**No.: S230568**

# IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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| THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, etc., et al.,<br>Petitioners,<br><br>*vs*.<br><br>LOS ANGELES COUNTY SUPERIOR COURT,<br>Respondent. | Court of Appeal,<br>Second Appellate District, Division 7<br><br>No. B254959<br><br>Los Angeles County Superior Court<br><br>No. SC108504 |
| KATHERINE ROSEN,<br>Real Party in Interest | |

On Review of an Order Denying a Motion for Summary Judgment
Honorable Gerald Rosenberg, Presiding

## OPENING BRIEF ON THE MERITS


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## OPENING BRIEF ON THE MERITS

## ISSUE PRESENTED FOR REVIEW

Do California public institutions of higher learning–the University of California, the California State University and the California Community Colleges–and their employees have a duty of care to their students while in the classroom to warn of and protect from foreseeable acts of violence by fellow students?

## INTRODUCTION

When she went to her UCLA chemistry lab on October 8, 2009, Katherine Rosen didn't know. She didn't know her classmate, quiet Damon Thompson, was hearing voices in his head saying she and other UCLA women were ridiculing him, calling him stupid. She didn't know Thompson had named her as one of the women doing so, had threatened to do something about it, had been writing letters to faculty for almost a year urging they stop the ridicule, and had a "history of violence," having been permanently expelled from the dorm and ordered to therapy as a condition of his remaining in school. She didn't know Thompson no longer knew right from wrong.

And she didn't know her professor Alfred Bacher and her teaching assistant Adam Goetz knew about Thompson's threats against her. She didn't know that Dean Cary Porter, and his fellow Consultation and Response Team [CRT] members, and campus police, and housing staff knew about Thompson's history

of violence. She didn't know the CRT was searching for Thompson but wouldn't think to look in the most obvious place to find him – the very chem lab she and he were attending.

What Katherine did know was that UCLA claimed she was on one of the most secure campuses in the country. She knew just months before, campus officials had re-published UCLA's commitment to "provide a safe work environment for all faculty, staff and students–one that is free from violence or threats of harm."[1] Sadly, she didn't know UCLA would disclaim responsibility when those charged with implementing this commitment failed–a failure that resulted in Thompson's savage attack on her that day.

Rosen wasn't at a dorm drinking party.[2] She wasn't playing intramural soccer.[3] She wasn't facing the "disastrous consequences which result from combining young students, alcohol, and dangerous or violent impulses."[4] She was in class where she needed to be if she hoped to graduate and pursue her dream of being a doctor.[5] She was in class where the California Constitution says she has an inalienable right to safety.[6]

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1 3EX642.

2 *Crow v. State of California* (1990) 222 Cal.App.3d 192 (*Crow)*; *Tanya H. v. Regents of the Univ. of California* (1991) 228 Cal.App.3d 434 *(Tanya H)*

3 *Ochoa v. California State Univ.* (1999) 72 Cal.App.4th 1300 [*Ochoa*]

4 *Tanya H.,* 228 Cal.App.3d at p. 436.

5 10EX2669.

6 Cal. Const., Art. I, § 28 (Art. 1, § 28).

UCLA failed Rosen. UCLA failed Thompson, too. Their relationship with UCLA was as "special" as any bus patron or prison inmate.[7] It was as special as the UCLA faculty and staff enjoy. And Rosen and Thompson were entitled to believe UCLA's promises–hollow promises it continues to make to this day.[8] They didn't know that UCLA would later claim that the risk of foreseeable fellow-student violence is simply part of the price of a public college education. They didn't imagine a Court of Appeal would agree.

Are UCLA's promises merely cynical public-relations gestures? Or does UCLA and its fellow public colleges have a duty to warn of and protect from foreseeable acts of student violence? Rosen, her 5,000 amici, Presiding Justice Perluss, and the 2.8 million public college students and their families say such a duty exists. The Court should so hold.

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[7] *Lopez v. S. California Rapid Transit Dist.* (1985) 40 Cal.3d 780 *(Lopez)*,*Giraldo v. California Dept. of Corr. & Rehab.* (2008) 168 Cal.App.4th 231.

[8] As reported in the Los Angeles Times, "Student safety continues to be a top priority for UCLA, and we continually strive to provide a welcoming environment for all students that encourages learning and offers resources to support our students in need." (Ceasar, *California Supreme Court to review opinion in UCLA stabbing case*, Los Angeles Times (Jan. 22, 2016).)

## STATEMENT OF FACTS

### I. Katherine Rosen matriculates to UCLA in 2007 and learns of UCLA's policies of providing a safe environment. The Dean of Students tells her she is "accountable" for these policies.

Katherine Rosen entered UCLA as a freshman for the Fall 2007 term and from her first day of orientation, she was made aware of UCLA's commitment to physical and emotional safety for its students. (1EX64–65.) The tragic events at Virginia Tech had occurred just months earlier. (7EX1848.) She and her parents were told "Welcome to one of the most secure campuses in the country." (8EX2099.) UCLA had mandated a stern Workplace Violence Prevention and Response Policy since the late 1990s. (3EX641.[9])

That fall, an email from the Dean of Students, defendant Robert Naples, told Rosen, along with the rest of the student body, that she was "accountable" to know the Student Conduct Code and other UCLA Policies. (2EX455.) Naples stated his office was involved in several activities including "serving as an administrative support source for students in distress or crisis and by working closely with the UCLA community in holding students accountable for their actions, and holding them to the highest standards of academic and personal integrity." (2EX455.)

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[9] The policy is imbedded in the electronic version of the document. (http://docs.chr.ucla.edu/chr/tabs/policy.html (as of 3–20-16).) Rosen includes it in her separately bound exhibits, Tab 5.

The Student Code of Conduct authorized the Dean of Students to exclude students from the campus who exhibited disruptive, paranoid, aggressive, and threatening behavior. (6EX1436–1439.) The UCLA polices included its threat assessment procedures and systems executed by its "Violence Prevention and Response Team," a multi-disciplinary group tasked with defusing foreseeable threats of violence. (3EX641–642.) Its component members, the Dean of Students, Office of Residential Life and Campus Counseling & Psychological Services [CAPS] were charged with forwarding and coordinating threats and concerns about violence. These services were paid for, at least in part, by the students themselves as mandatory, university-wide registration fees increased specifically for "prevention and intervention" of workplace violence. (7EX1817, 1824.) "UCLA is committed to providing a safe work environment for all faculty, staff and students–one that is free from violence and threats of harm." (3EX641.)

## II. Damon Thompson transfers to UCLA from Belize in fall 2008 and displays escalating paranoia that would lead to his attack on Katherine Rosen a year later.

Damon Thompson transferred to UCLA in the fall of 2008. (2EX475.) Shortly after enrolling in classes, Thompson sent several emails to his history professor, Stephen Frank, reporting he was "angered" by "offensive" remarks other students had made to him during an examination. (2EX482–483.) He warned Dean Robert Naples in January 2009, that unless UCLA staff admonished his imagined female tormentors, "this will escalate

into a more serious situation and I'll end up acting in a manner that will incur undesirable consequences on me." (6EX1448.) Thompson's condition deteriorated over time as he was in and out of psychological treatment and involved in hostilities that resulted in his being excluded from university housing and ordered to anger management and psychological counseling.

- February 2009: Feeling "threatened" by Ouija board in the dorm. (2EX576.) "Thought about" hurting someone. (6EX1463.)
- March 2009: Acknowledged acting "confrontational" with roommate. (6EX1471–1472.) "Admits to feeling angry when he is harassed by others" and admitted "prior or current concerns about physically harming or killing someone." (6EX1493, 1497.)
- April 2009: Returned an insult to a woman who "insulted" his maturity. (3EX804.)
- June 2009: Dormitory incident during which Thompson assaulted a residence-hall neighbor; he is charged with and accepted responsibility for Threatening and Disruptive behavior within the meaning of the On Campus Housing Regulations. Thompson is permanently excluded from UCLA Housing for "Physical Assault," ordered to avoid all contact with the victim, ordered to complete "Judicial Educator" modules on anger management, civility, conflict management, and ordered to attend a psychological counseling session, failing which "a hold will be placed on your. . . registration [that] will prevent you from registering for classes. . ." (3 EX836, 6EX1525–1526.)

- July 2009: Complained to two professors that "instead of deterring such behavior, people in authority have. . . encouraged it. . . ." (6EX1532–1534.)
- August 2009: Campus police responded twice to Thompson's complaints that persons in his apartment building are yelling insults at him. (3EX878–880, 4EX1027–1028.)

### III. Thompson confronts the chemistry lab teaching assistant. He names Rosen as one of his tormentors. But UCLA's tardy efforts to intervene fail to prevent him from stabbing and slashing Rosen in the lab.

On September 29, 2009, Thompson complained to Professor Bacher of "poor results with my experiment due to disruption caused by other students." (6EX1555.) The next day he attended the psychological counseling session ordered as part of his expulsion from campus housing for physical aggression. (6EX1537–1543.[10])

Laboratory teaching assistant Adam Goetz reported Thompson's complaints to Bacher. (6EX1552.) These complaints escalated to the point where Thompson confronted Goetz, pointed his finger at Goetz aggressively and was overheard saying "I'm going to do something about it if you don't." (6EX1562.) Rosen

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[10] Thompson saw both a psychologist and a psychiatrist. The latter noted Thompson's insight was "impaired" and prescribed thirty 50 mg Seroquel tablets for him. (6EX1643.) Seroquel is a psychotropic medication used to treat schizophrenia in adults. Side effects of Seroquel include mood or behavior changes or anxiety. (http://www.rxlist.com/ seroquel-drug/patient-images-side-effects.htm#sideeffects (as of 3–21-16).)

also observed this incident, posting on Facebook that Thompson "went a little crazy in the lab today and bitched out the t.a." "[H]e raised his voice and I think he actually cussed-out the t.a. Super-scary." (6EX1580.)

Goetz reported that Thompson claimed women in the lab "were calling him stupid, and specifically [Thompson] often said that Katherine [Rosen] was."(6EX1574.)[11] Thompson would point out Rosen as one of two women insulting him. (6EX1547.)"I had been keeping Dr.[Bacher] informed on all this stuff and he was apparently trying to figure out what to do." (6EX1574.) Goetz emailed Bacher, "I don't want Damon to get upset because he thinks I'm not doing anything about this, but I don't know what to do." (6EX1584.)

Bacher asked Associate Dean of Students and CRT member Cary Porter for help on October 7. (6EX1706.) CRT members began searching for Thompson, recognizing that he needed intervention. "Seems like a health and safety issue to me," emailed CRT member Karen Minero. (6EX1726.) CRT only then learned Thompson had been excluded from housing and had a "history of violence." (6EX1595.) Minero thought this was "important." (*Id.*)

These messages were transmitted contemporaneously to Dr. Nicole Green, who had been treating Thompson months before for mental illness. (4EX936–939.) Elizabeth Gong-Guy, Director of Campus Counseling and Psychological Services and CRT member, told Green, "He [Thompson] may need urgent outreach."

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[11] UCLA acknowledged these facts were undisputed. (9EX2238–2239.)

(4EX931.) Green apparently spoke with Thompson that day and made an appointment for him, but he was a no-show. (4EX943.)

Porter was supposed to meet with Thompson. (6EX1587.) Gong-Guy was to meet with professor Bacher and Goetz, in what she characterized as "faculty outreach." (6EX1714, 1717.) But Bacher was getting married on October 8 and Gong-Guy was too busy to meet before October 9 anyway. (6EX1574, 1717.)

Rosen almost died. (4EX988.) Thompson was charged with attempted murder and found not guilty by reason of insanity. (Pen. Code, § 1026, 4EX1026.) He was committed to Patton State Hospital in December 2010. (4EX1026.)

## STATEMENT OF THE CASE.

### I. Rosen sues the Regents and several of the UCLA employees.

Rosen sued the Regents and named several individual UCLA employees. Rosen relied on the direct liability of the employee defendants and the vicarious liability of the Regents which arises when Government Code sections 820 and 815.2 are read in combination. (5EX1217–1218.) Section 820 holds a public employee liable for an injury caused by his or her act or omission "to the same extent as a private person." Under section 815.2, when the act or omission of the public employee occurs in the scope of employment, the public entity will be vicariously liable for the injury. Rosen alleged that having invited her on the campus and having enrolled her as a student in exchange for

tuition, a special relationship arose between her, the Regents, the individual defendants and other agents of the University creating a duty –

> to take reasonable protective measures to ensure her safety against violent attacks and otherwise protect her from reasonably foreseeable criminal conduct, to warn her as to such reasonably foreseeable criminal conduct on its campus and in its buildings, and/or to control the reasonably foreseeable wrongful acts of third persons/other students.

(5EX1218–1219 [Second Amended Complaint].)[12]

The employees also had embarked on a substantial undertaking to protect and warn the entire UCLA community from threats of violence such as Thompson posed and also undertook to control Thompson prior to his attack. (*Ibid.*)

Rosen alleged that the UCLA employees knew of Thompson's violence and threats of violence directed at her and fellow students yet failed to employ measures available to them to warn of and protect from his foreseeable attack. (5EX1219.)

## II. UCLA moves for summary judgment but the trial court denies the motion.

In 2014, UCLA moved for summary judgment. (1EX1.) It admitted its contractual relationship with Rosen (1EX15–16),

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[12] Rosen asserts the negligence of both the named defendants and those other UCLA employees whose negligence was a substantial factor in causing her harm. The Regents could still be liable even if all the named individuals were exonerated. (*Perez v. City of Huntington Beach* (1992) 7 Cal.App.4th 817, 820.)

Thompson's year-long history of paranoid behavior (1EX16–17), his entry into and out of psychiatric treatment (1EX17–19, 27–28), his expulsion from the dormitory, and his compulsory therapy just two weeks before his attack on Rosen. (1EX29.) It also admitted its undertaking to control campus violence in general (1EX16, 22, 26) and Thompson in particular (1EX19–20), as he named Rosen and other women as his tormentors.(1EX 31, 34.) Yet it claimed no duty to exercise due care in doing any of these things. (1EX36–40.) It provided expert declarations that acknowledged UCLA's undertaking to practice threat assessment to prevent campus violence and stated that UCLA had not breached its duties. (1EX46–51.) Finally, it contended its employees were immune under Government Code sections 820, 856 and Civil Code section 43.92. (1EX52–58.)

Rosen opposed it. Fleshing out the evidence of Thompson's paranoia, she highlighted his long history of increasingly violent threats and UCLA's unsuccessful undertaking to address them. (5EX1243–1252.) She argued that she stood in a special relationship with UCLA giving rise to a duty of care and that UCLA had undertaken to provide for her safety. (5EX1250–1260.) Her experts established UCLA's breach of duty in failing to conduct proper threat assessment as the standard of care and UCLA's protocols required. (5EX1261–1266.) And she showed how the immunity statutes did not apply. (5EX1266–1269.)

UCLA's reply memorandum and factual showing conceded many of Rosen's contentions. Significantly, it did not contest her duty by undertaking argument or present any evidence to contest her claim that she had relied on the undertaking and that it had increased the risk of harm Thompson posed. (8EX2210–2219.)

UCLA admitted that prior to attacking Rosen, Thompson had named her as one of the women "ridiculing and insulting him, and calling him 'stupid' at every lab session." (8EX2238–2239.)

The trial court denied the motion for summary judgment, concluding that UCLA "had a duty to warn [Rosen] and/or take reasonable steps to prevent the threat [Thompson] posed to [her]." The court listed three sources of law that imposed a duty on UCLA to protect Rosen from foreseeable third party misconduct. First, the court found that a "special relationship existed" between the parties based on Rosen's "status as a student." Second, the court found Rosen qualified as a "business invitee," explaining that landowners must "protect . . . [their] invitee[s] from foreseeable third party criminal acts."[13] Third, the court concluded UCLA "may have voluntarily assumed the duty" to protect Rosen by "overseeing [Thompson's] psychological treatment" and attempting to "accommodate his disability." (10EX2667–2670.)

The court also found that the parties' conflicting expert declarations raised triable issues of fact whether UCLA had "breached its duty when it failed to inform [Rosen] that Thompson had identified her as a target of his anger and/or failed to place her into a different lab." The court also ruled that "the immunity statutes do not apply here." (*Ibid.*)

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[13] The majority rejected this premise on the authority of *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112 because Rosen had not shown a physical defect in the classroom. (Opn. 21-22.) Rosen believes *Zelig* was incorrectly decided in this context but does not press the point here because UCLA's duty is established in so many other ways.

### III. UCLA seeks appellate review and a divided court reverses. Rosen petitions for rehearing and review.

UCLA filed a petition for writ of mandate "directing respondent superior court to enter summary judgment" in defendants' favor. On October 22, 2014, the Court of Appeal issued an order to show cause and a call for amicus briefs stating that the petition "potentially presents issues of broad statewide importance."

On October 7, 2015, Justice Laurie Zelon, writing for herself and Los Angeles County Superior Court Judge Mary Strobel, filed an opinion granting UCLA's petition. Relying on decades-old cases involving campus drinking and intramural sports, the majority declared "a public university has no general duty to protect its students from criminal acts of other students." (Opn. 2.)

Presiding Justice Dennis Perluss thought otherwise. Noting UCLA's aspirations to "do everything feasible to create safe and secure campuses," he would find "a special relationship exists between a college and its enrolled students, at least when the student is in a classroom under direct supervision of an instructor, and the school has a duty to take reasonable steps to keep its classrooms safe from foreseeable threats of violence." (Dis. 2.)

Rosen filed a timely petition for rehearing on October 21 in which she pointed out errors in the majority's factual summary and in its analysis. (Cal. Rules of Court [Rule], rules 8.268,

8.490.) The court denied the petition without comment. The Court of Appeal's judgment became final on November 6. This Court granted Rosen's petition for review on January 22, 2016.

## ARGUMENT

When Californians adopted their "Master Plan for Higher Education" in 1960[14], they struck a balance between centers of excellence on one hand, and democratically-accessible education on the other. Under the Plan, California has a three-tiered system, serving nearly three million students each year. Guaranteeing a place for everyone, the Plan "requires a commitment from all to make high-quality education available and affordable for every Californian."[15]

In 2008, after Virginia Tech, Californians guaranteed their college students safe classrooms. "[T]he People find and declare that the right to public safety extends to public . . .community college, California State University, University of California, . . . campuses, where students and staff have the right to be safe and secure in their persons.[16]

Yet, according to the majority, public college students must now accept the risk of classroom violence as the price of their education. This conclusion defies public policy and cannot withstand scrutiny when analyzed.

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[14] http://www.ucop.edu/acadinit/mastplan/MasterPlan1960.pdf (as of 3–21-16).

[15] Ed. Code, § 66002.

[16] Initiative Prop. 9 (2008) (Marsy's Law); Cal. Const., art. I, § 28.

## I. Questions of duty are not amenable to broad, inflexible rules yet the majority has crafted one.

"As a general rule, each person has a duty to use ordinary care and is liable for injuries caused by his failure to exercise reasonable care in the circumstances. Whether a given case falls within an exception to this general rule or whether a duty of care exists in a given circumstance, is a question of law to be determined on a case-by-case basis." (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472 [internal citations and punctuation omitted].)

Insofar as the question before the Court is one of duty, it is limited to whether UCLA and its employees owed Katherine Rosen a duty to warn and protect her from the foreseeable harm that Damon Thompson posed. Is this "particular plaintiff entitled to protection?" (*Dillon v. Legg* (1968) 68 Cal.2d 728, 734.) Instead of applying this principle, the majority created a rule admitting no exceptions. "[A] public university has no general duty to protect students from the criminal acts of other students." (Opn. 2.)

And while the appellate courts have viewed the duty determination as appropriate for summary judgment, this does not mean that duty can always be determined on summary judgment. At least two important qualifications exist that preclude the Court from making an across-the-board duty determination on this record.

First, duty can be determined on summary judgment only if the facts on which the duty determination turns are undisputed.

Foreseeability is "the most important of the[] considerations in establishing duty." (*Tarasoff v. Regents of the Univ. of California* (1976) 17 Cal.3d 425, 434 *(Tarasoff)*.) Foreseeability must be assessed in the "totality of the circumstances." (*Ann M. v. Pac. Plaza Shopping Ctr.* (1993) 6 Cal.4th 666, 677 *(Ann M)*, disapproved on other grounds, *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527.) So, if the historical facts giving rise to the duty-determining circumstances are in dispute, the duty question cannot be resolved on summary judgment.

Statutory duties also may turn on issues of fact. For example, Civil Code section 43.92 imposes a duty to warn on treating psychotherapists under the circumstances described in subdivision (a)–"if the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims."

Second, where the plaintiff contends that a duty arises from the defendant's undertaking, "while the precise nature and extent of [such a] duty is a question of law, it depends on the nature and extent of the act undertaken, a question of fact. Thus, if the record can support competing inferences, or if the facts are not yet sufficiently developed an ultimate finding on the existence of a duty cannot be made prior to a hearing on the merits, and summary judgment is precluded. (Internal punctuation and citations omitted.)" (*Artiglio v. Corning, Inc.* (1998) 18 Cal.4th 604, 615 (*Artiglio*).)

UCLA's motion admitted it undertook to create a Violence Prevention and Response Team and a Consulting Response Team. (1EX92–93, 2EX318.) It also admitted undertaking a last-ditch, and ultimately futile, attempt to defuse the threat

Thompson posed to Rosen and her fellow female classmates. (1EX129–143.) As part of its moving-party initial burden, UCLA needed to have established that the scope of its undertaking precluded an adverse duty determination–otherwise it would not have met its burden of persuasion. (*Aguilar v. Atl. Richfield Co.* (2001) 25 Cal.4th 826, 851 *(Aguilar).*)

Not only did UCLA never meet its burden regarding Rosen's duty-by-undertaking theory, it never even attempted to do so in the trial court. (Compare 5EX1257–1260 [Rosen MPA] with 8EX2205–2219 [UCLA reply MPA].) Its writ petition fared little better. UCLA simply asserted it had not made such an undertaking. (Pet. 33.) UCLA offered nothing to refute Rosen's trial court assertion that she had relied on its promises regarding its violence-prevention protocols and that UCLA's failure to implement them with due care increased the risk that Thompson posed. Worse, the Court of Appeal punished Rosen for not offering evidence to show her reliance on the undertaking and how it increased the risk of harm even though UCLA never contested the issue. (Opn. 25–26.)

## II. California public policy demands that all classrooms be safe. This Court must apply that policy to public colleges and universities.

"[T]he fundamental public policies of the state and nation [are] expressed in their constitutions and statutes." (*Stevenson v. Superior Court* (1997) 16 Cal.4th 880, 889.) The People of California have, by constitution, established the paramount policy that applies here. "All students and staff of public primary,

elementary, junior high, and senior high schools, and community colleges, colleges, and universities have the inalienable right to attend campuses which are safe, secure and peaceful." (Cal. Const., art. I, § 28, subd. (f), see also subd. (a)(7), *supra*.)

The Court has recognized this policy supports a finding of duty in the K-12 context even though the provision has been held to be non-self executing. (*C.A. v. William S. Hart High Sch. Dist.* (2010) 53 Cal.4th 861, 879 fn. 3.) Justice Perluss recognized it as such. (Dis. 9.)

Rosen does not contend that UCLA's violation of her constitutional rights gives rise, in and of itself, to a cause of action for damages. The majority rejected her reliance on the Constitution stating the provisions of Article I, section 28 are not self-executing. (Opn. 21, fn. 6.) But the provision unquestionably establishes public policy. Article I, section 28 is a victims-rights provision. (Subd. (a).) Common-law and statutory policies cannot prevail over its provisions. (See *Green v. Ralee Eng'g Co.* (1998) 19 Cal.4th 66, 71 ["*aside from constitutional policy*, the Legislature, and not the courts, is vested with the responsibility to declare the public policy of the state"] [emphasis added].)

In addition, the fundamental public policy expressed in the California Constitution Article 1, section 8 embraces the "right to be free from sexual assault and harassment." (*Rojo v. Kliger* (1991) 52 Cal.3d 65, 91.) Thompson's attack was not merely on a fellow student who happened to be a woman. Rather, his pre-attack history reflects his psychosis was gender-based and that he viewed women as his tormentors.

The public policy in the constitution parallels the "fundamental and substantial public policy" that requires UCLA

to "take reasonable steps to address credible threats of violence in the workplace." (*Franklin v. Monadnock Co.* (2007) 151 Cal.App.4th 252, 259 (*Franklin*).) "The fundamental public interest in a workplace free from crime is no less compelling." (*Collier v. Superior Court* (1991) 228 Cal.App.3d 1117, 1127.) UCLA characterizes its campus and classrooms as workplaces and has adopted its own "Workplace Violence Prevention Policy" subjecting members of its community to "disciplinary action pursuant to applicable . . . faculty/student code of conduct." (RSD[17] 31.) It took such action with Thompson when it excluded him from housing and ordered him to anger management and psychological counseling. (6EX1523–1524.) Together these fundamental public policies should control the duty analysis.[18]

"Fulfilling the court's responsibility to determine if a legal duty exists necessarily requires consideration and balancing of sometimes competing public policies. . . ." (*Burns v. Neiman Marcus Grp., Inc.* (2009) 173 Cal.App.4th 479, 488.) Neither the majority nor UCLA have pointed to any competing public policies

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[17] RSD = Rosen's supporting documents filed with her return to the Order to Show Cause.

[18] The majority summarily dismissed Rosen's reliance on the workplace-safety policy on the bases that she did not raise it in the trial court and that she was not an employee. (Opn. 34.) But it was wrong to do so. "[I]t is settled that a change in theory is permitted on appeal when a question of law only is presented on the facts appearing in the record." (*Ward v. Taggart* (1959) 51 Cal.2d 736, 742.) And in doing so, the majority created a classroom dichotomy where the faculty and staff are entitled to protection from foreseeable violence while the students they are there to teach are not.

that supported the no-duty determination here. The Court should fulfill the policy the people of California have expressed so clearly.

## III. UCLA had a duty to warn and protect from the foreseeable harm such as Thompson posed and undertook to do so.

Imagine you are a parent whose child is a UCLA student. You get a call from an emergency room nurse at Ronald Reagan UCLA Medical Center who tells you your daughter has been stabbed with a knife by another student in the chem lab and has nearly died. (See 4EX962.) In shock, you ask, "How could this happen? What about that safety literature we received? The one that said, 'Welcome to one of the most secure campuses in the country?'" (8EX2099.)

Under the California Tort Claims Act (Gov. Code, § 801 et seq. [the Act]) the Regents' liability has two sources: "(1) the public entities' liability based on their own conduct and legal obligations, and (2) the public entities' liability, based on respondeat superior principles, for the misconduct of their employees that occurred in the scope of their employment." (*Zelig*, *supra*, 27 Cal.4th at p. 1127 (*Zelig).*) "[The Act's] provisions, however, are to be read against the background of general tort law. 'The conceptual theory of statutory liability under the act is keyed to the common law of negligence and damages. . . .' (Citations.) 'The exclusive sway of statutory rules does not foreclose the aid of common law tort doctrines and

analogies in ascertaining and achieving imperfectly expressed statutory objectives'." (*Peterson v. San Francisco Cmty. Coll. Dist.* (1984) 36 Cal.3d 799, 809 *(Peterson).*)

### A. Colleges and universities have duties to their matriculated students to protect from and warn of foreseeable violent conduct because their employees stand in a special relationship to the students.

"As a general rule, one owes no duty to control the conduct of another, nor to warn those endangered by such conduct." (*Davidson v. City of Westminster* (1982) 32 Cal.3d 197, 203.) "A duty to control the conduct of another or to warn persons endangered by such conduct may arise, however, out of what is called a "special relationship". . . . Such a duty may arise if '(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives the other a right to protection.' (Citation)." (*Zelig*, *supra*, 27 Cal.4th at p. 1129.)

#### 1. A special relationship exists between students and their professors or teaching assistants at least while in the classroom.

The trial court found a special relationship arose because Rosen was assaulted in the classroom while under supervision after UCLA employees had information which "established a serious threat of physical violence to all persons Thompson

believed were insulting him, including the Plaintiff." (10EX2668.) The court was right. While in the classroom, a place they are required to be, the students are subject to UCLA control. They are captive, vulnerable, and wholly dependent on faculty and staff for safety, just as are bus patrons and prison inmates. (*Lopez*, *supra*, 40 Cal.3d at p. 789 [bus patrons, "if trouble arises, are wholly dependent upon the bus driver to summon help or provide a means of escape"],*Giraldo*, *supra*, 168 Cal.App.4th at p. 250 ["important factors in determining whether a relationship is 'special' include vulnerability and dependence. Prisoners are vulnerable. And dependent."].)

While a college's non-property based duties to its adult students may not be as extensive as those owed by K-12 schools, in *Avila v. Citrus Cmty. Coll. Dist.* (2006) 38 Cal.4th 148 *(Avila)*, the Court stated "a body of law establishes that public schools and universities owe certain nonproperty-based duties to their students. Public schools have a duty to supervise students (Citations), a duty that extends to athletic practice and play. (Citations)." (*Id.* at p. 158.)

The demise of the *in loco parentis* doctrine has been the justification for the relaxation, in the college context, of the duty to supervise found in primary and secondary schools.[19] (*Avila*, *supra*, 38 Cal.4th at p. 158 ["colleges and universities do not owe similarly broad duties of supervision to all their students"].) But

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[19] Justice Perluss noted that developments in neuroscience to the effect that the human brain does not reach full maturity until age 25 undercut this relaxation and "justify a reassessment of tort principles relating to the university's responsibility for the safety of its students. (Citation.)" (Dis. 10 fn. 6.)

a duty that *extends* to the playing fields must first exist elsewhere and where else but in the classroom where all enrolled students are required to be at some point in time. UCLA cites no case for the dubious proposition that it might have duty to supervise athletic events but not its classrooms.

Presiding Justice Perluss writes eloquently why public policy and the evolution of the common law require a finding that Rosen, like the rest of the student body, stood in a special relationship with UCLA.

- a court can "identify certain core functions of a college or university where a special relationship with students still exists and where the school and its personnel, because of their students' dependence on them, have an affirmative duty to adopt and implement reasonable procedures to warn students or protect them from foreseeable third party misconduct: That is, the absence of a general duty to their students to ensure their welfare does not mean colleges and universities never have a duty to do so." (Dis. 8.)
- "if such an affirmative duty exists on the ball field where students are participating in school-sponsored intercollegiate athletics, surely it must also be present to some degree when a student is in her classroom or laboratory engaging in regular course work under the active supervision of a professor or teaching assistant—the central role of a college or university, at least for its students at the undergraduate level." (Dis. 8–9.)
- "The existence of such a protective duty in the classroom setting, moreover, is supported by California's fundamental public policy, which guarantees students and staff at every level of public and private school the right to their physical safety." (Dis. 9.)

- That the issue of a college or university's affirmative duties to its students is more nuanced than the all-or-nothing approach suggested by the courts in *Tanja H.* and *Ochoa* is reflected not only in the holding of *Avila* but also in the treatment of the issue in the Restatement Third of Torts, Liability for Physical and Emotional Harm, section 40. (*Ibid.*)
- "I would recognize an affirmative duty on the part of UCLA and its instructional and administrative personnel to take reasonable steps to keep their classrooms safe from foreseeable threats of violence." (Dis. 11.)
- Recognizing the legal duty of a college or university to adopt a reasonable program to protect students in the classroom by identifying and responding to foreseeable threats of campus violence—one that gives appropriate weight to the requirements of federal and state privacy and antidiscrimination laws—would impose no undue burden on The Regents or the other UCLA defendants. (Dis. 11.)

No law exists addressing the situation presented here– foreseeable violence by one student targeted at his fellow classmates in the classroom. The decisions of this Court that present the closest factual analogy involve a shrubbery-shrouded parking lot (*Peterson*, *supra*, 36 Cal.3d at p. 805) and an inter-collegiate baseball game. (*Avila*, *supra*, 38 Cal.4th at p. 152.)

The Court of Appeal decisions on which the majority and UCLA rely involve student drinking or participation in intramural events. (*Crow*, *supra*, 222 Cal.App.3d 192 [dormitory drinking]; *Tanya H*, *supra*, 228 Cal.App.3d 434 [drinking]; *Ochoa*, *supra*, 72 Cal.App.4th 1300 [intramurals].) But the "'language of an opinion must be construed with reference to the facts

presented by the case, and the positive authority of a decision is coextensive only with such facts.' (Citation.)" (*Brown v. Kelly Broad. Co.* (1989) 48 Cal.3d 711, 734–735.)

The cases themselves recognize this principle. *Crow* would have found a special, landlord-tenant, relationship between the student victim and the university created by his dormitory residence contract, but the student failed to assert that ground of liability in his government tort claim. (*Crow*, *supra*, 222 Cal.App.3d at pp. 198–199.) *Tanya H* was also limited to its facts. "Relevant authority indicates universities are not generally liable for the sometimes *disastrous consequences which result from combining young students, alcohol, and dangerous or violent impulses.*"[20] (*Tanya H*, *supra*, 228 Cal.App.3d at p. 437 [emphasis added].) Likewise, the *Ochoa* court found "no authority holding that a college or university forms a special relationship with its adult students, giving rise to a duty to protect them from the criminal acts of third parties, *merely by organizing and sponsoring an intramural activity*. . ." (*Ochoa*, *supra*, 72 Cal.App.4th at p. 1305 [emphasis added].)

Dormitory-drinking and intramural-fighting cases decided 17 to 36 years ago do not withstand scrutiny when measured by today's legal standards. The tragic events at Virginia Tech in 2007 were to campus safety as 9–11 was to air travel. "VA Tech" has become a rallying cry as institutions of higher education [IHE], including the University of California, adopted threat assessment procedures that are now the IHE standard of care.

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[20] Before the majority's opinion, no published opinion had ever cited *Tanya H.* on this point.

(7EX1756–1757,1912, 1915.) The University of California promised student safety and implemented procedures for that purpose. It increased student fees to pay for it and located other funding sources. (6EX1653, 7EX1824.)

The drinking-fighting cases emphasize the voluntary nature of the activities in which the victims participated. But attending class while at college is mandatory if one hopes to graduate. Of course, one need not go to college at all, consigning oneself to a lifetime of lower earning power and potential.[21] In other words, playing sports and partying with alcohol is voluntary while at college. Attending class is not.

The drinking-fighting cases also involved a different degree of foreseeability from that presented in the Rosen-Thompson situation. While campus drinking and sports-related fighting are known phenomena, the particular incidents in which *Ochoa, Crow* and *Tanya H.* arose were not presaged as was Thompson's attack on Rosen. He was a fellow student, known to faculty and staff as having serious, potentially violent problems and having named Rosen as a potential victim. Karen Minero, a member of UCLA's CRT, warned fellow CRT members before Thompson's attack that he had a "history of violence." (5EX1595.) Thompson's

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[21] For young adults ages 25–34 who worked full time, year round, higher educational attainment was associated with higher median earnings; this pattern was consistent for 2000, 2003, and 2005 through 2013. . . . [Y]oung adults with a bachelor's degree earned more than twice as much as those without a high school credential (103 percent more), 62 percent more than young adult high school completers, and 29 percent more than associate's degree holders. (National Center for Education Statistics, http://nces.ed.gov/fastfacts/display.asp?id=77 [as of 3/20/16].)

attack cannot be characterized as third-party criminal action in the sense of the shrubbery-shrouded attempted rape in *Peterson* (36 Cal.3d at p. 805) or the "random, violent" rape in *Ann M.* (6 Cal.4th at p. 677.)

The drinking-fighting cases likewise fail to account for present-day societal norms regarding violence against women. They fail to address the federal policy requiring that education be free from sexual harassment and violence. (Title IX, 20 U.S.C. § 1681(a), the Clery Act, 20 U.S.C. § 1092(f) and the Violence Against Women Act. (42 U.S.C. § 13981(b).)

Thompson's pre-attack history reflects his psychosis was gender-based and that he viewed women as his tormentors. Beginning in October 2008 when he first arrived on campus, Thompson believed women in the dorms were harassing him and making unwelcome sexual advances. (6EX1446–1448.) He mentioned a woman by name in April, 2009. (6EX804.) In July he again complained about a female graduate student calling him stupid. (6EX1530.) Just the day before his assault, he identified another female whom the TA described as "very sweet." (6EX1720.) When the TA pressed Thompson to identify the students insulting him, Thompson pointed to Rosen and another woman. (6EX1547.) Thompson "often said that Katherine [Rosen] was calling him stupid . . . they worked right next to each other in the lab." (6EX1574.) Thompson's psychological issues were with women, not alcohol.

The decisions on which the majority and UCLA rely shed little, if any, light on what responsibilities a public college has to its students for their safety while engaged in its core function of providing a college education. They provide no basis for the

majority's claim that the no-duty rule is settled. They do not stand for the majority's holding that public colleges "never owe a duty of care to their adult students." (*Patterson v. Sacramento Unified Sch. Dist.* (2007) 155 Cal.App.4th 821, 832.) Events such as VA Tech and developments in the law over the past decades demand that these out-of-date, factually-inapposite cases be rejected as precedent.

"Let the Legislature fix it" is no answer. None of the so-called "settled law" on which the majority relied was statutory. The public policy of California demands classroom safety at every level.

### 2. A special relationship arises from the implied-in-fact contract that exists between a college and its students.

A contract is one source of a special relationship. "[A] special relationship of the type that gives rise to a duty to take affirmative action to protect another may be created by contract, or by a statute or government regulation." (*Suarez v. Pac. Northstar Mech., Inc.* (2009) 180 Cal.App.4th 430, 438.) The courts have long recognized that a matriculated student stands in an implied-in-fact contractual relationship with her or his college. A special relationship also exists between the UCLA faculty and staff on the one hand and the students on the other that arises from the implied-in-fact contract that exists between a college and its matriculated students, the terms of which include the UCLA student code of conduct, its risk assessment plan and its violence prevention plan. (*Andersen v. Regents of the Univ. of California* (1972) 22 Cal.App.3d 763, 769 (*Andersen*).)

### i. Rosen's complaint raises this theory.

Rather than address this basis of duty, the majority criticized Rosen for raising a "new" theory of duty on appeal. But Rosen alleged that she "had a special relationship" because she was on campus property as a result of her contract with UCLA. (5EX 1218.) Rosen alleged the contractual relationship. (*Ibid.*) She alleged that UCLA employees knew Thompson's dangerous and violent tendencies as he exhibited "increasingly bizarre behavior" "stemming from his unfound belief that students were criticizing his classroom performance." (5EX1219.) She was stabbed by Thompson while they both were enrolled in academic programs at UCLA. (5EX1217–1218.) When Thompson stabbed her, he was under the supervision and control of UCLA employees. (5EX1218.)

These allegations are sufficient "'to acquaint [UCLA] with the nature, source and extent of [her] cause of action.' (Citation.)" (*Fenn v. Sherriff* (2003) 109 Cal.App.4th 1466, 1492.) UCLA had the obligation to negate this basis of duty and until it did, Rosen had no obligation on summary judgment motion to do anything. The burden rested on UCLA as the moving defendant to affirmatively negate the existence of a duty. (*Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 849.) If the plaintiff pleads several theories, the defendant must negate all of them. (*Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 889.)

Even if Rosen's theory was "new," the Court of Appeal should have considered it. "[I]t is settled that a change in theory is permitted on appeal when a question of law only is presented on the facts appearing in the record." (*Ward v. Taggart*, *supra*, 51

Cal.2d at p. 742.) This rule has particular force where the opposing party does not claim prejudice or otherwise object. Instead of complaining of any unfairness in Rosen's arguments, UCLA attempted to meet them on their merits. (Writ Reply 9–15.) No reason existed for the majority to slight Rosen's arguments, particularly absent a UCLA objection.

### ii. The factual basis for UCLA's contractual duty is found in its own separate statement.

"'[B]y the act of matriculation, together with payment of required fees, a contract between the student and the institution is created containing two implied conditions: (1) that the student will not be arbitrarily expelled, and (2) that the student will submit himself to reasonable rules and regulations for the breach of which, in a proper case, he may be expelled, ...' (Citation.)" (*Andersen*, *supra*, 22 Cal.App.3d at pp. 769-770.) "[T]here seems to be almost no dissent from the proposition that the relationship between a public post-secondary educational institution and a student is contractual in nature." (*Kashmiri v. Regents of the Univ. of California* (2008) 156 Cal.App.4th 809, 824 (*Kashmiri*) [internal citations and punctuation omitted].)

As UCLA's separate statement admits, Rosen's orientation materials and interview included materials describing UCLA's commitment to her safety and the student conduct code under which violators would be dealt. (1EX63–65.) UCLA's separate statement also establishes that in the fall of 2007, the Dean of Students sent an email to all students in which he stated that "the UCLA community is holding students accountable for their

actions, and holding them to the highest standards of academic and personal integrity." (1EX65–66.) It specifically invokes "the UCLA Student Conduct Code and other UCLA and University of California Policies. This information is important and *all students are accountable for the information contained in them*." (2EX455 [emphasis added].) UCLA expert Deisinger notes these provisions applied to Rosen and Thompson. (1EX175.) The Code proscribes "Conduct that threatens the health or safety of any person, including oneself." (6EX1433.) An individual who "has committed an act of physical violence or has threatened to commit such an act" can be placed on emergency suspension and not enter upon specified areas of the campus. (6EX1438.)

UCLA invoked its contractual rights when staff permanently expelled Thompson from campus housing, ordered him "to avoid all contact and communications, at any time, with [the victim]" and ordered him to undergo anger management, civility training and psychiatric counseling. (5EX1525–1526.)

Students are contractually obligated to pay for UCLA's protective services in the form of mandatory fees earmarked for student mental health services "dedicated to prevention and intervention." Fees rose 3% in 2007-08 and were expected to rise eventually to a full 25% over 2006-07 levels to pay for this protection. (7EX1824.)

The terms of the UCLA-student contract are every bit as specific as those found enforceable in *Kashmiri*, where, in its catalogue, the Regents promised law students at Boalt Hall that certain fees would not be raised. The students properly treated that promise as contractual. (*Kashmiri, supra*, 156 Cal.App.4th at p. 834.)

UCLA students, and Rosen in particular, quite properly had expectations arising out of the payment of tuition and fees that they would be protected from and warned of foreseeable threats of campus violence. The Court recognized this over 30 years ago in *Peterson* when it stated that students on college campuses rightly expect school authorities to address these foreseeable threats. (*Peterson*, *supra*, 36 Cal.3d at p. 813.)

UCLA repeatedly admonished students, including Rosen and Thompson, of their duties to comply with policies and conduct codes. (1EX174–175.) No "too vague to be enforceable" precludes UCLA from being bound by its contractual promises. With enrollment, a special relationship arises between universities and their students.

### 3. Faculty and staff should not be entitled to more protection in the classroom than the students.

The UCLA campus and classrooms are a workplace. "UCLA is committed to providing a safe work environment for all faculty, staff and students–one that is free from violence and threats of harm." (UCLA, Preventing and Responding to Violence in the UCLA Community (2009) 2 [3EX641].) In 2009, UCLA promised that physical violence and any threats of physical violence in the "workplace" would be taken seriously. Its brochure incorporated the "UCLA Violence Prevention & Response Policy" adopted in 1998. (*Ibid.*) With that policy, UCLA committed "to providing and maintaining a workplace and academic community free from intimidation and acts or threats of violent behavior."

(UCLA Workplace Violence Prevention Policy (1998) 1[22].) The policy defines violent behavior and threats of violent behavior to include "[t]he actual or implied threat of harm to an individual or a group of individuals . . . [and] any other conduct, either physical or verbal, that a reasonable person would perceive as constituting a threat of violent behavior." (*Ibid.*) "Any member of the UCLA community found to commit or threaten acts of violent behavior . . . will be subject to disciplinary action pursuant to applicable academic, and non-academic personnel policies, collective bargaining agreements or faculty/student code of conduct. . . ." (*Id.* at p. 2.) "Safety and security in the University workplace environment are the responsibility of every member of the UCLA community." (*Id.* at p. 1.) UCLA invoked some of these provisions when it expelled Thompson from campus housing and imposed other conditions on him in order that he remain a registered student. (6EX1525-1526.)

Labor Code section 6400 et seq., Code of Civil Procedure section 527.8 and CalOSHA regulations, "taken together express an explicit public policy requiring employers to take reasonable steps to provide a safe and secure workplace. Such responsibility appears to include the duty to adequately address potential workplace violence." (*City of Palo Alto v. Serv. Emps. Int'l. Union* (1999) 77 Cal.App.4th 327, 336–337 *(Palo Alto).*)

*Franklin*, *supra*, 151 Cal.App.4th 252, following *Palo Alto* and relying on the same authorities, held "it is self-evident that the policy expressed in the statutes upon which we rely that protects employees from violence or threats of violence in the workplace is

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[22] See footnote 7, *supra.*

a fundamental and substantial public policy." (*Id.* at p. 260.) By UCLA's own terms Rosen was part of the workplace. (3EX642.) Rosen, as a student, was entitled to the protection of this "fundamental and substantial public policy."

UCLA did not object to Rosen raising a workplace-safety theory in the Court of Appeal. UCLA addressed the argument's merits. (Writ Reply 9–13.) Yet the majority rejected Rosen's workplace-safety theory summarily, asserting that she had failed to develop the argument properly in the trial court. (Opn. 34.) The opinion does not challenge the proposition that such a duty exists. Rosen is just not an employee, it says. (Opn. 34.) But the opinion does not reconcile the perverse anomaly it creates. Faculty and staff are entitled to protection but the students they are there to educate are not. The majority fails to address UCLA's own characterization of the classroom as its workplaces. (3EX642.)

The point is not whether Rosen or Thompson were employees. Rather, the issue is whether the "fundamental and substantial public policy" that requires UCLA as an employer to protect the faculty and staff "from threats of violence in the workplace" extends to the students it has committed to teach. (*Franklin*, *supra*, 151 Cal.App.4th at p. 259.) This "fundamental public policy" as applied here is more "substantial" than that supporting workplace safety. It finds its voice in the California Constitution, the ultimate source of public policy in this state. (Cal. Const., art. I, § 28.) No amount of legal legerdemain can justify according UCLA faculty and staff a better right to safety than the students they are to educate.

### B. UCLA undertook to provide specific threat assessment and prevention measures for the safety of its students on campus and was required to exercise due care in doing so.

"Th[e] negligent undertaking doctrine (sometimes referred to as the "Good Samaritan" rule, but in actuality an exception to that rule) is reflected in Restatement Second of Torts, sections 323 and 324A. Section 323 addresses cases concerning a duty assumed by a defendant to another. (Citations.) Similarly, section 324A of the Restatement addresses cases concerning a duty assumed by a defendant to third persons. (Citations.)" (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 249 fn.28.) Section 324A recognizes that where one, not otherwise under a duty to do so, undertakes "to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care." (*Paz v. State of California* (2000) 22 Cal.4th 550, 558.) This liability is subject to the qualification that the actor's conduct must either 1) increase the risk of harm or 2) be relied upon by the third person. (*Id.* at p. 559.)

#### 1. UCLA made a general undertaking to all of its students, faculty and staff to address threats of violence in its classrooms and to protect against them.

A week following the Virginia Tech shootings in April 2007, University president Robert Dynes appointed a Campus Security

Task Force to conduct an assessment of campus security and mental health measures and to make recommendations for implementation at all of its ten campuses, including UCLA. (7EX1848.) The task force issued its Report of the University of California Campus Security Task Force in January, 2008. (7EX1812–1872.)

It prefaced its report by acknowledging "[t]here is no greater priority for the University of California system than the safety and security of students, faculty, staff, and visitors." (7EX1817.) Regarding student mental health, the task force urged that each campus "ensure that a multidisciplinary behavioral management team (or coordinated series of teams) has been established to address issues, problems or students, staff, or faculty who may pose a threat to the campus community" and that "an immediate review of the current structure, composition, and related protocols of the team should be undertaken." (7EX1819.).

The task force's Campus Safety Workgroup concluded, "Each campus should establish an interdisciplinary behavioral risk assessment team to address . . . individuals who may pose a threat to the campus community. The team would be responsible for developing an action plan to address the threat." (7EX1842.)

The task force's Student Mental Health Workgroup was of like mind. "Acting together these programs and services will provide the strongest realistically achievable insurance available to the University for preventing the occurrence here of Virginia Tech-like tragedy." (6EX1657.) Mandatory student registration fees would be increased to fund the added mental health elements of the action plan. (6EX1657, 7EX1817, 1829.)

In response to these recommendations, UCLA announced again that it was "committed to providing a safe work environment for all faculty, staff and students–one that is free from violence of threats of harm." (3EX642.) "Supervisors who have knowledge of a suspected violation of this policy should promptly contact and consult with the UCLA Violence Prevention and Response Team." (3EX642.) "The Violence Prevention and Response Team includes the UCLA Police Department, Staff & Faculty Counseling Center, Human Resources, Academic Personnel, Dean of Students, and Student Counseling & Psychological Services." (*Ibid.*) UCLA Human Resources published this policy in a brochure distributed to all faculty and staff and published on its website with commentary that "preventing violence is a shared responsibility in which everyone at UCLA plays a part." (2EX315–316, 3EX641–642.)

UCLA already had in place a care team called the "Consultation and Response Team," formed in the fall of 2006. (2EX318, 5EX1481.) "The purpose of the CRT is [among other things] to provide an appropriate response to students in crisis or at-risk. The CRT is composed of members from different departments of the campus, whose goal is to fashion a reasonable solution to the specific needs of each individual student [e.g., Thompson]." (*Ibid.*) UCLA's expert Deisinger views the CRT as *the* threat assessment team, contrary to UCLA's own characterization of it. He agrees Thompson should have been subjected to threat assessment procedures and his opinion is that the CRT did so. (1EX211.)

Little quarrel can exist with the proposition that UCLA has undertaken to address campus threats of violence and

violence in its workplace, particularly those driven by mental health issues. UCLA undertakes to make its campus (and thus its classrooms) "safe" and "secure." According to Gong-Guy, in school year 2009-2010, 116 cases were addressed by the CRT of which eight required intervention. "Although there aren't many of them, in all of the cases where we had a specific reason to act very proactively, we did so in 100 percent of the cases." (Boyarsky, *UCLA response teams act to prevent violence on campus*, Daily Bruin (Feb. 2, 2011).)

Katherine Rosen, like all UCLA students, was encouraged to rely on this undertaking. She paid increased fees for it.

"[W]hen 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, thereby inducing reliance, it is held to the same standard of care as a private person or organization." (*Williams v. State* (1983) 34 Cal.3d 18, 24.) The UCLA employees had this duty of care and breached it.

### 2. The UCLA employees undertook to address the specific threat that Thompson posed to his fellow students.

The Patton State Hospital records UCLA offered in support of its motion reflect, in Thompson's own words, that he exhibited clear-cut and escalating symptoms of serious paranoid and auditory hallucinations that led him to attempt to kill Katherine Rosen. (4EX1026–1028) Thompson had been complaining to any UCLA employee who would listen for months. (4EX1027–1028.) The day of his attack "he heard [Rosen] say 'the only thing she fears about me is my intelligence.' Then he heard [her] say, "any

real person would kill him." He "perceived this as a threat" so he "slit her throat and stabbed her two times." (4EX1028.) Rosen told police she was "kneeling down, placing equipment in her chemistry locker when she suddenly felt someone's hands around her neck." (5EX1201.)

UCLA undertook to address this very specific threat that Thompson posed. Its petition acknowledges that the CRT discussed him but no one referred his case to the Violence Prevention and Response Team. (Pet. at 10–11.) UCLA undertook to control Thompson when it excluded him from university housing for assaulting a fellow student, ordered him to avoid that student, and ordered him to undergo anger management, civility and psychiatric counseling with CAPS. (5EX1526–1526.) But, again, no one referred him to the Violence Prevention and Response Team.

On September 29, 2009, Thompson complained to Professor Bacher of "poor results with my experiment due to disruption caused by other students." (6EX1555.) The next day he underwent the psychiatric counseling that had been ordered. (6EX1537-1543.)

TA Goetz also reported Thompson's classroom complaints. (6EX1552.) These complaints escalated to the point where Thompson confronted Goetz and was overheard by another student saying "if you're not going to do anything about it, then I will." (6EX1562.) According to Goetz, Thompson perceived people in the lab "were calling him stupid, and specifically he often said that Katherine [Rosen] was." Goetz "had been keeping Dr. Bacher informed on all this stuff and he was apparently trying to figure out what to do." (6EX1574.) Bacher asked Associate Dean

of Students Cary Porter for help. (6EX1706.) So far as the record reflects, no one reported these threats to Violence Prevention and Response team members or to the campus police or to CAPS where Thompson was undergoing his compulsory counseling.

On October 7, following Bacher's request for assistance from Dean Porter, CRT members began an "urgent" search for Thompson, recognizing that intervention was needed. (6EX1598.) "Seems like a health and safety issue to me," emailed Karen Minero. (6EX1726.) Only then the CRT learned he had been excluded from housing and had a "history of violence." (6EX1595.) Minero thought this was "important." (*Id.*)

CRT's plan was for Porter was to get Thompson in to see him. (6EX1587.) Gong-Guy was to meet with Bacher and Goetz, for "faculty outreach." (6EX1714, 1717.) But Bacher was getting married on October 8 and Gong-Guy was too busy to meet before October 9 anyway. (6EX1574, 1717.)

This series of events reflect a concerted, albeit grossly ineffective, undertaking to address Thompson's threatening responses to what he perceived as fellow-student harassment and to protect those students from what the UCLA employees recognized as the threat that Thompson posed. Goetz, Bacher, Porter, Minero, Green, and Gong-Guy, "specifically have undertaken to perform the task that [they are] charged with having performed negligently." (*Artiglio*, *supra*, 18 Cal.4th at p. 614.) They "undertook special duties to protect [the students] [and] to control the conduct of [Thompson]." (*Zelig*, *supra*, 27 Cal.4th at p. 1130.) Like private persons in their shoes, the UCLA defendants had a duty of care created by their undertaking. (Gov. Code, § 815.2, § 820.)

### 3. The majority improperly burdened Rosen to refute a showing UCLA never made.

The majority dismissed Rosen's duty analysis and limited its discussion to the general undertaking UCLA made to protect its students from foreseeable violence, while failing to address its Thompson-specific undertaking. The majority then held that Rosen had failed to show UCLA increased the risk of harm to her and failed to show that she relied on the undertaking. (Opn. 25–26.)

#### i. UCLA's undertaking increased the risk of harm Thompson posed.

"Rosen provided no evidence that UCLA's action increased the risk of harm that Thompson posed beyond that which existed before. . . ." (Opn. 26.) But this conclusion ignores evidence from both sides demonstrating the escalating nature of Thompson's symptoms as he grew increasingly frustrated over the faculty and staff failure to address his paranoiac concerns. He warned Dean Naples as early as January 2009, that unless staff admonished his tormentors, "I'll end up acting in a manner that will incur undesirable consequences on me." (6EX1448.) By late September, when no action had been taken, he shouted at the TA, "if you don't do something about it, I will." (6EX1562, 1580.) Thompson's condition deteriorated over time, culminating in his vicious attack. Rosen's experts conclude that the failure by the UCLA Consultation and Response Team to bring in the Violence Prevention and Response Team to mitigate the threat Thompson

posed also increased the risk of harm to her. (7EX1768.) As the moving party, UCLA had the burden to show that it had not increased the risk of harm before Rosen had a burden to do anything.

UCLA staff had a panoply of tools available to them and used some of them to address the risk of harm that Thompson posed. (5EX1525-1526.) Whether UCLA increased the risk of harm or whether Rosen relied on the undertaking are questions of fact for the jury. (*Scott v. C.R. Bard, Inc.* (2014) 231 Cal.App.4th 763, 776 *(Scott)*.)

#### ii. Rosen relied on the undertakings for her safety.

UCLA's moving papers established that upon matriculation Rosen attended a three-day orientation during which she received an orientation packet that covered "personal safety, harassment, and situational stress." (1EX64, 2EX306.) She also had an orientation interview. (1EX64.) UCLA's violence prevention polices and the CRT were already in place by that time. (2EX 318, 3EX641–642.) With her agreement to attend classes, she manifest her reliance. (*Simank Realty, Inc. v. Demarco* (1970) 6 Cal.App.3d 610, 616 [reliance may be demonstrated by conduct].)

The record also supports Rosen's reliance on UCLA's specific undertaking to intervene with Thompson immediately in the days before his attack. She witnessed him "bitch out" the teaching assistant in a way she found "super-scary" (6EX1580), yet she continued to attend the laboratory where Thompson

worked by her side. She held the reasonable belief that faculty and staff would deal with Thompson appropriately taking her and her fellow students' safety interests to heart.[23] Rosen saw that Thompson presented potential trouble and, just as the rest of her classmates, she relied on UCLA personnel to defuse any danger. She was captive in the lab, wholly dependent on UCLA personnel for her safety as surely as if she had been a passenger on a public bus. (See *Lopez*, *supra*, 40 Cal.3d at p. 789.)

Rosen's summary judgment opposition raised the "negligent undertaking doctrine" and argued how she relied on it. (5EX1257–1260.) UCLA did not contest her claim of reliance. (9EX2205–2219.) UCLA likewise never addressed the reliance or increased-risk-of-harm elements of the "negligent undertaking doctrine" in its writ petition. (Pet. 33–36.) Rosen had no obligation to present evidence on matters which UCLA did not contest or asserted were undisputed.

UCLA's first mention of the reliance element came in its reply brief. (Writ Reply 16–17.) A party may not raise an argument for the first time in its reply brief leaving the opponent with no opportunity to respond. (E.g., *Las Lomas Land Co., LLC v. City of Los Angeles* (2009) 177 Cal.App.4th 837, 855.) Instead of applying this rule, the majority held Rosen responsible for failing to contest an uncontested issue.

When reviewing a summary judgment motion, a court is required to indulge every inference in favor of the party opposing

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[23] Students "can reasonably expect . . . that school authorities will also exercise reasonable care to keep the campus free from conditions that increase the risk of crime." (*Peterson*, *supra*, 36 Cal.3d at p. 813.)

summary judgment. (*Aguilar*, *supra*, 25 Cal.4th at pp. 844-845.) The majority has done just the opposite. "If the record can support competing inferences, or if the facts are not yet sufficiently developed, a court cannot determine duty prior to trial, and summary judgment is precluded. (Internal punctuation and citations omitted.)" (*Artiglio*, *supra*, 18 Cal.4th at p. 615.) Any doubts on this issue (or any other) must be resolved against summary judgment. (*Castaneda v. Ensign Grp., Inc.* (2014) 229 Cal.App.4th 1015, 1019.)

The extent of UCLA's undertaking, the extent to which it increased the risk of harm and Rosen's reliance are all questions of fact for a jury to determine. Contrary to the majority, Rosen's reliance on UCLA's general undertaking to protect its students from foreseeable acts of violence and on the specific undertaking to protect from and warn about Thompson finds ample support in the record–or at least enough support that the question should go to the jury. (*Scott*, *supra*, 231 Cal.App.4th at p. 776.)

## IV. The immunity statutes do not apply. Rosen is not complaining about any protected conduct.

The trial court found that "the immunity statutes do not apply here." (10EX2669.) The court was correct.

### A. Section 856 only immunizes the decision not to confine Thompson, not UCLA's subsequent negligent conduct.

"Multiple medical professionals at [UCLA] evaluated Thompson. None found him to fit the criteria for an involuntary psychiatric hold." (Pet. at 10.) That evaluation and decision, according to the only evidence cited by UCLA in their petition, took place on February 28, 2009. (2EX580–595.) Rosen does not challenge this determination. It is immune under Government Code section 856.

But any subsequent wrongful act or omission, such as failure to warn, lies outside the immunity provided by Section 856. "Section 856 includes the exception to the general rule of immunity 'for injury proximately caused by . . . negligent or wrongful acts or omission in carrying out or failing to carry out . . . a determination to confine or not to confine a person for mental illness . . ..'" (*Tarasoff*, *supra*, 17 Cal.3d at p. 449, fn. 23.) Thus, "careless or wrongful behavior subsequent to a decision respecting confinement [] is stripped of protection by the exception in section 856." In the seven months following UCLA's decision not to confine Thompson, a duty of care existed. Rosen's experts support her allegations that the UCLA employees breached their duties. (6EX1436–1439; 7EX1768, 1893.)

### B. Section 43.92 only applies to Dr. Green.

The Legislature enacted a psychotherapist-specific statute to combat an over-broad interpretation of *Tarasoff* which had stated

in dicta that a duty arose when the psychotherapist, "should determine, that his patient presents a serious danger of violence to another." (*Tarasoff*, *supra*, 17 Cal.3d at p. 431.)

"Section 43.92 represents a legislative effort to strike an appropriate balance between conflicting policy interests." (*Ewing v. Goldstein* (2004) 120 Cal.App.4th 807, 816 (*Ewing).*) " Section 43.92 strikes a reasonable balance in that it does not compel the therapist to predict the dangerousness of a patient. Instead, it requires the therapist to attempt to protect a victim under limited circumstances, even though the therapist's disclosure of a patient confidence will potentially disrupt or destroy the patient's trust in the therapist." (*Ewing*, *supra*, at p. 817.) By its terms, section 43.92 applies only to treating psychotherapists and their "patients." So far as this case goes, only Nicole Green could consider Thompson her patient and then only until June 2009 when he stopped coming to treatment. UCLA has advanced no argument that he was anyone else's patient.

Section 43.92 both immunizes conduct and imposes a duty when the duty-creating circumstances are present. UCLA does not dispute that if Thompson "communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims," the psychotherapist would have a duty to warn. (Civ. Code, § 43.92, subd. (a).) They say he did not. But they never met their burden to present evidence that would require a jury to find for them on this point. (*Aguilar*, *supra*, 25 Cal.4th at p. 851.) UCLA has offered no evidence from Green even though her duty turns on her

knowledge of and subjective belief in the seriousness of Thompson's threats. (*Ewing*, *supra*, 120 Cal.App.4th at p. 820.) They have not met their burden as to Green or anyone else.

The majority and the dissent agreed that Rosen needed to show that Thompson had communicated a liability-creating threat directly or indirectly to Green, but they overlooked the procedural posture in which section 43.92 arose. UCLA first raised the statute in its moving papers, claiming it immunized all UCLA employees. (1EX13–14.) Rosen countered by showing that section 43.92 is a duty-creating statute and that UCLA had not produced evidence negating its operation. If section 43.92 applies at all, it is only to Dr. Green and UCLA had the burden to show she was protected by its provisions.

### C. A public employee with a duty to protect and to warn has no discretion not to do so.

The discretionary immunity statute, section 820.2 does not apply because the employees' actions were operational, not planning or policy-making. "The 1963 Tort Claims Act did not alter the basic teaching of [*Muskopf v. Corning Hosp. Dist.* (1962) 55 Cal.2d 211, 219]: 'when there is negligence, the rule is liability, immunity is the exception.' Accordingly, courts should not casually decree governmental immunity; through a literal interpretation of 'discretionary' or otherwise, section 820.2 should not be made a 'catchall section broadly encompassing every judgment exercised at every level." (*Johnson v. State of California* (1968) 69 Cal.2d 782, 798 *(Johnson).*)

A "workable" definition of discretionary immunity distinguishes between basic policy decisions on the one hand and how those decisions are carried out. Courts are required "to find and isolate those areas of quasi-legislative policy-making which are sufficiently sensitive to justify a blanket rule that courts will not entertain a tort action alleging that careless conduct contributed to the governmental decision." (*Johnson*, *supra*, 69 Cal.2d at p. 794.) "[A]lthough a basic policy decision (such as standards for parole) may be discretionary and hence warrant governmental immunity, subsequent ministerial actions in the implementation of that basic decision still must face case-by-case adjudication on the question of negligence." (*Id.* at p. 797.) The decision to parole a 16-year-old offender to a foster home has discretionary immunity but implementing that decision by determining whether to warn the prospective foster parents of the parolee's known violent tendencies was operational and did not enjoy immunity. (Compare *Thompson v. Cnty. of Alameda* (1980) 27 Cal.3d 741, 748 *(Thompson)* with *Johnson*, *supra*, at pp. 795–796.)

Government Code section 820.2 confers immunity only to basic policy decisions and the distinction is sometimes characterized as that between "planning" and "operational" levels of decisions. (*Lopez*, *supra*, 40 Cal.3d at p. 793.) In *Peterson,* the Court made short work of UCLA's discretionary-immunity argument.

> No provision in the Tort Claims Act explicitly immunizes a public defendant for failure to warn. (Citation.) As we noted in *Tarasoff*, the defendant is not immune from liability pursuant to section 820.2 []

> because the failure to warn does not involve those basic policy decisions which this immunity provision was meant to protect.

(*Peterson*, *supra*, 36 Cal.3d at p. 815.)

"Immunity is reserved for those basic policy decisions which have been expressly committed to coordinate branches of government." (*Barner v. Leeds* (2000) 24 Cal.4th 676, 685 [internal punctuation omitted].) "[T]he immunity's scope should be no greater than is required to give legislative and executive policymakers sufficient breathing space in which to perform their vital policymaking functions." (*Tarasoff*, *supra*, 17 Cal.3d at p. 445.)

Here no basic policy decisions were involved in handling the Damon Thompson threat, in providing classroom supervision or in warning. Like the decision on which warnings to give the foster parents, the decisions made regarding Thompson were implementing the existing threat-assessment-and-prevention policies.

The specific immunities relied on by UCLA support this view of the discretionary immunity. The "policy" decision whether or not to confine Thompson is immune. The execution of that decision is held to a standard of due care. (Gov. Code, § 856.) Likewise, Civil Code section 43.92 imposes an affirmative duty to warn under the circumstances prescribed there. This duty cannot be vitiated by the simple expedient of calling the decision not to warn discretionary. "'A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision, although the latter, standing alone, would be broad

enough to include the subject to which the more particular provision relates.' (Citation.)" (*San Francisco Taxpayers Assn. v. Bd. of Supervisors* (1992) 2 Cal.4th 571, 577.)

The cases on which UCLA relied below turn on their specific facts and "the expressed policy against impeding the work of social workers dealing with custody issues of minors." (*Ortega v. Sacramento Cnty. Dept. of Health & Human Servs.* (2008) 161 Cal.App.4th 713, 730 *(Ortega).*) Thus, in *Thompson*, the decision to parole the juvenile and the selection of his foster parent were immune based on the combined operation of sections 820.2 and 845 (immunity for releasing prisoner.) (*Thompson*, *supra*, 27 Cal.3d at pp. 748–749.) As for the decision not to warn, there was no duty to do so because of the absence of a special relationship with the victim. (*Thompson*, *supra*, at pages 750–753.)

*Ronald S. v. Cnty. of San Diego* (1993) 16 Cal.App.4th 887, involved a decision to release a foster child to adoptive parents. No duty to warn was implicated and the court found sections 820.2 *and* 821.6 (institution of judicial proceedings) immunities applied because the decision to place the minor was a basic policy decision involving a legal (adoption) proceeding. (*Id.* at pp. 898-899.)

*Ortega* and *Christina C. v. Cnty. of Orange* (2013) 220 Cal.App.4th 1371, 1381, likewise involved policy decisions to place or remove a child from protective custody. No duties to warn and to protect were implicated in these decisions and they cannot trump the clear holdings of *Johnson, Tarasoff* and *Peterson.*

Moreover, nothing in UCLA's evidence supports a finding that the employees actually exercised any discretion in the sense that

the statute requires. "[T]o be entitled to immunity the state must make a showing that such a policy decision, consciously balancing risks and advantages, took place. The fact that an employee normally engages in 'discretionary activity' is irrelevant if, in a given case, the employee did not render a considered decision [about policy]." (*Johnson*, *supra*, 69 Cal.2d at p. 794, fn. 8.) The policies on which Rosen relied for her safety and on which she now relies were established before Thompson became a threat. The UCLA employees simply did not do their jobs.

## V. All agree that threat assessment is the answer to targeted campus violence. The only question is whether UCLA had an obligation to perform the threat assessment it undertook with due care.

"Maintaining the safety of IHE's and the students and employees that comprise IHE communities is a vital task." (FBI, Campus Attacks, Targeted Violence affecting Institutions of Higher Education (2010) 5.) UCLA agrees.

By 2009, UCLA had threat assessment procedures and systems in place–its "Violence Prevention and Response Team," a multi-disciplinary group tasked with defusing foreseeable threats of violence. (3EX641–642.) Its component members, the Dean of Students, Office of Residential Life and Campus Counseling & Psychological Services [CAPS] were charged with forwarding and coordinating threats and concerns about violence. It also had a specialized care team–the Consulting and Response Team [CRT] "to provide an appropriate response to the needs of students in crisis or at risk." (2EX318.)

UCLA's amicus The Jed Foundation and its affiliated organization, Higher Education Mental Health Alliance [HEMHA], agree. Jed and HEMHA have published guides to assist the formation and implementation of campus teams such as UCLA's Violence Prevention and Protection Team that provide "direct threat assessment." "While there are no precise predictors of dangerousness, there are behaviors and risk factors that might indicate an acute emergency" such as UCLA faced the days immediately before Thompson's attack on Rosen. (Higher Education Mental Health Alliance, Balancing Safety and Support - A Guide For Campus Teams (2012) 15 [HEMHA Guide][RSD215[24] at 55].) UCLA expert Eugene Deisinger has also published a guide. "A Threat Assessment and Management Team is a multidisciplinary team that is responsible for the careful and contextual identification and evaluation of behaviors that raise concern and that may precede violent activity on campus." (E. Deisinger, et al., Campus Threat Assessment and Team Handbook (2008) 5 [7EX1912].) "Early identification . . . enables colleges and universities to prudently take the appropriate steps to prevent targeted violence from occurring." (*Ibid.*) "Once the team has received information, it can consider whether or not further action or monitoring is needed – and what form it should take." (HEMHA Guide at p. 17 [RSD215 at 57].) "The only real risk is doing nothing at all." (*Id.* at p. 20 [RSD215 at 60.)

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[24] RSD215 = supporting documents filed by Rosen in February 2015 when responding to the amicus brief of The Jed Foundation.

What Deisinger, Jed and the other UCLA amici establish is that campus violence of the type that Thompson posed was predictable. They establish that threat assessment teams such as UCLA created are the standard of care.

> [A]n IHE's responsibility regarding a student who threatens violence toward others and/or recklessly puts the lives of others at risk is significant. . . . [A]n IHE must also use reasonable care when a specific individual presents a foreseeable danger to others which could be mitigated by using reasonable care.

The Jed Foundation, Student Mental Health and the Law (2008) 26 ([RSD215 at 26.)

According to Rosen's expert Steven Pitt, "by October 9, 2009, there is no question that Damon Thompson posed a threat to Katherine Rosen, one of the specific individuals he repeatedly identified as taunting him and ridiculing him by calling him stupid." And while UCLA's experts disagree, this disagreement presents exactly the issue of material fact found by the trial court. (10EX2669.)

HEMHA also recognizes that breaches of the duty to operate a threat assessment team with reasonable care results in liability. But it concludes that the overall reward justifies the risk of having to compensate victims such as Rosen injured by team negligence. "On balance, utilizing campus safety teams is a good and promising practice in which the risks that a team may err are usually outweighed by the benefits of silo-breaking,

efficiency, and improved decision-making." (HEMHA at p. 21 [RSD215 at 61].) Justice Perluss has reached the same conclusion. (Dis. 11.)

Who must bear the burden when the public college's threat-assessment team makes a mistake? According to the majority, Katherine Rosen and all other future victims of foreseeable classroom violence do. This conclusion defies well-expressed, constitutionally-based California public policy.

## VI. Rosen's experts establish UCLA's breach of its duties to her.

UCLA conceded in the Court of Appeal that a "battle of the experts" exists giving rise to the issue of fact that the trial court found. (Pet. at 46.) But it urged the Court to disregard Rosen's experts because "they never referenced the California legal standards that govern duty and liability"as did its experts. (*Id.*[emphasis omitted].) Nonsense.

The predicate for UCLA's motion is that duty is a question of law. But experts may not opine on the law. (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1181.) UCLA's claim that its experts made a duty determination[25] requires those opinions to be disregarded. "To the extent that [the UCLA expert] opinion was based on a legal conclusion, it is not substantial evidence. (Citation.)" (*Baker*, 204 Cal.App.4th at p. 1245.)

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[25] Such a duty determination as Deisinger made was that UCLA *did have a duty.* His opinion can only be read as that UCLA had a duty but discharged it. (1EX210–211.)

Neither UCLA expert offers a California-specific opinion, in any event. Deisinger claims that "there were no nationally recognized industry standards" at the time. (1EX210.) Rosen expert Madero disagrees. (7EX1881.)

UCLA expert Mills's opinion is likewise devoid of any California specifics and limited to healthcare providers, all of whom are unnamed except Nicole Green. (1EX286–287.) The bare recitation that an expert has reviewed certain legal authorities, string-cited in his declaration without discussion, cannot provide the foundation for an opinion based on them. (1EX174, 227; see generally *Howard Entm't, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1114–1115.)

Rosen's experts properly offer opinions on the standard of care–which they find in the national standards incorporated into UCLA's own established policies and procedures for addressing threats such as Thompson posed. (7EX1767–1771 [Pitt], 1878–1883 [Madero].) And they offer their opinions that UCLA's employees failed to act in accordance with it and with UCLA's own rules and procedures. (7EX1767–1771, 1893–1896.) UCLA experts disagree. Conflicting expert opinions create issues of fact. (*Kelley v. Trunk* (1998) 66 Cal.App.4th 519, 524; 10EX2669.) UCLA cannot contend otherwise.

## VII. UCLA's claim of "harm to higher education" is belied by its experts, its amici and its own public pronouncements.

UCLA has postulated calamitous results should the Court agree that it has a duty - via special relationship, undertaking or otherwise. But it has offered no evidence to support this

argument. The evidence UCLA did offer by way of expert testimony was that UCLA had threat-assessment procedures in place, that they were appropriate and had operated within the standard of care. (1EX210–211.) UCLA's case was, and always has been, about breach of duty and not about duty itself. Not a single UCLA witness has expressed a contrary view. Even now, UCLA continues to profess its lack of negligence. (Ans. at 15–17.)

UCLA simply has no answer to Rosen's evidence of its threat assessment procedures that simply failed to work in her and Thompson's case. It has no answer to the writings and opinions of its expert Eugene Deisinger, of its amicus The Jed Foundation and of Jed's related organization, Higher Education Mental Health Alliance, all of whom agree that an institution of higher education has a duty and responsibility "regarding a student who threatens violence towards others." (Jed at p. 26.) UCLA likewise has no answer to the pronouncements of its Chancellor and the University of California Campus Security Task Force of 2008 to "do everything feasible to create safe and secure campuses." (7EX1825.)

## CONCLUSION

The landmark 1960 California Master Plan for Higher Education[26] contemplated access to higher education for all Californians. A person contemplating attending a public college

[26] Footnote 12, *supra.*

in California should not have to elect between accepting the risk of foreseeable classroom violence and not attending at all, yet that is exactly what the majority's no-duty rule requires.

"UCLA is committed to providing a safe work environment for all faculty, staff and students–one that is free from violence and threats of harm."[27] UCLA continues to make these statements to the public.[28] In the face of these and UCLA's other promises to its students and their families to provide a safe campus, UCLA's arguments border on cynicism. As it stands, public college students must bear the risk of foreseeable fellow-student violence as part of the price of a public education. When UCLA's touted threat-assessment protocols and procedures fail, as they did here, the victims bear the burden. Public policy rooted in the California Constitution dictates a contrary conclusion.

UCLA is free to argue that it did not breach its duty. Rosen and her experts disagree–the UCLA personnel charged with discharging its threat-assessment procedures negligently failed to do so.[29] This is an issue of material fact. Rosen merely seeks to have the Court recognize her fundamental right to have a jury decide who is correct.

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[27] 3EX642. This was disseminated to all students, faculty and staff. (1EX 92–94.)

[28] Footnote 8, *supra.*

[29] 7EX1769, 1893–1894.

The Court should reverse the order granting the Regents' petition and remand with directions to the Court of Appeal to vacate its peremptory writ and to enter a different order denying the petition.

Respectfully submitted,

Dated: March 23, 2016

By: _____

Alan Charles Dell'Ario

Attorney for Katherine Rosen

## CERTIFICATE OF COMPLIANCE

This brief is set using **13-pt Century Schoolbook**. According to TypeLaw.com, the computer program used to prepare this brief, this brief contains **13,789** words, excluding the cover, tables, signature block, and this certificate.

The undersigned certifies that this brief complies with the form requirements set by California Rules of Court, rule 8.204(b) and contains fewer words than permitted by rule 8.204(c), rule 8.360(b), or by Order of this Court.

Dated: March 23, 2016 By: _____

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Attorney for Katherine Rosen

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S230568

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