2nd Civil No. B259424

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

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. SC108504

Hon. Gerald Rosenberg, Judge
West District, Santa Monica
Department K
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PETITIONERS' BRIEF IN RESPONSE TO AMICUS CURIAE BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA AND OTHERS

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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. SC108504 Hon. Gerald Rosenberg, Judge West District, Santa Monica Department K Telephone: (310) 260-3501

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INTRODUCTION

There is not much new in the amicus curiae brief filed on behalf of Consumer Attorneys of California and some 5000+ others. It echoes arguments made in Rosen's return to the writ petition, albeit playing up a few different angles, but it is no more successful than the return, whose shortcomings were addressed in our reply. Like the return, Consumer Attorneys' amicus curiae brief fails on the law and on the facts.

Consumer Attorneys' brief contends that the UCLA defendants may be held responsible for Rosen's injury because the law is moving in the direction of imposing a duty on colleges and universities to assure student safety. It says that because UCLA promotes campus safety, has voluntarily established threat assessment protocols and supposedly charges a general security fee, the UCLA defendants can be liable for having fallen short of meeting UCLA's own voluntarily-adopted standards. And it argues that the facts as it depicts them justify liability. Each argument is built upon false assumptions.

Universities may be tightening up security in the wake of highly publicized incidents such as the Virginia Tech massacre; however, contrary to Consumer Attorneys' intimations, even if they are, that has not changed the prevailing law in California holding that these institutions owe students no tort duty of care absent a serious threat of physical violence against a reasonably identifiable victim. The amicus brief's argument accordingly dies at the threshold. Further, in attempting to conjure the necessary duty, Consumer Attorneys relies on dangerous-condition cases – but Rosen has never asserted a dangerous-condition claim; in fact, she expressly eschews reliance on any such theory. As to the Virginia Tech tragedy, the Virginia Supreme Court concluded there was no

liability there. (*Commonwealth of Virginia v. Peterson* (2013) 749 S.E.2d 307.) California law compels a like conclusion here – no duty and no liability.

That UCLA promotes a safe campus and takes steps to provide one also does not create a duty of care making the UCLA defendants liable any time a student is attacked or injured on campus, even if the UCLA defendants supposedly could have done a better job of implementing their programs. That is not how the negligent undertaking doctrine – on which Consumer Attorneys relies – works. The question is whether the UCLA defendants' conduct comported with California law. And under California law, no duty arises unless a defendant, by its actions, has increased the risk of harm to the injured party or specifically caused her to rely upon its protections. (E.g., *Paz v. State of California* (2000) 22 Cal.4th 550, 558-559.) Neither Consumer Attorneys nor Rosen has explained how the existence of campus safety protocols or the UCLA defendants' treatment of attacker Damon Thompson increased any risk to Rosen, or how she was aware of, let alone specifically relied on, anything the UCLA defendants did.

Finally, while Consumer Attorneys is correct that whether a duty exists in a case depends upon the circumstances, its brief misconceives or at least misreports the circumstances in this case. Incorrect assumptions about the facts, evidently drawn from Rosen's return, underlie not only the entirety of the Consumer Attorneys' brief itself but also the basis upon which a plethora of organizations and 5000+ individuals were persuaded to sign onto the brief. (See Consumer Attorneys' Brief ["CAB"] 3 [individuals and organizations signed on because they are "appalled" at the claim "that colleges and universities do not have a duty to protect their students from foreseeable violence from other students in their classrooms or on their campuses"].) Like Rosen, Consumer

Attorneys depicts Thompson's tenure at UCLA as a criminal assault upon Rosen waiting to happen. But the fact is that Thompson never communicated to his psychotherapist (or anyone) a serious threat of physical violence against Rosen or any reasonably identifiable victim. Absent such a threat, the UCLA defendants owed no duty to protect or warn Rosen under any theory posited by her or by Consumer Attorneys.

Our briefs have demonstrated that there is no basis for imposing liability on the UCLA defendants in this case. Consumer Attorneys has not come close to showing otherwise.

ARGUMENT

I. CONTRARY TO CONSUMER ATTORNEYS' SELECTIVE AND MISLEADING CHRONOLOGY, THERE IS NO "RESURGENCE" OF ANY BROAD DUTY TO ASSURE STUDENT SAFETY.

The Consumer Attorneys' amicus curiae brief begins by giving a purported history of college and university liability for injuries to their students. The brief depicts a selective chronology in which the law is steadily evolving toward imposing a broad duty on institutions of higher learning to protect their students from violent attacks. (Consumer Attorneys' Brief [CAB] 15-18.) However, the thesis that the law has been moving toward adopting a broadened duty collapses upon examination.

For example, the brief cites *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425 and the enactment of Civil Code section 43.92 as early signs of movement away from insulating colleges and universities from liability for third-party criminal attacks, noting that *Tarasoff* imposed liability on a university "for failing to warn a student-victim of a threat made by another student" and that "[a] form of the *Tarasoff* duty became statutory upon the enactment of Civil Code section 43.92 by the California

Legislature." (CAB 17.) While not strictly incorrect, the depiction of *Tarasoff* and Civil Code section 43.92 is misleading.

The focus of both *Tarasoff* and Civil Code section 43.92 is on the responsibilities of psychotherapists, not those of colleges and universities – it was only incidental that the psychotherapist in *Tarasoff* happened to be a university employee. As for Civil Code section 43.92, it (a) has nothing whatever to do with the duties of colleges and universities, and (b) was enacted to rein in – i.e., to *narrow* – the scope of the "duty to warn" liability that the California Supreme Court recognized in *Tarasoff*. (See, e.g., *Elijah W. v. Superior Court* (2013) 216 Cal.App.4th 140, 155, fn. 12 [noting after discussing *Tarasoff* that "Civil Code section 43.92 later limited a therapist's liability for failing to protect from a patient's threatened violent behavior to situations in which 'the patient has communicated to the psychotherapist a serious threat of physical violence against a reasonable identifiable victim or victims'"].) So neither *Tarasoff* nor Civil Code section 43.92 supports the thesis that the law has long been moving toward imposing any broad duty of student protection upon colleges and universities.

Further, it should not be overlooked that Consumer Attorneys (like Rosen) are trying to (a) expand *Tarasoff* liability to apply against lay faculty, deans and staff of colleges and universities, and, (b) in so doing, impose a "should have known" standard that was abandoned against psychotherapists in the post-*Tarasoff* era as unworkable even for such trained professionals given the unpredictability of patient violence. (See Civ. Code, § 43.92, subd. (a) [no liability or cause of action arises against psychotherapist "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" (emphasis added)].) Thus, the duty that Consumer Attorneys seeks to impose would not only extend liability to a vastly expanded population of layperson defendants, but would also make a plaintiff's burden of proof against lay persons much easier than what must be proved against a psychotherapist whom Civil Code section 43.92 protects from any such expansive reading of *Tarasoff*. The resulting dichotomy would be a legal absurdity.

The brief likewise misses the mark in suggesting that cases post-*Tarasoff* have imposed on colleges and universities some expansive duty of care for student safety under California law. (CAB 17-18.) *Mullins v. Pine Manor College* (Mass. 1983) 449 N.E.2d 331, 335-336, being a Massachusetts case, neither reflects nor predicts trends in California law; in any event, its facts (concerning a female student raped in the on-campus dormitory where the college required her to reside) show it to be a "dangerous condition of property" case. Likewise, *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, 813, is a "dangerous condition of public property" case, as discussed in our petition and reply. (Petition 32-33; Reply 5, 14-15.) There is a big difference between imposing a general duty to protect or warn students against all manner of on-campus danger or injury (as Consumer Attorneys posits as the coming trend) and recognizing a duty to keep a college's physical plant safe and in working order. (See Return 37 ["Rosen makes no dangerous-condition claims"].) *Peterson* neither establishes nor endorses the type of broad duty that Consumer Attorneys promotes.

Waving the "Remember Virginia Tech" banner, the amicus brief observes that colleges and universities, including the University of California, have developed and put

in place tighter campus security measures in the wake of that tragedy. (CAB 18.) No doubt they have. But their voluntary action does not, and should not, change the law – perhaps the surest way to deter colleges and universities from taking such voluntary additional measures is to impose liability on them based on whether they satisfy self-imposed heightened standards. The fact remains, as addressed in the petition and reply, that California law does not impose a general duty on colleges and universities to ensure student welfare. (See *Avila v. Citrus Community College Dist.* (2006) 38 Cal.4th 148, 162.)

II. CALIFORNIA LAW SETS THE SCOPE OF A COLLEGE'S OR UNIVERSITY'S RESPONSIBILITY TO ENSURE STUDENT SAFETY. WHETHER THE UCLA DEFENDANTS SUCCESSFULLY IMPLEMENTED ANY SPECIAL STANDARDS THEY VOLUNTARILY ADOPTED IS NOT THE LEGAL STANDARD.

A. The Negligent Undertaking Doctrine Has No Application Here, As The UCLA Defendants' Purported Adoption Of Heightened Security Standards Neither Increased Any Risk To Rosen Nor Specifically Caused Her To Rely On Such Standards.

Consumer Attorneys' central argument is that UCLA voluntarily assumed a heightened duty of care by, e.g., adopting special threat assessment and prevention measures and by attempting to control Thompson; and the UCLA defendants can be held liable for having breached that voluntarily-assumed duty of care. (CAB 19-32.) Rosen made the same argument in her return (Return 44-52) and we refuted it in the reply (Reply 15-17, citing *Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 249; *Zelig v. County of*

Los Angeles (2002) 27 Cal.4th 1112, 1128-1129; *Paz, supra*, 22 Cal.4th at pp. 558-559 [no duty arises unless defendant, by its actions, has increased the risk of harm to the injured party or specifically caused her to rely upon its protections]; *Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 613-616 [noting the limited boundaries of the doctrine].)

To recap briefly, even if Rosen and Consumer Attorneys were correct that UCLA undertook all the special measures they say and then failed to perform at the voluntarily-assumed heightened level (a point not remotely conceded, particularly given the absence of evidence that Damon Thompson posed any foreseeable threat of serious physical violence against Rosen or any identifiable victim), they have not shown and cannot show that UCLA's failure increased the risk of harm to Rosen or that she reasonably relied on (or even was aware of) UCLA adoption of standards heightened above what was otherwise required.

Straining to manufacture some reliance by Rosen, Consumer Attorneys stresses that "UCLA actually *charged additional fees to cover the costs of its security programs.*" (CAB 24 (original emphasis), citing UCLA's writ exhibits at 7 Exh. 1824, 7 Exh. 1829.) Not so; what the cited pages reflect is imposition of a fee to cover campus services for student mental health needs – services that Damon Thompson actually used. In any event, like Rosen herself, the Consumer Attorneys' brief does not explain how Rosen relied upon UCLA's institution of any particular program.

Like Rosen, Consumer Attorneys points to the California Constitution, article I, section 28, subdivision (a)(7), which states that students and staff in California schools, including at colleges and universities, have a right to safe and secure campuses and asserts that this provision "imposes a duty on UCLA and other post-secondary schools in

California." (CAB 26, 36.) As explained in the reply to Rosen's return, the provision does no such thing. (Reply 6-9; see *Clausing v. San Francisco Unified School Dist.* (1990) 221 Cal.App.3d 1224, 1236-1238 ["we conclude that (the safe schools provision) is not self-executing, in the sense that *it does not provide an independent basis for a private right of action for damages. Neither does it impose an express affirmative duty on any government agency to guarantee the safety of schools*" (quote at 1237-1238, emphasis added)]; *Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448, 1455, quoting *Older v. Superior Court* (1910) 157 Cal. 770, 780 ["We recognize that a constitutional provision is presumed to be self-executing unless a contrary intent is shown. (Citations.) Here, however, (the safe schools provision) declares a general right without specifying *any* rules for its enforcement. *It imposes no express duty on anyone to make schools safe. It is wholly devoid of guidelines, mechanisms, or procedures from which a damages remedy could be inferred.* Rather, 'it merely indicates principles, without laying down rules by means of which those principles may be given the force of law'" (emphasis added)]; see also *Bautista v. State of California* (2011) 201 Cal.App.4th 716, 729 ["*Clausing* reached the same conclusion we do, namely that the right to safe schools, just like the right to securing safety in employment, *required legislative action to make the constitutional provision operative as a judicially enforceable right*" (emphasis added)]; cf., *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 306-317 [approvingly citing *Leger*'s and *Clausing*'s analysis of whether a constitutional provision supports a damages cause of action].)

The broad duty that Consumer Attorneys seeks to impose on the UCLA defendants does not exist under California law, and nothing these defendants did or failed to do heightened their responsibilities above what the law requires.

B. The UCLA Defendants Do Not Have A Special Relationship With Their Students That Gives Rise To A Tort Duty Of Care.

One of the superior court's stated grounds for denying the UCLA defendants' summary judgment motion was the determination that UCLA had a special relationship with Rosen based upon her enrollment as a UCLA student. Both the petition and the reply have extensively addressed the reasons why that ruling is error. (Petition 4, 12-17, 27-31; Reply 4-15.) In a nutshell, the Supreme Court has observed that it "(has) no quarrel" with "cases establishing that colleges and universities owe no general duty to their students to ensure their welfare" (*Avila v. Citrus Community College*, *supra*, 38 Cal.4th at p. 162) and the undisputed evidence establishes that the UCLA defendants had no knowledge about Thompson that would take the case out of the application of that general no-duty rule.

The Consumer Attorneys' brief argues for a special relationship based on a couple of angles that have not been addressed previously. These are readily refuted.

First, the brief contends that *Delgado v. Trax Bar & Grill*, *supra*, 36 Cal.4th 224 "actually demonstrates why a special relationship *does* exist between colleges and universities who have developed threat assessment and violence prevention protocols and their students." (CAB 27, original emphasis.) It does not.

In *Delgado*, the plaintiff was a patron at Trax Bar & Grill. He got into an altercation with another patron and was asked to leave; when he did, he was attacked in

the Trax parking lot by the other patron and his companions. The Supreme Court held that the bar had a special relationship with its patrons that required it to take reasonable steps to secure the property against foreseeable criminal assaults. (*Delgado v. Trax Bar & Grill, supra*, 36 Cal.4th at pp. 234-244.) According to Consumer Attorneys, "[i]f a bar owner owes a duty to its casual patrons, clearly a college or university, which charges enormous fees for the services provided, including special fees for security services, is also in a special relationship with its invitees, i.e., its students." (CAB 28.)

The attempted analogy between this case and *Delgado* fails. The comparison is apples to oranges. *Delgado* is a business invitee case; the UCLA defendants are public entity defendants, and our Supreme Court has established that 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; see Petition 31-33; Reply 4-5.) But Rosen makes no claim of defect in the property itself; again, she "makes no dangerous-condition claims." (Return 37.)

The amicus brief also places heavy reliance on a Georgia State College of Law JD candidate's student note that proposes using a sliding scale approach for determining whether colleges and universities should be found to have had a special relationship justifying imposing liability when one student injures another student. (CAB 29-32, discussing Note, *Taking a Bullet: Are Colleges Exposing Themselves to Tort Liability by Attempting to Save Their Students?* (2013) 29 Ga. St. U. L.Rev. 539, 554-555 ("Student Note").) The Student Note posits that "[i]f the college has no notice that the violent perpetrator may pose a risk, no duty should attach" (Student Note at p. 578), but "if a

university through its threat assessment team has actual or constructive notice of a tangible threat against an individual or group, courts should find a duty to exercise reasonable care to prevent harm and protect the community" (*ibid.*).[1/] Seizing upon this analysis, Consumer Attorneys argues that the scale supports imposing a duty here because "as the evidence in this specific case confirmed, UCLA was well aware of the risk Thompson posed to Rosen and others." Even accepting arguendo that the Student Note's proffered method of analysis is persuasive, Consumer Attorneys' reliance on it fails because it depends on a thoroughly erroneous characterization of the facts in this case.

As addressed in the reply, Rosen's depiction of the evidence – on which Consumer Attorneys obviously relies – is distorted at best. (Reply 22-26.) The fact is, Damon Thompson never communicated to his psychotherapist (or anyone) a serious threat of physical violence against Rosen or any reasonably identifiable victim. In fact, over and over again, he was questioned about and denied any intent to harm himself or others. Just eight days before the attack, Thompson specifically disavowed to his mental health providers any intent to harm others, including those he believed to be criticizing him. (5 Exh. 1345-1346; 3 Exh. 891.) On the day before the attack he said if those maligning him didn't stop, he threatened to take action – by complaining to the Dean of Students. (5 Exh. 1360.) Even under the Student Note's sliding scale approach, this is a no-duty case.

[1/] What Student Note posits is essentially congruent with the Civil Code section 43.92 standard for psychotherapists. As discussed, however, there is no support in California law for imposing that standard on lay people.

CONCLUSION

Nothing in the Consumer Attorneys' brief undercuts the petition's demonstration that the UCLA defendants merit relief. This Court should direct the superior court to vacate its order, to instead enter a new order granting the UCLA defendants' summary judgment motion, and to enter judgment in favor of the UCLA defendants.

DATED: January 29, 2015

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 **PETITIONERS' BRIEF IN RESPONSE TO AMICUS BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA AND OTHERS** contains 3,184 words, not including the cover, the tables of contents and authorities, the caption page, the signature blocks, or this Certification page.

DATED: January 29, 2015

Feris M. Greenberger

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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

On January 29, 2015, I served the foregoing document described as: **PETITIONERS' BRIEF IN RESPONSE TO AMICUS CURIAE BRIEF OF CONSUMER ATTORNEYS OF CALIFORNIA AND OTHERS** on the interested parties in this action by serving:

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

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Executed on January 29, 2015 at Los Angeles, California.

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

Pauletta L. Herndon

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