

1992

# M. Dalton Cannon and Patricia Cannon v. The University of Utah : Brief of Appellee

Utah Court of Appeals

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R. Paul Van Dam; Utah Attorney General; Brent A. Burnett; Assistant Attorney General; Attorneys for University of Utah Defendant/Appellee.

Van Cott, Bagley, Cornwall and McCarthy; Michael F. Richman; John W. Andrews; Attorneys for Plaintiffs/Appellants.

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IN THE UTAH COURT OF APPEALS

920377  
STATE OF UTAH

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M. DALTON CANNON and PATRICIA CANNON,  
Plaintiffs/Appellants,  
vs.  
THE UNIVERSITY OF UTAH,  
Defendant/Appellee.

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:

Case No. 920377-CA  
Priority 16

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BRIEF OF DEFENDANT/APPELLEE  
THE UNIVERSITY OF UTAH

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Appeal from the Judgment of the  
Third Judicial District Court, Salt Lake County  
Honorable Richard H. Moffat Presiding

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R. PAUL VAN DAM (3312)  
Utah Attorney General  
BRENT A. BURNETT (4003)  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, Utah 84114  
Telephone: (801) 538-1016  
Attorneys for University of Utah  
Defendant/Appellee

VAN COTT, BAGLEY, CORNWALL  
& MCCARTHY  
Michael F. Richman  
John W. Andrews  
Attorneys for  
Plaintiffs/Appellants  
50 South Main Street, Suite 1600  
Salt Lake City, Utah 84114

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COURT OF APPEALS

IN THE UTAH COURT OF APPEALS

STATE OF UTAH

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Utah Attorney General  
BRENT A. BURNETT (4003)  
Assistant Attorney General  
236 State Capitol  
Salt Lake City, Utah 84114  
Telephone: (801) 538-1016  
Attorneys for University of Utah  
Defendant/Appellee

VAN COTT, BAGLEY, CORNWALL  
& MCCARTHY  
Michael F. Richman  
John W. Andrews  
Attorneys for  
Plaintiffs/Appellants  
50 South Main Street, Suite 1600  
Salt Lake City, Utah 84114

#### **LIST OF ALL PARTIES**

Plaintiffs in this action are M. Dalton Cannon, and his wife, Patricia Cannon. The only defendant in the instant appeal is the University of Utah. Defendant Malissa K. Austin was dismissed from this action pursuant to a separate settlement and is not a party to the instant appeal. R. 165-168. Defendants Brian Purvis and Kim Beglarian were dismissed pursuant to stipulation of the parties and are not parties to the instant appeal. R. 140-141.

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BRIEF OF DEFENDANT/APPELLEE  
THE UNIVERSITY OF UTAH

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STATEMENT OF JURISDICTION

The instant action comes within the original jurisdiction of the Supreme Court of Utah under Utah Code Ann. §78-2-2(3)(j) (Supp. 1992). Pursuant to Utah Code Ann. §78-2-2(4) (Supp. 1992), and Utah Code Ann. §78-2a-3(2)(k) (Supp. 1992), this Court has jurisdiction over this appeal by reason of the transfer of this action from the Supreme Court of Utah to the Utah Court of Appeals.

STATEMENT OF THE ISSUES

1. Did the University of Utah owe the plaintiffs a duty of care different from, and separate from, the public duty owed to the general population at large?

**STANDARD OF REVIEW:** In reviewing a grant of summary judgment, as in the instant action, the Court reviews the facts in a light most favorable to the losing party. In deciding whether the trial court properly granted judgment as a matter of law, the Court gives no deference to the trial court's view of the law, but reviews it for correctness. Mountain States Tel. v. Garfield County, 811 P.2d

184, 192 (Utah 1991).

2. Can the University of Utah be held liable on a theory of landowner liability to the plaintiffs as "business invitees" for an accident that did not occur on land owned or controlled by the University of Utah?

**STANDARD OF REVIEW:** The Standard of Review is the same as that for the first issue, *supra*.

3. Was any action, or inaction, of employees of the University of Utah a proximate cause of the complained of accident?

**STANDARD OF REVIEW:** The Standard of Review is the same as that for the first issue, *supra*.

4. Did the trial court abuse its discretion in striking the affidavits of Mr. Cannon and Mr. Lord?

**STANDARD OF REVIEW:** In reviewing the decision of the trial court on the admissibility of evidence, this Court will not reverse such a decision absent an abuse of discretion affecting a party's substantial rights. Hardy v. Hardy, 776 P.2d 917, 924 (Utah App. 1989).

#### **DETERMINATIVE STATUTES**

Defendants do not believe there are any statutes the interpretation of which are determinative of the issues presented in this action.

#### **STATEMENT OF THE CASE**

Plaintiffs, M. Dalton and Patricia Cannon, brought this action alleging that they were injured by the negligence of Malissa Austin, the driver of an automobile that struck the plaintiffs

while they were crossing South Campus Drive inside a crosswalk. R. 2-6. Plaintiffs then amended their complaint to add as additional defendants the University of Utah and two of its officers. R. 63-71. The two officers of the University were dismissed pursuant to stipulation of the parties. R. 140-141. The plaintiffs settled with Ms. Austin and dismissed her from the action. R. 165-167. Plaintiffs then filed a new amended complaint in which the sole defendant was the University of Utah. R. 174-181. The University of Utah moved for summary judgment, which was granted. R. 248-249, 430-435, 439-440. Plaintiffs appeal the dismissal of their action against the University of Utah. R. 443-446.

#### **STATEMENT OF RELEVANT FACTS**

This action arises out of an auto/pedestrian accident on February 1, 1990 at approximately 6:57 p.m.. [R. 176 at ¶ 8]. It had been raining or snowing that afternoon and it was dark. [R. 270]. Plaintiffs allege that they were using the cross walk to cross South Campus Drive in a northerly direction when a 1987 Toyota Pick-up truck driven by Malissa K. Austin struck them. [R. 176 at ¶ 8]. Officers Beglarian and Purvis were assigned to traffic control at the subject cross walk. [R. 267].

As was normal practice for traffic control at the subject cross walk, officers Beglarian and Purvis arrived there at approximately 6:30 p.m., or thereafter, parked the car in the center lane with the flashers on and set up flares. [R. 267-269, 271, 276-279, 285, and 289]. At the time of the accident, the flares were still burning. [R. 272-273, 288].

On the night in question, the plaintiffs were dressed in dark clothing. [R. 283]. Upon reaching the cross walk, the plaintiffs saw the police car parked in the median lane, but did not see the police officers anywhere. Mr. Cannon remarked to Mrs. Cannon that, "they're not going to stop the traffic for us now like they generally do." [R. 293]. Knowing that the police officers were not going to stop traffic for them, the plaintiffs waited for some cars to go by and then began to cross South Campus Drive. [R. 293]. The car driven by Ms. Austin struck the Cannons as they were nearing the inside lane, towards the north side of the South Campus Drive. [R. 281-282]. Prior to impact neither Officer Beglarian, nor Officer Purvis ever saw the Cannons. [R. 271, 287].

At the time of the accident, both officers were about to resume traffic control. [R. 274]. Officer Purvis was putting on his gloves and Officer Beglarian was looking South and exiting the car. [R. 269, 271, 286]. University police are not to engage in parking control. [R. 37-38].

Plaintiffs contend that the negligent acts of the defendant University of Utah and its employees were a proximate cause of the accident. [R. 16 at ¶16] In particular, plaintiffs contend that Officers Purvis and Beglarian, while on duty and acting within the scope of their employment, with the University of Utah acted negligently by: (1) failing to monitor or direct pedestrian traffic crossing the pedestrian cross walk or halt oncoming vehicles so as to reduce the chance of an auto/pedestrian accident; (2) parking their vehicle in such a manner as to obscure pedestrians view of

the on-coming westbound traffic; (3) failing to insure that the pedestrian crosswalk was adequately lighted and marked by flares; (4) permitting vehicles to park illegally at the southern end of the pedestrian crosswalk so as to obscure pedestrians view of westbound traffic. [R. 178 at ¶ 15].

In addition, the plaintiffs claim that the defendant, University of Utah was negligent in: (1) providing inadequate lighting of said crosswalk area, such the pedestrians in the crosswalks were not sufficiently visible to approaching motorists; (2) failing to provide adequate temporary warning signs at times of heavy pedestrian usage prior to events at the Huntsman Center; and; (3) failing to adequately maintain painted markings and signs indicating the location of the crosswalk. [R. 179-180 at ¶ 23].

The University of Utah has nothing to do with the maintenance, painting, signage, etc, of South Campus Drive. [R. 296-302]. South Campus Drive is a State owned road, under the jurisdiction of the Utah Department of Transportation. [R. 296-302]. The painting, lighting, signage, and maintenance of South Campus Drive is the responsibility of the Utah Department of Transportation and not the University of Utah. [R. 296-302].

#### **SUMMARY OF ARGUMENT**

The University of Utah owed no duty of care to the plaintiffs. Plaintiffs were injured in an automobile-pedestrian accident on a roadway owned, maintained, and operated by the Utah Department of Transportation, a non-party to this action. The University did not have control or custody of the driver of the motor vehicle in

question. The plaintiffs were not in the control or custody of the University. The plaintiffs were not minors, or members of any class whose care had been entrusted to the University. Absent such a relationship the University of Utah owed no affirmative duty to the plaintiffs to protect them from Malissa Austin's poor driving.

Because the accident occurred on a public highway, and not on the premises of the University of Utah, no landowner liability can be shown. A landowner is not liable to the public or business invitees for the conditions of the public roadway. Such a claim should properly be brought against the agency or government that owns and maintains the roadway.

#### **ARGUMENT**

##### **I. THE UNIVERSITY OWED NO SPECIFIC DUTY OF CARE TO THE CANNONS**

An essential element of a negligence claim is a duty of care owed by a defendant to a particular plaintiff. Ferree v. State, 784 P.2d 149, 151 (Utah 1989). To establish a negligence claim against a public entity, a plaintiff must show the entity breached a duty owed specifically to the plaintiff as an individual, rather than one owed generally to the public at large. Id. There can be no negligence where the entity merely breaches a public duty. Id. The existence of such a duty is determined by the court. Weber ex rel. Weber v. Springville City, 725 P.2d 1360, 1363 (Utah 1986).

The public duty doctrine is followed in an overwhelming majority of jurisdictions, State v. Flanigan, 489 N.E.2d 1216 (Ind. Ct. App. 1986), and Utah is one that has long recognized the rule. In Obray v. Malmberg, 26 Utah 2d 17, 484 P.2d 160, 162 (1971), the

Supreme Court of Utah held that a sheriff's obligation to investigate crime is a duty to the public at large and that a breach of this duty is, consequently, not actionable. A similar result was reached in Christenson v. Hayward, 694 P.2d 612 (Utah 1984). Christenson held that a deputy's statutory duty to "make all lawful arrests" was a public obligation rather than a private duty to the plaintiff's decedent. Id. at 613.

The public duty rule was once again relied upon in Ferree v. State, 784 P.2d 149 (Utah 1989). Ferree involved a wrongful death action alleging that corrections officers were "reckless, negligent or grossly negligent" in their failure to supervise a parolee who killed the plaintiffs' decedent. In affirming summary judgment, the Supreme Court of Utah held that the officers owed no duty of care to the victim apart from their general obligation to the public at large. Id. at 151.

The public duty rule applies with equal force to actions alleging negligent control of traffic (as opposed to negligent maintenance of the roadway). Public entities with traffic control responsibilities cannot be held liable in the absence of a particular duty to a specific individual. State v. Flanigan, 489 N.E.2d 1216, 1219 (Ind. App. 1986). An obligation to control traffic for the general public's benefit simply does not create a duty of care on which a negligence claim may be based. Id.

In Flanigan, the plaintiffs were injured when a car struck them as they walked along a state highway to attend a flea market. Id. at 1217. Like the instant case, plaintiffs sued the State [of

Indiana] claiming it was negligent because it "had a duty to assure safe pedestrian and vehicular traffic on the highway and failed to provide any traffic control to assure that pedestrians could travel on the highways safely." Id. The State moved unsuccessfully for judgment on the pleadings and appealed. Id.

In Flanigan, the Indiana Court of Appeals reversed the trial court because the state had no duty to the plaintiffs. Id. at 1219. Any obligation to provide traffic control was a public duty, according to the court, and a breach of such a duty was not actionable. Id. Since there was no particularized duty to protect the plaintiffs from errant vehicles, the court held the state was not liable. Id. The court found traffic control to be a non-actionable public duty.

In the instant case, plaintiffs' claims of negligence with respect to Officers Purvis and Beglarian amount to nothing more than failure to generally protect the public through aspects of traffic control, a public duty. The alleged negligent acts all go to the officers' duties generally, as opposed to any assumed on behalf of the plaintiffs specifically. Indeed, it is uncontroverted that the officers did not even see the Cannons, who on a dark and stormy night, were wearing dark clothing. Even more pointedly, Mr. Cannon candidly admits that neither he nor his wife saw the officers, and they discussed the fact that no officer would be helping them cross the street that evening. Nevertheless, they undertook to cross the five lane street as they had done many times before. Unlike cases where there are special relationships and

reliance; no relationship existed between the Cannons and the officers. The Cannons were not relying on the officers in any way. Officers Purvis and Beglarian were not engaged in traffic control at the time of the accident. The plaintiffs, prior to crossing the street, recognized that there was no ongoing traffic control. They therefor undertook to cross the street without assistance. Having never undertaken a duty to these specific plaintiffs, there can be no claim.

There is simply no basis upon which to impose a duty upon the officers other than their duty to the public generally. Yet as demonstrated above, failure to perform a duty to the public is not actionable.

The plaintiffs do not dispute that the Public Duty Doctrine continues to be recognized by Utah as limiting claims against governmental entities for violation of duties owed to the public at large. On the night of the accident the officers were engaged in one such general duty, that of enforcing the traffic laws governing auto and pedestrian travel. See Utah Code Ann. § 41-6-78. In that respect, their job was no different than other types of law enforcement, such as investigating alleged burglaries. In each given instance, officers have a public duty to enforce the law. But they owe no legal duty to come to the aid or assistance of anyone in particular. Any failure to do so in this case is no different than the failure in Christensen v. Hayward, 694 P.2d 612 (Utah 1984), where the Court held that a deputy's duty to "make all lawful arrests" was a public obligation rather than a private duty

to the plaintiff which was not actionable. Id. at 613. Traffic control is enforcing laws governing auto and pedestrian travel, and is merely another form of law enforcement, a public duty. Indeed, plaintiffs tacitly admit as much. Seeking to overcome the public duty obstacle, plaintiffs attempt to bring themselves within the "special relationship" exception. That attempt falls short because neither Malissa Austin, the driver of the vehicle involved, or the plaintiffs were in the custody or control of the University.

Coffel v. Clallam County, 735 P.2d 686 (Wash. App. 1987), cited by the plaintiffs below (R. 400), demonstrates this principle. There the court listed the required elements of the "special relationship" exception to the public duty doctrine as "(1) there is some form of privity between the police department and the victim that sets the victim apart from the general public, and (2) there are explicit assurances of protection that give rise to reliance on the part of the victim." Id. at 690.

The Supreme Court of Utah, in Rollins v. Petersen, 813 P.2d 1156 (Utah 1991), sought to more fully explain the meaning of the special relationship exception. After stating that the general rule, adopted from the Restatement (Second) of Torts §§ 314-320 (1965), that there is no duty to control the conduct of third persons, the Court adopted the Restatement's provision of two exceptions to this general rule. First, if a special relation exists between the actor and the third person, then the actor has a duty to control the third person's conduct. Second, if a special relation exists between the actor and the plaintiff. These two

exceptions are given more detailed explanation in sections 319 and 314 respectively of the Restatement. Section 319 provides that one who takes charge of a third person, whom is likely to cause bodily harm to others if not controlled, is under a duty to exercise reasonable care to control the third person. Section 314A provides the four circumstances when a special duty arises between the plaintiff and the actor. These circumstances are: (1) a common carrier's duty to its passengers, (2) an innkeeper's similar duty to its guests, (3) a landowner's duty to invitees on its land, and (4) "One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal opportunities for protection is under a similar duty to the other."

Malissa Austin, the driver has not even been alleged to meet the criteria of Restatement, Second, Torts § 319 (1965) as one with dangerous propensities. Nor has any effort been made to show that she was under the control or supervision of the University of Utah. Any special relationship would have to be between the University of Utah and the plaintiffs. Clearly the common carrier and innkeeper circumstances are not applicable. The landowner circumstance is also inapplicable because the public highway was not under the control of the University. Restatement, Second, Torts § 349 (1965). The final circumstance does not apply because the plaintiffs were never in the custody or control of the University.

Because none of the exceptions can apply, the general rule must be applicable. Restatement, Second, Torts § 314 (1965) is

clear.

The fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not of itself impose upon him a duty to take such action.

In support of their duty argument that a special relationship existed, the plaintiffs rely upon two foreign cases, Alhambra School District v. Superior Court, 796 P.2d 470, 474 (Ariz. 1990) and Florence v. Goldberg, 375 N.E.2d 763, 766 (N.Y. App. 1978). For several reasons, plaintiffs' reliance on these cases is misplaced.

First, while the facts of the Alhambra School District case are markedly different and distinguishable from the case at hand, the case is inapplicable because eight years prior to its decision the Arizona Supreme Court flatly rejected the public duty doctrine. See, Ryan v. State of Arizona, 656 P.2d 597, 599 (Ariz. 1982).

Unlike Utah and the majority of states where the public duty doctrine recognized, the Arizona Supreme Court specifically found that Arizona may no longer benefit from its public status in the determination of the existence of a duty. Id. For this obvious reason, Alhambra has no precedential value here. However, even if it somehow did, the specific facts of that case highlight its inapplicability.

There, pursuant to a specific Arizona statute, the Alhambra School District created a school crossing and therefore by statute was required "to operate the crossing in conformance to the Arizona School Crossing Manual." Id. at 472. When the defendant school

district questioned its duty to the public, the court responded "the answer, of course, is that the district applied for and established a specifically marked crosswalk, where none previously existed." Id. at 474. Under the Arizona statute the creation of the crosswalk created a public duty which under Arizona precedent did not preclude a negligence claim. The Alhambra court was constrained to hold that creation of the walk also created a duty of reasonable care.

However, unlike Alhambra, in the instant case the plaintiffs concede that the University was not responsible for and did not create the crosswalk. The crosswalk and roadway in question are both owned, designed, operated and maintained by the Utah State Department of Transportation (UDOT). UDOT is not a party to the instant action. The University was not obligated by law to operate it in conformance with any rules or regulations. The limited holding of Alhambra is plainly inapplicable.

The plaintiffs' only other authority, the New York decision of Florence v. Goldberg, supra, contains factual differences which not only preclude its application here, but also demonstrate the absence of the "special relationship" necessary to sustain plaintiffs' claim. In Florence, a municipality voluntarily assumed a duty to supervise a school crossing for infants at a busy, two-way street. Indeed, the police department had enacted specific regulations with checks to insure that a crossing guard would be present at the crossing at the times when small school children would be crossing.

Every day during the first two weeks of school a mother accompanied her small child to and from school and noticed a crossing guard at the fatal intersection. Having witnessed the daily presence of the crossing guard, the child's mother then relied upon the presence and assistance of the guard, and sent her child off to school alone one day. Tragically, no guard was present and the child was struck by a taxi--because the police completely failed to follow their regulations to insure against the walk being unguarded. The Court held:

A municipality whose police department voluntarily assumes a duty to supervise school crossings, the assumption of that duty having been relied upon by parents of school children may be held liable for its negligent omission to provide a guard at a designated crossing.

Id. at 585-586 (emphasis added). In stark contrast to the plaintiffs' situation here, Florence involved assumption of a duty to a specific class of dependent persons, school age children, and specific reliance by a parent on the assumption and performance of that duty. The same is true of Little v. Utah State Div. of Family Services, 667 P.2d 49 (Utah 1983). Little involved a young child who had been taken into the custody of the State of Utah. The child, while under state control, died due to the negligent care of the state. In Little, the requisite special relationship was demonstrated.

The Cannons simply cannot make that claim here. The Cannons were competent, physically able, adults who undoubtedly had crossed streets hundreds of times before the night in question. In fact, with respect to the very street where the accident occurred, the

Cannons had crossed at that precise location countless times before. There is no evidence that the particular crosswalk was unreasonably dangerous or that the Cannons needed assistance. Even if the crosswalk was defective, it was not owned or operated by the University of Utah, but by the Utah Department of Transportation.

Mr. Cannon's sworn testimony is that upon reaching the crosswalk and not seeing any policemen anywhere he remarked to Mrs. Cannon that "they're not going to stop the traffic for us now like they generally do." (R. 293). Knowing that the police officers were not going to stop traffic for them, the Cannons waited for some cars to go by and then crossed the street. (Id.) The officers here did nothing with respect to the Cannons, and did not assume any duty with respect to them. There simply was no relationship between the Cannons and the police officers on the night in question. Perhaps more importantly, there was no reliance by the Cannons upon the officers. Plaintiffs' claim that they had somehow been "entrusted to the care" of the University of Utah is without support. (Appellants' Brief at 27). They were not under the custody or control of the University. No special relationship existed that would identify these plaintiffs from any other member of the public who might use crosswalks in the vicinity of the University of Utah.

Plaintiffs efforts to find a special relationship between the University of Utah and those attending a university sporting event is reminiscent of Beach v. University of Utah, 726 P.2d 413 (Utah 1986). Beach rejected any special relationship being created by

the relationship of student and school. The Supreme Court of Utah also held that, absent such a special relationship, the University of Utah had no affirmative duty to protect or supervise the plaintiff.

Plaintiffs are incorrect in alleging that there are any material issues of fact that are in dispute. Whether the flares were still burning, or the emergency lights on the University's car were operating, are not material. These questions of fact do not change the sole important fact that the University of Utah did not have a special relationship with the plaintiffs upon which liability could be based.

Accordingly, the trial court was correct when it ruled that the University of Utah was entitled to summary judgment dismissing the plaintiffs' claims with prejudice.

**II. PLAINTIFFS' LANDOWNER LIABILITY ANALYSIS HAS NO APPLICATION TO A POLICE OFFICER'S PUBLIC SAFETY / LAW ENFORCEMENT DUTIES.**

Premised upon a landowner liability analysis, plaintiffs argue that as "business invitees", defendant owed them a duty of care even though the accident at issue did not occur on the property of the University of Utah. Fortunately, for unsuspecting businesses, this is not the law. On the contrary, as recently stated in Dwiggins v. Marsan Jewelers, 811 P.2d 182, 183 (Utah 1991) and Deats v. Commercial Security Bank, 746 P.2d 1191 (Utah App. 1987), cert. denied, 765 P.2d 1277 (1988), "property owners are not insurers for the safety of their business invitees."

The "business invitees" doctrine is inapplicable to this

action for two fundamental reasons. First, the instant action seeks to impose upon a landowner responsibility for injuries sustained off the landowner's premises.

Secondly, plaintiffs have confused the different nature of landowner duties and those attendant with public safety/police power functions.

None of the cases cited by plaintiffs extend a landowner's duty to property owned by others. Yet that is precisely what the plaintiffs seek to do in the instant case. The plaintiffs readily concede that they have no claim against the University for the ownership, maintenance or condition of the street in which the accident occurred, South Campus Drive. (R. 395, footnote 1). In fact, they have specifically withdrawn that claim. (Id.) But landowner liability contemplates persons "coming on his property," Stevens v. Salt Lake County, 478 P.2d 496, 498 (Utah 1970), and governs claims against a landowner by "one who is injured on his property," Tjas v. Proctor, 591 P.2d 438, 441 (Utah 1979). This is not a case of an invitee who is injured while watching a game due to an unreasonably dangerous condition in the arena. See Cimino v. Yale University, 638 F. Supp. 952 (D. Conn. 1986) (goal post struck spectator in stadium).

Despite acknowledging that they may not maintain a claim against the University premised upon ownership, the Cannons nevertheless seek to impose liability upon the University based upon landowner duties. In so doing, they are confusing two markedly different and distinct types of duty. On the one hand, a

landowner has a duty to exercise reasonable care in the maintenance of his property to avoid exposing persons who come upon his land to an unreasonable risk of harm.

But that is not a claim that the plaintiffs have made in this action and, as they have acknowledged, in light of the fact that the street was owned and under the jurisdiction of the Utah Department of Transportation, such a claim could not be made against the University.

However, plaintiffs seek to superimpose that landowner duty upon University police engaged in a public safety/police protection function. The police power is derived from a different source and is supported by policies far different than those applicable to a landowner.

Plaintiffs have not suggested that there was a duty to provide traffic control in the first instance. On the contrary, plaintiffs argue that by undertaking traffic control, defendant was required to continue to perform it. The duty plaintiffs claim was breached is a law enforcement, not a landowner duty. Accordingly, the business invitee analysis offered by plaintiffs has no application.

Indeed, plaintiffs reliance on Restatement, Second, Torts § 344 (1965), is misplaced. The applicable provision is found at Restatement, Second, Torts § 349 (1965).

A possessor of land over which there is a public highway or private right of way is not subject to liability for physical harm caused to travelers upon the highway or persons lawfully using the way by his failure to exercise reasonable care  
(a) to maintain the highway or way in safe condition for their use, or

(b) to warn them of dangerous conditions in the way, which, although not created by him, are known to him and which they neither know nor are likely to discover.

No material facts are in dispute. The University of Utah did not own, operate, or maintain the roadway in which the accident in question occurred. There can be no liability on the University as the owner of abutting land.

**III. PLAINTIFFS FAILED TO MEET THEIR BURDEN TO PRODUCE EVIDENCE SUPPORTING PROXIMATE CAUSE.**

In Mitchell v. Pearson Enterprises, 697 P.2d 240 (Utah 1985), the Utah Supreme Court set out the definition of proximate cause.

The standard definition of proximate cause is "that cause which, in natural and continuous sequence, (unbroken by an efficient intervening cause), produces the injury and without which the result would not have occurred. It is the efficient cause - the one that necessarily sets in operation the factors that accomplish the injury."

697 P.2d at 245 (footnote omitted). Proximate cause is one of the elements of a negligence claim upon which the plaintiffs bear the burden of proof. Rather than set forth specific facts demonstrating that the conduct of the officers was the proximate cause of the plaintiffs' injuries, plaintiffs instead rely upon the general rule that proximate cause in a negligence case is usually a jury question. Brief of Appellants at page 35, and speculation regarding flares, and the location of the car. But plaintiffs' argument is insufficient to create a genuine issue as to proximate cause. There is no evidence whatsoever in the record that the flares were not burning or that the placement of the car had anything to do with the accident. On the contrary, the officers

testified that the flares were burning and that a driver shouldn't have had difficulty seeing pedestrians walking in the two northernmost westbound lanes, where the Cannons were struck. Any conclusion to the contrary is pure conjecture.

In Mitchell, the Court noted that "when proximate cause of an injury is left to speculation, the claim fails as a matter of law." Id. at 246. The Court also held "There must be evidence that establishes a direct causal connection between the negligence and the injury." Id. at 245. No such evidence exists here.

Plaintiffs submitted no evidence to the trial court that would show that any action of the defendant, or its employees, was a proximate cause of the accident in question. Pursuant to Rule 56(c) and (e), defendant was entitled to summary judgment.

Even if the affidavit of plaintiffs' expert witness is considered, the result does not change. (R. 378-381). While reciting the officers' statements of what they felt their duty was, the expert does not give any facts at all upon which to support his mere speculation that the accident was caused by the officers. No foundation is given as to how the presence of the officers in the crosswalk would have resulted in anything other than a possible third victim of Ms. Austin's failure to yield to the pedestrians in the crosswalk.

#### **IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN STRIKING THE UNTIMELY AFFIDAVITS PROFFERED BY THE PLAINTIFFS**

Plaintiffs have misstated the standard of review relevant to this issue. This Court has stated that it will not reverse a trial

court's determination on the admissibility of proffered evidence absent an abuse of discretion affecting a party's substantial rights. Hardy v. Hardy, 776 P.2d 917, 924 (Utah App. 1989). Hardy involved a question of the timeliness of the evidence's receipt and the question of an expert witness' qualifications. In Tjas v. Proctor, 591 P.2d 438, 440 (Utah 1979), the Court held that determination of the question of whether adequate foundation has been laid for the introduction of evidence is solely within the discretion of the trial court.

The affidavits of M. Dalton Cannon and David Lord were not filed with the trial court until 4:36 p.m. on the evening before a 9:00 a.m. hearing. (R. 378, 382). A full day was not provided the defendant to review or oppose these affidavits. Therefore these affidavits were not timely pursuant to Rule 6(d) of the Utah Rules of Civil Procedure. To rule otherwise would be to permit the late filing of affidavits the evening before an early morning hearing as a subterfuge to circumvent the provisions of the rule.

The Affidavit of M. Dalton Cannon is an effort to change Mr. Cannon's deposition testimony, presented to the Court by defendant in its motion for summary judgment, by means of an affidavit. In Webster v. Sill, 675 P.2d 1170, 1173 (Utah 1983) the Utah Supreme Court held that a contradictory affidavit which wholly fails to explain the discrepancy between the deposition and affidavit was insufficient to defeat summary judgment.

Both affidavits were also correctly stricken as being immaterial to the issues at hand. Neither of the affidavits are of

any benefit to the court in deciding the legal questions under the public duty doctrine or landowner liability for accidents occurring off the landowner's property.

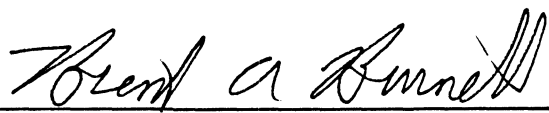
Mr. Lord's affidavit concludes that the officers were negligent and that this negligence caused, in part, the complained of accident. This affidavit is solely the reflection of Mr. Lord's unsubstantiated conclusions and fails to contain any supporting facts in evidence to support this bald assumption. American Concept Ins. Co. v. Lochhead, 751 P.2d 271, 274 (Utah App. 1988). Nowhere does Mr. Lord claim to be an expert on police procedure. His testimony is irrelevant and was properly stricken.

#### CONCLUSION

The trial court properly dismissed this action on the basis of there being no duty owed by the University of Utah to the plaintiffs. For this reason the judgment of the trial court should be affirmed.

Respectfully submitted this 19th day of October, 1992.

R. PAUL VAN DAM  
Utah Attorney General

  
BRENT A. BURNETT  
Assistant Attorney General  
Attorneys for University of Utah

**CERTIFICATE OF SERVICE**

I hereby certify that I mailed four true and exact copies of the foregoing Brief of Defendant/Respondent University of Utah, postage prepaid, to the following counsel of record on this the 17<sup>th</sup> day of October, 1992:

VAN COTT, BAGLEY, CORNWALL  
& MCCARTHY  
Michael F. Richman  
John W. Andrews  
Attorneys for  
Plaintiffs/Appellants  
50 South Main Street, Suite 1600  
Salt Lake City, Utah 84114

Robert A. Burnett