

2002

James Webb, Plaintiff/Appellant, v. University of Utah, a division of the State of Utah, Defendant/Appellee, Park Plaza Condominium Owners' Association, a Utah Non-/Profit Corporation, and Jonette Webster, Defendants : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

JAMES WEBB, :
 :
 Plaintiff/Appellant, :
 :
 v. : Case No. 20020985-CA
 :
 THE UNIVERSITY OF UTAH, a division of :
 the State of Utah, :
 :
 Defendant/Appellee,
 :
 PARK PLAZA CONDOMINIUM OWNERS' :
 ASSOCIATION, a Utah Non-/Profit :
 Corporation, and JONETTE WEBSTER, :
 :
 Defendants. :

BRIEF OF APPELLEE

Appeal from an Order of Dismissal with Prejudice of the Third Judicial District Court
in and for Salt Lake County, State of Utah, Honorable Stephen L. Henriod, Presiding

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ORAL ARGUMENT NOT REQUESTED BY DEFENDANT/APPELLEE.

IN THE UTAH COURT OF APPEALS

JAMES WEBB,	:	
Plaintiff/Appellant,	:	
v.	:	Case No. 20020985-CA
THE UNIVERSITY OF UTAH, a division of the State of Utah,	:	
Defendant/Appellee,	:	
PARK PLAZA CONDOMINIUM OWNERS' ASSOCIATION, a Utah Non-/Profit Corporation, and JONETTE WEBSTER,	:	
Defendants.	:	

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IN THE UTAH COURT OF APPEALS

JAMES WEBB,	:	
Plaintiff/Appellant,	:	
v.	:	Case No. 20020985-CA
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the State of Utah,	:	
Defendant/Appellee,	:	
PARK PLAZA CONDOMINIUM OWNERS'	:	
ASSOCIATION, a Utah Non-/Profit	:	
Corporation, and JONETTE WEBSTER,	:	
Defendants.	:	

BRIEF OF APPELLEE

JURISDICTION AND NATURE OF PROCEEDINGS

This is an appeal from an order dismissing plaintiff's claim of negligence against defendant University of Utah (R. 73-75). Plaintiff, James Webb, filed his complaint in the Third Judicial District Court in and for Salt Lake County, State of Utah, on September 28, 1999 (R. 1-3). The complaint alleged that the University's negligence in conducting a field trip resulted in injuries to Webb. The University moved to dismiss under Utah R. Civ. P. 12(b)(6) on the ground that it owed no duty to Webb (R. 18-26). Following an exchange of memoranda and a hearing, the motion was granted by order entered January 31, 2000 (R. 73-75). Webb filed three unsuccessful interlocutory appeals

(R. 79-80, 111-12, and 117-18) between the time of this order and the dismissal of the last party remaining before the district court on November 13, 2002 (R. 150-52). His fourth, timely notice of appeal was filed one week later (R. 153-54). Utah Code Ann. § 78-2a-3(2)(j) (Supp. 2002) gives this Court jurisdiction over the appeal as transferred from the Utah Supreme Court by order of December 23, 2002.

ISSUE PRESENTED UPON APPEAL

The sole issue presented upon appeal is whether the district court correctly dismissed Webb's claim against the University of Utah based on the absence of a duty running to him.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

All relevant text of constitutional provisions, statutes, and rules pertinent to the issues before the Court for decision is contained in the body of this brief.

STATEMENT OF THE CASE

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

Webb filed his complaint in this case in September, 1999 (R. 1-3), alleging, as to the University, that it negligently conducted a scheduled class field trip, resulting in injuries to him. The University moved to dismiss Webb's claim against it under Utah R. Civ. P. 12(b)(6) (R. 18-26) on the ground that, under Beach v. University of Utah, 726 P.2d 413 (Utah 1986), the University was under no special duty to Webb that would confer liability. After Webb's response (R. 35-38) and the University's reply (R. 47-57),

the district court heard the motion (R. 72), which was granted by order entered January 31, 2000 (R. 73-75).

On February 28, 2000, Webb filed a notice of appeal from the order of dismissal (R. 79-80). The Utah Supreme Court dismissed the appeal without prejudice as taken from a non-final order. See Webb v. University of Utah, No. 20000181 (Addendum A, attached). Webb then moved the district court to certify the order of dismissal as final pursuant to Utah R. Civ. P. 54(b) (R. 90-96). On October 11, 2000, after the judge granted the Rule 54(b) motion by minute entry (R. 99-100) but before an order was entered, Webb filed a second notice of appeal (R. 111-12). Once the order was entered on October 25, 2000 (R. 115-16), a third notice of appeal was filed on November 1, 2000 (R. 117-18). Both the second and third appeals were transferred from the supreme court to this Court for disposition, where they were consolidated and dismissed for improper certification. See Webb v University of Utah, Nos. 20000881-CA and 20000980-CA (Addendum B, attached).

Following the dismissal of the last party remaining before the district court by orders entered November 13, 2002 (R. 150-52), Webb filed his fourth and final notice of appeal on November 20, 2002 (R. 153-54).

B. Statement of Relevant Facts

The relevant facts in this case are few. On March 7, 1998, while he was a student at the University of Utah, Webb participated in a scheduled class field trip which was

conducted outdoors (R. 2, ¶¶ 6-7 and 9). During the field trip, a fellow student slipped, causing Webb to fall and become injured (R. 2-3, ¶¶ 11 and 15).

SUMMARY OF ARGUMENT

On appeal, Webb premises his argument on the alleged existence of a contractual relationship with the University (see Apl't. Brief at 4-5). Webb did not raise his contractual theory in the district court, depriving both the University and the court of an opportunity to respond to it. Because it has been raised for the first time on appeal, the contract theory is not appropriate for consideration here.

This case is controlled by the decision of the Utah Supreme Court in Beach v. University of Utah, holding that the student-teacher relationship, in the context of a mandatory field trip sponsored by a public university, is, by itself, insufficient to create a special duty running from the university to the student. While Webb attempts to distinguish Beach on the basis of an Arizona case, he fails to recognize that Arizona, unlike Utah, has explicitly rejected the "special duty" or "special relationship" doctrine on which Beach is based. In addition, the other cases on which Webb relies either involve private entities to which the special duty analysis does not apply or, contrary to controlling Utah precedent, find a general duty sufficient to support liability. As in Beach, the University had no reason in the case at bar to believe that Webb's situation was distinguishable from that of the other students on the field trip, and therefore, it stood in no special relationship with him that can sustain a duty.

Because Webb failed to establish that the University owed a duty to him as an individual, there are no grounds on which to reverse the trial court's dismissal of his claim.

ARGUMENT

Standard of Review: "Because the propriety of a dismissal under Utah Rule of Civil Procedure 12(b)(6) is a question of law, we give the trial court's ruling no deference and review it under a correctness standard." Warner v. DMG Color, Inc., 2000 UT 102, ¶ 6, 20 P.3d 868.

I. PLAINTIFF'S ARGUMENT OF A CONTRACT THEORY FOR THE FIRST TIME ON APPEAL IS NOT ENTITLED TO CONSIDERATION.

For the first time on appeal, Webb newly premises his argument that the University owed him a duty of care on an alleged contractual relationship (see Aplt. Brief at 4-5). However, he identifies no point in the record showing that he argued his contract theory to the district court or that the district court ruled on the issue. Webb has not met his burden under Utah R. App. P. 24(a)(5) to provide either "(a)(5)(A) citation to the record showing that the issue was preserved in the trial court; or (a)(5)(B) a statement of grounds for seeking review of an issue not preserved in the trial court." Rule 24 embodies the established practice of Utah's appellate courts of declining to consider issues raised for the first time on appeal. See Strawberry Elec. Serv. Dist. v. Spanish Fork City, 918 P.2d 870, 880 (Utah 1996); Astill v. Clark, 956 P.2d 1081, 1088 (Utah App. 1998). This practice applies whether the new material is characterized as an argument or an issue:

Defendants contend that we should reach this and other new points raised for the first time on appeal because they are really new arguments as opposed to new issues. We decline to honor such a distinction. Our concern is whether an argument was addressed in the first instance to the trial court."

Ong Int'l (U.S.A.) Inc. v. 11th Ave. Corp., 850 P.2d 447, 455 n.31 (Utah 1993).

By not raising his contract theory in the district court, Webb foreclosed any opportunity for either the University or the court to address it. He has articulated no plain error or exceptional circumstances that would preclude application of the appellate courts' general rule of declining to consider issues newly raised on appeal. See State v. Hardy, 2002 UT App 244, ¶ 15, 54 P.3d 645. Consequently, the contract theory is not appropriately before this Court for consideration.

II. UNDER THE BINDING AUTHORITY OF BEACH, PLAINTIFF CANNOT ESTABLISH THAT THE UNIVERSITY IS UNDER A DUTY TO HIM.

Beach v. University of Utah is both factually and legally analogous to the present case. In Beach, a University student was enrolled in a class that required participation in three one-day field trips and three weekend field trips. The final trip was a three-day camp-out. On the third evening of the trip, Beach became disoriented when returning to her tent for the night. After a fellow student discovered Beach was missing, a search was initiated, and Beach was found the next day after she had fallen in a rocky area and sustained injuries that rendered her quadriplegic. In her suit against the University and numerous University officials, Beach argued that the University and the professor who

taught the class "breached their affirmative duty to supervise and protect her." Beach, 726 P.2d at 415. The trial court granted summary judgment for the defendants. On appeal, it was conceded "that the mere relationship of student to teacher was not enough to give rise to such a duty." Id. at 416. The Utah Supreme Court held that in order to prevail, Beach must establish a special duty by "distinguish[ing] her circumstances from those of the other students on the field trip." Id. Stating that "[t]he essence of a special relationship is dependence by one party upon the other or mutual dependence between the parties" (id. at 415-16), the court declared, "The law imposes upon one party an affirmative duty to act only when certain special relationships exist between the parties. These relationships generally arise when one assumes responsibility for another's safety or deprives another of his or her normal opportunities for self-protection." Id. at 415. Finding that nothing put the professor on notice that Beach's judgment, skills, and physical condition were different from "any normal twenty-year-old college student" (id. at 416), the court affirmed judgment for the defendants. In analyzing the claim, the court observed that

[d]etermining whether one party has an affirmative duty to protect another from the other's own acts or those of a third party requires a careful consideration of the consequences for the parties and society at large. If the duty is realistically incapable of performance, or if it is fundamentally at odds with the nature of the parties' relationship, we should be loath to term that relationship "special" and to impose a resulting "duty," for it is meaningless to speak of "special relationships" and "duties" in the abstract.

Id. at 418. The Beach opinion expressly contrasts the student-teacher relationship to relationships considered inherently special, such as those identified in DCR Inc. v. Peak Alarm Co., 663 P.2d 433 (Utah 1983). See Beach, 726 P.2d at 415 n.2. Relying on DCR to establish a duty, Webb fails to perceive the difference.

Webb's brief pays only lip service to Beach. In a footnote (see Aplt. Brief at 6 n.1), Webb ignores the Beach court's careful analysis of the special relationship doctrine altogether. While he attempts to distinguish his case factually from Beach, the attempted distinction--that "Webb's injuries are alleged to be directly caused from the negligent instruction he received while **in class** as opposed to the injuries which were caused by the self-created damages and events which occurred **after class** in Beach" (Aplt. Brief at 6 n.1)--has no bearing on the analysis the Beach court used to reach its decision. Applying the Beach court's rationale to Webb's complaint shows that the University did not owe a special duty of care to Webb.

Under Beach, Webb must distinguish his circumstances from those of the other students on the field trip in order to establish a special relationship conferring a duty on the University. However, nothing in the record shows that Webb's circumstances differed from the circumstances of his fellow students. The allegations of the complaint do not set Webb apart from his classmates in any significant way. They state only that Webb was enrolled in a University class (R. 2, ¶ 6); that a field trip was scheduled for the class (R. 2, ¶ 7); that the students were taken to certain property to examine fault lines (R. 2, ¶¶ 8-9);

that sidewalks on the property were covered with snow and ice (R. 2, ¶ 10); and that a fellow student slipped, causing Webb to fall as she steadied herself (R. 2, ¶ 11). As in Beach, nothing suggests that Webb did not have the judgment, skills, or physical condition of a normal college student. Nor is there any suggestion that walking in the presence of icy sidewalks and fellow pedestrians is a skill beyond the ability of the typical student. There is no indication that the University assumed responsibility for Webb's safety or deprived him of his normal opportunities for self-protection. Under these circumstances, requiring the University to protect an adult student from accidentally falling on the same kinds of icy sidewalks encountered by the public at large is a duty realistically incapable of performance that cannot support a special relationship. Webb's failure to provide relevant analysis on point is telling. The only fact he presents to support his contention that the University had a duty to him is his status as a student. Beach establishes that the student-teacher relationship, by itself, is simply not enough.

The special duty doctrine is well-established in Utah law. "To hold a government agency or one of its agents liable for negligence or gross negligence, a plaintiff cannot recover for the breach of a duty owed to the general public, but must show that a duty is owed to him or her as an individual." Madsen v. Borthick, 850 P.2d 442, 444 (Utah 1993); see also Hunsaker v. State, 870 P.2d 893, 897 (Utah 1993) (duty premised on special relationship is "necessary premise for any negligence liability of the State actors"); Ferre v. State, 784 P.2d 149, 151 (Utah 1989) ("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"); Higgins v. Salt Lake County, 855 P.2d 231, 236 (Utah 1993) (same); Cannon v. Univ. of Utah, 866 P.2d 586, 589 (Utah App. 1993) ("where the government deals generally with the welfare of all, it does so without a duty to anyone, unless there is a 'special relationship' between the government and the individual").

Webb places primary reliance on Delbridge v. Maricopa County Community College District, 182 Ariz. 55, 893 P.2d 55 (Ariz. App. 1994), to establish a duty on the part of the University. Delbridge, however, is readily distinguishable. In direct contradiction to the concession in Beach, Delbridge states, "The teacher-student relationship is a special one, affording the student protection from unreasonable risks of harm." Delbridge, 182 Ariz. at 58, 893 P.2d at 58. However, the special relationship in Delbridge is predicated on a statutory duty under Arizona law to "provide for adequate supervision over pupils in instructional and noninstructional activities." Collette v. Tolleson Unified Sch. Dist., 203 Ariz. 359, 363 n.3, 54 P.3d 828, 832 n.3 (Ariz. App. 2002); see also Chavez v. Tolleson Elementary Sch. Dist., 122 Ariz. 472, 475, 595 P.2d 1017, 1020 (Ariz. App. 1979). Moreover, Delbridge was decided after the Supreme Court of Arizona, in contrast to Utah's appellate courts, explicitly rejected the special duty doctrine, stating, "We shall no longer engage in the speculative exercise of determining whether the tortfeasor has a general duty to the injured party, which spells no recovery, or

if he had a specific individual duty which means recovery." Ryan v. State, 134 Ariz. 308, 310, 656 P.2d 597, 599 (Ariz. 1982).¹ Because Utah law contains no statutory duty similar to Arizona's, Delbridge is inapposite to the analysis of the duty issue presented here.

The other cases Webb cites are equally unpersuasive. Both Nova Southeastern University v. Gross, 758 So.2d 86 (Fla. 2000), and Gross v. Family Services Agency, 716 So.2d 337 (Fla. App. 1998), deal with claims against a private university, so no issue of a public university's duty in the absence of a special relationship is involved. The institutions sued in Brigham Young University v. Lillywhite, 118 F.2d 836 (10th Cir. 1941), Kleinknecht v. Gettysburg College, 989 F.2d 1360 (3d Cir. 1993), and Kirchner v. Yale University, 150 Conn. 623, 192 A.2d 641 (1963), likewise are private entities, not public institutions, and consequently lack analysis under the special duty doctrine. To the extent that Webb's remaining cases find a duty of care owed by a public university to its

¹As a result of Ryan's abandonment of the distinction between general and special duty (see Clouse v. State, 194 Ariz. 473, 476, 984 P.2d 559, 562 (Ariz. App. 1999)), the Arizona legislature passed comprehensive legislation in 1984 "which governs the immunity and liability of public entities and employees." Johnson v. Superior Court, 158 Ariz. 507, 508, 763 P.2d 1382, 1383 (Ariz. App. 1988). Unlike the Utah Governmental Immunity Act, which maintains sovereign immunity for all but explicitly excepted causes of action, Arizona's legislation proceeds from the opposite perspective: "that public entities are liable for acts and omissions of employees in accordance with the statutes and common law of [Arizona]." Clouse, 194 Ariz. at 476-77, 984 P.2d at 563-64 (quoting City of Tucson v. Fahringer, 164 Ariz. 599, 600, 795 P.2d 819, 820 (1990)). Thus, while Ryan has been abrogated by statute, its rejection of the "special duty" doctrine is still good law as codified in statute. For this reason, Arizona case law regarding a university's duty to its students is meaningless to a determination of duty under Utah law.

students, the duty is owed to the students in general--the very position that Utah's recognition of the special duty doctrine rejects. See Hores v. Sargent, 230 A.D.2d 712, 712, 646 N.Y.S.2d 165, 166 (N.Y. App. Div. 1996) (finding community college's comprehensive organization, planning, and supervision of student bicycle trip through its Office of Student Activities sufficient to confer "a duty to take reasonable precautions for the safety of the participants"); Kyriazis v. University of West Virginia, 192 W. Va. 60, 66, 450 S.E.2d 649, 655 (1994) ("As an enterprise charged with a duty of public service here, the University owes a duty of due care to its students when it encourages them to participate in any sport."); Whittington v. Sowela Technical Institute, 438 So.2d 236, 247 (La. App. 1983) (stating, without analysis, "that Sowela owed a duty to its students to provide transportation under safe conditions").

While finding a general duty of care may be laudable public policy from Webb's perspective, it is not the law in Utah. Beach and the other Utah cases requiring a plaintiff to establish a duty owed to him individually in order to recover for his injury represent controlling authority over Webb's claim. Webb has identified no Utah precedent that provides grounds for reversal of the district court's dismissal of his complaint for failure to state a claim upon which relief can be granted. While other jurisdictions may have reached contrary results, they have not done so under the special duty doctrine consistently applied in Utah decisions. Because the district court correctly dismissed

Webb's claim against the University for his failure to show a duty owed to him individually, its decision is entitled to affirmance by this Court.


CONCLUSION

Webb's attempt to introduce a contract theory not presented to the district court, unsupported by any citation to the record or alternative ground for seeking review, is not appropriately before this Court for decision. The sole issue for appellate determination, whether the University had a special relationship with Webb giving rise to a duty, is governed by controlling precedent. Because Webb did not establish any duty owed to him individually, the district court correctly dismissed his claim against the University. Webb's disagreement with the result does not change the outcome under well-established Utah law: absent a special relationship, the University has no duty on which liability can be predicated. For these reasons, as more fully explained above, the University of Utah respectfully requests the Court to affirm the order of dismissal entered by the district court.

STATEMENT REGARDING ORAL ARGUMENT

Because the issue in this case is governed by controlling precedent, the University does not believe oral argument is necessary to the appropriate disposition of this appeal. However, the University desires to participate if oral argument is ordered by the Court.

Dated this 1st day of July, 2003.

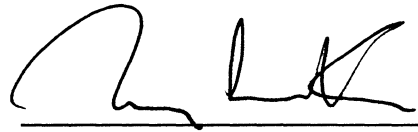
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NANCY L. KEMP
Assistant Attorney General
Attorney for Defendant/Appellee

CERTIFICATE OF MAILING

I hereby certify that on this 1st day of July, 2003, I caused to be mailed, first class postage prepaid, two true and correct copies of the foregoing BRIEF OF APPELLEE to the following:

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Salt Lake City, Utah 84102



ADDENDUM A

IN THE SUPREME COURT OF THE STATE OF UTAH

---oo0oo---

James Webb,
Plaintiff and Appellant,

No. 20000181

v.

The University of Utah, a division of
the state of Utah,

Defendant University of Utah's motion for summary dismissal is granted. The appeal was taken from a non-final order, as parties remain before the trial court and plaintiff did not request certification of the dismissal order. The dismissal is without prejudice.

BY THE COURT:

May 1, 2000
Date

Richard C. Howe
Richard C. Howe
Chief Justice

ADDENDUM B

FILED
Utah Court of Appeals

FEB 27 2001

Paulette Stagg
Clerk of the Court

IN THE UTAH COURT OF APPEALS

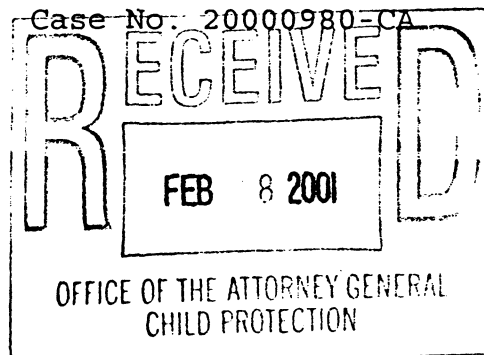
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James Webb,
Plaintiff and Appellant,
v.
University of Utah, a
division of the State of
Utah,
Defendant and Appellee.

ORDER CONSOLIDATING AND
DISMISSING APPEALS

Case No. 20000881-CA

Case No. 20000980-CA

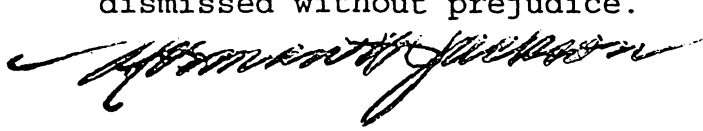


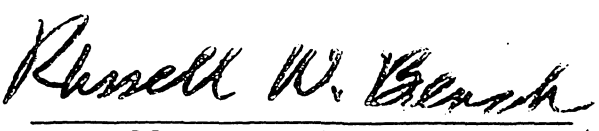
Before Judges Jackson, Bench, and Davis.

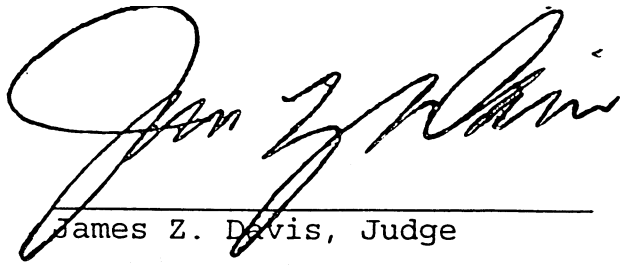
These cases represent an appeal from a single order of the trial court and are accordingly consolidated under case number 20000881-CA.

Our review of the record convinces us that this case involving multiple defendants was not properly certified under Utah Rule of Civil Procedure 54(b). Under the rule, "the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination by the court that there is no just reason for delay and upon an express direction for the entry of judgment." Here, although the trial court's order stated that "plaintiff shall have a final and appealable order," the court did not make an express finding that there was no just reason for delay supported by a statement of the reasons for the finding. Bennion v. Pennzoil, 826 P.2d 137, 139 (Utah 1992). A judgment is not final "merely because the order so recites." Little v. Mitchell, 604 P.2d 918, 919 (Utah 1979).

Accordingly, IT IS HEREBY ORDERED that the appeal is dismissed without prejudice.


Norman H. Jackson,
Associate Presiding Judge


Russell W. Bench, Judge

A handwritten signature in black ink, appearing to read "James Z. Davis". The signature is fluid and cursive, with a large initial "J".

James Z. Davis, Judge