

S234269

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

DOE NO. 1,
Defendant and Petitioner,
v.

LATRICE RUBENSTEIN,
Plaintiff and Respondent

SUPREME COURT
FILED

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REPLY BRIEF BY PETITIONER DOE NO. 1



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

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I.

Introduction

Both *V.C. v. Los Angeles Unified School Dist.* (2006) 139 Cal.App.4th 499, 508-512 (*V.C.*), and *Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 201-214 (*Shirk*), held that Code of Civil Procedure section 340.1 (section 340.1) neither alters the accrual date for purposes of the Government Code's claim presentation deadlines nor extends the Government Code's six-month claim presentation deadline. *V.C.* was explicit in this regard, stating "while section 340.1 extends the time during which an individual may commence a cause of action alleging childhood sexual abuse, it does not extend the time for accrual of that cause of action" for purposes of the Government Code's claim filing deadlines. (*V.C.*, *supra*, 139 Cal.App.4th at 510.) Without discussing either *V.C.* or *Shirk*, the Court of Appeal here was equally clear in coming to the opposite conclusion, holding that "section 340.1 governs the accrual date for claim filing purposes." (*Rubenstein v. Doe No. 1* (2016) 245 Cal.App.4th 1037, 1045 (*Rubenstein*)). Given this conflict review is necessary to eliminate the confusion.

The conclusion that review is necessary and appropriate is not altered or in any way diminished by Latrice Rubenstein's argument that no conflict or confusion exists. According to Rubenstein, the Court of Appeal correctly found her claim timely under common law delayed discovery. But the Court of Appeal relied on section 340.1's statutory delayed discovery provisions and not common law delayed discovery. So, whether common law delayed discovery delays the accrual date of a childhood sexual abuse cause of action for purposes of the Government Code's six-month claim filing deadline is not presently an issue in this case. The issue here is the Court of Appeal's actual holding and the conflicts it creates; specifically, whether section 340.1's statutory delayed discovery provisions apply in determining the accrual date of a childhood sexual abuse cause of action for purposes of the Government Code's six-month claim presentation deadline for conduct occurring before January 1, 2009.

II.

Argument

- A. **The Court of Appeal relied on section 340.1's statutory delayed discovery provisions to find Rubenstein's claim timely and not on common law delayed discovery**

Rubenstein states that the Court of Appeal “analyzed that the common-law delayed discovery rule applies to the accrual of a childhood sexual abuse cause of action for purposes of compliance with the Government Codes [sic] presentation claims deadlines.” (Answer, page 6.) Thus, according to Rubenstein, the Court of Appeal’s opinion does not conflict with *V.C.* because *V.C.* acknowledged that common law delayed discovery might delay the accrual of a childhood sexual abuse cause of action for purposes of the Government Code’s six-month claim presentation deadline. (See Answer, page 7-8.) Although Rubenstein correctly observes that *V.C.* addressed common law delayed discovery and its impact on accrual of a childhood sexual abuse cause of action for claim presentation purposes, *V.C.*, *supra*, 139 Cal.App.4th at 515, the problem with Rubenstein's argument is that the Court of Appeal did not find her claim timely under common law delayed discovery. Without question, the Court of Appeal solely relied on section 340.1's statutory delayed discovery provisions. Indeed,

the Court of Appeal noted that "*Quarry [v. Doe 1* (2012) 53 Cal.4th 945] eliminated the common law delayed discovery doctrine for childhood sexual abuse claims." (*Rubenstein, supra*, 245 Cal.App.4th at 1047.) And as stated *ante*, the Court of Appeal in no uncertain terms stated that "section 340.1 governs the accrual date for claim filing purposes." (*Id.* at 1045.)

This distinction between common law delayed discovery and statutory delayed discovery under section 340.1 is not academic. Nor are the concepts interchangeable; delayed discovery under section 340.1 is broader than common law delayed discovery. Notably, this Court rejected an argument nearly identical to Rubenstein's delayed discovery argument in *Shirk*. In that case, the plaintiff argued that her duty to present a claim to the defendant school district did not arise (i.e., the accrual of her childhood sexual abuse cause of action was delayed) until she first learned from a mental health practitioner that her adult-onset emotional problems resulted from her teacher's molestation of her as a teenager, some 25 years earlier. The same day as her discovery, the plaintiff presented her claim to the school district, which denied it as untimely. This Court

found that the presentation of plaintiff's claim right after discovery did not render her government claim timely, stating:

We concluded earlier that the Legislature's amendment of section 340.1, subdivision (c), revived for the year 2003 certain lapsed causes of action against nonpublic entities, but that nothing in the express language of those amendments or in the history of their adoption indicates an intent by the Legislature to apply against public entity defendants the one-year revival provision for certain causes of action. (§ 340.1, subd. (c).) *In light of that conclusion, it seems most unlikely that the Legislature also intended revival applicable to persons who discovered only in 2003 a new injury attributable to the same predicate facts underlying a cause of action previously barred by failure to comply with the government claims statute.*

Shirk, supra, 42 Cal.4th at 214 (emphasis added.)

As briefed in the petition, in response to *Shirk*, the Legislature amended Government Code Section 905 in 2009 which added subsection (m), exempting from the claim presentation requirement “[c]laims made pursuant to Section 340.1 of the Code of Civil Procedure for the recovery of damages suffered as a result of childhood sexual abuse.” However, subdivision (m) expressly limited its application prospectively: “This subdivision shall apply only to claims arising out of conduct occurring on or after January 1, 2009.” The clear implication is

that all other holdings of *Shirk* remain intact with respect to claims based on pre-January 1, 2009 conduct.

- B. Rubenstein's reliance on *K.J. v Arcadia Unified School Dist.* (2009) 172 Cal.App.4th 1229 (*K.J.*), further demonstrates why review is necessary as the Court of Appeal's decision conflicts with *K.J.*

Rubenstein cites to *K.J.* to support her assertion that the Court of Appeal's decision creates no conflict or inconsistency. (Answer, pages 8-9) But an examination of *K.J.* actually shows the Court of Appeal's decision conflicts with *K.J.* Moreover, *K.J.* has some analytical problems that add to the uncertainty on the issue of the accrual date of a childhood sexual abuse cause of action for purposes of compliance with the Government Code's six-month claim presentation deadline. All of this further demonstrates the need for this Court to grant review.

In *K.J.*, the plaintiff alleged being the victim of childhood sexual abuse in 2003 when she was 15. At the time, the plaintiff thought she was in love and that there was nothing improper going on. She further alleged lacking any real awareness that she had been abused until July 2007 when she realized that she was actually being victimized. (*K.J.*, *supra*, 172 Cal.App.4th at 1234-1235.) The plaintiff presented a claim to the school district

in September 2007, which was denied as untimely. The trial court sustained the school district's demurrer finding plaintiff failed to timely present her claim. (*Id.* at 1236-1237.) *K.J.* reversed.

Although noting that childhood sexual abuse causes of action generally accrue when the abuse occurs, and that section 340.1's delayed discovery provisions do not apply to government entities, *K.J.* found the plaintiff had sufficiently alleged facts establishing the timeliness of her claim under common law delayed discovery. (*Id.* at 1234, 1239, 1241-1244.) As discussed *ante*, the Court of Appeal held that common law delayed discovery for childhood sexual abuse causes of action has been supplanted by section 340.1 and that section 340.1 governed the accrual date for presenting a claim based on childhood sexual abuse. (*Rubenstein, supra*, 245 Cal.App.4th at 1045, 1047-1048.) Thus, the Court of Appeal's decision conflicts with *K.J.* on these two issues.

K.J. itself is also problematic for two reasons.

As noted, *K.J.* concluded that section 340.1's delayed discovery provisions do not delay the accrual of a cause of action

for childhood sexual abuse for purposes of presenting a timely Government Code claim. (*K.J., supra*, 172 Cal.App.4th at 1242.) But despite this conclusion, *K.J.* nonetheless relied on “the language in Code of Civil Procedure section 340.1 characterizing accrual as ‘the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse’ [to] guide[] [its] understanding of the accrual date applicable to *K.J.*’s presentation of a tort claim to the District.” (*K.J., supra*, 172 Cal.App.4th at 1243-1243.) *K.J.*’s reasoning is confusing and inconsistent. If section 340.1 does not apply to determine the accrual date for purposes of presenting a claim to a government entity, then it cannot serve as a guide to determining when a claim accrues for purposes of the Government Code’s claim presentation deadline under common law delayed discovery. Using section 340.1 as a basis for applying common law delayed discovery rather than simply relying on common law delayed discovery creates nothing but confusion, and, in fact, is no different than actually relying on section 340.1.

K.J. further found Government Code section 905, subdivision (m) “declaratory of existing law to the extent that it applies the delayed discovery doctrine to the accrual of a cause of action brought by a plaintiff against a public entity for childhood sexual abuse”, *K.J., supra*, 172 Cal.App.4th at 1234, fn.2, a conclusion the Court of Appeal endorsed. (*Rubenstein, supra*, 236 Cal.App.4th at 1046.) As established in the petition, the Legislative history surrounding the enactment of Government Code section 905, subdivision (m) shows this is clearly wrong. In granting the petition, this Court can prevent other courts from reaching the same erroneous conclusion.

III.

Conclusion

This Court should grant review to clarify and bring consistency to the issue of what impact, if any, section 340.1 has on the accrual date for a childhood sexual abuse cause of action for purposes of compliance with the Government Code’s claim

presentation deadlines. Absent review now, litigants and courts will continue to struggle over these issues and inconsistency and confusion will remain as lower courts come to different conclusions.

DATED: June 2, 2016

Daley & Heft, LLP

By: 

Lee H. Roistacher
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Doe No. 1

CERTIFICATE OF WORD COUNT

The text of this brief consists of 1,667 words as counted by the Microsoft Office 2010 word-processing program used to generate this document.

DATED: June 2, 2016

Daley & Heft, LLP

By: 

Lee H. Roistacher

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Defendant and Petitioner

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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA Street Address: 350 McAllister Street City and Zip Code: San Francisco, CA 94102	
PLAINTIFF(S)/PETITIONER(S) Doe No. 1	Case Number: S234269
Defendant(S)/RESPONDENT(S) Latrice Rubenstein	Court of Appeal Case No. D066722 Superior Court Case No.: ECU08107
PROOF OF SERVICE—CIVIL	
Check method of service: <input type="checkbox"/> By Personal Service <input type="checkbox"/> By Mail <input type="checkbox"/> By Messenger Service <input type="checkbox"/> By Facsimile <input checked="" type="checkbox"/> By Overnight Delivery <input type="checkbox"/> By E-Mail/Electronic Transmission	JUDGE: <u>Hon. Juan Ulloa</u> DEPT: <u>9</u>

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

1. At the time of service I was over 18 years of age and **not a party to this action.**
2. My address is (specify one):
 - a. Business: b. Residence:

462 Stevens Avenue, Suite 201, Solana Beach, CA 92075
3. The fax number or electronic address from which I served the documents is *(complete if service was by fax or electronic service)*:
4. On (date): June 3, 2016 I served the following documents (specify):

The documents are listed in the Attachment to Proof of Service—Civil (Documents Served).
5. I served the documents on the **person or persons** below, as follows:
 - a. Name of person served:
 - b. *(Complete if service was by personal service, mail, overnight, or messenger service.)*
Business or residential address where person was served:
 - c. *(Complete if service was by fax or electronic service.)*
 - (1) Fax number or electronic notification address where person was served:
 - (2) Time of Service:

The names, addresses, and other applicable information about the persons served is on the Attachment to Proof of Service—Civil (Persons Served).
6. The documents were served by the following means (specify):
 - a. **By personal service.** I personally delivered the documents to the persons at the addresses listed in item 5. (1) For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents in an envelope or package clearly labeled to identify the attorney being served with a receptionist or an individual in charge of the office, between the hours of nine in the morning and five in the evening. (2) For a party, delivery was made to the party or by leaving the documents at the party's residence with some person not less than 18 years of age between the hours of eight in the morning and six in the evening.

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Superior Court Case No.:

ECU08107

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

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

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

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

c. **By overnight delivery.** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses in item 5. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

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

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

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

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

Date: June 3, 2016

Heather Grady

(TYPE OR PRINT NAME OF DECLARANT)

Heather Grady

(SIGNATURE OF DECLARANT)

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

DECLARATION OF MESSENGER

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

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

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

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

(TYPE OR PRINT NAME OF DECLARANT)

(SIGNATURE OF DECLARANT)

CASE NAME:
Doe No. 1 v. Latrice Rubenstein

CASE NUMBER:
S234269
Court of Appeal Case No. D066722
Superior Court Case No.:
ECU08107

ATTACHMENT TO PROOF OF SERVICE - CIVIL (DOCUMENTS SERVED)

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

REPLY BRIEF BY PETITIONER DOE NO. 1

CASE NAME: <i>Doe No. 1 v. Latrice Rubenstein</i>	CASE NUMBER: S234269 Court of Appeal Case No. D066722 Superior Court Case No.: ECU08107
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ATTACHMENT TO PROOF OF SERVICE - CIVIL (PERSONS SERVED)

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

<u>Name of Person Served:</u>	<u>Where Served:</u> <i>(Provide business or residential address where service was made by personal service, mail, overnight delivery, or messenger service. For other means of service, provide fax number or electronic notification address, as applicable.)</i>	<u>Time of Service:</u> <i>(Complete for service by fax transmission or electronic service.)</i>
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