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IN THE UTAH SUPREME COURT

STATE OF UTAH, **Plaintiff/Petitioner,** **vs.** **DAVID ROGER MARKLAND,** **Defendant/Respondent.**	**Case No. 20040190-SC**

REPLY BRIEF OF PETITIONER

ON WRIT OF CERTIORARI TO THE UTAH COURT OF APPEALS

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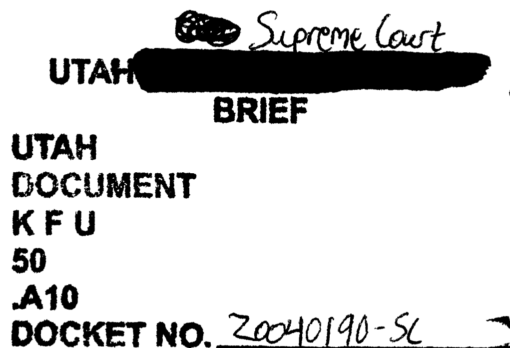
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IN THE UTAH SUPREME COURT

STATE OF UTAH, Plaintiff/Petitioner, vs. DAVID ROGER MARKLAND, Defendant/Respondent.	Case No. 20040190-SC

REPLY BRIEF OF PETITIONER

* * *

Pursuant to rule 24(c), Utah Rules of Appellate Procedure, the State submits this brief in response to a change in the standard of appellate review of trial court determinations of reasonable suspicion and to new matters raised in respondent's brief.

A. CHANGE IN STANDARD OF REVIEW.

On certiorari, the Utah Supreme Court reviews for correctness the decision of the court of appeals, including the "standard of review which it applied to the ruling of the trial court." *State v. Brake*, 2004 UT 95, ¶ 11. In the opening briefs, the State and defendant agreed that a trial court's conclusion that reasonable suspicion exists based on its factual findings are reviewed for correctness, "'with a measure of discretion given to the trial

judge's application of the legal standard to the facts.'" Pet. Brf. at 2 (quoting *State v. Veteto*, 2000 UT 62, ¶ 8, 6 P.3d 1133) and Resp. Brf. at 1-2 (quoting *State v. Fridleifson*, 2002 UT App 322, ¶ 7, 57 P.3d 1098). Last month, however, this Court "abandon[ed] the standard which extended 'some deference' to the application of law to the underlying factual findings in search and seizure cases in favor of non-deferential review." *Brake*, 2004 UT 95, ¶ 15.

The non-deferential review now applied by Utah appellate courts is consistent with the standard of appellate review applied by the United States Supreme Court to reasonable suspicion and probable cause cases. In *Ornelas v. United States*, 517 U.S. 690, 696-99, 116 S.Ct. 1657, 1661-63 (1996), the U.S Supreme Court held that determinations of reasonable suspicion and probable cause are reviewed independently or "*de novo*" on appeal. Such non-deferential review permits the appellate courts "to maintain control of, and to clarify, the legal principles" of search and seizure law. *Id.* at 697, 116 S.Ct. 1662. Although "one case may not squarely control another one, [multiple] decisions when viewed together may usefully add to the body of law on the subject." *Id.* at 698, 116 S.Ct. at 1663.

The appellate courts' non-deferential review of a trial court's reasonable suspicion and probable cause determinations should not, however, be confused with the deferential review accorded to a trial court's findings of fact and the factual inferences drawn from those facts. Appellate courts give deference to a trial court's factual findings because of its "advantaged position to evaluate the evidence and determine the facts." *State v. Gamblin*, 2000 UT 44, ¶ 17 n.2, 1 P.3d 1108.

Likewise, reviewing courts in search and seizure cases are required to give due weight to the officers' inferences from the facts. In *United States v. Arvizu*, 534 U.S. 266, 273, 122 S.Ct. 744, 750-51 (2002), the U.S. Supreme Court held that in determining reasonable suspicion, courts must "allow[ ] officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" (citation omitted). This same deference should be applied to the trial court's factual inferences. *Cf. In re Tanner*, 960 P.2d 399, 401 (Utah 1998) (holding that unlike other cases, the Utah Supreme Court "reserve[s] the right to draw [its] own inferences" in attorney discipline cases because "[r]eview of attorney discipline proceedings is fundamentally different from judicial review in other cases"); *State v. Hansen*, 2002 UT 125, ¶ 50, 63 P.3d 650 (holding that the trial court did not clearly err in finding that defendant consented to a search of his car when, in response to the officer's question, "Do you mind if I check [your car)?", defendant responded, "Yes," which the officer understood to mean that he could conduct the search).[1]

In *Ornelas*, the U.S. Supreme Court observed that appellate courts must "take care both to review findings of historical fact only for clear error and to give due weight to inferences drawn from those facts by resident judges and local law enforcement officers." *Id.* at 699, 116 S.Ct. at 1663. The Supreme Court thus explained:

---

[1] An inference is nothing more than a "factfinding device[ ] whereby one fact is used to determine the existence of another fact." *State v. Chambers*, 709 P.2d 321, 325 (Utah 1985).

> A trial judge views the facts of a particular case in light of the distinctive features and events of the community; likewise, a police officer views the facts through the lens of his police experience and expertise. The background facts provide a context for the historical facts, and when seen together yield inferences that deserve deference. For example, what may not amount to reasonable suspicion at a motel located alongside a transcontinental highway at the height of the summer tourist season may rise to that level in December in Milwaukee. . . . The background facts, though rarely the subject of explicit findings, inform the judge's assessment of the historical facts.

Id. at 699-700, 116 S.Ct. at 1663. In other words, "[a]n appeals court should give due weight to a trial court's finding that the officer was credible and the inference was reasonable." *Id.* at 700, 116 S.Ct. at 1663.[2]

As explained in the State's opening brief, Deputy Spotten's suspicion that defendant might have been involved in criminal activity was supported by the facts articulated by Deputy Spotten and the reasonable inferences drawn from those facts, including the inference that defendant was connected to the cry for help. *See* Pet. Brf. at 5-12. Indeed, what may not have amounted to reasonable suspicion at the apartment complex at midday, when no suspicious activity had been reported, rose to that level at 3:15 a.m. where (1) someone reported a cry for help, (2) defendant was found at the location of the reported cry for help, within minutes of the report, (3) no one else was in the vicinity, and (4) defendant said he was walking home, but could not get there the way he was walking.

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[2] The appellate court's role in reviewing a reasonable suspicion determination can be likened to a mathematical equation: F (factual findings) + I (inferences) = R (reasonable suspicion). The appellate court's grants deferential review to the trial court's determination of what constitutes F and what constitutes I. However, whether F+I=R is reviewed non-deferentially for correctness.

B. Establishing Identity and Running a Warrants Check Is a Routine and Accepted Part of a Terry Stop.

Defendant argues that "once [the deputies] learned that [he] knew nothing about the [cries for help,] they were required to end the encounter and to allow [him] to proceed on his way." Resp. Brf. at 21. He contends that detention to ask for identification and run a background and warrants check was not within the permissible scope of the investigatory stop under *Terry v. Ohio*, 391 U.S. 1, 88 S.Ct. 1868 (1968). Resp. Brf. at 21-23. Defendant argues that at most, the officers should have limited their investigation to questions about how he planned on getting home on the route he was taking. Resp. Brf. at 19, 21-23. This contention lacks merit.

Just this year, in *Hiibel v. Sixth Judicial District Court of Nevada*, — U.S. —, 124 S.Ct. 2451, 2458 (2004), the U.S. Supreme Court held that "an officer may ask a suspect to identify himself in the course of a *Terry* stop . . . ." Indeed, requesting identification is a routine and accepted practice in *Terry* stops. *See id.* (citing *United States v. Hensley*, 469 U.S. 221, 229, 105 S.Ct. 675 (1985); *Hayes v. Florida*, 470 U.S. 811, 816, 105 S.Ct. 1643 (1985); and *Adams v. Williams*, 407 U.S. 143, 146, 92 S.Ct. 1921(1972)). "The request for identity has an immediate relation to the purpose, rationale, and practical demands of a *Terry* stop." *Id.* at 2459. For example, "knowledge of identity may inform an officer that a suspect is wanted for another offense, or has a record of violence or mental disorder." *Id.* at 2458. On the other hand, knowledge of identity "may help clear a suspect and allow the police to concentrate their efforts elsewhere." *Id.*

Hiibel, therefore, permits a police officer to not only request identification from a suspect during a *Terry* stop, but also to run a background and warrants check based on that information. Here, the deputies, like the officers in *Hiibel*, "need[ed] to know whom they [were] dealing with in order to [accurately] assess the situation." *Id.* Had the deputies learned that defendant had a background of violence or theft, or did not reside at the location he claimed, they would have had reason to doubt defendant's explanation. Further investigation would then have been warranted. On the other hand, information confirming defendant's residence and showing no criminal history would have "help[ed] clear [defendant] and allow[ed] the [deputies] to concentrate their efforts elsewhere." *Id.*

Defendant contends, however, that he could have provided a number of innocent explanations for his travel route if only the deputies had asked. Resp. Brf. at 19-20, 22-23. While additional questioning may have afforded defendant an opportunity to provide an innocent explanation for his travel route, Deputy Spotten was not bound to accept that explanation, particularly given the late hour, the distance from defendant's home, and the freshness of the reported cry for help. *See State v. Beach*, 2002 UT App 160, ¶ 11, 47 P.3d 932 (holding that officer "was not bound to accept Defendant's first explanation as truthful, particularly when he observed other suspicious actions by Defendant"). As observed by the court of appeals in *Beach*, "'officers need not close their eyes to suspicious circumstances.'" *Id.* (quoting *United States v. Williams*, 271 F.3d 1262, 1268 (10th Cir. 2001)).

C. DEFENDANT HAS WAIVED ANY CLAIM THAT THE INITIAL QUESTIONING CONSTITUTED A LEVEL TWO STOP.

Defendant also criticizes the initial encounter by the deputies because "the original informant here may have been a citizen or prankster" and that "the deputies observed nothing to confirm the dispatched report." Resp. Brf. at 16-17 fn.3. The State acknowledges that no evidence was introduced regarding the identity of the caller. However, the Fourth Amendment does not bar officers from investigating an anonymous report, nor does it bar officers from merely questioning individuals who may have knowledge of, or who may be implicated in, the reported activity. *See Florida v. Royer*, 460 U.S. 491, 497, 103 S.Ct. 1319, 1324 (1983).[3]

In this case, the officer's initial encounter with defendant was consensual and thus not subject to the Fourth Amendment. To the extent that defendant claims that he was seized when the deputies initially questioned him, *see* Resp. Brf. at 18-19, 21, that claim must fail because he did not raise it in his motion to suppress before the trial court. *See* R. 68-69, 72-74; R. 111: 13-14. To the contrary, defendant expressly conceded that "[t]he initial questioning [was] fine," but argued that the encounter escalated to a level two detention requiring reasonable suspicion when the officer took his identification. R. 68; R. 111: 13-14. Having led the trial court into the now alleged error, defendant was barred from asserting it

---

[3] In any event, the reliability of the report increased when the deputies found a lone individual in the very vicinity of the reported cry for help and that individual's responses to the deputies' questions were contradictory (claiming he was walking home, but walking down a road that would not get him there).

on direct appeal. *See State v. Dunn*, 850 P.2d 1201, 1220 (Utah 1993) (discussing "invited error" doctrine).

Defendant's attempt to resurrect the claim on certiorari is thus likewise barred. Moreover, the only issue addressed by the court of appeals below was whether the detention, which "occurred when the police retained Defendant's identification while they ran a warrants check," was supported by reasonable suspicion. *State v. Markland*, 2004 UT App 1, ¶ 3, 84 P.3d 240. Defendant did not seek certiorari review of the court of appeals' failure to address his claim that the initial questioning constituted a detention. This Court should not, therefore, address it on certiorari.

CONCLUSION

For the foregoing reasons and those stated in the State's opening brief, the State respectfully requests the Court to reverse the judgment of the court of appeals.

Respectfully submitted December 1, 2004.

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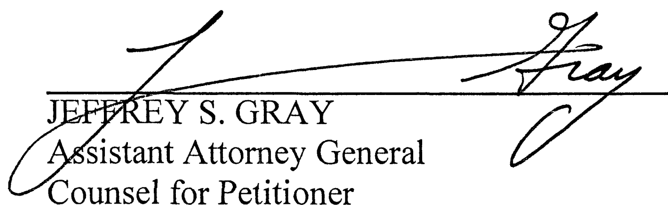

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2004, I served two copies of the foregoing Reply Brief of Petitioner upon the defendant/respondent David Roger Markland by causing them to be delivered by first class mail to his counsel of record as follows:

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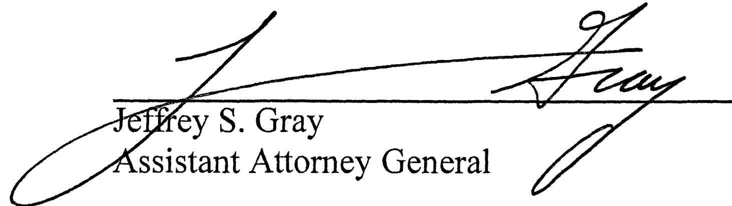

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IN THE UTAH SUPREME COURT

JAMES WEBB,	:	
Plaintiff/Appellant/Respondent,	:	
v.	:	Case No. 20040282
THE UNIVERSITY OF UTAH, a division of the State of Utah,	:	
	:	
Defendant/Appellee/Petitioner,		
	:	
PARK PLAZA CONDOMINIUM OWNERS' ASSOCIATION, a Utah Non-/Profit Corporation, and JONETTE WEBSTER,	:	
	:	
Defendants.		
	:	

REPLY BRIEF OF PETITIONER

On Writ of Certiorari to the Utah Court of Appeals,
Judges Billings, Bench, and Thorne

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	:	
Defendants.	:	

REPLY BRIEF OF PETITIONER

SUMMARY OF ARGUMENT

The requirement for a "special relationship" between a plaintiff and a public defendant is a manifestation of the public duty doctrine. In its motion to dismiss, the University of Utah set out the standard for establishing a breach of duty under the public duty doctrine, and the trial court decided the motion on that basis. By contending that the use of alternative terms such as "special relationship" or "special duty" fails to preserve the issue of the public duty doctrine's applicability for appeal, Webb elevates form over substance. The need to show a special relationship between the parties in order to

establish a duty owed by a public entity has been central to this case from the outset and was raised in both the trial court and the court of appeals.

Webb's invocation of the Restatement (Second) of Torts to establish a special relationship with the University is unavailing. Sections 314A through 320 do not list the student-teacher relationship among those that give rise to a special duty, and Beach v. University of Utah, 726 P.2d 413 (Utah 1986), acknowledges the parties' concession that the student-teacher relationship, by itself, is insufficient to give rise to one.

Webb continues to rely on cases that are readily distinguishable from the circumstances here. Rather than acknowledging the distinctions, he focuses his argument on policy considerations that are more appropriately directed to the legislature. The special relationship required in order to hold a state entity liable in tort is firmly established in Utah's appellate decisions. Had the legislature wished to abrogate the public duty doctrine, it had the opportunity to do so when it enacted the new Governmental Immunity Act of Utah, effective July 1, 2004. The fact that it did not indicates its intent to maintain the public duty doctrine as a valid defense to liability.

Finally, Webb misrepresents the University's position by quoting language out of context without identifying its source. The University has neither identified the public duty doctrine as "unconscionable" (Brief of Respondent at 21) nor conceded that its extinction would be "laudable public policy" (id.), but has stated only that Webb's belief in these positions is contrary to decided case law. See Brief of Petitioner at 12-13; Aplee.

Brief at 12 (Webb v. Univ. of Utah, No. 20020985-CA). Placing the University's statements in a false light does not advance Webb's case.

The University's reliance on the public duty doctrine is in harmony with precedent on point. The court of appeals' deviation from precedent cannot be sustained without overruling the line of cases that controls the outcome here. For these reasons, as more fully explained below, the University respectfully asks the Court to reverse the court of appeals' decision and to reinstate the trial court's dismissal of this action.

ARGUMENT

I. THE "SPECIAL RELATIONSHIP" EXCEPTION TO THE PUBLIC DUTY DOCTRINE HAS ALWAYS BEEN THE CONTROLLING ISSUE IN THIS CASE.

Webb claims that the University raised the issue of the public duty doctrine for the first time in its petition for writ of certiorari, and the Court should, therefore, not address it (see Brief of Respondent at 5). He acknowledges, however, that the University cited the line of public duty cases with respect to the need to establish a special relationship in order to establish a duty (id.). The record amply demonstrates that, contrary to Webb's contention, the public duty doctrine's requirement of a special relationship between the parties was not only raised and argued, but was the basis for the trial court's decision.

In the memorandum supporting its motion to dismiss, the University clearly set out the public duty standard: "A plaintiff suing a government agency for negligence must show a breach of duty owed to him as an individual, not merely the breach of an

obligation owed to the general public at large by the agency or its employee." R. 19-20. The memorandum cited a number of cases that, as Webb concedes, involved the public duty doctrine and its special relationship requirement. See Brief of Respondent at 5. This standard was reiterated in the University's reply memorandum, where the University, citing to Ferree v. State, 784 P.2d 149, 150 (Utah 1989), stated that this Court has held that "a plaintiff, who is a member of the general public, who sues a governmental agency 'must show a breach [of a duty] owed to him as an individual, not merely the breach of any obligation owed to the general public at large.'" R. 48. These are clear statements of the public duty doctrine as it has been applied by Utah courts.

Moreover, in arguing the motion to dismiss, the University's counsel stated as follows:

> And what's unique, in suing the governmental agencies, is that you have to show that a duty is owed to that particular plaintiff individually, not at large, and you have to show that by demonstrating that there is an ability on the behalf of the University of Utah to control the conduct of a third party. And in this case, we feel those facts aren't alleged and that there could not be a situation where those facts could be alleged, because no special relationship existed.

R. 134 at 2:21 - 3:4. This was the sole ground argued for the University's motion. Webb's counsel was given an opportunity to respond to it, after which the trial court judge granted the motion from the bench (see id. at 7:18-20).

The essence of the public duty doctrine was again extensively discussed in the University's brief on appeal:

> 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); Ferree v. State, 784 P.2d 149, 151 (Utah 1989) ("plaintiff must show a breach of duty owed to him as an individual, not merely the breach of an obligation owed to the general public at large by the government 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").

Aplee. Brief at 9-10, Webb v. Univ. of Utah, No. 20020985-CA..

Likewise, while the court of appeals did not use the phrase "public duty doctrine" in its opinion, it explicitly rejected the "special duty doctrine" as formulated in Hunsaker, Higgins, Ferree, and similar cases. See Webb v. Univ. of Utah, 2004 UT App 56, ¶ 6, 88 P.3d 364. Its use of a different phrase to identify the doctrine considered in these cases does not alter its holding that the special relationship requirement of the public duty doctrine does not apply to Webb's case.

Given the University's repeated references, with numerous citations, to the necessary showing under the public duty standard, and the court of appeals' holding, Webb's contention that the issue has been raised for the first time in the petition for writ of certiorari is in error. At all times throughout this litigation, Webb was on notice that suing a governmental entity in tort required him to show that a duty was owed to him

beyond any duty owed to the public at large. This is the essence of the public duty doctrine. The issue is properly before this Court on certiorari.

II. THE COURT OF APPEALS' RELIANCE ON THE DISTINCTION BETWEEN NONFEASANCE AND MISFEASANCE LACKS SUPPORT IN BINDING CASE LAW.

Webb observes that this Court, in Beach v. University of Utah, cited to Restatement (Second) of Torts § 314A in its discussion of special relationships that give rise to a duty to act. See Brief of Respondent at 7. Although he enumerates the special relationships that the Beach Court recognized, he neglects to acknowledge that in Beach, the parties "conceded that the mere relationship of student to teacher was not enough to give rise to such a duty." Beach v. Univ. of Utah, 726 P.2d 413, 416 (Utah 1986). Perhaps in tacit concession to this point, he then argues that his claim should be analyzed under the Restatement's distinction between an act and a failure to act, contending that the University's conduct was an act of misfeasance that was actionable without reliance on a special relationship. He has provided no citation to any case in which Utah courts have applied the Restatement's distinction in the context of a negligence action against a state actor.

The sole case to which Webb cites to show actionable misfeasance in the absence of a special relationship is a case between private litigants, a host and guest. See Gilger v. Hernandez, 2000 UT 23, 997 P.2d 305. Aside from this obvious distinction from the present case, the circumstances in Gilger are far different from the circumstances of

Webb's claim. In Gilger, the defendant, Hernandez, hosted a party at which she provided alcohol to a minor who, in the course of the evening, threatened to injure other guests with a gun or knife. After being escorted outside the home, the minor inflicted serious stab wounds on the plaintiff guests. Although Hernandez was aware of the stabbing, she declined to summon aid and grabbed the telephone away from another guest who was attempting to call for assistance. While this Court found nothing inherent in the host-guest relationship "that imposes on a social host a duty to either to control one guest or to protect another when one threatens to injure the other[,]" 2000 UT 23, ¶ 17, it held "that where a guest is sufficiently ill or injured so as to lack the ability to summon aid for him- or herself, a host has a duty to take reasonable steps to secure such aid." Id., ¶ 19. The Court found actionable negligence where the host actively interfered with another guest's attempt to summon aid. See id., ¶ 20. In doing so, it quoted W. Page Keeton et al., Prosser and Keeton on the Law of Torts ¶ 19, § 56, at 382 (5th ed. 1984), as follows:

> "Even though the defendant may be under no obligation to render assistance himself, he is at least required to take reasonable care that he does not prevent others from giving it . . . . The principle has been carried even to the length of holding that there is liability for interfering with the possibility of such aid, before it is actually being given. Such acts are of course 'misfeasance,' but the real basis of liability would appear to be the interference with the plaintiff's opportunity of obtaining assistance."

Gilger, 2000 UT 23, ¶ 20 (quoting Keeton).

Applying the Gilger analysis to Webb's case, it is apparent that the University is not liable for Webb's injuries. The student-teacher relationship, like that of host and

guest, is not inherently the kind of relationship that gives rise to a duty. If, in Gilger, even the threats of guest against guest did not create a duty, the neutral act of conducting a field trip can hardly be said to create one. The University's role is comparable to that of the host in Gilger. Had the university failed to respond to injuries that prevented Webb from summoning aid for himself or interfered with someone else's attempt to obtain assistance for him, its conduct, under Gilger, would be actionable in the absence of a special relationship. The simple act of hosting the field trip is not actionable misfeasance as Gilger defines it.

Webb cites section 314A of the Restatement (Second) of Torts in support of the nonfeasance/misfeasance distinction. However, he fails to take cognizance of this Court's modified approach to the application of the Restatement's special relationship exception as articulated in Higgins, where the Court recognized that its own "analysis produces results that appear to diverge from sections 314, 315, and 319 of the Restatement." Higgins v. Salt Lake County, 855 P.2d 231, 237 (Utah 1993). Rather than looking to the Restatement for guidance, Webb should look to the Court's precedents rejecting "claims for broad categories of special relationships which operatively seem to be indistinguishable from a general negligence theory." Id.; see also Rollins v. Petersen, 813 P.2d 1156, 1159-62 (Utah 1991); Ferree, 784 P.2d at 151-52; Beach, 726 P.2d at 416. Webb's uncritical invocation of the Restatement is not supported by Utah's appellate case law. Just as a mechanical application of the Restatement has not determined past

outcomes under Utah law, there is no reason to treat the Restatement as determinative here.

Webb continues to cite non-binding cases from other jurisdictions while failing to address the extensive Utah precedents articulating the public duty doctrine. Both he and the court of appeals dismissed these cases as irrelevant, distinguishing them in a group as involving failures to act, not acting negligently. See Webb, 2004 UT App 56, ¶ 6. In support of this position, Webb cites to dictum in Day v. State, 1999 UT 46, ¶ 13 n.2, 980 P.2d 1171, noting the Court's observation that four other jurisdictions recognize an exception to the public duty doctrine where injury is caused by an affirmative act. See Brief of Respondent at 14. However, the Court in Day did not adopt or apply this exception; in fact, the Court stated that a general duty "does not impose a specific duty of care on the government with respect to individuals who may be harmed by *governmental action or inaction*;" i.e., misfeasance or nonfeasance. Day, 1999 UT 46, ¶ 12 (emphasis added). The distinction noted in Day as adopted in other jurisdictions is squarely contrary to the state of the law in Utah as Day proclaimed it.

The court of appeals erred in holding the special relationship requirement of the public duty doctrine inapplicable to Webb's claim by failing to apply this Court's precedents, and Webb has provided no authority on which its decision can be sustained. Consequently, the decision warrants reversal.

III. THE COURT OF APPEALS ERRED IN HOLDING THAT WEBB HAS A SPECIAL RELATIONSHIP WITH THE UNIVERSITY.

As an alternative to its holding that Webb was not obligated to show a special relationship, the court of appeals held that "were a special relationship required in this case, the facts alleged by Webb are sufficient to establish a special relationship." Webb, 2004 UT App 56, ¶ 10 n.6. Its holding was premised on an assumption that the University assumed responsibility for Webb's safety or deprived him of his normal opportunities for self-protection. However, Webb's complaint contains no allegations supporting these assumptions.[1]

As Beach makes clear, the University's relationship with its students is not in loco parentis. Even where the University allowed Beach, a minor, to consume alcohol in violation of the law, the Court found no liability, holding that "[i]t would be unrealistic to impose upon an institution of higher education the additional role of custodian over its adult students" to protect them from their own actions. Beach, 726 P.2d at 419. As an adult, Webb chose to attend the University and to take a class for which field trips were required. Had he perceived the area to which the class was taken to be dangerous, he could have exercised his adult judgment to alert the leader of the field trip to the perceived danger, express misgivings, ask for personal assistance, seek an alternative

[1]Webb incorrectly states that in his complaint, he alleged that the University "instruct[ed] him to engage in a dangerous activity." Brief of Respondent at 15. In fact, the complaint alleged that the University was negligent in "taking the class into a dangerous area." R. 2, ¶ 12.

assignment, or even decline to participate--all measures that were available to him for self-protection. Although he was not deprived of these opportunities for self-protection, he did none of these things. Likewise, there is no indication in the record that the University undertook responsibility for Webb's safety merely by conducting a routine field trip. As the Court held in Beach, because the student-teacher relationship does not, by itself, constitute a special relationship, to show a special relationship requires the plaintiff to "distinguish her circumstances from those of other students on the field trip." Beach, 726 P.2d at 416. Webb has neither alleged nor argued that he was in any way distinguishable from his student colleagues. Because Webb failed make the required showings, the court of appeals' determination that Webb stood in a special relationship to the University is unsupported by the record and, for this reason, should be reversed.

IV. POLICY CONSIDERATIONS FAVOR THE RETENTION OF THE PUBLIC DUTY DOCTRINE.

While Webb asserts the existence of a "trend to abrogate the public duty doctrine" (Brief of Respondent at 16), the doctrine continues to be recognized and applied by a substantial majority of states. See John H. Derrick, Annot., Modern Status of Rule Excusing Governmental Unit from Tort Liability on Theory that Only General, Not Particular, Duty was Owed Under Circumstances, 38 A.L.R.4th 1194 (2004). Webb characterizes the doctrine as unintended by the legislature, and urges the Court to abandon the majority position for the purpose of avoiding confusion and inequitable results. Not only would abandonment of the public duty doctrine create as much

confusion and inequity as Webb argues it would resolve, but Webb also addresses his argument to the wrong forum.

A. The Doctrine Does Not Create Confusion and Inequity.

Webb complains that the exceptions to the public duty doctrine "swallow the rule" (Brief of Respondent at 18), citing to Day and two other Utah cases. In Day, the Court set out the four recognized circumstances under which a special relationship can be established:

> (1) by a statute intended to protect a specific class of persons of which the plaintiff is a member from a particular type of harm; (2) when a government agent undertakes specific action to protect a person or property; (3) by governmental actions that reasonably induce detrimental reliance by a member of the public; and (4) under certain circumstances, when the agency has actual custody of the plaintiff or of a third person who causes harm to the plaintiff.

Day, 1999 UT 46, ¶ 13. There is nothing particularly confusing or difficult about these exceptions. In Day, the state's liability was based on the defendant's statutory duty to operate an emergency vehicle "to act with due regard for the safety of other persons on the road." Id. at ¶ 14. This is a straightforward application of the first exception. Gabriel v. Salt lake City Corp., 2001 UT 277, 34 P.2d 234, was, likewise, decided on the basis of a statutory duty to operate a vehicle in a manner to avoid collision with pedestrians. Id. at ¶ 5. In Trapp v. Salt Lake City Corp., 835 P.2d 161 (Utah 1992), the common law duty of one who controls a physical facility to maintain it in safe condition was codified as an exception to governmental immunity in Utah Code Ann. § 63-30-8 (Supp. 1989), which,

at the relevant time, waived immunity "for any injury caused by a defective, unsafe, or dangerous condition of any highway, road, street, alley, crosswalk, sidewalk, culvert, tunnel, bridge, viaduct, or other structure located thereon."[2] See Trapp, 835 P.2d at 161. Nothing in these cases demonstrates the confusion Webb claims.

In fact, abrogating the public duty doctrine in favor of a nonfeasance/misfeasance distinction would create its own confusion and inequity. For example, in Cannon v. University of Utah, 866 P.2d 586, 588 (Utah App. 1993), both nonfeasance and misfeasance were alleged: "Specifically, the Cannons claimed that the officers were negligent in the manner in which they assisted [misfeasance] or failed to assist [nonfeasance] pedestrians using the crosswalk in question." Under the analysis advanced here by Webb and the court of appeals, the outcome of Cannon would turn on whether the complaint alleged that the officers "assisted" or "failed to assist" the Cannons rather than on the essence of the allegations. To hold this distinction determinative elevates form over substance.

B. The Doctrine Does Not Create Unintended Immunity.

Nor does the public duty doctrine create immunity where the legislature did not intend it. Only last session, the legislature repealed the Utah Governmental Immunity Act, Utah Code Ann. §§ 63-30-1 through -38 (West 2004), and enacted the new

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[2]The same waiver is now codified at Utah Code Ann. § 63-30d-301(3)(a)(i) (West 2004).

Governmental Immunity Act of Utah, Utah Code Ann. §§63-30d-101 through -904 (West 2004). At the time of reenactment, the public duty doctrine was firmly established in Utah cases addressing public liability. Had the legislature wished to repudiate the doctrine, it could have disavowed it explicitly in the new act. It did not do so. Abolishing the public duty doctrine under these circumstances would have the opposite effect from the one Webb claims: it would expose state entities to potential liability where the legislature did not intend it. As this Court has held, reenactment or amendment of a legislative act that does not respond to the Court's judicial gloss reinforces the interpretation the Court has placed on it. See Horton v. The Royal Order of the Sun, 821 P.2d 1167 (Utah 1991) (noting the Court's statement in Beach that the Dramshop Act did not create a cause of action in strict liability for the intoxicated person). The Horton Court concluded, "After our statement in *Beach*, the legislature amended the statute in both 1989 and 1990. Had the legislature thought *Beach* at variance with legislative intent, it had ample opportunity to correct the statute. Its failure to do so further supports our reading of [the relevant statute]." Horton, 821 P.2d at 1169.

C. The Doctrine Serves a Different Purpose Than the General Tort Standard.

The public duty doctrine is not coextensive with the duty analysis under general tort law. It recognizes that government entities have responsibilities eclipsing those of private actors, and they operate under obligations that private actors do not. Governmental entities occupy a unique position in that, unlike private actors, they cannot

select the population they serve, but are obligated to provide services to the entire public--services that are also the product of public funding which they are bound to protect. The public duty doctrine is an acknowledgment that the government cannot fulfill these competing obligations if it must serve as an insurer for all harms that befall those who must be served. Given the dual role in which governmental entities function, the public duty doctrine ensures that the claims of only those plaintiffs who are more than members of the general public can go forward. A private actor, by contrast, has the opportunity to protect himself by taking on obligations selectively and is not burdened with the government's comprehensive responsibilities. It is the comprehensive nature of the government's functions that renders liability for duties owed only to the public at large "fundamentally at odds with the nature of the parties' relationship" on an individual basis because those duties are "realistically incapable of performance." Beach, 726 P.2d at 418.

As the Supreme Court of Washington explained, "The policy underlying the public duty doctrine is that legislative enactments for the public welfare should not be discouraged by subjecting a governmental entity to unlimited liability." Taylor v. Stevens County, 111 Wash. 2d 159, 170, 759 P.2d 447, 453 (1988). The court further observed, "This potential exposure to liability can only dissuade public officials from carrying out their public duty. This can no longer be tolerated." 111 Wash. 2d at 170-71, 759 P.2d at 453. Nonetheless, the Taylor court, noting that the public duty "does not absolve the . . . government from all liability and responsibility[,]" 11 Wash. 2d at 171, 759 P.2d at 453,

held that "[a] duty of care may arise where a public official charged with the responsibility to provide accurate information fails to correctly answer a specific inquiry from a plaintiff intended to benefit from the dissemination of the information." Id. The duty found in Taylor was premised on the direct contact between the official and the plaintiff, the specific nature of the inquiry, the official's express assurances, and the plaintiff's justifiable reliance on the official's representations. Id. The Washington court's approach, like Utah's line of public duty cases, reasonably allocates the burdens of governmental action by focusing first on the relationship between the plaintiff and the governmental actor: "When considered in combination with the 'special relationship' rule, however, [the public duty doctrine] becomes a mechanism for focusing upon whether a duty is actually owed an individual claimant rather than the public at large." J & B Dev. Co. v. King County, 100 Wash. 2d 299, 302-03, 669 P.2d 468, 472 (1983). The court continued, "To say, as the Court of Appeals does, that '[a] duty owed to the public generally is also a duty owed to individual members of the public' has the danger of creating new duties where none may have existed previously, even under the most liberal construction of" a governmental immunity act. 100 Wash. 2d at 305, 669 P.2d at 472 (quoting J & B Dev. Co. v. King County, 29 Wash. App. 942, 951, 631 P.2d 1002 (1981)) (alteration in original). As in Taylor, the Washington court's analysis did not preclude liability, but served to sharpen the court's focus on the relevant facts.

D. The Doctrine Honors Both Precedent and the Purpose of the Governmental Immunity Act.

In its essence, Webb's argument asks the Court to jettison the principle of stare decisis and to substitute its judgment for that of the legislature. which has shown no inclination to disavow the public duty doctrine as the Court has previously applied it. On the contrary, by not addressing the issue in its recent revision of the Governmental Immunity Act, the legislature has signaled its approval of the doctrine. The importance of stare decisis to this Court is manifested by its decision in S.H. v. State, 865 P.2d 1363 (Utah 1993). S.H. involved a deaf child who was sexually molested and assaulted while being transported to the Utah State School for the Deaf and Blind by a taxi driver under contract with the school. The Court affirmed summary judgment for the state defendants, finding its prior rulings in Higgins and Ledfors v. Emery County School District, 849 P.2d 1162 (Utah 1993) dispositive. The Court remarked, "Plaintiffs here have provided no legal argument that would set this case apart" from those decisions--including the recharacterization of the cause of action as affirmative, governmental acts of negligent hiring, retention, and supervision of the defendant taxi service. S.H., 865 P.2d at1365. As the Court further observed, "Plaintiffs may find the immunity given by the legislature unconscionable, but their remedy lies with that same legislature." Id.[3]

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[3]The alleged unconscionability of the public duty doctrine and asserted laudability of its prospective demise are positions embraced by Webb, not, as Webb misstates, by the University. See Brief of Respondent at 21. Webb's failure to identify the source of his quotations places them in a false light. See Brief of Petitioner at 12-13 (observing that

This appeal shares the problem noted in S.H. It attempts to reframe the claim against the University, a failure to keep Webb safe, as an affirmative act--exposure to an allegedly dangerous area--in order to create a duty where one does not otherwise exist. To recognize a duty here would be to undo more than the public duty doctrine itself: it would deprive state entities of legislatively-crafted immunity on the basis of nothing more than artful pleading, a practice the Court has explicitly rejected in S.H. and other cases. See Brief of Petitioner at 11 n.1.

Even under the public duty doctrine, Webb had the opportunity to obtain relief by showing a special relationship with the University, something he failed to establish in the trial court. The public duty doctrine has the effect of creating a rebuttable presumption in favor of immunity--a presumption that is in harmony with the legislative choice to retain immunity unless explicitly waived. It does no more than put a complaining party to his proof that the governmental entity specifically induced his reliance on it through statutory mandates; custodial relationships; or explicit, individual actions, representations, or assurances. Despite the court of appeals' contrary conclusion, Webb has failed to meet

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"plaintiffs who find themselves without a remedy may, like Webb, find the result [of the public duty doctrine] unconscionable, but their remedy, like Webb's, lies with the legislature, not with the courts."); Aplee. Brief at 12, Webb v. Univ. of Utah, No. 20020985-CA ("While finding a general duty of care may be laudable public policy from Webb's perspective, it is not the law in Utah."). Webb's characterization of this language as a concession misinforms the Court.

this ordinary burden. His failure renders the court of appeals' determination erroneous under both precedent and principle and provides grounds for this Court's reversal.

CONCLUSION

The public duty doctrine's requirement to show a "special relationship" with a governmental entity in order to recover in negligence actions has always been, and remains, central to this case. The doctrine has been applied both where the government's alleged negligence has stemmed from a failure to act and where it has arisen from an affirmative act. Rather than relying on a nonfeasance/misfeasance distinction that is readily manipulated by artful pleading and has no basis in precedent, this Court has consistently held that liability against the government cannot be based on a duty owed to the public at large. The legislature had the opportunity to disavow the public duty doctrine when it reenacted the Governmental Immunity Act, but chose not to address it, indicating its acceptance of the Court's judicial gloss. The court of appeals erred by substituting its judgment for that of the legislature in weighing the policy considerations that balance the public and private interests served by the public duty doctrine. It further erred in finding a special relationship where the University neither assumed responsibility for Webb's safety nor deprived him of his normal opportunities for self-protection.

For these reasons, as more fully explained above, the University of Utah respectfully requests the Court to reverse the decision of the court of appeals, vacate its

opinion, and enter an order affirming the district court's judgment in the University's favor.

Dated this 27th day of October, 2004.

Nancy L. Kemp
Assistant Attorney General
Attorney for Defendant/Appellee/Petitioner

CERTIFICATE OF MAILING

I hereby certify that on this 27th day of October, 2004, I caused to be mailed, first class postage prepaid, two true and correct copies of the foregoing REPLY BRIEF OF PETITIONER to the following:

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