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

IN THE SUPREME COURT OF IOWA

MATTHEW HOLMES
Plaintiff-Appellant,

v.

MIRANDA POMEROY
Defendant-Appellee.

ON FURTHER REVIEW FROM THE COURT OF APPEALS OF IOWA & THE IOWA DISTRICT COURT IN WARREN COUNTY HONORABLE MICHAEL JACOBSEN, DISTRICT COURT JUDGE

APPLICATION FOR FURTHER REVIEW OF THE COURT OF APPEALS OF IOWA FROM AN OPINION FILED SEPTEMBER 23, 2020

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PROOF OF SERVICE

On October 13, 2020, I served this application on all other parties by EDMS one copy thereof to their respective counsel and served Appellant at her last known address in Iowa:

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CERTIFICATE OF FILING

I, Matthew Sahag, certify that I did file the attached application with the Clerk of the Iowa Supreme Court by EDMS on October 13, 2020.

_____
Matthew Sahag, AT#0008849
Counsel of Record for Appellant

QUESTIONS PRESENTED FOR REVIEW

1. Are fifty (50) instances of a defendant's post-collision use of a cellphone while driving sufficient evidence from which a reasonably juror may infer a habit or routine under Iowa Rule of Evidence 5.406?

2. Can the court of appeals exclude Plaintiff's pre-collision and post-collision of habit evidence on a ground that was not asserted or argued by the defendant before the district court, and a ground that the district court never ruled upon?

3. Can a district court limit a plaintiff's subsequent use of testimony offered during defendant's examination of the witness and admitted into the record without objection?

4. Can the court of appeals exclude Plaintiff's use of the unobjected-to testimony on a ground that was not asserted or argued by the defendant before the district court?

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STATEMENT SUPPORTING FURTHER REVIEW

In this case, Plaintiff Matthew Holmes ("Holmes") was riding a bicycle when he collided with Defendant Miranda Pomeroy ("Pomeroy") who was driving a vehicle. The collision resulted in injuries to Holmes. At trial, Holmes sought to establish that Pomeroy had a habit of distracted driving though evidence of more than fifty (50) instances in which she was driving while using her cell phone. The district court excluded much of the evidence as habit evidence because most of the instances were not relevant because they occurred after the collision.

Admissibility of post-collision cell phone evidence as evidence of habit or routine in cases involving automobiles is an important issue of public importance that should be settled by the Iowa Supreme Court. Iowa R. App. 6.1103(1). The supreme court has not yet addressed whether post-collision evidence is relevant to habit, and as a result, the district court relied on other jurisdictions to ultimately rule on Plaintiff Matthew Holmes' evidence. Moreover, in addressing the issue on appeal, the court

of appeals concluded, "[w]e are not as sure," and then declined to decide the issue. (Court of Appeals Opinion at 8).

After declining to address the post-collision habit evidence issue, the court of appeals affirmed on an entirely unpreserved theory that there were not enough instances were not enough to infer a habit, anyways. The court of appeals decision to affirm the district court's opinion on entirely unpreserved theories is in direct conflict with *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002)("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.").

Also, Holmes introduced testimony from a witness that "thought they heard she was texting while driving." When Holmes' counsel attempted to cross-examine the witness about the statement, the court sustained defense counsel's objection. Plaintiff's counsel subsequently attempted to highlight the evidence in his closing argument, but the district court prohibited its use on hearsay grounds. Again, this decision to affirm on an unpreserved theory is in direct conflict with *Meier.*

ARGUMENT

I. FURTHER REVIEW IS REQUIRED BECAUSE THE ADMISSIBILITY OF POST-COLLISION CELL PHONE EVIDENCE AS EVIDENCE OF HABIT OR ROUTINE IN CASES INVOLVING AUTOMOBILES IN AN IMPORTANT ISSUE OF PUBLIC IMPORTANCE THAT SHOULD BE SETTLED BY THE IOWA SUPREME COURT

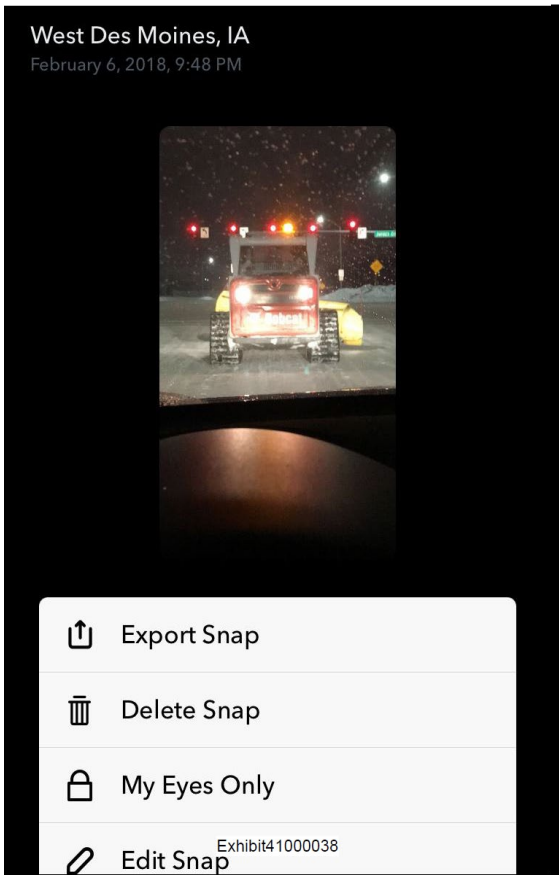
A. The district court erred in concluding that post-collision instances of cell phone use while driving is not relevant to establishing habit or routine.

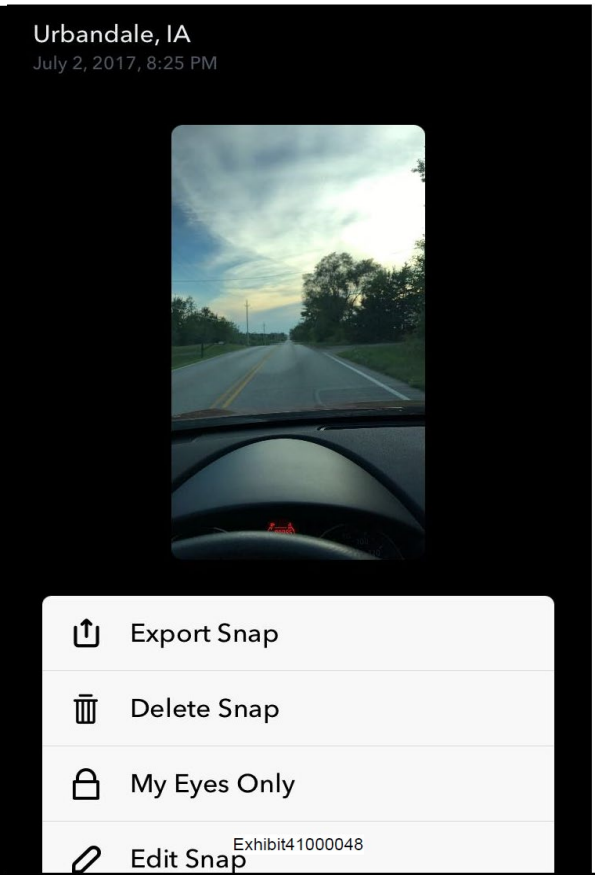
At trial, Plaintiff sought to introduce evidence via his Exhibit 41 under Iowa Rule of Evidence 5.406 that on more than fifty (50) occasions defendant used her cell phone while driving.

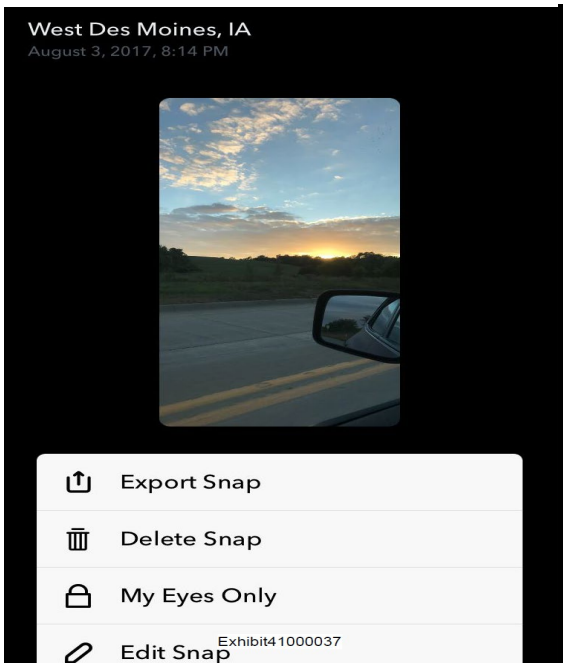
> MR. SAHAG: It will. I just want to make sure I have the record preserved. If counsel will stipulate that any of the excluded -- I am going to want all of the exhibits in. If counsel will stipulate that I have preserved my record for purposes of appeal.
>
> THE COURT: The Court will allow the other exhibits in as an offer of proof, if counsel does not object to that.
>
> MR. BARDOLE: Yes. That is fine.
>
> THE COURT: As an offer of proof, the Court will accept the remaining exhibits of 41, the remaining photographs.
>
> MR. SAHAG: Just to be clear, the offer of proof as to the relevancy of the exhibits, that would encompass foundation and relevant purposes, but also, obviously,

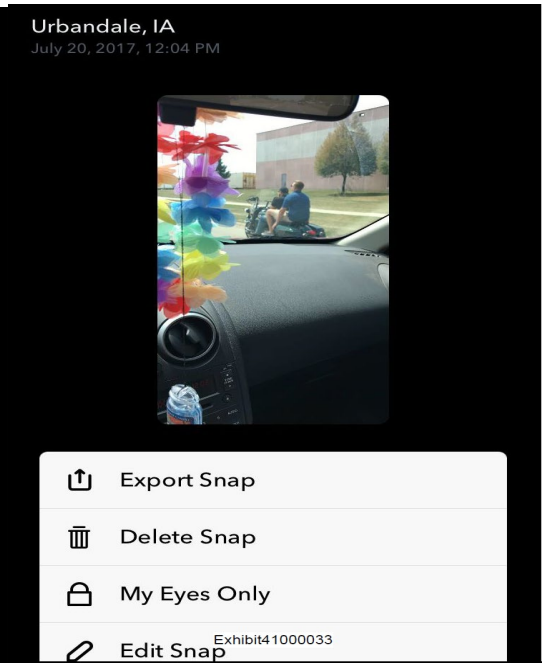
> we had a disagreement over habit. It constitutes the offer of proof for habit as well.
>
> THE COURT: I think as far as 41 itself, the whole thing you are offering as an offer of proof for habit purpose. The Court has already excluded those by a previous ruling.

Holmes' proposed Exhibit 41 contained fifty (50) photos of Pomeroy in a variety of circumstances while in the driver-seat of her vehicle taking selfies with her seat-belt on, stopped in traffic, moving in traffic as evidenced by the speedometer, moving along the traveled portions of the roadway taking photos of sunsets, taking pictures while at stoplights, and taking photos while driving in inclement weather. (T.T. Vol. II, 8-27; Proposed Exhibit 41). Some examples of Exhibit 41 are as follows:


West Des Moines, IA
February 6, 2018, 9:48 PM
Export Snap
Delete Snap
My Eyes Only
Edit Snap
Exhibit41000038


Urbandale, IA
July 2, 2017, 8:25 PM
Export Snap
Delete Snap
My Eyes Only
Edit Snap
Exhibit41000048


West Des Moines, IA
August 3, 2017, 8:14 PM
Export Snap
Delete Snap
My Eyes Only
Edit Snap
Exhibit41000037


Urbandale, IA
July 20, 2017, 12:04 PM
Export Snap
Delete Snap
My Eyes Only
Edit Snap
Exhibit41000033

Also, Holmes provided an offer of proof for Exhibit 7 and Exhibit 8 that depicted Pomeroy taking videos while her vehicle was in the traveled portion of the roadway. (T.T. Vol. 1, 55-60).

Additionally, Holmes elicited testimony from Pomeroy regarding text messages she had either sent/or received while driving. (T.T. Vol. 1. 75-77).

Via a motion in limine, Defendant objected solely on the basis that post-collision instances of cell phone use while driving was not relevant to establish an inference of habit or routine. The district court agreed and excluded the evidence. (September 10, 2018, Ruling on Motions in Limine).

There was no Iowa authority on point and so the district court's evidentiary ruling followed a New Mexico case that conflicts with the majority of courts in other jurisdictions. *See 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)(holding that habit may be shown by subsequent conduct exhibiting that habit). *Id.* This error was far from

harmless – especially since the habit evidence offered by Holmes showed both pre-accident and post-accident distracted driving by Pomeroy. Indeed, its logical to surmise that post-collision conduct is just as relevant, if not more than pre-collision conduct because post-collision conduct proves that the course of action is actually a habit. If there were no post-collision conduct, certainly Pomeroy would argue that her conduct possibly be a habit because it didn't continue. Had this evidence been admitted for purposes of proving habit, a reasonable juror may have concluded that defendant was operating her cell phone and distracted at the time of the collision.

Importantly, the court of appeals declined to reach a conclusion on the issue of whether post-collision evidence is relevant to habit. Thus, it is important for the Iowa Supreme Court to reach a conclusion on the issue.

B. The admissibility of evidence of cell phone use while driving is an issue of public concern.

There is no meaningful dispute that in today's world cell phones are ubiquitous. "Prior to the digital age, people did not typically carry a cache of sensitive personal information with them

as they went about their day." *Riley v. California*, 573 U.W.373, 395 (2014). "Now it is the person who is not carrying a cell phone, with all that it contains, who is the exception." *Id.* By 2014, "nearly three-quarters of smart phone users report being within five feet of their phones most of the time, with 12% admitting that they even use their phones in the shower." *Id.*

We are also becoming increasingly aware of the dangers of cell phone use while driving. In 2001, the Iowa Department of Transportation reported 518 crashes that occurred as a result of drivers being distracted by use of a phone or other electronic devices. That number has since more than doubled with the 2019 number of crashes reaching 1,099. *Distracted Drivers using cell phone/other device crashes – 2001 to 2019*, https://iowadot.gov/mvd/factsandstats (last visited October 13, 2020). Given the increased frequency in which cell phone use will be relevant to deciding automobile collision trials and the dangers of distracted driving, this is undoubtedly an issue of public importance that should be decided by this Court. Accordingly, further review is required.

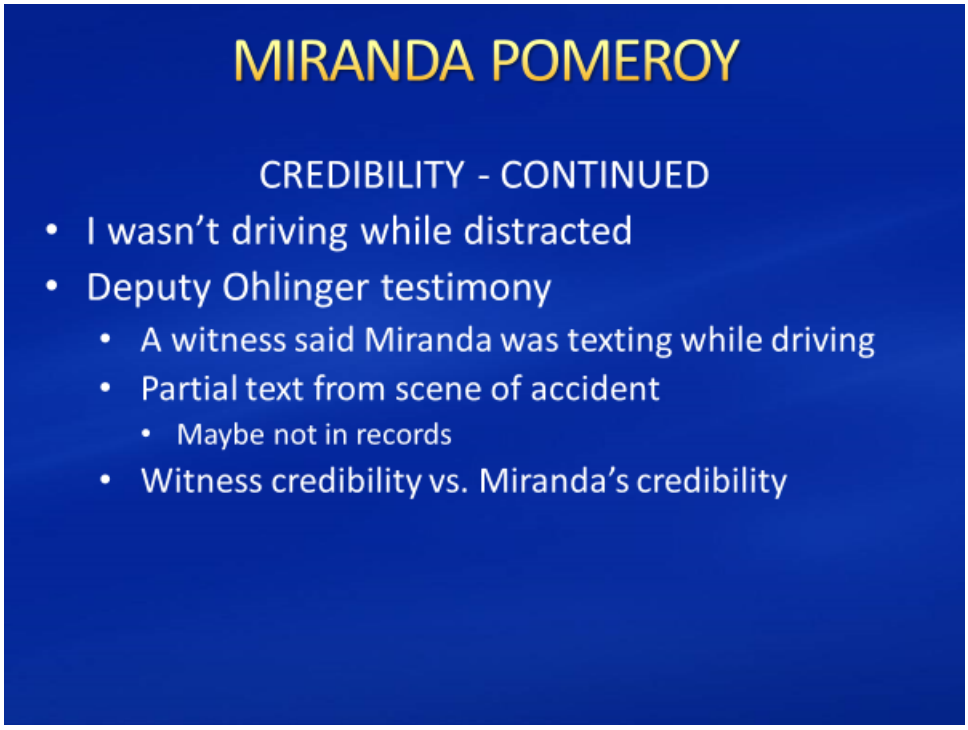
II. FURTHER REVIEW IS WARRANTED TO CLARIFY THAT EVIDENCE ADMITTED BY ONE PARTY WITHOUT OBJECTION MAY BE USED BY THE PARTY FOR ANY PURPOSE

During defense counsel's examination of Deputy Lisa Ohlinger, he questioned her about investigation into the accident between Holmes and Pomeroy.

> 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). Plaintiff did not object to this testimony. On cross-examination, Plaintiff's counsel sought to explore Deputy Ohlinger's testimony, but the district court prohibited his line of questioning. (T.T. Vol. II. 198:2-200:1).

Later, during closing argument, Plaintiff attempted to highlight Deputy Olinger's testimony in his PowerPoint slide:



Defense counsel again objected on the basis of hearsay, and the district court sustained the objection. (T.T. Vol. III. 29:20-25).

Both rulings are directly contrary to clearly established holdings from this Court. "[W]hen hearsay evidence which would be objectionable and incompetent when properly objected to is admitted without objection and is relevant and material to an issue it is to be considered and given its natural probative effect as if it were in law competent evidence. Its weight is to be determined by the trier of fact by the same criteria as is employed in considering other competent evidence. Recognition of such a principle will, in our opinion, advance uniformity and abolish

impossible line drawing." *Tamm, Inc. v. Pildis*, 249 N.W.2d 823, 834 (Iowa 1976); *see also State v. Johnson*, 223 N.W.2d 226, 228-29 (Iowa 1974)(explaining that otherwise inadmissible evidence that is received without objection "is in the case as fully and effectively as if it were not objectionable.").

This evidence was essential to resolving the dispute as to the cause of the collision, and both the district court and court of appeals erred in holding that the evidence was hearsay after it had been admitted.

III. THE COURT OF APPEALS' AFFIRMANCE ON GROUNDS NOT PRESENTED OR ARGUED BEFORE THE DISTRICT COURT IS CONTRARY TO THIS COURT'S DECISIONS REGARDING ERROR PRESERVATION

Further review is warranted for another reason. The district court excluded the cell phone evidence on the sole basis that post-collision evidence is not relevant to give rise to an inference of habit or routine. (September 10, 2018, Order on Motions in Limine). On appeal, however, the court of appeals affirmed on the basis that Holmes hadn't provided proof that Pomeroy "always or

in most instances uses her phone while driving a moving vehicle." (Court of Appeals Opinion at 9).

Similarly, as to the issue of Deputy Ohlinger's testimony the district court shut down Holmes' counsel's cross-examination and closing argument on the basis that it was hearsay based on the objection of Pomeroy's counsel that it was hearsay. (T.T. Vol. III. 31:23 to 32:3). The court of appeals, however, affirmed on the basis that Plaintiff's counsel misstated the testimony. Yet, defense counsel did not object on this basis. (T.T. Vol. III. 29:19 to 30:6);

These decisions by the court of appeals to are in direct conflict with well-settled law regarding the preservation of issues on appeal and as a result the Iowa Supreme Court should correct the Court of Appeals' errors. *See Meier v. Senecaut*, 641 N.W.3d 532, 537 (Iowa 2002)("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal."); *see also State v. Taylor*, 310 N.W.2d 174, 177 (Iowa 1981)("It is incumbent upon the objecting party to lodge specific objections so the trial court is not left to speculate whether the evidence is in fact subject

to some infirmity that the objection does not identify… "Every ground of exception that is not particularly specified is considered abandoned." *Id.* "A party cannot announce one reason for an objection at trial and on appeal rely on a different one to challenge an adverse ruling.").

CONCLUSION

For the reasons articulated herein, Court should grant this application for further review.

COST CERTIFICATE

I hereby certify that the costs of printing the Appellant's application was $0.00.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of because:

[x] this brief contains 2673 words, excluding the exempted parts of the brief.

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_____

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