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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

ANTHONY DURANT, JR., Plaintiff and Appellant, v. LOS ANGELES UNIFIED SCHOOL DISTRICT et al., Defendants and Respondents.	B155739 (Super. Ct. No. NC023595)

APPEAL from the judgment of the Superior Court of Los Angeles County. Elizabeth Allen White, Judge. Reversed and remanded.

Karlin & Karlin, and Marc A. Karlin for Plaintiff and Appellant.

Kohrs & Fiske, and Conrad Kohrs, J. Peter Fiske, and Kenneth P. Scholtz for Defendants and Respondents.

Appellant Anthony Durant, Jr. appeals from the judgment dismissing his complaint after the trial court granted a nonsuit following opening statement. We reverse and remand for trial.

FACTS AND PROCEDURAL BACKGROUND

The week appellant Anthony Durant, Jr., enrolled at Banning High School, a group of students challenged him to fight because they believed he had defaced a "homey's" name in a book. Although no fight broke out, the looming ruckus attracted the attention of the school's dean of discipline, who learned the students disliked appellant. The following weeks, the students repeatedly threatened appellant. When his parents told school officials about the threats, the dean recommended for appellant's safety that respondent Los Angeles Unified School District transfer appellant to another high school, but the district ignored the recommendation. Instead, school administrators reassured appellant's parents that they would "take care" of the problem.

One morning, appellant got to school before classes started. The high school was a "closed campus," meaning school officials monitored the coming and going of students and secured all campus entrances and exits during school hours. The school day not having started, however, the campus was open and the school gates unsupervised. Appellant saw on school grounds another student who gave appellant a "look." The two of them left the campus and moved to the sidewalk outside, an area over which school administrators exercised authority by disciplining students who fought there. They began arguing, during which the other student shot appellant in the neck.

Appellant sued respondents Los Angeles Unified School District and school principal Charles Taylor Didinger, claiming their negligent supervision led to his being shot. After appellant's opening statement setting out the facts as we have described them above, the court granted respondents' motion for nonsuit and entered judgment for the defense because respondents had no duty to prevent what the court deemed to be an unforeseeable shooting. This appeal followed.

STANDARD OF REVIEW

". . . In considering [a motion for nonsuit after opening statement], the court must accept as proved all of the facts counsel says he expects to prove, and must indulge in all favorable inferences reasonably arising from those facts. [Citations.] A nonsuit on an opening statement may be granted 'only where it is clear that counsel has undertaken to state all of the facts which he expects to prove, and it is plainly evident that the facts thus to be proved will not constitute a cause of action.' [Citations.] Only the grounds of the motion specified by the defendant may be considered by the trial court in its ruling, or by the appellate court on review. If such grounds are insufficient, a nonsuit is improper even though other good grounds may exist. [Citation.]" (*Smith v. Roach* (1975) 53 Cal.App.3d 893, 897-898; see also *Nally v. Grace Community Church* (1988) 47 Cal.3d 278, 291.)[1]

DISCUSSION

The Trial Court Erred in Granting Nonsuit

"Schools should be safe and secure places for all students, teachers, and staff members. Without a safe learning environment, teachers may have difficulty teaching and students may find their environment a difficult one in which to learn. Priorities set by schools, local authorities, and state and federal government have prompted the nation

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[1] Respondents suggest that, in ruling on the nonsuit motion, the trial court properly considered evidence offered in connection with their motion for summary judgment and factual statements made by the court and counsel during the hearing on respondents' motions in limine. Respondents argue that, to the extent this was error, it was waived by appellant's failure to object. Our reading of the transcript of the court's nonsuit ruling reveals that the trial court did make reference to the prior proceedings but did not state her intent to go beyond the opening statement in ruling on the motion. Accordingly, our review of the correctness of nonsuit is limited to those facts offered only during opening statement.

to focus on improving the safety of American schools. The effort toward providing safer schools requires establishing good indicators of the current state of school crime and safety, and periodically monitoring and updating these indicators. Student safety is of concern outside of school as well. In fact . . . a larger number of serious violent victimizations happen away from school than at school." (National Center for Education Statistics, "Indicators of School Crime and Safety 2002" [128,000 serious violent crimes reported against 12 to 18 year olds in school in 2000].)

As these sobering words remind, the vigilant and effective school supervision of our children on and near school grounds is an increasing component of child safety. Thus, it is reasonable to expect that school officials will be under a greater, not a lesser, duty to take reasonable steps to protect students from harm that may befall them. This is the result of increasingly foreseeable risks to children at school as well as the special relationship between student and school that exists due to the compulsory nature of education. (See *M.W. v. Panama Buena Vista Union School Dist.* (2003) __ Cal.App.4th __, 1 Cal.Rptr.3d 673, 679 (*Panama*).) Indeed, it is founded in our Constitution which provides that both students and staff "have the inalienable right to attend campuses which are safe, secure and peaceful." (Cal. Const., art. I, § 28, subd. (c).)

In this case, a third party's crime—the shooting by a fellow student—was the immediate cause of appellant's injuries. The trial court correctly observed that those who control the property where such a crime occurs typically have no duty to prevent the crime unless the totality of the circumstances make the crime foreseeable. (*Frances T. v. Village Green Owners Assn.* (1986) 42 Cal.3d 490, 503; *Brownell v. Los Angeles Unified School Dist.* (1992) 4 Cal.App.4th 787, 797-798 (*Brownell*).) Here, the court found the shooting was unforeseeable, and therefore respondents had no duty to prevent it, because appellant and the shooter (who was not one of the students who had been threatening appellant) had no previous fights, and no prior shootings had occurred on the sidewalk. (See Ed. Code, § 44808 [school districts generally do not owe a duty of care to students

not on school grounds]; *Frances T. v. Village Green, supra,* at p. 503 [existence of a duty is a legal question to be decided by the court].)

We conclude the court erred by focusing on duty in the narrowest of formulations: respondents' duty to protect appellant from being shot outside the campus. But appellant's opening statement also alleged respondents had breached a broader duty by not properly supervising him and the shooter, a duty school officials shoulder every morning when students come to school. (*Panama, supra,* 1 Cal.Rptr.3d 673 ["special relationship" exists between schools and students requiring schools to "take all reasonable steps to protect" students]; *Brownell, supra,* 4 Cal.App.4th 787; *Perna v. Conejo Valley Unified School Dist.* (1983) 143 Cal.App.3d 292, 295.)

Appellant's opening statement asserted respondents breached the duty of supervision implicit in a closed campus by permitting him and his assailant to leave the campus at will and without the presence of supervisors. Appellant asserts the duty to supervise students is fixed neither by the clock nor by boundary lines, nor is it necessarily defeated by a third party's wrongful conduct. We agree. It is well-established that a school's duty to supervise students begins before students sit down at their desks when the school bell rings. (*Panama, supra,* 1 Cal.Rptr.3d at p. 683 [school liable to student attacked on campus before school day began]; Cal. Code Regs., tit. 5, § 5552 [school must supervise students on campus before and after classes].) It is also equally well-established that a school's duty to supervise may reach beyond the schoolyard to areas near the school—a proposition seemingly underpinning the district's disciplining of students who fight on the sidewalk outside the school. (See, e.g., *Hoyem v. Manhattan Beach City Sch. Dist*. (1978) 22 Cal.3d 508, 514-515 ["no California decision suggests that when a school district fails to properly supervise a student on school premises, the district can automatically escape liability simply because the student's ultimate injury occurs off school property"]; *Brownell, supra,* 4 Cal.App.4th 787 [school may be held liable for injuries suffered by student off school premises and after school hours if injury resulted from school's negligence while student was on school premises]; *Perna v. Conejo Valley Unified School Dist., supra,* 143 Cal.App.3d at p. 295; Ed. Code, § 44808

[school may be liable for injury suffered off school property when it "has failed to exercise reasonable care under the circumstances"].) That another student's crime contributed to appellant's injury does not defeat a negligent supervision claim, particularly when, as here, school officials assured appellant's parents that the school "would take care" of the threats against him. (*Dailey v. Los Angeles Unified School Dist.* (1970) 2 Cal.3d 741, 750-751 [another student's "wrongful conduct [does not] absolve the [school] of liability, once a negligent failure to provide adequate supervision is shown"].)

Respondents argue they had no duty to supervise because a shooting by a person who had not personally threatened appellant was not foreseeable.[2] They point to (1) the lack of shootings or stabbings at the school over a five-year period, and (2) the assailant not being present at school when the crowd of students initially threatened appellant.[3] "The existence of a duty of care of a school district toward a student depends, in part, on whether the particular harm to the student is reasonably foreseeable." (*Panama, supra,* 1 Cal.Rptr.3d at p. 680.) However, foreseeability does not require prior identical acts or injuries. In *Panama*, for example, a child was sexually assaulted by a particularly aggressive student. Although there were no prior events from which the school district could conclude that the assailant was likely to engage in a sexual attack, foreseeability was established given the student had been disciplined over 30 times for violent and disruptive behavior generally.

Here, counsel told the jury that appellant had been subject to repeated threats from a group of students with whom the shooter was associated. That these threats may have

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[2] Respondents premise their argument in terms of the duty to provide "additional supervision." The record does not reflect what *additional* supervision respondents may have had in mind. The nonsuit motion referred to the following duties: supervision, intervention, anticipation of a shooting incident; the thrust of the motion was that it was not foreseeable that an off-campus shooting would occur.

[3] These facts are not contained in the opening statement and should not have been considered by the trial court. (See fn. 1, *ante.*) We recite them in the text only because on retrial, even if these facts were included in an opening statement, they would not defeat the existence of duty.

more likely produced damage with fists rather than guns is not dispositive: "It is not necessary to prove that the very injury which occurred must have been foreseeable by the school authorities. . . . Their negligence is established if a reasonably prudent person would foresee that injuries of the same general type would be likely to happen in the absence of [adequate] safeguards." (*Taylor v. Oakland Scavenger Co*. (1941) 17 Cal.2d 594, 600.) Under the circumstances presented here, with gang overtures, an attack with firearms was foreseeable.

As to respondents' contention that there was no duty to protect appellant from an assault by an individual who allegedly was not a student at the time of the earlier threats, respondents' view of duty is again too narrow. Duty does not depend on the foreseeability of the conduct of any particular third party but instead "focuses on whether the allegedly negligent conduct at issue created a foreseeable risk of a *particular kind of harm."* (*Panama, supra,* 1 Cal.Rptr.3d at p. 681 (italics original). See also *Ballard v. Uribe* (1986) 41 Cal.3d 564, 572-573, fn. 6.) Here, the opening statement offered that respondents recognized the danger to appellant from a particular group of students, promised appellants' parents that they would take special precautions to protect him, yet failed to provide supervision, contributing to a situation in which a member of that group shot appellant. That respondents may not have been able to anticipate the identity of the particular assailant does not defeat their duty to supervise.

As appellant stated the existence of a cognizable duty to supervise, its breach, and damages, the trial court erred by granting a nonsuit. (*Dailey v. Los Angeles Unified School Dist., supra,* 2 Cal.3d at p. 749 ["our courts have often held that a failure to prevent injuries caused by the intentional or reckless conduct of the victim or a fellow student may constitute negligence"].)

We Need Not Address the Motions in Limine

The court granted a number of respondents' motions in limine. Appellant contends the court erred in doing so, but his opening and reply briefs do not come close

to giving us the information we need to assess the propriety of the trial court's rulings. The briefs do not cite the record where we can find the motions and the court's rulings. They do not cogently describe why the excluded evidence was relevant. They contain little pertinent authority and no substantial argument. We therefore pass on addressing appellant's contentions. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 781-785; *Kim v. Sumitomo Bank* (1993) 17 Cal.App.4th 974, 979.) As this case will be returned to the trial court, that court will have an opportunity to revisit the motions in limine in light of our opinion.

DISPOSITION

The judgment is reversed and the matter is remanded for trial. Appellant to recover costs on appeal.

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RUBIN, J.

We concur:

COOPER, P.J.

BOLAND, J.