

2010

Jason and Melissa Miller v. Utah Department of Transportation : Reply Brief

Utah Court of Appeals

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IN THE UTAH SUPREME COURT

JASON AND MELISSA MILLER,
individually and as guardians ad litem for
MEGAN MILLER, a minor,

Plaintiffs/Appellants,

vs.

UTAH DEPARTMENT OF
TRANSPORTATION, a subdivision of
the State of Utah,

Defendant/Appellee.

Case No. 20100629

APPEAL FROM A FINAL JUDGMENT
THIRD JUDICIAL DISTRICT COURT
THE HON. ANTHONY QUINN

**REPLY BRIEF OF APPELLANTS AND
CROSS-APPELLEE'S BRIEF ON CROSS APPEAL**

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Much could be argued in response to each section of UDOT's brief. However, it would be mostly repetitious. The Millers therefore focus only on the following points.

RESPONSE TO APPELLEE'S AND CROSS-APPELLANT'S STATEMENT OF FACTS

UDOT argues that Millers have only presented facts that support their position. When "reviewing a jury verdict, the evidence and all reasonable inferences drawn from the evidence are viewed in the light most favorable to the verdict." Appellee's Brief at 12. The Millers are not challenging the verdict based on insufficiency of the evidence. There was certainly evidence adduced at trial that could be used to support the verdict. This is not the issue. Miller's appeal focuses on a number of rulings by the trial court that prevented Millers from having a fair trial, including the inability to: (1) present relevant and important evidence; (2) explain the absence of critical evidence; (3) have the jury properly instructed; and (4) having a fair opportunity to exercise their challenges to prospective jurors.

ARGUMENT – REPLY BRIEF

I. THE TRIAL COURT'S RULINGS REGARDING THE ACCIDENT HISTORY DATA CONSTITUTED PREJUDICIAL ERROR AND THE TRIAL COURT SHOULD HAVE GIVEN THE MITIGATING INSTRUCTION REGARDING THE §409 PRIVILEGE

In its Statement of Facts, UDOT emphasizes that AASHTO's Roadside Design Guide only focuses on two factors when deciding whether a median barrier is needed, and it "is really a function of median width and traffic volume." Appellee Brief at 15. It then emphasizes that the median width where the accident occurred was 40 feet, well

within the discretionary 30 to 50 feet where engineering judgment may be used to make the decision; however, UDOT ignores the next step of AASHTO's analysis—unless there is an accident history. The absence of accident data, therefore, became the pivotal issue at trial.

UDOT's approach to this Court is the same as it approached the jury. It wants to focus solely on the initial analysis—median width and traffic volume—because there is no evidence of accident history. Therefore, it argues, AASHTO's qualification to the initial analysis (accident history) is irrelevant. UDOT's approach is the very reason why the trial court's refusal to allow the proposed jury instruction 51 explaining the reason why there was no such accident data, was so prejudicial and denied Millers a fair trial.

UDOT argues that Millers had the accident reports for a period of five years before this accident and therefore they were not prejudiced. Here, UDOT is playing both sides of the argument. Before trial, UDOT attacked Millers' expert, claiming that accident data a few years before the accident cannot form the basis for UDOT's failure to install median barriers in the 1995 and 1999 projects. It takes a few years to analyze the data, design a construction plan, obtain funding, bid out the job and then complete the construction. The recent data is therefore irrelevant.

By arguing that there was no prejudice because the Millers had five years of data, UDOT wants the court to ignore that it was the accident data before 1998 that was the critical evidence. Given the inherent delays from the analysis phase to the completion of construction, a five year history was simply inadequate and essentially useless to the Millers.

It is important to note that in the fall of 2002, a year and a half before this accident, Daren Duersch became UDOT's Regional One Traffic Engineer for the Northern Division. One of the first things he did as a new director was to propose the installation of median barriers in the area where the accident occurred and northward. UDOT refused to allow Mr. Duersch to explain why he immediately started the median barrier project when becoming the Traffic Engineer, asserting the § 409 privilege. Because of the inherent delays in completing such a project (preparing the designs, obtaining funding, bidding the job, completing the project, etc.), this construction did not start until 2005 and the median barriers were not installed until 2006. (R. 2709, pp. 45, 59-60, 62.)

The lack of accident data before 1998 affected the Millers' trial strategy. Without the jury instruction explaining why the historical data was absent, it would have backfired if the Millers tried to use the recent data. Such evidence could not establish the historical accident rate applicable to the 1995 and 1999 projects. It would have opened the door to arguments about, and focused the jury's attention on, the lack of evidence to support the claim that UDOT should have installed the median barriers as part of the 1995 and 1999 projects.

The judge had ruled before trial that he would not give the Millers' proposed mitigating instruction (No. 51) and ordered UDOT not to take advantage of the privilege by arguing the lack of such evidence. Nonetheless, UDOT (subtly during trial and not so subtly during closing argument) did the very thing that the trial court instructed UDOT

not to do. Despite this and the Miller's renewed request, the trial court refused to change his prior ruling and give the proposed instruction. (R. 2712, pp. 152, 160.)

Importantly, UDOT actually produced a 1994 internal memo (see copy attached to this brief as Addendum 1, R. 235-236) pursuant to the Millers' initial Request for Production of Documents, which verified that the area where the accident occurred had an excessively high accident rate, the very thing which AASHTO said would require a median barrier if the median width is between 30 and 50 feet. At UDOT's request, the trial court excluded this evidence. Knowing that it was contrary to the actual facts, UDOT still used the lack of accident history evidence at trial to strongly imply, if not actually argue, that there was no accident history. Therefore, UDOT argued, the jury should only consider the median width and volume as the determining factors. Through this, UDOT used the privilege to perpetrate a fraud on the jury, and the Millers had no way to explain the true situation.

UDOT also argues that the Millers only asked for the accident history from 1996 forward. This is misleading. Before the judge had excluded the accident history evidence and ruled that UDOT did not have to produce any such information, the Miller's had served formal discovery requests to obtain all documents relating to applicable area, without a time limitation, which would include the historical accident data. See, e.g. Requests for Production Nos. 2, 5, and 8 (R. 90, 1360-1362). It was through these requests that UDOT inadvertently disclosed the 1994 internal memo verifying a high accident rate.

The Millers' subpoena to CODES and the noticed deposition of the CODES representative were to verify the accident data that went back as far as 1971. (R. 669-671.) It was the court's ruling that prevented the Millers from seeking and obtaining the accident data before 1996. It is simply untrue that the Millers never sought to obtain the data before 1996. The accident reports that were held by the Department of Public Safety had all been destroyed prior to 1998. The Millers, therefore, could not obtain anything earlier than 1998.

Finally, UDOT emphasizes that the traffic volume was the lowest average daily traffic of any section of I-15 in the area. Appellees Brief at 30. Again, this is misleading. The traffic volume was very high even though it may have been the lowest when compared to the surrounding areas. The traffic volume in 1995 was 73,755 cars per day. (R. 2710, p. 45.) In 2003, the traffic volume was over 90,000 cars per day. (R. 2711, pp. 208, 210.) The traffic volume considered by AASHTO as the maximum amount was only 80,000 cars per day. (R. 2710, p. 38.)

In any event, the traffic engineer should consider the increase of expected traffic volume within the foreseeable future when designing the roadway. (R. 2710, p. 46.) The evidence was uncontested that the traffic volume was increasing at a high rate in this area of Davis County. (R. 2709, pp. 89-98; 2710, pp. 38-40; and 2711, pp. 215-218.)

Regardless of the traffic volume, because the median width was 40 feet, the pivotal issue still involved the accident history. For this reason, the trial court's rulings restricting the discovery and use of the historical accident data, its refusal to give the

Millers' explanatory instruction and its failure to prevent UDOT from using the privilege as a sword against the Millers claims, denied the Millers a fair trial.

ARGUMENT – CROSS APPEAL

I. THE JURY INSTRUCTION GIVEN BY THE TRIAL COURT REGARDING UDOT'S DUTY WAS APPROPRIATE.

UDOT argues that the trial court erred in giving Instruction 27, specifically subparagraphs a and c of the instruction. UDOT takes no issue with the remaining language in the instruction. The language of the instruction, when taken as a whole, is a fair statement of UDOT's duties. Instruction 27 reads:

The Utah Department of Transportation had the legal duty to exercise reasonable care to:

- a. investigate, analyze and evaluate roadway safety;
- b design and construct a freeway in a reasonably safe condition for motorists; and
- c. take reasonable measures to minimize or prevent dangerous conditions that would create unreasonable risks of foreseeable injury to motorists.

Reasonable care means what a reasonably careful government Department of transportation would do under similar circumstances. Negligence may be in acting or failing to act. The Department of Transportation might be required to use more care if it were to understand that more danger was involved in a particular situation. In contrast, a department may be able to use less care because it would understand that less danger is involved.

UDOT is correct in arguing that this instruction is more than a simple, general statement of the law (which UDOT argues should only be given); however, it is not true that the language is an incorrect statement of the law.

UDOT's duties originate from statutory language of which UDOT only quotes a limited portion in its brief. The relevant language of the statute is quite broad:

There is created the Department of Transportation which shall:

(1) have the general responsibility for planning, research, design, construction, maintenance, security, and safety of state transportation systems;

* * *

(4) plan, develop, construct, and maintain state transportation systems that are safe, reliable, environmentally sensitive, and serve the needs of the traveling public, commerce, and industry.

Utah Code Anno. §72-1-201, as amended. Subparagraph (1) is very broad, "have the general responsibility for...safety of state transportation systems." Subparagraph (4) is similarly broad, "plan, develop, construct, and maintain state transportation systems that are safe...."

UDOT's claimed offending language in Instruction 27 fits well within the parameters of the broad statutory duties. In fact, it is difficult to image how the language in the instruction would be outside of UDOT's general statutory duties. This is aptly illustrated by using UDOT's own statement, "UDOT is obligated only to fix problems that it knows or reasonably should know about." (Appellee's Brief at 44, emphasis added.) How would UDOT "know" or "reasonably should know" unless it had a duty to: "a. investigate, analyze and evaluate roadway safety"? How would UDOT have a duty to "fix problems" unless it was required to "c. take reasonable measures to minimize or prevent dangerous conditions that would create unreasonable risks of foreseeable injury to motorists"?

The duty language in the Instruction 27 is couched in terms of reasonableness. Moreover, the last paragraph in the instruction further qualifies the duties, “Reasonable care means what a reasonably careful government Department of Transportation would do under similar circumstances.” This language can hardly be argued as creating new duties beyond the statutorily mandated duties.

UDOT’s reliance on the single case it cites (which it claims supports its objection to Instruction 27), *Bramel v. Utah State Rd. Comm’n*, 24 Utah 2d 50, 465 P.2d 534 (1970), seems misplaced. *Bramel* involved the appeal from a non-jury judgment in plaintiff’s favor based on the trial court’s finding that the “State failed to give adequate, reasonable or sufficient” warning signs for drivers approaching an upcoming danger on the roadway.

The State appealed on two grounds, arguing that the evidence was inadequate to support the trial court’s finding that: (1) the State was negligent; and (2) the plaintiff driver was not contributorily negligent.¹ This Court affirmed the judgment and the trial court’s finding that the State did not properly “discharge its duty of exercising reasonable care under the circumstances by placing adequate and appropriate warning signs for the safety of traffic using the highway.” *Id.* at 536.

Bramel did not discuss any jury instruction (there was no jury) nor did it generally address the scope or extent of UDOT’s duties. Its holding related only to the adequacy

¹ Under the law at that time, contributory negligence was a complete bar to a negligence claim.

and appropriateness of the warning signs, an issue that was not present in the case at hand.

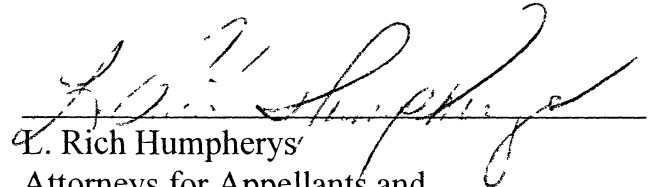
Instruction 27 properly instructed the jury regarding UDOT's duties as it related to this case.

CONCLUSION

For the reasons set forth above and as set out in Appellant's primary brief, Appellants respectfully request the Court reverse the judgment of the trial court and remand the case for a new trial.

DATED this 12th day of May, 2011.

CHRISTENSEN & JENSEN, P.C.



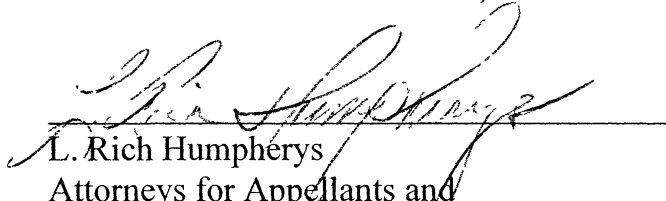
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CERTIFICATE OF SERVICE

This is to certify that on the 12th day of May, 2011, two true and correct copies of the foregoing **REPLY BRIEF OF APPELLANTS AND CROSS-APPELLEES BRIEF ON CROSS APPEAL** were mailed, first-class postage prepaid, to:

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ADDENDUM

DATE: April 12, 1994

TO : Lynn Zollinger, P.E.
District One Assistant Director

FROM : Mack O. Christensen, P.E.
Traffic and Safety Studies Engineer

SUBJECT: Operational Safety Report
Project No. IM-15-7(191)332, South Layton to SR-193 (Interstate Repair), Davis County

We have evaluated the accident history for the subject section of SR-15, M.P. 332.0-338.0 for the three-year period of 1990 through 1992, with the following results:

	ACTUAL			TOTAL/AVG	EXPECTED
INTERSTATE URBAN	1990	1991	1992		
No. of Accidents	108	118	134	360	120
Accident Rate	1.01	1.05	1.13		0.99
Severity	1.41	1.39	1.37		1.26
Single Vehicle Acc. (31%)				113	
Side Swipe Acc. (20%)				75	
Rear End Acc. (19%)				71	
Right Angle Acc. (15%)				54	

Accident data indicates that both the accident rate and severity of this section are higher than the expected. Out of the 113 single vehicle accidents, 92 were of the run-off-road type. Some rear-end accidents and all of the right-angle accidents occurred at the I-15 northbound off-ramp with SR-108 (2000 North Antelope Drive).

We recommend that the following items be considered during design of the project to reduce the number/severity of accidents:

1. Provide end treatments for concrete barriers.
2. Flatten out side slopes where needed.
3. Upgrade delineators.
4. Provide rumble strips.
5. Re-do signing.
6. Inside shoulder width does not meet current standard.
7. Install backing plates on signals at all interchanges.
8. Extend barrier protecting structure columns at Hill Field Road interchange.
9. Remove concrete pipe at M.P. 333.60± (northbound).

Source documents are available at the Division of Traffic and Safety for additional analysis. If questions arise, please call me at 965-4264.

MOC/EGonzalez/cdf

cc: Dave Miles Dave Berg
 Mack Christensen Duncan Silver, FHWA
 Eric Cheng