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

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

I. The Court's recent decisions[1] applying the *Rowland* factors[2] support a finding of duty even in the absence of a special relationship.

"The general rule is that an employee of a public entity is liable for his torts to the same extent as a private person and the public entity is vicariously liable for any injury which its employee causes to the same extent as a private employer." (*C.A. v. William S. Hart Union High Sch. Dist.* (2012) 53 Cal.4th 861, 868, Gov. Code, §§ 815.2, 820.) The public employee's duty derives from the same statutory and common-law bases as does a private employee. (*Lugtu v. California Highway Patrol* (2001) 26 Cal.4th 703, 715–16 *(Lugtu)*) ["defendants' potential liability for [its employee's] conduct, turns on ordinary and general principles of tort law," applying Civ. Code, § 1714].)

In *Kesner v. Superior Court (Kesner)* (2016)1 Cal.5th 1132, the Court considered the duty of an employer to prevent secondary exposure to asbestos. The plaintiff's uncle, an employee of the

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[1] *Kesner v. Superior Court* (2016) 1 Cal.5th 1132 *(Kesner), Vasilenko v. Grace Family Church* (2017) 3 Cal.5th 1077 (*Vasilenko*) Rosen focuses her discussion on *Kesner* as *Vasilenko* applied the *Rowland* factors to premises liability.

[2] Some confusion exists among the Courts of Appeal as to whether the *Rowland* analysis is subsumed by the special-relationship doctrine or is applied as a further limit on special-relationship-based duty. (Compare *Conti v. Watchtower Bible & Tract Society of New York, Inc.* (2015) 235 Cal.App.4th 1214, 1228, with *Doe v. United States Youth Soccer Association, Inc.* (2017) 8 Cal.App.5th 1118, 1131.)

defendant employer, had exposed plaintiff to asbestos carried home from defendant's workplace. Years later, plaintiff contracted mesothelioma. (*Id.* at p. 1140.)

The Court first addressed the duty of the employer. Writing for a unanimous court, Justice Liu commenced the analysis with the proposition "'California law establishes the general duty of each person to exercise, in his or her activities, reasonable care for the safety of others.' (Citation.)" (*Kesner*, *supra*, 1 Cal.5th at p. 1142.) Duty is the rule; no duty is the exception. (See *Johnson v. State of California* (1968) 69 Cal.2d 782, 798 ["The 1963 Tort Claims Act did not alter the basic teaching of *Muskopf v. Corning Hospital Dist.* (1961) 55 Cal.2d 211, 'when there is negligence, the rule is liability, immunity is the exception.'"]) Any exception to duty should be "clearly supported by public policy." (*Kesner*, *supra*, at p. 1143.) These principles apply with equal force to the public employees who are liable for their torts "to the same extent as private person[s]." (Gov. Code, § 820.)

The Court of Appeal majority opinion founders on this basic principle. The majority starts with the premise that no-duty is the general rule. (Opn. 14.) The majority compounds the error by viewing the UCLA employees' conduct as nonfeasance when Rosen is complaining about their *misfeasance* in executing UCLA's violence-prevention, threat-assessment procedures. (Opn. 15.) Those procedures required the employees take certain action but they did so negligently, resulting in grievous harm to Rosen. (See *Lugtu*, *supra*, 26 Cal.4th at pp. 716–17.) This is misfeasance.

A. Injury to a student is a foreseeable consequence of the UCLA employees' failure to execute the threat-assessment protocols with due care.

As does Rosen, the Court cited *Tarasoff v. Regents of the Univ. of California* (1976) 17 Cal.3d 425, 434 for the proposition that foreseeability is the "most important factor in determining whether to create an exception to the general duty to exercise ordinary care." (*Kesner*, *supra*, 1 Cal.5th at p. 1145; OBM 25.) Is "the category of negligent conduct at issue sufficiently likely to result in the kind of harm experienced . . . .?" (*Ibid.*) The question is not whether Thompson's assault on Rosen could have been foreseen, but whether injury to students in the classroom "is *categorically* unforeseeable" when UCLA's Consultation and Response Team and its Violence Prevention and Response Team fail to do their jobs. (*Id.* at p. 1144.) If not, then do "clear considerations of policy" justify an exception to the duty to use due care? (*Ibid.*)

The Court need not engage in extended analysis to reach the inexorable conclusion that harm to students is foreseeable when employees charged with implementing programs designed to "address the needs of students of concern . . . and consult with . . . individuals impacted by a student's behavior" fail to do so. (UCLA "Faculty & Staff 911 Guide" 2 [5EX1431].) The UCLA directs its faculty, staff and students to address "questions about potential violence in the workplace" to the Violence Prevention and Response Team. ("Preventing and Responding to Violence in the UCLA Community" (2009) 2 (*Preventing*) [3EX642].) If the Violence Prevention and Response Team members fail to do their jobs properly, violence is foreseeable.

B. Rosen's injury is "certain" and closely connected to the UCLA employees' negligent conduct.

The second *Rowland* factor is the "degree of certainty that the plaintiff suffered injury." (*Kesner*, *supra*, 1 Cal.5th at p. 1148.) Rosen's life-threatening wounds "are certain and compensable under the law." (*Ibid.*)

"The third *Rowland* factor, 'the closeness of the connection between the defendant's conduct and the injury suffered,' is strongly related to the question of foreseeability itself." (*Kesner*, *supra*, 1 Cal.5th at p. 1148) "In determining whether one has a duty to prevent injury that is the result of third party conduct, the touchstone of the analysis is the foreseeability of that intervening conduct. (Citation.)" (*Ibid.*) UCLA had violence-prevention measures in place to address the very type of threat students like Thompson posed. Staff had undertaken steps to avoid Thompson's specific "intervening" conduct. He was a student with a "history of violence." (4EX925.) After issuing threats against other students, he made good on those threats. Harm to students at the hands of fellow students is foreseeable when college employees fail to properly execute measures implemented to prevent those fellow students from inflicting harm.

C. Policy considerations overwhelmingly support the imposition of liability.

Foreseeability, standing alone, does not "create an independent tort duty." (*Kesner*, *supra*, 1 Cal.5th at p. 1151.) The

Court must "weigh[] the policy considerations for and against imposition of liability." (*Ibid.*) "These policy considerations include the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved." (*Ibid.* citing *Rowland.*)

1. Moral blame attaches because UCLA students are vulnerable and powerless in the classroom and because UCLA touted the very measures that failed.

The Court has "previously assigned moral blame, and [] relied in part on that blame in finding a duty, in instances where the plaintiffs are particularly powerless or unsophisticated compared to the defendants or where the defendants exercised greater control over the risks at issue." (*Kesner*, *supra*, 1 Cal.5th at p. 1151.) UCLA claims "[c]ollege students are not a captive audience" when on the campus. They are "free" to come and go. (ABM 18.) But they are captive in the classroom where they must be to fulfill degree requirements. And more importantly to the policy analysis here, students are "particularly powerless or unsophisticated *compared to the defendants*" who "exercised greater control over the risks at issue." (*Ibid.*) UCLA disseminated materials touting its commitment "to providing a safe work environment for all faculty, staff and students–one that is free from violence and threats of harm." (*Preventing, supra,* at 2 [3EX642].)

UCLA had protective measures in place. "We have said that if there were reasonable ameliorative steps the defendant could have taken, there can be moral blame 'attached to the defendants' failure to take steps to avert the foreseeable harm.' (Citation.)" (*Vasilenko*, *supra*, 3 Cal.5th 1077[3] .)

UCLA's and the majority's attempts to shoehorn the facts of this case into out-of-date principles derived from cases involving campus drinking or fighting on the sports field fail under this analysis, too.

2. Preventing future harm will be served by imposing liability.

"The overall policy of preventing future harm is ordinarily served, in tort law, by imposing the costs of negligent conduct upon those responsible." (*Kesner*, *supra*, 1 Cal.5th at p. 1150.) No "laws or social mores" indicate approval of UCLA's failures. (*Ibid.*)

"[S]hielding tortfeasors from the full magnitude of their liability for past wrongs is not a proper consideration in determining the existence of a duty. Rather, our duty analysis is forward-looking, and the most relevant burden is the cost to the defendants of upholding, not violating, the duty of ordinary care." (*Kesner*, *supra*, 1 Cal.5th at p. 1152.) UCLA postulates "undesirable consequences" from imposing liability but Rosen has

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[3] 224 Cal.Rptr.3d at 856. Official pinpoint citation unavailable as of this writing.

shown these so-called undesirable consequences are imagined or just plain false. (OBM 65–66, RBM 19–21, see also Justice Perluss' dissent 11–12.)

3. California public policy demands that college classrooms be free from foreseeable violence.

Additional, compelling public policy considerations not present in *Kesner* point to the imposition of liability here. As Rosen explained in her opening brief, the people of California find campus safety so important they have made it part of their Constitution. (OBM 26–28, Cal. Const,, art. I, § 28.) UCLA cannot point to any competing public policy. "In sum, proper application of the *Rowland* factors supports the conclusion that defendants had a duty of ordinary care. . . . ."(*Kesner*, *supra*, 1 Cal.5th at p. 1156.)

II. The *People v. Sanchez* and *Perry v. Bakewell Hawthorne LLC* decisions make clear that UCLA failed to meet its initial summary-judgment burden because its supporting evidence was inadmissible.

"A party may not raise a triable issue of fact at summary judgment by relying on evidence that will not be admissible at trial." (*Perry v. Bakewell Hawthorne, LLC* (2017) 2 Cal.5th 536, 543 *(Perry)* [expert excluded for discovery violation].) A party moving for summary judgment is subject to the same admissible-evidence requirement. (See Code Civ. Proc., § 437c, subd. (c).) Thus, inadmissible evidence may not be used to support or oppose a summary-judgment motion. (*Perry*, *supra*, at p. 540.)

A. UCLA's attorney did not properly authenticate the exhibits.

In support of UCLA's motion, attorney Kenneth Maranga sought to authenticate all the exhibits offered by stating:

> The large majority of the documents comprising the exhibits have been produced by The Regents in discovery in response to plaintiff's multiple requests for production. Upon information and belief, all the documents are true and correct copies of the originals. The defendants' responses to the requests for production and documents produced have been verified by an authorized representative of the Regents . . . .

(2EX291.)

No produced-in-discovery exception to the hearsay rule exists. Maranga's declaration fails to provide any business-record foundation as required by Evidence Code section 1271. "Declarations based on information and belief are insufficient to satisfy the burden of . . . the moving . . .party on a motion for summary judgment. . . ." (*Lopez v. Univ. Partners* (1997) 54 Cal.App.4th 1117, 1124.)

Rosen objected to the Maranga Declaration and the exhibits. (8EX2196–2203.) Afterward, UCLA attempted to cure its evidentiary deficiencies with a declaration from its Director of Insurance and Risk Management and a new declaration from its lawyer. (9EX2254, 10EX2417.) But these came too late and contravened due process. (*San Diego Watercrafts, Inc. v. Wells*

Fargo Bank, N.A. (2002) 102 Cal.App.4th 306, 316.) Rosen objected. The trial court ultimately overruled the objections. (10EX2670.)

B. The expert declarations were inadmissible to the extent they presented case-specific facts.

"What an expert cannot do is relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception." (*People v. Sanchez* (2016) 63 Cal.4th 665, 686 *(Sanchez).*) A summary-judgment moving party who supports its motion with such inadmissible, expert-related hearsay fails to meet its initial burden of production. (*Aguilar v. Atl. Richfield Co.* (2001) 25 Cal.4th 826, 850.)

With its summary-judgment moving papers, UCLA filed declarations of Eugene Deisinger and Mark Mills. Deisinger is a self-described threat-assessment expert. (1EX173.) Mills is a medical doctor and mental-health expert. (1EX225–26.) Both Deisinger and Mills declared that they had "determined the following facts" and proceeded with over 140 paragraphs of case-specific facts derived from various hearsay exhibits. (1EX174–210 [Deisinger], 227–261 [Mills[.) Rosen objected on the grounds that expert's hearsay recitation of case-specific facts cannot be offered for the truth of that hearsay. (8EX2200–02.) The trial court overruled that objection, too. (10EX2670.) Rosen raised it again in her return to the Court of Appeal's order to show cause. (Rtn. 22–24.) But the majority was not concerned. Indeed, the majority opinion fails to address the issue at all.

Rosen did not raise this evidentiary issue as part of her petition for review. But the Court's power of decision extends to any issue presented by the case. (Cal. Rules of Court, rule 8.516(b)(1).) The Court's post-briefing decisions make clear that the rules of evidence are not mere boilerplate in the summary-judgment context. "Because a successful summary judgment motion denies the losing party a trial, the papers of the moving party are strictly construed while those of the losing party are liberally construed." (*Yanez v. Plummer* (2013) 221 Cal.App.4th 180, 183.) UCLA's failure to present competent evidence in its moving papers means it failed to meet its initial burden and presents the Court with an additional reason why the Court of Appeal's decision should be reversed.

Conclusion - Duty Exists, the Real Dispute is About Standard of Care and its Breach

Rosen has never sought to impose a duty on the UCLA employees beyond that they exercise reasonable care for her classroom safety as they carry out their activities as UCLA employees. Those "activities" are set forth in the violence-prevention, threat-assessment policies and procedures UCLA promulgated and touted to teachers, staff, students and their parents. As the UCLA experts make clear, UCLA's dispute with Rosen is really about the standard of care and its breach. Resolution of that dispute lies with the jury. The Court should reverse the judgment of the Court of Appeal and remand with directions to vacate its peremptory writ and to enter a new order denying the petition.

Respectfully submitted,

Dated: December 11, 2017 By: /s/ Alan Charles Dell'Ario

Attorney for Real Party in Interest

CERTIFICATE OF COMPLIANCE

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Attorney for Real Party in Interest

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S230568

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