

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 Reply BRIEF FOR APPELLANTS

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PROOF OF SERVICE

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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STATEMENT OF ISSUES PRESENTED FOR REVIEW

- I. WHETHER HOLMES WAS PREJUDICED BY THE DISTRICT COURT’S DECISION TO PRECLUDE HIM FROM USING DEPUTY OHLINGER’S TESTIMONY ABOUT POMEROY’S TEXTING WHILE DRIVING IN CLOSING ARGUMENTS..... 6

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- III. WHETHER HOLMES PRESERVED THE ISSUE OF POMEROY’S MISCONDUCT IN CLOSING ARGUMENT FOR APPEAL BY FILING A MOTION FOR NEW TRIAL; EVEN SO, WHETHER POMEROY’S MISCONDUCT WAS SO FLAGRANTLY IMPROPER AND SO EVIDENTALLY PREJUDICIAL THAT IT SHOULD BE CONSIDERED REGARDLESS OF WHETHER HOLMES MADE AN OBJECTION IN CLOSING 8

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REPLY ARGUMENT

I. **HOLMES WAS PREJUDICED BY THE DISTRICT COURT'S DECISION TO PRECLUDE HIM FROM USING DEPUTY OHLINGER'S TESTIMONY ABOUT POMEROY TEXTING WHILE DRIVING IN CLOSING ARGUMENTS**

Pomeroy correctly acknowledges that Deputy Ohlinger's testimony surrounding Pomeroy texting while driving "actually came into evidence." Appellee's Br. at 11. However, she incorrectly states that Holmes suffered no prejudice as a result of the trial court's decision to preclude Holmes from using the evidence in closing argument. Appellee's Br. at 11. Jury Instruction No. 11 instructed the jury that while examining fault, it must "consider all of the surrounding circumstances as shown by the evidence, together with the conduct of the plaintiff and the defendant..." App. at 23. Thus, it cannot be disputed that Holmes was not prejudiced because the trial court excluded admitted evidence from the jury's consideration even though it instructed the jury to consider all of the evidence when examining fault. App. at 23. Similarly, Jury Instruction No. 19 defined proper lookout, as "the lookout a reasonable person would keep in the same or similar situation." App. at 26. Therefore, Holmes was prejudiced because he was not able to use evidence of Pomeroy texting while driving to argue

that Pomeroy didn't maintain a proper lookout. Similarly, Jury Instruction No. 29 explicitly instructed the jury on the grounds of fault in defining fault, in part, as failing to keep a proper lookout and failing to take proper evasive action. App. at 30. Here again, Holmes was prejudiced as he could not use evidence that was indisputably admitted at trial as evidence that he had satisfied his burden of proof. For these reasons, Holmes was prejudiced by the trial court's error.

II. POMEROY'S HABIT FOR TEXTING WHILE DRIVING WAS RECENTLY DEVELOPED AND THEREFORE SUBSEQUENT INSTANCES WERE RELEVANT TO PAST CONDUCT.

Pomeroy's brief acknowledges that the trial court was correct in stating that "[s]ubsequent incidents may only be proof of a recently developed habit..." Appellee's Br. at 20. This is significant considering Pomeroy's testimony that she was seventeen (17) years old at the time of the incident. (T.T. Vol. I. 6:15-17). Given that the driving age in Iowa is sixteen (16), Pomeroy's habit was indisputably recently developed. Thus, by her own admission, evidence of her recently developed habit for texting while driving after the incident should have been admissible at trial. For this reason, the trial court erred.

III. HOLMES PRESERVED THE ISSUE OF POMEROY'S MISCONDUCT IN CLOSING ARGUMENT FOR APPEAL BY FILING A MOTION FOR NEW TRIAL; EVEN SO, POMEROY'S MISCONDUCT IN ARGUMENT WAS SO FRAGRANTLY IMPROPER AND SO EVIDENTLY PREJUDICIAL THAT IT SHOULD BE CONSIDERED REGARDLESS OF WHETHER HOLMES MADE AN OBJECTION DURING CLOSING

A district court is not prohibited from “granting a new trial in every case where the ground for new trial was not raised at the first available opportunity during trial.” *Bronner v. Reicks Farms, Inc.*, 2018 WL 2731618, *16 (June 6, 2018)(quoting *Loehr v. Mettille*, 806 N.W.2d 270, 278 (Iowa 2011)). A trial court is not bound by the record in the way that appellate courts are. *Id.* A trial court may exercise its discretion to grant a new trial if grounds exist pursuant to Iowa R. Civ. P. 1.1004.

Here, Holmes preserved error with respect to Pomeroy's misconduct by raising the issue in his Motion for New Trial. App. at 37-43. Notably, Pomeroy's resistance to the Motion for New Trial argued the merits of the motion and did not raise the argument that Holmes had not timely raised an objection to her misconduct. As it should have, Holmes timely asserted that Pomeroy had committed misconduct in argument in his Motion for New Trial pursuant to Iowa R. Civ. P.

1.1004. *See Loehr*, 806 N.W.2d at 278. Importantly, the trial court considered and ruled on the merits of the motion and did not rule that the underlying basis for the motion was untimely. App. at 69-70. This certainly preserved Holmes' right to raise the issue here on appeal.

Even so, Pomeroy's misconduct was so flagrantly improper and prejudicial that it should be considered regardless of whether Holmes' objection in the Motion for New Trial was timely. *See Bronner*, 2018 WL 2731618 at *16 (citing *Connelly v. Nolte*, 21 N.W.2d 311, 317 (Iowa 1946)). As is articulated in Holmes' prior brief, Pomeroy's counsel argued to the court outside the presence of the jury that "there is no way that anyone can recover those texts. They are gone. They are in the ether sphere." (T.T. Vol. III. 9:12-19). Minutes later, while trying to undercut the spoliation instruction she had unsuccessfully objected to, Pomeroy's counsel told the jury that the texts were on her phone and blamed Holmes for not looking at them. (T.T. Vol. III. 64:25 to 65:7). Indeed, this is the epitome of severe and pervasive misconduct surrounding a central issue in the case – whether Pomeroy was at fault for the incident. *See Bronner*, 2018 WL 2731618 at *19 (stating that misconduct is present where it is severe and pervasive and goes to the

central issues of the case). In the minutes preceding and after the incident, Pomeroy had sent approximately forty-six (46) text messages, some of which there can be no doubt relate to the incident. (App. at 40-42. For these reasons, Holmes preserved this issue on appeal and the trial court was incorrect to deny his motion for 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

because it was filed electronically.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

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