SUPREME COURT COPY

CASE NO. S171382

IN THE SUPREME COURT OF CALIFORNIA

TERRY QUARRY, et al.,
Plaintiffs and Appellants.

v.

DOE 1 DIOCESE,
Defendant and Respondent.

CRC 8.25(b)

SUPREME COURT
FILED
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Court of Appeal, First Appellate District, Division 4
Case No. A120048

Alameda County Superior Court, No. HG07313640
Honorable Kenneth Mark Burr

PLAINTIFFS AND APPELLANTS ANSWER BRIEF ON THE MERITS

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CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

S171382 - QUARRY v. DOE 1

Full Name of Interested Entity/Person	Party	Non-Party	Nature of Interest
NONE	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
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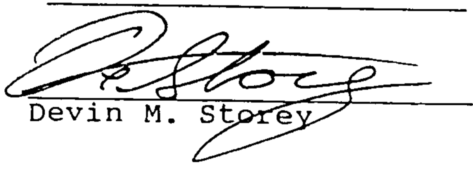

Devin M. Storey

Submitted by: Devin Miles Storey

Case No: S171382
Terry Quarry, et al. v. Defendant Doe 1, Diocese
Court of Appeal, First Appellate District, Division 4
Case No: A120048
Superior Court - County of Alameda
Case No. HG 07313640

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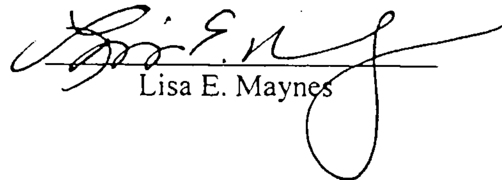

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I. INTRODUCTION

In 2002, the Legislature responded to growing public awareness of rampant sexual abuse of children by clerics and the abject failure of liturgical institutions to curb those abuses over the course of many decades by re-evaluating the State's statute of limitations for commencing actions against third parties who could have prevented children from being abused. At that time, the statute proscribing the limitations period for the filing of claims alleging childhood sexual abuse set an eight year period after the victim reached the age of majority, or three years from recognizing the connection between the molestation and adulthood psychological injuries, whichever period expires later. Code Civ. Proc., § 340.1(a).

The eight years from majority / three years from discovery period applies to any action filed against a perpetrator of sexual abuse on or after January 1, 1991, "thereby reviving those causes of action which had lapsed or technically expired under the law existing prior to January 1, 1991." Cal. Code Civ. Proc. § 340.1(r). The provision similarly applies to any action against a non-perpetrator defendant filed on or after January 1, 1999, "including any action or causes of action which would have been barred by the law in effect prior to January 1, 1999." Cal. Code Civ. Proc. § 340.1(u).

In 1998, the statute precluded use of the discovery provision against non-perpetrator defendants by providing that any action against such defendants must be commenced prior to the victim's twenty-sixth birthday. Cal. Code Civ. Proc. § 340.1(b).

In 2002, the Legislature was concerned about this "arbitrary" age twenty-six limitation that "unfairly deprives a victim from seeking redress and unfairly and unjustifiably protects responsible third parties from being held accountable for their actions." *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 544; LH0110.[1] In response, the Legislature enacted California Code of Civil Procedure §340.1(b)(2), which eliminates the age 26 limitation if a non-perpetrator defendant "knew or had reason to know, or was otherwise on notice" of prior acts of sexual abuse by the perpetrator and failed to respond appropriately.[2] The result of this amendment was that "[p]eople who discover the cause of 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

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[1] All further "LH" references refer to the legislative history documents submitted by Appellants and judicially noticed by the court of appeal.

[2] All further statutory references are to the Code of Civil Procedure unless otherwise noted.

adulthood trauma was caused by the childhood abuse." LH0142.

Simply allowing actions to be commenced after the victim's twenty-sixth birthday, but within three years of the victim's discovery of injury, did not address claims by individuals who had discovered the cause of their injuries many years ago and were therefore unable to take advantage of the lifting of the age 26 limitation. The addition of subdivision (b)(2), in itself, was therefore insufficient to accomplish the Legislature's goal of ensuring "victims severely damaged by childhood sexual abuse are able to seek compensation from those responsible." LH0050. As a result, the Legislature also codified section 340.1, subdivision (c), which revived for a period of one year, those actions that would have been barred under the newly-amended statute due to the victim's discovery many years ago that the abuse resulted in adult-onset harm.

Division Four of the First District Court of Appeal concluded in *Quarry v. Doe 1* (2009) 172 Cal.App.4th 1574, that Appellants timely commenced their actions in reliance on the plain and unambiguous language of section 340.1, subdivisions (a) and (b)(2). The result reached by the court of appeal is supported on several distinct bases.

First, the court of appeal correctly interpreted the plain language of

section 340.1 in a manner that effectuated the Legislature's intent. *Paris v. Santa Clara County* (1969) 270 Cal.App. 3d 691, 699. The decision considered each provision of section 340.1 and adopted a construction that harmonized the various parts of the statute. *J.R. Norton Co. v. Agricultural Labor Relations Board* (1979) 26 Cal.3d 1, 37. Given proper construction, the plain language of subdivisions (a)(2), (a)(3), (b)(2), (c) and (u), demonstrate the applicability of the statutory delayed accrual provision of section 340.1 to Appellants' claims.

The court of appeal also embraced the directives of the legislative history of the statute, which recognized that victims who discover the cause of their adulthood injuries after January 1, 2003, were intended to receive the benefit of the delayed accrual provision, and effectuated the statute's remedial purpose. LH0142; *Alford v. Pierno* (1972) 27 Cal.App.3d 682, 688.

Second, by finding that the common law delayed discovery doctrine was available to Appellants, the court refused to interpret section 340.1 to infer an unstated abrogation of common law principles. *Goodman v. Zimmerman* (1994) 25 Cal.App.4th 1667, 1676 (a statute does not alter or depart from a common law rule unless the statutory language evidences the

Legislature's clear and unequivocal intent to do so.) The court instead embraced established authorities applying the equitable delayed discovery doctrine to claims of childhood sexual abuse. *Curtis T. v. County of Los Angeles* (2004) 123 Cal.App.4th 1405; *Evans v. Eckelman* (1990) 216 Cal.App.3d 1609.

Finally, although not expressly considered in the court of appeal's decision, the outcome of the appeal below is supported by vicarious liability principles. Whether an employee's misconduct was committed within the scope of his employment is a question of fact that can only decided at the demurrer stage if "the facts are undisputed and no conflicting inferences are possible." *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, 299 (quoting *Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 213.) When the facts could give rise to an inference that the misconduct took place within the scope of the wrongdoer's employment, the scope of employment issue must be decided by the trier of fact. *Alma W. v. Oakland Unified School District* (1981) 123 Cal.App.3d 133, 138. The statute of limitations governing a claim based on vicarious liability is the statute of limitations applicable against the perpetrator. *Kocsis v. Harrison* (Neb. 1996) 249 Neb. 274 ("[w]hen a plaintiff initiates an action

under the theory of respondeat superior . . . The controlling statute of limitations applicable to the employer is that which would apply to the employee.") The retroactive discovery provision applicable against the perpetrator governs Appellants' timely vicarious liability claims.

The decision of the court of appeal should be affirmed.

II. STANDARD OF REVIEW

A demurrer tests the sufficiency of a complaint as a matter of law. *Wilner v. Sunset Life Ins. Co.* (2000) 78 Cal.App.4th 952, 958; *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. In ruling on a demurrer, all material facts pleaded in the complaint and those that arise by reasonable implication are deemed admitted. *Schnall v. Hertz Corp.* (2000) 78 Cal.App.4th 1144, 1151-1152. The complaint must be liberally construed, drawing reasonable inferences from the facts. *See Schnall*, 78 Cal.App.4th at 1151-1152.

The appellate court reviews an order of the trial court sustaining a demurrer without leave to amend *de novo*. *Smith v. State Farm Mut. Auto. Ins. Co.* (2001) 93 Cal.App.4th 700, 710-711. A demurrer may only be sustained on the ground that the complaint is barred by a statute of limitations if the allegations in the complaint, and matters subject to judicial notice, demonstrate clearly that the cause of action is necessarily barred.

Lockley v. Law Office of Cantrell, Green, Pekich, Cruz & McCort (2001) 91 Cal.App.4th 875, 881. A demurrer must be overruled if the plaintiff has stated a timely cause of action under any possible legal theory. *Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 810.

III. STATEMENT OF THE CASE

A. Statement of Facts[3]

Throughout their respective minorities, Appellants were parishioners and/or altar boys at St. Joachim's Parish. (Appellants' Appendix: v. 1, pp. 8, 12, 13, 14, 16: v. 2, pp. 268, 271, 272, 273, 274, 276) (A.A.) In 1972 and 1973, Appellants were repeatedly sexually abused by Fr. Donald Broderson, a priest at St. Joachim's.[4] (A.A.: v. 1, pp. 10-17; v. 2, pp. 270-277.)

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[3] On review following the sustaining of a demurrer, all facts pleaded in the complaint are deemed true and liberally construed with a view to attaining substantial justice. *Stop Youth Addiction Inc. v. Lucky Stores, Inc.* (1998) 17 Cal.4th 553, 558.

[4] The Opening Brief makes several factual mistakes. Notably, it was Jerry rather than Michael Quarry who filed a police report in 1994. (Opening Brief at 5; A.A.: v. 2, pp. 274, 281.) Defendant claims Michael Quarry was sexually abused at the age of 13 or 14. (Opening Brief at 9.) Michael was born in 1963, and abused from 1972-73; meaning Michael was between eight and nine at the time of the abuse. (A.A.: v. 2, pp. 268, 270.) Defendant incorrectly notes that Division Seven of the Second District Court of Appeal decided *Hightower v. Roman Catholic Bishop of Sacramento* (2006) 142 Cal.App.4th 759, when it was actually Division Eight. (Opening Brief at 5.) Later, Defendant mis-cites the court of appeal's discussion of the statutory delayed discovery provision as relevant

Appellants were subjected to Fr. Broderson's control due to their devout Catholic upbringing and Fr. Broderson's position of authority. (A.A.: v. 1, pp. 3-8; v. 2, pp. 263-268.) Through frequent contact over a one-year period of time commencing in 1972, Fr. Broderson was able to gain Appellants' trust and confidence. (A.A.: v. 1, pp. 3-8, 10-17; v. 2, pp. 263-268, 270-277.) Preying on that trust, as well as the Appellants' adolescent vulnerabilities, Fr. Broderson cultivated unprofessional and inappropriate relationships with Appellants. (A.A.: v. 1, pp. 3-8; v. 2, pp. 263-268.)

Fr. Broderson molested Terry by open-mouth kissing the boy, cuddling Terry in a sexual manner and fondling Terry's genitals on at least two occasions. (A.A.: v. 1, pp. 10-11; v. 2, pp. 270-271.) Fr. Broderson repeatedly molested Jerry by open-mouth kissing Jerry, fondling Jerry's genitals, skin-to-skin, masturbating Jerry's penis, and engaging in inappropriate sexual cuddling. (A.A.: v. 1, p. 14; v. 2, p. 274.) Fr. Broderson molested Tony by open-mouth kissing the boy, and fondling his genitals, skin-to-skin. (A.A.: v. 1, p. 16; v. 2, p. 276.) Fr. Broderson

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to its discussion of the common law delayed discovery doctrine. (Opening Brief at 41-42.) This Court should be mindful of this Defendant's careless citations to the facts of this case and look skeptically at its legal arguments.

molested Gordon by showing the boy graphic sexual images, open-mouth kissing Gordon, fondling Gordon's genitals, both over the clothes and skin-to-skin, and simulating anal intercourse by grinding his erect penis against Gordon. (A.A.: v. 1, p. 15; v. 2 p. 275.) Fr. Broderson abused Michael on approximately ten occasions consisting of open-mouth kissing, Fr. Broderson fondling Michael's genitals, skin-to-skin, and Fr. Broderson simulating anal intercourse by grinding his erect penis against Michael's buttocks. (A.A.: v. 1, p. 12; v. 2, p. 272.) Fr. Broderson showed plaintiff sexually graphic images, open-mouth kissed Ronald on the lips, put his hand down Ronald's pants, and fondled Ronald's genitals on at least one occasion. (A.A.: v. 1, p. 11-12; v. 2, pp. 271-272.)

As a result of the molestation, Terry, Tony, Gordon, Michael and Ronald developed various psychological coping mechanisms that rendered them reasonably incapable of ascertaining the wrongful nature of the abuse suffered at the hands of Fr. Broderson, or discovering the connection between the molestation and psychological injuries occurring during adulthood. (A.A.: v. 1, pp. 17, 18, 19, 20; v. 2, pp. 277-284.)

Jerry recognized the wrongfulness of the touching at the time of the molestation, and filed a police report regarding the molestation in 1994.

(A.A.: v. 1, p. 14; v. 2 p. 274, 281.) Jerry, however, did not discover that the molestation caused adult psychological injuries until March of 2006.[5] (A.A.: v. 2, p. 281.)

Fr. Broderson was a serial child molester employed by the Defendant in the 1960s and 1970s. (A.A.: v. 1, pp. 8-10; v. 2, pp. 268-270.) Fr. Broderson was ordained in 1968 and assigned to Santa Paula Parish in Fremont, California. (A.A.: v. 1, p. 8; v. 2, p. 268.) Fr. Broderson was openly affectionate toward children at Santa Paula, allowing them to sit on his lap while he stroked their hair and massaged their bodies, as well as openly kissing the children on the mouth in view of his fellow priests and parishioners. (A.A.: v. 1, p. 9; v. 2, p. 269.) At Fr. Broderson's next assignment, St. Phillip Neri Parish, the Pastor entered Fr. Broderson's room and observed the priest fondling a young boy's genitals. (A.A.: v. 1, p. 9; v. 2, p. 269.) Fr. Broderson was then assigned to St. Joachim's Parish, where

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[5] Though not raised as a basis for demurrer at the trial level, Defendant labels Appellants' allegations that they discovered the cause of their respective adulthood psychological injuries on the same day when Appellants each met with a mental health practitioner "incredible." (Opening Brief at 5.) Appellants request this Court not opine on the issue of what constitutes discovery of a claim under section 340.1(a), but recognize that Appellants' allegations are consistent with prior case law. *See Lent v. Doe* (1995) 40 Cal.App.4th 1177 (accrual occurred when plaintiff attended counseling as an adult, notwithstanding actual damage at time of touching).

he was given access to Appellants. (A.A.: v. 1, p. 9; v. 2, p. 269.) Fr. Broderson has admitted to molesting numerous children during his career as a priest, including Appellants. (A.A.: v. 1, p. 17; v. 2, p. 277.)

The abuse of Appellants is all the more egregious because Defendant was informed and aware of Fr. Broderson's abhorrent conduct and yet failed to take any action to prevent Fr. Broderson from sexually abusing Appellants. (A.A.: v. 1, pp. 8-10; v. 2, pp. 268-270.) As a result of Fr. Broderson's actions and the inexcusable inaction of the Defendant, Appellants suffered severe emotional trauma. (A.A.: v. 1, pp. 17-21; v. 2, pp. 277-285.)

B. Procedural History

Appellants' Complaint was filed on March 2, 2007, alleging fourteen causes of action resulting from the sexual abuse. On May 18, 2007, Defendant demurred to Appellants' complaint, contending that Appellants' claims were time barred. (A.A.: v. 1, p.45.) Defendant relied largely on the decision in *Hightower*, claiming that Appellants' only opportunity to bring a claim expired on December 31, 2003. The trial court remarked: "It would appear to me that the factual situation in *Hightower* is identical to what we have here." (Reporter's Transcript at A-10.)

After a hearing, the trial court sustained Defendant's demurrer with 20 days leave to amend. (A.A.: v. 1, p. 260.) Appellants filed a first amended complaint on July 12, 2007. Again, relying on *Hightower*, Defendant demurred. After briefing was completed, the court held a hearing on September 11, 2007, at which time the court sustained the demurrer. In ruling, the court expressed its view that *Hightower* was controlling, and mandated the dismissal of Appellants' claims.

"The Court feels that there has been a very thorough examination of these issues [in *Hightower*] . . . And that's how the Court arrived at its tentative ruling . . . I'm inclined to find that there is nothing new that has been created here to cause me to deviate from the Court's tentative ruling sustaining the demurrer without leave." (Reporter's Transcript at B - 7.)

The court additionally determined that "Plaintiffs' claims are not subject to common law delayed discovery principles. C.C.P. § 340.1 provides the exclusive limitation period for Plaintiffs' claims. It applies to all claims of childhood sexual abuse made by an adult." (A.A.: v. 2, pp. 574-575.)

On November 7, 2007, a Judgment dismissing Appellants' action was entered by the trial court. (A.A.: v. 2, p. 577.) On November 28, 2007,

Defendant served notice of entry of the judgment. (A.A.: v. 2, p. 579.)

On December 3, 2007, Appellants filed their notice of appeal. (A.A.: v. 2, p. 583.) After briefing was completed, Division Four of the First District Court of Appeal heard oral argument in this Appeal on December 2, 2008. On February 10, 2009, the Court of Appeal reversed the decision of the trial court.

The Court of Appeal correctly determined that the plain language of section 340.1 demanded a finding that Appellants' actions were timely filed, noting:

> [T]he 1998-1999 amendments to section 340.1 revived all previously lapsed, unadjudicated claims against perpetrators and third parties, and provided two alternative limitations periods: A claim must be filed (1) within eight years after reaching majority or (2) within three years of discovering that the cause of the psychological injury occurring after the age of majority was the childhood abuse, whichever occurs later [citation omitted]; as against third parties, however, the outside limit was age 26 [citation omitted]. Thus, under the prior law, any person discovering after age 26 that childhood abuse was the cause of his or her adulthood injuries was barred from suing responsible third parties. Effective 2003, however, the Legislature deleted the age 26 cutoff as against a narrow category of third party defendants who had both the knowledge and the ability to protect against abusive behavior but failed to do so. Anyone discovering that childhood abuse was the cause of their injuries after 2003 could sue these - more culpable - defendants without regard to the age 26 cutoff. . . [¶] . . . It therefore follows, and we hold, that under section 340.1 the complaint in this action is not time-barred because plaintiffs have alleged they did not discover the cause of their psychological injuries until 2006.

Quarry, 172 Cal.App.4th at 1584.

The court found additional support for its finding by reference to *Nelson v. Flintkote* (1985) 172 Cal.App.3d 727, which interpreted section 340.2, a similar remedial statute of limitations concerning claims for asbestos-related injuries. Following *Nelson*, the court of appeal determined that "the fact that prior limitations periods may have expired before section 340.1, subdivision (b)(2)'s more liberal discovery rule became effective and before any complaint was filed does not bar plaintiffs' action, because discovery of the cause of plaintiffs' psychological injuries had not yet occurred." *Quarry*, 172 Cal.App.4th at 1586-87.

After concluding that the delayed accrual provision in section 340.1, subdivisions (a) and (b)(2) applied to Appellants' claims, the court determined that the common law delayed discovery doctrine remained viable, and is available to victims of childhood sexual abuse who repressed their memory of the abuse, or otherwise were unable to ascertain the wrongfulness of the abuse. *Id.* at 1593.

IV. ARGUMENT

A. The Legislature has Repeatedly Expanded the Statute of Limitations in Actions Resulting From Childhood Sexual Abuse to Increase Victims' Access to the Courts

Section 340.1 represents the Legislature's recognition that the comprehension of harm inflicted as a result of childhood sexual abuse can be delayed for many years into adulthood. *Curtis T.*, 123 Cal.App.4th at 1421. Thus, the Legislature enacted the statute to provide "very generous limitations periods for adults who belatedly realize 'that psychological injury or illness occurring after the age of majority was caused by the sexual abuse' that occurred many years ago in childhood." *Id.*

As originally enacted in 1986, section 340.1's provisions were limited to acts by family and household members and the limitations period was three years. Stats, 1986 ch. 914, § 1; *DeRose v. Carswell* (1987) 196 Cal.App.3d 1011, 1021. In 1990, the Legislature expanded the scope of the statute's limitations period to claims against any perpetrator, and extended the limitations period to eight years from the date the plaintiff reaches majority, or three years from the date the plaintiff discovers the causal connection between the abuse and injuries manifesting as an adult. *See Snyder v. Boy Scouts of Am., Inc.* (1988) 205 Cal.App.3d 1318, 1325;

Tietge v. Western Province of the Servites, Inc. (1997) 55 Cal.App.4th 382, 385. The purpose of the expanded limitation provided by section 340.1, subd. (a), is to allow victims "a longer time period in which to become aware of their psychological injuries and remain eligible to bring suit against their abusers." *Debbie Reynolds Prof. Rehearsal Studios v. Superior Court* (1994) 25 Cal.App.4th 222, 232.

In 1994 the Legislature again extended the scope of section 340.1 by expressly making the provisions enacted in 1990 retroactive. Stats, 1994, ch. 288 § 1. In 1998, the statute was further expanded to make the eight year / three year statute of limitation period applicable against responsible third parties under a theory of direct liability. Section 340.1, subd. (a) added in 1998, Stats, 1998, ch. 1032 §1. Such actions were required to be filed prior to the plaintiff's 26th birthday. *Id.* at subd. (b)(1). In 1999 the Legislature clarified that the 1998 provisions relating to non-abuser liability applied retroactively 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.'" *Shirk v. Vista Unified School District* (2007) 42 Cal.4th 201, 208 citing Stats, 1999, ch. 120 § 1.

In 2002, the Legislature lifted the age 26 bar and permitted victims over the age of 26 who discovered the causal connection between their abuse and adult-onset injuries to file a claim against responsible entities if defendant possessed a requisite level of notice of the perpetrator's actions and failed to take actions to prevent further abuse. Section 340.1, subds. (a), (b)(2). For those victims who discovered the cause of their injuries and were over the age of 26 prior to 2003, and therefore unable to rely on the discovery provision of section 340.1(a), the Legislature revived, for one year, those claims that "would otherwise be barred as of January 1, 2003, solely because the applicable statute of limitations has or had expired . . ." Section 340.1, subd. (c).

From the enactment of section 340.1 in 1986, through the most recent amendments in 2002, the Legislature has consistently acted to expand and liberalize the "very generous limitations" period afforded by section 340.1. *See McVeigh v. Does 1 through 3* (2006) 138 Cal.App.4th 898, 903-904 (§ 340.1 "has been amended numerous times since its enactment in 1986 . . . [e]ach time, plaintiffs' access to the courts was expanded.") The unmistakable intent of the Legislature was to insure that adults who suffered during their childhood from the acts of sexual predators

are afforded every opportunity to have their claim heard on the merits.

With the foregoing legal framework in mind, we show below that the Court of Appeal correctly determined that Appellants' actions were timely commenced.

B. The Plain Language of Section 340.1 Applies the "Three Years From Discovery" Provision to Appellants' Actions

"When construing a statute, a court's goal is 'to ascertain the intent of the enacting legislative body so that we may adopt the construction that best effectuates the purpose of the law.'" *Gattuso v. Harte-Hanks Shoppers, Inc.* (2007) 42 Cal.4th 554, 567 quoting *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715. "Generally, the court first examines the statute's words, giving them their ordinary and usual meaning and viewing them in their statutory context, because the statutory language is usually the most reliable indicator of legislative intent." *Gattuso*, 42 Cal.4th at 567

In construing the words of a statute, the court must be mindful of "the nature and obvious purpose of the statute where they appear. Moreover, the various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole." *J.R. Norton Co.*, 26 Cal.3d at 37. The pertinent

provisions of section 340.1 provide:

(a) In an action for damages suffered as a result of childhood sexual abuse, the time for commencement of the action shall be within eight years of the date the plaintiff attains the age of majority or within three years of 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, whichever period expires later, for any of the following actions:

(a)(2) An action for liability against any person or entity who owed a duty of care to the plaintiff, where a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to plaintiff.

(a)(3) An action for liability against any person or entity where an intentional act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to plaintiff.

(b)(1) No action described in paragraph (2) or (3) of subdivision (a) may be commenced on or after the plaintiff's 26th birthday.

(b)(2) This subdivision does not apply if the person or entity knew or had reason to know, or was otherwise on notice, of any unlawful sexual conduct by an employee, volunteer, representative or agent, and 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 inherent part of that function or environment. For purposes of this subdivision, providing or requiring counseling is not sufficient, in and of itself, to constitute a reasonable step or reasonable safeguard.

(c) Notwithstanding any other provision of law, any claim for

damages described in paragraph (2) or (3) of subdivision (a) that is permitted to be filed pursuant to paragraph (2) of subdivision (b) 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. Nothing in this subdivision shall be construed to alter the applicable statute of limitations period of an action that is not barred as of January 1, 2003.

(u) The amendments to subdivision (a) of this section, enacted at the 1998 portion of the 1997-98 Regular Session, shall apply to any action filed on or after January 1, 1999, and to any action filed prior to January 1, 1999, and still pending on that date, including any actions or causes of action which would have been barred by the laws in effect prior to January 1, 1999. Nothing in this subdivision is intended to revive actions or causes of action as to which there has been a final adjudication prior to January 1, 1999.

1. Section 340.1 expressly applies the "three years from discovery" provision retroactively to actions commenced after January 1, 1999

"A section of a statute may not be amended unless the section is re-enacted as amended." Cal. Const., Art IV., § 9. "Under the 'reenactment rule' of statutory interpretation, the unamended portion of a statute is reenacted with the enactment of the amendment, so that the statute is deemed to have been acted on as a whole." *Barratt American, Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 704; *see also People v. Scott* (1987) 194 Cal.App.3d 550, 554 ("The amendment of a statute ordinarily

has the legal effect of reenacting (thus enacting) the statute as amended, including the unamended portions.")

Claims against third party defendants are authorized by subdivisions (a)(2) and (a)(3) of section 340.1, which permit a plaintiff to commence an action prior to the age of 26, or within three years of discovering that the molestation caused adulthood injuries, "whichever period expires later." Paragraphs (2) and (3) were added to subdivision (a) "at the 1998 portion of the 1997-98 Regular Session" and are therefore affected by the retroactive language of subdivision (u). *See* Cal. Code Civ. Proc. § 340.1(u).

Current subdivision (u) expressly applies subdivisions (a)(2) and (a)(3) retroactively to all cases filed after January 1, 1999. Subdivision (b)(2) provides that victims over the age of 26 can bring an action against a third party defendant in appropriate circumstances. Cumulatively, these subdivisions allow a plaintiff over the age of 26 to file an action against a third party defendant at any time within three years of discovering the causal connection, provided the action is commenced on or after January 1, 1999.

In *Bouley v. Long Beach Memorial Medical Center*, the court applied identical reasoning when it noted that:

> "Here, the Legislative intent is unmistakable. In subdivision (d), section 377.60 provides that 'This section applies to any cause of action arising on or after January 1, 1993.' With that language, the Legislature unambiguously provided that the 2002 amendments must be applied to this lawsuit. . . .[¶] . . . It is true that subdivision (d) was not added to the statute to address the 2002 amendments. Instead, it was added in 1997 as urgency legislation in order to undo the unintended consequences of the 1996 amendments, in which the Legislature had inadvertently deprived certain parents of the right to sue. . . . [¶] . . . That bit of history is not determinative. The Legislature is presumed to be aware of the existing law and may certainly be presumed to know the full text of the laws it is amending. The Legislature was free to remove subdivision (d) from the statute once it served its original purpose, or to amend it to specify that it did not apply to the 2002 amendments. The fact that the Legislature chose not to do so can only lead us to conclude that the Legislature intended that subdivision (d) would apply to the 2002 amendments, making those amendments retroactive."

(2005) 127 Cal.App.4th 601, 607 (internal citations omitted); *see also Armijo v. Miles* (2005) 172 Cal.App.4th 1405, 1412-13 (by re-enacting subdivision (d) of Section 377.60 without change, Legislature demonstrated "clear intent that the 2002 amendment have retroactive application.")

Like the statute at issue in *Bouley*, the Legislature did not add subdivision (u) to section 340.1 in 2002. Instead, that subdivision was added in 1999 to address a deficiency in the application of the 1998 amendments. Cal. Code Civ. Proc. § 340.1(s)(1999). As in *Bouley*, the Legislature could have removed that subdivision from the statute once it served its original purpose, or indicated the subdivision did not apply to the

2002 amendments. Instead, the Legislature reenacted the provision, including its retroactive language. In fact, the Legislature re-designated that subdivision from subdivision (s) in the 1999 version of the statute to subdivision (u) in 2002; thereby going to greater efforts to preserve the language of retroactivity. Appellants must be permitted to avail themselves of the delayed accrual provision of section 340.1(a)(2) and (a)(3).[6]

2. Section 340.1 must be interpreted in a way that gives meaning to all of its provisions

"Well-established canons of statutory construction preclude a construction which renders a part of a statute meaningless or inoperative." *Manufacturer's Life Insurance Co. v. Superior Court* (1995) 10 Cal.4th 257, 274; *see also Hassan*, 31 Cal.4th at 715-716. In the construction of a

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[6] Section 340.1(a) is significant since the phrase "whichever period expires later" was applied to third party defendants by the amendments to subdivision (a) added "at the 1998 portion of the 1997-98 Regular Session," and must therefore be applied retroactively. Cal. Code Civ. Proc. § 340.1(u). The phrase clearly contemplates that a victim over the age of twenty-six may commence an action if the requirements of subdivision (b)(2) are satisfied. Since the phrase retroactively permits plaintiffs over the age of 26 to file actions, the phrase must be interpreted to override previously-existing limitations preventing such actions, i.e. subdivision (b) of the 1999 amendment to section 340.1. As a result, Appellants' claims were completely revived on January 1, 2003, and the law then in effect permitted actions to be filed after the plaintiff reached the age of 26. *See* CCP § 340.1(b)(2).

statute, it is the duty of the court to "ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted to give effect to all." Cal. Code Civ. Proc. § 1858; *Manufacturer's Life Insurance Co.*, 10 Cal.4th at 274.

"Pursuant to this mandate, we must give significance to every part of a statute to achieve the legislative purpose." *Manufacturer's Life Insurance Co.*, 10 Cal.4th at 274; *People v. Kennedy* (2008) 168 Cal.App.4th 1233, 1239 ("A construction rendering some words in the statute useless or redundant is to be avoided"); *see also Schwab v. Rondel Homes* (1991) 53 Cal.3d 428, 435 ("significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose.")

Under Appellants' interpretation of the statute, subdivision (u) is given meaning and effect by enacting retroactive language authorizing victims of childhood sexual abuse to commence actions within three years of discovering adulthood injury, even if said victims are over the age of 26 when the action is commenced. Subdivision (u) is a pivotal part of the statutory scheme, and its retention in the statute serves a significant

purpose.

Defendant's position declines to afford any meaning to that subdivision. According to the Defendant, in 2002 subdivision (u) became a relic of a past amendment, serving no purpose in the current statutory scheme and adding clutter to an already long and complicated statute. Since the Legislature is presumed not to enact surplusage, Appellants' interpretation of the statute should be adopted since it affords meaning to subdivision (u).

3. Subdivision (c) demonstrates the Legislature intended that victims who discover the cause of their injuries after January 1, 2003 may utilize the delayed accrual provision

The language of subdivision (c) supports Appellants' reading of section 340.1. That subdivision consists of two distinct sentences which were, in fact, analyzed separately by the legislative analysts. LH0073. The first sentence provides a one year revival window for otherwise time-barred claims that are "permitted to be filed pursuant to paragraph (2) of subdivision (b)," i.e., claims by victims of childhood sexual abuse who are over the age of 26 and who can prove the requisite level of notice. Therefore, subdivision (c) by its unambiguous terms, excludes claims by plaintiffs who are under the age of 26 since they are not permitted to bring

claims under subdivision (b)(2).

The second sentence of subdivision (c) provides that "nothing in this subdivision shall be construed to alter the applicable statute of limitations period of an action that is not time barred as of January 1, 2003." Cal. Code Civ. Proc. § 340.1, subd. (c).[7]

To whom could the Legislature be referring in the second sentence of subdivision (c)? There are two possibilities. First, the Legislature could be referring to victims of childhood sexual abuse who are under the age of 26. Accepting this interpretation renders the second sentence of subdivision (c) surplusage since the first sentence already excludes victims under the age of 26 by prefacing its application on the plaintiff's ability to satisfy subdivision (b)(2)'s requirements. The Legislature would not have gone to the effort of adding this language to exclude a group that was already not affected by the provision. Since this Court must interpret that sentence to have meaning, this interpretation must be rejected.

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[7] Defendant claims that the introductory phrase in subdivision (c) - "notwithstanding any other provision of law" forecloses Appellants from relying on the delayed discovery provision of subdivision (a). (Opening Brief at 30.) This completely disregards the second sentence of subdivision (c). There is nothing about the existence of the one year revival that was intended to bar otherwise timely claims. Defendant's argument is non-sensical, contrary to the statute's purpose and requires this Court to ignore half of subdivision (c).

The only other possibility, and the only interpretation that gives meaning to the second sentence of subdivision (c), is that it refers to victims who were over the age of 26 on January 1, 2003, but as of that date had not discovered the connection between their abuse and adulthood injuries. This interpretation is consistent with the language of subdivision (u) and the decision of the Court of Appeal below.

C. The Remedial Purpose and Legislative History of SB1779 Support Appellants' Interpretation of Section 340.1

Notwithstanding section 340.1's clear and unambiguous language of retroactivity, the legislative history and remedial purpose of SB1779 provide additional support for application of the delayed accrual provision to Appellants' claims. When interpreting a statute, the courts may take into account matters such as the context, the evils to be remedied, legislation on the same subject and public policy. *People v. $1,930 U.S. Currency* (1995) 38 Cal.App.4th 834, 843; *Pandazos v. Superior Court* (1997) 60 Cal.App.4th 324, 326-27 ("[o]ne of the wide variety of factors a court may consider in reviewing legislative history to help 'illuminate the legislative design' is the specific 'evil' to be remedied by the legislation"); *see also Pacific Gas & Elec. Co. v. County of Stanislaus* (1997) 16 Cal.4th 1143, 1152 ("'[b]oth the legislative history of the statute and the wider historical

circumstances of its enactment may be considered in ascertaining the legislative intent'" citing *California Teachers Ass'n. v. Governing Bd. of Rialto Unified School Dist.* (1997) 14 Cal.4th 627, 659.)

In *Doe v. City of Los Angeles*, this Court had occasion to consider the 2002 amendments to section 340.1. 42 Cal.4th 531. This Court noted that the 2002 amendment:

> "is intended to ensure that victims severely damaged by childhood sexual abuse are able to seek compensation from those responsible. [¶] . . . [T]his bill provides that the extended statute of limitations in childhood sexual abuse cases against a third party extends beyond age 26 of the victim, when the third party knew, had reason to know, or was otherwise on notice, of unlawful sexual conduct by the individual and the third party failed to take reasonable steps and to implement reasonable safeguards to avoid future acts of unlawful sexual conduct by that individual . . . In support of the measure, the author states: [¶] This bill is essential to ensure that victims severely damaged by childhood sexual abuse are able to seek compensation from those responsible. While current law allows a lawsuit to be brought against a perpetrator within three years of discovery of the adulthood aftereffects of the childhood abuse, current law bars any action against a responsible third party entity (such as an employer, sponsoring organization or religious organization) after the victim's 26th birthday."

Id. at 544 (citing Assem. Floor Analysis of Sen. Bill 1779, as amended June 17, 2002, pp. 3-4.)

From a policy perspective, the Legislature was concerned about the "arbitrary" age 26 limitation, that "unfairly and unjustifiably" shields highly

culpable third parties from liability." LH0048; LH0052-53; LH0058; LH0069-70; LH0074; LH0103; LH0106; LH0110; LH0114; LH0118; LH0124-125; LH0130; LH0134; *Doe v. City of Los Angeles*, 42 Cal.4th at 544. In this regard, the Legislature repeatedly stated that "[t]his bill would provide that the absolute age of 26 limitation in actions against a third party does not apply, and the broader 'within three years of discovery' statute of limitations in subdivision (a) applies" when the plaintiff satisfies the requirements of subdivision (b)(2). LH0047; LH0068; LH0073; LH0088; LH0109; LH0112; LH0124.[8] This broad language demonstrates the Legislature's intent to lift the age 26 limitation retroactively.

Mindful of these concerns, the Assembly Judiciary Committee explained in an Assembly Judiciary Committee Background Information Worksheet: "[p]eople 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

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[8] "Bill Makes Age 26 Limitation Inapplicable, Applying Broader Statute Of Limitations To Suits Against Third Parties Who Knew Of Prior Claims Of Abuse But Failed To Act To Prevent Future Abuse." LH0059; LH0135; *See also* LH0074; LH0089; LH0125.

adulthood trauma was caused by the childhood abuse."[9] LH0142.[10] This understanding of the statutory framework is consistent with the Legislature's oft-cited example of:

> "a 35-year old man with a 13-year old son involved in many community and sporting events, may begin to relive his nightmare of being molested by an older authoritarian figure when he was 13 years old and about to enter puberty. While a lawsuit against the perpetrator is possible, that person may be dead, may have moved to places unknown, or may be judgment-proof. However, any lawsuit against a responsible third party is absolutely time-barred after the victim passes his 26th birthday. This arbitrary limitation unfairly deprives a victim from seeking redress and unfairly and unjustifiably protects responsible third parties from being held accountable for their actions that caused injury to victims."

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[9] This statement followed a heading entitled: "prospective application." In light of the Committee's description of the effect of SB1779, it appears that the word "prospective" was used to demarcate between individuals who had made the connection contemplated by section 340.1(a) as of the effective date of SB1779, and those who had not; as opposed to dividing individuals who were over the age of 26 on January 1, 2003 from those who were younger. In other words, a plaintiff who makes a causal connection prospectively may avail himself or herself of subdivision (b)(2).

[10] This document plainly described a one year revival window for those who had discovered the cause of their adulthood injuries before the effective date of the bill, and a three year from discovery provision for those who discover the cause of their trauma after January 1, 2003. The document just as clearly declines to describe a framework where only victims who were under the age of 26 as of the effective date of the bill may avail themselves of the delayed discovery provision. Defendant invites this Court to become bogged down in a discussion of retroactive versus prospective application of the delayed discovery provision while ignoring the Legislature's plain description of the workings of the Bill.

LH0048; LH0052-53; LH0058; LH0069-70; LH0074; LH0103; LH0106; LH0110; LH0114; LH0118; LH0124-125; LH0130; LH0134.

"Clearly then, the Legislature's goal in enacting subdivision (b)(2) was to expand the ability of victims of childhood sexual abuse to sue those responsible for the injuries they sustained as a result of that abuse. This reading of subdivision (b)(2) is also consistent with the Legislature's larger purpose in enacting section 340.1 . . . to allow victims of childhood sexual abuse a longer time period in which to bring suit against their abusers. . ." *Doe v. City of Los Angeles*, 42 Cal.4th at 545.

The one year revival window, standing alone, does not safeguard this victim's ability to pursue an action. If the 35-year-old man discovered the cause of his adulthood injuries after the one year window of subdivision (c) had closed, Defendant's interpretation of the statute would disregard the Legislature's clear concern that the man be able to seek justice later in life and would instead forever bar his claim.[11]

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[11] In *Fox,* 35 Cal.4th at 815, this Court stated that "[i]t would be contrary to public policy to require plaintiffs to file a lawsuit at a time when the evidence available to them failed to indicate a cause of action." *See also Leaf v. City of San Mateo* (1995) 104 Cal.App.3d 398, 408. "Indeed, it would be difficult to describe a cause of action filed by a plaintiff, before that plaintiff reasonably suspects that cause of action is a meritorious one, as anything but frivolous." *Fox*, 35 Cal.4th at 815. Such a plaintiff "would run the risk of sanctions for filing a cause of action without any factual

Defendant's interpretation of section 340.1 would create the anomalous result of lifting the arbitrary age twenty-six limitation for some plaintiffs, but leaving it in place for others; thereby disregarding the Legislature's intent to alleviate the "arbitrary" results generated by the limitation and permitting culpable third parties to continue to be "unfairly and unjustifiably" shielded from liability.

Though not part of the record, Defendant informs this Court that more than 1000 lawsuits were filed during the 2003 revival period, and settlements of more than one billion dollars were paid. (Opening Brief at 2.) The implication being that a flood of lawsuits will follow if this Court affirms the decision of the Court of Appeal. Aside from using hindsight as a tool for determining the Legislature's intent before those cases were filed and settlements entered, Defendant's argument ignores the Legislature's discussions of the financial repercussions of SB1779. As noted by several legislative reports:

> Proponents assert that the emotional and psychological damage that results from childhood sexual abuse affects the public at large. Many victims will require state-funded therapy or other medical care. They contend that untreated victims often have problems with

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support." *Id.* A plaintiff who had not discovered that the abuse caused him injuries prior to the close of the one year window could therefore not file a claim.

> alcohol and drug abuse and low achievement and will require state-funded treatment programs and/or public assistance. Some victims will become perpetrators themselves. In short, it is the victims themselves, their families, and the public that now bear the financial and other burdens of this abuse while the responsible entities, which can prevent the harms, are free from potential liability.

LH00125. The Legislature sought to redistribute the financial impact of sexual abuse from the public to the culpable institutions that could have prevented the abuse.[12] Defendant would have this Court continue to saddle the taxpayers with these costs while the responsible parties remain free from liability.[13]

The Legislature intended that victims such as Appellants could commence an action after January 1, 2003 using the statutory delayed accrual provision.

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[12] In essence, Defendant throws itself on the mercy of this Court with a plea to be insulated from liability because it has paid for *some* of the harm it caused.

[13] Defendant also fails to consider the difficulties facing plaintiffs bringing actions under the new statutory scheme. Plaintiffs bringing claims under the delayed accrual provision must obtain certificates of merit, prove the validity of their delayed discovery and plead specific facts showing that the defendant was on notice of the abuse pursuant to this Court's ruling in *Doe v. City of Los Angeles*, 42 Cal.4th 531. In short, only those legitimate delayed discovery claims against truly culpable third parties will be able to proceed if this Court affirms the decision of the Court of Appeal.

1. Remedial statutes like section 340.1 must be interpreted liberally to achieve the statute's purpose

In *Doe v. City of Los Angeles*, this Court recognized "[S]ubdivision (b)(2) is a remedial statute that the Legislature intended to be construed broadly to effectuate the intent that illuminates section 340.1 as a whole; to expand the ability of victims of childhood sexual abuse to hold to account individuals and entities responsible for their injuries." 42 Cal.4th at 536.

There is a strong public policy favoring the disposition of litigation on the merits instead of procedural grounds. *Barrington v. A.H. Robins Company* (1985) 39 Cal.3d 146. For this reason, statutory limitations on actions should be construed to avoid the forfeiture of a plaintiff's rights. *Gonzales v. County of Los Angeles* (1988) 199 Cal.App.3d 601, 605.

In interpreting a remedial statute the courts are instructed to liberally construe its language to insure that the objectives intended by the statute are met. *The People ex rel. Dep't of Transp. v. Muller* (1984) 36 Cal.3d 263, 269 ("[t]he rule of law in construction of remedial statutes requires great liberality, and whenever the meaning is doubtful, it must be construed so as to extend the remedy"); *see also Alford*, 27 Cal.App.3d at 688 (remedial statutes "are not construed within the narrow limits of the letter of the law,

but rather are to be given liberal effect to promote the general object sought to be accomplished.")

To the extent that any ambiguity exists as to the Legislature's intent to apply the benefits of an extended statute of limitations to cases such as Appellants', the ambiguity must be resolved in favor of extending the remedy and effectuating the statute's remedial purpose.

D. Defendant's Criticisms of the Court of Appeal's Decision are Without Merit

Defendant criticizes the court of appeal for analogizing section 340.1 to a similar remedial statute of limitation: section 340.2. Section 340.2 establishes the statute of limitations in asbestos-related claims. Like section 340.1, the statutory scheme in section 340.2 created a new date of accrual that was completely independent of the previous statute of limitations. The courts' treatment of that similar statute is highly relevant in interpreting the Legislature's intent in enacting and amending section 340.1.

Defendant also faults the court of appeal for declining to accept its highly optimistic interpretation of this Court's decision in *Shirk*. Defendant claims the court of appeal ignored "clear, binding Supreme Court precedent." (Opening Brief at 33.) The court of appeal did nothing of the sort. The *Quarry* court instead applied the *Shirk* opinion as it was actually

written, and appropriately determined that it was not controlling of the issues in this action.[14]

Finally, Defendant vociferously attacks the court of appeal for engaging in improper judicial legislation with no better justification than that the court did not agree with Defendant's view of this case. Accepting Defendant's argument, every court would engage in improper judicial legislation in every case requiring statutory interpretation because one party has to lose and will almost certainly disagree with the court rendering the decision. Defendant faults the court of appeal for attempting to effectuate the intent of the Legislature in enacting SB1779, notwithstanding that the courts are charged with doing exactly that. *Bodell Construction Co. v. Trustees of Cal. State University* (1998) 62 Cal.App.4th 1508, 1515-16. In

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[14] Defendant chastises the court of appeal for disagreeing with *Hightower*, however that decision is factually distinguishable. The court of appeal found that the plaintiff had not alleged delayed discovery and factually no delayed discovery could be alleged in light of the plaintiff's recognition of psychological injury in 1982. 142 Cal.App.4th at 767. The court found that applying the statutory discovery rule would obliterate the statute's distinction between timely and time-barred claims. *Id.* at 767-768. This reasoning holds up when the plaintiff discovered the cause of his injuries pre-2003, but not for a post-2003 discovery as alleged by Appellants. Particularly in light of the Legislature's understanding that "[p]eople who discover their adulthood trauma from the molestation after the effective date of the bill [SB1779] 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." LH00142

that pursuit, the court of appeal applied well-worn tools of statutory construction and disagreed with the Defendant's interpretation of the statute. This alone does not mean the court of appeal was acting as a three person Legislature; just that the court was doing its job.

1. The creation of section 340.2 is highly analogous to the evolution of section 340.1

The *Quarry* court explained the application of enlarged statutes of limitation in section 340.1 through analogy to a similar remedial statute of limitations: section 340.2. 170 Cal.App.4th at 1585-87. The court of appeal looked to *Nelson v. Flintkote*, which involved a plaintiff who had been exposed to asbestos and developed asbestosis. 172 Cal.App.3d at 729-730. The plaintiff was diagnosed with asbestosis in 1976. *Id.* at 730. At that time, the statute of limitations allowed the plaintiff one year to bring a claim after diagnosis. *Quarry*, 172 Cal.App.4th 1586-86.

In 1979, after the one year statute of limitations then in effect had run against Nelson, the Legislature enacted section 340.2, which provided that asbestos-related claims did not accrue until the plaintiff became disabled. *Id.* at 1585. The *Nelson* court determined that the plaintiff was entitled to use the new statute of limitations in section 340.2, noting:

"There is no automatic magical extinguishment of a cause of action

> by the mere passage of time. A statute of limitations is an affirmative defense which must be pleaded by a defendant and ruled upon by a court. Where, as here, a court has not adjudicated the timeliness of the action with reference to [the previous statute of limitations], prior to the effective date of section 340.2, the claim is considered still pending or potential and governed by the changed rules for accrual of section 340.2." 172 Cal.App.3d at 732.

The court reasoned that "the fact that the limitations period under the discovery rule of section 340, subdivision (3) may have expired before section 340.2's more liberal discovery and disability rule became effective and before any complaint was filed does not bar the action since no disability had occurred." *Id.* "Since there had been no extinguishment, there is no problem of an impermissible retroactive revival of a barred cause of action." *Id.*[15]

The *Quarry* court adopted this reasoning, finding that previous statutes of limitations were immaterial due to the express retroactive effect of the 1999 amendment to section 340.1 and the Appellants' belated discovery of the cause of their adulthood injuries. 172 Cal.App.4th at 1586-87. This position is consistent with accepted principles relating to the prospective application of procedural statutes. *See Andonagui v. May*

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[15] While Defendant attacks the reasoning of *Nelson*, this attack is without justification. This Court has, on more than one occasion, cited *Nelson* with approval. *See Hamilton v. Asbestos Corp.* (2000) 22 Cal.4th 1127, 1139; *Adams v. Paul* (1995) 11 Cal.4th 583, 597.

Department Stores Co. (2005) 128 Cal.App.4th 435, 440.[16]

Defendant claims that section 340.2 differs from section 340.1 because the former applies to "those causes of action which accrued prior to the change in the law made by this act and have not otherwise been extinguished by operation of law, " and the latter has "no such legislative pronouncement." (Opening Brief at 35.) Defendant ignores the plain language in section 340.1, subdivision (u), which unequivocally provides for retroactive application of the delayed discovery provision of section 340.1 to "any action commence on or after 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."

Defendant claims "the traditional justifications for statutes of limitations do not apply [in asbestos cases] since there is no real problem of loss of witnesses' memories." According to the Defendant asbestos-related

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[16] Defendant claims the court of appeal's interpretation of section 340.1 conflicts with *Krupnick v Duke Energy* (2004) 115 Cal.App.4th 1026. Defendant ignores cases such as *Andonagui* which find that expanded statutes of limitations apply to all actions not previously barred when the new statute takes effect. As the court of appeal held, since Appellants' action was revived in 1999 and had not accrued under section 340.1's discovery provision until after the age 26 limitation was lifted, Appellants' actions were not time-barred and the *Krupnick* line of cases is inapplicable. Notwithstanding, section 340.1 applies retroactively as discussed above.

claims are based on documentary evidence, while childhood sexual abuse claims must "rest primarily on the memories of the few remaining witnesses." (Opening Brief at 36.) The Legislature considered Defendant's point and again disagreed:

> "claims of some victims were delayed because the employer withheld information from victims or lied to victims so the employer's negligence or wrongful conduct would not be discovered. This is a key distinction and policy justification for holding these wrongdoing employers liable past the victim's 26th birthday. In these cases, the evidence is not lost because the perpetrator of the abuse could not be found or his memories faded: Instead, the evidence is in the possession of the wrongdoing employer or third party. LH00128.[17]

Section 340.2 and the cases interpreting it provide an excellent tool for interpreting section 340.1.

2. This Court's decision in *Shirk* did not reach the issues raised in this Appeal

Defendant claims that in *Shirk*, this Court emphatically declared

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[17] Defendant concedes that any person who was under the age of twenty-six on January 1, 2003 can make use of the delayed discovery provision of subdivision (a), meaning that in 35 years, someone abused in 2003 can bring their claim. Defendant then paradoxically argues that the Legislature could not have intended claims such as Appellants' to move forward because they are contrary to the policies underlying statutes of limitations. The former claim raises the same or greater issues with the passage of time, faded memories and lost or deceased witnesses as this case where notice is established and the perpetrator has testified to committing the abuse. Defendant's argument does not hold water.

section 340.1 does not provide a second accrual of a cause of action resulting from childhood sexual abuse against a non-public entity defendant. The issues raised by this Appeal were not addressed in *Shirk*, which instead rested upon the distinction between public and non-public entity defendants. Defendant's position blatantly exaggerates the scope of this Court's decision in *Shirk*, and extrapolates a holding that is neither expressly stated by this Court, nor capable of implication from its reasoning.

In *Shirk*, this Court solely addressed the question of how public entity defendants must be treated under the recent amendments to section 340.1. There, the plaintiff was sexually abused by her English teacher when she was fifteen years of age and attending a public high school. *Id.* at 205. The plaintiff discovered that the cause of her injuries on September 12, 2003; presented a tort claim to the defendant School District on that date; and filed her complaint on September 23, 2003, when she was forty-one years of age. *Id.* at 205-06. Shirk asserted her claim was timely-filed in accordance with the revival provision of section 340.1(c), or, alternatively, her obligation to file a tort claim did not arise until she discovered the cause of her injuries under section 340.1(a). *Id.* at 210-11.

This Court determined:

> the Legislature's amendment of section 340.1, subdivision (c), revived for the year 2003 certain lapsed causes of action against *non-public entities*, but that nothing in the express language of those amendments or in the history of their adoption indicates an intent by the Legislature to apply against *public entity defendants* the one-year revival provision for certain causes of action. *Id.* at 212-213 (italic emphasis in original.)

This Court reasoned section 340.1, subdivision (c) "makes no reference whatsoever to any revival of the period in which to present a claim under the government claims statute," and found that "[h]ad the Legislature intended to also revive in subdivision (c) the claim presentation deadline under the government claims statute, it could easily have done so." *Id.* at 212, 213.

This rationale applies to the revival of claims under the delayed discovery provision of section 340.1(a). The 1998 and 1999 amendments to section 340.1 revived previously time-barred claims and established a new accrual date for such actions, but did not include direct language reviving a plaintiff's ability to present a new tort claim. As a result, a claim against a public entity that was barred by the plaintiff's failure to present a claim under the government claims statute at the time of the abuse remained

barred even after claims against private litigants were revived.[18]

Dissenting in *Shirk*, Justice Werdegar noted that the Majority never determined whether a claim could accrue twice and that the Majority opinion "begs the question" as to whether the plaintiff complied with the tort claim act following a second accrual. 42 Cal.4th at 215, 216. This Court did not - - as advanced by Defendant - - determine that a claim against a non-public entity cannot accrue twice as provided in section 340.1.

Defendant notes that the court of appeal cited *Shirk* for an unrelated proposition, but misses the import of that citation. *Quarry*, 172 Cal.App.4th at 1589. That the appellate court did not apply *Shirk* in the manner urged by the Defendant does not, as advocated in the Opening Brief, indicate the court ignored the plain holding of *Shirk*. Instead, the court of appeal simply declined to accept Defendant's extremely broad interpretation of the opinion. Nor is the court of appeal alone in disagreeing with Defendant about the scope of *Shirk's* holding.

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[18] The original accrual of a claim - - occurring when the abuse took place or when the plaintiff discovered the wrongfulness of the touching - - is identical for both public and non-public entity defendants. *See Shirk*, 42 Cal.4th at 217; *Curtis T.*, 123 Cal.App.4th 1405; *Evans*, 216 Cal.App.3d 1609. Without an express legislative declaration that the second, statutorily-created, accrual applies against public-entities, the statute must be interpreted as applying only to private defendants. *Shirk*, 42 Cal.4th at 213-214.

In *K.J. v. Arcadia Unified School District*, the Second District Court of Appeal cited *Shirk* extensively in determining when an adult victim of childhood sexual abuse's claim accrued for purposes of the government claims statute. (2009) 172 Cal.App.4th 1229 (petition for review and depublication request denied by 2009 Cal. LEXIS 6929.) Despite the court's obvious awareness of the *Shirk* decision, the court did not agree with defendant's interpretation of that opinion, instead finding the adult plaintiff's claim for childhood sexual abuse accrued pursuant to section 340.1, subdivision (a), when she discovered the cause of her adulthood injuries. *K.J.*, 172 Cal.App.4th at 1243, fn. 7.

The court of appeal's opinion, as to the non-public entity defendant in the instant case, presents no affront to the dichotomy between public entity defendants and non-public entity defendants described by this Court in *Shirk*.

E. The Equitable Discovery Doctrine Prevented the Accrual of Appellants' Claims Until After SB1779 Became Effective

In the absence of statutory delayed accrual under section 340.1, subdivision (a), Appellants' actions were timely commenced in accordance with equitable delayed discovery principles. Statutes of limitation do not

begin to run on a claim until the cause of action has accrued. "A plaintiff must bring a claim within the limitations period after the accrual of the cause of action . . . [I]n other words, statutes of limitation do not begin to run until a cause of action accrues." *Fox,* 35 Cal.4th at 806.

A cause of action generally accrues when each element of the cause of action is present. *Norgart* v. *Upjohn, Co.* (1999) 21 Cal.4th 383, 398; *see also DeRose,* 196 Cal.App.3d at 1017 ("[t]he statute of limitations ordinarily begins to run upon the occurrence of the last fact essential to the cause of action.") "An important exception to the general rule of accrual is the 'discovery rule,' which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." *Fox,* 35 Cal.4th at 807; *see also Evans*, 216 Cal.App.3d at 1613.) The discovery rule may be "expressed by the Legislature or implied by the courts." *Norgart*, 21 Cal.4th at 397. The plaintiff discovers the claim when he "at least suspects . . . that someone has done something wrong to him." *Id.*

Following the enactment of section 340.1, the courts adopted a more liberal view of delayed discovery in sexual abuse cases.[19] *Sellery v. Cressey*

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[19] In *Mark K. v. Roman Catholic Archbishop of Los Angeles* (1997) 67 Cal.App.4th 63, the court considered whether the equitable delayed discovery doctrine could be applied when the plaintiff failed to recognize the perpetrator's employer had committed any wrongful act. *Id.* at 612. In

(1996) 48 Cal.App.4th 538, 545. "Knowledge of the act and injury is not in itself sufficient to start the limitations period." *Evans,* 216 Cal.App.3d at 1611. Instead, the focus of the analysis is when the plaintiff discovered that the perpetrator's actions were wrongful. *Id.* "Awareness of wrongdoing is a prerequisite to accrual of the action under the delayed discovery rule." *Evans,* 216 Cal.App.3d at 1611; *Curtis T.*, 123 Cal.App.4th 1405, 1422.[20]

In *Evans*, three brothers were sexually abused by their foster father. 216 Cal.App.3d at 1612. The plaintiffs alleged that "[a]s a result of the abuse, the secrecy, and the violation of trust, plaintiffs developed various psychological blocking mechanisms" and that as a result of those coping

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the absence of any allegations of a lack of knowledge or appreciation of the wrongfulness of perpetrator's conduct, the plaintiff was obligated to determine whether the priest's employer shouldered any responsibility for the misconduct. *Id.* The court declined to apply the discovery doctrine in that circumstance. *Id.* Appellants ask this Court to revisit the *Mark K.* theory and find that Jerry Quarry's lack of information relating to the Defendant's wrongful conduct was sufficient to delay the accrual of this claim.

[20] "[A] new statute that enlarges a statutory limitations period applies to actions that are not already barred by the original limitations period at the time the new statute goes into effect." *Andonagui,* 128 Cal.App.4th at 441. Since, under the equitable discovery doctrine, Appellants' claims did not accrue until they recognized the wrongfulness of the molestations, the statute of limitations on Appellants' claims could not begin to run until that time. If Appellants' claims were not time-barred at the time SB1779 took effect on January 1, 2003, the changes made by SB1779 apply to Appellants' claims.

mechanisms the plaintiffs did not recognize the wrongfulness of the touchings for many years after the abuse. *Id.* at 1613. The court could not "state as a matter of law that it is psychologically impossible for plaintiffs to have lived in such continuing ignorance that what happened to them was wrong." *Id.* at 1619; *see also Curtis T.,* 123 Cal.App.4th at 1422-23.

Appellants experienced various psychological coping mechanisms including repression, Post Traumatic Stress Disorder, Depression Disorder, substance abuse and polysubstance abuse, avoidant personality, and dissociation, which reasonably prevented Appellants from recognizing the wrongfulness of Fr. Broderson's actions. (A.A.: v. 1, pp. 17-21; v. 2, pp. 277-285.) In addition, as a result of their Catholic indoctrination and upbringing, they were unable to contemplate that any act engaged in by a Roman Catholic priest was "wrong." (A.A.: v. 1, pp. 7-8; v. 2, pp. 267-268.) Appellants have invoked the equitable doctrine of delayed discovery.

1. The Legislature did not abrogate the common law delayed discovery rule in the context of childhood sexual abuse claims

Defendant notes that the 1986 and 1990 versions of section 340.1 advised that the statute should not be interpreted as the Legislature's disapproval of the common law delayed discovery doctrine. (Opening Brief

at 42.) The 1994 amendment removed all reference to the common law delayed discovery doctrine. (Opening Brief at 42.) Defendant argues that by removing the statute's previous references to the equitable delayed discovery doctrine, the Legislature abrogated that common law doctrine as against non-perpetrator defendants. (Opening Brief at 43.) This interpretation is untenable.

"As a general rule, 'unless expressly provided, statutes should not be interpreted to alter the common law, and should be construed to avoid conflict with common law rules." *Cal. Ass'n of Health Facilities v. Dept. of Health Services* (1997) 16 Cal.4th 284, 297. "A statute will be construed in light of common law decisions, unless its language 'clearly and unequivocally discloses an intention to depart from, alter, or abrogate the common - law rule concerning a particular subject matter.'" *Goodman*, 25 Cal.App.4th at 1676 (quoting *People v. Zikrous* (1983) 150 Cal.3d 324, 330.) "Repeal by implication is recognized only where there is no rational basis for harmonizing two potentially conflicting laws." *Zikrous*, 150 Cal.App.3d at 330. The court of appeal correctly found that "the removal of the savings clause in 1994 did not expressly abrogate the common law delayed discovery rule, nor is such *necessarily* implied." *Quarry*, 172

Cal.App.4th at 1593 (emphasis in original.)

The 1994 amendment to section 340.1 expressly applied the statutory delayed accrual provision of subdivision (a) to all claims against a perpetrator of childhood sexual abuse. *See* Cal. Code Civ. Proc. § 340.1(1994). The change was applied retroactively and revived previously time-barred causes of action. *See* Cal. Code Civ. Proc. § 340.1(1994). Thus, following the 1994 amendment, all victims of childhood sexual abuse could commence an action against their abuser at any time within three years from the date they recognized that psychological injury or illness occurring during adulthood was caused by the molestation. *See* Cal. Code Civ. Proc. § 340.1 (1994).

As of 1994, the equitable delayed discovery doctrine could not conceivably result in a longer period of time than the statutory provision, and required a more onerous showing by the plaintiff. The court of appeal correctly reasoned "the [1994] amendment having revived all claims that had lapsed under the previous limitations periods, thus extending the three-years-from-date-of-discovery period to all plaintiffs, the 'savings clause' for the shorter, 'one-year-from-discovery common law rule became superfluous." *Quarry*, 172 Cal.App.4th at 1593.

Defendants would have this Court determine that in 1994, the Legislature implicitly sought to preclude the application of the equitable delayed discovery doctrine against non-perpetrator defendants, notwithstanding that such defendants were not subject to the statute at the time, and would not be for another four years. This runs contrary to the reasoning of several long-standing authorities interpreting section 340.1, which have consistently declined to extend the benefits of the 1994 amendment to claims against non-perpetrator defendants not included within its terms. *See Mark K.*, 67 Cal.App.4th 603; *Tietge*, 55 Cal.App.4th 382; *Debbie Reynolds*, 25 Cal.App.4th 222. There is no justification for extending the burden of an implied abrogation of the common law delayed discovery doctrine to non-perpetrator defendants when the courts have refused to extend the benefit of the enlarged limitations period against such defendants.

In addition, the Legislature explained during the lawmaking process underlying the 1998 amendment to section 340.1, that the common law doctrine had not been abrogated as to such defendants. The Legislature repeatedly expressed its understanding that the law existing at the time "[p]rovides that the time for commencing an action (i.e. the statute of

limitations) is tolled while the injured party (eg., plaintiff) is a minor, so that, unless the extended statute of limitations or another exception applies, a person alleging childhood sexual abuse has to file such an action by age 19." (Appellants Request for Judicial Notice, Exhibits 2 at p. 1, 3 at p. 1, Exhibit 7 at p. 1-2.)

By noting the availability of "exception[s]" to the statute of limitations, the Legislature recognized that delayed discovery and tolling provisions were not vitiated by the 1994 amendment as applied to non-perpetrator defendants. Moreover, subsequent to both the 1994 and 1998 amendments to section 340.1, courts have recognized the availability of the common law doctrine, but have declined to apply it to the facts of those particular cases. *See Mark K.*, 67 Cal.App.4th 63; *Hightower*, 142 Cal.App.4th at 768.

This Court should not accept Defendants' inference that the Legislature sought, by implication, to preclude reliance on the equitable delayed discovery doctrine.

2. The court of appeal correctly applied the equitable doctrine of delayed discovery

Defendant ascribes "several critical flaws" in the court of appeal's reasoning with respect to application of the equitable doctrine of delayed

discovery. None of Defendant's contentions has merit.

Defendant claims that the court of appeal applied the wrong standard as to both the common law and statutory delayed discovery provisions by focusing on when the Appellants discovered their claims rather than when the Appellants reasonably should have discovered their claims. (Opening Brief at 41.) This is a departure from the position taken by the Defendant at the trial level, where the demurrer challenged the availability of the statutory and common law delayed discovery doctrines, not whether Appellants pleadings sufficiently invoked either.

"As with plaintiffs' causes of action under section 340.1, the issue as presented does not raise the sufficiency of the allegations to state a claim for common law delayed discovery and we, therefore, have no opinion on that question." *Quarry*, 172 Cal.App.4th at 1594, fn. 12. The court of appeal did not discuss the legal standard applicable to a claim under the common law delayed discovery doctrine, but rather considered only whether the doctrine had been abolished.

Next, Defendant claims that the court of appeal erroneously determined the common law delayed discovery doctrine prevented accrual of a claim until the plaintiff discovered the cause of his or her psychological

injuries rather than when the Appellants ascertained the wrongfulness of the injury-causing action. (Opening Brief at 41 - 42.) This argument is disingenuous. Defendant cites page 1584 of the *Quarry* opinion discussing the statutory delayed discovery provision and passes the quote off as though the court were misapplying the common law delayed discovery doctrine. In truth, the court correctly recognized the difference between the two doctrines:

"The [common law doctrine] arises in situations where the plaintiff repressed the memory of the abuse, or did not understand the wrongfulness of the abuse, until within one year of the filing of the action. . . . [citations omitted.] . . . Section 340.1, subdivision (a), on the other hand, permits filing within three years of the date the cause of the injuries was or should have been discovered." The court of appeal did not misstate or misapply the equitable doctrine of delayed discovery.

3. Defendant's reading of the statute raises serious constitutional concerns

It is well accepted the Legislature may shorten statutory limitations periods. *Rosefield Packing Co. v. Superior Court* (1935) 4 Cal.2d 120, 122. Amendments shortening limitations periods are procedural, are normally applied retroactively and are applicable to pending actions. *Aronson v.*

Superior Court (1987) 191 Cal.App.3d 294, 297. But, in any given case, the court must inquire whether retroactive application violates due process by, in effect, eliminating the plaintiff's right. *Id.* If the time left to file suit is reasonable, there is no constitutional impediment to the application of the new statute. *Id.* However, "if no time is left, or only an unreasonably short time remains, then the statute cannot be applied at all." *Id.*

Thus, "[w]hen necessary to provide a reasonable time to sue, a shortened limitations period may be applied prospectively so that it commences on the effective date of the statute, rather than on the date the cause of action accrued." *Coachella Valley Mosquito & Vector District v. California Public Employment Relations Board* (2005) 35 Cal.4th 1072, 1092; *see also Brown v. Bleiberg* (1982) 32 Cal.3d 426, 437 ("A statute shortening the statute of limitations may be interpreted prospectively to avoid constitutional problems which would attend retroactivity"); *Niagra Fire Ins. Co. v. Cole* (1965) 235 Cal.App.2d 40; *Krusesky v. Baugh* (1982) 138 Cal.App.3d 562; *Scott v. County of Los Angeles* (1977) 73 Cal.App.3d 476; *Olivas v. Weiner* (1954) 127 Cal.App.2d 597.

Appellants were each over the age of 26 when the 1998 amendment to section 340.1 took effect. Appellants have invoked the common law

delayed discovery doctrine to delay the accrual of their respective actions. On December 31, 1998, nothing prohibited the courts from applying the equitable doctrine of delayed discovery to Appellants' actions. *See Evans*, 216 Cal.App.3d 1609; *Mark K.*, 67 Cal.App.4th at 612-13. On December 31, 1998, Appellants' claims were timely.

When the 1998 amendment to section 340.1 took effect on January 1, 1999, Defendants' interpretation of the statute would immediately destroy Appellants' previously timely claims.[21] Due process considerations foreclose such a 'harsh and unreasonable" result. *See Olivas*, 127 Cal.App.2d at 600. To avoid constitutional concerns, the statute must be interpreted as allowing eight years from majority before the bar becomes effective.[22] For individuals with timely claims at the time of the enactment

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[21] When a statute is susceptible to two constructions, one of which renders the statute constitutional and the other raising difficult constitutional issues, the interpretation avoiding the constitutional questions must be accepted, even if the interpretations are equally reasonable. *In re Marriage Cases* (2008) 43 Cal.4th 757, 800. The age 26 limitation of subdivision (b), cannot constitutionally be interpreted as written. It must instead be applied prospectively from the effective date of the 1998 amendment to avoid due process concerns. Appellants' reading of the statute must be adopted over Defendant's interpretation of the statute raising constitutional concerns.

[22]This eight year period adopts the language of subdivision (a), which sets the statute of limitations as eight years after the plaintiff attains the age of majority.

of the 1998 amendment, the eight year period must be applied from the effective date of the bill. The 1998 amendment to section 340.1 cannot be applied as written without depriving Appellants of due process.

F. Appellants May Avail Themselves of the "Three Year From Discovery" Provision of § 340.1(a)(1) Using Vicarious Liability Principles

Section 340.1(a) delineates between actions against a perpetrator of the abuse, and actions resulting from the negligent or intentionally tortious acts of third parties. Cal. Code Civ. Proc. § 340.1(a)(1) - (a)(3).

Unlike the direct liability principles embodied by section 340.1(a)(2) and (a)(3), vicarious liability is based on the relationship of the perpetrator to his employer, rather than the direct fault of the employer. *Srithong v. Total Investment Co.* (1994) 23 Cal.App.4th 721, 728. Liability is imposed as a rule of policy regardless of the employer's control or fault. *Lathrop v. HealthCare Partners Medical Group* (2004) 114 Cal.App.4th 1412, 1423; *see also Miller v. Stouffer* (1992) 9 Cal.App.4th 70, 84 ("under the doctrine, an innocent principle or employer is vicariously liable for the torts of the agent or employee, committed while acting within the scope of employment.")

Since the imposition of vicarious liability against the employer is not

based on the employer's culpability, it is counter-intuitive to apply the statute of limitations applicable to the employer's directly-tortious conduct to Appellants' vicarious liability claims. Instead, the Court must look to the statute of limitations applicable against the perpetrator.

> "When a plaintiff initiates an action under the theory of respondeat superior . . . The controlling statute of limitations applicable to the employer is that which would apply to the employee. Therefore, if the action is brought within the limitations period that applies to the employee's tortious conduct, the action is not time barred as to the employer whose liability is solely vicarious."

Kocsis, 249 Neb. 274. "For purposes of the statute of limitations, a respondeat superior claim is the same as a cause of action against the employee who committed the tort." *D.M.S. v. Barber* (Minn. 2002) 645 N.W.2d 383, 391.

California courts have accepted the mirror-image of the proposition advocated by Appellants.[23] Since an employer's vicarious liability is derived from the liability of the employee, the employer may avail itself of substantive defenses available to the employee. *Lathrop*, 114 Cal.App.4th at 1423. The employer steps into the shoes of the employee to assert

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[23] Appellants are aware of no California authority addressing this issue and believe it to be a question of first impression. In *Boyer v. Jensen* (2005) 129 Cal.App.4th 62, 70-71, the plaintiff appears to have made a similar argument, but the court never reached the issue.

available defenses. The employer must also step into the shoes of the employee for purposes of the statute of limitations. There is no justification for an employer to reap the benefits of substantive defenses available to the employee, but not share the same exposure created by the statute of limitations applicable to the employee's tortious acts. Since employer liability based on vicarious liability principles is derivative of the liability of the employee, the statute of limitations for such claims must be the statute applicable to the employee's tortious acts.

1. Appellants can maintain their claims under a respondeat superior theory

An "employees willful, malicious and even criminal torts may be committed within the course and scope of employment, thus rendering their employers liable under respondeat superior."[24] *Torres v. Parkhouse Tire Service* (2001) 26 Cal.4th 995, 1008 (quotation omitted.) The doctrine of

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[24] The statute of limitations against the perpetrator can also be extended to the defendant based on a theory of ratification, whereby the principal may become liable for an originally unauthorized tort of the agent by the subsequent ratification of the tort. 3 Witkin, Summary 10th (2005) Agency, § 164, p. 207. The failure to discharge an agent or employee despite knowledge or the opportunity to learn of his unfitness is evidence tending to show ratification. *See McChristian v. Popkin* (1946) 75 Cal.App.2d 249, 256. The theory of ratification is particularly relevant when an employer fails to respond to allegations that an employee committed an intentional tort. *Baptist v. Robinson* (2006) 143 Cal.App.4th 151, 170.

respondeat superior applies when the employee's tort was committed within the scope of his employment. *Mary M.*, 54 Cal.3d. at 209. "To be within the scope of employment, the incident giving rise to the injury must be an outgrowth of the employment, the risk of injury must be inherent in the workplace, or typical of or broadly incidental to the employer's enterprise." *Torres*, 26 Cal.4th at 1008.

The "roots of sexual violence and exploitation are [not] in all cases so fundamentally different from those other abhorrent human traits as to allow a conclusion sexual misconduct is per se unforeseeable in the workplace." *Lisa M.* 12 Cal.4th at 300. Whether an employee's conduct was within the scope of employment is a question of fact that may be decided as a matter of law only when the facts are undisputed and no conflicting inferences are possible. *Id.* at 299. Where it is arguable whether the employee acted within the scope of employment, the question must be decided by the trier of fact. *Alma W.*, 123 Cal.App.3d at 138.

The majority in *Lisa M.* found the defendant hospital could not be held vicariously liable under a theory of respondeat superior for the sexual misconduct of an ultrasound technician. 12 Cal.4th at 306. The Majority's analysis first determined the molestation was not an outgrowth of the

technician's employment, and then determined respondeat superior was not applicable on the alternative basis of liability resulting from the foreseeability of the conduct. *Id.* at 299-303.

The court noted:

> "[A] sexual tort will not be considered engendered by the employment unless its motivating emotions were fairly attributable to work-related events or conditions. Here the opposite was true: a technician took advantage of solitude and a naive patient to commit an assault for reasons unrelated to his work. [The perpetrator's] job was to perform a diagnostic examination and record the results. The task provided no occasion for a work-related dispute or any other work-related emotional involvement with the patient. The technician's decision to engage in conscious exploitation of the patient did not *arise out of* the performance of the examination, although the circumstances of the examination made it possible."

Id. at 301. The shortcoming in the plaintiff's argument for respondeat superior liability was not that the perpetrator's "actions were personally motivated, but that those personal motivations were not engendered by or an outgrowth of workplace responsibilities, conditions or events." *Id.* at 301-302. The court's focus was whether the relationship between agent and third-party victim established an emotional connection that could devolve into sexual conduct.

Appellants have alleged the molestations resulted directly from the emotions generated by the perpetrator's employment "responsibilities,

conditions or events", namely his agency responsibility to "groom" young boys, including plaintiffs. (A.A.: v. 1, pp. 4-7; v. 2, pp. 264-267.) In this circumstance, the agency relationship, the Perpetrator's employment responsibilities and the setting of the molestation created a significant likelihood of "work-related emotional involvement" with the Appellants, and therefore provides a compelling reason for the imposition of respondeat superior liability on Defendant.

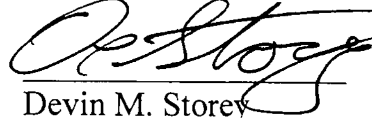
V. CONCLUSION

For these reasons, this Court should affirm the decision of the court of appeal.

Respectfully submitted,

THE ZALKIN LAW FIRM, P.C.

Dated: 9-9-09



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S171382

CERTIFICATE OF WORD COUNT

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

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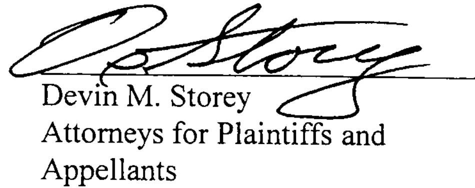

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Case No: S171382
Terry Quarry, et al. v. Defendant Doe 1, Diocese
Court of Appeal, First Appellate District, Division 4
Case No: A120048
Superior Court - County of Alameda
Case No. HG 07313640

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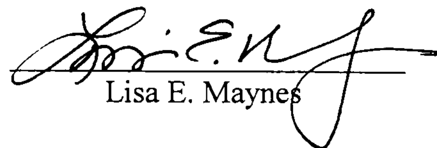

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