No.: S230568

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, etc., et al.,
Petitioners,

vs.

LOS ANGELES COUNTY SUPERIOR COURT,
Respondent.

KATHERINE ROSEN,
Real Party in Interest

Court of Appeal,
Second Appellate District, Division 7

No. B254959

Los Angeles County Superior Court

No. SC108504

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

UNIFIED RESPONSE TO AMICI CURIAE

Alan Charles Dell'Ario, SBN 60955
ATTORNEY AT LAW
1561 Third Street, Suite B
Napa, California 94559
707 - 666 - 5351
charles@dellario.org

Brian Panish, SBN 116060
*Deborah S. Chang, SBN 246013
PANISH, SHEA & BOYLE, LLP
11111 Santa Monica Boulevard, Suite 700
Los Angeles, Califonia 90025
Tel: 310 - 477 - 1700
Fax: 310 - 477 - 1699

Attorneys for Petitioner and Real Party In Interest Katherine Rosen

No.: S230568

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

UNIFIED RESPONSE TO AMICI CURIAE

Alan Charles Dell'Ario, SBN 60955
ATTORNEY AT LAW
1561 Third Street, Suite B
Napa, California 94559
707 - 666 - 5351
charles@dellario.org

Brian Panish, SBN 116060
*Deborah S. Chang, SBN 246013
PANISH, SHEA & BOYLE, LLP
11111 Santa Monica Boulevard, Suite 700
Los Angeles, Califonia 90025
Tel: 310 - 477 - 1700
Fax: 310 - 477 - 1699

Attorneys for Petitioner and Real Party In Interest Katherine Rosen

No.: S230568

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

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

UNIFIED RESPONSE TO AMICI CURIAE

Alan Charles Dell'Ario, SBN 60955
ATTORNEY AT LAW
1561 Third Street, Suite B
Napa, California 94559
707 - 666 - 5351
charles@dellario.org

Brian Panish, SBN 116060
*Deborah S. Chang, SBN 246013
PANISH, SHEA & BOYLE, LLP
11111 Santa Monica Boulevard, Suite 700
Los Angeles, Califonia 90025
Tel: 310 - 477 - 1700
Fax: 310 - 477 - 1699

Attorneys for Petitioner and Real Party In Interest Katherine Rosen

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes, Rule and Constitution:

Other Authorities:

RESPONSE TO AMICI CURIAE

Although they come from varying points of view, the several amici curiae supporting UCLA share several things in common. Foremost is their misunderstanding of how the very threat-assessment protocol employed by UCLA works as UCLA's own expert, Eugene Deisinger, describes. The lesson of Virginia Tech and other similar tragedies is that "dangerous people rarely show all of their symptoms to just one department or group on campus."[1] But colleges can identify "red flags" that "prevent targeted violence from occurring."[2] UCLA could have, and belatedly did, recognize that Damon Thompson posed a real threat of physical violence to the women classmates he named including Katherine Rosen.[3]

Nothing in the record supports amici's claim that non-medical personnel are being held to a higher standard than are the psychotherapists. As Deisinger acknowledges, the UCLA protocol "was a multidisciplinary collaboration of representatives of campus life."[4] Civil Code section 43.92 is a psychotherapist-specific statute representing a legislative effort to strike an

---

1 7EX1918.

2 7EX1912.

3 6EX1547, 1552, 1562, 1574, 1584, 1595, 1726.

4 1EX211.

appropriate balance between conflicting policy interests of public safety and the psychotherapist-patient privilege.[5]

The fears expressed by amici are imagined and unsupported by the record. The Court should disregard them.

I. Amici fail to confine themselves to issues raised by the parties in the record.

"[A]n amicus curiae accepts the case as he finds it and may not 'launch out upon a juridical expedition of its own unrelated to the actual appellate record.' (Citations)."(*E. L. White, Inc. v. City of Huntington Beach* (1978) 21 Cal.3d 497, 513.) While the rule is not absolute, amici offer no reasons why the court should depart from it. (*In re Marriage of Oddino* (1997) 16 Cal.4th 67, 82 n. 7.)

The rule makes sense because cases must be decided and opinions rendered based on the facts in the record. (See, e.g., *Trope v. Katz* (1995) 11 Cal.4th 274, 284.)"[T]he language of an opinion must be construed with reference to the facts presented by the case; the positive authority of a decision is coextensive only with such facts." (*PLCM Group v. Drexler* (2000) 22 Cal.4th 1084, 1097.)

Amici also are not exempt from the rule that factual assertions in briefs must be supported by citations to the record. (Cal. Court Rules, rules 8.520, subd. (b)(1); 8.204, subd. (a)(1)(C).) The courts have recognized a limited exception for '[t]he 'Brandeis brief,' which brings social statistics into the courtroom." (*Rivera v.*

---

[5] *Ewing v. Goldstein* (2004) 120 Cal.App.4th 807, 816.

Division of Industrial Welfare (1968) 265 Cal.App.2d 576, 572 n. 20.) For example, amicus California Psychiatric Association (PSA) quotes from a study on gun violence proffered by The Jed Foundation in its UCLA-paid-for amicus brief in the Court of Appeal. (PSA at 7 fn. 2) Rosen completely discredited Jed's reliance on that study and demonstrated how Jed's other published articles support a finding of duty on the facts of this case. (Rosen's response to The Jed Foundation, filed 2-9-15 at 9, 11.)

II. Duty depends on circumstances. Amici's fears of unlimited liability to all public sectors are unfounded.

Both the California State University and the California Medial Association indulge in hyperbole. No risk exists that CSU staff will be called upon to apply "unfounded and undefined criteria" in discharging the duty they have led their students to expect. As UCLA expert Deisinger states, colleges can prevent targeted violence from occurring using well-established protocol. (7EX1912.) UCLA's own director of Counseling and Psychiatric Services, Elizabeth Gong-Guy, acknowledged applying UCLA's protocols to intervene in eight of 116 cases UCLA's Consultation and Response Team considered in 2009-2010.[6] Rosen has never argued for broad duties with undefined criteria. She is concerned about her case, not about what happens at CSU campuses or, as

---

[6] Boyarsky, *UCLA response teams act to prevent violence on campus* (Daily Bruin, Feb. 2, 2011.)

the California Medical Association posits, for California health care providers.

The Court of Appeal majority fashioned a broad, no-duty rule on its own. Rosen asserts she should not be forced to bear the burden of UCLA's mistakes in operating the threat-assessment protocols it elected to adopt and which became part of UCLA's marketing plan[7] to students and their families.

CSU and the CMA complain that imposing a duty on UCLA under the circumstances of this case would be bad public policy. But they do not point to any competing policies and ignore the those on which Rosen relies founded in the California Constitution (Art. 1, § 28) and workplace-safety precedents such as *Franklin v. Monadnock Co.* (2007) 151 Cal.App.4th 252. Amici apparently recognize that the campus-drinking and intramural-

---

[7] That colleges choose to market safety to students is not just an outgrowth of Virginia Tech. The Clery Act (20 U.S.C. § 1092, subd. (f)) requires colleges to report campus-crime statistics just so that students can have that information when they choose colleges. For CSU or the Regents to say that we have safe campuses without qualifying that statement with "but we're not responsible if anything happens to you" is a species of fraud–"The suppression of a fact, by one . . . who gives information of other facts which are likely to mislead for want of communication of that fact." (Civil Code section 1710.)

fighting cases[8] relied upon by the majority below have no application because they make no attempt to rely on them.

Amici postulate dire consequences should the Court rule for Rosen and conclude that under the circumstances of *this* case, UCLA had a duty to her regarding the threat Thompson posed. (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472 [this "particular plaintiff is entitled to protection."].) CMA's Chicken-Little argument dissolves when the proper duty analysis is employed, focused on the particular facts of this case. Rosen debunked each of UCLA's policy arguments in her reply on the merits by pointing out that UCLA was already conducting threat assessment without dire consequences to campus life and student mental-health programs. (RBM 19-21.) Like UCLA before them, amici do not advance a single policy argument why the victims of a college's threat-assessment mistakes should bear the burden of them.

III. UCLA never met its summary-judgment burden regarding Dr. Green.

The California Psychiatric Association argues that Rosen, as the party opposing summary judgment, had the burden of producing evidence that Dr. Green knew of a threat to reasonably-identifiable potential Thompson victims. Rosen asserts that Dr. Green had the burden of producing evidence that

---

[8] E.g., *Crow v. State of California* (1990) 222 Cal.App.3d 192; *Tanya H. v. Regents of the University of California* (1991) 228 Cal.App.3d 434; *Ochoa v. California State University* (1999) 72 Cal.App.4th 1300.

she did not have such knowledge. The answer lies in *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 857-858.

> [I]f a defendant moves for summary judgment against such a plaintiff, he may present evidence that would require such a trier of fact not to find any underlying material fact more likely than not. In the alternative, he may simply point out—he is not required to present evidence (Citation)—that the plaintiff does not possess, and cannot reasonably obtain, evidence that would allow such a trier of fact to find any underlying material fact more likely than not.

Dr. Green never sought to rely on the first prong of the Court's test. No declaration exists from her or any of the other UCLA personnel who were scrambling to locate and intervene with Thompson the final days. Rather, she argued that the email flowing back and forth between her and the other members of the Consultation and Response Team did not support an inference of the requisite knowledge on her part. (1EX57.) This was not enough.

Rosen demonstrated how the record supported an inference of the duty-creating knowledge. (RBM 25-26.) And thus she met whatever burden of production shifted to her.

CONCLUSION

California State University and the California Medical Association fail to advance any legal analysis or policy reasons why, on the circumstances of this case, Rosen should bear the burden of UCLA's threat-assessment mistakes. The California

Psychiatric Association would create a special rule for summary judgment where Civil Code section 43.92 was involved.

In the end, amici add little or nothing to the discussion. UCLA owed Rosen the care it promised her when she enrolled.

Dated: August 25, 2016

ALAN CHARLES DELL'ARIO
PANISH, SHEA & BOYLE, LLP

_____
Alan Charles Dell'Ario
Attorneys for Katherine Rosen

WORD COUNT CERTIFICATE

I certify that the foregoing Response to Amici Curiae contains 1,466 words as returned by Word Perfect X6.

Alan Charles Dell'Ario

PROOF OF SERVICE

I declare that:

I am employed in the County of Napa, California. I am over the age of eighteen years and not a party to the within cause; my business address is 1561 Third Street, Suite B, Napa, California 94559. On August 25, 2016, I served the within Response to Amici Curiae on the below named parties in said cause, by placing true copies thereof enclosed in sealed envelopes with postage thereon fully prepaid, in the United States mail at Napa, California addressed as follows:

Charles F. Robinson
University of California
1111 Franklin St., 8th Flr.
Oakland, CA 94612

Attorney for Petitioners

Kevin S. Reed
University of California Los Angeles
2135 Murphy Hall
405 Hilgard Ave.
Los Angeles, CA 90095
Attorneys for Petitioners

Kenneth A. Maranga
MARANGA •MORGENSTERN
5850 Canoga Ave., Ste. 600
Woodland Hills, CA 91637
Attorneys for Petitioners

Feris M. Greeberger
GREINES, MARTIN, STEIN & RICHLAND, LLP
5900 Wilshire Blvd., 12th Flr.
Los Angeles, CA 99036
Attorneys for Petitioners

Hon. Gerald Rosenberg
Los Angeles Superior Court
11701 S. La Cienega
Los Angeles, CA 90045

Daniel H. Willick
1875 Century Park East, #1600
Los Angeles, CA 90067
Attorney for California Psychiatric Association, et al.

Cassidy C. Davenport
Cole Pedroza LLP
2670 Mission St., Ste. 200
Pasadena, CA 91108
Attorneys for California Medical Association, et al.

William C. Hsu
California State University, Office of the General Counsel
401 Golden Shore, 4th Flr.
Long Beach, CA 90802
Attorney for California State University

Sharon J. Arkin
1720 Winchuck River Road
Brookings, OR 97415

Attorney for Consumer Attorneys of California, et al.

I served the Court of Appeal, Second District, Division Seven via e-submission.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on August 25, 2016 at Napa, California.

Alan Charles Dell'Ario