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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DOE NO. 1,
Defendant and Petitioner,
v.

LATRICE RUBENSTEIN,
Plaintiff and Respondent

PETITION FOR REVIEW

After a Decision From the Court of Appeal of California, Fourth Appellate District, Division One,
Case No. D066722

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Pursuant to California Rules of Court, rule 8.500(b)(1), defendant and petitioner Doe No. 1 seeks review of *Rubenstein v. Doe No. 1* (2016) 245 Cal. App. 4th 1037 (*Rubenstein*), an opinion from the Court of Appeal, Fourth Appellate District, Division One, wherein the Court of Appeal held that Code of Civil Procedure section 340.1 delays the accrual date of a childhood sexual abuse cause of action for purposes of complying with the Government Code's claim presentation deadlines even where the alleged abuse occurred prior to January 1, 2009. (See Exhibit "A".)

I.

Introduction And Issues Presented

To properly frame the issues presented, a brief overview of statutory and decisional law is necessary.

Before suing a government entity for personal injuries, a plaintiff generally must have presented a claim to the government entity within six months of the cause of action's accrual. (Government Code §§ 911.2, 905; *Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 208 (*Shirk*).) If the six-month deadline was missed, one can ask the government entity for permission to present a late claim, but permission must be

sought within one-year of the cause of action's accrual or a court is without jurisdiction to grant relief from the Government Code's claim presentation requirement and six-month deadline. (Government Code §§ 911.4, 946.6; *County of Los Angeles v. Superior Court* (2005) 127 Cal.App.4th 1263, 1272 (*County of Los Angeles*).) Minority does not toll the six-month or one-year deadlines. (*John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 444 n. 3 (*John R.*); Government Code § 911.4, subd. (c)(1).)

Although causes of action for childhood sexual abuse generally accrue at the time of the abuse (*Shirk, supra*, 42 Cal.4th at 210; *John R., supra*, 48 Cal.3d at 488), Code of Civil Procedure section 340.1 (section 340.1) creates a codified delayed discovery rule altering and delaying the accrual date of childhood sexual abuse causes of action brought by adults. (Section 340.1, subds. (a), (b).) However, *V.C. v. Los Angeles Unified School Dist.* (2006) 139 Cal.App.4th 499, 508-512 (*V.C.*), and *Shirk, supra*, 42 Cal.4th 210-214, hold that section 340.1 neither alters the accrual date of childhood sexual abuse causes of action for purposes of the Government Code's claim presentation deadline nor extends the Government Code's six-month claim presentation

deadline. (See also *County of Los Angeles, supra*, 127 Cal.App.4th at 1269 (section 340.1 does not alter the time to commence a lawsuit against a government entity for a childhood sexual abuse cause of action).)

Responding to *Shirk*, the Legislature amended the Government Code in 2008 to exempt from the Government Code's claim presentation requirement childhood sexual abuse causes of action based on *post*-January 1, 2009 conduct. (See Government Code § 905, subd. (m).) The Government Code's claim presentation requirement and six-month deadline still apply to childhood sexual abuse causes of action based on *pre*-January 1, 2009 conduct, like the conduct alleged here. (*Ibid.*)

Directly conflicting with *V.C.* and *Shirk*, implicitly conflicting with *County of Los Angeles*, and contrary to what the Legislature intended when enacting Government Code section 905, subdivision (m), the Court of Appeal held that section 340.1's delayed discovery provisions alter the accrual date of a childhood sexual abuse cause of action for purposes of the Government Code's six-month claim presentation deadline. (*Rubenstein, supra*, 245 Cal.App.4th at 1043, 1044-1045, 1046-1047.) The Court of Appeal came to this conclusion without any discussion or

even mention of *Shirk, V.C.* or *County of Los Angeles*, and further erroneously concluded that the 2008 amendment to Government Code section 905 was irrelevant to the issue.

This petition presents two important and now unsettled issues of law affecting every government entity in this State:

1. Does the Government Code's strictly construed claim presentation deadlines (deadlines requiring presentation of a claim no later than six months after the cause of action's accrual and requiring presentation of an application for leave to present a late claim no later than one-year after accrual) apply regardless of the delayed discovery provisions of section 340.1?

2. In light of the 2008 amendment to Government Code section 905, subdivision (m), where the Legislature – in response to this Court's decision in *Shirk* – eliminated the claim requirement for only those childhood sexual abuse causes of action based on conduct occurring after January 1, 2009, should an adult victim of childhood sexual abuse occurring before January 1, 2009 be barred from suing a government entity if he or she failed to present a claim to the government entity within six months of the abuse?

II.

Why Review Should Be Granted

The Court of Appeal held that the section 340.1's statutory delayed discovery provisions govern the accrual date of a childhood sexual abuse cause of action for purposes of the Government Code's claim presentation deadlines. (*Rubenstein, supra*, 245 Cal.App.4th at 1043, 1044-1045, 1046-1047.) This holding directly conflicts with *V.C., supra,* 139 Cal.App.4th at 508-512, implicitly conflicts with *County of Los Angeles, supra,* 127 Cal.App.4th at 1269, and disregards what this Court held in *Shirk, supra,* 42 Cal.4th at 210-214.

County of Los Angeles, *V.C.* and *Shirk* all establish that section 340.1's delayed discovery provisions have no impact on the Government Code's claim presentation requirement and deadlines. Indeed, *V.C.* and *Shirk* specifically hold that a childhood sexual abuse cause of action accrues when the abuse occurs and section 340.1 in no way alters the Government Code's six-month claim presentation deadline. And, critically, the Legislature has approved and accepted these holdings for pre-January 1, 2009 abuse (like in this case) and reaffirmed that a cause of action for childhood sexual abuse based on pre-January

1, 2009 conduct continues to require presentation of a claim within six months of the abuse.

Two years after *Shirk*, the Legislature addressed the impact of *Shirk* by amending Government Code section 905. While the Legislature initially proposed a bill that would completely undo *Shirk* by exempting from the Government Code's claim presentation requirement any childhood sexual abuse cause of action no matter when the abuse occurred, the bill that eventually passed and established Government Code section 905, subdivision (m) drew a bright line – for policy reasons – exempting from the Government Code's claim presentation requirement only those childhood sexual abuse causes of action based on conduct occurring after January 1, 2009. Causes of action for childhood sexual abuse for pre-January 1, 2009 conduct remain subject to the Government Code's claim presentation requirement and the six-month deadline.

Review is appropriate and necessary to secure uniformity of decision on a vitally important issue impacting every government entity in the State. (California Rules of Court, rule 8.500(b)(1).) Review is appropriate and necessary to resolve the conflict *Rubenstein* creates. (*Ibid.*) Review is also needed to clarify and

reaffirm that *V.C.* and *Shirk* remain the law regarding the necessity of presenting a claim within six months of the abuse for pre-January 1, 2009 conduct. (*Ibid.*)

If left standing, *Rubenstein* creates significant confusion and will dramatically increase the number of sexual abuse lawsuits brought against government entities at the expense of the public fisc. The latter is something the Legislature intended to limit when amending the Government Code to exempt from the claim presentation requirements only those causes of action based on post-January 1, 2009 conduct.

Under *Rubenstein*, the Government Code's six-month claim presentation deadline is extended indefinitely by section 340.1 for causes of action against entity defendants because subdivision (b)(2) of section 340.1 has no outside age limitation. Section 340.1, subdivision (b)(2) renders timely a childhood sexual abuse cause of action brought by a plaintiff of any age against an entity that knew or should have known of the abuse if brought within three years of discovery. Given the Court of Appeal's holding that section 340.1 governs when a childhood sexual abuse cause of action accrues for purposes of the Government Code's six-

month claim presentation deadline, *Rubenstein* provides, for example, that a 65 year-old timely complies with the six-month claim presentation deadline for abuse occurring 50 years earlier if the claim is presented within six-months of discovering the abuse. Such a result drastically circumvents the public policy reasons behind the Government Code's claim presentation requirement, the six-month claim presentation deadline, and the need to treat government entities different than private entities. As observed in *Shirk*, "[r]equiring a person allegedly harmed by a public entity to first present a claim to the entity, before seeking redress in court, affords the entity an opportunity to *promptly* remedy the condition giving rise to the injury, thus minimizing the risk of similar harm to others." (*Shirk, supra*, 42 Cal. 4th at 213 (emphasis added); see also *City of Stockton v. Superior Court* (2007) 42 Cal.4th 730, 738 (*City of Stockton*) (noting that the Government Code's claim presentation requirements and deadlines "enable . . . fiscal planning for potential liabilities and to avoid similar liabilities in the future"); Recommendation: Claims, Actions and Judgments Against Public Entities and Public Employees (Dec. 1963) 4 Cal. Law Revision Com. Rep. (Jan. 1963) pages 1008-1009 ("[p]rompt

notice" ensures "prompt investigation and opportunity to repair or correct the condition which gave rise to the claim").) As further observed in *Shirk*, "[t]he requisite timely claim presentation before commencing a lawsuit also permits the public entity to investigate *while tangible evidence is still available, memories are fresh, and witnesses can be located.* [Citations.] *Fresh notice* of a claim permits early assessment by the public entity, allows its governing board to settle meritorious disputes without incurring the added cost of litigation, and gives it time to engage in appropriate budgetary planning." (*Shirk, supra,* 42 Cal.4th at 213 (emphasis added); "The notice requirement under the government claims statute thus is based on a recognition of the special status of public entities, according them greater protections than nonpublic entity defendants, because unlike nonpublic defendants, public entities whose acts or omissions are alleged to have caused harm will incur costs that must ultimately be borne by the taxpayers." (*Ibid.*)

III.

Background

In June 2012, Rubenstein, 34 years old at the time, submitted a claim to Doe No. 1 alleging a volunteer track coach repeatedly molested her in 1993 and 1994. (Clerk's Transcript, Volume 1, pages 136-137 (1 CT 136-137).) Born in November 1978, Rubenstein was 15 or 16 at the time. (1 CT 136.) Rubenstein alleged in her claim the resurfacing of repressed memories of the molestation within the prior six months. (1 CT 136.) In August 2012, Doe No. 1 rejected Rubenstein's claim as untimely since it was not presented within six months of the alleged molestation. (1 CT 140.) In September 2012, Rubenstein sought permission from Doe No. 1 for leave to present a late claim. Rubenstein asserted her repressed memory of the molestation rendered her claim timely under section 340.1, subdivision (a), because she presented the claim within six-months of her discovery of the molestation. (1 CT 142.) Several days later, Doe No. 1 denied Rubenstein's application to present a late claim. (1 CT 145.)

Rubenstein subsequently filed in Superior Court a petition for relief from the Government Code's claim presentation

requirement arguing the delayed discovery provisions of section 340.1, subdivision (a) rendered her claim timely. (1 CT 080-097.) Doe No. 1 opposed Rubenstein's petition, arguing her cause of action for childhood sexual abuse accrued for purposes of the Government Code's claim presentation deadline within six months of the last molestation in 1994, and section 340.1, subdivision (a) did not extend the six-month deadline. (1 CT 099-105.) Doe No. 1 further argued the court lacked jurisdiction to grant Rubenstein relief as more than a year passed since her cause of action accrued. (CT 099-105.) On August 9, 2013, the trial court granted Rubenstein's petition finding her June 2012 claim timely under section 340.1, subdivision (a)'s delayed discovery provisions. (1 CT 161-163.)

The trial court subsequently sustained without leave to amend Doe No. 1's demurrer. (2 CT 553-557). The trial court concluded Rubenstein failed to comply with certificate of merit requirements in subdivision (h) of section 340.1 and could not correct this defect because the applicable limitation period had

run (which was 30 days from the granting of the Government Code section 946.6 petition for relief).[1] (2 CT 553-557.)

On appeal, Doe No. 1 argued the trial court properly sustained the demurrer without leave to amend, and in the alternative argued that a judgment of dismissal was proper in any event because the trial court lacked jurisdiction to grant Rubenstein's Government Code section 946.6 petition. Thus, any error in sustaining the demurrer without leave to amend on the certificate of merit issue was not prejudicial.

In addition to finding error in sustaining the demurrer without leave to amend, the Court of Appeal "reject[ed] [Doe No. 1's] argument that the trial court lacked jurisdiction to grant a

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[1] This case bounced between the Imperial and San Diego County Superior Courts. The trial court in San Diego County heard and granted Rubenstein's Government Code section 946.6 petition. (1 CT 161-163.) The trial court in Imperial County heard and sustained Doe No. 1's demurrer. (2 CT 533-536.) In the order sustaining the demurrer, the trial court noted that when Rubenstein initially filed her complaint in Imperial County Superior Court she failed to seek relief under Government Code section 946.6 and stated "[t]his effort might have proven unsuccessful, in that the California Supreme Court has held that in these types of cases, the claim requirement is not tolled by Code of Civil Procedure section 340.1 (*Shirk v. Vista Unified School District* (2007) 42 Cal.4th 207, 218-220.)" (3 CT 554.)

Government Code section 946.6 petition" concluding "that the statutory delayed discovery rule of [ ] section 340.1 applied to delay the accrual date of plaintiff's action for childhood sexual abuse. (Code Civ. Proc., section 340.1, subd. (a))." (*Rubenstein, supra*, 245 Cal.App.4th at 1043.) The Court of Appeal's reasoning was limited to the following:

> The accrual date for claim filing purposes is the same as the accrual date for a corresponding civil cause of action. (Gov. Code, § 901.) Code of Civil Procedure section 340.1 sets forth the limitations period for filing an action for childhood sexual abuse. (*Quarry v. Doe I* (2012) 53 Cal.4th 945, 952 (*Quarry*).) Thus, section 340.1 governs the accrual date for claim filing purposes.

(*Id.* at 1045.) Regarding Government Code section 905, subdivision (m), the Court of Appeal said:

> Although not relevant here, it is important to note that in 2008 the Legislature added subdivision (m) to Government Code section 905, to provide an exception to the claim presentation requirement for childhood sexual abuse claims arising out of conduct occurring on or after January 1, 2009. Because the conduct in this case occurred in 1994, this amendment does not apply. Nonetheless, we agree with an observation made by the *K.J.* court that the amendment appears 'declaratory of existing law to the extent that it applies the delayed discovery doctrine to the accrual of a cause of action brought by an adult plaintiff against a public entity for childhood

sexual abuse.' (*K.J., supra*, 172 Cal.App.4th at p. 1234, fn. 2.)[2]

(*Id.* at 1046.)

Doe No. 1 sought rehearing, pointing out to the Court of Appeal that its conclusion that "section 340.1 governs the accrual date for claim filing purposes" was unsupported by any precedent and, in fact, conflicted with *V.C.* and *Shirk*, neither of which were discussed nor even cited. Doe No. 1 also explained that Government Code section 905, subdivision (m) was not declarative of existing law but was rather enacted to address *Shirk*. The Court of Appeal denied rehearing. (Exhibit "B".) This petition timely follows.

IV.

Legal Argument

A. Strict compliance with the Government Code's claim presentation requirement and deadlines furthers public policy

Unless specifically exempted, a plaintiff suing a government entity for personal injuries must present a claim to the government entity within six months of the cause of action's

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[2] *K.J. v. Acardia Unified School Dist.* (2007) 172 Cal.App.4th 1229.

accrual. (Government Code §§ 905, 911.2, subd. (a); 945.4; *Shirk, supra*, 42 Cal.4th at 208.) The six-month period is not tolled while the claimant is a minor. (*John R., supra,* 48 Cal. 3d at 444 n.3; *V.C., supra*, 139 Cal.App.4th at 508; Code of Civil Procedure § 352, subd. (b); Government Code § 911.4, subd. (c)(1).) For purposes of the six-month deadline, a cause of action accrues at the same time it would accrue against a private entity. (Government Code § 901; *Shirk, supra*, 42 Cal.4th at 208-209; *V.C., supra*, 139 Cal.App.4th at 508.) This Court has repeatedly held that "[g]enerally, a cause of action for childhood sexual molestation *accrues at the time of the molestation.*" (*Shirk, supra*, 42 Cal.4th at 210 (emphasis added); *John R., supra,* 48 Cal.3d at 444.)

After six months, a claimant may seek permission from the government entity to present a late claim but must do so within a year of the cause of action's accrual. (Government Code §§ 911.4, 946.6; *County of Los Angeles, supra*, 127 Cal.App.4th at 1272.) Like the six-month period to present a claim, the one-year period to seek permission to present a late claim is not tolled for minority. (Government Code § 911.4, subd. (c)(1).)

If the government entity rejects an application to present a late claim, the claimant can petition the court for relief from the Government Code's claim presentation requirement. (Government Code § 946.6). But a court lacks jurisdiction to grant the petition if the application to present a late claim was made to the government entity more than one-year after the cause of action's accrual. (*County of Los Angeles, supra*, 127 Cal.App.4th at 1272; *Brandon G. v. Gray* (2003) 111 Cal.App.4th 29, 34.)

The Government Code's claim presentation requirement and deadlines are strictly construed. (*Shirk, supra*, 42 Cal.4th at 209.) Strong public policy reasons require strict compliance, as government entity liability directly impacts the public fisc. Indeed, "[t]he purpose of the claims statutes is not to prevent surprise, but to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation. . . . . The claims statutes also enable the public entity to engage in fiscal planning for potential liabilities and to avoid similar liabilities in the future." (*City of Stockton, supra,* (2007) 42 Cal.4th at 738

(internal quotes and citations omitted); see *Shirk, supra,* 42 Cal.4th at 213.)

B. Section 340.1 and childhood sexual abuse causes of action

In stark contrast to the Government Code's six-month claim presentation deadline applicable to childhood sexual abuse causes of action based on pre-January 1, 2009 conduct (see Government Code § 905, subd. (m) and discussion *post*), and the absence of tolling of this six-month deadline during a claimant's minority, section 340.1 establishes a special limitation period for victims of childhood sexual abuse.[3] For lawsuits against abusers, the limitation period is delayed until the plaintiff turns 26 or within three years of discovery of the childhood sexual abuse. (Section 340.1, subd. (a).) For lawsuits against certain non-abusers (those that knew or should have known of an employee's unlawful conduct and failed to take action to prevent the unlawful conduct), a plaintiff timely brings a lawsuit for childhood sexual abuse regardless of age if the lawsuit is brought

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[3] Section 340.1 was enacted in 1986. Between 1986 and 2002, section 340.1 was amended many times. (See *Quarry, supra*, 53 Cal.4th at 961-972 (describing amendments); *Shirk, supra*, 42 Cal.4th at 207-208 (same).)

within three years of discovery of the childhood sexual abuse. (Section 340.1, subd. (b)(2).) This Court has stated that section 340.1 legislatively supplants common law delayed discovery for childhood sexual abuse claims. (*Quarry, supra*, 53 Cal.4th at 983-984; see *Aryeh v. Cannon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 1193 (noting the holding in *Quarry*).) [4]

C. *Rubenstein* directly conflicts with *V.C.*, implicitly conflicts with *County of Los Angeles*, and is unfaithful to *Shirk*

In 2005, *County of Los Angeles* held that section 340.1 does not abrogate the Government Code's claim filing requirement and deadlines, concluding that section 340.1 does not extend the time

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[4] Prior to *Quarry*, a number of Court of Appeal decisions analyzed whether common law delayed discovery applied to delay the accrual date of a childhood sexual abuse cause of action for purposes of compliance with the Government Code's six-month claim presentation deadline. (See e.g., *S.M. v. Los Angeles Unified School Dist.* (2010) 184 Cal.App.4th 712, 719-720; *K.J. v. Arcadia Unified School Dist.* (2009) 172 Cal.App.4th 1229, 1241-1242; *V.C., supra*, 139 Cal.App.4th at 515-516.) Subsequent to *Quarry*, only one Court of Appeal has addressed common law delayed discovery in this context. The Court of Appeal in *J.J. v. County of San Diego* (2014) 223 Cal.App.4th 1214, the same Court of Appeal involved in this petition, analyzed the issue without any discussion of *Quarry*. (*Id.* at 1222-1226.) The Court of Appeal here accepted *Quarry's* recognition that section 340.1 did away with common law delayed discovery for childhood sexual abuse causes of action. (See *Rubenstein, supra,* 245 Cal.App.4th at 1046-1047.)

a plaintiff has to commence a lawsuit against a government entity for those causes of action requiring timely presentation of a claim. (*County of Los Angeles, supra*, 127 Cal.App.4th at 1268-1270.)

Similarly, in 2006, the Court of Appeal in *V.C.* specifically addressed the issue of whether section 340.1 applied to delay the accrual date of a childhood sexual abuse cause of action for purposes of the Government Code's six-month claim presentation deadline. Following the analysis utilized in *County of Los Angeles*, the Court of Appeal held it did not. The Court of Appeal first held "that while section 340.1 extends the time during which an individual may commence a cause of action alleging childhood sexual abuse, it does not extend the time for *accrual* of that cause of action." (*V.C., supra*, 139 Cal.App.4th at 510 (emphasis added).) "Rather, as cases decided both before and after the enactment of section 340.1 have confirmed, '[a] civil cause of action for child molestation generally *accrues at the time of the molestation*. [Citations]." (*Ibid.* (emphasis added).)

Significantly, the Court of Appeal further held that section 340.1's delayed discovery provisions have no bearing on when a childhood sexual abuse cause of action accrues for purposes of the

Government Code's six-month claim presentation deadline. (*V.C., supra*, 139 Cal. App. 4th at 510-512; *id.* at 514 ("nothing in the language or legislative history of section 340.1 [ ] establishes the Legislature intended to modify either the date of accrual or the [Government Code's] claim requirements"); see also *County of Los Angeles, supra*, 127 Cal.App.4th at 1268-1269 ("To the extent that section 340.1 now authorizes suits against a person or entity other than the actual perpetrator, nothing in that statute or the legislative history of the 1998 amendment to that statute reflects an intent on the part of the Legislature to excuse victims of childhood sexual abuse from complying with the [Government Code] when the defendant is a public entity or public employee").)

In 2007, this Court addressed the issue of whether section 340.1 impacts when a cause of action for childhood sexual abuse accrues for purposes of the Government Code's six-month claim presentation deadline. This Court granted review in *Shirk* to resolve a conflict between the lower court's opinion (the same court in this case) and *County of Los Angeles* on the issue of whether the Legislature intended with its 2002 amendment to section 340.1 to excuse childhood sexual abuse victims from

complying with the Government Code's claim filing requirement and deadlines. (*Shirk, supra,* 42 Cal.4th at 206-207.)

In *Shirk*, the plaintiff alleged being last abused in November 1979 but was unaware she was suffering psychological problems from the abuse until seeing a therapist in September 2003. She presented a claim to the school district immediately thereafter. (*Shirk, supra,* 42 Cal.4th at 205.) This Court framed the issue it was resolving as follows: "The six-month statute of limitations for filing a lawsuit that is generally applicable to actions against public defendants (Code Civ. Proc., § 342; Gov. Code, § 945.6, subd. (a)(1)) is not implicated by the facts here. Rather, it is the claim presentation deadline (Code Civ. Proc., § 313; Gov. Code, § 911.2) that is at issue . . . ." (*Id.* at 209.)

After confirming the general rule that a cause of action for childhood sexual abuse accrues when the abuse occurs (*Shirk, supra,* 42 Cal.4th at 210), and noting the plaintiff conceded she failed to present a claim within six months of the last abuse (*ibid.*), this Court rejected the plaintiff's argument that she timely presented her claim in 2003 some 25 years after the abuse because her obligation to present a claim did not accrue, and her obligation to present a claim thus did not arise, until she

discovered her psychological problems were caused by the abuse. (*Id.* at 210-211.) Analyzing the legislative history, this Court held that the Legislature never intended for 340.1 to have any impact on when a childhood sexual abuse cause of action accrues for purposes of the Government Code's six-month claim presentation deadline nor was there any indication that the Legislature intended to delay or extend the six-month deadline for childhood sexual abuse causes of action. (*Id.* at 211-214.)

Although seemingly recognizing the inequities of precluding a plaintiff from suing a government entity for failing to present a claim within the six-month deadline because a minor might not recognize being a victim of abuse until years later, this Court explained the public policy underlying the strict six-month claim presentation deadline - a Legislative decision - warrants government entities receiving special treatment and greater protection because the taxpayers ultimately bear the costs associated with harmful actions by government entities. (*Shirk, supra,* 42 Cal.4th at 213.)

D. **By enacting Government Code section 905, subdivision (m), and limiting its application to post-January 1, 2009 abuse, the Legislature accepted and approved the holdings in *V.C.* and *Shirk* for pre-January 1, 2009 abuse, holdings establishing that the Government Code requires presentation of a claim within six months of the abuse notwithstanding section 340.1**

Prior to the enactment of Government Code section 905, subdivision (m), all claims for childhood sexual abuse were subject to the Government Code's six-month claim presentation deadline. (*Shirk, supra*, 42 Cal.4th at 210-214; *V.C., supra*, 139 Cal.App.4th at 510-512, 514; *County of Los Angeles, supra*, 127 Cal.App.4th at 1268-1269.) After the enactment of section 905, subdivision (m), however, only those causes of action based on conduct occurring before January 1, 2009 are subject to the Government Code's claim presentation requirement and six-month claim presentation deadline. As the Legislative history for section 905, subdivision (m) establishes, causes of action for childhood sexual abuse based on conduct occurring before January 1, 2009 remain barred if a claim was not filed within six months of the abuse.[5]

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[5] Because the legislative history cited *post* is publically available (www.leginfo.ca.gov), no motion for judicial notice is necessary. (*Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 440, fn. 18; *Wittenburg v. Beachwalk Homeowners Assn.* (2013) 217

In 2008, the Legislature proposed Senate Bill 1339.[6] (Sen Bill No. 1339 (2007-2008 Reg. Sess.).) The Senate Judiciary Committee's analysis stated that "this bill would provide that childhood sexual abuse claims against local public entities would not be subject to the Government Tort Claims Act, which generally requires claims for damages to be presented to the public entity within six months of when an injury occurred." (Sen. Judiciary Com., Analysis of Sen. Bill No. 1339 (2007-2008 Reg. Sess.), as introduced, page 1.) This same analysis noted

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Cal.App.4th 654, 665, fn. 4.) Citation to it is sufficient. (*Quelimane Co. v. Stewart Title Guaranty Co.* (1998) 19 Cal.4th 26, 46 fn., 9.)

[6] "[A court] may properly rely on the legislative history of subsequent enactments to clarify the Legislature's intent regarding an earlier enacted statute. 'Although a legislative expression of the intent of an earlier act is not binding upon the courts in their construction of the prior act, that expression may properly be considered together with other factors in arriving at the true legislative intent existing when the prior act was passed. [Citations.]' (*Eu v. Chacon* (1976) 16 Cal.3d 465, 470.) While the concept of 'subsequent legislative history' may seem oxymoronic, it is well established that 'the Legislature's expressed views on the prior import of its statutes are entitled to due consideration, and we cannot disregard them. (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 244.)" (*Ailanto Properties, Inc. v. City of Half Moon Bay* (2006) 142 Cal.App.4th 572, 589 n.13; see *Lee v. Hanley* (2015) 61 Cal.4th 1225, 1235 (considering subsequent legislative history); *Mt. Hawley Ins. Co. v. Lopez* (2013) 215 Cal.App.4th 1385, 1408 (same).)

that "existing case law holds that, notwithstanding [ ] section 340.1 and its delayed discovery provisions, a timely [public entity six-month] claim is a prerequisite to maintaining an action for childhood sexual abuse against a public entity [school district]. *(Shirk v. Vista Unified School District* (2007) 42 Cal.4th 201; see Comment 2 for details." (*Id.* at page 4 (second and third brackets in original).)

Senate Bill 1339 was "intended to address the *Shirk* decision by expressly providing that childhood sexual abuse actions against public entities are exempted from the government tort claims requirements." (Sen. Judiciary Com., Analysis of Sen. Bill No. 1339 (2007-2008 Reg. Sess.), as introduced, page 2; see also *id.* at page 4 (noting the bill's author stated: "SB 1339 would respond to the *Shirk* decision by specifically exempting Section 340.1 civil actions for childhood sexual abuse from government tort claims requirements, thereby treating Section 340.1 actions against public entities the same as those against private entities.").) Specifically, the bill would "amend [Government Code] section 905 to provide that claims against local public entities for the recovery of damages suffered as a result of childhood sexual abuse made pursuant to [Code of Civil

Procedure] section 340.1 would be exempt from the Government Tort Claims Act and its six-month public entity claim presentation requirement." (*Id.* at page 4.) However, Senate Bill 1339 was relegated to the "suspense file" and never passed. (Sen. Appropriations Com., Analysis of Sen. Bill No. 1339 (2007-2008 Reg. Sess.), as amended Feb. 20, 2008).

Instead, Senate Bill 640 passed.[7] (Sen. Bill No. 640 (2007-2008 Res. Sess.), as amended July 14, 2008).) Senate Bill 640 was "identical to SB 1339 [ ], except that this bill applies prospectively only, to claims arising out of conduct occurring on or after January 1, 2009 . . . [which] should reduce the bill's financial impact on local public entities." (Sen. Rules Com., Analysis of Sen. Bill No. 640 (2007-2008 Reg. Sess.), as amended July 14, 2008, page 1.)

When enacting Government Code section 905, subdivision (m), the Legislature clearly understood existing case law required presentation of a claim within six months of the abuse. For policy reasons, the Legislature chose to alter this case law *only for claims based on post-January 1, 2009 conduct*, thus approving

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[7] See footnote 6, *ante*

and leaving intact the impact of this prior case law on causes of action based on pre-January 1, 2009 conduct. "[W]hen the Legislature amends a statute without altering portions of the provision that have previously been judicially construed, the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction. Accordingly, reenacted portions of the statute are given the same construction they received before the amendment." (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 734; see *Estate of Heath* (2008) 166 Cal.App.4th 396, 402 ("[w]hen a statute has been construed by judicial decision, and that construction is not altered by subsequent legislation, it must be presumed that the Legislature is aware of the judicial construction and approves of it"); accord *Goldstone v. County of Santa Cruz* (2012) 207 Cal.App.4th 1038, 1047.)

E. Attempted amendments to Section 340.1 further evidence the Legislature's intent when enacting Government Code section 905, subdivision (m) to keep in place existing case law requiring presentation of a claim within six months of the abuse for pre-January 1, 2009 conduct

During the 2013-2014 regular Legislative session, the Legislature sought to amend section 340.1 with Senate Bill 131 and Senate Bill 924. (Sen. Bill No. 131 (2013-2014 Reg. Sess.);

Sen. Bill No. 924 (2013-2014 Reg. Sess.).) The Legislature sought to amend section 340.1 to further extend the limitation period for childhood sexual abuse causes of action and to revive previously lapsed claims. (See Sen. Judiciary Com., Analysis of Sen. Bill No. 131 (2013-2014 Reg. Sess.), as amended May 2, 2013; Sen. Judiciary Com., Analysis of Sen. Bill No. 924 (2013-2014 Reg. Sess), as introduced). Although both were vetoed by Governor Brown, an analysis of the Legislative history is appropriate as it further supports the conclusion that when enacting Government Code section 905, subdivision (m) and limiting its impact to post-January 1, 2009 conduct, the Legislature accepted and approved, notwithstanding section 340.1, prior case law holding that the failure to present a claim to a government entity within six months of the abuse bars a lawsuit against the government entity. (*See Freedom Newspapers, Inc. v. Orange County Retirement Board of Directors* (1993) 6 Cal.4th 821, 832-833 ("The Legislature's adoption of subsequent, amending legislation that is ultimately vetoed may be considered as evidence of the Legislature's understanding of the unamended, existing statute.").)

Although both Senate Bill 131 and Senate Bill 924 sought to further extend the limitation period and revive previously lapsed causes of action for childhood sexual abuse, neither sought to alter the "status quo" regarding childhood sexual abuse causes of action against government entities established by *Shirk*, which the Legislature understood as requiring the presentation of a claim under the Government Code within six months of the last abuse. Indeed, the Legislature specifically noted that adults not previously complying with the Government Code's six-month claim presentation deadline would remain barred from suing a government entity, unless the cause of action involved post-January 1, 2009 conduct, as provided in Government Code section 905, subdivision (m). (See Sen. Judiciary Com., Analysis of Sen. Bill No. 131 (2013-2014 Reg. Sess.), as amended May 2, 2013, page 10; Sen. Appropriations Com., Analysis of Sen. Bill No. 131 (2013-2014 Reg. Sess.), as amended May 9, 2013, page 4; Assem. Com. on Judiciary, Analysis of Sen. Bill No. 131 (2013-2014 Reg. Sess.), as amended May 28, 2013, page 15; Assem. Comm. on Appropriations, Analysis of Sen. Bill 131 (2013-2014 Reg. Sess.), as amended June 19, 2013, page 6; Sen. Rules Com., Analysis of Sen. Bill No. 131 (2013-2014 Reg. Sess.), as amended

June 19, 2013; Sen. Rules Com., Analysis of Sen. Bill 131 (2013-2014 Reg. Sess.), as amended July 14, 2013, page 6; Sen. Appropriations Com., Analysis of Sen. Bill No. 924 (2013-2014 Reg. Sess.), as amended May 13, 2014, page 3; Assem. Com. on Judiciary, Analysis of Sen. Bill No. 924 (2013-2014 Reg. Sess.), as amended June 11, 2014, pages 8-9; Assem. Com. on Appropriations, Analysis of Sen. Bill No. 924 (2013-2014 Reg. Sess.), as amended June 11, 2014, page 3.)

V.

Conclusion

This Court should grant Doe No. 1's petition for review. This Court needs to secure uniformity of decision and resolve the conflict created by *Rubenstein* on this extremely important and far reaching issue affecting every government entity in the State. (California Rules of Court, rule 8.500(b)(1).) Alternatively, this Court can grant the petition and transfer the case back to the Court of Appeal with directions to reconsider its opinion in light

of *V.C.* and *Shirk* and the Legislative history of Government Code section 905, subdivision (m). (California Rule of Court, rule 8.500(b)(4).)

DATED: April 29, 2016 Daley & Heft, LLP

By: _____
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Doe No. 1

CERTIFICATE OF WORD COUNT

The text of this brief consists of 5,908 words as counted by the Microsoft Office 2010 word-processing program used to generate this document.

DATED: April 29, 2016

Daley & Heft, LLP

By: _____

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Defendant and Petitioner
Doe No. 1

EXHIBIT A

Rubenstein v. Doe No. 1

Court of Appeal of California, Fourth Appellate District, Division One

March 22, 2016, Opinion Filed

D066722

Reporter
245 Cal. App. 4th 1037; 2016 Cal. App. LEXIS 211

LATRICE RUBENSTEIN, Plaintiff and Appellant, v. DOE No. 1 et al., Defendants and Respondents.

Prior History: [**1] APPEAL from a judgment of the Superior Court of Imperial County, No. ECU08107, Juan Ulloa, Judge.

Disposition: Reversed and remanded with directions.

Core Terms

certificates, trial court, certificate of merit, penalty of perjury, declaration, leave to amend, sexual abuse of child, in camera, allegations, practitioner, asserts, provides, days, meritorious cause, public entity, molestation, coach, sustaining a demurrer, entity, delayed discovery rule, amended complaint, filing claim, fictitious, demurrer, delayed discovery, mental health, sexual abuse, set forth, requirements, principles

Case Summary

Overview
HOLDINGS: [1]-In a case alleging childhood sexual abuse, the appellate court, which addressed a number of issues regarding the certificate of merit requirement under *Code Civ. Proc., § 340.1*, held that the certificates are not required to be filed under penalty of perjury; [2]-The certificates must contain some facts to allow the trial court to determine there is a reasonable and meritorious cause for filing the action; [3]-The certificates must be filed as to all named Doe defendants unless the plaintiff invokes *Code Civ. Proc., § 474*, pertaining to lawsuits against fictitiously named defendants; and [4]-After filing the complaints and certificates, the plaintiff must file an ex parte application seeking an in camera review of the certificates; [5]-The trial court erred in sustaining a demurrer to plaintiff's first amended complaint without leave to amend.

Outcome
Reversed and remanded with directions.

LexisNexis® Headnotes

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Parties > Real Party in Interest > Fictitious Names

Torts > Intentional Torts > Assault & Battery

HN1 Regarding allegations of childhood sexual abuse, certificates of merit must be filed as to all named Doe defendants unless the plaintiff invokes *Code Civ. Proc., § 474*, pertaining to lawsuits against fictitiously named defendants.

Civil Procedure > Appeals > Reviewability of Lower Court Decisions

HN2 Generally, a respondent who has not appealed from the judgment may not urge error on appeal. A statutory exception exists that allows a respondent to assert a legal theory which may result in affirmance of the judgment. *Code Civ. Proc., § 906*.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Intentional Torts > Assault & Battery > Defenses

Torts > Procedural Matters > Statute of Limitations > Begins to Run

Torts > Public Entity Liability > Liability > Claim Presentation

HN3 Generally, a claim must be presented to a public entity as a prerequisite for filing a suit for money or damages against the public entity. *Gov. Code § 945.4, subd. (b)*. A plaintiff must file a claim with defendant no later than six months after he accrual of the cause of action. *Gov. Code, § 911.2, subd. (a)*. Alternatively, a late claim may be presented within a reasonable time after accrual, not to exceed one year. *Gov. Code, § 911.4, subd. (b)*. If the application to file

a late claim is denied, a plaintiff may petition the court for an order relieving plaintiff from the claims presentation requirement. Gov. Code, § 946.6. The court, however, lacks jurisdiction to grant relief if the application is filed more than one year after the cause of action accrued. Gov. Code, § 911.4, subd. (b). If the court approves the plaintiff's petition for relief, the plaintiff has 30 days in which to file a complaint. Gov. Code, § 946.6, subd. (f). The accrual date for claim filing purposes is the same as the accrual date for a corresponding civil cause of action. Gov. Code, § 901. Code Civ. Proc., § 340.1, sets forth the limitations period for filing an action for childhood sexual abuse. Thus, § 340.1 governs the accrual date for claim filing purposes.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Intentional Torts > Assault & Battery > Defenses

Torts > ... > Statute of Limitations > Tolling > Discovery Rule

HN4 Generally, a civil cause of action for child molestation accrues at the time of the molestation, but delayed discovery principles may apply to a cause of action arising out of childhood sexual abuse. Code Civ. Proc., § 340.1, which governs childhood sexual abuse claims, has been amended numerous times. The California Legislature removed reference to common law delayed discovery principles from § 340.1 in 1994. This deletion and the addition of a strict age limit for some cases but a statutory discovery rule for others indicated that § 340.1, not common law delayed discovery principles, govern application of the statute of limitations to all late-discovered claims based upon childhood sexual abuse.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Intentional Torts > Assault & Battery > Defenses

Torts > ... > Statute of Limitations > Tolling > Discovery Rule

HN5 In 2002, the California Legislature amended Code Civ. Proc., § 340.1, and provided a longer limitations period for childhood sexual abuse claims, subject to the statutory delayed discovery rule already defined by § 340.1, subd. (a). This statutory delayed discovery rule provides that an action for damages suffered as a result of childhood sexual abuse must be filed within eight years of the date the plaintiff attains the age of majority or within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse, whichever period expires later. § 340.1, subd. (a). Where the action is against an entity that employed or supervised the individual perpetrating the abuse, the action cannot be filed after the plaintiff's 26th birthday, § 340.1, subd. (b)(1), unless the 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. § 340.1, subd. (b)(2).

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Intentional Torts > Assault & Battery > Defenses

Torts > ... > Statute of Limitations > Tolling > Discovery Rule

HN6 The statutory delayed discovery rule in Code Civ. Proc., § 340.1, provides that an action against the person that committed the abuse is timely if brought prior to the plaintiff's 26th birthday or within three years of the date the plaintiff discovers or reasonably should have discovered the injury caused by the sexual abuse, whichever period expires later. § 340.1, subd. (a)(1). Similarly, an action against any person or entity whose (1) breach of a duty of care owed to the plaintiff caused the sexual abuse, § 340.1, subd. (a)(2), or (2) intentional act caused the sexual abuse, § 340.1, subd. (a)(3), is timely 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. Providing or requiring counseling is not sufficient, in and of itself, to constitute a reasonable step or reasonable safeguard. § 340.1, subd. (b)(2).

Civil Procedure > Pleading & Practice > Pleadings > Complaints

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Demurrers

HN7 For purposes of demurrer, the allegations of the complaint must be taken as true, no matter how unlikely or improbable.

Governments > Legislation > Statute of Limitations > Time Limitations

Torts > Procedural Matters > Statute of Limitations

Torts > Public Entity Liability > Liability > Claim Presentation

HN8 If the court makes an order relieving a petitioner from the claims presentation requirement of Gov. Code, § 945.4,

suit on the cause of action to which the claim relates must be filed with the court within 30 days thereafter. Gov. Code, § 946.6, subd. (f). Complying with this time period is mandatory.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Sanctions > Baseless Filings > Frivolous Lawsuits

Torts > Intentional Torts > Assault & Battery

HN9 Every plaintiff 26 years of age or older at the time an action for childhood sexual abuse is filed must file certificates of merit. Code Civ. Proc., § 340.1, subd. (g). The purpose of the certificate of merit requirement is to impose pleading hurdles aimed at reducing frivolous claims. Separate certificates of merit must be filed for each defendant named in the complaint. § 340.1, subd. (i). Section 340.1, subd. (h), details the certificate of merit requirement.

Civil Procedure > Parties > Real Party in Interest > Fictitious Names

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Service of Process

Torts > Intentional Torts > Assault & Battery

HN10 The plaintiff's attorney and a licensed mental health practitioner must file certificates showing there is reason to believe the plaintiff suffered childhood sexual abuse. Code Civ. Proc., § 340.1, subd. (h). The trial court reviews the certificates of merit in camera to determine if there is a reasonable and meritorious cause for the filing of the action against each defendant. § 340.1, subd. (j). If the court makes such a finding, the duty to serve that defendant arises. (§ 340.1, subd. (j).) Additionally, a plaintiff 26 years of age or older must name a defendant by "Doe" designation until the plaintiff's attorney obtains permission to amend the complaint to substitute the name of the defendant for the fictitious designation name by filing an application and executing a certificate of corroborative fact as to the charging allegations against that defendant. § 340.1, subds. (m), (n)(1), (o). A failure to comply with these requirements is ground for demurrer or motion to strike the complaint and may constitute unprofessional conduct subject to disciplinary action against the plaintiff's attorney. § 340.1, subds. (k), (l).

Criminal Law & Procedure > Criminal Offenses > Obstruction of Administration of Justice > Perjury

Evidence > Types of Evidence > Testimony

HN11 An affidavit is one mode of taking the testimony of a witness, Code Civ. Proc., § 2002, and consists of a written declaration under oath, Code Civ. Proc., § 2003, taken before any officer authorized to administer oaths, Code Civ. Proc., § 2012. The California Legislature added Code Civ. Proc., § 2015.5, in 1957 to streamline the oath or affirmation procedure in order to hold one legally responsible for information given in an official document and eliminate many of the technicalities and formalities which made prosecutions for perjury difficult.

Criminal Law & Procedure > Criminal Offenses > Obstruction of Administration of Justice > Perjury

Evidence > Types of Evidence > Testimony

HN12 See Code Civ. Proc., § 2015.5.

Criminal Law & Procedure > Criminal Offenses > Obstruction of Administration of Justice > Perjury

Evidence > Types of Evidence > Testimony

HN13 Code Civ. Proc., § 2015.5, provides that if a statement in writing, such as a certificate, is required to "sworn," executing the certificate under penalty of perjury in the format delineated in § 2015.5 will be sufficient.

Criminal Law & Procedure > Criminal Offenses > Obstruction of Administration of Justice > Perjury

Evidence > Types of Evidence > Testimony

Torts > Intentional Torts > Assault & Battery

HN14 To "swear" means a person took an oath. An "oath" includes a declaration under penalty of perjury. Evid. Code, § 165. Regarding claims of childhood sexual abuse, Code Civ. Proc., § 340.1, subd. (h), provides that certificates of merit shall be executed by the attorney for the plaintiff and by a licensed mental health practitioner selected by the plaintiff declaring, respectively, as follows, setting forth the facts which support the declaration. The plain language of the statute does not require that the certificates be sworn or executed under penalty of perjury.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Sanctions > Baseless Filings > Frivolous Lawsuits

Criminal Law & Procedure > Criminal Offenses > Obstruction of Administration of Justice > Perjury

Torts > Public Entity Liability

HN15 A method exists to ensure that certificates, despite not being filed under penalty of perjury, have been filed in good faith. *Code Civ. Proc., § 128.7, subd. (b)(1)-(3)*, provides that an attorney's signature on a court paper constitutes a certificate that: (1) the filing is not being presented primarily for an improper purpose; (2) the legal contentions are warranted by existing law or by a nonfrivolous argument to extend, modify or reverse existing law; and (3) the factual allegations or contentions have or are likely to have evidentiary support. The statute expressly applies to pleadings, *§ 128.7, subd. (a)*, and thus would apply to the certificates of merit which are considered an aspect of the complaint. The statute provides a method for a party to seek sanctions or for the court to impose sanctions on its own motion. *§ 128.7, subd. (c)(1)* & *(2)*. Significantly, the statute imposes a continuing obligation on a party and counsel to ensure that claims are factually and legally sound. *§ 128.7, subd. (b)*. Additionally, *Code Civ. Proc., § 1038*, provides a public entity with a way to recover the costs of defending against unmeritorious and frivolous litigation. Under *§ 1038*, sanctions may be awarded in a tort action against a governmental entity if the court finds the action was not brought in good faith and with reasonable cause.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Service of Process

Torts > Intentional Torts > Assault & Battery

HN16 Before an action for childhood sexual abuse may be served, the trial court must review the certificates of merit in camera and make a finding that there is reasonable and meritorious cause for the filing of the action against that defendant. *Code Civ. Proc., § 340.1, subd. (j)*. To aid in this requirement, *§ 340.1, subd. (h)*, provides that the certificates of merit must set forth the facts which support the declaration.

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Torts > Intentional Torts > Assault & Battery

HN17 Regarding an action for childhood sexual abuse, the attorney certificate must show the attorney has reviewed the facts of the case, that the attorney has consulted with at least one mental health practitioner who is licensed to practice and practices in California and who the attorney reasonably believes is knowledgeable of the relevant facts and issues involved in the particular action. *Code Civ. Proc., § 340.1, subd. (h)(1)*. Thus, the attorney certificate should, at a minimum, set forth the general facts of the case, the name of the licensed mental health practitioner consulted and some facts supporting the attorney's conclusion that the practitioner consulted is knowledgeable of the relevant facts and issues involved in the particular action. Similarly, the certificate of the practitioner should set forth some facts showing the practitioner's knowledge of the facts and issues in the action, why the practitioner reasonably believes the plaintiff had been subjected to childhood sexual abuse and how the plaintiff discovered the alleged abuse. *Code Civ. Proc., § 340.1, subd. (h)(2)*; *Evid. Code, § 801*. If the trial court believes a certificate is deficient and that the deficiency is potentially correctable, it should allow the plaintiff leave to amend.

Civil Procedure > Parties > Real Party in Interest > Fictitious Names

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Torts > Intentional Torts > Assault & Battery

HN18 Where a plaintiff is ignorant of the true name of a defendant or the facts rendering a defendant liable, the plaintiff may include fictitious names as defendants in the complaint (e.g., "Does 1 through 10 inclusive") and allege that the identities and capacities in which they acted are unknown. *Code Civ. Proc., § 474*. Plaintiffs may invoke *§ 474* by alleging they are (1) ignorant of the true names or capacities of the defendants sued under the fictitious names, or (2) suing the fictitiously named defendants under *§ 474*. In contrast, *Code Civ. Proc., § 340.1, subd. (m)*, states that no defendant may be named except by Doe designation until there has been a showing of corroborative fact as to the charging allegations against that defendant and *§ 340.1, subd. (i)*, provides that the attorney for the plaintiff shall execute a separate certificate of merit for each defendant named in the complaint.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Service of Process

Torts > Intentional Torts > Assault & Battery

HN19 All plaintiffs 26 years of age or older at the time an action alleging childhood sexual abuse is filed must file

certificates of merit. *Code Civ. Proc., § 340.1, subd. (g)*. The duty to serve a defendant arises after the trial court reviews the certificates of merit in camera and finds a reasonable and meritorious cause for the filing of the action against each defendant. *§ 340.1, subd. (j)*.

Civil Procedure > Pleading & Practice > Pleadings > Service of Process

HN20 A motion to quash is the proper method for a defendant to challenge an improper summons or service without making a general appearance. *Code Civ. Proc., § 418.10*.

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

HN21 Trial courts manage hundreds of cases and are not in a position to know about a procedural requirement in a particular case unless a party brings the procedural requirement to the court's attention. The proper method of doing so is with an ex parte application seeking an in camera review of the certificates and explaining in the accompanying declaration why notice was not required.

Headnotes/Syllabus

Summary
CALIFORNIA OFFICIAL REPORTS SUMMARY

Plaintiff filed a complaint alleging childhood sexual abuse against 20 Doe defendants. The trial court sustained a demurrer to plaintiff's first amended complaint without leave to amend on the ground the certificates of merit contained no facts and a mental health practitioner did not sign the certificate under penalty of perjury. The trial court also found that plaintiff's claim was fatally time barred and dismissed the action. (Superior Court of Imperial County, No. ECU08107, Juan Ulloa, Judge.)

The Court of Appeal reversed the judgment of dismissal and remanded the matter with directions. The court, which addressed a number of issues regarding the certificate of merit requirement under Code Civ. Proc., § 340.1, held that the certificates are not required to be filed under penalty of perjury. The certificates must contain some facts to allow the trial court to determine there is a reasonable and meritorious cause for filing the action. The certificates must be filed as to all named Doe defendants unless the plaintiff invokes Code Civ. Proc., § 474, pertaining to lawsuits against fictitiously named defendants. After filing the complaints and certificates, the plaintiff must file an ex parte application seeking an in camera review of the certificates. The trial court erred in sustaining a demurrer to plaintiff's first amended complaint without leave to amend. The court rejected the argument that the trial court lacked jurisdiction to grant a Gov. Code, § 946.6, petition finding that the statutory delayed discovery rule of § 340.1 applied to delay the accrual date of plaintiff's action. (Opinion by McIntyre, J., with Huffman, Acting P. J., and Aaron, J., concurring.)

Headnotes
CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1) (1)
Appellate Review § 131 > Standing to Allege Error > Respondent.

Generally, a respondent who has not appealed from the judgment may not urge error on appeal. A statutory exception exists that allows a respondent to assert a legal theory which may result in affirmance of the judgment (Code Civ. Proc., § 906).

CA(2) (2)
Government Tort Liability § 17 > Claims > Presentation > Statute of Limitations > Childhood Sexual Abuse.

Generally, a claim must be presented to a public entity as a prerequisite for filing a suit for money or damages against the public entity (Gov. Code § 945.4). A plaintiff must file a claim with the defendant no later than six months after the accrual of the cause of action (Gov. Code, § 911.2, subd. (a)). Alternatively, a late claim may be presented within a reasonable time after accrual, not to exceed one year (Gov. Code, § 911.4, subd. (b)). If the application to file a late claim is denied, a plaintiff may petition the court for an order relieving the plaintiff from the claims presentation requirement (Gov. Code, § 946.6). The court, however, lacks jurisdiction to grant relief if the application is filed more than one year after the cause of action accrued (Gov. Code, § 911.4, subd. (b)). If the court approves the plaintiff's petition for relief, the plaintiff has 30 days in which to file a complaint (Gov. Code, § 946.6, subd. (f)). The accrual date for claim filing purposes is the same as the accrual date for a corresponding civil cause of action (Gov. Code, § 901). Code Civ. Proc., § 340.1, sets forth the limitations period for filing an action for childhood sexual abuse. Thus, § 340.1 governs the accrual date for claim filing purposes.

CA(3) (3)
Limitation of Actions § 26 > Torts > Childhood Sexual Abuse > Delayed Discovery.

Generally, a civil cause of action for child molestation accrues at the time of the molestation, but delayed discovery principles may apply to a cause of action arising out of childhood sexual abuse. Code Civ. Proc., § 340.1, which governs childhood sexual abuse claims, has been amended numerous times. The Legislature removed reference to common law delayed discovery principles from § 340.1 in 1994. This deletion and the addition of a strict age limit for some cases but a statutory discovery rule for others indicated that § 340.1, not common law delayed discovery principles, govern application of the statute of limitations to all late-discovered claims based upon childhood sexual abuse.

CA(4) (4)

Limitation of Actions § 26 > Torts > Childhood Sexual Abuse > Delayed Discovery > Employee of Entity Defendant.

In 2002, the Legislature amended Code Civ. Proc., § 340.1, and provided a longer **[*1039]** limitations period for childhood sexual abuse claims, subject to the statutory delayed discovery rule already defined by § 340.1, subd. (a). This statutory delayed discovery rule provides that an action for damages suffered as a result of childhood sexual abuse must be filed within eight years of the date the plaintiff attains the age of majority or within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse, whichever period expires later (§ 340.1, subd. (a)). Where the action is against an entity that employed or supervised the individual perpetrating the abuse, the action cannot be filed after the plaintiff's 26th birthday (§ 340.1, subd. (b)(1)), unless the 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 (§ 340.1, subd. (b)(2)).

CA(5) (5)

Limitation of Actions § 26 > Torts > Childhood Sexual Abuse > Delayed Discovery.

The statutory delayed discovery rule in Code Civ. Proc., § 340.1, provides that an action against the person that committed the abuse is timely if brought prior to the plaintiff's 26th birthday or within three years of the date the plaintiff discovers or reasonably should have discovered the injury caused by the sexual abuse, whichever period expires later (§ 340.1, subd. (a)(1)). Similarly, an action against any person or entity whose (1) breach of a duty of care owed to the plaintiff caused the sexual abuse (§ 340.1, subd. (a)(2)), or (2) intentional act caused the sexual abuse (§ 340.1, subd. (a)(3)), is timely 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. Providing or requiring counseling is not sufficient, in and of itself, to constitute a reasonable step or reasonable safeguard (§ 340.1, subd. (b)(2)).

CA(6) (6)

Government Tort Liability § 17 > Claims > Presentation.

If the court makes an order relieving a petitioner from the claims presentation requirement of Gov. Code, § 945.4, suit on the cause of action to which the claim relates must be filed with the court within 30 days thereafter (Gov. Code, § 946.6, subd. (f)). Complying with this time period is mandatory.

CA(7) (7)

Assault and Battery § 12 > Civil > Action for Childhood Sexual Abuse > Certificate of Merit.

Every plaintiff 26 years of age or older at the **[*1040]** time an action for childhood sexual abuse is filed must file certificates of merit (Code Civ. Proc., § 340.1, subd. (g)). The purpose of the certificate of merit requirement is to impose pleading hurdles aimed at reducing frivolous claims. Separate certificates of merit must be filed for each defendant named in the complaint (§ 340.1, subd. (i)). Section 340.1, subd. (h), details the certificate of merit requirement. The plaintiff's attorney and a licensed mental health practitioner must file certificates showing there is reason to believe the plaintiff suffered childhood sexual abuse. The trial court reviews the certificates of merit in camera to determine if there is a reasonable and meritorious cause for the filing of the action against each defendant (§ 340.1, subd. (j)). If the court makes such a finding, the duty to serve that defendant arises. Additionally, a plaintiff 26 years of age or older must name a defendant by "Doe" designation until the plaintiff's attorney obtains permission to amend the complaint to substitute the name of the defendant for the fictitious designation name by filing an application and executing a certificate of corroborative fact as to the charging allegations against that defendant (§ 340.1, subds. (m), (n)(1), (*o*)). A failure to comply with these requirements is ground for demurrer or motion to strike the complaint and may

constitute unprofessional conduct subject to disciplinary action against the plaintiff's attorney (§ 340.1, subds. (k), (*l*)).

CA(8) (8)

Assault and Battery § 12 > Civil > Action for Childhood Sexual Abuse > Certificate of Merit > Penalty of Perjury > Deficiencies > Leave to Amend.

In a case alleging childhood sexual abuse, plaintiff's certificates of merit under Code Civ. Proc., § 340.1, were not required to be filed under penalty of perjury. Although plaintiff's certificates were deficient regarding whether there was a reasonable and meritorious cause for filing the action, the trial court should have allowed plaintiff leave to amend to correct the deficiencies.

[Levy et al., Cal. Torts (2015) ch. 71, § 71.02.]

CA(9) (9)

Witnesses § 2 > Affidavit > Oath or Affirmation > Perjury.

An affidavit is one mode of taking the testimony of a witness (Code Civ. Proc., § 2002), and consists of a written declaration under oath (Code Civ. Proc., § 2003), taken before any officer authorized to administer oaths (Code Civ. Proc., § 2012). The Legislature added Code Civ. Proc., § 2015.5, in 1957 to streamline the oath or affirmation procedure in order to hold one legally responsible for information given in an official document and eliminate many of the technicalities and formalities which made prosecutions for perjury difficult.

CA(10) (10)

Witnesses § 2 > Certificate > Sworn > Penalty of Perjury.

Code Civ. Proc., § 2015.5, provides that if a statement in writing, such as a certificate, is required to be "sworn," executing the certificate under penalty of perjury in the format delineated in § 2015.5 will be sufficient.

CA(11) (11)

Assault and Battery § 12 > Civil > Action for Childhood Sexual Abuse > Certificate of Merit > Penalty of Perjury.

To "swear" means a person took an oath. An "oath" includes a declaration under penalty of perjury (Evid. Code, § 165). Regarding claims of childhood sexual abuse, Code Civ. Proc., § 340.1, subd. (h), provides that certificates of merit must be executed by the attorney for the plaintiff and by a licensed mental health practitioner selected by the plaintiff declaring, respectively, as follows, setting forth the facts which support the declaration. The plain language of the statute does not require that the certificates be sworn or executed under penalty of perjury.

CA(12) (12)

Pleading § 16 > Complaint > Certificates > Good Faith > Sanctions.

A method exists to ensure that certificates, despite not being filed under penalty of perjury, have been filed in good faith. Code Civ. Proc., § 128.7, subd. (b)(1)–(3), provides that an attorney's signature on a court paper constitutes a certificate that (1) the filing is not being presented primarily for an improper purpose; (2) the legal contentions are warranted by existing law or by a nonfrivolous argument to extend, modify or reverse existing law; and (3) the factual allegations or contentions have or are likely to have evidentiary support. The statute expressly applies to pleadings (128.7, subd. (a)), and thus would apply to the certificates of merit which are considered an aspect of the complaint. The statute provides a method for a party to seek sanctions or for the court to impose sanctions on its own motion (§ 128.7, subd. (c)(1) & (2)). Significantly, the statute imposes a continuing obligation on a party and counsel to ensure that claims are factually and legally sound (§ 128.7, subd. (b)). Additionally, Code Civ. Proc., § 1038, provides a public entity with a way to recover the costs of defending against unmeritorious and frivolous litigation. Under § 1038, sanctions may be awarded in a tort action against a governmental entity if the court finds the action was not brought in good faith and with reasonable cause.

CA(13) (13)

Assault and Battery § 12 > Civil > Action for Childhood Sexual Abuse > Certificate of Merit.

Before an action for childhood sexual abuse may be served, the trial court must review the certificates of merit in camera and make a finding that there is reasonable and meritorious cause for the filing of the action against that defendant. (Code Civ. Proc., § 340.1, subd. (j)). To aid in this requirement, § 340.1, subd. (h), provides that the certificates of merit must set forth the facts which support the declaration.

CA(14) (14)

Assault and Battery § 12 > Civil > Action for Childhood Sexual Abuse > Certificate of Merit > Leave to Amend.

Regarding an action for childhood sexual abuse, the attorney certificate must show the attorney has reviewed the facts of the case, that the attorney has consulted with at least one

mental health practitioner who is licensed to practice and practices in California and who the attorney reasonably believes is knowledgeable of the relevant facts and issues involved in the particular action (Code Civ. Proc., § 340.1, subd. (h)(1)). Thus, the attorney certificate should, at a minimum, set forth the general facts of the case, the name of the licensed mental health practitioner consulted and some facts supporting the attorney's conclusion that the practitioner consulted is knowledgeable of the relevant facts and issues involved in the particular action. Similarly, the certificate of the practitioner should set forth some facts showing the practitioner's knowledge of the facts and issues in the action, why the practitioner reasonably believes the plaintiff had been subjected to childhood sexual abuse and how the plaintiff discovered the alleged abuse (Code Civ. Proc., § 340.1, subd. (h)(2); Evid. Code, § 801). If the trial court believes a certificate is deficient and that the deficiency is potentially correctable, it should allow the plaintiff leave to amend.

CA(15) (15)

Parties § 8 > Designation > Doe Defendants > Action for Childhood Sexual Abuse > Separate Certificates of Merit.

Where a plaintiff is ignorant of the true name of a defendant or the facts rendering a defendant liable, the plaintiff may include fictitious names as defendants in the complaint (e.g., "Does 1 through 10 inclusive") and allege that the identities and capacities in which they acted are unknown (Code Civ. Proc., § 474). Plaintiffs may invoke § 474 by alleging they are (1) ignorant of the true names or capacities of the defendants sued under the fictitious names, or (2) suing the fictitiously named defendants under § 474. In contrast, Code Civ. Proc., § 340.1, subd. (m), states that no defendant may be named except by Doe designation until there has been a showing of corroborative fact as to the charging allegations against that defendant and § 340.1, subd. (i), provides that the attorney for the plaintiff must execute a separate certificate of merit for each defendant named in the complaint.

CA(16) (16)

Assault and Battery § 12 > Civil > Action for Childhood Sexual Abuse > Certificate of Merit.

All plaintiffs 26 years of age or older at the time an action alleging childhood sexual abuse is filed must file certificates of merit (Code Civ. Proc., § 340.1, subd. (g)). The duty to serve a defendant arises after the trial court reviews the certificates of merit in camera and finds a reasonable and meritorious cause for the filing of the action against each defendant (§ 340.1, subd. (j)).

CA(17) (17)

Process, Notices, and Papers § 6 > Improper Service > Motion to Quash.

A motion to quash is the proper method for a defendant to challenge an improper summons or service without making a general appearance (Code Civ. Proc., § 418.10).

CA(18) (18)

Pleading § 16 > Complaint > Certificates > In Camera Review.

Trial courts manage hundreds of cases and are not in a position to know about a procedural requirement in a particular case unless a party brings the procedural requirement to the court's attention. The proper method of doing so is with an ex parte application seeking an in camera review of the certificates and explaining in the accompanying declaration why notice was not required.

Counsel: Elliott N. Kanter for Plaintiff and Appellant.

Daley & Heft, Lee H. Roistacher, Richard J. Schneider and Reece A. Román for Defendant and Respondent Doe No. 1.

Judges: Opinion by McIntyre, J., with Huffman, Acting P. J., and Aaron, J., concurring.

Opinion by: McIntyre, J.

Opinion

McINTYRE, J.—In this case, we reject the argument that the trial court lacked jurisdiction to grant a *Government Code section 946.6* petition finding that the statutory delayed discovery rule of *Code of Civil Procedure section 340.1* applied to delay the accrual date of plaintiff's action for childhood sexual abuse. (*Code Civ. Proc., § 340.1, subd. (a).*) (Undesignated statutory references are to the Code of Civil Procedure.) We also address a number of issues of first impression regarding the certificate of merit requirement under *section 340.1*, including that (1) the certificates are not required to be filed under penalty of perjury; (2) the certificates must contain some facts to allow the trial court to determine there is a reasonable and meritorious cause for filing the action; (3)***HN1*** certificates must be filed as to all named Doe defendants unless the plaintiff invokes *section 474* pertaining to lawsuits against fictitiously named defendants; **[**2]** and (4) after filing the complaint and certificates, the plaintiff must file an ex parte application seeking an in camera review of the certificates.

As we shall discuss, the trial court erred in sustaining defendant's demurrer to a complaint alleging childhood

sexual abuse. Accordingly, we reverse the judgment of dismissal and remand the matter for further proceedings in accordance with this opinion.
[*1044]

FACTUAL AND PROCEDURAL BACKGROUND

In 1993, Latrice Rubenstein was a high school student. That year, her cross-country and track coach (coach) began sexually molesting her. Coach was an employee of Doe No. 1, a public entity (defendant). In early 2012, when Rubenstein was about 34 years old, the latent memories of the sexual abuse resurfaced. She filed a claim under the Government Claims Act (*Gov. Code, § 810 et seq.*) with defendant, but defendant denied the claim as late filed. Later that year, she filed a complaint against defendant in Imperial County without the required certificates of merit. She ultimately dismissed the action.

She then filed a complaint in San Diego County against Doe No. 1 and Does No. 2 through No. 20. The complaint included certificates of merit as to Doe No. 1 and an individual not named in the complaint. **[**3]** She also filed a petition for relief under *Government Code section 946.6* (the petition). The trial court granted Rubenstein's petition. The trial court later granted defendant's motion to change venue to Imperial County. After the case returned to Imperial County, defendant demurred to the complaint. In lieu of opposing the demurrer, Rubenstein filed a first amended complaint (the complaint). Attached to the complaint were the previously filed certificates of merit from her attorney and a psychiatrist.

Defendant again demurred. The trial court sustained the demurrer without leave to amend, finding (1) Rubenstein did not seek a finding of merit after an in camera review before serving the original or amended complaint; (2) the certificate of merit submitted by Rubenstein's counsel failed to articulate facts supporting his conclusion that Rubenstein's claim is meritorious; (3) the psychiatrist's letter was not executed under penalty of perjury and otherwise failed to articulate any facts supporting the conclusion that Rubenstein's claim is meritorious; and (4) no certificates of merit were filed for parties sued as Does No. 2 through No. 20. The trial court also found Rubenstein's failure to comply with the procedural hurdles **[**4]** of *section 340.1* within 30 days of the order granting her *Government Code section 946.6* petition rendered her claim against defendant fatally time-barred and dismissed the action. Rubenstein timely appealed from the judgment of dismissal.

DISCUSSION

I. *Government Code Section 946.6* Petition

Defendant contends the trial court lacked jurisdiction to grant Rubenstein's petition because she filed the petition more than a year after her cause of action accrued in 1994. Defendant also asserts the trial court properly **[*1045]** sustained the demurrer without leave to amend because Rubenstein failed to file the required certificates of merit within 30 days after the trial court granted the petition. Defendant asserts it did not file a cross-appeal from the judgment as review of these issues is proper under section 906. We agree that section 906 applies.

HN2 (1) (1) Generally, a respondent who has not appealed from the judgment may not urge error on appeal. (*Hutchinson v. City of Sacramento (1993) 17 Cal.App.4th 791, 798 [21 Cal. Rptr. 2d 779]*.) A statutory exception exists that allows a respondent to assert a legal theory which may result in affirmance of the judgment. (*Ibid.*; § 906.) Here, assuming we agree with either of defendant's arguments, the result would be an affirmance of the judgment of dismissal. Accordingly, we address the merits of defendant's arguments. As we shall explain, defendant's **[**5]** contentions are meritless.

A. *General Legal Principles*

HN3 (2) (2) Generally, a claim must be presented to a public entity as a prerequisite for filing a suit for "money or damages" against the public entity. (Gov. Code § 945.4.) A plaintiff must file a claim with the defendant no later than six months after "the accrual of the cause of action." (*Gov. Code, § 911.2, subd. (a)*.) Alternatively, a late claim may be presented within a reasonable time after accrual, not to exceed one year. (*Gov. Code, § 911.4, subd. (b)*.) If the application to file a late claim is denied, a plaintiff may petition the court for an order relieving the plaintiff from the claims presentation requirement. (*Gov. Code, § 946.6*.) The court, however, lacks jurisdiction to grant relief if the application is filed more than one year after the cause of action accrued. (*Gov. Code, § 911.4, subd. (b)*.) If the court approves the plaintiff's petition for relief, the plaintiff has 30 days in which to file a complaint. (*Gov. Code, § 946.6, subd. (f)*.)

The accrual date for claim filing purposes is the same as the accrual date for a corresponding civil cause of action. (*Gov. Code, § 901*.) *Code of Civil Procedure section 340.1* sets forth the limitations period for filing an action for childhood sexual abuse. (*Quarry v. Doe 1 (2012) 53 Cal.4th 945, 952 [139 Cal. Rptr. 3d 3, 272 P.3d 977]* (*Quarry*).) Thus, *section 340.1* governs the accrual date for claim filing purposes.

HN4 (3) (3) Generally, a civil cause of action for child molestation accrues at the [**6] time of the molestation (*K.J. v. Arcadia Unified School Dist. (2009) 172 Cal.App.4th 1229, 1239 [92 Cal. Rptr. 3d 1]* (*K.J.*)), but delayed discovery principles may apply to a cause of action arising out of childhood sexual abuse (*id. at p. 1241*). As detailed in *Quarry*, *section 340.1* has been amended numerous times. (*Quarry, supra, 53 Cal.4th at pp. 962–972.*) As relevant [*1046] here, the Legislature removed reference to common law delayed discovery principles from *section 340.1* in 1994. (*Quarry, at p. 983.*) This deletion and "the addition of a strict age limit for some cases but a statutory discovery rule for others" indicated that *section 340.1*, not common law delayed discovery principles, govern application of the statute of limitations to all late-discovered claims based upon childhood sexual abuse. (*Quarry, at p. 984.*)

HN5 (4) (4) In 2002, the Legislature again amended *section 340.1* and "provided a longer limitations period for childhood sexual abuse claims, subject to the statutory delayed discovery rule already defined by subdivision (a) of [the statute]." (*Quarry, supra, 53 Cal.4th at p. 968.*) This statutory delayed discovery rule provides that an action for damages suffered as a result of childhood sexual abuse must be filed "within eight years of the date the plaintiff attains the age of majority or within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority [**7] was caused by the sexual abuse, whichever period expires later." (*§ 340.1, subd. (a).*) Where, as here, the action is against an entity that employed or supervised the individual perpetrating the abuse, the action cannot be filed after the plaintiff's 26th birthday (*§ 340.1, subd. (b)(1)*) unless the 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 ..." (*§ 340.1, subd. (b)(2)*; see generally *Quarry, at pp. 968–969*).

Although not relevant here, it is important to note that in 2008 the Legislature added subdivision (m) to Government Code section 905, to provide an exception to the claim presentation requirement for childhood sexual abuse claims arising out of conduct occurring on or after January 1, 2009. Because the conduct in this case occurred in 1994, this amendment does not apply. Nonetheless, we agree with an observation made by the *K.J.* court that the amendment appears "declaratory of existing law to the extent that it applies the delayed discovery doctrine to the accrual of a cause of action brought by an adult plaintiff against a public entity [**8] for childhood sexual abuse." (*K.J., supra, 172 Cal.App.4th at p. 1234, fn. 2.*)

B. *Analysis*

Defendant argues that the common law delayed discovery doctrine no longer exists for childhood sexual abuse claims after *Quarry*. Accordingly, defendant asserts Rubenstein's claim accrued after the last molestation occurred in 1994, that she had six months from the date of accrual to file a claim, but did not file a claim until 18 years later in 2012. We disagree.

[*1047]

Defendant correctly states that a civil cause of action for child molestation generally accrues at the time of the molestation and that *Quarry* eliminated the common law delayed discovery doctrine for childhood sexual abuse claims. (*Ante*, pt. I.A.) Defendant, however, incorrectly asserts delayed discovery no longer exists for childhood sexual abuse claims. As our prior discussion indicates, *Quarry* simply acknowledged the legislative action of removing reference to *common law* delayed discovery principles from *section 340.1* and the creation of a statutory delayed discovery rule. (*Quarry, supra, 53 Cal.4th at p. 984.*)

HN6 (5) (5) The statutory delayed discovery rule in *section 340.1* provides that an action against the person that committed the abuse is timely if brought prior to the plaintiff's 26th birthday or within three years of the date the plaintiff discovers [**9] or reasonably should have discovered the injury caused by the sexual abuse, whichever period expires later. (*§ 340.1, subd. (a)(1).*) Similarly, an action against any person or entity whose (1) breach of a duty of care owed to the plaintiff caused the sexual abuse (*§ 340.1, subd. (a)(2)*) or (2) intentional act caused the sexual abuse (*§ 340.1, subd. (a)(3)*) is timely "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" (*§ 340.1, subd. (b)(2)*).

Doe No. 1 is an entity and is not alleged to be the perpetrator of the abuse. Accordingly, the question presented is whether

Rubenstein alleged facts invoking the statutory delayed discovery rule for a nonabuser entity as described [**10] in subdivision (b)(2) of section 340.1. Defendant did not challenge Rubenstein's allegations below and our review of the complaint shows the allegations are adequate for pleading purposes.

Rubenstein alleged that coach, an employee of the entity defendant, sexually molested her around 1993 when she was a high school student. Defendant and its employees owed her a duty of care and defendant is vicariously liable for the negligence of its employees who knew or should have known about the coach's unlawful sexual misconduct. Defendant, through its employees, knew or should have known that coach had previously engaged in unlawful sexual conduct with minors, but nonetheless hired coach to work directly with minors while failing to protect Rubenstein from this foreseeable danger. In early 2012, when Rubenstein was about 34 years old, [*1048] the latent memories of the sexual abuse resurfaced. These allegations of ultimate fact are sufficient to invoke the delayed discovery rule of accrual. (Doe v. City of Los Angeles (2007) 42 Cal.4th 531, 545–546, 550 [67 Cal. Rptr. 3d 330, 169 P.3d 559].)

The claim she presented to defendant in June 2012, within six months after she allegedly realized that coach had sexually molested her, is timely for pleading purposes. To escape this result, defendant asserts Rubenstein cannot rely on delayed [**11] discovery because she was 15 or 16 when the alleged molestation occurred and cannot legitimately assert she was unaware of the wrongfulness of her coach's conduct when it occurred. ***HN7*** For purposes of demurrer, however, the allegations of the complaint must be taken as true, no matter how unlikely or improbable. (Del E. Webb Corp. v. Structural Materials Co. (1981) 123 Cal.App.3d 593, 604 [176 Cal. Rptr. 824].)

Defendant next argues that the trial court properly sustained the demurrer without leave to amend because Rubenstein failed to file the required certificates of merit within 30 days after the court granted her petition in August 2013. Rubenstein asserts she filed timely certificates of merit when she filed the complaint in March 2013, and thus did not have to re-file the certificates or file a new complaint within 30 days after the trial court's ruling. We agree with Rubenstein.

HN8 ***(6)*** (6) If the court makes an order relieving a petitioner from the claims presentation requirement of Government Code section 945.4, suit on the cause of action to which the claim relates must "be filed with the court within 30 days thereafter." (Gov. Code, § 946.6, subd. (f).) Complying with this time period is mandatory. (Fritts v. County of Kern (1982) 135 Cal.App.3d 303, 305–306 [185 Cal. Rptr. 212] [plaintiff one day late in filing complaint; demurrer sustained].)

Here, however, at the time Rubenstein filed the petition for relief she simultaneously [**12] filed her complaint alleging compliance with the claims statutes and attached the required certificates of merit. Defendant cited no authority to support its implied argument that Rubenstein was required to undertake the idle act of re-filing the complaint and certificates of merit after the court issued its ruling on the petition. Rather, other courts have rejected similar arguments.

In Savage v. State of California (1970) 4 Cal.App.3d 793 [84 Cal. Rptr. 650], the plaintiff filed a complaint against the state alleging that an application for leave to file a late claim was pending. (Id. at p. 795.) After the court granted her petition for relief under Government Code section 946.6, she filed a supplement to the complaint describing this event. (Savage v. State of [*1049] California, at p. 795.) Because the plaintiff had already filed a complaint against the state, and was later relieved of the necessity of filing a claim, the appellate court rejected the argument that plaintiff should have filed a new complaint. (Id. at pp. 796–797.)

Similarly, in Bahten v. County of Merced (1976) 59 Cal.App.3d 101 [130 Cal. Rptr. 539] (*Bahten*), the plaintiffs filed suit against a public entity while their petition for leave to file a late claim was pending. (Id. at p. 104.) The complaint did not allege compliance with Government Code claim procedures. (*Ibid.*) The plaintiffs then obtained a court order under Government Code section 946.6 relieving them of the claim filing requirements, and [**13] they described this development in an amended complaint. (Bahten, at p. 104.) Although the plaintiffs filed the first amended complaint more than 30 days after the court order under Government Code section 946.6 (Bahten, at p. 106), the appellate court determined that the 30-day limitation period is satisfied when a complaint against the public entity is already on file when the order is made (id. at p. 112; see State of California v. Superior Court (2004) 32 Cal.4th 1234, 1244 [13 Cal. Rptr. 3d 534, 90 P.3d 116] [approving *Savage* and *Bahten* where a premature complaint against the public entity was already on file when the plaintiff successfully petitioned for leave to present a late claim, but disapproving *Bahten* to the extent the case stated that compliance with the claim presentation requirement is not an element of a cause of action against a public entity]).

Here, Rubenstein filed a complaint against defendant alleging compliance with the Government Code claims procedures

and attached the certificates of merit *before* the trial court granted her petition. Accordingly, we reject defendant's argument that the action is time-barred because Rubenstein did not file an amended complaint or re-file the certificates of merit within 30 days after the court issued its order on the petition.

II. *Certificates of Merit*

A. *General Legal Principles*

HN9 (7) (7) Every plaintiff 26 years **[**14]** of age or older at the time an action for childhood sexual abuse is filed must file certificates of merit. (*§ 340.1, subd. (g).*) The purpose of the certificate of merit requirement is to impose "'pleading hurdles aimed at reducing frivolous claims.'" (*Jackson v. Doe (2011) 192 Cal.App.4th 742, 752 [121 Cal. Rptr. 3d 685].*) Separate certificates of merit must be filed for each defendant named in the complaint. (*§ 340.1, subd. (i).*) *Subdivision (h) of section 340.1*, details the certificate of merit requirement.
[*1050]

Briefly, ***HN10*** the plaintiff's attorney and a licensed mental health practitioner must file certificates showing there is reason to believe plaintiff suffered childhood sexual abuse. (*§ 340.1, subd. (h).*) The trial court reviews the certificates of merit in camera to determine if there is a "reasonable and meritorious cause for the filing of the action" against each defendant. (*§ 340.1, subd. (j).*) If the court makes such a finding, the duty to serve that defendant arises. (*Ibid.*) Additionally, a plaintiff 26 years of age or older must name a defendant by "Doe" designation until the plaintiff's attorney obtains permission to amend the complaint to substitute the name of the defendant for the fictitious designation name by filing an application and executing a certificate of corroborative fact as to the charging allegations against that defendant. (*§ 340.1, subds. (m), (n)(1), (o).*) **[**15]** A failure to comply with these requirements is ground for demurrer or motion to strike the complaint and may constitute unprofessional conduct subject to disciplinary action against the plaintiff's attorney. (*§ 340.1, subds. (k), (l).*)

B. *Propriety of Certificates of Merit*

(8) (8) The trial court sustained the demurrer without leave to amend on the ground the certificates of merit contained no facts and the mental health practitioner did not sign the certificate under penalty of perjury. Rubenstein asserts the trial court erred because the certificates are not required to contain facts or be filed under penalty of perjury. Even assuming she is wrong on these points, Rubenstein asserts the trial court should have allowed her leave to amend to correct the deficiencies. We conclude the certificates were not required to be filed under penalty of perjury, but that they must contain sufficient factual support so as to allow the trial court to determine whether there is a reasonable and meritorious cause for filing the action. Because Rubenstein's certificates were deficient in this regard, the trial court should have allowed her leave to amend to correct the deficiencies.

1. *Penalty of Perjury*

HN11 (9) (9) An affidavit is one mode of taking **[**16]** the testimony of a witness (§ 2002) and consists of "a written declaration under oath" (§ 2003) taken before "any officer authorized to administer oaths" (§ 2012). The Legislature added section 2015.5 in 1957 to streamline the oath or affirmation procedure in order to hold one legally responsible for information given in an official document and eliminate many of the technicalities and formalities which made prosecutions for perjury difficult. (*People v. Flores (1995) 37 Cal.App.4th 1566, 1572–1573 [44 Cal. Rptr. 2d 585].*) Section 2015.5 provides ***HN12*** "*Whenever*, under any law of this state ... made pursuant to the law of this state, *any matter is required* ... to be ... evidenced ... *by the sworn* statement, declaration, verification, certificate, oath, or affidavit, in writing of the person making the **[*1051]** same ... such matter *may* with like force and effect be ... evidenced ... by the unsworn ... declaration ... in writing of such person which recites that it is ... declared by him or her to be true under penalty of perjury . ..." (Italics added.)

(10) (10) Thus, ***HN13*** section 2015.5 provides that *if* a statement in writing, such as a certificate, is required to be "sworn," executing the certificate under penalty of perjury in the format delineated in section 2015.5 will be sufficient. As another court noted, section 2015.5 "sheds no light on *whether* the declaration **[**17]** [or certification] required in [a particular statute] must be under penalty of perjury." (*Mabry v. Superior Court (2010) 185 Cal.App.4th 208, 234 [110 Cal. Rptr. 3d 201]* (*Mabry*).) The question presented is whether *section 340.1* requires certificates of merit to be sworn. If so, then the certificates must either meet the affidavit procedure or be executed under penalty of perjury per *section 2015.5*.

HN14 (11) (11) To "swear" means a person took an oath. (Black's Law Dictionary (10th ed. 2014) p. 1677.) An "[o]ath" includes a declaration under penalty of perjury. (*Evid. Code, § 165.*) *Subdivision (h) of section 340.1* provides that "[c]ertificates of merit shall be executed by the

attorney for the plaintiff and by a licensed mental health practitioner selected by the plaintiff *declaring*, respectively, as follows, setting forth the facts which support the *declaration* ... ." (Italics added.) The plain language of the statute does not require that the certificates be "sworn" or executed under penalty of perjury. (See *Conservatorship of Whitley (2010) 50 Cal.4th 1206, 1214 [117 Cal. Rptr. 3d 342, 241 P.3d 840]* [if statutory language is unambiguous, the plain meaning of the statute controls].)

Defendant seizes on the statutory language that the attorney and licensed mental health practitioner "declar[e]" facts supporting the "declaration" to support its argument that the certificates must be executed under penalty of perjury. (*§ 340.1, subd. (h)*.) As another court noted, "ordinary English usage **[**18]** of the word 'declaration' imports no requirement that it be under oath. In the Oxford English Dictionary, for example, numerous definitions of the word are found, none of which require a statement under oath or penalty of perjury. In fact, the second legal definition given actually juxtaposes the idea of a declaration against the idea of a statement under oath: 'A simple affirmation to be taken, in certain cases, instead of an oath or solemn affirmation.'" (*Mabry, supra, 185 Cal.App.4th at p. 233*.)

As Rubenstein aptly notes, the Legislature is well aware of the distinction between a "declaration" and a "declaration under penalty of perjury" and cited numerous statutes utilizing the phrase "declaration under penalty of perjury." (See, e.g., §§ 98 [allowing prepared testimony of relevant witnesses **[*1052]** in limited actions in the form of affidavits or declarations under penalty of perjury], 170.6, subd. (a)(2) [motion to disqualify judge may be "supported by affidavit or declaration under penalty of perjury, or an oral statement under oath ..."].) Similarly, a certificate need not be under penalty of perjury unless the Legislature has so required. (See, e.g., *Gov. Code, § 1094* [certificate required to be under penalty of perjury]; Welf. & Inst. Code, § 11265, subd. (b)(2) [same]; Rev. & Tax. Code, § 18668, subd. (e)(4) [same]; *Gov. Code, § 9130.5* [same]; *Rev. & Tax. Code, § 60503* [same]; **[**19]** cf. *Wat. Code, § 26130* [certificate required with no mention of penalty of perjury]; *Corp. Code, § 109* [same]; *Gov. Code, § 66499.35* [same]; Pen. Code, § 597p [same]; Food & Agr. Code, § 21201 [same].)

"[I]f the Legislature wanted to say that the statement required in [a statute] must be under penalty of perjury, it knew how to do so." (*Mabry, supra, 185 Cal.App.4th at p. 233*.) That the Legislature did not require certificates to be executed under penalty of perjury is not surprising as the purpose of the requirement is to reduce frivolous claims (*Jackson v. Doe, supra, 192 Cal.App.4th at p. 752*), rather than provide admissible evidence at a time in the litigation when discovery has not even commenced.

(12) (12) Notably, ***HN15*** a method exists to ensure that the certificates, despite not being filed under penalty of perjury, have been filed in good faith. Section 128.7 provides that an attorney's signature on a court paper constitutes a certificate that (1) the filing is not being presented primarily for an improper purpose; (2) the legal contentions are warranted by existing law or by a nonfrivolous argument to extend, modify or reverse existing law; and (3) the factual allegations or contentions have or are likely to have evidentiary support. (§ 128.7, subd. (b)(1)–(3).) The statute expressly applies to pleadings (*id.*, subd. (a)), and thus would apply to the certificates of merit which are considered "an aspect of **[**20]** the complaint" (*Doyle v. Fenster (1996) 47 Cal.App.4th 1701, 1707 [55 Cal. Rptr. 2d 327]*). The statute provides a method for a party to seek sanctions or for the court to impose sanctions on its own motion. (§ 128.7, subd. (c)(1) & (2).) Significantly, the statute imposes a continuing obligation on a party and counsel to insure that claims are factually and legally sound. (*Id.*, subd. (b) [counsel's certification applies to the initial pleading and as to "later advocating"].) Additionally, section 1038 provides a public entity with a way to recover the costs of defending against unmeritorious and frivolous litigation. (*Kobzoff v. Los Angeles County Harbor/UCLA Medical Center (1998) 19 Cal.4th 851, 857 [80 Cal. Rptr. 2d 803, 968 P.2d 514]*.) Under section 1038, sanctions may be awarded in a tort action against a governmental entity if the court finds the action was "not brought in good faith and with reasonable cause."
[*1053]

2. *Facts Within Certificates*

The trial court sustained the demurrer without leave to amend because the certificates did not contain supporting facts. Rubenstein asserts the trial court erred because the certificates stated the facts required by the statute and nothing more is required. On this point, the trial court did not err, but it should have allowed Rubenstein leave to amend the certificates.

HN16 (13) (13) Before an action for childhood sexual abuse may be served, the trial court must review the certificates of merit **[**21]** in camera and make a finding "that there is reasonable and meritorious cause for the filing of the action against that defendant." (*§ 340.1, subd. (j)*.) To aid in this requirement, *subdivision (h) of section 340.1* provides that the certificates of merit "set[] forth the facts which support the declaration ... ."

Section 340.1 is modeled after *section 411.35*, an earlier statute requiring certificates of merit be filed for malpractice actions against certain construction professionals. (*Jackson v. Doe, supra, 192 Cal.App.4th at p. 751, fn. 5*; § 411.35. subd. (a).) Section 411.35 requires that the plaintiff's or the cross-complainant's attorney file and serve a "certificate" "executed by the attorney for the plaintiff or the cross-complainant declaring" the attorney consulted with and received an opinion from an expert in the field "that there is reasonable and meritorious cause for the filing of this action" or an adequate excuse for not doing so. (§ 411.35, subd. (b).)

Notably, *subdivision (h) of section 340.1* differs from *subdivision (b) of section 411.35* by requiring that the certificates of merit "set[] forth the facts which support the declaration . ..." In interpreting a statute we strive to give meaning to every word and avoid a construction making any word surplusage. (*Arnett v. Dal Cielo (1996) 14 Cal.4th 4, 22 [56 Cal. Rptr. 2d 706, 923 P.2d 1]*.) Following this maxim of construction, we must presume the Legislature did not want the *section 340.1* certificates to simply recite the statutory language contained **[**22]** in subdivision (h), but rather "set[] forth the facts" supporting the statutory requirements to aid the court in determining whether a reasonable and meritorious cause exists for filing the action.

(14) (14) For example, ***HN17*** the attorney certificate must show "the attorney has reviewed the facts of the case, that the attorney has consulted with at least one mental health practitioner who is licensed to practice and practices in this state and who the attorney reasonably believes is knowledgeable of the relevant facts and issues involved in the particular action ... ." (*§ 340.1, subd. (h)(1)*.) Thus, the attorney certificate should, at a minimum, set forth the general facts of the case, the name of the licensed mental health practitioner consulted and some facts supporting the attorney's conclusion **[*1054]** that the practitioner consulted is knowledgeable of the relevant facts and issues involved in the particular action. Similarly, the certificate of the practitioner should set forth some facts showing the practitioner's knowledge of the facts and issues in the action, why the practitioner reasonably believes the plaintiff had been subjected to childhood sexual abuse and how the plaintiff discovered the alleged abuse. (*§ 340.1, subd. (h)(2)*; see **[**23]** Evid. Code, § 801.)

If the trial court believes a certificate is deficient and that the deficiency is potentially correctable, it should allow the plaintiff leave to amend. (See *Price v. Dames & Moore (2001) 92 Cal.App.4th 355, 360 [112 Cal. Rptr. 2d 65]* [trial court should have allowed leave to amend defective § 411.35 certificate].) Here, although the attorney's certificate concluded that a reasonable and meritorious cause existed for filing of the action and the practitioner's certificate concluded that Rubenstein had been subjected to childhood sexual abuse, they contained no facts supporting these conclusions. Thus, the certificates lacked sufficient factual support so as to allow the trial court to determine whether there existed a reasonable and meritorious cause for filing the action. Because the action was not fatally time-barred, the trial court should have granted leave to amend to correct the deficiencies.

C. *Certificates of Merit for Does No. 2 Through No. 20*

The trial court sustained the demurrer without leave to amend because the complaint contained allegations against Does No. 2 through No. 20, but Rubenstein failed to file the required certificates of merit as to these defendants. Rubenstein claims that Does No. 2 through No. 20 are not "named" defendants as contemplated by *subdivision (i) of section 340.1*; rather, these Does **[**24]** are defendants as contemplated by *section 474*. As we shall explain, the trial court erred by not allowing Rubenstein leave to amend to clarify her allegations.

HN18 (15) (15) Where a plaintiff is ignorant of the true name of a defendant or the facts rendering a defendant liable, the plaintiff may include fictitious names as defendants in the complaint (e.g., "Does 1 through 10 inclusive") and allege that the identities and capacities in which they acted are unknown. (§ 474.) Plaintiffs may invoke section 474 by alleging they are (1) ignorant of the true names or capacities of the defendants sued under the fictitious names, or (2) suing the fictitiously named defendants under section 474. (See *Motor City Sales v. Superior Court (Proulx) (1973) 31 Cal.App.3d 342, 347–348 [107 Cal. Rptr. 280]*.) In contrast, *subdivision (m) of section 340.1* states that "no defendant may be named except by 'Doe' designation ... until there has been a showing of corroborative fact as to the charging allegations against **[*1055]** that defendant" and subdivision (i) provides that "the attorney for the plaintiff shall execute a separate certificate of merit for each defendant named in the complaint."

Rubenstein argues the fictitiously named defendants in her complaint are contemplated by section 474. Her complaint, however, contains no allegations invoking section 474. Rather, Rubenstein alleged in her complaint that **[**25]** she named defendants by the Doe designation "until such time as the Court ... finds that there has been a showing of corroborative facts." This allegation suggests Rubenstein

knows the identity of Does No. 2 through No. 20. In light of this inconsistency, the trial court should have allowed plaintiff leave to amend to clarify her allegations and (1) file the required certificates of merits as to all named Doe defendants or (2) invoke section 474. We express no opinion on whether Rubenstein may genuinely claim the benefits of section 474, including application of the relation-back doctrine or whether this issue can be decided at the pleading stage. (*Austin v. Massachusetts Bonding & Insurance Co. (1961) 56 Cal.2d 596, 599 [15 Cal. Rptr. 817, 364 P.2d 681]* ["Where a complaint sets forth, or attempts to set forth, a cause of action against a defendant designated by fictitious name and his true name is thereafter discovered and substituted by amendment, he is considered a party to the action from its commencement so that the statute of limitations stops running as of the date of the earlier pleading."].)

As an aside, review of the attorney's certificate of merit filed by Rubenstein suggests she knows the identity of at least one other Doe defendant because the certificate names an individual as a defendant. The complaint, **[**26]** however, contains no specific allegations as to this individual. If Rubenstein intended to sue this individual she should be allowed leave to amend to add this individual as a "named" Doe within her complaint.

D. *Lack of in Camera Finding of Merit*

HN19 (16) (16) All plaintiffs 26 years of age or older at the time an action alleging childhood sexual abuse is filed must file certificates of merit. (*§ 340.1, subd. (g).*) The duty to serve a defendant arises after the trial court reviews the certificates of merit in camera and finds a "reasonable and meritorious cause for the filing of the action" against each defendant. (*§ 340.1, subd. (j).*)

Here, although Rubenstein filed the required certificates concurrently with her initial complaint and amended complaint, she did not obtain an in camera review of the certificates before serving defendant. Defendant demurred on this ground asserting the defect could not be cured because Rubenstein failed to file the certificates and obtain an in camera review within 30 days after the trial court granted her petition. The trial court cited this defect as another **[*1056]** basis for sustaining the demurrer without leave to amend. Rubenstein argues the only method for challenging improper service is by a motion to **[**27]** quash and defendant's motion to change venue constituted a general appearance which waived defendant's right to challenge service. (§ 1014; *Air Machine Com SRL v. Superior Court (2010) 186 Cal.App.4th 414, 419 [112 Cal. Rptr. 3d 482]* [party waives any objection to court's exercise of personal jurisdiction when party makes a general appearance in the action].)

(17) (17) We agree with Rubenstein's general premise that ***HN20*** a motion to quash is the proper method for a defendant to challenge an improper summons or service without making a general appearance. (*§ 418.10*, see generally Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2015) ¶ 4:411, pp. 4-66 to 4-67.) Defendant, however, is not challenging service or the personal jurisdiction of the trial court. Rather, defendant asserts Rubenstein violated the requirements of *subdivision (j) of section 340.1* by not obtaining an in camera review of the certificates before serving the complaint. The question presented is whether this defect is a proper ground for sustaining the demurrer without leave to amend.

As discussed above, we rejected defendant's argument that the action is time-barred because Rubenstein did not file an amended complaint or re-file the certificates of merit within 30 days after the court issued its order on the petition. (*Ante*, pt. I.B.) **[**28]** Accordingly, the trial court erred in citing this purported defect as a basis for sustaining defendant's demurrer without leave to amend.

In any event, we reject defendant's implied argument that the trial court must undertake an in camera review of the certificates of merit *before* expiration of the statute of limitations. First, *section 340.1* contains no such requirement. Additionally, under certain circumstances, *subdivision (h)(3) of section 340.1* allows the late filing of certificates where the certificates cannot be filed before the statute of limitations expires. In such situations, by necessity, the in camera review could not occur before the statute of limitations had expired. Here, Rubenstein timely filed the certificates, but then erroneously served her complaint before requesting an in camera review. Under these circumstances, we see no reason why Rubenstein cannot request an in camera review and obtain the necessary finding before serving any amended pleading.

(18) (18) Finally, Rubenstein argued below that she filed the required certificates with the complaint and is not responsible for the trial court's failure to undertake the required in camera review. We disagree. ***HN21*** Trial courts manage hundreds of cases and are not in a position **[**29]** to know about a procedural requirement in a particular case unless a party brings the procedural requirement to the court's attention. The proper method of doing so is with an ex **[*1057]** parte application seeking an in camera review of

the certificates and explaining in the accompanying declaration why notice was not required. (See generally *Cal. Rules of Court, rule 3.1200 et seq.*)

DISPOSITION

The judgment of dismissal is reversed. The matter is remanded with directions to the trial court to enter an order sustaining the demurrer with leave to amend. Plaintiff is entitled to her costs on appeal.

Huffman, Acting P. J., and Aaron, J., concurred.

EXHIBIT B

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

LATRICE RUBENSTEIN,

Plaintiff and Appellant,

v.

DOE #1,

Defendant and Respondent.

D066722

(Super. Ct. No. ECU08107)

ORDER DENYING REHEARING

THE COURT:

The petition for rehearing is denied.

McINTYRE, Acting P. J.

Copies to: All parties

ATTORNEY or party without attorney (Name, state bar number, and address):	FOR COURT USE ONLY
Daley & Heft, LLP, Attorneys at Law Lee H. Roistacher, Esq. (SBN 179619) Richard J. Schneider, Esq. (SBN 118580) 462 Stevens Avenue #201, Solana Beach, CA 92075 Telephone No. (858) 755-5666 Facsimile No. (858) 755-7870 ATTORNEY FOR (Name): Doe No. 1	
IN THE SUPREME COURT OF THE STATE OF CALIFORNIA Street Address: 350 McAllister Street City and Zip Code: San Francisco, CA 94102	
PLAINTIFF(S)/PETITIONER(S) Doe No. 1	Case Number: S_____
Defendant(S)/RESPONDENT(S) Latrice Rubenstein	Court of Appeal Case No. D066722 Superior Court Case No.: ECU08107
PROOF OF SERVICE—CIVIL Check method of service: ☐ By Personal Service ☐ By Mail ☐ By Messenger Service ☐ By Facsimile ☒ By Overnight Delivery ☐ By E-Mail/Electronic Transmission	JUDGE: Hon. Juan Ulloa DEPT: 9

(Do not use this Proof of Service to show service of a Summons and Complaint)

. At the time of service I was over 18 years of age and **not a party to this action.**

. My address is (specify one):
a. ☒ Business: b. ☐ Residence:

462 Stevens Avenue, Suite 201, Solana Beach, CA 92075

. The fax number or electronic address from which I served the documents is (*complete if service was by fax or electronic service*):

. On (date): May 2, 2016 I served the following **documents** (specify):

☒ The documents are listed in the Attachment to Proof of Service–Civil (Documents Served).

. I served the documents on the **person or persons** below, as follows:

a. Name of person served:

b. ☒ (*Complete if service was by personal service, mail, overnight, or messenger service.*)
Business or residential address where person was served:

c. ☐ (*Complete if service was by fax or electronic service.*)
(1) Fax number or electronic notification address where person was served:

(2) Time of Service:

☒ The names, addresses, and other applicable information about the persons served is on the Attachment to Proof of Service—Civil (Persons Served).

. The documents were served by the following means (specify):

. ☐ **By personal service.** I personally delivered the documents to the persons at the addresses listed in item 5. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with a receptionist or an individual in charge of the office, between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not less than 18 years of age between the hours of eight in the morning and six in the evening.

CASE NAME: *Doe No. 1 v. Latrice Rubenstein*	CASE NUMBER: S _____ Court of Appeal Case No. D066722 Superior Court Case No.: ECU08107

b. ☐ **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses in item 5 and (specify one):

(1) ☐ deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.

(2) ☐ placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at (city and state): olana Beach, California

☒ **By overnight delivery.** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses in item5. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

☐ **By messenger service.** I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed in item 5 and providing them to a professional messenger service for service. *(A declaration by the messenger must accompany this Proof of Service or be contained in the Declaration of Messenger below.)*

☐ **By fax transmission.** Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed in item 5. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

☐ **By electronic service.** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the persons at the e-mail addresses listed in item 5.

declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

)ate: May 2, 2016

Maria E. Kilcrease
TYPE OR PRINT NAME OF DECLARANT)

Maria E. Kilcrease
(SIGNATURE OF DECLARANT)

If item 5d above is checked, the declaration below must be completed or a separate declaration from a messenger must be attached.)

)ECLARATION OF MESSENGER

☐ **By personal service.** I personally delivered the envelope or package received from the declarant above to the persons at the addresses listed in item 4. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package, which was clearly labeled to identify the attorney being served, with a receptionist or an individual in charge of the office. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not less than 18 years of age between the hours of eight in the morning and six in the evening.

At the time of service, I was over 18 years of age. I am not a party to the above-referenced legal proceeding.

served the envelope or package, as stated above, on (date):

declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

TYPE OR PRINT NAME OF DECLARANT)

(SIGNATURE OF DECLARANT)

CASE NAME:	CASE NUMBER:
Doe No. 1 v. Latrice Rubenstein	S _____ Court of Appeal Case No. D066722 Superior Court Case No.: ECU08107

ATTACHMENT TO PROOF OF SERVICE - CIVIL (DOCUMENTS SERVED)

The documents that were served are as follows (describe each document specifically):

'ETITION FOR REVIEW

CASE NAME: *Doe No. 1 v. Latrice Rubenstein*	CASE NUMBER: S _____ Court of Appeal Case No. D066722 Superior Court Case No.: ECU08107

ATTACHMENT TO PROOF OF SERVICE - CIVIL (PERSONS SERVED)

Name, Address, and Other Applicable Information About Persons Served:

Name of Person Served:	***Where Served:*** *(Provide business or residential address where service was made by personal service, mail, overnight delivery, or messenger service. For other means of service, provide fax number or electronic notification address, as applicable.)*	***Time of Service:*** *(Complete for service by fax transmission or electronic service.)*
Elliott N. Kanter, Esq. Justin O. Walker, Esq.	Elliott N. Kanter, Esq. Justin O. Walker, Esq. Law Offices of Elliott N. Kanter 2445 Fifth Avenue, Suite 350 San Diego, CA 92101 Tel: (619) 231-1883 Fax: (619) 234-4553 Email: ekanter@enkanter.com jwalker@enkanter.com Attorney for Plaintiff	Time:
Hon. Juan Ulloa Superior Court of California County of Imperial	Hon. Juan Ulloa Superior Court of California County of Imperial 939 West Main Street El Centro, CA 92243 (760) 482-2200	Time:
Court of Appeal Division One 750 B Street San Diego, CA 92101	Court of Appeal Fourth District Division One 750 B Street San Diego, CA 92101 (619) 744-0760	