

1992

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

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,	)	REPLY BRIEF
	)	
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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**FILED**

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**COURT OF APPEALS**

M. DALTON CANNON and PATRICIA  
CANNON,

**vs.**

Defendant and Respondent.

Court of Appeals No. 92-0377

Argument Priority 16

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### INTRODUCTION

Appellants M. Dalton Cannon and Patricia Cannon (the "Cannons") were struck by a vehicle at 6:58 p.m. on February 1, 1990, while using a pedestrian crosswalk en route to a University of Utah basketball game. The Cannons, who were in their late sixties when the accident occurred, were critically injured, and are permanently disabled as a result of the accident.

The crosswalk where the accident occurred is located on South Campus Drive immediately south of the Huntsman Center. Two University of Utah police officers had been specifically assigned that evening to assist pedestrians across the crosswalk and to control traffic there. However, at the time of the accident, the officers had chosen to get out of the bad weather that evening, and were sitting in their car at the crosswalk talking. They were not taking a formal break from their duties, but rather were simply trying to perform their duties from the car. Both officers subsequently admitted that in order to perform their duties properly, they needed to have been out of their car, actively managing pedestrian and vehicular flow at the crosswalk. The Cannons contend inter alia in this action

that the officers' negligent failure to perform their assigned tasks was a proximate cause of the accident that befell them.

The Third District Court, Hon. Richard Moffat presiding, granted summary judgment in favor of the defendant University of Utah (the "University") on the basis that the University officers owed no duty of care to the Cannons. This ruling was based upon the "public duty" doctrine, as enunciated in Ferree v. State, 784 P. 2d 149 (Utah 1989). The Court initially held that the officers had only a general duty to ensure public safety. Relying on Ferree, the Court found that this general duty to the public was insufficient to create a special duty of care in favor of the Cannons. The Court also rejected the Cannons' claim that the University owed them a duty of care as business invitees, and struck two affidavits filed by the Cannons in opposition to the University's Motion for Summary Judgment.

#### ARGUMENT

I. The University Fails to Distinguish Between The University's Obligation to Control Traffic In the First Place and Its Obligation to Do So Competently Once the Task Was Undertaken.

A. The Public Duty Rule Is Inapplicable Here.

The University has argued at length concerning the nature of the public duty rule. The Cannons have little quarrel

with the rule itself -- where a public entity owes a duty only to the public at large, a negligence claim cannot be predicated on the breach of that public duty alone. Ferree v. State, 784 P. 2d 149 (Utah 1989). Applied to this case, the rule might arguably relieve the University from responsibility for providing traffic control at the crosswalks in the first place.<sup>1</sup> However, the University fails to make a crucial distinction here. The issue in this case is not whether traffic control should have been provided in the first place. It is whether, once the University affirmatively undertook to station police officers at the crosswalks, those officers had a duty to act non-negligently. In this situation, the public duty doctrine simply does not apply.

All of the cases cited by the University are distinguishable for this reason. In the case most heavily relied upon by the University, State v. Flanigan, 489 N.E. 2d 1216 (Ind. App. 1989), the plaintiffs were hit by a car while

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<sup>1</sup> The Cannons contend that the University owed them a duty of care as business invitees independently of any other duty of care. University basketball games are highly promoted, revenue producing events. The University obviously was aware of the danger posed by high volumes of pedestrian traffic crossing busy campus streets, based upon its assignment of police to the crosswalks. In this situation, the University had a duty to take reasonable measures to protect its invitees while on campus.



walking along a highway. There was no allegation that the police were anywhere in the area when the accident occurred. The plaintiffs nonetheless sued the State of Indiana, claiming that it had an obligation to provide safe pedestrian access in the area. Thus, the issue in Flanigan was whether Indiana had a duty to provide traffic control in the first place, not whether it had performed a voluntarily assumed duty competently.

The other cases cited by the University are similarly distinguishable. In Obray v. Malmberg, 484 P. 2d 160, 162 (Utah 1971) and Christensen v. Hayward, 694 P. 2d 612 (Utah 1984), the plaintiffs' claims were based upon the defendant sheriffs' general responsibilities to provide crime control. Neither case involved the issue of whether a specifically assumed task had been performed in a non-negligent manner.

This distinction is also clear in Ferree, supra. In Ferree, a prison inmate on a weekend furlough got drunk at a wedding and later killed a stranger. The Supreme Court held that the Department of Corrections' general duty to protect the public did not create a duty of care in favor of unforeseeable potential plaintiffs who might somehow be harmed by a released prisoner.

The University contends that the officers were only engaged in pursuing their general duty of traffic control, and that they had no duty to come to the assistance of anyone in particular. University Brief at 9. This assertion is factually untrue. The officers were specifically assigned by the University to assist pedestrians at the crosswalk where the Cannons were injured. R. 327, 329. One of the officers acknowledged that their assignment required them to stop traffic until pedestrians made it across the crosswalk. R. 327. The investigating officer similarly stated that it was the officers' specific duty to make contact with pedestrians at the edge of the crosswalk, and to advise them when to cross. R. 329. Officers Purvis and Beglarian instead chose to return to their car and get out of the rain. In short, they attempted to perform their duties from the car, rather than getting wet and remaining available to assist pedestrians.

Where, as here, a public entity has assumed a specific task, such as providing traffic control, it must do so non-negligently. Florence v. Goldberg, 375 N.E. 2d 763 (N.Y. App. 1978); Alhambra School Dist. v. Superior Court, 796 P. 2d 470, 474 (Ariz. 1990). The public duty rule is irrelevant here, because the University specifically assumed responsibility for

assisting pedestrians at the crosswalks. A duty of care therefore existed in favor of those pedestrians.

**B. Where A Specific Class of Victims Exists, A Duty of Care Arises.**

The University argues that a public entity cannot be held liable in the absence of a particular duty to a specific individual. University Brief at 7. This is not the law in Utah. In order for a special relationship sufficient to support a duty of care to exist, a plaintiff need merely be a part of a reasonably identifiable group. Rollins v. Peterson, 813 P. 2d 1156, 1162 (Utah 1991). Where there is a foreseeable risk of harm to such an identifiable group from a government entities' failure to exercise reasonable care, the government entity owes that group a duty of care to act non-negligently. Id. Here, the University recognized the danger that pre-game traffic would pose to a specific group - pedestrians using the South Campus Drive crosswalks prior to basketball games. It chose to remedy this danger by assigning officers to assist pedestrians there. Similarly, the officers recognized the danger of the crosswalks, and the need to actively assist pedestrians. Injury to a specific group was clearly foreseeable as a result of their

failure to do so. Under Rollins, a duty of care is present here.

II. The Restatement (2d) of Torts Supports the Existence of A Duty of Care In this Case.

The University relies upon Sections 314 through 320 of the Restatement (Second) of Torts in support of its claims that no duty of care exists. As with the case law cited by the University, this reliance is misplaced. Section 314A of the Restatement lists certain situations where a special relationship creating a duty of care is deemed to exist: common carriers and their passengers; innkeepers and guests; possessors of land and their invitees; and custodians and their wards. The University insists that this list is the exclusive list of relationships that give rise to a duty of care. University Brief at 11. In fact, a caveat to Restatement (2d) § 314A expressly states that this list is not intended to be exclusive, and the Utah Supreme Court has recognized other such relationships. See DCR, Inc. v. Peak Alarm Co., 663 P.2d 433 (Utah 1983).

The University additionally neglects to mention a more directly applicable provision of the Restatement (2d) of Torts. The Restatement (2d) also recognizes the distinction between a

duty to act in the first place, and the obligation to act non-negligently once services are undertaken. Section 323 of the Restatement (2d) provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person ... is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) the harm is suffered because of the other's reliance upon the undertaking.

(Emphasis added).

In this case, the University undertook to provide police protection to pedestrians utilizing the South Campus Drive crosswalks prior to University basketball games. The officers knew the area was dangerous at times such as this; Officer Beglarian testified: "Yes. I've driven down South Campus Drive during a game -- or prior and not been assigned traffic control, and it's -- it's really bad. But I personally go very slow." Beglarian Deposition at 52, l. 22-24. On the night in question, the visibility of pedestrians and vehicular traffic was made worse by the inclement conditions then prevailing. Under these circumstances it was critical to the

safety of the Cannons and other pedestrians that the officers remained vigilant and performed their duties properly.

To fulfil their assignment adequately, the officers needed to meet pedestrians in the crosswalk and either stop the pedestrians or stop oncoming traffic. They failed to do so here, instead remaining in their car while the Cannons were forced to navigate the crosswalk without assistance. The officers failure to perform their assignment in a clearly dangerous situation obviously increased the risk that a vehicle-pedestrian accident would occur. Restatement (2d) § 323 supports a ruling that the University owed a duty of care to pedestrians using police-operated crosswalks prior to University basketball games.

III. Multiple Factual Issues Preclude Summary Judgment In Favor of the University.

The trial court also erred in granting summary judgment because disputed factual issues exist here. Where underlying facts are in dispute, the application of the public duty rule and the existence of a duty of care become a question of fact. Estate of Tanasijevich v. City of Hammond, 383 N.E. 2d 1081 (Ind. App. 1978). The Court of Appeals should note that the Cannons claim that the University officers were actively

negligent, by allowing marker flares to burn down,<sup>2</sup> negligently parking their vehicle in a manner that obstructed drivers' views, and otherwise acting negligently. See Appellants' Principal Brief at 28. Even assuming arguendo that the public duty rule were applicable, the officers were required to refrain from increasing the risk to pedestrians. Their failure to do so precludes summary judgment in favor of the University.

The University's arguments concerning the public duty rule, and the trial court's decision on this issue, also rely upon disputed facts. The trial court's decision states that the officers were not engaged in traffic control at the time of the accident. The court reasoned that since the University might have no obligation under the public duty rule to provide traffic control in the first place, the officers total failure to perform their task excuses any liability. The University's brief echoes this argument.<sup>3</sup> In fact, the officers were on

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<sup>2</sup> The trial court stated that there was "sufficient" evidence to conclude that the flares were burning, despite testimony of the driver and of Dr. Cannon that they saw no flares. Memorandum Decision at 3. This sort of weighing of the evidence is clearly inappropriate in the context of summary judgment.

<sup>3</sup> The University states that the officers were about to "resume" traffic control at the time of the accident. University Brief at 4.

active duty at the time of the accident, but were completely neglecting their duties. The trial court failed in its obligation to resolve all doubts concerning factual issue in favor of the party opposing summary judgment. Durham v. Margetts, 571 P. 2d 1332 (Utah 1977). The various factual misapprehensions by the trial court require reversal here.

IV. The Issue of Reliance, Even if Relevant, Involves Disputed Issues of Fact.

The University places major emphasis on one statement Dr. Cannon made in his deposition. Dr Cannon stated that, when he and his wife arrived at the crosswalk, they saw the police car, but no police officers. This was of course because the officers were inside their car talking and staying out of the weather, rather than performing their duties. Dr. Cannon states that because the Cannons saw no police to help them, they proceeded across the crosswalk. After passing immediately in front of the officers car, they stepped into the westbound lanes of South Campus Drive and were hit.

The University argues that, because the Cannons saw that no officers would be assisting them, and proceeded to attempt to cross the street anyway, they did not rely on police assistance. The University argues that this alleged lack of



reliance means that no special relationship arose between them and the officers sufficient to support a duty of care.

University Brief at 15. Initially, it is important to note that reliance is unnecessary as a matter of law for the creation of a duty of care in these circumstances. Section 323 of the Restatement (2d) of Torts provides that one who undertakes to provide services to another is subject to liability if his failure to exercise reasonable care increases the risk of harm, without reference to reliance by the plaintiff. In addition, it would be pernicious public policy to allow public officers to escape liability by completely failing to perform their assigned duties, and then claiming that the injured victim had not relied upon their presence. The fact that the Cannons were forced to attempt to cross South Campus Drive without assistance does not prevent a duty of care from arising.

Even if proof of reliance were necessary, the issue is one of fact, and not appropriate for summary judgment. Dr. Cannon submitted an affidavit in opposition to summary judgment stating that one of the reasons he and Mrs. Cannon used the crosswalk was the typical availability of police traffic control. The trial court struck this affidavit as contradictory to his previous deposition testimony, in which he stated that

other parking sites on the University campus involved climbing many stairs.<sup>4</sup> As more fully set forth in the Cannons' principal brief, the affidavit and Dr. Cannon's deposition testimony are simply not contradictory. Unless any inconsistency between deposition testimony and an affidavit is completely implausible -- which is not the case here -- an affidavit creating a question of fact should not be stricken. Gaw v. State by and through UDOT, 798 P. 2d 1130, 1140-41 (Utah App. 1990). The issue of reliance, if relevant at all, is a factual issue, and one that should not have figured in a decision on summary judgment.

V. The Cannons Were Business Invitees.

The University argues that it is not responsible for taking reasonable actions to protect the safety of pedestrians on South Campus Drive before basketball games, because the Utah Department of Transportation ("UDOT") holds title to South Campus Drive. It further argues that it has no duty of care towards those injured off the premises that it owns. The

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<sup>4</sup> The trial court also held that the affidavit was not filed timely, because it was filed on the day before the summary judgment hearing. Rule 6(d) U.R.C.P. permits affidavits to be filed the day before a summary judgment hearing. See Beaufort Concrete Co. v. Atlantic States Constr. Co., 352 F. 2d 460, 462 (5th Cir. 1965)(interpreting identical federal rule).

problem with the University's argument is that it is possession of land, not ownership, that determines whether a duty of care is created. Section 344 of the Restatement (2d) of Torts provides that a possessor of land is subject to liability for the negligent acts of third parties where it has failed to exercise reasonable care to protect them from the harm. This section of the Restatement imposes an affirmative duty on possessors of land to exercise care in protecting the safety of invitees.

The University should not be able to escape liability here simply because UDOT holds legal title to South Campus Drive. The University, not UDOT, advertises and encourages public attendance at University basketball games. The University, not UDOT, makes parking lots on the south side of South Campus Drive available to spectators who are en route to the Huntsman Center, directly across the street. Most importantly, the University, not UDOT, was physically in possession of South Campus Drive when the accident occurred. The Cannons claim is based upon the University's failure to protect those it invited to the University campus. The University obviously recognized the dangers posed by the combination of heavy pedestrian and vehicle traffic at the

crosswalks, because it, not UDOT, specifically assigned officers to assist pedestrians there. It is equitable that the University be required to exercise due care to protect invitees.

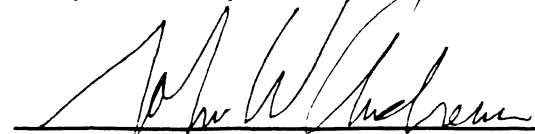
#### CONCLUSION

The University's brief seeks to gloss over certain crucial facts that distinguish this case from typical "public duty" cases. The University obviously recognized the danger posed to its invitees by the crosswalks, because it specifically assigned officers to assist pedestrians there. Those officers recognized that, to prevent accidents, they had to be out of their car directing traffic and pedestrians. Unfortunately, the officers here neglected their assigned task, and the Cannons were injured as a result. This is not a case where the officers failed to perform only some generalized public duty. Instead, the officers negligently performed a specific assigned task in the face of a recognized danger to those they were assigned to protect. The officers owed a duty of care to the Canons. The trial court's decision should be reversed, and this case remanded for trial.

DATED this 23 day of November, 1992.

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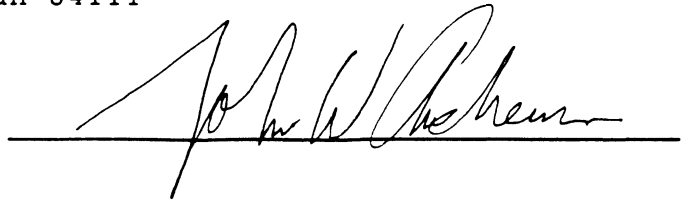
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CERTIFICATE OF MAILING

I hereby certify that I caused four true and correct copies of the within and foregoing REPLY BRIEF OF APPELLANTS to be mailed, postage prepaid, this 23 day of November, 1992, to the following:

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