

1992

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

Utah Court of Appeals

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BRIEF

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IN THE UTAH COURT OF APPEALS

M. DALTON CANNON and PATRICIA)	
CANNON,)	BRIEF OF APPELLANTS
)	
Plaintiffs and Appellants,)	Court of Appeals No. 92-
)	0377
vs.)	
)	Argument Priority 16
THE UNIVERSITY OF UTAH,)	
)	
Defendant and Respondent.)	
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)	

ON APPEAL FROM THE THIRD DISTRICT COURT FOR SALT LAKE COUNTY,
HON. RICHARD MOFFAT PRESIDING

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FILE

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CONFIDENTIAL

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PARTIES TO THIS PROCEEDING

The parties to this proceeding in the Third District Court were the plaintiffs, Dr. M. Dalton Cannon and Mrs. Patricia Cannon (the "Cannons"), and defendant the University of Utah (the "University"). Prior to the entry of judgment in this case, another defendant, Ms. Malissa K. Austin, settled with plaintiffs, and plaintiffs' claims against her were dismissed with prejudice.

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DETERMINATIVE STATUTORY PROVISIONS

The only determinative statutory or rule provisions in this appeal are as follows:

1. Rule 56(c), U.R.C.P., which states as follows:

Rule 56. Summary judgment.

(c) **Motion and proceedings thereon.**
The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages. (Emphasis added).

2. Rule 6(d), U.R.C.P., which states as follows:

Rule 6. Time.

(d) **For motions -- Affidavits.** A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59(c), opposing affidavits may be served not later than 1 day before the hearing, unless the court permits them to be served at some other time. (Emphasis added).

JURISDICTION OF THE COURT OF APPEALS

This is an appeal from a final judgment of the Third District Court for Salt Lake County, the Honorable Richard Moffat presiding. This appeal was originally taken to the Utah Supreme Court pursuant to Utah Code Ann. § 78-2-2(3)(j). The appeal was subsequently assigned by the Utah Supreme Court to the Utah Court of Appeals pursuant to Utah Code Ann. § 78-2-2(4). The Court of Appeals has jurisdiction of the appeal pursuant to Utah Code Ann. § 78-2a-3(j).

ISSUES PRESENTED FOR REVIEW

The issues presented by this appeal, and the appropriate standard of review for each, are as follows:

1. Did the trial court err in ruling in this negligence action that the University owed no duty of care to the Cannons, on the basis of the "public duty" doctrine? This issue presents a question of law, and the trial court's decision is to be reviewed for correctness, without according deference to its conclusions. Bonham v. Morgan, 788 P. 2d 497, 499 (Utah 1989); Jones v. American Coin Portfolios, Inc., 709 P. 2d 303, 306 (Utah 1985).
2. Did the trial court err in ruling that the University owed no duty of care to the Cannons as business

invitees of the University? This issue also presents a question of law, and the standard of review is the same as for issue #1.

3. Did the trial court rely upon disputed issues of material fact in ruling that the University owed no duty of care to the Cannons? In reviewing the trial court's decision granting summary judgment, the Court of Appeals must view the facts in the record, together with all inferences fairly arising from the facts, in the light most favorable to the Cannons, and affirm only if there is no genuine issue of material fact.

Provo City Corp. v. State, 795 P.2d 1120, 1121 (Utah 1990). The trial court's legal conclusions in granting summary judgment are reviewed simply for correctness, and no deference is accorded to such conclusions. Blue Cross & Blue Shield v. State, 779 P. 2d 634 (1979).

4. Did the trial court err in striking the affidavits of Dr. Cannon and plaintiffs' traffic safety expert, Mr. David Lord, as untimely pursuant to U.R.C.P. Rule 6(d) and inadmissible under U.R.C.P. 56(e)? The issue of timeliness is a question of law, and subject to review for correctness without deference. The sufficiency of Dr. Cannon's and Mr. Lord's affidavits in the context of a motion for summary judgment is a

question of law. American Concept Ins. Co. v. Lockhead, 751 P.2d 271 (Utah App. 1988).

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This action arose from an auto-pedestrian accident on the University of Utah campus on the evening of February 1, 1990. The appellants, Dr. M. Dalton Cannon and Mrs. Patricia Cannon, were en route to a University of Utah basketball game when they were struck by an automobile while using a crosswalk across South Campus Drive adjacent to the Huntsman Center. R. 250-251.¹ The Cannons were critically injured, and remain seriously and permanently disabled.

That evening, the University had specifically assigned two University of Utah police officers to assist pedestrians using the crosswalk across South Campus Drive en route to the basketball game, in accordance with the University's normal practice. R. 327, 329. At the time of the accident, the officers were sitting in their car at the crosswalk talking. R.

¹Citations to the record of proceedings before the trial court are set forth as "R____." No transcript was made of the summary judgment hearing.

287, 329, 330. Neither officer attempted to assist the Cannons across the crosswalk, or tried to control approaching vehicular traffic. There was additional evidence that the officers had allowed flares marking the crosswalk to approaching vehicular traffic to burn down prior to the accident. R. 251, 327, 396.

In deposition testimony, University police officers stated that it was the specific duty of officers assigned to the crosswalk prior to basketball games to assist pedestrians across the crosswalk and to control vehicular traffic in the immediate vicinity of the crosswalk. The officer supervising the accident investigation testified that this task could not be performed adequately without the officers being out of the police vehicle and actively involved in controlling pedestrian and vehicular traffic.

Based on these and other facts, Dr. and Mrs. Cannon filed this action against the University for the injuries they suffered as a result of the negligent conduct of its employee police officers. The Cannons also sued the driver of the car that hit them, Ms. Malissa Austin. Prior to the entry of judgment in this case, Ms. Austin settled with the Cannons, leaving the University as the sole defendant.

B. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

On February 11, 1992, the defendant University of Utah moved for summary judgment in this proceeding, claiming that the University officers owed no duty of care to the Cannons, and that any negligent conduct by the officers was not the proximate cause of the Cannons' injuries.² By Memorandum Decision dated March 10, 1992, the Third District Court, Hon. Richard Moffat presiding, granted summary judgment in favor of the defendant University of Utah on the basis that the University officers owed no duty of care toward the Cannons pursuant to the "public duty" doctrine. R. 430-435. The court additionally rejected the Cannons claim that a duty of care was created by their status as business invitees of the University, and struck two affidavits filed by the Cannons in opposition to the University's motion. Id. The Court made no ruling on the University's claim that proximate causation was not present.³

² At the time of this motion, the parties stipulated to the voluntary dismissal of the Cannons' claims that the University had negligently failed to maintain adequate lighting and signage in the vicinity of the crosswalk. R. 436-437.

³ However, the Court stated that it was granting summary judgment on the duty of care issue, and for the reasons set forth in the University's memorandum. This issue is discussed in Part IV.C. of the brief.

A Judgment and Order of Dismissal was entered by the Court on March 24, 1992. R. 441-442. The Cannons filed their Notice of Appeal on March 27, 1992. R. 443-446. On June 15, 1992, this appeal was transferred by the Utah Supreme Court to the Utah Court of Appeals.

STATEMENT OF FACTS

1. The Cannons were struck by an automobile while in a pedestrian crosswalk on the University of Utah campus en route to a University of Utah basketball game at approximately 6:58 p.m. on the evening of February 1, 1990. R. 176, 250. The Cannons, who were in their late sixties at the time, were critically injured in the accident, and both are substantially and permanently disabled. R. 177.

2. Two University of Utah police officers, Officer Kim Beglarian and Officer Brian Purvis, had been specifically assigned that evening to assist pedestrians across the crosswalk in question, which is located on South Campus Drive adjacent to the Huntsman Center. R. 327, 329.

3. The Cannons had used the crosswalk prior to basketball games in the past, and police officers had generally

been at the crosswalk, with flares lit, actively directing traffic. R. 327.

4. The lead investigator for the University Police Department, Officer Mike McPharlin, testified in his deposition that in order to perform their assigned crosswalk duties properly, the officers needed to have been out of their car. R. 329.

5. Officer McPharlin additionally stated that a pedestrian using the crosswalk should have had contact with the officers prior to using the crosswalk, because it was the duty of the officers to advise pedestrians when to cross. R. 329. It was the specific duty and responsibility of the officer to be on the lookout for pedestrian traffic, and to decide whether to stop the pedestrian. Id.

6. Officer Beglarian acknowledged that their assignment specifically required the duty to assist pedestrians by stopping traffic until the pedestrians made it across the crosswalk. R. 327. Officer Beglarian further stated that the purpose of the officers' presence at the crosswalk was pedestrian safety. R. 329. Their normal procedure would have been to help the Cannons across the crosswalk. Id. The officers

were supposed to check pedestrian and vehicular traffic, and to stop one while the other proceeded. Id.

7. That evening, the officers had been out of their car helping pedestrians, but had gotten back in their car prior to the time of the accident. R. 329. However, at the time of the accident, approximately 28 minutes after their duties commenced at 6:30 p.m. [R. 251], both officers were sitting in their car, trying to stay warm, talking and possibly listening to the radio. R. 287, 329, 330.

8. There were other pedestrians in the area at the time the accident occurred. R. 328. Officers Purvis and Beglarian would watch for pedestrians from their car, and then get out and assist them. R. 329. Even the presence of only one pedestrian would have triggered this obligation. R. 288. However, the Cannons walked directly in front of the officers' car seconds before the accident, and the officers did not see them. R. 328-330.

9. Where it was located, their car would have partially blocked the view of westbound traffic of pedestrians using the crosswalk. R. 330. Officer Beglarian did not believe that lighting at the crosswalk was adequate. R. 330.

10. The purpose of the flares set by the officers was to warn approaching traffic of pedestrians. R. 330. Although the officers stated that the flares they had set to mark the crosswalk to approaching traffic were still burning (albeit burning down), neither Dr. Cannon nor the driver of the vehicle, Ms. Malissa Austin, saw flares burning at the time of the accident. R. 327.

11. The officers set flares out at the crosswalk when they arrived at the crosswalk around 6:30. R. 251. Flares such as those used can burn out in 25 minutes or less in adverse weather conditions. R. 396. It had been snowing or raining intermittently as recently as five to ten minutes before the accident. R. 396. According to Dr. Cannon, the officers' car did not have its flashers on, although one of the officers stated that they had their amber flashers on. R. 289, 293. The investigating officer testified that normally the car's red and blue emergency lights should have been on to alert vehicular traffic of activity in the area. R. 367.

12. Men's basketball games at the University of Utah are revenue-producing events for which admission is generally charged. The general public is invited, and the University

promotes the games using radio and television advertising, in order to increase attendance. R. 371.

13. The University makes parking areas on the south side of South Campus Drive, across from the Huntsman Center, available for use by spectators attending University basketball games. R. 371. The Cannons utilized this parking on the night of the accident, and were proceeding northbound to the Huntsman Center, attempting to cross South Campus Drive, when they were hit. R. 426-428.

SUMMARY OF ARGUMENTS

In ruling upon a motion for summary judgment, a court is required to view all facts, and the inferences that can be drawn from those facts, in the light most favorable to the non-moving party. The Cannons presented the Court with facts clearly establishing the existence of a duty of care owed to them by the University police officers assigned to guard the crosswalk where the accident occurred.⁴ The trial court

⁴ The Cannons believe that the deposition testimony set forth in their Memorandum In Opposition to the Defendant's Motion for Summary Judgment was alone sufficient to preclude summary judgment. The trial court erroneously struck two additional affidavits filed by the Cannons in opposition to the University's motion. These affidavits provided additional admissible factual material precluding summary judgment, and should have been considered by the court. See Part IV, infra.

instead founded its ruling upon facts disputed by the Cannons, and reached legal conclusions that were contrary to the record before it. Its decision should be reversed and this case remanded for trial.

The trial court's decision was based primarily upon the "public duty" doctrine set forth in Ferree v. State, 784 P. 2d 149 (Utah 1989). Based upon that doctrine, the court ruled that the Cannons had failed to prove that the University owed them some specific duty of care, rather than a general duty owed to members of the public to ensure traffic safety. The trial court's ruling glosses over a crucial and undisputed fact: the police officers in question were specifically assigned to assist pedestrians across the crosswalk prior to the basketball game, thus creating a duty of care toward those pedestrians. The law is clear that when a governmental entity voluntarily assumes a task, it assumes a duty to perform that task non-negligently. The officers admitted that their assignment required active involvement with pedestrians and vehicles at the crosswalk, yet they were sitting in their car talking and listening to the radio at the time of the accident. Their negligence is difficult to dispute.

The trial court shoehorned this case into the public duty doctrine by relying upon the University's arguable lack of a duty to provide traffic control at the crosswalk in the first place.⁵ The court equated the absence of a duty to assign the officers to the crosswalk in the first place with the officers' failure to perform their assigned task once they got there. Because the University had no duty to provide traffic control, the officers also had no duty to do so, despite their assignment. This premise both misstates the law and relies on disputed facts. The officers were in fact engaged that evening in traffic control; the evidence shows that they simply were failing to do so competently at the time of the accident. The Cannons also suggest that this ruling is highly undesirable from a policy standpoint; the trial court would relieve governmental employees from liability only if they completely ignored their assigned task. Finally, the trial court disregarded factual evidence that the officers were actively negligent, by parking their car in a manner that obscured pedestrians from oncoming

⁵ The Cannons contend that their status as business invitees of the University created a duty of care in the University's employees to act non-negligently when on property owned or occupied by the University. See Part IV, infra.

traffic and by allowing marker flares to burn down or out at the crosswalk.⁶

As business invitees of the University, the Cannons were also entitled to have the University and its employees exercise due care to protect their safety in all areas under the University's control. The trial court denied this claim because the street underlying the crosswalk is owned by the Utah Department of Transportation, not the University. However, applicable law (as expressed in the Restatement 2d of Torts) provides that occupation of property, not ownership, is determinative when an invitee relationship is alleged. The University police officers were clearly in occupation and control of the crosswalk, and owed those using it a duty of care.

ARGUMENT

I.

**THE "PUBLIC DUTY" DOCTRINE IS INAPPLICABLE
WHERE A RISK OF HARM TO IDENTIFIABLE
INDIVIDUALS OR GROUPS ARISES FROM THE
DEFENDANT'S NEGLIGENT CONDUCT**

⁶ The Cannons flatly dispute, on the basis of convincing deposition testimony, that the marker flares were still burning at the time of the accident, yet the trial court stated that there was "sufficient evidence" to believe the contrary. R. 433. The court's weighing of the evidence is improper on summary judgment.

A. The Public Duty Doctrine In Utah.

The "public duty" doctrine, upon which the trial court's decision was based, has been the subject of considerable litigation in Utah's courts in recent years. See e.g. Rollins v. Petersen, 813 P. 2d 1156, 1162 (Utah 1991); Ferree v. State, 784 P. 2d 149 (Utah 1989); Little v. Utah State Div. of Family Services, 667 P. 2d 49 (Utah 1983); Lamarr v. Utah Dept. of Transportation, 828 P. 2d 535 (Utah 1992). The public duty doctrine has been succinctly defined as stating that "a duty to all is a duty to none." Lamarr, supra, 828 P.2d at 539.⁷ The Utah Supreme Court has defined the doctrine more broadly as follows:

For a governmental agency and its agents to be liable for a negligently caused injury suffered by a member of the public, the plaintiff must show a breach of duty owed him as an individual, not merely the breach of an obligation owed to the general public at large by the governmental official.

Ferree v. State, supra, 784 P. 2d at 151.

In the absence of a specific rather than a general duty, the "special relationship" necessary for a duty of care is not present. See Beach v. University of Utah, 726 P. 2d 413

⁷ Citing Rollins v. Petersen, 813 P. 2d 1156, 1165 (Utah 1991)(Durham, J., concurring in part and dissenting in part).

(Utah 1986). Because the existence of a duty of care is an essential element of a negligence claim, the public duty doctrine, if applicable, precludes a plaintiff from recovering damages for negligence from a governmental employee.⁸

The Cannons agree that the public duty doctrine, as it has been stated by Utah's appellate courts, remains the law in Utah.⁹ In this case, however, the trial court misinterpreted the doctrine, and additionally relied upon disputed material facts to apply it to the Cannons. Summary judgment was therefore inappropriate.

B. Lack of An Identifiable Risk of Harm to Specific Individuals or Groups Is the Common Factor In Utah's Reported Public Duty Cases.

The reported Utah public duty cases have been based upon a factual pattern that is clearly distinguishable from the instant case. Where the courts have found the public duty doctrine applicable, there has been no identifiable person or

⁸ Sovereign immunity is not an issue in this appeal. The University admits that it may be held liable for the negligent acts or omissions of its employees, Officers Purvis and Beglarian. R. 257.

⁹ In Rollins, supra, Justice Durham of the Utah Supreme Court argued in her partial dissent for the abolition of the public duty doctrine. Other western states have abolished the doctrine in recent years. See e.g. Leake v. Cain, 720 P. 2d 152 (Colo. 1986).

class of persons that foreseeably could be harmed by the allegedly negligent conduct. The distinction is crucial. In Ferree v. State, 784 P. 2d 149 (Utah 1989), the case upon which the trial court here based its ruling, an inmate at a community corrections facility became intoxicated and murdered a total stranger while on a weekend release. The victim's family sued the Department of Corrections, claiming that the Department's negligence in supervising the inmate's release was a proximate cause of the victim's death. The Utah Supreme Court held that the Department did not owe a duty of care to the decedent, because the Department of Corrections' general duty to protect public safety could not extend to the protection of unknown parties from future violent acts by parolees, in the absence of knowledge that a specific individual or group might be in danger.

In Rollins v. Petersen, 813 P. 2d 1156 (Utah 1991), an escaped mental patient injured the plaintiff, a stranger, in a car accident on Interstate 15. The Supreme Court understandably held that the defendant mental health facility's duty to exercise care in controlling patients did not create any enforceable duty to unidentifiable persons who might somehow be injured after an escape. In Lamarr v. Utah Dept. of

Transportation, 828 P. 2d 535 (Utah App. 1992), the plaintiff was harassed by transients under the North Temple viaduct in Salt Lake City, leading him to avoid the pedestrian walkway by walking on the roadway, where he was subsequently hit by a car. He then claimed that the city had a duty to control the transient population to prevent injuries to persons such as himself. The Court of Appeals held that the City had no way of knowing of Lamarr's activities, and no reason to distinguish Lamarr from any other member of the public, so no duty of care existed. 828 P. 2d at 540.

These cases all involve a common and readily distinguishable fact pattern. The defendants, while having a general duty to perform their duties properly, had no means of identifying the persons who might be harmed by their alleged negligence. In the absence of a person or persons who could foreseeably be harmed, no actionable duty of care could be found to exist. In contrast, where there is a reasonably identifiable risk of harm to a specific person or group, a "special relationship" giving rise to a duty of care exists. Rollins,

supra, 813 P. 2d at 1162. See also Little v. Utah State Division of Family Services, supra, 667 P. 2d 49.¹⁰

The Court should note that, in order to escape the public duty doctrine, the plaintiff need not be identifiable as an individual. Instead, the plaintiff need merely be part of a reasonably identifiable group. Rollins v. Petersen, 813 P. 2d 1156, 1162 (Utah 1991). The Court in Rollins indicated that if harm was likely to a distinct group as a result of a governmental defendant's failure to act with due care, an actionable duty of care existed toward that group. Id.

C. Pedestrians Using the Crosswalk Clearly Were At Risk As a Result of The Officers' Negligence.

The trial court's Memorandum Decision is based in large part upon the conclusion that the Cannons proved no duty on the part of the officers toward them as specific individuals, rather than as members of the general public. R. 433. Under Rollins, the Cannons were not required to do so; they instead simply needed to show that they were part of an identifiable class of people which was foreseeably at risk. See also 18 E.

¹⁰ In Little, the Supreme Court found that a governmental social agency was liable for harm to a child in foster care, where the possibility of harm to that child from the agency's negligent acts was foreseeable.

McQuillen, The Law of Municipal Corporations, Sec. 53.04b at 165 (3d Ed.1985)(duty can exist to class of individuals as well as individual persons).

On appeal from a grant of summary judgment, the facts in the record, and all fair inferences from those facts, must be viewed in the light most favorable to the appellant. The record here demonstrates that the University recognized the danger to pedestrians crossing busy campus streets immediately prior to University basketball games. In order to protect those pedestrians, it assigned University police to guard the South Campus Drive crosswalk prior to the games. Those officers were specifically aware that their assigned task was to be out of their car advising pedestrians when to cross the crosswalk and stopping vehicular traffic. On the night of the accident, the weather had been bad, and visibility was poor, increasing the risks of an auto-pedestrian accident. The officers were aware of the danger that the crosswalk presented under the circumstances. The officers obviously could have foreseen that game spectators using the crosswalk (an identifiable class of individuals) would be subject to harm if the officers failed to perform their crossing duties competently. Under Rollins, the officers owed a duty of care to those persons.

II.

THE PUBLIC DUTY DOCTRINE IS INAPPLICABLE, BECAUSE THE UNIVERSITY ASSUMED A DUTY OF CARE TO PEDESTRIANS AT THE CROSSWALK BY ASSIGNING OFFICERS TO GUARD IT.

A. Once A Governmental Entity Voluntarily Assumes A Task, It Is Required to Perform That Task In A Non-Negligent Manner.

The public duty doctrine involves an inquiry into whether the relationship between the parties gives rise to a duty of care. In this case, however, there is no need for such inquiry, because the University expressly assumed a duty to act non-negligently when it assigned the officers to guard the crosswalk on the evening of the accident. Once a government entity assumes a specific duty towards individuals, it has an obligation to act with due care. Rollins, supra, citing Little v. Utah State Division of Family Services, 667 P. 2d 49 (Utah 1983). This principle was recently discussed by the Court of Appeals in Jones v. Bountiful City, 187 Utah Adv. Rep. 23, ___ P. 2d ___ (Utah App. 1992). In Jones, the plaintiff claimed that the city of Bountiful should have erected signage to prevent accidents at an intersection known to be dangerous. The Court of Appeals rejected this contention, but stated that once the City did choose to erect signs, it had a duty to do so in a non-negligent manner. 187 Utah Adv. Rep. at 24, citing 19 E.

McQuillen, The Law of Municipal Corporations Sec. 54.28b at 90 (3d Ed. 1985).

Other courts have similarly ruled that where a governmental entity assumes the responsibility of providing some service, it concurrently assumes a duty of care to provide that service competently. In Florence v. Goldberg, 375 N.E. 2d. 763 (N.Y. App. 1978), the defendant school district supplied a crossing guard near a public school for several weeks, but then negligently failed to schedule a guard on a particular day. In the absence of the guard, a child was forced to cross unassisted, and was hit by a car. The New York court expressly held that the public duty doctrine did not apply to prevent the school board from being held liable. It noted that the municipality might have had no duty in the first place to provide a crossing guard for the protection of the public. However, once the defendant voluntarily assumed the task, it had the duty to perform the task non-negligently. 375 N.E. 2d at 766; see also Veach v. City of Phoenix, 427 P. 2d 335 (Ariz. 1967).

The trial court recognized that officers Purvis and Beglarian had been assigned by their superiors to help people across South Campus Drive. R. 434. However, it then ruled that

the assumption of this obligation did not extend the duty otherwise owed by the officers. Id. This ruling confuses the University's original obligation to provide traffic control in the first place with performance of that task. Under the public duty rule, the University may arguably have had no obligation to provide traffic control at the crosswalk in the first place.¹¹ Once it chose to do so, however, it had an obligation to do so competently and non-negligently. Utah's law is clear that the University's failure to fulfil its voluntarily assumed duty to this group is actionable under relevant law. See Rollins, supra; Little v. Utah State Division of Family Services, supra, 667 P. 2d at 53-54.

The University police officer investigating the accident, Officer Mike McPharlin, acknowledged that an officer could protect pedestrians only by being out of the car and halting pedestrians at the curb while traffic passed. Instead, officers Purvis and Beglarian were sitting in their car with the heater on, talking and perhaps listening to the radio. This forced the Cannons to attempt to cross the street without the

¹¹ The Cannons contend that the University and its employees had a duty of care to invitees to its athletic events, and that this duty existed independently of whether any duty of care was assumed by the University. See Part VI, infra.

normal level of police assistance, with catastrophic results. The University undertook to protect the safety of pedestrians using the Huntsman Center crosswalk. This created a "special relationship" between the University and those pedestrians. A duty to exercise reasonable care to protect pedestrians at the crosswalk existed under the circumstances.

Other courts dealing with crosswalk accidents have had no hesitancy in ruling that, once the government undertakes to provide crosswalk safety, it assumes a duty of care to those using the crosswalk. Alhambra School District v. Superior Court, 796 P. 2d 470, 474 (Ariz. 1990). The Alhambra court stated:

Although pedestrians are not absolutely required to use crosswalks to cross a street, it is certainly foreseeable that pedestrians might conclude ... that use of a marked crosswalk would be the prudent thing to do. A pedestrian might reasonably rely on the added safety of a marked crosswalk - particularly a school crosswalk, with its additional protections.

We conclude, therefore, that in creating the marked crosswalk where none previously existed, the District created a relationship with those who would use the crosswalk, and thereby assumed a duty of reasonable care with respect to its operation. 796. P. 2d at 474 (Emphasis added).

In the case at bar, not only was there a marked crosswalk, but also uniformed University police officers whose

sole function was to make pedestrian crossings safe. The Cannons had used the crosswalk for years, and had always been afforded this protection. It is apparent that the University assumed the duty of protecting "those who would use the crosswalk, and thereby assumed a duty of reasonable care with respect to its operation." Alhambra School District, supra, 796 P. 2d at 474.

The facts and law set forth in Alhambra and Florence are directly on point here. The University may not have been obligated under law to provide police protection at the crosswalk, but it chose to assume responsibility for doing so. It specifically assigned two officers to do one thing - protect pedestrian safety at the crosswalk on that evening. The officers then utterly failed to comply with the duties they were sent to perform. This failure is actionable under Utah law.

III.

THE TRIAL COURT RELIED UPON DISPUTED FACTS, AND IGNORED MATERIAL ISSUES OF FACT RAISED BY THE CANNONS

A. The Trial Court's Ruling Is Based Upon A Misconception
of the Facts.

As one of the foundations of its ruling, the trial relied upon the factual conclusion that the officers were not engaged in traffic control activities at the time of the accident. R. 434. The court somehow equated the officers' failure to perform their assigned task at the crosswalk with the University's arguable lack of a duty to send them there in the first place. Id. The court's logic is faulty; it is the equivalent of ruling that a lifeguard who stays in his chair when he sees a drowning child should be absolved from liability because he was not conducting lifesaving activities. More importantly, the court was making an inherently factual determination concerning what the officers were and should have been doing. This is an issue of material fact sufficient to bar summary judgment. Barnes Co. v. Sohio Natural Resources, 627 P. 2d 56, 59 (1981)(a single issue of material fact is sufficient to prevent summary judgment).

The trial court's ruling reflects the University's argument that, because the officers were sitting in their car rather than directing traffic as assigned, the Cannons did not rely upon their presence in attempting to cross the street. The University relies on a brief statement in Dr. Cannon's deposition, in which he stated that when he and his wife arrived at the crosswalk, the police who were usually present to assist them were nowhere in evidence. As a result, they were forced to cross the street without assistance, and were hit in the crosswalk.

Even if taken as true, the contention that the Cannons did not rely on the officers to cross the street does not absolve the officers of responsibility. In Florence v. Goldberg, supra, the Court found liability where no officers had been present at a crosswalk; the omission of assistance was the determinative factor. Here, the investigating officer clearly indicated that it was necessary for the officers to be out of their car stopping traffic and/or pedestrians to perform their assigned task effectively. One of the officers similarly acknowledged that they needed to meet and stop pedestrians in the face of oncoming traffic to perform their assigned task effectively. Their assigned duty also included advising

pedestrians when to cross the street. The fact that the Cannons were been forced by the officers' inaction to cross the street without assistance is itself indicative of a negligent failure to act. In this situation, a duty of care includes the obligation to act affirmatively if necessary to prevent injury to those entrusted to the actor's care. See Prosser & Keeton On Torts § 56 at 376-377 (5th Lawyers Ed. 1984). In any event, this is an inherently factual determination, and one that is disputed by the Cannons.¹²

B. The Existence of a Duty of Care Is a Question of Fact Here.

The Cannons agree that the existence of a duty of care is generally an issue of law. However, when the facts upon which the issue must be decided are in dispute, summary judgment is improper. Estate of Tanasijevich v. City of Hammond, 383

¹² In his affidavit, stricken by the Court as untimely and immaterial, Dr. Cannon stated that one of the reasons that the Cannons used the crosswalk in question was the availability of police assistance in crossing the street. The Cannon affidavit clearly raises material factual questions concerning the issue of reliance. The Cannons have appealed the trial court's striking of his affidavit, because it was filed in accordance with the time requirements of U.R.C.P. 6(d), and was otherwise admissible. However, the Cannons believe that the Court of Appeals can decide the issue of duty in their favor, without reference to the affidavits.

N.E. 2d 1081 (Ind. App. 1978). In that case, the court denied summary judgment to a governmental entity that claimed that the public duty rule absolved it of liability to the plaintiff. The court noted that disputes of fact existed concerning whether there was some reasonably apparent danger to the plaintiff that might create a duty. 383 N.E. 2d at 1085. Similar disputes exist here.

The Court should also note that the officers' failure to assist the Cannons is not the only allegation of negligence here. The Cannons contend that the officers had allowed marker flares at the crossing to burn down or go out, increasing the likelihood that a driver would be unable to see the Cannons, or be placed on notice of a potential hazard. Neither the Cannons nor the driver of the car saw flares, and even the officers admitted that the flares were burning down. There was further evidence that the flares could burn down in 25 minutes or less in wet and windy conditions such as the night in question, which could lead to the inference that the flares were not burning at the time of the accident.¹³ Yet the trial court stated as a

¹³ The Cannons also contend that the officers also parked in the middle lane of South Campus Drive, obscuring pedestrians from the view of westbound drivers. Together with the officers' failure to perform their assigned task of actively assisting pedestrians across the crosswalk, these negligent acts made it highly

basis for its ruling that "...there is sufficient evidence to believe that there were flares burning in the crosswalk...." R. 433. This sort of weighing of disputed evidence is improper on summary judgment, and justifies reversal. See Barnes Co. v. Sohio Natural Resources, supra, 627 P.2d at 59.

C. The Trial Court's Decision Is Bad Public Policy.

The trial court's decision, if affirmed by this court, would create a disincentive toward safe behavior by governmental employees. To perform their assigned job, officers Purvis and Beglarian admittedly had to be out of their car, stopping traffic or pedestrians until the other passed. They failed to do so. Yet the trial court relied on their nonfeasance as a factor supporting its ruling. The court reasoned that, because the officers were not performing their duty, the Cannons could not have relied upon them, and no duty of care existed. This ruling would discourage active involvement in protecting public safety, and reward those who shirk their duties. By remaining removed from potentially dangerous situations, an employee could escape liability entirely, while taking action to protect public

foreseeable that a driver could hit the Cannons.

safety would pose higher risks of litigation. This is exactly the opposite of what the Utah legislature has sought to encourage with the Utah "Good Samaritan Act" and other legislation. Sound public policy dictates that the trial court's ruling be set aside.

IV.

THE TRIAL COURT ERRED IN STRIKING DR. CANNON' S AFFIDAVIT

A. The Affidavit Was Timely.

The hearing on the University's Motion for Summary Judgment was held on Friday, March 6, 1992. The University filed and served its reply memorandum in the case on the afternoon of Wednesday, March 4. In that reply memorandum, the University raised in detail for the first time factual and legal contentions concerning the Cannons' reliance upon the officers' presence at the crosswalk. To rebut these contentions, the Cannons the next day filed the Affidavit of M. Dalton Cannon. The affidavit was filed and served upon counsel for the defendant on the afternoon of Thursday, March 5, the day before the hearing. R. 382-383.¹⁴

¹⁴ Defendant's counsel states he received the affidavit at approximately 2:30 p.m. that Thursday.

The University moved to strike the affidavit as untimely under Rule 6(d) U.R.C.P., and the trial court agreed. This ruling was incorrect. Rule 6(d) U.R.C.P. allows affidavits in opposition to a motion for summary judgment to be filed not later than 1 day before the hearing, unless otherwise allowed by the Court. This rule must be interpreted in conjunction with Rule 56(c) U.R.C.P., which states: "The adverse party prior to the date of hearing may serve opposing affidavits." (emphasis added). These rules by their terms permit affidavits in opposition to a motion for summary judgment to be served at any time prior to the day of hearing. Accord Beaufort Concrete Co. v. Atlantic States Constr. Co., 352 F. 2d 460, 462 (5th Cir. 1965)(interpreting identical federal rules). The affidavits were timely as a matter of law.

B. Dr. Cannon's Affidavit Was Otherwise Admissible.

The trial court also adopted without comment the University's objections that Dr. Cannon's affidavit was contradictory to his deposition testimony, and immaterial. It is neither.¹⁵ Dr. Cannon's affidavit stated that, at past

¹⁵ The immateriality objection should be disposed of summarily. The University makes the circular objection that the affidavit is immaterial because the University had no duty of care to the

University basketball games, he and his wife had used the same crosswalk and had taken advantage of the assistance of University police in crossing South Campus Drive. Para. 4, R. 383. On the night in question, one reason that they used the South Campus Drive parking lots and crosswalk was the availability of police protection at the crosswalks. Para. 5. On the night of the accident, they did not see the officers at the crosswalk, but did see their automobile.¹⁶ Dr. Cannon then stated that, had the officers been available at the crosswalk, the Cannons would have followed their directions. In their absence, the Cannons were forced to fend for themselves in crossing the street. R. 383.

The University contends that these statements should have been held inadmissible on the basis of Webster v. Still, 675 P. 2d 1170 (Utah 1983). In Webster, the Utah Supreme Court stated that when a party takes a clear position in a deposition, he may not thereafter raise an issue of fact by his own

Cannons. R. 421. However, the University's own arguments concern the issues raised in the affidavit - e.g. reliance. The affidavit clearly involves material issues; that is why the University seeks to bar its admission.

¹⁶The officers were inside the automobile at the time. This is another indication of how dark the crosswalk area was, a fact that should have led the officers to take additional precautions to ensure pedestrian safety in the crossing.

contradictory affidavit. 675 P. 2d at 1172-3. Yet the Webster court went on to state that this rule should be applied cautiously, and only when there is an unequivocal contradiction between deposition testimony and an affidavit. 675 P.2 at 1173. The Court of Appeals has exercised similar caution in refusing to strike affidavits that could raise issues of fact. Gaw v. State by and through DOT, 798 P.2d 1130, 1140-1 (Utah App. 1990).

Upon review of the affidavit and the allegedly inconsistent statements, it becomes apparent that there are no inconsistencies of any consequence. R. 383; cf. R. 422. In his affidavit, Dr. Cannon stated that one of the reasons the Cannons parked where they did was the availability of police assistance in crossing South Campus Drive. The University somehow argues that this testimony was contradicted by his statement that he and his wife would arrive early to get a good parking place and avoid the crowds. It similarly sees a contradiction in Dr. Cannon's testimony that other parking areas involved climbing stairs. These statements are neither directly contradictory to nor mutually exclusive with his affidavit statement that one of the reasons they parked where they did was the availability of manned crosswalks.

Summary judgment is a harsh remedy, and the court is required to resolve all doubts in favor of the party opposing the motion. Durham v. Margetts, 571 P. 2d 1332 (Utah 1977). The Utah Supreme Court in Webster made it clear that it is not the task of the trial court to weigh evidence at the summary judgment stage. Unless the inconsistency is completely implausible, it is the finder of fact that must weigh the credibility of the explanation. Gaw, supra, 798 P.2d at 1141. Accordingly, an affidavit should be disregarded only if there is a direct and clear contradiction to prior testimony. 675 P. 2d at 1172-3. No such direct contradiction exists here; in fact, there is no inconsistency whatsoever between Dr. Cannon's testimony and his affidavit. The affidavit raised a clear and material issue of fact concerning the Cannon's reliance on the officers' presence in choosing where to park. The trial court erred in striking Dr. Cannon's affidavit.

C. The Lord Affidavit Should Also Have Been Admitted.

The affidavit of David Lord, the plaintiffs' traffic safety expert, concerns the issue of proximate cause. In it he states that his expert opinion was that, had the officers acted in accordance with their assigned tasks and without negligence, by stopping them or the oncoming vehicle, the Cannons would not

have been injured. R. 37-381. As noted previously, the trial court made no express ruling on the issue of proximate cause, but did adopt the defendant's memorandum. R. 435.

The Court of Appeals, to the extent that it is necessary to address proximate causation, can find a material issue of fact on the issue of causation even without the Lord Affidavit. In virtually all cases, including this one, causation is a factual issue to be determined by the jury. Apache Tank Lines, Inc. v. Cheney, 706 P.2d 614 (Utah 1985). The Lord affidavit meets all the requirements for an expert's affidavit set forth in American Concept Ins. Co. v. Lockheed, 751 P.2d 271 (Utah App. 1988), and clearly raises factual questions concerning causation. Even if it did not, the officers' admitted failure to assist the Cannons raises the same issues of fact. Summary judgment is also improper on the causation issue.

V.

THE CANNONS WERE BUSINESS INVITEES OF THE
UNIVERSITY, REQUIRING THE UNIVERSITY TO
EXERCISE REASONABLE CARE TO PROTECT THEIR
SAFETY

The trial court rejected the Cannon's claims that the University owed them a duty of care as business invitees because the University does not own the roadway underlying the crosswalk where the accident occurred. The Cannons, as paying customers of the University basketball program, were clearly business invitees; mens basketball games are promoted to the public by the University, with the purpose of raising attendance and thereby ticket revenue. R. 371. See Stevens v. Salt Lake County, 478 P. 2d 496, 498 (Utah 1970)(business invitee is one who goes on the premises of another for some business of mutual advantage). With respect to such invitees, the business is expected to exercise a high degree of care to assure their safety. Id. at 498. The Court should note that the owner-invitee relationship is a "special relationship" creating a duty of care. DCR, Inc. v. Peak Alarm Co., 663 P. 2d 433, 435 (Utah 1983). This relationship provides an entirely independent basis for imposing a duty of care on the University.¹⁷

The trial court denied the existence of a duty of care to the Cannons as invitees because the Utah Department of

¹⁷ Those who attend university events for a fee stand in the status of invitees. Peterson v. San Francisco Community College, 685 P. 2d 1193 (Cal. 1984); see also Cimino v. Yale University, 638 F. Supp. 952, 955 (D. Conn. 1986).

Transportation ("UDOT"), not the University, owns South Campus Drive. R. 432. The trial court's reliance on ownership of the street is misplaced. Section 344 of the Restatement (2d) of Torts makes it clear that occupancy, not ownership, of the premises is the test for whether a special relationship arises:

A possessor of land who holds it open for his business purposes is subject to liability to members of the public while they are on the land for such a purpose, for physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons or animals, and by the failure of the possessor to exercise reasonable care to...

(b) give a warning adequate to protect the visitors to avoid the harm, or otherwise to protect them against it.

Restatement (2d) of Torts, § 344 (emphasis added).

The University, through its officers, was in active possession of the crosswalk at the time the accident occurred. The University, not UDOT, had specifically undertaken to operate the crosswalk in question. UDOT was not shown to have any input into how or when pedestrians would be provided with police protection; that task was assumed solely by the University.

In light of the significant level of involvement that the University had with the crosswalk, this is hardly an expansion of the law governing invitees. The University

actively promotes public attendance at its basketball games. As part of this activity, it makes parking lots on the south side of South Campus Drive available to basketball fans. To get to the game, those fans must cross South Campus Drive. The University expressly recognized that this crossing posed a danger to them, and assigned police to guard the crosswalks. In a very real sense, it "held open" the crosswalk to its invitees for its own business purposes. The fact that the University did not hold title to the underlying roadway is irrelevant in light of its recognition of the danger and its undertaking to provide protection at the crosswalk for its invitees. Under Restatement § 344 and the law of invitees, the University and its employees had a duty of care towards the Cannons, a duty which they failed to fulfil.

In finding that no invitee relationship existed, the trial court also relied upon the Cannons' withdrawal of their claim against the University based upon ownership of South Campus Drive. R. 432. This argument is misplaced. The claim withdrawn by the Cannons concerned the possible lack of adequate signage and lighting at the crosswalk, an issue within the admitted responsibility of UDOT. This issue has no connection with the University's failure to use reasonable care to protect

those invitees who were using a crosswalk staffed by University employees to go to from a University parking lot to a University sports facility. The dismissal of the inadequate maintenance claims is irrelevant.

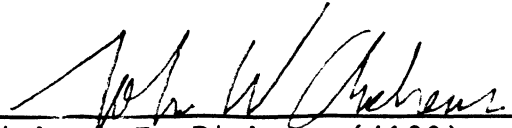
CONCLUSION

There is little question that the University of Utah recognized the danger to pedestrians arising from the use of the Huntsman Center crosswalks prior to evening basketball games. To alleviate this danger, it assigned University police to the crosswalks to assist spectators in reaching the Huntsman Center. On the evening of February 1, 1990, the University's officers utterly failed to comply with their assigned task, resulting in devastating injuries to the Cannons. The University is not entitled to escape responsibility for its officers' negligent performance of a duty that the University expressly assumed. The University owed the Cannons a duty of care. The trial court's decision should be reversed, and the Cannons given an opportunity to prove their case.

DATED this 19 day of August, 1992.

VAN COTT, BAGLEY, CORNWALL & McCARTHY

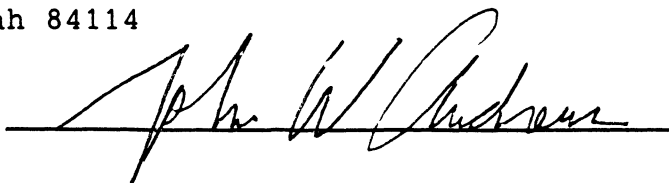
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CERTIFICATE OF SERVICE

I hereby certify that I caused four true and correct copies of the within and foregoing BRIEF OF APPELLANTS to be hand-delivered this 19 day of AUGUST, 1992, to the following:

Brent A. Burnett
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

A handwritten signature in cursive script, appearing to read "John W. Anderson", is written over a horizontal line.

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

M. DALTON CANNON and	:	MINUTE ENTRY
PATRICIA CANNON,	:	
Plaintiffs,	:	Case No. 900902128 PI
vs.	:	JUDGE RICHARD H. MOFFAT
THE UNIVERSITY OF UTAH,	:	
Defendant.	:	

The Court having considered the defendant's Motion for Summary Judgment and the various memoranda in support and in opposition thereto, the Motion to Strike the Affidavits of M. Dalton Cannon and David Lord and having heard oral argument in regard to said matters and being fully advised in the premises makes this its:

MINUTE ENTRY

The Motions to Strike are granted. The memorandum were filed untimely and in addition suffer the defects set forth in defendant's Motion to Strike and in particular points two and

three which the Court adopts as additional basis for the granting of said Motion.

The Motion for Summary Judgment on behalf of the defendant is likewise granted. The Court is of the opinion that any duty which the University might have had in relation to escorting people across the street at the point of the incident involved in this case was at most a public duty. It can be argued that there was no public duty in that there is no showing that the University had any obligation to conduct traffic control measures at the particular crosswalk under any circumstances. The claim that there was a duty because of ownership has been dropped by the plaintiff and the claim that there is a duty because of a landlord/tenant or business invitee concept does not stand up to scrutiny. The plaintiffs now admit that the University does not own the street where the incident occurred so therefore they can in no way be the landlord or the tenant of said property it being a public road. Secondly, the plaintiff cannot boot strap a business invitee argument, even if it were valid, from the premises of the defendant to a premises the defendant does not own or occupy. The place of the accident was a public highway owned by the State of Utah and occupied only by the State and it's citizens.

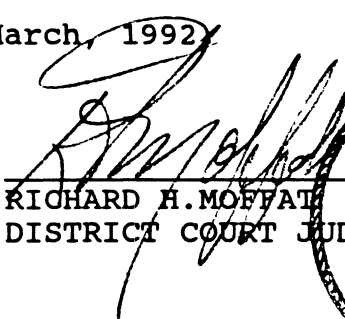
Returning to the question of duty, it is clear that the University need not have conducted any crossing walk activities

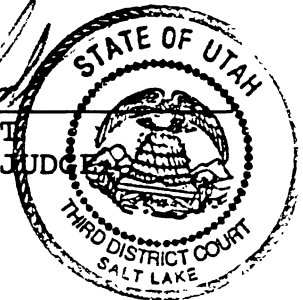
had it chosen not to do so and in the event it had not, a member of the public injured at that location could not have complained. Under Ferree v. State, 784 P2d 149 (Utah, 1989) it is clear that the duty breached which forms the basis of the claim must be a duty owed specifically to the plaintiff and not to a general member of the public. The question that always arises in these kinds of cases is the attempt to classify each of the plaintiffs as falling within a given category. In this case the plaintiff attempts to classify as a member of a group of people attending a basketball game at the University of Utah or those persons crossing the roadway of this crosswalk. The Court is of the opinion that such classification is not appropriate and that does not create a duty running to a specific individual to wit: the plaintiffs in this case. It should be further noted that at the time and place of the accident the University, through their officers, was not in fact engaged in traffic control. While the police car was present and there is sufficient evidence to believe that there were flares burning in the crosswalk it was perfectly apparent that the officers were not present and were not going to conduct the plaintiffs across the intersection. As a matter of fact the testimony is undisputed that the plaintiffs noted that the officers were not present and would not be there to conduct them across the road as had been done on other occasions. Thereafter

they proceeded to cross, as would anybody else, and the accident occurred without any further involvement from any agent of the University of Utah. Thus the University was not engaged in traffic control through their officers at the time and place of the accident and they had no specific duty to do so on behalf of the plaintiffs. The fact that the officers had been assigned by their superior the task of directing traffic, including helping people cross the street does not extend the duty owed by the University or the officer under the law. The scope of the assigned task, even if not fulfilled by the agent, cannot extend the duty of the privilege to a third party under these circumstances. For these reasons as well as those set forth in the defendant's Memorandum in Support of its Motion for Summary Judgment and the Reply Memorandum in Support of its Motion said Motion will be granted.

Counsel for the defendant will prepare an appropriate order and summary judgment.

DATED this 10th day of March, 1992


RICHARD H. MOFFAT
DISTRICT COURT JUDGE



MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing Minute Entry, postage prepaid, to the following, this 10 day of March, 1992:

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