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

REPLY TO ANSWER

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REPLY TO ANSWER

I. Are California public college students entitled to classrooms safe from foreseeable fellow-student violence or is such a risk simply part of the price of a public college education? It's a 2.8-million-student question.

UCLA concedes the breath of the question presented. It offers no challenge to Rosen's statistics concerning the extent of campus violence and the size of the public college population, both of which seemingly compel this Court's consideration of the questions this case presents. Rather it confines its opposition to the merits of the majority opinion, an argument that should be reserved for its merits brief.

In her petition, Katherine Rosen demonstrated how the majority holding – "a public university has no general duty to protect its students from the criminal attacks of other students" (Opn. at 2) – affects each and every one of California's 2.8 million public college students and their families. A rule that affects over ten percent of the state's population between ages 18 and 64 cannot be other than "an important question of law" (Cal. Rules of Court, rule 8.500, subd. (b)(1)) that this Court should resolve, particularly in light of the total absence of any prior Court decisions addressing the question.

Rather than dispute this premise, the Regents respond with the unsupported claim that the case merely "called for a straightforward application of established law to the facts."(Answer [Ans.] at 7.[1]) But no law, established or otherwise, exists addressing the situation presented here - foreseeable violence by one student targeted at his fellow classmates in the classroom. The decisions of this Court that present the closest factual analogy involve a shrubbery-shrouded parking structure (*Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799) and an inter-collegiate baseball game. (*Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148.)

The Court of Appeal decisions on which the majority and UCLA rely involve student drinking or participation in intramural events. (*Crow v. State of California* (1990) 222 Cal.App.3d 192 [*Crow*][dormitory drinking]; *Tanya H. v. Regents of the University of California* (1991) 228 Cal.App.3d 434 [*Tanya H*] [drinking]; *Ochoa v. California State University* (1999) 72 Cal.App.4th 1300 [*Ochoa*][intramurals].) The majority and the Regents have overlooked a basic premise of California stare-decisis jurisprudence. An opinion is authority only as to issues "actually involved and actually decided." (*Santisas v. Goodin*

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[1] Indeed, UCLA criticizes Rosen for what it characterizes as "little mention" of the majority's analysis. Not only is UCLA's claim incorrect, it ignores the purpose of a petition for review which is to present the reasons why the state's highest court should decide the issue the case presents.

(1998) 17 Cal.4th 599, 620.) "[T]he language of an opinion must be construed with reference to the facts presented by the case, and the positive authority of a decision is coextensive only with such facts.'" (*Brown v. Kelly Broadcasting Co.* (1989) 48 Cal.3d 711, 734-735.)

The cases themselves recognize this principle. *Crow* would have found a special relationship between the student victim and the university based on his residence contract–landlord-tenant–but the student failed to assert that ground of liability in his government tort claim. (222 Cal.App.3d at pp. 198-199.) *Tanya H* was also limited to its facts. "Relevant authority indicates universities are not generally liable for the sometimes *disastrous consequences which result from combining young students, alcohol, and dangerous or violent impulses.*"[2] (228 Cal.App.3d at p. 437[emphasis added].) Likewise, the *Ochoa* court found "no authority holding that a college or university forms a special relationship with its adult students, giving rise to a duty to protect them from the criminal acts of third parties, *merely by organizing and sponsoring an intramural activity. . .*" (72 Cal.App.4th at p.1305 [emphasis added].)

In other words, the decisions on which the majority and UCLA rely shed little, if any, light on what responsibilities a

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[2] Indeed, before the majority's opinion, no published opinon has cited *Tanya H.* on this point.

public college has to its students for their safety while engaged in its core function of providing a college education. They provide no basis for UCLA's and the majority's claim that the no-duty rule is settled. They do not stand for the proposition that public colleges "never owe a duty of care to their adult students." (*Patterson v. Sacramento Unified Sch. Dist.* (2007) 155 Cal.App.4th 821, 832.) Yet that is exactly what the majority has here held. *Crow, Tanya H.* and *Ochoa* highlight the need for this Court to correct the majority's serious misinterpretation of them.

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

II. The Court is reviewing an order denying summary judgment. UCLA, not Rosen, had the burden of persuasion. Rosen had no obligation to present evidence on issues UCLA did not contest.

In her return to the Court of Appeal's order to show cause, Rosen cautioned that the rules of summary judgment are more than mere boilerplate. (Return at 21-22.) But rather than apply them to UCLA's evidence–evidence that failed to contain a single sworn statement of the numerous UCLA employees whose collective negligence led to Rosen's injuries at Thompson's hands–the majority shifted the burden to Rosen to produce

evidence giving rise to duty before UCLA ever met its burden to show the absence of duty.

All UCLA did was assert that it had no special relationship with Rosen as a student. (Opn. 9-10.) Yet its separate statement of undisputed material facts, some 344 of them, recite, chapter and verse, the contract between Rosen and the University, its terms that required all students to follow its rules and student code, the extensive risk-assessment undertaking that UCLA undertook in general and the specific, failed, risk-assessment undertaking it made with Thompson. (1EX64-66 [contract and rules]; 66-166 [risk-assessment undertaking].)

On a motion for summary judgment, the burden rests on the moving defendant to affirmatively negate the existence of a duty. (*Erikson v. Nunnink* (2011) 191 Cal.App.4th 826, 848.) If the plaintiff pleads several theories, the defendant must negate all of them. (*Carlsen v. Koivumaki* (2014) 227 Cal.App.4th 879, 889.)

Rosen alleged that she "had a special relationship" because she was on campus property as a result of her contract with UCLA. (5EX 1218.) She alleged that UCLA employees had knowledge of Thompson dangerous and violent tendencies as he exhibited "increasingly bizarre behavior" "stemming from his unfound belief that students were criticizing his classroom performance. (5EX 1219.) She was stabbed by Thompson while

they both were enrolled in academic programs at UCLA. (5EX1217-1218.) When Thompson stabbed her he was under the supervision and control of UCLA employees. (5EX1218.)

Rosen had no burden to produce any evidence to support the existence of a duty until UCLA negated it and UCLA never did. UCLA's argument concerning duty was limited to the drinking-fighting cases as they address the question of a special relationship between a college and its students. (1EX37-39.) UCLA never negated the duty arising from undertaking described in its separate statement, so Rosen had no burden to show evidence supporting her reliance or increased risk.

UCLA carried forward this omission into its petition for writ of mandate in the Court of Appeal. That is, nothing in the petition questions Rosen's reliance on UCLA's undertaking and manner in which UCLA's failure to address Thompson's complaints increased the risk he would respond violently. (Petition at 33-37.) Yet the majority (and now UCLA) task Rosen for not presenting evidence on the issue. (Opn. 24-27.) As she pointed out in her petition for rehearing and petition for review, her reliance and the increased risk Thompson presented are demonstrated on the record. (Rehearing at 12-14, Review at 31.) But due process required UCLA to raise the issue before Rosen had any obligation to meet it. (*San Diego Watercrafts, Inc. v. Wells Fargo Bank, N.A.* (2002) 102 Cal.App.4th 308, 316 ["due process requires a party be fully advised of the issues to be

addressed and be given adequate notice of what facts it must rebut in order to prevail."].)

Although Rosen pleaded the contract expressly (5EX1218-1219) and UCLA obliged by supplying its relevant terms in its separate statement (1EX64-66), UCLA never negated this basis of duty. UCLA's separate statement raised the issue of workplace safety with its incorporation of the very documents that characterize its classrooms as workplaces. (1EX92-94, 3EX641-642 ["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."].)

"[I]f a defendant moves for summary judgment against such a plaintiff [with the burden of proof], he must present evidence that would require a reasonable trier of fact not to find any underlying material fact more likely than not—otherwise, he would not be entitled to judgment as a matter of law, but would have to present his evidence to a trier of fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 851.) UCLA never did so and the majority improperly shifted a burden to Rosen that was never hers.

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

UCLA postulates calamitous results should the Court agree that it has a duty - via special relationship, undertaking or otherwise. But it never offered any evidence in support of this argument. UCLA's list of "what abouts" at pages 18 to 22 is completely without reference to the record. In fact, the evidence UCLA did offer by way of expert testimony was that UCLA had threat-assessment procedures in place, that they were appropriate and operated within the standard of care. (1EX210-211.) In other words, UCLA's case was, and always has been, about breach of duty not duty itself. Not one UCLA witness or declarant has been offered expressing a contrary view. Even now, UCLA continues to profess its lack of negligence. (Ans. at 15-17.)

UCLA simply has no answer to Rosen's evidence of its threat assessment procedures that simply failed to work in her and Thompson's case. It has no answer to the writings and opinions of its expert Eugene Deisinger, its amicus The Jed Foundation and Jed's related organization, Higher Education Mental Health Alliance, all of whom agree that an institution of higher education has a duty and responsibility "regarding a student who threatens violence towards others." (Pet. at 25-28, citing The Jed Foundation, Student Mental Health and the Law (2008) 26.) UCLA likewise has no answer to the pronouncements

of its Chancellor and the University of California Campus Security Task Force of 2008 to "do everything feasible to create safe and secure campuses." (7EX1825.)

UCLA is free to argue that it did not breach its duty. Rosen and her experts disagree–the UCLA personnel charged with discharging its threat-assessment procedures negligently failed to do so. (7EX1769, 1893-1894.) That is an issue of material fact. (10EX2669.) Rosen merely seeks to have the Court recognize her fundamental right to have a jury decide who is correct.

• • •

"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."[3] (3EX642.) In the face this and UCLA's other promises to its students and their families to provide a safe campus, UCLA's legal argument borders on cynicism. As it stands, public college students must bear the risk of foreseeable fellow-student violence as part of the price of a public education. When UCLA's touted threat-assessment protocols and procedures fail, as they did here, the victims bear the burden. The Court, whose responsibility it is to resolve these issues of broad statewide importance, should grant Rosen's petition and consider the matter on its merits.

Dated: December 11, 2015

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

WORD COUNT CERTIFICATE

I certify that the foregoing Reply to Answer contains 1,980 words as returned by Word Perfect X6.

_____

Alan Charles Dell'Ario

PROOF OF SERVICE BY MAIL

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 December 11, 2015, I served the within Reply to Answer 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:

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I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed on December 11, 2015 at Napa, California.

Alan Charles Dell'Ario