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Supreme Court Number S272166

In the Supreme Court of the State of California

JANE S.D. DOE, et al.,

Petitioners,

v.

SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent,

MOUNTAIN VIEW SCHOOL DISTRICT,

Real Party in Interest.

After a Decision by the California Court of Appeal
Second Appellate District, Division Two, No. B313874
Los Angeles County Superior Court, Case No. BC712514
The Honorable Mary Ann Murphy

ANSWER BRIEF ON THE MERITS

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ISSUES PRESENTED

Since there is no order specifying the issues to be briefed, petitioner's opening brief on the merits was required to quote "[t]he statement of issues in the petition for review[.]" (Cal. Rules of Court, rule 8.520(b)(2)(B).) Those issues are:

"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)?" (Petn. for review, p. 6, original italics and bolding.)

"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?" (Petn. for review, p. 6, original italics.)

Petitioner's opening brief on the merits did not quote the statement of issues in the petition for review and instead presented different, broader issues for review:

"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))?" (Opening Brief on the Merits ("OBM"), p. 6.) The only possible answer to this question is "it depends."

"2. If admissible, what procedures and quantum of proof are required to admit such evidence?" (OBM, p. 6.) The

Legislature answered this question in 1985 in Evidence Code section 783, which sets forth the procedures that "shall be followed" when "evidence of sexual conduct of the plaintiff is offered to attack [the] credibility of the plaintiff[.]"

Defendant and real party in interest Mountain View School District (the "District") proposes the following issue for review:

Evidence Code section 1106, subdivision (a), provides: "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." Section 1106 "*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, subd. (e), italics added.)

Did the Legislature vest trial courts with discretion to admit evidence of a plaintiff's prior sexual conduct to attack the plaintiff's credibility pursuant to Evidence Code section 783 even though in many cases there will necessarily be a certain amount of overlap between the issues of the plaintiff's damages and the plaintiff's credibility?

INTRODUCTION

Plaintiff and petitioner Jane S.D. Doe ("Susana D.") was formerly a student at Miramonte Elementary School ("Miramonte"). She alleges a former Miramonte teacher, Joseph Baldenebro ("Baldenebro"), sexually molested her in 2009 and 2010. Susana D.'s allegations against Baldenebro stand out from her fellow plaintiffs in this case. In contrast to Susana D.'s graphic sexual allegations, the other five student-plaintiffs allege conduct such as hugging and hand holding that—while plainly inappropriate and inexcusable—is far less extreme.

In 2013, Susana D. was sexually molested by a relative or family friend and developed chronic post-traumatic stress disorder (PTSD) shortly thereafter. PTSD can significantly affect a person's ability to accurately recollect traumatic events and often results in distorted memories. (Writ exh. 9, vol. 2, pp. 143–144 [sealed].)[1] A witness's "capacity to … recollect" any matter about which she testifies is a statutorily-recognized factor for assessing credibility. (Evid. Code, § 780, subd. (c).) The 2013 incident was a perfect storm for the creation of false memories of

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[1] For the court's convenience, the District uses plaintiffs' record citation abbreviations. (Petn., pp. 7–8, fn. 1.) The District refers to: (1) the original exhibits filed with plaintiffs' petition for writ of mandate as "writ exh."; (2) the exhibits filed in this court on August 6, 2021 with plaintiffs' reply to the District's answer to the petition for review as "SC reply exh."; and (3) the exhibits filed in the Court of Appeal on September 30, 2021 in support of plaintiffs' reply to the District's return as "supp. writ exh."

Susana D.'s experiences with Baldenebro—which helps explain why her claims differ so markedly from the other plaintiffs.

In Evidence Code sections 783 and 1106 (and their criminal counterparts, sections 782 and 1103), the Legislature vested trial courts with discretion to decide whether evidence such as the 2013 incident is admissible to attack a plaintiff's credibility. The Court of Appeal recognized the inherent "'tension'" between section 783, which allows trial courts to admit evidence of a plaintiff's sexual conduct to attack her credibility, and section 1106, subdivision (a), which states that evidence of the plaintiff's sexual conduct "is not admissible by the defendant in order to prove consent by the plaintiff or the absence of injury to the plaintiff[.]" (*Doe v. Superior Court* (2021) 71 Cal.App.5th 227, 239 (*Mountain View School Dist.*), quoting *People v. Rioz* (1984) 161 Cal.App.3d 905, 915–916 (*Rioz*).)

Plaintiffs' argument that "there is no 'tension'" (OBM, p. 35), fails to recognize "[t]here is *necessarily a certain amount of overlap*" between the issues of a plaintiff's damages and her credibility. (*Rioz*, *supra*, 161 Cal.App.3d at p. 916, italics added.) After all, if the jury finds the graphic events with Baldenebro are exaggerated or imagined—unintentionally or intentionally—it necessarily follows that Susana D.'s damages will be affected. Thus, once a defendant makes a sworn offer of proof concerning the relevance of the sexual conduct to attack the plaintiff's credibility, "the absolute protection" afforded by Evidence Code section 1106, subdivision (a), "gives way to the detailed

procedural safeguards inherent in Evidence Code section 78[3]." (*Ibid*.)

Plaintiffs invite this court to dictate how trial courts exercise their discretion under Evidence Code section 783 by strictly limiting the admissibility of evidence of a plaintiff's sexual conduct to instances where the plaintiff made "a false statement" about sexual conduct. (OBM, p. 6.) The Court of Appeal correctly rejected this argument because it is not "supported by the plain text of" Evidence Code sections 783 and 1106. (*Mountain View School Dist.*, *supra*, 71 Cal.App.5th at p. 242.) Indeed, sections 782 and 783 *do not apply* when a defendant seeks to use a false statement to impeach—even if the false statement concerned sexual conduct. (*People v. Tidwell* (2008) 163 Cal.App.4th 1447, 1456 (*Tidwell*) ["the language of section 782 does not apply" to "false complaints"].)

The trial proceedings are stayed and no evidence of the 2013 incident has been introduced. Counsel for both plaintiffs and the District disclosed the 2013 incident to the jury in their respective opening statements. Susana D.'s credibility featured prominently in the District's opening statement. (SC reply exh. 1, vol. 1, pp. 69–73.) Given the evidence of Susana D.'s 2013 molestation is admissible to challenge her credibility—an issue that was squarely raised in the District's opening statement—the potential prejudice resulting from any irregularities in the proceedings below is inchoate. If this court finds the procedures followed by the trial court in admitting the evidence were not

sufficient, there is a simple solution: the District will file an Evidence Code section 783 motion after the stay is lifted.

Finally, plaintiffs "urge this Court to issue an order directing the respondent superior court to … discharge the current jurors, and begin trial anew upon remand." (OBM, p. 45.) What plaintiffs are asking for is a mistrial and the Court of Appeal correctly left that issue to the trial court. While "[t]he District did not limit its discussion of the 2013 molestation strictly to impeaching plaintiff's testimony[,] … the trial court is in the best position to assess the impact of the parties' mention of the 2013 molestation on" the jury. (*Mountain View School Dist.*, *supra*, 71 Cal.App.5th at p. 242.)

The Court of Appeal's decision should be affirmed.

FACTUAL AND PROCEDURAL HISTORY

A. The parties.

Plaintiffs are six former students at Miramonte and two of their parents. (Writ exh. 1, vol. 1, pp. 6–8.) Miramonte is within the District. (*Id.* at p. 9.) Plaintiffs allege a former Miramonte teacher, Baldenebro, sexually molested the student plaintiffs. (*Id.* at pp. 11–13.)

In 2020, plaintiffs filed a first amended master complaint against the District alleging negligent supervision and retention of Baldenebro. (Writ exh. 1, vol. 1, pp. 5–40.)

B. Plaintiffs' motion in limine to exclude all evidence regarding plaintiffs' sexual history and the District's Evidence Code section 782 motion and offer of proof.

On May 26, 2021, plaintiffs filed a motion in limine to exclude reference to plaintiffs' sexual history with persons other than Baldenebro. (Writ exh. 2, vol. 1, pp. 41–51.) Plaintiffs argued "Defendant should not be permitted to bring up any Plaintiffs' [*sic*] prior sexual history with anyone other than Mr. B during this trial for *any purpose*." (*Id*. at p. 44, italics added.)

The trial court addressed motions in limine on July 19, 2021. With regard to plaintiffs' motion in limine to exclude reference to plaintiffs' sexual history with persons other than Baldenebro, the trial court ruled "any evidence of sexual history of the victims must be the subject of an Evidence Code Section 783 -- 782 … [¶] motion before trial. A motion in limine is not the appropriate method of litigating the issue now." (Writ exh. 6, vol. 1, pp. 75–76.)

Later that same day, the District filed under seal an Evidence Code section 782 motion seeking to admit evidence that Susana D. was sexually molested in 2013 by a relative or family friend. (Writ exh. 10, vol. 2, pp. 147–153 [sealed].) The District requested a hearing regarding its offer of proof pursuant to section 782, subdivision (a)(3) if the trial court found section 782 applied to evidence of the 2013 incident. (*Id*. at p. 152 [sealed].)

The District's motion was accompanied by a declaration with an offer of proof and supporting evidence, including the

report of the District's expert witness, Anne C. Welty, M.D., a board-certified child and adolescent psychiatrist. (Writ exh. 9, vol. 2, pp. 108–146 [sealed].) Dr. Welty diagnosed Susana D. with chronic PTSD. (*Id*. at p. 143.) The onset of her symptoms began in 2013—around the same time as the incident in which she was sexually molested by a relative or family friend. (*Id*. at p. 137.) The 2013 trauma led Susana D. to seek therapy in 2016. (*Id*. at pp. 137, 146.)

PTSD can cause "[n]egative alterations in cognition and mood associated with the traumatic event(s)," including "*[i]nability to remember an important aspect of the traumatic event(s)"* and "[p]ersistent, *distorted cognitions* about the cause or consequences of the traumatic event(s)[.]" (Writ exh. 9, vol. 2, p. 144, italics added.)

Plaintiffs opposed the District's Evidence Code section 782 motion on July 22, 2021. (Writ exh. 4, vol. 1, pp. 56–67.) Plaintiffs' opposition stated the District intended to use evidence of the 2013 incident to claim Susana D. "is exaggerating or making up the abuse she suffered." (*Id*. at p. 58.) "According to the District, the evidence of this separate sexual assault is admissible to not only cast doubt on her allegations of sexual abuse by Baldenebro but also to diminish her claim for damages as a result of Baldenebro's sexual abuse." (*Ibid*.) Plaintiffs' opposition says nothing about the District's request for a hearing pursuant to Evidence Code section 782, subdivision (a)(3).

The trial court ruled on the District's Evidence Code section 782 motion on July 28, 2021. (Writ exh. 7, vol. 1, pp. 81, 83–95.) The trial court concluded the 2013 "incident is not prior sexual conduct within the meaning of 782." (*Id*. at p. 93.) The court found the evidence "highly and directly relevant on the defense damage case[.]" (*Id*. at p. 94.) The court then exercised its discretion under Evidence Code section 352: "I am not excluding the evidence because the probative value is not substantially outweighed by the probability that its admission will necessitate undue consumption of time, creates [*sic*] substantial danger of undue prejudice, confuse the issue, or mislead the jury." (*Ibid*.)

C. Plaintiffs' writ petition and first petition for review.

The next day, July 29, 2021, plaintiffs filed a petition for writ of mandate, prohibition and/or other appropriate relief in the Second Appellate District Court of Appeal and requested an immediate stay. The prayer in plaintiffs' writ petition includes a request for "a peremptory writ of mandate commanding the Superior Court to … enter a new order … prohibiting [evidence of Susana D.'s 2013 molestation] from being presented at trial" for any purpose. (Writ petn., p. 17.) Plaintiffs contended all "'argument and discussion about Plaintiff DS Doe or any other Plaintiffs' [*sic*] sexual history, before, or after the abuse by Joseph Baldenebro is not permitted under the Evidence Code.'" (*Id*. at p. 13, quoting writ exh. 2, vol. 1, p. 43.)

The case was assigned to Division Two of the Second Appellate District Court of Appeal (Second Civil Number

B313874) and that court issued a stay of further trial court proceedings pending resolution of the petition, with the exception of jury selection, which could be completed.

On July 30, 2021, the Court of Appeal denied plaintiffs' writ petition and dissolved the stay.

On Sunday, August 1, 2021, plaintiffs filed a petition for review with the California Supreme Court (Supreme Court Case Number S270160) and requested another immediate stay.

D. The parties' opening statements.

Trial resumed on Monday, August 2, 2021. During plaintiffs' opening statement, counsel told the jury the evidence will show "Susana D. got the worst abuse" and detailed Susana D.'s graphic sexual allegations, including forced oral sex, digital penetration, and ejaculation. (SC reply exh. 1, vol. 1, pp. 42–43.) In contrast, counsel stated the evidence would show Baldenebro sat the other plaintiffs on his lap, hugged them, and kissed them on the cheeks. (*Id*. at pp. 42–44.) The trial court sustained multiple objections during plaintiffs' opening statement (*id*. at pp. 39–40, 45–46, 48), and admonished plaintiffs' counsel after his opening statement for two instances of "unacceptable" behavior. (*Id*. at pp. 48–51.)

During the District's opening statement, counsel stated Baldenebro's "conduct was inappropriate and wrong. Nobody is going to try to defend his conduct in this case." (SC reply exh. 1, vol. 1, p. 52.) And "Baldenebro did most of the things claimed by

the plaintiffs." (*Id.* at p. 53.) "So what are the most of the things that he actually did do? Holding hands with students. He did, and that was wrong. He gave them hugs. And this is coming from most of the plaintiffs. This is what most of the plaintiffs are going to say he did to them. Sitting on his lap, kissing and touching them outside their clothing." (*Ibid.*) "Now, not in dispute, Baldenebro caused the plaintiffs emotional distress, and as I've said from the outset, the District has already admitted it was negligent and could have supervised him better. It acknowledged that." (*Ibid.*) Counsel also previewed what each of the six student plaintiffs allege happened. (*Id.* at pp. 58–74.)

Counsel highlighted several grounds for calling Susana D.'s credibility into question, including the 2013 incident:

a. First, of the six student-plaintiffs, Susana D. is the only one who makes "graphic allegations[.]" (SC reply exh. 1, vol. 1, p. 69.) Counsel told the jury: "You're going to hear evidence in this case about this concept of grooming and that molesters start seeing what they can get away with, and … if they can get away with small things, they escalate into larger things and keep getting more bold and keep trying." (*Ibid.*) "The evidence is going to be that the Susana D. allegations, the more graphic things, occurred first in the timeline according to Susana, it happened in 2010, that he did these graphic things earliest, and with the other five later, the less graphic things." (*Ibid.*)

b. Second, in November 2009, Susana D. told her mother "Baldenebro was mean to her and yelled at her" but did

not say anything about molestation. (SC reply exh. 1, vol. 1, pp. 69–70.)

c. Third, Susana D. first reported her allegations to the police in October 2019—after she became aware that Baldenebro had been arrested. (SC reply exh. 1, vol. 1, p. 70.) Susana D. was no longer a minor at the time, and her allegations were much less extreme than the allegations made in this lawsuit. (*Id.* at pp. 70–71.) "So she goes to the Sheriff's Department, and she tells the police the following. Baldenebro rubbed her vagina outside her clothing and brushed his arm against her breast or breasts. Now, in this interview when she's 18 years old now and she's talking to this female deputy, she never indicated ever that Baldenebro sat her on his lap. She did not tell the police he took off her pants or panties. She didn't say anything about fingers in her vagina. She did not report anything about ejaculation into her hand. She did not talk about nipples or oral copulation. Nothing." (*Ibid.*)

Counsel told the jury: "You're going to see the report that this deputy filled out. It's literally -- there's a Victims of Sexual Abuse Report, and there are boxes you check off if the person says anything. And the deputy will say if she had said any of this, it would have been in my report." (SC reply exh. 1, vol. 1, p. 71.)

d. Fourth, Susana D. "underwent therapy from October 2016 to April 2017. … And in over six months of therapy she never mentions or states anything about Baldenebro. I'm

talking about anything. Nothing about laps, hugs, anything in all of those therapy records." (SC reply exh. 1, vol. 1, pp. 71–72.) "There's more. The plaintiff stops therapy and then restarts therapy again in April of 2019. Both sides have those records. She reported in those records and discussed with the therapist abuse by a school teacher. That's it. Abuse by a school teacher. [¶.] Doesn't articulate anything else. She never says oral copulation or vaginal touching or penetration or ejaculation. Never raises that. Never discusses this with the second round of therapy and the therapist." (*Id*. at p. 72.)

e. Finally, counsel told the jury that Susana D. "was sexually molested and abused unrelated to … the school district or Baldenebro -- by a family friend or relative in 2013" and Dr. Welty will testify she "can't just separate" the 2013 incident and the incident with Baldenebro in her mind. (SC reply exh. 1, vol. 1, p. 73.)

After opening statements, the jury heard testimony from four witnesses. (SC reply exh. 1, vol. 1, pp. 74–211.)

E. The prior proceedings in this court and the trial court's efforts to maintain the status quo during the stay of trial court proceedings.

The next day, August 3, 2021, this court stayed the trial (supp. writ exh. 1, vol. 1, p. 4), and it remains stayed to this day. This court also requested the District file an answer to plaintiffs' petition for review by 3:00 p.m. on August 5, 2021. In addition, the court directed plaintiffs to file a reply to the answer by 3:00

p.m. on August 6, 2021, along with the transcript of the proceedings held on August 2, 2021.

The District filed its answer by 3:00 p.m. on August 5, 2021, and plaintiffs filed their reply on August 6, 2021. On August 9, 2021, this court granted plaintiffs' petition for review and transferred the matter to the Court of Appeal with directions to vacate its July 30, 2021 order denying plaintiffs' petition for writ of mandate and to issue an order directing respondent court to show cause why the relief sought in the petition should not be granted. The court also ordered that the temporary stay it issued on August 3, 2021 "shall remain in place pending further order of the Court of Appeal."

In order to preserve the status quo during the pendency of the stay, the trial court issued several orders:

> The instant long cause civil priority jury trial of three consolidated cases was in the fourteenth day of trial when the Supreme Court issued its August 3, 2021 stay order. …
>
> Substantial judicial resources have been devoted to this trial.
>
> Trial commenced on July 14, 2021. The Court conducted hearings on 27 motions in limine and ruled on 26 of those motions. An Evidence Code section 402 hearing on the then-last remaining motion in limine was in progress when the August 3, 2021 stay order was issued.
>
> The Court conducted a jury instruction conference, finalized most of the jury instructions and the jury verdict form.

The Court ruled on objections to four videotaped depositions. Numerous matters not presented by motion were resolved.

Plaintiffs dismissed defendant Baldenebro and dismissed all but one cause of action against the District. The District has admitted negligence on the one remaining cause of action and counsel have advised that the only issues remaining for trial are causation and damages.

The court summoned 592 jurors and only 345 appeared due to Covid and the Delta variant surge. Jury questionnaires were used. It took nine court days to pick 12 jurors and 8 alternate jurors….

The Court will issue an Order re Jurors and serve the jurors with the order by mail and e-mail with the exception of one juror who does not have an e-mail who will be notified by telephone and by mail. …

The Order re Jurors will provide:

To the jurors and alternate jurors in the trial of this case:

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.
>
> …
>
> Plaintiffs' objection to the above order is overruled. The above order is issued with the concurrence of Los Angeles Superior Court Supervising Civil Courts Judge David J. Cowan.

(Supp. writ exh. 2, vol. 1, pp. 6–9.)

F. The District's return to plaintiffs' writ petition.

On August 10, 2021, the Court of Appeal vacated its July 30th order denying plaintiffs' petition for writ of mandate and ordered respondent court to show cause why the relief prayed for in the petition should not be granted.

The District filed its return to plaintiffs' writ petition on September 7, 2021. The District did not argue evidence of the 2013 molestation was admissible for all purposes; it did not argue the 2013 molestation did not qualify as "sexual conduct" within the meaning of Evidence Code section 1106; it did not argue section 1106's bar applies only when the other sexual conduct occurs before the incidents involved in the lawsuit; and it did not argue its questioning of Susana D. regarding the 2013 incident would be minimal.

Rather, the District argued plaintiffs are not entitled to "'a peremptory writ of mandate commanding the Superior Court to vacate its orders of July 28, 2021 (and any subsequently entered formal order), and enter a new order denying the District's

Evidence Code 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 and thus prohibiting such evidence from being presented at trial[.]'" (Return, pp. 13–14, quoting writ petn., p. 17.) The District denied that "all '"argument and discussion about Plaintiff DS Doe or any other Plaintiffs' [*sic*] sexual history, before, or after the abuse by Joseph Baldenebro is not permitted under the Evidence Code."'" (Return, p. 14, quoting writ petn., p. 13, quoting writ exh. 2, vol. 1, p. 43.)

Evidence Code section 1106 "*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, subd. (e), italics added.) Evidence Code section 783 sets forth procedures to be followed "if evidence of sexual conduct of the plaintiff is offered to attack credibility of the plaintiff" at trial. (Return, p. 18.)

Thus, the District argued evidence of Susana D.'s 2013 molestation is not absolutely inadmissible, as plaintiffs argue; it is admissible to attack Susana D.'s credibility. (Return, p. 19.) The District stated it had not yet filed an Evidence Code section 783 motion to attack her credibility and the trial court had not yet conducted Evidence Code section 783 proceedings or decided whether that evidence is admissible on the issue of credibility. (*Ibid*.)

Accordingly, the District prayed that the Court of Appeal "[d]eny the relief requested in plaintiffs' petition to the extent

plaintiffs seek a peremptory writ of mandate directing respondent court to enter an order prohibiting evidence of Susana D.'s 2013 molestation from being presented for any purpose at trial" and "[d]irect respondent court to conduct Evidence Code section 783 proceedings, should [the] court issue a peremptory writ of mandate directing respondent court to vacate its July 28, 2021 order finding evidence of … Susana D.'s 2013 molestation admissible on the issue of damages." (Return, p. 15.)

G. The Court of Appeal's opinion.

The Court of Appeal found the scope of the trial court's ruling regarding the 2013 incident "ambiguous." (*Mountain View School Dist.*, *supra*, 71 Cal.App.5th at p. 235.) "Because an ambiguous or uncertain order should be construed in favor of its validity if possible [citations]," the court "construe[d] the trial court's order to be limited to admitting the 2013 molestation for impeachment purposes only." (*Ibid.*) Accordingly, the court "reject[ed] as inaccurate the District's representation that '[t]he hearing required by' 'section 783' 'was not conducted,' and decline[d] its consequent request to remand for 'section 783 proceedings regarding this evidence.'" (*Id.* at p. 235, fn. 4.)

The court recognized Evidence Code "section 1106 erects 'an *absolute bar* to the admission of evidence of "specific instances of plaintiff's sexual conduct."'" (*Mountain View School Dist.*, *supra*, 71 Cal.App.5th at p. 238, original italics, quoting *Patricia C. v. Mark D.* (1993) 12 Cal.App.4th 1211, 1216.)

However, "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 and Evidence Code section 783." (*Mountain View School Dist.*, *supra*, 71 Cal.App.5th at p. 239, fn. omitted, citing Stats. 1985, ch. 1328, §§ 2, 3, p. 4655.) "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." (*Mountain View School Dist.*, at p. 239, quoting *Rioz*, *supra*, 161 Cal.App.3d at p. 915.) "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 § 783)." (*Mountain View School Dist.*, at p. 239.)

Plaintiffs suggested to the Court of Appeal that Evidence Code 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 statute: 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." (*Mountain View School Dist.*, *supra*, 71 Cal.App.5th at p. 242.)

In reviewing the trial court's ruling, the Court of Appeal assessed "whether the court's section 352 analysis was an abuse of discretion." (*Mountain View School Dist.*, *supra*, 71 Cal.App.5th at p. 241.) The Court of Appeal found it was not an abuse of discretion to admit the evidence for impeachment purposes 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." (*Ibid.*)

As for the appropriate remedy, the Court of Appeal noted both parties had already given "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. … 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." (*Mountain View School Dist.*, *supra*, 71 Cal.App.5th at p. 242.) Accordingly, the Court of Appeal denied plaintiffs' writ petition and instructed the trial court "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." (*Id.* at p. 243.)

ARGUMENT

I. The Court of Appeal Correctly Rejected Plaintiffs' Overly-Restrictive Interpretation of the Credibility Exception to Evidence Code Section 1106.

Evidence Code section 1106, subdivision (a), provides: "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."

Evidence Code section 1106 explicitly provides it "*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, subd. (e), italics added.)

A. The Court of Appeal correctly recognized the inherent tension between Evidence Code sections 783 and 1106.

Plaintiffs assert the Court of Appeal's statutory construction analysis is "unprecedented" and "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)." (OBM, pp. 7, 35, original italics.)

The Court of Appeal here was not the first court to recognize the inherent "'tension'" between Evidence Code sections 783 and 1106 (and between their criminal counterparts, sections 782 and 1103). (*Mountain View School Dist.*, *supra*, 71 Cal.App.5th at p. 239, quoting *Rioz*, *supra*, 161 Cal.App.3d at p. 915; see *Tidwell*, *supra*, 163 Cal.App.4th at p. 1455 ["evidence of prior sexual conduct goes to the question of the victim's *credibility concerning lack of consent*"], italics added; *People v. Chandler* (1997) 56 Cal.App.4th 703, 707 [recognizing Evidence Code section 1103 "strictly preclud[es] admission of the victim's past sexual conduct for purposes of proving consent" but the victim's credibility as to consent "is almost always at issue in sexual assault cases" and can be admitted pursuant to section 782]; *People v. Varona* (1983) 143 Cal.App.3d 566, 569 ["In this case, an attack on the woman's credibility would necessarily be an attack on her claim of nonconsent and evidence of prior conduct to show consent is expressly barred by section 1103 of the Evidence Code. [¶] However, under section 782 of the Evidence Code, a trial court may permit evidence of prior sexuality in a particular case"].)

Decades ago, in *Rioz*, *supra*, 161 Cal.App.3d 905, 915, the court discussed the "inherent tension between Evidence Code section 782 and section 1103[.]"[2]

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[2] Evidence Code sections 783 and 1106 were modeled after sections 782 and 1103, which were enacted in 1974. (Stats. 1974, ch. 569, pp. 1388–1389; see Stats. 1985, ch. 1328, § 1, p. 4655 ["It (footnote continued)

"There is *necessarily a certain amount of overlap* between the issues of the victim's consent in a rape or other sex offense case and the victim's credibility. Presumably, any complaining witness in a rape case will deny consent to the sexual acts complained of; to avoid the harassment which had traditionally plagued complaining witnesses in cases of this type, the Legislature excluded evidence of prior sexual activity by the complaining witness with persons other than the defendant in order to prove consent." (*Rioz*, *supra*, 161 Cal.App.3d at p. 916, italics added.) Under Evidence Code section 1103, "a defendant in a rape case cannot, based solely upon the victim's testimony and her presumed denial of consent, introduce evidence that she engaged in sexual activity with 1 other man, 10 other men, or 100 other men, nor that she engaged in such activity freely or for monetary compensation." (*Ibid*.)

"**However**, once the defendant, in accordance with the procedural requirements of Evidence Code section 782, makes a *sworn* offer of proof concerning the relevance of the sexual conduct of the complaining witness to attack her credibility, even though it is the underlying issue of consent which is being challenged, then the absolute protection afforded by Evidence Code section 1103, subdivision (b)(1) [now subdivision (c)(1)], gives way to the detailed procedural safeguards inherent in

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is the intent of the Legislature to take similar measures in sexual harassment, sexual assault, or sexual battery cases"].) Indeed, plaintiffs concede "Section 782[] largely mirrors Section 783[.]" (OBM, p. 11.)

Evidence Code section 782." (*Rioz*, *supra*, 161 Cal.App.3d at p. 916, bolding added, original italics.)

"It is significant that the express provisions of Evidence Code section 782 vest broad discretion in the trial court to weigh the defendant's proffered evidence, prior to its submission to the jury, and to resolve the conflicting interests of the complaining witness and the defendant. Initially, the trial court need not even hold a hearing unless it first determines that the defendant's sworn offer of proof is sufficient. Moreover, even after a hearing outside the presence of the jury at which the complaining witness is questioned about the defendant's offer of proof, the statute specifically reaffirms the trial court's discretion, pursuant to Evidence Code section 352, to exclude relevant evidence which is more prejudicial than probative." (*Rioz*, *supra*, 161 Cal.App.3d at p. 916.)

"An example serves to demonstrate the wisdom of this statutory framework: A defendant charged with forcible rape makes the requisite written motion, supported by a sworn affidavit, offering to prove that the complaining witness, a convicted prostitute, agreed to have sex with the defendant for money and charged him with rape to get even with him when he refused to pay her. However, not only has the complaining witness denied that the sexual activity with the defendant was consentual [*sic*], but other evidence establishes without contradiction that the complaining witness was beaten in connection with the event. Given the potentially prejudicial

impact of a prostitution conviction on the victim's testimony that she did not consent, the trial court, in the exercise of its discretion, may determine that the injuries suffered by the victim are wholly inconsistent with the defendant's offer of proof and either reject the sufficiency of the offer of proof in the first instance or exclude evidence of the prostitution conviction, after a hearing, pursuant to Evidence Code section 352." (*Rioz*, *supra*, 161 Cal.App.3d at pp. 916–917.)

"This discretion in the trial court, along with the other safeguards inherent in Evidence Code section 782, including the requirement that the defendant tender a sworn offer of proof of the relevancy of the complaining witness' sexual conduct to attack her credibility, all operate to provide a rational resolution of the tension existing between Evidence Code sections 782 and 1103, subdivision (b)(1) [now subdivision (c)(1)]. Such a resolution recognizes both the right of the victim to be free from unwarranted intrusion into her privacy and sexual life beyond the offense charged and the right of a defendant who makes the necessary sworn offer of proof in order to place the credibility of the complaining witness at issue to fully establish the proffered defense." (*Rioz*, *supra*, 161 Cal.App.3d at p. 917.)

Just as there is necessarily a certain amount of overlap between a criminal complainant's or a civil plaintiff's consent in a criminal or civil sexual assault case and her credibility, there is necessarily a certain amount of overlap between the issues of a civil plaintiff's damages and her credibility. To be sure, there will

be some overlap between Susana D.'s damages and her credibility. If what she claims happened with Baldenebro did not actually happen because the 2013 trauma caused her to misremember or unintentionally exaggerate the details, then her damages for what may actually have occurred would be less. Thus, once a defendant makes a sworn offer of proof concerning the relevance of the sexual conduct to attack the plaintiff's credibility, "the absolute protection" afforded by Evidence Code section 1106, subdivision (a) "gives way to the detailed procedural safeguards inherent in Evidence Code section 78[3]." (*Rioz*, *supra*, 161 Cal.App.3d at p. 916.)

Accordingly, the Court of Appeal here correctly rejected plaintiffs' suggestion "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 statute: 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." (*Mountain View School Dist.*, *supra*, 71 Cal.App.5th at p. 242.) And "a limiting instruction could minimize the dangers of confusing or misleading the jury as well as blunt the undue prejudice flowing from" introduction of the 2013 incident. (*Id.* at p. 241.)

B. The credibility exception is not limited to instances where the plaintiff made a prior false statement.

Citing *People v. Franklin* (1994) 25 Cal.App.4th 328 (*Franklin*), plaintiffs contend "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." (OBM, p. 12, original bolding and italics.) Trial courts' discretion is not so limited.

To start with, there is more to credibility than whether the witness is deliberately lying. "Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following: … *[t]he extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies*" and "[t]he existence or nonexistence of any fact testified to by him." (Evid. Code, § 780, subds. (c), (i), italics added; see *People v. Rodriguez* (1999) 20 Cal.4th 1, 9 ["always relevant for impeachment purposes are the witness's capacity to observe and the existence or nonexistence of any fact testified to by the witness"], citing Evid. Code, § 780, subds. (c), (i).)

Here, evidence of Susana D.'s 2013 trauma is relevant to her credibility because it significantly affects her capacity to recollect what happened with Baldenebro and likely distorted her memories, as Dr. Welty will testify. (Writ exh. 9, vol. 2, pp. 143–144 [sealed].) This explains why Susana D.'s allegations differ so significantly from her fellow plaintiffs.

Moreover, Evidence Code sections 782 and 783 do not even apply to admissibility of prior false statements. "Even though the term 'sexual conduct' in section 782 is interpreted broadly, it does not encompass … allegedly false statements[.]" (*Tidwell*, *supra*, 163 Cal.App.4th at p. 1456.) *Tidwell* explains why plaintiffs' reliance on *Franklin*, *supra*, 25 Cal.App.4th 328, is misplaced: "In [*Franklin*], the court made the distinction between the attempt to impeach with prior sexual conduct and to impeach with prior false complaints of rape or molest. It stated: 'Even though the content of the statement [the false complaint] 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.'" (*Tidwell*, at p. 1456, quoting *Franklin*, at p. 335.)

In *Franklin*, *supra*, 25 Cal.App.4th 328, "[s]ection 782 *was inapplicable* because it was [the complaining witness]'s allegedly

false complaints that the defense sought to use as impeachment evidence, not her prior sexual conduct or willingness to engage in sexual activity. Under these circumstances, *the language of section 782 does not apply and the procedure mandated by section 782 is unnecessary*." (*Tidwell*, *supra*, 163 Cal.App.4th at p. 1456, italics added.)

II. Plaintiffs' Criticisms of the Procedure Followed in the Trial Court Are Beside the Point, as the District Can File an Evidence Code Section 783 Motion When the Stay Is Lifted.

There is no need for this Court to address "what procedures and quantum of proof are required to admit" evidence of sexual conduct to attack the credibility of a plaintiff. (OBM, p. 6.)

Evidence Code section 783 sets forth the procedures to be followed "if evidence of sexual conduct of the plaintiff is offered to attack credibility of the plaintiff" in a "civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery[.]" The defendant files a written motion "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." (Evid. Code, § 783, subd. (a).) "The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated." (Evid. Code, § 783, subd. (b).)

"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." (Evid. Code,

§ 783, subd. (c).) "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, subd. (d).)

The Court of Appeal here found "the trial court adhered to all but one of the specific procedural requirements and the balancing requirements of section 783." (*Mountain View School Dist.*, *supra*, 71 Cal.App.5th at p. 241.) The "trial court did not insist that the District comply with section 783's requirement that a motion be accompanied by an affidavit including an offer of proof[.]" (*Ibid.*) But the District's motion *was* accompanied by a declaration with an offer of proof and supporting evidence, including Dr. Welty's report. (Writ exh. 9, vol. 2, pp. 108–146 [sealed].)

In the end, any debate about the sufficiency of the procedures followed in the trial court would be purely academic. If this court finds the procedures followed in the trial court were not sufficient, there is an easy solution. When the stay is lifted, the District can file another motion seeking to admit evidence of the 2013 incident to impeach Susana D.'s credibility, pursuant to Evidence Code section 783. If the trial court finds the offer of proof sufficient, it can hold the hearing contemplated by section

783, subdivision (c), and then decide whether to exercise its discretion pursuant to Evidence Code section 352. Indeed, this is exactly what the District proposed in the Court of Appeal. (Return, p. 19.)

As the Court of Appeal stated in *Rioz*, *supra*, 161 Cal.App.3d 905, when sending the case back for retrial: "we cannot comment prospectively upon the trial court's exercise of its discretion, pursuant to Evidence Code section 352, regarding the admissibility of the evidence adduced at" a section 782 (or 783) hearing that has not yet been held. (*Id.* at p. 918.)

III. The Court of Appeal Correctly Left the Issue of Whether to Declare a Mistrial to the Trial Court.

"Plaintiffs urge this Court to issue an order directing the respondent superior court to vacate its erroneous July 28, 2021 order permitting introduction of" evidence regarding the 2013 incident, "discharge the current jurors, and begin trial anew upon remand." (OBM, p. 45.) Plaintiffs are asking this court to grant a mistrial in the first instance.

"There is no specific statute governing mistrials in the Code of Civil Procedure, though that code certainly recognizes that there will be mistrials, and the code thus makes rules to take them into account." (*Blumenthal v. Superior Court* (2006) 137 Cal.App.4th 672, 678 (*Blumenthal*).) "The fundamental idea of a mistrial is that some *error* has occurred which is too serious to be corrected, and therefore the trial must be terminated, so that proceedings can begin again." (*Ibid*., original italics.) "The

decision to declare a mistrial is one that essentially scraps a considerable public investment in the form of judge (and maybe juror) time, and an equivalent private investment in the form of attorney and witness time." (*Id.* at p. 679.)

"Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions." (*People v. Haskett* (1982) 30 Cal.3d 841, 854.) "That is, the trial judge, present on the scene, is obviously the best judge of whether any error was so *prejudicial to one of the parties* as to warrant scrapping proceedings up to that point." (*Blumenthal*, *supra*, 137 Cal.App.4th at p. 678, original italics.)

The Court of Appeal here correctly left the issue of whether a mistrial is warranted to the trial court because "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." (*Mountain View School Dist.*, *supra*, 71 Cal.App.5th at p. 242.) Accordingly, the Court of Appeal instructed the trial court "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." (*Id.* at p. 243.)

Plaintiffs' request for a mistrial should be addressed to the trial court in the first instance. (See *People v. Gray* (2005) 37 Cal.4th 168, 226–227 [defendant who complained about a "338-day hiatus between the guilt and penalty phases of his trial" but

did not move for a mistrial was precluded from raising the issue on appeal; "We acknowledge the possibility the long delay in this case may have caused jurors to forget details of the evidence produced at the guilt phase. But that result is an inevitable consequence of *defendant's* midtrial pursuit of appellate relief. He cannot have it both ways"], original italics.)

CONCLUSION

Real party in interest Mountain View School District respectfully requests that this court affirm the Court of Appeal's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 8.520

I, the undersigned, Jeffry A. Miller, declare that:

1. I am an attorney licensed to practice in all courts of the state of California and a partner at the firm of Lewis Brisbois Bisgaard & Smith LLP, attorneys for defendant and real party in interest Mountain View School District.

2. This certificate of compliance is submitted in accordance with rule 8.520 of the California Rules of Court.

3. This answer brief on the merits was produced with a computer. It is proportionately spaced in 13 point Century Schoolbook typeface. The brief contains 8,090 words, including footnotes.

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

Executed at San Diego, California, on June 10, 2022.

/s/ Jeffry A. Miller
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PROOF OF SERVICE

Jane S.D. Doe v. Superior Court (Mountain View School Dist.)
Supreme Court Number S272166

I, Lynn Sylvestre, state:

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 550 West C Street, Suite 1700, San Diego, California 92101.

On June 10, 2022, I served the following document described as **ANSWER BRIEF ON THE MERITS** on all interested parties in this action through TrueFiling, addressed to all parties appearing on the electronic service list for the above-titled case. The service transmission was reported as complete and a copy of the TrueFiling Receipt/Confirmation will be filed, deposited or maintained with the original document in this office.

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

Executed on June 10, 2022 at San Diego, California.

/s/ *Lynn Sylvestre*
Lynn Sylvestre

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **JANE S.D. DOE v. S.C. (MOUNTAIN VIEW SCHOOL DISTRICT)**
Case Number: **S272166**
Lower Court Case Number: **B313874**

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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.

6/10/2022

Date

/s/Lynn Sylvestre

Signature

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