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 BRIEF ON THE MERITS

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REPLY BRIEF ON THE MERITS

In her opening brief, Katherine Rosen established that the policies clearly expressed by the people of California in their constitution and statutes require that public colleges and universities provide classrooms that are safe from foreseeable violence. "UCLA already takes classroom and campus safety extremely seriously," it says. (AB 2.) But when UCLA's "campus security programs and measures" "fall short," UCLA is content to let the victims suffer. (*Ibid.*) Indeed, Rosen's (and Justice Perluss') contrary conclusion would create a "perverse effect." (*Ibid.*) Under UCLA's view, Rosen and other victims of any safety-program failure must bear the burden for the greater good of student mental health.

Rosen seeks to "fundamentally and adversely change the college/university experience in California," says UCLA. (AB 1.) If by this UCLA means that Rosen seeks to give voice to her unrealized expectations for her classroom safety that UCLA and California public policy led to her to expect, UCLA is correct.

UCLA never warns its students or their parents that the students must protect themselves in class. As it stands, the risk of classroom violence is part of the price of a public college education in California. This cannot be the law.

I. Questions of duty are not amenable to broad rules. The "settled" no-duty rule found by the majority does not exist.

First the majority, and now UCLA, point to a "settled" rule that institutions of higher education [IHE] have no duty to students "to protect them against the criminal acts of third persons." (AB 10.) UCLA claims that Rosen seeks to change this "rule" so as to impose a duty "to warn of and protect against virtually any foreseeable act of violence, whether committed by students or others." (*Ibid.*)

Rosen does no such thing. "[W]hether a duty of care exists in a given circumstance, is a question of law to be determined on a case-by-case basis." (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 472.) And "if the record can support competing inferences, or if the facts are not yet sufficiently developed an ultimate finding on the existence of a duty cannot be made prior to a hearing on the merits, and summary judgment is precluded. (Internal punctuation and citations omitted.)" (*Artiglio v. Corning, Inc.* (1998) 18 Cal.4th 604, 615 *(Artiglio).*)

"[T]he issue of a college or university's affirmative duties to its students is more nuanced than the all-or-nothing approach" adopted by the majority. (Dis. 9.) "[T]he absence of a general duty to their students to ensure their welfare does not mean colleges and universities never have a duty to do so." (Dis. 8.)

The Chief Justice recognized this distinction when writing for the Third Appellate District in *Patterson v. Sacramento Unified Sch. Dist.* (2007) 155 Cal.App.4th 821 *(Patterson).* The plaintiff was an adult education student injured while participating in an

off-campus community-service project. The court assumed "the presumed maturity of college students warrants different treatment in terms of duty of supervision" from K-12 students. (*Id.* at p. 831.) Then, the court examined two of the decisions in which UCLA and the majority found its settled no-duty rule, *Crow v. State of California* (1990) 222 Cal.App.3d 192 *(Crow)* and *Ochoa v. California State Univ., Sacramento* (1999) 72 Cal.App.4th 1300 *(Ochoa)*. The court distinguished *Crow* on the basis that "plaintiff was an adult college student voluntarily participating in drinking beer at the dormitory. (Citation.)" (*Patterson, supra,* at p. 831.) The court noted that in *Ochoa,* "we rejected the student's claim that the university created a special relationship and duty to supervise by organizing and sponsoring the intramural activity. (Citation.)" (*Ibid.*) "Although *Crow, Ochoa* and *Stockinger* demonstrate that the school and community college districts did not owe a duty to supervise their adult students in the circumstances of those cases, they do not hold that school or community college districts never owe a duty of care to their adult students." (*Id.* at p. 832.) Neither *Tanya H. v. Regents of the Univ. of California* (1991) 228 Cal.App.3d 434[1]nor *Baldwin v. Zoradi* (1981) 123 Cal.App.3d 275, on which UCLA and the majority relies, so holds, either. UCLA, in discussing *Patterson*, overlooks this significant qualification of the authorities on which UCLA and the majority rely. (AB 16.)

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[1] As Rosen explained in her opening brief, *Tanya H.* has never been cited for the proposition that UCLA and the majority ascribe to the opinion–as settling a no-duty rule. (OBM 34.) UCLA does not contest this point–it simply continues to ascribe holdings to this and the other cases that were never made.

The majority and UCLA have given these decisions a broader application than did the courts rendering those decisions. A settled "no-duty" rule does not exist.

II. The relationship between college students and their colleges is "special."

In her opening brief, Rosen demonstrated why public college students stand in a special relationship with their college. UCLA's response fails to blunt that showing. As noted above, the authorities on which UCLA relies support a finding of a nonproperty-based duty of care. (See also *Alvia v. Citrus Cmty. Coll. Dist.* (2006) 38 Cal.4th 148, 158 ["a body of law establishes that public schools and universities owe certain nonproperty-based duties to their students"] (*Avila*).)

The contract between the students and the university that incorporates the student conduct code creates a special relationship. (*Andersen v. Regents of the Univ. of California* (1972) 22 Cal.App.3d 763, 769.) With its invocation of the workplace concept to campus life–particularly to the education of students–UCLA acknowledges the special relationship it fosters with its students, faculty and staff.[2] (UCLA, Preventing and Responding to Violence in the UCLA Community (2009) 2 [3EX642][3].) UCLA just brushes these issues and its promises aside saying they are too vague.

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[2] UCLA addresses Rosen's workplace argument on its merits, finding nothing objectionable in her raising it (as did the Court of Appeal). (Opn. 31.)

[3] The brochure is attached to this brief following the proof of service.

UCLA criticizes Rosen for her analogy to the captive bus patrons and prison inmates who are dependent on transit and corrections authorities for safety. College students are not captives, it says. (AB 18.) But one need not be captive like an inmate to be dependent on campus authorities for safety. "It has been observed that a typical setting for the recognition of a special relationship is where 'the plaintiff is particularly vulnerable and dependent upon the defendant who, correspondingly, has some control over the plaintiff's welfare.' (Citation.)" (*Giraldo v. California Dept. of Corr. & Rehab.* (2008) 168 Cal.App.4th 231, 245–246.) Students are vulnerable and dependent, notwithstanding UCLA's contrary claims.[4] UCLA exercises control over their welfare in many ways, not the least of which is the student conduct code[5] which UCLA applied to Damon Thompson when it permanently excluded him from

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[4] To the extent that one could dispute this point, it is a question of material fact that cannot be resolved on summary judgment. (*Artiglio, supra*, 18 Cal.4th at p. 615.)

[5] The student conduct code is part of the contract between UCLA and its students. Rosen's orientation materials and interview included materials describing UCLA's commitment to her safety and the student conduct code under which violators would be dealt. (1EX63–65.)

campus housing and ordered him to complete anger-management training and to undergo a one-time counseling session[6] as a condition of his continued enrollment. (6EX1525–1526[7].)

In the end, what UCLA would have the Court do is ignore all of its disingenuous promises and statements to its students and their parents. We are committed "to providing and maintaining a workplace and academic community free from intimidation and acts or threats of violent behavior." (UCLA Workplace Violence Prevention Policy (1998) 1.) But we're not really a workplace. "[T]he UCLA community is holding students accountable for their actions, and holding them to the highest standards of academic and personal integrity." (1EX65–66.) Except when we don't. We "take classroom and campus safety extremely seriously." (AB 2.) Just don't expect us to honor our promises when our "campus security programs and measures" fail and you are injured.

III. UCLA's duty does not depend on Thompson having communicated a threat of violence against Rosen although the record supports an inference of such a threat.

UCLA attributes a "communicated threat of violence exception" argument to Rosen that she does not make. UCLA would have the Court apply the duty-creating circumstances for

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[6] The counseling occurred on September 29, 2009 and was not "treatment" as UCLA would have the Court believe. (6EX1537–1543.)

[7] "[I]f you fail to complete your assigned sanctions, a hold will be placed on your student records and registration. This hold will prevent you from registering from classes." (6 EX 1526.)

treating psychotherapists to all of its personnel responsible for implementing its "campus security programs and measures." (Civ. Code, § 43.92.)

The existence of a special relationship by itself creates a duty of protective care. "A defendant may owe an affirmative duty to protect another from the conduct of third parties, or to assist another who has been attacked by third parties, if he or she has a "special relationship" with the other person. (Citations.)" (*Morris v. De La Torre* (2005) 36 Cal.4th 260, 269.) This duty of protection includes the duty to warn if the applicable standard of care warrants. (*Id.* at p. 270.) The Court was addressing the duty of a restaurant proprietor but its analysis applies to any "special-relationship-based duty."

As Rosen explained in her opening brief, Civil Code section 43.92 is a psychotherapist-specific statute representing a legislative effort to strike an appropriate balance between conflicting policy interests of public safety and the psychotherapist-patient privilege. (*Ewing v. Goldstein* (2004) 120 Cal.App.4th 807, 816.) By its terms, section 43.92 applies only to treating psychotherapists and their "patients." If the special relationship exists, then the duty to protect and warn arises as part of the standard of care.

The UCLA personnel charged with the responsibility for implementing its "campus security programs and measures" include its Consultation and Response Team [CRT]. Contrary to UCLA's claim, these are not untrained faculty and staff. Vice-Chancellor and Dean of Students Robert Naples formed the CRT in 2006 "to provide an appropriate response to the needs of students at risk." (2EX318.) According to Naples, the CRT

recognized Thompson as a "potential student in crisis." (2EX319.) Just days before Thompson's attack on Rosen, CRT member Karen Minero, Ph.D., told the others Thompson had a "history of violence" and presented a "health and safety issue." (6EX1595, 1726.) Rosen and others saw Thompson "bitch out" the teaching assistant. (6EX1580.) He threatened to take matters into his own hands. (6EX1562.) The TA passed this information on to his professor and asked for help. (6EX1574.) The professor contacted Dean Cary Porter, who brought in the CRT. (6EX1706.) Dr. Nicole Green reached out to Thompson, made an appointment, but he did not show. (4EX943.) Certainly a jury could infer that CRT personnel knew Thompson posed physical danger to Rosen, a woman student whom he had named as insulting his intelligence.

Thompson presented the very behavior that UCLA expert Eugene Deisinger (1EX169–221) has described as "dangerous" and requiring intervention. In his threat-assessment handbook,[8] Deisinger writes that colleges can identify "red flags" that "prevent targeted violence from occurring." (7EX1912.)

> Most important, dangerous people rarely show all of their symptoms to just one department or group on campus. A **professor may see a problem** in an essay, the **campus police may endure belligerent statements**, a **resident assistant may notice** the student is a loner, the **counseling center may notice that the student fails to appear for a**

[8] E. Deisinger, Campus Threat Assessment & Management Team Handbook (Applied Risk Management 2008)(*Deisinger*). His handbook was offered as part of Rosen's opposition evidence in the trial court. (7EX1905–1993.)

> **follow-up visit.** Acting independently, no department is likely to solve the problem. In short, colleges must recognize that managing an educational environment is a team effort, calling for collaboration and multilateral solutions.

(Deisinger, *supra*, 7EX1918 [emphasis added].)

Thompson exhibited each of the "red flags" that Deisinger warns about:

- The professor sees a problem when Thompson emails that he is "angered" about students "passing remarks" during an exam in December 2008 (2EX486–488[9], 6EX1442) and again when he warns in a January 2009 letter to Dean Robert Naples that unless "you issue letters of admonition" "this will escalate into a more serious situation and I'll end up acting in a manner that will incur undesirable consequences to me." (6EX 1448.) Other faculty notice in February that Thompson's schizophrenic symptoms "seem[] written on the wall." (2EX547.) And still other faculty receive complaints in July where Thompson describes a "worsening" situation at the hands of female graduate students. (6EX1529–1531.) In the days before Thompson's attack he wrote and articulated complaints and threatened to take matters into his own hands. (6EX1547, 1552, 1555, 1562, 1574, 1584, 1595, 1707, 1726.)
- The campus police endure belligerent statements when Thompson said he was on the phone to his father and told police his father told him "to hurt

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[9] The professor, Stephen Frank, passed the email along to his supervisors but nothing was done and nothing in the record suggests that the CRT or the Violence & Threat Assessment Team ever learned of it. (2EX486.)

someone" (6EX1463), or when police were called out for the dormitory assault and Thompson told his co-resident "this is your last warning." (3EX836.)

- The resident assistant notices and documents Thompson's confrontations with other dormitory residents in February over a Ouija board (2EX 576), in March over a roommate leaving the lights on (6EX1471) and in June where he assaulted a co-resident resulting in being expelled from the dorm and being required to take anger-management training and to attend counseling as a condition of further enrollment. (6EX1525–1526.)
- The counseling center notices that Thompson fails to appear in April-May (3EX 819–823), July (3EX865), and October 7, the day before the stabbing. (4EX929.)

Rosen's experts, Pitt, Dvoskin and Madero, agree. Thompson presented exactly the person described by UCLA's Deisinger–a student exhibiting the "red flags" of incipient violence. (7EX1768–1771 [Pitt]; 1893–1996 [Madero]; 8EX2084–2085 [Dvoskin].) UCLA has admitted that prior to Thompson's attack, he had named Rosen as one of the women "ridiculing and insulting him, and calling him 'stupid' at every lab session." (8EX2238–2239.)

UCLA maintained a Violence Prevention and Response Team [VPRT], a multi-disciplinary group tasked with defusing foreseeable threats of violence. (3EX641–642[10].) But UCLA's CRT personnel never alerted the VPRT despite UCLA policy that they do so. (3EX642.) CRT personnel were aware that Thompson

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[10] Existence of the this team was announced to UCLA faculty, staff and student body in an email sent to the entire UCLA community on March 6, 2009 describing the team as one of the "resources" available to prevent violence. (3EX640.)

posed a danger to Rosen–they simply failed to act properly to defuse the threat he posed, exposing Rosen to harm and ultimately subjecting Thompson to commitment at Patton State Hospital, his having been adjudged not guilty by reason of insanity. (Pen. Code, § 1026.) UCLA failed to stop someone its personnel had reason to believe no longer knew right from wrong.

IV. UCLA's scant attention to Rosen's duty-by-undertaking analysis underscores its inability to refute the analysis.

UCLA admits it had undertaken a general violence prevention program and cannot not deny it undertook to prevent the "health and safety issue" that Thompson posed in the days before his attack on Rosen. (6EX1726.) "UCLA is committed to providing a safe work environment for all faculty, staff and students–one that is free from violence or threats of harm." (3EX642.) UCLA does not even discuss the cases that establish this doctrine.

Rather, UCLA seizes the lifeline thrown its way by the Court of Appeal majority–that its undertaking did not increase the risk of harm that Thompson posed and that Rosen did not rely on the undertaking. (AB 33–34.) But UCLA has no answer to the fact that it never raised this issue in the trial court even after Rosen raised it first. (5EX1257–1260, 9EX2205–2219.) UCLA then failed to raise the issue in its writ petition. (Pet. 33–36.) UCLA did not address the issue until its reply brief in the Court of Appeal. (Writ Reply 16–17.) A defendant moving for summary judgment must negate the existence of duty before the burden shifts to the plaintiff and UCLA never did on this basis of duty. (*Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 849.)

More importantly, UCLA's belated showing does not establish that its negligent undertakings failed to increase the risk Thompson posed or that Rosen did not rely on UCLA's promises. It characterizes Rosen's claim that she relied on the promised undertaking by attending class as "weak." UCLA does not establish, as a matter of law, lack of reliance. She relied on UCLA to keep Thompson under control after she witnessed him "bitch out the TA." (6EX1580.)

Gonzalez v. City of San Diego (1982) 130 Cal.App.3d 882 *(Gonzalez)* illustrates the concept of reliance in the context of the defendant's undertaking. Plaintiff's decedent drowned when she was caught in a riptide and swept out to sea. The city had posted lifeguards at the beach but failed to post any warning of the riptide condition known to the guards. The presence of the lifeguards created a reasonable expectation of safety for which a duty of care attached.

> [W]here a public entity voluntarily assumes a protective duty toward certain members of the public, even though there is no liability for its acts or omissions, upon undertaking the action on behalf of the public and inducing public reliance, the entity will be held to the same standard of care as a private individual or entity.[11]

(*Gonzalez, supra,* 130 Cal.App.3d at p. 887.)

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[11] The majority relied on Government Code section 835 but as the concurring justice observed the reliance principles apply to negligence liability under Government Code section 815.2 on which Rosen relies. (*Gonzalez, supra,* 130 Cal.App.3d at pp. 888, 890–891.)

UCLA's oft-repeated promises to maintain a campus free from violence and threats of violence could only have been intended to induce the students and their families to rely on them. (E.g., 6EX642.) But if they were not so intended, they are a fraud on those students. Rosen need not have been aware of UCLA's specific efforts to intervene with Thompson. She saw a troubled student in the classroom and justifiably assumed UCLA would honor its commitment to deal with him in a manner consistent with her and her fellow students' safety. Students "can reasonably expect . . . that school authorities will also exercise reasonable care to keep the campus free from conditions that increase the risk of crime." (*Peterson v. San Francisco Cmty. Coll. Dist.* (1984) 36 Cal.3d 799, 813.)

UCLA also fails to establish as a matter of law that its undertaking to control Thompson did not increase the risk of harm he posed. Beyond saying UCLA personnel did not do so, UCLA makes no argument whatsoever. As Rosen established in her opening brief, Thompson's symptoms and threats escalated as months went by without what he considered to be a proper response from UCLA. (OBM 50–51.) Rosen's experts confirm this. (7EX1767–1772, 1893–1895.)

This is a summary judgment motion the Court is reviewing. The Court must "liberally construe plaintiff's evidence and strictly scrutinize that of defendant in order to resolve any evidentiary doubts or ambiguities in plaintiff's favor." (*O'Riordan v. Fed. Kemper Life Assur.* (2005) 36 Cal.4th 281, 284 [internal punctuation omitted].) These principles are not simply platitudes. A jury could well conclude that the evidence establishes undertaking, reliance and increased risk of harm.

V. UCLA's policy arguments make no sense because UCLA already employs campus security programs and measures that would have protected Rosen had UCLA personnel implemented them with due care.

UCLA makes a series of arguments forecasting dire consequences to higher education and student mental health should the Court hold UCLA to its promises. UCLA argues as though a finding of duty will greatly increase its obligations for student safety. But that is not what this case is about. Rosen has never asserted that there should have been different "campus security programs and measures" from those that existed. (AB 2.) This case is about UCLA's failure to execute those programs and measures with due care in her and Thompson's case. As Rosen's expert Steven Pitt stated in opposition to UCLA's motion:

> [T]he defendants failed to follow UCLA's own policies and procedures and the standard applicable to all University of California campuses in 2009 by failing to perform any type of threat assessment or implement any type of violence prevention measure in response to a distressed student who was continuously and consistently obstructive and disruptive because of his paranoid behavior and who threatened the health and safety of others.

(7EX1767–1768.)

Rosen does not claim that more or different procedures or systems needed to be in place. Her claim is that UCLA personnel charged with implementing its Violence Prevention and Response Policy failed to do so. (5EX1243.) As UCLA asserts, "Apart from alleging that [the policies and programs] fell short in this

instance, Rosen has never demonstrated or even intimated that these programs are anything but successful." (AB 2.) Exactly. The rub is that UCLA wants Rosen and any future victims to bear the burden of the failure of these programs and measures.

Viewed through this lens, UCLA's policy arguments fail to withstand scrutiny. Implementing the threat assessment programs cannot be too expensive–UCLA is already doing them–with money extracted from the students themselves as "registration" fees. (7EX1817, 1829.) Imposing a duty to exercise due care in executing existing threat assessment programs will not deter students from seeking mental health care or services "to which they are legally entitled" any more than those programs already do. (AB 38.) CRT member, Elizabeth Gong-Guy, Ph.D., has stated publicly that the CRT intervened in eight of 116 cases it considered in 2009–2010.[12] UCLA does not advance a single policy argument why the victims of its threat-assessment mistakes should bear the burden of them.

Justice Perluss had little trouble disposing of UCLA's policy arguments.

> Recognizing the legal duty of a college or university to adopt a reasonable program to protect students in the classroom by identifying and responding to foreseeable threats of campus violence—one that gives appropriate weight to the requirements of federal and state privacy and antidiscrimination laws—would impose no undue burden on The Regents or the other UCLA defendants: All parties agree the University of California has already

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

> developed sophisticated, interdisciplinary, threat assessment and violence prevention protocols. Indeed, UCLA promotes itself and encourages student enrollment on the basis of campus safety. And funding for UCLA's program comes in part from the intended beneficiaries, UCLA students, through an increase in mandatory student fees. Simultaneously, as reflected in the January 2008 Report of the University of California Campus Security Task Force, the University has pursued "extramural funding opportunities to provide complementary and enrichment support for its core student mental health programmatic and services needs."
>
> The Regents's amici curiae confirm the University of California's actions in this regard are not unusual, particularly in the post-Virginia Tech shooting era: Even without a duty, colleges and universities throughout the country "have voluntarily put in place proactive and effective measures" to reduce the incidence of criminal violence among students by maximizing protective factors and minimizing risk factors.

(Dis. 11–12 [footnotes omitted].)

UCLA need not do more. It needs to do right. No public policy supports an outcome in which Rosen bears the burden of UCLA mistakes that resulted in her grievous injuries.

VI. No immunity shields the UCLA personnel from their negligence.

As Justice Perluss notes, once the Court gets past the duty "horse" it must consider the immunity "cart." (Dis. 12, fn 10.) UCLA suggests the Court return the case to the Court of Appeal

for its consideration. No reason exists to do so. The issue of any immunity at this summary-judgment stage of the proceedings must be decided on the current record and has been fully briefed at each level. The events in question occurred nearly seven years ago and will be closer to nine-years old when the Court decides the case if it does so in its customary 22–23-month time frame. The immunity issues are "fairly included" in Rosen's petition and any decision that failed to address them would leave bench and bar without guidance. (Cal. Rules of Court, rule 8.516.) "Justice delayed is little better than justice denied."[13]

UCLA proceeds with an attempt to bring itself within the confinement immunity, the discretionary immunity and the treating-psychotherapist immunity. Its efforts fail. (See Dis. 13–18.)

A. Government Code section 856 is a duty-creating statute in this context.

Section 856 immunizes a public entity's "negligent or wrongful acts or omissions in carrying out or failing to carry out . . . a determination to confine or not to confine a person for mental illness . . ..' (*Tarasoff v. Regents of the Univ. of California* (1976) 17 Cal.3d 425, 449 fn. 23 *(Tarasoff).*) Nothing in Rosen's complaint challenges UCLA's February 2009 decision not to confine Thompson. But UCLA had a duty of care thereafter.

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[13] G. Dillwyn, Occasional Reflections, Offered Principally for the Use of Schools (1815), often attributed to William Penn and W.E. Gladstone.

"[C]areless or wrongful behavior subsequent to a decision respecting confinement [] is stripped of protection by the exception in section 856." (*Ibid.*)

UCLA cites *Tarasoff* and then ignores the part that applies here. (AB 44.) "The failure of the Consulting and Response Team to refer Thompson's case to the Violence Prevention and Response Team or to employ many of the other intervention techniques available to it constituted actions outside the scope of this immunity provision." (Dis. 14.)

B. The workings of the CRT, campus housing and other members of the Violence Prevention and Response Team are operational, not discretionary.

As Rosen and Justice Perluss have established, the discretionary aspect of UCLA's "campus security programs and measures"– lies in the decision to have the various programs at all. But once established, the actions of its CRT, its Counseling and Psychological Services [CAPS] and its Violence Prevention and Response Team are operational, outside the scope of Government Code section 820.2.

"[A] public employee's initial decision whether to provide professional services to an individual might involve the exercise of discretion pursuant to section 820.2," but, "once the employee undertakes to render such services, he or she is not immune for the negligent performance of professional duties that do not amount to policy or planning decisions." (*Barner v. Leeds* (2000) 24 Cal.4th 676, 686 *(Barner)*; see Dis. 16–18.)

UCLA argues that the "non-therapist defendants" lack training and expertise, making their decisions "discretionary." (AB 48.) But this claim finds no support in the record (UCLA fails to cite to any) and is belied by the evidence that UCLA offered. Dean Robert Naples declared that he formed the CRT to "provide consultation" and an "appropriate response to the needs of students in crisis or at risk." (2EX318.) All but one of its members hold Ph.D.s, JDs or Ed.Ds. (*Ibid.*) The Violence Prevention and Response Team is comprised of Campus Police, Staff & Faculty Counseling, the Dean of Students, CAPS and other specialists. (3EX641.) UCLA's argument that these "untrained" personnel should be granted discretionary immunity simply does not withstand scrutiny.

> A public university's decisions to create interdisciplinary behavioral risk assessment protocols and to include specific procedures to identify and respond to threats of campus violence in its programs are unquestionably policy or planning determinations and thus "discretionary" as that term was defined in *Johnson v. State of California* [(1968)] 69 Cal.2d 782 and *Barner, supra* 24 Cal.4th 676. By contrast, the actual execution of those programs by university employees with respect to individual students who have been identified as at risk—here, the actions and, more importantly, omissions that Rosen has alleged culminated in her being attacked by Thompson during their classroom laboratory—constitute "subsequent ministerial actions in the implementation of the basic decision" to adopt measures to maintain a safe campus. In sum, even though the UCLA officials involved may have exercised highly skilled, professional judgment in making choices among complex alternatives in

> their responses to the situation presented by Thompson, Government Code section 820.2 does not bar Rosen's negligence claim.

(Dis. 17–18.)

In the end, UCLA's argument mirrors its posture on the case as a whole. "We're going to create these programs. We're going to tout them to the students, to their families, and to the public to create the impression that UCLA is doing everything possible to make a safe campus. But when our personnel fail to discharge their responsibilities under these programs or just make a mistake, the student victim should pay the price." In UCLA's words, "Rosen's recourse is against her assailant." (AB 41.) This cannot be the law.

C. UCLA never met its burden to show that Civil Code section 43.92 immunized Dr. Green.

The parties agree that Civil Code section 43.92 is both a duty-creating and immunizing statute. The majority decided that UCLA met its summary-judgment burden to shift to Rosen the burden of producing evidence that Thompson "communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims." UCLA had the burden to negate this basis of duty and never did.

At best, its evidence created an inference that Thompson never communicated such a threat and an equally plausible inference that he did. The evidence contains no direct declaration or testimony from any of the UCLA actors, even though section

43.92's duty-creating provisions turn on the subjective understanding of the therapist. (*Ewing v. Goldstein, supra*, 120 Cal.App.4th at p. 820.)

The CRT members dealing with the Thompson crisis in the days before his attack, recognized:

- He had named individual women classmates as tormenting him ("reasonably identifiable victims")(6EX1547, 1574, 1584.)
- He had a history of violence (6EX1726.)
- He presented a health and safety issue (6EX1595.)
- He had threatened to take matters into his own hands (6EX1552, 1562.)
- These circumstances were transmitted to Dr. Green who apparently spoke with Thompson and then reported he had been a no-show for his appointment. (4EX931, 936–939, 943.)

The majority recognized that a therapist's duty "may be triggered by information provided by persons other than the patient," but found that Rosen had not produced evidence that "Nicole Green had any knowledge" of Thompson's threats. (Opn. 290.) The email correspondence between the CRT members, Porter, Minero and Gong-Guy containing all this information were copied to Dr. Green. (6EX1591–1593 ["He [Thompson] may need urgent outreach"].)

UCLA's showing failed to shift the burden to produce more evidence to Rosen, particularly where all the evidence on this subject was exclusively within its control. But even if the Court were to disagree, Dr. Green's "removal from the lawsuit as a

named defendant does not in any way protect the Regents from liability based on the negligence of other university employees, whether named or unnamed." (Dis. 15.)

CONCLUSION

Rosen does not ask the Court to impose new, previously-unknown duties on public universities. "UCLA already takes campus safety extremely seriously," it acknowledges.[14]

As UCLA amicus, The Jed Foundation, explains, an institution of higher education's "responsibility regarding a student who threatens violence toward others and/or recklessly puts the lives of others at risk is significant. . . . [A]n IHE must also use reasonable care when a specific individual presents a foreseeable danger to others which could be mitigated by using reasonable care."[15]

The Court need not create new or novel theories of duty. Students are special and UCLA undertook to protect them. Thompson presented a "foreseeable danger" to Rosen which could have been "mitigated by using reasonable care."[16]

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[14] AB 2.

[15] The Jed Foundation, *Student Mental Health and the Law* (2008) 26 [filed with Rosen's supporting documents on Feb. 3, 2015]. UCLA paid for The Jed Foundation to file an amicus brief in the Court of Appeal.

[16] 7EX1768–1769 ["By October 9, 2009, there is no question that Damon Thompson posed a threat to Katherine Rosen. . . ."].

If public colleges and universities have no duty of care to their students in this context, then the risk of classroom violence has become part of the price of a public education. The people of California demand better.

The Court should reverse the order granting the Regents' petition and remand with directions to the Court of Appeal to vacate its peremptory writ and enter a different order denying the petition.

Respectfully submitted,

Dated: June 14, 2016

By: _____

Alan Charles Dell'Ario

Attorney for Real Party in Interest
Katherine Rosen

CERTIFICATE OF COMPLIANCE

This brief is set using **13-pt Century Schoolbook**. According to TypeLaw.com, the computer program used to prepare this brief, this brief contains **5,342** words, excluding the cover, tables, signature block, and this certificate.

The undersigned certifies that this brief complies with the form requirements set by California Rules of Court, rule 8.204(b) and contains fewer words than permitted by rule 8.520(c) or by Order of this Court.

Dated: June 14, 2016

By: _____

Alan Charles Dell'Ario

Attorney for Real Party in Interest

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S230568

PROOF OF SERVICE

I declare:

At the time of service I was at least 18 years of age and not a party to this legal action. My business address is 1561 Third Street, Suite B, 6320 Canoga Ave Ste 1400, Napa, CA 94559. I served document(s) described as Reply Brief on the Merits as follows:

By U.S. Mail

On June 14, 2016, I enclosed a copy of the document(s) identified above in an envelope and deposited the sealed envelope(s) with the US Postal Service with the postage fully prepaid, addressed as follows:

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I am a resident of or employed in the county where the mailing occurred (Napa, CA).

By e-submission

On June 14, 2016, I served via the Court's e-submit system, and no error was reported, a copy of the document(s) identified above on:

Court of Appeal, Second Appellate District, Division Seven

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

Dated: June 14, 2016 By: _____

Alan Charles Dell'Ario

Reporting a Potential Threat

To report a threat or seek assistance regarding violence, call any of these resources who are members of the UCLA Violence Prevention and Response Team:

UCLA Police Department

Emergency (campus phone)	911
Non-Emergency	5-1491

Program non-emergency number into your cell phone and use for campus-area emergencies.

Students & Residents

Student Counseling & Psychological Services	5-0768
Dean of Students Office	5-3871
Medical Student Affairs	5-6774
Dental Student Affairs	5-2615

Campus Staff

Employee Relations	4-0860
Staff & Faculty Counseling Center	4-0245

Campus Faculty

Academic Personnel Office	5-3841
Staff & Faculty Counseling Center	4-0245

HEALTH SYSTEM

Westwood Staff

Employee Relations	4-0500
Staff & Faculty Counseling Center	4-0245
Security Department	7-7100

Santa Monica Staff

Human Resources	(310) 828-0242
Staff & Faculty Counseling Center	4-0245
Security Department	(310) 319-4883

Medical Faculty

Academic Personnel Office	5-3841
Staff & Faculty Counseling Center	4-0245

Learn More

Check out the resources, services and training classes below. Also visit the Campus Human Resources website at: www.chr.ucla.edu.

UCLA Violence Prevention & Response Policy: Provides information about prohibited behavior in the UCLA work environment and how to report acts or threats of violent behavior.

UCLA Police Department Programs & Prevention: Details appropriate action to take if you experience a threat of violence.

Staff & Faculty Counseling Center: Offers counseling, management consultation, coaching, training, retreat facilitation, work-life programs and support groups.

Student Counseling & Psychological Services: Designed to help students address the psychological, relational and intellectual challenges of University life.

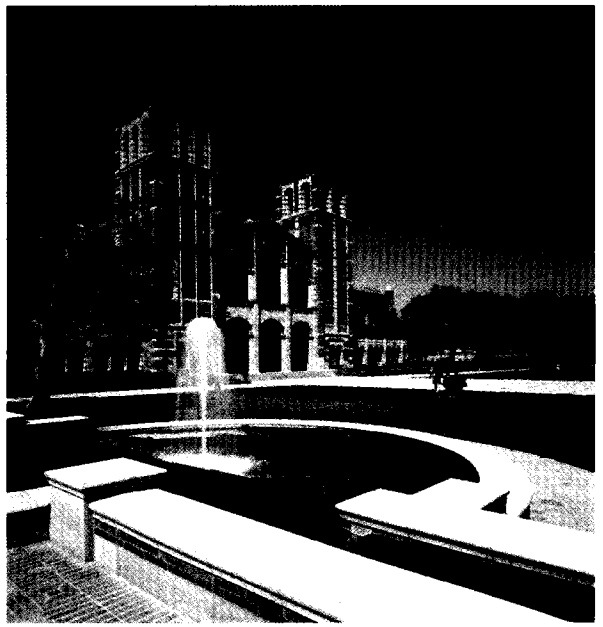
Training Classes: Workshops include "Preventing Violence in the Workplace," "Dealing with Troubled Employees," "Dealing Effectively with Anger in the Workplace," "Conflict Resolution" and "Dealing with Distressed Students."

OSHA Fact Sheet: Provides practical suggestions on workplace safety and violence prevention.

UCLA

Preventing and Responding to Violence in the UCLA Community

A Guide for Faculty, Staff and Students



UCLA Campus Human Resources
Staff & Faculty Counseling Center

Awareness & Prevention

UCLA is committed to providing a safe work environment for all faculty, staff and students—one that is free from violence or threats of harm. Physical violence and any reported threats of physical violence will be taken seriously and investigated.

VIOLENT OR THREATENING BEHAVIOR INCLUDES, BUT IS NOT LIMITED TO:

- Weapons in the UCLA Community
- Physically aggressive acts towards others
- Stalking
- Communicated threats of harm
- Intimidating behavior raising concern for personal safety
- Willful or intentional behavior which causes damage to property
- Suicide threats

Individuals who engage in violent behavior are in violation of the *UCLA Violence Prevention & Response Policy* and will be subject to disciplinary action and may be prosecuted. This policy applies to all UCLA locations including offices, residences, classrooms, work sites, vehicles and off-campus locations.

Seek Assistance

The UCLA Violence Prevention & Response Team includes the UCLA Police Department, Staff & Faculty Counseling Center, Human Resources, Academic Personnel, Dean of Students, and Student Counseling & Psychological Services.

For questions regarding potential violence in the workplace, contact any member of the Violence Prevention and Response Team. (See back panel for phone numbers.)

Managing a Threat

Staff and Faculty Responsibilities

UCLA employees should report suspected violations of this policy to their supervisor or another official who is not a party to the violation, or to Employee Relations (4-0860) or Academic Personnel (5-3841). No employee will be subject to disciplinary action for acting in good faith to report acts that violate the *UCLA Violence Prevention & Response Policy*.

Supervisory Responsibilities

It is the responsibility of all supervisors to encourage their employees to report any suspected violation of this policy. Supervisors who have knowledge of a suspected violation of this policy should promptly contact and consult with the UCLA Violence Prevention & Response Team. (See back panel for phone numbers.)

Student Responsibilities

Students play a critical role in ensuring that facilities, residence halls, classrooms and places of employment are free from violence. Any student who suspects that a member of the UCLA community is in violation of the *UCLA Violence Prevention & Response Policy* should contact the Dean of Students Office (5-3871). Students living in University housing should contact their residential staff.

Taking Action

Emergencies

The first priority is to ensure your safety.

- Call 911 immediately. Do not attempt to intervene or deal with the situation yourself.
- Be prepared to answer the dispatcher's questions such as: What is occurring? What does the subject look like? Does the subject have any weapons? When did this occur?
- The dispatcher may keep you on the phone. Otherwise, hold a phone line open until police arrive.
- Isolate or evacuate other people if there is immediate danger.

Non-Emergencies

Document, evaluate, determine next steps and develop a plan of action.

- Promptly inform the appropriate campus administrator.
- Call a member of the UCLA Violence Prevention & Response Team. (See back panel for phone numbers.)

On-going Support

UCLA's *Staff & Faculty Counseling Center* conducts counseling sessions to help employees and departments cope with traumatic events. Contact 4-0245. *Student Counseling & Psychological Services* has counselors available 24 hours a day by phone. Students may contact 5-0768.