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IN SUPREME COURT OF THE STATE OF CALIFORNIA

REGENTS OF THE UNIVERSITY OF CALIFORNIA et al.,

Petitioners

vs.

SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent

KATHERINE ROSEN,

Real Party in Interest.

On Review of an Order Denying Summary Judgment
Court of Appeal Case No. B259424
Los Angeles Superior Court, Case No. SC108504
The Hon. Gerald Rosenberg, Judge Presiding

APPLICATION TO FILE AMICUS BRIEF AND AMICUS BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA AND OTHERS IN SUPPORT OF REAL PARTY KATHERINE ROSEN

CRC 8.25(b)

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Attorney for *Amici Curiae* Consumer Attorneys of California, et al.

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CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rule of Court 8.208, Consumer Attorneys of California certifies that it is a non-profit organization which has no shareholders. The other organizations that are also amici joining in this brief are similarly non-profit organizations. Those organizations and other individuals who join as amici are further identified in Exhibit A. Amici and their counsel certify that *amici* and their counsel know of no other person or entity that has a financial or other interest in the outcome of the proceeding that the *amici* and their counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under canon 3E of the Code of Judicial Ethics.

Dated: July 15, 2016

SHARON J. ARKIN

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APPLICATION TO FILE AMICUS BRIEF

Consumer Attorneys of California and the other amici identified in the following section and in Exhibit A, submitted concurrently with this brief in two separately-filed volumes, hereby request that the attached amicus brief submitted in support of plaintiff and real party in interest Katherine Rosen be accepted for filing in this action.

Counsel is familiar with all of the briefing filed in this action to date. The concurrently-filed amicus brief addresses fundamental public policy issues not otherwise considered or argued by the parties and amicus believes the brief will assist this Court in its consideration of the issues presented. In particular, this brief discusses when imposition of a duty on post-secondary schools to protect their students from violent actions by other students is appropriate.

No party to this action has provided support in any form with regard to the authorship, production or filing of this brief.

STATEMENT OF INTEREST OF THE *AMICI*

Amici consist of several organizations and over 5,000 individuals who have joined in this brief in support of the real party in interest Katherine Rosen. The lead amicus, Consumer Attorneys of California ("CAOC") is a voluntary membership organization representing over 6,000 associated consumer attorneys practicing throughout California. The organization was founded in 1962. Its membership consists primarily of attorneys who represent individuals who are injured or killed because of the negligent or wrongful acts of others, including students and parents of students at various California universities and colleges. CAOC has taken a leading role in advancing and protecting the rights of Californians in both the courts and the Legislature.

As an organization representative of the plaintiff's trial bar throughout California, including many attorneys who represent plaintiffs injured or killed as the result of negligence, CAOC is interested in the significant issues presented by the trial court's decision in this case, particularly with respect to the determination of what duty is owed by a college or university to protect its students from a credible threat of harm by another student.

Thousands of other individuals with a substantial interest in this

issue also join in this brief as amici, and are identified in Exhibit A to this brief. These individuals, on behalf of themselves or organizations, have signed a petition stating the following:

1) We are appalled to hear that the [colleges and universities that submitted amici briefs in the appellate court] have claimed that colleges and universities do not have a duty to protect their students from foreseeable violence from other students in their classrooms or on their campuses.
2) We believe that such colleges and universities do have such a duty, and we do not want other needless, preventable acts of violence to occur in college and university classrooms or on their campuses because of those institutions' failure to perform any type of threat assessment of troubled students known by them to pose danger to other students.
3) We authorize the CAOC to file an Amicus Curiae Brief on our behalf regarding these important issues.

These amici are more specifically described as follows:

A. Students and Faculty at Colleges and Universities.

Of these individuals, 5,391 consist of concerned students and faculty members at schools within the California Community Colleges system, the California Institute of Technology, schools within the California State University system, Chapman University, Claremont McKenna College, Pepperdine University, Pitzer College, Pomona College, Stanford University, the University of Southern California, schools within the University of California system, and the University of California Los Angeles ("UCLA"), as well as other colleges and universities not affiliated with the amici that supported the Regents of the University of California and the other petitioners in the appellate court.[1] These individuals disagree with the stated positions of the colleges and universities that supported the Regents as amici in the Court of Appeal.

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1 These other schools include: Alliant International University, American Career College, California Institute of the Arts, Associated Technical College, Biola University, Bryman College, California Baptist University, California Lutheran University, College of San Mateo, Compton Community College, Concorde Career College, Everest College, Fashion Institute of Design & Merchandising, Fremont College, Fullerton College, Harvey Mudd, ICDC College, La Sierra University, Las Positas College, Los Angeles Film School, Los Angeles ORT College, Loyola Marymount, Mesa College, Mount St. Mary's, Occidental City College, Pacific University, Pierce College, Platt College, Point Loma Nazarene, Pomona College, San Diego Christian College, Scripps College, St. Mary's College, UEI College, and Union University.

B. Victims and Relatives of Victims of School Shootings.

These individuals also include victims and relatives of victims of school shootings that have occurred throughout the country, including the following:

1. Virginia Tech Shooting on April 16, 2007: A troubled senior, Seung-Hui Cho, shot and killed 32 people and wounded 17 others before committing suicide on the campus at Virginia Polytechnic Institute and State University in Blacksburg, Virginia. Surviving victims Kevin Sterns and Jamal Carver, and three relatives of surviving victim Colin Goddard, are amici in support of the plaintiff and the real party in interest Katherine Rosen.

2. Northern Illinois University Shooting on February 14, 2008: Steven Kazmierczak, a graduate student who had stopped taking his psychiatric medication, shot and killed five people and injured 21 others before committing suicide on the campus of Northern Illinois University in DeKalb, Illinois. Surviving victims Harold Ng and Patrick Korellis, and the brother of surviving victim Maria Ruiz-Santana, are amici in support of the plaintiff and the real party in interest Katherine Rosen. In addition, Donald Grady, the former Chief of Police of Northern Illinois University who responded to this shooting and assisted the victims, is also an amicus in support of the plaintiff and the real party in interest Katherine Rosen.

3. Oikos University Shooting on April 2, 2012: Former student One L. Goh, suffering from paranoid schizophrenia, shot and killed seven people and wounded three others on the campus of this Korean Christian college in Oakland, California. Eleven relatives of victims Kathleen Ping and Doris Achu, who were killed in the shooting, are amici in support of the plaintiff and real party in interest Katherine Rosen.

4. Isla Vista/Santa Barbara Shooting on May 23, 2014: 22-year old Elliott Rodger shot and killed six people and injured 13 others before committing suicide in Isla Vista, California. All six murder victims were students at the University of California, Santa Barbara. Jane Lui, mother of deceased victim David Wang, is an amicus in support of the plaintiff and real party in interest Katherine Rosen.

These individuals, all of whom have suffered tremendous losses because of violence occurring on campuses, also disagree with the stated positions of the colleges and universities supporting the defendants as amici.

C. Organizations and Prominent Individuals Dedicated to Preventing Violence in Colleges and Universities.

Various organizations dedicated to preventing needless and foreseeable violence, including violence at schools and on campuses, have

also joined in the filing of this brief as amici, including the following:

1. **Friends of Safe Schools U.S.A.:** The Friends of Safe Schools United States of America is a 501(c)(3) public charity committed to improving safety in and around schools. It establishes partnerships with local police departments, including the Los Angeles Police Department, to accomplish its goals.

2. **National Center for Victims of Crime:** The National Center for Victims of Crime is a non-profit organization that advocates for the rights of victims and is the most comprehensive national resource committed to advancing victims' rights and helping victims of crime rebuild their lives.

3. **Crime Victims United of California:** Since its founding in 1990, the Crime Victims United of California's mission has been to support and strengthen public safety, promote balance in the criminal justice system, and protect the rights of victims. Founded by Harriet Salarno, whose eldest daughter, Catina Rose Salarno, was murdered at the University of the Pacific in Stockton on her first day of school, the organization is widely seen as the primary voice of crime victims in California.

In addition to these organizations, numerous members of various law enforcement agencies and the Association of Threat Assessment

Professionals ("ATAP") have also joined in the filing of this brief as amici, including the following:

John Lane was a detective in the Los Angeles Police Department, retiring in 1997 as a Lieutenant after 25 years of service. While at the Los Angeles Police Department, he developed its Threat Management Unit, which gained international recognition for its management of aggravated stalking cases. He was also a part of the resource group that developed the workplace violence policy for the City of Los Angeles. He founded ATAP in 1992 as a non-profit organization comprised of law enforcement, prosecutors, mental health professionals, corporate security experts, probation and parole personnel and others involved in the areas of threat and violence risk assessment. Mr. Lane served as ATAP's President for a number of years, and created the National Threat Management Conference.

Detective Jeff Dunn is a 21-year-veteran of the Los Angeles Police Department and is currently the officer-in-charge of its Threat Management Unit. This unit was formed in 1990 after the murder of actress Rebecca Schaeffer, and over the years, has been visited and emulated by many city, state, and federal law enforcement agencies, as well as agencies from Canada, Australia, the United Kingdom, Europe, Asia, and South America.

Efrain "Tony" Beliz, Ph.D. is a clinical psychologist and is the retired Deputy Director of the Los Angeles County Department of Mental

Health Emergency Outreach Bureau. He oversaw the School Threat Assessment Response Team program, which was founded by the Los Angeles Police Department in 2007 after the Virginia Tech massacre, and was taken nationwide in 2009 by Dr. Beliz. It consists of a collaboration of county mental health professionals, law enforcement agencies, and schools and is widely heralded as one of the most intensive efforts in the nation to identify the potential for school violence and take steps to prevent it.

Bryan M. Vossekuil is a retired Special Agent of the United States Secret Service who served as the executive director of the Secret Service's National Threat Assessment Center. He co-directed the Secret Service Exceptional Case Study Project and the Secret Service Safe School Initiative, both of which formed the genesis of threat assessment and violence prevention in schools and campuses.

Paul Bristow is the President of the Los Angeles chapter of ATAP, and has prior experience in law enforcement as a member of the Metropolitan Police, New Scotland Yard, where he oversaw physical security issues for members of the Royal family and numerous heads of state including Prime Minister Margaret Thatcher.

Unlike the amicus brief filed in support of the defendants, which was funded by the defendants, no party to this action has provided support in any form with regard to the authorship, production or filing of this brief,

except that counsel for Katherine Rosen has provided the service and filing copies of Exhibit A.

AMICUS BRIEF OF CAOC, ET AL., IN SUPPORT OF REAL PARTY IN INTEREST, KATHERINE ROSEN

INTRODUCTION

The Court of Appeal, the defendants in this action (hereafter collectively referred to as "UCLA") and the numerous colleges and universities rhat supported UCLA as amici in the appellate court, contend that as a matter of law no duty should *ever* be imposed on any college or university for injuries inflicted on one student by another and that no college or university *ever* has a special relationship with *any* student that engenders a duty of care in that context. The assertion is that while violent attacks may be foreseeable in the larger context, their very unpredictability precludes imposition of duty in any case. Such a blanket rule is, of course, simply too broad to withstand scrutiny.

Just as there cannot rationally be a blanket rule of *no* duty, there similarly cannot be a blanket duty *imposing* a duty in every context. As with every legal determination of duty, a duty may properly be imposed, depending on the circumstances. This is, in fact, the rule universally followed by California courts: Duty depends on circumstances. (*Ann M. v.*

Pacific Plaza Shopping Center (1993) 6 Cal.4th 666, 677, 25 Cal.Rptr.2d 137, 863 P.2d 207 disapproved on other grounds in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527, 113 Cal.Rptr.3d 327, 325 P.3d 988; *Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472, 63 Cal.Rptr.2d 291, 936 P.2d 70.)

The law with respect to the liability of colleges and universities for their students' safety and welfare has evolved over the last several decades as the concept of *in loco parentis* has been discarded and the autonomy of students has been recognized. But in more recent years, the increase in rampages and attacks by disturbed students has effected yet another sea change, not only in the administrative actions by colleges and universities, but in the legal analysis that applies to those administrative actions.[2]

One important distinction between this case and the circumstances in prior decisions must be noted at the outset: This is not a case where an unpredictable alcohol-fueled attack or rape by one or more students on another student is at issue; nor is this a case where an unpredictable student

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2 UCLA's policies were implemented immediately after the Virginia Tech shooting occurring on April 16, 2007 (UCLA's writ exhibits, pp 1848, 1842.)

suicide occurred.[3] This is a case involving a university's development of a sophisticated threat assessment and violence prevention protocol, its conduct in promoting and marketing itself based on its promise of student safety, its increase in charges and fees to pay for that promised protection, and the failure to implement its own policies, which resulted in severe injury to the plaintiff.

That factual context warrants recognition of a "special relationship" between UCLA and its students that imposes on UCLA a duty to protect its students from foreseeable violence that should have been, but was not, stopped before someone got hurt. That factual context compels the conclusion that UCLA had a duty to protect its student, Katherine Rosen, from the known potential danger represented by another student, Damon Thompson. Such danger was noted and reported by various members of the faculty, teaching assistants, research assistants, students, residential hall advisors, campus police, and the administration, but UCLA failed to put the

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3 That, therefore, distinguishes this case from those relied on by the appellate court, e.g., *Tanja H. v. Regents of the University of California* (1991) 228 Cal.App.3d 434, 278 Cal.Rptr. 918 [rape of a student by other students after alcohol-fueled party]; *Baldwin v. Zoradi* (1981) 123 Cal.App.3d 275, 176 Cal.Rptr. 809 [injury caused by driver during a speed contest after becoming intoxicated at a campus party]; *Crow v. State of California* (1990) 222 Cal.App.3d 192, 271 Cal.Rptr. 349 [assault after an on-campus drinking party]. Since the facts here do not involve intoxication, none of these cases have any relevance.

pieces together pursuant to its own threat assessment and violence prevention protocol. Despite having policies and procedures in place, UCLA failed to promptly *implement* its protocol and failed to take action to warn Rosen or protect her from Thompson despite its knowledge of the risk he represented to her.

Contrary to the conclusion of the appellate court or the arguments of UCLA and its amici, imposition of a duty in *this* case does not open the door to unlimited liability; it does not make a university the "insurer" of its students' safety. A finding that UCLA had a duty to Rosen in *this* case does nothing more than impose the same "reasonable person" standard on universities that exists in the non-academic world. (Govt. Code § 820 [imposes reasonable person standard on government employees].)

Because the factual circumstances warrant a finding of duty in the context of the relationships at issue in this case, the trial court correctly denied summary judgment and the issues of breach of duty and causation must be left for determination by the jury. The decision of the Court of Appeal should be reversed.

LEGAL ARGUMENT

1.

AN HISTORICAL PERSPECTIVE: THE DECLINE OF THE *IN LOCO PARENTIS* DOCTRINE AND THE RESURGENCE OF A DUTY TO ASSURE STUDENT SAFETY

Numerous commentators and academics have traced the history of college and university liability for injuries to their students. (See, e.g., Peters, *Protecting the Millennial College Student*, 16 S. Cal. Rev. L. & Soc. Just. 431, 432-448 (Spring 2007) ("Peters"); Hoffman, Taking a Bullet: Are Colleges Exposing Themselves to Tort Liability by Attempting to Save Their Students?, 29 Ga. St. U. L. Rev. 539, 554-555 (Winter 2013) ("Hoffman"), Sokolow, Lewis, Keller, Daly, College and University Liability for Violent Campus Attacks, 34 J. C. & U. L. 319, 321-323 (2008) ("Sokolow"); Cloud, 295 Ed. Law. Rep. 457, 458-461 (Sept. 2013) ("Cloud").)

Prior to the civil rights movement of the early 1960's, the doctrine of *in loco parentis* applied to university and college students, i.e., the university stood in the shoes of the parents and had institutional autonomy and control over those students. (Peters, at 433-434.) As such, the

university had the power to limit, restrict and discipline student actions and activities and, in turn, obtained immunity from liability for exercising those rights. (*Id.*, at 434.) The cases during that era did not address the university's liability for injury caused by one student to another. "Thus, under the doctrine of *in loco parentis*, colleges had expansive rights over their students but virtually no responsibilities to them." (Peters, at 436.)

The civil rights movement of the 1960s changed that dynamic. "Unwilling to accept a system of paternalistic control and a lack of civil rights, [the Baby Boom students] successfully challenged the insularity of the *in loco parentis* college, winning their own fundamental civil rights and subjecting college decisions to judicial review and basic legal standards." (Peters, at 436.) That change, however, did not significantly affect university tort liability and "various immunities continued to insulate colleges from tort liability." (Peters, at 437-438.)

Next came the "bystander" era, where colleges and universities were insulated from liability for student safety as "bystanders" to third party violence. (Peters, at 438-448.) The seminal case during this era, *Bradshaw v. Rawlings* (3rd Cir. 1979) 612 F.2d 135, 139 and its progeny, "used college students' newfound freedoms against them, emphasizing that without the authority of *in loco parentis*, colleges had neither the ability nor the duty to control or protect these 'newly empowered students.'" (Peters,

at 443.)

Gradually, however, the legal landscape evolved, and the courts began viewing colleges as businesses, imposing standard duties of due care "in premises maintenance, campus housing, and activities in which colleges exercise supervision and control," but still largely insulating colleges from liability for third-party criminal attacks. (Peters, at 445-446.) There were, however, certain expansions of liability, even in that context. For example, this Supreme Court in *Tarasoff v. Regents of the University of California* (1976) 17 Cal.3d 425, 331 Cal.Rptr. 14, 551 P.2d 334 imposed liability on a psychologist and his university employer for failing to warn a student-victim of a threat made by another student. A form of the *Tarasoff* duty became statutory upon the enactment of Civil Code section 43.92 by the California Legislature.

Other courts during this era similarly imposed duties of care on colleges for the safety of their students. (See, e.g., *Peterson v. San Francisco Community College District* (1984) 36 Cal.3d 799, 813, 205 Cal.Rptr. 842, 685 P.2d 1193.) Similarly, in *Mullins v. Pine Manor College* (1983) 449 N.E.2d 331, 335-336, the Massachusetts Supreme Court held that despite the demise of the *in loco parentis* doctrine, colleges could not simply "abandon any effort to ensure [students'] physical safety."

The more recent rampage attacks on college campuses have resulted

in another sea-change in the perspective of both the university community and the larger community as to a college's obligations to protect students from violent crime on campus. After the Virginia Tech massacre in 2007, in which 32 people were killed and 17 others were injured by a student rampage, campus threat assessment teams became common on college and university campuses. (Dunkle, Silverstein, Warner, Managing Violent and Other Troubling Students: The Role of Threat Assessment Teams on Campus, 34 J. C. & U. L. 585.) Indeed, as UCLA's amicus brief in the appellate court confirmed, "colleges and universities have voluntarily put in place proactive and effective measures toward" reducing the incidence of criminal violence on their campuses. (UCLA's amicus brief, p. 35; see, also, pp. 36-37.) More specifically, as UCLA's amicus brief confirms, defendants have specifically put in place such protective measures on all of the University of California campuses, including UCLA.

Thus, the question is no longer whether colleges and universities *should* do something to protect their students from violent attacks – they admit that they should, and have. The question then becomes whether they should be liable for acting negligently in failing to *implement* the sufficient protocols they have established.

2.

HAVING ADMITTEDLY ESTABLISHED A PROTOCOL TO PROVIDE CAMPUS SAFETY, A DUTY MAY PROPERLY BE IMPOSED FOR THE FAILURE TO DO SO REASONABLY

The Court of Appeal concluded that that colleges and universities have no duty to protect college students from violence by other students. The appellate court conceded, however, that such a duty can lie where there is either a "special relationship" or the voluntary assumption of a duty. The appellate court, however, rejected the existence of a special relationship based on the establishment of threat assessment and violence prevention protocols, the touting of student safety as a marketing ploy, or as the result of actually imposing additional fees to pay for student safety protocols.

There are some preliminary issues that must be addressed.

First, Rosen's amici do not contend that a college or university is required to be an "insurer of student safety." But when a college or university promotes itself as taking measures to assure student safety, it assumes the duty to take reasonable steps to actually adopt a protocol that has a reasonable chance of doing so, and a duty to implement that protocol in a reasonable way. And it is for the jury to decide, based on the evidence in any particular case, whether the efforts by the college were reasonable

and whether the failure of those efforts was a substantial factor in the resulting injury. (*Lawrence v. La Jolla Beach and Tennis Club, Inc.* (2014) 231 Cal.app.4th 11, 32, 179 Cal.Rptr.3d 758 [breach of duty is an issue of fact for the jury]; *Vasquez v. Residential Investments, Inc.* (2004) 118 Cal.App.4th 269, 278, 12 Cal.Rptr.3d 846 [same]; *Lawrence, supra* [causation is an issue of fact for the jury]; *Landeros v. Flood* (1976) 17 Cal.3d 399, 411, 131 Cal.Rptr. 69, 551 P.2d 389 [same].)

Second, UCLA's amici argued that while it is remotely foreseeable that *some* kind of violence *may* occur on college campuses, violence is unpredictable and, given that a college cannot predict when violence may occur, it cannot have a duty to protect against it. (UCLA's amicus brief, pp 30-35.) That contention, however, is belied by the very fact that UCLA and its amici, have established threat assessment and violence prevention protocols in response to the Virginia Tech shooting and in light of other shootings occurring on campuses – including campuses in California. Indeed, the literature is replete with confirmation that while violence in general is unpredictable, warning signs exist which can identify *individuals* who may resort to violence. And numerous studies have identified factors which can predict who may become violent. Those are the very bases for the threat assessment and violence prevention protocols that UCLA had already formulated before Damon Thompson ever set foot on its campus.

[See, e.g., UCLA's writ exhibits, pp 1430-1433.]

For example, "[i]n 2002, the United States Secret Service and the United States Department of Education released a report detailing the results of the 'Safe School Initiative,'" which was "a detailed examination of 37 incidents of school violence perpetrated by 41 individuals across the United States from 1974 to 2000." (Pochini, Managing Risk of Violence in the Post-Secondary Educational Environment, 18 Educ. & L. J. 145, 146 (October 2008) ("Pochini").) The study produced ten key findings, including the conclusion that such incidents were "rarely sudden or impulsive actions," that prior to the attacks, people other than the attackers knew of the plan, most of the attackers "engaged in other behaviors that either should have caused or did cause concerns for others" prior to the attacks; the attackers "had previous difficulties coping with loss or failure, and many had either attempted or at least considered suicide," and "had felt bullied or hurt by others prior to the attacks." (*Ibid.*, at 146-147.)[4] These are, in fact, all circumstances that existed with respect to Thompson's attack on Rosen in this case, even as the facts are articulated by Court of Appeal below. (See *Regents of the University of California v. Superior Court (Rosen)* (2015) 240 Cal.App.4th 1296, 1300-1306, 1322, fn.

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4 Brian Vossekuil, who co-directed this study, has joined this brief as one of the amici in support of Plaintiff and real party in interest Katherine Rosen.

9.)

Other studies have further refined the predictability of violence. (McDermott, Edens, Quanbeck, Busse, Scott, Examining the Role of Static and Dynamic Risk Factors in the Prediction of Inpatient Violence: Variable-and Person-Focused Analysis, 32 Law & Hum. Behav. 325, 325-326 (August 2008).) Indeed, three dynamic factors have been identified as helpful to the assessment of violence potential: impulsivity, anger and substance use. (*Id.*, at 327.) (See, also, McCann, Risk Assessment and the Prediction of Violent Behavior, 44-OCT Fed. Law. 18 (1997); Lamparello, Using Cognitive Neuroscience to Predict Future Dangerousness, 42 Colum. Hum. Rts. L. Rev. 481 (Winter 2011).) These kind of metrics provide a basis for the risk assessment protocols established by various colleges, including UCLA.

Thus, given that the propensity for violence in an individual can be assessed, and given that threat assessment and violence prevention protocols have been adopted, there is no impediment to imposing liability on a college or university for failing to properly implement a threat assessment and violence prevention protocol. Accordingly, where a reasonable protocol is negligently implemented or where a university fails to implement an existing reasonable protocol, the issue is no longer whether a legal duty exists (it does), but whether the legal duty has been breached.

A. **By promoting student enrollment on the basis of campus safety, by establishing threat assessment and violence prevention protocols, and by charging a security fee, defendants assumed a duty to take reasonable precautions to protect students**.

There are three factors which come into play in the analysis of whether defendants owed a duty to warn and/or protect Rosen from Thompson's violent attack on her. The first is the fact that UCLA actually uses campus safety as a marketing ploy and promotes applications for admission on the basis of that representation.[5] The second is the fact that UCLA voluntarily established a threat assessment and violence prevention

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5 The United States Department of Education, in its publication, "The Handbook of Campus Safety and Security Reporting," has recognized that campus safety is of "vital concern" to students and their families choosing a college or university. UCLA described its campus on a website for "Parents and Families" by stating, "Welcome to one of the most secure campuses in the country." (UCLA's writ exhibits, p. 2099). UCLA also claimed in one of many brochures that "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's writ exhibits, p. 641).

protocol to address campus safety issues.[6] Third, UCLA actually *charged additional fees to cover the costs of its security programs.* (UCLA's writ exhibits, pp. 1824, 1829).[7]

Any one of these three factors should properly impose a duty on UCLA to provide safety and security to its students; the combination of the three make the finding that a duty exists inevitable.

The negligent undertaking doctrine in California was articulated by this Court in *Artiglio v. Corning, Inc.* (1998) 18 Cal.4th 604, 613-614, 76 Cal.Rptr.2d 479, 957 P.2d 1313: "As the traditional theory is articulated in the Restatement, a negligent undertaking claim of liability to third parties requires evidence that: (1) the actor [here, UCLA] undertook, gratuitously or *for a consideration*, to render services to another [here, to provide a safe

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6 A week following the Virginia Tech shootings in April of 2007, University of California President Robert Dynes appointed a Campus Security Task Force to make recommendations for implementation at all of its ten campuses, including UCLA (UCLA's writ exhibits, p. 1848). In the preface of the report recommending such threat assessment and violence prevention protocol, the defendants stated, "There is no greater priority for the University of California system than the safety and security of students, faculty, staff and visitors." (UCLA's writ exhibits, pg. 1817). In response to these recommendations, UCLA announced its commitment for providing a safe work environment for all faculty, staff, and students, and described the UCLA Violence Prevention & Response Team (UCLA's writ exhibits, p. 642).

7 Tuition fees were raised 3% in the 2007-08 year with a target of 25% rise over the next several years to pay for this protocol and to fund the added mental health elements of the plan.

campus for its students]; (2) the services rendered were of a kind the actor should have recognized as necessary for the protection of third persons [here, Rosen]; (3) the actor failed to exercise reasonable care in the performance of its undertaking; (4) the failure to exercise reasonable care resulted in physical harm to the third person; and (5) either (a) the actor's carelessness increased the risk of such harm, *or* (b) the undertaking was to perform a duty owed by the other to the third person, *or* (c) *the harm was suffered because of the reliance of the other or the third persons upon the undertaking*." (Emphasis added.) As the *Artiglio* court confirmed, recovery under this doctrine "thus requires proof of each of the well-known elements of any negligence cause of action, viz., duty, breach of duty, proximate cause and damages."

Depending on the facts and evidence in a particular case, then, if a student selects a college in reliance, at least in part, on its representations of safety – and actually pays for the promised protections – the college has undertaken a duty to provide that promised safety. Again, this does not make the college an insurer of the student's safety, but – as with any other negligence claim – it only imposes a duty to act *reasonably* to fulfill the

duty undertaken. But there is, nonetheless, a duty.[8]

There is no social policy or other public policy reason to exempt colleges and universities from this doctrine. Indeed, having represented that its campus is safe, having charged additional fees to assure that safety, and having actually established a procedure and protocol to implement those safety promises, there are strong policies that require imposition of a duty. In fact, the California Constitution itself imposes that duty on UCLA and other post-secondary schools in California: California Constitution, art. 1, § 28, subd. (a)(7) expressly declares that "the right to public safety extends to public and private primary, elementary, junior high, and senior high school, and *community college, California State University, University of California , and private college and university campuses*, where students

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8 The appellate court rejected this finding of duty no the ground that Rosen had not submitted any evidence of her *reliance*. (*Regents*, at 1319-1321.) The appellate court, however, blurred the analysis between whether a duty generally *existed* in that context and the factual question of whether Rosen could *prove* the elements of the duty to the jury in order to recover. Had the appellate court properly analyzed the case, it would have concluded that a duty could be stated but that (arguably) Rosen did not submit sufficient evidence on summary judgment to sustain the cause of action in this case.

and staff have the right to be safe and secure in their persons."[9]

Not only should the college be required to fulfill its express promises, but the fact that students may rely on a university's assurances of safety, and their constitutional entitlement to safety, as part of their decision to attend school there, warrants enforcement of that promise. Over 5,000 current students of the colleges and universities in California have joined this brief as amici based on their perceived belief that their schools have a duty to fulfill their promises of safety and to implement the policies set in place for threat assessment and violence prevention.

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9 In his dissenting opinion in *Regents*, Justice Perluss acknowledged the majority's acceptance of the rationale in cases which have held that this provision, by itself, is not self-executing and does not establish a legal duty. But, as Justice Perluss also said, this Constitutional provision does, at the very least, establish a public policy which can undergird a cause of action in this context.

B. By promoting student enrollment on the basis of campus safety, by establishing threat assessment protocols and by imposing fees for security, defendants established a special relationship with both Thompson and Rosen which required it to act reasonably in the face of a threat.

Alternatively, a duty to protect or warn a student should be imposed on UCLA in this case under the "special relationship" doctrine.

Although the appellate court cited to *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 30 Cal.Rptr.3d 145, 113 P.3d 1159 in support of its conclusion that no special relationship existed under the facts of this case, the analysis in *Delgado* actually demonstrates why a special relationship *does* exist between colleges and universities and their students where the college or university has have developed threat assessment and violence prevention protocols.

In *Delgado,* the plaintiff, a bar patron, got into an altercation with another patron. The bar's security guard asked the plaintiff to leave and when he did, the plaintiff was attacked in the parking lot by the other patron and his friends. The plaintiff sued the bar. This Court confirmed that "it is undisputed that defendant, a bar proprietor, stood in a special relationship with plaintiff, its patron and invitee, and hence owed a duty to undertake 'reasonable steps to secure common areas against foreseeable criminal acts

of third parties that [were] likely to occur in the absence of such precautionary measures.'" (*Delgado* at 244.) If a bar owner owes a duty to its casual patrons, clearly a college or university, which charges enormous fees for the services provided, including special fees for security services, is also in a special relationship with its invitees, i.e., its students.

In deciding whether the special relationship between the bar and the patron established a duty to provide *special* security, this Court confirmed the application of a sliding scale assessment balancing the foreseeability of harm with the burden of preventing the harm. (*Delgado*, at 237-238.) Thus, imposition of a high burden (e.g., *hiring* security guards) also requires a high level of foreseeability. (*Id.*, at 240.) But imposition of a minimal burden (e.g., having already hired security guards, the guard only needed to maintain a separation of the combatants), requires only a showing of minimal foreseeability. (*Id.*, at 245-246.)

It is admitted by UCLA (and the other schools that submitted amicus briefs in the appellate court) that they have established and maintain threat assessment and violence prevention protocols designed to identify and neutralize threats to student safety. (UCLA amicus brief, pp 35-43.) Just like the bar owner in *Delgado*, having already met the higher burden of establishing and implementing safety protocols, UCLA and its amici have concededly established a special relationship with their students, and there

is only a minimal burden to initiate and implement those protocols, and to do so in a reasonable, non-negligent manner.[10]

This application of the law is actually the very conclusion in one of the law review articles extensively cited to and relied on by UCLA's amici. (Hoffman, Taking a Bullet: Are Colleges Exposing Themselves to Tort Liability by Attempting to Save Their Students?, 29 Ga. St. U. L. Rev. 539, 554-555 (Winter 2013) ("Hoffman").) Hoffman, in fact, confirms the existence of a special relationship which, under the proper circumstances, should impose liability on a college where the violence of one student injures another student.

First, Hoffman confirms that "[i]f the college has no notice that the violent perpetrator may pose a risk, no duty should attach." (Hoffman, at 578.) But, as discussed above, and as established by the 2000 study conducted by the Secret Service, as well as the declarations submitted by the plaintiff's experts (UCLA's writ exhibits, pp1768-1770 [Pitt]; pp 893-1895 [Madero]) and the book written by the defendant's expert, virtually all violent attacks are preceded by warning signs. (UCLA's writ exhibits, p. 1912.) UCLA's own Campus Security Task Force recognized this in its 2008 report. (UCLA's writ exhibits, p. 1842.) As long as the college has a

10 Although the *Delgado* court conducted its balancing analysis in the context of a premises liability claim, this Court's special relationship analysis should apply with equal force in these circumstances.

protocol that ensures that a multidisciplinary team gathers and analyzes the correct information, more often than not, the college will have notice of the risk. And as the evidence in this specific case confirmed, UCLA was well aware of the risk Thompson posed to Rosen and others.

Second, Hoffman continues, "if a university through its threat assessment team has actual or constructive notice of a tangible threat against an individual or group, courts should find a duty to exercise reasonable care to prevent harm and protect the community." (*Id.*, at 578.) Hoffman emphasizes that the "notice can be actual, like in *Tarasoff* where Poddar made a direct threat against Tarasoff, or constructive, developed through multiple sources during the threat assessment process." (*Ibid.*)

And in response to defendants' arguments that the unpredictability of violence, especially by non-psychiatrists, should not lead to liability, Hoffman confirms that "when multidisciplinary threat assessment teams have psychologists, law enforcement, and various other professionals assessing student risk, they are in a *better* position to identify and prevent student harm than an average school administrator and are arguably better trained and equipped to predict violence than doctors or psychiatrists." (*Id.*, at 579, emphasis added.)

Hoffman posits the proper analysis: "Now that the use of behavioral intervention and threat assessment is so commonplace at America's

colleges and universities, if an institution did not have a threat assessment team, a court may find the college breached its duty if a violent incident occurs, the risk of which was known or knowable at the time. Once a college implements threat assessment, a court may find the institution breached its duty by showing that the college did not follow general best practices for conducting the assessment, failed to reasonably identify at-risk students, failed to properly administer the threat assessment process, or failed to develop a plan to address a threat." (Hoffman, at 580.) That is precisely what happened here.

And the Hoffman analysis falls squarely within California's liability rubric, as established in *Tarasoff*: A special relationship between the institution and the assailant or the victim imposes a duty to – at the very least – warn the identifiable potential victim and the failure to do so warrants imposition of liability. "There is no reason why a university may act without regard to the consequences of its actions while every other legal entity is charged with acting as a reasonably prudent person would in like or similar circumstances." (*University, Inc. v. Gross* (Fla. 2000) 758 So.2d 86, 90.)

The imposition of a duty to act reasonably in the context of already-existing threat assessment and violence prevention protocols is a minimal burden, especially in light of the fact that UCLA students actually pay an

additional fee for that protection. Under *Delgado,* such a minimal additional burden in the context of the existing special relationship between the university and its students warrants a finding of duty in this case, especially in light of the fact that it was reasonably foreseeable that Thompson, based on his known erratic behavior and stated intentions, was likely to attack one or more of the students he believed were harassing him. [UCLA's writ exhibits, 1768:24-1771:5; 1893:18-1896:3.]

3.

THE ARGUMENT THAT IMPOSITION OF LIABILITY IS LIKELY TO IMPAIR *ALL* STUDENTS' RIGHTS IS INSUPPORTABLE AND UNREASONABLE

UCLA's amici argued in the Court of Appeal that imposition of liability on colleges and universities for failing to protect their students from violent attack would work to the detriment of all students at a university because such measures would "require intrusive measures thus substantially limiting *all* students' 'freedom and privacy.'" (UCLA's amici brief, p. 43, emphasis in original.) That overblown rhetoric is insupportable. Indeed, there is no evidence that the conduct of the vast majority of students at any campus of any college or university would

trigger the initiation of a threat assessment and violence prevention protocol against them, or disclosure of their private information. Indeed, as UCLA's own threat assessment protocol demonstrates, there are numerous built-in protections to assure that the privacy and freedom of its students are not impaired *at all* unless and until there is some tangible basis for further action. [UCLA's writ exhibits, 1430-1433.]

This argument is further undermined by the fact that "[m]ost, if not all, post-secondary institutions have a Student Discipline Code" which "generally define 'misconduct' (for which the student may be subject to discipline) in an encompassing manner, including, but not limited to, such behaviors as conduct which disrupts the classroom or threatens or endangers the health, safety or well-being of any member of the university campus.. [¶] Most universities, then, have already turned their minds to creating policies with parameters sufficiently wide to address a variety of problematic non-academic behaviors." (Pochini, at 150-151.)

Indeed, UCLA has such a disciplinary code and it is a term of the implied-in-fact contract that exists between UCLA and its students. [UCLA writ exhibits, p. 1436.] (See, also, *Anderson v. Regents of the University of California* (1972) 22 Cal.App.3d 763, 769, 99 Cal.Rptr. 531.)

Additionally, various federal regulations, statutory limitations and common law principles protect universities when disclosure of otherwise-

private information is necessary. For example, the Family Education Rights and Privacy Act of 1974, 20 U.S.C. 1232g ("FERPA") "is a federal law designed to protect the privacy of eligible students' education records." (Sokolow, at p. 341.) The Health Insurance Portability & Accountability Act of 1996, 42 U.S.C.1320d ("HIPAA") (similarly protects the "confidentiality and security of health data." (*Ibid.*) Notably, however "[w]hen implementing or considering any prevention strategy regarding incidents of conduct that may be self-injurious or injurious to others, these laws, and the professional and ethical standards that govern physicians, psychiatrists, psychologists and other counseling professionals *all have provisions allowing for appropriate sharing of information in cases of emergency*." (*Id.*, at 342, emphasis added.) Further, "universities may also utilize appropriate procedures during training and orientation and/or adopt published policies that would allow for explicit or implied consent in cases where the *Tarasoff* standard may not be met." (*Id.*, at 343.)

"Thus, in dealing with a situation such as the one a Virginia Tech, *colleges and universities and their agents are not as hampered as they may believe in making choices about sharing information with appropriate parties*. These decisions, when made properly, may indeed enable the institutions not only to better serve their immediate and peripheral constituencies, but may also serve to limit their liability." (*Id.*, at 343,

emphasis added.)

As such, UCLA and its amici have already armed themselves with the tools to intervene and provide notice to students about when such interventions will occur. Assuming universities exercise that power reasonably, they will face no greater liability than they will from reasonably exercising their power to make threat assessments and intervene *before* violence occurs.

And UCLA already has significant duties imposed on it by federal regulations relating to campus safety and security that have not resulted in any unnecessary intrusion or impairment of all student rights. The Clery Act, 20 U.S.C. § 1092(f), the Violence Against Women Act, 42 U.S.C. § 13701 *et seq.*, and Title IX, 20 U.S.C. § 1681(a), for example, cumulatively require colleges and universities to have sufficient programs and protocols in place to provide safe and secure campuses for women.[11] Under these federal regulations, UCLA must have violence prevention and awareness programs and policies in place, must maintain and publish crime reports

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11 It should be noted that Katherine Rosen is a woman, and Damon Thompson had written a disturbing three-page letter to Dean of Students Robert Naples in January of 2009 in which he described perceived problems with female students. In that letter, Damon Thompson stated that if the Dean did not take action, "this will escalate into a more serious situation and I'll end up acting in a manner that will incur undesirable consequences on me." (UCLA's writ exhibits, pp. 1446-48). Most of Damon Thompson's complaints during his troubled year at UCLA were against female students.

and statistics, and must issue campus alerts and timely warnings. Failure to adhere to these requirements results in substantial fines and penalties.

Furthermore, if there is to be a balancing of concerns for student privacy versus student safety, student safety must win. Not only have the voters of California spoken on this issue by adding art. 1, section 28, subdivision (a)(7) to the Constitution, but commentators agree: "Personal safety is a basic right extended to American citizens that is at least as important as the rights to worship, speech, and association. In light of recent events . . . there are legitimate concerns for safety on American higher education campuses where millions of students, faculty, and staff congregate daily." (Cloud, at 470-471.)

CONCLUSION

"Postsecondary institutions do have a duty to provide reasonable security because students pay for security through their tuition and fees" and those institutions "have a duty to warn a potential victim when a special relationship exists between the institution and either the assailant or the identifiable victim." (Cloud, at 471.) The circumstances here fall squarely within the parameters established by this Court in *Tarasoff* and

Delgado, and as confirmed by the very law review articles relied on by UCLA's amici.

As such, the trial court properly denied summary judgment and UCLA's writ petition should be denied.

Dated: July 15, 2016

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CERTIFICATE OF LENGTH OF BRIEF

I, Sharon J. Arkin, declare under penalty of perjury under the laws of the State of California that the word count for this Brief, excluding Tables of Contents, Tables of Authority, Proof of Service and this Certification is 8125 words as calculated utilizing the word count feature of the Word:Mac software used to create this document.

Dated: July 15, 2016

SHARON J. ARKIN

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am over the age of 18 and not a party to the within action; my business address is 1720 Winchuck River Road, Brookings, OR 97415.

On **July 16, 2016**, I served the within document described as:

APPLICATION TO FILE AMICUSE BRIEF; AMICUS BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA, ET AL. IN SUPPORT OF KATHERINE ROSEN

on the interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as set forth in the attached service list and by depositing the envelopes with the U.S. Postal Service on this day, with postage thereon fully prepaid, at Brookings, OR.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on July 16, 2016 at Brookings, Oregon.

SHARON J. ARKIN