

2004

Yvonne Day v. U-Systems, Inc. : Brief of Appellee

Utah Court of Appeals

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Kara L. Pettit; Julianne P. Blanch; Derke Williams; Snow, Christensen and Martneau; Attorney for Appellant.

James R. Hasenyager; Hasenyager and Summerill; Attorney for Appellant.

Recommended Citation

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YVONNE DAY,
Plaintiff and Appellant, ,
vs.
U-SYSTEMS, INC.,
Defendant and Appellee.

Trial Case No. 990601744
Court of Appeals Case No. 20040697

UTAH COURT OF APPEALS
BRIEF
UTAH
APPEALMENT
N.P.O.
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DOCKET NO. 2004 0697

IN THE UTAH COURT OF APPEALS

YVONNE DAY,	:	
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Plaintiff and Appellant, ,	:	Trial Case No. 990601744
vs.	:	Court of Appeals Case No. 20040697
U-SYSTEMS, INC.,	:	
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Defendant and Appellee.	:	
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BRIEF OF APPELLEE U-SYSTEMS, INC.

Appeal from Second District Court, Davis County
Judge Thomas L. Kay

Kara L. Pettit, USB 8659
Julianne P. Blanch USB 6495
Derek Williams USB 9864
SNOW, CHRISTENSEN & MARTINEAU
10 Exchange Place, Suite 1100
Salt Lake City, UT 84111
Attorney for Appellee
Telephone: (801) 521-9000

James R. Hasenyager
HASENYAGER & SUMMERILL
1004 24th Street
Ogden, Utah 84401
Telephone: (801) 621-3662
Attorney for Appellant

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I. STATEMENT OF JURISDICTION

This court has jurisdiction pursuant to the Utah Supreme Court's order of transfer dated August 16, 2004 and Utah Code Annotated § 78-2a-3 (2004).

II. ISSUES PRESENTED AND PRESERVATIONS OF ISSUES BELOW

Appellant Yvonne Day ("Ms. Day" or "Appellant") presents two issues for review. First, she alleges the trial court erred in excluding from evidence the construction contract between defendant U-Systems, Inc. ("U-Systems" or "Appellee") and the federal Government. Second, Ms. Day contends the court erred by precluding Ms. Day's construction expert from testifying. Brief of Appellant, p. 1. U-Systems does not object to the way Ms. Day has framed the issues for appeal but notes that Ms. Day has not shown where each issue has been preserved in the record pursuant to Utah Rule of Appellate Procedure 24(a)(5)(A). Nonetheless, because significant pretrial hearings were held on both issues, U-Systems does not contend that the issues were not properly preserved for appeal.

III. STANDARDS OF REVIEW

1. Ms. Day stated in her brief that a trial court's decision excluding the construction contract from evidence was reviewed "for correctness, granting no deference." She then cites to *Ault v. Holden*, 2002 UT 33, 44 P.3d 781, for support. *Ault v. Holden* does not involve an appellate court's review of a trial court's decision to admit or exclude evidence. Although Ms. Day is correct that a trial court's decision to admit or

exclude evidence is a legal question, she is incorrect that this decision is reviewed by an appellate court for correctness. “The admissibility of an item of evidence is a legal question. However, in reviewing a trial court’s decision to admit or exclude evidence, we allow for broad discretion.” *Jensen v. Intermountain Power Agency*, 1999 UT 10, ¶12, 977 P.2d 474. The Supreme Court has further stated that “[t]he trial court has a great deal of discretion in determining whether to admit or exclude evidence, and its ruling will not be overturned unless there is an abuse of discretion.” *Gorostieta v. Parkinson*, 2000 UT 99, ¶14, 17 P.3d 1110.

2. As Ms. Day correctly noted, a trial court’s decision to exclude an expert witness from testifying is reviewed for an abuse of discretion. *See Anton v. Thomas*, 806 P.2d 744, 746 (Utah Ct. App. 1991).

IV. DETERMINATIVE PROVISIONS, STATUTES AND RULES

Utah Rule of Evidence 702, while not solely determinative of the issues, is applicable to this appeal. It is set forth in footnote 4 of this brief.

V. STATEMENT OF THE CASE

A. Nature of the Case, Parties, Course of the Proceedings and Disposition Below.

Ms. Day was a construction inspector employed by the federal government who worked at Hill Air Force Base (HAFB). (R. 641 at 67). U-Systems was a general contractor who, at the time of Ms. Day’s accident, was employed by the federal government to build housing units at HAFB. (R. 641 at 77). Ms. Day brought suit

against U-Systems, Precision Drywall, the sheetrock subcontractor, and Capitol Building Materials, the company that delivered the sheetrock and propped it against the wall. (R. 35). Ms. Day brought the lawsuit after she was injured at a construction site when she and a co-worker pulled a stack of sheetrock away from the wall to look behind it. The sheetrock became imbalanced and she fell as she was backpedaling away from the falling sheetrock. (R.36).

One of the defendants, Capitol Building Materials, later filed for bankruptcy and the claims against it were stayed. (R.105). Just before trial, Ms. Day settled with Precision Drywall and it was dismissed from the case. (R.275). Ms. Day's negligence claim against U-Systems was tried to a jury on April 19-21, 2004. (R.641-643). The jury concluded that U-Systems was negligent, but that its negligence was not the proximate cause of Ms. Day's injuries. (R. 533). Ms. Day now appeals two of the trial court's discretionary pretrial rulings.

B. Statement of Facts.

In November 1997, Ms. Day was employed as a construction inspector at Hill Air Force Base (HAFB). (R. 641 at 67). Her responsibilities as an inspector included verification that building codes were being met during different phases of construction. (R. 641 at 68). In November 1997, one of the projects on HAFB was the renovation of a number of housing units. (R. 641 at 70). U-Systems was the general contractor awarded the contract to renovate the HAFB housing units. (R. 641 at 77).

Precision Drywall was a subcontractor responsible for hanging the sheetrock in the renovated housing units. It was the responsibility of Precision Drywall to contact the sheetrock supplier, Capitol Building Materials, order the sheetrock, and set a delivery date. (R. 642 at 191-92). On November 14, 1997, employees of Capitol Building Materials delivered sheetrock to two units titled 3126 A & B. (R. 642 at 217). The Capitol Building employees carried the sheetrock into both units and placed it against various walls, depending on the length of the sheetrock pieces. The sheetrock was placed on end leaning or propped up against the wall. (R. 642 at 220-21). It was the standard practice of Capitol Building Supply to lean sheetrock up against the walls in unoccupied housing units such as these. (R. 642 at 220-21). Capitol Building Supply employees did not talk with anyone from U-Systems on the day the sheetrock was delivered. (R. 642 at 222).

At some point prior to Ms. Day's accident, a representative of U-Systems called Al Collins, the project manager for this housing renovation, and requested an inspector come out to building 3126 for an insulation inspection prior to Precision Drywall hanging the sheetrock. (R. 641 at 83). Ms. Day was assigned by Mr. Collins to inspect these units. (R. 641 at 212). Accompanying Ms. Day on this inspection was Lareen Parkinson, a new inspector who accompanied Ms. Day for training purposes. (R. 641 at 213). After inspecting side A of unit 3126, in which they observed sheetrock propped against the walls, Ms. Day and Ms. Parkinson entered side B. After entering side B, Ms. Day noticed

a problem with the insulation in one of the walls. They also observed approximately eight sheets of 4'x15'x1/2" sheetrock boards leaning against this wall. Ms. Day told Ms. Parkinson they needed to see what was going on behind the sheetrock. (R. 641 at 130-31). With Ms. Parkinson on one end of the 15 foot sheets of sheetrock, and Ms. Day on the other end, Ms. Day tried looking over the sheetrock and down the wall behind it. While doing this, Ms. Parkinson pulled the sheetrock away from the wall, believing that Ms. Day was also pulling the sheetrock away from the other end. (R. 641 at 135-36). As the sheetrock was pulled back, it became imbalanced. Ms. Parkinson successfully moved out of the way of the falling sheetrock, but Ms. Day fell to the ground striking her head and sustained other injuries. (R. 641 at 138).

Prior to trial in this matter, U-Systems filed a Motion in Limine to Exclude Testimony of Plaintiff's Proposed Expert Ken Todd. (R. 169). In a separate motion, U-Systems also sought to limit questioning about requirements within U-Systems contract with HAFB. (R. 280). On December 10, 2003, at a hearing on the Motion in Limine regarding Ken Todd, the trial court granted U-Systems' motion on the grounds that Mr. Todd's testimony was not helpful to the jury's determination of the issues, and that the trial court would instruct the jury on the law. (R. 646 at 6, 21-22). On March 16, 2004, at a pretrial conference, the trial court heard arguments on U-Systems' motion to limit questioning. The trial court granted U-System's motion on the issue of the contract because it concluded that the contract did not provide the standard of care for a tort

action. (R. 644 at 24). After trial, Ms. Day filed this appeal on the grounds that this evidence was improperly excluded from trial by the trial court.

VI. SUMMARY OF ARGUMENTS

POINT I: THE EXCLUDED EVIDENCE ON DUTY WOULD NOT CHANGE THE JURY'S DETERMINATION OF A LACK OF PROXIMATE CAUSE

Ms. Day is asking this Court to overturn the jury's verdict in this case based on the trial court's exclusion of two pieces of evidence. The evidence of U-Systems' contract and Mr. Todd's testimony was appropriately excluded, but more importantly, if it had been admitted, Ms. Day cannot show how the evidence would have changed the outcome of the trial. The excluded evidence only related to the duty of care U-Systems owed to Ms. Day – whether U-Systems should have left the sheetrock propped against the wall. The jury concluded that U-Systems' acts or omissions were negligent. However, the jury then determined that U-Systems' negligence was not the proximate cause of Ms. Day's injuries. Therefore, Ms. Day's appeal is meritless because she is unable to show how the trial court's exclusion of the evidence on duty would have changed the outcome of the case.

POINT II: THE TRIAL COURT APPROPRIATELY EXCLUDED THE CONTRACT FROM EVIDENCE AND PROPERLY PRECLUDED PLAINTIFF'S EXPERT FROM TESTIFYING

The trial court did not abuse its discretion when it excluded from evidence the contract between U-Systems and the federal government. First, under Utah law, a

contract cannot be the basis for a duty owed in a tort action. Second, through trial testimony solicited by Ms. Day's attorney, the jury heard the substance of the contract at issue. The president of U-Systems testified about U-Systems' duty to supervise and control the jobsite as well as the safety of those working on this project. Because Ms. Day was able to tell the jury about U-Systems' duty under the contract, the exclusion of the contract was not prejudicial.

Likewise, the trial court had good reason for excluding Ms. Day's expert witness Ken Todd. As the trial court concluded, Mr. Todd was simply going to testify as to his opinion that a broad federal OSHA regulation applied to handling sheetrock in this specific case. He based this opinion upon his experience with a more specific California regulation and a phone call to some unknown person at the Utah OSHA office. The trial court concluded that Mr. Todd's simple recitation of the federal regulation and his opinion that it applied to this case was not helpful to the jury. Instead, the trial court gave a jury instruction quoting the OSHA regulation and instructing the jury that it could be used against U-Systems as evidence of the standard of care. Ms. Day did not object to this jury instruction. Thus, again, the trial court's exclusion of Mr. Todd's testimony would have had no effect on the jury's verdict.

VII. ARGUMENT

POINT I: THE EXCLUDED EVIDENCE ON DUTY WOULD NOT CHANGE THE JURY'S DETERMINATION OF A LACK OF PROXIMATE CAUSE

A. Additional Evidence of A Defendant's Duty Does Not Create Proximate Cause.

It is uncontested by the parties that the law allows a jury, as in this case, to conclude that a defendant was negligent but that the negligent acts or omissions were not the proximate cause of the plaintiff's injuries. See *Holmstrom v. C.R. England*, 2000 UT App 239, ¶32, 8 P.3d 281. In fact, negligence and proximate cause are "separate and distinct factors in assigning tort liability." *Id.* In a tort case a plaintiff holds two very different evidentiary burdens of proof. "Proof of negligence is never 'enough by itself to establish liability; it must also be proved that negligence was a cause of the event which produced the injury or harm sustained by the one who brings the complaint.'" *Id.* (citations omitted).

Ms. Day's argument on appeal is illogical and inconsistent with this clear legal principle. She makes conclusory statements that more evidence of U-Systems' duty to Ms. Day would somehow have changed the jury's decision on proximate cause. Yet she is unable to explain how this excluded evidence would have affected the jury's proximate cause determination. The excluded evidence only related to the duty of care U-Systems owed to Ms. Day – whether U-Systems should have left the sheetrock propped against the wall. Plaintiff adduced ample evidence as to this duty at trial, and the excluded evidence

did not relate to any separate acts or omissions by U-Systems – it also related to whether or not U-Systems should have left the sheetrock propped against the wall. Twice as much evidence on the duty element of a tort does not create any evidence of proximate cause.

In support of her argument Ms. Day quotes the following from the decision in *Milligan v. Capitol Furniture Co.*, 8 Utah 2d 383, 335 P.2d 619, 622 (1959):

“It is true that the question of proximate cause is ordinarily one of fact for the jury. This is so because of different conclusions generally arising on a conflict of the evidence, or because of different deductions or inferences arising from undisputed facts, in respect to the question of whether the injury was the natural and probable consequence of the proved negligence or wrongful act and ought to have been foreseen in light of the attending circumstances.”

Id. (quoting *Anderson v. Bransford*, 39 Utah 256, 116 P. 1023 (1911)). Ms. Day’s reliance on *Milligan* is misplaced. She has taken this passage out of context simply to fit her theory on appeal. In *Milligan*, the court was addressing a completely different question. In that case, the Supreme Court affirmed the trial court’s order of judgment for the defendant after a jury verdict awarding damages to the plaintiff despite concluding that the defendant’s negligence was not the proximate cause of the injuries. *Id.* at 622.¹ The *Milligan* court did not say, as Ms. Day contends in her opening brief, that evidence of a defendant’s duty is material to the question of proximate cause. No Utah court has held that additional evidence of duty is relevant to a proximate cause determination.

¹ In fact, *Anderson v. Bransford*, 39 Utah 256, 116 P. 1023 (1911), from where this complete quote is taken, also does not support Ms. Day’s argument. Like *Milligan*, *Anderson* discussed a case where the trial court directed a verdict for defendant due to a lack of proximate cause. *Anderson*, 116 P. at 1024.

In this case, Ms. Day had the burden of showing the jury that U-Systems' negligence was the proximate cause of her injuries. This is a separate and distinct burden of proof from that of demonstrating negligence. *See Nelson v. Salt Lake City*, 919 P.2d 568, 574 (Utah 1996). The trial court specifically instructed the jury as to the type of evidence required to find proximate cause. Ms. Day's burden of proof was not to simply show that U-Systems' negligence was a cause of her injuries. Jury instruction number 30 stated that to find proximate cause, the jury must determine that the negligence "played a substantial role in causing the injuries." (R. 512). The excluded evidence was unrelated to the cause of Ms. Day's injuries. The duty language within the contract and Mr. Todd's opinion about applicable OSHA standards could not be used to show that U-Systems' negligence was a "substantial" factor in the cause of the injuries. The jury concluded that Ms. Day did not meet her burden of proof on proximate cause. The jury was not satisfied, for whatever reason, that U-Systems caused this accident. The excluded evidence that goes strictly to U-Systems' duty would not have changed this outcome.

B. Ms. Day Cannot Demonstrate That She Was Prejudiced By The Trial Court's Exclusion of The Duty Evidence.

In order to obtain relief on appeal, Ms. Day "must show [she] was prejudiced or harmed by the trial court's action." *A.K. & R. Whipple Plumbing and Heating v. Aspen Construction*, 1999 UT App 87, ¶39, 977 P.2d 518. The Utah Supreme Court has stated that it will reverse a trial court's improper admission or exclusion of evidence "only where the court's erroneous ruling 'was prejudicial,' 'affected the substantial rights of the

party,' or was otherwise 'harmful,'" *City of Hildale v. Cooke*, 2001 UT 56, ¶30, 28 P.3d 697 (citations omitted). For an error to be harmful, "the likelihood of a different outcome must be sufficiently high to undermine confidence in the verdict." *Id.*; see also *Anton v. Thomas*, 806 P.2d 744 (Utah Ct. App. 1991) (stating that even if trial court abused its discretion in excluding expert testimony, ruling will not be reversed unless appellant can show "the excluded evidence would probably have had a substantial influence in bringing about a different verdict.").

It is impossible to know, without speculating about how the jury reached its verdict, if the evidence excluded by the trial court would have affected the outcome of the case. The Utah Supreme Court has previously held that it will not find prejudice when the claim is so speculative that it becomes "groundless." See *Canyon Country Store, v. Bracey*, 781 P.2d 414, 423 (Utah 1989). We can only guess as to which of U-Systems' acts or omissions the jury found to be negligent.² Likewise, although there was ample evidence for the jury to find no proximate cause, we do not know exactly why the jury thought U-Systems was not the proximate cause Ms. Day's injuries.³ At the same time,

² Ms. Day alleged that U-Systems was negligent in three separate ways, by (1) failing to exercise reasonable care to permit plaintiff to safely perform her insulation inspection; (2) failing to exercise reasonable care for the safety of all persons who needed to come onto the job site; and (3) failing to foresee that plaintiff, in conducting the insulation inspection, would look behind the sheetrock to determine if the insulation was correctly installed. (R. 507).

³ Jury instruction number 30 instructed the jury that to find proximate cause, the jury had to find: (1) a cause and effect relationship between the negligence and the plaintiff's injury; (2) that the negligence played a substantial role in causing the injuries; and (3) that a reasonable person could foresee that the injury could result from this negligent behavior. (R. 512). Jury

there is no reason to think that the jury did not properly apply the law to the evidence, which means that no matter how much evidence it heard regarding a duty owed by U-Systems, that would not have changed its belief that there was insufficient or unconvincing evidence of causation.

The jury in this case determined that U-Systems' negligence was not the proximate cause of Ms. Day's injuries. Even if Ms. Day could "shed[] an entirely different light on defendant's responsibility," Brief of Appellant, p. 10, introducing more evidence of U-Systems' duty would only go to the jury's decision on negligence, not proximate cause. It therefore would not have changed the outcome of the trial. The jury was obviously satisfied that the cause of the accident was something other than U-Systems' action or inaction. Because she cannot show that she was prejudiced by the exclusion of this evidence, this Court should affirm the rulings of the trial court.

POINT II: THE TRIAL COURT APPROPRIATELY EXCLUDED THE CONTRACT FROM EVIDENCE AND PROPERLY PRECLUDED PLAINTIFF'S EXPERT FROM TESTIFYING

A. The Trial Court Did Not Abuse Its Discretion In Excluding U-Systems' Contract With The Federal Government From Evidence.

The trial court correctly excluded evidence at trial of the contract between U-Systems and the federal government. On appeal, broad discretion is given to the trial court's decision to admit or exclude evidence. *See Jensen v. Intermountain Power*

instructions 31 and 32 then discussed the possibility of contributory negligence on Ms. Day's part. (R. 513-514).

Agency, 1999 UT 10, ¶12, 977 P.2d 474. This decision to exclude the contract from evidence should not be overturned unless there is an abuse of discretion. *See Gorostieta v. Parkinson*, 2000 UT 99, ¶14, 17 P.3d 1110. An appellate court “will presume that the discretion of the trial court was properly exercised unless the record clearly shows to the contrary.” *State v. Morgan*, 813 P.2d 1207, 1210 n.4 (Utah Ct. App. 1991).

The law in Utah is that contractual provisions cannot be the basis for creating a tort duty between parties. *See Interwest Construction v. Palmer*, 923 P.2d 1350, 1355 (Utah 1996); *Tallman v. City of Hurricane*, 1999 UT 55, ¶6, 985 P.2d 892; *DCR Inc. v. Peak Alarm Co.*, 663 P.2d 433 (Utah 1983). In *Interwest Construction*, the court pointed out that tort duties were different from and independent of contractual duties: “[e]ach category of relationships must be analyzed to determine as a matter of law and policy, whether in that setting a party to a contract owes any tort-type duties to the other beyond the duties spelled out in the contract.” *Interwest Construction*, 923 P.2d at 1355 (citing *Beach v. University of Utah*, 726 P.2d 413, 417-420 (Utah 1986)).

In her opening brief, Ms. Day misconstrued the court’s holding in *DCR Inc. v. Peak Alarm Co.*, 663 P.2d 433 (Utah 1983), which she cites for the proposition that a party who breaches a duty can be held liable even if that duty originates in a contract. Brief of Appellant, p. 8. In *DCR*, the court found that a tort duty existed between parties to a contract; however, it said “the defendant’s tort liability is not based upon breach of contract, but rather upon violation of the legal duty independently imposed as a result of

what the defendant undertook to do with relation to the plaintiff's interests." *DCR Inc.*, 663 P.2d at 437 (quotations omitted). Thus, in order for Ms. Day to establish that U-Systems owed her a duty of care, she had to show that the duty arose from a legal duty independently imposed, and not upon the contract provisions. This was precisely the reasoning of the trial court when it excluded the contract from evidence:

As to the contract issue, I'm going to grant the motion just for this reason. I do not believe that the contract between Hill Air Force Base and U-Systems develops the tort liability. I mean I've listened and I've read these arguments that have been made and it's too unclear to me and I don't believe that's the law. I think the standard of care isn't done by this contract and I'm going to grant the motion as it relates to that.

(R. 644 at 24).

Furthermore, through trial testimony and jury instructions, Ms. Day was able to present to the jury the substance of the contract provisions she was seeking. Dave Freitas, U-Systems' President, testified at trial about U-Systems' hierarchy of responsibility on the HAFB job site. He discussed the different job site managers, including its project manager, quality control manager, and safety managers. (R. 642 at 159-65). Mr. Freitas explained his managers' responsibilities, spending significant time discussing U-Systems' duty for job site safety. (R. 642 at 163-65). Ms. Day also sought and received a jury instruction explaining the federal OSHA standard she contends was required by the contract. (R. 526). Thus, in the end, despite the trial court's ruling on U-Systems' Motion in Limine, the jury heard testimony regarding the duties arising from the HAFB contract. Had the judge allowed the contract itself into evidence, it would not have had a

substantial influence on the outcome of the trial. The trial court's decision to exclude the contract from evidence is soundly supported in the law and was a correct legal conclusion.

B. The Trial Court Correctly Concluded that Ken Todd Would Not Assist the Jury in Understanding U-Systems' Duty of Care.

The trial court did not abuse its discretion when it granted U-Systems' motion in limine excluding Ken Todd from testifying as an expert. Whether or not a witness qualifies as an expert witness is governed by Rule 702 of the Utah Rules of Evidence.⁴ In applying rule 702, the trial court must assess the competency of the offered expert. "The critical factor in determining the competency of an expert is whether that expert has knowledge that can assist the trier of fact in resolving the issues before it." *Pack v. Case*, 2001 UT App 232, ¶35, 30 P.3d 436.

Ms. Day hired Ken Todd to testify about a very broad federal OSHA regulation and his opinion as to its applicability to sheetrock placement in this case. Federal OSHA regulation 1926.250(a)(1) states, "[a]ll materials stored in tiers shall be stacked, racked, blocked, interlocked, or otherwise secured to prevent sliding, falling or collapse." Ms. Day proffered that Mr. Todd would testify that this regulation applied to sheetrock being used in new construction work sites in Utah. As foundation for his opinion that the

⁴ Utah Rule of Evidence 702 states

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise. Utah R. Evid. 702.

federal OSHA regulation required sheetrock to be tied or laid flat on the floor, Mr. Todd relied on California OSHA regulation 1549(d), which provides that "Sheetrock, plywood, trusses and similar material shall not be stocked on edge unless positively secured against tipping or falling." (R. 200). This regulation is completely different, not applicable to the facts of this case, and much more detailed about handling sheetrock than the federal regulation Mr. Todd was referencing. He also made a phone call to the Utah OSHA office and spoke to some unknown and unidentified person as his basis for citing to regulation 1926.250(a)(1).

In excluding Mr. Todd's testimony, the trial court concluded that Mr. Todd's personal opinion as to the meaning of the federal OSHA regulation was improper testimony for an expert witness and would not assist the jury. The trial court stated:

Well, he can maybe say the ultimate issue but why in the world do we have a witness coming in here and telling us, first of all, what a section means even if the section were applicable, why do we have a witness saying what that section means, interpreting "the law." If you say OSHA is the law, why is he interpreting the law? Why don't we have a jury instruction that says what the law means because it's an issue of law, it's not an issue for an expert witness in any case to say what the law means."

...
it's my view that [Mr. Todd] will not assist the trier of fact because if he testifies as indicated, he's going to tell the jury what this document [federal OSHA regulation] means and if it's applicable. . . . I do not believe, number one, that Mr. Todd will assist the trier of fact; number two, I don't believe that Mr. Todd, there's a question about his qualifications. I think if he comes in and even says that he supports this thing on the California OSHA, that's just a backhanded way of getting that in and making the jury think, you know, if anything it's going to confuse the jury. . . . So I'm going to grant the Motion in Limine as it relates to Mr. Todd. I do not believe he will assist the trier of fact. I think he will confuse the jury versus help them

make the determination they have to make.

(R. 646 at 6, 22-23).

Ms. Day now contends on appeal that this was an abuse of discretion because the jury “was completely deprived of what it means in terms of implementation within the construction industry.” Brief of Appellant, 12. This is simply not true. As stated early, the jury received instruction number 30 which quoted federal OSHA regulation 1926.250(a)(1) and defined the key terms. (R. 526). Instruction 30 also told the jury that this regulation “may be considered by you as evidence of the standard of care.” Thus, the jury was free to use the regulation in determining the duty of care U-Systems owed to Ms. Day. Furthermore, even if Mr. Todd’s testimony had been allowed, it would have only gone to the question of duty and negligence, not proximate cause. Thus, since the jury did find U-Systems negligent, Ms. Day was not prejudiced by the exclusion of Mr. Todd’s opinion.

The trial court clearly considered whether Mr. Todd’s proposed testimony would assist the jury in understanding the proper standard of care that U-Systems was required to follow. The trial court correctly concluded that rule 702 was not intended to allow a party to “just have a hired gun who basically comes in here and says this is my opinion.” (R. 646 at 21).

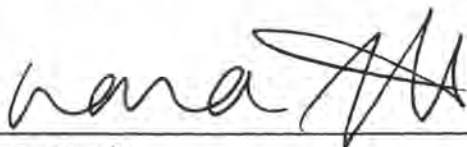
CONCLUSION

Ms. Day's argument should be rejected because the excluded evidence would have simply given the jury additional cumulative evidence of U-Systems' duty. This evidence would not have changed the jury's consideration of or verdict on proximate cause. Ms. Day cannot show that she was prejudiced by this decision and that the jury's verdict would have been different with the excluded evidence.

Furthermore, the trial court did not abuse its discretion by excluding the contract between U-Systems and the Federal Government, and by precluding Mr. Todd from testifying as an expert. The trial court's reasons for excluding this evidence are proper and supported by Utah law. U-Systems requests that this Court affirm the jury's verdict.

DATED this 4th day of May, 2005.

SNOW, CHRISTENSEN & MARTINEAU

By 
Kara L. Pettit
Attorney for Defendant/Appellee
U-Systems, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 4th day of May, 2005, I caused a true and correct copy of the foregoing Brief of Appellee U-Systems, Inc. to be mailed to the following:

James R. Hasenyager
Hasenyager & Summerill
1004 24th Street
Ogden, UT 84401
Attorneys for Plaintiff/Appellant



Legal Assistant

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