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Supreme Court of California
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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

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ISSUES PRESENTED

1. Is evidence that a plaintiff in a civil action suffered a prior sexual assault admissible for impeachment purposes (Evid. Code, § 783) or inadmissible as a claim that the plaintiff did not suffer injury (Evid. Code, § 1106, subd. (a))?

2. If admissible, what procedures and quantum of proof are required to admit such evidence?

INTRODUCTION

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 Legislature's intent and the plain language of Section 1106, subdivision (a), precluding the admissibility of evidence of a victim's sexual conduct (with someone other than the perpetrator) to prove an *absence of injury*, the court of appeal here concluded that substantive evidence of a victim's 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 sexual conduct itself*.

Pursuant to the court's analysis, the very existence of the other 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 other sexual conduct "***is not admissible***" to prove "the absence of injury to the plaintiff," the court attempts to justify its

interpretation on a fatally flawed and unprecedented statutory construction analysis. (*Doe v. Superior Court* (2021) 71 Cal.App.5th 227, 238-239.)

As detailed below, the court of appeal's characterization of its analysis as creating a "tension," is an extreme understatement. Instead, its interpretation of the credibility exception in Section 1106, subdivision (e), swallows whole the protection afforded victims in subdivision (a). In its place, the court leaves victims of sexual abuse clinging to a "case-by-case" Section 352 analysis to defend against the admissibility of their prior sexual conduct at trial. Of course, even without Section 1106, a Section 352 objection would be available. Yet, the court concluded that here the trial court's Section 352 analysis was sufficient in kind to satisfy the rigorous requirements prescribed by Section 783, creating the risk that the entire statutory scheme would be rendered a nullity.

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. (Writ Exh. 1.)[1] The physical and emotional abuse she suffered is unfathomable.

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[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].) Plaintiffs refer to

On the eve of trial, the District revealed that its focus at the trial would 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 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*." (Writ 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 Writ Exh. 6, pp. 75-76; Writ Exh. 7, p. 92.) That day the District filed a Section 782 application explicitly maintaining its contention that neither Section 1106 nor Section 782 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.'" (Writ Exh. 10, p. 151; see also *Doe, supra ,* 71 Cal.App.5th 227, 233 and fn. 3 [although the District erroneously cited Section 782, which governs

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these exhibits as "Writ Exh." Additional exhibits were filed in Support of the Reply to Answer to Petition for Review before this Court on 8/6/21. These exhibits are referred to as "SC Reply Exh." Lastly, Plaintiffs submitted Supplemental Exhibits in support of their Reply to Return before the Court of Appeal on 9/30/21. These exhibits are referred to as "Supp. Writ Exh."

the admissibility of such evidence in criminal actions, the court of appeal constructed the filing as a Section 783 motion].)

The District explicitly represented to the trial court in its motion that it did *not* "intend to use the 2013 molestation evidence to 'attack the credibility' of [Jane DS Doe]. The District intends ***only*** to use the 2013 molestation evidence to establish an alternative explanation for her psychological harm and condition." (Writ Exh. 10, p. 150-151 (emphasis added); see also Writ 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. (Writ 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." (Writ 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. (Writ Exh. 7, p. 93-95.)

Plaintiff 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 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. (*Doe*, *supra*, 71 Cal.App.5th at pp. 236-238.)[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). (*Id.* at pp. 236-240.)

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."'" (*Id.* at p. 238 (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

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[2] Plaintiffs did 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 [].)" (*Doe*, supra 71 Cal.App.5th at p. 238.) 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.* p. 240.)

> [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"].)

(*Ibid.* (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 other 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. (*Id.* at p. 239.) 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 other 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. (*Doe*, *supra*, 71 Cal.App.5th at p. 239.) 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." (*Ibid.*) None of this is correct.

As detailed below, the credibility exception is reserved for when the conduct being placed before the jury has bearing on credibility because it tends to call into question whether the victim is offering false testimony. This is something other than the fact that there has simply been ***other sexual conduct itself***. An example would be where there is a claim that the victim has made a false statement that coincidentally concerns prior sexual conduct. "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.) Further, the defendant cannot itself "open the door" to impeaching a witness by asking the witness about evidence explicitly excluded under Section 1106(a). In other words, a defendant cannot ask the plaintiff if she consented to the sexual conduct alleged – and with a denial, then argue the evidence of sexual conduct is relevant for purposes of credibility. The statement to be impeached cannot be one that is inadmissible under Section 1106(a).

Such an interpretation preserves the intent of the Legislature and harmonizes the credibility exception in subsection (e) with the absolute bar prescribed by subsection (a) in Section 1106.

As held by this Court, in light of the Legislature's intent in enacting California Rape Shield Laws to encourage victims of sex-related offenses to come forward and protect them from having their personal lives paraded in a trial where they happen to be the unfortunate victim of sexual assault by the defendant, the discretion afforded to trial courts to permit evidence of sexual conduct to be admissible on the issue of credibility must be "***narrow***." (*People v. Fontana* (2010) 49 Cal.4th 351, 363, citing *People v. Chandler* (1997) 56 Cal.App.4th 703, 708.) As highlighted by this Court:

> **Great care must be taken to insure that this [credibility] exception to the general rule barring evidence of a complaining witness' prior sexual conduct,** … ***does not impermissibly encroach upon the rule itself*** **and** ***become a 'back door'*** **for admitting otherwise inadmissible evidence**.

(*Fontana*, 49 Cal.4th at p. 363, citing *People v. Rioz* (1984) 161 Cal.App.3d 905, 918–919.) 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.

Beyond this, even assuming *arguendo* that such evidence could be admissible under the credibility exception, none of the procedural requirements of Evidence Code section 783 were met here and the court of appeal's 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 (Jane DS Doe 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 782/783 *to be inapplicable*, there was no deference or even consideration given to the Legislature's codification of the balancing concerning such evidence. (See *Vinson v. Superior Court* (1987) 43 Cal.3d 833, 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 Section 782/783 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.

The prejudice resulting from the erroneous ruling permitting the introduction of the 2013 sexual assault of Plaintiff Jane DS Doe at trial cannot be undone. At the time Plaintiffs filed the Writ Petition before the

court of appeal, trial had not yet begun. As detailed below, during the days between the filing of the Writ Petition and this Court's order staying the trial, the trial court permitted the District to discuss the 2013 sexual assault during its opening statement – over Plaintiffs' *repeated objection*. Following the subsequent orders of this Court and the court of appeal concerning the order to show cause as to why the relief sought for in the petition should not be granted, the trial court instructed the jurors that they are still jurors in this case and that they would be required to return to appear for trial sometime after review is complete by the appellate court.

As explained below, should this Court grant the relief sought and vacate the trial court's July 28, 2021 order permitting evidence of the 2013 sexual assault to be admitted at trial, the Court should further instruct that the current jurors be discharged and a new trial ordered. The prejudicial impact of the introduction of evidence concerning an independent sexual assault is implicit in the very statutes designed to protect against its disclosure and admissibility. As the court's order has tainted the trial, the jurors should be discharged and trial begin anew.

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").

Plaintiff Jane DS Doe, who was just *8 years old* and in the fourth grade at the time of the abuse, suffered the worst of the abuse. (Writ Exh. 1; see also SC Reply Exh. 1 at 35-36, 42-43.)[3] Baldenebro repeatedly molested Jane DS Doe, which included such horrific acts as digital penetration, oral copulation and ejaculating on her hands. (Id.) As a result, Jane DS Doe suffered emotional distress and psychological injuries. (See Writ Exh. 9, p. 112.) As alleged, despite the fact the District had received numerous reports of Baldenebro's inappropriate conduct with students, the District woefully failed to do anything in response to protect children, including Plaintiffs, from Baldenebro's abuse. (Writ Ex. 1.)

[3] While the complaint states that the abuse of Plaintiff DS Doe occurred during the 2010-2011 school year, the record reveals that the abuse occurred in 2009-2010. (See SC Reply Exh. 6 at 35-36, 42-43, 68-70, 73; see also Writ Exh. 9, p. 138.)

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." *(Doe*, *supra*, 71 Cal.App.5th at p. 233; 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. (Writ 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. (Writ Exh. 2, pp. 43-44.) The District did not file an opposition to Plaintiffs' MIL No. 10. (See Writ 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. (Writ 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 (Writ Exh. 6, pp. 75-76), which the District thereafter filed later that day on July 19, 2021. (Writ Exhs. 8-11; *Doe*, *supra* 71 Cal.App.5th at 233, fn. 3 [as noted earlier, 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. (Writ Exh. 10, at 149-150.) The Motion began by stating: "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." (Writ Exh. 10, p. 149.) Further, the District made clear in its motion that the District *does not* intend to use the 2013 molestation evidence to "'attack the credibility'" of Plaintiff Jane DS Doe. (Writ Exh. 10, p. 151 [the District stated that it does 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."]; see also Writ Exh. 9, p. 109 [Decl. of Christovich filed under seal]; *Doe*, *supra*, 71 Cal.App.5th at p. 233.)

On July 22, 2021, Plaintiffs filed an Opposition to the District's Section 782 Motion concerning the District's intention to introduce and admit evidence of a subsequent sexual assault suffered by Jane DS Doe in 2013. (Writ Exh. 4.) Plaintiffs argued that that the District's attempt to justify introduction of the evidence concerning the 2013 sexual assault as an alleged "alternative explanation" for the injuries suffered by Plaintiff is entirely improper and clearly barred by the express language of Evidence Code section 1106, subdivision (a), prohibiting the use of prior sexual history evidence to prove *the absence of injury* to the plaintiff. (Writ Exh. 4, p. 59.) Plaintiffs explained that that District's position that a subsequent sexual assault is admissible because such prior experiences may impact how the victim is emotionally affected by the abuse at issue in the case *would be true in all cases*, and thus the protections afforded by the legislature would always be swallowed up by the standing "relevance" the District asserts prior sexual history has to emotional distress damages. (Writ Exh. 4, p. 59-63.)

On July 26, 2021, the District filed its Reply to Plaintiffs' Opposition to the District's Evidence Code section 782 Motion. (Writ Exh. 5.) The District again stressed that that the 2013 sexual abuse did not fall within Evidence Code section 1106(a). (See Writ Exh. 5, p. 69-70.)

According to the District, because the abuse is not sexual conduct and thus not protected by the Rape Shield Laws, "[t]he sexual privacy concerns in these cases [*Vinson, Knoettgen, Mendez,* etc.] do not apply here." (Writ Exh. 5, p. 71.) The District maintained its position that the sexual assault was relevant to damages: "[t]he issue is causation of trauma as between the 2009-2010 Baldenebro incident and the 2013 incident." (Id. at p. 70.)

On July 28, 2021, while the parties were engaged in voir dire, the trial court noted: "This is the first opportunity I've had with no jurors in the courtroom to give you a ruling on the 783 motion." (Writ Exh. 7, p. 83.) The trial court then stated: "Give me a brief argument. I'm going to give you my ruling. Then we're *not* going to argue it after I give you my ruling. I don't need a repetition of what's in your papers." (Writ Exh. 7, p. 84.)

Counsel for the District argued that "it's our position that while 782 doesn't even apply, if it were to apply, we're not offering history of sexual history." (Writ Exh. 7, p. 84-85.) "We want to offer evidence that there had been the prior sexual abuse or sexual molestation that we believe was in approximately 2013 to show *concurrent cause of harm*." (Writ Exh. 7, p. 85.) In response, Plaintiffs' counsel explained that evidence of the 2013 sexual assault violates Plaintiff Jane Doe's constitutional right to privacy and cannot be used to show an alternate source of harm. (Writ Exh. 7, p. 88-90.) 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 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).)

After both parties were asked whether they submitted, the court issued its ruling. (Writ Exh. 7, p. 92-95.) 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." (Writ Exh. 7, p. 92; *Doe*, *supra*, 71 Cal.App.5th at p. 233.) 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. (*Doe*, at p. 233; Writ Exh. 7, p. 93.) The court held that the 2013 molestation is admissible "*because it's relevant on damages*." (*Doe*, at p. 233; Writ Exh. 7, p. 93.) Likening the evidence of an alleged subsequent sexual assault to "an auto case, [where] if there's a subsequent auto case, auto accident, and the plaintiff is injured and the judge excludes evidence of that, I think it would be reversible error" (Exh. 7, p. 93), the trial court held that evidence of an independent sexual assault is admissible on the issue of damages. (Ibid.)

B. Writ Proceedings.

On July 29, 2021, the day after the court's ruling, Plaintiffs filed a Petition for Writ of Mandate and Request for Immediate Stay with the court of appeal. (*Doe*, *supra*, 71 Cal.App.5th at p. 234.) After issuing a stay of the trial proceedings that same day, on July 30, 2021, the court of appeal issued an order dissolving the stay and denying the Writ Petition. (*Ibid.*)

On August 1, 2021, Plaintiffs filed a Petition for Review with this Court. (*Ibid.*)

As this was occurring, the trial court ruled—over Plaintiffs' repeated objections—that the District could discuss the 2013 sexual assault during the District's opening statement to the jury – which the District did. (*Doe*, *supra*, 71 Cal.App.5th at p. 234; See also SC Reply Exh. 1, p. 69-74 [the District's Opening Statement at 52-74]; SC Reply Exh. 3, p. 255-256, 258-259, 350-351, 356 and SC Reply Exh. 1, p. 10-11 [Plaintiffs' repeated objections].) 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.; SC Reply Exh. 1, p. 46 [Plaintiffs' Opening Statement is at 28-48, with only one short paragraph concerning the 2013 assault].)

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. (*Doe*, *supra*, 71 Cal.App.5th at p. 234.) The court of appeal did so and thereafter obtained further briefing and heard argument. (*Ibid.*) 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 Issued 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. (*Doe*, *supra*, 71 Cal.App.5th at pp. 236-240.) While the court of appeal 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.* at p. 235.)

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. (*Id*. at pp. 238-240, 241-242.) The court of appeal 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." (*Id.* at p. 239.)

Moving on to the section 783 analysis, the court of appeal 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. (*Id.* at pp. 240-241.) 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." (*Id.* at p. 241.) The court of appeal 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 of appeal accordingly denied Plaintiffs' Writ Petition.

Plaintiffs did not file a Petition for Rehearing.

D. Pursuant to the Trial Court's Order Dated August 12, 2021, the Jurors Remain on Call in this Trial.

Following this Court's August 9, 2021 order directing the court of appeal to issue an order to show cause, and the court of appeal's August 10, 2021 order doing so and setting the matter for hearing on October 28, 2021, the trial court instructed the jurors to remain *on call* until resolution of the appeal. Specifically, on August 12, 2021, following a telephonic conference with counsel, the trial court issued an order whereby the jurors were informed that they were still jurors in this case and were required to appear back in court for this trial sometime after October 28, 2021. The jurors were told, in pertinent part:

> This case has been stayed and the stay will remain in place until at least October 28, 2021 and possibly for several weeks after October 28, 2021. You are still jurors in this case. [¶] The Court is not in a position to predict when this trial will resume. [¶] The Court will advise you when proceedings do resume and when you will be required to appear in Department Q for this trial. … [¶] You are still jurors in this case and you are ordered not to discuss the case among yourselves or with anyone else and not to do any research. All prior orders of the Court remain in effect.

(Supp. Writ Exh. 2, p. 6-10.)

ARGUMENT

I.

THE COURT OF APPEAL'S DECISION RENDERS CALIFORNIA'S RAPE SHIELD LAWS MEANINGLESS

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. (*Doe*, *supra*, 71 Cal.App.5th at pp. 241-242.) 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. Pursuant to the court's analysis, victims of sexual abuse will have 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.)

A. A Victim's Constitutional Right to Sexual Privacy and California's Rape Shield Laws.

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. (*Vinson,* 43 Cal.3d 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." (*Vinson*, at p. 841 (emphasis added).)

In its discussion, this Court highlighted that the legislature had "recently enacted a measure designed to protect the privacy of plaintiffs in cases such as these" and noted the critical legislative intent in creating California's Rape Shield laws. (*Vinson,* 43 Cal.3d at p. 843; citing Stats. 1985, ch. 1328, pp. 4654-4659, enacting Code Civ. Proc. § 2036.1 [now § 2017.220] and Evid. Code §§ 783 and 1106.)

> The discovery of sexual aspects of complainant's [sic] lives, … has the clear potential to discourage complaints and to annoy and harass litigants. That annoyance and discomfort, as a result of defendant[s]' … inquiries, **is *unnecessary and deplorable*. 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 and in open … judicial proceedings**.

> The Legislature is mindful that a similar state of affairs once confronted victims in criminal prosecutions for rape. …
>
> The Legislature concludes that the use of evidence of a complaint's sexual **behavior is *more often harassing and intimidating then genuinely probative*, and the potential for prejudice *outweighs* whatever probabtive value that evidence may have**. ***Absent extraordinary circumstances*, inquiry into those areas should not be permitted, either in discovery or at trial.**

(*Mendez v. Superior Court* (1988) 206 Cal.App.3d 557, 564-565, citing Stats. 1985, ch. 1328, § 1, pp. 4654-4655 (emphasis added); see also *Vinson*, supra, 43 Cal.3d at p. 843; *Knoettgen,* 224 Cal.App.3d at p. 13-14.)

Under California's Rape Shield law, as applied to civil actions alleging sexual harassment, sexual assault or sexual battery, victims are afforded heightened protection against disclosure of specific instances of sexual conduct with persons other than the defendant both in discovery and trial.[4]

Evidence Code section 1106, governing admissibility at trial, states:

> (a) In any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, opinion

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[4] Code of Civil Procedure section 2017.220(a), which governs discovery of such private information, states:

> (a) In any civil action alleging conduct that constitutes sexual harassment, sexual assault, or sexual battery, any party seeking discovery concerning the plaintiff's sexual conduct with individuals other than the alleged perpetrator **shall establish *specific facts* showing that there is good cause for that discovery**, and that the matter sought to be discovered **is relevant to the subject matter of the action *and* reasonably calculated to lead to the discovery of *admissible evidence***. This showing shall be made by a noticed motion, accompanied by a meet and confer declaration under Section 2016.040, and shall not be made or considered by the court at an ex parte hearing.

(Code Civ. Proc. § 2017.220(a) (emphasis added).)

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*.

(b) Subdivision (a) does not apply to evidence of the plaintiff's sexual conduct with the alleged perpetrator.

(c) Notwithstanding subdivision (b), in any civil action brought pursuant to Section 1708.5 of the Civil Code involving a minor and adult as described in Section 1708.5.5 of the Civil Code, evidence of the plaintiff minor's sexual conduct with the defendant adult shall not be admissible to prove consent by the plaintiff or the absence of injury to the plaintiff. Such evidence of the plaintiff's sexual conduct may only be introduced to attack the credibility of the plaintiff in accordance with Section 783 or to prove something other than consent by the plaintiff if, upon a hearing of the court out of the presence of the jury, the defendant proves that the probative value of that evidence outweighs the prejudice to the plaintiff consistent with Section 352.

(d) If the plaintiff introduces evidence, including testimony of a witness, or the plaintiff as a witness gives testimony, and the evidence or testimony relates to the plaintiff's sexual conduct, the defendant may cross-examine the witness who gives the testimony and offer relevant evidence limited specifically to the rebuttal of the evidence introduced by the plaintiff or given by the plaintiff.

(e) *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 (emphasis added).)[5]

[5] Evidence Code section 783 details the procedural requirements where evidence of sexual conduct is sought to be admitted for purposes of impeachment. The language of the statute is detailed below in Section II.

Thus, in enacting Section 1106 and California's Rape Shield laws, the Legislature 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.) In *Vinson*, this Court highlighted the "great pains" the Legislature took to state its intent in enacting California's Rape Shield laws and noted:

> We anticipate that in the majority of sexual harassment suits*, a separate weighing of privacy against discovery will not be necessary*. **It should normally suffice for the court,** in ruling on whether good cause exists for probing into the intimate life of a victim of sexual harassment, sexual battery, or sexual assault, **to evaluate the showing of good cause in light of the legislative purpose in enacting this section and the plaintiff's constitutional right to privacy**.

(*Vinson, supra,* 43 Cal.3d at p. 844 (emphasis added).)

As explained by one court, citing *Vinson*: "The legislative expressions addressing this area have now, in our view, codified the 'balancing process' and have 'obviated the need for us to engage in an individualized balancing of privacy with discovery ....'" (*Mendez, supra,* 206 Cal.App.3d at p. 569, citing *Vinson*, at p. 843.)

B. The Credibility Exception Can't be Used to Admit Evidence of Sexual Conduct For the Very Purpose That Evidence is Inadmissible Under Section 1106(a).

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 (*Doe*, *supra*, 71

Cal.App.5th at pp. 236-237, 240), 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 (Id. at pp. 239-2402). This makes no sense.

As explained above, 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 at p. 13.) 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 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 thus be negated because the "relevance" the court reasoned prior sexual history has to the "credibility" of a plaintiff's claim for emotional distress damages – would exist whenever a victim of sexual abuse claims emotional distress damages and has suffered a separate sexual assault. There would be no difference between using the evidence substantively to show an absence of injury (expressly improper) and to impeach a plaintiff's claim that it was the perpetrator who was the cause of harm. 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 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.)

Against the backdrop of the legislative intent in enacting California's Rape Shield Laws, because evidence of sexual conduct that is inadmissible to prove an absence of damages under Section 1106(a), it necessarily cannot be admissible to impeach a victim's claim for emotional distress

damages under the credibility exception in subdivision (e). In such a situation, there is no "extraordinary" circumstance justifying its admissibility.

Thus, the credibility exception 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 incisively 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 (*Doe*, *supra*, 71 Cal.App.5th at pp. 238-239), 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 *ibid.* ["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 the 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. (*Doe*, *supra*, 71 Cal.App.5th at pp. 241-242.) "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.

The analysis of whether sexual conduct excluded under Section 1106(a) can be used to impeach a victim's claim for damages under the credibility exception in subsection (e) must acknowledge the legislative intent that "'***absent extraordinary circumstances*** inquiry into … [a complainant's sexual behavior] ***should not be permitted***, either in discovery or at trial.'" (See *Mendez, supra,* 206 Cal.App.3d at p. 569.) Viewed from this legislative intent, there is no "tension" between exclusion of evidence of sexual conduct to prove an absence of injury under Section 1106, subsection (a), with the *narrow* credibility exception in subsection (d).

Nor can a defendant create an opportunity to backdoor evidence of sexual conduct into a trial under the guise of impeachment. For example, a defendant cannot ask a victim whether she consented to the sexual activity alleged and, when she presumably denies such, argue that the denial has now opened the door to the use of such evidence for impeachment or credibility purposes.

Mendez is again instructive. There, the plaintiff denied having an extramarital affair at her deposition. (*Mendez*, 206 Cal.App.3d at p. 575-576.) At the time of her deposition, she had a pending claim for loss of consortium that was later dismissed. The defendant argued that given her denial under oath, discovery concerning an extramarital affair should be permitted as it bears on her *credibility* and thus may be admissible under Section 1106(e) and Section 783. (*Id*. at pp. 575-579.) Rejecting such an argument, the court explained that the question upon which the denial rests is one that has no longer has relevance in the action given her dismissal of the loss of consortium claim and thus could not be elicited at trial. "If the statement to be impeached *is not admissible* then the impeachment of it is

not permissible." (*Mendez*, at p. 577, citing *People v. Belmontes* (1983) 34 Cal.3d 335, 341.) Exactly.

At the heart of the Rape Shield Laws is the notion that the filing of an action for sexual abuse, even with a claim for mental and emotional damage that often accompanies such abuse, *does not* open the door or otherwise waive the victim's right to privacy in matters involving sexual conduct. Without the protection of Section 1106, victims risk having their intimate lives intruded upon and exploited before a jury simply for coming forward against the perpetrator of their abuse. Finding evidence of a victim's sexual conduct with persons other than the defendant (whether consensual or nonconsensual) "more often harassing and intimidating then genuinely probative," the Legislature has *prohibited* such evidence from being introduced at trial to prove an absence of injury to the victim. (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.)

Therefore, in bringing her action against the school district for woefully failing to protect her from the repeated and horrific sexual abuse she suffered at the hands of her fourth-grade teacher when she was just 8 years old, the District is precluded from presenting evidence that Plaintiff subsequently suffered a separate independent sexual assault by a teenage boy to undermine her claim for emotional distress damages caused by her teacher's sexual abuse.

II.

EVEN ASSUMING ARGUENDO THAT EVIDENCE OF THE 2013 SEXUAL ASSAULT COULD BE ADMISSIBLE FOR IMPEACHMENT PURPOSES, NONE OF THE PROCEDURAL PROTECTIONS AFFORDED VICTIMS UNDER SECTION 783 WERE COMPLIED WITH HERE

Undeterred by the District's complete failure to offer proof that the 2013 sexual conduct was relevant to Plaintiff Jane DS Doe's credibility, as well as the trial court's finding that the stringent analysis required by Sections 1106 and 783 *did not apply* since the assault was not sexual conduct falling with protection of the Rape Shield Laws, the court of appeal held that the trial court's ultimate Section 352 analysis admitting the evidence as "relevant to damages" did not constitute an abuse of discretion. According to the court, the trial court "ostensibly" admitted the evidence "to impeach the plaintiff," and the court's Section 352 analysis of prejudice is "identical" to the one required under Section 783. (*Doe*, *supra*, 71 Cal.App.5th at pp. 231-232.) None of this is correct.

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." (Writ Exh. 10, p. 149.) The first heading read, "Evidence Code Section 782 Does Not Apply to Evidence of the 2013 incident." (Writ 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." (Writ Exh. 10, p. 151; see also Writ 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 Writ Exh. 7, p. 92-95.) Under this analysis, the court concluded the 2013 molestation is "relevant on damages." (Writ 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 of appeal reasoned that it was tasked with reviewing the court's ruling, not its rationale. (*Doe*, *supra*, 71 Cal.App.5th at p. 241.) 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 Section 352 analysis was an abuse of discretion. (*Id*. at pp. 235-236, 241.) 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 Section 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." (*Id.* at p. 241.) The court appeared to reason that because the trial court ultimately heard an offer of proof (albeit regarding the relevance of the evidence on the issue of damages), it was not necessary for the District to submit one in writing. However, Section 783 specifically states that the offer of proof *must be made in writing*. Throughout its briefing concerning its Section 783 motion, 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. Thus, there was *no offer of proof*, written or otherwise, to use the evidence for purposes of attacking Plaintiff's credibility.

As for the Section 783 hearing, the court of appeal 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." (*Id.* at p. 241.) 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 Section 352 analysis and thus there was no opportunity for the parties to question 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. (*Id.* at p. 235, 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, and thus no finding by the trial court that any supposed offer of proof was sufficient to trigger a hearing under Section 783, *there necessarily was no hearing* as required under Section 783.

Further problematic is the fact that there was no notice of a hearing for either the Section 783 motion, nor any hearing prescribed by subdivision (c) *after* the court has found a sufficient offer of proof.[6] Here, within mere days of the initial Section 783 motion being filed, and without any forewarning as to which day the court would hear the purported Section 783 motion, the trial court merely stated: "This is the first opportunity I've had with no jurors in the courtroom to give you a ruling on the 783 motion." (Writ Exh. 7, p. 83.) The court then began by stating that it would provide its ruling only after the parties argued and submitted on the briefing. (Writ Exh. 7, p. 83-84.)

[6] Notably, where a defendant seeks to even discover information concerning a victim's sexual conduct under Code of Civil Procedure section 2017.220, subdivision (a), the motion "*shall not be made or considered* by the court at an *ex parte hearing*." (Code Civ. Proc. § 2017.220(a) (emphasis added).)

Without notice of the hearing or even a finding that an adequate offer of proof had been made, the exchange of arguments by counsel can in no way suffice as a Section 783(c) hearing where the witness is questioned concerning the offer of proof outside the presence of the jury. Nor can the court of appeal's position that the parties *could have* asked for an opportunity to question Plaintiff but "opted not to" suffice since the parties were unaware of the finding of an adequate offer of proof until after they submitted on their arguments. (Id.) Moreover, Section 783 does not require that a party must elect to question the victim. Rather, it mandates the questioning of the victim *before* the trial court can admit such highly sensitive information to be admitted for credibility purposes. (See Evid. Code § 783.)

The court of appeal's further conclusion that the Section 352 analysis conducted by the trial court here was identical to the one required under Section 783 is entirely mistaken. (*Doe*, *supra*, 71 Cal.App.5th at p. 232) Here, after finding that Section 1106 and 783 did not apply, the court went on to conduct a traditional Section 352 analysis. The court's analysis of prejudice necessarily *fell outside* of Sections 1106 and 783. The court thus 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 have weighed the probative and prejudicial value of the evidence under a Section 352 analysis.

Thus, while subdivision (e) states that evidence to attack the credibility of the victim is not made in inadmissible by Section 1106, it sets forth the scrutiny with which the claim of admissibility for this purpose must be examined. In exercising "narrow" discretion to admit such evidence under the credibility exception, "great care must be taken" to protect the victim from disclosure of such deeply personal information.

(See *People v. Fontana, supra,* 49 Cal.4th at p. 362-363; see also p. 370 [citing *United States v. One Feather* (8th Cir.1983) 702 F.2d 736, 739 [the policy of the rape shield law "to guard against unwarranted intrusion into the victim's private life[ ] *may be taken into account in determining the amount of unfair prejudice*"].) As the trial court here did not even consider the 2013 sexual assault to be "sexual conduct" entitled to the "heightened protections" afforded to victims under California's Rape Shield Laws, it is axiomatic that the court's subsequent Section 352 analysis could not have considered the prejudicial nature of such evidence – nor even its supposed probative value. The trial court found that the evidence was *relevant as to damages* – not credibility.

As such, nothing about the court's Section 352 analysis resembled one under Section 783. Any exercise of discretion by the trial court was therefore necessarily an error of law as the court employed the wrong legal standard to the analysis. (See *Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485, 1493 [applying the wrong legal standard constitutes an abuse of discretion as a matter of law]; *Doe 2 v. Superior Court* (2005) 132 Cal.App.4th 1504, 1517 ["'A trial court abuses its discretion when it applies the wrong legal standards applicable to the issue at hand.'"]; *Linder v. Thrifty Oil Co*. (2000) 23 Cal.4th 429, 435-436.)

Further still, the trial 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 safeguards 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." (*Doe*, *supra*, 71 Cal.App.5th at p. 241; see also *id.* at p. 242 [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 sets forth dangerous precedent. Under no analysis were the procedural rights of victims of sexual assault as guaranteed by Section 783 followed by the trial court here.

CONCLUSION

For the foregoing reasons, Plaintiffs urge this Court to issue an order directing the respondent superior court to vacate its erroneous July 28, 2021 order permitting introduction of this highly sensitive and inadmissible evidence, discharge the current jurors, and begin trial anew upon remand.

Dated: April 11, 2022

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