S234269

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

LATRICE RUBENSTEIN,
Plaintiff and Appellant,

vs.

DOE #1,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION 1, CASE NO. D066722
HON. JUAN ULLOA, JUDGE, SUPERIOR COURT NO. ECU08107

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

Plaintiff Latrice Rubenstein was just 14 years old when her high school track coach used his position of trust and authority to sexually exploit and abuse her. As a consequence of suffering such abuse as a child, Plaintiff repressed all memory of the abuse. It was not until early 2012, when Plaintiff was approximately 34 years old, that the memories resurfaced. Six months later, in June 2012, Plaintiff presented a Government Tort Claim to Defendant Doe 1, the school district ("the District") that employed the coach. The District rejected the claim as untimely. According to the District, Plaintiff's claim accrued for claim filing purposes at the time of the *last act of molestation* in 1994. The Court of Appeal correctly rejected such an untenable position and held that the delayed discovery rule, as defined by the Legislature in Code of Civil Procedure section 340.1, applied to determine the date of accrual for claim filing purposes.

Setting aside the exaggerated rhetoric and mischaracterizations of law scattered throughout the District's Opening Brief on the Merits, the argument advanced by the District boils down to its position that a claim concerning sexual abuse of a child accrues at the time of the molestation *as a matter of law*. Citing this Court's decision in *Shirk v. Vista Unified School District* (2007) 42 Cal.4th 201, the District posits that the Tort Claims Act requires "presentation of a claim within six months of the last act of abuse *regardless of repressed memories or delayed discovery*."

(Opening Brief ("OB") at p. 6 (emphasis added).) But this has never been the law. Nowhere in *Shirk* did this Court preclude a child victim of sexual abuse from ever relying on the delayed discovery rule to postpone the accrual date of his or her claim. The District's position is not only belied by the fact that the Legislature created its own delayed discovery rule for such claims in recognition of the difficulties victims of childhood sexual abuse often face in identifying the harm caused by such abuse, but is also entirely unsupported by legal authority.

Pursuant to Government Code section 911.2, 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.) The accrual date for claim filing purposes is the *same* as the accrual date for a corresponding civil cause of action. (Gov. Code, § 901; *Shirk v. Vista Unified School District* (2007) 42 Cal.4th 201, 208-209; *K.J. v. Arcadia Unified School Dist.* (2009) 172 Cal.App.4th 1229, 1233, 1238-1239.) As explained in *K.J.*, "the government claims statutes do not contain a unique definition of accrual. Rather, accrual of the cause of action for purposes of the claims statute is the date of accrual that would pertain under the statute of limitations applicable to a dispute between private litigants." (*K.J., supra,* at p. 1238, citing Gov. Code, § 901 and *Shirk,* at pp. 208-209.)

Code of Civil Procedure section 340.1 sets forth the limitations period for filing an action for childhood sexual abuse. (Code Civ. Proc. § 340.1; *Quarry v. Doe I* (2012) 53 Cal.4th 945, 952.) Section 340.1 states in

pertinent part: "In an action for recovery of damages suffered as a result of childhood sexual abuse, the time for commencement of the action shall be within eight years of the date the plaintiff attains the age of majority or within three years from 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, ..." (Code Civ. Proc. § 340.1 (emphasis added).) As recognized by this Court in *Quarry*, Section 340.1 "**created its own statutory delayed discovery rule,** evidencing intent to provide a new rule that would extend delayed discovery principles beyond what had been recognized in the case law." (*Id.* at p. 965.)

Against this backdrop, the Court of Appeal held that because this statutorily defined delayed discovery rule applies to determine the date of accrual for the statute of limitations in cases between civil litigants, *this same delayed discovery rule* applies to determine the date of accrual for purposes of filing a government tort claim. (See *Rubenstein v. Doe 1* (2016) 245 Cal.App.4th 1037, 1045-1046,[1] see also Gov. Code, § 901; *Quarry v. Doe I* (2012) 53 Cal.4th 945, 982, fn. 11; *K.J., supra,* 172 Cal.App.4th at pp. 1233, 1238-1239.) The Court of Appeal correctly held that the analysis for determining the date of accrual for tort claim filing

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Rather than cite the Slip Opinion from the Court of Appeal, Plaintiff conforms her citations to the previously published opinion as done by the District to provide consistency.

purposes *is* the statutorily defined discovery rule outlined in Section 340.1. (*Id.* at pp. 1045-1046.) Furthermore, even assuming, *arguendo*, Section 340.1 does not directly apply to determine the accrual date for Plaintiff's action, the District cannot avoid application of the equitable doctrine of delayed discovery, rendering Plaintiff's claim timely and thus supporting reversal of the judgment below.

Plaintiff notes that throughout its brief, the District fails to appreciate the contours of sexual abuse against a child and the effect of the manipulation orchestrated by the abuser which prevents a child from recognizing the wrongfulness of the conduct. "'A survivor of childhood sexual abuse often lacks the means or ability to ascertain his or her injuries and their cause within the traditional limitations period. Many victims of childhood sexual abuse have repressed all memory of the abuse for many years or, if they do remember the abuse, they minimize or deny its effects to the extent that they do not connect the abuse with later injuries. Generally, it is only when an adult survivor of sexual abuse enters therapy that any meaningful understanding of his or her injuries can be developed.'" (*Sellery v. Cressey* (1996) 48 Cal.App.4th 538, 546-548.)

As discussed below and confirmed by the significant development in the research of the affects of child sexual abuse, many child victims of sexual abuse suppress memories of the abuse, deny the abuse and fail to appreciate that the conduct was even abuse, let alone harmful well into adulthood. That is precisely what occurred here. Viewing the allegations in

the light most favorable to Plaintiff, as is required at the demurrer stage, the facts support application of the delayed discovery rule to the determination of the date of accrual for purposes of timely filing the government tort claim.

While the District boasts that applying the discovery rule to the date of accrual for claim filing purposes "drastically circumvents the public policy reasons behind the Act's claim presentations requirement and deadlines and the need to treat government entities different than private entities" (OB at p. 8), the District fails to grasp that the shorter limitations period of six months (and not the three years as provided in Section 340.1) *remains in tact* under the Court of Appeal's decision. The issue here is *not* statute of limitations but the date of accrual. Nothing in the District's brief justifies imposing a different date of accrual when a claim is brought against a public entity than when one is brought against a private party. Indeed, such a position is the anthesis of Government Code section 901.

The Court of Appeal's opinion is correct and should be affirmed.

FACTUAL AND PROCEDURAL BACKGROUND[2]

In 1993, Latrice Rubenstein was a high school student. (*Rubenstein, supra,* 245 Cal.App.4th at p. 1044.) That year, her cross-country and track coach (coach) began sexually molesting her. Coach was an employee of the District, a public entity. 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 the District, but the District denied the claim as late filed. Plaintiff also filed a petition for relief under Government Code section 946.6 (the petition). The trial court granted Rubenstein's petition. (*Id.* at p. 1044.)

The District demurred to the complaint. In lieu of opposing the demurrer, Rubenstein filed a first amended complaint (the complaint). Defendant again demurred. The trial court sustained the demurrer without leave to amend. The trial court found that Plaintiff failed to comply with the certificates of merit procedure as described in Code of Civil Procedure section 340.1 and that her failure to comply with the procedural hurdles of section 340.1 within 30 days of the order granting her Government Code section 946.6 petition rendered her claim against the District fatally time barred and dismissed the action. Rubenstein timely appealed from the

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The statement of facts are derived from the Court of Appeal's opinion and the underlying operative complaint (2 CT 406-413) as is appropriate in an appeal reviewing an order sustaining a demurrer without leave to amend such as this. (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966-967.)

judgment of dismissal. (*Id.* at p. 1044.) The Court of Appeal reversed.

With respect to the issue of certificates of merit, the Court held: "[w]e 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) certificates must be filed as to all named Doe defendants unless the plaintiff invokes section 474 pertaining to lawsuits against fictitiously named defendants; and (4) after filing the complaint and certificates, the plaintiff must file an ex parte application seeking an in camera review of the certificates." (*Ib.* at p. 1043.) As noted in the opening brief, these findings are not being challenged by the District before this Court. (Opening Brief ("OB") p. 14, fn. 7 ["The Court of Appeal also held the trial court erred on the section 340.1 certificate of merit issue. [] Doe did not seek review on this issue and does not discuss it."].)[3] This portion of the Court of Appeal's opinion therefore remains law of the case.

As an alternative ground in support of the trial court's order, the District argued before the Court of Appeal that a judgment of dismissal was

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Because the Court of Appeal's opinion on the issue of certificates of merit is unchallenged, and addressed issues of first impression intended to be published by the Court, Plaintiff requests that this Court order that the Court of Appeal's decision concerning the certificate of merits remain in tact and certified for publication. (See Cal. Rules of Court, rule 8.1105 (e)(2).)

proper despite any trial court error because the trial court lacked jurisdiction to grant Plaintiff's petition for relief from the Tort Claim Act's claim presentation requirements. The Court disagreed. "[W]e 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).)" (*Id.* at p. 1043.)

The Court therefore concluded that the trial court erred in sustaining defendant's demurrer to a complaint alleging childhood sexual abuse, and reversed the judgment of dismissal and remanded the matter for further proceedings in accordance with its opinion. (Id.)

ARGUMENT

I.

THE STATUTORILY DEFINED DELAYED DISCOVERY RULE FOUND IN CODE OF CIVIL PROCEDURE SECTION 340.1 APPLIES TO DETERMINE THE *DATE OF ACCRUAL* FOR GOVERNMENT TORT CLAIM FILING PURPOSES

Generally, and prior to the enactment of Government Code section 905, subdivision (m) (which provides an exception to the claim presentation requirement for childhood sexual abuse claims arising out of conduct occurring after January 1, 2009), the plaintiff must present a timely written claim for damages to the public entity before a civil action may be asserted against the entity. (Gov. Code § 945.4, subd. (b).) Pursuant to Government Code section 911.2, subdivision (a), a plaintiff must file a claim with defendant no later than six months after "*the accrual of the cause of action.*" (Gov. Code, § 911.2, subd. (a).) In the alternative, a late claim may be presented within a reasonable time after accrual, not to exceed one year. (Gov. Code, § 911.4, subd. (b).) A court, however, lacks jurisdiction to grant relief if the late claim application is filed more than one year after the cause of action *accrued.* (Gov.Code, § 911.4, subd. (b).)

Pursuant to Government Code section 901, "**The *accrual date for claim filing purposes* is the *same* as the accrual date for a corresponding civil cause of action.**" (Gov. Code, § 901 (emphasis added).)

Applying the above legal principles, the Court of Appeal concluded "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, 139 Cal.Rptr.3d 3, 272 P.3d 977 ("*Quarry*").) **Thus, section 340.1 governs the accrual date for claim filing purposes**." (*Rubenstein*, at p. 1045 (emphasis added).)

The Court of Appeal detailed how this Court's decision in *Quarry* supported its holding that the statutorily defined delayed discovery rule in Section 340.1 governs the accrual date for purposes of filing the government claim. (*Id.* at pp. 1045-1047.) "Generally, a civil cause of action for child molestation accrues at the time of the molestation (*K.J. v. Arcadia Unified School Dist.* (2009) 172 Cal.App.4th 1229, 1239 ...), 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 here, the Legislature removed reference to common law delayed discovery principles from section 340.1 in 1994. (*Quarry,* at p. 983 [].)." (*Rubenstein, supra,* at p. 1045-1046.) Indeed, as recognized by this Court in *Quarry,* the amendments to Section 340.1 "**created its own *statutory delayed discovery rule,*** evidencing intent to provide a new rule that would extend delayed discovery principles beyond what had been recognized in the case law." (*Quarry*, at p. 965 (emphasis added).)

As explained by this Court in *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, while a claim generally accrues at the time "the wrongful act is done," application of a statutory or common law discovery rule *postpones the date of accrual.* (*Norgart,* 21 Cal.4th at p. 397.)

> The general rule for defining the accrual of a cause of action sets the date as the time "when, under the substantive law, the wrongful act is done," or the wrongful result occurs, and the consequent "liability arises...." (3 Witkin, Cal. Procedure, supra, Actions, § 459, p. 580, italics omitted.) In other words, it sets the date as the time when the cause of action is complete with all of its elements [Citations omitted].
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> **An exception to the general rule for defining the accrual of a cause of action — indeed, the "most important" one — is the discovery rule.** (3 Witkin, Cal. Procedure, supra, Actions, § 463, p. 583.) ***It may be expressed by the Legislature* or implied by the courts.** (Ibid.) It postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. (Ibid.; see *Neel v. Magana, Olney, Levy, Cathcart & Gelfand, supra*, 6 Cal.3d at p. 179, 98 Cal.Rptr. 837, 491 P.2d 421 [postponing accrual "until the [plaintiff] discovers, or should discover, his cause of action"].)

(*Ibid.* (emphasis added).)

K.J., a case cited by the Court of Appeal here, is instructive. There, the plaintiff had been sexually abused by her teacher when she was 16 years old. She turned 18 during her senior year in December 2005. In July 2006, after graduation, the plaintiff told her mother of the relationship with her teacher and began therapy. Plaintiff's mother reported the abuse in October 2006, and the teacher was arrested. While the plaintiff continued her therapy, she alleged that she was still in love with her teacher and did not believe he had done anything wrong. It was not until July 2007, that she realized she had been victimized by the teacher. (*K.J.*, 172 Cal.App.4th at pp. 1235-1236.) The defendant filed a demurrer on the grounds that the claim, filed in September 2007, was untimely. According to the defendant, the claim accrued in 2005 when the plaintiff reached age 18, or, in July 2006, when she told her mother about the relationship and began therapy. The trial court agreed.

Reversing the order sustaining the demurrer, the Court highlighted that the principle issue is the date the plaintiff's claims *accrued.* (*Id.* at p. 1233.) While the Court noted that the extended *statute of limitations* set forth in Section 340.1 does not apply since "sexual abuse victims who bring suit against a public entity are bound by the much shorter statute of limitations set forth in section 945.6 [i.e. six months from accrual of the claim]" the Court explained that the statutorily defined discovery rule outlined in Section 340.1 is applicable to determine the date of accrual. (*Id.* at pp. 1242-1243.)

The Court specifically rejected the defendant school district's argument that Section 340.1 cannot be considered when determining the date of accrual. (*Id.* at p. 1243, fn. 7.)

> At oral argument, counsel for the District argued this court should not look to Code of Civil Procedure section 340.1 to determine the date of accrual; instead, this court should look to Government Code section 911.2. However, section 911.2 merely requires presentation of a claim within six months of 'accrual of the accrual of the cause of action' - it does not define the date of accrual for purposes of presenting a claim to a public entity. Counsel for the District then went on to acknowledge the date of accrual for purposes of filing a government claim is *the same* as the date of accrual in an action in which no public entity is involved. (§ 901.)
>
> Therefore, ***the conclusion is ineluctable*** that *the date of accrual in Code of Civil Procedure section 340.1, pertaining to private defendants, is applicable to the presentation of a claim to a public entity* for damages arising out of childhood sexual abuse.

(*K.J.*, 172 Cal.App.4th at p. 1243, fn. 7 (emphasis added).)

Thus, it is the statutorily defined delayed discovery rule in Section 340.1 that determines the of accrual for claim filing purposes.

The District continues to misunderstand this precept of the law. While the District acknowledges "'[a]ccrual of the cause of action for purposes of the [Act] is the date of accrual that would pertain under the statute of limitations applicable to a dispute between private litigants,'" citing Government Code section 901 (OB at p. 19), the District insists that "Section 340.1 does not control when childhood sexual abuse causes of action accrue because it is a statute of limitations" (OB at p. 25). But, such a position makes no sense. What the District fails to understand is that, while the statute of limitations for a civil action may not apply to trump the six month claim filing statute of limitations, the Legislature's definition of *accrual* for purposes of determining when the statute of limitations is triggered *does apply* to determine the date of accrual for government tort claim purposes. (See *K.J., supra,* at pp. 1242-1243.)

Consideration of cases concerning the date of accrual for claim filing purposes against public entities in areas outside of sexual abuse claims illustrate the flaw in the District's argument. (See e.g. *Whitfield v. Roth* (1974) 10 Cal.3d 874, 884-888 [medical malpractice]; *Jefferson v. County of Kern* (2002) 98 Cal.App.4th 606, 610-611 [medical malpractice]; *People ex rel. Dep't of Transp. v. Superior Court* (1980) 26 Cal.3d 744, 750-751 [equitable indemnity].) In *Whitfield*, a medical malpractice action, the trial court granted a motion for nonsuit brought by the defendant county on the ground of failure to present a claim against the county within 100 days after accrual of the cause of action on which the claim was based as required by

then existing Government Code section 911.2. To determine whether the claim was in fact untimely, this Court begin its analysis by stating: "It is necessary, therefore, *first to consider* ***what is meant by the phrase 'accrual of the cause of action on which the claim is based'*** *which event by virtue of the provisions of section 911.2 starts the running of the 100-day claim presentation period* and, secondly, to determine whether Mary presented her claim within such period." (*Id.* at p. 884 (emphasis added).) After quoting Government Code section 901, this Court held "the date of accrual for the purpose of starting the claim presentation period 'is the *same* as for the statute of limitations which would otherwise be applicable.' [Citation]" (*Ibid.*)

Whitfield then noted that the statute of limitations with respect to malpractice commences to run when the plaintiff discovers the injury and its negligent cause or, through the exercise of reasonable diligence, should have discovered it. (*Id.* at p. 885; see also Code of Civ. Proc. § 340.5 ["In an action for injury or death against a health care provider based upon such person's alleged professional negligence, the time for the commencement of the action shall be three years after the date of injury ***or*** *one year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury,* whichever occurs first. ..." (emphasis added)].) Finding evidence that the claim was timely under this delayed discovery rule, the Court reversed the order granting nonsuit and affirmed the judgment entered on the jury verdict. (*Whitfield, supra*, at pp. 883-889; see

also *People ex rel. Dep't of Transp., supra,* 26 Cal.3d at pp. 750-751 [after quoting Government Code section 901, this Court noted: "Thus, the relevant question in this case turns on whether the defendants' equitable indemnity actions would be deemed to accrue for purposes of the statute of limitations 'if the action were between private litigants.'"].)

As explained in *Jefferson, supra*, also a decision involving an analysis of the accrual date for a government tort claim in a medical malpractice case: "**By enacting section 901, the Legislature directed the courts to apply the statute of limitations corresponding to the cause of action asserted-*in this case, Code of Civil Procedure section 340.5.*** The determination about when a cause of action has accrued for purposes of this statute is a proper subject for a jury when the facts are in dispute." (*Jefferson, supra*, 98 Cal.App.4th at p. 614-615 (emphasis added).)

The issue in *Jefferson* was whether the determination as to the date of accrual for purposes of government claim filing was a question of fact - just as the date of accrual for purposes of statute of limitations. (*Ibid.*) On that point, the Court highlighted: "The fact the issue [of accrual] arises in the context if the claims statute rather than in the context of the statute of limitations, and the fact that the defendant is a public entity rather than a private person or entity, are not distinctions that make a difference. The nature of the inquiry and the purpose of the inquiry are the same - a determination about whether the action at law for damages may proceed." (*Id.* at pp. 614-615.)

Just as *Whitfield* and *Jefferson* applied the delayed discovery rule applicable to the determination of the statute of limitations in a claim for medical malpractice to determine the date of accrual, here too Section 340.1 defines the date of accrual for purposes of filing a government tort claim.

Without acknowledging application of the discovery rule, the District blithely repeats throughout its opening brief that "childhood sexual abuse causes of action accrue at the time of the abuse." (See OB at p. 26, see also pp. 4-6, 8, 27, 32, 40, 50-51, 53-54.) Under *Norgart,* and indeed even the cases cited by the District (as discussed below), while a claim may generally accrue at the time of the wrongdoing, the accrual date may be *postponed* pursuant to the discovery rule, which as noted in *Norgart*, "may be ***expressed by the Legislature*** or implied by the courts." (See *Norgart.* 21 Cal.4th at p. 397.) Through Section 340.1, a claim does not accrue until "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." (Code Civ. Proc. § 340.1 (emphasis added).)

As highlighted by the Court of Appeal, here it was not until "early 2012, when Rubenstein was about 34 years old, the latent memories of the sexual abuse resurfaced. These allegations of ultimate fact are sufficient to invoke the delayed discovery rule of accrual." (*Rubenstein*, 245 Cal.App.4th at p. 1047-1048.) Rejecting the District's position that the trial court lacked jurisdiction to grant a Government Code section 946.6 petition, the Court properly concluded "[t]he 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." (*Id.* at pp. 1043, 1047-1048.)

The Court of Appeal therefore appropriately recognized that pursuant to Government Code section 901, Code of Civil Procedure section 340.1 "governs the accrual date for claim filing purposes" and renders Plaintiff's claim timely. (*Id.*)

A. Contrary to The District's Position, the Court of Appeal's Finding that Section 340.1 Applies to Determine the Date of Accrual for Claim Filing Purposes Decision Does Not Conflict with *Shirk*, *V.C.* or *County of Los Angeles.*

According to the District, the Court of Appeal's conclusion that Section 340.1 governs the accrual date for claim filing purposes is "diametrically at odds" with *Shirk* and *V.C. v. Los Angeles Unified School District* (2006) 139 Cal.App.4th 499. (OB at p. 4.) The District goes so far as to argue that the absence of any discussion of *Shirk* and *V.C.* in the Court's opinion is "troubling" and posits that the Court of Appeal "surely should have explained why it was not bound by *Shirk* and what good reason existed not to follow *V.C.*" (OB at pp. 4-5.) Setting aside such exaggerated hyperbole, the likely reason *Shirk, V.C.,* as well as *County of Los Angeles* (see OB at p. 34-38) are not cited in the Court's opinion is because the opinions are not relevant in an analysis as to when a claim accrues

i. *V.C.* and *County of Los Angeles*

The District begins its discussion with *V.C.* and as such, so will Plaintiff. (See OB at p. 28.) In *V.C.*, the plaintiff was sexually molested by her teacher between 2001 and 2003. (*V.C.*, 139 Cal.App.4th at p. 504.) The plaintiff's mother had suspected something was going on and discussed the matter repeatedly with school administration. By August 2003, the teacher was criminally charged for his abuse of V.C. On September 17, 2004, V.C. presented her claim for damages against the District. After it was rejected, the plaintiff brought her civil action against the school district and the District demurred on the ground that claim was untimely. The trial court agreed. As she had below, the plaintiff argued that Section 340.1 "*sets the date of accrual of her cause of action at or beyond the age of majority*, thereby rendering her claim timely." (*Id.* at p. 509 (emphasis added).) According to the plaintiff, her claim for childhood sexual abuse did not accrue, until the earliest, eight years after she attained the age of majority. The Court rejected the notion that the claim could not accrue before the plaintiff reached the age of majority, and noted that "V.C. confounds the principles of limitations periods and accrual dates." (*Ibid.*) The Court held that nothing in Section 340.1 reflects an intention by the Legislature to supplant the limitations period provided in Government Code section 911.2. (*Id.* at pp. 508-514.)

V.C.'s refusal to disregard the government code's six-month statute of limitations does not shed light on the issue here concerning when the

claim actually *accrued.* The issue here concerns the application of the statutorily defined delayed discovery rule as it applies to the date of accrual. As framed by the Court in *K.J.*, "When a plaintiff sues a public entity following the denial of a tort claim for childhood sexual abuse, the statute of limitations is the standard six-month period set forth in section 945.6, not the extended statute of limitations found in Code of Civil Procedure section 340.1. **However, the issue in this case is *not* the statute of limitations, but rather, the date the cause of action *accrued*.**" (*K.J., supra,* 172 Cal.App.4th at p. 1233 (emphasis added).)

The same is true with respect to the District's reliance on *County of Los Angeles v. Superior Court* (2005) 127 Cal.App.4th 1263. (OB at pp. 34-38.) The issue before the Court there likewise did *not* concern accrual of a claim - but rather the applicable statute of limitations.

The plaintiff argued that "she commenced suit within *eight years of attaining the age of majority* and thus her action was timely under the statute of limitations applicable to victims of childhood sexual abuse." (*County of Los Angeles*, 127 Cal.App.4th at p. 1266.) Rejecting such a position, the Court explained that "Section 340.1 does not *trump* the [Government Claims] Act," and that pursuant to the Government Code, the applicable *statute of limitations* is Section 945.6 (providing that a claim be filed within six-months after the claim accrues). (*Id.* at p. 1269-1270 (emphasis added).)

Unlike in *County* and *V.C.*, there is no contention here that the statute of limitations found in Section 340.1 *supplants* the limitations period prescribed by the Government Code for filing a government claim. The Court of Appeal's decision is in no way predicated on a finding that Section 340.1 "trumps" the Government Claims Act. As explained above, pursuant to Government Code section 901, the accrual date is the same for claim filing purposes as it is for a corresponding civil cause of action. (Gov. Code § 901.)

The flaw in the District's position before this Court is perhaps best illustrated by the District's own argument. According to the District, "Under Section 340.1, the cause of action accrues when the last abuse occurs, (*Shirk, supra*, 42 Cal.4th at p. 201), but the plaintiff's deadline (or limitation period) for commencing a civil action is suspended or tolled while the plaintiff is between 18 and 26 years old *or delayed or tolled until plaintiff discovers the injury the abuse caused*, and in that case, begins to run for another three years." (OB at p. 27 (emphasis added).)

At the outset, there is no authority for the District's argument that a claim accrues at the time of molestation but is "delayed or tolled" by the statutorily described delayed discovery rule under Section 340.1. Such a position is contrary to the very definition of the delayed discovery rule. "The common law discovery rule, where applicable, *indefinitely* ***delays accrual*** *of a cause of action* until the plaintiff discovers or reasonably has cause to discover the facts constituting it. As we have explained, the

discovery rule 'may be expressed by the Legislature or implied by the courts' and is the '"most important"' exception to the general rule that a cause of action accrues when the allegedly wrongful result occurs." (*Samuels v. Mix* (1999) 22 Cal.4th 1, 9, quoting *Norgart, supra,* 21 Cal.4th at p. 397 and *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 179; see also *Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109 ["The discovery rule provides that *the accrual date* of a cause of action is delayed ..."].)

Furthermore, as highlighted by the District, if a victim is over age 26, his or her claim is "delayed or tolled until plaintiff discovers the injury the abuse caused, and in that case, *begins to run for another three years*." (OB at p. 27.) Thus, whether identified as "accrual" or some other adjective picked by the District, the starting point is when the plaintiff "discovers the injury the abuse caused." (Id.) While claims brought under Section 340.1 must be brought *within three years* from this accrual date (Code Civ. Proc. § 340.1), a government tort claim must be brought within *6 months* of this same date (see Gov. Code § 911.2). Thus, in accord with *V.C.* and *County of Los Angeles*, the three year statute of limitations in Section 340.1 does not "trump" the six month government tort claim statute of limitations. (See also *Jefferson, supra,* 98 Cal.App.4th at p. 616 [Court explained that while the medical malpractice statute of limitations does not prevail over the six-month statute of limitations for filing a government claim, the statute is nonetheless applicable to determine date of accrual].) The

objectives of a shorter limitation period for public entities, touted by the District throughout its brief, remain in tact under the Court of Appeal's decision in this case.

ii. *Shirk*

The District represents that in *Shirk*, this Court held that "section 340.1 does not govern *the accrual date* for childhood sexual abuse causes of action for purposes of the Act's six month claim presentation deadline." (OB at p. 4.) But this is simply not true. In *Shirk*, the plaintiff alleged that she was molested by her teacher from 1978-1979. (*Shirk, supra,* 42 Cal.4th at pp. 205-207.) She filed her action against the school district on September 23, 2003. As noted by the Court: "Plaintiff acknowledges that because of her failure to present a claim to the School District in 1980, her cause of action against the School District was extinguished in 1980. But she argues that under section 340.1, subdivision (c), which revived for the year 2003 those childhood sexual abuse causes of action on which the statute of limitations had already lapsed as of January 1, 2003, her cause of action against the School District **re-accrued** on September 12, 2003, when she discovered that her present psychological injury was caused by teacher Jones's sexual abuse of her some 25 years earlier." (*Id.* at pp. 210-11.)

Thus, the plaintiff in *Shirk* ***conceded*** that her claim was barred and argued that her claim "re-accrued" pursuant to the 2003 revival amendment. This Court disagreed. "Section 340.1, subdivision (c), makes no reference whatsoever to any revival of the period in which to present a claim under

the government claims statute." (*Id.* at pp. 212-213.) The Court's statutory construction analysis focused on whether the 2002 amendment intended to revive not only expired civil claims but also expired government tort claims. (*Id.* at pp. 211-213.) Similar to *V.C.* and *County of Los Angeles*' holdings that the statute of limitations does not supplant the statute of limitations in the Government Code, this Court concluded that the revival period did not encompass expired government tort claims in light of an absence of any intention to do so by the Legislature. (*Id.*) "[W]e conclude that plaintiff's causes of action against the School District for injury resulting from her childhood sexual abuse by teacher Jones ***were not revived*** in 2003 by section 340.1, subdivision (c)." (*Id.* at p. 213 (emphasis added).) *Shirk* therefore does not address the issue presented here.

While in *Shirk*, the plaintiff also argued that her claim did not arise until 2003, when "she first learned from a mental health practitioner that her adult-onset emotional problems resulted from teacher Jones's molestation of her as a teenager," the Court rejected that contention, finding that the legislature did not intend to revive claims by persons who had recently discovered "*a new injury* attributable to the same predicate facts underlying a cause of action previously barred by failure to comply with the government claims statute." (*Id.* at p. 214 (emphasis added).) Thus, the Court simply reiterated its finding that the already barred claim could not be revived by some later realization of *additional* harm. (See also *Quarry*, 53 Cal.4th at p. 982, fn. 11.) Here, Plaintiff's position that her claim was

timely does not rely upon the discovery of a "new" or "additional" injury. Rather, as alleged, Plaintiff suppressed all memory of the sexual abuse and it was not until early 2012, when the latent memories of the sexual abuse resurfaced for Plaintiff, that she first discovered *any* injury.

Therefore, unlike *Shirk*, where the issue addressed was whether an already barred claim can be revived, the issue here is simply when Plaintiff's claim first accrued. Since *Shirk* only considered the issue of whether an already barred claim "re-accrued" under the 2003 revival period, it's reasoning does not apply to the issue of original accrual of Plaintiff's claim here. (See *People v. Harris* (1989) 47 Cal.3d 1047, 1071 ["It is axiomatic, of course, that a decision does not stand for a proposition not considered by the court."].)

B. The District Mistakenly Represents that Under *Shirk* a Claim Accrues at the Time of the Last Abuse Without Exception, and Because the District's Legislative History Analysis is Predicated on this Flawed Premise, it is Unpersuasive.

The District's further contention that the Legislative History of Government Code section 905, subdivision (m), which was enacted in response to *Shirk* and provides an exception to the claim presentation requirement for childhood sexual abuse claims arising out of conduct occurring on or after January 1, 2009, is relevant and determinative of the issues of accrual here is predicated on a perversion of the law.

The District represents: "Recognizing that *Shirk* held that the Act mandated the presentation of claim *within six months of the last act of abuse* ***regardless of repressed memories or delayed discovery***, the Legislature addressed *Shirk's* impact by amending Government Code section 905 to add subdivision (m)." (OB at p. 6 (emphasis added).) The District highlights that the Legislature chose only to exempt those claims occurring on or after January 1, 2009, and reasons: "By choosing not to exempt all childhood sexual abuse causes of action from the Act's claim presentation requirement and its six-month deadline, the Legislature approved, accepted and reaffirmed the holdings in *Shirk* and *V.C.* and confirmed that the Act requires a claim for childhood sexual abuse pre-January 1, 2009 conduct to be presented within *six months of the last abuse*." (OB at pp. 7-8 (emphasis added).)

The District's argument hinges upon its representation that *Shirk* held that a claim accrues at the time of the abuse without exception. But this was not the holding in *Shirk*. In *Shirk,* this Court noted only that "*[g]enerally*, a cause of action for childhood sexual molestation accrues at the time of molestation." (*Shirk, supra,* 42 Cal.4th at p. 210.)[4] While as explained above, in *Shirk*, the plaintiff *conceded* that her action accrued at the time of the last act of sexual abuse, this Court in no way held that in *all*

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[4] Throughout its Opening Brief, the District repeatedly references this language from *Shirk* but omits the word "*generally.*" (See OB at pp. 5, 26-27, 32, 51.)

cases a claim accrues at the time of incident of abuse.

Indeed, as recognized by several decisions, including those cited by The District, the delayed discovery rule may apply to extend the time that the claim is deemed to have accrued. (See *V.C., supra,* 139 Cal.App.4th at p. 515 ["Courts may equitably apply the delayed discovery doctrine to a cause of action for sexual abuse brought by a minor"]; *K.J., supra,* 172 Cal.App.4th at p. 1239 [while an action for childhood sexual molestation "generally" accrues at the time of molestation, the doctrine of delayed discovery may postpone the accrual date]; *Curtis T. v. Cty. of Los Angeles* (2004) 123 Cal.App.4th 1405, 1411 [court reversed trial court decision that the claim accrued at the time of the molestation as a matter of law; triable issue of fact as to whether delayed discovery rule applied to extend the date of accrual]; *S.M. v. Los Angeles Unified School District* (2010) 184 Cal.App.4th 712, 717 ["[t]he accrual date for presenting a government tort claim is determined by the rules applicable to determining when any ordinary cause of action accrues. (§ 901.) *That date may be postponed under the delayed discovery doctrine.*"]; see also *John R. v. Oakland Unified Sch. Dist.* (1989) 48 Cal.3d 438, 444 [equitable estoppel may apply to toll the period within which a government claim must be filed in a case involving abuse of a child].)[5]

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[5] As explained in more detail below in Section II, some of these decisions rely on the common law delayed discovery rather than the statutorily defined delayed discovery rule found in Section 340.1. However, whether common law or statutory, the very fact that these decisions acknowledge the

The District's analysis of the significance of the Legislature's reaction to *Shirk* in the passing of Senate Bill 640 is thus predicated on the false assertion that existing law required that all claims be filed within six months of the last incident of abuse. While the District selectively plucks statements concerning the Legislature's response to *Shirk*, wherein members of the Legislature describe the absurdity of the general rule that a claim for molestation by a child accrues at the time of the last molestation (see OB at pp. 41-50), the comments do not compel the conclusion that Court of Appeal erred in this case by finding that the date of accrual is the same as the date for purposes of commencing a civil action under Section 340.1.

Even just considering the comments quoted by the District in its brief, many of the quoted statements in fact note that *generally* the date of accrual for a cause of action for sexual abuse of a child; the Tort Claims Act "'*generally* requires claims for damages to be presented to the public entity within six months of when an injury occurred'" (OB at p. 43), the Act "'*generally* requires claims for damages to be reported to the local entity within six months of when the injury occurred" (OB at p. 43), the Act requires claims "'be brought within six months of the cause of the injury, *baring certain exceptions*'" (OB at p. 44) and "'[t]he Government Tort Claims Act *generally* requires claims for damages against a public entity to

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application of delayed discovery to the accrual of a claim for sexual abuse brought by a minor undermines the District's representation that in all instances the claim accrues at the time of the last molestation.

be presented to that entity within six months of when an injury occurred'" (OB at p. 46).

Nothing in the Legislative history cited by the District demands a finding that a claim *always accrues* at the time of the molestation, "regardless of repressed memories or delayed discovery." (See OB at p. 6.)

Judicial notice, as requested by the District, should therefore be denied. (See OB at pp. 39, fn. 13 & 41, fn. 14.) There is simply no benefit gleamed from examining the senate reports, memorandums, or other such documents concerning the amendment to Section 905, subdivision (m). It is without dispute that "[i]n ascertaining the meaning of a statute, we look to the intent of the Legislature as expressed by the actual words of the statute." (*Wasatch Prop. Mgmt. v. Degrate* (2005) 35 Cal.4th 1111, 1117–18.) "We examine the language first, as it is the language of the statute itself that has '*successfully braved the legislative gauntlet.*' (*Halbert's Lumber, Inc. v. Lucky Stores, Inc.* (1992) 6 Cal.App.4th 1233, 1238, 8 Cal.Rptr.2d 298.) '"It is that [statutory] language which has been lobbied for, lobbied against, studied, proposed, drafted, restudied, redrafted, voted on in committee, amended, reamended, analyzed, reanalyzed, voted on by two houses of the Legislature, sent to a conference committee, and, after perhaps more lobbying, debate and analysis, finally signed 'into law' by the Governor. The same care and scrutiny does not befall the committee reports, caucus analyses, authors' statements, legislative counsel digests and other documents which make up a statute's 'legislative history.'"' (*Ibid.*)

Here, there is no ambiguity as to the language of Government Code section 901, requiring that the date of accrual for claim filing purposes is the *same* as the accrual date for a corresponding civil cause of action. (See Gov. Code § 901.) There is also no ambiguity, and indeed no reason to even cite, Government Code section 905, subdivision (m), since the abuse occurred before January 2009 and thus a claim was required to be submitted to the District. As held in *K.J.*, and agreed with by the Court of Appeal here, "it would appear the 2008 amendment [§ 905, subd. (m)] is 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. (Code Civ. Proc., § 340.1, subd. (a).)." (*K.J., supra*, 172 Cal.App.4th at p. 1234; *Rubenstein*, 245 Cal.App.4th at p. 1046.)

Thus, for several reasons, the District fails to explain why this Court must consider the Legislative History pertaining to Government Code section 905, subdivision (m). This Court is capable of interpreting existing law and the passing comments by some members of the Legislature are not controlling, nor even persuasive on this issue.

Likewise misplaced is the District's citation and request for judicial notice of Senate Bills 131 and 924, which concern Code of Civil Procedure section 340.1. The District fails to point to any discussion in the Legislative History of these bills, which were vetoed by the Governor, that pertain to the issue of accrual presently before the Court. (See OB at pp. 52-54.) The

fact that the Legislature *did not mention* Government Code section 901 and its provision that a claim accrues on the same date as it would in an action between private litigants for claim filing purposes is of no consequence. Indeed, the only relevance to be gleamed from the Legislative History cited by the District here is the Legislature's unwavering interest in protecting victims of child sexual abuse.

II.

EVEN ASSUMING THE STATUTORILY DEFINED DELAYED DISCOVERY RULE PRESCRIBED BY SECTION 340.1 DOES NOT DIRECTLY APPLY TO DETERMINE THE DATE OF ACCRUAL, THE EQUITABLE DOCTRINE OF DELAYED DISCOVERY APPLIES AND WARRANTS A FINDING THAT PLAINTIFF'S CLAIM WAS TIMELY

Setting aside the issue of whether the statutorily defined delayed discovery rule applies, which as explained above and concluded by the Court of Appeal *it does*, an analysis of the equitable delayed discovery rule demonstrates that in the context of childhood sexual abuse claims, it is not until the victim understands, under an objective test, whether the abuse caused the victim harm that his or her claim accrues.

Here, Plaintiff was sexually abused by her high school track coach from 1993 to 1994. (*Rubenstein, supra,* 245 Cal.App.4th at p. 1044, 1047-1048; CT 406-408.) Plaintiff repressed all memory of the abuse, and it was not until early 2012, when she was about 34 years old, that the latent memories of the sexual abuse resurfaced. (Id.) Plaintiff presented her

claim to the District in June 2012, within six months after she realized the coach had sexually molested her. (Id.) Because Plaintiff's allegations therefore support application of the common law delayed discovery rule to extend the date of accrual until early 2012 when the memories of the abuse first resurfaced, the judgment of dismissal should be reversed.[6]

A. The Equitable Delayed Discovery Rule[7] Applies to Extend the Date of Accrual for Claim Filing Purposes.

As noted, the District posits throughout its brief that in a child molestation case, the claim accrues on the date of the last act of molestation as a matter of law. (See OB at pp. 4-6, 8, 18, 26-27, 32, 40, 50-51, 53-54.)

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In a footnote in its opening brief, the District represents: "Doe anticipates Rubenstein will argue in her merits brief that common law delayed discovery renders her claim timely. Because the Court of Appeal did not rely on common law delayed discovery, and Rubenstein did not present that issue in her answer as an additional issue for review, issues regarding common law delayed discovery, to the extent they even exist, are not presently before this Court." (OB at pp. 15-16, fn. 9.) The District is mistaken. As highlighted by the District, Plaintiff did reference application of the common law delayed discovery in her initial answer to the Petition. There was no basis to file any sort of cross-petition as the Court of Appeal concluded "delayed discovery principles may apply to a cause of action arising out of childhood sexual abuse." (*Rubenstein*, at p. 1045, citing *K.J., supra*, 172 Cal.App.4th at p. 1239.) Further, given the overlap between Legislatively created and judicially recognized delayed discovery provisions, and the fact that both support the Court of Appeal's opinion in this case, the issue may properly be considered by this Court.

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Plaintiff's reference to "equitable delayed discovery rule" is meant only to distinguish it from the statutorily defined discovery rule in Code of Civil Procedure Section 340.1. It may very well be that the two discovery rules (i.e. statutory [Section 340.1] and equitable) are the same.

The District unabashedly takes the position that the delayed discovery doctrine *does not apply* to child sexual molestation cases. (OB at p. 6.) Such an untenable position is not only belied by California's strong interest in protecting children, but in the many decisions where the delayed discovery has been applied to postpone the date of accrual in child sexual abuse cases. (See *K.J., supra,* 172 Cal.App.4th at p. 1239 [the doctrine of delayed discovery may postpone the accrual date]; *Curtis T. v. Cty. of Los Angeles* (2004) 123 Cal.App.4th 1405, 1411 [triable issue of fact as to whether delayed discovery rule applied to extend the date of accrual]; see also *S.M. v. Los Angeles Unified School District* (2010) 184 Cal.App.4th 712, 717 [the accrual date for presenting a government tort claim may be postponed under the delayed discovery doctrine]; *V.C., supra,* 139 Cal.App.4th at p. 515 ["Courts may equitably apply the delayed discovery doctrine to a cause of action for sexual abuse brought by a minor"].) The District fails to offer any explanation as to why children who are sexually abused should be singled out and precluded from relying on the delayed discovery rule. Indeed, it is in the very context of sexual abuse torts against children, where children are often manipulated by those trusted adults in a position of power over the child, that the application of the discovery rule is most appropriate.

"There is nothing in the statutory scheme to prohibit courts from granting additional time for the accrual of claims by minors who, due to their young age, inexperience, ignorance, or other vulnerabilities were

unable to comprehend that they had been molested. *The Legislature explicitly recognized that such comprehension can be delayed* when it created very generous limitations periods for adults who belatedly realize 'that psychological injury or illness occurring after the age of majority was caused by the sexual abuse' that occurred many years ago in childhood. (Code Civ. Proc., § 340.1, subd. (a).)" (*Curtis T. v. Cty. of Los Angeles* (2004) 123 Cal.App.4th 1405, 1421 (emphasis added).) *Curtis T.* demonstrates the flawed legal reasoning of the District here.

In *Curtis T.*, a plaintiff was molested by another child while living in a foster home and alleged that his foster parent saw the alleged molestation but failed to stop it. (*Id.* at p. 1408.) The plaintiff was between five and eight years old at the time of the sexual abuse. (*Id.* at p. 1412.) The plaintiff presented his claim with the County in 2003, when he was 12 year old, and within 6 months of when his mother first learned of the molestation. (*Id.*) The trial court sustained the County's demurrer without leave to amend on the ground that the claim was untimely. Similar to the District here, the County argued "[t]here is no 'delayed discovery' rule with respect to such government claims," and that "that the accrual of a minor's claim for molestation '*begins on the date of molestation.*" (*Curtis T.*, 123 Cal.App.4th at pp. 1413-14.) The Court of Appeal reversed.

After noting that the delayed discovery rule has been judicially applied to extend the date of accrual to claims in a number of different contexts, and that "[i]n addition to the judicial application of the delayed

discovery rule, the Legislature has adopted the delayed discovery rule in certain statutes of limitations," the Court held "[w]hile there is no blanket rule for always or never applying the delayed discovery rule to minors' molestation cases, **we believe the courts may equitably apply the delayed discovery rule in appropriate child molestation cases**." (*Id.* at pp. 1416-1418 (emphasis added).) Finding that such facts as the plaintiff's youth, ignorance, and inexperience may support application of the delayed discovery rule to postpone the accrual of his claim, the Court reversed and ordered that the plaintiff be given the opportunity to amend his complaint. (*Id.* at p. 1422-1422.)

Citing *Evans v. Eckelman* (1990) 216 Cal.App.3d 1609, a decision predating the Legislature's extended statute of limitations in Section 340.1, the Court noted "[i]n this case, '[w]e cannot, however, state as a matter of law that it is psychologically impossible for plaintiff[] to have lived in such continuing ignorance that what happened to [him] was wrong." (*Curtis T.*, 123 Cal.App.4th at p. 1421, citing *Evans, supra,* 216 Cal.App.3d at p. 1619.) The Court in *Curtis T.* further noted, and again citing *Evans,* "One of the '[t]wo common themes run[ning] through the cases applying the discovery rule of accrual' is that 'the rule is applied to types of actions in which it will *generally be difficult for plaintiffs to immediately detect or comprehend the breach or the resulting injuries* .... Even when the breach and damage are not physically hidden, *they may be beyond what the plaintiff could reasonably be expected to comprehend.*'" (*Curtis T.*, at p.

1420, citing *Evans, supra*, 216 Cal.App.3d at pp. 1614-1615 (emphasis added).)

Thus, despite the fact that the decision in *Evans* is more than 25 years old, and thus predates the Legislature's recognition of the appropriate delayed discovery analysis in the context of childhood sexual abuse, as well as the significant development in the research of Child Sexual Abuse Accommodation Syndrome revealing why adult victims of childhood sexual abuse often do not realize that the harm they have suffered is directly related to the abuse they endured as a child (see below subsection B), the Court recognized the unique context of childhood sexual abuse cases and the role of the doctrine of delayed discovery in determining accrual of the cause of action. *Evans*, as well as *Curtis T.*, underscore the fact that in the context of childhood sexual abuse - and in particular when such abuse is engaged in by a person in a position of authority and power over the child - it is not reasonable to demand that a young child comprehend the existence of a cause of action at the time of the molestation.

Thus, the District's position that claims for sexual abuse against a child always accrue at the time of the molestation, and the equitable delayed discovery rule does not apply to postpone the date of accrual, is at its core fundamentally flawed. The District fails to meaningfully appreciate the context of the wrongdoing here and the appropriateness of the delayed discovery rule to claims of sexual abuse against a child. "'A survivor of childhood sexual abuse often lacks the means or ability to ascertain his or

her injuries and their cause within the traditional limitations period. Many victims of childhood sexual abuse have repressed all memory of the abuse for many years or, if they do remember the abuse, they minimize or deny its effects to the extent that they do not connect the abuse with later injuries. *Generally, it is only when an adult survivor of sexual abuse enters therapy that any meaningful understanding of his or her injuries can be developed.*'" (*Sellery v. Cressey* (1996) 48 Cal.App.4th 538, 546-548.)[8]

B. Application of the Delayed Discovery Rule to Claims Concerning Sexual Abuse of Children Should Not be the Exception, but Rather Should be the Presumptive Rule for Purposes of Determining the Date of Accrual.

As highlighted by this Court in *Norgart*, the discovery rule is the "most important exception" to the general rule defining the accrual date of a cause of action. (*Norgart*, 21 Cal.4th at p. 397.) This is especially true in the context of childhood sexual abuse cases. While several appellate and trial court decisions faced with issues concerning the timeliness of a claim for sexual abuse of a child often begin by citing this Court's statement in

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On this point, Plaintiff notes that while she suppressed all memory of the abuse until early 2012, and then filed her government within six months of first recalling the abuse, the fact that a victim may be aware that he or she was abused does not foreclose application of the delayed discovery rule. (See *Sellery*, at pp. 546-548, citing *Lent v. Doe* (1995) 40 Cal.App.4th 1177, 1185-1186 [the fact that a victim of childhood sexual abuse was at all times aware that he suffered such abuse, does not negate a finding that it was only in adulthood that he discovered that the psychological injury was caused by the childhood sexual abuse].)

Shirk that "[*g*]*enerally*, a cause of action for childhood sexual molestation accrues at the time of molestation" (*Shirk, supra*, 42 Cal.4th at p. 210), the reality is that the objective facts of childhood sexual abuse demonstrate that a child most often *does not know* he or she is being injured at the time of the sexual abuse. It is only from an adult perspective, and indeed an adult who has not been a victim of childhood sexual abuse, that the harm from such abuse could be recognized at the time of the abuse so as to trigger accrual of a claim.

Recent studies and articles concerning sexual abuse of children and how children process such abuse validate the notion that children are often mentally and emotionally incapable of recognizing the harm from such abuse until much later in adult life.

> Grooming usually involves normalizing sexualized behavior in the offender-child relationship by introducing increasingly intimate physical contact by the offender toward the victim, very gradually sexualizing the contact, and sometimes using child pornography to break down the child's barriers. **This *gradual process and the relationship of trust and authority that the offender usually holds over the child, along with the child's immaturity and subservience, serves to break down the child's resistance.* These children have a difficult time understanding what is happening to them and why and have very little control over their circumstances.**

U.S. DEP'T OF JUSTICE: THE NATIONAL STRATEGY FOR CHILD EXPLOITATION PREVENTION AND INTERDICTION: A REPORT TO CONGRESS 21 (Aug. 2010), emphasis added; See also Anne-Marie McAlinden, 'Setting 'Em Up': Personal, Familial and Institutional Grooming in the Sexual Abuse of Children, 15 SOCIAL & LEGAL STUDIES 339, 340 (2006) [grooming "refers to the situation whereby a potential offender will set up opportunities to abuse by gaining the trust of the child in order to prepare them for abuse."]; Karen M. Staller, *Missing Pieces, Repetitive Practices: Child Sexual Exploitation and Institutional Settings*, 12 CULTURAL STUDIES/CRITICAL METHODOLOGIES 274, 275-76 (2012) [noting, "offenders also engage in institutional grooming, which involved manipulating entire systems or institutions into believing they do not present a danger to children."].)[9]

Thus, because children frequently do not understand what is happening to them when they are being sexually abused, it is often difficult

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The objective facts of childhood sexual abuse and the failure of the law to recognize such when determining dates of accrual for statute of limitations purposes has been, and continues to be, explored by Marci Hamilton, a highly regarded professor of constitutional law and one of the nation's leading advocates for women's and children's rights. (See http://sol-reform.com/; http://www.cardozo.yu.edu/news/professor-marci-hamilton-leading-church-state-and-constitutional-law-scholar-and-advocate-women.) If her recent work on the topic is published before the Court issues its opinion, Plaintiff will provide such citations to the Court.

for these victims to realize that the sexual acts themselves are abuse. As explained in these recent studies, when a child is sexually abused, such abuse often leads to disassociation, suppression of memories, depression and other mental issues, as well as substance abuse, all of which can affect the child's, and then adult's, ability to appreciate the harm caused by the abuse (See Guy R. Holmes, *See No Evil, Hear No Evil, Speak No Evil: Why Do Relatively Few Male Victims of Childhood Sexual Abuse Receive Help for Abuse-Related Issues in Adulthood?*, 17(1) CLINICAL PSYCHOL. REV. 69, 69-88 (1997); Bagley, C.,Wood, M., & Young, L., *Victim to Abuser: Mental Health and Behavioral Sequels of Child Sexual Abuse in a Community Survey of Young Adult Males*, 18 CHILD ABUSE & NEGLECT, 683-97 (1994); Frank W. Putnam, *Ten-Year Research Update Review: Child Sexual Abuse*, 42 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY 269, 273 (2003); David Lisak, *The Psychological Impact of Sexual Abuse: Content Analysis of Interviews with Male Survivors*, 7(4) J. OF TRAUMATIC STRESS 525, 525-526, 544 (1994); see also Lena Lim et al., *Gray Matter Abnormalities in Childhood Maltreatment: A Voxel-Wise Meta-Analysis*, AMERICAN JOURNAL OF PSYCHOLOGY IN ADVANCE, April 29, 2014, at 7 [the reality that a victim of childhood sexual abuse may not even know the sexual acts were abuse operates at the level of neurobiology: studies indicate that there is an association between childhood maltreatment, including sexual abuse, and gray matter abnormalities in specific brain regions that "suggest an environmentally triggered disturbance in the

normal development of these networks that may underlie the cognitive and emotional problems that develop as a consequence of early adversities."].)

Thus, while as adults, it is not hard to comprehend that at the time a child is being sexually abused, the child is being *harmed,* the very contours of childhood sexual abuse preclude a child from objectively recognizing such abuse and harm. The California Legislature has repeatedly recognized that victims of childhood sexual abuse often do not know that they have been harmed or abused until well into their adult years. It is precisely because of these concerns that in 1990, the Legislature amended Section 340.1 to enlarge the limitations period as well as create "*its own statutory delayed discovery rule*, evidencing intent to provide a new rule that would extend delayed discovery principles beyond what had been recognized in the case law." (*Quarry*, 53 Cal.4th at p. 965 (emphasis added).) "'The obvious goal of amended section 340.1 is to allow sexual abuse victims a longer time period in which *to become aware of their psychological injuries* and remain eligible to bring suit against their abusers.'" (*Id.* at p. 963 (emphasis added).)[10]

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The Legislative History for Senate Bill 108, which created the statutory delayed discovery rule in then existing Section 340.1, is replete with statements recognizing the unique context of determining the date of accrual for a claim arising out of sexual abuse of a child. (See e.g., Sen. Judiciary Com., Analysis of Sen. Bill No. 108, (1989-1990 Reg. Sess.), March 28, 1989 ["The proponents contend that it is well documented that most victims of childhood sexual abuse either repress their memories of the abuse or are unable to appreciate their injuries until well into their adult years."]; Ass. Com. On Judiciary, Analysis of Sen. Bill No. 108 (1989-1990

Therefore, while at one time it may have been understood that claims concerning sexual abuse of children "generally" accrued at the time of the abuse, the more recently developed research in the area reveals that the delayed discovery rule will *almost always* apply to extend the time for which the claim accrues for a victim of childhood sexual abuse given the context of the abuse. While, of course, that does not mean that delayed discovery will apply in *every case,* such research dispels the outdated understanding that a claim for childhood sexual abuse generally accrues at the time of the last act of abuse.

Thus, whether it is the statutorily defined delayed discovery rule in Section 340.1, or a judicially recognized equitable delayed discovery rule, the analysis of accrual must take into account the unique circumstances of childhood sexual abuse and how victims often do not appreciate the harm, or even the fact that the sexual conduct was abuse, until much later in life. Against this backdrop, the facts of a particular case should guide an analysis of accrual. Here, Plaintiff's allegations that she, like so many victims of

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Reg. Sess.), as amended Aug. 21, 1989, p. 3 ["Several proponents contend that when victims of childhood sexual abuse do not disclose, or are not believed when they attempt to disclose, incidents of abuse, they will 'accommodate' to the 'abuse psychologically by mechanisms of denial, repression, and dissociation from the experiences of abuse and from the feelings of fear and betrayal which they cause.' It is argued that the child will internalize the fear, anger or guilt which result from the abuse and that this 'internalization' produces many of the long-term psychological injuries and results in the victim's being unable either to 'remember the abuse' or 'to perceive its effects, until he or she enters psychological therapy or counseling at some point later in adult life.'"].)

abuse, repressed all memory of the sexual abuse until early 2012, support application of the delayed discovery to the accrual of her claim and thus support the Court of Appeal's order reversing judgment.

CONCLUSION

For the foregoing reasons, the Court should affirm the opinion of the Court of Appeal, and reverse the judgment, remanding the matter for further proceedings before the trial court.

Dated: October 14, 2016 **LAW OFFICES OF ELLIOT N. KANTER**

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By: 

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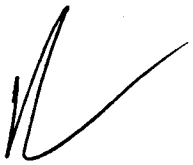

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Executed on October 14, 2016, at Pasadena, California.

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

Holly Boyer

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(Trial Judge)

Court of Appeal
Fourth Appellate District,
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