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Moises J. Sanchez v. State of Utah, Department of Transportation, Utah State Highway Patrol, Harold C. Clements : Reply Brief

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MOISES J. SANCHEZ, Plaintiff and Appellant, vs. STATE OF UTAH, DEPARTMENT OF TRANSPORTATION, UTAH STATE HIGHWAY PATROL and HAROLD C. CLEMENTS, Defendants and Appellees.	Case No. 950273-CA Priority No: 15

REPLY BRIEF OF APPELLANT

APPEAL FROM A FINAL ORDER OF SECOND JUDICIAL DISTRICT COURT
IN AND FOR WEBER COUNTY, STATE OF UTAH
THE HONORABLE W. BRENT WEST PRESIDING

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APPELLANT REQUESTS ORAL ARGUMENT AND PUBLISHED OPINION

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ARGUMENT

UNDER GENERAL TORT LAW PRINCIPLES, TROOPER TAYLOR ASSUMED A DUTY TO EXERCISE REASONABLE CARE WHEN HE VOLUNTEERED TO OFFER HIS ASSISTANCE.

Respondent has elected to ignore a critical fact in the instant case which clearly distinguishes Trooper Taylor's conduct from the officers' alleged failure to act in Cannon v. University of Utah, 866 P.2d 586 (Utah App. 1993), cert. denied, 879 P.2d 266 (Utah 1994). This is not a "public duty" case: The facts of this care simply do not support the State's reliance upon the doctrine. Appellant does not contend that Trooper Taylor failed in some duty to the public at large. Appellant does not suggest that the highway patrol has a duty to warn the motoring public about icy conditions on all snow packed on and off ramps, or to slow traffic on icy roadways. Appellant alleges Trooper Taylor voluntarily assumed a protective duty when he stopped to come to Appellant's aid and having volunteered his assistance, the Trooper assumed an obligation to exercise reasonable care in his performance.

This distinction is discussed by the California court in the 1983 decision, Williams v. State, 664 P.2d 137 (Cal. 1983). Williams was a passenger in an automobile when a piece of heated brake drum from a passing truck was propelled through the windshield of the vehicle, striking Williams in the face. Williams brought an action against the Highway Patrol, alleging the officers conducted their investigation in a negligent fashion and destroyed her opportunity to prosecute a claim for her damages. Williams claimed

that stopping to aid a motorist created a special relationship which gave rise to the duty to secure information or preserve evidence for civil litigation between the motorist and third parties. The state moved for summary judgment and the trial court granted the state's motion.

While the appellate court refused to find that officers had a duty to preserve evidence for civil litigation the court determined that when the state, through its agents, voluntarily assumes a *protective duty* toward a *certain member* of the public and undertakes action on behalf of that member, the state *is held to the same standard of care as a private person.* 664 P.2d at 138, 140. (Emphasis added). The court examined the question of "duty" under the general tort law principle that a person who has not created a peril is not liable in tort for merely failing to take affirmative action to assist or protect another unless some relationship exists between them which gives rise to a duty to act. 664 P.2d at 139, citing Rest. 2d Torts, § 314; (citations omitted). Once an individual undertakes to come to the aid of another, however, he is

> under a duty to exercise care in performance and is liable if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.

Id. at 139, citing Rest. 2d Torts, § 323.

Although Respondent's reliance upon Rollins v. Petersen, 813 P.2d 1156 (Utah 1991) may be misplaced under the facts of this case, the obligation to exercise care when one volunteers to offer assistance is not inapposite to the Utah Supreme Court's decision.

In Rollins the personal representative for the decedent's estate brought a wrongful death action after the decedent was killed in a motor vehicle collision with a stolen automobile driven by a state hospital patient. Unlike the Appellant in the instant case, the plaintiff in Rollins urged the court to follow the Restatement of Torts' criteria for determining when a duty is owed to third persons by a custodian who has taken control of the one causing injury. The court held that no special relationship existed between the state hospital and the *public at large* which would impose a duty on the hospital to protect the general public from an allegedly dangerous person in its custody. 813 P.2d at 1161. (Emphasis added). But, the court went on to explain that in order to impose such a duty, "others" to whom bodily harm is likely must be identifiable. 813 P.2d at 1162. In other words, the Rollins court would have found a duty on the part of the state hospital to take some action had the hospital appreciated a specific danger to an identifiable individual.

The case at bar is not one in which the Appellant is relying upon the Trooper's duty to control a third party in his custody. Rather, the undisputed facts clearly demonstrate that Trooper Taylor, while en route to another accident, observed Appellant, a clearly identifiable individual, assisting a stranded motorist on the ramp. R. 94 at ¶ 4. He noted what he determined to be dangerous conditions and told Appellant to leave the area, asserting his authority as a law enforcement officer to take control of the scene. Id. Trooper Taylor voluntarily assumed a protective duty to Appellant and was, therefore, obligated to exercise reasonable care in performance. Whether the Trooper did, in fact, exercise reasonable care is a question of fact to be determined by the factfinder.

IT IS UNSOUND PUBLIC POLICY TO ALLOW INDIVIDUALS TO INSULATE THEMSELVES FROM BASIC DUTIES BY BECOMING LAW ENFORCEMENT OFFICERS.

The notion that a person who undertakes to come to the aid of another is liable for his negligent conduct is not foreign in Utah law. Volunteers may be liable for their negligent conduct. See, U.C.A. § 63-30b-2 (1979). The state may be held liable for negligent voluntary conduct of its employees under the right circumstances. See, U.C.A. § 63-30-10. It does not follow, therefore, that a law enforcement officer is insulated from the obligation to exercise care simply by virtue of his chosen profession.

Respondent contends the policy concerns in the present case are analogous to those considered in Cannon v. University of Utah, 866 P.2d 586 (Utah App. 1993), cert. denied, 879 P.2d 266 (Utah 1994). In Cannon, the court determined that to adopt the Cannons' theory would impose too broad a duty on the University and would "expose them to liability to every person injured in an accident that occurs while on the way to any University event." 866 P.2d at 590, n.3. The likely result of such exposure "would be for the University to stop providing any sort of traffic enforcement." Id. The "public interest," continued the court, "would not be served by imposing liability on the University and its police officers in this case." Id.

It is difficult to believe that law enforcement officers will "stop intervening where the actions of motorists and pedestrians...may pose a potential danger" if the court imposes upon them the same duty all citizens who volunteer to offer assistance have to act with reasonable care. See, Brief of Respondent at 15. Individuals who choose law enforcement as a profession do so, for the most part, because they have a strong sense

of duty to the public and a desire to help the people in their communities. They undergo rigorous training and subject themselves to dangerous situations on a daily basis because of their strong sense of committment. Imposing an obligation on them to refrain from negligent conduct is not going to deter them from carrying out their duties as skilled law enforcement officers.

It is not unreasonable to expect that trained law enforcement officers who stop to render assistance do so without creating a risk of harm to those they seek to protect. It is not unreasonable to expect law enforcement officers who stop to render assistance to do so without creating a risk of harm to the very individuals who rely on the officers' position of authority. It is, however, unreasonable to shield police officers from liability for their alleged negligent conduct under the guise of the "public duty doctrine" given the facts of this case. If Joe Citizen had observed what he perceived to be a dangerous situation and he stopped to render assistance to Appellant, Joe Citizen would be held to a standard of conduct which Respondent contends should not apply to police officers. This court cannot sanction such special treatment.

CONCLUSION

The facts in the instant case, when viewed in a light most favorable to Appellant as the nonmoving party, demonstrate that it is reasonable to expect that, by his conduct, Trooper Taylor assumed a protective duty which gave rise to an obligation to exercise reasonable care. Whether Trooper Taylor breached the duty to exercise reasonable care is a disputed question of fact which precludes summary judgment. Accordingly, Appellant respectfully requests the court reverse the trial court's grant of summary judgment.

REQUEST RE ORAL ARGUMENT AND/OR PUBLISHED OPINION

Appellant respectfully requests oral argument in light of the fine distinctions in Appellant's contention that Trooper Taylor assumed a protective duty to Appellant and the public duty doctrine. In addition, Appellant joins in Respondent's request for a published opinion.

DATED this 30th day of October, 1995.

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CERTIFICATE OF SERVICE/MAILING

I hereby certify that on this 30 day of October, 1995, the foregoing REPLY BRIEF OF APPELLANT was served/mailed in the manner indicated below upon the following:

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