S171382

IN THE

SUPREME COURT OF CALIFORNIA

TERRY QUARRY ET AL.

PLAINTIFFS AND APPELLANTS,

vs.

DOE 1,

DEFENDANT AND RESPONDENT.

After A Published Opinion By The Court Of Appeal
First Appellate District, Division Four
Case No. A120048

Following A Dismissal After An Order Sustaining A Demurrer Without Leave To Amend
Alameda County Superior Court, No. HG07313640
Honorable Kenneth Mark Burr

REPLY TO ANSWER TO PETITION FOR REVIEW

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Plaintiffs answered the Petition for Review with the remarkable assertion that the published decision in this case does not conflict with the published decision of the Second District in *Hightower v. Roman Catholic Bishop of Sacramento* (2006) 142 Cal.App.4th 759. They did so despite the Court of Appeal in this case expressly acknowledging in reaching its holding that it disagreed with the analysis of the *Hightower* court on the same issue, and despite plaintiffs' own (successful) argument to the Court of Appeal that it should not follow the analysis of the *Hightower* court, but instead reach the opposite conclusion – that claims for adult injuries from alleged childhood molestation occurring decades ago are not time-barred even if filed after 2003, as long as they were "discovered" within three years prior to the filing date. The Second District in *Hightower* said such claims are barred; the Court of Appeal in this case said they are not.

In addition to *Hightower*, there is now another published appellate decision – this time from the Third District, that directly conflicts with the holding in this case and expressly holds that claims such as those of the plaintiffs here are time-barred. In *K.J. v. The Roman Catholic Bishop of Stockton*, 2009 WL 962691, filed on April 10, 2009 (copy attached), the Court of Appeal analyzed the statutory history of Code of Civil Procedure Section 340.1, including the 2002 amendments relied on by the Court of Appeal in this case, and concluded that claims that arose from childhood molestation in the 1960s and 1970s were revived by the 2002 amendments, but only for calendar year 2003. In reaching its holding, the *K.J.*

court expressly disagreed with the premise adopted by the Court of Appeal in this case that claims for adult injury arising from childhood molestation accrue upon discovery, and can be filed within three years thereafter, correctly finding instead that this Court already determined in *Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201 that such claims only accrue once – at the time of the alleged molestation. Finally, the Court of Appeal in *K.J.* held that the plaintiffs' arguments that the 2002 amendments to section 340.1 revived lapsed claims beyond the express one-year revival window would violate "settled rules of statutory interpretation" that do not permit retroactive application to lapsed claims absent an express mandate in the statutory enactment itself.

However plaintiffs may have justified their assertion in their Answer that the conflicting *Hightower* holding was actually mere *dictum*, it is indisputable that the holding in *K.J.* (which states that it is "in accord with the result in *Hightower*") directly conflicts with the holding in this case. The Court of Appeal here held that previously lapsed molestation claims can be filed after 2003, as long as they are filed within three years of discovery of adulthood injuries, but the Court of Appeal in *K.J.* (and in *Hightower*) held they cannot be filed after 2003 regardless of the time of discovery.

Review is necessary to secure uniformity of decision. Plaintiffs do not dispute that the scores of pending cases cited in footnote 2 of the Petition involve this issue of law, addressed now in at least these three disparate published

appellate opinions. The litigants and courts in all these cases await this Court's word.

THIS OPINION CONFLICTS WITH *K.J.*

Plaintiffs argue in their Answer that the Court of Appeal correctly concluded that their "claims were revived in 1999 and did not accrue under section 340.1 until 2006 when they discovered the cause of their respective adult-onset injuries...." Answer, p. 8. The Court of Appeal in *K.J.*, however, fully aware of the opinion in *Quarry* when it asked counsel to be prepared to address *Quarry* at oral argument (see Petition at p. 4), made directly contrary holdings on these two points, (1) holding that the plaintiff's previously lapsed claims were unaffected by the 1998/99 statutory amendments because he was over age 26 at the time (*K.J.* at p. 13), and (2) rejecting the argument that such claims do not accrue until discovery (*K.J.* at p. 21, relying on *Shirk*, supra).

In *K.J.* the plaintiff was allegedly molested in the 1960's and 1970's by a Catholic priest. Like the plaintiffs here, he did not file a claim by age 19 as required by the statute of limitations in effect at the time, nor did he file a claim during the statutory revival window of 2003. Instead, in 2007, when he was 48 or 49 years old, he sued the Bishop allegedly responsible for allowing the molestation to occur, claiming he had suppressed all memory of the molestation until 2004. Also like the plaintiffs here, he asserted that under subdivision (b)(2) of section 340.1, enacted effective January 1, 2003, his claim was timely because it was filed

within three years of discovery of adult-onset injuries arising from the abuse despite the fact that he was over age 26 (which would have made his claims absolutely barred before the 2002 amendments). Like the defendant here, the Bishop in *K.J.* demurred based on the statute of limitations, and the trial court sustained the demurrer and entered a judgment of dismissal.

The Court of Appeal in *K.J.*, unlike the Court of Appeal in this case, upon conducting a lengthy review of the statutory history and legislative intent, held that the plaintiff's claim was untimely and that the provisions of the 2002 statutory amendment – other than the one-year revival window in 2003 – do not apply to decades-old molestation claims.

Before the opinion in *K.J.* was filed, it was apparent that this Court should accept review because this opinion conflicts with *Hightower*, *Shirk*, and other published cases. *K.J.* further highlights the importance of this Court's review.

THIS OPINION CONFLICTS WITH *HIGHTOWER*

In their Opening Brief to the Court of Appeal, plaintiffs first acknowledged that the trial court sustained the demurrer based on the holding of *Hightower* (AOB pp. 3-4), then argued that the "reasoning of the *Hightower* Court is flawed and should not be adopted" (AOB p. 35) and that the "circumstances of the *Hightower* Opinion diminish the strength of its precedent" (AOB p. 36). Plaintiffs successfully convinced the Court of Appeal to reverse the trial court and depart from the *Hightower* holding. Now, in an apparent fit of amnesia beneficial only

to avoid review by this Court, plaintiffs assert that *Hightower* really has nothing to do with this case and that defendant is merely manufacturing "an illusory conflict." (Answer, p. 12).

Plaintiffs were correct originally, when they had no reason to misconstrue the record, that the trial court expressly relied on the holding in *Hightower* to sustain the demurrer in this case (Appellants Appendix, Ex. 19, p. 574). As in dozens of other cases, the trial court here relied on the *Hightower* court's holding that the Legislature's 2002 amendments created a clear distinction between claims that were previously time-barred and those that were not, and that the delayed discovery provisions in the amendment do not apply to previously time-barred claims. *Hightower*, 142 Cal.App.4th at 767-768.

The plain and express holding of *Hightower* is that the delayed discovery rule in section 340.1 does not apply to claims that were previously time-barred. *Id.* The *Hightower* court followed the express statement of that holding with an alternative holding: "we alternatively hold that [Hightower] has not alleged any delayed discovery." *Id.* Plaintiffs have attempted to turn this on its head and assert that the express "alternative" holding is the holding of the case, and the actual holding is mere dictum. As much as they might wish the *Hightower* court had not ruled the way it did, their wishes do not change the law. The holding in this case, that the delayed discovery rule applies to certain previously time-barred claims, directly conflicts with the holding in *Hightower* that it does not.

As plaintiffs acknowledged in their Opening Brief on appeal, and as is evident from a reading of *Hightower* and of the opinion here, the two cases are in direct conflict.

THIS OPINION CONFLICTS WITH *SHIRK*

The Court of Appeal in *K.J.* analyzed and applied *Shirk* in the same way urged by defendants here but ignored by the Court of Appeal in reaching its contrary holding:

> Had the state Supreme Court accepted the argument advanced by Shirk – and repeated by plaintiff here – that 340.1 actions against intentional entity defendants do not even *accrue* until discovery of the psychological abuse, Shirk's claim would have been ruled timely, since the filing of a government claim runs from the date of accrual (see fn. 10 *ante*). The fact that the court adhered to the general rule that the claim accrued when the molestations occurred constitutes an implied rejection of the notion that lapsed childhood sexual abuse claims can "accrue" a second time under a delayed discovery theory.

K.J. at p. 21.

As explained in more detail in the letter to this Court dated April 9, 2009 from Lee W. Potts requesting depublication on behalf of the Roman Catholic Archbishop of Los Angeles, plaintiffs' counsel here tried to depublish *Hightower* because, "this Court will decide the same issue in *Shirk*" and acknowledged that on this issue *Shirk* would "bind all other courts within the State." (Potts' letter, p. 10). The argument they presented in the Answer here that in *Shirk* "this Court solely addressed the question of how public entity defendants must be treated under the recent amendments to section 340.1" (Answer, p. 15) is inconsistent with counsel's prior representations to this Court.

But in any event this Court in *Shirk* clearly stated that the accrual of molestation claims is the same regardless of whether the defendant is a public entity or a private party, and held that section 340.1 does not affect accrual. The narrow reading of *Shirk* advanced by plaintiffs is not justified.

THIS OPINION CONFLICTS WITH SETTLED RULES OF STATUTORY INTERPRETATION DISFAVORING RETROACTIVE APPLICATION

In apparent acknowledgment of the presumption against retroactive application of statutory enactments absent express legislative intent, plaintiffs here argue there was no retroactive application. Rather, they assert, the Court of Appeal applied section 340.1 *prospectively* because their claim had not yet accrued. (Answer, pp. 22: "the Court of Appeal dutifully applied the rule governing prospective application of statutes of limitation when it held that the enlarged statue of limitations applied prospectively to any claim that had not yet

accrued [because] the plaintiff had not discovered the cause of his or her adulthood injuries.") But that argument fails under *Shirk* and was directly rejected in the Third District's published opinion in *K.J.* This inconsistency alone justifies review by this Court.

It is clear, despite plaintiffs' efforts to re-characterize the holding, that the Court of Appeal here was intentionally applying the statute retroactively, when it held that the statute of limitations applicable to a claim is the one in effect at the time the claim is filed, despite acknowledging that the plaintiffs' claims had previously lapsed on their respective nineteenth birthdays. This express holding,[1] set forth at the outset of the opinion, directly conflicts with the rule that "a legislative change in the statute of limitations is presumed *not* to revive lapsed claims unless the amending act expressly mandates such an effect." *Gallo v. Superior Court* (1988) 200 Cal.App.3d 1375, 1388, cited in *K.J.* at p. 16.

CONCLUSION

Scores of litigants await this Court's review of the opinion in this case. At the time the Petition was filed, forty-two cases could be identified involving the issue of the application of the delayed discovery provision to previously lapsed claims; they were identified in footnote 2 of the Petition. Although the decision in *K.J.* reduces that by one, additional claims have since been filed. See, e.g., April

[1] "We reverse and hold that ... the timeliness of the complaint is to be measured by the statute in effect at the time the complaint was filed." *Quarry v. Doe* (2009) 170 Cal.App.4th 1574, 1579

10, 2009 letter to this Court from Stephen J. Greene, Jr. supporting review on behalf of the Roman Catholic Bishop of Stockton (the "RCBS," which is the defendant in *K.J.*), which states that five new matters involving allegations of child abuse decades ago have been filed in the Superior Court against the RCBS since the opinion in this case was issued.

For the reasons set forth in the Petition, and for the additional confirmation created by the recent publication of *K.J. v. The Roman Catholic Bishop of Stockton*, that this opinion conflicts with existing law on several important issues, Defendant requests that this Court accept this case for review.

DATED: April 20, 2009

FOLEY & LARDNER LLP

By: Tami S. Smason
Tami S. Smason
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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.504(d)

The text of this brief consists of 2091 words, including footnotes, as counted by the word-processing program used to generate the brief.

DATED: April 20, 2009

FOLEY & LARDNER, LLP

By: Tami S. Smason

Tami S. Smason
Attorneys for Defendant and Respondent

Filed 4/10/09

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

K.J.,	C058034
Plaintiff and Appellant,	(Super. Ct. No. CV032693)
v.	
THE ROMAN CATHOLIC BISHOP OF STOCKTON,	
Defendant and Respondent.	

APPEAL from a judgment of the Superior Court of San Joaquin County, Elizabeth Humphreys, Judge. Affirmed.

Manly & Stewart, John C. Manley and Vince W. Finaldi for Plaintiff and Appellant.

Zalkin & Zimmer, Irwin M. Zalkin, Michael H. Zimmer, Devin M. Storey and Michael J. Kinslow for K.J. as Amicus Curiae on behalf of Plaintiff and Appellant.

Neumiller & Beardslee, Paul N. Balestracci and Lisa Blanco Jimenez for Defendant and Respondent.

This case requires us to unravel the many changes and revisions to Code of Civil Procedure section 340.1,[1] a special

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[1] Undesignated statutory references are to the Code of Civil Procedure.

statute of limitations governing claims by victims of childhood sexual abuse.

Plaintiff K.J. (suing under the fictitious name of "John K.J. Doe") alleges he was sexually abused and molested by "Doe 4," an unnamed priest and agent of defendant The Roman Catholic Bishop of Stockton (the Bishop), when plaintiff was between seven and 11 years of age. According to the complaint, the Bishop condoned the misconduct and protected Doe 4, despite actual or constructive knowledge that the priest was a chronic child molester.

Plaintiff, now well into middle age, alleges he "immediately repressed" all memory of the acts of molestation at the time they occurred. Only in June 2004, 33 years after the last molestation occurred, did plaintiff begin remembering the sexual abuse perpetrated upon him by Doe 4, when he connected it to his current psychological problems.

In 2002, when the Legislature amended section 340.1 by opening up a one-year "revival window" for bringing time-barred childhood sexual abuse claims against third party defendants, it also established a new outer date for bringing these types of claims, to wit: "within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse . . . ." (§ 340.1, subd. (a).) The question on appeal is whether the quoted language applies retroactively to childhood sexual abuse claims

against entity defendants that had already lapsed by virtue of the statute of limitations. We agree with the trial court that the answer to this question is "no." Plaintiff's claims are time-barred. We shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The complaint

This action was filed on May 31, 2007, by plaintiff who, by then, was either 47 or 48 years old.[2] From 1967 to 1971, plaintiff was an altar boy and parishioner at defendant "Doe 3," a Catholic church and school, wholly owned and operated by the Bishop and defendant "Doe 2." During that time, when he was between the ages of seven and 11, plaintiff came under the direction and control of "Doe 4,"[3] a priest and seminarian at the church, who used his position of trust and authority to sexually harass, molest and abuse plaintiff.

Plaintiff alleges, on information and belief, that the Bishop "knew or should have known and/or [was] put on notice of DOE 4's past sexual abuse of minors, past arrests, charges, claims and/or investigations, and his propensity and disposition to engage in . . . unlawful sexual activity with minors such that Defendant[] knew or should have known that DOE 4 would

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[2] Plaintiff alleges that the abuse took place from 1967 to 1971, when he was seven through 11 years old. This would place his birth date in the calendar year 1959 or 1960.

[3] Except for the Bishop, who was named as "Doe 1," none of the other defendants is a party to this appeal.

commit wrongful sexual acts with minors, including Plaintiff." Instead of implementing reasonable safeguards to protect Doe 4 from contact with minors, the Bishop ignored and/or covered up the sexual abuse of minors that had already been perpetrated by Doe 4. The cover-up was part of a "conspiratorial plan" to conceal wrongful acts, avoid detection, block public disclosure of child sexual molestation and abuse, and preserve a false appearance of propriety.

The complaint contains a lurid description of the sexual abuse perpetrated on plaintiff by Doe 4, which acts took place "a few times a week," and sometimes were performed on church premises and within full view of other priests.

Despite the frequency and horrendous nature of the acts, plaintiff alleges that he "immediately repressed all memories" and "had no awareness" of them. It was not until June 2004, that plaintiff "began remembering" the sexual abuse that was perpetrated on him as a child more than 30 years ago. At that time, plaintiff "discovered" that psychological injuries and illnesses he was experiencing were caused by the childhood sexual harassment he suffered at the hands of Doe 4.

Based on these general allegations, plaintiff posits causes of action against the Bishop for negligence, negligent supervision, negligent hiring and retention, negligent failure to warn, train or educate, constructive fraud, and intentional infliction of emotional distress.

Procedural history

The Bishop demurred to the complaint, asserting that because plaintiff's childhood sexual abuse claims had lapsed under then-applicable statutes of limitations and were not brought within the one-year revival window provided for in the 2002 amendment to section 340.1, they were untimely. Plaintiff maintained that his claims were governed by the "delayed discovery" rule of section 340.1, subdivision (a) so that it was timely if brought within three years of the date he reasonably should have discovered that his adult psychological injury was caused by the childhood sexual abuse.

The trial court, relying on the decision in *Hightower v. Roman Catholic Bishop of Sacramento* (2006) 142 Cal.App.4th 759 (*Hightower*), agreed with the Bishop and sustained the demurrer without leave to amend. Plaintiff appeals from the final judgment of dismissal.

DISCUSSION

I. Applicable Principles

Because this appeal arises from a judgment of dismissal following the sustaining of a demurrer without leave to amend, we give the complaint a reasonable interpretation, and treat the demurrer as admitting all material facts properly pleaded. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 543.) "We apply well-established principles of statutory construction in seeking 'to determine the Legislature's intent in enacting the statute "'so that we may adopt the construction that best effectuates

the purpose of the law.'"'" (*Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 211 (*Shirk*).) The statutory language is generally the most reliable indicator of legislative intent. However, if the statutory language may reasonably be given more than one interpretation, courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history,[4] public policy, and the statutory scheme encompassing the statute. (*Ibid.*)

II. Analysis

"Section 340.1 sets forth a special statute of limitations for victims of childhood sexual abuse." (*County of Los Angeles v. Superior Court* (2005) 127 Cal.App.4th 1263, 1268.) It therefore prevails over more general statutory limitations periods that may apply. (*Aetna Cas. etc. Co. v. Pacific Gas & Elec. Co.* (1953) 41 Cal.2d 785, 787.)

A. The Bishop Is a Subdivision (b)(2) Defendant

Section 340.1 contains varying limitations periods for bringing actions for childhood sexual abuse[5] against different

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[4] Plaintiff requests that we take judicial notice of legislative history materials regarding Assembly Bill No. 2846, which amended section 340.1 in 1994. Amicus for plaintiff requests that we take judicial notice of legislative materials relevant to Assembly Bill No. 1651, which amended the statute in 1998, and Senate Bill No. 1779, which amended the statute in 2002. We grant both requests. (See *Doe v. City of Los Angeles*, *supra*, 42 Cal.4th at p. 544, fn. 4.)

[5] "Childhood sexual abuse" is defined in subdivision (e) of section 340.1 as "any act committed against the plaintiff that occurred when the plaintiff was under the age of 18 years and

groups of defendants. Deciphering the statute is rendered more complicated by the fact that these limitations periods have been amended several times over a span of years. To clarify our analysis at the outset, we observe that the Bishop is being sued as a defendant identified in subdivision (b)(2) of the statute.

Collectively, subdivisions (a) and (b)(1) of section 340.1 permit a cause of action for childhood sexual abuse to be brought against a nonperpetrator defendant within three years of the date of the discovery of the psychological injury caused by the abuse, but not later than the victim's 26th birthday. (§ 340.1, subds. (a), (b)(1).) Subdivision (b)(2) creates an exception to the age 26 cap for bringing claims against third party defendants who had actual or constructive notice of their agent's unlawful sexual misconduct, but failed to prevent it. "The words of subdivision (b)(2) create three conditions that must be met before it applies to a particular case: (1) the nonperpetrator defendant 'knew or had reason to know, or was otherwise on notice'; (2) that the perpetrator--'an employee, volunteer, representative, or agent'--had engaged in 'unlawful sexual conduct'; and (3) 'failed to take reasonable steps, and to implement reasonable safeguards, to avoid acts of unlawful sexual conduct in the future by that person, including, but not limited to, preventing or avoiding placement of that person in a function or environment in which contact with children is an

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that would have been proscribed" by enumerated Penal Code sections dealing with sex crimes.

inherent part of that function or environment.'" (*Doe v. City of Los Angeles*, *supra*, 42 Cal.4th at p. 545.)

Plaintiff alleged that the Bishop knew or should have known of Doe 4's past sexual abuse of minors, parishioners and students under his charge, yet failed to take reasonable safeguards to prevent him from coming into contact with children such as plaintiff; he also alleged that the Bishop covered up such abuse and permitted Doe 4 to be placed in a situation that enabled him to continue to sexually abuse plaintiff. Accordingly, plaintiff's causes of action are governed by the statute of limitations applicable to subdivision (b)(2) defendants.[6]

B. The Issue in Controversy: Was Plaintiff's 2007 Claim Timely?

As enacted in 2002, subdivision (c) of section 340.1 provided for a one-year revival window for bringing claims such as plaintiff's, which had already lapsed[7] by virtue of the statute of limitations. It provides: "Notwithstanding any

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[6] In the course of this opinion we use the term "subdivision (b)(2) defendant" interchangeably with "entity defendant" or "intentional nonabuser defendant." We use the word "intentional," not in the sense that defendant intended the sexual abuse to occur, but that it had knowledge or constructive notice of specific instances of past unlawful sexual conduct by the agent or employee who is accused of sexual misconduct toward the plaintiff. (See *Doe v. City of Los Angeles*, *supra*, 42 Cal.4th at p. 549.)

[7] The term "lapsed" is used herein to "describe a cause of action against which the limitations period has run, but which no court has adjudicated." (*David A. v. Superior Court* (1993) 20 Cal.App.4th 281, 284, fn. 4 (*David A.*).)

other provision of law, any claim for damages described in [subdivision (a)(2) or (3)] that is permitted to be filed pursuant to [subdivision (b)(2)] *that would otherwise be barred as of January 1, 2003, solely because the applicable statute of limitations has or had expired, is revived*, and, in that case, a cause of action *may be commenced within one year of January 1, 2003.*" (Italics added.)

Plaintiff missed the revival window, having waited until May 2007 to file this action. He nevertheless argues that his action is timely based on the "delayed discovery" provision of section 340.1, which permits bringing an action against intentional nonabuser defendants until eight years from the age of majority *or* within "three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was cause by the sexual abuse," whichever is later. (§ 340.1, subds. (a), (b)(1), (2).) Plaintiff's position is that, because he repressed all memory of the molestations, his present claim is timely under the quoted provision because it *never accrued* until he recovered the memory of the horrors inflicted on him by Doe 4, some 33 years later. Alternatively, plaintiff contends that his claims are timely under equitable, common law theories of delayed accrual.

The Bishop counters that the Legislature gave plaintiffs in K.J.'s position only one chance to bring childhood sexual abuse claims that had previously lapsed--the calendar year 2003--and

plaintiff's failure to avail himself of that opportunity forever bars his action. Moreover, the Legislature has decisively precluded use of common law doctrines of delayed discovery by deleting language in section 340.1 that had previously permitted their application.

Resolution of the dispute regarding the timeliness of plaintiff's 2007 claim requires us to take a circuitous journey through the history of the statute.

C. History of Section 340.1

As a general rule, a cause of action for childhood sexual abuse accrues at the time of molestation. (*John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 443 (*John R.*); *Doe v. Bakersfield City School Dist.* (2006) 136 Cal.App.4th 556, 567, fn. 2.) Prior to the enactment of section 340.1 in 1986, courts applied former section 340, which provided for a one-year statute of limitations for child sexual abuse claims. Courts also applied section 352, which tolled the running of the statute while the plaintiff was a minor, such that the action could be timely brought on or before the plaintiff's 19th birthday. (See former § 340, subd. (3); *DeRose v. Carswell* (1987) 196 Cal.App.3d 1011, 1015.)

Since the alleged molestation ceased in 1971 when plaintiff was 11 years old, he had until his 19th birthday to file suit. He did not. Accordingly, the statute of limitations expired on plaintiff's claim against the Bishop either in 1978 or 1979. (See fn. 2, *ante*.)

1. Enactment of section 340.1.

In 1986, the Legislature enacted section 340.1, providing for a three-year statute of limitations for sexual abuse by a relative or household member of a child under the age of 14 years. (Former § 340.1, added by Stats. 1986, ch. 914, § 1, pp. 3165-3166; see *Shirk*, *supra*, 42 Cal.4th at p. 207.) The statute also included a revival provision, permitting the new rule to be applied to any action commenced after January 1, 1987, that would otherwise have been barred by the statute of limitations prior to that date (former § 340.1, subd. (e)), and contained additional language permitting the courts to apply equitable doctrines of delayed discovery.[8] However, none of these provisions applied to nonperpetrator defendants such as the Bishop. Accordingly, plaintiff's claims against the Bishop remained time-barred.

2. 1990 amendments.

In 1990 section 340.1 was expanded to cover *any* person who sexually abused a child. (*Shirk*, *supra*, 42 Cal.4th at p. 207.)

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[8] Subdivision (d) of former section 340.1 stated: "Nothing in this bill is intended to preclude the courts from applying delayed discovery exceptions to the accrual of a cause of action for sexual molestation of a minor." (See *Evans v. Eckelman* (1990) 216 Cal.App.3d 1609, 1614 (*Evans*).) The language was retained as subdivision (*l*) in 1990: "Nothing in the [1990] amendments . . . shall be construed to preclude the courts from applying equitable exceptions to the running of the applicable statute of limitations, including exceptions relating to delayed discovery of injuries, with respect to actions commenced prior to January 1, 1991." (Amended Stats. 1990, ch. 1578, § 1, p. 7552.)

The Legislature also extended the statute of limitations to eight years from the date the victim "attains the age of majority" (i.e., age 26) or three years from the date the victim "discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse." (§ 340.1, former subd. (a); *Shirk*, *supra*, at p. 207.) A plaintiff over the age of 26 years had to provide a certificate of merit from a mental health practitioner. (§ 340.1, former subds. (a), (b), & (d), as amended by Stats. 1990, ch. 1578, § 1, pp. 7550-7551; *Shirk*, at p. 207.) Again, because the amendment did not apply to nonabuser defendants, it did not affect plaintiff's claim.

3. 1994 amendments.

In 1994, the Legislature again amended section 340.1 by expressly providing that the 1990 amendments "apply to any action commenced on or after January 1, 1991, including any action otherwise barred by the period of limitations in effect prior to January 1, 1991, thereby reviving those causes of action which had lapsed or technically expired under the law existing prior to January 1, 1991." (§ 340.1, former subds. (o)-(p), added by Stats. 1994, ch. 288, § 1, p. 1930.)

But while the Legislature giveth with one hand, it taketh away with the other. The 1990 subdivision (*l*), which had permitted the courts to apply "equitable exceptions to the running of the applicable statute of limitations," including those relating to "delayed discovery of injuries," (see fn. 8,

ante) was deleted. (Stats. 1994, ch. 288, § 1; see 13C West's Annot. Code Civ. Proc., Historical and Statutory Notes (2006) foll. § 340.1, p. 173 (Historical and Statutory Notes).) As we shall see, that deletion was significant.

4. 1998 and 1999 amendments.

In 1998, the Legislature amended section 340.1 to include, for the first time, claims alleging childhood sexual abuse against persons or entities other than the perpetrator. (§ 340.1, former subd. (a)(2) & (3), added by Stats. 1998, ch. 1032, § 1; *Mark K. v. Roman Catholic Archbishop* (1998) 67 Cal.App.4th 603, 610, fn. 4.) The amendment, which permitted suits against parties whose negligent or intentional acts were a "legal cause" of a minor's sexual abuse, also created a firm time cap for actions against nonperpetrator defendants, requiring them to be brought not later than the victim's 26th birthday. (§ 340.1, former subd. (b)(1), amended by Stats. 1998, ch. 1032, § 1; *Shirk*, *supra*, 42 Cal.4th at p. 208.)

Although the 1998 legislation permitted tort claims against intentional nonabusers such as the Bishop, plaintiff was by then 39 or 40 years old, well beyond the 26-year-old outer limit provided for in the statute. Thus, his claim remained lapsed.

The Legislature again amended section 340.1 in 1999, clarifying that its 1998 changes relating to the liability of nonabuser defendants applied only to actions begun on or after January 1, 1999, or if filed before that time, actions still pending as of that date, "including any action or causes of

action which would have been barred by the laws in effect prior to January 1, 1999." (See *Shirk*, *supra*, 42 Cal.4th at p. 208, quoting § 340.1, former subd. (s), added by Stats. 1999, ch. 120, § 1.)

5. 2002--the final amendments.

In 2002, the Legislature put one final flourish on section 340.1. (Stats. 2002, ch. 149, § 1.) The age 26 cap was retained (§ 340.1, subd. (b)(1)) *except* in cases such as this, where a nonabuser defendant knew or had reason to know of its agent's or employee's unlawful misconduct and failed to take reasonable steps to protect others from the employee's predatory behavior. (§ 340.1, subd. (b)(2).) In those cases, the statute provided that the limitations would run until the later of the plaintiff's 26th birthday or three years after the plaintiff discovers or should have discovered that his psychological injuries were the result of childhood sexual abuse. At the same time, the Legislature added current subdivision (c), which expressly *revived lapsed claims* against intentional entity defendants that had been barred due to the expiration of the statute of limitations. For those claims, the Legislature opened up a one-year window period for the bringing of new actions, beginning on January 1 and ending on December 31, 2003. (*Hightower*, *supra*, 142 Cal.App.4th at p. 766.)

Plaintiff's present cause of action was unquestionably revived by the 2002 legislation. Thus, he had a final

opportunity to sue the Bishop during the calendar year 2003. However, no suit was filed during that year.

D. Resolution of the Statutory Dispute

Despite having failed to avail himself of the one-year revival window in 2003, plaintiff contends his lawsuit is timely under the "delayed discovery" provision of section 340.1, subdivision (a)--"within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse"--which was made applicable to subdivision (b)(2) defendants in 2002 by virtue of subdivision (c). Plaintiff argues that, because he immediately repressed all memory of the molestations until June 2004, his claim did not "accrue" until then. The merit of this argument turns on whether the Legislature intended the courts to apply the three-year delayed discovery provision *retroactively*, to claims against intentional entity defendants that had previously lapsed.

In general, a statute will be construed as prospective unless there is clear legislative intent that it apply retroactively. (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 844; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207.) Such intent has been found where there is express language of retroactivity, or where extrinsic sources undisputedly demonstrate that the Legislature intended the statute to be retroactive. (*Evangelatos, supra*, 44 Cal.3d at

p. 1209 ["[I]n the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application"].)

The rule is even stricter in the case of legislative changes to a statute of limitations. "[A] legislative change in the statute of limitations is presumed *not* to revive lapsed claims unless the amending act expressly mandates such an effect. (*Gallo v. Superior Court* [(1988)] 200 Cal.App.3d [1375,] 1378; *Barry v. Barry* (1954) 124 Cal.App.2d 107, 112.) If the Legislature wishes to revive lapsed claims, it should so declare in 'unmistakable terms.' (See *Douglas Aircraft Co.* [*v. Cranston* (1962)] 58 Cal.2d [462,] 466.) Otherwise such claims will be left to lie in repose." (*David A., supra*, 20 Cal.App.4th at p. 286.)

In this case, the three-year delayed discovery provision contains no unmistakable, express language of retroactivity. Nor is there anything in the legislative history of section 340.1 that indisputably shows a retrospective application was intended. On the contrary, an examination of the history of the statute points to the opposite conclusion.

Whenever it has amended section 340.1, the Legislature has been clear about whether the courts may apply new limitations periods retroactively. In 1990, the Legislature inserted language containing a limited revival of actions commenced after 1987. The 1994 amendment provided that the liberalized

discovery rule enacted in 1990 shall "apply to any action commenced on or after January 1, 1991, including any action otherwise barred by the period of limitations in effect prior to January 1, 1991, thereby *reviving* those causes of action which had lapsed or technically expired under the law existing prior to January 1, 1991." (§ 340.1, former subds. (o)-(p), added by Stats. 1994, ch. 288, § 1, p. 1930, italics added.) This amendment was added to overrule *David A.*, *supra*, 20 Cal.App.4th at page 286, a case which had held that the 1990 amendment did not revive lapsed claims. (Legis. Counsel's Dig., Assem. Bill No. 2846, 5 Stats. 1994 (1993-1994 Reg. Sess.) Summary Dig., p. 111.)

In 1999, the Legislature clarified that its 1998 changes relating to the liability of nonabuser persons or entities were to be applied to actions commenced on or after or pending as of January 1, 1999, "'including any action or causes of action which would have been barred by the laws in effect prior to January 1, 1999.'" (*Shirk*, *supra*, 42 Cal.4th at p. 208, quoting § 340.1, former subd. (s), added by Stats. 1999, ch. 120, § 1.)

Finally, the 2002 amendments, while removing the age 26 cap on subdivision (b)(2) defendants, explicitly provided that, as to *lapsed claims*, the applicable limitations period "*is revived*," provided suit was commenced within one year of January 1, 2003. (§ 340.1, subd. (c), italics added.)

This sequence demonstrates that the Legislature knows precisely how to specify whether and under what conditions a

newly enacted statute of limitations period should be applied to revive lapsed claims. In 2002, the Legislature opened the gates to lapsed claims against subdivision (b)(2) defendants, but only for a limited one-year period. The enactment, in clear stentorian language, of a one-year revival period, announced to the world that these types of claims must be brought within that period or forever remain in repose. It would be illogical to infer that the Legislature silently intended that lapsed claims *not* filed within the window period could nevertheless be revived through the back door by use of the delayed discovery rule.

Our conclusion is in accord with the result in *Hightower*. There, a prisoner who had allegedly been molested by a priest in the early 1970's claimed that his suit against a Catholic bishop, filed in April 2004, was timely because the delayed discovery rule of section 340.1, subdivision (a) applied. (*Hightower*, *supra*, 142 Cal.App.4th at pp. 761, 763, 767.) The court flatly rejected the notion, stating, "When the Legislature first applied the delayed discovery rule to entity defendants like the bishop in 1998, those claims were subject to the outer limit of the plaintiff's 26th birthday, meaning that his claims remained time-barred. Effective 2003, the Legislature extended the limitations period for claims such as Hightower's to the later of the plaintiff's 26th birthday or the date when the plaintiff discovered that his psychological injuries were caused by sexual abuse. At the same time, the Legislature revived for only one year all such claims that were already time-barred.

The Legislature therefore drew a clear distinction between claims that were time-barred and those that were not. Hightower's interpretation would obliterate that distinction by allowing his time-barred claim to take advantage of the new limitations period. Therefore, the new delayed discovery rule does not revive Hightower's previously lapsed claims." (*Hightower*, at pp. 767-768, italics added.)[9]

Plaintiff's argument suffers from the same infirmity as Hightower's. It presupposes an implicit, unexpressed intent to enact a delayed accrual rule retroactively, contrary to settled rules of statutory interpretation and despite the Legislature's unambiguous intent to treat lapsed and unlapsed claims differently.

The unavailability of section 340.1's delayed accrual rule to revive lapsed claims appears to have been acknowledged by the California Supreme Court in *Shirk*. Shirk, a 41-year-old plaintiff in 2003, claimed she was the victim of sexual misconduct by her male teacher during the 1978-1979 school year. She sued the school district that employed him on the basis that it knew or should have known that he was a sexual predator. Shirk filed a government tort claim in September 2003, the date

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[9] While it is true that the *Hightower* court also rejected the plaintiff's claim on the alternative ground that the plaintiff's allegations were insufficient to trigger the delayed discovery rule, that conclusion was dictum, since the court had already ruled that his complaint was time-barred. (*Hightower*, *supra*, 142 Cal.App.4th at p. 768.)

on which she allegedly "discovered" the connection between her psychological problems and the sexual abuse. The trial court sustained a demurrer without leave to amend on the ground that Shirk failed to timely file a government tort claim in 1980. (*Shirk*, *supra*, 42 Cal.4th at pp. 205-206.)

Although the suit was brought under the 2003 "revival" window set forth in section 340.1, Shirk still faced the problem of having failed to file a government claim within the statutory period.[10] She attempted to steer around this obstacle by relying on the delayed discovery rule in subdivision (a), contending that her claim did not "accrue" until she discovered that the sexual abuse was the cause of her psychological injuries. (*Shirk*, *supra*, 42 Cal.4th at p. 206.) After reviewing the history of the statute, the *Shirk* court reaffirmed the long-settled rule that a cause of action for sexual abuse accrues at the time of the molestation. (*Id.* at p. 210.) Finding no indication in either the language or history of the statute that the Legislature's magnanimity in liberalizing the limitations period for civil actions for childhood sexual abuse also included an intent to excuse or delay the time for filing tort

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[10] As the *Shirk* court explained, "such claims must be presented to the government entity no later than six months after the cause of action accrues. (Gov. Code, former § 911.2, as amended by Stats. 1987, ch. 1208, § 3, p. 4306.) Accrual of the cause of action for purposes of the government claims statute is the date of accrual that would pertain under the statute of limitations applicable to a dispute between private litigants." (*Shirk*, *supra*, 42 Cal.4th at pp. 208-209.)

claims against governmental entities, the state's high court held Shirk's action was properly dismissed. (*Id.* at pp. 211-213.)

Had the state Supreme Court accepted the argument advanced by Shirk--and repeated by plaintiff here--that section 340.1 actions against intentional entity defendants do not even *accrue* until discovery of the psychological abuse, Shirk's claim would have been ruled timely, since the time for filing a government claim runs from the date of accrual (see fn. 10, *ante*). The fact that the court adhered to the general rule that the claim accrued when the molestations occurred constitutes an implied rejection of the notion that lapsed childhood sexual abuse claims can "accrue" a second time under a delayed discovery theory.

Although unnecessary to our decision, legislative materials surrounding the enactment of Senate Bill No. 1779, of which we have taken judicial notice (see fn. 4, *ante*), confirm our interpretation. A summary of the 2002 amendments prepared for the Assembly Judiciary Committee cites two aspects of the bill: first, "[r]etroactive *application and revival of lawsuits*," to "create a one-year window" for victims of childhood sexual abuse to bring lawsuits against intentional entity defendants that would otherwise have been barred by the age 26 cap; and, second, "*Prospective application*: People who discover their adulthood trauma from the molestation after the effective date of the bill will have three years from the date the victim discovers or

reasonably should have discovered that the adulthood trauma was caused by the childhood abuse." (Italics added.)

The statement on the floor by the author of Senate Bill No. 1779, John Burton, mirrors this summary. Senator Burton told his colleagues that the bill would allow actions to be filed after the victim's 26th birthday against "a person or entity that knew or had reason to know of any complaint against an employee for unlawful sexual conduct and failed to take reasonable steps to avoid similar acts . . . *in the future*. . . . [¶] This bill *also* revives actions that were previously barred by the statute of limitations and *allows those actions to be filed within one year of the effective date of this bill*." (Italics added.)

These background materials support our conclusion that while the Legislature intended to lift the age 26 cap prospectively as a prophylactic measure, it sought to revive lapsed actions only for a limited one-year period.

Amicus counsel appearing on behalf of plaintiff discerns a contrary intent from the Legislature's retention and redesignation of former subdivision (s) as subdivision (u) in 2002. Current subdivision (u) (originally enacted as subdivision (s) in 1999) states, in relevant part: "The *amendments to subdivision (a) of this section*, enacted at the 1998 portion of the 1997-98 Regular Session, shall apply to any action commenced on or after January 1, 1999, and to any action filed prior to January 1, 1999, and still pending on that date,

including any action or causes of action which would have been barred by the laws in effect prior to January 1, 1999." (Italics added.) Because subdivision (a) contained delayed discovery language, amicus argues that the Legislature's preservation of subdivision (u), considered "cumulatively" with the amendments in 2002, evinces an intent to apply the delayed discovery rule to entity defendants retroactively.

This argument ignores the fact that subdivision (u) refers *only* to the amendments to subdivision (a) enacted in the 1997-1998 Regular Session. That legislation *capped the limitations period at age 26*. Thus, the Legislature's retention of the subdivision says nothing about its intent in 2002 when, for the first time, it lifted the age 26 cap and allowed a delayed discovery rule to be applied to intentional nonabusers. (§ 340.1, subds. (b)(2), (c).)

E. Common Law Delayed Discovery Theories

Both plaintiff and amicus counsel assert that, regardless of whether section 340.1 expressly permits it, plaintiff may avail himself of the common law delayed discovery doctrine, which "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397.) Their primary authority is *Evans, supra*, 216 Cal.App.3d 1609. *Evans* was a case where the adult plaintiffs sued their uncle and former foster father for sexual abuse they suffered in their childhood. (*Id.* at p. 1612.) They claimed that "'psychological

blocking mechanisms'" such as fear, internalized shame, disassociation and repression caused them to be unaware, for decades, of both the sexual abuses and the psychological injuries they caused. (*Id.* at p. 1613.) The Court of Appeal, First Appellate District, Division Five, applied the common law "delayed accrual" doctrine applicable to fiduciary relationships to hold the complaint sufficient to withstand a demurrer based on the statute of limitations. (*Id.* at pp. 1614-1616.) "We conclude that the purposes of the statute of limitations and the rationale of the delayed discovery rule as it has developed in our courts require that accrual of a cause of action for child sexual abuse by a parent or similar figure of authority be delayed until the plaintiff knows or reasonably should know of the cause of action." (*Id.* at p. 1617.)

However, *Evans* was decided in early 1990, at a time when section 340.1 gave courts express permission to apply equitable delayed discovery principles to lawsuits alleging child molestation. Former subdivision (d) of the statute then stated: "'*Nothing in this bill is intended to preclude the courts from applying delayed discovery exceptions to the accrual of a cause of action for sexual molestation of a minor.*'" (*Evans, supra,* 216 Cal.App.3d at p. 1614, italics added.) *Evans* quoted that section and relied on it as a legislative imprimatur for its decision. (*Ibid.*)

Four years after *Evans*, when the Legislature liberalized the limitations period to commence actions for childhood sexual

abuse, it also *eliminated* the provision allowing courts to apply equitable delayed discovery exceptions to the statute of limitations.[11] That deletion has been preserved in all subsequent amendments to the statute.

Amicus on behalf of plaintiff dismisses the deletion of former subdivision (d) as "removal of surplusage." We disagree. Cases such as *Evans* had applied equitable, common law principles of delayed discovery to avoid normal rules regarding accrual in cases of childhood abuse. This practice could easily have continued unabated unless the Legislature put a stop to it.

"'It is ordinarily to be presumed that the Legislature by deleting an express provision of a statute intended a substantial change in the law.'" (*People v. Dillon* (1983) 34 Cal.3d 441, 467, quoting *People v. Valentine* (1946) 28 Cal.2d 121, 142.) "'Where the Legislature omits a particular provision in a later enactment related to the same subject matter, such deliberate omission indicates a different intention which may not be supplanted in the process of judicial construction.'" (*Hoschler v. Sacramento City Unified School Dist.* (2007) 149 Cal.App.4th 258, 269, quoting *Kaiser Steel Corp. v. County of Solano* (1979) 90 Cal.App.3d 662, 667.)

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[11] In 1990, the Legislature reenacted former subdivision (d) in substantially the same form as subdivision (*l*). (See fn. 8, *ante*.) The 1994 bill deleted this language from section 340.1 altogether. (Historical and Statutory Notes foll. § 340.1, *supra*, pp. 172-173.)

In light of these rules, we cannot view the elimination of former subdivision (d) as a mere housekeeping measure. By withdrawing its previous sanction of common law principles at the same time it made it easier for victims of childhood sexual abuse to sue, the Legislature drew a line in the sand, declaring an end to employment of common law delayed discovery theories that were not expressly set forth in the statute.

We conclude that plaintiff may not rely on common law delayed discovery rules that are inconsistent with the limitations periods expressly set forth in section 340.1.[12]

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[12] *Curtis T. v. County of Los Angeles* (2004) 123 Cal.App.4th 1405, upon which plaintiff and amicus heavily rely, does not persuade us otherwise. In *Curtis T.*, a guardian ad litem filed a government claim for damages against Los Angeles County on behalf of a 12-year-old child, based on molestations that occurred in a foster home when he was between five and eight years old. (*Id.* at pp. 1411-1413). The Court of Appeal for the Second Appellate District, Division One, applying principles of equitable delayed discovery, held that the claim was timely as long as the guardian could establish that she could not, with reasonable diligence, have discovered the molestations earlier. (*Id.* at pp. 1422-1423.) Unlike actions against private parties, the statute of limitations to file a minor's claim against a public entity is not automatically tolled until the minor reaches the age of majority. (See § 352, subd. (b).) The *Curtis T.* court emphasized that its decision was limited to the filing of *government claims* against public entities on behalf of minors who, because of their tender age, may not appreciate the wrongfulness of what was done to them. (*Curtis T.*, at pp. 1409, 1422.) It also acknowledged that the limitations period for *adult plaintiffs* to file civil actions based on childhood sexual abuse was governed by section 340.1, a statute which it had no occasion to interpret. (*Id.* at pp. 1419-1420.) Opinions are not authority for issues they do not consider. (*Stoll v. Shuff* (1994) 22 Cal.App.4th 22, 27.)

We decline to reach the question posed by amicus for plaintiff of whether the theory of *equitable estoppel*--which is conceptually distinct from delayed discovery (see *John R.*, *supra*, 48 Cal.3d at pp. 444-445, fn. 4)--may apply to excuse timely filing under section 340.1. That theory was never raised by plaintiff, either in the trial court or on this appeal. Hence, it is not properly before us. (See *People ex rel. Dept. of Transportation v. Superior Court* (2003) 105 Cal.App.4th 39, 46 [appellant may not raise issues never considered by the trial court]; *Bialo v. Western Mutual Ins. Co.* (2002) 95 Cal.App.4th 68, 73-74 [issues raised only by the amicus curiae briefs are not cognizable].)

F. Conclusion

Plaintiff's cause of action against the Bishop for childhood sexual abuse accrued when the molestations occurred. Because he failed to file suit by age 19, the statute of limitations expired. (*Shirk*, *supra*, 42 Cal.4th at p. 210; *Doe v. Bakersfield City School Dist.*, *supra*, 136 Cal.App.4th at p. 567, fn. 2.) Plaintiff's lapsed claim remained in repose until it was revived during the calendar year 2003, but he failed to avail himself of the opportunity to file suit within the statutorily advertised window period.

Plaintiff's allegations of repressed memory do not save his complaint, because the delayed discovery rule applicable to intentional nonabuser defendants (see fn. 6, *ante*) that was added to section 340.1 in 2002 did not have retrospective

effect. Consequently, it did not operate to revive decades-old claims such as plaintiff's, which had lapsed due to the running of the statute of limitations.

DISPOSITION

The judgment is affirmed. Defendant is awarded costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1).) ***(CERTIFIED FOR PUBLICATION.)***

BUTZ, J.

We concur:

SCOTLAND, P. J.

BLEASE, J.

PROOF OF SERVICE

I am employed in the **County of Los Angeles, State of California**. I am over the age of 18 and not a party to this action; my current business address is **555 S. Flower Street, Suite 3500, Los Angeles, CA 90071**.

On **April 20, 2009**, I served the foregoing document described as **REPLY TO ANSWER TO PETITION FOR REVIEW** on the interested parties in this action as follows:

X BY THE FOLLOWING MEANS:

X I placed a true copy thereof enclosed in sealed envelopes addressed as follows:

See Attached Service List

___ BY EXPRESS SERVICE CARRIER (**Via Overnight Courier Service**) I am readily familiar with the firm's practice for collection and processing of correspondence for delivery by Federal Express: Collected packages are picked up by an express carrier representative on the same day, with the Airbill listing the account number for billing to sender, at **Los Angeles, California**, in the ordinary course of business. I placed the envelope(s) in an envelope or package designated by the express service carrier for collection and processing for express service delivery on the above date following ordinary business practices.

X BY MAIL

x I am readily familiar with the firm's practice of collection and processing correspondence for mailing with the United States Postal Service; the firm deposits the collected correspondence with the United States Postal Service that same day, in the ordinary course of business, with postage thereon fully prepaid, at **Los Angeles, California**. I placed the envelope for collection and mailing on the above date following ordinary business practices.

X Executed on **April 20, 2009**, at **Los Angeles, California**.

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

X I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Dolores Kreider

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