

2002

# James Webb v. University of Utah, a division of the State of Utah, Park Plaza Condominium Owner's Association, a Utah Non-Profit Corporation, and Jonette Webster : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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JAMES WEBB,

Plaintiff and Appellant,

v.

THE UNIVERSITY OF UTAH, a  
division of the State of Utah,

Defendant and Appellee,

PARK PLAZA CONDOMINIUM  
OWNER'S ASSOCIATION, a Utah  
Non-Profit Corporation, and  
JONETTE WEBSTER,

Defendants not on appeal.

**REPLY BRIEF OF  
APPELLANT**

Appellate Court No. 20020985-CA

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APPEAL from a Decision of the  
Third Judicial District Court, Salt Lake County  
Honorable Stephen Henriod

JUL 22 2003

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**(ORAL ARGUMENT AND PUBLISHED DECISION REQUESTED)**

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## **ARGUMENT**

In order for the University of Utah to prevail on a motion to dismiss pursuant to 12(b)(6), the university must show to a certainty that Webb would not be entitled to relief under any set of facts that could be proved in support of his claims. See Prows v. State, 822 P.2d 764, 766 (Utah 1991). Webb satisfied his obligation under Utah's liberal notice pleading to state a claim for relief by alleging negligence.

The University of Utah argues, however, that Webb, and all other university students, can never make a claim against the university for negligence because the university does not have a special relationship with its students. Thus, it argues, it is immune from liability for its negligent conduct.

The University of Utah simply misunderstands Webb's position and misunderstands basic tort law. Webb has argued from the beginning that its negligence claim against the University of Utah was based on the University of Utah's failure to exercise reasonable care when directing and assigning Webb to participate in a dangerous activity; a claim based on malfeasance. Webb's complaint alleges that the University of Utah was negligent for "taking the class into a dangerous area." The word "taking" denotes a particular action undertaken by the University of Utah. Thus, Webb alleged that the University of Utah's affirmative act of directing students to participate in a dangerous activity constitutes negligence and was the cause of his injuries.

A review of basic tort principles will clear up much of the confusion caused by the University of Utah's reference to a "special relationship" and show why the University of Utah owed a duty of care to Webb and why Beach v. University of Utah, 726 P.2d 413 (Utah 1986) is inapplicable.

The Restatement (Second) of Torts identifies two types of conduct which lead to negligence, malfeasance and nonfeasance. Section 284 of the Restatement (Second) of Torts is entitled, "Negligent Conduct; Act or Failure to Act," and states,

Negligent conduct may be either

(a) ***an act*** which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another, or

(b) ***a failure to do an act*** which is necessary for the protection or assistance of another and which the actor is under a duty to do.

RESTATEMENT (SECOND) OF TORTS § 284 (emphasis added).

The Restatement (Second) of Torts outlines those situations where a duty is owed when a claim is made for malfeasance or nonfeasance:

Conduct which is negligent in character does not result in liability unless there is a duty owed by the actor to the other not to be negligent. Normally, ***where there is an affirmative act which affects the interests of another, there is a duty not to be negligent with the respect to the doing of the act.*** On the other hand, where the negligence of the actor consists in a failure to act for the protection or assistance of another, there is normally no liability unless some relation between the actor and the other . . . has created a duty to act for the other's protection or assistance.

The essential difference between the two situations is that in the first the other is positively injured by the actor's affirmative action, while in the latter he

merely fails to receive the benefit which he would receive if the actor had taken the action necessary for his protection or assistance.

RESTATEMENT (SECOND) OF TORTS, topic 4 (emphasis added).

The Restatement (Second) of Torts separately addresses malfeasance and nonfeasance. Under malfeasance, the Restatement (Second) of Torts notes that a person who engages in an affirmative act must do so with reasonable care (§ 298), with reasonable competence (§ 299), with reasonable preparation (§ 300), with reasonable warning (§ 301), without unreasonable risk of direct or indirect harm (§ 302), etc.

Under nonfeasance, the Restatement (Second) of Torts states the general rule that a person does not owe a duty to render aid or protect another. For example, a person does not owe a duty to help a person who is drowning or is in other need of assistance. However, comment c to section 314 notes, “Liability for non-feasance is largely confined to situations in which there was some special relationship between the parties, on the basis of which the defendant was found to have a duty to take action for the aid of plaintiff.” Sections 314A-320 identify situations giving rise to special relationships and liability for nonfeasance.

Utah law is in accord with the Restatement (Second) of Torts. “In cases where the alleged negligence consists of a failure to act, the person injured by another’s inaction must demonstrate the existence of some special relationship between the parties creating a duty on the part of the latter to exercise such due care in behalf of the former.” See DCR Inc. v. Peak Alarm Co., 663 P.2d 433 (Utah 1983). The Utah Supreme Court noted that “[r]elationships which give rise to such a duty include those between carriers and passengers,



employers and employees, owners and invitees, and parents and children.” Id. The Court then went on to hold that contractual relationships give rise to a special relationship and a duty to act. See id.

To determine whether the special relationship cases are even applicable, the Court must first determine whether Webb’s claim of negligence against the University of Utah was based on an allegation of malfeasance or nonfeasance. Webb’s complaint alleges that the University of Utah was negligent for “taking the class into a dangerous area.” The word “taking” denotes a particular action undertaken by the University of Utah. Webb did not allege that the University of Utah failed to render aid to him or protect him. Thus, Webb’s claim of negligence against the University of Utah is based on malfeasance and not nonfeasance.

Beach v. University of Utah, 726 P.2d 413 (Utah 1986) is inapplicable because it discusses a claim based on nonfeasance. Beach merely sets forth the basic common law rule that negligent conduct arising from nonfeasance is only actionable after a finding of a special relationship.

The University of Utah incorrectly argues that the finding of a special relationship is always necessary when a claim of negligence is brought against any governmental entity. The requirement of finding a special relationship is only necessary when a claim of negligence is based on nonfeasance as opposed to malfeasance. In fact, the traditional special relationships which give rise to a duty to render aid or protect another involve

relationships between non-governmental entities and individuals, i.e., landowner-invitee, master-servant, innkeeper-guest, carriers and passengers, and parents and children.

The cases cited by the University of Utah which supports its assertion that a special relationship is necessary when a claim of negligence is brought against a governmental entity each involve a claim of nonfeasance. Ferre v. State, 784 P.2d 149 (Utah 1989) was based on a nonfeasance claim of failure to supervise a former inmate who was assigned to a halfway house. Hunsaker v. State, 870 P.2d 893 (Utah 1993) involved a nonfeasance claim of failure to supervise a parolee. Higgins v. Salt Lake County, 855 P.2d 231 (Utah 1993) involved a nonfeasance claim of failure of the county to protect plaintiff from a mental patient. Cannon v. University of Utah, 866 P.2d 586 (Utah App. 1993) involved a nonfeasance claim of failure to assist pedestrians across the street. Each of these cases required a finding of a special relationship because they each involved a claim of nonfeasance.

In cases grounded in malfeasance, there is a duty not to be negligent in undertaking an affirmative act which affects the interests of another. See RESTATEMENT (SECOND) OF TORTS, topic 4. The court cases which analyze claims by students against universities draw a distinction between claims which arise from activities which occur during class and those arising from activities which occur after class. The distinction between in-class and after-class cases really boils down to a distinction between claims of malfeasance and nonfeasance. Those cases where a student was injured during class have been claims of

malfeasance: negligent instruction and assignment. Those cases where a student was injured after-class have been claims of nonfeasance: failure to protect or supervise.

The Florida Supreme Court stated the well-settled tort principle regarding malfeasance and discussed its application to a university:

it is clearly established that one who undertakes to act . . . thereby becomes obligated to act with reasonable care. . . . There is no reason why a university may act without regard to the consequences of its actions while every other legal entity is charged with acting as a reasonably prudent person would in like or similar circumstances.

Nova Southeastern Univ. Inc. v. Gross, 758 So.2d 86, 89 (Fla. 2000).


Webb's claim against the University of Utah is based on malfeasance. Under well-settled tort law, the University of Utah owed a duty to act with reasonable care when rendering services to its students. The duty is owed to all of those whose interests may be affected by the university's conduct. Certainly, its students would be affected by the university's conduct.

## **CONCLUSION**

For the reasons set forth above, Webb respectfully requests that the trial court's Order of Dismissal be reversed and that this case be remanded to the trial court for further proceedings.

Dated this 23<sup>rd</sup> day of July, 2003.

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**CERTIFICATE OF SERVICE**

I hereby certify that on the 23<sup>rd</sup> day of July, 2003, I mailed a true and correct copy of  
the foregoing to the following:

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