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IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JANE DOE, A MINOR, BY HER GUARDIAN AD LITEM AGUSTINA KARINA FLORES; JOHN DOE, A MINOR, BY HIS GUARDIAN AD LITEM VICTORIA MACIAS; JANE GJ DOE, A MINOR, BY HER GUARDIAN AD LITEM BLANCA GAMEZ; JANE DR DOE, A MINOR, BY HER GUARDIAN AD LITEM, SILVIA PICOS; JANE DS DOE; JANE RY DOE; AGUSTINA KARINA FLORES; AND VICTORIA MACIAS,
Plaintiffs and Petitioners,

v.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF LOS ANGELES,
Respondent;

MOUNTAIN VIEW SCHOOL DISTRICT,
Defendant and Real Party in Interest.

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIVISION 2, CASE NO. B313874
HON. MARY ANN MURPHY, TRIAL JUDGE
LOS ANGELES COUNTY SUPERIOR COURT, CASE NO. BC712514

PETITION FOR REVIEW

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STATUTES AT ISSUE

Included within California's Rape Shield laws is Evidence Code sections 1106 and 783. "In any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, opinion evidence, reputation evidence, and **evidence of specific instances of the plaintiff's sexual conduct**, or any of that evidence, ***is not admissible*** **by the defendant in order to prove** consent by the plaintiff or ***the absence of injury to the plaintiff***, unless the injury alleged by the plaintiff is in the nature of loss of consortium." (Evid. Code § 1106(a).) Subsection (e) states: "This section shall not be construed to make inadmissible any evidence offered to attack the credibility of the plaintiff as provided in Section 783."

ISSUES PRESENTED

1. In an action involving sexual abuse of a child by her teacher when the child was just 8 years old, is evidence that the child subsequently suffered a separate independent sexual assault by a teenage boy ***admissible at trial*** to undermine the child's claim for emotional distress damages caused by the teacher's sexual abuse under the credibility exception in Evidence Code section 783, or is that evidence an unvarnished effort to claim "the absence of injury to the plaintiff" and therefore inadmissible under the direct terms of Section 1106, subdivision (a)?

2. Where the defendant disavows any intent to use prior sexual conduct to impeach a plaintiff under Section 783 and thus no offer of proof was made, no hearing was held, and no order was issued stating precisely what evidence may be introduced under Section 783, and indeed the trial court found that the evidence at issue *fell outside* of the ambit of Sections 1106 and 783, can the court's order admitting such evidence under a Section 352 analysis nonetheless be sufficient to comply with Section 783?

INTRODUCTION AND WHY REVIEW SHOULD BE GRANTED

In its published opinion, the Court of Appeal, Second District, Division Two, eviscerated the protections afforded victims of sexual abuse under California's Rape Shield laws and specifically Evidence Code section 1106. Despite the clear prohibition in Section 1106 precluding the admissibility of evidence of a victim's prior sexual conduct to prove an *absence of injury*, the Court of Appeal here concluded that substantive evidence of a victim's prior sexual conduct may be admitted to prove an absence of damages so long as it masquerades as attacking the victim's "credibility" in making a claim for damages. The instance of conduct being placed before the jury as purportedly bearing on credibility is not the making of a false statement, but *the prior sexual conduct itself*. Pursuant to the Court's analysis, the very existence of the prior sexual conduct alone undermines and impeaches the victim's claim for damages rendering it admissible so long as it is not unduly prejudicial under an Evidence Code section 352 analysis. While the Court acknowledged that such an interpretation creates a "tension" with the Legislature's explicit statement in Section 1106, subdivision (a), providing that evidence of prior sexual conduct "***is not admissible***" to prove "the absence of injury to the plaintiff," the Court attempted to justify its interpretation on a fatally flawed and unprecedented statutory construction analysis.

Review is imperative as the Court of Appeal's interpretation of the credibility exception in Section 1106, subdivision (e), swallows whole the protection afforded victims in subdivision (a). In its place, the Court left victims of sexual abuse with nothing but a "case-by-case" Section 352 analysis to defend against the admissibility of their prior sexual conduct at trial. Beyond this, the Court of Appeal's finding that the trial court's Section 352 analysis here was sufficient in kind to satisfy the rigorous requirements prescribed by Section 783 where prior sexual conduct is

admitted at trial to attack the credibility of the victim sets forth dangerous precedent rendering the entire statutory scheme vulnerable. The stakes could not be higher and the need for review more compelling.

This is not the first time Plaintiff has been required to seek relief from this Court on this very issue. This case arises out of the horrendous sexual abuse of multiple young students at Miramonte Elementary School, by their teacher, Joseph Alfred Baldenebro. Plaintiffs allege that Defendant Mountain View School District ("the District") failed to take any meaningful action to protect them from such known and foreseeable sexual abuse. Plaintiff Jane DS Doe suffered the worst sexual abuse by Baldenebro of all of the plaintiffs in this action. At just 8 years old, and in the fourth grade, her teacher Baldenebro repeatedly molested her, which included such horrific acts as digital penetration, oral copulation and ejaculating on her hands. (Exh. 1.)[1] The physical and emotional abuse she suffered is unfathomable.

On the eve of trial, the District revealed that its focus at the trial will not be defending against its complete failure to protect the students within its care from the known and suspected sexual impropriety of Baldenebro, but the perverse strategy of exploiting a subsequent sexual assault suffered by Jane DS Doe when she was approximately 13 years old in 2013 to argue that the molestation she alleges in this action did not cause the injury she claims. According to the District, "everyone has a right to privacy, but that was placed at issue with this to show the concurrent cause of the harm and

[1] In support of the Petition for Writ of Mandate, two volumes of exhibits were filed with the Court of Appeal. Plaintiffs note that Volume 2 of the Writ Exhibits contained documents *ordered under seal* by the Court of Appeal (see Vol. 2, pages 108-146 [filed under seal].) Additional exhibits were filed in Support of the Reply to Answer to Petition for Review before this Court on 8/6/21. The citations correspond to those Writ Exhibits as well as the Court of Appeal's Slip Opinion.

that we have the right, *once she has said I'm emotionally harmed by Baldenebro's conduct* to show alternative causes of that harm. *So she's placed her mental well being at issue in this case*." (Exh. 7, p. 91 (emphasis added).) The District argued that since the abuse was non-consensual and occurred after the sexual abuse of the teacher, it did not qualify as "sexual conduct" falling within the protections Section 1106.

In connection with its review of Plaintiffs' motion in limine to exclude evidence of prior sexual abuse at trial, the trial court instructed the District to file a "Evidence Code Section 783 – 782" motion "in an abundance of caution." (See Exh. 6, pp. 75-76; Exh. 7, p. 92.) That day the District filed a Section 782 application explicitly maintaining its contention that neither Section 1106 nor Section 782/783 applied since the evidence was *not* sexual conduct falling within the statutes *and* the District did not seek to admit the evidence to "'attack [plaintiff's] credibility.'" (Exh. 10, p. 151.) The District explicitly represented to the trial court in its Section 782/783 motion that it did *not* "intend to use the 2013 molestation evidence to 'attack the credibility' of Susana D. The District intends ***only*** to use the 2013 molestation evidence to establish an alternative explanation for her psychological harm and condition." (Writ Exh. 10 at 150-151 (emphasis added); see also Exh. 9, p. 109 [Decl. of Christovich filed under seal].)

Shockingly, the trial court agreed with the District that the 2013 independent sexual abuse of Jane DS Doe was not "sexual conduct" falling with the protection of Sections 1106 and 782/783 since it was not consensual. (Exh. 7, p. 92-94 ["this is not prior sexual conduct within the meaning of 782."].) The trial court continued: "But be that as it may, there's still an issue of whether this is admissible because it was the subject of an MIL." (Exh. 7, p. 93.) The court then employed an Evidence Code section 352 analysis and concluded that the prior sexual conduct is

admissible as it is "highly and directly relevant on defense damage case" and its introduction is not unduly prejudicial. (Exh. 7, p. 93-95.)

Plaintiffs immediately filed a Petition for Writ of Mandate and Request for Immediate Stay with the Court of Appeal. The Court of Appeal denied the Writ finding "Petitioner has an adequate remedy by way of appeal." Plaintiff then filed a Petition for Review before this Court and Request for Immediate Stay of Trial. This Court granted review and remanded the matter to the Court of Appeal to issue an order to show cause. The Court of Appeal did so and issued its published opinion denying Plaintiff's Writ Petition and *permitting the District to admit evidence of the prior sexual assault* of Jane DS Doe to "impeach" her claim for damages.

In its published opinion, the Court of Appeal began by finding that the term "plaintiff's sexual conduct" as used in Sections 1106 and 783 encompasses *involuntary* sexual abuse suffered by the plaintiff – thus rejecting the trial court's finding here that Sections 1106 and 782/783 did not apply since the conduct was not consensual. (Opn. at 10-12.)[2] In so finding, the Court of Appeal concluded that the 2013 sexual abuse could not be admitted as substantive evidence to show "the absence of injury" stemming from the teacher's sexual abuse of Jane DS Doe under Section 1106(a). (Opn. at 9-15.)

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[2] Plaintiffs do not seek review of this aspect of the Court's opinion. Indeed, following review and remand by this Court, the District *itself* abandoned any argument in its briefing before the Court of Appeal that Section 1106 only protected voluntary sexual conduct. In any event, and as noted by the Court of Appeal here, "[a] handful of 31 year-old cases in California have interpreted the term 'sexual conduct' to reach involuntary sexual conduct inflicted upon a victim. (*Knoettgen v. Superior Court* (1990) 224 Cal.App.3d 11, 14-15 []; *People v. Daggett* (1990) 225 Cal.App.3d 751, 754, 757 [].)" (Opn. at 12.) The Court also properly rejected the District's argument that because the sexual abuse occurred *after* the abuse by the teacher it somehow fell outside of Sections 1106 and 783. (Id. at 15-16.)

The Court of Appeal thereafter stressed that "[u]nlike its counterpart in the Federal Rules of Evidence, section 1106 erects 'an "**absolute bar**" to the admission of evidence of 'specific instances of plaintiff's sexual conduct."'" (Opn. at 12 (emphasis added).)

> Consequently, a person accused in a civil case of inflicting physical or psychological trauma upon the plaintiff *will be barred from adducing any evidence that the plaintiff's trauma was caused in part by sexual abuse inflicted by someone else* and may therefore end up compensating the plaintiff for injuries inflicted by someone else. (Compare Civ. Code, § 1431.2 [joint tortfeasors are not to be held jointly and severally liable for noneconomic damages].) Absent section 1106, such outcomes would be less likely because courts would be called upon to balance the "right of civil litigants to discover [and introduce] relevant facts [bearing on causation] against the privacy interests of persons subject to discovery," bearing in mind that "plaintiff[s] cannot be allowed to make [their] very serious allegations without affording defendants an opportunity to put their truth to the test." (*Vinson, supra*, 43 Cal.3d at pp. 841-842.) **But section 1106 does that balancing in advance, and has categorically struck that balance in favor of exclusion.** (Stats. 1985, ch. 1328, § 1 ["The Legislature concludes that the use of evidence of a complainant's sexual behavior is more often harassing and intimidating than genuinely probative, and the potential for prejudice outweighs whatever probative value that evidence may have"].)

(Opn. at 12-13 (emphasis added).)

Despite this and although recognizing the Legislature's "clear intent" to prohibit a civil defendant from admitting evidence at trial of the victim's prior sexual conduct to prove consent or the absence of damages, the Court of Appeal held that the "categorical bar is to some extent softened, ***if not potentially undermined***" by Evidence Code section 783. (Opn. at 13.) Evidence Code section 1106, subsection (e), provides: "This section shall not be construed to make inadmissible any evidence offered to attack the credibility of the plaintiff as provided in Section 783." (Evid.

Code § 1106(e).) As detailed below, evidence of sexual conduct falling within the protection of Section 1106 may be admitted to attack the credibility of a witness only after the defense makes the requisite showing under either Evidence Code sections 782 or 783 and a hearing is held outside the presence of the jury prior to admission of the evidence. (See Evid. Code §§ 1106, 782, 783; *People v. Fontana* (2010) 49 Cal.4th 351, 362 [in discussing Section 782, which largely mirrors Section 783, the Court noted: "Evidence of the sexual conduct of a complaining witness is admissible in a prosecution for a sex-related offense ***only under very strict conditions***."]; *People v. Bautista* (2008) 163 Cal.App.4th 762, 782; *Meeks v. Autozone, Inc.* (2018) 24 Cal.App.5th 855, 874–75.)

According to the Court of Appeal, because the existence of prior sexual conduct *itself* impeaches a victim's claim for civil damages against a defendant, such substantive evidence is admissible under the "credibility" exception provided for under Section 783. (Opn. at 15.) According to the Court, a "tension" exists because "the very same evidence section 1106 categorically excluded becomes admissible – subject to balancing under section 352 – under section 783 to impeach." (Id.) None of this is correct.

As detailed below, the credibility exception is reserved for those instances where the conduct being placed before the jury as bearing on credibility ***is something other than the prior sexual conduct itself***. An example would be where the victim has made a false statement that coincidentally concerns prior sexual conduct. As explained in one case, "Even though the content of the statement has to do with sexual conduct, ***the sexual conduct is not the fact from which the jury is asked to draw an inference about the witness's credibility***. The jury is asked to draw an inference about the witness's credibility from the fact that she stated as true something that was false. The fact that a witness stated something that is not true as true is relevant on the witness's credibility whether she

fabricated the incident or fantasized it." (*People v. Franklin* (1994) 25 Cal.App.4th 328, 335.) Such an interpretation preserves the intent of the Legislature and harmonizes the credibility exception with the absolute bar prescribed by Section 1106(a).

Courts, including this Court, have stressed that with respect to the Rape Shield laws, which include Evidence Code sections 1106 and 783:

> **Great care must be taken to insure that this [credibility] exception to the general rule barring evidence of a complaining witness' prior sexual conduct,** i.e., Evidence Code section 1103, subdivision (b)(1) [now § 1106(d)], ***does not impermissibly encroach upon the rule itself* and *become a 'back door'* for admitting otherwise inadmissible evidence**.

(*People v. Rioz* (1984) 161 Cal.App.3d 905, 918–919; see also *People v. Fontana* (2010) 49 Cal.4th 351, 363 [quoting same].) The Court's finding here that the independent sexual abuse suffered by Plaintiff in 2013 is admissible to impeach her claim for emotional distress damages caused by the sexual abuse of her teacher is the ultimate "back door" admission of prior sexual conduct. According to the Court of Appeal, evidence of prior sexual conduct bears on credibility because *the very fact that the plaintiff was victimized by a prior sexual conduct may tend to prove that Plaintiff's claimed damages were not all caused by this defendant's wrongful conduct*.

The effect of the Court's decision is that while Section 1106 bars a defendant from introducing evidence of a victim's sexual conduct to show an absence of injury, a defendant can always invoke Section 783 to introduce evidence of sexual conduct to impeach a claim of injury, in other words, show an absence of injury. The credibility exception essentially swallows the Legislature's "absolute bar" of such evidence whole.

Review is also warranted because none of the procedural requirements of Evidence Code section 783 were met and the Court of

Appeal's published opinion finding otherwise erodes the very structures in place to protect victims from such offensive intrusions into their lives. As detailed below, the District disavowed any intention to use the prior sexual conduct to "attack the credibility" of Plaintiff Jane DS Doe. As such, there was *no offer of proof* as to the relevancy of the evidence on the issue of credibility (Plaintiff had not even testified), there was no hearing allowing questioning of Plaintiff regarding the supposed offer of proof, and because the trial court found Section 1106 and 783 *to be inapplicable*, there was no deference or even consideration given to the Legislature's codification of the balancing concerning such evidence. (See *Vinson*, 43 Cal.3d at pp. 843-844 [the legislature codified the "balancing process" and generally "obviated the need for us to engage in an individualized balancing of privacy with discovery" when it enacted the Rape Shield laws].)

Nevertheless, the Court of Appeal excused each of these omissions, holding it was sufficient for the trial court to invite the District to make a 783 motion (in which the District disavowed its intent to rely on section 783) and hold a hearing where it conducted a section 352 analysis. But these omissions are inexcusable. The procedural protections guaranteed by section 783 cannot be so easily obviated as the Court has done here.

Review by this Court is warranted under California Rules of Court, rule 8.500 (b)(1) given the extremely troubling statutory interpretation employed by the Court in its published opinion and the important public policies behind California's Rape Shield laws that are now in jeopardy.

BRIEF STATEMENT OF FACTS AND PROCEDURAL POSTURE

This case arises out of the horrendous sexual abuse of multiple young students at Miramonte Elementary School, by their teacher, Joseph Alfred Baldenebro. The Petitioners and Plaintiffs are Jane Doe, a minor by her Guardian ad Litem Agustina Karina Flores; John Doe, a minor, by his Guardian Ad Litem Victoria Mascias; Jane GJ Doe, a minor, by her Guardian ad Litem Blanca Gamez; Jane DR Doe, a minor, by her Guardian ad Litem, Silvia Picos; Jane DS Doe; Jane RY Doe; Agustina Karina Flores; and Victoria Macias. Respondent is the Superior Court of Los Angeles. The real party in interest and Defendant is Mountain View School District ("the District").

A. The Trial Court's Ruling Permitting the District to Admit Evidence at Trial of the 2013 Sexual Assault of Plaintiff.

On May 26, 2021, Plaintiffs filed "Plaintiffs' Motion in Limine No. 10 – To Exclude Reference to Plaintiffs' Sexual History with Persons Other than the Abuser, Joseph Baldenebro." (Opn., p. 4; Exh. 2.) Plaintiffs sought to preclude the District from using evidence that Jane DS does was subsequently sexually abused by a teenage boy in 2013 to show an absence of damages caused by Baldenebro. (Exh. 2.) Citing Evidence Code section 1106, as well as *Knoettgen v. Superior Court* (1990) 224 Cal.App.3d 11, Plaintiffs explained that prior sexual history, including prior assaults, cannot be used to argue *an absence of injury* by the plaintiff. (Exh. 2, pp. 43-44.)The District did not file an opposition to Plaintiffs' MIL No. 10. (See Exh. 3.)

On July 19, 2021, in reviewing the motions in limine and specifically Plaintiffs' MIL No. 10, the trial court stated that before any evidence concerning a victim's sexual conduct may be introduced at trial, the defense must file an "Evidence Code Section 783 – 782" motion. (Exh.

6, pp. 75-76; Opn., p. 4-5.) Counsel for the District appeared to then correct the court and note that it is a "782" motion (Exh. 6, pp. 75-76), which the District thereafter filed. (Exhs. 8-1; Opn., at 4, fn. 3 [while the District filed a Section 782 motion, the Court of Appeal treated it as a Section 783 motion which is the statute applicable in civil actions].)

Throughout its motion the District explicitly stated its position that Section 782/783 does not apply since the sexual abuse is not "sexual conduct" falling within the ambit of Evidence Code sections 1106 and 782/783 (Exh. 10, p. 150) and further that "the District intend to use the 2013 molestation evidence to 'attack the credibility'" of Plaintiff Jane DS Doe. (Exh. 10, p. 151; see also Opn., pp. 4-5.)

The trial court agreed with the District and held that the admissibility of the 2013 sexual abuse was not governed by either Section 1106 or Section 782/783. "This is not prior sexual conduct within the meaning of 782. That is a willingness to engage in sexual conduct." (Exh. 7, p. 92; Opn., p. 5.) After finding sections 1106 and 782/783 to be inapplicable, the trial court conducted a traditional relevance analysis under section 352 to determine whether the 2013 molestation is admissible. (Opn., p. 5; Exh. 7, p. 93.) The court held that the 2013 molestation is admissible "*because it's relevant on damages*." (Opn., p. 5; Exh. 7, p. 93.)

B. Writ Proceedings

On July 29, 2021, Plaintiffs filed a Petition for Writ of Mandate and Request for Immediate Stay with the Court of Appeal, Second Appellate District. (Opn., p. 6.) After issuing a stay of the trial proceedings that same day, on July 30, 2021, the Court of Appeal, Second Appellate District, Division 2, issued an order dissolving the Stay and denying the Writ Petition. (Opn., p. 6.) On August 1, 2021, Plaintiffs filed a Petition for Review with this Court. (Opn., p. 6.)

As this was occurring, the trial court ruled—over Plaintiffs' repeated objections—that the District could discuss the 2013 sexual assault that was the subject of the Petition for Review during the District's Opening Statement, which the District did in its Opening Statement to the jury. (Opn., p. 6-7.) Plaintiffs also briefly mentioned the 2013 sexual assault in opening statement in an attempt to "minimize the sting" of this information before the District's opening. (Id.)

On August 9, 2021, this Court granted Plaintiffs' petition and remanded the matter to the Court of Appeal to issue an order to show cause. (Opn., p. 6.) The Court of Appeal did so, obtained further briefing, and heard argument. (Opn., p. 6.) In its Return brief before the Court of Appeal following remand by this Court, the District abandoned its previous position that the evidence concerning the 2013 sexual assault falls outside the reach of Evidence Code sections 1106 and 783. Instead, and *for the first time* in this action, the District took the position that the 2013 sexual abuse may be admissible to the issue of Plaintiff's credibility and thus should the Court of Appeal vacate the trial court's order admitting the evidence on the issue damages, the Court should "[d]irect respondent court to conduct Evidence Code section 783 proceedings." (Return at 7, 15.)

C. The Court of Appeal Issues a Published Opinion Denying Writ of Mandate.

The Court of Appeal began its Opinion by finding that "sexual conduct" within the meaning of Evidence Code section 1106 applies to sexual abuse, and thus evidence of such conduct is embraced by the protections of Sections 1106 and 783. (Opn. pp. 9-16.) While the Court recognized that the trial court's ruling that Sections 1106 and 783 were inapplicable since the 2013 sexual abuse fell outside of these statutes ***was mistaken***, the Court of Appeal chose to view the ruling as "ambiguous" and

thereafter construed the ruling as "admitting the 2013 molestation *for impeachment purposes only*" under Section 783. (Id. p. 8.)

The Court of Appeal then acknowledged that Section 1106 erects an "absolute bar" to the admissibility of prior sexual conduct to prove an absence of injury, but held that the statutes permit use of such substantive evidence "to impeach" a claim for emotional distress damages by the plaintiff. (Opn. at 12-15, 17-18.) The Court described the "tension" that exists between Section 1106's bar and Section 783's exception for credibility, which the Court found especially pronounced in cases such as this because "the very same evidence section 1106 categorically excludes becomes admissible—subject to balancing under section 352—under section 783 to impeach." (Opn., p. 15.)

Moving on to the section 783 analysis, the Court acknowledged that the trial court erred in finding section 783 *inapplicable*, but reasoned that the error was of no consequence because it is tasked with reviewing the court's ruling, not its rationale. (Opn., p. 16-17.) The Court thereafter noted the many failures of the District and the trial court in complying with the requirements of Section 783, but excused such errors as immaterial. (Id.)

Against this backdrop, the Court of Appeal framed the issue as "whether the trial court's ruling in this case was incorrect turns on whether the court's section 352 analysis was an abuse of discretion." (Opn., p. 17.) The Court then held that the trial court did not abuse its discretion in finding that the probative value of the 2013 sexual assault to undermine Plaintiff's claim for emotional harm resulting from the abuse by her teacher outweighed any minimal prejudice to Plaintiff. (Id.) The Court accordingly denied Plaintiffs' Writ Petition.

Plaintiffs did not file a Petition for Rehearing.

ARGUMENT

I.

REVIEW IS NECESSARY AS THE COURT OF APPEAL'S DECISION RENDERS CALIFORNIA'S RAPE SHIELD LAWS MEANINGLESS

This Court reviews appellate decisions "when necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules of Court, rule 8.500(b)(1).) While the Court of Appeal correctly concluded that a sexual assault constituted "sexual conduct" within the meaning of Evidence Code section 1106, the Court's further holding that such evidence *is nonetheless admissible* to impeach Jane DS Doe's "attribution of all of her emotion distress to Baldenebro's (and, by extension, the District's) conduct" pursuant to Section 783 is entirely mistaken. (Opn., pp. 16-19.) As now explained, this interpretation of section 783 threatens to undercut the Legislative purpose behind California's Rape Shield statutes and render section 1106 a nullity in countless sexual abuse cases, including those involving minors.

Review is imperative to protect victims of sexual abuse from having to endure the disclosure of deeply personal information concerning prior sexual conduct, here evidence that the young plaintiff was victimized by a second molestation, under the guise of "impeaching" a claim for emotional distress damages. Admission of such sensitive evidence to discredit the injuries claimed to have been suffered by Plaintiff is precisely what is barred by the express language of Evidence Code section 1106(a), prohibiting the use of prior sexual history evidence to prove *the absence of injury* to the plaintiff. The mere fact that a victim of sexual abuse is seeking emotional distress does not "open the door" to evidence of sexual history, including sexual assaults. Such reasoning has been categorically

repudiated by this Court. (*Vinson v. Superior Court* (1987) 43 Cal.3d 833, 841-842.)

In *Vinson*, this Court acknowledged the federal and state constitutional considerations involved in any inquiry into a plaintiff's sexual history, and highlighted that a plaintiff's right to a protected zone of privacy includes one's sexual conduct. (*Id*. at pp. 841-843; see also *Mendez v. Superior Court* (1988) 206 Cal.App.3d 562, 566.) Rejecting the defendant's argument that the plaintiff waived her right to privacy by bringing the civil action for emotional distress damages, this Court explained: "We cannot agree that *the mere initiation of a sexual harassment suit, even with the rather extreme mental and emotional damage* plaintiff claims to have suffered, functions to waive all her privacy interests, exposing her persona to the unfettered mental probing of defendants' expert." (*Id*. at p. 841 (emphasis added).) This Court went on to highlight the legislative intent in creating California's Rape Shield laws:

> In enacting the measure, the Legislature took pains to declare that "The discovery of sexual aspects of complainant's [sic] lives, as well as those of their past and current friends and acquaintances, has the clear potential to discourage complaints and to annoy and harass litigants. ... *Without protection against it, individuals whose intimate lives are unjustifiably and offensively intruded upon might face the 'Catch-22' of invoking their remedy only at the risk of enduring further intrusions into the details of their personal lives in discovery* .... [¶] ... Absent extraordinary circumstances, inquiry into those areas should not be permitted, either in discovery or at trial." (Stats. 1985, ch. 1328, § 1.)

(*Vinson*, supra, 43 Cal.3d at p. 843.)

While the Court of Appeal here seemingly recognized that the Legislature has made "its intent clear" that Section 1106 provides an "absolute bar" to the District's admission of the 2013 molestation as *substantive evidence* to claim that Jane DS Doe did not actually suffer the

injury she claimed resulted from Baldenebro's abuse (Opn., p. 10, 15), the Court reasoned that the *very same evidence* of sexual conduct *is admissible* to impeach or undermine Plaintiff's claim for emotional distress damages under Section 783 (Opn., p. 14-15, 17-18). This makes no sense. In enacting Section 1106 and California's Rape Shield laws, the Legislature has already determined that the prejudicial impact of evidence of other sexual conduct by the victim *outweighs* any probative value regarding the alleged absence of injury suffered by the plaintiff as a result of the defendant's conduct. (See Evid. Code §1106; *Vinson*, 43 Cal.3d at pp. 843-844; *Knoettgen*, *supra*, 224 Cal.App.3d 11, 13, citing Stats. 1985, ch. 1328, pp. 4654-4659, enacting Code Civ. Proc. § 2036.1 [now § 2017.220] and Evid. Code §§ 783 and 1106.)

The Court of Appeal's analysis here that evidence of sexual conduct may nonetheless be admissible to impeach a victim's claim for emotional distress damages is *no different* than the use of such evidence to prove an absence of damages.

Knoettgen is instructive. There, a female truck driver brought an action for battery and employment discrimination after allegedly being sexually harassed at work. After refusing to answer questions regarding two incidents of sexual abuse she suffered as a child at her deposition, the employer moved to compel, arguing that inquiry into the prior sexual conduct was necessary to evaluate the plaintiff's claimed emotional damages. (*Knoettgen, supra*, 224 Cal.App.3d at p. 14.) Similar to the District here, the employer argued that such prior history "may well have affected Plaintiff's perception of what transpired, her response thereto, and the nature and extent of emotional distress she may have suffered." (*Id*. at p. 14.) The employer submitted a declaration of a forensic psychiatrist, stating: "Such incidents [of prior sexual assault] are directly relevant to the issues of whether there is an alternative source of any emotional distress

suffered by Plaintiff and the extent of damages Plaintiff allegedly has suffered from the acts alleged in her Complaint. In addition, traumatic sexual experiences in childhood often play a significant role in sexual perceptions, attitudes and behavior." (*Id*. at p. 14.) The trial court granted the motion.

The Court of Appeal issued a writ of mandate commanding the trial court to set aside its order granting defendant's discovery motion and to enter a new order *denying* the motion. The Court specifically rejected the argument that the subsequent sexual assault is relevant as an "alternative explanation" for the injuries suffered. (*Id.* at p. 14.) In concluding that the defendant failed to make the requisite showing of exceptional circumstances, the Court held: "**We do not perceive that this showing differentiates this case from any other sexual harassment case**. ***If this be good cause, then this type of discovery is automatically available in every case***, and Code of Civil Procedure section 2017, subdivision (d) is **meaningless**." (*Ibid.* (emphasis added).)

The same is precisely true here. The Court of Appeal's conclusion that a victim's prior sexual history is admissible because such prior experiences impact how the victim is emotionally affected by the abuse would be true in all cases. The protections afforded by the Legislature would always be swallowed up by the standing "relevance" the Court reasoned prior sexual history has to the "credibility" of a plaintiff's claim for emotional distress damages. There would be no difference between using the evidence substantively to show an absence of injury and to impeach a plaintiff's attribution of damages to the perpetrator. Both purposes are premised on the idea that in light of some other instance of sexual conduct, the plaintiff's claimed injuries are somehow lessened.

Such an unjust result was likewise cautioned against by the Court in *Mendez*. There, in rejecting the defendant's argument that a plaintiff's prior

sexual history, which included extramarital affairs, was admissible in her sexual harassment action against her employer in light of her claim for emotional distress, the Court explained:

> An essential aspect of the damage *in any case* of sexual harassment, sexual assault or sexual battery is the *outrage, shock and humiliation of the individual abused.* **We cannot conceive of a circumstance where a cause of action for sexual assault, battery, or harassment could accrue *devoid* of any consequential emotional distress.** [Citations]

(*Mendez, supra*, 206 Cal.App.3d at p. 573 (emphasis added).)

The Court continued: "The legislative statement of purpose compels the conclusion that because such distress is *inextricably intertwined* in the cause of action that to allow privacy intrusion in the ordinary case would have a chilling effect on the pursuit of a cause of action for sexual harassment or sexual assault. ***Any other conclusion would render the statute meaningless in the face of a simple claim for damages involving consequential mental distress.*** Thus, the legislative requirement that only in *extraordinary circumstances* (as opposed to ordinary circumstances) is inquiry to be permitted, compels the conclusion that the Legislature did not intend, and its statement of purpose disavows, *that a simple claim for derivative emotional trauma waives the right of privacy*." (*Id*. at p. 573 (emphasis added).) Elsewhere the Court explained that: "The Legislature clearly envisioned inquiry into the sexual privacy of a plaintiff only under circumstances or facts of an extraordinary nature: 'extraordinary' is defined as 'going far beyond the ordinary degree, measure, limit, etc.; very unusual; exceptional; remarkable.' (Webster's New World Dict. (2d ed. 1982) p. 497.)" (*Id*. at p. 572.)

Thus, the credibility exception in Section 783 must concern the use of evidence involving prior sexual conduct in a manner different in kind then proving consent or absence of damages. Indeed, this is precisely how

the credibility exception has been interpreted by the courts. As poignantly recognized the Court of Appeal in *People v. Chandler* (1997) 56 Cal.App.4th 703, involving the criminal proceeding counterparts to Sections 1106 and 782 (i.e. Sections 1103 and 782), "**the credibility exception has been *utilized sparingly*, most often in cases where the victim's prior sexual history is one of prostitution**. [Citations]" as prostitution has been held to be considered "conduct involving moral turpitude which is admissible for impeachment purposes." (*Ibid.*) In such a situation, it is not the existence of prior sexual conduct that itself impeaches a plaintiff's contention that the sex was non-consensual, but the fact that the plaintiff *is a prostitute* which itself involves conduct of moral turpitude admissible for impeachment purposes. (See also *Franklin, supra,* 25 Cal.App.4th at p. 335 ["The instance of conduct being placed before the jury as bearing on credibility is the making of the false statement, not the sexual conduct which is the content of the statement. Even though the content of the statement has to do with sexual conduct, the sexual conduct is not the fact from which the jury is asked to draw an inference about the witness's credibility."].)

As recognized by the Court of Appeal here, while evidence of an independent trauma may generally be probative in a civil action given its tendency to show that the injuries are attributable to someone other than the defendant (Opn. at 12-13), by enacting Section 1106 *to prohibit* the use of prior sexual conduct to prove an absence of injury, *the Legislature has already engaged in the relevant balancing test* and concluded that the prejudicial effect outweighs its probative value on the issue of plaintiff's claimed emotional distress damages. (See Opn. at 13 ["But section 1106 does that balancing in advance, and has categorically struct the balance in favor of exclusion."].) Where evidence of sexual conduct is admissible under the credibility exception of Section 783, the mere fact of the prior

sexual conduct is not *itself* important. Rather, it is something other than the sexual conduct itself that renders it relevant to an issue of impeachment or credibility. According to the Court of Appeal here, however, evidence of prior sexual conduct bears on credibility because *the very fact that the plaintiff was victimized by a prior sexual conduct may tend to prove that Plaintiff's claimed damages were not all caused by defendant's wrongful conduct*. This is wrong.

In support of its analysis that evidence of prior sexual conduct can be admissible to impeach a victim's claim for emotional distress damages, the Court of Appeal here cited this Court's opinion in *People v. Fontana* (2010) 49 Cal.4th 351. (Opn. at 18.) "As our Supreme Court noted in a related (albeit not identical context), '[w]here the [plaintiff] has attempted to link the defendant to . . . evidence of sexual activity on the complainant's part, "the defendant should unquestionably have the opportunity to offer alternative explanations for that evidence, even though it necessarily depends on evidence of other sexual conduct."'" (Id.) The Court of Appeal reasoned: "This principle will not always justify admitting evidence for impeachment under section 783, but it was not an abuse of discretion to conclude that it does in this case" where Plaintiff's claim for emotional distress damages "could render the District liable for trauma inflicted by the more recent 2013 molestation for which it could argue it is not responsible." (Id.) The glaring error in the Court of Appeal's reliance on this passage from *Fontana*, is that *Fontana* concerned Evidence Code section 1103 – the criminal law counterpart to Section 1106.

Because a victim of sexual assault in a criminal case is *not seeking civil damages,* Section 1103, subdivision (c)(1) prohibits only the admissibility of evidence of the complaining witness' sexual conduct to prove consent by the complaining witness. (Evid. Code § 1103(c)(1).)

Thus, unlike Section 1106, there is no statutory bar from the admission of prior sexual conduct to prove "the absence of injury to the plaintiff."

In *Fontana,* this Court explicitly noted: "The parties agree that Evidence Code section 1103, subdivision (c)(1) ***does not bar*** evidence of the complaining witness's prior sexual conduct when offered to explain injuries the prosecution alleges were the result of the defendant's conduct. The parties further agree that such evidence may be admissible under section 782, provided that the evidence of the complaining witness's prior sexual conduct is relevant under section 780 and is not barred by section 352." (*Fontana,* 49 Cal.4th at p. 363.) Here, of course, the exact opposite is true. Evidence Code section 1106 bars the admissibility of a plaintiff's prior sexual conduct to prove an absence or injury.

Thus, the "narrow" discretion afforded by Evidence Code section 783 to permit the admissibility of evidence concerning a victim's prior sexual conduct, which can only be exercised under "very strict" compliance with the procedural safeguards in place under Section 783, is reserved for those instances where the prior sexual conduct is itself coincidental to the instance of impeachment. In other words, the credibility exception cannot be interpreted as a "back door" for the admission of evidence of a victim's sexual conduct for the very purpose it is explicitly barred under Section 1106. "By narrowly exercising the discretion conferred upon the trial court in this screening process, **California courts have *not allowed the credibility exception in the rape shield statutes to result in an undermining of the legislative intent* to limit public exposure of the victim's prior sexual history**. [Citations.]" (*Chandler, supra,* 56 Cal.App.4th at p. 708.) Yet that is precisely the result under the Court of Appeal's opinion here.

II.

REVIEW IS FURTHER NECESSARY TO ADDRESS THE COURT OF APPEAL'S COMPLETE EVISCERATION OF THE PROCEDURAL PROTECTIONS AFFORDED VICTIMS UNDER SECTION 783

Review is further warranted because in excusing the District's failure to comply with the procedural requirements of Evidence Code section 783, the Court of Appeal drastically eroded the procedural protections provided by the Legislature when it enacted section 783.

Evidence Code section 783 specifies:

> In any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, if evidence of sexual conduct of the plaintiff is offered to attack credibility of the plaintiff under Section 780, **the following procedures *shall* be followed**:
>
> (a) A written motion shall be made by the defendant to the court and the plaintiff's attorney stating that the *defense has an offer of proof of the relevancy of evidence of the sexual conduct* of the plaintiff proposed to be presented.
>
> (b) The written motion shall be accompanied by an affidavit *in which the offer of proof shall be stated*.
>
> (c) If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and *at the hearing allow the questioning of the plaintiff regarding the offer of proof made by the defendant*.
>
> (d) At the conclusion of the hearing, *if* the court finds that evidence proposed to be offered by the defendant regarding the sexual conduct of the plaintiff is relevant pursuant to Section 780, and is not inadmissible pursuant to Section 352, *the court may make an order stating what evidence may be introduced by the defendant*, and the nature of the questions to be permitted. **The defendant *may then offer evidence pursuant to the order* of the court**.

(Evid. Code § 783 (emphasis added).)

None of section 783's procedures were followed here. There has been no motion, no offer of proof, and no hearing. Indeed, the District disavowed any argument that the sexual assault was admissible to attack Plaintiff's credibility.

Defendants' "782 Motion" began: "At the Court's request, the District makes this Application under Evidence Code section 782. As discussed herein, however, the District believes Evidence Code section 782 does not apply to the limited evidence at issue." (Exh. 10, p. 149.) The first heading read, "Evidence Code Section 782 Does Not Apply to Evidence of the 2013 incident." (Exh. 10, p. 149.) The District specifically represented: "Nor does the District intend to use the 2013 molestation evidence to "attack the credibility" of Susana D. The District intends only to use the 2013 molestation evidence to establish an alternative explanation for her psychological harm and condition." (Exh. 10, p. 151; see also Exh. 9, p. 109 [Decl. of Christovich filed under seal.)

Throughout the proceedings below, and even in its briefing before this Court in response to the first Petition for Review, the District argued that the evidence was relevant *only* to demonstrate alternative source of damages, explicitly disavowing any intention of using the prior sexual assault to attack Jane DS Does' credibility.

In ruling on the admissibility of the prior sexual conduct, the trial court likewise found Sections 1106 and 783 *inapplicable* and admitted the 2013 molestation under the traditional rules of relevance. (See Exh. 7, p. 92-95.) Under this analysis, the court concluded the 2013 molestation is "relevant on damages." (Exh. 7, pp. 93-94.) In other words, the court did not admit evidence of the 2013 molestation under section 783, and as a consequence never admitted the evidence under the procedures provided by section 783.

In affirming the trial court's ruling permitting the evidence to be admitted at trial, the Court of Appeal agreed that the trial court erred in finding that section 783 was inapplicable but excused the error on two grounds.

First, the Court reasoned that it was tasked with reviewing the court's ruling, not its rationale. (Opn., p. 16.) But this principle of review is inapplicable because in ruling that the 2013 assault was not subject to the prohibitions of section 1106 and exception provided by section 783, the court by definition did not grant a motion (to the extent one was even made) to admit evidence under section 783's credibility exception.

Second, the Court of Appeal reasoned that the ruling permitting the evidence to be admitted was "ambiguous," and construed the court's ruling as admitting the 2013 molestation for *impeachment purposes only* under section 783, and thereafter solely analyzed whether the court's 352 analysis was an abuse of discretion. (Opn., pp. 7-8, 17.) In doing so, the Court of Appeal excused the trial court's failure to comply with section 783's procedural requirements, reasoning that the only procedural requirement the court failed to follow was the offer of proof requirement since the court held a "hearing" on the admissibility of the 2013 molestation and conducted a 352 analysis. None of this is correct.

On the offer of proof, the Court reasoned that the omission was immaterial because "[a]lthough trial court did not insist that the District comply with section 783's requirement that that a motion be accompanied by an affidavit including an offer of proof (§ 783, subd. (b)), this requirement would have been pointless in this case because the court invited the District to file the motion after hearing from the parties the undisputed fact of plaintiff's victimization in 2013." (Opn., p. 17.) In other words, the Court appeared to reason that because the trial court ultimately heard an offer of proof, it was not necessary for the District to submit one

in writing. But as explained above, at no point the District made an offer of proof to attack Plaintiffs' credibility.

As for the section 783 hearing, the Court reasoned: "There is nothing to indicate that either party was denied its statutory right to question the plaintiff at the hearing (§ 783, subd. (c)); because this right exists whether a hearing is conducted under section 782 or 783, the parties were aware of this right when the court erroneously invoked section 782, yet opted not to question plaintiff." (Opn., p. 17.) Under no analysis could the court's discussion of its ruling on the motion in limine constitute a hearing as required under Section 783.

As explained, the court ruled that section 783 was inapplicable and swiftly moved on to conducting a 352 analysis[3] and thus there was no opportunity for the parties to question the plaintiff under section 783. In fact, the District itself admitted that a hearing as required by section 783 was not conducted and accordingly requested the Court of Appeal to remand the case for the trial court to conduct a section 783 hearing in the first instance. (Opn. p. 8, fn. 4.) Notably, a hearing under Section 783 where the plaintiff is questioned concerning the offer of proof as to credibility is triggered *only after* the trial court has found that a sufficient offer of proof under Section 783 has been made. (Evid. Code § 783(c).) Because there was no offer of proof concerning credibility, no finding by the trial court that any supposed offer of proof was sufficient to trigger a

[3] Even if the Court of Appeal were correct that a hearing under section 783 only required a 352 analysis, here the trial court conducted a 352 analysis outside of sections 1106 and 783. As stated above, the court found that sections 1106 and 783 were inapplicable. In doing so, the court implicitly *rejected the presumed prejudice* that the Legislature assigned to evidence of sexual conduct in enacting sections 1106 and 783. In rejecting the presumed prejudice that evidence such as the 2013 assault possesses, it by definition could not properly weighed the probative and prejudicial value of the evidence under a 352 analysis.

hearing under Section 783, *there necessarily was no hearing* as required under Section 783.

Further still, the court never made "an order stating what evidence may be introduced by the defendant, and the nature of the questions to be permitted." These omissions cannot be so easily excused.

The dangers of failing to comply with Section 783's procedural protections are evident in the Court of Appeal's own opinion. Denying the writ petition and finding no error with the trial court's admission of the prior sexual abuse, the Court of Appeal here held that such evidence is relevant and admissible to impeach the "*likely* attribution of all of her emotional distress to Baldenebro's (and, by extension, the District's) conduct." (Opn., p. 17; see also 18 [the trial court did not abuse its discretion "where denying the District the ability to impeach plaintiff's attribution of all of her emotional distress to Baldenebro, *should she do so*, could render the District liable for trauma inflicted by the more recent 2013 molestation for which it could argue it is not responsible."].) The Court's use of the words "likely" and "should she do so" is telling.

Because an offer of proof was never made, a Section 783 hearing was never held, and Jane DS Doe has not testified at trial. As such, there is absolutely no indication that she did in fact attribute *all* of her distress to Baldenebro. In some respects it does not even matter if she did testify to such because according to the Court of Appeal, the existence of the prior assault is enough by itself to impeach Plaintiff's claimed emotional distress damages. Indeed by finding that the trial court did not abuse its discretion in admitting the evidence as to damages, that is precisely what the Court of Appeal held. The Court's reasoning thus proves that the evidence is not being offered to impeach any alleged false statement made by Plaintiff, but rather to undermine her claim for emotional distress damages – the precise use forbidden by Section 1106.

The heightened protections afforded victims of sexual assault in protecting against their prior sexual conduct, both consensual and sexual abuse, being paraded in a trial where the plaintiff happened to be the unfortunate victim of sexual assault by the defendant cannot be so casually set aside. The Court of Appeal's excusal of the failure to comply with section 783's procedural requirements—in a published opinion—sets forth dangerous precedent. Therefore, review by this Court is also warranted to ensure the procedural rights of victims of sexual assault as guaranteed by Section 783 are followed.

CONCLUSION

For the foregoing reasons, Plaintiffs urge this Court to grant review of the issues raised in this Petition.

Dated: December 8, 2021

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CERTIFICATE OF WORD COUNT

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s/ Holly N. Boyer
Holly N. Boyer

Filed 10/29/2021

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JANE S.D. DOE et al.,

Petitioners,

v.

SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent;

MOUNTAIN VIEW SCHOOL DISTRICT,

Real Party in Interest.

B313874

(Los Angeles County
Super. Ct. No. BC712514)

ORIGINAL PROCEEDINGS in mandate. Mary Ann Murphy, Judge. Petition denied with instructions.

Carrillo Law Firm, Luis A. Carrillo, Michael S. Carrillo, Laura M. Jimenez; The Senators (Ret.) Firm, Ronald T. Labriola; Esner, Chang & Boyer, Stuart B. Esner, and Holly N. Boyer for Petitioners.

No appearance for Respondent.

Lewis Brisbois Bisgaard & Smith, Jeffry A. Miller, Lann G. McIntyre, Dana Alden Fox, Gregory M. Ryan, Edward E. Ward Jr., and Wendy S. Dowse for Real Party in Interest.

* * *

A young woman sued a school district for negligently supervising the fourth-grade teacher who molested her in 2010 and 2011. Prior to trial, the district sought to introduce evidence that the woman had been sexually abused by someone else in 2013. The trial court admitted the evidence in part, reasoning that (1) the evidence fell outside of the scope of Evidence Code sections 1106 and 783[1] because those statutes regulate the admission of "the plaintiff's sexual conduct," which the court ruled did *not* include being involuntarily subjected to sexual abuse, and (2) admitting the evidence was proper, ostensibly to impeach the plaintiff, under section 352 because its probative value to contradict her anticipated testimony attributing all of her emotional distress to the teacher's molestation was not substantially outweighed by the danger of undue prejudice. To resolve the woman's petition for writ of mandate challenging this ruling, we must confront the question: Does the term "plaintiff's

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1 All further statutory references are to the Evidence Code unless otherwise indicated.

sexual conduct" in sections 1106 and 783 (as well as Code of Civil Procedure section 2017.220) encompass sexual abuse to which a plaintiff has been involuntary subjected as well as the plaintiff's voluntary sexual conduct? We conclude that the answer is yes. Because section 783 requires a trial court, after following certain procedures, to engage in a section 352 analysis identical to the one the trial court undertook, we must also confront the question: Did the trial court abuse its discretion in finding that the probative value of the subsequent sexual abuse was not outweighed by the danger of undue prejudice? We conclude that the answer is no. Accordingly, we deny the writ petition and dissolve the stay of the trial proceedings, but instruct the trial court to either assess any prejudice flowing from the empaneled jury's exposure to the mentioning of the 2013 incident during opening statements, or begin the trial with a new jury.

FACTS AND PROCEDURAL BACKGROUND

I. Plaintiff's Complaint

S.D. (plaintiff) is one of several plaintiffs suing the Mountain View School District (the District). While plaintiff was a fourth-grade student at one of the District's elementary schools during the 2010-2011 school year, her teacher—Joseph Baldenebro—molested her. Plaintiff is suing the District for (1) negligence due to its (a) negligent hiring and retention of Baldenebro, (b) negligent supervision of him, (c) negligent failure to warn, train, and educate against his abuse, and (d) negligence per se in not reporting his abuse, and (2) sexual harassment (Civ. Code, § 51.9).[2] Among other things, plaintiff is seeking

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2 Other student-plaintiffs' parents sued the District for negligent infliction of emotional distress in the same complaint.

compensation for the "physical, mental, and emotional damages and injuries resulting from the sexual harassment."

II. Discovery

In response to discovery propounded by the District, the District learned that plaintiff had been "sexually molested" by a "teenage family friend" in 2013. The molestation inflicted "emotional and psychological trauma" upon plaintiff for the next several years, severe enough that she sought out "medical" and psychological treatment in 2016.

III. Pretrial Rulings on Admissibility of 2013 Molestation

In May 2021, plaintiff filed a motion in limine to exclude evidence of her "sexual history with persons other than" Baldenebro; her motion cited sections 1106 and 352.

At a pretrial hearing on July 19, 2021, the trial court shared its preliminary view that section 1106 may not bar admission of the 2013 molestation because section 1106 "[t]ypically . . . relates to voluntary sexual activity." The court nevertheless invited the District to submit a motion seeking to admit the evidence for impeachment purposes under section 783.[3]

On the same day as the hearing, the District filed its 783 motion. Although the motion indicated that the District sought to admit evidence of the 2013 molestation "to establish an alternative explanation for [plaintiff's] psychological harm and condition" rather than to "'attack [plaintiff's] credibility,'" the District nevertheless moved to admit evidence of the 2013

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3 Although the trial court cited section 782, that section—as the District pointed out repeatedly in its filings with the trial court—is similar in effect to section 783 but applies only in criminal prosecutions (§ 782, subd. (c)); section 783 is the section applicable to "civil action[s] alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery" (§ 783).

molestation under section 783—and hence for impeachment purposes—"out of an abundance of caution."

After additional briefing, the trial court held a further hearing during jury selection and before opening statements. The trial court ruled that the admissibility of evidence regarding the 2013 molestation was not governed by either section 1106 (as urged by plaintiff in her motion in limine) or section 783 (as suggested by the court). In so ruling, the court reasoned that those sections govern the admissibility of a victim's "sexual conduct," that "sexual conduct" must reflect voluntary sexual conduct or a "willingness to engage in sexual conduct," and that the 2013 molestation was necessarily "involuntary" because plaintiff was "a victim of inappropriate sexual behavior." Finding no need to apply the special analysis set forth in sections 1106 or 783, the court proceeded to analyze the admissibility of the 2013 molestation under the general rules governing relevance, including section 352. In this regard, the court found the 2013 molestation to be "highly and directly relevant" to whether plaintiff's emotional distress was caused solely by Baldenebro's conduct (for which the District was to be held responsible) or caused by a combination of his conduct and the 2013 molestation because both the 2010-2011 molestation and the 2013 molestation involved the "[s]ame conduct" and the "[s]ame injury" and because the 2013 molestation "undoubtedly added to [plaintiff's] damages." The court found that this significant probative value was "not substantially outweighed by the probability that its admission will necessitate undue consumption of time, create[] substantial danger of undue prejudice, confuse the issues, or mislead the jury" because the District planned to elicit the 2013 molestation through

"minimally invasive" questioning of plaintiff and the opinion of an expert witness as to its impact.

IV. Writ Proceedings

On July 29, 2021, the day after the ruling, plaintiff petitioned this court for a writ of mandate ordering the trial court to exclude evidence of the 2013 molestation and requested a stay of the trial proceedings pending our review of the trial court's evidentiary ruling. We granted a stay, but ultimately denied the writ (and dissolved the stay) on July 30, 2021.

The next court day, the parties made opening statements to the jury. After the court ruled that the District could mention the 2013 molestation in its opening statement, plaintiff mentioned the molestation in her opening statement. In its opening statement, the District stated that plaintiff's mental distress was "caused" "both" "by the . . . 2013 sexual abuse incident and by Baldenebro."

Plaintiff petitioned the California Supreme Court to review our denial of her writ and to stay the trial court proceedings. The Supreme Court issued a stay of proceedings on August 3, 2021, and then on August 9, 2021, granted the petition for review and remanded the matter to this court to issue an order to show cause. We did so, continued the stay of trial proceedings issued by the Supreme Court, and obtained further briefing and argument, and now issue this opinion.

DISCUSSION

In her writ petition, plaintiff challenges the trial court's pretrial evidentiary ruling allowing the District to introduce evidence of the 2013 molestation. This challenge presents two questions on the merits: (1) Did the trial court err in ruling that section 1106 and section 783 do not apply to sexual conduct that

is involuntary, and (2) Did the trial court abuse its discretion in concluding that the probative value of this evidence was not substantially outweighed by the dangers of unfair prejudice? It also presents a question of remedy.

As a threshold matter, however, we address the parties' competing claims of waiver.

The District has argued that plaintiff has waived any right to press her challenge to admitting the 2013 molestation because plaintiff mentioned it during her opening statement to the jury after we ruled but before the Supreme Court intervened. Because the plaintiff's decision to do so was a tactically reasonable response to try to make the best of the trial court's adverse ruling by "fronting" evidence that would be devastating if it first came from the opposing side, there was no waiver. (*Mary M. v. City of Los Angeles* (1991) 54 Cal.3d 202, 212-213 [""An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which [s]he was not responsible""].)

Conversely, plaintiff argues that the District has waived the right to argue that the 2013 molestation is admissible under section 783 to impeach plaintiff because the District repeatedly disavowed to the trial court any intention to use the evidence for impeachment. Although the District's focus was certainly on admitting the 2013 molestation as substantive evidence under section 1106, and although the District repeatedly (and accurately) noted that section *782* was inapplicable, the District also argued that it was seeking to admit the evidence for impeachment purposes in an "abundance of caution." Further,

our task is to review the propriety of the trial court's ruling and not its rationale. (E.g., *People v. Zapien* (1993) 4 Cal.4th 929, 976 (*Zapien*).) The scope of that ruling is admittedly ambiguous. On the one hand, the trial court ruled that the 2013 molestation fell outside the scope of section 782 (and, ostensibly section 783), and then analyzed its admissibility under section 352. On the other hand, the court made its ruling after invoking the statutes applicable only when admitting evidence for impeachment purposes, conducted a hearing as statutorily required, applied the same section 352 analysis called for by those statutes, engaged in a section 352 analysis that looked to the factors pertinent to impeachment (namely, how the 2013 molestation would impeach plaintiff's evidence regarding the cause of her emotional distress damages), and never expressly indicated that the 2013 molestation was admitted "for all purposes." Because an ambiguous or uncertain order should be construed in favor of its validity if possible (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 631; *California School Employees Assn. v. King City Union Elementary School Dist.* (1981) 116 Cal.App.3d 695, 702; *Richter v. Walker* (1951) 36 Cal.2d 634, 639), we construe the trial court's order to be limited to admitting the 2013 molestation for impeachment purposes only.[4] At oral argument, plaintiff urged that the public policy underlying section 1106 requires us to construe the ambiguous order regarding admissibility under section 783 to be invalid, but we disagree that a statement of legislative purpose regarding specific

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4 Accordingly, we reject as inaccurate the District's representation that "[t]he hearing required by" "section 783" "was not conducted," and decline its consequent request to remand for "section 783 proceedings regarding this evidence."

statutes alters a general principle of appellate review. The District remains free to disavow that limited purpose of impeachment on remand (and thus not to seek to admit the evidence at all), but what it chooses to do next does not affect our analysis now.

I. The Merits

A. *Section 1106*

In this writ proceeding, and consistent with one possible reading of the trial court's ambiguous order (albeit, not the one we elect to credit), the parties debate whether the 2013 molestation is admissible under section 1106 for *all* purposes, not just impeachment. This turns on a question of statutory interpretation, which we independently examine. (*Kirby v. Immoos Fire Protection, Inc.* (2012) 53 Cal.4th 1244, 1250.)

> In pertinent part, section 1106 provides that:
> "[i]n any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, opinion evidence, reputation evidence, and evidence of specific instances of the *plaintiff's sexual conduct*, or any of that evidence, is not admissible by the defendant in order to prove consent by the plaintiff or the absence of injury to the plaintiff, unless the injury alleged by the plaintiff is in the nature of loss of consortium."

(§ 1106, subd. (a), italics added.) Section 1106 does not apply (1) "to evidence of the plaintiff's sexual conduct with the alleged perpetrator" except in civil actions under Civil Code section 1708.5 (*id.*, subds. (b) & (c)), or (2) to "evidence offered to attack the credibility of the plaintiff" under section 783 (*id.*, subd. (e)).

Here, the 2013 molestation would be admitted as substantive evidence to show "the absence of injury" stemming from Baldenebro's earlier molestation. Thus, the applicability of section 1106 to exclude evidence of the 2013 molestation turns on whether the 2013 molestation qualifies as "plaintiff's sexual conduct." Stated more broadly, we must decide whether a "plaintiff's sexual conduct" within the meaning of section 1106 includes sexual conduct that was inflicted upon the plaintiff involuntarily—that is, does it apply to sexual abuse? We hold that it does, and do so for three reasons.

First, interpreting "plaintiff's sexual conduct" to include both voluntary sexual conduct *and* involuntary sexual conduct is most consonant with legislative intent. "[T]he objective of statutory interpretation is to ascertain and effectuate legislative intent." (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 775.) Although our Legislature did not define the term "plaintiff's sexual conduct" for purposes of section 1106, section 1106 has two discernable objectives: (1) to exclude evidence of a civil plaintiff's character trait for promiscuity (because section 1106 is part of the broader cluster of rules (§§ 1101-1106) aimed at excluding evidence of one's character to prove conduct on a particular occasion (*Curle v. Superior Court* (2001) 24 Cal.4th 1057, 1063 ["we consider portions of a statute in the context of the entire . . . statutory scheme of which it is a part"])), and (2) to encourage civil complainants to bring lawsuits without fear of having the "sexual aspects of [their lives]" scrutinized (Stats. 1985, ch. 1328, § 1; *Vinson v. Superior Court* (1987) 43 Cal.3d 833, 841 (*Vinson*); *People v. Fontana* (2010) 49 Cal.4th 351, 362 (*Fontana*); *In re Venus B.* (1990) 222 Cal.App.3d 931, 936-937). The second objective has footing in the

"'inalienable right'" to privacy enshrined in the California Constitution. (*Vinson*, at p. 841 [so noting]; see generally, Cal. Const., art. I, § 1.) If the first objective were the *sole* objective of section 1106, it might make sense to construe "plaintiff's sexual conduct" only to reach voluntary sexual conduct—as well as other voluntary sexual conduct indicating a willingness to have sex—because only voluntary behavior says something about a person's character. (Accord, *Rieger v. Arnold* (2002) 104 Cal.App.4th 451, 461-462 ["sexual conduct" includes "conduct that reflects a willingness to engage in sexual activity"]; *Meeks v. AutoZone, Inc.* (2018) 24 Cal.App.5th 855, 874; *People v. Franklin* (1994) 25 Cal.App.4th 328, 334; *People v. Casas* (1986) 181 Cal.App.3d 889, 895.) But the second, privacy-focused objective applies with equal force to sexual conduct whether it is voluntarily undertaken or involuntarily inflicted. Although involuntarily inflicted abuse says nothing about the victim's character or traits thereof, revealing the details of one's prior sexual victimization still invades one's privacy.

Second, interpreting "plaintiff's sexual conduct" not to embrace involuntary sexual conduct would lead to absurd results, which we generally try to avoid when interpreting statutes. (*People v. Bullard* (2020) 9 Cal.5th 94, 106 [courts must "choose a reasonable interpretation that avoids absurd consequences that could not have possibly been intended"].) Because persons under the age of 14 are, in the eyes of the law, incapable of voluntarily consenting to sexual conduct (e.g., *People v. Soto* (2011) 51 Cal.4th 229, 247), excluding involuntary conduct from the ambit of section 1106 would allow for the admission of evidence of all sexual conduct of a person under the age of 14 (subject to the other rules of evidence, of course). Given the prevalence of sexual

abuse of children, excluding younger minors from the ambit of section 1106 would appear to be an absurd result we cannot sanction. (See, e.g., *Westley v. State* (2021) 251 Md.App. 365, 394, fn. 9 [making this point].)

Third, interpreting "plaintiff's sexual conduct" to exclude involuntary sexual conduct would also be against the weight of precedent both here in California and in our sister states. A handful of 31 year-old cases in California have interpreted the term "sexual conduct" to reach involuntary sexual conduct inflicted upon a victim. (*Knoettgen v. Superior Court* (1990) 224 Cal.App.3d 11, 14-15 (*Knoettgen*) [so holding, as to discovery of a victim's "sexual conduct"]; *People v. Daggett* (1990) 225 Cal.App.3d 751, 754, 757 [so holding, as to section 782].) And the weight of out-of-state courts have construed their states' statutes—which are similarly worded to section 1106—to reach involuntary sexual conduct. (See *People v. Parks* (2009) 483 Mich. 1040, 1046-1047 & fn. 23 (conc. opn. of Young, J.) [citing cases from 20 states].)

To be sure, this interpretation of section 1106 is not without consequence.

Unlike its counterpart in the Federal Rules of Evidence, section 1106 erects "an 'absolute bar' to the admission of evidence of 'specific instances of plaintiff's sexual conduct.'" (§ 1106, subd. (a) [declaring such evidence "not admissible"]; *Patricia C. v. Mark D.* (1993) 12 Cal.App.4th 1211, 1216; cf. Fed. Rules Evid., rule 412(b)(2) [evidence of a "victim['s] . . . other sexual behavior" admissible in civil cases "if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party"].) Consequently, a person accused in a civil case of inflicting physical or psychological trauma upon the

plaintiff will be barred from adducing any evidence that the plaintiff's trauma was caused in part by sexual abuse inflicted by someone else and may therefore end up compensating the plaintiff for injuries inflicted by someone else. (Compare Civ. Code, § 1431.2 [joint tortfeasors are not to be held jointly and severally liable for noneconomic damages].) Absent section 1106, such outcomes would be less likely because courts would be called upon to balance the "right of civil litigants to discover [and introduce] relevant facts [bearing on causation] against the privacy interests of persons subject to discovery," bearing in mind that "plaintiff[s] cannot be allowed to make [their] very serious allegations without affording defendants an opportunity to put their truth to the test." (*Vinson*, *supra*, 43 Cal.3d at pp. 841-842.) But section 1106 does that balancing in advance, and has categorically struck that balance in favor of exclusion. (Stats. 1985, ch. 1328, § 1 ["The Legislature concludes that the use of evidence of a complainant's sexual behavior is more often harassing and intimidating than genuinely probative, and the potential for prejudice outweighs whatever probative value that evidence may have"].)

To be sure, section 1106's categorical bar is to some extent softened, if not potentially undermined, by two other statutes enacted in the same bill—namely, what is now Code of Civil Procedure section 2017.220[5] and section 783. (Stats. 1985, ch. 1328, §§ 2, 3.) Code of Civil Procedure section 2017.220 authorizes trial courts to permit "discovery concerning the plaintiff's sexual conduct" upon a "showing" of "good cause" based

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5 This section is derived from Code of Civil Procedure section 2036.1. (See *Knoettgen*, *supra*, 224 Cal.App.3d at p. 12; *Vinson*, *supra*, 43 Cal.3d at p. 843.)

on "specific facts." (Code Civ. Proc., § 2017.220, subd. (a).) And section 783, as discussed more fully below, authorizes trial courts in "civil action[s] alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery" to admit "evidence of sexual conduct of the plaintiff" to "attack credibility" if they (1) conduct a hearing out of the jury's presence based on a written motion and affidavit with an offer of proof, (§ 783, subds. (a)-(c)), and (2) conclude that the evidence is "relevant" to impeachment and "not inadmissible pursuant to [s]ection 352" (*id.*, subd. (d)). Unlike section 1106, these statutes allow for a case-by-case approach that sometimes allows for the discovery and limited admissibility of a plaintiff's sexual conduct, which puts them in some "tension" with section 1106 (*People v. Rioz* (1984) 161 Cal.App.3d 905, 916-917 (*Rioz*); *People v. Chandler* (1997) 56 Cal.App.4th 703, 707-708 (*Chandler*)). Courts have tried to minimize this tension by construing "good cause" under Code of Civil Procedure section 2017.220 narrowly and by applying more scrutiny to the section 352 analysis under section 783 (as well as by highlighting the need for limiting instructions when evidence is admitted solely for impeachment purposes under section 783). (*Vinson*, *supra*, 43 Cal.3d at pp. 843-844 ["good cause" construed strictly to require "specific facts justifying inquiry"]; *Barrenda L. v. Superior Court* (1998) 65 Cal.App.4th 794, 801 ["'good cause'" requires more than "[t]he mere fact that a plaintiff has initiated an action seeking damages for extreme mental and emotional distress"]; *Mendez v. Superior Court* (1988) 206 Cal.App.3d 557, 572-573 [same], overruled in part by *Williams v. Superior Court* (2017) 3 Cal.5th 531; *Knoettgen*, *supra*, 224 Cal.App.3d at pp. 14-15 [courts must be "vigilant" when allowing discovery of prior sexual abuse]; *Chandler*, at p. 708 [courts should "narrowly

exercis[e]" their discretion under section 783]; *Rioz*, at pp. 918-919 [noting that "[g]reat care must be taken" to ensure section 783 does not "become a 'back door' for admitting otherwise inadmissible evidence"]). That tension is especially pronounced in cases like this one, where a plaintiff seeking to recover emotional distress damages will typically need to testify to establish that the defendant's conduct has inflicted emotional distress, and this testimony will make evidence of emotional distress involuntarily inflicted by others through sexual abuse relevant to impeach her testimony. In such cases, the very same evidence section 1106 categorically excludes becomes admissible—subject to balancing under section 352—under section 783 to impeach.

Despite the consequences and challenges that accompany section 1106, our Legislature has made its intent clear and we defer to that intent by holding that evidence of a plaintiff's sexual conduct—voluntary *or involuntary*—may not be admitted under section 1106 under any circumstances.

The District resists this conclusion with two arguments. First, relying on the facts in *Knoettgen*, *supra*, 224 Cal.App.3d 11, the District has argued that section 1106's bar only applies when the involuntary sexual conduct inflicted upon the plaintiff occurs *before* the molestation underlying the plaintiff's lawsuit. But *Knoettgen*'s interpretation of section 1106 is not tied to the temporal order of the sexual abuse suffered by a plaintiff, and we perceive no reason why it would be—the invasion of the plaintiff's privacy interests through the potential airing of the sexual abuse inflicted by others is the same no matter when it was inflicted. Second, the District has argued that its questioning of plaintiff regarding the 2013 molestation will be minimal, implicitly

suggesting that there is a "minimal questioning" exception to section 1106. There is not.

For these reasons, we reject the District's argument that the 2013 molestation should have been admitted for all purposes.

B. *Section 783*

As alluded to above, section 783 authorizes a trial court to admit "evidence of sexual conduct of the plaintiff" "to attack [the] credibility of the plaintiff" if the (1) court adheres to specific procedural requirements, which are that (a) the defendant files a written motion that is "accompanied by an affidavit" making an "offer of proof" (§ 783, subds. (a) & (b)), (b) if the offer of proof is "sufficient," the court holds a "hearing out of the presence of the jury" (*id.*, subd. (c)), and (2) "the court finds that evidence proposed to be offered . . . is relevant [to impeach the plaintiff], and is not inadmissible pursuant to [s]ection 352" (*id.*, subd. (d)). Also as noted above, section 783 is an express exception to section 1106. (§ 1106, subd. (e).) Although we review questions of statutory construction de novo (*Kirby*, *supra*, 53 Cal.4th at p. 1250), we review a trial court's balancing of considerations under section 352 for an abuse of discretion. (*Chandler*, *supra*, 56 Cal.App.4th at p. 711 ["A trial court's ruling on the admissibility of prior sexual conduct will be overturned on appeal only if appellant can show an abuse of discretion"].)

Although the trial court erred in concluding that section 783 is inapplicable to involuntary sexual conduct, that error is of no moment because we are tasked with reviewing the court's ruling—not the rationale it used to get there. (*Zapien*, *supra*, 4 Cal.4th at p. 976.) As noted above, we have construed its ambiguous ruling as admitting evidence of the 2013 molestation solely for purposes of impeaching the plaintiff. Further, the trial

court adhered to all but one of the specific procedural requirements and the balancing requirements of section 783. Although trial court did not insist that the District comply with section 783's requirement that that a motion be accompanied by an affidavit including an offer of proof (§ 783, subd. (b)), this requirement would have been pointless in this case because the court *invited* the District to file the motion *after* hearing from the parties the undisputed fact of plaintiff's victimization in 2013. There is nothing to indicate that either party was denied its statutory right to question the plaintiff at the hearing (§ 783, subd. (c)); because this right exists whether a hearing is conducted under section 782 or 783, the parties were aware of this right when the court erroneously invoked section 782, yet opted not to question plaintiff. Thus, whether the trial court's *ruling* in this case was incorrect turns on whether the court's section 352 analysis was an abuse of discretion.

It was not, although it is admittedly a close question.

The 2013 molestation has substantial probative value in impeaching plaintiff's likely attribution of all of her emotional distress to Baldenebro's (and, by extension, the District's) conduct. Based on facts disclosed in discovery that was obtained without objection, the court found that the 2013 molestation involved similar conduct to the molestation by Baldenebro and thus inflicted similar "emotional and psychological trauma" upon plaintiff and thus "undoubtedly added to her damages," and this finding is supported by the evidence that plaintiff sought out "medical" and psychological treatment for that trauma in 2016.

The court's finding that admitting evidence of the 2013 molestation was "not substantially outweighed by the probability that its admission will necessitate undue consumption of time,

create[] substantial danger of undue prejudice, confuse the issues, or mislead the jury" is also supported by the record. Although the District's questioning of plaintiff or introduction of records would need to elicit sufficient evidence of the 2013 molestation's general character and gravity to be useful for impeachment purposes, the court had a basis for finding that the questioning of plaintiff could be "minimally invasive" in light of the court's careful regulation of the content and form of evidence presented regarding the 2013 molestation, the time needed to admit evidence of the 2013 molestation would be relatively minimal, and a limiting instruction could minimize the dangers of confusing or misleading the jury as well as blunt the undue prejudice flowing from its introduction. The balance is assuredly a hard one. As our Supreme Court noted in a related (albeit not identical context), "[w]here the [plaintiff] has attempted to link the defendant to . . . evidence of sexual activity on the complainant's part, 'the defendant should unquestionably have the opportunity to offer alternative explanations for that evidence, even though it necessarily depends on evidence of other sexual conduct.'" (*Fontana*, *supra*, 49 Cal.4th at p. 363.) This principle will not always justify admitting evidence for impeachment under section 783, but it was not an abuse of discretion to conclude that it does in this case where denying the District the ability to impeach plaintiff's attribution of all of her emotional distress to Baldenebro, should she do so, could render the District liable for trauma inflicted by the more recent 2013 molestation for which it could argue it is not responsible.

At oral argument, plaintiff suggested that section 783 is categorically unavailable when the proposed impeachment regards the plaintiff's consent or the absence of injury prohibited

as substantive evidence under section 1106. Although this would be one way to try to harmonize the inherent tension between sections 1106 and 783, it is not one supported by the plain text of either statuite: Section 1106 expressly names section 783 as an exception to its prohibitions, and section 783 looks to a case-by-case balancing of considerations under section 352.

For these reasons, we conclude that the trial court did not abuse its discretion in admitting the 2013 molestation for purposes of impeachment.

II. Remedy

At the time that we initially denied plaintiff's writ petition, the trial had yet to begin and, in light of our analysis, the proper remedy was to deny the petition.

Since then, however, the parties gave their opening statements and both parties referred to the 2013 molestation. The District did not limit its discussion of the 2013 molestation strictly to impeaching plaintiff's testimony. We do not know whether the jury that was selected is still intact or has been released in light of the delay associated with appellate review. To the extent the prior jury was discharged and a new jury must be selected, any danger arising from statements discussing the 2013 molestation for purposes beyond impeachment is gone. To the extent the prior jury remains intact upon remand, the trial court is in the best position to assess the impact of the parties' mention of the 2013 molestation on any still constituted jury. Accordingly, we deny the writ with instructions.

DISPOSITION

Plaintiff's petition for a writ of mandate is denied. Upon remand, and if the previously selected jury is still constituted, the trial court is to assess whether any prejudice resulted from the District's discussion of the 2013 molestation during opening statement for purposes beyond impeachment, and to take appropriate action, if necessary, to eliminate that prejudice. The stay of the trial proceedings is hereby dissolved.

CERTIFIED FOR PUBLICATION.

_____, J.
HOFFSTADT

We concur:

_____, P. J.
LUI

_____, J.
CHAVEZ

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 234 East Colorado Boulevard, Suite 975, Pasadena, CA 91101.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on December 8, 2021 at Honolulu, Hawaii.

s/ Kelsey Wong
Kelsey Wong

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Hon. Mary Ann Murphy
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Supreme Court of California

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Date

/s/Kelsey Wong

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