SUPREME COURT NO. 19-1162
WARREN COUNTY CASE NO. LACV036899

IN THE
SUPREME COURT OF IOWA

MATTHEW HOLMES

Plaintiff/Appellant
v.

MIRANDA POMEROY,

Defendant-Appellee.

ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR WARREN COUNTY
HONORABLE MICHAEL JACOBSEN,
DISTRICT COURT JUDGE

Final BRIEF FOR APPELLANTS

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On March 26, 2020, I filed this brief electronically through the EDMS system, which will serve the parties:

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CERTIFICATE OF FILING

I, Matthew M Sahag, certify that I did file the attached brief with the Clerk of the Iowa Supreme Court by electronically filing the brief through the EDMS system on March 26, 2020.

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ROUTING STATEMENT

Because this case involves the application of facts to existing precedent, transfer to the Court of Appeals would be appropriate. IOWA R. APP. P. 6.1101.

STATEMENT OF THE CASE

This appeal follows a district court trial tried to Judge Michael Jacobsen on September 11, 2018 to September 13, 2018, in which Plaintiff Matthew Holmes ("Holmes") alleged that Defendant Miranda Pomeroy ("Pomeroy") was negligent in operating her vehicle thereby causing him injury. A jury verdict was entered September 13, 2018. The jury found in favor of Pomeroy on Holmes' claim. On October 12, 2018, the district court denied Holmes' Motion for New Trial. Judgment was entered on June 14, 2019.

STATEMENT OF FACTS

On June 8, 2015, Holmes was riding his bicycle southbound on the bike trial just west of the Cumming Tap in Cumming, Iowa. (T.T. Vol. II. 107:15 to 111:24). At the same time, Pomeroy was operating her vehicle driving westbound on Cumming Avenue. (T.T. Vol. II. 111:22) Holmes turned left onto Cumming Avenue and proceeded towards the

eastbound lane prior to making a turn up the alley that leads to the Cumming Tap. As Holmes reached the eastbound lane, he noticed that Pomeroy had also changed direction towards the eastbound lane. (T.T. Vol. II. 111:22-24). As he reached the eastbound lane, he noticed that Pomeroy was also in the same lane and believed that if he continued in that direction that he would be in a collision with Pomeroy. Holmes changed direction towards the westbound lane in an attempt to avoid a collision, but Pomeroy also changed direction towards him again. Pomeroy's vehicle collided with Holmes and his bicycle. (T.T. Vol. II. 112:11 to 24). Holmes suffered extensive injuries in the collision, including tears/strains of his MCL, PCL, ACL and meniscus, scarring, an anal muscle tear, facial lacerations and a dislocated shoulder. (T.T. Vol. II. 116:1 to 119:25). Pomeroy was not harmed.

Deputy Lisa Ohlinger investigated the collision. While investigating the incident, a witness told her that Pomeroy was texting while driving. (T.T. Vol. II. 195:2-14). Dr. Andrea J. Silvers did not witness the collision but tended to Holmes while he was laying on the ground. (T.T. Vol. II. 135:11 to 136:25). Silvers testified that Holmes said the collision was his fault. (T.T. Vol. II. 137:3-5).

During discovery, Holmes requested all of Pomeroy's text messages on her phone. App. at 48-62. Pomeroy represented via her production of documents that she had no text messages on her cellphone. App. at 48-62. Outside the presence of the jury during trial, Pomeroy told the Court that she no longer had text messages on her phone, saying that they were somewhere in the ether sphere. (T.T. Vol. III. 15-21). However, during closing arguments, Pomeroy told the jury that the text messages were still on her cellphone and blamed Holmes for not seeing them. (T.T. Vol. III. 65:1-7).

During trial, Holmes attempted to offer testimony and Exhibit 41 as evidence of Pomeroy's exhibit for driving while distracted. App. at 75-124; (T.T. Vol. I. 68:24 to 71:25). The Court allowed some of the evidence for purposes of impeachment only, but not for purposes of showing habit. App. at 22.

This appeal ensued.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT ADMITTED DEPUTY OHLINGER'S TESTIMONY ON DIRECT EXAMINATION THAT POMEROY WAS TEXTING WHILE DRIVING AND THEN PRECLUDED HOLMES FROM CROSS-EXAMINING DEPUTY OHLINGER ON THE SAME STATEMENT OR USING THE ADMITTED STATEMENT IN CLOSING ARGUMENTS ON HEARSASY GROUNDS.

Preservation of Error:

Plaintiff preserved error by attempting to cross-examine Deputy Ohlinger about her already admitted statement and by attempting to use the statement during closing arguments. (T.T. Vol. II. 197:24 to 199:24; Vol. III. 29:3 to 31:25).

Standard of Review:

Evidentiary rulings are reviewed on appeal for an abuse of discretion, which occurs when the district court bases its ruling on grounds that are unreasonable or untenable. *Estate of Poll*, 928 N.W.2d 890 (Iowa Ct. App. 2019)(citing *see Giza v. BNSF Ry. Co.,* 843 N.W.2d 713, 718 (Iowa 2014).

Merits:

Pomeroy called Deputy Lisa Ohlinger, the deputy who investigated the collision, as one of her witnesses. On direct

examination, Pomeroy's counsel engaged in the following exchange with Ohlinger pertaining to her investigation:

> Q Now, do you recall in your report whether you investigated whether or not there was any – whether Ms. Pomeroy had been acting in any way that might have contributed to the accident at the time?
>
> …
>
> A Somebody there had mentioned that somebody else maybe had thought she was texting…

(T.T. Vol. II. 195:2-18). Significantly, this exchange was not objected to and therefore admitted into evidence. After six (6) more questions, Pomeroy's lawyer concluded his examination of Ohlinger. (T. T. Vol. II. 197:18). On cross, Holmes' lawyer's first question of Ohlinger pertained to her testimony on direct examination that there was a suspicion that Pomeroy was texting while driving. (T.T. Vol. II. 197:24-25). However, Pomeroy's lawyer lodged a hearsay objection and the Court sustained the objection even though the statement was already in evidence. (T.T. Vol. II. 198:2-15). Holmes' lawyer reminded the Court of the same after several repeated objections from Pomeroy, but the

Court maintained that the already admitted statement constituted hearsay. (T.T. Vol. II. 198;7 to 200:1).

For closing arguments, Holmes prepared a PowerPoint slide that said "[a] witness said Miranda was texting while driving." (T.T. Vol. III. 29:3-14). However, Pomeroy's lawyer objected to the slide arguing that the statement was hearsay, and the Court precluded Holmes from using the statement in closing argument despite the fact that the statement was admitted during direct examination of Ohlinger. (T.T. Vol. III. 29-31). Precluding Holmes from using testimony on cross-examination and in closing arguments that had already been admitted was clearly unreasonable. As such, the Court abused its discretion and this Court should award Holmes a new trial.

II. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT IMPROPERLY ADMITTED LAY WITNESS TESTIMONY THAT HOLMES SAID THE ACCIDENT WAS HIS FAULT BECAUSE LEGAL CONCLUSIONS ARE NOT ADMISSIBLE AS ADMISSIONS AGAINST A PLEADER'S INTEREST.

Preservation of Error:

Plaintiff preserved error by filing a Motion in Limine attempting to exclude testimony surrounding his purported statement that the

accident was his fault and by objecting to the testimony during trial App. at 9; (T.T. Vol. II. 137:4-9).

Standard of Review:

Evidentiary rulings are reviewed on appeal for an abuse of discretion, which occurs when the district court bases its ruling on grounds that are unreasonable or untenable. *Estate of Poll*, 928 N.W.2d 890 (Iowa Ct. App. 2019)(citing *see Giza v. BNSF Ry. Co.,* 843 N.W.2d 713, 718 (Iowa 2014).

Merits:

In his Motion in Limine, Holmes argued evidence surrounding his purported statement that the collision was his fault is inadmissible as a legal conclusion. App. at 9. Additionally, during testimony, Holmes objected to Dr. Andrea Silvers' statement that Holmes said the collision was his fault as a legal conclusion, but the Court overruled Holmes' objection. (T.T. Vol. II. 137:4-9). The Court's decision to admit Holmes' purported statement was clearly unreasonable. Ultimately the jury decided who prevailed based on who was at fault as instructed by the jury instructions. At the time of the incident, Holmes didn't know the law, and as such was not equipped to opine on "fault." The law in Iowa

is clear – legal conclusions are not admissible as admissions against a pleader's interest. *See Beyer v. Todd*, 601 N.W.2d 35, 42 (Iowa 1999)(citing *Blinder, Robinson Co. v. Bruton*, 552 A.2d 46, 474 (Del. 1989). This is precisely why it was unreasonable for the Court to admit lay witness testimony regarding Holmes' purported statement that the collision was his fault. For this reason, this Court should reverse the District Court's decision and award Holmes a new trial.

III. THE DISTRICT COURT ABUSED ITS DISCRETION WHEN IT IMPROPERLY EXCLUDED EXAMPLES OF POMEROY'S HABIT OF TEXTING WHILE DRIVING BECAUSE MANY OF THE EXAMPLES OCCURRED AFTER THE ACCIDENT.

Preservation of Error:

Plaintiff preserved error by offering the exhibits via an offer of proof during trial. (T.T. Vol. II. 86-106 to Vol. III. 9:24 to 23:24).

Standard of Review:

Evidentiary rulings are reviewed on appeal for an abuse of discretion, which occurs when the district court bases its ruling on grounds that are unreasonable or untenable. *Estate of Poll*, 928 N.W.2d 890 (Iowa Ct. App. 2019)(citing *see Giza v. BNSF Ry. Co.,* 843 N.W.2d 713, 718 (Iowa 2014).

Merits:

Via discovery, Holmes obtained pictures, videos and social media messages from Pomeroy's cellphone for the period May 31, 2015, to June 24, 2018, with Pomeroy using her cell phone while driving. App. at 75-124; (T.T. Vol. I. 68:24 to 71:25). As such, evidence existed of Pomeroy driving while distracted prior to and after the June 8, 2015, incident. App. at 75-124; (T.T. Vol. I. 68:24 to 71:35). Holmes argued in pretrial motions and via an offer of proof that this evidence is admissible as Pomeroy's habit for driving while districted. However, relying on the case of *DeMatteo v. Simon*, 812 P.2d 361 (Ct. App. New Mexico 1991), the Court held that subsequent conduct is not admissible for the purpose of showing a habit. App. at 14-15. In relying on the New Mexico Court of Appeals decision, the Court declined to follow authorities cited by Holmes including *Gasiorowski vs. Hose*, 182 Ariz. 376, 380 (Court App. Az. 1995), *Kita vs. Borough of Lindenwold*, 701 A.2d 938, 941 (NJ App. 1997) and John H. Wigmore, *Wigmore on Evidence* §375 (Chadbourn rev. 1979) that hold the opposite; habit may be shown by subsequent conduct exhibiting that habit. *Id.* The Court specifically instructed the jury in Jury Instruction #9, that the above-mentioned evidence could not be considered as proving that the

Pomeroy was distracted by such acts at the time of the accident on June 8, 2015 App. at 22.

Notably, Iowa appellate courts have not addressed whether subsequent conduct is admissible as evidence of a habit. In the context of this matter, however, the frequency in which Pomeroy drove distracted by her cell phone after the collision and he fact that Pomeroy drove while distracted prior to the incident in question certainly sheds light on whether she was driving while distracted on June 8, 2015, when she collided with Holmes. The following evidence is a sample of evidence that was presented via an offer of proof to be used as habit evidence; some of which was admitted for impeachment purposes because Pomeroy testified that she had never driven while distracted:

Date	Description	Evidence	Admitted/Excluded
5/31/2015	7 text messages while Pomeroy was driving	T.T. Vol. I. 75:10 to 77:8	Admitted – impeachment only

9/25/2015	Pomeroy took a photo while driving in her car	Exhibit 41-10	Admitted – impeachment only
1/31/2016	Pomeroy texts, "I am driving," to Caleb Bracken	T.T. Vol. I. 78:13-22	Admitted – impeachment only
2/14/2017	Pomeroy takes photo of dog in truck while driving	Exhibit 41-16; T.T. Vol. II. 18:9	Admitted – impeachment only
3/19/2017	Pomeroy takes photo of sunset while driving	Exhibit 41-14; T.T. Vol. I. 91:3	Admitted – impeachment only
3/19/2017	Pomeroy takes photo while driving	Exhibit 41-17; T.T. Vol. I. 93:7	Admitted – impeachment only

3/19/2017	Pomeroy takes photo while driving	Exhibit 41-18; T.T. Vol. I. 94:1	Admitted – impeachment only
4/17/2017	Pomeroy snaps selfie while driving – seatbelt on	Exhibit 41-22; T.T. Vol. I. 94:24-25	Excluded
5/4/2017	Pomeroy snaps selfie while driving – seatbelt on	Exhibit 41 – 20; T.T. Vol. I. 96:18	Excluded
6/13/2017	Pomeroy snaps selfie with sister in car while in traffic – vehicle next to them	Exhibit 41-21; T.T. Vol. I. 97:20	Excluded

6/23/2017	Pomeroy takes photo, while driving; speedometer reads 15 mph	Exhibit 41-13; T.T. Vol. I. 89:16	Admitted – impeachment only
7/1/2017	Pomeroy takes photo of car ahead of her while driving	Exhibit 41-25; T.T. Vol. I. 104:1	Admitted – impeachment only
7/2/2017	Pomeroy takes selfie while driving	Exhibit 41-26; T.T. Vol. I. 99:12	Admitted – impeachment only
7/2/2017	Pomeroy takes picture of road while driving	Exhibit 41-48; T.T. 100:4	Admitted – impeachment only
7/2/2017	Pomeroy takes photo of road while driving	Exhibit 41-27; T.T. Vol. I. 100:22	Admitted – impeachment only

7/2/2017	Pomeroy takes photo of sky and field while driving	Exhibit 41-28; T.T. Vol. I. 101:17	Admitted – impeachment only
7/2/2017	Pomeroy takes photo of sky and cornfield while driving	Exhibit 41-29; T.T. Vol. I. 102:15	Admitted impeachment only
7/20/2017	Pomeroy takes photo of motorcycle while driving	Exhibit 41-33; T.T. Vol. I. 105:1	Admitted – impeachment only
7/23/2017	Pomeroy takes photo of sky while driving	Exhibit 41-35; T.T. Vol. II. 20:2	Excluded
2/6/2018	Pomeroy takes photo of snowplow while driving	Exhibit 41-28; T.T. Vol. II. 20:23	Admitted – impeachment only

App. at 74-124.

If Pomeroy testified that she wasn't driving and the picture didn't obviously show Pomeroy on the traveled portion of the roadway, the Court totally excluded the evidence. (T.T. Vol. II. 12:22 to 13:5). This was problematic because all of the evidence was admitted for impeachment purposes in the first place due to the fact that Pomeroy testified that she had never driven while distracted. (T.T. Vol I. 45:9 to 48:12, 49:6 to 50:9, 61:13 to 106). While all of the evidence was excluded to show habit, the Court shouldn't have taken Pomeroy's statement that she wasn't driving at face value. The pictures offered inferences that Pomeroy was indeed driving. For example, exhibit 41-20 was excluded because Pomeroy said she wasn't driving, yet Pomeroy had her seatbelt on in the picture. App. at 94. This picture along with others offered circumstantial evidence that Pomeroy was driving while distracted and should have been admitted. The twenty (20) examples in the table above should have been enough for the Court to allow the evidence to show Pomeroy's habit for driving while distracted. Indeed, the only rational explanation for Pomeroy to text, snapchat and/or take photos while driving *after* she severely injured Holmes while driving

was that she couldn't break her habit. For these reasons, it was unreasonable for the Court to exclude the evidence as habit evidence, and Holmes should be awarded a new trial.

IV. THE DISTRICT COURT ERRORED IN DENYING HOLMES' MOTION FOR NEW TRIAL DUE TO POMEROY'S MISCONDUCT WHEN SHE CONCEALED TEXT MESSAGES ON HER CELL PHONE THROUGHOUT LITIGATION AND THEN TOLD THE JURY THEY WERE ON HER PHONE DURING CLOSING ARGUMENTS

Preservation of Error:

Plaintiff preserved error by filing a motion for new trial. App. 37-43.

Standard of Review:

The appellate courts review "the denial of a motion for new trial based on the grounds asserted in the motion." *Rivera v. Woodward Resource Center*, 865 N.W.2d 887, 891-92 (Iowa 2015) (quoting *Fry v. Blauvelt*, 818 N.W.2d 123, 128 (Iowa 2012). If the basis for the motion is a legal question, review is for correction of errors at law. *Id.* citing *Id.*

Merits:

A new trial may be granted where there is misconduct by the prevailing party. Iowa R. Civ. P. 1.1004. Evidence of text messages on Pomeroy's cellphone on the date of the incident was repeatedly

requested throughout the trial stages of this matter. App. at 38-43. However, up until her closing argument, Pomeroy maintained that she obtained a new cellphone and that the text messages did not transfer from her old phone.

Pomeroy resisted a spoliation instruction during trial with her lawyer arguing that the **messages were gone and somewhere out in the ether sphere**. (T.T. Vol. III. 9:17-18). That argument was consistent with her response to Holmes's Second Request for Production of Documents #11 which read as follows:

> Request for Production 11:
>
> Any and all cell phone records, to include billing and call records and text message records for the date of the accident, for all cell phones you had access to on the date of the accident.
>
> Response: See attached.

App. at 50. No text messages were produced with the response. Holmes was given a spoliation instruction based on Pomeroy's intentional deletion of the messages from her phone. App. at 23. Then, in closing arguments, and contrary to the record made to the spoliation instruction and the entirety of litigation, Pomeroy's lawyer tried to undercut the spoliation instruction by stating to

the jury that the text messages weren't deleted, and that Holmes just didn't look at them. (T.T. Vol. III. 65:6-7). Specifically, Pomeroy's lawyer argued as follows:

> Mr. Sahag then decided that in order to try and – since he doesn't have the facts, he doesn't have the law, let me see what I can do. So he goes and looks through thousands of photos. He went through her Snapchat. He went through her Facebook. He went through every picture on her phone.
>
> ***I don't know why he didn't look at the texts. They were there, too.***

(T.T. Vol. III. 64:25 to 65:7). Again, outside the presence of the jury while opposing the spoliation instruction, Pomeroy's lawyer represented the following:

> She has no idea there is going to be any lawsuit brought at all. So how can she have knowingly destroyed these texts…***there is no way that anyone can recover those texts. They are gone. They are in the ether sphere.*** Where is he going to get them? Not one text has been introduced into evidence.

(T.T. Vol. III. 9:12-19). There can be no dispute that this is misconduct. Pomeroy cannot be permitted to argue outside the presence of the jury that the messages are gone in a separate "ether sphere," and then contradict that representation to the jury by stating that the messages

are actually on her phone, and that it was Holmes' fault for not looking at them.

The district court was incorrect when it held that Pomeroy's concealment of her text messages was not prejudicial. App. at 70. First, the Court's decision to give a spoliation instruction based on intentional deletion of the text messages illustrates just how prejudicial it was for Pomeroy to misrepresent that the text messages had been deleted when in reality they had been on her phone the whole time. Second, Pomeroy's lawyer undercut the spoliation instruction in her closing argument when she blamed Holmes for not realizing the messages where on her phone after she represented to Holmes and the Court that they weren't there. (T.T. Vol. III. 65:6-7). Third, the messages that were supposedly in the ether sphere until closing arguments were all sent and received on June 8, 2015 – the date of the collision. (Pl's Motion for New Trial). Specifically, Pomeroy sent two messages to her friend Lanna Whitlock just prior to the incident, forty-one (41) messages to an individual named Kyle directly before and after the incident, and several messages to her sister and parents directly after the incident. App. at 40-41. It is highly probable that these

messages contained information relevant to collision, perhaps messages that showed Pomeroy was at fault, showing just how prejudicial it was for Pomeroy to conceal the evidence. This is clearly misconduct, and Holmes should have been awarded a new trial.

CONCLUSION

For the reasons articulated herein, the district courts order for judgment dated June 14, 2019, should be reversed and the matter should be remanded back to district court with instructions for the court to grant a new trial.

REQUEST FOR ORAL ARGUMENT

Counsel for Appellant requests to be heard in oral argument.

COST CERTIFICATE

I hereby certify that the costs of printing this brief was $0.00

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