IN THE SUPREME COURT OF IOWA

MATTHEW HOLMES, Appellant/Plaintiff, v. MIRANDA POMEROY, Appellee/Defendant.	SUPREME COURT NO. 19-1162

APPEAL FROM THE IOWA DISTRICT COURT FOR WARREN COUNTY CASE NO. LACV036899

APPELLEE MIRANDA POMEROY'S FINAL BRIEF

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SUPREME COURT RULE 6.1101 ROUTING STATEMENT

This case involves questions relating to existing legal principles and should, therefore, be transferred to the Court of Appeals. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

Defendant concurs with the Statement of the Case submitted by plaintiff in his brief.

STATEMENT OF RELEVANT FACTS

On June 8, 2015 plaintiff was riding his bicycle on the Great Western Bike Trail near the Cumming Tap in Cumming, Iowa. The bike trail intersects Cumming Avenue and plaintiff attempted to make a left hand onto the north shoulder of Cumming Avenue so he could go to the Cumming Tap. (T.T. Volume II page 192, lines 10-14). Plaintiff told investigating officer, Deputy Lisa Ohlinger, that as he attempted to make his turn, he turned too wide and shot into the westbound lane of Cumming Avenue where he was struck by a westbound vehicle driven by the defendant. (T.T. Volume II page 192, lines 1-18). Physician Andrea Silvers was at the scene of the accident and provided first aid to the plaintiff. (T.T. Volume II; pages 135-136, lines 21-25 and 1-24). Plaintiff told Dr. Silvers that the accident was his fault. (T.T. Volume II; pages 136-137, lines 25 and 1-23).

Plaintiff argued that defendant was using her cellphone at the time of the accident and was at fault for the collision. The collision occurred at 6:30 p.m. and between 5:57 p.m. and 6:30 p.m. defendant's cell phone records showed that she did not send any texts or make any phone calls. (App. 72; T.T. Volume II page 192, lines 22-25). Plaintiff admitted that he had no documentary evidence that plaintiff

was using her cellphone in any way at the time of the accident. (T.T. Volume II page 164, lines 1-4).

ARGUMENT

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN PRECLUDING PLAINITFF FROM CROSS EXAMINING DEPUTY OHLINGER ON HEARSAY STATEMENTS AND USING THE HEARSAY STATEMENTS IN CLOSING ARGUMENT.

A. Standard of Review.

A trial court's evidentiary rulings are reviewed for abuse of discretion. *Williams v. Hedican,* 561 N.W.2d 817, 822 (Iowa 1997). An abuse of discretion occurs when the court exercises its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Maghee,* 573 N.W.2d 1, 5 (Iowa 1997). "A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law." *Graber v. City of Ankeny,* 616 N.W.2d 633, 638 (Iowa 2000).

B. The trial court properly excluded the continuing use of double hearsay testimony from Deputy Ohlinger.

Deputy Lisa Ohlinger of the Warren County Sheriff's department was the officer who arrived on the scene to investigate the accident. She was called by the defendant to testify about statements made by the plaintiff at the scene. Deputy Ohlinger testified that she had limited recollection of the accident. (T.T. Volume II page 189, lines 19-26). She was permitted to refresh her recollection by reviewing

the accident report she had prepared regarding the accident. (T.T. Volume II page 190, lines 1-6). She testified that plaintiff told her he was attempting to make a left hand onto the north shoulder of Cumming Avenue so he could go to the Cumming Tap. (T.T. Volume II page 192, lines 10-14). Plaintiff also told Deputy Ohlinger that as he attempted to make his turn, he turned too wide and shot into the westbound lane of Cumming Avenue where he was struck by a westbound vehicle driven by the defendant. (T.T. Volume II page 192, lines 1-18).

In his brief plaintiff points to the following testimony of Deputy Ohlinger in support of his appellate point:

> 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…
>
> (Appellant's Brief, page 14.)

However, plaintiff did not provide the complete testimony of Deputy Ohlinger which is italicized below:

> A. Somebody there had mentioned that somebody else maybe thought she had been texting. *However, whoever told me that was not the person who witnessed it, nor did they know who allegedly witnessed that. That was*

complete hearsay, and I didn't have anybody to corroborate that, so that was left out.

(T.T. Volume II page 195, lines 13-18).

The testimony was double hearsay that Deputy Ohlinger admitted was uncorroborated. Further, her testimony was that "somebody else ***maybe thought*** she had been **texting.**" In closing argument plaintiff attempted to argue that "A witness said Miranda was texting while driving." (T.T. Vol. III, page 29, lines 13-14). In fact, no witness said defendant was texting while driving. One alleged witness told another person who then told Deputy Ohlinger that they "maybe thought" defendant was texting while driving. Plaintiff's argument that "a witness said Miranda was texting while driving" was incorrect and not supported by the evidence in addition to being double hearsay, and speculative. The trial court did not abuse its discretion in disallowing cross examination or the incorrect recitation of evidence during closing argument.

Even if the trial court abused its discretion by limiting plaintiff's cross examination and preventing him from using incorrect and hearsay slides in closing arguments, such rulings were harmless error. "Error may not be predicated upon a ruling [that] admits or excludes evidence unless a substantial right of the party is affected." Iowa R. Evid. 5.103(a). The question to be asked is "[D]oes it sufficiently appear the rights of the complaining party have been injuriously affected by the error

[so] that he has suffered a miscarriage of justice?" *State v. Trudo,* 253 N.W.2d 101, 107 (Iowa 1977). In order to show that plaintiff was prejudiced, he must show that "it is probable a different result would have been reached but for the admission of evidence or testimony." *Mohammed v. Otoadese*, 738 N.W.2d 628, 633 (Iowa 2007).

First and foremost, the testimony of Deputy Ohlinger actually came into evidence. This is not a case where the hearsay testimony was not heard by the jury. Second, the documentary evidence in the case unquestionably proved that defendant was not texting at the time of the accident. The hearsay testimony in this case is the person "maybe thought" that defendant was ***texting.***"

Exhibit 28 is the phone record for the defendant's phone subpoenaed from Sprint, the defendant's cell phone carrier. (App. 72) It is a printout of all texts and phone calls made on the defendant's phone on the day of the accident. The accident occurred at 6:30 p.m. (T.T. Vol. II, page 87, lines 5-6). Referring to Exhibit 28, defendant testified that no phone calls or texts were made from defendant's phone between 5:58 p.m. and 6:30 when the accident occurred. (T.T. Vol. II, page 88, lines 2-16). Defendant called her mother about the accident at 6:33 p.m., three minutes after the accident. (T.T. Vol. II, page 88, lines 8-10).

Plaintiff did not challenge the accuracy or authenticity of Exhibit 28, so the evidence presented from plaintiff's cell phone proved to the jury that defendant was

not texting at the time of the accident. Defendant testified that she wasn't texting or using her phone in any way at the time of the accident and that her phone was in the center console of her car at the time of the accident. (T.T. Volume I page 45, lines 9-19). Even though plaintiff was provided access to defendant's phone and the various social medial apps on her phone, he admitted to having no evidence that defendant was using her phone in any way at the time of the accident. Plaintiff admitted that he did not see defendant using her phone in any way at the time of the accident. (T.T. Volume II page 161, lines 15-18). Plaintiff admitted that between 6:00 p.m. and 6:30 p.m. that defendant was not calling or texting on her phone. (T.T. Volume II page 162, lines 22-25). Plaintiff admitted that he was not aware of any witnesses who could testify that defendant was on her phone at the time of the accident. (T.T. Volume II page 163, lines 1-6). Finally, plaintiff admitted that he had no evidence that defendant was texting or using her phone in any other way at the time of the accident. (T.T. Volume II page 163-64, lines 1-25 and 1-4).

The documentary evidence from Exhibit 28 and plaintiff's own testimony proves that no texts were sent from defendant's phone at the time of the accident. If the plaintiff had been permitted to reiterate the double hearsay testimony that someone "maybe thought" plaintiff was ***texting***, it would not have tipped the scales in the plaintiff's favor and was therefore harmless error since plaintiff was not prejudiced. There can be no prejudice where the evidence in support of the verdict

is overwhelming. *State v. Holland,* 485 N.W.2d 652, 656 (Iowa 1992) .

The trial court did not abuse its discretion in preventing plaintiff from using double hearsay testimony elicited from Deputy Ohlinger during the course of the trial. Alternatively, the trial court's ruling preventing plaintiff from continuing to refer to the double hearsay testimony was harmless error. The overwhelming evidence at trial proved that defendant was not texting at the time of the accident and the usage of testimony from Deputy Ohlinger that "Somebody there had mentioned that somebody else maybe thought she had been texting" would not have changed the outcome of the trial and was harmless error.

II. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN ALLOWING TESTIMONY REGARDING PLAINTIFF'S STATEMENT THAT THE ACCIDENT WAS HIS FAULT.

A. Standard of Review.

A trial court's evidentiary rulings are reviewed for abuse of discretion. *Williams v. Hedican,* 561 N.W.2d 817, 822 (Iowa 1997). An abuse of discretion occurs when the court exercises its discretion "on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *State v. Maghee,* 573 N.W.2d 1, 5 (Iowa 1997). "A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law." *Graber v. City of Ankeny,* 616 N.W.2d 633, 638 (Iowa 2000).

B. The trial court did not err in permitting testimony from a witness that plaintiff admitted fault for the accident.

The trial court properly permitted the following testimony from Dr. Silver where plaintiff admitted to her that the accident was his fault:

> Q Did he say anything about the accident himself?
> A Yes.
> Q What did he say?
> A This is—he either said. "It was my fault," or "This was my fault."
> ***
> Q Do you recognize Mr. Holmes here?
> A Honestly, I don't. He had his helmet on. His face was covered in blood…
>
> ***
> Q But the person did say, "It was my fault," or—what did he say?
> A Yes.
> Q What were the two phrases you used?
> A It was either "This was my fault," or "It was my fault."
>
> ***
> (Cross examination by plaintiff's counsel)
> Q And, as I understand your testimony, you can't—you don't recall exactly what he said?
> A It has been three years. But the words "my fault" are 100%. I just don't know if he said "It is my fault," or "This is my fault." That I cannot say. It is one of those two.
>
> (T.T. Volume II pages 136-137, lines 25, 1-23; and page 139, lines 20-25).

Plaintiff objected to the original question as calling for a legal conclusion and his objection was overruled. (T.T. Volume II page 137, lines 6-9). Plaintiff argues that legal conclusions are not admissible as admissions against "a pleader's interest," citing *Beyer v. Todd*, 601 N.W.2d 35 (Iowa 1999). However, *Beyer v.*

Todd deals with an admission in pleadings, not an oral admission at trial and is inapplicable to this case.

Plaintiff wrongfully tries to argue that his admission that he was at fault is a lay opinion regarding his fault and invades the province of the jury. "Anything said by a party-opponent may be used against him as an 'admission', provided it exhibits inconsistency with those facts presently asserted in pleadings or testimony." *Bailey v. Chicago, B. & Q.R., Co.,* 179 N.W.2d 560 (Iowa 1970). Admissions of a party opponent, including admissions of fault, are admissible at trial. Iowa Rules of Evidence 5.801(d.)(2)(A).

> "Another argument sometimes made to exclude opinions within admissions is that they constitute conclusions of law. Most often this issue arises in connection with statements of a participant in an accident that the mishap was the speaker's fault. While conceivably a party might give an opinion on an abstract question of law, such are not the typical statements actually offered. Instead, the statements normally include an application of a standard to the facts. Thus, they reveal the facts as the declarant thinks them to be, to which the standard of 'fault' or other legal or moral standard involved in the statement was applied. In these circumstances, the factual information conveyed should not be ignored merely because the statement may also indicate the party's assumptions about the law."
>
> McCormick on Evidence. § 256 (8th ed. 2020)

In his brief, plaintiff admits he "didn't know the law, and as such was not equipped to opine on 'fault.'" (Appellants Brief, page 16-17). This admission bolsters the point made by Professor McCormick that typically admissions of fault are not an opinion of abstract law, but facts to which the plaintiff believed the

standard definition of fault would be applied. If, as plaintiff has admitted, he did not know the legal definition of fault when he made his admission, how could he have possibly intended to use the word fault in its legal application? It is clear that plaintiff used the term "fault" in its normal application, not its legal application.

Regardless of his intent, it should also be noted that legal terms like fault may be used in opinions regarding liability, if the popular meaning of the word is the same as the legal meaning. *In Re Detention of Palmer*, 691 N.W.2d 413, 419 (Iowa 2005). Unless the word fault has a "separate, distinct and specialized meaning in the law different" from the regular usage, it is not excludable as an inadmissible opinion regarding liability. *Id.* at 420.

Plaintiff's admission that the accident was his fault was clearly admissible under Rule 5.801(d.)(A). Additionally, since there is no difference between the word fault, as used in everyday conversation, and the word fault, as used in a legal application, the trial court did not abuse its discretion in allowing Dr. Silver to testify that plaintiff admitted that the accident was his fault.

III. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN EXCLUDING IRRELEVANT EVIDENCE AND FINDING THAT THE BEHAVIOR OF DEFENDANT AFTER THE ACCIDENT COULD NOT BE USED IN AN ATTEMPT TO PROVE HABIT.

A. Standard of Review.

A trial court's rulings on the admissibility of evidence are reviewed for abuse of discretion. *Gamedinger v. Schaefer,* 603 N.W.2d 590, 594 (Iowa 1999). The trial court's decisions on admissibility of evidence "will not be disturbed unless there is a clear and prejudicial abuse of discretion." *Id.* It is ordinarily within the trial court's discretion to decide to exclude evidence on grounds of relevancy. *Fell v. Kewanee Farm Equip. Co.,* 457 N.W.2d 911, 920 (Iowa 1990).

B. The trial court properly ruled that defendant's alleged conduct after the accident was not relevant to prove that defendant had a habit of driving while distracted.

In an attempt to divert attention from his admission that he was at fault for the accident, plaintiff tried to argue that defendant was using her cell phone at the time of the accident. He contended that since she was driving while distracted that she failed to react in a timely manner to avoid the accident. Of course, plaintiff offered no evidence at trial that defendant was using her phone at the time of the accident. As shown above, plaintiff actually testified that he had no evidence that plaintiff was using her cell phone at the time of the accident.

Since there was no evidence that plaintiff was using her phone at the time of the accident, plaintiff argued that he should be able to show that defendant had a habit of driving while distracted. (Appellant's Brief page 18). In support of this claim, plaintiff offered exhibit 41 which was a group of pictures, videos, and social media messages which plaintiff claimed defendant prepared while driving.

(Appellant's Brief page 18). Of the 50 pages of Exhibit 41, not one was prepared prior to the accident on June 8, 2015. In fact, the plaintiff was only able to elicit testimony from the plaintiff of one instance where she was texting while she was driving prior to the accident. (Appellant's Brief, pg. 20). Because the plaintiff had no evidence that defendant had a habit of driving while distracted prior to the accident, he argued that he should be able to use instances where she allegedly drove distracted after the accident to prove that she had a habit of driving while distracted. Since he had no witnesses who testified that defendant had a habit of driving her vehicle while distracted, he relied entirely on photos and other social media taken from her phone to support his position that defendant had a habit of driving while distracted.

Defendant objected to plaintiff attempts to use actions of the defendant after the accident to prove habit in both her motion in limine and when plaintiff submitted his offer of proof on the issue. In his Ruling on Defendant's and Plaintiff's Motions in Limine, the trial judge sustained defendant's motion in limine ruling that plaintiff was "prohibited from offering evidence of incidents subsequent to the accident in this case to attempt to prove a habit of distracted driving." (App. 15). The trial court reiterated its ruling when exhibits were offered during plaintiff's offer of proof.

The trial court has wide discretion in ruling on the admissibility of evidence and will not be disturbed unless there is a clear and prejudicial abuse of discretion.

Gamedinger v. Schaefer, 603 N.W.2d 590, 594 (Iowa 1999). The determination of similarity of conditions and timeliness pertaining to habit involves relevancy and is vested in the trial court's discretion. *See Schuller v. Hy–Vee Food Stores, Inc.,* 328 N.W.2d 328, 330–31 (Iowa 1982). In order for evidence of habit to be admissible under Iowa Rule of Evidence 406 (now Rule 5.406), plaintiff was required to prove that the conduct of the defendant on the date of the accident was in conformity with her habit or routine practice. *Gamedinger v. Schaefer*, 603 N.W.2d 590, 594 (Iowa 1999). The *Gamedinger* court took Rule 406 even further, holding

> "The basis for admissibility of habit and custom is the inference that if a person has acted a certain way ***with regularity in the past***, it is probable the person acted in conformity with that pattern on the occasion in question. "
>
> *Id.* at 594

As plaintiff notes in his brief, there are no Iowa cases holding that acts occurring ***after*** an accident may be considered in proving habit. Notwithstanding the lack of case law, plaintiff argues that he should be able to use acts occurring after the accident to show habit. Iowa law, as set forth in *Gamedinger,* specifically provides only acts occurring before the accident may be considered in proving habit. *Id.* at 594. The trial court properly excluded plaintiff from using actions of the defendant that occurred after the date of the accident to try and prove that she had a habit of driving while distracted. As the trial court noted, "Subsequent incidents

may only be proof of a recently developed habit and therefore irrelevant to past conduct." (App. 15).

C. The subsequent actions of the plaintiff were insufficient to constitute a habit of driving while distracted.

Although Iowa law clearly holds that only prior actions may be considered in the habit question, in the event the court decides that subsequent acts can be used in the habit analysis, there was insufficient evidence in this case to establish habit.

> "In general, where a habit of conduct is to be evidenced by specific instances, there is no reason why they should not be resorted to for that purpose. The only conditions are (a) that they should be numerous enough to base an inference of systematic conduct; and (b) that they should have occurred under substantially similar circumstances, so as to be naturally accountable for by a system only, and not as casual recurrences."
>
> *Barrick v. Smith* 80 N.W.2d 326, 329 (Iowa 1957)(cited by *Maxwell v. Palmer*, 2000 WL 186895(Iowa App. 2000)(unpublished opinion))

While Iowa courts have not delved deeply into the habit issue, it has been thoroughly litigated in Federal courts where Iowa Rule of Evidence 5.406 is identical to Fed. R. Evid 406. Habit "describes one's regular response to a repeated specific situation." *Thompson v. Boggs*, 33 F.3d 847, 854 (7th. Cir 1994) *cert. denied,* 514 U.S. 1063, 115 S.Ct. 1692, 131 L.Ed.2d 556 (1995), citing Fed. R. Evid 406, advisory committee's note. In order for habit evidence to be admissible under rule 406 "the offering party must establish the degree of specificity and frequency of uniform response that ensures more than a mere 'tendency' to act in a given manner, but rather, conduct that is 'semi-automatic' in nature." *Simplex, Inc. v. Diversified*

Energy Systems, Inc., 847 F.2d 1290, 1293 (7th Cir.1988). "Although there are no precise standards for determining whether a behavior pattern has matured into a habit, two factors are considered controlling as a rule: ***adequacy of sampling and uniformity of response.***" *Thompson v. Boggs*, 33 F.3d at 854 (emphasis supplied), citing *United States v. Newman,* 982 F.2d 665, 668 (1st Cir.1992), *cert. denied,* 510 U.S. 812, 114 S.Ct. 59, 126 L.Ed.2d 28 (1993). The two factors "focus on whether the behavior at issue occurred ***with sufficient regularity making it more probable than not that it would be carried out in every instance or in most instances."*** *Thompson v. Boggs*, 33 F.3d at 854 (emphasis supplied). The requisite regularity is tested by the ratio of reaction to situations. *United States v. Newman,* 982 F.2d 665, 668 (1st Cir.1992), *cert. denied,* 510 U.S. 812, 114 S.Ct. 59, 126 L.Ed.2d 28 (1993). It is essential, therefore, that the ***regularity of the conduct alleged to be habitual rest on an analysis of instances numerous enough to [support] an inference of systematic conduct and to establish one's regular response to a repeated specific situation***." *Thompson v. Boggs*, 33 F.3d at 854 (emphasis supplied).

In order for evidence of defendant's habit of driving while distracted to be admissible in this case, plaintiff was required to show that it was more likely than not that defendant always or in most instances, used her phone while she was driving. *Thompson v. Boggs*, 33 F.3d at 854. Since she was driving at the time of the accident, the "substantially similar circumstances" would be using her phone while

she was driving, not while she was parked or stopped. *Barrick v. Smith* 80 N.W.2d at 329.

At trial, plaintiff offered Exhibit 41, which included several photos taken by the plaintiff on thirteen instances she was allegedly driving her vehicle, all taken within three years ***after*** the accident. (Appellant's Brief, pg. 20-24). The photos and two or three social media excerpts are the only evidence plaintiff offered to show that defendant had a "habit" of driving while distracted. Because of objections from the defendant, the trial court excused the jury to consider the admissibility of the various photos in Exhibit 41. (T.T. Vol 1, page 85).

The following chart of photos provided by the plaintiff in Appellant's Brief lists the photos he contends show that defendant had a habit of driving 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	App. 84	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	App. 90; T.T. Vol. II.	Admitted – impeachment only
3/19/2017	Pomeroy takes photo of sunset while driving	App. 88; T.T. Vol. I. 91:3	Admitted – impeachment only
3/19/2017	Pomeroy takes photo while driving	App. 91; T.T. Vol. I. 93:7	Admitted – impeachment only
3/19/2017	Pomeroy takes photo while driving	App. 92; T.T. Vol. I. 94:1	Admitted – impeachment only
4/17/2017	Pomeroy snaps selfie while driving – seatbelt on	App. 96; T.T. Vol. I.	Excluded
5/4/2017	Pomeroy snaps selfie while driving – seatbelt on	App. 94; T.T. Vol. I.	Excluded
6/13/2017	Pomeroy snaps selfie with sister in car while in traffic	App. 95; T.T. Vol. I.	Excluded
	– vehicle next to them		
6/23/2017	Pomeroy takes photo, while driving; speedometer reads	App. 87; T.T. Vol. I.	Admitted – impeachment only
7/1/2017	Pomeroy takes photo of car ahead of her while driving	App. 99; T.T. Vol. I.	Admitted – impeachment only

7/2/2017	Pomeroy takes selfie while driving	App. 100; T.T. Vol. I.	Admitted – impeachment only
7/2/2017	Pomeroy takes picture of road while driving	App. 122; T.T. 100:4	Admitted – impeachment only
7/2/2017	Pomeroy takes photo of road while driving	App. 101; T.T. Vol. I.	Admitted – impeachment only
7/2/2017	Pomeroy takes photo of sky and field while driving	App. 102; T.T. Vol. I.	Admitted – impeachment only
7/2/2017	Pomeroy takes photo of sky and cornfield while driving	App. 103; T.T. Vol. I.	Admitted impeachment only
7/20/2017	Pomeroy takes photo of motorcycle while driving	App. 107; T.T. Vol. I.	Admitted – impeachment only
7/23/2017	Pomeroy takes photo of sky while driving	App. 109; T.T. Vol. II.	Excluded
2/6/2018	Pomeroy takes photo of snowplow while driving	App. 102; T.T. Vol. II.	Admitted – impeachment only

In the description portion of the above chart, plaintiff has misrepresented that defendant was driving in each entry, while she testified that was not driving in the following entries:

9/25/2015 App. 84

A. I don't remember exactly what was going on that day, but I do know that when I took that photo my car was not moving. I parked on the street that day at my house. I took that photo to show people that I got my tassel.

(T.T. Vol I; page 84, lines 3-7)

3/19/2017 App. 88

Q. You took that photo while you were on the traveled portion of the roadway?

A. Yes. I took it while I was stopped at a red light.

(T.T. Vol I; page 91, lines 22-25)

4/17/2017 App. 96

A. Yes. I took that photo in the parking lot of DMACC. You can tell by my sunglasses in the photo I was parked in the parking lot of DMACC.
(T.T. Vol I; page 95, lines 17-19)

5/4/2017 App. 94

A. I took that photo…I was sitting in the parking lot of my school.

(T.T. Vol I; page 97, lines 7-11)

6/13/2017 App. 95

Q. So you were driving that day in that video[sic]?

A. No I don't believe so. On that date we actually went to help on of our friends pick up a dog. He had bought a Labrador.

(T.T. Vol I; page 98, lines 11-15)

7/1/2017 App. 99

A. I was stopped when I took that photo.

(T.T. Vol I; page 104, line 19)

7/23/2017 App. 109

Q. Your testimony is that you were parked in that picture?
A. Yes, I was parked.

(T.T. Vol II; page 20, lines 5-7)

2/6/2018 App. 112

Q. 41-38, are you in traffic there?
A. Yes. I was at a stoplight. My car was not moving.

(T.T. Vol II; page 20, lines 18-21)

The above chart shows thirteen separate trips when defendant took a photo while in her vehicle. (The multiple photos taken on March 19, 2017 and July 2, 2017 were taken at or near the same time on the same trip). The chart shows that defendant only took photos while her vehicle was in motion on six of the thirteen instances photos were taken. Defendant testified that she had over 1000 photos on her phone. (T.T. Volume II, page 57, lines 24-25). Plaintiff had access to the thousands of photos on defendant's phone and yet found only six separate trips where defendant took a photo while she was driving. In order to prove that taking photos on her phone or driving while distracted was a habit, plaintiff needed to prove that it was "more probable than not" that she would take photos or drive distracted "in every instance or in most instances" when she drove a vehicle. *Thompson v. Boggs*, 33 F.3d at 854.

In the three years after the accident defendant likely averaged at least two separate trips in her vehicle per day, since she testified that she was attending school, working, driving to meet friends, and driving to work out. She made over 2000 separate trips in her vehicle, yet plaintiff was only been able to provide evidence that she took photos while driving on six trips. That means that she took photos while she was driving at best, .003% of the times she drove a vehicle. Even if this Court were to hold that subsequent acts should be considered in the habit analysis, it is hard to imagine any interpretation which would conclude that performing an act only .003% of the time is a habit.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PLAINTIFF'S MOTION FOR NEW TRIAL FOR ATTORNEY MISCONDUCT.

A. Standard of Review.

A motion based on a discretionary ground such as misconduct is reviewed for an abuse of discretion. *See Roling v. Daily,*596 N.W.2d 72, 76 (Iowa 1999). "An abuse of discretion consists of a ruling which rests upon clearly untenable or unreasonable grounds." *Lawson v. Kurtzhals,* 792 N.W.2d 251, 258 (Iowa 2010). An "unreasonable" decision is one that is not based on substantial evidence. *Channon,* 629 N.W.2d at 859. "In ruling upon motions for new trial, the district court has a broad but not unlimited discretion in determining whether the verdict effectuates substantial justice between the parties." Iowa R.App. P.

6.904(3)(*c*). "Unless a different result would have been probable in the absence of misconduct, a new trial is not warranted." *Loehr v. Mettille,* 806 N.W.2d 270, 277 (Iowa 2011).

B. Since plaintiff failed to make an objection at the time the statement in closing argument was made, he is barred from raising the issue on appeal.

Plaintiff alleges misconduct due to defendant's counsel making the statement in closing argument "I don't know why he didn't look at the texts. They were there, too." (T.T. Vol. III., page 65, lines 6-7). However, plaintiff failed to object to the statement at the time the statement was made or at any other time before the case was submitted to the jury. (T.T. Vol. III., 65, lines 8-15). The first time that plaintiff raised his objection to the statement was in his motion for new trial. Waiting until filing a motion for new trial to raise an objection

> "is contrary to the general rule that parties are not permitted to delay objections until it is too late for the problem to be corrected. Thus, errors to which objection could be made at trial may not be raised for the first time as grounds for new trial. Therefore, error was not preserved.
>
> *Rudolph v. Iowa Methodist Medical Center*, 293 N.W.2d 550, 555 (Iowa 1980).

Not only was it improper for plaintiff to raise his objection for the first time in his motion for new trial, but since the motion for new trial was denied, he is barred from raising the issue on appeal. "It needs to be emphasized, of course, that failure to make a contemporaneous objection will preclude a party from raising the matter

on appeal if the motion for new trial is ***denied.***" *Loehr v. Mettille,* 806 N.W.2d at 279(emphasis supplied). It is "the general rule that parties are not permitted to delay objections until it is too late for the problem to be corrected." *Id*. Since plaintiff did not lodge an object to the statement of counsel during trial, he is barred from raising the issue of misconduct on appeal. *Id.*

C. The trial court erred in submitting a spoliation instruction.

Plaintiff asserts that the statement made by counsel "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." (Appellant's Brief page 27). In fact, the trial court should not have submitted a spoliation instruction so any statement that "undercut the spoliation instruction" was harmless error.

At the jury instruction conference the trial court presented the following instruction pertaining to spoliation of evidence:

Instruction No. 10

> Plaintiff Matthew Homes claims that Defendant Miranda Pomeroy has intentionally destroyed evidence consisting of text messages. You may, but are not required to, conclude that such evidence would be unfavorable to Miranda Pomeroy.
>
> Before you can reach this conclusion, Matthew Homes must prove all of the following:
>
> 1. The evidence exists or previously existed.
> 2. The evidence is or was within the possession or control of Miranda Pomeroy.

3. Miranda Pomeroy's interests would call for production of the evidence if favorable to that party.
4. Miranda Pomeroy has intentionally destroyed the evidence without satisfactory explanation.

For you to reach this conclusion, more than the mere destruction of the evidence must be shown. It is not sufficient to show that a third person destroyed the evidence without the authorization or consent of Miranda Pomeroy.

(App. 18)

Defendant objected to the instruction arguing that plaintiff had failed to establish the elements of spoliation necessary to warrant a spoliation instruction. (T.T. Vol. III pages 8-10). The following is the only testimony offered at trial regarding the deletion of actual text messages from defendant's phone:

Q Now, in this case you were asked to produce copies of those text messages. Do you recall that?

A What text messages?

Q The text messages from June 8, 2015.

A Like, the call?

Q The actual content of the text messages.

A I don't recall that.

Q Well, do you have them?

A Do I have the text messages from three years ago? I don't know. I got a new phone when I turned eighteen. They told me when they – nowadays they can transfer over

stuff from phone to phone. That is how a lot of the iPhones and some Sprint companies work.

They did tell me, though, that not all of my text messages were going to come through. They told me that my pictures and my contacts were going to come through, but I was going to lose some of my messages. They didn't tell me which ones. They never told me how many I was going to lose. I never kept track, so I don't know for sure if I have messages from three years ago. I don't know.

Q You don't know whether or not these text messages are on your current cell phone today?

A Correct. I don't know.

(T.T. Vol. I pages 44-45 lines 9-25 and 1-8).

The spoliation instruction is only proper "when a party who reasonably anticipates litigation destroys an item that may be relevant to that litigation." *Myers v. Crawford Heating & Cooling,* (unreported)No. 09–1849, 2010 WL 4484386, at *5 (Iowa Ct. App. Nov. 10, 2010), referencing *State v. Hartsfield* v. 681 N.W.2d 626, 622-623; and *Prudential Ins. Co. v. Lawnsdail,* 235 Iowa 125, 130, 15 N.W.2d 880, 883 (1944). "Where the record is unclear whether the party destroyed the evidence with knowledge it was relevant to future litigation, no spoliation instruction is required." *Myers v. Crawford Heat & Cooling,* (unreported) No. 09–1849, 2010 WL 4484386, at *5 (Iowa Ct. Appt. Nov. 10, 2010), referencing *Lynch v. Saddler,* 656 N.W.2d 104, 111 (Iowa 2003). "A party who destroys a document ***with***

knowledge that it is relevant to litigation is likely to have been threatened by the document." *Lynch v. Sadler* 656 N.W.2d at 111. (emphasis added).

Defendant testified that in November of 2015, several months after the accident, she got a new phone from Sprint for her 18th birthday. (T.T. Vol. I pages 44-45 lines 9-25 and 1-8). She further testified that she was informed by Sprint that some of her text messages may be lost when transferring data from her old phone to her new phone, but not how many might be lost. (T.T. Vol. I pages 44-45 lines 19-25 and 1-5). Sprint, not the defendant, was responsible for the deletion of any text messages.

In order for the spoliation instruction to have been warranted in this case, plaintiff had to prove that defendant herself deleted the texts and had knowledge that the possible deletion of text messages by Sprint was relevant to litigation. *Id*. The Petition at Law and Jury Demand in this matter was not filed until June 1, 2017, 19 months after the texts were deleted from defendant's phone. (App. 6); (T.T. Vol. I pages 44-45 lines 9-25 and 1-8). Defendant's testimony throughout the trial showed that she did not believe she had done anything wrong to cause the accident. Since the plaintiff did not believe she had done anything to cause the accident and was not informed that plaintiff had filed suit against her until 19 months after she got a new cell phone, how could she possibly have thought that she would be involved in litigation, let alone that the texts would be relevant to litigation? Additionally,

defendant did not delete the text messages, they were deleted by Sprint. There is no evidence that defendant traded in her phone with the intent of deleting text messages. Since defendant did not delete the texts, herself a spoliation instruction should not have been submitted to the jury.

The plaintiff failed to satisfy the elements necessary to receive a spoliation instruction. If he had not received the spoliation instruction the issue of deleted texts would not have been raised. Therefore, the comment in closing argument by defendant's counsel was harmless error.

D. The result of the trial would not have changed in the absence of defendant's counsel's "misconduct."

As noted above, plaintiff alleges misconduct due to defendant's counsel making the statement in closing argument "I don't know why he didn't look at the texts. They were there, too." (T.T. Vol. III., page 65, lines 6-7). Defense counsel vigorously disputes that the statement made during closing argument constituted misconduct. Plaintiff's counsel apparently agreed since he did not object to the comment nor did he address it during his rebuttal.

Assuming, arguendo, that counsel's statement in closing argument constituted misconduct, said alleged misconduct would not be grounds for a new trial based on Iowa Rule of Civil Procedure 1.1004(2) which provides that a new trial based on attorney misconduct may only be granted if the objectionable conduct was prejudicial to the interest of the complaining party. *Mays v. C. Mac. Chambers Co.,*

490 N.W.2d 800, 803 (Iowa 1991). "Unless a different result would have been probable in the absence of misconduct, a new trial is not warranted." *Loehr v. Mettille,* 806 N.W.2d at 277.

In order to prevail on his Rule 1.1004(2) argument for new trial, plaintiff must prove that the alleged misconduct of counsel caused the jury to determine that defendant was ***not*** negligent. The evidence in this case, discussed in depth above, overwhelmingly supported the jury's verdict and it is inconceivable that any alleged misconduct on the part of defense counsel in closing argument was so prejudicial that had the statement ***not been made***, the jury would have found that defendant was negligent. As the trial court noted in its Order Denying Motion for New Trial:

> "Even if the Court could find that the statement of Defendant's Counsel, regarding text messages still being on her phone, was in itself misconduct the Court cannot find that but for the claimed misconduct it is probable that a different result would have been reached. Plaintiff admitted at trial that he did not see Defendant using her cell phone at the time of the accident. Further, Defendant made statements on scene regarding the accident being his fault and on how he ended up in the path of Defendant's vehicle."
>
> (App. 69)

In order for a new trial to be granted, plaintiff had to prove that the jury would have found defendant was negligent but for the misconduct of counsel during closing argument. *Loehr v. Mettille,* 806 N.W.2d at 277 (Iowa 2011). With the evidence so stacked against the plaintiff, it is hard to imagine that a jury would have found

defendant to be negligent and even harder to imagine that her counsel's alleged misconduct could have caused the jury to find that she was not negligent. Therefore, no actionable misconduct was committed by defendant's counsel in this case and the trial court correctly denied plaintiff's motion for new trial.

CONCLUSION

Based on the arguments presented, defendant respectfully requests that this Court affirm the trial court's denial of plaintiff's Motion for New Trial and the take nothing judgment entered herein.

REQUEST FOR ORAL ARGUMENT

Appellee respectfully requests oral argument.

RESPECTFULLY SUBMITTED,

BY:_____

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CERTIFICATE OF FILING

The undersigned hereby certifies that the foregoing Final Brief of Appellants was filed with the Iowa Supreme Court by electronically filing the same on March 26, 2020, pursuant to Iowa R. App. P. 6.902(2) (2013) and Iowa Ct. R. 16.1221(1).

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This Final Brief was served upon the attorneys of record for the Appellee by electronic filing and electronic delivery via EDMS on March 26, 2020.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE-STYLE REQUIREMENTS

This brief complies with the type-volume limitation and typeface requirements of Iowa R. App. P. 6.903(1)(e) and Iowa R. App. P. 6.903(1)(f) of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 6,937 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g) and because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

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03/26/2020
Date