2nd Civil No. _____

Exempt from Fees Pursuant To Gov't Code §6103

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION _____

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.

Los Angeles Superior Court,
Case No. SC108507

Hon. Gerald Rosenberg, Judge
West District, Santa Monica
Department K
Telephone: (310) 260-3501

PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES
[Exhibits Filed Under Separate Cover]

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Court of Appeal
State of California
Second Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: _____

Case Name: The Regents of the University of California, et al. v. Superior Court of the State of California, County of Los Angeles (Katherin Rosen)

Please check the applicable box:

[✓] There are no interested entities or parties to list in this Certificate per California Rules of Court, Rule 14.5(d)(3).

[ ] Interested entities or parties are listed below:

Name of Interested Entity or Person	Nature of Interest

Please attach additional sheets with Entity or Person Information if necessary.

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INTRODUCTION

Sometimes a summary judgment denial warrants writ relief just because it is flatly incorrect on the law and intervention is required to avoid needless expenditure of public and private resources on a trial with built-in reversible error. Other times writ relief is necessary because the underlying legal issue is uncertain, making it difficult to conceive how the parties and trial court can even formulate coherent jury instructions or special verdict forms. In other instances, writ relief is essential because a ruling, if taken at face value, represents a sea change in the law resulting in severe and unwarranted expansion of negligence liability, with the resulting adverse impact on the day to day operations of a defendant, contrary to the public interest.

All of those factors compel writ relief in this case. The trial court's ruling that petitioners Regents of the University of California and its employees – lay and professional alike – had a duty of care to protect students from an unpredictable criminal assault on the UCLA campus and that issues of fact exist as to whether that duty was met, sends untenable claims to trial in an amorphous posture that makes crafting jury instructions and special verdict forms little better than guesswork. If uncorrected, the court's ruling will serve as a springboard for other claims, directly affecting daily operations at college and university campuses throughout California.

Plaintiff/real party Katherine Rosen was an undergraduate at UCLA taking an organic chemistry lab when, one day in the lab, classmate Damon Thompson pulled a kitchen knife and stabbed her repeatedly. The attack

was sudden, unprovoked, and horrifying. Rosen, who was seriously injured but survived, filed this negligence lawsuit. While Thompson is a nominal defendant, Rosen has focused her case on the additional defendants – her chemistry professor, Alfred Bacher; UCLA's Associate Vice Chancellor and Dean of Students, Robert Naples; UCLA's then-Senior Associate Dean of Students, Cary Porter; Thompson's treating psychologist at UCLA, Nicole Green; and these defendants' employer, the Regents of the University of California (collectively, "the UCLA defendants").

The UCLA defendants moved for summary judgment, noting that uniform case law establishes that universities and colleges, unlike K-12 schools, do not stand in loco parentis to their adult students and hence have no special relationship with their students so as to impose a generalized duty to assure their safety from third party criminal activity, and plaintiff could establish no other basis for imposing a duty based on a special relationship: while Thompson was a diagnosed schizophrenic and under treatment at UCLA, he had not communicated to his psychotherapist a serious threat of physical violence against Rosen (or any reasonably identifiable victim); consequently, the UCLA defendants owed no duty to protect Rosen from or warn her about him, and the limited Civil Code section 43.92 duties to warn or protect have never been extended to laypersons, including faculty or college administrators. Besides this, no UCLA defendant was negligent in treating or handling Thompson; and various statutory immunities bar liability in any event.

Yet respondent superior court denied the motion, finding a duty of care based on: (1) a special relationship between Rosen and the UCLA defendants created by her status as a student at the university; (2) a special relationship based on Rosen's status as a business invitee owed protection from foreseeable third-party criminal acts; and (3) voluntary assumption of a duty by the UCLA defendants by establishing policy and safety procedures and by undertaking to treat and counsel Thompson. The court rejected application of the immunity statutes and found an issue of fact as to whether defendants met the applicable standard of care – whatever that standard might be. The trial court's ruling does not withstand scrutiny and requires intervention and reversal by this court.

A. The Issues Presented.

The trial court's ruling finds no support in California law. Indeed, in the face of well-developed jurisprudence that strictly limits liability for failing to prevent criminal attacks to the narrowest categories of defendants (chiefly mental health professionals, under the standard first articulated in *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, later statutorily diluted by the enactment of Civil Code section 43.92) and the narrowest circumstances (only upon evidence of an articulated threat of physical violence against a reasonably identifiable person or group), the ruling here opens up potential liability to all manner of university personnel – including lay persons – who teach or counsel or otherwise interact with mentally ill students. Writ relief is warranted here because the superior court's ruling is legally insupportable:

First, respondent court erred in finding a special relationship based on Rosen's enrollment as a student at UCLA. California law is clear that the duty of protection that adheres in the K-12 education setting does *not* apply at the college/university level. Contrary to the superior court's ruling, there is no special relationship, no generalized duty of supervision, between a university and its students based upon enrollment status, and nothing in this case would bring Rosen's claim within the narrow line of authorities that has imposed liability in the context of a special program, such as an intercollegiate athletic program. (E.g., *Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 159 ["a separate body of law has developed to govern the special duties that schools and colleges owe their athletes"]; *id.* at p. 158 [citing an assortment of other cases holding that "colleges and universities do not owe similarly broad duties of supervision to all their students"]; *id.* at p. 162 [Court observes that it "(has) no quarrel" with "cases establishing that colleges and universities owe no general duty to their students to ensure their welfare"].)

The trial court's business-invitee conclusion is equally insupportable. The California Supreme court has specifically held in the context of third-party criminal attacks on public property that there is no general business invitee relationship with a public entity and that any such liability is limited to claims arising from dangerous condition of property. (*Zelig v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1119, 1129-1131.) Rosen has never pleaded or identified any dangerous physical condition of public property that could support a business invitee theory here.

Likewise, the law does not support the superior court's finding of voluntary assumption of a duty based on activities such as providing treatment and counseling services for students like Thompson. Again, the Supreme Court rejected this very theory in *Zelig*. Unless a public entity or public employee voluntarily undertakes to provide a particular level of protection and then fails to follow through, or undertakes affirmative acts that increased the risk of harm to the plaintiff (neither a scenario presented here), they – like anyone else – owe no duty to control anyone's dangerous conduct or to warn those endangered by such conduct. (*Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th at pp. 1128-1129.)

Thompson never articulated a serious or credible threat of physical violence against Rosen. So this case is no *Tarasoff*. Yet under respondent court's ruling, these defendants, most of them faculty or college administrator laypersons, face more expansive potential liability than California law imposes on any treating psychotherapist. That simply cannot be right. Besides all this, the undisputed material evidence shows that the UCLA defendants were not negligent, and that, contrary to respondent court's conclusion, liability is barred by several statutory immunities.

B. Why Writ Review Is Necessary.

Writ review is necessary because the trial court had no discretion under law but to grant the summary judgment motion.

Code of Civil Procedure section 437c, subdivision (m)(1) expressly authorizes writ review following denial of a summary judgment motion. (Code Civ. Proc., § 437c, subd. (m)(1) [after any outcome other than a grant

of summary judgment, a party may "petition an appropriate reviewing court for a peremptory writ"].) Moreover, it is well-established that "[w]here the trial court's denial of a motion for summary judgment will result in trial on non-actionable claims, a writ of mandate will issue." (*Farmers Insurance Exchange v. Superior Court* (2013) 220 Cal.App.4th 1199, 1204; *Arnall v. Superior Court* (2010) 190 Cal.App.4th 360, 364 [same (summary adjudication)].)

The UCLA defendants have no other plain, speedy, or adequate remedy at law for the trial court's erroneous ruling. Appeal after trial is inadequate given the enormous burden and expense imposed on the UCLA defendants and the court system from trying a lawsuit whose outcome the law preordains. Moreover, even if the trial court's ruling is permitted to stand, it is essential that this court provide some guidance concerning the nature and scope of liability arising from the purported failure of a university and its employees to prevent third party criminal attacks by one student on another. Here, plaintiff asserts negligence by both lay and health care professional defendants, but are they both governed by the same standard of care? Any mental healthcare professional is squarely entitled to invoke the heightened, modified *Tarasoff*-based standard of Civil Code section 43.92. What about the lay defendants? Are they subject to an instruction imposing a more lax standard of liability that that governing the duty of a trained treating psychotherapist? How is a special verdict to coherently parse out the claims as between the various defendants based on differing standards of liability for the same conduct? It is essential that this

court set down guidelines for this and future cases in this important and now (given the trial court's ruling) uncertain area of the law. (E.g., *People v. Superior Court* (2011) 195 Cal.App.4th 857, 863 [writ review warranted to address first impression issue and provide guidance to the bench and bar].) For all these reasons, this Court should issue a peremptory writ directing respondent superior court to enter summary judgment for petitioners.

PETITION

By this verified Petition, petitioners The Regents of the University of California, Alfred Bacher, Cary Porter, Robert Naples, and Nicole Green allege:

A. Parties.

1. Katherine Rosen, real party in interest here, is the plaintiff in *Katherine Rosen, an individual vs. The Regents of the University of California, a public entity; et al.*, LASC Case No. SC 108504. (1 Exh. 15 [1], 5 Exh. 1215 [7].)[1/] Rosen was a UCLA undergraduate student at the time of the events underlying the lawsuit. (1 Exh. 15 [1], 1 Exh. 62 [2], 5 Exh. 1215, 1217-1218 [7].) Rosen was seriously injured in a vicious knife attack perpetrated by Damon Thompson, a fellow student in an organic chemistry lab class at UCLA, and her lawsuit seeks redress for those injuries. (1 Exh. 34 [1], 1 Exh. 142-143 [2], 4 Exh. 962-963 [7].)

[1/] The accompanying exhibits are true and correct copies of documents in the superior court record, except for Exhibits 20 and 25, which are certified copies of reporter's transcripts. We cite the exhibits as [vol.] Exh. [page] [tab no.].

2. This petition is brought by the UCLA defendants, consisting of the following:

a. Alfred D. Bacher is in the Chemistry department at UCLA. At times relevant, he was Rosen's chemistry professor. (1 Exh. 15 [1], 1 Exh. 62, 156-157 [2], 4 Exh. 1154 [7], 5 Exh. 1216 [7].)

b. Robert J. Naples is Associate Vice Chancellor and Dean of Students at UCLA. He is also a member of UCLA's Consultation and Response Team (CRT). (1 Exh. 15 [1], 1 Exh. 62, 148-150 [2], 4 Exh. 1164 [7], 2 Exh. 455-456 [6], 4 Exh. 1156 [7].)

c. At times relevant, Cary Porter was Senior Associate Dean of Students at UCLA. (1 Exh. 15 [1], 1 Exh. 62-63 [2], 4 Exh. 1156 [7].)

d. Nicole Green, Ph.D. is a clinical psychologist practicing at UCLA Counseling and Psychological Services (CAPS). At times relevant, she was Damon Thompson's treating psychologist at UCLA. (1 Exh. 15 [1], 1 Exh. 63, 95, 153 [2], 4 Exh. 1155 [7].)

e. The Regents of the University of California is a public entity established under Article IX, Section 9, of the California Constitution to govern the affairs of the various campuses of the University of California, including UCLA. All of the individual UCLA defendants (Bacher, Naples, Porter, Green) are employees of The Regents. (1 Exh. 15 [1], 1 Exh. 63 [2], 5 Exh. 1215-1216 [7].)[2/]

[2/] Damon Thompson is also named as a defendant in the lawsuit. He (continued...)

3. Respondent Los Angeles County Superior Court is the court exercising jurisdiction over the action. (5 Exh. 1215 [7].)

B. Overview Of Underlying Events.

4. On October 8, 2009, Katherine Rosen was a third-year UCLA undergraduate student taking a chemistry lab. That day in the lab, suddenly and without provocation, fellow student Damon Thompson pulled a kitchen knife, stabbed Rosen repeatedly and slashed her throat. Rosen was injured grievously but survived. (1 Exh. 142-143 [2], 4 Exh. 962-963 [7].)

5. The UCLA defendants were well aware of Thompson. He was both an honor student and a diagnosed schizophrenic under voluntary treatment at UCLA Counseling and Psychological Services (CAPS). (1 Exh. 66-67 [2], 2 Exh. 458, 479-480 [6].)

6. Thompson heard voices and frequently had complained to UCLA administrators, faculty, and personnel that he believed students in his classes and in the dorms were whispering about him and putting him down. (1 Exh. 16-22 [1], 1 Exh. 66-80 [2].)

7. On one occasion, UCLA campus police were summoned to the dorm upon Thompson's complaint to the Duty Resident Director that he heard someone clicking a gun. (1 Exh. 20 [1], 1 Exh. 82 [2], 2 Exh. 578 [6].) When no gun was found, Thompson voluntarily agreed to be escorted to Ronald Reagan UCLA Medical Center (RRMC) for psychiatric evaluation. (1 Exh. 20 [1], 1 Exh. 83 [2], 2 Exh. 578 [6].)

[2/] (...continued)
is not a party to these proceedings.

8. Multiple medical professionals at RRMC evaluated Thompson. (1 Exh. 20 [1], 1 Exh. 84 [2], 2 Exh. 580-595 [6].) None found him to fit the criteria for an involuntary psychiatric hold. (1 Exh. 20 [1], 1 Exh. 84 [2], 2 Exh. 580-595 [6].)

9. As part of sanctions imposed for a pushing incident related to an alleged noise violation by another student in Thompson's UCLA dorm that did not result in charges after investigation by UC police, Thompson was excluded from university housing by Residential Life administrators. (1 Exh. 28 [1], 1 Exh. 119-120 [2], 3 Exh. 842-844, 867 [7]].) Apart from that incident, Thompson had neither assaulted nor threatened to harm anyone. He repeatedly denied having suicidal or homicidal thoughts. (1 Exh. 21, 26 [1], 1 Exh. 86, 111, 115 [2], 2 Exh. 580-595 [6], 3 Exh. 757 [6], 3 Exh. 780 [7].)

10. With patchy success, UCLA personnel including the individual UCLA defendants had doggedly pushed Thompson to undergo voluntary treatment for schizophrenia, including therapy and medication when involuntary treatment could not be compelled. (1 Exh. 23-31 [1], 1 Exh. 115-118, 124-130 [2].)

11. By Spring 2009, some 19 medical/mental health providers at UCLA had seen Thompson or been consulted about Thompson's mental health since February 2009. (1 Exh. 27 [1], 1 Exh. 117 [2], 1 Exh. 200 [3], 1 Exh. 252 [4].)

12. UCLA's CRT had repeatedly discussed Thompson and made recommendations for his treatment and management. (1 Exh. 21-22, 25, 26,

27, 1 Exh. 89-90, 91-92, 104, 109. [2].) So had a CAPS Peer Review Committee composed of seven members of the CAPS professional mental health staff. (1 Exh. 25, 27 [1], 1 Exh. 106, 107, 116-117 [2], 3 Exh. 739 [6], 3 Exh. 768-770, 786-791, 827 [7].)

13. On September 30, 2009, eight days before the attack, Thompson was evaluated by a CAPS psychotherapist and his treating psychologist. He still complained of hearing occasional voices but denied any intent to harm those who might be talking about him or to act impulsively in response. (5 Exh. 1345-1348 [10].) On October 7, he expressed to a teaching assistant ["TA"] that if other students continued to malign him, he would report it to the Dean of Students. (5 Exh. 1360 [10].)

14. In the final days preceding the attack on Rosen, there was heavy communication among UCLA personnel, including the individual UCLA defendants, addressed both at getting Thompson to continue with voluntary treatment and at giving guidance to faculty and teaching assistants in managing his classroom behavior and utilizing campus resources in case of emergency. (1 Exh. 31-34 [1], 1 Exh. 129-142 [2], 3 Exh. 911- 4 Exh. 960 [7].)

15. An October 19, 2009, post-attack LAPD report noted that the chemistry lab TA reported that Thompson had at least once named Rosen among the students who had called Thompson stupid; the TA believed the charge was false and didn't mention it to Rosen, but he reported it to the professor. (1 Exh. 34 [1], 1 Exh. 143 [2], 5 Exh. 1199 [7].) When that occurred, the professor reported it to the Dean of Students, who in turn

notified the CRT, which began gathering updated data on Thompson. (5 Exh. 1352-1357 [10].)

16. Following the attack, Rosen brought this lawsuit against the UCLA defendants and Thompson. In it, she sued the UCLA defendants in a single cause of action for general negligence. (5 Exh. 1215-1227 [7].) She characterizes no aspect of her lawsuit as being for medical negligence.

C. Summary Judgment Proceedings.

1. Arguments presented.

17. The UCLA defendants moved for summary judgment. They did so on grounds that they owed Rosen no duty of care; that they were not negligent in any event; and that several statutory immunities bar Rosen's claims against them. (1 Exh. 1-58 [1]; see 1 Exh. 60-167 [2] [separate statement], 1 Exh. 169-222 [3] [Deisinger declaration], 1 Exh. 223-289 [4] [Mills declaration], 2 Exh. 290-320 [5] [Maranga declaration], 2 Exh. 321-613, 3 Exh. 614-760 [6] [Evidentiary exhibits, vol. 1], 3 Exh. 761-916, 4 Exh. 917-1182, 5 Exh. 1183-1227 [7] [Evidentiary exhibits, vol. 2], 5 Exh. 1228-1230 [8] [proof of service].)

18. Specifically, in their summary judgment motion, the UCLA defendants showed that Rosen's action is without merit and there are no triable issues of material fact for the following reasons:

a. **No Duty.** Rosen's cause of action fails as a matter of law because the UCLA defendants owe no general duty to protect adult college students from criminal acts, including the criminal attack on Rosen by Thompson. Moreover, the UCLA defendants owed no duty to warn

either the UCLA community in general or Rosen in particular to beware of Thompson, who was under voluntary treatment for schizophrenia at UCLA and had not, at any relevant time, communicated to any healthcare provider information supporting the conclusion that he presented a serious danger of physical violence to any reasonably identifiable intended victim, let alone Rosen. Rather, eight days before the attack, he informed his psychotherapist and psychologist that he would *not* harm those he believed were still maligning him; and, just one day before the attack, he threatened only to report his concerns to the Dean of Students. The UCLA defendants owed an obligation to reasonably accommodate this troubled individual, who had an ADA-protected diagnosis and privacy rights, and while it may be natural for the public to fear those with mental illness, in the absence of an articulated serious threat of physical violence against a reasonably identifiable intended victim, the UCLA defendants owe no duty to warn or otherwise shield Rosen or anyone from their presence. (1 Exh. 36-45 [1].)

b. **No Negligence.** Duty issues aside, undisputed material evidence shows that even if the UCLA defendants owed Rosen a duty of care, they did not breach it – that is, they were not negligent in treating Thompson, in assessing whether he posed a risk to the UCLA community, or assessing whether Rosen or anyone else in the UCLA community required protection from him. (1 Exh. 46-52 [1].)

c. **Multiple Immunities Apply.** Even apart from duty and negligence considerations, several immunities preclude liability against the UCLA defendants. Specifically, the UCLA defendants are immune

from liability under **Government Code section 856**, which shields public entities and public employees from injuries resulting from their determinations whether to confine a person for mental illness. The **discretionary acts immunity established by Government Code section 820.2** also insulates the UCLA defendants from liability for the attack on Rosen. Finally, the **psychotherapists immunity established by Civil Code section 43.92** shields Dr. Green and any other mental health professional involved in Thompson's UCLA management and care from liability for the attack absent an actual communicated serious threat of physical violence reasonably identifiable as being directed against Rosen. (1 Exh. 52-57 [1].)

19. In her opposition, Rosen argued that the UCLA defendants owed her duties of care arising from multiple sources. She contended: (a) that a special relationship existed between her and her college, at least while she was in the classroom; (b) that the UCLA defendants had a non-property-based duty to supervise its classrooms and to warn students purportedly threatened by Thompson's conduct; (c) that UCLA undertook to provide for the safety of its students on campus and accordingly was required to exercise due care in doing so; (d) that the UCLA defendants had a duty of due care in implementing their decision not to confine Thompson; and (e) that Civil Code section 43.92 imposes a duty to warn where a serious threat of harm is expressed against a reasonably ascertainable group of victims. Rosen contended the UCLA defendants breached each of these duties of care. (5 Exh. 1231-1266 [9]; see 5 Exh. 1275-1422 [10]

[opposition to separate statement], 6 Exh. 1423-1736, 7 Exh. 1737-2004, 8 Exh. 2005-2195 [11] [evidence in opposition], 8 Exh. 2196-2204 [12] [Rosen's evidentiary objections].)

20. Rosen further contended that the immunities raised by the UCLA defendants did not apply. (5 Exh. 1266-1268 [9].) She also raised various evidentiary objections to the UCLA defendants' evidence. (5 Exh. 1269-1273 [9].)

21. In their reply, the UCLA defendants asserted, among other responses, that Rosen's strained effort to manufacture a broad university/student duty of care was built on a misplaced reliance on supervisorial cases; that Rosen insupportably attempted to shoehorn her claim into a grossly expanded "dangerous condition" framework; and that, further, Rosen overstated the scope of the psychotherapist's duty to warn, distorted the evidence, and misplaced her reliance on Civil Code section 43.92 and California law addressing what constitutes an actual serious threat against a reasonably identifiable victim. (9 Exh. 2205-2219 [13].)

22. The reply reiterated that the UCLA defendants were not negligent and demonstrated that Rosen's contrary contention was not founded on California law. Regarding discretionary acts immunity (Government Code section 820.2), the UCLA defendants pointed out that Rosen's argument was based entirely on outmoded or misapplied authorities and studiously avoided addressing the modern jurisprudence detailed in the summary judgment motion. (9 Exh. 2210-2214 [13]; see 9 Exh. 2220-2252 [14] [response to Rosen's opposition to separate statement].) In regard to

Rosen's evidentiary objections, the UCLA defendants showed them to be improperly presented and unfounded. (9 Exh. 2214-2219 [13]; see 9 Exh. 2253-2416 [15] [Declaration of Dean Malilay in support of reply], 10 Exh. 2417-2574 [16] [supplemental Maranga declaration].) The UCLA defendants submitted evidentiary objections of their own. (10 Exh. 2575-2584 [17], 10 Exh. 2585-2587 [18] [proof of service]; see 10 Exh. 2588-2592 [19] [Rosen's objections to supplemental declarations].) Further, Rosen's own exhibits mirrored those used by the defense to support its arguments.

2. Tentative ruling and hearing.

23. Respondent superior court's tentative ruling was to deny the motion. According to the tentative, the UCLA defendants had a duty to warn Rosen and/or to take reasonable steps to warn or prevent the threat Damon Thompson posed to her. The court proposed to reach that conclusion on three bases: a special relationship between Rosen and the UCLA defendants based upon her enrollment as a student at the university; Rosen's status as a business invitee owed protection from foreseeable third-party criminal acts; and voluntary assumption of a duty by the UCLA defendants by establishing police and safety procedures and by attempting to treat and counsel Thompson. The court rejected application of the immunity statutes. The court heard the summary judgment motion on September 9, 2014, taking the matter under submission. (10 Exh. 2593-2610 [20].)

3. Minute order denying summary judgment.

24. On September 10, 2014, respondent superior court denied the motion, adopting its tentative ruling as its order. There was no ruling on either side's evidentiary objections at that time. (10 Exh. 2611-2615 [21].) The court served its ruling on September 10, 2014. (10 Exh. 2615 [21].)

4. Supplemental proceedings on order and request for 10-day extension of time to seek writ relief.

25. On September 22, 2014, well after the 5-day period specified in rule 3.1312, California Rules of Court, plaintiff circulated a proposed formal order on respondent court's denial of the summary judgment motion. The proposed order included terms, including evidentiary rulings, that found no basis in the minute order or hearing transcript. (10 Exh. 2616-2624 [22]; see 10 Exh. 2627-2636 [24] [served copy of circulated proposed order].) The UCLA defendants responded with objections on September 25, 2014. (10 Exh. 2625-2626 [23].)

26. On October 2, 2014, respondent court convened a hearing on the UCLA defendants' objections to the proposed order; at the same time, the court took up defendants' request for a 10-day extension of time to seek writ relief. (10 Exh. 2637-2656 [25]; see Code Civ. Proc., § 437c, subd. (m)(1).)

27. At the hearing, the court granted the 10-day extension to seek writ relief. As to the summary judgment ruling, the court ordered that plaintiff prepare a new proposed order based on the September 10, 2014, minute order. The court found that it had not yet ruled on evidentiary objections, indicated that it would do so and notify counsel, and directed

plaintiff to incorporate the ruling on the evidentiary objections into the proposed summary judgment order. The court further declared that once plaintiff submitted a new proposed order on the summary judgment motion, the court would hold the proposed order, and sign it if no further objections were filed. (10 Exh. 2637-2656 [25] [transcript], 2657-2660 [26] [minute order].)

28. Later on October 2, respondent court, having reviewed the evidentiary objections, overruled both sides' objections in their entirety. (10 Exh. 2657-2660 [26].)

29. Rosen submitted a new proposed order on October 5. (10 Exh. 2661-2664 [27].) No further objections were filed. Respondent court signed the order on October 7, 2014. (10 Exh. 2665-2672 [28].)

D. Writ Relief Is Statutorily Authorized And Is Necessary To Prevent A Trial Whose Result Will Inevitably Be Reversed On Appeal. At The Very Least, This Court's Guidance Is Necessary In Order To Make Clear The Parameters Of Any Purported Or Newly-Created Duty Of Care.

30. Code of Civil Procedure section 437c, subdivision (m)(1) expressly provides that upon denial of a summary judgment motion, a party may "petition an appropriate reviewing court for a peremptory writ." The UCLA defendants have no other plain, speedy, or adequate remedy at law.

31. "Where the trial court's denial of a motion for summary judgment will result in trial on non-actionable claims, a writ of mandate

will issue." (*Farmers Insurance Exchange v. Superior Court*, *supra*, 220 Cal.App.4th at p. 1204.) Writ relief is warranted here because the superior court's ruling is legally insupportable:

- California law is clear that the duty of protection that adheres in the K-12 education setting does *not* apply at the college/university level. Contrary to the superior court's ruling, there is no special relationship, no generalized duty of supervision, between a university and its students based simply upon enrollment status, and nothing in this case would bring Rosen's claim within the narrow line of authorities that has imposed liability in the context of a special program, such as an intercollegiate athletic program. (E.g., *Avila v. Citrus Community College Dist.*, *supra*, 38 Cal.4th at p. 159 ["a separate body of law has developed to govern the special duties that schools and colleges owe their athletes"]; *id.* at p. 158 [citing an assortment of other cases holding that "colleges and universities do not owe similarly broad duties of supervision to all their students"]; *id.* at p. 162 [Court observes that it "(has) no quarrel" with cases establishing that colleges and universities owe no general duty to their students to ensure their welfare"].)

- Business invitee jurisprudence does not apply here. Rosen has never pleaded or identified any dangerous physical condition of public property that could support a business invitee theory, and the California Supreme Court has specifically held that there is no general business invitee relationship with a public entity. (*Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th at pp. 1119, 1129-1131.)

- Likewise, the law does not support the superior court's finding of voluntary assumption of a duty based on activities such as providing treatment and counseling services for students like Thompson. Again, *Zelig* is conclusive. Unless a public entity or public employee voluntarily undertakes to provide a particular level of protection and then fails to follow through, or undertakes affirmative acts that increased the risk of harm to the plaintiff (neither a scenario presented here), they – like anyone else – owe no duty to control anyone's dangerous conduct of another or to warn those endangered by such conduct. (*Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th at pp. 1128-1129.)

- Besides all this, the only expert declarations based on California law conclude that the UCLA defendants were not negligent, and several statutory immunities bar liability.

32. Writ relief is also appropriate to define the parameters of the unprecedented duty recognized by the superior court. (E.g., *People v. Superior Court*, *supra*, 195 Cal.App.4th at p. 863 [writ review appropriate "when the issue is one of first impression and writ review will provide guidance to the bench and bar"]; *Oceanside Union School Dist. v. Superior Court* (1962) 58 Cal.2d 180, 185-186, fn. 4 [same].) If this case must go forward, at the very least the law needs to be clear.

This lawsuit is doomed to fail. Before more resources are wasted on preparing for and conducting a pointless trial, this Court should intervene, grant writ relief, and direct respondent superior court to enter judgment for the UCLA defendants.

E. No Stay Request At Present Time.

33. The trial date in this matter was recently continued to June 8, 2015. Accordingly, the UCLA defendants do not seek a stay at this time.

F. Timing.

34. Cases such as *Schmidt v. Superior Court* (1989) 207 Cal.App.3d 56 and *Bensimon v. Superior Court* (2003) 113 Cal.App.4th 1257 hold that the clerk's mailing of a minute order denying summary judgment triggers the statutory period within which to seek writ relief – and that this calculation is jurisdictional and cannot be altered by subsequent trial court proceedings. Accordingly, the UCLA defendants have calculated the timing of this petition from the September 10, 2014, filing and service of respondent court's minute order denying summary judgment, along with the 10-day extension granted by the court, even though the October 2, 2014, proceedings demonstrate that the trial court's ultimate order was then a work in progress, and the court did not sign a formal order until October 7. The UCLA defendants will update the petition if further developments make it necessary.

PRAYER

WHEREFORE, Petitioners the Regents of the University of California, Alfred Bacher, Cary Porter, Robert Naples, and Nicole Green pray that this Court:

1. Issue a peremptory writ of mandate or other appropriate relief in the first instance, directing respondent superior court (a) to vacate its order denying petitioners' summary judgment motion, (b) to enter an order granting such motion, and (c) to enter summary judgment in favor of each of the UCLA defendants; or

2. Issue an alternative writ, order to show cause, or other order directing respondent superior court to show cause why such a peremptory writ should not issue, and then to issue such a peremptory writ;

3. Award petitioners their costs in this proceeding; and

4. Grant petitioners such other and further relief as may be just and proper.

DATED: October 14, 2014

Respectfully submitted,

MARANGA • MORGENSTERN
GREINES, MARTIN, STEIN & RICHLAND LLP
UNIVERSITY OF CALIFORNIA, Office of the General Counsel
UNIVERSITY OF CALIFORNIA, LOS ANGELES

By: _____
Timothy T. Coates
Attorneys for Defendants and Petitioners
The Regents of the University of California, Alfred Bacher, Cary Porter, Robert Naples, and Nicole Green

VERIFICATION

I, Timothy T. Coates, declare as follows:

I am an attorney duly licensed to practice law in California. I am a partner in the law firm of Greines, Martin, Stein & Richland LLP, attorneys of record for defendants and petitioners The Regents of the University of California, Alfred Bacher, Cary Porter, Robert Naples, and Nicole Green. I have reviewed and am familiar with the records and files that are the basis of this petition. I make this declaration because I am more familiar with the particular facts, i.e., the state of the record and the litigation, than are my clients. I certify that the petition's allegations are true and correct.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this verification was executed on October 15, 2014, at Los Angeles, California.

Timothy T. Coates

MEMORANDUM OF POINTS AND AUTHORITIES

I. THIS COURT'S REVIEW IS DE NOVO. AS IN THE TRIAL COURT, DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT WHEN THEY ESTABLISH A COMPLETE DEFENSE OR SHOW THAT PLAINTIFF CANNOT PROVE AN ESSENTIAL ELEMENT OF HER CLAIM.

This Court reviews a summary judgment ruling (whether a grant or a denial) de novo. (*Farmers Insurance Exchange v. Superior Court, supra*, 220 Cal.App.4th at p. 1204.) The appellate court need not defer to the trial court's decision and is not bound by the trial court's stated reasons supporting its ruling. (*Ibid.*; *Arnall v. Superior Court, supra*, 190 Cal.App.4th at p. 364.) In other words, this Court's review is a "do over" employing the same standards that governed consideration of the motion in the trial court. (E.g., *Silva v. Lucky Stores, Inc.* (1998) 65 Cal.App.4th 256, 261.)[3/]

[3/] However, "'[a] different analysis is required for . . . review of the trial court's . . . rulings on evidentiary objections. Although it is often said that an appellate court reviews a summary judgment motion 'de novo,' the weight of authority holds that an appellate court reviews a court's final rulings on evidentiary objections by applying an abuse of discretion standard.'" (*Miranda v. Bomel Constr. Co., Inc.* (2010) 187 Cal.App.4th 1326, 1335, quoting *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694.) The superior court overruled both sides' evidentiary objections here. (10 Exh. 2658 [26], 10 Exh. 2670 [28].)

"The purpose of the law of summary judgment is to . . . cut through the parties' pleadings . . . to determine whether . . . trial is in fact necessary . . . ." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.) "A motion for summary judgment should be granted if the submitted papers show that 'there is no triable issue as to any material fact,' and that the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A defendant meets her burden of showing a cause of action has no merit if she shows that one or more elements of the cause of action cannot be established, 'or that there is a complete defense to that cause of action.' (Code Civ. Proc., § 437c, subd. (p)(2).)" (*Christina C. v. County of Orange* (2013) 220 Cal.App.4th 1371, 1378.)

Here, the applicable law and undisputed evidence establish that the UCLA defendants are entitled to summary judgment.

II. THE TRIAL COURT WAS REQUIRED TO GRANT SUMMARY JUDGMENT BECAUSE UNDER THE GOVERNING LAW DEFENDANTS OWED PLAINTIFF NO DUTY OF CARE.

Absent a duty of care, there can be no negligence liability. """'Duty' is not an immutable fact of nature but only an expression of the sum total of those *considerations of policy* which lead the law to say that the particular plaintiff is entitled to protection."'" (*Campbell v. Ford Motor Co.* (2012) 206 Cal.App.4th 15, 26, quoting *O'Neil v. Crane Co.* (2012) 53 Cal.4th 335, 364, (in turn quoting earlier decisions) original italics.) The superior court concluded that the UCLA defendants "had a duty to warn Plaintiff

and/or to take reasonable steps to prevent the threat Damon Thompson posed to the Plaintiff." (10 Exh. 2611 [21], 2667 [28].)

The court cited three bases for its conclusion that a special relationship existed between Rosen and the UCLA defendants giving rise to a duty of care – Rosen's status as a UCLA student, her presence as a business invitee on the campus, and UCLA's having voluntarily undertaken a duty by providing campus security and by enrolling and treating Damon Thompson. The court's ruling is erroneous. Established California law and public policy considerations converge to dictate a finding of no duty.[4/]

A. Duty Is An Indispensable Element Of A Negligence Cause Of Action And Its Existence Is A Question Of Law; When A Plaintiff's Evidence, Given All Credence, Reveals That No Duty Exists, A Defendant Is Entitled To Judgment.

A cause of action for negligence requires pleading and proof of: "(a) a legal duty to use due care; (b) a breach of such legal duty; [and] (c) the breach as the proximate or legal cause of the resulting injury." (*Ladd v. County of San Mateo* (1996) 12 Cal.4th 913, 917-918, internal quotation

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[4/] That the UCLA defendants raised this issue on demurrer and petitioned this Court at that stage (2d Civil No. B234987) did not foreclose renewing the argument on summary judgment or seeking writ relief now. (E.g., *Swartzendruber v. City of San Diego* (1992) 3 Cal.App.4th 896, 907, fn. 5 ["'It should go without saying that a ruling which erroneously overrules a demurrer is not binding on anyone. The objection may be raised again by the defendants, and the error may be corrected by the same or some different law and motion judge, by the trial judge, or by the appellate court.'" (quoting *Summers v. City of Cathedral City* (1990) 225 Cal.App.3d 1047, 1063)]; *Ion Equipment Corp. v. Nelson* (1980) 110 Cal.App.3d 868, 877 [same].)

marks, citations, and emphasis omitted.) Plaintiff must prove every element or her claim must fail.

Duty is a question of law. (*Avila v. Citrus Community College Dist.*, *supra*, 38 Cal.4th at p. 161; *Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 316; *Meighan v. Shore* (1995) 34 Cal.App.4th 1025, 1033; *Banerian v. O'Malley* (1974) 42 Cal.App.3d 604, 612-613.) "As such, it is generally amenable to resolution by summary judgment." (*Eriksson v. Nunnink* (2011) 191 Cal.App.4th 826, 838; *Kahn v. East Side Union High School Dist.* (2003) 31 Cal.4th 990, 1004; *Garcia v. W & W Community Development, Inc.* (2010) 186 Cal.App.4th 1038, 1044-1045.)

Where a defendant owes no duty, it cannot be liable. Under a proper analysis of California law, the UCLA defendants owed no duty to protect Rosen or to warn her against Thompson.

B. A College Or University Owes No General Legal Duty To Protect Its Adult Students From Criminal Acts.

1. Colleges/universities have no special relationship with their students based upon their enrollment, and consequently owe no generalized duty to protect students from harm.

Respondent court ruled that the UCLA defendants owed Rosen a duty based upon her status as an enrolled student. (10 Exh. 2668-2669 [28].) California law is to the contrary.

California courts have uniformly rejected imposing negligence liability on colleges and universities for injuries to students arising from the

criminal acts of third persons, for the very reason that they have no special relationship with their students, and accordingly owe no duty to protect them from such assaults.

True, the courts have sometimes imposed this type of protective responsibility *in the K-12 setting*. (E.g., *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 869-870; *Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448 [appellate court permitted high school student to pursue negligence claim against public high school district, principal and wrestling coach, where student was attacked in school restroom while changing clothes for wrestling practice].) However, no California decision has extended the K-12 holdings on general duty of supervision to the college/university context.

Indeed, courts consistently have distinguished the K-12 cases based on the absence of any in loco parentis considerations in the higher education setting:

- Holding that "institutions of higher education have no duty to their adult students to protect them against the criminal acts of third persons," the Court of Appeal rejected a college student's negligent supervision claim for injuries he sustained when an opposing player punched him during an intramural soccer game. (*Ochoa v. California State University* (1999) 72 Cal.App.4th 1300, 1306, disapproved on another ground [immunity based on hazardous recreational activity] in *Avila v. Citrus Community College*, *supra*, 38 Cal.4th at p. 160.)

- In *Tanja H. v. Regents of University of California* (1991) 228 Cal.App.3d 434, the Court of Appeal affirmed summary judgment for the university in this personal injury action brought by a UC Berkeley student who was raped and sexually assaulted by fellow students following a party in a university dormitory they shared. The Court declared, "[a] university is not liable as an insurer for the crimes of its students." (*Id.* at p. 435.) The Court explained,"[a]s campuses have, thus, moved away from their former role as semimonastic environments subject to intensive regulation of student lives by college authorities, they have become microcosms of society; and unfortunately, sexually degrading conduct or violence in general—and violence against women in particular—are all too common within society at large. College administrators have a moral duty to help educate students in this respect, but they do not have a legal duty to respond in damages for student crimes." (*Id.* at p. 438.)

- Similarly in *Crow v. State of California* (1990) 222 Cal.App.3d 192, the Court of Appeal affirmed summary judgment for a state university in an action brought by a student who suffered injuries as a result of an assault by another student in a Cal State Sacramento dormitory. The Court expressly rejected the contention that Crow's affiliation with the university as a student created a special relationship imposing a duty to protect him against criminal assaults. (*Id.* at p. 208.) Distinguishing its own decision in *Leger v. Stockton Unified School Dist.*, *supra*, 202 Cal.App.3d 1448, the Court explained that in *Leger*, "[w]e noted that attendance at high school is mandatory and that school officials are directly in charge of the children

and their environs. . . . Here, in contrast, plaintiff was an adult college student voluntarily participating in drinking beer at the dormitory." (*Crow*, *supra*, at p. 208; see *id.* at p. 209, citing discussion in *Baldwin v. Zoradi* (1981) 123 Cal.App.3d 275, 287, 291, addressing modern reality that colleges no longer serve as parental stand-ins for their adult students.)

- As the Court noted in *Baldwin v. Zoradi*, *supra*, 123 Cal.App.3d 275, "the authoritarian role of college administrators is gone. Students have demanded rights which have given them a new status and abrogated the role of *in loco parentis* of college administrators." (*Id.* at p. 287, citing *Bradshaw v. Rawlings* (3d Cir. 1979) 612 F.2d 135, 138 [no special relationship between Cal Poly trustees and university students imposing duty of due care to prevent injuries sustained by plaintiff in "speed contest" with fellow students; judgment of dismissal affirmed].)

The only case the trial court cited for imposing a duty of care based solely on Rosen's status of a student was *Avila v. Citrus Community College Dist.*, *supra*, 38 Cal.4th at pp. 162-163, where the Supreme Court found that a college owed a duty of care to athletes engaging in intercollegiate competitions where the activity was undertaken on behalf of the college and under its formal supervision. In so holding, however, the Court made clear that it was not departing from the established principle as articulated in *Crow* and *Baldwin* "that colleges and universities owe no general duty to their students to ensure their welfare." *Id.*[5]

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[5] In opposition to the motion, plaintiff cited *Patterson v.*

(continued...)

Thus, the superior court's ruling that the UCLA defendants owed Rosen a duty of care based upon her status as an enrolled student is flatly untenable.

2. The Supreme Court has expressly rejected imposing "business invitee" liability on public entities absent the presence of a dangerous physical condition of property.

The superior court equally erred in concluding that the UCLA defendants owed Rosen a duty of care on grounds that "the law recognizes a special relationship based on plaintiff's status as defendant's business invitee." (10 Exh. 2669 [28].) California law is squarely to the contrary.

According to the superior court,

> Even without finding a special relationship based on plaintiff's status as a student in defendant's classroom and the information known concerning Thompson, the law recognizes a special relationship based on plaintiff's status as defendant's business invitee. *Peterson v. San Francisco Community College District* (1984) 36 Cal.3d 799, 806. There is a duty to protect a business invitee from foreseeable third party

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[5/] (...continued)
Sacramento City Unified School Dist. (2007) 155 Cal.App.4th 821, 828-833 as somehow establishing that colleges and universities owe a general duty of care to their students, yet there the court held that a City K-12 school district owed a duty to supervise and protect an adult student who was injured while participating in an adult truck driver training course, because "the instructors expressly and properly undertook supervision of the off-campus community service project." There are no similar allegations or evidence here – plaintiff does not assert that she was injured as a result of a failure to supervise an off-campus project or an on-campus classroom activity, such as a botched experiment; rather she asserts a failure to protect her from criminal conduct completely unrelated to the work performed in the lab.

> criminal acts. See *Ericson v. Federal Express* (2008) 162 Cal.App.4th 1291, 1300.

(10 Exh. 2669 [28].)

This analysis fails across the board.

First, the California Supreme Court has held unequivocally that there is no general business invitee relationship with a public entity. (*Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th at pp. 1119, 1129-1131 [demurrer properly sustained in lawsuit based on husband's murder of wife in Stanley Mosk Courthouse, where both were present for a hearing in their divorce proceedings].)

Business invitee liability may be imposed upon a public entity "only when there is some defect in the property itself and a causal connection is established between the defect and the injury." (*Zelig*, *supra*, 27 Cal.4th at p. 1135.) But Rosen has never pleaded any dangerous condition claim, has eschewed reliance on such a theory, and has never identified a predicate dangerous physical condition of public property on which she might base her cause of action.

The holding in *Zelig* thus undermines the superior court's reliance on *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, which – as the Supreme Court noted in *Zelig*, *supra*, 27 Cal.4th at p. 1134 – was a dangerous condition case. (See *Peterson v. San Francisco Community College Dist.*, *supra*, 27 Cal.4th at pp. 805-810 [allowing claim for injuries sustained in assault in dangerous campus parking garage].)

As the Supreme Court pointed out both in *Peterson* and in *Zelig*, there simply is no public entity liability under the type of circumstance presented here, because "'third party conduct by itself, unrelated to the condition of the property, does not constitute a "dangerous condition" for which a public entity may be held liable.'" (*Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th at p. 1134, quoting *Peterson v. San Francisco Community College Dist.*, *supra*, 36 Cal.3d at p. 810.)[6/]

3. Neither instituting campus security measures nor undertaking to treat and counsel mentally ill students constitutes voluntarily undertaking a duty to protect or warn students except in cases involving the most specific threats.

Respondent court lastly concluded:

> [D]efendant may have voluntarily assumed the duty. Defendant worked with Thompson by overseeing his psychological treatment, accommodating his disability, encouraging him to take medication and seek counseling, and intervening in his housing situation. Does their interaction create an assumption of duty?

(10 Exh. 2669 [28].)

That this portion of the ruling ends in a question mark suggests that the court itself had doubts about this duty finding. Those doubts were justified. The rare circumstances when courts have found colleges or universities to owe a duty of care to their adult students have involved

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[6/] The superior court's reliance on *Ericson v. Federal Express Corp.* (2008) 162 Cal.App.4th 1291 is misplaced for the simple reason that Federal Express isn't a public entity.

neither ordinary classroom enrollment nor providing counseling to troubled students. Rather, as noted, unlike the scenario here, they have involved specific programs, such as sports programs, in which the university has undertaken to provide protection in a defined context. (See, e.g., *Avila v. Citrus Community College Dist.*, *supra*, 38 Cal.4th at pp. 162-163; cf. *Patterson v. Sacramento City Unified School Dist., supra,* (2007) 155 Cal.App.4th 821, 828-833 [City K-12 school district owed duty to supervise and protect adult student who was injured while participating in adult truck driver training course, because "the instructors expressly and properly undertook supervision of the off-campus community service project"].)

The court's conclusion that undertaking to treat, counsel, and accommodate a mentally ill student – and thus gaining knowledge of his condition – constitutes voluntary assumption of a duty of care contravenes several entrenched principles of California law.

The general "no duty" rule. Where duty does not otherwise exist – where there is no special relationship – knowledge of danger to the plaintiff changes nothing. "The general rule is that, 'one has *no* duty to come to the aid of another. A person who has not created a peril is not liable in tort merely for failure to take affirmative action to assist or protect another unless there is some relationship between them which gives rise to a duty to act.'" (*Camp v. State* (2010) 184 Cal.App.4th 967, 975, italics added, quoting *Williams v. State of California* (1983) 34 Cal.3d 18, 23 [Highway Patrol officer who responded to traffic emergency owed no duty to plaintiff who sustained spinal injury allegedly because officer failed to inquire about

injury or summon medical personnel, and ordered passengers to leave the scene without ascertaining whether doing so might aggravate plaintiff's injuries].)

Numerous decisions apply this principle. For instance:

- Los Angeles County was not liable for husband's murder of wife in the Mosk courthouse when both were present for dissolution proceedings, notwithstanding that wife had previously sought redress in family court on various occasions due to husband's verbal abuse, and had informed the bailiff on at least three occasions "that she feared Harry and believed he might attack or kill her in the courthouse." (*Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th at pp. 1112, 1119, 1129-1131 [no general duty to protect all citizens who use the courthouse].)

- San Diego County medical examiner owed no duty to prevent a murder committed with toxic materials that its employee took from the office and used to kill her husband, even if the murderer's co-workers knew she posed a threat. (*de Villers v. County of San Diego* (2007) 156 Cal.App.4th 238, 248-251.)

- A child care referral service owed no duty to a child who was sexually assaulted by a daycare provider's teenage grandson at a daycare to which the service had referred the child's family, even if the service failed to inquire about the grandson's presence at the daycare. (*J.L. v. Children's Institute, Inc.* (2009) 177 Cal.App.4th 388, 392-394, 396-399 ["'If there is no duty, there can be no liability, no matter how easily one may have been

able to prevent injury to another. . . .'" (quoting *Margaret W. v. Kelley R.* (2006) 139 Cal.App.4th 141, 150)].)

The narrow "communicated threat of violence" exception. The narrow exception to the "no duty to prevent criminal attacks" rule comes up where "the citizen bears some special protective relationship to the victim *and* has *actual* knowledge of the assaultive propensities of the criminal actor. . . ." (*de Villers v. County of San Diego, supra,* at p. 249.) The paradigm case, of course, is *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, where the Supreme Court found that a psychiatrist owed a duty to warn a readily identifiable victim that his patient had announced an intent to kill the victim at a particular time. But "a citizen 'cannot be liable under a negligent supervision theory . . . based solely on constructive knowledge or information they should have known.'" (*de Villers* at p. 249, quoting *Margaret W. v. Kelley R., supra,* 139 Cal.App.4th at p. 153, fn. omitted.)

Indeed, developments in the statutory and decisional law since *Tarasoff* have established and clarified that the psychotherapist exception to the "no duty to warn" rule is very narrow.

On the statutory front, Civil Code section 43.92 was enacted in 1985 in direct response to the Supreme Court's decisions in *Tarasoff* and another "duty to warn" case, *Hedlund v. Superior Court* (1983) 34 Cal.3d 695, expressly to place tight boundaries on the scope of the duty. (See *Ewing v. Goldstein* (2004) 120 Cal.App.4th 807, 814-817 [reviewing historical context of statutory enactment].) While *Tarasoff* had countenanced "duty to

warn" liability based on threats that a psychotherapist either knew or should have known about, the Legislature scaled back the boundaries to cases of actual knowledge of serious threats of physical violence. As the Assembly Committee on Judiciary noted in its bill analysis, Civil Code section 43.92's purpose is "'to limit the psychotherapists' liability for failure to warn to those circumstances where the patient has communicated an "actual threat of violence against an identified victim", and to "abolish the expansive rulings of *Tarasoff* and *Hedlund* . . . that a therapist can be held liable for the mere failure to predict and warn of potential violence by his patient."'" (*Ewing v. Goldstein, supra*, 120 Cal.App.4th at p. 816, quoting Assem. Com. on Judiciary, Analysis of Assem. Bill No. 1133 (1985-1986 Reg. Sess.), May 14, 1985.) Consistent with its purpose, Civil Code section 43.92, provides, in subdivision (a):

> There shall be no monetary liability on the part of, and no cause of action shall arise against, any person who is a psychotherapist as defined in Section 1010 of the Evidence Code in failing to protect from a patient's threatened violent behavior or failing to predict and protect from a patient's violent behavior except if the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims.

Subdivision (b) amplifies:

> There shall be no monetary liability on the part of, and no cause of action shall arise against, a psychotherapist who, under the limited circumstances specified in subdivision (a), discharges his or her duty to protect by making reasonable efforts to communicate the treat to the victim or victims and to a law enforcement agency.

Our appellate courts have both confirmed the tight strictures placed on psychotherapist "duty to warn" liability and have rejected expansion of such liability beyond the mental health professional context. In *Calderon v. Glick* (2005) 131 Cal.App.4th 224, for example, the Court of Appeal affirmed summary judgment in favor of psychotherapists who were sued on a duty to warn theory by victims and surviving relatives of a deranged gunman who had shot and killed three members of his former girlfriend's family, and whom the psychotherapists had treated. In affirming the "no duty" finding, the Court noted that the gunman had repeatedly denied any intention to harm his former girlfriend and the psychotherapists believed him. (*Id.* at pp. 227-228, 230-232.) As the Court noted, "We empathize with the remaining members of the family but the Legislature has expressly precluded monetary recovery from psychotherapists in this situation." (*Id.* at p. 227.)

Similarly in the interrelated cases of *Smith v. Freund* (2011) 192 Cal.App.4th 466 and *Greenberg v. Superior Court* (2009) 172 Cal.App.4th 1339, both of which involve an autistic teenage gunman, William, who shot and killed two members of a neighbor family, the Court of Appeal found that neither the gunman's parents (*Smith v. Freund*) nor his psychotherapist (*Greenberg v. Superior Court*) owed a duty to protect the victims against William or warn them about him absent specific threats of violence against identified or identifiable third parties. The Court found the claim against the psychotherapist materially indistinguishable from the scenario in *Calderon v. Glick, supra*, 131 Cal.App.4th 224. (*Greenberg* at pp. 1348-

1349.) As to the gunman's parents, the Court noted that even assuming some responsibility to control their son, and even though there was evidence of his aggressive conduct toward his parents, the record revealed only one instance in which he had acted in anger toward another third party – an incident in which, as the gunman had related it to his psychologist, "he (William) slapped another student at school in the face because the other student 'karate-chopped him' on the shoulder and William felt he had a right to defend himself." (*Smith v. Freund*, *supra*, 192 Cal.App.4th at p. 475.) "Based on this lone instance of William's behavior against a student who had struck William first," the Court concluded, "defendant could not reasonably foresee that William would, several years later, harm a third party." (*Ibid.*)

The most that Rosen pleaded or might remotely establish here is that Thompson was a mentally ill student who once engaged in a dormitory noise-related pushing match with another student (not Rosen) and who had frequently complained about other students (possibly including Rosen) without ever threatening serious physical harm to any of them, and specifically disavowed such an intent to both his treating psychologist and psychotherapist eight days before the attack, and whose only communicated threat was a statement to a TA that he might complain to the Dean of Students. Even if Rosen could get past the general rule that colleges and universities have no special relationship with their students by identifying a specific special relationship between Thompson and any of the individual UCLA defendants (for example, Dr. Green as his treating psychologist),

there still is no evidence that Thompson ever actually communicated to his psychotherapists an intent to commit physical violence against Rosen or anyone in particular – and there is substantial materially undisputed evidence to the contrary. (See 5 Exh. 1364-1370 [10].)

Thompson was under treatment for schizophrenia, and yes, he had repeatedly evinced irrational concern that other students had taunted or ridiculed him. But assuming Thompson did name Rosen among the students he claimed had bothered him, this is still a far cry from *Tarasoff* or Civil Code section 43.92 and the duties these create for a psychotherapist only. Rosen cannot come close to raising any material factual dispute that might remove her case from application of the general rule against imposing any duty on citizens to prevent criminal attacks.

4. The expansion of duty that Rosen promotes would upend decades of law and would so interfere with the administration of colleges and universities as to contravene public policy.

In enacting Civil Code section 43.92, the Legislature signaled clearly that only the narrowest circumstances justify an exception to the basic rule that there is no duty to protect another against criminal attack. Even as to treating psychotherapists, no duty arises outside of actual knowledge of an actually communicated threat of physical violence against an identified or reasonably identifiable individual. There is no evidence here that would support liability under the governing standard even against the psychotherapists who treated Damon Thompson; and Rosen's thesis that

laypersons who interacted with Thompson owed a greater "should have known" duty is insupportable, indeed absurd.

Even if California's jurisprudence left open a door permitting the conclusion that the UCLA defendants owed a duty to protect Rosen from criminal attack (which it does not), the breathtaking scope of the responsibility that Rosen seeks to impose on the UCLA defendants – and by extension, all personnel of the Regents – would be reason to shut it. The Regents enrolls some 234,000 students and has 189,000 employees. (See The University of California: Statistical Summary of Students and Staff (Fall 2012), pp. 3, 22 [Tables 1a and 10], at < http://legacy-its.ucop.edu/uwnews/stat>.) Applied broadly, Rosen's theory of liability would make professors, instructors, administrative personnel and perhaps even graduate students at every institution of higher learning in California insurers of the personal safety of students enrolled in their classes and cripple the institution's ten campuses. The cost to the public of imposing such a responsibility, assuming it could be implemented, would be overwhelming. The proposition is as unwise as it is unworkable. (See *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 678; *Sharon P. v. Arman, Ltd.* (1999) 21 Cal.4th 1181, both cases disapproved on another point in *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 527 [burden of imposing duty of care to protect against criminal assaults is relevant consideration in determining whether such duty exists].)

Furthermore, imposing a new duty on colleges and universities to prevent or warn against mentally ill students absent an articulated threat of

serious physical violence against an identified or readily identifiable person would exact substantial undesirable social costs. For instance, beyond the direct monetary costs, colleges and universities would face pressure to avoid liability exposure, perhaps by attempting to remove rather than treat students who face mental health challenges. Institutions yielding to such pressure would face harsh consequences because of protections the law has put in place to guard against this kind of conduct. (See, e.g., Rehabilitation Act of 1973, § 504, 29 U.S.C. § 701; Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12101 et seq. [both statutes prohibiting colleges/universities from discriminating against students on the basis of disability, actual or perceived, and requiring provision of reasonable accommodations for disabled students]; Family Educational Rights and Privacy Act of 1974 (FERPA), 20 U.S.C. § 1232g [safeguarding students' right of privacy in their "educational records"].)

Besides this, imposing this newly postulated duty ultimately would harm students more than help them – by discouraging colleges/universities from providing services for students in order to avoid learning information that could trigger an obligation to protect/warn, by discouraging students from seeking treatment for mental health issues, and by marginalizing students who do seek mental healthcare, to name just a few of the more obvious consequences. To place these considerations within the framework of this litigation, given the absence of any articulated threat of serious physical violence against Rosen or anyone, the UCLA defendants could not have removed Thompson or warned Rosen (or anyone) concerning him

without breaching substantial obligations that the university owed to Thompson's privacy rights.

Because of all these considerations, on the record presented, the superior court's ruling amounts to imposing a broad new duty on university personnel (whether or not psychotherapists) to protect students from criminal attack. This Court should correct the error by shutting the door to that expansion of duty, just as our Supreme Court declined in *Ann M.* and *Sharon P.*, in the premises liability context, to impose a duty on a premises owner to prevent a third party from committing a violent criminal assault against a person on the premises, even though violent criminal activity is predictable as a general phenomenon. (*Ann M. v. Pacific Plaza Shopping Center*, *supra*, 6 Cal.4th at p. 670 [shopping center owed no duty to provide security guards in the center's common areas]; *Sharon P. v. Arman, Ltd.*, *supra*, 21 Cal.4th at p. 1199 [commercial landlord owed no duty to provide security in its garage]; *id.* at pp. 1186, 1191 [noting the commission of "prior robberies . . . on the premises" and the commission of "363 crimes" in the surrounding 50-block area the previous year].)

Rosen's recourse is against her assailant. The UCLA defendants owed no duty to protect Rosen, and accordingly are entitled to summary judgment. This Court should rectify respondent superior court's error and issue a writ directing entry of summary judgment for the UCLA defendants.

III. THE UCLA DEFENDANTS ALSO ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE EVEN IF THEY OWED ROSEN A DUTY OF CARE, THEY DID NOT BREACH IT – THEY WERE NOT NEGLIGENT IN TREATING OR HANDLING THOMPSON.

Rosen asserts that her claim against Dr. Green and all the UCLA defendants is for general rather than professional negligence.[7/]

Negligence is the failure to use reasonable care to prevent harm to oneself or to others. A person can be negligent by acting or by failing to act, and is negligent, assuming a duty is owed, if he or she does something that a reasonably careful person would not do in the same situation or fails to do something that a reasonably careful person in the same situation would do. (CACI No. 401.) "Because application of [due care] is inherently situational, the amount of care deemed reasonable in any particular case will vary, while at the same time the standard of conduct

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[7/] Rosen's characterization of her claim, particularly against Dr. Green, as being for general negligence is dubious at best. "[W]hen a cause of action is asserted against a health care provider on a legal theory other than medical malpractice, the courts must determine whether it is nevertheless based on the 'professional negligence' of the health care provider so as to trigger MICRA." (*Smith v. Ben Bennett, Inc.* (2005) 133 Cal.App.4th 1507, 1514.) Dr. Green was Damon Thompson's treating psychologist at UCLA CAPS, and Rosen's accusations of deficiencies in treatment and in failing to warn the UCLA community concerning Thompson clearly constitute professional, not general, negligence. (See, e.g., *Hedlund v. Superior Court, supra*, 34 Cal.3d at p. 703 [duty to warn "inextricably interwoven" with doctor's professional negligence]; *Waters v. Bourhis* (1985) 40 Cal.3d 424, 432 [same]; Bus. & Prof. Code, §§ 6146, subd. (c)(2), 2900, et seq. [together defining psychologist as healthcare provider under MICRA]; Evid. Code, § 1010 [defining "psychotherapist"].)

itself remains constant, i.e., due care commensurate with the risk posed by the conduct taking into consideration all relevant circumstances. [Citations.]" (*Flowers v. Torrance Memorial Hospital Medical Center* (1994) 8 Cal.4th 992, 997.) In the case of a medical practitioner, negligence consists of the failure to use the level of skill, knowledge, and care in diagnosis and treatment that other reasonably careful medical practitioners would use in the same circumstances. (CACI No. 501.)

Rosen has not advanced any direct liability theory against the Regents, but rather relies on the Regents' respondeat superior responsibility for the torts of its employees. Accordingly, the Regents can be liable only if Rosen can establish negligence on the part of the individual defendants – Dean of Students and Vice Chancellor Robert Naples, Associate Dean of Students Cary Porter, Dr. Nicole Green, Ph.D., or chemistry professor Alfred Bacher. But she cannot do so.

The overwhelming evidence shows that UCLA's policies for dealing with mentally ill students and for apprising the UCLA community concerning dangers were advanced for the time, and that Damon Thompson was watched carefully, received treatment repeatedly, and never showed himself to be a threat to his own or anyone else's safety. Given the evidence, it is not surprising that two expert witnesses have concluded that the UCLA defendants were not negligent under California law.

Rosen did submit countervailing expert declarations. (7 Exh. 1751-2004, 8 Exh. 2005-2085 [11].) According to respondent superior court, there is a triable issue of fact on duty, and the evidence fueling it lies in the

dueling expert declarations. (10 Exh. 2669 [28] ["Triable issue: Did Defendant breach its duty when it failed to inform Plaintiff that Thompson had identified her as a target of his anger and/or failed to place her into a different lab? *The evidence giving rise to this triable issue of material fact are the declarations of the parties' experts, Mark Mills, Eugene Deisinger, Steve Pitt and James Madero and the evidence cited therein.*"] (emphasis added).)

But in deeming the case a battle of the experts, the court overlooked the crucial distinction between Rosen's experts' declarations and those of the UCLA defendants' experts: Rosen's experts' conclusions that the UCLA defendants were negligent are founded vaguely on "the standard applicable to all universities in 2009." (5 Exh. 1413-1414 [10], 7 Exh. 1893 [11].) In their declarations, Rosen's experts discoursed at length about general practices in universities but they never referenced or acknowledged the *California legal standards* that govern duty and liability. The UCLA defendants' experts, in contrast, based their opinions on a review that expressly included relevant California law.

Dr. Deisinger (the UCLA defendants' threat assessment expert) and Dr. Mills (their medical expert in the diagnosis, treatment and management of schizophrenia) each independently conducted an exhaustive review of the materials adduced in discovery detailing the UCLA defendants' interactions with and responses to Damon Thompson, *as well as relevant California law*, and concluded that the UCLA defendants were not

negligent either in their care and treatment of Damon Thompson or in their management of his presence on campus. (1 Exh. 174 [3], 1 Exh. 227 [4].)

Because Rosen's expert declarations do not purport to be based on California legal standards, they are not competent to contradict the UCLA defendants' experts' opinions. So, the case really is *not* a battle of experts. Bottom line: The only expert evidence based on analysis under California law squarely conclude that the UCLA defendants did not breach any duty of care in their dealings with or in regard to Damon Thompson. Since they were not negligent, they cannot be liable to Rosen for her injuries.

This court should correct the superior court's error – it should issue a peremptory writ directing entry of summary judgment in the UCLA defendants' favor.

IV. THE SUPERIOR COURT ERRED IN FAILING TO AWARD THE UCLA DEFENDANTS SUMMARY JUDGMENT ON IMMUNITY GROUNDS.

The superior court concluded without elaboration that "[t]he immunity statutes do not apply here." (10 Exh. 2669 [28].) That conclusion, too, is in error.

A. Government Code Section 856 Shields Public Entities And Their Employees From Liability For Injuries Resulting From Their Determinations Whether To Confine A Person For Mental Illness.

Government Code section 856, subdivision (a), provides that "[n]either a public entity nor a public employee acting within the scope of

his or her employment is liable for any injury resulting from determining in accordance with any applicable enactment: (1) Whether to confine a person for mental illness or addiction." Subdivision (b) adds that "[a] public employee is not liable for carrying out with due care a determination described in subdivision (a)." These provisions shield all of the UCLA defendants from liability here.

Rosen postulates that the attack on her would not have occurred had the UCLA defendants, individually and collectively, acted to confine or remove Damon Thompson or to warn the UCLA public about him based on indications made known to each of them that his condition was escalating in the days preceding it. However, the claim cannot be substantiated. Thompson never communicated to Dr. Green, his treating psychologist, or to any other UCLA medical or mental health personnel, a serious threat of physical violence against anyone, let alone Rosen. (See Civ. Code, § 43.92, subd. (a).) As to the laypersons who interacted with Thompson, to hold them responsible to warn about or protect against him based upon what they "should have suspected" – that is, to hold them to a higher standard than the one that governs mental health personnel – would be absurd. In any event, Rosen's contention that defendants are liable for having failed to confine Thompson or put out a warning about him is barred by the immunity established by Government Code section 856.

In *Tarasoff v. Regents of University of California, supra*, 17 Cal.3d 425, although the Court held that liability could be imposed on psychotherapists for failing to warn an identifiable victim of an attack

threatened by a patient, it held that Government Code section 856 barred any liability based on the failure to confine Ms. Tarasoff's attacker. (17 Cal.3d at pp. 447-449.) In so doing, the Court rejected the contention that the immunity has application solely to persons designated under Welfare and Institutions Code section 5150:

> The language and legislative history of section 856 . . . suggest a far broader immunity. . . . The Legislature did not refer in section 856 only to those persons authorized to institute emergency proceedings under [a predecessor to section 5150]; it broadly extended immunity to all employees who acted in accord with 'any applicable enactment,' thus granting immunity not only to persons who are empowered to confine, but also to those authorized to request or recommend confinement.

(17 Cal.3d at p. 447.)

The Court further explained:

> We believe that the language of section 856, which refers to any action in the course of employment and in accordance with any applicable enactment, protects the therapist who must undertake this delicate and difficult task. (Citation.) Thus the scope of the immunity extends not only to the final determination to confine or not to confine the person for mental illness, but to all determinations involved in the process of commitment. (Citation.)

(17 Cal.3d at p. 448.)

The heart of Rosen's case is effectively that the UCLA defendants should have warned the UCLA community in general, and Rosen in particular, concerning Damon Thompson or somehow excluded him from campus. The evidence shows beyond material dispute that they made a

reasoned determination not to do that. Moreover, had they taken such action, they would have violated Thompson's rights under the United States and California Constitutions, the ADA, and HIIPA. Accordingly, under Section 856, they are immune from liability for the attack. (See *Johnson v. County of Ventura* (1994) 29 Cal.App.4th 1400, 1409-1410 [quote at 1410] [Section 856 immunity insulated public entity and employees from liability for attack arising from a patient's leaving a hospital and stabbing plaintiff's decedent to death].)

B. Government Code Section 820.2 Immunity Bars Liability Here.

Government Code section 820.2 immunizes public employees from liability for injuries resulting from their discretionary acts:

> Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused.

While the immunity does not shield against liability for injuries resulting from ministerial or operational acts or decisions, the cases consistently hold that the immunity insulates public employees from liability for injuries resulting from their basic policy decisions. (E.g., *Barner v. Leeds* (2000) 24 Cal.4th 676, 684-687 [citing earlier decisions]; *Johnson v. State of California* (1968) 69 Cal.2d 782, 793-795 [rejecting mechanical analysis of term "discretionary"; drawing distinction between basic policy decisions and operational acts].)

As a result a court must make a "'judicial determination of the category into which the particular act falls: i.e., whether it was ministerial because it amounted "only to an obedience to orders, or the performance of a duty in which the officer is left no choice of his own," or discretionary because it required "personal deliberation, decision and judgment."'" (*Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 748-749, quoting *McCorkle v. City of Los Angeles* (1969) 70 Cal.2d 252, 260-261; *Morgan v. County of Yuba* (1964) 230 Cal.App.2d 938, 942-943).) Thus, actual decisionmaking – personal deliberation, decision and judgment – is key to determining whether the immunity applies in a given context.

Application of the "personal deliberation, decision and judgment" standard compels application of the immunity to each of the UCLA defendants. Some of Rosen's allegations, particularly against Dean Porter and Dean Naples, directly challenge UCLA's development and choice of policy in dealing with students like Damon Thompson. Beyond this, the evidence unambiguously depicts at every stage, from Thompson's enrollment at UCLA forward, a process of considered, detailed, painstaking deliberations by the UCLA defendants concerning both Thompson's treatment and UCLA community safety.

Courts have repeatedly applied discretionary immunity under section 820.2 to precisely the sort of conduct at issue here – i.e., where decisions regarding the assessment or treatment of a mentally ill person have resulted in injury:

- In *Thompson v. County of Alameda*, *supra*, 27 Cal.3d 741, the Court held the County immune under Section 820.2 where plaintiffs' five-year-old son was killed by a juvenile offender within 24 hours of his release on temporary leave irrespective of whether the county's employees were negligent in authorizing the release. (*Id.* at pp. 748-749 ["The discretionary nature of the selection of custodians for potentially dangerous minors and the determination of the requisite level of governmental supervision for such custodians becomes apparent when the underlying policy considerations are analyzed . . . . The decision, requiring as it does, comparisons, choices, judgments, and evaluations, comprises the very essence of the exercise of 'discretion' and we conclude that such decisions are immunized under section 820.2"].)

- In *Ronald S. v County of San Diego* (1993) 16 Cal.App.4th 887, the Court of Appeal held the county immune from liability under section 820.2 for injuries suffered by a minor who was abused by his adopted father, who had been selected by the county following the deaths of the minor's natural parents. (*Id.* at pp. 896-897, quote at 897 ["the pre-adoption work of the social service employees of the County constituted discretionary activity protected by the immunity provision of section 820.2. The nature of the investigation to be conducted and the ultimate determination of suitability of adoptive parents bear the hallmarks of uniquely discretionary activity"].)

- In *Ortega v. Sacramento County Dept. of Health and Human Services* (2008) 161 Cal.App.4th 713, the court applied Section 820.2

immunity where an 11-year-old girl sustained savage injuries days after the county department released her to her father's custody notwithstanding his bizarre and disturbing behavior while under the influence of PCP coupled with evidence that the county inadequately investigated his background and suitability as a custodian. (*Id.* at pp. 729-732 [section 820.2 applies to protective custody investigations], p. 733 ["the record in this case does reflect that (the social worker) made a considered decision balancing risks and advantages. It is clear she did so on woefully inadequate information, but she did do so." "[T]he exercise of discretion invariably entails the collection and evaluation of information. Thus, the collection and evaluation of information is an integral part of 'the exercise of discretion' immunized by section 820.2"].)

- In *Christina C. v. County of Orange*, *supra*, 220 Cal.App.4th 1371, 1374, 1376, the immunity applied to a social worker's decision to remove a minor child from his mentally ill mother and place him with his father, notwithstanding evidence that the mother was able to provide care, that the child fared poorly with the father, and that the child ultimately returned to the mother after the father pleaded guilty to charges that he poisoned his live-in maid with benzodiazepine and was a felon in possession of a firearm. The court noted, "The immunity applies even to 'lousy' decisions in which the worker abuses his or her discretion, including decisions based on 'woefully inadequate information.'" (*Id.* at p. 1381, quoting *Ortega v. Sacramento County Dept. of Health & Human Services*, *supra*, 161 Cal.App.4th at pp. 725, 728)].)

The public employees' decisions in these and other cases entailed exercise of discretion similar to that required of the UCLA defendants. As these cases make clear, to the extent Rosen charges the UCLA defendants with making poor choices in their decisions concerning treatment and handling of Thompson, section 820.2 immunity still applies.

Even under painful facts such as those in *Thompson v. County of Alameda, supra*, 27 Cal.3d at p. 746 – where family of the young man (James) whom the County decided to parole lived but a few doors down from the little boy whom James ultimately murdered; where the County knew that James had "'latent, extremely dangerous and violent propensities regarding young children and that sexual assaults upon young children and violence connected therewith were a likely result of releasing [him] into the community'"; where the County knew that James had "'indicated that he would, if released, take the life of a[n unidentified] young child residing in the neighborhood'"; and where the County did nothing to warn the child's parents or anyone else in the neighborhood of the danger that James's presence posed – section 820.2 immunity applied, because the County exercised its discretion within the meaning of the statute in deciding to parole James. The individual UCLA defendants analogously exercised discretion here in making decisions regarding treating Thompson and protecting the UCLA community. Accordingly, the individual UCLA defendants as well as the Regents (which acts through them) are likewise entitled to section 820.2's protection.

C. Because Thompson Never Communicated Any Serious Threat Of Physical Violence Against Rosen, Civil Code Section 43.92 Shields The UCLA Defendants From Liability Founded On Any Psychotherapist's Failure To Protect Or Warn Her Against Thompson.

As discussed in Section II (Duty), Civil Code section 43.92 precludes pursuing a cause of action or imposing monetary liability against any psychotherapist for failing to predict, warn or protect against a patient's violent behavior except where "the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonably identifiable victim or victims." (Civ. Code, § 43.92, subd. (a).) The statute further precludes pursuing a cause of action or imposing liability upon a psychotherapist who, having learned of such a threat, "discharges his or her duty to protect by making reasonable efforts to communicate the threat to the victim or victims and to a law enforcement agency." (Civ. Code, § 43.92, subd. (b).) This section immunizes Dr. Green, all other UCLA psychotherapists who treated Damon Thompson, and The Regents as their employer sued under respondeat superior. The evidence shows that Thompson never communicated a threat against Rosen (or anyone else) that met the statutory description; and to the extent that UCLA's personnel were concerned that Thompson might be a danger to himself or unidentified others (his repeated denials notwithstanding), they brought those concerns to law enforcement, which found no cause to confine Thompson

involuntarily. Under Civil Code section 43.92, as for all the other reasons addressed, the UCLA defendants are entitled to summary judgment.

CONCLUSION

There is a natural sympathy for the injured party in a case like this, but based upon the governing law, as well as the undisputed evidence, the trial court had no discretion other than to grant the motion for summary judgment. For the foregoing reasons, the petition should be granted.

DATED: October 14, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rules 8.204(c) and 8.486(a)(6), I certify that this **PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES** contains 13,541 words, not including the cover, the certification of interested parties, the tables of contents and authorities, the caption page, the verification page, the signature blocks, the supporting Exhibits, or this Certification page.

DATED: October 14, 2014

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 October 15, 2014, I served the foregoing document described as: **PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF** on the parties in this action by placing a true copy thereof enclosed in sealed envelope(s) addressed as follows:

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(X) BY MAIL: As follows: I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with United States Postal Service on that same day with postage thereon fully prepaid at Los Angeles, California 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 October 15, 2014, at Los Angeles, California.

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

ANITA F. COLE