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
Telephone: (310) 260-3501

REPLY TO RETURN TO ORDER TO SHOW CAUSE ON PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF

MARANGA • MORGENSTERN
Kenneth A. Maranga (SBN 94116)
Paul A. Elkort (SBN 175302)
Morgan A. Metzger (SBN 273330)
Dennis Newitt (SBN 243276)
5850 Canoga Avenue, Suite 600
Woodland Hills, California 91367
(818) 587-9146 // Fax (818) 587-9147
ken.maranga@marmorlaw.com

Charles F. Robinson (SBN 113197)
Karen J. Petrulakis (SBN 168732)
Norman J. Hamill (SBN 154272)
UNIVERSITY OF CALIFORNIA
Office of the General Counsel
1111 Franklin Street, 8th Floor
Oakland, California 94607
(510) 987-9800 // Fax (510) 987-9757

GREINES, MARTIN, STEIN & RICHLAND LLP
Timothy T. Coates (SBN 110364)
* Feris M. Greenberger (SBN 93914)
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
(310) 859-7811 // Fax (818) 276-5261
tcoates@gmsr.com; fgreenberger@gmsr.com

Kevin S. Reed (CSB No. 147685)
Vice Chancellor, Legal Affairs
UNIVERSITY OF CALIFORNIA, LOS ANGELES
2135 Murphy Hall
405 Hilgard Avenue
Los Angeles, California 90095
(310) 206-1335

Attorneys for Petitioners
The Regents of the University of California,
Alfred Bacher, Cary Porter, Robert Naples, and Nicole Green

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
Telephone: (310) 260-3501

REPLY TO RETURN TO ORDER TO SHOW CAUSE ON PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF

MARANGA • MORGENSTERN
Kenneth A. Maranga (SBN 94116)
Paul A. Elkort (SBN 175302)
Morgan A. Metzger (SBN 273330)
Dennis Newitt (SBN 243276)
5850 Canoga Avenue, Suite 600
Woodland Hills, California 91367
(818) 587-9146 // Fax (818) 587-9147
ken.maranga@marmorlaw.com

Charles F. Robinson (SBN 113197)
Karen J. Petrulakis (SBN 168732)
Norman J. Hamill (SBN 154272)
UNIVERSITY OF CALIFORNIA
Office of the General Counsel
1111 Franklin Street, 8th Floor
Oakland, California 94607
(510) 987-9800 // Fax (510) 987-9757

GREINES, MARTIN, STEIN & RICHLAND LLP
Timothy T. Coates (SBN 110364)
* Feris M. Greenberger (SBN 93914)
5900 Wilshire Boulevard, 12th Floor
Los Angeles, California 90036
(310) 859-7811 // Fax (818) 276-5261
tcoates@gmsr.com; fgreenberger@gmsr.com

Kevin S. Reed (CSB No. 147685)
Vice Chancellor, Legal Affairs
UNIVERSITY OF CALIFORNIA, LOS ANGELES
2135 Murphy Hall
405 Hilgard Avenue
Los Angeles, California 90095
(310) 206-1335

Attorneys for Petitioners
The Regents of the University of California,
Alfred Bacher, Cary Porter, Robert Naples, and Nicole Green

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

CONSTITUTION & STATUTES

INTRODUCTION

The return is revealing in that its primary focus is a fictional tale, complete with "dramatis personae," in which Damon Thompson "presented a textbook case for intervention" while the UCLA defendants stood idly by. Its distorted storytelling fails to disguise that none of the authorities it cites supports imposing a duty of care on the UCLA defendants for Rosen's injuries. The lawsuit fails on the law.

As the petition discussed, California law does not impose a generalized duty of care on colleges and universities to look after their students, and the limited Civil Code section 43.92 duties to warn or protect have never been extended to laypersons, including college faculty or administrators. In tacit acknowledgment that the law does not support Rosen, the return focuses on end runs. For instance, it makes much of UCLA's supposed failure to follow all of its own procedures, but, even if true, that doesn't help Rosen's cause. There is no legal basis for finding that the UCLA defendants owed a duty to protect or warn Rosen against Thompson, and indeed, no reason to suppose UCLA would have removed Thompson from classes under any protocol; moreover, even under Rosen's posited scenario, the fact that something more or different could have been done is immaterial to the key question of whether what *was* done met the prevailing standard of care.

Lacking a credible rejoinder to the petition's demonstration that there was no special relationship between the UCLA defendants and Rosen, the return posits various creative theories, all unsuccessful. For example, Rosen argues that UCLA has an implied-in-fact contractual relationship with its students that gives rise to a special relationship, that students are akin to public employees who are entitled to a safe workplace, which UCLA failed to provide, and that the California constitutional provision declaring a right to safe campuses supplies a vehicle for imposing tort liability even for unforeseeable attacks. These theories find no support in California law.

The return also fails on the facts.

In renewing her evidentiary objections, Rosen overlooks the patent relevancy of the evidence submitted (though she relies on the same evidence). She also ignores the entirety of the superior court's treatment of the evidentiary objections and fails to devote even one word to demonstrating how the superior court's considered ruling constituted an abuse of discretion.

The return does no better in conveying what the evidence says. The record citations that Rosen provides do not support her sensationalized story. In fact, Rosen does not identify any evidence contradicting UCLA's demonstration 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 her under any posited theory.

Rosen exhorts the Court to remember Virginia Tech, but the thing to remember about it is that the courts recognized there was no basis for liability for that horrifying tragedy. (*Commonwealth of Virginia v. Peterson* (2013) 749 S.E.2d 307.) Here too, there is no basis to hold the UCLA defendants liable for this unfortunate event.

MEMORANDUM OF POINTS AND AUTHORITIES

I. NO AUTHORITY THAT ROSEN CITES SUPPORTS HER CONTENTION THAT THE UCLA DEFENDANTS OWED HER A DUTY OF CARE.

The petition established that Rosen's claims are barred as a matter of law given the absence of any duty of care to her under these circumstances, and showed why each of the three bases that the superior court cited for its conclusion that a special relationship existed between Rosen and the UCLA defendants giving rise to a duty of care is patently erroneous. (Petition 25-43.) The return offers weak defenses of the superior court's ruling and, tellingly, strains to manufacture new grounds for finding a duty. (Return 29-51.) Without recapitulating the petition's discussion, we will demonstrate fatal flaws in the return's presentation.

A. California Law Does Not Establish A Special Relationship Between College Students And Their College Or Their Professors Or Their Teaching Assistants In The Classroom Or Elsewhere.

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. (Petition 27-31.) In the return, Rosen posits various novel bases for working around this obstacle to her action. Her efforts are unsuccessful.

1. Public entities have no "business invitee" liability absent the presence of a dangerous condition of public property, and Rosen concedes she makes no dangerous condition claim.

The California 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 v. County of Los Angeles* (2002) 27 Cal.4th 1112, 1135; see Petition 31-33.) The return flatly concedes that "Rosen makes no dangerous-condition claims." (Return 37.)

Yet Rosen insists that business invitee liability is available, citing *Peterson v. San Francisco Community College Dist.* (1984) 36 Cal.3d 799, because "tuition-paying students are business invitees of the faculty and staff." (Return 36-38, quote at 36.) As the petition pointed out (Petition 32-33), *Peterson* was a dangerous condition case, so it lends Rosen's position no support.

To the extent Rosen is drawing a distinction between UCLA itself and its public-employee faculty and staff on the basis that *Zelig*'s business invitee discussion doesn't preclude imposing such liability on the individual defendants (and therefore vicariously upon the university itself) (see Return 37), her argument makes no sense. A business invitee is one whom a *business* invites to be present. (E.g., *Schwartz v. Helms Bakery Limited* (1967) 67 Cal.2d 232, 239 ["The courts have long held that one who invites another to do business with him owes to the invitee the duty to exercise reasonable care to prevent his being injured on 'the premises'"].) UCLA is the business; its faculty and staff – UCLA's *employees* – are not. Moreover, it would be anomalous indeed if California law precluded imposing business invitee liability directly on a public entity in the absence of a dangerous condition of property, but readily permitted plaintiffs to circumvent that rule by imposing business invitee liability on public employees for whose conduct the public entity is vicariously liable.

2. The "Safe Schools Act" does not supply a basis for finding a special relationship.

The California Constitution includes a "safe schools" provision. (Cal. Const., art. I, § 28, subds. (a)(7), (f)(1).) As originally enacted in 1982 as part of Proposition 8, the "Victim's Bill of Rights" initiative, it declared that students and staff in K-12 schools have a right to attend safe campuses. (See generally *Brosnahan v. Brown* (1982) 32 Cal.3d 236 [upholding constitutionality of original enactment].) A 2009 initiative amended the safe schools provision to encompass institutions of higher learning, so that it now reads: "All students and staff of public primary, elementary, junior high, and senior high schools, *and community colleges, colleges, and universities* have the inalienable right to attend campuses which are safe, secure and peaceful." (Cal. Const., art. I, § 28, subd. (a)(7), emphasis added.)

According to Rosen, "[t]he Supreme Court has looked to the California Constitution as a source of the special relationship that exists between schools and K-12 students[,]" and since the safe schools provision now extends beyond the K-12 setting, so does the special relationship. (Return 35-36, citing *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 870, fn. 3 [citing the safe schools provision]; see also Return 62-63.) The argument does not withstand scrutiny.

First, *C.A. is a K-12 case*. (*C.A. v. William S. Hart Union High School Dist.*, *supra*, 53 Cal.4th at p. 865 ["C.A., a minor, sued his public high school guidance counselor and the school district for damages arising out of sexual harassment and abuse by the counselor"].) As such, it is not authority for any proposition concerning the potential tort liability of colleges or universities, particularly since, as detailed in the Petition (at pp. 27-31), California law has consistently found a special relationship giving rise to a tort duty of care only in the K-12 setting. (E.g., *People v. Avila* (2006) 38 Cal.4th 491, 566, quoting *People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10 ["'It is axiomatic that cases are not authority for propositions not considered'"].)

Further, Rosen overreaches in depicting *C.A.* as relying on the safe schools provision as a "source" of the special relationship found in the K-12 setting. The Court did observe in a footnote that the provision expresses a "fundamental public policy favoring measures to ensure the safety of California's public school students" (*C.A. v. William S. Hart Union High School Dist.*, *supra*, 53 Cal.4th at p. 870, fn. 3), but it did *not* name the provision as a source of the special relationship necessary to support a tort liability claim. For that principle, it cited the usual K-12 cases. (*Id.* at p. 871.)

Moreover, there is no reason to suppose that the Court – if presented with the issue – would conclude that the safe schools provision supports

imposing a tort duty of care upon colleges and universities. Rather, there is substantial reason to conclude it would not, because our appellate courts have long held that the safe schools provision imposes no express duty on anyone to make schools safe, and does *not* provide a basis for a damages action in tort or otherwise. (See, e.g., *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].)

Simply put, since the constitutional safe schools provision does not support a damages remedy even in the K-12 setting, it does not assist Rosen here.

3. The duty to provide a safe workplace has no application here.

Rosen argues that she is entitled to take her claim to trial because "UCLA had a duty to provide a safe workplace – its classrooms – that adequately addresses potential workplace violence." (Return 28, 39-42, 63.) For several reasons, this argument does not pass muster.

At the threshold, the "safe workplace" argument does not assist Rosen because, if taken at face value, her thesis that UCLA was her workplace and she was an employee would mean that her action against the UCLA defendants is barred by the exclusive remedy provisions of workers' compensation. (See Lab. Code, § 3600, et seq.; *Privette v. Superior Court* (1993) 5 Cal.4th 689, 697 ["When the conditions of compensation exist, recovery under the workers' compensation scheme 'is the exclusive remedy

against an employer for injury or death of an employee.' (Citation)]; *ibid.* ["The Act's exclusivity clause applies to work-related injuries regardless of fault, including those attributable to the employer's negligence or misconduct (Citation), as well as the employer's failure to provide a safe workplace (Citation)"].)

In any event, to state the obvious, while students "work" at school and do "school work," UCLA was not Rosen's "workplace" in the sense addressed in California law, including the cases on which Rosen relies – i.e., the place of an employee's employment. (See, e.g., *Franklin v. The Monadnock Co.* (2007) 151 Cal.App.4th 252 [addressing duty of "employers" to provide "employees" with safe workplace]; *City of Palo Alto v. Service Employees Internat. Union* (1999) 77 Cal.App.4th 327, 330 [addressing soundness of an arbitration award in favor of a "former city employee"].)

None of Rosen's stratagems for likening herself to an employee and UCLA to her place of employment withstands scrutiny. That UCLA published a brochure declaring its commitment "to providing a safe work environment for all faculty, staff and students – one that is free from violence and threats of harm" does not transform Rosen into an employee or make UCLA her workplace in any legal sense. (See Lab. Code, § 2750 [defining an employee as one engaged "to do something for the benefit of the employer or a third person"].) Neither does the fact that Thompson was

at some point a paid employee in an undergraduate summer research program having no connection to the chemistry course in which the attack took place, or that Rosen volunteered in the same summer program. (See Return 41.) And neither does the principle treating attendance at public colleges or universities as broadly akin to public employment for purposes of evaluating speech claims. (*Ibid.*; see *Goldberg v. Regents of the University of California* (1967) 248 Cal.App.2d 867, 877.) The safe workplace provisions do not assist Rosen here because Thompson's attack on her in the chemistry lab was not a workplace injury.

Finally, even if UCLA could be considered Rosen's "workplace" in any meaningful legal sense, Rosen still cannot overcome the fact that there was no articulated or foreseeable threat against her as to which the UCLA defendants owed a duty to protect or warn her. That starkly distinguishes her case from the ones on which she relies. *City of Palo Alto v. Service Employees Internat. Union*, *supra*, 77 Cal.App.4th 327 involved an express threat made by one city employee, Camm, against a co-worker, Bingham. After Bingham informed Camm that he had complained to a supervisor about him, "Camm threatened to shoot Bingham, his wife and their new baby if he lost his job." (*Id.* at p. 331.) Likewise in *Franklin v. The Monadnock Co.*, *supra*, 151 Cal.App.4th at p. 255, "[p]laintiff alleged that a coworker in the workplace had threatened to have plaintiff and three other employees killed, that defendants did nothing in response to his complaint

to them about the threats, that the coworker thereafter assaulted him with a screwdriver, that plaintiff reported the assault to the police, and that plaintiff was terminated from his employment as a result of his complaints to defendants and the police." These express threats are a far cry from the facts here – which entail, at most, Thompson having named Rosen among the students he thought had called him "stupid."

Franklin makes clear, moreover, that the "safe workplace" public policy only requires employer action in the face of a credible articulated threat. (*Franklin v. The Monadnock Co.*, *supra*, 151 Cal.App.4th at pp. 259-260; see, e.g., Code Civ. Proc., § 527.8, subd. (b)(2) [cited in *Franklin*, *supra*, 151 Cal.App.4th at p. 260, defining "[c]redible threat of violence" as "'a knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose'"]; Pen. Code, § 139, subd. (c) [cited in *Franklin*, *supra*, 151 Cal.App.4th at p. 260, defining a "credible threat" as "a threat made with the intent and the apparent ability to carry out the threat so as to cause the target of the threat to reasonably fear for his or her safety or the safety of his or her immediate family"]; Pen. Code, § 646.9, subd. (g) [cited in *Franklin*, *supra*, 151 Cal.App.4th at p. 260, defining "credible threat" as "verbal or written threat . . . made with the intent . . . and . . . with the apparent ability to carry out the threat so as to cause the person who is the target of the threat to

reasonably fear for his or her safety or the safety of his or her family"].) Again, as discussed in the petition and as we address in Section II(B), *post*, Rosen, her florid rhetoric notwithstanding, cannot identify evidence that Thompson ever articulated any threat of violence against her – because he never did.

4. The enrollment contract between a student and a university does not create a special relationship supporting the tort duty that Rosen posits.

Rosen contends that her enrollment at UCLA created an implied-in-fact contract that created a special relationship giving rise to a tort duty behooving the UCLA defendants to protect or warn her against Thompson's attack. (Return 42-44.) She is wrong.

Certainly, there is a contractual relationship between a university student and the university. (See, e.g., *Andersen v. Regents of University of California* (1972) 22 Cal.App.3d 763, 769-770 [disciplinary due process case]; *Kashmiri v. Regents of University of California* (2007) 156 Cal.App.4th 809, 815 [university fees case].) As Rosen acknowledges, that contract contains implied conditions entitling the student not to be arbitrarily expelled, and requiring the student to submit to reasonable rules and regulations that, in a proper case, may lead to expulsion. (Return 42, citing *Andersen*.) But it is a huge leap from that proposition (existence of

contractual relationship) to the conclusion that, by virtue of the contract, a university owes a student a tort duty of care.

Rosen tries to piece together a tort duty by (a) citing authority holding that a special relationship may be created by contract (Return 42, citing *Suarez v. Pacific Northstar Mechanical, Inc.* (2009) 180 Cal.App.4th 430, 438), (b) citing *Peterson v. San Francisco Community College District*, *supra*, 36 Cal.3d at p. 814, which she depicts as supporting a duty to protect students from foreseeable threats of violence, (c) pointing to the brochure voicing UCLA's commitment to providing a "safe work environment" and (d) quoting a UCLA Student Conduct Code provision proscribing "[c]onduct that threatens the health or safety of any person, including oneself." (Return 43, 44.) But the theory does not gel:

- While *Suarez* does say that a special relationship giving rise to a tort duty may be created by contract, it also rejects finding any such duty absent clear contractual intent. (*Suarez v. Pacific Northstar Mechanical, Inc.*, *supra*, 180 Cal.App.4th at pp. 437-439; *id.* at p. 439 [written contract between contractor and subcontractor did not clearly create tort duty in subcontractor to protect contractor's employees from injury].) If a written contract does not create a tort duty absent terms evincing clear intent, then, necessarily, the duty cannot be cobbled together from limited implied-in-fact conditions juxtaposed with snippets from a brochure and a disciplinary code.

- Rosen persists in overreading *Peterson*, which, as noted above (Section I(A)(1), *ante*) and in the Petition (Petition 32-33), was a dangerous condition case – a theory Rosen has expressly eschewed pursuing.

Furthermore, unless Rosen means to posit a limitless duty exposing UCLA to tort liability any time something bad happens to a student on campus, her contract theory fails because of the same unsurmountable shortcoming as the rest of her arguments: the lack of any foreseeable articulable threat of violence against her.

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 Dist.* (2006) 38 Cal.4th 148, 162; see *id.* at p. 159 [noting that "a separate body of law has developed to govern the special duties that schools and colleges owe their athletes"].) Nothing in the return takes Rosen's case outside the general "no duty" rule. The UCLA defendants owed no duty to protect or warn Rosen concerning Thompson.

B. The UCLA Defendants Did Not Assume A Duty Of Care By Undertaking Measures To Enhance Campus Security.

Shifting gears, Rosen contends that if the law does not impose a tort duty of care here based upon a special relationship, the UCLA defendants nevertheless assumed one under the negligent undertaking doctrine. (Return 44-52.) Under that doctrine, "a volunteer who, having no initial

duty to do so, undertakes to provide protective services to another, will be found to have a duty to exercise due care in the performance of that undertaking if one of two conditions is met: either (a) the volunteer's failure to exercise such care increases the risk of harm to the other person, or (b) the other person reasonably relies upon the volunteer's undertaking and suffers injury as a result." (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 249; see, e.g., *Zelig v. County of Los Angeles*, *supra*, 27 Cal.4th at pp. 1128-1129; *Paz v. State of California* (2000) 22 Cal.4th 550, 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].) Rosen's argument fails because neither requisite is met.

Rosen asserts the UCLA defendants voluntarily undertook a heightened duty of care by adopting special threat assessment and prevention measures, by undertaking in general to address threats of violence in UCLA's classrooms, and by attempting to control Thompson. (Return 44-52.) But even if Rosen were correct that UCLA did all these things and then failed to perform at the voluntarily-assumed heightened level (a point not remotely conceded, particularly given the absence of any foreseeable threat of serious physical violence against Rosen), she has not shown and cannot show that UCLA's failure increased the risk of harm to

her or that she reasonably relied on (or even was aware of) UCLA's adoption of standards heightened above what was otherwise required.

Boiled down, Rosen's complaint is that the UCLA defendants – despite their having treated and monitored Thompson closely via the services of 19 or more professionals – could have done better. Even if that were so, it is no basis for imposing liability. (See, e.g., *Mixon v. Pacific Gas & Electric Co.* (2012) 207 Cal.App.4th 124, 139-140 [PG&E not liable for failing to provide brighter streetlights, when it was under no duty to light its streets]; cf., *Barnard v. Langer* (2003) 109 Cal.App.4th 1453, 1462, fn. 13, citation omitted [attorney not liable for failing to obtain the best possible settlement, because "'No lawyer has the ability to obtain for each client the best possible compromise but only a reasonable one'"].) The law does not require the best possible actions, but only what is reasonable under the circumstances.

Neither Rosen nor respondent court has identified a sound basis for imposing on the UCLA defendants a duty of care to have protected or warned Rosen against Thompson's attack. Since the UCLA defendants owed no duty to protect Rosen, they are entitled to summary judgment.

II. ROSEN'S EFFORT TO MANUFACTURE FACTUAL ISSUES BOTH IGNORES THE TRIAL COURT'S EXERCISE OF DISCRETION IN OVERRULING HER EVIDENTIARY OBJECTIONS AND MISREPRESENTS THE RECORD.

As noted in the petition and in section I, *supra*, Rosen's claims are barred as a matter law given the absence of any duty of care under the circumstances. Yet, as further noted in the petition, even assuming the existence of any such duty, the undisputed evidence established that defendants satisfied the only legally relevant standard. There is no evidence that Damon Thompson communicated to any defendant – healthcare professional or otherwise – a serious threat of physical violence against Rosen or anyone else.

In the face of the abundant evidence detailed in the petition and presented to the trial court, gleaned from the pertinent records detailing Thompson's interaction with defendants – much of it evidence that Rosen herself relies on – Rosen purports to renew evidentiary objections rejected by the trial court without actually making any argument as to why the trial court erred in overruling her objections, and offers an exaggerated, flatly untenable account of what the evidence depicts.

A. Rosen's Renewed Evidentiary Objections Should Both Be Rejected As Groundless And Deemed Waived For Failure To Show That The Superior Court Abused Its Discretion In Overruling Them.

1. The evidentiary challenge is baseless.

The return attacks the evidence that the UCLA defendants submitted on summary judgment and with the petition. (Return 18-29.) In particular, Rosen argues that defendants should have submitted more declarations from the individual defendants and other UCLA personnel involved in the events, as opposed to the emails, student and medical records actually contemporaneously detailing events (Return 21-22), and asserts defendants are attempting to "smuggle" in evidence via expert witness declarations (Return 22-25). The attack is baseless.

For one thing, the evidence was submitted separate from and independent of the expert declarations, although, of course, it did supply the foundation on which the experts evaluated Rosen's claim. As demonstrated to the superior court, it stands on its own as valid support of the UCLA defendants' position. (See 9 Exh. 2215-2219.) For another, all the evidence was offered, considered by the superior court, and admitted on legitimate bases, including as authenticated business records. (See 9 Exh. 2216-2219 [UCLA defendants' response to evidentiary objections]; 10 Exh. 2658 [minute order], 10 Exh. 2670 [formal order], 10 Exh. 2650-

2656 [hearing on evidentiary objections], Petition 17-18.) When Rosen raised an authentication objection below, the UCLA defendants submitted additional authentication (10 Exh. 2417-2574), which the superior court accepted.

2. The return utterly fails even to argue (much less show) that the superior court abused its discretion in overruling Rosen's objections.

Rosen obviously is dissatisfied with the superior court's evidentiary rulings. But in "renewing" her objections, she misstates the standard of review and fails to demonstrate or even address error under the correct (or any) standard. Accordingly, her objections must be deemed waived.

Rosen lobbies for the de novo standard, pointing out that "[i]n *Reid v. Google, Inc.* (2010) 50 Cal.4th 512, 'the Supreme Court expressly left open the question of whether a de novo standard or an abuse of discretion standard applies to evidentiary rulings [actually made] in connection with summary judgment motions. . . .'" (Return 23, fn. 33, quoting *Howard Entertainment, Inc. v. Kudrow* (2012) 208 Cal.App.4th 1102, 1114.) The Supreme Court did leave the question open, but that does not mean there is no law on the subject.

As the concurrence pointed out in *Howard*, "[e]very single Court of Appeal decision in the past one-half decade has applied the abuse of discretion standard of review in the summary judgment context to

admissibility of evidence contentions." (*Howard Entertainment, Inc. v. Kudrow*, *supra*, 208 Cal.App.4th at pp. 1122-1123 (conc. opn. of Turner, P.J.) [citing thirteen Court of Appeal decisions].) While *Reid* tells us that the Supreme Court could take up the issue someday, there is no question that right now, in 2015, California law 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.* (2010) 187 Cal.App.4th 1326, 1335, quoting *Carnes v. Superior Court* (2005) 126 Cal.App.4th 688, 694; see Petition 24, fn. 3.).)

Again, respondent superior court considered and overruled both sides' evidentiary objections. (10 Exh. 2658 [minute order], 10 Exh. 2670 [formal order]; see 10 Exh. 2650-2656 [hearing on evidentiary objections].) Under prevailing law, that ruling is reviewed for abuse of discretion. But while Rosen carps about alleged deficiencies in the evidence and purports to "renew" her objections (Return 20-29), there is not one word in the return that attempts to demonstrate how or why respondent court's order overruling the objections was an abuse of that court's broad discretion.

When a party asserts a point but fails to support it with reasoned argument and citations to authority, the appellate court may treat it as waived or forfeited, and pass it without consideration. (E.g., *People v. Stanley* (1995) 10 Cal.4th 764, 793; *Taylor v. Roseville Toyota, Inc.* (2006) 138 Cal.App.4th 994, 1001, fn. 2.) That is precisely what this Court should

do here, given the complete absence of any specific argument as to how the trial court purportedly erred in overruling Rosen's objections.

B. The Record Does Not Support Rosen's Depiction Of Thompson As Having Posed A Foreseeable Threat To Her, Or Anyone.

In addition to attacking the evidence, Rosen distorts it.

The return asserts that Damon Thompson "exhibited documented, increasingly-threatening, paranoid behavior"; told UCLA "faculty and staff if they didn't do something about his tormentors, he would"; and "presented a textbook case for intervention." (Return 1; see Return 67 [asserting that the attack was unexpected "only from Katherine Rosen's point of view"].) This dramatic characterization is the cornerstone of Rosen's lawsuit – the notion that Damon Thompson was an obvious criminal assault waiting to happen, and UCLA did nothing – in contrast to the UCLA defendants' assertion that Thompson never communicated to his psychotherapist (or anyone) a serious threat of physical violence against Rosen or any reasonably identifiable victim. Rosen supports her depiction with a string of record citations. (See Return 1 fn. 3 [citing 2 Exh. 528, 571-572; 3 Exh. 804; 6 Exh. 1448, 1463, 1471-1472, 1493, 1529-1534, 1562]; 67 fn. 49 [identical].) Yet none of them support her contention. If anything, in fact, they confirm that Thompson didn't make specific threats against anyone and posed no foreseeable risk to Rosen.

Specifically:

2 Exh. 528: In an email to Professor Lin, Thompson complained that other students were attempting to distract him with offensive comments and the like; he requested special accommodations seating him away from others during exams.

2 Exh. 571-572: Janelle Rahyns forwarded to Dean Porter an email from the Delta Terrace dorm Resident Advisor ("RA") describing odd complaints that Thompson had made about his roommates and dorm neighbors.

3 Exh. 804: A clinic note by Dr. Green recounts that Thompson "states that he sometimes feels very angry by insults and harassment and even this week insulted a woman back for insulting his maturity, but states that he has no intention to act on impulse to harm physically, even if he feels like it. Says he and [redacted] [are] not getting along but no intention to harm [redacted]. Again reminded [Thompson] to contact me or go to hospital ASAP if he feels more violent urges."

6 Exh. 1448: In a lengthy letter to Dean Naples complaining about perceived harassment in the dorm, Thompson asked that he "issue letters of admonition to the residence [*sic*] of D21 to deter further offenses in this quarter." He continued, "Otherwise, this will escalate into a more serious situation and I'll end up acting in [a] manner that will incur undesirable consequences upon me."

6 Exh. 1463: The incident report on the occasion when Thompson voluntarily entered the hospital for a psychiatric evaluation notes, "He also could hear voices coming through the walls calling him an idiot. He said that he was on the phone with his father and his father told him to hurt the other residents. Duty RD asked him if he wanted to hurt himself or anyone else. The resident reported that he thought about it but he wasn't going to do anything." Thompson related his fears that other residents had a gun and might come after him; when no gun was found, he agreed to be hospitalized for psychiatric evaluation.

6 Exh. 1471-1472: This is another dorm incident report. It recounts Thompson's inability to get along with his roommates, whom Thompson considered too noisy.

6 Exh. 1493: This is another of Dr. Green's clinic notes, which recounts, among other things, that Thompson still believes other students are harassing him in the dorm, that he continued to deny suicidal intentions and also denied homicidal intentions, "[a]lthough admits to feeling angry when he is harassed by others."

6 Exh. 1529-1534: This are two lengthy, somewhat rambling letters from Thompson to the director of the MARC program, to which Thompson had applied, and to a chemistry professor in whose lab he had worked. In them, Thompson details the perceived problems with harassment in his class and lab work and his fears that it has affected his performance and

may affect his ability to obtain letters of recommendation. There is nothing in them either identifying any harasser or suggesting that Thompson intends to act out against anyone.

6 Exh. 1562: This is an excerpt from a fellow undergraduate, Benjamin Yeung, who stated that on one occasion when he heard Thompson complaining to teaching assistant Adam Goetz about other students talking about him, Yeung heard Thompson tell Goetz "something along the lines of I'm going to do something about it if you don't." But Yeung never heard Thompson say *what* he intended to do. ("Q: Do you know what he intended to do about it? A: No. Q: You'd be speculating, correct? A: Yeah.")[1/]

None of this adds up to anything close to Thompson posing a foreseeable threat to Rosen, or a case for any intervention beyond the monitoring of Thompson's condition that was being provided. Indeed, it adds nothing to the characterization of events presented in the petition: The UCLA defendants acknowledged that there may have been occasions when Thompson identified Rosen among the group of students whom he perceived as having called him stupid. (Petition 11.) The petition further

---

[1/] A different section of the return cites Goetz's deposition testimony that Thompson often named Rosen among the students who were calling him "stupid." (Return 50, citing 6 Exh. 1574.) In that testimony, Goetz elaborated that the situation "had never, um, escalated to something where he confronted anyone. He always just kind of said, 'This person is calling me stupid.'" (6 Exh. 1574.)

acknowledged that on the day before the attack, Thompson told a TA that if other students continued to malign him, he would report it to the Dean of Students. (Petition 11 [5 Exh. 1360].)[2/]

Straining to support her story, Rosen emphasizes that Thompson "later" disclosed that he stabbed Rosen because he believed he heard her threaten him on the day of the attack. (Return 49.) Upon examination it turns out that "later" means at a psychological evaluation at Patton State Hospital on June 1, 2011 – more than 1½ years after the attack. (See 4 Exh. 1028; see also Return 3 & fn. 12 [quoting Thompson's June 2011 remarks without noting that they post-dated the attack].) The fact is, UCLA monitored Thompson closely, but during his tenure at UCLA he *never* communicated – to his treating psychotherapist or anyone else – a serious threat of physical violence against Rosen (or anyone). Absent such a threat, the UCLA defendants had no legal duty to intervene.

CONCLUSION

For all the reasons addressed in the petition and in this reply, this Court should direct the superior court to vacate its order denying the UCLA defendants' summary judgment motion, to instead enter a new order

---

[2/] Rosen does not dispute that on September 30, 2009, 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.)

granting the motion, and to enter judgment in favor of the UCLA defendants.

DATED: January 13, 2015

Respectfully submitted,

MARANGA • MORGANSTERN
Kenneth A. Maranga
Paul A. Elkort
Morgan A. Metzger
Dennis Newitt

GREINES, MARTIN, STEIN & RICHLAND LLP
Timothy T. Coates
Feris M. Greenberger

UNIVERSITY OF CALIFORNIA
Office of the General Counsel
Charles F. Robinson
Karen J. Petrulakis
Eric K. Behrens
Norman J. Hamill

UNIVERSITY OF CALIFORNIA, LOS ANGELES
Kevin S. Reed, Vice Chancellor, Legal Affairs

By: _____
Feris M. Greenberger
Attorneys for Petitioners THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, ALFRED BACHER, CARY PORTER, ROBERT NAPLES, and NICOLE GREEN

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rules 8.204(c) and 8.486(a)(6), I certify that this **REPLY TO RETURN TO ORDER TO SHOW CAUSE ON PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF** contains 5,938 words, not including the cover, the tables of contents and authorities, the caption page, the verification page, the signature blocks, or this Certification page.

DATED: January 13, 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 13, 2015, I served the foregoing document described as: REPLY TO RETURN TO ORDER TO SHOW CAUSE ON PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF on the interested parties in this action by serving:

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

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

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

Executed on January 13, 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

The Regents of the University of California, et al. v. Superior Court (Rosen)
Court of Appeal, Second Appellate District Case No. B259424

Service List

Brian J. Panish, Esq.
Panish, Shea & Boyle LLP
11111 Santa Monica Boulevard, Suite 700
Los Angeles, California 90025
Telephone: (310) 477-1700

A. Charles Dell'Ario, Esq.
Alan Charles Dell'Ario, P.C.
1561 Third Street, Suite B
Napa, California 94559
Telephone: (707) 666-5351

Attorneys for Real Party In Interest
KATHERINE ROSEN

Paul D. Fogel, Esq.
Reed Smith LLP
101 Second Street, Suite 1800
San Francisco, California 94105
Telephone: (415) 659-5929

Attorneys for Amici Curiae for Petitioner
CALIFORNIA COMMUNITY COLLEGES. CALIFORNIA INSTITUTE OF TECHNOLOGY, CALIFORNIA STATE UNIVERSITY, CHAPMAN UNIVERSITY, CLAREMONT MCKENNA COLLEGE, PEPPERDINE UNIVERSITY, PITZER COLLEGE, POMONA COLLEGE, STANFORD UNIVERSITY, and UNIVERSITY OF SOUTHERN CALIFORNIA

Sharon J. Arkin, Esq.
The Arkin Law Firm
225 South Olive Street, Suite 102
Los Angeles, California 90012
Telephone: (541) 469-2892

Attorneys for Amicus Curiae For Real Party in Interest
CONSUMER ATTORNEYS OF CALIFORNIA

Clerk to the
Los Angeles County Superior Court
West District, Santa Monica
1725 Main Street, Department F
Santa Monica, California 90401
[LASC Case No. SC108504]

Damon Thompson
Patton State Hospital
3102 East Highland Avenue
Patton, California 92369
[Defendant In Pro Per]