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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

DIAMANTE BANKS,

Plaintiff and Appellant,

v.

PITTSBURG UNIFIED SCHOOL  
DISTRICT,

Defendant and Respondent.

A137805

(Contra Costa County  
Super. Ct. No. CIVMSC11-00945)

While a student at Pittsburg High School, Diamante Banks was violently assaulted by three students who allegedly have gang affiliations. The attack occurred during a lunch recess on a public sidewalk adjacent to the school's campus. In connection with the attack, Banks brought this negligence action against the Pittsburg Unified School District (hereafter School District). The trial court granted summary judgment in favor of the School District. Banks argues the trial court erred because the School District is not immune from suit and there are triable issues as to whether the School District violated its duty of care by failing to protect Banks and isolate the assailants before the attack occurred. We affirm.

I.

BACKGROUND

On October 26, 2009, the day of the attack, Banks discovered that his brother had left \$10,000 in fake play money in his backpack. During a third period class, Banks showed the play money to a classmate, Sergio, and then returned it to his bag. Later in

the day, at the beginning of lunch recess, Sergio and two other students, Miguel and Demari'ea, followed Banks and then attacked him on a sidewalk adjacent to the school. Bystanders told police that Banks fell to the ground, one of the attackers leaned over and repeatedly punched him in the face, and the other two hit and kicked him. The attackers stole Banks's backpack, along with the play money inside, which they discarded a few blocks away. Banks lost one or more teeth and suffered severe injuries to his head and face.

Two days later, the police identified and arrested Miguel, who initially refused to name the other two assailants. Miguel claimed that one of the other attackers planned on assaulting Banks for disrespecting the City of Pittsburg, and the other felt they should take the opportunity to rob Banks of the \$10,000, which they believed to be genuine. Later, the police identified Sergio and Demari'ea. Sergio admitted to participating in the assault. He explained that he was angry with Banks for insulting him in class, and that he planned on robbing Banks because he was bragging about having a large sum of money. Demari'ea admitted to stealing the money, but not to hitting Banks. He also said that "if they [Miguel, Sergio, and Demari'ea] didn't do [the robbery, then] someone else would," because word was out that Banks was carrying a large sum of money.

The assailants had disciplinary problems prior to the incident. Between 2006 and 2009, Sergio had been suspended seven times. One of the suspensions involved a physical altercation. Miguel was suspended eight times during this period, three times for fighting and once for gang-related fighting. Demari'ea had been suspended four times before the incident, though never for fighting<sup>1</sup>. Mose Paulo, a school security officer,<sup>2</sup> believes Sergio was involved with gangs based on his clothing, "who he hangs around with," and "the kids that they always have problems with." Paulo also believes

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<sup>1</sup>In 2007, Demari'ea was suspended for pushing over lockers after a brief "altercation" with another student. It is unclear from the record whether the altercation was physical.

<sup>2</sup>Paulo's official title was "campus resource assistant." His duties included supervising students on and off campus and looking for possible violence.

Miguel and Demari'ea were involved in gang-related activities because he had observed them get into verbal altercations with other students. Miguel had been in two fights that Paulo had observed, one of which occurred earlier that academic year.

Pittsburg High School had a “zero tolerance policy” with respect to gang activity. In a letter sent to parents in 2008, Principal Todd Whitmire stated: “Students involved in any fighting that is gang related will be removed from our school. Students who continue to affiliate or claim membership in a gang will be removed from our school if they refuse to follow our school rules including our dress code . . . and associating with other students who claim or are affiliated with any known gang.” Under the policy, if students were considered a danger to other students, they would be transferred to an “involuntary education setting.”

Additionally, the school had a policy in place to protect students carrying money to school. Specifically, if the school administration learned a student had a large sum of money on his or her person, the administration would call the student’s parents and then hold onto the money for them. School officials did not talk to Banks or his parents about the play money, and the parties dispute whether the school had prior knowledge of the rumors that Banks had \$10,000 in his backpack on the day of the incident.

Banks filed this negligence action against the School District in 2011, asserting that it should have known the three attackers posed a danger to other students and failed to protect Banks from the risk of physical assault while on school property. The School District moved for summary judgment on the ground that it was immune from liability under Education Code<sup>3</sup> section 44808.5, because the assault occurred off of school property during a lunch period. The School District also argued that it was not liable due to a lack of security. In opposing the motion, Banks argued that both he and the attackers had been identified as security risks prior to the lunch recess, and that the school failed to take reasonable measures to prevent the incident. Banks also filed a declaration from James Shaw, a school security expert, who opined the attack was gang-related; school

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<sup>3</sup>All further statutory references are to the Education Code unless otherwise specified.

records showed Miguel and Sergio presented an ongoing and constant threat of violence and intimidation to other students; and the school administration's failure to take any intervention actions to secure the school from violent attacks by these students fell below the standard of care.

The trial court granted the motion, concluding the suit was barred by section 44808.5. Even assuming statutory immunity did not apply, the court held the School District owed no duty of care to Banks under the circumstances since it was not reasonably foreseeable he would be the object of assault by the three assailants. The court reasoned the only conflicting testimony about foreseeability came from Shaw, and that his expert testimony was incompetent on the predicate question of whether a duty exists. The court also found Shaw's testimony entirely speculative as to what might have happened under different circumstances.

## II.

### DISCUSSION

#### A. *Standard of Review*

We review the trial court's decision to grant the School District's motion for summary judgment de novo. (*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 163.) Summary judgment must be granted if all the papers and affidavits submitted, together with "all inferences reasonably deducible from the evidence" and uncontradicted by other inferences or evidence, show that "there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. . . ." (Code Civ. Proc., § 437c, subd. (c).) Where, as here, the defendant is the moving party, he or she may meet the burden of showing that a cause of action has no merit by proving that one or more elements of the cause of action cannot be established. (See *id.*, § 437c, subd. (o).) Once the defendant has met that burden, the burden shifts to the plaintiff to show the existence of a triable issue of material fact as to that cause of action. (*Union Bank v. Superior Court* (1995) 31 Cal.App.4th 573, 583.) On appeal, "[w]e may consider only those facts which were before the trial court, and disregard any new factual allegations made for the first time on appeal." (*Sangster v. Paetkau, supra*, 68 Cal.App.4th at p. 163.)

### *B. Immunity*

As an initial matter, the parties dispute whether the trial court erred in finding the School District is immune from suit under section 44808.5. The statute provides a school district “may permit the pupils enrolled at any high school to leave the school grounds during the lunch period,” and “[n]either the school district nor any officer or employee thereof shall be liable for the conduct or safety of any pupil during such time as the pupil has left the school grounds pursuant to this section.” The School District contends that the statute applies here because Banks was attacked on a public sidewalk during his lunch period. Banks counters that immunity does not attach because the events at issue arose out of the School District’s failure to properly supervise students on school premises. Banks appears to have the better argument here, but we need not and do not address the issue because we find that his negligence claim fails as a matter of law.

### *C. Banks’s Negligence Claims*

Banks’s claims against the School District are predicated on two theories. First, Banks asserts that the school district had prior knowledge of rumors that he was carrying a large sum of money on the day in question, that based on this knowledge, the School District had a special duty to protect Banks, and that the School District breached its duty by failing to take appropriate action. Second, Banks contends that, prior to the incident, the School District was aware that Banks’s attackers, Sergio, Miguel, and Demari’ea, posed a danger to other students, and the School District failed to take action to either expel them or somehow segregate them from the rest of the student body. We find both theories unpersuasive.

#### *1. School District’s Duty to Protect Banks*

Banks does not claim the School District should have hired more security personnel, the school campus should have been patrolled in a different manner, or day-to-day security measures were otherwise inadequate. Instead, he asserts the School District had a special duty to preempt the attack because it had prior knowledge of rumors that Banks was carrying a large sum of money, and thus he was in danger of being assaulted

and robbed. The problem with this theory is that Banks failed to raise a triable issue as to whether the School District was aware of the rumors before the attack.

In its motion for summary judgment, the School District presented evidence that the attack on Banks could not have been anticipated. Specifically, it showed the attack happened shortly after Banks showed the play money to Sergio, and Banks considered himself to be on friendly terms with Sergio and Demari'ea prior to the incident. In response, Banks pointed to a police report and the depositions of campus security officer Richard Gonzales and Principal Todd Whitmire as evidence that the School District and its employees were aware of rumors that Banks was carrying a large sum of money.

We agree with the trial court's conclusion that Banks's evidence does not establish the attack was foreseeable. The police report relied on by Banks states that on October 27, 2009, one day after the assault, campus security officer Gonzales "related that rumors were circulating around the school that Banks was bragging about having a large sum of money on his person and was showing off a roll of cash to other students." However, nothing in the report indicates when Gonzales heard these rumors, and at his deposition, Gonzales denied that he learned of them before the attack.

Banks argues Gonzales's testimony on this point is not credible and thus a matter for the jury because Gonzales also stated that he heard about the rumors from Sergio, which Banks claims is impossible since Gonzales did not talk with Sergio about the attack until October 28. But Gonzales actually testified that he did not remember how he heard about the rumors. According to Gonzales, they could have come from Sergio or from "anybody in the office or who [security personnel] were talking to." Moreover, contrary to Banks's assertion, it is unclear from the record when Gonzales talked with Sergio, who was identified as a suspect as early as October 27.

During his deposition, Principal Whitmire confirmed that his administration did not have prior knowledge of rumors that Banks was carrying a large sum of money. Specifically, he stated: "[T]alking to my staff I believe we were not aware of [the rumors]—quite honest with you—until after the fact, until [the assault] already happened." Banks contends that Principal Whitmire also offered contrary testimony, creating a

credibility issue for the jury. Specifically, Banks points to the following exchange concerning Gonzales's statement to police:

“Q: With regard to my client, Mr. Banks, are you aware that there's a statement made by Mr. Gonzale[s] . . . that he had heard rumors. . . prior to the assault on Mr. Banks. . . that Banks had some roll of money that he was showing off and talking about, and students were discussing that issue?

“A: Yes.”

While Principal Whitmire's response is straightforward, counsel's question is not. There was no objection to the form of the question, but we can only speculate as to how Principal Whitmire interpreted it. Counsel was either positing that Gonzales stated there were rumors circulating prior to the incident, or that Gonzales heard about the rumors prior to the incident, it is unclear which.

Moreover, later in the deposition, Principal Whitmire testified he could not recall if Gonzales spoke to him about the rumors or spoke about them in his presence. Accordingly, at most, Principal Whitmire's testimony establishes that he was aware that Gonzales made a statement to police about the rumors after the incident. There is no foundation for Banks's assertion that Principal Whitmire had more information about the content of that statement than what was reported by police, which as set forth above, was vague on when Gonzales heard the rumors. While we must draw all inferences in favor of Banks, he cannot avoid summary judgment based on conjecture and speculation about a vague statement in a police report and a response to an ambiguous question.

Moreover, as the trial court held, even if the school administration was aware of the rumors, it is “also entirely speculative as to what ‘might’ have happened under different circumstances.” Shaw, Banks's security expert, opined that upon hearing the rumors that a student is carrying valuables, school officials can: “call[] the student to the school office to remove him from the student population until the risk [is] removed, tak[e] the valuables from the student's possession, call[] the student's parents to come to the school and retrieve the valuables, or requir[e] the student to be escorted from the

school.”<sup>4</sup> But had school officials reached out to Banks on the day in question, they would have presumably learned that he was carrying fake money. They might have also assumed the play money did not pose a security risk or make Banks a target. Though these assumptions might have turned out to be incorrect, we cannot say they would have been unreasonable under the circumstances. In any event, confiscating the fake money would not have eliminated the risk if Banks’s attackers still believed that he was carrying \$10,000, and it is entirely unclear whether removing Banks from school would have been a reasonable precaution given the circumstances.

## 2. *School District’s Duty to Supervise Assailants*

Next, Banks asserts the School District violated its duty to supervise the assailants, Sergio, Miguel, and Demari’ea. Based on their disciplinary records and security officer Paulo’s opinion that they were affiliated with gangs, Banks argues that the School District should have enforced its own zero tolerance policy and segregated these students from the rest of the student body. Shaw, Banks’s security expert, opined that multiple options were available to the School District, including in-school segregation or monitoring during school recesses, enrollment in an external Diversion Program, or transfer to a more secure and controlled school environment at a different campus.

A similar theory was rejected in *Thompson v. Sacramento City Unified School District* (2003) 107 Cal.App.4th 1352 (*Thompson*). In that case, two students beat and

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<sup>4</sup>While Shaw’s declaration might be relevant to the issue of whether the School District’s actions fell below the standard of care, it has no bearing on the threshold issue of whether the School District owed a special duty. As an initial matter, Shaw does not have any direct knowledge about what the School District did and did not know on the day in question. Moreover, as the trial court held, the existence of a duty is a question of law to be determined by the court. (*Carleton v. Tortosa* (1993) 14 Cal.App.4th 745, 755.) Contrary to Banks’ argument, *People v. Valadez* (2013) 220 Cal.App.4th 16, does not demand a different result. *Valadez* merely held that a gang expert’s testimony on the history of certain criminal gangs was admissible under Evidence Code section 801 and did not violate a criminal defendant’s confrontation clause rights, even though it was based in part on hearsay. (*Id.* at pp. 28–30.) Nothing in *Valadez*, or the other authority cited by Banks, suggests an expert opinion is admissible to determine whether a defendant owes a duty, or that speculative and conclusory expert opinions are entitled to any weight on summary judgment.

robbed the plaintiff in a high school bathroom after they learned he was carrying a substantial amount of marijuana. (*Id.* at p. 1358.) One of the assailants had been expelled during middle school, and the plaintiff suggested that he should not have been readmitted. (*Id.* at p. 1361.) The court rejected this argument, holding that “[a] school district’s exercise of authority to expel and/or readmit a pupil involves the type of decision that entails ‘ “the resolution of policy considerations, entrusted by statute to a coordinate branch of government, that compels immunity from judicial reexamination.” ’ ” (*Ibid.*) The court also rejected the plaintiff’s argument that the school was liable for failing to suspend the assailant because he set fire to a poster and threatened to hit another student the day prior to the attack. (*Id.* at p. 1362.) The court concluded the school did not have a duty, reasoning (1) the conduct for which the suspension should have been imposed was unrelated to the plaintiff; (2) the plaintiff’s only basis for asserting a causal connection was that failure to impose an immediate suspension allowed the student to be on campus; and (3) the imposition of a special duty to suspend would undermine the role of the school in the suspension process, along with the assailant’s due process rights. (*Id.* at pp. 1365–1366.)

Banks contends this case is distinguishable from *Thompson, supra*, 107 Cal.App.4th 1352, since he is not arguing that Sergio, Miguel, and Demari’ea should have been expelled, but instead placed into an involuntary education setting or a more secure and controlled environment. Banks does not explain what this process would entail. However, as he concedes that it would involve removal of the students, this appears to be a distinction without a difference. (Cf. § 48432.5 [rules and regulations pertaining to the involuntary transfer of pupils].) In any event, regardless of whether the School District is entitled to complete immunity, its decisions concerning the expulsion or transfer of students are entitled to deference. (Cf. *Nathan G. v. Clovis Unified School Dist.* (2014) 224 Cal.App.4th 1393, 1405 [recognizing “the deference to be accorded to a school administrator’s decision to discipline a student,” including involuntary transfer to a continuation school] .)

Based on the record before us, we cannot conclude the School District abused that discretion here. While both Sergio and Miguel had previously been suspended for physical altercations in the years prior to the attack, there is no indication that those altercations were as extreme or violent as the one at issue here. Demari'ea was suspended two years prior to the incident for hitting another student with a ruler, but his disciplinary record does not reflect any other incidents of physical violence. Moreover, Banks's assertion that the assailants were violent gang members is based exclusively on the testimony of Paulo, who believed they were in gangs because of their clothing, the people they associated with, and verbal altercations observed by staff.<sup>5</sup> Paulo's suspicions might be correct, but we cannot find the School District had a duty to remove the students based solely on suspicions about their clothing and associates. Even if the School District had expelled or involuntarily transferred the assailants earlier, they would have been eligible for readmission the following semester. (§§ 48916, subd. (a), 48432.5.)

To the extent that Banks is arguing the School District should have pursued in-school segregation options, his claim also fails. When assessing the duty of a public agency, a court may consider, among other things, the extent of the burden on the agency, the role imposed on the agency by law, and budgetary limitations. (*Thompson, supra*, 107 Cal.App.4th at p. 1365.) In this case, the feasibility of Shaw's suggestions is questionable. When asked about the School District's "zero tolerance policy" for gang-related activity, Principal Whitmire testified that "it's almost impossible to segregate [gang members] on th[e] campus itself," and that school intervention typically centers on student counseling and working with parents. Further, it is unclear that in-school segregation was warranted in light of the assailant's disciplinary records. In any event, even if the School District had taken these measures, it is speculative that the precautions

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<sup>5</sup>Shaw opined that, based on his experience and training, he believed it was foreseeable that Sergio, Miguel, and Demari'ea posed a threat to other students. But, as discussed above, an expert's opinion has no bearing on the existence of a duty, as such determinations are questions of law. (*Carleton v. Tortosa, supra*, 14 Cal.App.4th at p. 755.)

would have prevented the attack, especially since Banks was on friendly terms with two of the assailants, the School District did not have advanced warning that Banks was in danger, and the assailants followed Banks off school property.

Banks's reliance on *Rosh v. Cave Imaging Systems, Inc.* (1994) 26 Cal.App.4th 1225 (*Rosh*), is also misplaced. In that case, a jury found the defendant negligently failed to provide adequate security services where the plaintiff was shot by a disgruntled and recently terminated employee after the employee was allowed to reenter the employers' secured premises. (*Id.* at p. 1229.) On appeal, the court rejected the defendant's argument that there was no evidence that it caused the plaintiff's injuries since the plaintiff might have been injured even if it had taken every reasonable precaution. (*Id.* at p. 1235.) Unlike here, the defendant in *Rosh* had been instructed three times to bar the assailant from the premises but failed to do so. (*Id.* at p. 1236.) Banks cannot point to comparable notice or threat in the instant action. Moreover, the existence of a duty was not at issue in *Rosh*.

In sum, we cannot conclude that the School District had a special duty to preempt the attack by either removing Banks, the play money, or the assailants.<sup>6</sup>

### III.

#### DISPOSITION

The judgment is affirmed. Each party is to bear its own costs.

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<sup>6</sup>Although the trial court granted summary judgment on different grounds, Banks has addressed the issues discussed above in his briefing, including the legal principles set forth in *Thompson, supra*, 107 Cal.App.4th 1352.

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McGuiness, P.J.

We concur:

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Pollak, J.

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Jenkins, J.