

2010

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

Utah Court of Appeals

Follow this and additional works at: https://digitalcommons.law.byu.edu/byu_ca3



Part of the [Law Commons](#)

Original Brief Submitted to the Utah Court of Appeals; digitized by the Howard W. Hunter Law Library, J. Reuben Clark Law School, Brigham Young University, Provo, Utah; machine-generated OCR, may contain errors.

Peggy E. Stone; assistant attorney general; attorneys for appellee.

L. Rich Humpherys, Alain C. Balmanno; Christensen & Jensen; attorneys for appellants.

Recommended Citation

Brief of Appellant, *Miller v. Department of Transportation*, No. 20100629 (Utah Court of Appeals, 2010).
https://digitalcommons.law.byu.edu/byu_ca3/2443

This Brief of Appellant is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Court of Appeals Briefs by an authorized administrator of BYU Law Digital Commons. Policies regarding these Utah briefs are available at http://digitalcommons.law.byu.edu/utah_court_briefs/policies.html. Please contact the Repository Manager at hunterlawlibrary@byu.edu with questions or feedback.

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

BRIEF OF APPELLANTS

L. Rich Humpherys, 1582
Alain C. Balmanno, 3985
CHRISTENSEN & JENSEN, P.C.
15 W. South Temple, Suite 800
Salt Lake City, Utah 84101
Attorneys for Appellants

Peggy E. Stone
Assistant Utah Attorney General
160 East 300 South, Sixth Floor
Salt Lake City, Utah 84114-0856
Attorneys for Defendant /Appellee

FILED
UTAH APPELLATE COURTS
JAN 7 - 2011

PARTIES TO THE PROCEEDING

The caption of the case on appeal contains the names of all parties to the proceeding.

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

BRIEF OF APPELLANTS

L. Rich Humpherys, 1582
Alain C. Balmanno, 3985
CHRISTENSEN & JENSEN, P.C.
15 W. South Temple, Suite 800
Salt Lake City, Utah 84101
Attorneys for Appellants

Peggy E. Stone
Assistant Utah Attorney General
160 East 300 South, Sixth Floor
Salt Lake City, Utah 84114-0856
Attorneys for Defendant /Appellee

PARTIES TO THE PROCEEDING

The caption of the case on appeal contains the names of all parties to the proceeding.

TABLE OF CONTENTS

JURISDICTION.....	1
ISSUES PRESENTED FOR REVIEW.....	1
DETERMINATIVE CONSTITUTIONAL PROVISIONS,	3
STATEMENT OF THE CASE.....	4
Nature of the case, course of proceedings, and disposition below	4
Statement of Facts	5
SUMMARY OF ARGUMENT	19
ARGUMENT	21
I. THE TRIAL COURT ERRED IN RULING THAT CERTAIN ACCIDENT HISTORY EVIDENCE WAS INADMISSIBLE UNDER 23 U.S.C. § 409, EVEN THOUGH THE DATA WAS MADE PUBLIC, WAS IN THE POSSESSION OF THE UNIVERSITY OF UTAH, AND/OR WAS USED FOR REASONS UNRELATED TO FEDERAL FUNDING	21
II. THE TRIAL COURT ERRED IN ALLOWING UDOT TO USE THE PRIVILEGE UNDER 23 U.S.C. § 409 AS BOTH A SHIELD AND A SWORD, AND IN REFUSING TO INSTRUCT THE JURY THAT NO ADVERSE INFERENCE SHOULD BE DRAWN FROM THE ABSENCE OF THE EXCLUDED EVIDENCE.....	24
III. IN A SITUATION IN WHICH EVERY POTENTIAL JUROR FACED AN INHERENT CONFLICT OF INTEREST BY REASON OF BEING A TAXPAYER AND CONSUMER OF THE ROAD SYSTEM MANAGED EXCLUSIVELY BY THE DEFENDANT (UDOT), THE TRIAL COURT ERRED BY ALLOWING ONLY LIMITED COURT VOIR DIRE AND DENYING THE MILLERS' REQUEST FOR A WRITTEN JURY QUESTIONNAIRE	32
IV. THE TRIAL COURT ERRED IN REFUSING TO EXCLUDE WITNESSES IN CONFORMITY WITH U.R.E. 615 AFTER PLAINTIFFS' REQUEST	40
V. THE CUMULATIVE EFFECT OF THE TRIAL COURT'S ERRORS DEPRIVED PLAINTIFFS OF A FAIR TRIAL	43
CONCLUSION.....	44

TABLE OF AUTHORITIES

Cases

<i>Alcazar v. University of Utah Hospitals, et al.</i> , 2008 UT App 222 ¶9, 188 P.3d 490 . 2, 35, 36, 37	
<i>Arbogast Family Trust v. River Crossings, LLC</i> , 2010 UT 40, 238 P.3d 1035	40
<i>Barrett v. Peterson</i> , 868 P.2d 96 (Utah Ct. App. 1993).....	35, 36
<i>Belden v. Dalbo, Inc.</i> , 752 P.2d 1317 (Utah Ct. App. 1988)	39
<i>Brewer v. Denver & Rio Grande Western Railroad</i> , 2001 UT 77, 31 P.3d 557	2, 3
<i>Claypoole v. Winward Electric, Inc., et al.</i> , 2010 UT App 77	34, 35
<i>Combined Metals, Inc. v. Bastian</i> , 71 Utah 535, 267 P. 1020 (1928)	24
<i>Dixon v. Stewart</i> , 658 P.2d 591 (Utah 1982)	38, 39
<i>Evans v. Doty</i> , 824 P.2d 460 (Utah App. 1991).....	32, 33, 35, 36
<i>Green v. Louder</i> , 2001 UT 62; 29 P. 3d 638.....	31
<i>McGinn v. Utah Power & Light Co.</i> , 529 P.2d 423 (Utah 1974)	39
<i>Menard v. City of Carlisle</i> , 834 S.W. 2d 632 (Ark. 1992).....	41
<i>Newsom v. Gold Cross Services</i> , 779 P. 2d 692 (Utah App 1989).....	30
<i>Ostler v. Buhler</i> , 1999 UT 99, 989 P.2d 1073	3
<i>Pierce County v. Guillen</i> , 537 U.S. 129 (U.S. 2003).....	22, 23
<i>Radman v. Flanders Corp.</i> , 2007 UT App. 351; 172 P. 3d 668	43
<i>Reese v. Tingey Construction</i> , 2008 UT 7, 177 P.3d 605	1
<i>Seppi v. Betty</i> , 579 P.2d 683 (Idaho 1978).....	39
<i>Sperberg v. Goodyear Tire & Rubber Co.</i> , 519 F.2d 708 (6th Cir. 1975), <i>cert. denied</i> , 423 U.S. 987 (1975)	41
<i>State ex rel. A.M.D.</i> , 2006 UT App 457, 153 P.3d 724	40
<i>State v. Alonzo</i> , 932 P.2d 606 (Utah Ct.App.1997), <i>aff'd</i> , 973 P.2d 975 (Utah 1998)	27
<i>State v. Billsie</i> , 2006 UT 13, 131 P.3d 239	41
<i>State v. Cruz-Meza</i> , 2003 UT 32, 76 P.3d 1165.....	1
<i>State v. Edwards</i> , 739 P.2d 1325 (Ariz. Ct. App. 1986).....	42
<i>State v. Hamilton</i> , 827 P.2d 232 (Utah 1992).....	31
<i>State v. Kohl</i> , 2000 UT 35; 999 P. 2d 7	43
<i>State v. Larson</i> , 933 P.2d 958 (Or. 1997)	41
<i>State v. Verde</i> , 770 P.2d 116 (Utah 1989).....	31
<i>State v. Young</i> , 853 P. 2d 327 (Utah 1993).....	27, 43
<i>Steffensen v. Smith's Management Corp.</i> , 862 P. 2d 1342 (Utah 1993).....	31
<i>William L. Comer Family Equity Pure Trust v. C.I.R.</i> , 958 F.2d 136 (6th Cir. 1992)	41
<i>Wood v. Southwestern Bell Telephone Co.</i> , 637 F.2d 1188 (8th Cir. 1981).....	42

Statutes

23 U.S.C. § 409	passim
Utah Code Ann. § 78A-3-102(3)(j).....	1

Other Authorities

1 McCormick on Evid. § 50 (6 th ed. 2009)	42
<i>Attorney Voir Dire and Jury Questionnaire: Time for a Change</i> , Robert B. Sykes & Francis J. Carney, Utah Bar Journal, (August 1997)	35
<i>Swearing With Crossed Fingers</i> , Ut Trial L Assn, Spring 2001, at. 208.....	34

Rules

Utah Rule of Evidence 507(c)(3)	2, 30, 31
Utah Rule of Evidence 615	3, 40, 41, 42

JURISDICTION

The Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78A-3-102(3)(j).

ISSUES PRESENTED FOR REVIEW

ISSUE 1: Did the trial court err in ruling that certain accident history evidence was inadmissible under 23 U.S.C. § 409, even if the data was made public, was in the possession of the University of Utah and/or used for reasons unrelated to federal funding?

Standard of Review: Interpretation of a statute is a question of law reviewed for correctness. *Reese v. Tingey Construction*, 2008 UT 7, § 6, 177 P.3d 605.

Preservation: This issue was raised below in the Millers' briefing (R. 638-656, 723-729), and in the Order on Plaintiffs' Motion to Compel (R. 911-913).

ISSUE 2: Did the trial court err in allowing defendant UDOT to use the evidentiary privilege under 23 U.S.C. § 409 as both a shield (preventing plaintiff from discovering or eliciting evidence regarding accident history) and a sword (using the absence of evidence to create an inference that there was no accident history)? Included within this issue is whether the trial court erred in failing to instruct the jury that no adverse inference should be drawn from the absence of the excluded evidence.

Standard of Review: Generally, a trial court's decision to admit or exclude specific evidence is reviewed for abuse of discretion. *State v. Cruz-Meza*, 2003 UT 32, ¶ 8, 76 P.3d 1165. However, a party against whom an adverse inference might be drawn from the invocation of a privilege is entitled as a matter of right to an instruction

precluding the drawing of any such inference. Utah Rule of Evidence 507(c)(3) and Advisory Committee Note Subparagraph (c). A trial court's refusal to give a proposed jury instruction is a question of law reviewed for correctness. *Brewer v. Denver & Rio Grande Western Railroad*, 2001 UT 77, ¶ 38, 31 P.3d 557.

Preservation: This issue was raised both before and at trial in the Millers' briefing (R. 1156-1157); the Order Regarding Plaintiffs' Motion to Compel (R. 1410); Plaintiffs' Trial Memorandum Re: Prohibiting Disclosure and Use of Accident Data Pursuant to 23 U.S.C. § 409 (R. 2196-2200); Plaintiffs' Proposed Jury Instruction No. 51 (R. 2156); Pre-trial Hearing of May 10, 2010, pp. 21-24, 27-30 (Addendum 2); and at trial (R. 2708, p. 6, 8-18; R. 2712, pp. 67-68, 160).

ISSUE 3: In a situation in which every potential juror faced an inherent conflict of interest by reason of being a taxpayer and consumer of the road system managed exclusively by the defendant (UDOT), did the trial court err by allowing only limited court voir dire and denying the Millers' request for a written jury questionnaire?

Standard of Review: A trial court's management of jury voir dire is reviewed for abuse of discretion. *Alcazar v. University of Utah Hospitals, et al.*, 2008 UT App 222 ¶ 9, 188 P.3d 490, 493. Parties are entitled to seek sufficient information in voir dire to intelligently use peremptory challenges. *Id.*, ¶ 10.

Preservation: This issue was raised below in the Millers' briefing (R. 1428-1449, 1871-1875); and during pre-trial hearings March 29, 2010, pp. 10-11 (Addendum 4), and May 10, 2010, pp. 8-12, 32-34 (Addendum 2).

ISSUE 4: Under the circumstances of this case, did the trial court err in refusing to give plaintiffs' proposed jury instruction that there is a statutory cap on damages and that the money would be paid from a risk management pool rather than directly by taxes or a decrease in roadway services?

Standard of Review: The trial court's refusal to give a jury instruction is a question of law reviewed for correctness. *Brewer, supra*.

Preservation: This issue was raised below in plaintiffs' proposed jury instructions nos. 49 and 55 (R. 2153 and 2537); in plaintiffs' briefing (R. 2535-2538); and during trial with exceptions (R. 2712, pp. 66-69).

ISSUE 5: Did the trial court err in denying plaintiffs' request to invoke the witness exclusionary rule as contained in Rule 615, Utah Rules of Evidence?

Standard of Review: The trial court's refusal to apply the witness exclusionary rule is reviewed for correctness. *Ostler v. Buhler*, 1999 UT 99, ¶ 5, 989 P.2d 1073.

Preservation: This issue was raised below at trial. (R. 2709, pp. 5-7.)

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES AND RULES

23 U.S.C. § 409 (pre-1995):

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented

utilizing Federal-aid highway funds shall not be admitted into evidence in Federal or State court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

23 U.S.C. § 409 (as amended, 1995):

Notwithstanding any other provision of law, reports, surveys, schedules, lists, or data compiled or collected for the purpose of identifying, evaluating, or planning the safety enhancement of potential accident sites, hazardous roadway conditions, or railway-highway crossings, pursuant to sections 130, 144, and 152 of this title or for the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds shall not be subject to discovery or admitted into evidence in Federal or State court or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such reports, surveys, schedules, lists, or data.

STATEMENT OF THE CASE

Nature of the case, course of proceedings, and disposition below

This case arises out of an accident that occurred on June 26, 2004, on Interstate 15 north of the Kaysville exit in Davis County, Utah. Jackilyn Neal, a 57-year-old diabetic, lost consciousness and crossed the open median at approximately 70 mph, colliding head on with the Millers' vehicle.

The Millers filed suit against the Utah Department of Transportation ("UDOT") on September 7, 2005, alleging that UDOT was liable for failing to install median barriers in a 1,735 foot length of roadway in which the accident took place ("the gap"). (R. 1-4.) (Median barriers had been erected to the north and south of the gap. (Pl. Exh. 9).) It is undisputed that a median barrier would have prevented the accident.

During discovery, the trial court granted UDOT's motion to exclude any data or information used or compiled by UDOT regarding prior accident history in the vicinity of the accident. (R. 400-402.) The court also excluded the same accident data that was available to the public and that UDOT had provided to the University of Utah for unrelated medical research. (R. 913.)

The case was tried to a jury from May 24 to June 2, 2010. On the second day of deliberations, the jury (in a six to two vote) answered only one question on the three page special verdict form finding that UDOT was not at fault. (R. 2713, pp. 4-6.) Judgment against the Millers was entered on June 18, 2010 (Addendum 1). (R. 2649-2650.) Millers timely appealed (R. 2683), and UDOT cross appealed (R. 2685).

Statement of Facts

On June 26, 2004, Jackilyn Neal, a 57-year-old diabetic, was traveling northbound on I-15 in Davis County. Just north of the Kaysville exit, Ms. Neal lost consciousness, crossed the open median at approximately 70 mph, and collided head on with the vehicle in which Jason, his wife (Melissa) and their young daughter (Megan) were riding. (R. 2708, pp. 156, 160-161; 2710, pp. 233-236.) The Millers were severely injured, with collective past and future medical expenses exceeding \$1,000,000.00. (Pl. Exh. 33.) Ms. Neal was killed.

In 1995 and 1999, UDOT had two major construction projects in the area of the accident in which median barriers had been installed to the north and south of a 1,735-foot long stretch of roadway ("the gap"). (Def. Exhs. 4, 5.) Ms. Neal's vehicle crossed the median in the gap. (Pl. Exh. 9.)

UDOT witnesses testified at trial that UDOT had not performed any study or analysis regarding the need of a median barrier in the gap. (R. 2709, pp. 187-188.) Darin Fred Duersch, a Rule 30(b)(6) witness designated by UDOT on this issue, testified that UDOT could not explain why the gap did not have median barriers:

Q. And as part of your investigation as a 30 (b)(6) witness, you didn't find out why?

A. I was unable to find out why.

(R. 2709, pp. 67-68.)

Based on the 1995 plans and specification prepared by UDOT (which included the gap within the project (R. 2709, p. 187)), the cost of installing median barriers was approximately \$35 per foot, which means it would have cost \$60,000 to have filled in the gap. (R. 2710, pp. 26-27; Pl. Exh. 40, p. 2.) The total cost of the project was \$5.5 million. (Pl.Exh. 40, p. 3; R. 2709, pp. 185-186.)

Instead of installing barriers in the gap in 1995, UDOT installed attenuators at the end of the barriers immediately to the north and south, at the cost of \$24,000 each.¹ In the 1999 project, UDOT replaced these two attenuators at approximately the same cost. Between the two projects, UDOT paid approximately \$30,000 more for the attenuators than it would have cost to place a barrier in the gap, which if installed, would have eliminated the need for the attenuators. (R. 2710, pp. 29-30, 34.)

¹ An attenuator is a collapsible metal system installed at the end of a median barrier to mitigate the severity of an impact when a vehicle hits the end of the barrier. (R. 2710, p. 28.)

David Lee Kennison, UDOT's twenty-five year Regional One (northern Utah) Traffic Engineer whose responsibilities included determining the need for median barriers on I-15, did not explain the absence of the barrier in the gap. He also served on UDOT's hazard elimination project committee, the purpose of which was to identify safety concerns on the roadway system. Mr. Kennison testified that the committee had not met for several years before his retirement in 2002. (R. 2709, pp. 248, 255-256, 259.)

In 2003, Darin Fred Duersch replaced Mr. Kennison and, shortly thereafter, recognized a need to have median barriers installed in certain open areas on I-15 in Davis and Weber Counties, including the gap. Due to the natural delays in planning and funding, this project did not start until 2005. (R. 2709, pp. 45, 59-60, 62.)

UDOT stated at trial that when addressing a need for median barriers, it followed the guidelines of the American Association of State Highway and Transportation Officials ("AASHTO"). (R. 2709, p. 251.) AASHTO identifies the following factors to be considered by traffic engineers when deciding to install median barriers: (1) the width of the median, (2) average traffic volume, (3) accident history, and (4) average traffic speed. Other factors included a cost/benefit analysis, the presence of on or off ramps, and geometry of the roadway (curves, slopes and grades). (R. 2709, pp. 251-253; R. 2710, pp. 38-51; R. 2711, pp. 236-237.)

- Width of Median: The median at the accident site was 40 feet wide. (Pl. Exh. 9.) Under the AASHTO guidelines, a median barrier was required on a freeway if the median was less than 30 feet. Between 30 and 50 feet, it was optional, subject to sound engineering judgment. (R. 2709, pp. 73-74; R. 2710, p. 45.) Beyond 50 feet, a

median barrier was not required. (R. 2710, p. 52.) UDOT's fault, therefore, turned on the remaining factors.

- Average traffic volume: UDOT's Regional One Traffic Engineer agreed that the greater the volume of traffic, the greater the need for a median barrier. (R. 2709, p. 251.) In 1995, the average traffic volume was increasing yearly and was projected by UDOT to hit AASHTO's maximum volume (80,000 vehicles per day) within a few years. The volume of large truck traffic was also unusually high at 15 percent.² This factor therefore supported the placement of median barriers. (R. 2710, pp. 38-39, 45-50; Pl. Exh. 38, 39.)

- Accident history: UDOT successfully resisted the Millers' efforts to discover or introduce evidence of the accident history in the area of the accident, claiming a federal exclusionary rule under 23 U.S.C. § 409. The jury therefore had no information about this factor, other than an inference from the absence of such evidence that there was no prior accident history. (See *infra*.)

- Average speed: Because the accident occurred on I-15, it was undisputed that the average speed was at the maximum level under AASHTO's guidelines. Mr. Kennison conceded that the higher the speed, the greater the need for a barrier. (R. 2709, p. 252.) This factor therefore weighed in favor of a median barrier. (R. 2710, pp. 41, 47-48.)

² Large trucks usually go slower and result in cars maneuvering around them. This creates a higher risk for vehicular interference and crossover accidents. (R. 2710, pp. 39-40.)

- Other factors: The cost/benefit analysis to be performed related to the cost to society from preventable injury and death in comparison to the reasonable ability of UDOT to prevent it. (R. 2709, pp. 202-203; R. 2711, pp. 236-237.) Obviously, this analysis was hindered without the accident history. The jury therefore only heard the dollar cost of installing the barriers compared with the cost of the attenuators, which weighed in favor of having barriers.

On- and off-ramps were also present in the area on both sides of the highway. These ramps, particularly the on-ramp, affected the flow of traffic as cars maneuvered to let slower traffic onto the freeway, thus increasing the risk of vehicular interference and cross-over accidents. (R. 2710, pp. 48-49.) This factor thus militated in favor of the installation of barriers. Geometry of the roadway was essentially a non-factor, as the road and median where the accident occurred was relatively flat and straight. This factor would weigh in favor of not installing barriers. (*Id.*, pp. 74-75.)

Exclusion of accident history evidence

During discovery, the Millers requested documents relating to the analysis and evaluation of barriers in the area of the accident. As part of the production, UDOT produced an internal memorandum dated April 12, 1994, which analyzed the number of accidents, accident rate, severity and other related information in the relevant area and concluded that, "Accident data indicates that both the accident rate and severity of this section are higher than the expected." (R. 235-236.)

When the Millers used the memorandum during UDOT depositions, UDOT instructed the witnesses not to answer and asserted an evidentiary privilege under 23

U.S.C. §409, a provision that protects accident data compiled (or, after 1995, “compiled or collected”) by a department of transportation as part of a federally-funded road project. UDOT moved for a protective order excluding the “inadvertently produced” memorandum and all other accident-related data (some of which the Millers obtained through a GRAMA request). (R. 176-236.) The trial court granted UDOT’s motion. (R. 400-402.)

Millers then subpoenaed the University of Utah, Intermountain Injury Control Research Center, “Crash Outcome Data Evaluation System” (hereafter “CODES”), and also subpoenaed the Utah Department of Public Safety³ to obtain crash data. Both of these entities, together with UDOT, objected to the subpoenas. (R. 377, 383, 432.)

CODES had obtained from UDOT crash data and historical accident information from 1992 through 2004. (R. 641; 675.) According to the CODES web site,

When first funded in 1992, the Utah CODES project used four 1991 population-based data bases: motor vehicle crash records, completed by police officers at the scene, collected by the Utah Department of Transportation UDOT); emergency medical services runs collected by the Department of Health, Bureau of Emergency Medical Services; emergency department and hospital discharge records....

(R. 721.) The use of this information had nothing to do with 23 U.S.C. § 152 roadway funding and the corresponding § 409 Exclusionary Rule. CODES used the data to conduct public health activities and research. (R. 417.) CODES publically published extensive reports regarding crash data for cities, counties and other categories, including

³ The Utah Department of Public Safety stored the actual accident reports which the investigating officer completed after each accident.

the actual crash rates for all of the roads in Utah. (R. 454-594; 729-748; specifically, R. 744-745 crash data and rates from 1971 – 2001.)

After months of trying to resolve the disputed issues, the parties agreed to have the court resolve the matter. (R. 786.) The trial court ruled that all of the crash data held by CODES was protected under § 409, because the primary purpose of generation of the information was for § 152 roadway funding. However, the court ordered that the Department of Public Safety produce the investigating officers' reports. (R. 911-913.) That proved futile as the 22 boxes of reports only went back to 1998, which would have been inapplicable for the 1995 and 1999 projects.⁴ (R. 1347.) All prior reports had been destroyed. (Addendum 2⁵, p. 29.)

Millers filed another motion for an *in camera* review, to challenge the additional documents which UDOT claimed were privileged. (R. 1139-1140; 1143-1302.) As part of this motion, Millers also asked the court to restrict UDOT from trying to take advantage of the § 409 Exclusionary Rule by using the absence of accident history as both a shield and sword against the Millers. (R. 1156-1157.)

The trial court agreed with UDOT that all of the documents were excluded pursuant to § 409; however, the court expressed concern that § 409 created the potential for prejudice and stated:

⁴ 1995 and 1999 are the dates in which the projects were under construction. Planning, designing and funding of the projects would have occurred a few years before.

⁵ The official transcript of the May 10, 2010 pre-trial conference does not appear to have been included within the record on appeal, though it is filed with the court below. It is anticipated that the transcript will be added to the record by motion, and is attached hereto within the Addendum.

I don't think that at trial you [UDOT] can suggest that this road is safe based upon accident history that they [plaintiffs] don't have access to.

* * *

I don't think that you [UDOT] can rely on this data that you've determined to be privileged in concluding that this stretch of highway was not dangerous....

* * *

You [UDOT] can't suggest there's no accident history.

* * *

Let's just limit it to say you cannot make any argument at the time of trial based upon accident history that hasn't been provided to them [plaintiffs]. Let's just leave it at that for now.

(R. 1403, 2197.) The court then issued the following order, "[N]either party should attempt to take advantage of the fact that the evidence was excluded and unavailable to plaintiffs". (R. 1410.)

Because UDOT continued to advance its defense that without an accident history, there would be no requirement to have a barrier, Millers addressed the issue again with the trial court in a pre-trial hearing shortly before trial. Millers explained that the experts and UDOT witnesses would be referring to AASHTO, which states that the accident history is a primary factor. As a solution, Millers proposed that the jury be told that there was a data base that may or may not contain accident histories, but that because of federal law it could not be used, and the jury should not draw any inference for or against either party. Without such an explanation, Millers argued, the jury would be left to speculate about the absence of a primary factor. The court proposed that Millers prepare a jury instruction to address this, which Millers did and gave to the court at a second pre-trial conference. (Addendum 2, pp. 21-24; R. 2707, p. 5.)

Millers filed a trial memorandum outlining the prejudice to them and the ways that UDOT could take unfair advantage. (R. 2196-2200.) On the morning of trial, Millers raised the issue again. The trial court expressed concern about the prejudice to Millers if UDOT suggested or implied that the lack of evidence meant that there was no accident history or that “the absence of accidents gives a reasonable inference of safety.” (R. 2708, pp. 6, 10-12.)

UDOT argued that the standards required an analysis of the accident history and said that it intended to cross-examine Millers’ expert about the absence of prior accidents. (*Id.*, pp. 12-13.) The trial court allowed UDOT to ask if the expert was aware of any accident history but would not allow further inquiry. *Id.* The court was disinclined to give Millers’ proposed instruction regarding § 409, but cautioned that if UDOT asked about accident history, it might give the instruction, “because we can’t leave the inference out there that the accident history has been available to both sides and there was no accident history.” If UDOT opened the door, the court would give Millers’ proposed instruction. (*Id.*, pp. 16-18.)

During trial, Millers steered clear of the accident history issue, presenting expert about the other factors that would call for barriers. UDOT, however, did not. With the first UDOT witness, Darin Duersch, UDOT elicited testimony that when considering whether to install median barriers, traffic engineers have to look at crash history:

[I]t’s hard to know whether or not [the absence of a median barrier is] a problem or not until we evaluate it and take a look at the crashes, the frequency...[UDOT staff] do an analysis that includes, ...geometries, alignment, traffic volumes, median widths, crash history, all of those things. And then we determine if there is potential for a project here.

(R. 2709, pp. 117-118) (emphasis added.)

On cross-examination of Millers' expert, UDOT went straight to the AASHTO guidelines and asked about his prior testimony that traffic engineers are to analyze the accident history to determine why prior accidents occurred and whether a barrier should be installed. (R. 2710, pp. 68-69.) Referring to and quoting from AASHTO, UDOT asked the expert to agree that for a median width between 30 and 50 feet, "a barrier may not be warranted, again, depending on the cross-median accident history," which the witness agreed was part of AASHTO. (*Id.*, p. 64.)

When addressing jury instructions, Millers again argued the need of their proposed Instruction 51, which explained (a) why there was no evidence of accident history, (b) the application of § 409, and (c) that there should be no inference for or against either party because the lack of said evidence. (*See* Instruction No. 51, Addendum 3.) The absence of accident history was the "elephant in the courtroom." UDOT had elicited testimony and referred to authoritative sources about it, while the Millers were precluded from explaining the real circumstances. (R. 2712, pp. 67-68.) The trial court refused to give the instruction.

Finally, in closing argument, UDOT held up the AASHTO book and read directly from it as follows:

Likewise, for relatively wide medians, the probability of a vehicle crossing the median is also low...thus, for median widths greater than 30 feet and within the optional area of the figure, a barrier may or may not be warranted, again, depending on the cross-median accident history.

(R. 2712, p. 148) (emphasis added.)

Millers requested a side bar and again pointed out that UDOT had opened the door. Because of the court's exclusion of accident data and UDOT's continued arguments referencing the lack of accident history, Millers argued that an unfair inference had been created that there was no such history, the inaccuracy of which the Millers were prevented from explaining. To mitigate the prejudice, Millers renewed their request for the jury instruction (with a small modification), which the trial court denied. (*Id.*, pp. 152, 160.)

After deliberating Friday, the jury recessed for the weekend and continued its deliberations most of the following morning. In a 6 to 2 vote, the jury answered only the first question in the special verdict, finding that UDOT was not negligent. (R. 2713, pp. 4-6.)⁶

Voir Dire

Before trial, Millers raised with the trial court on several occasions the difficult situation that this case presented in that all of the jurors had an inherent conflict of interest, being taxpayers and consumers of UDOT's road system. The spring of 2010 saw extensive media coverage of budgetary shortfalls in the range of hundreds of millions of dollars, stating that all government agencies would be cutting back. (*See*

⁶ Appellants were unable to find in the record the Special Verdict signed by the jury foreman; however, the jury's finding is undisputed and is reflected in the transcript of the trial court reading the question and answer from the verdict and polling the jury. *Id.*

Addendum 4, p. 10⁷; Addendum 2 pp. 9-12, 32-34; R. 1871-1875.) For example, Millers presented a recent news article about UDOT “axing” eleven projects due to budget woes. (R. 1874⁸) Millers also addressed the potential bias from media coverage regarding tort reform and presented a recent news article about that. (R. 1872 and duplicate 1872.)

To address these concerns, Millers requested that the trial court allow a relatively short, written questionnaire to be filled out by the jury panel before selection began, or in the alternative, to allow attorney voir dire. Millers argued that the task of discovering subtle bias and prejudice for peremptory challenges was even more important when a jury had an inherent conflict of interest. (R. 1428-1449.)

Millers presented authoritative articles confirming that prospective jurors are typically hesitant to admit in open court in front of the judge, attorneys and their fellow potential jurors, that they have concerns, feelings and biases that might influence their ability to be fair. These authorities provided research demonstrating that jurors are less candid in answering general questions which are addressed to the panel as a whole, than when answering written questions in less intimidating situations. (R. 1442-1449.)

The trial judge acknowledged the potential for bias, the concern relating to dire economic times, and the concern that taxes would increase or that road services would diminish; but he expressed that his voir dire was not “perfunctory.” He would thoroughly explore all of these issues with the jury panel. Accordingly, he refused to allow attorney

⁷ The transcript of the March 29, 2010 pre-trial conference does not appear to be part of the record on appeal, though it is filed with the court below. It is anticipated that the transcript will be added to the record by motion.

⁸ There is a duplication of the following page numbers in the record: 1872-1875.

voir dire or a jury questionnaire, expressing in part concern about the court's own limited budget and concern about timely completing the trial.⁹ (Addendum 4, pp. 10-11; Addendum 2, pp. 9-12.)

The trial court only asked two questions to the jury panel about UDOT as a defendant:

Obviously, the State of Utah is the defendant in this case. Is there any of you who would have any concern at all that your consideration of this case would be affected by the fact that the State of Utah is a defendant? If you have any concern about that please raise your hand."

Four people raised their hand. The court called each of the four to a side bar where an unrecorded discussion was held. (R. 2708, pp. 57-58.)

Have any of you had any negative experience or have negative feelings about UDOT, the Utah Department of Transportation? If you have, please raise your hand.

No one raised a hand. (*Id.*, p. 85.).

Regarding tort reform bias, the court inquired as follows:

Is there any of you who have any view about awarding pain and suffering in personal injury cases? You know when people are injured, we're not able to wind back the clock and make everything the way it was before. And one of the elements that we look at is how much pain and suffering have they experienced and are likely to experience in the future. And we award damages for that as part of your legal system.

Is there any of you that have any concerns about whether it's appropriate to award pain and suffering, assuming that the evidence supports it, in a personal injury case? If you have any concerns about that, please raise your hand.

No one raised a hand. (*Id.*, p. 82)

⁹ The trial was scheduled for May 24 through June 2, 2010. (R. 1422-1423.) The actual trial, including deliberations, was fully concluded June 1. (R. 2713.)

Is there any of you that have any concerns about whether a lawsuit is a proper way to resolve a dispute?

Some people are just, you know, under the view that for whatever reason they think it's not morally appropriate to seek compensation or file a lawsuit for damages. Do any of you have any concerns in that regard? If you do, please raise your hand.

One person raised her hand, whereupon the court had a sidebar discussion that was unrecorded. (*Id.*, pp. 82-83.)

There's been an issue that's gotten a lot of publicity in the last few years, and that is the whole issue of whether or not there is a lawsuit crisis, whether there's a need for tort reform. Those are words that you may have used.

How many of you have been exposed to any kind of information with respect to that issue? If you would raise your hand high.

Okay. Okay. Everybody – let's get all the hands.

Of those of you who have responded yes to that, which of you believe that you would be influenced in any way in your deliberations by something that you've been exposed to in that regard?

Out of the many who raised their hands to the first question, only one raised his hand to the follow up question, Andrew Barrett, who was later struck for cause. (*Id.*, p. 84.)

Requested Jury Instruction Regarding UDOT

To mitigate potential bias regarding increased taxation or diminished road services, Millers proposed the following jury instructions, which the court denied:

As of the date of this accident, injury claims against a governmental agency such as UDOT is limited and capped at the amount of \$532,500 for one individual and \$1,065,000 for all claims arising out of one accident. In other words, any one of the Millers injury claims is limited to an amount no higher than \$532,500, but their total injury claims together cannot exceed \$1,065,000.

This "cap" applies only to injury damages, not to personal property damage.

If you find that UDOT was at fault to any degree, you must still determine the amount of total damages that each of the Millers have suffered. I will make any reductions or adjustments later.

Plaintiffs' Proposed Instruction no. 49. (R. 2153. *See* Addendum 5.)

If you make an award of damages against UDOT, you should not concern yourself with how the payment will be made. A payment of an award will not affect roadway services or maintenance. The source of any money that will be used to pay an award must not influence you to award more or less in damages. The award of damages must be based only on the evidence you have heard during the trial. You must not speculate on anything else.

Plaintiffs' Proposed Instruction No. 55. (R. 2535-2537. *See* Addendum 6.)

Exclusionary rule

At the beginning of the second trial day, Millers invoked the exclusionary rule when two of UDOT's witnesses sat down in the courtroom. The court denied the request, ruling that Millers were required to have invoked the rule at the beginning of trial before opening statements. (R. 2709, pp. 5-7 ("I'm going to rule that you are too late in invoking it....So it will be perfectly appropriate for witnesses to be in the courtroom during the course of the trial from this point forward.").)

SUMMARY OF ARGUMENT

Plaintiffs in this matter have been unable to fairly present their case to the jury, and were thereby denied due process. Faced with a restrictive federally mandated evidentiary privilege tied to the acquisition of federal funds which prevents the introduction of relevant probative evidence of accident history held by Defendant UDOT, Plaintiffs sought and found other sources for the accident history evidence necessary to their case. Those sources include a database created and held by the University of Utah's

School of Medicine, and data created and held by the Department of Public Safety and the Utah Highway Patrol, all of which contained relevant probative evidence of the essential accident history. However, Plaintiffs were prevented from developing that evidence or from submitting that evidence to the jury by the trial court's erroneous rulings which broadened the effects of the federal privilege, applying it to data not held by UDOT and not created for purposes covered by the federal law.

In addition, after preventing plaintiffs from acquiring and submitting relevant probative evidence from non-privileged sources, the trial court refused to give a jury instruction requested by Plaintiffs. The instruction would have guided the jury about the effects of the federal privilege and would have mitigated the unfair damage done by UDOT's trial strategy of focusing the jury on the seeming lack of accident history evidence.

Additionally, the trial court erred in refusing to allow a jury questionnaire or to engage in voir dire as needed to assess jurors' biases and exercise peremptory challenges, particularly when each juror had an inherent conflict of interest as a taxpayer and consumer of UDOT's road system.

The trial court further erred in refusing to exclude UDOT's witnesses from the courtroom on the grounds that U.R.E. 615's exclusionary rule must be invoked before opening statement or else it is waived. Neither the rule nor case law from other jurisdictions construing a similar rule specify a time period in which exclusion must be invoked.

Finally, the cumulative effect of the trial court's errors sufficiently undermines confidence in the fairness of the trial that a new trial is warranted.

ARGUMENT

I. THE TRIAL COURT ERRED IN RULING THAT CERTAIN ACCIDENT HISTORY EVIDENCE WAS INADMISSIBLE UNDER 23 U.S.C. § 409, EVEN THOUGH THE DATA WAS MADE PUBLIC, WAS IN THE POSSESSION OF THE UNIVERSITY OF UTAH, AND/OR WAS USED FOR REASONS UNRELATED TO FEDERAL FUNDING.

23 U.S.C. § 409 provides that reports, surveys, schedules, lists, or data compiled (or, after 1995, collected) for the purpose of identifying, evaluating, or planning the safety improvements of potential accident sites and hazardous roadway conditions, for the purpose of developing any highway safety or construction improvement project which may be implemented with Federal-aid highway funds, shall not be subject to discovery or admitted into evidence in Federal or State court proceedings.

Needing to avoid the limitations presented by the UDOT § 409 data, and knowing that the industry standards pertaining to when a median barrier should be installed embraces a number of factors including the historical accident rate or crash rate, Plaintiffs also subpoenaed information and data held by the University of Utah's Intermountain Injury Control Research Center in its Crash Outcome Data Evaluation System (CODES) (R. 432), from the Department of Public Safety (DPS) (R. 377–382 and 383–388), and from the Department of Health (DOH) (R. 389–394). Although the parties negotiated at length, they were unable to resolve their disputes regarding the discovery and admissibility of the data sought by Plaintiffs. The University of Utah moved to quash the

subpoena (R. 412-413), and Plaintiffs moved to compel production of the data from the University, and DPS. (R. 635–636.)

The University stated that the data in its CODES database came from UDOT, DPS and DOH pursuant to agreements of confidentiality, security, limited use and disclosure. In part, the University argued that the data was protected by 23 U.S.C. § 409 (R. 423), arguing that § 409 protects the data wherever it is held, regardless of the agency holding it and irrespective of the reason for that agency to have the data. (R. 722G-722H.)

The trial court denied the motion to compel and ruled that “to the extent that the underlying data provided to CODES by UDOT contains privileged information pursuant to § 409 the data has not lost its privilege, by reason of being transferred to CODES under the confidentiality agreement.” (R. 912-913.)

Holding that the CODES database was covered by § 409 because some of its data came from UDOT broadened the privilege created by § 409 well beyond its intended meaning and was error. The United States Supreme Court has made clear that § 409 is “inapplicable to information compiled or collected for purposes unrelated to § 152 and held by agencies that are not pursuing § 152 objectives.” *Pierce County v. Guillen*, 537 U.S. 129, 145-146 (U.S. 2003). The agency which administers CODES, and the other organizations to which the data has been provided, are agencies that are not pursuing § 152 objectives.

CODES is operated by the University of Utah’s School of Medicine. (R. 441.) CODES was developed to demonstrate “the feasibility of probabilistic record linkage using large, statewide databases” and to quantify “the risk of not wearing a seatbelt as it

pertains to being treated by emergency medical services, treated at the emergency department, admitted to a hospital, and killed as a result of a motor vehicle crash.” *Id.* The School of Medicine does not concern itself with § 152 highway funds and the CODES database is not used to identify, evaluate or plan highway safety improvements.

The data which goes into the CODES database comes from several sources, most of which have no connection to UDOT or § 152: motor vehicle crash records completed by police officers at the scene, information collected by UDOT, emergency medical services runs collected by DOH, emergency department and hospital discharge records collected from hospitals. (R. at 441-442.) In addition, the CODES research has been presented to a wide variety of public groups, including the American Public Health Association, the Association for the Advancement of Automotive Medicine, the International Forum for Traffic Records and Highway Information Systems, and the National Congress of Childhood Emergencies. (R. at 443.) The CODES data has been used to develop traffic legislation on the use of seatbelts in Utah. (R. at 444.)

Certainly, the School of Medicine’s CODES database meets the *Guillen* decision’s definition of “information compiled or collected for purposes unrelated to § 152 and held by agencies that are not pursuing § 152 objectives.” *Guillen*, at 145-46. As such CODES should have been made available to the plaintiffs.

Additionally, at the time the 1994 memorandum was prepared, § 409 did not encompass data or information merely “collected” by UDOT, as with the accident report data. In *Guillen*, the Supreme Court held that the 1995 amendment of § 409 to add the words “compiled *or collected*” was intended “to have real and substantial effect,”

broadening the scope of the privilege. 537 U.S. at 145. Accordingly, the trial court's ruling should not have extended to the 1994 memorandum.

II. THE TRIAL COURT ERRED IN ALLOWING UDOT TO USE THE PRIVILEGE UNDER 23 U.S.C. § 409 AS BOTH A SHIELD AND A SWORD, AND IN REFUSING TO INSTRUCT THE JURY THAT NO ADVERSE INFERENCE SHOULD BE DRAWN FROM THE ABSENCE OF THE EXCLUDED EVIDENCE.

During oral argument on the Millers' motion to compel, the trial court addressed the accident history with UDOT's counsel. (R. 1403, 2197.) The trial court directed UDOT to refrain from arguing lack of evidence, and directed UDOT to only refer to information relied upon by the Millers. *Id.* ("You can't suggest there's no accident history.") The court further advised UDOT that it could not suggest that the road was safe based on an accident history to which the Millers. *Id.* ("You cannot make any argument at the time of trial based upon accident history that hasn't been provided to them.")

The order signed by the court which flowed from the oral argument provided that "neither party should attempt to argue or use the absence of the information as implied or express proof that there is no such information. Neither party should attempt to take advantage of the fact that the evidence was excluded or unavailable to Plaintiffs." (R. 1410.) That is consistent with this Court's longstanding disapproval of using a protection as both a sword and a shield. *See, e.g., Combined Metals, Inc. v. Bastian*, 71 Utah 535, 267 P. 1020, 1029 (1928) ("plaintiffs ought not now be permitted to beat their shield of protection into a sword against [the defendant].")

At trial, however, counsel for UDOT repeatedly introduced accident history issues. For example:

a. During its examination of Darin Duersch, UDOT Regional Traffic Engineer called as a witness by the Millers, UDOT elicited the following testimony referring to crash history:

It's hard to know whether or not it's a problem or not until we evaluate it and take a look at the crashes, the frequency...[UDOT staff] do an analysis that includes, ...geometries, alignment, traffic volumes, median widths, *crash history*, all of those things. And then we determine if there is potential for a project here." *They also consider the crash reduction rate* that comes from national and state statistics. They also account for the number of crashes that could be eliminated as a result of the proposed change.

(R. 2709, pp. 117-119) (emphasis added).)

b. In the testimony of David Lee Kennison, UDOT's former Regional Traffic Engineer, submitted by deposition, the jury heard that UDOT always looked at accident history in determining the need for median barriers, but he could not remember how that fit into the criteria. (R. 2709, pp. 252-53.)

c. In cross-examination of expert witness Ed Ruzak, UDOT, focusing on the AASHTO national highway safety standards, elicited the following testimony: "A barrier may not be warranted, again, depending on the *cross-median accident history*," (R. 2710, p. 64 (quoting AASHTO) (emphasis added).) UDOT also addressed crossover accidents in Mr. Ruzak's testimony in a different case involving a crossover accident and a failure to have median barriers, emphasizing that when there is a history of crossover

accidents, the engineer should analyze the history to determine the reasons why and whether or not should be installed in light of the accident history. (*Id.*, p. 68 – 69.)

d. In closing argument, UDOT's counsel argued that:

Once a road is built, UDOT just does not turn on the blinders and ignore things until another project comes along. UDOT constantly monitors its roads for potential hazards on every level. Every road in the State of Utah has a maintenance shed that's responsible for different areas. These roads are patrolled on a daily basis and looked at on a daily basis. They also obtain information from other sources, including the highway patrol, the media, from the public and so forth. They take their job very seriously.

(R. 2712, p. 145 line 16 to p.146 line 1.)

Later in his argument, UDOT's counsel referred to the AASHTO standards, told the jury it should find the probability of an accident to be low, and raised the need to establish a history of accidents:

Likewise for relatively wide medians, the probability of a vehicle crossing the median is also low – so determine it is low – thus for median widths greater than 30 feet and with the optional area of the figure, a barrier may or may not be warranted, again, depending on the cross-median accident history.

(R. 2712, p. 148 lines 14-20.)

The clear inference of these arguments is that there would be evidence of accidents at the site if it was dangerous, and that a barrier was not warranted because no history of accident was presented by the Millers. Of course that was misleading because convincing evidence of accident history existed that the Millers were prevented from submitting by the granting of UDOT's motion.

Accident history was especially important because the special verdict form asked in Question No. 1 whether UDOT was negligent in failing to have median barriers in the gap. (R. 2713, p. 4, lines 12-15.) Showing a history of earlier accidents, exposing an excessive rate and severity of accidents for the relevant location, was critical to the Millers' ability to fairly present their case to the jury.

Although parties are afforded considerable latitude in their closing arguments, "counsel exceeds the bounds of this discretion and commits error if he or she calls to the jury's attention material that the jury would not be justified in considering in reaching its verdict." *State v. Alonzo*, 932 P.2d 606, 615 (Utah Ct.App.1997), *aff'd*, 973 P.2d 975 (Utah 1998)). The absence of accident history evidence was "material that the jury was not justified in considering," and UDOT was prohibited from bringing that lack of evidence to the attention of the jury.

Insinuating that evidence not proffered to the jury either exists or does not exist "encourages the jury to determine its verdict based upon evidence outside the record and jeopardizes a [party's] right to a trial based upon the evidence presented." *State v. Young*, 853 P. 2d 327, 349 (Utah 1993). Intimating that there was no history of accident in this case encouraged the jury to base its verdict on evidence outside the record – and, in fact, to base its verdict on information that was flatly untrue.

In an attempt to mitigate prejudice from the lack of accident history evidence and to provide the jury with relevant information upon which to make its decision, the Millers asked the trial court to instruct the jury that a database with accident history exists, but that the data is protected under federal law and cannot be submitted to the jury.

Plaintiffs first raised their concern regarding § 409 being used both as a shield to exclude evidence and as a sword to attack Plaintiff's case during the discovery phase of the case. (R. 1156-1157). They again raised their concern that § 409 not be used as both a shield and a sword during the pre-trial and trial phase. (Addendum 2, pp. 21-24; R. 2708, pp. 6, 10-18.) In a trial memorandum, plaintiffs again described the potential for prejudice and misuse if an instruction regarding the accident history database was not given because there was a significant concern that UDOT intended to use the absence of accident history in its defense. (R. 2196-2200.) UDOT had continually addressed the lack of accident history as one of its themes during discovery. (R. 2708, pp. 6, 9.)

The original instruction no. 51 proposed by plaintiffs read:

During the trial there will be references made by some of the witnesses to the CARS system or database. This instruction is given to assist you in understanding those references.

UDOT maintains a computer-based database of the accidents occurring on State and Federal Roads in Utah ("CARS"). This database is maintained under federal guidelines for the purpose of receiving Federal-aid highway funding for improvements of state and federal roadways.

A federal statute (23 U.S.C. Sec. 409) prohibits accident victims who are pursuing lawsuits (like the Millers), and their attorneys or experts, from obtaining or using information from this database. Consequently, you should not be critical of the Millers for not having that information or of UDOT for not providing it. (Addendum 3.)

Plaintiffs first submitted this proposed instruction when the trial court and parties were preparing jury instructions. (R. 2707, p. 5.) At the end of UDOT's argument, Plaintiffs renewed their motion for a jury instruction at a bench conference and preserved their objection to the Court's rejection of the instruction on the record:

The record should reflect that at the bench conference at the close of Mr. Combe's closing argument we renewed our request for an instruction concerning the fact that there is a database with the accident history that is privileged, and therefore, that's why the jury has not heard about it.

Basically we would propose a jury instruction modified slightly from the one we proposed, eliminating the first paragraph which said during the trial there would be references made to the CARS program.

Anyway we made that request. Our feeling is that counsel raised that in closing statement inviting the jury to conclude there was no accident history. I understand the Court has ruled on it, so this is simply for purposes of preserving the record.

(R. 2712, p. 16 ln 6-22.)

Before trial, the court expressed apprehension about UDOT suggesting that the lack of evidence regarding accident history might imply that there was no accident history. (R. 2708, pp. 10-11.) The court observed that "it would be unfair to suggest or imply that the absence of accidents gives a reasonable inference of safety." (*Id.*, p. 12). UDOT disagreed, indicated that industry standards concerning the installation of median barriers require an analysis of the volume of traffic, the width of the median and the accident history, and that UDOT intended to cross-examine witnesses regarding their knowledge of accident history. (*Id.*, pp. 12-13). UDOT also asserted that its witnesses would testify that the lack of barrier meant that there had been a review of accident history. (*Id.*, p. 14).

The court then cautioned UDOT that if it was going to expressly ask about the accident history, the court would explain to the jury about § 409, "Because we can't leave the inference out there that the accident history has been available to both sides and there was no accident history." (*Id.*, p. 16.) Plaintiffs reemphasized that § 409 was never

intended to mislead courts and juries, and the court agreed. (*Id.*, p. 16.) The court ruled that if UDOT opened the door, it would give plaintiffs' proposed instruction regarding §409: "If you suggest in any way to the jury that there was a clean accident history prior to 1999...but you've got to be very careful about suggesting in any way to the jury that there's a clean accident history...That's a problem if you don't want this instruction given." (*Id.*, pp. 16-18.)

In spite of this clear warning, and the inherent prejudice and unfairness to the Millers, the trial court ultimately refused to instruct the jury or allow the Millers to explain why no evidence regarding accident history had been adduced. This error was highly prejudicial because it misled the jury into thinking there was no accident history, a key factor in assessing reasonableness, because it unfairly exploited the federally created evidentiary privilege, and because there is a reasonable likelihood of a more favorable outcome for Plaintiffs if the error had been corrected by the jury instruction.

"All parties are entitled to have their theories of the case submitted to the jury in the court's instructions, provided there is competent evidence to support them." *Newsom v. Gold Cross Services*, 779 P. 2d 692, 694 (Utah App 1989). Although it is not error for a court to refuse to give an instruction if the point is properly covered in other instructions and if the jury instructions in their entirety taken as a whole, fairly instruct the jury on the law applicable to the case, the accident history was not addressed in any other instruction, and the jury was not fairly instructed in the law applicable to the case.

Utah Rule of Evidence 507 provides further support for the need to instruct the jury. Rule 507(c)(1) establishes that no inference may be drawn from a claim of

privilege, and Rule 507(c)(3) mandates that “upon request, any party against whom the jury might draw an adverse inference from the claim of privilege is entitled to instruction that no inference may be drawn therefrom.” Although UDOT did not claim the evidentiary privilege created by § 409 in front of the jury, it established its defense on the benefits of the § 409 evidentiary privilege by drawing inferences before the jury that no accident history existed from the testimony of witnesses and in its closing argument.

As Rule 507(c)(3) exemplifies, when a jury might draw an adverse inference as a result of an evidentiary privilege, a jury instruction becomes an entitlement as of right when requested by the party against whom the inference is drawn. As interpreted by the trial court, § 409 created such an evidentiary privilege which, given UDOT’s argument and evidence submission, very likely drew the jury into making an adverse inference against the Millers.

When improper closing arguments are given, reversal is warranted if “this court concludes that absent the improper argument, there was a reasonable likelihood of a more favorable outcome for the plaintiff.” *Green v. Louder*, 2001 UT 62, ¶ 35; 29 P. 3d 638. Likewise, an error in jury instruction will support a reversal if there is a reasonable likelihood that the error affected the result. *Steffensen v. Smith’s Management Corp.*, 862 P. 2d 1342, 1347 (Utah 1993) citing to *State v. Verde*, 770 P.2d 116, 120 (Utah 1989); *State v. Hamilton*, 827 P.2d 232, 240 (Utah 1992) (jury instruction error supports reversal if error undermines Court’s confidence in verdict).

UDOT’s closing argument was improper in that it implied the non-existence of prior accidents, and the error was compounded by the refusal of the requested jury

instruction. In this case there is great likelihood that a more favorable outcome would have resulted because the remainder of the evidence, absent the accident history, supported Plaintiffs' claim of negligence.

III. IN A SITUATION IN WHICH EVERY POTENTIAL JUROR FACED AN INHERENT CONFLICT OF INTEREST BY REASON OF BEING A TAXPAYER AND CONSUMER OF THE ROAD SYSTEM MANAGED EXCLUSIVELY BY THE DEFENDANT (UDOT), THE TRIAL COURT ERRED BY ALLOWING ONLY LIMITED COURT VOIR DIRE AND DENYING THE MILLERS' REQUEST FOR A WRITTEN JURY QUESTIONNAIRE.

This case posed unusual issues regarding potential juror biases. All of the potential jurors were tax payers and consumers of UDOT's road system. All potential jurors therefore had a direct interest in UDOT and its services. Nonetheless, the trial court did not believe this case presented circumstances that should require a jury questionnaire. (Addendum 4, pp. 10-11.) Instead, the court expressed concern about the court's limited financial resources. *Id.* Even though the trial was scheduled for seven to eight trial days, when both parties pared down their anticipated evidence so that it appeared the matter could be concluded in five days, the court would not change its position regarding a jury questionnaire.

Numerous Utah opinions have addressed the need for adequate voir dire to make jury selection meaningful. For example, in *Evans v. Doty*, 824 P.2d 460 (Utah Ct. App. 1991), the Court of Appeals stated:

Voir dire has two distinct and equally important purposes: the first is to detect actual juror bias—the basis of a "for-cause" challenge; and the second is to allow parties to collect sufficient information to intelligently exercise preemptory challenges.

* * *

[A] trial judge should liberally allow questions ‘designed to discover attitudes and biases, both conscious and subconscious,’ even though such questions go beyond that needed for challenges for cause.

* * *

[D]iscretion should be liberally exercised in favor of allowing counsel to elicit information from prospective jurors.

* * *

The judge must also allow counsel the opportunity to hear responses to questions that may indicate hidden or subconscious attitudes. Without such an opportunity, the prospect of impanelling a fair and impartial jury is diminished.

* * *

In tort cases...we cannot ignore the reality that potential jurors may have developed tort reform biases as a result of an overall exposure to such propaganda. Accordingly, in cases such as this one, the plaintiff has a legitimate interest in discovering which jurors may have read or heard information generally on ...tort reform.

* * *

In sum, we believe the trial court should have asked the potential jurors some of the questions proposed by [plaintiff] about their exposure to tort reform...propaganda—not just if they had been biased by the exposure.

Id. at 462-467 (internal citations omitted).

It has been the experience of plaintiffs' counsel that jurors feel inhibited and even intimidated to express feelings and biases in open court, particularly if those feelings would make it appear that the potential juror cannot be fair or unbiased. In fact, research has confirmed that on important questions that may show biases, 30 to 50 percent of jurors do not adequately disclose their true feelings during oral voir dire. See Exhibit 2,

Swearing With Crossed Fingers, Ut Trial L Assn, Spring 2001, at. 208. Research has also demonstrated that people are willing to be more candid on written questionnaires because they feel less inhibited or intimidated. *Id.*

In today's world, it is imperative that plaintiffs have candid and true feelings expressed about: (1) tort reform, (2) bias against awarding of general damages, (3) bias against claims against a state agency in these economically difficult times with publicized budget shortfalls in the hundreds of millions of dollars, (4) concern that tax payers will end up paying any damage award, and related issues. Otherwise, challenges for cause and preemptory challenges cannot be properly made.

A jury questionnaire can be completed in less than 1/2 hour during the morning of jury selection. Questionnaires can request all of the statutory foundation information, making voir dire more efficient, allowing the court and attorneys to focus on the jurors who have given information that may affect a for-cause or preemptory challenge. Questions addressed to the entire pool in open court require time spent on the entire jury pool, rather than on those who are likely to be on the jury. Once the requisite number from the pool have been passed for cause, the court and attorneys need not spend more time with the remaining members of the pool.

Over the past 15 years, the Court of Appeals has consistently recognized a trial court's duty to fully explore the issues such as tort reform, and that jury questionnaires can most effectively accomplish this. The most recent case is *Claypoole v. Winward Electric, Inc.*, et al., 2010 UT App 77, in which the court stated:

We agree with Plaintiff that there is much to recommend using a jury questionnaire in appropriate cases. As has been noted, questionnaires may be useful in obtaining a great deal of information about prospective jurors, including sources of possible bias, with only a small investment of the trial court's time.

The *Claypoole* court cited to the article *Attorney Voir Dire and Jury Questionnaire: Time for a Change*, Robert B. Sykes & Francis J. Carney, Utah Bar Journal, (August 1997), at 63, a copy of which was given to the trial court. The Court of Appeals did rule, however, that the decision to use a questionnaire is left to the discretion of the trial court.

Other decisions have held that parties are entitled to seek information from prospective jurors regarding their views on these issues. *See, e.g., Alcazar v. U of U Hospitals*, 2008 UT App 222, ¶¶ 5, 19, 188 P.3d 490 (noting “rather direct authority” and “prior, clear precedents” establishing plaintiffs’ entitlement to *voir dire* questions regarding tort reform), citing *Evans v. Doty*, 824 P.2d 460 (Utah App. 1991) and *Barrett v. Peterson*, 868 P.2d 96 (Utah Ct. App. 1993).

In *Alcazar*, the trial court reviewed the plaintiffs’ requested voir dire but declined to ask the questions the plaintiffs wanted in order to elicit jurors’ potential biases regarding medical malpractice claims and tort reform. Instead, the court decided to ask more general questions. *Id.*, ¶¶ 5-7. The jury returned a verdict finding the defendant not negligent.

The *Alcazar* court was very clear as to why the trial court’s *voir dire* procedure was both erroneous and prejudicial. When the trial court had asked only general questions regarding fairness and impartiality that “was only effective in identifying

proper for-cause challenges,” the narrow questioning was insufficient. The Court of Appeals held:

The trial court’s questions did not allow the plaintiff an opportunity to know which of the prospective jurors had been *exposed* to tort reform propaganda, totally aside from whether the prospective jurors would themselves admit such exposure had changed their attitudes or biased them. Essentially, we concluded that the trial judge’s line of questions ignored the plaintiff’s need to gather information to assist in exercising her peremptory challenges.

Alcazar, 2008 UT App 222, ¶12 (emphasis in original; citations omitted).

In *Barrett*, the court again reversed a trial court’s refusal to ask about exposure to tort reform information, depriving the plaintiff of “information necessary both to detect actual bias and to intelligently exercise his peremptory challenges.” *Id.*, ¶ 13, quoting *Barrett*, 868 P.2d at 102 n.7. In both *Evans* and *Barrett*, the *Alcazar* court noted, the plaintiffs had not been given an opportunity to “determine which, if any, prospective jurors had been exposed to tort reform propaganda, much less whether that exposure produced hidden or subconscious biases affecting the jurors’ ability to render a fair and impartial verdict.” *Id.* at ¶14.

Alcazar observed that, under *Evans* and *Barrett*, “our inquiry does not end once we have established that the trial court abused its discretion in failing to ask any meaningful tort reform . . . questions during voir dire.” *Id.* at ¶15. Once a party was substantially impaired in its right to exercise peremptory challenges, “[w]e will reverse if, considering the totality of the questioning, counsel was not afforded an adequate opportunity to gain the information necessary to evaluate the jurors.” *Id.* at ¶15 (internal citations to quotes omitted).

In *Alcazar*, the only question the trial court asked specifically regarding tort reform was: “Has any of you or a close friend or relative personally formed an opinion either in favor or opposed to tort reform or been a member of any organization that has?” *Id.* at ¶18. Most of the other questions were designed to uncover general biases and prejudice. However, the trial court “allowed the potential jurors to be questioned as to both their experience with doctors and hospitals and any negative aspects of this experience.” *Id.* Based on these facts, the *Alcazar* court concluded that the “trial court **simply** left Plaintiffs’ counsel without the necessary information needed to ferret out a potential juror’s actual bias or to intelligently exercise peremptory challenges, thus prejudicing Plaintiffs.” *Id.* The Court of Appeals reversed and remanded for a new trial **due** to the restrictive *voir dire*. *Id.* at ¶¶ 18-19.

The principles addressed in the above cases related to tort reform, but apply equally to the other issues raised by the Millers. When the media was filled with articles, editorials and political rhetoric about the financial difficulties facing the State, it was especially imperative that the trial court explore the biases of prospective jurors. UDOT is insured for this kind of claim through a risk management system, a fact of which a juror would have no knowledge. It is foreseeable that some prospective jurors would associate any fault to UDOT with increased taxes or reduced services. This would be an insurmountable obstacle to obtain a fair and unbiased jury.

A written questionnaire asking the prospective juror to express his/her feelings, rather than a general questions being asked to the whole group, is much more likely to uncover bias and information that Millers needed in order to properly challenge a juror

for cause or exercise preemptory challenges. In any event, the trial court should have explored through appropriate voir dire all aspects of the concerning issues raised above.

This Court has expressed that juries should be given relevant facts and law in order to allow them to make an informed decision. *See, e.g., Dixon v. Stewart*, 658 P.2d 591, 596 (Utah 1982). The Millers' proposed jury instruction no. 49 and 55 were designed to mitigate the inherent conflict that any award would increase taxes or diminish services. Instruction No. 49 informed the jury that UDOT's exposure is capped by law. No. 55 explained that any award would not diminish UDOT's services and they should not speculate where the money would come from to pay the award.

In the economic environment where every juror would have a legitimate concern regarding the economic and/or tax consequences of its decision, these instructions were very important. A general instruction that simply says not to consider anything but the evidence, ignores the reality that every juror is a beneficiary of State services and/or a tax paying citizen. Without specific instructions to allay these concerns, the adverse consequences of an award loomed. This could not help but affect a juror's evaluation and decision regarding liability. The proposed instructions would have allowed a juror to understand that an award will not have such effect and that such considerations should not be a part of deliberations.

In an analogous situation regarding the effects of apportioning fault, this Court has held that "[i]f requested, a trial court must inform the jury of the effect of apportioning to the plaintiff 50% or more of the negligence it finds in a comparative negligence case, if the effect of such an instruction will not be to confuse or mislead the jury." *Dixon v.*

Stewart, 658 P.2d 591, 596 (Utah 1982) (overruling *McGinn v. Utah Power & Light Co.*, 529 P.2d 423 (Utah 1974)); see also *Belden v. Dalbo, Inc.*, 752 P.2d 1317, 1319 (Utah Ct. App. 1988) (allowing retroactive application of the Dixon standard where a motion for a new trial was pending while Dixon was decided).

The *Dixon* Court explained the underlying policy behind the disclosure of complex issues affecting the ultimate outcome. “[J]urors can function properly and intelligently with full disclosure of relevant law in comparative negligence cases.” *Dixon* at 597. In overruling *McGinn*, the Court found that in “nearly all” the cases cited in *McGinn*, “the appellant had interviewed the jurors after the trial and had learned that the jury had confused the issues of negligence and damages and were disappointed at the unexpected legal consequences of their findings.” *Id.* at 596. Further, the Court reasoned that “[t]his is a much more effective way to control the problems of misunderstanding and bias in jury verdicts than attempting to blindfold the jury.” *Id.* at 597 (quoting *Seppi v. Betty*, 579 P.2d 683, 692 (Idaho 1978)).

The ultimate right to trial by jury is best served by allowing a jury to make an informed decision rather than having the jury speculate about the effect of its decisions. These instructions would serve the desired purpose of alleviating or at least minimizing confusion, speculation, and undue influence (conscious or subconscious) caused by each juror’s inherent conflict of interest.

In today’s political climate where extensive publicity and rhetoric abounds regarding the need for liability caps, this proposed instruction will also minimize the potential adverse bias that a jury may have, or may be influenced by, to limit awards or

otherwise make liability and damage decisions that will have the same effect as a cap. Proposed jury instructions 49 and 55 should have been given to avoid these likely untoward results.

IV. THE TRIAL COURT ERRED IN REFUSING TO EXCLUDE WITNESSES IN CONFORMITY WITH U.R.E. 615 AFTER PLAINTIFFS' REQUEST.

At the commencement of the second day of the week-long trial, Plaintiffs requested the court to apply Rule 615, Ut Rules of Evid. (the witness exclusionary rule). The trial court judge denied Plaintiffs' request, ruling that a party must invoke the exclusionary rule at the beginning of the trial or it is waived.

When interpreting an evidentiary rule, courts should “look to the express language of that procedural rule and to the cases interpreting it.” *Arbogast Family Trust v. River Crossings, LLC*, 2010 UT 40, ¶ 16, 238 P.3d 1035 (internal citations omitted); *see also State ex rel. A.M.D.*, 2006 UT App 457, ¶ 14, 153 P.3d 724 (“Utah courts may look to the interpretation of federal rules “[t]o the extent that they are similarly worded” *Arbogast Family Trust*, 2010 UT 40, at ¶ 16.

Rule 615 states: “At the request of a party the court *shall* order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order on its own motion.” Utah R. Evid. 615(1) (emphasis added).¹⁰ The purpose of Rule 615 is to prevent “witnesses from changing their testimony based on other evidence adduced at

¹⁰ There are some exceptions to the rule; however, none of them apply to the facts of this case.

trial.” *State v. Billsie*, 2006 UT 13, ¶ 10, 131 P.3d 239. The language does not provide a time when a party must invoke the rule.

The plain language of Rule 615 does not support the trial court’s ruling that Plaintiffs waived the right to invoke the rule since they had not invoked it prior to opening statements. Moreover, appellants could not find any case from this Court which has so interpreted the rule. The plain language of the rule states “[a]t the request of a party the court *shall* order witnesses excluded” Utah R. Evid. 615(1) (emphasis added).

Other jurisdictions, with nearly identical rules, have found that a party may raise the exclusionary rule after a trial has begun. *See, e.g., William L. Comer Family Equity Pure Trust v. C.I.R.*, 958 F.2d 136, 140 (6th Cir. 1992) (“Nothing in the rule specifies a time for making the request.”); *see also Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 713-14 (6th Cir. 1975), *cert. denied*, 423 U.S. 987 (1975) (“There is no federal rule requiring that a request for separation of witnesses be made at any particular stage of a trial.”); *see also State v. Larson*, 933 P.2d 958, 964 (Or. 1997) (“the rule does not require that a motion to exclude witnesses be made before trial or at any other specific time. Therefore, the fact that defendant did not move for exclusion of witnesses under [Rule] 615 until after the direct examination of the state’s second witness did not, by itself, provide a basis for denying the motion.”); *see also Menard v. City of Carlisle*, 834 S.W. 2d 632, 634 (Ark. 1992) (“Rule 615 does not specifically require that the exclusionary request be made at any particular stage of the trial. It need not be demanded at the very opening of the testimony; at any time later, when the supposed exigency

arises, the order may be requested.”); *see also State v. Edwards*, 739 P.2d 1325, 1330-31 (Ariz. Ct. App. 1986) (“There is no general rule that exclusion must be demanded at a particular time or the availability diminishes.”); *see also* 1 McCormick on Evid. § 50 (6th ed. 2009) (“A request to exclude witnesses is often referred to as ‘invoking the rule on witnesses.’ No time period is specified in which to make the request.”).

In *Wood v. Southwestern Bell Telephone Co.*, 637 F.2d 1188, 1193-94 (8th Cir. 1981), the plaintiff moved to exclude witnesses on the second day of trial. The district court “denied appellant’s motion on the ground that it was not timely made.” *Id.* On appeal, the court, in dicta, pointed out that “[i]t is clear from the wording of Rule 615 that generally the exclusion of witnesses so they cannot hear the testimony of other witnesses is required when requested by a party. Rule 615 does not specifically require that the exclusionary request be made at any particular stage of the trial.” *Id.*

Good policy would support this conclusion. Facts may develop during trial that make a witness’s candid and uninfluenced testimony critically important, which facts were not deemed significant prior to trial. Unaffected testimony would not prejudice any party. The law seeks to determine truth which is the ultimate purpose of Rule 615. With rare exception, the timing of its application is irrelevant.

It is a very difficult task to establish prejudicial error for a trial court’s failure to apply Rule 615, since it is nearly impossible to show how a witnesses’ testimony was influenced by what he or she has heard or seen at trial. It is for this reason that the rule does not require a party to show good cause or any other predicate before it is applied.

Its application is mandatory merely upon request. Accordingly, there should be a presumption of prejudicial error should the trial court err in its application.

V. THE CUMULATIVE EFFECT OF THE TRIAL COURT'S ERRORS DEPRIVED PLAINTIFFS OF A FAIR TRIAL.

Barring Plaintiffs from using evidence not excluded by § 409, allowing UDOT to wrongly intimate that there was no accident history, and refusing to instruct the jury regarding the federal prohibition to Plaintiffs introducing evidence of accident history, should undermine this Court's confidence that Plaintiffs received a fair trial. When the cumulative effect of several errors undermines the Court's confidence that a fair trial was had, reversal is appropriate. *Radman v. Flanders Corp.*, 2007 UT App. 351, ¶ 20; 172 P. 3d 668, citing *State v. Kohl*, 2000 UT 35, ¶ 25; 999 P. 2d 7.

In assessing a cumulative error claim, the Court considers all the identified errors, as well as any other errors which may have occurred." *Id.* "The doctrine of cumulative error allows for a new trial when standing alone, no error is severe enough to warrant a new trial, but when considered together, the errors denied the defendant a fair trial." *State v. Young*, 853 P.2d 327, 367 (Utah 1993).

In this case, the Defendant UDOT was allowed to call the jury's attention to the lack of evidence concerning accident history at the location where the injuries occurred, even though such evidence existed and the Plaintiffs were barred through no fault of their own from submitting that evidence. In addition, when the Plaintiffs sought to protect themselves from that misleading, unfair argument, the trial court refused to instruct the jury as to why no accident history was submitted. The trial court also erroneously ruled

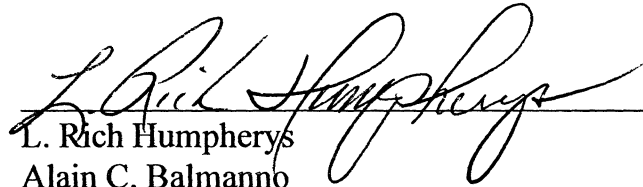
that the CODES database was protected, that UDOT's witnesses could observe other testimony and did not adequately address important issues through voir dire or instruction. The sum of these errors undermines confidence in the verdict, and this Court should conclude that Plaintiffs were not afforded a fair trial.

CONCLUSION

For the reasons set forth above, appellants respectfully request the Court reverse the judgment of the trial court and remand the case for a new trial.

DATED this 7th day of January, 2011.

CHRISTENSEN & JENSEN, P.C.

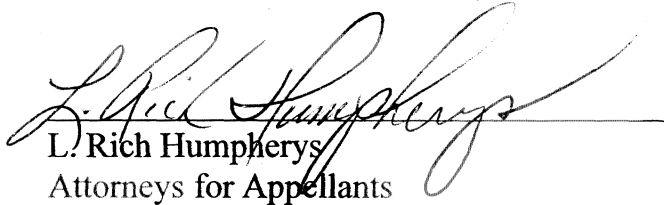

L. Rich Humpherys
Alain C. Balmanno
Attorneys for Appellants

CERTIFICATE OF SERVICE

This is to certify that on the 7th day of January, 2011, two true and correct copies of the foregoing **BRIEF OF APPELLANTS** were mailed, first-class postage prepaid, to:

Sandra Steinvoot
Peggy E. Stone
Assistant Utah Attorney General
160 East 300 South, Sixth Floor
Salt Lake City, Utah 84114-0856
Attorneys for Defendant /Appellee

CHRISTENSEN & JENSEN, P.C.


L. Rich Humpherys
Attorneys for Appellants

ADDENDUM

1. Final Order and Judgment
2. Hearing Transcript – 5/10/ 2010
3. Jury Instruction No. 51 – Reference to CARS Program
4. Hearing Transcript – 03/29/2010
5. Jury Instruction No. 49 – UDOT's Liability Cap
6. Jury Instruction No. 55

ADDENDUM 1

SANDRA L. STEINVOORT (5352)
STEVEN A. COMBE (5456)
Assistant Utah Attorneys General
MARK L. SHURTLEFF (4666)
Utah Attorney General
Attorneys for Defendant
160 East 300 South, Sixth Floor
P.O. Box 140856
Salt Lake City, Utah 84114-0856
Telephone: (801) 366-0100
email: ssteinvoort@utah.gov
scombe@utah.gov

FILED DISTRICT COURT
Third Judicial District

JUN 15 2010

SALT LAKE COUNTY

By _____

FILED DISTRICT COURT
Third Judicial District

JUN 18 2010

SALT LAKE COUNTY

By _____

Deputy Clerk

IN THE THIRD JUDICIAL DISTRICT COURT IN AND FOR
SALT LAKE COUNTY, STATE OF UTAH

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

Plaintiffs,

vs.

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

Defendant.

FINAL ORDER AND JUDGMENT

Case No. 050915765

Judge Anthony B. Quinn

The above-captioned case was tried before the Court and a jury on May 24, 2010 through June 1, 2010, the Honorable Anthony B. Quinn, District Court Judge, presiding. L. Rich Humpherys and Roger P. Christensen represented the Plaintiffs and Sandra L. Steinvoort and

Steven A. Combe, Assistant Attorneys General, represented the Defendant.

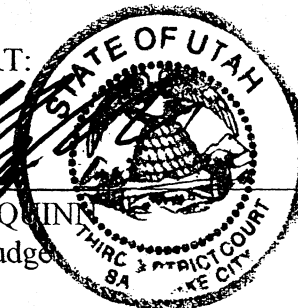
The issues having duly been tried and the jury having rendered its verdict, it is hereby
ORDERED and ADJUDGED:

1. Plaintiffs shall recover nothing from the Defendant, except for the professional fee of Mr. Ed Ruzak regarding his second deposition and the Order of Fees and Expenses entered by the Court on or about June 2, 2010.
2. Defendant shall recover from Plaintiffs their allowable costs in this action, subject to Rule 54 (d)(1), Utah Rules of Civil Procedure.
3. This action shall be dismissed on the merits.

DATED this 17 day of June, 2010.

BY THE COURT:

ANTHONY B. QUINN
District Court Judge



APPROVED AS TO FORM AND CONTENT:

L. Rich Humpherys
Roger P. Christensen
Attorney for Plaintiffs

ADDENDUM 2

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

_____)	
JASON MILLER,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 050915765
)	
UTAH DEPARTMENT OF TRANSPORTATION,)	
)	
Defendant.)	
_____)	

Hearing
Electronically Recorded on
May 10, 2010

BEFORE THE HONORABLE ANTHONY B. QUINN
Third District Court Judge

APPEARANCES

For the Plaintiff: L Rich Humpherys
Roger Christensen
CHRISTENSEN & JENSEN
15 W South Temple #800
SLC, UT 84101
Telephone: (801) 323-5000

For the Defendant: Sandra Steinvoort
Steven A. Combe
ATTORNEY GENERAL'S OFFICE
160 E. 300 S. 6th Floor
PO Box 140856
SLC, UT 84114
Telephone: (801) 366-0100

Transcribed by: Natalie Lake, CCT

152 Katresha St.
Grantsville, UT 84029
Telephone: (435) 884-5515

P R O C E E D I N G S

(Electronically recorded on May 10, 2010)

THE COURT: Well, let's go on the record in the matter of Miller vs. UDOT. State your appearances, please

MR. HUMPHERYS. My name is Rich Humpherys for the plaintiff, and beside me is Roger Christensen, co-Counsel.

MS. STEINVOORT: Sandra Steinvoort and Steve Combe on behalf of Utah Department of Transportation.

THE COURT: All right. Everybody looks happy to be here this morning. You're not under any stress, I take it. Good. We've got a number of motions that have been filed. Let's address the motions first. I sort of have them listed in no particular order, and we'll just take them in the order that I have them listed in.

The first motion I'd like to address is UDOT's motion in limine, and this deals with a couple of issues. First of all, it deals with the revised report that has been submitted by Mr. Ruzak that is different from his original report. Apparently mostly based upon the fact that he apparently very reasonably assumed that mileage markers are mileage markers and they stay the same, and wasn't aware that the mile markers had been changed on I-15.

I guess my view about this is that it would just be grossly unfair to exclude his revised opinions to the extent that they're based upon him coming to an understanding that the mile

1 markers had changed in this case, and so the accident actually
2 occurred at a somewhat different place than what he originally
3 believed.

4 It doesn't appear to me that UDOT acted improperly
5 in withholding that information. I don't think it had been
6 specifically requested. On the other hand, I certainly can't
7 fault the plaintiffs for not having a specific interrogatory to
8 address the issue of whether the mile markers had ever changed.
9 I mean that's just something that I don't think would have
10 occurred to me. So I think it's fair to allow him to revise his
11 report.

12 The only real issue is is UDOT prejudiced by that, and
13 what can we do to ameliorate that prejudice. If what you're
14 telling me is all you need to address that is to be able to call
15 your four lay witnesses, I think that that's an easy call. I
16 think that we allow Mr. Ruzak to revise his report and testify in
17 accordance with his revised report. If those are the witnesses
18 you need to respond to that, you'd be allowed to call those
19 witnesses. Any additional argument you want to make about that,
20 Ms. Steinvoort?

21 MS. STEINVOORT: No, your Honor.

22 THE COURT: You're okay with that, Mr. Humpherys?

23 MR. HUMPHERYS: We've resolved the issue of those four
24 witnesses by having UDOT indicate they would call only one of
25 three, and that's the only one they have now designated as their

1 trial witness. He has been deposed as of last Friday. I don't
2 know -- is UDOT changing their position as to the other three?

3 MR. COMBE: No.

4 MR. HUMPHERYS: So we're only talking about one. That
5 motion to exclude those four have been -- has been resolved
6 accordingly.

7 THE COURT: All right. So Mr. Ruzak can testify in
8 accordance with his revised report. UDOT can respond with the
9 witness they've designated.

10 The other aspect of this motion in limine is the
11 markings on the barriers. I think that there's a little
12 confusion here, at least I see it differently than the way UDOT
13 has framed the issue to me. I don't think that it's a Rimmasch
14 issue of him -- of Mr. Ruzak looking at those pictures and coming
15 to the inference that those pictures reflect collisions between
16 automobiles and the barrier. I haven't seen the pictures yet,
17 but it seems to me that that's not so much his opinion as it is
18 one of the bases of his opinion.

19 An expert can rely as a basis of his opinion on anything
20 that would be customarily relied upon by experts in the field.
21 So if Mr. Ruzak lays the foundation that observations of this
22 kind are the sort of thing that experts in the field would
23 customarily rely on, then I think he's allowed to use that as
24 part of the basis of his opinion and testify accordingly. Do
25 you want to address further, Ms. Steinvoort?

1 MS. STEINVOORT: It's actually Mr. Combe's motion.

2 THE COURT. Mr. Combe?

3 MR. COMBE: Your Honor, I would agree with that. I
4 don't have a problem with that.

5 THE COURT: All right. So assuming there's a proper
6 foundation laid at trial, he can so testify.

7 The next one that I have is plaintiff's motion in limine
8 No. 3, and that is a motion to exclude the reference to any fault
9 of Jacquelyn Neal. I've got to tell you, Mr. Humpherys, that
10 it's my view that Utah's comparative fault statute reflects a
11 policy decision on the part of the legislature that fault in the
12 broadest sense will be considered, and that liability will be
13 limited to the proportionate fault attributed to a particular
14 defendant. I think the statute is drafted in such a way as to
15 make fault as all inclusive as possible, and to limit recovery to
16 the proportionate fault attributable to a particular defendant

17 I think it would be -- clearly go against the express
18 policy of the legislature not to submit the issue of Jacquelyn
19 Neal's fault to the jury in this case. I think that the argument
20 that you've made that there would be no accident at all if the
21 road had been properly designed and if there had been a barrier
22 median, it's a good argument, but it's an argument that any fault
23 assessed to Ms. Neal should be minimal, if any, but it doesn't
24 prevent the issue from going to the jury. I'll hear any
25 additional argument you want to make about that.

1 MR. HUMPHERYS: No, nothing further.

2 THE COURT: All right. The next issue that I have is
3 plaintiff's motion in limine No. 2 to exclude any reference to
4 plaintiff's settlement with the estate of Neal. Let me ask UDOT
5 in this case if there's a belief that the settlement reflects on
6 the credibility of any witness at trial. In other words, does
7 the settlement reflect the bias of any witness? Could any
8 witness be impeached by bias as a result of this settlement?

9 MS. STEINVOORT: I'm thinking. No, probably not.

10 THE COURT: All right, then. It seems to me that
11 the only issue that is left is kind of the difficult issue that
12 both sides face of how the jury will handle really a lack of
13 information that they are going to have regardless of what we do.

14 I think the plaintiff's concern is that if the jury is
15 told about the settlement -- of course the jury would not be told
16 the amount of the settlement -- the jury may go back to the jury
17 room and speculate that plaintiffs have already received a
18 recovery and therefore minimize the recovery that the plaintiffs
19 would receive in this case.

20 On the other hand, if there is no disclosure of the
21 settlement, I think the defendants can reasonably be concerned
22 that we're going to tell the jury that the only damages that
23 UDOT will be assessed will be based upon the proportionate fault
24 assessed to UDOT. So they'll be wondering in their minds, "Well,
25 does that mean that there was no recovery for any percentage of

1 fault that is assessed to Ms. Neal?" I think that that's a
2 reasonable concern, and I think that's part of the reason why
3 the general rule is that you notify -- you inform jurors of the
4 existence of a settlement, but not the amount.

5 I've thought a little bit about this. This is an
6 instruction that sort of, I think, addresses my concerns about
7 that -- what the jury may be likely to speculate about. I'd like
8 you to both take a shot at -- assuming that I'm going to notify
9 the jury in some fashion of the existence of a settlement -- how
10 it should be done. This is what I would propose, or something
11 along this line.

12 "You have been instructed that UDOT's liability, if any,
13 is limited to the percentage of fault allocated to it. Do not
14 speculate whether plaintiffs have or will recover damages for any
15 fault allocated to Jacquelyn Neal. It is enough for you to know
16 that any issues between plaintiffs and Ms. Neal's estate have
17 been addressed and resolved separately."

18 MS. STEINVOORT: If -- let me just -- excuse me If I
19 could just pull out the instruction that I've prepared. In fact,
20 may I --

21 THE COURT: Sure. Anyway, I guess the bottom line is
22 I'm inclined to notify the jury in some fashion, coupled with
23 an instruction, not to speculate on what's going to happen with
24 respect to any fault allocated to Ms. Neal. You want to make
25 more argument on that, Mr. Humpherys?

1 MR. HUMPHERYS: Argument might not be the right word,
2 but we would invite the Court to share that instruction with us,
3 and Counsel from both sides can look at it more carefully and
4 scrutinize it. If we were to give such an instruction, it would
5 be our request that that instruction be given at the commencement
6 of the trial because there's just no way -- it's like the
7 elephant in the room, but nobody's talking about. There's --
8 I believe that that needs to be somehow addressed, and then it
9 needs to be incorporated in a way that Counsel on either side
10 cannot raise the issue or address the issue or imply or suggest
11 either through witnesses or through argument anything other than
12 what the Court has stated.

13 THE COURT: Well, I just typed this up myself this
14 morning. It's not well punctuated. I would have put in some
15 commas, done some other things, but why don't you -- could you
16 make a couple of copies of that? It will give you something to
17 think about. I'm sure it can be improved. Anybody else want to
18 say anything about that particular motion? Plaintiff's motion in
19 limine No. 1 with respect to insurance, it doesn't sound like
20 that's disputed. Everybody agrees on that?

21 The motion with respect to the jury questionnaire, let
22 me just ask you, Mr. Humpherys, how logistically at this point
23 would you handle a questionnaire?

24 MR. HUMPHERYS: At this point when they come in I -- I'm
25 not sure exactly when the jurors are called in, but I understand

1 they're called in sometime around 8 or 8:30, which is before the
2 time which they -- when they come up here to the courtroom. I
3 understand we're starting at 9.

4 THE COURT: We're starting at 8:30.

5 MR. HUMPHERYS: At 8 30, all right So I don't know
6 what time they would have in the jury -- the general jury pool,
7 but if they come in you could request that the jury pool come
8 in even earlier than 8:30, allow the jurors to fill out this
9 questionnaire. I don't think it would take more than 15 minutes,
10 20 at the most, and the Court can then request some general basic
11 information as the Court typically does.

12 In the meantime the clerk can make copies of the
13 questionnaires and allow a break after the Court has concluded
14 its general basic foundational questions, allow us to go through
15 them quickly, and then we'd proceed with more specific questions
16 in voir dire. I think the Court has indicated that the Court
17 does not allow attorney voir dire. I would urge that if we don't
18 have a questionnaire that attorneys be allowed to voir dire the
19 prospective jurors.

20 I think this jury questionnaire, given its shortness
21 and yet the importance to us to intelligently exercise both our
22 challenges to cause as well as to the peremptory, we believe we'd
23 need to have this additional information. I think it will short
24 circuit much of the open voir dire. In fact, the Court in voir
25 dire has to go through oftentimes each witness individually where

1 that now can be avoided, at least on certain issues. There is
2 a question of whether someone's comment in open court might
3 engender some kind of feelings by others. This again allows
4 that to be handled without such influence one way or the other.

5 I would assume that UDOT would want to have the same
6 kind of information available to them. The fact that it's a
7 governmental agency, it is a common issue to both sides, and
8 there are some people that do not care for government. There
9 are some people who feel the opposite, that government should be
10 immune from any kind of claim regardless of the law, concern for
11 the tax consequences and so forth.

12 So a jury questionnaire such as this does allow some
13 of the more difficult issues to be addressed outside of the group
14 as a whole, and then as the parties and/or the Court has more
15 specific questions, we can handle those in chambers again without
16 having that influence to the general body. So that's how I would
17 propose it.

18 THE COURT: How long do you think it would take you to
19 review those questionnaires? I mean we're going to summon 40
20 people, I think, for this trial.

21 MR. HUMPHERYS: We have two Counsel, I think, that are
22 going to be trying the case on both sides. I think we could
23 probably do that within 20 minutes.

24 THE COURT: Now I'm not as a general rule opposed to the
25 use of jury questionnaires. I generally reserve them for cases,

1 though, where there is concern about pre-trial publicity or
2 some particularly sensitive information that people would be
3 particularly reluctant to talk about in open court during the
4 course of voir dire.

5 What you're proposing, there's no question that it
6 would ultimately result in a much longer voir dire process,
7 even with the fact that some questions might be -- some oral
8 questions might not be necessary because of what we went through.
9 I just really don't see anything about this case that raises
10 particularly difficult issues to address in typical oral voir
11 dire.

12 In contrast to my feelings about jury questionnaires,
13 I have pretty strong feelings about attorney conducted voir dire
14 When I was in practice I tried cases in jurisdictions where that
15 was the rule. I've also been to -- as a lawyer to seminars where
16 trial tactics were taught, and there were classes given in
17 attorney conducted voir dire.

18 In Nevada, for example, attorney conducted voir dire
19 takes hours or days, and everything -- it's basically open
20 season, and it's got nothing to do with picking an impartial
21 jury. It has much more to do -- and this is way it's actually
22 taught in trial practice seminars is that this is your
23 opportunity to introduce the themes of your case, and this is
24 your opportunity to commit jurors to look at the case from a
25 particular perspective. All of that has got nothing to do with

1 picking an impartial jury.

2 It's my view, with all due respect to the lawyers
3 present here, which I have enormous respect for, but nevertheless
4 my view that I'm the only person in the room interested in
5 picking an impartial jury. Everybody else wants to pick a
6 partial jury. So I really try hard not to just do a perfunctory
7 voir dire. I really try hard to be probing and give everybody a
8 chance to express any concerns they have about whether they can
9 be fair in a particular case. If I don't cover something
10 adequately enough, if you tell me at the time, I'll try again.

11 I'm not inclined to depart from my usual practice in this case.

12 I think we've covered the motion relating to the lay
13 witnesses. That really just leaves the motion with respect to
14 attorney's fees and expenses. The way I propose to handle that
15 is I think that it would be helpful for me to make that decision
16 after I've heard the evidence, after I've heard Mr. Ruzak
17 testify, after I've seen what exhibits came into evidence and
18 maybe can identify what exhibits were part of the more recently
19 produced documents and how important they were to the case.
20 Unless somebody really has an objection to that and really wants
21 a decision now, I would like to have another hearing on that
22 after the trial and give you a chance to argue that at that time.
23 Anybody have a problem with that?

24 MS. STEINVOORT: No.

25 MR. COMBE: No, your Honor.

1 THE COURT: Is that okay with you, Mr. Humpherys?

2 MR. HUMPHERYS: Well, it's one more thing we have to
3 deal with after the trial -- post trial hearings -- but it has
4 to be dealt with, I guess, one way or the other. I guess, your
5 Honor, that if the Court desires and if there's specific
6 evidentiary questions that need to be asked of Mr. Ruzak, he
7 could either be questioned at a time when the jury is out while
8 he is here, or perhaps we could do it by telephone. I don't have
9 a problem taking the stand under oath and submitting to questions
10 as well.

11 I appreciate the delicate balance and the detail
12 associated with this, and it's no exact science to be able to say
13 what additional time -- or let's roll back time and assume you
14 had all the documents and roll forward, how does it look versus
15 how does the picture look today. I know it's a difficult issue.
16 I'm happy to submit additional evidence by way of testimony, if
17 the Court desires, but --

18 THE COURT: I'm sure that I'm going to need additional
19 testimony so much as just an understanding of how the recently
20 produced documents fit into the case. I've seen sort of the
21 description of that in these papers, but I haven't seen the
22 documents yet, and I haven't got the factual context that both of
23 you have having heard the evidence in the case, and I think even
24 without hearing additional evidence, just being able to put it in
25 the context of being more familiar with the record and the case

1 would help me make a more intelligent decision about that.

2 MR. HUMPHERYS: Well, in light of that it makes sense to
3 then have it after the trial.

4 THE COURT: All right. Thank you. I think that covers
5 all the motions.

6 MR. HUMPHERYS: Your Honor, there is an additional issue
7 which Counsel are very aware of. It has to do with Jacquelyn
8 Neal, and let me kind of put this in context because this will be
9 a focus of one of the primary issues in the trial. The Court
10 should be aware of it, and I think we want to raise an issue with
11 the Court and Counsel, and we can address that as we move along.

12 That has to do with Mrs. Neal's state of mind at
13 the time of the accident. Let me give the following factual
14 background. I understand you have your next hearing at a quarter
15 after. I'm respectful of that. I don't think it will take long
16 to --

17 THE COURT: Don't worry about it. We can also -- this
18 can take as long as it needs.

19 MR. HUMPHERYS: All right. Jacquelyn Neal was a 57-
20 year-old lady, very conservative in her general nature and
21 personality. She was leaving a family gathering, a reception,
22 a 50th wedding anniversary of her sister. Her husband was not
23 with her; he was tied up in work. She left Bountiful, and from
24 witnesses that we have talked to, she was fine. She never
25 expressed any concern. Certainly no hurry was being -- no

1 expedience had anything to do with her talk and her nature. It
2 was all relaxed.

3 She is a diabetic, has been for approximately 40 years.
4 She left Bountiful and traveled to the Roy area where her --
5 the Layton/Roy area where her home is. Sometime prior to the
6 accident something happened to her, and she began to act very
7 irrationally. Witnesses describe her traveling between 85 and 95
8 miles an hour on the shoulder of the road, darting in and out,
9 weaving, and then at this particular point where there were no
10 median barriers she went straight across the median and hit my
11 clients head on.

12 The -- UDOT has hired Dr. Barry Benowitz, one of the
13 renowned local doctors in the area of diabetes. He has reviewed
14 her medical records, both previous and at the time of the
15 accident. An autopsy I believe was done. She lived for a short
16 time after the accident. Various tests were taken. He was also
17 aware of the irrational kind of driving behavior that she was
18 involved in at the time of the accident. It is his conclusion
19 that she suffered from a hypoglycemic event which is a low blood
20 sugar, and as a result had a mind altering or mental altering
21 state of consciousness.

22 There are two -- at least two Utah cases, one directly
23 on point where a particular defendant was being sued who ran into
24 a parked car and injured people. His defense was that he was a
25 diabetic and that he went into a state of altered consciousness

1 and was not able to control his ability to drive.

2 The verdict came back in favor of the defense as a
3 no cause of action as a result of the diabetic condition. It
4 was appealed and the Utah Supreme Court considered the jury
5 instructions, which were associated with that case and the facts
6 and upheld it stating that fault implies some necessary mental
7 requisite ability to control one's ability to drive. As a result
8 it was affirmed along with the jury instructions. So this will
9 become a central issue.

10 THE COURT: Were either of those cases decided after the
11 Utah Comparative Fault Act?

12 MR. HUMPHERYS: No, they were both before. No, I take
13 it back. The second one, I believe, was in 1991. That was, I
14 think, after. I think it was 1987 when the comparative fault
15 was first enacted. It may be before the amendment -- recent
16 amendments to the comparative fault. I'm sorry, it was 1993
17 was the second case that referred to this specific line of law
18 and upheld it.

19 It states -- the Utah Supreme Court states, "(Inaudible)
20 defense" -- the defendant's defense -- "is based on a rule of law
21 that if a person driving an automobile is suddenly stricken by an
22 illness that he or she has no reason to anticipate, and the
23 illness makes it impossible for him or her to control the car,
24 that person is not liable for negligence associated with the
25 accident."

1 Now there will be jury instructions associated with
2 that. The third motion in limine dealt with the concept in a
3 different light. I appreciate there are going to be issues of
4 fact regarding this, and so we did not base any motion of her
5 fault because of her diabetic condition, because it is also part
6 of the law that if the person who suffered from such condition
7 had some kind of notice or knowledge that he or she might have
8 such a condition if medications were not taken or proper diets
9 were not adhered to and so forth, that there could be fault
10 associated with that as opposed to at the moment of accident
11 whether speeding and/or lane changing or loss of control was the
12 actual fault.

13 UDOT has developed that part of the theory and has
14 taken that position of the husband of Mrs. Neal. The husband
15 of Mrs. Neal indicated that Mrs. Neal years earlier had had an
16 episode similar to this where she was pulled over by some law
17 enforcement officer thinking that she may be drunk or having some
18 other problem -- under the influence of drugs or whatever. Once
19 the officer determined that she was suffering from a diabetic
20 condition, he suggested that she not use her driver's license,
21 and there's controverted issue whether it was actually suspended
22 or not.

23 As far as we can determine it was not suspended, but
24 we're still trying to verify that with the driver's license
25 division. But at least as of 2002 there was no suspension, no

1 citations, no improper driving record nor qualifications on her
2 driving. He treating doctor on the diabetes, her -- his records
3 do not indicate any such thing that he was consulted, that he
4 had concerns, that he issued any kind of report (inaudible) her
5 to drive, yet the husband believed -- and this is going to be
6 part of the reason I'm addressing this with the Court is a prior
7 bad act under Rule 404. I'm going to ask my partner, Roger
8 Christensen, to address the law as it relates to that point, but
9 I'm giving the factual background because I'm more familiar with
10 it.

11 So we have a situation where I think even a police
12 officer, which has been designated as a witness by UDOT,
13 indicated that he recalls someone erratically driving and he
14 pulled her over and it was Mrs. Neal. He thought that the
15 driver's license was suspended or pulled or something until a
16 medical report could be submitted.

17 The husband said that after a few months when the doctor
18 continued to help her with her medical condition, he then thought
19 it was appropriate to give her a driver's license, and then
20 certified to the State that she was capable of driving, and at
21 that point in time supposedly according to the husband the
22 driver's license is given back to her. That was years before,
23 and as far as we can tell there have been no problems since.

24 So there are a number of issues that surround that
25 factual basis. Since it does deal with a core issue in the case,

1 i.e , the fault of Mrs. Neal as compared to UDOT's, we need to
2 address that and have it in our minds because there will be a lot
3 of evidentiary issues that surround that during the course of
4 trial, depending on how the witnesses may or may not testify.

5 There's certainly a lot of hearsay, double hearsay and
6 triple hearsay associated with the factual assertions that UDOT
7 wishes to present to the jury, both in opening and in the course
8 of evidence, all of which are going to be carefully monitored by
9 us, objected to when appropriate and addressed, so we felt the
10 Court needed to be aware of this. With the Court's -- if the
11 Court would please, I would like to ask Roger to talk about Rule
12 404 and how we believe it would apply in this case so that we can
13 then address it appropriately.

14 THE COURT: Sure. I'd be happy to hear that.

15 MR. CHRISTENSEN: Thank you, your Honor. So I'm sure
16 the Court recognizes relatively new to being involved more than
17 just on a minimal level on this, and I've been -- tried to get
18 up to speed on this case, Rule 404(b) talks about other crimes,
19 wrongs or acts. It says, "Evidence of other crimes, wrongs or
20 acts is not admissible to prove the character of a person in an
21 order to show action in conformity therewith." It says it can be
22 admissible for other purposes.

23 Conceptually, though, it's simply you can't show that
24 someone was negligent several years before and therefore the jury
25 should consider that that may be evidence they were negligent at

1 the time in question

2 THE COURT: I don't think that's the point. I mean
3 it sounds to me like that history relates to notice to her of
4 possible limitations on her ability to drive. You know, it isn't
5 ultimately the State's responsibility to identify when someone
6 has a physical condition that makes them incapable of driving
7 safely or puts them at risk of not driving safely. I think the
8 State has a role in that and they attempt to screen people out of
9 that.

10 Ultimately it's the driver's responsibility to look at
11 their own abilities. In the case of a diabetic, they need to
12 know how well their diabetes is controlled and how frequently
13 they have episodes, and this would just simply be notice to her
14 that there is a potential problem there that she needs to make
15 sure that her diabetes is well controlled before she gets behind
16 the wheel of a car. It's not propensity evidence. It's not
17 evidence of a trait of character, it's just notice evidence.

18 MR. CHRISTENSEN: I think the Court is correct on that.
19 This is our concern. Certainly the defense in this case is
20 entitled to present evidence that this woman was a diabetic and
21 that she knew she was, and that she should have been properly
22 taking care of herself. When it though goes beyond that issue
23 to -- now let me tell you about something really bad that would
24 scare anybody on a jury that happened more than two years before
25 this incident.

1 The details, she was driving erratically, pulled over,
2 had a discussion with the police officer, or there was another
3 event where she got hypoglycemia and ended up in a parking lot
4 of a mall and not real functional mentally. Her family came and
5 found her. When you get into that kind of detail it becomes
6 prejudicial. I think it gets into Rule 403, and that is whether
7 the probative value is outweighed by the prejudice. So our
8 thought would be you get into the specifics of these prior events
9 it becomes prejudicial for obvious reasons.

10 On the other hand, to say she was a diabetic, she
11 was aware of it and I think it was 42 years she had had this
12 condition, she needed to take her medications, control her diet
13 and take all of that into account in driving a car, we have no
14 problem with that. It's when they get into specific instances
15 and the details of those that we think the problem arises.

16 THE COURT: All right. I'm going to have to give that
17 some consideration, but I appreciate -- I think it's very helpful
18 for me to have a heads up on that issue.

19 MR. CHRISTENSEN: There is one other that if I may while
20 I'm here, I've thought just in trying to get up to speed on this
21 case myself, may I address that?

22 THE COURT: Sure.

23 MR. CHRISTENSEN: I know there is the -- there's a
24 federal database that contains accident history. I think there's
25 a federal regulation that says it's not to be used in courtrooms.

1 I think that's the CARS program, if I understand it. As I have
2 looked at the record in this case, I think there's been some
3 ruling by the Court that we can't get into evidence from CARS
4 database. In fact, I don't think we're even allowed to discover
5 it.

6 On the other hand, some accident history has been
7 provided through other sources. This is more of a practical
8 issue, your Honor, that I throw out for the Court and for Counsel
9 to consider, more of a practical issue than a legal one per se.
10 The defense is centering on just how extensive was the accident
11 history, how many accidents have the plaintiffs been able to find
12 in this area, and so forth.

13 This is the concern. If there's going to discussion
14 in this trial -- and it seems to me it's inevitable that there
15 will be -- of accident history, and yet the main database for
16 that accident history has been put off limits by federal law,
17 that could get very confusing for a jury, and even not very
18 practically workable for Counsel. I'm wondering if the jury
19 could simply be told what is going on, and that is there is a
20 federal database.

21 As part of federal law that can't be used in trials, so
22 you're told it's there. That has not been made available to the
23 parties, and that's because we're all bound to follow the law,
24 but you're not to draw any negative inference against UDOT for
25 withholding that evidence. That's again what the law requires.

1 By -- on the other hand, as witnesses talk about accident history
2 or the lack of it, it needs to be fair game to say well, this is
3 only a partial history we've been given. There may be more,
4 there may not.

5 I don't see how we honor that federal statute if we're
6 talking about accident history. That's something that I think
7 all of the engineers have said they routinely review, take into
8 account in making decisions on median barriers. Everybody has
9 admitted that. We can't use it in the case.

10 As I say, I think it's going to be very confusing to
11 the jury not to simply be told why there's something there that
12 is routinely used but they're not hearing about it. I raise
13 that as an invitation for us to, if we can, agree on a practical
14 solution, the jury not just be kept totally in the dark but be
15 told what's going on, and then the parties do what they need to
16 to obey federal law, but to minimize the confusion created out of
17 it.

18 THE COURT: Why don't you propose an instruction?

19 MR. CHRISTENSEN. All right. I think -- and I haven't
20 made -- of course, not just an instruction, but also some agreed
21 approach to choose during trial during examination of witnesses
22 as well.

23 THE COURT: So your concern, as I understand it, that
24 given the importance of accident history to the decision of
25 whether or not there should have been a median in this place,

1 you're concerned that the jury will come to the assumption that
2 whatever accident history they're provided is -- represents the
3 entire accident history, which may or may not be the case,
4 and the reason we don't know whether or not it's the case is
5 because -- actually, I think it's a state database that is
6 protected by federal law, it simply isn't accessible and not
7 useable in this courtroom.

8 MR. CHRISTENSEN: Right. I would think UDOT would have
9 the other concern I raise, though, and that would be in fairness
10 we get to say, "Well, we don't know if this is complete because
11 we can't see your database, the one you use," and then UDOT's
12 going to say, "Well, it's not fair to infer that we somehow acted
13 improperly in withholding this evidence because that's -- the law
14 requires us to."

15 So something that allows the jury it's there, nobody has
16 done anything wrong here. The plaintiffs haven't been derelict
17 by not doing their homework on it. They haven't been derelict by
18 withholding it, but that database is there and it's off limits,
19 and therefore you need to weigh any evidence upon accident
20 history with that in mind.

21 MR. COMBE: Your Honor, may I address that?

22 THE COURT: You can address anything that has been said
23 by either Counsel. I'm going to give you a chance to do that
24 now.

25 MS. STEINVOORT: Your Honor, I'd like to address

1 Mrs. Neal's prior history.

2 THE COURT: Sure I'm not going to decide anything on
3 those issues today, but I think it's fair that you get a chance
4 to speak to it now if you'd like to

5 MS. STEINVOORT. Mrs. Neal was a diabetic for 43
6 years. She was a type I diabetic, which meant she had to
7 take her insulin. Her incident in 2002 -- in March of 2002 was
8 documented. Her license was revoked. Coincidentally, the same
9 trooper who responded to the fatality accident in this case was
10 the trooper who pulled her over. So we do have a documented
11 history of her losing her license for a period of time.

12 Dr. Benowitz (inaudible) that she would always tell her
13 physician or treating doctor that in fact she was fine, there was
14 nothing wrong, but the family observed her doing things such as
15 driving off and not being located for hours and then finding her
16 in a parking lot. She wasn't particularly good about monitoring
17 her insulin needs.

18 There is case out of Tennessee (Inaudible) had a case
19 last year involving another diabetic. It was our employee. He
20 did a lot of research as to the foreseeability issue, and that's
21 really the key here, whether it was foreseeable. The idea of a
22 person not being attributed any fault is for an unforeseeable
23 situation. Mrs. Neal knew she was a diabetic, knew she had to
24 complete an annual exam by her physician to be submitted to the
25 driver's license department.

1 She -- and the factors that the Tennessee court that
2 I found -- the case from Tennessee that I found discussed the
3 following "Extent of driver's awareness or knowledge of her
4 condition that caused sudden impairment, whether the driver was
5 under the medical care of a physician, whether the driver was
6 prescribed to a medication for the condition, whether sudden
7 incapacity had previously occurred while driving, number,
8 frequency, extent and duration of previous incapacity, temporal
9 relationship of prior incapacitating episodes, position of
10 (inaudible) regarding driving and the medical opinion regarding
11 adherence and foreseeability of incapacity."

12 So there are factors to look at. I think Mrs Neal
13 knew, as did her family, that she really wasn't a very safe
14 driver, and it was just a matter of time where this tragedy is
15 going to happen with her because she didn't want to give up her
16 license.

17 Her husband said he would come home and find her in a
18 stupor vacuuming the same spot or washing the same dish over and
19 over. She was oblivious to where she was. Her eyes would be
20 open, she looked like she was okay, but she wasn't with us, so to
21 speak. When Mr. -- or Dr. Benowitz was deposed, Mr. Humpherys
22 said, "Well, how do we know she wasn't starting to develop
23 dementia or something?" Dr. Benowitz noted that as soon as you
24 gave her food she would come out of it.

25 So the foreseeability here is I think clearly met. She

1 knew she had a problem, and she didn't take very good care of it.
2 Just to sort of describe this lady, we're not -- she was also
3 convicted of embezzling, and we're not going to talk about
4 because that's not, you know, necessary to discuss her -- of
5 that, but in terms of her ability to drive, the foreseeability
6 of her medical problems and her likelihood of impairment, I think
7 it's well established and I think the jury needs to know that she
8 knew about it and didn't take proper precautions.

9 We do have, by the way, an entire file of her driving
10 history. I didn't bring it with me because I didn't know this
11 issue would be addressed today, but I don't think it would be
12 fair to suggest that she was unaware of her medical problems.

13 MR. HUMPHERYS: We need to get those documents.

14 MS. STEINVOORT: Well, it's just -- it's the driver
15 license stuff we've all talked about.

16 MR. HUMPHERYS: Well, I know, but we have searched to
17 try and find out if her license was revoked and we haven't been
18 able to find it. So if you --

19 MS. STEINVOORT: Just through a GRAMA request, so I will
20 share that with you.

21 MR. HUMPHERYS: Okay. Please do.

22 THE COURT: Mr. Combe?

23 MR. COMBE: Your Honor, on this other issue regarding
24 the CARS database, that is in fact a state database; the Court
25 was correct there.

1 This issue has already been addressed by the Court
2 Mr Christensen wasn't involved at that time, but the Court
3 already addressed this in its protective order and then again
4 in the motion to compel

5 THE COURT Yeah, I addressed a different issue, though
6 I addressed whether it was discoverable Mr Christensen has
7 raised the issue of is it unfair -- is there some unfairness in
8 leaving the inference out there that whatever accident history
9 has been able to be gleaned from other sources is the entire
10 accident history I don't know if there is or not, but that's
11 the issue Is there some unfairness in not advising the jury
12 that there -- this is or may be an incomplete accident history,
13 and the reasons why it's incomplete

14 MR COMBE Well, I think, your Honor, when we talked
15 about this earlier, the Court was going to treat the CARS
16 database as if it did not exist, and we were going to proceed
17 that way There's no one on the jury that's going to be -- as
18 far as I know, that's going to be aware of the CARS database

19 You start talking about the CARS database and then
20 that's going to raise the confusion If we approach this case
21 like any others, if they've obtained some accident history by
22 some other method and they want to present that to the jury,
23 that's one way All I think that will happen with the raising
24 of the CARS database is creating a confusion itself because the
25 CARS -- if the jury doesn't know about that CARS database, I'm

1 not sure how it could cause any confusion.

2 More importantly, they did obtain all of these accident
3 records that I'm aware of. They subpoenaed these records from
4 Department of Public Safety. They obtained 10,000 accident
5 reports. It's my understanding that they've went through those
6 10,000 accident reports the same way as we would go and create
7 the CARS database. So I think it's unfair for them to come back
8 and say, "Well, we're not sure that this is all of the records."

9 In fact, if they mention the fact that there's this CARS
10 database, then the jury is wondering whether or not there are
11 more accidents out there, and there is no evidence -- at least no
12 admissible evidence of any more accidents. They cannot use that
13 CARS database under 409 to try and at least imply that there may
14 have been more accidents. For that reason, we would object to
15 any type of instruction.

16 MR. HUMPHERYS: Here's part of the problem, your Honor
17 When we were -- if the Court remembers, we were moving to compel
18 the Department of Safety to produce the officer's investigating
19 reports here -- the investigating officer's reports. They only
20 had records, I believe, through back to about '99, and they had
21 destroyed previous records.

22 The critical time periods relate to the '99 -- or excuse
23 me, the 1995 construction project that dealt with this very 1700
24 feet of lack of barriers -- or barriers on both sides, and it
25 actually was part of installing the median barriers from the

1 north end of that 1700 feet further north. UDOT has not provided
2 us with any explanation of why they did not fill that gap in of
3 the 1700 feet.

4 The second project is in 1999 when there was another
5 construction project to the south, and there was some parts of
6 that construction project that involved placing median barriers.
7 Again, the State chose not to put any median barriers within this
8 1700 feet. So the problem we have is really yeah, we can show
9 that there are accidents from 1999 forward from the subpoenaed
10 DI-9's, the officer's -- or investigating officer's reports, but
11 we can't show anything prior to that time because we have no
12 records.

13 So what we're proposing is not getting into the CARS
14 program. Quite the contrary, it's to simply explain, as
15 Mr. Christensen has suggested, that there is a law prohibiting
16 us from going into any of that. The Court has addressed that
17 because I -- in that part -- as part of that motion to reconsider
18 the Section 409 I addressed the very issue of how this could
19 raise prejudice with both sides or either side, depending on
20 how it's presented. The Court said the Court is unable to
21 address specific questions about how the evidence and arguments
22 at trial will be affected by the -- well, I'm sorry, that's the
23 disclosure. Let's see. Well, we can brief it another time.

24 I think -- we'll prepare a proposed jury instruction
25 and we'll present it to Counsel and then we'll submit it to the

1 Court.

2 THE COURT. All right I'm not going to decide anything
3 on those two issues today. Have you brought with you your jury
4 instructions?

5 MS. STEINVOORT: I have, but unfortunately there was
6 some typographical errors that I spotted that my paralegal didn't
7 (inaudible) before I left for court. I just want to clean those
8 up and hand deliver them. We have discussed a set already, and
9 there's some that are a little bit different, so I'd like the
10 opportunity, if that's okay, to just deliver them to the Court
11 this afternoon and to Mr. Humpherys. We have gone through
12 them, though

13 THE COURT. Okay.

14 MR. HUMPHERYS We have agreed upon probably 95 percent
15 of the instructions. I have -- I did not number them because I
16 have not yet received the UDOT's proposed.

17 THE COURT: I'd rather have them blank -- at least the
18 agreed ones I'd rather have them blank.

19 MR. HUMPHERYS: Right. We assume the Court would like
20 them in some order that would make sense rather than have us put
21 them together in order rather than a hodgepodge of stipulated
22 instructions. So I'm happy to do that if the Court wishes.

23 MR. STEINVOORT. We prepared an index with ours, if that
24 would be helpful.

25 THE COURT: Let's just have a brief meeting tomorrow

1 morning, 8:30. Finish those up and come back and present them to
2 me in the morning. Can you do that?

3 MR. HUMPHERYS: All right. We'll do that.

4 MS. STEINVOORT: Here at the court -- in court?

5 THE COURT: Yeah.

6 MS. STEINVOORT: Okay.

7 THE COURT: How about your voir dire -- your requested
8 voir dire, other than the questionnaire, which I have seen, do
9 you have requested voir dire for me?

10 MS. STEINVOORT: I submitted mine already.

11 MR. HUMPHERYS: Ours was within the motion. However,
12 there will be some supplements in light of the Court's decision.

13 THE COURT: All right. If you could give me those as
14 soon as possible. I haven't seen the State's, so can you just
15 send me a courtesy copy of that?

16 MS. STEINVOORT: Sure.

17 THE COURT: I'm not sure how you want me to handle the
18 issue of concern that the -- at least that the prospective jurors
19 will have that this will come out of taxpayer funds. I mean I'm
20 willing to ask that any way you want me to ask that, but I have
21 some concern that most jurors wouldn't even focus on that issue
22 unless we raise it.

23 MR. HUMPHERYS: It's an interesting question. We have
24 preformed three mock juries on this case, and there were some
25 jurors that were concerned about if there was an award would it

1 mean that either UDOT would not be able to perform repairs and/or
2 would it raise taxes or would it affect taxes or the deficit and
3 all of the related issues. So that was part of the supplemental
4 voir dire questions that we were going to think about if the
5 Court was not going to give the jury questionnaire, but it's
6 essentially the same subject matter that was in the
7 questionnaire.

8 THE COURT: Okay. I'll look at those very carefully.
9 I'll ask it any way you want me to ask it.

10 MS. STEINVOORT: Can I make a suggestion? It's really
11 not -- it is not really accurate to say it's taxpayer money
12 because it's actually state risk management that charges premiums
13 to the client and agency that pays, so it's really no different
14 than a relationship anyone would have -- a corporation would have
15 with their insurance carrier.

16 Maybe we just -- you should treat the State as it is any
17 other corporate entity or something of that nature, because it
18 really -- it's not going to -- the money is not going to come out
19 of UDOT's budget in the sense they're not going to fix potholes
20 because of verdicts in favor of plaintiffs. It doesn't work that
21 way. There are premiums and --

22 THE COURT: You want me to tell the jury panel that?

23 MS. STEINVOORT: No, I'm just saying I don't think it's
24 very accurate to suggest that -- I think you should just say the
25 State is like any other private corporation, you should look at

1 them as such. They're individuals and they're corporations.

2 THE COURT: Well, we can say that all we want, but I
3 mean really -- the concern is that the jury is thinking in the
4 back of their minds, you know, "Am I ultimately going to pay for
5 this, or am I going to have decreased services because of this."
6 We won't know that -- the answer to that question, regardless of
7 what we tell them. We won't know the answer to that question
8 unless we ask them something.

9 MS. STEINVOORT: I would suggest that every person who
10 sits -- I mean if I was called to serve on a medical malpractice
11 jury I think I'd say, "My gosh, how is this going to impact my
12 co-pay or my deductible or something." I mean everyone's going
13 to make that -- that's just natural for an individual to consider
14 that if they're going to consider it at all, but I don't think we
15 should -- it's not unique to the government. So I would just
16 say --

17 THE COURT: Leave it alone.

18 MS. STEINVOORT: Leave it alone. Ultimately we're --

19 THE COURT: Well, I'm not going to leave it alone. I
20 mean if Mr. Humpherys wants me to get into it -- I think it could
21 be a reasonable decision to leave it alone from both parties'
22 standpoint, but ultimately that's the plaintiff's decision to
23 make, and I think it's a fair subject matter for voir dire if
24 they want to go into it. So let's not give the option. If they
25 want to go into it, they can go into it.

1 Let's see, I had a couple of other things. I was
2 looking over the list of witnesses. Of course, it's always an
3 ambitious trial when you start looking at the number of possible
4 witnesses in this case and you start thinking about the days we
5 have set aside

6 I'm going to give you some unsolicited advice, which I
7 strongly believe based upon almost 13 years of sitting through
8 these trials, and that is if there's one thing that civil lawyers
9 don't get it's that it's the persuasive impact, and that's what
10 this job is ultimately about. It's the persuasive impact of
11 brevity and focus.

12 I think that there is a real inclination on the part of
13 civil trial lawyers to over try their cases, to try and address
14 every nuance, every possibility. You're all smart lawyers. We
15 go to law school and the first thing we learn is how to spot
16 issues, and we get points for the number of issues that we spot.
17 You don't get points with juries for addressing all of the issues
18 that you spot. You get points with juries for focusing on the
19 elements of your case or the elements of your defense and honing
20 in like a laser beam on those issues.

21 I would -- you're all good writers I've read your
22 briefs. You're not afraid to take an editing pen to the drafts
23 of your briefs. Take an editing pen to your proposed cases,
24 because your cases will have more impact and more persuasive
25 power if they're focused and they really hone in on the issues in

1 the case.

2 I strongly believe that. I as a judge during the
3 course of the trial exercise liberally my discretion under Rule
4 611 to cut you off if I think that you're being cumulative. My
5 definition of cumulative basically relates to the importance of
6 the issue to the case and the extent to which it's controverted.
7 There can be a really important issue in the case, but if the
8 defense isn't questioning it -- for example, that somebody is
9 disabled, then I don't want to hear six witnesses saying that
10 they can't mow their lawn anymore. I mean if that's not
11 disputed, even though it's real important to the case for the
12 jury to understand that, you know, one witness is probably enough
13 on that. I'm going to constantly nudge you to move forward and
14 to not be cumulative in the case.

15 I would like you to over schedule your witnesses because
16 I don't want there to be big gaps where the jury is cooling their
17 heels waiting for the next witness to arrive. We're going to
18 start promptly every day. We're going to put in fairly long
19 days, you know, starting at 8:30 in the morning, brief break mid
20 morning, short lunch -- just an hour -- and a brief break in the
21 afternoon. We'll wrap up for the day sometime between 4 and
22 4:30.

23 Do any of you have any questions about how I conduct a
24 trial or anything like that?

25 MS. STEINVOORT: We were going to ask you if you had --

1 is there a screen available if someone wants to use it for power
2 point or something of that nature, or do we need to bring our
3 own?

4 THE COURT: I'm sure we've got a screen. Call Marianna,
5 and she probably doesn't know. Marianna is kind of new, but she
6 can find out.

7 MS. STEINVOORT: Okay.

8 THE COURT: I'm pretty sure that we've got a screen that
9 you can use, and we can make arrangements for that.

10 MR. HUMPHERYS: Are we going all five days of that --
11 the week of the 24th?

12 THE COURT: I'm pretty sure the answer to that is yes,
13 but let me just look right here. We are.

14 MR. HUMPHERYS: Each morning at 8:30 a.m.?

15 THE COURT: Each morning at 8:30 a.m.

16 MR. HUMPHERYS: In light of that we would anticipate
17 completing our case by Wednesday evening. I say that so that
18 UDOT can --

19 THE COURT: Excellent. I appreciate --

20 MR. HUMPHERYS: We --

21 THE COURT: And by all means, you know, be generous in
22 letting each other know your order of witnesses so that you can
23 be prepared. I think that's the professional and helpful thing
24 to do.

25 MR. HUMPHERYS: We will be submitting a trial plan which

1 will have a complete breakdown of when we anticipate each
2 witness, the time that we anticipate each side taking. We won't
3 have their side unless they want to contribute that information,
4 but we've already prepared that and we'll provide that to the
5 Court at the commencement of trial.

6 THE COURT: Thank you very much. Anything else? Let me
7 just put another pitch for settlement. It looks like you're on
8 your way to the war path, and that's fine. I'm happy to try this
9 case, and I look forward to working with good lawyers, but now is
10 the time to take one last shot at settlement. With this trial
11 moving in just a couple of weeks, before you spend more money,
12 take one more shot, see if you can get it settled I'll leave
13 that to your judgment and discretion. Anything else I can help
14 you with today? See you briefly tomorrow and then get ready for
15 trial.

16 (Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss.
COUNTY OF UTAH)

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings

That I have authorized Natalie Lake to prepare said transcript, as an independent contractor working under my license, appropriately authorized under Utah statutes.

That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording

I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

Natalie Lake
Official Court Transcriber

WITNESS MY HAND AND SEAL this 16th day of December 2010.

My commission expires:
February 24, 2012

Beverly Lowe
NOTARY PUBLIC
Residing in Utah County

ADDENDUM 3

JURY INSTRUCTION NO. 51

Reference to CARS Program

During the trial there will be references made by some of the witnesses to the CARS system or database. This instruction is given to assist you in understanding those references.

UDOT maintains a computer-based database of the accidents occurring on State and Federal Roads in Utah ("CARS"). This database is maintained under federal guidelines for the purpose of receiving Federal-aid highway funding for improvements of state and federal roadways.

A federal statute (23 U.S.C. Sec. 409) prohibits accident victims who are pursuing lawsuits (like the Millers), and their attorneys or experts, from obtaining or using information from this database. Consequently, you should not be critical of the Millers for not having that information or of UDOT for not providing it.

ADDENDUM 4

IN THE THIRD JUDICIAL DISTRICT COURT
OF SALT LAKE COUNTY, STATE OF UTAH

_____)	
JASON MILLER,)	
)	
Plaintiff,)	
)	
vs.)	Case No. 050915765
)	
UTAH DEPARTMENT OF TRANSPORTATION,)	
)	
Defendant.)	
_____)	

Hearing
Electronically Recorded on
March 29, 2010

BEFORE: THE HONORABLE ANTHONY B. QUINN
Third District Court Judge

APPEARANCES

For the Plaintiff: L. Rich Humpherys
CHRISTENSEN & JENSEN
15 W. South Temple #800
SLC, UT 84101
Telephone: (801) 323-5000

For the Defendant: Sandra Steinvooort
Steven A. Combe
ATTORNEY GENERAL'S OFFICE
160 E. 300 S. 6th Floor
PO Box 140856
SLC, UT 84114
Telephone: (801) 366-0100

Transcribed by: Natalie Lake, CCT

152 Katresha St.
Grantsville, UT 84029
Telephone: (435) 884-5515

P R O C E E D I N G S

(Electronically recorded on March 29, 2010)

THE COURT: Good morning Let's take the matter of Miller vs. Utah Department of Transportation. Your appearances, please.

MR. HUMPHERYS: My name is L. Rich Humpherys for the plaintiffs.

MS. STEINVOORT: Sandra Steinvoort and Steve Combe for the defendant, UDOT.

THE COURT: All right. I take it mitigation -- or I mean mediation didn't help?

MR. HUMPHERYS: Well, it was more than -- I mean it wasn't just a perfunctory -- I mean there was a serious good faith effort, and I think we should let the Court know that, but it was not successful.

THE COURT: I appreciate very much you making the effort. More often than not that will end in a case being settled, but let's get this case tried. How about April 19th? Well, no, that won't work. April 20th.

MR. HUMPHERYS: I am gone three days of that week.

THE COURT: Let's try the next week, the 26th.

MR. HUMPHERYS: I have two federal hearings that week, but in May I'm wide open.

MR. COMBE: I have a trial the first week of May, your Honor.

1 MR HUMPHERYS. Is your trial all week?

2 MR. COMBE. No, it's only one day.

3 MR. HUMPHERYS One day. What about the week of the 10th
4 of May?

5 THE COURT: I've got -- I don't have consecutive days
6 that week, as I have to -- that's a week that I have to do
7 preliminary hearings on Tuesday and Thursday.

8 MR. HUMPHERYS: The 17th?

9 THE COURT: That week won't work because of the district
10 court conference on the 20th and 22nd. So we're at the 24th, which
11 would put us over Memorial Day, which I don't mind.

12 MR HUMPHERYS. Does the Court have one of the days of
13 the week that he uses for law and motion?

14 THE COURT. No, I usually just handle anything that has
15 to be handled during the trial early in the morning before we
16 start

17 MR. HUMPHERYS: So we'll have the full five days?

18 THE COURT: Yes.

19 MR. HUMPHERYS: We were just talking before, and Counsel
20 and I believe that it will take a total of seven days with jury
21 and closings and openings.

22 THE COURT: That's what I understood from our previous
23 conversations. What do you think about going over Memorial Day
24 weekend?

25 MS. STEINVOORT: It's fine with me.

1 MR. COMBE: It's fine with me.

2 THE COURT: All right, then. Let's start the 24th.

3 MR. COMBE I bet the jury will. I'm not sure a jury
4 likes to be kept over Memorial Day. Once again, I don't --

5 THE COURT: I'm sure they'd prefer not to. It would
6 be harder to seat a jury because some people will be taking
7 additional days off, but --

8 MR. COMBE: When would be the next day after that
9 Memorial Day weekend?

10 MR. HUMPHERYS: The week of the 7th? I'm open on the 7th
11 as well.

12 THE COURT The week of the 7th I'm covering for Judge
13 Christiansen, because we've lost a judge with Steve Roth being
14 appointed to the Court of Appeals, and so she's going out to West
15 Jordan, and we have to take turns covering her calendar. Boy, I
16 tell you, is there really no way we can do this earlier? What
17 day of the week did you have a hearing in May?

18 MR. COMBE: The 7th, your Honor. The -- it's -- the
19 trial will be the 7th. It's down in Provo.

20 THE COURT: I want to go back and look at that time
21 period, then.

22 MR. COMBE: Did we rule out the 10th, the week of the
23 10th?

24 THE COURT: We did because I have two criminal days that
25 week. What if we started -- let's see, now what were your issues

1 on the week of the 26th, Mr. Humpherys?

2 MR. HUMPHERYS: The week of -- oh, April?

3 THE COURT: April 26th.

4 MR. HUMPHERYS: I have two federal hearings, and they're
5 both major hearings -- summary judgment.

6 THE COURT: What days?

7 MR. HUMPHERYS: Pardon me?

8 THE COURT: Which days?

9 MR. HUMPHERYS: One is the 27th and one is the 28th.

10 THE COURT: So if we started the 29th and 30th, that only
11 gives us six days.

12 MS STEINVOORT: I think we could do it in six days,
13 personally. Do you?

14 MR. COMBE: Well, I still (inaudible) make sure we're
15 done.

16 MR. HUMPHERYS: I have a final pre-trial with Judge
17 Jenkins on the 7th, and I don't know if the Court has had
18 experience with him, but his pre-trials are not the type where
19 you just come in and kind of work out the logistics for trial.
20 He actually pre-tries the case and there's usually multiple days
21 and it takes either half the day or all day if he's scheduled it
22 for that.

23 THE COURT: Yeah. We won't be using the 7th anyway
24 because Mr. Combe is.

25 MR. HUMPHERYS: Do you need time for preparation for

1 that?

2 MR. COMBE: That trial? I will need some.

3 MR. HUMPHERYS: That's pushing him.

4 THE COURT: All right. Maybe the -- I mean we're not
5 going to get a perfect situation unless we go out way farther
6 than I'm anxious to go out. What time is your hearing on the
7 date -- in the 28th?

8 MR. HUMPHERYS: My hearing? It is the -- it's at 2:30
9 before Judge Benson.

10 THE COURT: I say we start the morning of the 28th,
11 pick a jury. Maybe that's all we'll be able to do. Maybe we
12 will also be able to do closing arguments -- I mean opening
13 statements, and then go from there to the 6th.

14 MR. HUMPHERYS: I do need a little bit of time to
15 prepare for that motion for summary judgment. That kind of
16 really pushes me, your Honor.

17 THE COURT: Well, you've got between now and then.

18 MR. HUMPHERYS: Yes. Well, I wish that were the way it
19 could go. I wish I could prepare a week in advance and then have
20 everything fresh on my mind. What would be the --

21 MR. COMBE: I just don't want to end on Memorial Day.

22 MR. HUMPHERYS: What would be the problem if we were to
23 start on the 3rd -- was the entire week of the 10th out for the
24 Court?

25 THE COURT: No, just Tuesday and Thursday -- well,

1 Friday is also out.

2 MR. HUMPHERYS: Okay That --

3 THE COURT: I mean if we started on the 3rd we wouldn't
4 be able to use the 7th, but we could use the 10th.

5 MR. COMBE: Your Honor, if it helps, maybe Memorial Day
6 weekend will have to be it. I just don't know what kind of jury
7 pool we're going to get there and what's going to be --

8 THE COURT: Yeah. Let's plan on starting the 24th -- May
9 24th, and we'll go through June 2nd. How about final pre-trial on
10 May 10th at 8 30 Any motions in limine should be filed soon
11 enough that they can be ready to be heard at the final pre-trial
12 conference.

13 I would like you at the final pre-trial conference to
14 give me your written proposed voir dire, and also I would like
15 you in advance of final pre-trial to meet together and attempt to
16 agree on a set of jury instructions. To the extent that you're
17 able to agree on the jury instructions, submit one copy of the
18 agreed instructions that is blank both with respect to numbers
19 and authorities. If there are additional instructions you want
20 to request that haven't been agreed on, submit two copies of
21 those, one that's blank and one has -- the one that has both
22 numbers and authorities. Any questions about any of that?

23 MR. HUMPHERYS: Let's see, your Honor. Are you going to
24 work on a 9 to 5 schedule?

25 THE COURT: We'll start most days at 8:30, and we'll

1 break between 4 and 4.30, depending upon how we're doing with
2 witnesses.

3 MR. HUMPHERYS: Your lunch hour is how long?

4 THE COURT: It's just an hour.

5 MR. HUMPHERYS: One hour.

6 THE COURT: From noon to one.

7 MR. HUMPHERYS: I assume you have at least one break in
8 the morning and afternoon?

9 THE COURT: Right.

10 MR. COMBE: How about dispositive motions, Judge? By
11 that day as well?

12 MS. STEINVOORT: On May 10th.

13 THE COURT: Are we still going to do dispositive
14 motions?

15 MR. HUMPHERYS: I thought we --

16 MR. COMBE: I don't know.

17 MR. HUMPHERYS: We don't have any. I think it's all
18 factual.

19 MR. COMBE: If we do we'll get them in before then.

20 THE COURT: Well, if you do we're probably not going to
21 have the trial, then.

22 MS. STEINVOORT: Do you want us to have it all completed
23 in April and argue it in April or --

24 THE COURT: Well, if you're serious about filing
25 dispositive motions, let's do that before we set a trial date.

1 MR HUMPHERYS: I object, your Honor

2 THE COURT I mean didn't you have a cutoff time for
3 dispositive motions in your scheduling order?

4 MR HUMPHERYS: Yes, we did.

5 MR. COMBE: When was that?

6 MR HUMPHERYS: Well, it was quite some time ago, and
7 the only reason we allowed some additional discovery was because
8 of the supplemental production, but it wasn't from the plaintiff,
9 it was from UDOT. The supplemental deposition again was UDOT's
10 deposition of my expert on a supplemental report, so if there
11 wasn't a basis before there isn't a basis now

12 THE COURT: Well, what --

13 MR. COMBE: Your Honor --

14 THE COURT: Tell me what you're thinking. You might
15 have a motion for summary judgment on -- just so I know what
16 we're talking about.

17 MR. COMBE: If there is a basis it would be under
18 discretionary function immunity under the Governmental Immunity
19 Act. I'm not sure the scheduling orders -- I haven't looked at
20 those recently -- talked about a dispositive motion cutoff date.
21 If it did then I don't have a problem, but I'm not sure it did.
22 The part of the basis for that motion would include -- certainly
23 include the expert's testimony which was taken last Friday.

24 THE COURT: Well, none of us have the scheduling order
25 in mind so I guess I'm not going to rule one way or the other on

1 whether or not such a motion is timely. Look at that and if
2 you think you have a motion, we may need to have a further
3 discussion

4 MR. COMBE: Okay.

5 THE COURT. Anything else?

6 MR HUMPHERYS: What about jury questionnaires? This
7 is involving the State of Utah, and during these economic times
8 there could very well be some substantial biases. I think that
9 those need to be ferreted out because we have a risk management.
10 It's not UDOT that would actually be paying for it. So to me, I
11 think it's fairly important that we be able to explore whether
12 people might think that an action against UDOT would mean that
13 it's going to crimp the budget. Sometimes I think that needs to
14 be done in quiet moments as opposed to --

15 THE COURT: I'm not really a fan of the jury
16 questionnaires, and I don't see any reason for one in this case
17 If one thing, it adds another day to the trial There's no way
18 that I've been able (inaudible) to do it without having the jury
19 come in a day earlier to do the questionnaires, which means that
20 the State of Utah has to pay to bring the whole jury panel back
21 on two different days. I'm just -- I don't see any reason to do
22 that in this case.

23 MR. HUMPHERYS: All right. Does the Court allow Counsel
24 voir dire?

25 THE COURT: I don't.

1 MR. HUMPHERYS: Okay. Well, I find that a very
2 significant issue that can taint how a juror's attitude toward a
3 case against UDOT or the State, and I'm very concerned about it

4 THE COURT. Well, I will try and explore it fully.
5 I don't give short shrift to the voir dire that I conduct. It
6 isn't just perfunctory, and I give them -- I give the jurors a
7 chance to express themselves. If you don't think I've fully
8 covered it I'll give you chances to suggest additional questions
9 that I should ask, but that is not the kind of issue that seems
10 to me necessarily requires a questionnaire and the additional
11 expense and time that it would take. Anything else?

12 MR. COMBE: How about a final designation of fact
13 witnesses we intend to use?

14 THE COURT: Rule 26 would say that those need to be
15 done, as well as your exhibit list, three days before trial.
16 So you've got a date for that.

17 MR. COMBE: Okay.

18 MS. STEINVOORT: Just your Honor, this case has
19 stagnated over time, so we don't have any current -- for example,
20 income and medical. We have the medical expenses. Just so that
21 we have the final numbers and final amounts that he (inaudible).

22 MR. HUMPHERYS: We'll get those to you as soon as we
23 can. I think we've given you most of the medical if not all.

24 MS. STEINVOORT: Well, we just want to know the liens we
25 haven't heard about before.

1 MR. HUMPHERYS: Well, the lien was from his present
2 medical carrier, and you've got the medical expenses for that.
3 It's just the medical carrier has a lien against any recovery for
4 that amount.

5 MS. STEINVOORT: Okay.

6 MR. HUMPHERYS: All right. We'll let Rule 26, then,
7 govern the exhibits and fact witness designations.

8 THE COURT: All right. Well, I guess I'll see you for
9 the next time on May 10th.

10 MS. STEINVOORT: Should I prepare an order, your Honor?

11 THE COURT: Yeah, if you would, please.

12 (Hearing concluded)

REPORTER'S CERTIFICATE

STATE OF UTAH)
) ss
COUNTY OF UTAH)

I, Beverly Lowe, a Notary Public in and for the State of Utah, do hereby certify:

That this proceeding was transcribed under my direction from the transmitter records made of these meetings.

That I have authorized Natalie Lake to prepare said transcript, as an independent contractor working under my license, appropriately authorized under Utah statutes.

That this transcript is full, true, correct, and contains all of the evidence and all matters to which the same related which were audible through said recording.

I further certify that I am not interested in the outcome thereof.

That certain parties were not identified in the record, and therefore, the name associated with the statement may not be the correct name as to the speaker.

Natalie Lake
Official Court Transcriber

WITNESS MY HAND AND SEAL this 14th day of December 2010.

My commission expires:
February 24, 2012

Beverly Lowe
NOTARY PUBLIC
Residing in Utah County

ADDENDUM 5

INSTRUCTION NO. 49

UDOT's Liability Cap

As of the date of this accident, injury claims against a governmental agency such as UDOT is limited and capped at the amount of \$532,500 for one individual and \$1,065,000 for all claims arising out of one accident. In other words, any one of the Millers injury claims is limited to an amount no higher than \$532,500, but their total injury claims together cannot exceed \$1,065,000.

This “cap” applies only to injury damages, not to personal property damage.

If you find that UDOT was at fault to any degree, you must still determine the amount of total damages that each of the Millers have suffered. I will make any reductions or adjustments later.

ADDENDUM 6

INSTRUCTION NO. 55

If you make an award of damages against UDOT, you should not concern yourself with how the payment will be made. A payment of an award will not affect roadway services or maintenance. The source of any money that will be used to pay an award must not influence you to award more or less in damages. The award of damages must be based only on the evidence you have heard during the trial. You must not speculate on anything else.