No. S230568

Public Entity
~ No Fee Required ~
Gov. Code, § 6103

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, a public entity; ALFRED BACHER; CARY PORTER; ROBERT NAPLES; and NICOLE GREEN, public employees,

Defendants and Petitioners,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF LOS ANGELES,

Respondent.

KATHERINE ROSEN, an individual,

Plaintiff and Real Party in Interest.

2d Civil No. B259424
(Court of Appeal, Second District, Division 7)

(Los Angeles Superior Court, West District, Case No. SC108504, Hon. Gerald Rosenberg, Judge)

SUPREME COURT
FILED

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Deputy

ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

No question about it—the *facts* in this case, as in many tort cases, are disquieting. But the *law* under which the Court of Appeal majority held that the UCLA defendants owed no duty to protect Rosen from Damon Thompson's criminal attack is well-settled and unremarkable.

The Court of Appeal carefully considered Rosen's arguments, and the majority rejected each of them. The majority observed, among other things, that there was "no basis to depart from the settled 'rule that institutions of higher education have no duty to their adult students to protect them against the criminal acts of third persons'" (Slip opn. 18, quoting *Ochoa v. California State University* (1999) 72 Cal.App.4th 1300, 1306, disapproved of on other grounds in *Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 160, fn. 5); that the case is not governed by the "'separate body of law'" governing supervision of students in collegiate athletic programs and the like, endorsed by this Court in *Avila* (Slip. opn. 19, quoting *Avila*, *supra*, 38 Cal.4th at p. 159); and that Rosen did not qualify as a business invitee onto campus property under this Court's decision in *Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112 (Slip opn. 21-23).

Dissenting Justice Perluss does not say the majority got the law wrong. Rather, he advocates reworking the law substantially, and that is exactly what Rosen, in her petition, asks this Court to do. Justice Perluss would find that a "special relationship exists between a college and its enrolled students, at least when the student is in a classroom under the

direct supervision or an instructor, and [that] the school has a duty to take reasonable steps to keep its classrooms safe from foreseeable threats of violence." (Dis. opn. 2; *id.* at 11 ["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"]; see Petition for Review 8 [Question Presented].) Reacting to recent incidents of campus violence that have focused nationwide attention on enhancing campus safety (Dis. opn. 1-2), with a nod to neuroscience studies evaluating the maturity of adults under age 25 (Dis. opn. 10-11, fn. 6), the dissent and Rosen call for an extension of "special relationship" doctrine.

Yet, to do so would unravel decades of California jurisprudence establishing (a) that persons generally owe no duty to protect against criminal attacks by third parties, (b) that the K-12 special relationship and duty of supervision does not extend to the college context outside the setting of discrete programs such as athletics, and (c) that only mental health professionals face liability for failing to warn concerning dangers posed by mentally ill persons, and even then only in the face of articulated serious physical threats against readily identifiable persons.

Such a revolution is uncalled for. Indeed, not only is it uncalled for, but, if undertaken, it would spell havoc for California colleges and universities, which would face not only unprecedented responsibility to warrant the safety of their adult students on campuses that far more resemble cities than they do K-12 institutions, but also hard decisions about

whether to treat or even enroll promising students who face the challenges of mental illness. Further, Rosen and the dissent would first create a new duty for college professors and administrative staff, similar to the existing standard governing a psychotherapist under Civil Code section 43.92, which requires a communication of an actual serious threat of physical violence. Worse yet, they would impose a lower standard of liability for these individuals—who lack mental health training—down to a "should have known" standard.

Rosen was attacked in a UCLA classroom, but the attack had nothing to do with the physical condition of the chemistry lab where she and Thompson did their work, or with the chemistry curriculum in that course. And, as the Court of Appeal majority opinion soberly recounts—notwithstanding Rosen's sensationalized depiction—Thompson had never articulated a threat or intent to commit physical violence against Rosen or any identifiable person. The attack could have happened any time, anywhere—in the cafeteria, in the library, or anywhere on UCLA's 419-acre campus, and does anyone seriously think that Rosen's decision to file her lawsuit hinged on the *classroom location* of the attack? No, if Rosen had her way, California colleges and universities would be broadly vulnerable to liability here and in any case involving a tort or crime committed by a student known to be coping with mental illness, in the name of preserving campus safety.

Moreover, the facts could hardly be farther from a case of university neglect. On the contrary, some 19 UCLA medical/mental health providers

saw Thompson or were consulted about his mental health since he arrived at UCLA. UCLA personnel had repeatedly discussed Thompson and made recommendations for his treatment and management, which could not be compelled but which he was convinced to accept voluntarily, even as late as eight days prior to this assault when he discussed the absence of any intent to harm others with his point psychiatrist at UCLA. Again and again, including mere days before the attack, Thompson was questioned about and denied impulses or plans to harm himself or others. There was nothing UCLA's personnel reasonably could have done with Thompson or for Rosen that they did not undertake to do.

Review by this Court is in order where it is "necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).) Review is not necessary in this case. There is no conflict in the law. The important legal questions have already been resolved. The posited extension of K-12 school liability to institutions of higher learning is bad law and worse policy. The Court of Appeal majority was correct. The petition for review should be denied.

STATEMENT OF THE CASE

A. Background.

Katherine Rosen, a UCLA undergraduate student, sustained severe injuries in a knife attack by another student, Damon Thompson, in a chemistry lab in which both were enrolled. Over an extended period before the attack, UCLA had treated Thompson for symptoms indicative of

schizophrenia disorder, including auditory hallucinations and paranoid thinking. (Slip opn. 2.) Thompson had never articulated a serious threat of violence against Rosen or anyone, at most identifying Rosen to a teaching assistant as being among a number of students whom he accused of belittling him. (See 5 Exhibits 1364-1370[1]; Slip opn. 3-8.)

B. Procedural History.

Rosen filed a negligence action in Los Angeles Superior Court against the Regents of the University of California and several UCLA employees (collectively, "the UCLA defendants"). She alleged that the UCLA defendants had breached their duty of care by failing to adopt reasonable measures that would have protected her from Thompson's supposedly foreseeable violent criminal conduct.[2] (Slip opn. 2.)

The UCLA defendants moved for summary judgment, arguing that public colleges and universities and their employees owe no legal duty to protect their adult students from third party criminal misconduct. (Slip opn. 2.) The trial court denied the motion, ruling that the UCLA defendants owed Rosen a duty of care based on her status as a student and, alternatively, as a business invitee onto campus property (even though Rosen never pleaded any dangerous condition of public property and has conceded none is involved; see Slip opn. 23). (Slip opn. 2.) The court further found there to be triable issues of material fact as to whether UCLA

1/ Citations are to the exhibits filed in the Court of Appeal.

2/ Rosen also named Thompson as a defendant. He is not a party to these proceedings.

had voluntarily assumed a duty to protect Rosen by providing mental health treatment to Thompson. (Slip opn. 2.) *Rosen has repeatedly disavowed any claim for a traditional Tarasoff allegation of professional negligence against any of Thompson's UCLA mental health providers.* (See, e.g., 5 Exhibits 1215-1226 [operative Second Amended Complaint]; cf. Petition for Writ of Mandate 44 & fn. 7.)

The UCLA defendants petitioned the Second District Court of Appeal for a writ of mandate, and Division Seven of that court issued an order to show cause. (Slip opn. 2.)

In a published split decision, the Court of Appeal granted the UCLA defendants' petition, the majority "concluding that a public university has no general duty to protect its students from the criminal acts of other students." (Slip opn. 2.) Presiding Justice Perluss, dissenting, declared that he would find that "a special relationship exists between a college and its enrolled students, at least when the student is in a classroom under the 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. opn. 2.)[3/]

[3/] Although denominated a dissenting opinion, it actually is a partial dissent, as Justice Perluss agrees with the majority that one defendant, Dr. Nicole Green—who was Thompson's treating psychologist—is entitled to summary judgment. (Dis. opn. 15 ["Rosen failed to allege the elements of a failure-to-warn claim pursuant to Civil Code section 43.92—specifically, that a serious threat of harm to Rosen was actually communicated to Dr. Green, either by Thompson himself or by others to whom Thompson had spoken. (See *Ewing v. Goldstein* (2004) 120 Cal.App.4th 807, 821. Accordingly, it appears as if summary judgment

(continued...)

Rosen filed a petition for rehearing, which was denied. Rosen's petition for review followed.

ARGUMENT

I. THE PETITION SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT IN THE CASE LAW AND NO IMPORTANT QUESTION OF LAW THAT REQUIRES RESOLUTION.

According to Rosen, the Court of Appeal majority crafted a broad, inflexible rule that is anathema to duty analysis. (Petition 21-22.) That just isn't so. Rather, what the majority opinion demonstrated is that proper resolution of this case called for a straightforward application of established law to the facts.

The Petition for Review makes little mention of most of the majority's analysis.[4] In holding that Rosen's claims are barred as a matter of law because the UCLA defendants owed no duty of care to protect Rosen from, or warn her against, Thompson under the given circumstances, the

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[3](...continued)
was properly ordered as to Dr. Green"] 21 ["I would deny the petition except as to Dr. Green"].) The Petition for Review appears not to challenge the Court of Appeal's unanimous conclusion in favor of Dr. Green.

[4] The Petition for Review tellingly ignores several key decisions in the majority's analysis, including *Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th 1112; *Williams v. State of California* (1983) 34 Cal.3d 18; *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224; and *Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809.

majority explained in detail why California law does not support any of the grounds put forward by the superior court, the dissent, or Rosen for their conclusion that a special relationship existed, or should be found to have existed, between Rosen and the UCLA defendants, giving rise to a duty of care. (Slip opn. 14-34.)

As the dissent acknowledged (Dis. opn. 4), as a general matter,"there is no duty to come to the aid of another (*Williams v. State of California* (1983) 34 Cal.3d 18, 23), to protect others from criminal conduct of third parties (*Delgado* [*v. Trax Bar & Grill* (2005) 36 Cal.4th 224,] 235) or to warn those endangered by such conduct (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1129.)" All three members of the panel agreed that in order for the UCLA defendants to have owed Rosen a duty of care under the facts, the duty had to be founded on the existence of a special relationship. (Slip opn. 14-15; Dis. opn. 4.) But, as the majority showed, no such relationship can be established under existing law.

A. There Is No Duty To Supervise Or Protect Students At The College/University Level.

Although courts have held that the responsibility of supervision gives rise to a special relationship and duty of care in the K-12 context (e.g., *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 870-871), "[o]ur courts have consistently held, however, that an adult student's affiliation with a college or university does not give rise to a similar duty." (Slip opn. 16.) After surveying the K-12 duty landscape, and clearly having well in mind both the material distinctions between

supervision of schoolchildren and the present facts, the majority concluded, "We find no basis to depart from the settled 'rule that institutions of higher education have no duty to their adult students to protect them against the criminal acts of third persons.'" (Slip opn. 18, quoting *Ochoa v. California State University*, *supra*, 72 Cal.App.4th at p. 1306.) The majority did what appellate courts do—it applied settled law to the facts of the case.

B. There Is No Connection Between Rosen's Injury And Any Classroom Instruction.

Similarly, the majority examined and found inapplicable the exception to the general no-duty rule that has developed in cases involving injuries sustained or crimes committed within the confines of college athletics programs or pedagogy, such as *Avila v. Citrus Community College Dist.*, *supra*, 38 Cal.4th 148 (intentional injury inflicted during an intercollegiate baseball game) and *Patterson v. Sacramento City Unified School Dist.* (2007) 155 Cal.App.4th 821 (injury sustained while performing activity that was part of the curriculum in an adult truck driver training course). As the majority recognized, the injury here had nothing whatsoever to do with the curriculum or with the physical condition of the chemistry lab. As the majority noted, "While *Patterson* suggests colleges and universities owe a duty to ensure their adult students do not injure themselves while performing class-related tasks, the case has no relevance to the question presented here: whether an adult student shares a special relationship with his or her school that gives rise to a duty to protect from

third party misconduct." (Slip opn. 21.) Again, an application of settled law to given facts.

C. Rosen Laid No Foundation For Business Invitee Liability, And That Theory Is Unavailable To Her Anyway.

The majority likewise applied settled law in rejecting the contention that the UCLA defendants owed a duty to protect Rosen from Thompson's criminal conduct on based on asserted status as a business invitee onto campus property. (Slip opn. 21-23.) Under this Court's decision in *Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th 1112, "a public college or university may not be held liable as a property owner for injuries caused by third party criminal conduct that is unrelated to any physical condition of the property[, and] Rosen concedes that she does not allege any physical condition on the property contributed to Thompson's actions or to her injuries." (Slip opn. 23.) Rather, "Rosen is asserting only that UCLA had a duty to protect her from foreseeable criminal conduct based solely on its status as the 'possessor of land' on which the crime occurred" and "Government Code section 835 precludes that claim." (Slip opn. 23, footnote omitted.)

D. There Is No Evidence Supporting Rosen's Theory That The UCLA Defendants Owed A Duty Of Care Under The Negligent Undertaking Doctrine.

Rosen asserted that "UCLA owed a duty to protect her from Thompson's criminal acts under the 'negligent undertaking doctrine,' which has been characterized as an 'exception to the no-duty-to-protect rule.'"

(Slip opn. 24, quoting *Delgado v. Trax Bar & Grill*, *supra*, 36 Cal.4th at p. 235, fn. 13.) But the majority observed that Rosen's claim failed "[e]ven assuming [she] could establish that UCLA did undertake to protect its students from potentially violent students and that it performed this task in a negligent matter" because "[t]o prevail under the negligent undertaking doctrine," she had to "additionally prove" either "(1) that UCLA's actions increased her risk of physical harm, or (2) that she relied on UCLA's undertaking and suffered injury as a result." (Slip opn. 25, citing *Paz v. State of California* (2000) 22 Cal.4th 550, 560.)

Combing the record, the majority concluded that Rosen failed to produce evidence of either prerequisite, noting that she "has provided no evidence that UCLA's actions increased the risk of harm that Thompson posed to her beyond that which existed before the school had taken any action to address his mental condition" and "also failed to provide any evidence that she was harmed because she detrimentally relied on UCLA's student safety measures." (Slip opn. 26.) As the majority explained, yet again applying well-settled law, "UCLA's alleged failure to neutralize the risk that Thompson posed to her is not sufficient to demonstrate an 'increased risk of harm" (Slip opn. 26) and "Rosen cites no evidence that she personally relied on [UCLA's] assurances or that her reliance resulted in her injuries" (Slip opn. 27). "Indeed," the majority observed, "Rosen has failed to cite any evidence that she was even aware of such policies at any time prior to Thompson's attack." (Slip opn. 27.)

E. There Is No Evidence Raising Triable Issues Under The "Implied-In-Fact Contract" Or "Workplace Violence" Theories That Rosen Raised For The First Time In The Court Of Appeal.

Finally, the majority deftly rejected two theories that Rosen newly minted in her appellate papers—that her matriculation at UCLA created an implied-in-fact contract creating a duty to protect her from foreseeable criminal conduct, and that UCLA owed a duty to protect her based on labor statutes that require employers to address threats of violence in the workplace. (Slip opn. 30-34.) The majority noted that the contract theory, if accepted, "would effectively impose a duty on every college and university to protect their students against third party misconduct" and, as explained earlier in the majority opinion, "our courts have rejected such a rule." (Slip opn. 32-33.) The majority concluded further, again applying existing law, that general declarations or promises in UCLA's safety brochures did not amount to any "'specific promise' that the university would undertake a legal duty to protect its students from third party misconduct." (Slip opn. 33, citing *Kashmiri v. Regents of University of California*, *supra*, 156 Cal.App.4th at pp. 825, 829, 832.) As to the workplace theory, the majority observed that Rosen had "produced no evidence she was an employee of UCLA, nor has she provided any

authority that the workplace statutes she cites extend to college students who are not otherwise employed by their school." (Slip opn. 34.)[5]

This case, like most tort cases, presents unfortunate facts, but that is all. There is no conflict in the governing law and there is no unresolved issue of widespread importance calling for this Court's intervention. The Petition should be denied for these reasons. And, as we next address, there is no merit to Rosen's campaign to have the Court use the case as a vehicle for a revolution in higher-education duty analysis.

II. THE PETITION SHOULD BE DENIED BECAUSE THE SUBSTANTIAL REWORKING OF CALIFORNIA LAW THAT ROSEN ADVOCATES IS UNWARRANTED AND WOULD CAUSE MATERIAL HARM TO HIGHER EDUCATION IN CALIFORNIA.

Waving the banner of Justice Perluss's dissent, Rosen's petition asks whether California public institutions of higher education—the University of California, the California State University, and the California Community Colleges—and their employees have, or should be found to have, "duty of care to their students while in the classroom to warn of and

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[5] The employment argument, if successful, would have implications far beyond supplying a basis for finding a legal duty of care. For example, if students were somehow to be considered to be employees, questions would then arise as to the application of workers compensation, and the extent to which it might preclude liability, and in what contexts. And beyond that, there is the specter of colleges and universities being exposed to vicarious liability for students' (read "employees'") acts in their capacities as students, yet without the control that an employer exercises over traditional employees.

protect from foreseeable acts of violence by fellow students." (Petition 8.) For multiple factual, legal, and public policy reasons, the answer is no.

A. Promoting Public Safety Is A Laudable Public Policy And Is Backed By A Constitutional Provision, But The Constitutional Policy Is Not Enforceable Absent Legislative Action.

As the majority, the dissent, and Rosen all note, the California Constitution declares a right to safe schools, including college and university campuses. (Cal. Const., Art. I, § 28, subds. (a)(7), (f)(1); Slip opn. 21, fn. 6; Dis. opn. 9 & fn. 4; Petition 23.) No one disputes that promoting campus safety is good policy. In fact, UCLA, like campuses all over America in recent years, has taken steps to promote and enhance safety, as Rosen has acknowledged. (Petition 14, 24-26, 30-32.) Rosen complains that UCLA's efforts fell short.

However, as the majority makes clear, and the dissent and Rosen tersely acknowledge (Petition 23; Dis. opn. 9, fn. 4), the courts have consistently held that the constitutional provisions do not create a right of action—they "do not 'impose an express affirmative duty on any [public] agency to guarantee the safety of schools.'" (Slip opn. 21, fn. 6, quoting *Clausing v. San Francisco Unified School Dist.* (1990) 221 Cal.App.3d 1224, 1238-1239.)

Rather, the constitutional provisions are policy statements. "A public policy statement """"merely indicates principles, without laying down rules by means of which those principles may be given the force of

law.'"'"'" (*Bautista v. State of California* (2011) 201 Cal.App.4th 716, 727.) To make the rights proclaimed in the "safe schools" policy statement judicially enforceable, as the majority noted, would require legislative action. (Slip opn. 21, fn. 6, quoting *Bautista v. State of California, supra*, 201 Cal.App.4th at p. 729 ["the right to safe schools (set forth in the California Constitution) . . . require(s) legislative action to make the constitutional provision operative as a judicially enforceable right"].)

Rosen seeks to enforce a judicially unenforceable right. She is in the wrong forum. Since this Court does not legislate, Rosen's petition should be denied.

B. Even If The Court Could Extend Liability For Failure To Provide University Classroom Safety, The Evidence Here Is Patently Inadequate To Entitle Rosen To The Relief She Seeks.

According to the Petition, Rosen wants this Court to find that California public institutions of higher education owe their students "a duty of care . . . while in the classroom to warn of and protect from foreseeable acts of violence by fellow students." (Petition 8.) Assuming the Court is a proper forum, and even if the Court were inclined in the abstract to consider finding such a duty, this case does not provide a factual predicate for granting relief. The record shows, as the majority recognized, that Damon Thompson's physical attack on Rosen was not foreseeable.

No doubt, Thompson was mentally ill. No doubt, he was verbally disruptive, including in the classroom. But there is no evidence he ever

articulated a threat of physical violence against any reasonably identifiable person or group. (See Slip opn. 3-8; see, e.g., *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425; Civ. Code, § 43.92.) He complained that various students belittled him, at least once naming Rosen among them, but that's all. The knife attack was unforeseeable. So Rosen could not be entitled to recovery under the standard she asks this Court to adopt.

That Rosen is sensitive to this shortcoming in her case is evident in the way she sensationalizes the record. She tells a lurid tale. (Petition 13-17.) She highlights a Facebook message to her boyfriend in which she recounted Thompson's weird classroom behavior, including that she found his actions toward the Chemistry lab TA "super scary." (Petition 16; see 6 Exhibits 1580.) Newly minted for this proceeding, she concocts a theory that Thompson's "pre-attack history reflects his psychosis was gender-based and that he viewed women as his tormentors[,]" implying that the UCLA defendants left her vulnerable by failing to pick up on this. (Petition 34.)

But nowhere does Rosen identify evidence that Thompson articulated a credible threat of violence against her, or anyone. Why not? Because there is no such evidence.

Since Thompson never articulated any threat of violence against Rosen, the UCLA defendants could not have protected her from the attack. And since Rosen (and everyone else in class) knew Thompson was weird, or mentally impaired, and Rosen found his behavior "super scary," what,

exactly, were the UCLA defendants supposed to tell her in warning that she did not already know?

This case does not present a compelling vehicle for the revolutionary reworking of duty law that Rosen urges the Court to undertake. Again, the petition should be denied.

C. The Result For Which Rosen Argues Would Entail Needlessly Undoing Substantial Well-Settled California Jurisprudence.

The extension of special relationship law, and concomitantly of the boundaries of tort duty, for which Rosen argues would not be a small change. It would be a major overhaul in tort liability.

It would be a substantial inroad on the general principles that there is no duty to come to the aid of another or to protect others from criminal conduct. (E.g., *Williams v. State of California*, *supra*, 34 Cal.3d at p. 23; *Delgado v. Trax Bar & Grill*, *supra*, 36 Cal.4th at p. 235.) It would mean treating adult college students like schoolchildren when, as discussed in Section I, *ante*, the law up to now has been well-settled that a public university has no general duty to protect its students from the criminal acts of other students. (See Slip opn. 2.) It would eviscerate *Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th 1112, undermining its holding that a public entity cannot be liable for its business invitees absent a dangerous physical condition of public property.

Apart from her inability to identify a factual predicate that would support imposing liability in this case, Rosen has not demonstrated any

pressing societal impetus for making the changes she advocates. As noted, she herself acknowledges that colleges and universities in California and throughout the country have made a priority of modernizing and enhancing threat assessment and public safety in their student bodies and on their campuses.[6/] This Court does not undertake major jurisprudential demolition-and-reconstruction projects without a showing of urgent reasons for doing so. Rosen has made no such showing here.

D. The Special Relationship And Duty Standard That Rosen And The Court Of Appeal Dissent Advocate Would Create Unworkable Enrollment And Classroom Dilemmas For Colleges, Among Other Problems.

If the Court were to choose to grapple with the question presented, the case would give rise to multiple difficult-to-impossible complications both for the Court and, ultimately, for California colleges and universities.

- For instance, Rosen and the dissent might have a point in a case where someone sustained injury in a classroom exercise, i.e., something connected to or arising from the class content. Of course, the law already addresses higher-education safety in the program-connected context. That is the message of cases such as *Avila v. Citrus Community College Dist.*, *supra*, 38 Cal.4th 148 (intentional injury inflicted during an intercollegiate baseball game) and *Patterson v. Sacramento City Unified*

[6/] As Rosen puts it, "[t]he tragic events at Virginia Tech in 2007 were to campus safety as 9-11 was to air travel." (Petition 32.) The litigation filed in the wake of Virginia Tech did not result in liability. (See *Commonwealth of Virginia v. Peterson* (Va. 2013) 749 S.E.2d 307.)

School Dist., *supra*, 155 Cal.App.4th 821 (injury sustained while performing activity that was part of the curriculum in an adult truck driver training course).

In this case, however, the chemistry lab was nothing but the situs of the attack. Rosen's injury had nothing whatever to do with the chemistry curriculum. Why should the UCLA defendants owe a duty to protect students in the classroom outside of instruction-related injuries or attacks? Is the notion that classrooms are to be general zones of safety? If so, how would that be implemented? Does the Court conceive of all classroom personnel (College professors? Graduate student TAs?) receiving training in assessment of a student's mental state and the severity of threat posed thereby at a level comparable to that of a licensed therapist? What other types of training might be required—emergency medical training, or hand-to-hand combat training, or perhaps firearms training?

- Logistics poses another problem. A college campus, such as 419-acre UCLA, is more like a city than like a high school or lower school building. As a practical matter, is it realistic to extend the same duty of supervision and protection to the higher education campus context?

- Under the proposed law, how should UCLA have handled Thompson? He received repeated treatment and intervention; some 19 UCLA medical/mental health providers had seen Thompson or been consulted about his mental health since he arrived at UCLA. (See, e.g., 1 Exhibits 27, 117, 200, 252.) UCLA's CRT had repeatedly discussed Thompson and made recommendations for his treatment and management,

resulting in his voluntarily receiving mental health care. (E.g., 1 Exhibits 21-22, 25, 26-27, 89-90, 91-92, 104, 109, 121.) So had a CAPS Peer Review Committee composed of seven members of the CAPS professional mental health staff. (1 Exhibits 25, 27, 106, 107, 116-117; 3 Exhibits 739, 768-770, 786-791, 827.) All these personnel repeatedly questioned Thompson regarding potential suicidal or homicidal thoughts or impulses; over and over, Thompson denied harboring destructive plans. And Rosen's name never even came up in discussion. What should UCLA's non-psychiatric personnel reasonably have done with Thompson or for Rosen that they did not undertake to do, particularly when such personnel did not have the training and were not privy to information revealed during Thompson's mental health treatment?

- What about the inconsistency (not to mention the irony) in the fact that the standard advocated would make untrained lay personnel more vulnerable to liability for campus criminal attacks than are trained mental health personnel, whom case law and Civil Code section 43.92 protect? Consider this: The dissent agreed that Thompson's treating psychologist, Dr. Green, is entitled to summary judgment because Rosen neither pleaded nor produced evidence to support a "failure to warn" claim against her. Isn't it anomalous to subject persons such as administrative deans (e.g., defendants Associate Vice Chancellor and Dean of Students Robert Naples and past Senior Associate Dean of Students Cary Porter) and classroom professors (e.g., defendant chemistry professor Alfred D. Bacher, in whose chemistry class Rosen and Thompson were enrolled), and even teaching

assistants (e.g., Bacher's chemistry lab TA, Adam Goetz, who has been dismissed as a defendant but whose conduct Rosen still argues as a basis for the Regents' respondeat superior liability exposure)[7] to liability, when Thompson's treating psychologist—the very person most professionally qualified to assess Thompson's state of dangerousness—is shielded from liability?

- Finally, what would the proposed changes in the law mean for mentally ill students at California public colleges and universities? What should our colleges and universities do to protect themselves from potential liability? Assuming they can do so legally, should they refrain from enrolling students who face the challenges of mental illness? Should colleges and universities stop offering or providing mental health treatment, adopting a sort of "don't ask, don't tell" policy? The Court of Appeal majority noted the double-edged sword that would arise from imposing the duty advocated. As the majority observed:

> The consequences of imposing such a duty on institutions of higher learning are difficult to predict. Some schools might attempt to shield themselves from liability by reducing or eliminating mental health services, thereby increasing the overall risks to the student community. Other schools might chose (*sic*) to compel their students, particularly those with mental disabilities, to participate in a wider range of mental

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[7] The attack took place in the chemistry course's lab component, which, as Rosen notes, was run by teaching assistant Goetz. (Petition 16-17.) Rosen initially sued Goetz, but later dismissed him as a defendant. (See 10 Exhibits 2678 [voluntary dismissal of Goetz as a defendant on 05/22/2012].) Professor Bacher was not on campus when the attack took place; it was his wedding day. (4 Exhibits 966; 5 Exhibits 1382; 6 Exhibits 1574.)

> health services, thereby intruding on the privacy and freedoms associated with the modern college experience. A college or university's task in addressing these issues would be further complicated by various statutes that prohibit discrimination based on disabilities, including mental illness. (See, e.g., 42 U.S.C. § 12182(a); 29 U.S.C. § 794.)

(Slip Opn. 18, fn. 5.)

The extension of duty advocated here would cause more problems than it would solve. And it would not have protected Rosen. As the dissent observed, the issue of duty is essentially one of public policy. (Dis. opn. 3.) "[L]egal duties are not discoverable facts of nature, but merely conclusory expressions that, in cases of a particular type, liability should be imposed for damage done." (*Tarasoff v. Regents of University of California*, *supra*, 17 Cal.3d at p. 434.) Public policy considerations here counsel against the changes in the law of special relationships and duty that the dissent and Rosen would have this Court put in place. The petition for review should be denied.

CONCLUSION

This case does not warrant the Court's attention. The Court of Appeal's decision applies unique facts to settled law, and this Court should turn down the invitation to rework California jurisprudence establishing that colleges and universities owe no duty to protect or supervise their adult enrolled students from third party criminal attacks. The petition should be denied.

DATED: December 2, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rules 8.504(d)(1), I certify that this **ANSWER TO PETITION FOR REVIEW** contains 5,543 words, not including the cover, the tables of contents and authorities, the caption page, the signature blocks, or this Certification page.

DATED: December 2, 2015

Feris M. Greenberger

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 5900 Wilshire Boulevard, 12th Floor, Los Angeles, California 90036.

On December 2, 2015, I served the foregoing document described as: **ANSWER TO PETITION FOR REVIEW** on the interested parties in this action by serving:

****** SEE ATTACHED SERVICE LIST ******

(✓✓) By U.S. Mail: The envelope was deposited in the mail at Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

I am "readily familiar" with firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. Postal Service or Federal Express on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

Executed on December 2, 2015, at Los Angeles, California.
(✓✓) (State) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

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Court of Appeal, Second Appellate District Case No. B259424

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