

2010

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

Utah Court of Appeals

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No. 20100629

IN THE UTAH SUPREME COURT

JASON and MELISSA MILLER, individually and as guardians ad
litem for Megan Miller,

Appellants and Cross-Appellees,

vs.

UTAH DEPARTMENT OF TRANSPORTATION,

Appellee and Cross-Appellant.

**UTAH DEPARTMENT OF TRANSPORTATION'S ANSWER BRIEF
ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL**

Appeal from a jury verdict in the Third Judicial District,
Honorable Anthony Quinn presiding.

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LIST OF ALL PARTIES

All of the parties are listed on the cover of this Brief.

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**UTAH DEPARTMENT OF TRANSPORTATION'S ANSWER BRIEF
ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL**

The Utah Department of Transportation (UDOT) submits this Answer
Brief on appeal and Opening Brief on cross-appeal.

JURISDICTION

This Court has jurisdiction over this appeal under Utah Code Ann. §
78A-3-102(3)(j) (West 2009).

ISSUES PRESENTED

On Appeal

I. Accident History

A. Discovery: Federal law prevents discovery of accident history information compiled by UDOT and prerequisite to receive federal highway funds. The trial court precluded the Millers from obtaining accident history information from UDOT or the same protected information that UDOT provided to the University of Utah's Crash Outcome Data Evaluation System because the system is directly related to highway safety improvement programs under federal law. Did the trial court correctly conclude that the accident history information was not discoverable from either UDOT or the University of Utah?

Standard of review

The trial court has broad discretion in discovery matters, but the conclusion that evidence is not subject to discovery due to a statutory privilege presents a question of law reviewed for correctness. *State v. Gomez*, 2002 UT 1201, ¶¶ 11-12, 63 P.3d 72; *Cannon v. Salt Lake Reg'l Med. Ctr., Inc.*, 2005 UT App. 352, ¶ 7, 121 P.3d 74.

Preservation of issue

This issue was raised in the Millers' motions to compel, UDOT's motions for protective order and the University of Utah's motion to quash subpoena. R. 400-409; 249-254; 255-294; 356-361; 377-382; 383-388; 1139-1140; 1143-1302. The trial court addressed the issue in its Order Regarding Plaintiffs' Motion To Compel. R. 1407-1411.

B. Jury instruction: Federal law precluded the Millers from obtaining accident history information from UDOT and the University of Utah, but not from the Utah Department of Public Safety. DPS gave the Millers accident reports from 1998 through 2003, or for five years before the crash. But the Millers did not introduce that evidence at trial. Did the trial court correctly refuse to instruct the jury about the reasons for the lack of accident history before 1998?

Standard of Review

An appeal challenging the refusal to give a jury instruction presents a question of law reviewed for correctness. *Ong Int'l (U.S.A.) Inc. v. 11th Ave. Corp.*, 850 P.2d 447, 452 (Utah 1993). Failure to give requested jury instructions constitutes reversible error only if the omission tends to mislead

the jury to the prejudice of the complaining party or insufficiently or erroneously advises the jury on the law. *See, e.g., Jensen v. Intermtn. Power Agency*, 1999 UT 10, ¶ 16, 977 P.2d 474; *Biswell v. Duncan*, 742 P.2d 80, 88 (Utah App.1987).

Preservation

This issue was preserved in the Millers' objection to the jury instructions. R. 2157-2164.

II. Jury Panel

A. Voir Dire: The trial court has wide discretion respecting jury selection. Here, the trial court declined to give the prospective jurors a written questionnaire based on a lack of pretrial publicity and sensitive issues that jurors might be reluctant to speak about in open court. But the trial court also indicated that if the parties believed that the court's questioning was incomplete, the parties needed only inform the court and request further questions. The Millers did not request further questioning. Did the trial court abuse its discretion when it declined to give the written questionnaire?

Standard of Review

Challenges to the trial court's management of jury voir dire are reviewed for an abuse of discretion. *State v. Piansiaksone*, 954 P.2d 861, 867 (Utah 1998).

Preservation

The Millers' requested the written questionnaire. R. 1428-36, R. 2717; R. 2718. But they failed to preserve this issue by thereafter failing to request further questioning by the court and by accepting the jury panel without objection. R. 2708 p. 103.

B. Jury Instruction: The jury decides factual questions regarding liability based on evidence of duty, breach, and causation. After determining liability, the jury decides the factual question of appropriate damages. Here, the jury found that UDOT was not negligent and never reached the damage issue. Did the trial court correctly refuse to instruct the jury on the immunity act's statutory damage cap?

Standard of Review

An appeal challenging the refusal to give a jury instruction presents a question of law reviewed for correctness. *Ong Int'l*, 850 P.2d at 452.

Preservation

This issue was preserved by the Millers' objection to the jury instructions. R. 2157-2164.

III. Exclusion of Witness

Rule 615 of the Utah Rules of Evidence prevents witnesses from changing their testimony based on other evidence adduced at trial. Before trial, the essential witnesses were deposed. On the second day of trial, after the Millers' first witness, Trooper Carlson, completed his testimony and plaintiff Jason Miller's direct testimony was finished, the Millers moved to exclude witnesses. During the trial, the Millers' counsel did not ask adverse witnesses about what testimony they heard or whether the evidence influenced their own testimony. Did the trial court abuse its discretion when it denied the Rule 615 motion to exclude witnesses?

Standard of Review

A trial court's decision under Rule 615 is reviewed for an abuse of discretion, and "[i]f the challenged practice is not inherently prejudicial, or the [moving party] fails to show actual prejudice, the judgment of the trial court will be affirmed. *State v. Billsie*, 2006 UT 13, ¶ 6, 131 P.3d 239.

Preservation

The Millers' moved to exclude the witnesses on the second day of trial, and the court denied the motion. R. 2709 p. 6. But the Millers failed to preserve the issue because they failed to specifically object to the court's ruling or to inform the trial court of a possible abuse of discretion with any argument or supporting authority. *See Pratt v. Nelson*, 2007 UT 41, ¶ 15, 164 P.3d 66 ("in order to preserve issue for appeal, the issue must be presented to the trial court in such a way that the trial court has an opportunity to rule on that issue.")

On Cross-Appeal

I. UDOT's Duty

UDOT has a nondelegable duty to provide reasonably safe roads for drivers exercising reasonable care. The trial court instructed the jury that

UDOT also has duties to go beyond that to inspect, locate, and remove defects and to take measures to minimize or prevent all dangerous conditions to drivers. Was the jury incorrectly instructed on the law?

Standard of Review

Whether a jury instruction correctly states the law is a question of law that is reviewed for correctness. *Ong Int'l*, 850 P.2d at 452.

Preservation of the Issue

UDOT preserved the issue by objecting to the proposed instruction. R. 2712 p. 71; R. 2175-2178.

DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

23 U.S.C. § 409 is attached as addendum B.

STATEMENT OF THE CASE

Nature of the Case

Jason and Melissa Miller, as individuals and on behalf of their minor child, (the Millers), sued UDOT for negligence in failing to install median barrier on a section of Interstate 15 (I-15). The Millers sustained injuries in a

head-on crash, when another driver, suffering from a medical emergency, crossed the median and collided with the Millers' car. After a five-day trial, the jury returned a no-cause verdict in favor of UDOT. Plaintiffs appealed, and UDOT cross-appealed.

Course of the Proceedings and Disposition Below

In September 2005, the Millers sued UDOT for negligence. *See Miller v. Utah Department of Transportation*, Case No. 050915765. In November 2006, the Millers amended the complaint. R. 167-171. Later that month, UDOT filed its answer. R. 172-175.

Subsequently, UDOT filed a motion for a protective order with a supporting memorandum that sought an order prohibiting disclosure and use of accident history data. R. 176-236. The motion was pursuant to 23 U.S.C. § 409 (attached as addendum B) that prohibits discovery of and admission at trial of accident history information compiled by UDOT in relation to federally funded road construction projects. The Millers opposed the motion, R. 255-294, and UDOT replied. R. 300-306. The trial court issued a protective order prohibiting discovery of the accident history information. R. 400-409.

To avoid the protective order, the Millers subpoenaed the accident history information from: 1) UDOT, R. 249-254; 2) the University of Utah, R. 356-361; and 3) the Utah Department of Public Safety (DPS). R. 377-382, 389-394. The University of Utah moved to quash the subpoena, arguing that section 409, health privacy laws, and government record laws prohibited disclosure of the information. R. 412-429. DPS also moved to quash. R. 722y-722Ah.

In response to the University's motion, the Millers filed a motion to compel production of the accident history information from UDOT, the University and DPS. R. 635-687. UDOT opposed the motion. R. 688-722. And the University responded in support of its motion to quash. R. 722A-722V. The Millers replied in support of their motion. R. 723-897.

After briefing and argument, the trial court denied the motion to compel as against UDOT and the University and kept the protective order in place. R. 911-914. With respect to DPS, the court ordered DPS to provide all the accident reports for the area in question. *Id.*

The Millers filed a third motion to compel and for in camera review. R. 1139-1140. UDOT opposed the motion, R. 1143-1302, and the Millers replied.

R. 1344-1377. The trial court denied the motion to compel,¹ but also gave the parties guidance on what was acceptable argument and action regarding the protected accident history:

Regarding the excluded evidence (accident history), 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 and unavailable to plaintiffs.

R. 1410.

Before trial, both the Millers and UDOT filed pretrial motions in limine. And both parties filed proposed jury instructions and objections. R. 1944-1990; R. 2051-2156. On May 28, 2010, the court signed its order containing the instructions that would be given to the jury. R. 2475-2534.

The trial began on May 24, 2010, and the jury reached a no-cause verdict in favor of UDOT on June 1, 2010. R. 2713 p. 4. The court entered judgment on June 18, 2010, attached as addendum A. The Millers timely appealed on July 8, 2010. R. 2649-2650. UDOT cross-appealed on July 20, 2010. R. 2685-2686.

¹ The trial court did review documents UDOT submitted in camera and found that they were protected by section 409.

STATEMENT OF FACTS

The Millers' factual recitation is not appropriate because they select only some facts and then argue their position on appeal. Yet, the Millers ignore the many facts that support the jury's verdict. Indeed, when reviewing a jury verdict, the evidence and all reasonable inferences drawn from the evidence are viewed in the light most favorable to the verdict. *Harding v. Bell*, 2002 UT 108, ¶ 2, 57 P.3d 1093. The facts are recited accordingly.

Jacquelyn Neal was a Type I diabetic for 43 years. R. 2710 p. 224. She suffered from episodes of severe hypoglycemia or low blood sugar, which resulted in altered mental status. R. 2710 p. 236. Many long-term diabetics, like Neal, exhibit hypoglycemic unawareness, where they suffer mild to moderate low blood sugar symptoms and do not realize it. R. 2710 p. 234.

In March 2002, Neal was weaving in and out of lanes on I-15 and driving very slowly, between 20 and 25 miles an hour. R. 2711 p. 242. A UHP Trooper tried to pull Neal over, and it took him several minutes to accomplish that. When the Trooper approached her, she appeared to be having a medical problem and was conscious but incoherent. R. 2711 p. 243. The Trooper called for medical help and after Neal ate some food, she could

tell the Trooper her name and who to contact, but had no recollection of how she got where she was. R. 2711 p. 167. The Trooper took Neal's drivers' license at that time and it was suspended. R. 2711 pp. 166, 245.

During the time period between 2002 and 2004, Neal had several episodes where she would not get to her expected destination, and her family would go looking for her and find her in another location and not knowing where she was or how she got there. R. 2711 pp. 168-69. Neal had trouble with low blood sugar and would not eat or forget to eat. R. 2711 pp. 184, 186. Her low blood sugar altered her mental state and she "would be unable to function." R. 2711 p. 165. Her family was concerned about her driving. R. 2711 p. 181.

On June 26, 2004, Neal was driving north on I-15. R. 2710 p. 237. She began to drive erratically, weaving in and out of traffic, driving on the shoulder between 80-95 miles per hour. *Id.* UHP was notified and was trying to reach her. Tragically, before UHP reached her, Neal lost control of her car, crossed the median and crashed, head-on, into the Millers' car.

Neal died as a result of her injuries. Jason Miller received critical injuries and Melissa Miller and their minor daughter suffered minor injuries as a result of the crash. At the time of the crash, Neal's judgment was impaired. R. 2710 p. 237.

The crash site is part of 1079 miles of roadway under UDOT's control in the northern part of the state. R. 2709 p. 60. The crash site did not have median barrier.

When federal money helps pay for road work on the interstates, the federal government requires the states to follow federal guidelines regarding construction and design. R. 2710 p. 62. That guideline, the Roadside Design Guide, created by the American Association of State Highway Transportation Officials (AASHTO), is used by Utah, as well as other states. R. 2709 p. 128.

In order to decide whether median barrier should be installed in any section of freeway, engineers consult reference materials, including AASHTO's guide. R. 2709 p. 73. Installing median barrier where it is not necessary is a safety hazard. R. 2709 pp. 121, 125; R. 2711 p. 212. Median barrier is dangerous because it redirects traffic back into the lanes, causing crashes and other property damage. R. 2709 p. 121. The Millers' expert testified that median barrier is the last option because it creates other problems. R. 2710 p. 68. Barrier is the "last resort" because it takes away "clear zone." R. 2710 p. 69. When median barrier is installed in an area, there is an increase in the crash rate in that area. R. 2709 p. 126.

Clear zone allows drivers to regain vehicle control and recover. R. 2709 p. 127. The guidelines direct road design so that a majority of drivers will not

encounter hazards, if they loose control of their car. R. 2709 p. 126. The goal is to have a road with a good clear zone. R. 2711 p. 209.

Accordingly, AASHTO's Roadside Design Guide establishes that whether to install median barrier is really a function of median width and traffic volume. R. 2709 pp. 98, 251; R. 2711 pp. 200, 210. The guide applies to only high-speed, controlled access roadways, like interstate freeways, so speed is already taken into account. R. 2711 p. 211.

In 1995, I-15 underwent a rehabilitation project using, in part, federal funds. The accident site was part of the 1995 project, but median barrier was not installed there. R. 2709 p. 187. Median barrier was not installed or discussed because "there was nothing to mitigate" and the Roadside Design Guide did not require barrier there. R. 2709 pp. 187-89. In 1999, another I-15 project started to the south of the crash site, and continued southward. R. 2709 pp. 188-89.

The median width at the crash site was 40 feet, which is considered "relatively wide," according to the guidelines. R. 2710 p. 65; R. 2710 p. 70; R. 2709 p. 106. The median at the crash site was smooth and allowed for a clear zone and recovery area. R. 2711 p. 213. The guide allows for engineering judgment and evaluation of barrier is site specific. R. 2709 p. 73. In addition to width, other factors are considered such as geometries and

geographical features, R. 2709 pp. 74-76, 117; R. 2710 p. 41; traffic volume, R. 2709 p. 98; R. 2710 p. 200; and accident history. R. 2709 pp. 117-118, 137, 252; R. 2710 pp. 54, 64.

Geographical and geometrical features are those where there are differences in elevation or there is a curve in the roadway. R. 2711 p. 235. Where there are elevation differences and sharper curves, there is an increased need for median barrier. R. 2709 p. 252. The crash site is flat and straight. R. 2709 pp. 227-228. The crash site's geometries were good for the posted speed limit. R. 2710 p. 76. The jury was shown an aerial photograph of the crash site that showed how the median and the roadway looked. Exhibit 8A. A copy of the smaller exhibit given to the jury is attached as addendum C.

Traffic volume is measured by the average daily traffic (ADT). The crash site had the lowest ADT of any other section in the surrounding area. R. 2709 p. 66.

According to AASHTO's guide, UDOT was not required to install barrier at the site – it was strictly optional. R. 2710 pp. 42, 45, 64; R. 2711 pp. 203, 207, 211, 212. And I-15 at the crash site met the Roadside Design Guide standards. R. 2709 pp. 128, 141. Even the Millers' expert stated that I-15 is a good freeway. R. 2710 p. 47. His main criticism of UDOT was his belief

that UDOT did not consider whether to install barrier at the crash site, R. 2710 p. 66, but he had to agree that barrier was strictly optional there. R.2710 pp. 45, 64.

SUMMARY OF THE ARGUMENT

On Appeal:

The Millers received all that they were entitled to, a fair trial. They presented their negligence theory to the jury and had their issues decided. The jury's verdict should not be disturbed. The trial court did not err when it found that federal law precluded discovery of accident history information for the crash site from UDOT or the University of Utah. The court did order DPS to give the Millers accident reports for the area. And the Millers obtained accident history for the crash site for five years before the crash, but neither they nor their expert offered that evidence at trial. Importantly, UDOT never argued or implied to the jury that the lack of accident history before that five year time period meant the crash site was safe. Thus, the trial court correctly refused to instruct the jury on the federal law.

The trial court handled jury selection and voir dire fairly and well within the bounds of its discretion. The trial court told the parties that if

they believed that the court needed to question prospective jurors further, they need only ask the court to do so. The Millers did not, and they accepted the jury panel without objection.

The trial court also correctly refused to instruct the jury on the immunity act's statutory damage cap. Like evidence of insurance, the damage cap is not appropriate as part of liability instructions. And because the jury found that UDOT was not negligent, the jury never reached the damage issue. Thus, any error was harmless.

The Millers failed to preserve their challenge to the trial court's denial of the Rule 615 motion to exclude witnesses. But even if the issue were preserved for review, the trial court did not abuse its discretion when it denied the motion because one witness had already finished testifying and plaintiff Jason Miller's direct examination was complete. The Millers have not shown actual prejudice, and the trial court should be affirmed.

And finally, the cumulative error doctrine does not apply. The evidence solidly supports the verdict, and the Millers have not shown multiple errors. The trial was fundamentally fair. The Millers are not entitled to a favorable verdict.

On Cross-appeal:

If this Court finds some basis upon which to reverse the jury's verdict, this Court should correct the jury instruction on UDOT's duty. UDOT has a duty to provide a reasonably safe road for reasonable and prudent drivers. Nothing more or less. The jury was incorrectly instructed that UDOT's duty was greater. If the case is remanded, the jury should be properly instructed.

ARGUMENT AS APPELLEE

I. The trial was fair.

Perfection in a court of law is unattainable because a multitude of human factors are involved. Like all human endeavors, jury trials are rarely, if ever, conducted without at least some arguable error. But, as has often been stated, a party is entitled to only a fair trial, not a perfect one. *See, e.g. State v. Lamorie*, 610 P.2d 342, 348 (Utah 1980). Here, the Millers had a fair trial, even if the verdict was not in their favor. The Millers had a reasonable opportunity to present their contentions to the jury and have their issues decided. They are not entitled to a favorable decision.

On appeal, the Millers fail to establish that the trial court erred. Moreover, they have waived the opportunity to raise some of the issues about

which they complain. And even if they could show that the trial court did err, they have not shown that they suffered any harm; the Millers must demonstrate more than a mere possibility that the verdict would have been different. But because the jury's verdict is supported by ample evidence, there is no reasonable likelihood that any error affected the verdict. The jury's verdict should stand.

A. Section 409

1. The accident history evidence was not discoverable from UDOT or the University of Utah.

The trial court correctly ruled that federal law precluded discovery of the crash site's accident history from UDOT. Congress provides federal money to states to conduct improvement construction projects on state-maintained roads. *See, generally*, 23 U.S.C., Chapter 1, entitled "Federal-Aid Highways." A state identifies areas of need by compiling accident histories, but states would be reluctant to collect and compile accurate accident information if the information could be used against the states in personal injury actions. Accordingly, Congress remedied this concern by adopting 23 U.S.C. § 409, which makes the histories unavailable in discovery:

[R]eports, 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 148² 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 a Federal or State court proceeding . . .

23 U.S.C. § 409 (2005) (emphasis added) (addendum B).

Section 409 allows states to compile accurate accident information without the risk that the information might be used against them. *Pierce County v. Guillen*, 537 U.S. 129, 147 (2003) (legislation enacted to address “reluctance” to compile accident data because it “would make state and local governments easier targets for negligence actions by providing would-be plaintiffs a centralized location from which they could obtain much of the evidence necessary for such actions”); *see also Duncan v. Union Pac. R. Co.*, 790 P.2d 595, 597 (Utah App. 1990) (“To facilitate candor in administrative

² The 2005 amendment replaced “152” with “148.” At the time of the crash, section 152 applied. Section 152 is the hazard elimination program. 23 U.S.C. § 152. The 2005 Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (“SAFETEA-LU”) legislation replaced section 152 with the Highway Safety Improvement Program, section 148, and more than doubled the funding. §1401(a)(3)(c), 119 Stat. 1144.

evaluations of highway safety hazards, 23 U.S.C. § 409 prevents a court from receiving records of such evaluations into evidence”).

Section 409 enumerates four “purposes” for which a state may compile accident data that gives rise to this protection: i) Section 130 purposes (relating to railway-highway crossings); ii) Section 144 purposes (relating to highway bridge replacement); iii) Section 152 purposes³ (relating to “hazard elimination programs”); and iv) “the purpose of developing any highway safety construction improvement project which may be implemented utilizing Federal-aid highway funds.” 28 U.S.C. § 409. If a state compiles data for any of those four purposes, section 409 protects the data from discovery.

Congress intended section 409’s scope to be broad, and because trial courts were interpreting the statute too narrowly, Congress amended it in 1991 and 1995 and made the statute applicable to pre-trial discovery and added the phrase “or collected” after the word “compiled.” 23 U.S.C § 409; *Pierce County*, 537 U.S. at 134-135. The U.S. Supreme Court explained that the amendments made clear that section 409 protects not just the information a transportation agency generates for section 152 purposes, but also any

³ See *infra* note 2.

information that the agency collects from others and used for section 152 purposes. *Id* at 144.

Here, the Millers sought accident history between 1996-2003 along the subject area of I-15.⁴ In UDOT's hands, this information is absolutely protected by section 409.

And importantly, UDOT's sharing of the accident history information with the University of Utah's Crash Outcome Data Evaluation System (CODES) did not change that result. First, Section 152 provides for state road surveys "to identify hazardous locations, sections, and elements." 23 U.S.C. § 152 (a)(1). CODES' purposes specifically include "describ[ing] factors that contribute to the occurrence of crashes, and crash-related injuries and fatalities." R. 722G. And the contract with UDOT authorizes "use of the databases to conduct research in the areas of injury prevention and control, motor vehicle safety, motor vehicle crashes and driver behaviors, emergency medical services, trauma system evaluation, emergency services utilization." R. 722G. Highway safety and hazard elimination is clearly part

⁴ The Millers never sought accident history for time periods before 1996. R. 249-254; 356-361; 377-382; 383-388; 126-236, so they should not be heard to complain about not having accident history before then.

of that scope. And nothing in section 152 requires UDOT to conduct those safety evaluations and studies alone.

Second, the Governmental Records Access Management Act allows governmental entities to share records when the record “will be used for a purpose similar to the purpose for which the information in the record . . . was obtained” and when “use of the record . . . produces a public benefit . . .” Utah Code Ann. §§ 63G-2-206(2)(a)(ii), (iii) (West 2009). The act also provides that “a governmental entity receiving a record under this section is subject to the same restrictions on disclosure of the record as the originating entity.” *Id.* at § 63G-2-206(6)(a). In this circumstance, section 409 applies equally to the University of Utah as it does to UDOT. The trial court correctly ruled that the accident history was not discoverable from either UDOT or the University of Utah.

But even if the trial court erred, reversal is not required. This Court will not reverse the trial court’s ruling on evidentiary issues unless “it is manifest that the trial court so abused its discretion that there is a likelihood that injustice resulted.” *State v. Tarrats*, 2005 UT 50, ¶ 16, 122 P.3d 581. Here, if the trial court erred, it was harmless. The Millers did obtain accident history for the crash site. The trial court ordered DPS to provide the information. R. 1407-1411. DPS gave the Millers accident reports for 1998

forward, meaning they had crash-site accident history for five years before the crash. Moreover, the Miller's expert had that information and could have testified about it and used it to support his opinions. But the Millers chose to remain silent, and neither they nor their expert offered the accident history into evidence. They must now live with the consequences of that strategic decision.

2. The trial court correctly refused to instruct the jury about section 409.

The trial court carefully considered section 409's ramifications and correctly determined that the jury did not need to be instructed about it. Before jury selection on the first day of trial, the court set clear boundaries for UDOT regarding what UDOT could and could not argue or imply to the jury, if it did not want the Millers' proposed jury instruction about section 409 to be given:

THE COURT: Prior to [1998, the date of the accident reports] we simply don't know anything one way or the other. And so, it would be arguing off the record for UDOT to suggest that the absence of accidents prior to that time is evidence of safety, because there simply is no evidence one way or the other. We simply don't know one way or the other.

R. 2708 at p. 9-10. The Millers' counsel reiterated the Millers' concern that UDOT would invite "the jury to draw the inference that since the [Millers]

haven't come forward with more accidents than they have, therefore they don't exist." R. 2708 p. 11.

The Court understood the concern and took it seriously, stating that such an argument would be unfair as it related to a time period when there was no information, R. 2708 p. 11, "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." R. 2708 p. 16. The court forcefully warned UDOT at least twice that UDOT risked "opening the door to me having to give some instruction with respect to [UDOT's compilation of accident history] if you suggest in any way to the jury that there was a clean accident history prior to [1998]." R. 2708 p. 16, 17.

With that clear warning, UDOT did not argue, suggest, or imply that the crash site was safe because there was no accident history for the site prior to 1998. Accident history itself was not an unfair trial topic; only accident history prior to the time that the Millers had it. In other words, UDOT did not open the door to the Millers' proposed jury instruction by the mere mention of the words "accident history." And, the few mentions of the term

throughout the trial did not imply to the jury that the crash site had no accident history.⁵

For example, UDOT engineer Duersch testified that before a median barrier project is approved UDOT analyzes “geometries, alignment, traffic volumes, median widths, crash history, all of those things.” R. 2709 p. 117-118. And the Millers introduced UDOT engineer Kennison’s deposition testimony into evidence:

Q What about accident history, did that play a role in determining whether there should be median barriers?

A. We always looked at the accident history, but I can’t remember how that – that plugged into the criteria.

Q. You can’t remember how?

A. But I can’t remember how that plugged into the criteria.

R. 2709 p. 252-53. UDOT’s counsel read the applicable section on median barriers from the Roadside Design Guide with the Millers’ expert, Mr.

Ruzak.⁶ AASHTO created the guide, and the federal government requires the

⁵ The Millers introduced the term “accident history” at trial as well. Mr. Ruzak mistakenly testified that he obtained accident history from UDOT’s website. R. 2710 p. 34. The website has average daily traffic information, not accident history. The Millers did not correct that testimony.

⁶ The Millers did not object or request clarification from the Judge that UDOT opened the door with either this testimony or the Duersh testimony.

guide to be used on all federal highway projects. R. 2710 p. 62. The 1989 guide states that “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 upon the cross-median accident history.” R. 2710 p. 63-64. It was not improper for UDOT to have the Millers’ expert read the guideline that he opined UDOT violated. Reading the guideline did not imply to the jury that the crash site did not have any accident history before 1998.⁷

Nor did UDOT’s counsel open the door in closing argument. Again, all that counsel did was to read the relevant provision of the Roadside Design Guide. Counsel did not argue that a lack of accident history at the crash site meant that the road was safe. The trial court was in the best position to determine whether UDOT crossed the court’s clearly delineated boundaries. *See, e.g., Donohue v. Intermtn. Health Care, Inc.*, 748 P.2d 1067, 1068 (Utah 1987); *Florez v. Schindler Elev. Corp.*, 2010 UT App. 254, ¶ 47, 240 P.3d 107. UDOT did not open the door to the section 409 instruction, and the trial court

⁷ Except for general mention about accident history, the Millers’ counsel admitted that UDOT did not talk about accident history. R. 2712 p. 68.

did not err by refusing to give it. The instruction was proper only if UDOT argued that the Millers' lack of accident history prior to 1998 established that the road was safe. Because that did not happen, there was no error.

But even if the jury should have been told why there was no accident history prior to 1998, no prejudice occurred requiring a new trial. First, as explained, the Millers could have introduced accident history from 1998 forward, but did not. Their strategic decision cannot be grounds for reversing the jury's verdict.

Second, any error is "sufficiently inconsequential" that there is no reasonable likelihood that the jury's verdict would have been different if the jury knew that federal law prevented the Millers from access to accident history for the crash site before 1998. *Price v. Armour*, 949 P.2d 1251, 1256 (Utah 1997) (harmless error standard). The evidence at trial solidly supported the jury's verdict.

The evidence established that UDOT provided a reasonably safe road for reasonably safe and prudent drivers. Sadly here, Neal was neither reasonable nor prudent. She was on notice that her blood-sugar levels were not well controlled and that her low blood sugar often altered her mental status. R. 2710 p. 236; R. 2711 p. 165. She had her drivers' license

suspended in the past for impaired driving, and was found lost and incoherent several times before the tragic crash here. R. 2711 p. 166, 245; R. 2711 p. 168-69.

In addition, trial evidence established that the median at the crash site was a relatively wide 40 feet. R. 2710 p. 65. It gave drivers a good clear zone, allowing them to regain control of their cars. R. 2709 p. 127; R. 2711 p. 213. This section of I-15 was flat and straight. R. 2709 p. 76. It did not have differences in either vertical or horizontal elevation. R. 27109 p. 76. It had the lowest average daily traffic of any section of I-15 in the area. R. 2709 p. 92. *See also* addendum C.

The testimony at trial was also that median barriers create dangers of their own because they redirect traffic back, causing vehicle and other damage. R. 2709 p. 121. Putting median barrier in an area where it is not necessary is a safety hazard. R. 2709 p. 121, 125. Indeed, according to the Millers' expert, median barrier is the last resort because barrier takes away clear zone. R. 2710 p. 68-69. And all of the testimony at trial indicated that the Roadside Design Guide did not require median barrier at the crash site. R. 2710 pp. 42, 45, 64; R. 2711 pp. 203, 207, 211-212. Even the Millers' expert admitted that the road was well-designed. R. 2710 p. 47.

The evidence solidly supports the verdict. Any error in not instructing the jury on section 409 was harmless and does not require a new trial.

B. The jury panel

1. The voir dire process was fundamentally fair and well within the court's discretion.

The trial court did not abuse its discretion when it declined to submit a questionnaire to the prospective jurors. The court has wide discretion respecting how to conduct jury selection, and abuses that discretion only when “considering the totality of the questioning, counsel [is not] afforded an adequate opportunity to gain the information necessary to evaluate jurors.”

Taylor v. State, 2007 UT 12, ¶ 70, 156 P.3d 739 (quotation omitted). Voir dire has two purposes: 1) to detect actual juror bias; and 2) to allow parties to intelligently exercise peremptory challenges. *See, e.g., State v. Worthen*, 765 P.2d 839, 845 (Utah 1989); *Evans v. Doty*, 824 P.2d 460, 462 (Utah App. 1992). In this case, the court's oral questioning of prospective jurors satisfied voir dire's purposes.

First, the court explained that a jury questionnaire was unnecessary because there was neither a concern about pre-trial publicity nor particularly sensitive information that people might be reluctant to talk about in open

court during the course of voir dire. R. 2718 p. 10-11. The trial court was well within the bounds of its discretion to refuse the Millers' proposed jury questionnaire when "nothing about this case raises difficult issues to address in typical oral voir dire." R. 2718 p. 11.

The court told the parties that its voir dire was not perfunctory and that the court tried to be "probing" and give jurors a chance to express themselves. R. 2718 p. 12; R. 2717 p. 11. That said, the court made clear that if the parties wanted the court to ask more questions, all they needed to do was ask. "If I don't cover something adequately enough, if you tell me at the time, I'll try again." R. 2718 p. 12. And "if you don't think I've fully covered it, I'll give you a chance to suggest additional questions that I should ask." R. 2717 p. 11.

Further, the court indicated that if the Millers wanted the court to address issues about taxpayer funds and UDOT's ability to pay a potential judgment, the Court "would not leave it alone." R. 2718 p. 33-34. The court said that it would review the Millers' proposed jury questionnaire and would ask the potential jurors questions about that in any way the Millers wanted the questions asked. *Id.*

The court's oral questioning was sufficient. The court asked the prospective jurors about their feelings regarding the state of Utah as a

defendant. R. 2708 p. 57-58. Four people raised their hands, and none served on the jury. The court also questioned the panel about tort reform, whether lawsuits were appropriate to resolve disputes, and whether the panel believed that there was a lawsuit crisis. R. 2708 p. 82-83. Of the potential jurors that indicated that they had been exposed to tort reform propaganda, Andrew Barrett, indicated that he would be influenced by it and he was stricken for cause. R. 2708 p. 84. The court's questioning allowed the parties to adequately select a jury. The court did not abuse its discretion here.

But even if the court should have given the prospective jurors the Millers' written questionnaire, the Millers have waived any challenge to the jury panel and voir dire. First, despite the court's clear invitation to do so, the Millers never asked the Court to conduct further questioning or to ask follow up questions. Nor did the Millers provide the court with other possible questions for the court to ask. The Millers never gave the court any indication that the court's voir dire was insufficient or just perfunctory. In fact, before voir dire began, the Millers' counsel stated, regarding the issues of taxation and liability consequences, that "we would ask the Court **not** to address that unless we come up and approach the bench." R. 2708 p. 21. If that bench conference took place, it is not part of the record.

Second, the Millers stated that although they had some issues with potential jurors, those issues were of no consequence because the Court struck all of those potential jurors for cause. R. 2708 p. 105-06. And the Millers accepted the jury without objections. R. 2708 p. 103. Where a party affirmatively expresses assent to the jury's composition, without objection, that party is precluded from raising the jury's composition on appeal. *State v. Lee*, 2006 UT 5, ¶ 18, 128 P.3d 1179.

Voir dire, like every other part of a trial, is adversarial. The “brilliance” of our adversarial system is “that each party is responsible to try to secure a jury that is favorable to the party's interests.” *Lee*, 2006 UT 5 at ¶ 19. The trial court has the responsibility to ensure that voir dire is fair, and Judge Quinn recognized that when he stated that he was “the only person in the room interested in picking an impartial jury.” R. 2718 p. 12. But our adversarial system requires the trial court to respect the parties' trial strategies.” *Lee*, 2006 UT 5 at ¶ 19. Here, the Millers did not avail themselves of the opportunity to have the court ask further questions, and they accepted the jury without objection. R. 2708 p. 103. The trial court had no obligation to second-guess the Millers' silence because the voir dire process was fundamentally fair. Nor did the court abuse its discretion in how it conducted voir dire and jury selection.

2. The trial court correctly refused to instruct the jury on the statutory damage cap.

The trial court correctly refused to instruct the jury on the governmental immunity act's damage cap. *See* Utah Code Ann. § 63G-7-604 (1)(a) (West 2009). The jury's task was to determine whether UDOT breached a duty of care it owed the Millers and if that breach caused the Millers' damages. The damage cap instruction – if part of the liability instructions – would be prejudicial. The instruction would encourage the jury to decide liability on matters outside of the evidence. In other words, it would allow the jury to determine liability based on something other than proof of a breach of a legal duty and causation because the damage cap has nothing to do with duty, breach, or causation.

Conceptually, it is the same reason that evidence of insurance is not admissible on the issue of negligence or liability. *See* Utah R. Evid. 411. The jury determines whether there is liability and then damages based on the evidence. If necessary later, the court can reduce the award as a matter of law. It is the jury's role to determine the facts; it is not the jury's role to determine the legal consequences of its factual findings. *Judd v. Drezga*, 2004 UT 91, ¶ 34, 103 P.3d 135 (“questions of fact are distinctly within the

jury's province," but "it is up to the court to conform the jury's finding to the applicable law.")

If, on the other hand, the cap instruction were a necessary part of the damage instructions and it were error not to give the instruction, the error was harmless. The jury never reached the issue of damages because it found UDOT was not negligent. The jury was specifically instructed that "if you decide that the Millers are not entitled to recover damages, then you must disregard these instructions." R. 2577; R. 2712 p. 86. "In the absence of the appearance or something persuasive to the contrary, we assume that the jurors were conscientious in performing their duty, and that they followed the instructions of the court." *State v. Hodges*, 30 Utah 2d 367, 370, 517 P.2d 1322 (1974); *Ortiz v. Geneva Rock Prod., Inc.*, 939 P.2d 1213, 1216 (Utah App. 1997). Due to the lack of negligence on UDOT's part, "the issue of damages became irrelevant. Thus the failure to give the requested instruction, if error, was harmless." *King v. Fereday*, 739 P.2d 618, 622 (Utah 1987).

C. Witness exclusion

Rule 615 of the Utah Rules of Evidence governs the exclusion of witnesses at trial. Utah R. Evid. 615. It operates to prevent witnesses from changing their testimony based on evidence they hear from other witnesses.

Billsie, 2006 UT 13 at ¶ 10; *see also State v. Cramer*, 2002 UT 9, ¶ 31, 44 P.3d 690 (Rule 615 is “directed toward preventing witnesses from changing their testimony based on other evidence *adduced at trial*.”) (emphasis in original); *Astill v. Clark*, 956 P.2d 1081, 1087 (Utah App. 1998) (purpose behind excluding witnesses is to prevent witnesses from being influenced or tainted).

Rule 615 states that the “court shall order witnesses excluded so that they cannot hear the testimony of other witnesses,” but the rule does not divest a trial court’s discretion in the rule’s application. *Billsie*, 2006 UT 13 at ¶ 8. And contrary to the Millers’ unsupported assertion, prejudice is never presumed when the court denies a motion to exclude witnesses.⁸ In order for a new trial, the party must show “actual prejudice” or the trial court will be affirmed. *Id.* at ¶ 6.

⁸ Even the Millers’ cases, advanced for the proposition that there is no time frame for making a request under rule 615, do not find prejudice rising to the level of requiring a new trial. *See, e.g., State v. Larson*, 933 P.2d 958, 963-64 (Or. 1997) (even though court erred by denying motion based on timing of motion, new trial not warranted because no prejudice shown); *William L. Comer Family Equity Pure Trust v. C.I.R.*, 958 F.2d 136, 140-41 (6th Cir. 1992) (reversal not required because no prejudice shown, evidence of tailoring was only that witness heard others testify); *State v. Edwards*, 739 P.2d 1325, 1330-31 (Ariz. App. 1986) (late timing of motion did not require new trial, but if prosecution had intentionally delayed then reversal might be warranted).

To establish prejudice, a party must show that the objectionable witness testified to critical facts and further, that they actually revised their testimony upon hearing earlier testimony. *See Id.* at ¶ 10 (new trial not required because there was no implication or suggestion that mother changed her testimony because of other evidence adduced at trial). For example, in *State v. Beltran-Felix*, the last witness for the prosecution was present during trial. 922 P.2d 30, 33 (Utah App. 1996). The defendant objected to the witness's presence in the courtroom. The Court of Appeals found that the defendant failed to meet his burden of showing the witness's presence prejudiced him to the extent that he should be granted a new trial. *Id.* "Defendant must show more than the *mere possibility* that [the witness] conformed her testimony to that of the other witnesses because . . . defendant bears the burden of proof in establishing he was denied a fair trial." *Id.* at 35. (emphasis added) (quoting *State v. Boone*, 820 P.2d 930, 932 (Utah App. 1991)). The defendant failed to meet his burden because "[t]here is no suggestion that the critical elements of the case turned upon [the witness's] testimony, or that any of [the witness's] testimony was revised to conform with that of the earlier witnesses." *Id.*

Similarly, in *U.S. v. Prichard*, 781 F.2d 179, 183 (10th Cir. 1986), the court found no prejudice when a witness, who spoke to other witnesses

testifying, just testified to “simple objective facts,” like the defendant’s license plate number, the make of his car and the bank’s insurance. The Tenth Circuit reasoned that “[t]his type of information ordinarily is not subject to tailoring, and, if it were, it could have been exposed easily.” *Id.* Actual prejudice, for purposes of Rule 615, is a high standard and only in the rare case does the court find prejudice that justifies a new trial.⁹

Here, the Millers have not preserved the issue for appeal. The Millers attempted to invoke the exclusionary rule on the second day of trial. R. 2709 p. 6. But when the trial court denied the motion, they did not object. Nor did they suggest that the court was in error, possibly abusing its discretion, or that the court should weigh factors to properly decide the motion.¹⁰ The

⁹ In *U.S. v. Jackson*, the Second Circuit outlined six helpful factors for district courts to consider in making a Rule 615 ruling. 60 F.3d 128, 135 (2d Cir. 1995). The factors that might usefully inform the exercise of the trial court’s discretion are: 1) how critical the testimony in question is, that is, whether it will involve controverted and material facts; 2) whether the information is ordinarily subject to tailoring, and whether cross-examination or other evidence would bring that to light; 3) to what extent the testimony in question is likely to encompass the same issues as that of other witnesses; 4) the order in which the witnesses will testify; 5) any potential for bias that might motivate the witness to tailor testimony; and 6) whether the witness’s presence is “essential” rather than simply desirable.

¹⁰ In *Menard v. City of Carlisle*, 834 S.W.2d 632, 633 (Ark. 1992), cited by the Millers, the court declined to address the defendant’s argument that the trial court erred when it denied a Rule 615 motion because the defendant failed to let the trial court know that a weighing of factors was required and

failure to specifically object or to introduce relevant legal authority denied the trial court the opportunity to address the alleged error and to correct it. *See Pratt*, 2007 UT 41, ¶ 15. The issue cannot be reviewed on appeal.

But even if the issue were properly preserved, the Millers fail to show either that the trial court abused its discretion or actual prejudice arising from the motion's denial. The Millers were on notice that witnesses were in the courtroom. UDOT's counsel mentioned it in her opening statements. R. 2708 p. 146. The court noted it is his ruling when he denied the Rule 615 motion. R. 2709 p. 5. The court further reminded the Millers that no one had invoked the exclusionary rule at the beginning of trial, and that the rule's application is not automatic. *Id.* By the time the Millers moved to exclude witnesses, they had started their case-in-chief. Trooper Carlson completed his testimony, and Jason Miller's direct examination was finished. The trial court noted that waiting to invoke the rule after testimony began was unusual and denied the motion. Under the circumstances, the court did not abuse its discretion.

Neither have the Millers shown the required actual prejudice for a reversal of the trial court's ruling. *Billsie*, 2006 UT 13 at ¶ 6 (if "the

that the court was possibly abusing its discretion.

defendant fails to show actual prejudice, the judgment of the trial court will be affirmed.” Rule 615’s purpose was adequately satisfied here. First, in a civil trial like this one, most all witnesses, certainly the crucial ones, have been deposed. If a witness tailors testimony, those changes are easily exposed. *See Prichard*, 781 F.2d at 183. This case was straightforward – the claims and defenses no mystery. There were no intricate time lines or disputed interactions involved. The witnesses testified to simple objective facts, and the likelihood of tailoring or influence by other evidence adduced at trial negligible.

Second, except for their own expert,¹¹ the Millers never asked any witness if they were present in the courtroom, who they heard testify, what they heard, or how it might have influenced the witness’s testimony. Based on the record here, the Millers were not concerned with witnesses in the courtroom or the possible tailoring of testimony. They certainly neither allege nor imply any particular witness changed his or her testimony based on evidenced adduced at trial.

¹¹ Rule 615 exempts witnesses who are essential to the party’s case from exclusion. Experts often modify or adapt their opinions based on testimony at trial. *State ex rel. L.D.S. v. Stevens*, 797 P.2d 1133, 1139 n. 3 (Utah App. 1990).

In Utah, “the trial judge has broad latitude to control and manage the proceedings and preserve the integrity of the trial process.” *Billsie*, 2006 UT 13 at ¶ 8 (quotation omitted). Even if the trial court were wrong to base denial of a Rule 615 motion based on timeliness alone, the Millers bear the burden of showing actual prejudice – it is not presumed. *Id.* at ¶ 12. Having failed to do that, the trial court’s ruling should be affirmed.

D. The cumulative error doctrine does not apply.

The cumulative error doctrine requires reversal “only if the cumulative effect of the several errors undermines . . . confidence that a fair trial was had.” *State v. Dunn*, 850 P.2d 1201, 1229 (Utah 1993) (citations omitted); *State v. Alonzo*, 932 P.2d 606, 617 (Utah App. 1997), *affirmed by* 973 P.2d 975 (Utah 1998).

Although the Millers have alleged several errors, as explained above, even if there were errors in the trial, they have not established that any substantial errors were committed that could collectively result in any harm to them. *See State v. Rammel*, 721 P.2d 498, 501-02 (Utah 1986). And, the Millers cannot claim cumulative error when they waived their objections or invited any possible error. Moreover, as discussed above, the evidence at trial

was sufficiently strong that even if none of the alleged errors had occurred, the jury would have found for UDOT.

ARGUMENT AS APPELLANT

UDOT's issue on cross-appeal is ripe only if this Court determines that the jury's verdict must be reversed and the case remanded for a new trial.

I. The court's instruction on UDOT's duty was wrong.

The court improperly instructed the jury on UDOT's duty. Instruction 27, offered by the Millers, provided as follows:

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

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

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

In contrast, a department may be able to use less care because it would understand that less danger is involved.

R. 2570; R. 2712 p. 83.

The Millers did not cite any authority for the instruction. *See* R. 2111. Nor is there support for subparts a and c in Utah law. Subpart b of the instruction is correct. UDOT has a nondelegable duty to provide roads that are reasonably safe for drivers using reasonable care. *Bramel v. Utah State Rd. Comm'n*, 24 Utah 2d 50, 465 P.2d 534, 536 (1970); Utah Code Ann. § 72-1-201 (West 2004); *see also* addendum D, UDOT's proposed instruction on duty. Indeed, UDOT "shall plan, develop, construct, and maintain state transportation systems that are safe, reliable, environmentally sensitive and serve the needs of the traveling public" Utah Code Ann. § 72-1-201 (4). But it is not an insurer of the public's safety. *See Bramel*, 465 P.2d at 536.

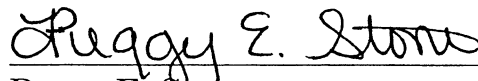
Subparts a and c instruct the jury that UDOT has additional duties that have no support and unnecessarily confuse the jury. Those subparts incorrectly instruct the jury that UDOT must take the extra steps to inspect every roadway to search out and find defects and all dangerous conditions. UDOT is obligated only to fix problems that it knows or reasonably should know about. UDOT's duty is to provide reasonably safe roads for the reasonable and prudent driver. Nothing more or less.

If this Court should reverse the case and order a new trial, the jury should be properly instructed on UDOT's duty.

CONCLUSION

The Millers received a fair trial. The trial court's rulings were well-considered and reasoned. The Millers have shown no errors in those rulings, have waived objection to some rulings, and to the extent that they have shown error, the error was harmless and does not require a new trial. The evidence at trial solidly supports the jury's verdict. But should this Court find some basis to reverse the jury's verdict, the jury should be properly instructed on UDOT's duty to provide a reasonably safe road for reasonable and prudent drivers. The instruction the jury received at trial was wrong.

RESPECTFULLY submitted this 10th day of March, 2011.

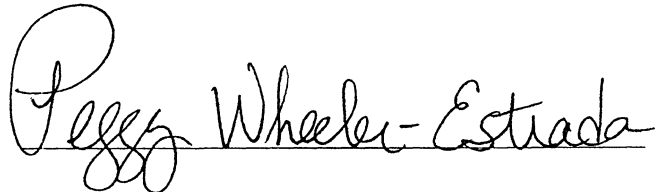


Peggy E. Stone
Assistant Utah Attorney General
Attorney for Appellee and Cross-Appellee
UDOT

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of March 2011, two true and correct copies of the foregoing, **UTAH DEPARTMENT OF TRANSPORTATION'S ANSWER BRIEF ON APPEAL AND OPENING BRIEF ON CROSS-APPEAL**, and an electronic copy of the brief in pdf format on CD, were sent by United States mail, first class, postage prepaid, to the following:

L. RICH HUMPHERYS
ALAIN C. BALMANNO
CHRISTENSEN & JENSEN
15 W S TEMPLE STE 800
SALT LAKE CITY UT 84101

Peggy Wheeler-Estrada

ADDENDUM A

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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.

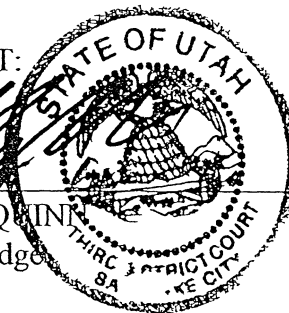
2. Defendant shall recover from Plaintiffs their allowable costs in this action, subject to Rule 54 (d)(1), Utah Rules of Civil Procedure.

3. This action shall be dismissed on the merits.

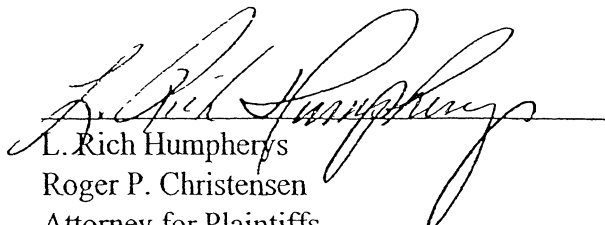
DATED this 17 day of June, 2010.

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 B

23 U.S.C.A. § 409



Effective: August 10, 2005

United States Code Annotated Currentness
Title 23. Highways (Refs & Annos)



Chapter 4. Highway Safety (Refs & Annos)



§ 409. Discovery and admission as evidence of certain reports and surveys

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 148 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 a Federal or State court proceeding 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.

CREDIT(S)

(Added Pub.L. 100-17, Title I, § 132(a), Apr. 2, 1987, 101 Stat. 170, and amended Pub.L. 102-240, Title I, § 1035(a), Dec. 18, 1991, 105 Stat. 1978; Pub.L. 104-59, Title III, § 323, Nov. 28, 1995, 109 Stat. 591; Pub.L. 109-59, Title I, § 1401(a)(3)(C), Aug. 10, 2005, 119 Stat. 1225.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1987 Acts. Senate Report No. 100-4 and House Conference Report No. 100- 27, see 1987 U.S. Code Cong. and Adm. News, p. 66.

1991 Acts. House Report No. 102-171(Parts I and II) and House Conference Report No. 102-404, see 1991 U.S. Code Cong. and Adm. News, p. 1526.

1995 Acts. House Report No. 104-246 and House Conference Report No. 104- 345, see 1995 U.S. Code Cong. and Adm. News, p. 522.

2005 Acts. House Conference Report No. 109-203, see 2005 U.S. Code Cong. and Adm. News, p. 452.

ADDENDUM C



ADDENDUM D

INSTRUCTION NO. _____

UTAH DEPARTMENT OF TRANSPORTATION'S DUTY

The Utah Department of Transportation is not an insurer of the safety of persons using a public road, nor, is it required to provide a road free of all defects. Under the law, however, the Utah Department of Transportation owes a duty to the motoring public to provide a road that is reasonably safe for use for drivers exercising reasonable care.

References:

Edmunds, et al. v. Germer, 12 Utah 2d 215, 364 P.2d 1015 (1961)

Bramel, et al. v. Utah State Road Commission, 24 Utah 2d 50, 465 P.2d 534 (1970)

Emelle v. Salt Lake City, 54 Utah 360, 181 P. 266 (1919)

de Villiers v. Utah County, et al., 882 P.2d 1161 (UT App. 1994)