S171382

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IN THE

SUPREME COURT OF CALIFORNIA

SUPREME COURT
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TERRY QUARRY ET AL.

PLAINTIFFS AND APPELLANTS,

VS.

DOE 1,

DEFENDANT AND RESPONDENT.

OPENING BRIEF ON THE MERITS

Court Of Appeal, First Appellate District, Division Four
Case No. A120048

Alameda County Superior Court, No. HG07313640
Honorable Kenneth Mark Burr

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CERTIFICATION OF INTERESTED ENTITIES OR PERSONS

S171382 - QUARRY v. DOE 1

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	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	
	[ ]	[ ]	

Submitted by: Stephen A. Mcfeely

Date: June 23, 2009

Stephen A. McFeely

Case No.: S171382
Terry Quarry, et al. v. Defendant Doe 1, Diocese
Court of Appeal, First Appellate District, Division 4
Case No.: A120048
Superior Court – County of Alameda
Case No. HG 07313640

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I am employed in the **County of Los Angeles, State of California**. I am over the age of 18 and not a party to this action; my current business address is **555 S. Flower Street, Suite 3500, Los Angeles, CA 90071.**

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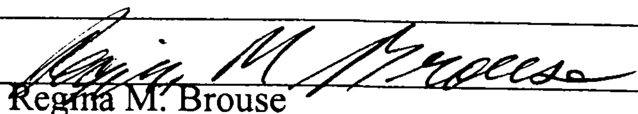

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I. STATEMENT OF ISSUES

1. Did the expansive 2002 amendments to the statute of limitations for child molestation, contained in California Code of Civil Procedure § 340.1, revive indefinitely a previously time-barred claim against a non-perpetrator that a plaintiff over age 26 had not yet discovered, or as the plain language of § 340.1(c) indicates and as *Hightower* held – revive "any" time-barred claims against a non-perpetrator, but only through December 31, 2003?

2. Does a cause of action for sexual molestation accrue only once, at the time of the molestation, as this Court held in *Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, or does the cause of action re-accrue upon the discovery that the childhood molestation caused adulthood injuries, contrary to *Shirk*?

3. Is the applicable statute of limitations the one "in effect at the time a claim is filed," as the Court of Appeal held, contrary to an established body of case law that amendments to statutes of limitation are prospective absent an express indication of Legislative intent to make them retroactive?

II. INTRODUCTION

This case comes before this Court to consider a remarkable interpretation of Code of Civil Procedure section 340.1 by Division Four of the First District Court of Appeal. After review of the lower court's decision, this Court will again be required to confirm two of the most fundamental and well established principles of law in California: (1) a legislative change to a statute of limitations is prospective only, unless the Legislature specifies otherwise; and (2) judicial legislation is impermissible.

In January of 2002 a firestorm started in Boston and soon spread across this country. The Boston Globe published a series of newspaper articles attacking the conduct of the Archbishop of Boston, charging him with having mishandled for years claims of child abuse by his clergy. The reaction to those charges moved swiftly out of Massachusetts, and the nature of clergy abuse, its history and prevalence became the subject of national discussion.

California took the lead in fashioning a response to what some called a crisis. In the spring of that year, the California Legislature passed, and the Governor signed, SB 1779, an extraordinary piece of legislation. SB 1779 amended Code of Civil Procedure section 340.1 and created a one year window in 2003 for the filing of previously time-barred civil suits seeking damages for child abuse from third parties allegedly responsible for the conduct of the abuser. Code Civ. Proc. § 340.1(c). There was no limit to how far back in time the claim could reach. That 2003 window resulted in more than 1,000 cases being filed statewide, many reaching back decades, and most against members of the Roman Catholic Church. More than one billion dollars was required to resolve these cases.

At the same time it authorized that unprecedented one year window, the Legislature also further liberalized section 340.1 to allow an action

against entities other than the perpetrator to be filed within three years after the plaintiff discovered the psychological injuries suffered as a result of the childhood sexual abuse. Code Civ. Proc. § 340.1 (a) and (b). There was no indication whatsoever that this revision was to have any retroactive effect. In 2006, the Court of Appeal designated to handle the legal issues arising out of SB 1779 confirmed that there was no retroactive effect to this provision – it was to operate prospectively only. *Hightower v. Roman Catholic Bishop of Sacramento* (2006) 142 Cal.App.4th 759 [48 Cal.Rptr.3d 420]. There matters stood for well over two years, guiding the courts throughout the State in dozens of post 2003 cases, until the case now before this Court.

In February 2009, the First District, Division Four, issued *Quarry v. Doe 1* (2009) 170 Cal.App.4th 1574 [89 Cal.Rptr.3d 640]. The case was brought by six brothers against the Bishop of Oakland. Each brother claimed that he had been abused by the same priest in 1972, and each claimed that it was more than 30 years later when, coincidentally, on the same day each of them connected his life-long psychological difficulties to the abuse that had taken place in 1972.

Division Four of the First District Court of Appeal crafted an obvious result-oriented decision. The panel clearly disfavors any limitations period for child sexual abuse claims against allegedly responsible third parties (the panel having concluded, we know not how, that they are "the more culpable" defendants). The *Quarry* Court swept aside *Hightower* (and other reasoned opinions), deliberately ignored both binding precedent of this Court and the most fundamental of provisions of California law, to manufacture the result the panel desired – the elimination of civil statutes of limitations for child abuse in California.

The time-barred claims that the Legislature authorized to be filed in 2003 resulted in cases alleging abuse that took place decades before, some as far back as the 1950s. That extraordinary relief was specifically legislated, but only for a limited time period – one year – 2003 . The *Quarry* Court wants to extend that outcome well beyond the Legislature's enactment. If *Quarry* were the law, the limited window that the Legislature created for time-barred claims would, by judicial fiat and not legislative enactment, be reopened permanently. No court has that authority. *Hightower* is correct and *Quarry* must be reversed.

III. STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

This case involves six brothers who allege that a priest of the Diocese of Oakland (referred to by the Court of Appeal as the "Bishop") sexually abused them in the early 1970's when they were children. (Appellants' Appendix ["AA"], v.2, pp. 268, 270.) The statute of limitations on the last of the Plaintiffs' claims had run by 1982 (because that is when the youngest brother turned 19) (AA, v. 2, p.268), and all of their claims had remained time-barred until 2003. In 2002, the Legislature enacted an amendment to California Code of Civil Procedure section 340.1 subdivision (c) which revived for one year only (from January 1, 2003 to December 31, 2003) all time-barred claims against "non-perpetrator defendants," namely those defendants who are alleged to have employed or supervised alleged perpetrators of child sexual abuse. Code. Civ. Proc. § 340.1(c).

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[1] This is a proper appeal from judgment entered after the trial court's sustaining of a demurrer, without leave to amend. All facts, therefore, are limited to the allegations in the complaint and judicially noticeable documents included in the record on appeal.

None of the Plaintiffs filed their claims against the Bishop during that prescribed one-year window. Instead, the Plaintiffs waited three years ***past*** the revival window and a full quarter of a century after the last of the claims was initially barred, before bringing suit in 2007. It was not until 2006 – they allege – that they realized that there was a connection between the abuse and their psychological injuries and that their injuries were caused by the abuse. (AA, v. 2, pp. 278-283.) Incredibly, all six Plaintiffs allege they made the late discovery on the same date – March 6, 2006 – while also alleging that, as children, they attempted to avoid the priest and warned other boys to stay away from him, and despite the further fact that the youngest brother, Michael Quarry, filed a police report about the childhood sexual abuse in 1994, at the age of 31. (AA, v.2, pp. 274, 281.)

In response to the Plaintiffs' complaint filed in 2007, the Bishop demurred. The trial court (Alameda County Superior Court (Burr, Judge)), after allowing an amendment to the complaint, relied on the Second District, Division Seven's opinion in *Hightower v. Roman Catholic Bishop of Sacramento*, *supra,* 142 Cal.App.4th 759 to sustain the demurrer without leave to amend. (AA, v.3, pp. 574-575.) Consistent with other trial courts throughout the state, the trial court stated it was bound by *Hightower* and "agree[d] with the reasoning in that case." (AA, v. 3, p. 574.) As in *Hightower*, it held that the Plaintiffs' claims had been time-barred prior to 2003, and because the Plaintiffs had not filed their claims during the 2003 revival window, they were thus time-barred, and that the statute's new delayed discovery rule did not apply retroactively to revive time-barred claims or save them from the 2003 revival window. (*Id.*) It characterized as "strained" the Plaintiffs' "conclusion that the Legislature only intended to revive the limitations period for victims who had discovered the causal connection between the abuse and their psychological damages, but

intended to allow all other victims to file suit whenever they discovered their claims, regardless of whether their claims were time-barred under previous stat[ut]es." (*Id.*) The trial court further found that the Plaintiffs' claims were "not subject to common law delayed discovery principles" because "C.C.P. § 340.1 provides the exclusive limitation period for Plaintiffs' claims. It applies to all claims of childhood sexual abuse made by an adult." (AA, v. 3, pp. 574-575.)

The Plaintiffs appealed and the Court of Appeal disagreed. In direct conflict with the Second District's opinion in *Hightower*, the First District held that section 340.1 revived time-barred claims – even decades old ones – not just during 2003, but indefinitely into the future, by retroactive application of the delayed-discovery rule. To reach what can only be viewed as a result-oriented decision, the Court of Appeal struggled to hold that the Plaintiffs' undiscovered claims of adult emotional distress caused by the childhood abuse did not accrue until 2006. In order to get there, the *Quarry* panel had to ignore the plain language of the statute and the legislative intent, ignore and contradict this Court's precedent in *Shirk v. Vista Unified School Dist., supra,* 42 Cal.4th 201 [164 P.3d 630, 64 Cal.Rptr.3d 210], and it further had to depart from well-established rules of law governing the retroactive application of statutes of limitations.

This Court granted the petition for review in this case in order to consider the First District's opinion. Pending the review of this case, the Third District Court of Appeal decided *K.J. v. Roman Catholic Bishop of Stockton* (2009) 172 Cal.App.4th 1388 [92 Cal.Rptr.3d 673], that confirmed *Hightower's* holding. This Court also granted the petition for review of that *K.J./Stockton* case. *K.J. v. Roman Catholic Bishop of Stockton* (June 24, 2009, S173042).

IV. LEGAL DISCUSSION

A. GUIDING PRINCIPLES OF STATUTORY INTERPRETATION

The issue before this Court is one of plain statutory interpretation. As such, a Court applies

> well-established principles of statutory construction in seeking to determine the Legislature's intent in enacting the statute so that [the Court] may adopt the construction that best effectuates the purpose of the law. [A Court is] to begin with the statutory language because it is generally the most reliable indication of legislative intent. If the statutory language is unambiguous, [the Court] presume[s] the Legislature meant what it said, and the plain meaning of the statute controls. But if the statutory language may reasonably be given more than one interpretation, courts may consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute.

Shirk v. Vista Unified School Dist., supra, 42 Cal.4th at 211 (internal quotations and citations omitted).

Here, because the statutory language is unambiguous, the Court need not look further than the plain language of the statute itself.

B. THE PLAIN LANGUAGE IS CLEAR THAT THE STATUTE'S DELAYED DISCOVERY PROVISION DOES NOT APPLY RETROACTIVELY

In 2002, the Legislature passed SB 1779 to amend Code of Civil Procedure section 340.1. The most significant of the new provisions was the Legislature's response to the clergy abuse scandal – an extraordinary

one-year window for retroactive revival of previously time-barred claims against certain non-perpetrator defendants. The less prominent of the new provisions created new limitation rules applying the delayed discovery rule for prospective claims against these defendants. The central issue now before this Court is whether that amendment containing the delayed discovery provision also applies retroactively to previously barred claims.

The plain language of section 340.1, both in its form as amended in 2002, and in its prior iterations, confirms that the statute's delayed discovery provision does not apply retroactively. The evolution of the statute clearly illustrates that the Legislature knows precisely how to specify when a limitations rule (including the delayed discovery rule) is to apply retroactively. The plain language of the current statute contains no retroactive language whatsoever with respect to its delayed-discovery provision. The evolution of the statute also establishes that the Plaintiffs' claims were all time-barred by 1982, and that they remained barred under each subsequent amendment to the statute until the 2003 revival window. Because the Plaintiffs' claims were not brought during the 2003 revival window, therefore, they were again time-barred when brought in 2007.

1. The Enactment and Evolution of Section 340.1 and Its Effect on the Plaintiffs' Claims

(1) The Limitations Rule Prior to Enactment of Section 340.1

Prior to the 1986 enactment of section 340.1, the limitations period for claims for childhood sexual abuse was one year, as governed by section 340(3) of the California Code of Civil Procedure. *Shirk v. Vista Unified School Dist., supra*, 42 Cal.4th at 207. The one-year period did not run, however, until after the age of majority (age 18), or until age 19. *Hightower v. Roman Catholic Bishop of Sacramento, supra,* 142

Cal.App.4th at 765. Under this rule, all of the claims of the Plaintiffs in this case would thus have expired by 1982 or earlier.[2]

(2) The 1986 Enactment of Section 340.1

In 1986, the Legislature enacted section 340.1 specifically to govern, and broaden, limitations periods for claims of childhood sexual abuse. (Former Code Civ. Proc. § 340.1, added by Stats. 1986, ch. 914, § 1, pp. 3165-3166); *Shirk v. Vista Unified School Dist., supra,* 42 Cal.4th at 207. But this new section 340.1 only applied to claims of abuse by a "household or family member," and it did not apply to claims against non-perpetrator defendants. (Former § 340.1); *Shirk, supra,* at 207. For this reason, the new section 340.1 did not apply to the Quarry brothers' claims (because they were not against the actual perpetrator being a household or family member, but rather were against a non-perpetrator defendant institution), and the Plaintiffs' claims thus remained barred as of 1982 under the prior section 340(3) rule.

As to claims that were covered under the new section 340.1, however, the limitations period was expanded up to the plaintiff's 21st birthday. The statute also expressly allowed for application of delayed discovery, stating, "Nothing in this bill is intended to preclude the courts from applying delayed discovery exceptions to the accrual of a cause of action for sexual molestation of a minor." (Former Code Civ. Proc. § 340.1(d)). The statute also included an ***express*** revival provision that permitted this new limitations period to be applied to "[a]ny action commenced after January 1, 1987, including any action which would be

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[2] The youngest Plaintiff was born in October 23, 1963. (AA, v. 2, p. 268.) He alleged he was abused between 1972 and 1973, when he was 13 and 14 years old. (AA, v. 2, p. 270.) Therefore, he would have reached age 19 on October 23, 1982.

barred by application of the period of limitations applicable prior to January 1, 1987." (Former Code Civ. Proc. § 340.1(e)(1)).

(3) The 1990 Amendment

In 1990, section 340.1 was amended to apply the more lenient limitations rule to childhood sexual abuse claims against any actual perpetrator of the alleged abuse, and not just a "household or family member." *Shirk v. Vista Unified School Dist., supra,* 42 Cal.4th at 207. The limitations rule was also changed, and extended to (1) eight years from the date the victim "attains the age of majority" (i.e. to the plaintiffs' 26th birthday), or (2) three years from the date the victim "discovers or reasonably should have discovered the psychological injury or illness occurring after the age of majority was caused by the sexual abuse."). *Shirk, supra*, at 207; *Debbie Reynolds Prof. Rehearsal Studio v. Super. Ct.* (1994) 25 Cal.App.4th 222, 230 [30 Cal.Rptr.2d 514]

Section 340.1 still only applied to claims against actual perpetrators and had not yet been expanded to non-perpetrator defendants. Accordingly, the 1990 amendment did not alter the Plaintiffs' claims in this case, and all of the Quarrys' claims in this case still remained barred.

Similar to the 1986 enactment, the 1990 amendment ***expressly*** authorized application of the delayed discovery rule. Subdivision (*l*) read: "Nothing in the [1990] amendment shall be construed to preclude the courts from applying equitable exceptions to the running of the applicable statute of limitations, including exceptions relating to delayed discovery of injuries, with respect to actions commenced prior to January 1, 1991. (Former § 340.1(*l*), amended by Stats. 1990, ch. 1578. § 1, p. 7552).

In 1993, the Court of Appeal confirmed, consistent with the statute's language, that the 1990 amendment's more lenient limitations period was not retroactive and thus did not revive lapsed claims. *David A. v. Superior*

Court (1993) 20 Cal.App.4th 281, 286 [24 Cal.Rptr.2d 537]. The First District held that the amendment could not revive lapsed claims, because the amending act did not mandate revival in "unmistakable terms." *Id.* at 286. The court rejected policy arguments favoring revival because "it is not for us to decide whether such claim should be revived." *Id.* at 288, fn. 7.

(4) The 1994 Amendment

In response to the *David A.* ruling, the Legislature decided in 1994 to make the 1990 amendments retroactive. The Legislature changed the statute to ***expressly*** state that the 1990 amendment would "apply to any action commenced on or after January 1, 1991, including any action otherwise barred by the period of limitations in effect prior to January 1, 1991, thereby reviving those causes of action which had lapsed or technically expired under the law existing prior to January 1, 1991." (Former Code Civ. Proc. § 340.1(p), amended by Stats. 1994, ch. 288, § 1); *Shirk v. Vista Unified School Dist., supra,* 42 Cal.4th at 207.

But at the same time the Legislature did this, the Legislature also deleted the portion of the statute (previously at subdivision (*l*)) that had allowed courts to apply "equitable exceptions to the running of the applicable statute of limitations," including those relating to "delayed discovery of injuries." Stats. 1994, ch. 288, § 1; see 13 C West's Annot. Code Civ. Proc., Historical and Statutory Notes (2006) foll. § 340.1, p. 173. Therefore, while expressly making part of the statute retroactive, the Legislature also chose simultaneously to delete the delayed discovery rule for these very claims.

Because the statute and its broader limitations period still did not apply to claims against non-perpetrator defendants, the Plaintiffs' claims in this case were still barred after this 1994 amendment.

(5) The 1998 Amendment

In 1998, the statute was amended to apply – for the first time – not only to actions against actual perpetrators, but also to actions against non-perpetrators. (Former Code Civ. Proc. § 340.1 (a)(2) & (3), amended by Stats. 1998, ch. 1032, § 1); *Mark K. v. Roseman Catholic Archbishop* (1998) 67 Cal.App.4th 603, 610, fn. 4 [79 Cal.Rptr.2d 73]. With respect to claims against non-perpetrator persons or entities deemed to be a "legal cause" of the minor's sexual abuse, the statute was clear: the claims had to have been brought no later than the plaintiff's 26th birthday. (Former § 340.1(b)(1)); *Shirk v. Vista Unified School Dist., supra*, 42 Cal.4th at 208. Applying the 1998 amendment to the facts of this case, however, because the youngest Plaintiff was 35 years old at that time, his claims and those of his older brothers were still barred even after this 1998 amendment because they were all older than 26.

(6) The 1999 Amendment

The 1998 amendment was silent about retroactive application and accordingly was not retroactive. In 1999, the Legislature decided to change the statute so that its delayed discovery and age-26 limit provisions applied retroactively to claims that were time-barred under prior laws but filed after the effective date of the 1998 amendment. The Legislature thus revised the statute to expressly apply to "any action or causes of action which would have been barred by the laws in effect prior to January 1, 1999." *Shirk v. Vista Unified School Dist., supra,* 42 Cal.4th at 208 quoting (Former Code Civ. Proc. § 340.1 (u), added by Stats. 1999, ch. 120, § 1).

Claims against non-perpetrator persons or entities were still subject to the age-26 outer-limit, however, and so the Plaintiffs' claims in this case against the Bishop remained barred through the 1999 amendment as well.

(7) The 2002 Amendment

In 2002, the Legislature amended section 340.1 for the last time. The amendment was the most drastic of them all, and gave all victims of childhood sexual abuse whose claims had lapsed a one-time opportunity to seek redress no matter how far back in time the abuse occurred. The Legislature created an extraordinary statute that revived all previously time-barred claims against those non-perpetrator defendants alleged to have known or had reason to know about prior abuse and to have failed to take steps to prevent it. But it also required that such revived claims be brought within a strict, one-year window, during calendar year 2003.

Subdivision (c) of the statute contained this revival, and provides as follows:

> Notwithstanding any other provision of law, any claim for damages described in paragraph (2) or (3) of subdivision (a) that is permitted to be filed pursuant to paragraph (2) of subdivision (b) that would otherwise be barred as of January 1, 2003, solely because the applicable statute of limitations has or had expired, is revived, and, in that case, a cause of action may be commenced within one year of January 1, 2003. Nothing in this subdivision shall be construed to alter the applicable statute of limitations period of an action that is not time-barred as of January 1, 2003.

(Code Civ. Proc. § 340.1(c))

Therefore, ***for the first time*** since at least 1982, the Plaintiffs' claims in this case – claims "that would otherwise be barred as of January 1, 2003, solely because the applicable statute of limitations has or had expired . . . ." – were temporarily no longer barred.

Another change the Legislature made to section 340.1 in the 2002 amendment was the removal of the absolute age-26 cap for prospective claims both against perpetrators and against certain non-perpetrator defendants. This change was made by two other provisions of the statute. Subdivision (a) first created a general limitations rule for all actions against perpetrators and non-perpetrator defendants alike (requiring claims be brought by age 26 or within three years of discovery of the causal relation of the psychological injury to the sexual abuse, whichever is later). Subdivision (a) reads, in pertinent part:

> In an action for recovery of damages suffered as a result of childhood sexual abuse, the time for commencement of the action shall be within eight years of the date the plaintiff attains the age of majority or within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse, whichever period expires later, for any of the following actions: . . . .

(Code Civ. Proc. § 340.1(a))

Subdivision (b) then excluded from that general rule all non-perpetrator defendants, unless such defendants "knew or had reason to know" of its agent's or employee's unlawful misconduct and failed to take reasonable steps to protect others from that person's unlawful conduct in the future. (Code Civ. Proc. § 340.1(b)) For the non-perpetrator defendants not alleged to have known or had reason to know, subdivision (b) stated that "no action" may be commenced against such defendants after the plaintiff's 26th birthday. For those non-perpetrator defendants alleged to have known or had reason to know and to have failed to take steps to prevent, the general rule in subdivision (a) would still apply.

The Court of Appeal in *Hightower*, discussed below, subsequently found no retroactivity in subdivision (a) of the 2002 amendment. The *Hightower* court issued this ruling three years ago, in 2006. ***Unlike*** the Legislature's response to the *David A.* opinion in 1994, however, the Legislature did ***not*** revise the statute to render subdivision (a) retroactive in response to the *Hightower* ruling.

2. The Plain Language of the Statute Itself Compels the Conclusion that the Delayed Discovery Rule in Subdivision (a) Does Not Apply Retroactively to Plaintiffs' Claims

The Quarry brothers well knew they had been abused in 1972 (AA, v.2, pp. 274, 281), but chose not bring their claims during the 2003 revival window. Instead, they contend that their claims were not "otherwise barred" under that provision (and thus were not required to have been brought during the one-year revival window), because the Plaintiffs did not discover the causal connection between their psychological injuries and the abuse until after 2003. The Plaintiffs thus argue that the delayed-discovery rule announced in a different part of the statute, at subdivision (a), applies retroactively to their previously barred claims such that the claims were never actually previously barred. The plain language of section 340.1 forecloses this argument.

(1) The 2002 amendment contains no express language of retroactive application of the delayed discovery provision at subdivision (a)

The plain language of the 2002 amendment to section 340.1 itself dictates that the delayed discovery rule at subdivision (a) does not apply retroactively, because that subdivision does not contain any express language retroactively applying it to previously barred claims.

It is a well-established rule that with respect to the retroactive application of statutes, a statute will be construed as prospective only, unless there is clear legislative intent for it to apply retroactively. *Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 840, 844 [123 Cal.Rptr.2d 40] ("[g]enerally, statutes operate prospectively only"). "In the absence of an express retroactivity provision, a statute will not be applied retroactively unless it is very clear from extrinsic sources that the Legislature . . . must have intended a retroactive application." *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1209 [246 Cal.Rptr.629].

An even higher standard applies to legislative changes of statutes of limitations. "[A]s a rule of statutory construction, it is established that an enlargement of limitations operates prospectively ***unless*** the statute ***expressly provides otherwise***." *Krupnick v. Duke Energy* (2004) 115 Cal.App.4th 1026, 1029 [9 Cal.Rptr.3d 767] (emphasis added). Therefore, the ***statute must expressly make the new limitations rule apply retroactively***; it is not sufficient to merely infer – as did the *Quarry* Court of Appeal – a clear legislative intent from extrinsic sources.

Here, there is simply no express language of retroactivity in the statute's delayed-discovery provision at subdivision (a). The delayed discovery provision at subdivision (a) thus cannot be applied retroactively to the Plaintiffs' claims so as to render them not previously barred and thus not subject to the 2003 revival window. The Court need not look any further to answer the question regarding retroactive application of the delayed discovery rule at subdivision (a). But even if this Court were to do so and examine the historic evolution of the statute, it would come to the same conclusion: no retroactivity.

(2) The evolution of section 340.1 further confirms that the delayed discovery provision at subdivision (a) does not apply retroactively

If there were any doubt as to the conclusion that the delayed discovery provision in subdivision (a) does not apply retroactively, a review of the historic evolution of section 340.1 quells it. It confirms that the Legislature knows precisely how to expressly apply limitations provisions in a retroactive fashion, including the delayed discovery rule itself. The Legislature knew how to make section 340.1 retroactive when it wanted to. It did so five times: in 1986, 1990, 1994, 1999 and in 2002 with (respect to subdivision (c)). In 2002, it did not make subdivision (a) retroactive. If it had intended to make it retroactive, it would have spelled it out just as it had the other five times.

In 1986, the Legislature stated that the section would apply to "any action which would be barred by application of the period of limitation applicable prior to January 1, 1987."

In 1990, the Legislature inserted language reviving certain actions commenced after 1987. The Court of Appeal confirmed, however, that that statute was silent with respect to whether it revived claims previously barred under prior law. *David A. v. Superior Court*, *supra,* 20 Cal.App.4th at 284.

In 1994, the Legislature responded to *David A.* and changed the statute to state that the 1990 delayed-discovery rule shall "apply to any action commenced on or after January 1, 1991, including any action otherwise barred by the period of limitations in effect prior to January 1, 1991, thereby ***reviving*** those causes of action which had lapsed or technically expired under the law existing prior to January 1, 1991."

Because the 1998 amendment related to non-perpetrators was not retroactive, in 1999, the Legislature again changed the statute so that it applied not only to actions commenced on or after January 1, 1999, but also "any action or causes of action which would have been barred by the laws in effect ***prior*** to January 1, 1999."

Finally, in 2002, in subdivision (c), the Legislature expressly provided that lapsed claims against certain non-perpetrator defendants were "revived" for calendar year 2003. The Legislature did not include similar retroactive language in subdivision (a) providing for the delayed-discovery rule.

The omission was clear, deliberate and unequivocal. It stands in contrast to these other instances where the Legislature expressly stated that certain portions of the statute (including the delayed discovery provision in 1994, and the revival provision in 2002) applied retroactively.

C. THE LEGISLATIVE HISTORY OF THE 2002 AMENDMENT CONFIRMS THAT ITS DELAYED DISCOVERY PROVISION DOES NOT APPLY RETROACTIVELY

This Court need not look further than the statute's plain language to decide this case. However, the legislative history behind the 2002 amendment further confirms that the statute's delayed discovery provision does not apply retroactively.

This history shows that the Legislature intended for the statute to have two, distinctly different purposes: one retroactive and one prospective. The retroactive portion at subdivision (c) revived previously time-barred claims, and thus drastically modified rules of limitation by allowing previously barred claims reaching back indefinitely to be revived, ***but only for one year***. The prospective portion of the statute at subdivision (a) (*i.e.* that which applied only to claims going forward) contained a

delayed discovery rule that relaxed the limitations period, but only for claims not time-barred.

The author of SB 1779 himself, Senator John Burton, confirmed this dual purpose in his statements on the Senate floor. After unequivocally noting to his colleagues that "[c]urrent law prohibits suits against third parties after the victim's 26th birthday[;]" Senator Burton stated to his colleagues that:

> This bill would allow actions to be filed after the victim's 26th birthday against a person or entity that knew or had reason to know of any complaint against an employee for unlawful sexual conduct and failed to take reasonable steps to avoid similar acts of unlawful sexual conduct in the future. The reasonable steps an employer must take to avoid similar future acts of abuse by an employee include avoiding placing the employee or agent in a function or environment where it is reasonably foreseeable that the employee would have contact with children.
>
> This bill ***also*** revives actions that were previously barred by the statute of limitations and ***allows those actions to be filed within one year of the effective date of this bill***.

(Assem. Com. On Judiciary, Background Information Worksheet, Burton Statement on Sen. Bill No. 1779 (2001-2002 Reg. Sess.), p. 1., Legislative History ["LH"][3], p. 000000140, emphasis added.)

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[3] The Legislative History is contained in the Appellate Record at Appellants' Request for Judicial Notice in Support of Opening Brief.

Senator Burton's comments in the first paragraph about the portion of the bill that would allow for actions to be filed after the victim's 26th birthday say absolutely nothing about retroactivity. Senator Burton's comments in the second paragraph about the one-year revival window, however, could not be clearer: those revived claims had ***"to be filed within one year of the effective date of this bill.***"

Also, there is a document of unknown origin found in the legislative file, with a cover sheet identified as "Assembly Judiciary Committee Background Information Worksheet." That document confirms the dual retroactive and prospective purposes of the 2002 amendment. It reads:

> WHO CAN SUE AFTER THE BILL PASSES, AND WHEN:
> ***Retroactive application and revival of lawsuits:*** Like the Northridge Earthquake bill, this bill would create a one-year window for victims to bring a lawsuit that would otherwise be barred by the age 26 limitation. (The Oxnard cop would far [sic] into this category.) This is fair because the statute should not protect those responsible from being held liable. (You might note that the courts have upheld the Northridge Earthquake legislation in court challenges by insurers.)
>
> ***Prospective application:*** People who discover their adulthood trauma from the molestation after the effective date of the bill will have three years from the date the victim discovers or reasonably should have discovered that the adulthood trauma was caused by the childhood abuse. This three-year statute is the same for actions against the perpetrator.

(Assem. Com. On Judiciary, Background Information Worksheet on Sen. Bill No. 1779 (2001-2002 Reg. Sess.) p. 0., LH, p. 000000142, emphasis added.)

The document has two statements. One about "retroactive application" (for claims that would "otherwise be barred by the age 26 limitation" in the statute as existed prior to the 2002 amendment), and another about "prospective application" (for people who "discover their adulthood trauma from the molestation after the effective date of the bill[,]" but whose claims are not "otherwise barred").

The stated desire to make the retroactive revival provision operate "[l]ike the Northridge Earthquake bill," further confirms the Legislature's intent was to draw a clear line in the sand: ***such claims could be revived for one year, but only one year***. *See Davaloo v. State Farms, Ins. Co.* (2005) 135 Cal.App.4th 409, 420 [37 Cal.Rptr.3d 528] (Northridge Earthquake revival statute at section 340.9 set "an absolute one-year period in which to properly initiate a lawsuit.").

As this legislative history makes clear, the Legislature intended for the 2002 amendment to have two parts, one retroactive and one prospective. It delineated a strict, one year rule for the retroactive portion. Had the Legislature intended to apply the delayed discovery rule from the prospective portion retroactively to the revived claims, then the Legislature never would have imposed such a strict-one year limit on the retroactive portion for bringing revived claims. There would be no need for such a one-year limit. By applying language from the prospective part of the statute to the retroactive part of the statute, however, one would fundamentally conflate and confuse these two purposes.

D. THE SECOND DISTRICT COURT OF APPEAL CAME TO THE SAME CONCLUSION IN *HIGHTOWER*

In 2006, the Second District Court of Appeal – the intermediate appellate court specially assigned to hear appeals from the statewide coordinated clergy abuse cases brought under the 2003 revival window,[4] and the court which had also decided some nine cases involving interpretation of this statute – issued an opinion that is consistent with the plain interpretation of the statute and legislative intent as outlined above. *Hightower v. Roman Catholic Bishop of Sacramento*, *supra*, 142 Cal.App.4th 759.[5]

In *Hightower*, the Court was confronted with the precise issue of a plaintiff who brought a claim against a non-perpetrator entity defendant for alleged abuse in 1970-1972, and who had failed to bring the claim until after the 2003 revival window, because he had not discovered his claim until after that window had closed. *Hightower*, 142 Cal.App.4th at 765. The Court analyzed the prior law and statutory framework and concluded that plaintiff's claims would have been barred as of approximately 1977. *Id.* Engaging in a detailed, step-by-step discussion of the enactment of section 340.1 and its subsequent amendments, the Court identified the 1998 amendment as the first instance where the statute was broadened "to include causes of action for sexual abuse against persons or entities other than the

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[4] *Hightower v. Roman Catholic Bishop of Sacramento*, *supra,* 142 Cal.App.4th at 762, fn. 1 ("The Second District Court of Appeal has been designated as the intermediate appellate court for the coordinated cases.").

[5] As previously noted, the Third District also recently authored an opinion consistent with this interpretation and the *Hightower* holding, and this Court has similarly granted the petition for review of that opinion as well. *See K.J. v. Roman Catholic Bishop of Stockton* (2009) 172 Cal.App.4th 1388 [92 Cal.Rptr.3d 673], *cert.* granted June 24, 2009, at S173042.

perpetrator[,]" but still noted that plaintiff was over the age of 26 at the time of that 1998 amendment, and thus "[u]nder that amendment, the age 26 cut-off still applied, however, meaning that Hightower's claims remained time barred." *Id.* at 765-66.

Just like the Quarrys in this case, Hightower similarly contended that his complaint was not time-barred, in part, "because the delayed discovery rule of § 340.1, subdivisions (a) and (b)(2) applies . . . ." *Id.* at 767. The Court rejected this argument, explaining:

> As explained above, the statute of limitations ran on Hightower's claims in 1977. When the Legislature first applied the delayed discovery rule to entity defendants like the Bishop in 1998, those claims were subject to the outer limit of the plaintiff's 26th birthday, meaning that his claims remained time barred. Effective 2003, the Legislature extended the limitations period for claims such as Hightower's to the later of the plaintiff's 26th birthday or the date when the plaintiff discovered that his psychological injuries were caused by sexual abuse. At the same time, the Legislature revived for only one year all such claims that were already time-barred. ***The Legislature therefore drew a clear distinction between claims that were time-barred and those that were not.*** Hightower's interpretation would ***obliterate*** that distinction by allowing his time-barred claim to take advantage of the new limitations period. Therefore, the new delayed discovery rule does not revive Hightower's previously lapsed claims.

Id. at 767-768 (emphasis added).

The *Hightower* opinion was well reasoned. It arrived at its conclusion based upon careful interpretation of the plain meaning of section 340.1, both in its present form and in its prior versions. It astutely recognized that the application of the discovery rule in this instance would simply "obliterate" the Legislature's intent behind the revival statute and creating a clear distinction between time-barred and timely claims for purposes of revival.

A number of attempts have been made to eliminate *Hightower* as precedent, all without success. For example, the Plaintiffs' counsel in *Quarry* asked this Court to depublish *Hightower* because this Court was to decide the same issue then pending before the Court in *Shirk v. Vista Unified School Dist., supra,* 42 Cal.4th 201. The request was denied.[6]

Authored by the Court of Appeal designated to deal with the appellate issues generated by SB 1779, since 2006 the *Hightower* decision has been relied upon by courts and parties to understand the scope of what the Legislature did in 2002, both in terms of settling hundreds of cases brought under that revival window, and then resolving later-filed cases. The law stood for well over two years, until the First District's opinion in this case.

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[6] *Hightower v. Roman Catholic Bishop of Sacramento* (Dec. 20, 2006, S147104) ("Depublication request denied."). As it turned out, counsel was prescient because, as will be discussed *infra*, this Court's opinion in *Shirk* ***would*** control on the issue confronted in this case as well as by *Hightower*. Counsel now contends, however, that *Shirk* does ***not*** control because *Shirk's* holding now forecloses counsel's arguments in this case.

E. THE FIRST DISTRICT COURT OF APPEAL IN THIS CASE IGNORED THE PLAIN MEANING OF THE STATUTE, MISCHARACTERIZED THE LEGISLATIVE INTENT, IGNORED BINDING SUPREME COURT PRECEDENT, AND CREATED NEW LAW

The First District Court of Appeal's opinion that is now before this Court is patently result-oriented. The *Quarry* panel came to the faulty conclusion that a certain class of plaintiffs – those like the Plaintiffs who did not bring their claims during the 2003 revival window because they claim they did not discover their injuries until after – were somehow disenfranchised by the revival window. The Court arrived at this conclusion even though the delayed discovery rule did not apply to the Plaintiffs during the revival window (the delayed discovery rule would only apply prospectively, to not-yet barred claims), and even though the revival window did not hinge on whether a plaintiff had previously discovered his injuries.

Based on this faulty conclusion, the Court of Appeal here nevertheless proclaimed the "overarching purpose" of section 340.1 – a statute of limitations – to be "to expand the ability of victims of childhood abuse to sue those responsible for the injuries they sustained as a result of that abuse." *Quarry v. Doe 1, supra,* 170 Cal.App.4th at 1585 (citing *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545 [67 Cal.Rptr.3d 330]). It also characterized the 2002 amendment in similar fashion, revealing almost open hostility toward application of a statute of limitations:

> In sum, the primary purpose of the 2002 amendments was to ameliorate the harsh result of a statute of limitations which precluded abuse victims from recovering any compensation from the most highly culpable of the responsible third parties

> – those who knew of the danger and took no steps to protect children from abuse. It would not effectuate this legislative intent to read the amendments as re-imposing the same harsh result on an entire class of victims over the age of 26 who did not discover the cause of their injury until after January 1, 2004, and therefore could not have filed their actions during 2003.

Quarry, supra, at 1588-1589.

This view ignored the important public policy behind the statute of limitations, and the basic fact that the statute of limitations, by its very definition, nature and purpose, excludes certain claims.

As this Court has held, statutes of limitations reflect important policies against the prosecution of stale claims when documents have been lost or destroyed, memories have faded, and witnesses have died. *Travis v. County of Santa Cruz*, (2004) 33 Cal.4th 757, 777 [16 Cal.Rptr.3d 404]. Simply put, "[j]ust determinations of fact cannot be made when, because of the passage of time, the memories of witnesses have faded or evidence is lost." *Id.*

As this Court has thus also recognized, statutes of limitations, by definition, necessarily exclude a group of plaintiffs, even those with otherwise meritorious claims, because this is the ***only*** way the underlying policies of due process protection and stability can ultimately be ensured. *See e.g. Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 396 [981 P.2d 79, 87, 87, Cal.Rptr.2d 453, 462] (rejecting past tendency of courts to refer to statutes of limitations defenses as "disfavored" precisely because "in a given case, [the statute] may buy [repose] at the price of procedurally barring a cause of action that is in fact meritorious.").

To arrive at its desired result – one based on the false premise that a group of plaintiffs would be disenfranchised and on the further false premise about the purpose of section 340.1 – the Court of Appeal had to disregard the language of the statute, mischaracterize the legislative intent, ignore a Supreme Court holding, and create brand new law on accrual that is inconsistent with a long-standing and established body of law.

1. *Quarry* Misinterpreted the Statute in Holding that the Delayed-Discovery Rule in Subdivision (a) Applies Retroactively

The Court of Appeal purported to follow the plain meaning of the statute but it erred when it concluded that undiscovered claims were not previously barred and as such *did not* fall within the revival statute.

Division Four's interpretation of the history of earlier amendments to section 340.1 did follow the statute's plain meaning, and was largely consistent with that of *Hightower's* in important respects. The Court of Appeal acknowledged (relying on *Hightower*) that the 1998 amendment was the first instance where the statute was amended "to include causes of action for sex abuse against persons or entities other than the perpetrator." *Id.*, at 1582. The Court further concluded, as did *Hightower*, that "such claims, however, ***had to be brought*** before the plaintiff's 26th birthday." *Id.*[7] (Emphasis added). In discussing the 2002 amendment, the Court also cited and quoted from a Third District opinion that described the revival provision as "reviving any such claim previously barred by the statute of limitations . . . ." *Quarry*, *supra*, 170 Cal.App. 4th at 1583, citing *Aaronoff v. Martinez-Senftner* (2006) 136 Cal.App.4th 910, 920 [39 Cal.Rptr.3d

[7] See also, *Quarry*, *supra*, 170 Cal.App.4th at 1584 (explaining with respect to the 1998 amendment, "under the prior law, any person discovering after age 26 that childhood abuse was the cause of his or her adulthood injuries was barred from suing responsible third parties."

137]. The Court of Appeal thus arrived at the same conclusion with respect to the revival statute as other courts: that it revived previously barred claims.

Where the Court of Appeal sharply departed from *Hightower* and from the plain meaning of the statute, however, was on the critical issue of what types of claims were previously barred, and specifically whether claims against non-perpetrators by plaintiffs older than 26 at the time of the 1998 amendment were previously barred (even though not discovered until later) so as to fall within the revival statute. Here, the Court of Appeal found that such claims were not previously barred, and thus *did not* fall within the revival statute. The Court found, instead, that the 2002 amendment's delayed discovery rule for prospective claims applied also to the previously time-barred claims covered by the revival provision. *Quarry, supra*, 170 Cal.App. 4th at 1590 ("plaintiffs' claims are not governed by the one-year window for the filing of time-barred claims, but are governed by the provisions of § 340.1, subdivision (b)(2) in its prospective application.").[8]

The appellate court's pronouncement was not supported by the plain meaning of the statute. The Court's principal discussion of the 2002 revival provision (at 1584, beginning with "Effective 2003, however . . ."), did not quote from the statute at all, nor did it analyze or otherwise discuss key phrases within the statute.

The Court of Appeal also necessarily ignored, and thus contradicted, critical language within the statute itself. It ignored the phrases "has or had expired" and "otherwise" in subdivision (c). The use of the phrase "has or

[8] The *Quarry* Court never did explain why the one year window was not available to the six brothers – they certainly knew they had been abused in 1972.

had expired" – as opposed to simply "has expired" or "had expired" – makes it evident that the revival applies not only to any claim that "has" expired under the present law or iteration of section 340.1, but also to any claim that "had" expired in the past under previous laws or iterations of section 340.1. The further use of the word "otherwise" confirms this broad reach. The statute thus clearly revived not just claims barred under the language of the current statute, but claims that were "otherwise" barred under previous iterations of the statute and/or other law. Absent this meaning, the word "otherwise" would simply have no significance and amount to surplusage. Although the Court of Appeal repeatedly acknowledged that the Quarrys' claims had, in fact, expired and remained expired up to the 2002 amendment, the Court did not explain how this fact would allow their claims to escape the broad language in the revival provision.

Hightower, by contrast, correctly observed in the statute's revival provision a legislative intent to draw a clear distinction between time-barred claims and those that were not, and that application of the discovery rule would obliterate this distinction. Division Four, while noting *Hightower's* contrary conclusion, did not - because it could not - substantively address this point. It simply stated, "we respectfully disagree with our colleagues in the Second Appellate District." *Id.*

In its brief attempt to address *Hightower*, the Court made an argument that was not based on the plain meaning of the statute, and that was internally flawed. The Court stated that *Hightower* was based upon a false premise: "[T]he court's conclusion in *Hightower* appears to rest on the premise that *all* causes of action of persons over age 26 – those already triggered as well as those not yet discovered – were extinguished under prior limitations periods." *Id.* (Emphasis original). But this premise is

emphatically true, and the Court's own argument could not disprove it. It blithely stated, "we disagree," and then gave an unsound reason.

First, it tried to give a counter-example at footnote 10 that was not persuasive. The Court stated:

> It is an oversimplification to say that *all claims* discovered before 2003 would be barred. If a person discovered the cause of injury prior to January 1, 2003, but the three-year statute had not expired before the 2002 amendments took effect, such claims would also be included in the prospective application of the statute.

Quarry, supra, at 1590, fn. 10.

This was not a persuasive example because, to the extent this example was of a claim by a plaintiff who had not reached age 26 prior to the 1998 amendment or 2002 amendment, then such a claim would ***not*** have been barred, and thus it would not have been necessary to revive the claim under the 2002 revival provision in the first place. It would be irrelevant for purpose of the revival statute, and irrelevant to the facts of this case. If, on the other hand, the example was intended to be of a claim from a plaintiff who ***did*** reach the age of 26 prior to 1998 (as the Plaintiffs in this case), then the example is merely a circular application of the Court's own interpretation of the 2002 revival provision. It is simply another statement that such a claim is not automatically barred, supported by the Court's flawed application of the delayed discovery rule.

Second, the Court of Appeal's reasoning on this point was internally inconsistent. As explained above, the Court twice acknowledged, both in its recitation of the statutory history and then its statutory analysis, that, prior to the 2002 amendment, claims against non-perpetrator third parties "had to be brought before the plaintiff's 26th birthday[;]" otherwise they

were barred. *Quarry, supra,* at 1582. The Court's single explanation for *Hightower's* statutory analysis was thus undermined by the Court's contradictory statements in its own statutory analysis.

Finally, in holding that the statute's prospective provision for delayed discovery applied to the previously barred claims covered by the revival provision, the Court also ignored the critical phrase at the beginning of subdivision (c) "Notwithstanding any other provision of law." On this point, "[t]he phrase 'notwithstanding any other provision of law' means what it says." *People v. Palacios*, (2007) 41 Cal.4th 720, 728 [62 Cal.Rptr.3d 145] (noting further this phrase's "broad and unambiguous scope", at 729). The phrase declares legislative intent "to have the specific statute control despite the existence of other law which might otherwise govern." *Klajic v. Castaic Lake Water Agency*, (2004) 121 Cal.App.4th 5, 13 [16 Cal.Rptr.3d 746]. This is a critical phrase.

This phrase has also been interpreted in other statutory contexts involving statutes of limitations and the delayed discovery rule. The Uniform Fraudulent Transfer Act, Civ. Code § 3439.04(c), for example, provides that, "[n]ot withstanding any other provision of law, a cause of action with respect to a fraudulent transfer or obligation is extinguished if no action is brought or levy made within seven years after the transfer." This phrase has been interpreted to override both the delayed discovery rule in subsection (a) of that ***same*** Fraudulent Transfer Act, ***as well as*** the general delayed discovery rule for fraud claims in CCP section 338(d), because "the Legislature clearly meant to provide an overarching, all-embracing maximum time period to attack a fraudulent transfer." *Macedo v. Bosio*, (2001) 86 Cal.App.4th 1044, 1051 [104 Cal.Rptr.2d 1].

Here, the Legislature added this phrase because it wanted to clearly delineate, as *Hightower* observed, which claims were previously barred, and

which claims had to be brought during the one-year revival window. The Court of Appeal in this case failed to address this critical phrase as well.

2. *Quarry* Mischaracterized the Legislative History and Intent

The *Quarry* opinion was anchored by the Court of Appeal's determination that "the primary purpose of the 2002 amendments was to ameliorate the harsh result of a statute of limitations . . . ." *Quarry, supra*, at 1588.

But this broad characterization of the legislative intent ignored that the statute actually had two functions and mechanisms, one retroactive, and the other prospective, and that its application would be different in each scenario.

For some reason, the Court of Appeal failed to mention the floor comments made by the statute's sponsor, Senator Burton, which were in the record before the Court, and which confirmed the statute's dual purposes.

The Court also cited and heavily relied upon the mysterious, stray document entitled, "Assembly Judiciary Committee Background Information Worksheet," but, chose not to quote the entire document. Instead, the Court only quoted selectively from the second part of the document, describing the "Prospective application" of the statute, and omitted any discussion of the first part, specifically discussing the statute's "Retroactive application and revival of lawsuits." *Quarry, supra,* at 1588. In doing so, the Court effectively applied the legislative intent behind the prospective portion of the statute to its interpretation of the retroactive portion of the statute, arriving at an inaccurate view of the legislative intent.

3. The Appellate Court Ignored Binding Supreme Court Precedent

In arriving at its result-oriented holding, the Court of Appeal also had to ignore clear, binding Supreme Court precedent regarding when a claim of childhood sexual abuse accrues.

In 1989, this Court unequivocally confirmed that a claim for childhood sexual abuse accrues once, at the time of molestation. *John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 443 [769 P.2d 948, 256 Cal.Rptr. 766] (accrual of cause of action to be "measured from the date that John was molested").

In 2007, this Court again confirmed this rule: "Generally, a cause of action for childhood sexual molestation accrues at the time of molestation." *Shirk v. Vista Unified School Dist., supra,* 42 Cal.4th 201 (citing *John R. v. Oakland, supra*; 48 Cal.3d 438; *Doe v. Bakersfield City School Dist.* (2006) 136 Cal.App.4th 556, 567, fn. 2, [39 Cal.Rptr.3d 79]; *Ortega v. Pajaro Valley Unified School Dist.* (1998) 64 Cal.App.4th 1023, 1053 [75 Cal.Rptr.2d 777]).

In *Shirk*, this Court further confirmed, consistent with this general rule, that the 2002 amendment's subdivision (a) delayed discovery provision does not apply to retroactively revived claims.

In *Shirk*, the plaintiff was an adult who had been molested as a teenager by her school teacher. She did not file a government tort claim within 100 days of the accrual of her cause of action as required by the law in effect at the time. *Shirk v. Vista Unified School Dist., supra,* 42 Cal.4th at 205. Decades later, she learned that she was suffering from psychological injury caused by the childhood molestation, and filed her claim during the 2003 revival window. *Id.* at 206. The plaintiff argued that the 2002 amendments to section 340.1 re-defined accrual, and created a

second accrual of claims for sexual molestation upon the discovery that the molestation caused adulthood injuries. *Id.* at 210-11. This Court, after reviewing the history of section 340.1, rejected that analysis, holding that while section 340.1 extends the time for filing certain civil claims, it does not affect the ***accrual*** of the claim. *Id.* at 211-14. Because this Court held that accrual of a claim is the same for both a civil action and a government tort claim, the *Shirk* holding thus applies equally to civil claims against private parties like that in the instant case.

Had the Supreme Court accepted the plaintiff's argument that section 340.1 actions do not accrue until discovery of the psychological abuse, the plaintiff's claim would have been ruled timely, since the time for filing a government claim runs from the date of accrual. But because this Court followed the general rule that the claim accrued when the molestations occurred, this Court implicitly rejected the notion that lapsed childhood sexual abuse claims can accrue a second time under a delayed discovery theory.

Here, the *Quarry* Court had to ignore *Shirk* – the result it desired would collapse if the First District had to admit "childhood sexual molestation accrues at the time of molestation." *Shirk v. Vista Unified School Dist., supra,* 42 Cal.4th 201. In doing so, it held, contrary to *Shirk*, that subdivision (a)'s delayed discovery rule applies to retroactively revived claims. While the Court of Appeal acknowledged that it was undisputed by the parties that "plaintiffs' claims for injuries from the alleged sexual abuse originally lapsed between 1976 and 1982, when each turned 19, under the law as it then stood" (*Quarry v. Doe 1, supra,* 170 Cal.App.4th at 1583), it circumvented this fact by holding, in complete disregard of *Shirk*, that a cause of action for sexual molestation re-accrues "when a plaintiff

discovers he has a compensable injury"(*Id.*, at 1591), rather than only once, at the time of the molestation, as held by *Shirk*.

Rather than address *Shirk*[9], the Court of Appeal here instead looked to a completely different area of law for support, and one that was not even advanced by the Plaintiffs in their appeal – that dealing with asbestosis claims. The analysis adopted in the asbestosis claims however is inapposite for at least three reasons.

First, the statute dealing with asbestos claims is different on its face because the Legislature explicitly declared its intent for the new statute to apply retroactively "to those causes of action which accrued prior to the change in the law made by this act and have not otherwise been extinguished by operation of law." *Nelson v. Flintkote Co.* (1985) 172 Cal.App.3d 727, 730 [218 Cal.Rptr. 562]. No such legislative pronouncement exists for subdivision (a) of section 340.1 allowing for application of delayed discovery.

Second, the asbestos statute is also different because, on its own terms, it says that there is a new accrual date when the victim loses time from work. Code Civ. Proc. § 340.2 (stating that statutory time limit begins to accrue at the time the plaintiff suffers or discovers the "disability," which is specifically defined as "the loss of time from work as a result of such exposure which precludes the performance of the employee's regular occupation."). This Court has thus interpreted that completely different statutory enactment to have created a second accrual date for asbestos claims, as specially defined in that statute to include ***loss of time from work***. *See Hamilton v. Asbestos Corp.* (2000) 22 Cal.4th 1127, 1138 [95

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[9] The Court of Appeal was aware of *Shirk*, citing it for other reasons in the opinion. *Quarry*, *supra,* at 1589. The accrual holding of *Shirk* was the focus of the oral argument in this case.

Cal.Rptr.2d 701]. This was different from prior law, under which claims accrued upon discovery of a compensable injury, such as a diagnosis of asbestosis. *Id.* at 1144. That specific statutory creation of a second accrual event (loss of time from work) markedly contrasts with the statute at section 340.1, and this Court's interpretation of that statute in *Shirk,* that no new accrual date was created by the 2002 amendment to section 340.1. *See also Nelson v. Flintkote Co., supra,* 172 Cal.App.3d at 732 (holding that the statutory enactment of section 340.2 was "more liberal" than a delayed discovery rule).

Third, and most notably, asbestosis is of a different nature than sexual molestation, because "the traditional justifications for statutes of limitations do not apply [in asbestosis cases] since there is no real problem of loss of witnesses' memories. An asbestos manufacturer's defense necessarily rests on documentary evidence which is typically kept in the course of business." *Id.* at 735. By contrast, decades-old sexual molestation claims rest primarily on the memories of the few remaining witnesses.

The Court of Appeal ignored binding precedent from this Court in *Shirk.* Its *sua sponte* reliance on *Nelson*, and analogy to the asbestos context, was not appropriate. This Court should reverse the Court of Appeal to affirm its prior ruling in *Shirk* and restore uniformity of law regarding the accrual of claims for sexual molestation.

4. *Quarry* Created New Law on Application of Statutes of Limitations, Ignoring a Well-Established Body of Law to the Contrary

To reach the conclusion it desired, the Court of Appeal had to create – again *sua sponte* – new law with respect to retroactive application of

limitations rules, ignoring a well-established body of law contrary to its new pronouncement.

As noted, the delayed discovery provision at subdivision (a) of the 2002 amendment contained no express language of retroactivity. Nevertheless, the Court of Appeal concluded that that provision did apply retroactively. *Quarry v. Doe 1*, *supra*, 170 Cal.App.4th at 1590 ("plaintiffs' claims are not governed by the one-year window for the filing of time-barred claims, but are governed by the provisions of section 340.1, subdivision (b)(2) in its prospective application.").

Indeed, at the commencement of its opinion, the Court of Appeal proudly pronounced that "the timeliness of the complaint is to be measured by the statute in effect at the time the complaint was filed." *Quarry*, *supra,* at 1579. But this is not the law of California. There are no cases to this effect – the *Quarry* Court simply made it up.

The Court's pronouncement amounts to nothing short of the elimination of the concept of the law of retroactivity in this State. It flies in the face of the established body of law that holds that statutes of limitations are not retroactive unless expressly declared so by the Legislature. This body of law exists both generally – in other areas of the law – as well as within the body of law specific to section 340.1. If, as Division Four has pronounced, the timeliness of the complaint is to be measured by the statute in effect at the time of filing, the concept of retroactivity has had no place in California law, and the many courts that have wrestled with retroactivity have been wasting their time.

The general rule is that statutes operate "prospectively only" (*Myers v. Philip Morris Companies, Inc.*(2002) 28 Cal.4th 828, 840, 844 [123 Cal. Rptr.2d 40]), and "it is established that an enlargement of limitations operates prospectively ***unless the statute expressly provides otherwise***."

Krupnick v. Duke Energy, *supra*, 115 Cal.App.4th at 1029 (emphasis added).

California authority thus weighs heavily against the Court of Appeal's decision. In *Krupnick*, the court was faced with a personal injury claim based on a January 2001 injury, when the statute of limitations was one year. In 2002, the Legislature amended the statute of limitations to two years, effective January 1, 2003. The plaintiff had not yet filed litigation, but did so in January 2003, within two years of the injury, asserting that the two-year statute of limitations then in effect governed the claim. The Court of Appeal disagreed, holding that the claim was barred under the earlier one-year statute of limitations and there could be no retroactive application of the new statute of limitations. *Id.* at 1030.

Several other reported decisions have cited *Krupnick* with approval for the proposition that an "expanded limitations period does not apply to claims that were already time-barred under the provisions of a previous statute of limitations when the new law went into effect." *See Aguilera v. Heiman* (2009) 174 Cal.App.4th 590 [95 Cal.Rptr.3d 18]; *City of Oakland v. Hassey* (2008) 163 Cal.App.4th 1477 [78 Cal.Rptr.3d 621]; *Quiroz v. Seventh Ave. Center* (2006) 140 Cal.App.4th 1256 [45 Cal.Rptr.3d 222]; *Mojica v. 4311 Wilshire, LLC* (2005) 131 Cal.App.4th 1069 [31 Cal.Rptr.3d 887]; *Bullard v. California State Automobile Assn.* (2005) 129 Cal.App.4th 211 [28 Cal.Rptr.3d 225]; *Andonagui v. May Dept. Stores Co.* (2005) 128 Cal.App.4th 435 [27 Cal.Rptr.3d 145]. The recent *Hassey* case is from the same division that authored the opinion here, and did not distinguish between time-barred claims that had never been previously filed and those in which a court had adjudicated their untimeliness. These six published opinions describe a rule of law that is directly contrary to the Court of Appeal's pronouncement in this case.

The *Krupnick* line of cases does not stand alone. With respect to this very same statute of limitations governing child molestation cases – section 340.1 – as noted above, the First District interpreted the 1990 amendment to be prospective only, because the amending act did not mandate revival in "unmistakable terms." *David A. v. Superior Court*, *supra*, 20 Cal.App.4th at 286. The Legislature then responded by changing the statute so that this amendment would thereafter apply retroactively.

There is no similar legislative pronouncement of intent with respect to the 2002 amendments to section 340.1. *Hightower* confirmed that the statute's delayed discovery provision was not retroactive. Since the *Hightower* decision, issued three years ago, the Legislature has ***not*** stepped in to change the law to make it retroactive contrary to its enactment in 1994.

In connection with yet a different statute of limitations, this same general rule has been acknowledged. In *Gallo*, the plaintiff sued the defendant for beating and sexually abusing her and taking her property by force and intimidation. *Gallo v. Superior Court* (1988) 200 Cal.App.3d 1375, 1377 [246 Cal.Rptr. 587]. At the time of the alleged acts, the statute of limitations was one year for personal injury torts, and like the Plaintiffs in this case, the plaintiff there did not file an action within that time. *Id.* at 1378. The Legislature subsequently enacted section 340.3 through emergency legislation to allow victims of felonies to sue civilly within one year after the defendant is convicted of a crime that caused the personal injuries. *Id.* Gallo's abuser was convicted in 1986 on multiple felony counts related to her claims. *Id.* She sued within one year of his conviction, but the Court of Appeal issued a writ of mandate directing the trial court to sustain the defendant's demurrer, because the new statute, like section 340.1, did not expressly say that it applied retroactively. *Id.* at 1378-79. In holding that the statute did not revive the lapsed personal

injury claims, the court in *Gallo* relied on the fact that "the underlying general body of precedent regarding changes in periods of limitations does not favor retrospectivity but instead ... presumes that periods of limitations once expired may not be revived except by express statutory language to that effect." *Id.* at 1380.

Rather than follow this body of law, the Court of Appeal, here, instead based its new rule of law on *Nelson* (the asbestos case), and the proposition that "[t]here is no automatic magical extinguishment of a cause of action by the mere passage of time" unless a court has affirmatively adjudicated that a claim is barred. *Quarry v. Doe 1*, *supra*, 170 Cal.App.4th at 1586. This reliance on *Nelson* was not proper for at least two reasons. First, the Court in *Nelson* made a dubious distinction between the Legislature's use of the word "extinguished" in the asbestos statute (section 340.2), as opposed to the more passive word "lapsed," implying that the use of extinguish meant that the claim must have been affirmatively adjudicated as time-barred. *Nelson*, *supra*, 172 Cal.App.3d at 731-732. But other courts have criticized the purported distinction between "extinguished" claims and "lapsed" claims. *See, e.g.*, *Gallo v. Superior Court*, *supra*, 200 Cal.App.3d at 1380 ("That is an argument that only a lawyer could love; it rests on semantics rather than on reason."). Second, section 340.1 does ***not*** use the word "extinguished." Rather, it uses the word "expired." Code Civ. Proc. § 340.1(c).

By forging a distinction for retroactivity purposes between time-barred claims that had lapsed on their own and time-barred claims that had been adjudicated to be untimely, the *Quarry* Court in this case created a rule of law simply contradicted by the overwhelming weight of authority and "general body of precedent" that such amendments do not revive any time-barred claims unless the Legislature expressly declares that intent. The

confusion that will result from this opinion, if it is not reversed by this Court, will be immense.

5. The Appellate Court Misinterpreted the Statute to the Extent it Held that Common Law Delayed Discovery Operated to Save The Plaintiffs' Claims

The Court of Appeal also concluded that prior iterations of section 340.1 did not abrogate what it referred to as the "common law delayed discovery rule." *Quarry v. Doe 1*, *supra*, 170 Cal.App.4th at 1592-93. The Court then appeared to hold that even if the delayed discovery provision contained in section 340.1(a) does not apply retroactively, the common law delayed discovery rule had always operated, and thus that rule had rendered the Quarry brothers' claims not time-barred and not subject to the 2002 revival statute because the Quarry brothers "did not discover the cause of their psychological injuries until 2006." *Id.* at 1584, 1592-93.

Several critical flaws exist with this reasoning. First, the Court's application of a "did not discover" standard was erroneous, because the common law delayed discovery rule is actually much broader. It is not just whether the plaintiff did or did not discover, but also whether the plaintiff ***reasonably should have*** discovered. *Norgart v. Upjohn Co.*, *supra*, 21 Cal.4th at 397 (common law delayed discovery rule "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action."). Indeed, the delayed-discovery provision contained at subdivision (c) of 340.1 tracks this formulation as well. Code Civ. Proc. § 340.1(a) ("discovers or reasonably should have discovered . . .").

Second, the Court's formulation of ***what*** must be discovered under the common law delayed discovery rule was similarly erroneous. The Court stated that it was "the cause of [the Plaintiffs'] psychological injuries." *Quarry*, *supra*, 170 Cal.App.4th at 1584. The common law delayed

discovery rule, as applied to childhood sexual abuse claims, does not require discovery of the cause of later psychological injuries, but rather merely discovery of the wrongfulness. *Evans v. Eckelman* (1990) 216 Cal.App.3d 1609, 1618-19 [265 Cal.Rptr. 605] (accrual occurs upon "[a]wareness of wrongdoing"). By applying a "did not discover" and "cause of psychological injuries" rule, the *Quarry* panel articulated the wrong rule for common law delayed discovery.[10]

Third, any such conclusion that the common law delayed discovery rule (however formulated) survived the enactment and multiple amendments of section 340.1 is contradicted by the language of the statute. In 1986, when the Legislature enacted section 340.1, the statute expressly allowed for application of the common law delayed discovery rule.[11] In 1990, when the Legislature amended the statute, the statute again expressly allowed for application of common law delayed discovery.[12]

In 1994, however, the Legislature ***specifically deleted*** this allowance for application of common law delayed discovery. It did so at the same time it liberalized application of the statute, allowing it to apply

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[10] The *Quarry* Court had to do this to arrive at its desired result, particularly given the allegations in the complaint about the Plaintiffs' knowledge of the wrongfulness of the abuse at a much earlier age. Indeed, the *Quarry* Court emphasized that it was not opining at all on whether the Complaint's allegations were sufficient to meet the delayed discovery standard. *Quarry v. Doe, supra*, 170 Cal.App.4th at 1579, fn. 2.

[11] The statute provided: "Nothing in this bill is intended to preclude the courts from applying delayed discovery exceptions to the accrual of a cause of action for sexual molestation of a minor." (Former § 340.1(d)).

[12] Former subdivision (*l*) read: "Nothing in the [1990] amendment shall be construed to preclude the courts from applying equitable exceptions to the running of the applicable statute of limitations, including exceptions relating to delayed discovery of injuries, with respect to actions commenced prior to January 1, 1991. (Former § 340.1(*l*)).

retroactively. This deletion was then preserved in all subsequent amendments to the statute, as the Legislature continued to liberalize the limitations rules. The Legislature then saw fit to re-impose a delayed discovery rule in 2002 by way of subdivision (a) (but only prospectively), something which would not have been necessary had the common law delayed discovery rule survived all along.

The legislative history is replete with statements confirming that there was no common law delayed discovery for such claims against non-perpetrators at the time the 2002 amendment was enacted, and that is precisely why the Legislature chose to amend the statute in 2002 to apply delayed discovery prospectively. *See e.g.* Senator Burton's Comments noted *supra*, at LH 140 ("Current law prohibits suits against third parties after the victim's 26th birthday."); *See also* (Sen. Com. On Judiciary, Analysis of Sen. Bill No. 1779 (2001-2002 Reg. Sess.) as amended May 2, 2002, p.3 [LH 231] ("Existing law provides that no action described in paragraph (2) or (3) above [describing the two categories of non-perpetrator defendants covered by the statute] may be commenced on or after the plaintiff's 26th birthday.")).

"'It is ordinarily to be presumed that the Legislature by deleting an express provision of a statute intended a substantial change in the law.'" *People v. Dillon* (1983) 34 Cal.3d 441, 467 [194 Cal.Rptr. 390] (quoting *People v. Valentine* (1946) 28 Cal.2d 121, 142 [169 P.2d 1]. "'Where the Legislature omits a particular provision in a later enactment related to the same subject matter, such deliberate omission indicates a different intention which ***may not*** be supplanted in the process of judicial construction.'" *Hoschler v. Sacramento City Unified School Dist.* (2007) 149 Cal.App.4th 258, 269 [57 Cal.Rptr.3d 115] (emphasis added, quoting *Kaiser Steel Corp. v. County of Solano* (1979) 90 Cal.App.3d 662, 667 [153 Cal.Rptr. 546]).

The 1994 amendment – which deleted the language allowing for common law delayed discovery – abrogated the common law delayed discovery rule. By specifically deleting the statute's application of this rule, it is common sense to conclude that the Legislature intended a substantial change in the law in this regard – particularly given that the Legislature was simultaneously expanding and liberalizing the limitations rules for these claims in other respects.

The Court of Appeal's judicial construction was also severely flawed. First, in relying on the case of *Ruoff v. Harbor Creek Community Assn.* (1992) 10 Cal.App.4th 1624, 1630 [13 Cal.Rptr.2d 755], the Court relied on an inapplicable standard: one that governs how courts are to determine whether a statute ***silently*** abrogates established rules of law, as opposed to expressly deletes them. *Quarry*, *supra*, at 1593. In *Ruoff*, the Court explained that when the Legislature enacts a statute, there is no presumption that the Legislature intends to overthrow long-established principles of law unless such intention is made clearly by express declaration or necessary implication. *Ruoff v. Harbor Creek Community Assn.*, *supra*, 10 Cal.App.4th at 1630. But that case involved a newly enacted statute, and the question of whether it silently abrogated an existing body of contrary common law; and the Court found it did not because the common law did not actually exist or otherwise conflict with the statute as claimed. *Id.*, at 1629-30.

That situation is very different from the one before this Court. The Legislature, here, did not simply create a new statutory law thereby raising the question of whether that law somehow silently conflicts with and/or abrogates another body of common law. It expressly ***deleted*** the rule of law. It removed the portion of the statute that had previously enunciated that rule. The *Ruoff* presumption or test applied by the Court of Appeal is

thus not applicable to this case. Rather, the presumption in *Dillon* and *Hoschler* applies. Setting aside the inappropriateness of the *Ruoff* standard, the Court of Appeal also failed to apply the *Ruoff* standard clearly. It attempted to articulate an alternate interpretation of the 1994 amendment that was unintelligible at least, and amounted to a splitting of hairs at most. *Quarry*, *supra*, at 1593.

Second, the Court of Appeal also cited two cases involving application of common law delayed discovery to sexual abuse claims (*Evans v. Eckelman*, *supra,* 216 Cal.App.3d 1609, and *DeRose v. Carswell* (1987) 196 Cal.App.3d 1011 [242 Cal.Rptr. 368]) that both predate the 1994 amendment to section 340.1, and the Legislature's deletion of the provision allowing for common law delayed discovery. It thus follows that those cases simply cannot be relied upon for the proposition that the common law delayed discovery rule survived the Legislature's subsequent amendments to section 340.1 in 1994, 1998, 1999, and 2002.[13]

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[13] Although a court recently found the continued existence of a common law delayed discovery rule in claims of childhood sexual abuse, that holding is actually different and does not affect this case. *See K.J. v. Arcadia Unified School District* (2009) 172 Cal.App.4th 1229 [92 Cal.Rptr.3d 1]. In the *K.J./Arcadia* case, the Court found common law delayed discovery to still apply to a different scenario: childhood sexual abuse claims that (a) were not previously barred (*i.e.* because they were more recent, for abuse in 2007), and (b) were also not covered by section 340.1 (because they were brought against a public entity, and thus subject to section 945.6 instead). *Id.* at 1233. First, such claims (being for abuse post-2002) would have, had they been subject to section 340.1, fallen under the delayed discovery rule at subdivision (a). Second, precisely because they do not fall under section 340.1, (and its more liberal limitations periods), that section's statutory delayed discovery rule does ***not*** override any common law delayed discovery rule. This Court has not granted review of this case. *See* July 15, 2009, S172172 ("The request for an order directing depublication of the opinion is denied."). Any contrary conclusion about this opinion would have to find that it simply ignored this

F. THE COURT OF APPEAL'S DECISION REPRESENTS IMPROPER JUDICIAL LEGISLATION

The Court of Appeal's decision was premised on the faulty assumption that any plaintiff that had failed to bring a previously barred claim during the 2003 revival window but claimed they had not discovered their psychological injuries until after was somehow disenfranchised. The Court of Appeal was thus motivated by the equally faulty desire to find retroactivity where it did not exist, and to avoid what it considered to be a "harsh result" of a statute of limitations. It reasoned that "[i]t would not effectuate" the legislative intent of the 2002 amendment to "ameliorate the harsh result of a statute of limitations which precluded abuse victims from recovering any compensation" were the Court "to read the amendments as re-imposing the same harsh result on an entire class of victims over the age of 26 who did not discover the cause of their injury until after January 1, 2001." *Quarry*, *supra*, 170 Cal.App.4th at 1588-89.

This approach was inconsistent with core tenants of judicial practice, and thus resulted in improper judicial legislation. As this Court stated more than 20 years ago – as if it were addressing the *Quarry* Court: "if a remedial objective were sufficient to demonstrate a clear legislative attempt to apply a statute retroactively, almost all statutory provisions would apply retroactively." *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1213 [246 Cal.Rptr. 629].

This Court held more than 75 years ago and has since repeatedly affirmed, a "court has no power to rewrite [a] statute so as to make it conform to a presumed intention which is not expressed." *Seaboard Acceptance Corp. v. Shay* (1931) 214 Cal. 361, 365 [5 P.2d 882]; *See also,*

Court's binding precedent in *Shirk* that the delayed discovery rule does not apply to alter the accrual of sexual abuse claims.

County of Santa Clara v. Perry (1998) 18 Cal.4th 435, 446 [75 Cal. Rptr. 2d 738, 744] (court is "bound by the words of [a] statute and must conclude the Legislature meant what it said."); *California Teachers Ass'n v. Governing Bd. of Rialto Unified School District* (1997) 14 Cal.4th 627, 633 [927 P.2d 1175, 59 Cal.Rptr.2d 671] ("due respect for the political branches of our government requires us to interpret the laws in accordance with the expressed intention of the Legislature.").

"Whatever may be thought of the wisdom, expediency, or policy," a court engages in "improper judicial legislation" when it ignores express language to "rewrite the statute to make it conform to a presumed intention that is not expressed." *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575, 585 [94 Cal.Rptr.2d 3].

This Court has made clear specifically with respect to statutes of limitations, "[t]o establish any such [limitations] period under any such statute ***belongs to the Legislature alone***, subject only to constitutional constraints." *Norgart*, *supra,* at 396 (emphasis added). *See also Sznyter v. Malone* (2007) 155 Cal.App.4th 1152, 1161 [66 Cal.Rptr.3d 633]; *Marin Healthcare District v. Sutter Health* (2002) 103 Cal.App.4th 861, 872 [127 Cal.Rptr.2d 113]; *Samuels v. Mix* (1999) 22 Cal.4th 1, 13 [989 P.2d 701, 91 Cal.Rptr.2d 273].

Disregarding all of these fundamental principles, the Court of Appeal simply rewrote the statute to create a new rule of limitations based on the view of the remedial purpose of the statute of three justices – not that of the Legislature. The *Quarry* panel ignored the plain language of the statute, and violated a core tenant by rewriting the statute "to make it conform to a presumed intention which is not expressed." *Morillion v. Royal Packing Co.*, *supra,* 22 Cal. 4th at 585. By rewriting a statute of

limitations, in particular, it intruded on territory that "belongs to the Legislature alone." *Norgart, supra,* at 396.

The Court of Appeal's opinion must be seen for what it is – improper judicial legislation, and therefore rejected.

V. CONCLUSION

The Court of Appeal's decision is rife with error, but equally as troubling is the panel's failure to consider the consequences of the law it was creating.

In 2002, the California Legislature created an extraordinary vehicle for civil actions for childhood sexual abuse. However, in doing so, it balanced the rights of the abused and the rights of the accused. While the window authorizing the revival of decades-old claims put tremendous burdens on those who were claimed to be responsible for the abuse, those burdens were not permanent – they were for one year only. The Legislature concluded that social policy justified forcing those defendants to deal with decades-old claims and their consequences – dead witnesses, lost evidence, inadequate insurance, and the like. But at the same time, the Legislature realized the drastic nature of such a revival provision and concluded that it should be made available for only a limited period of time.

Of course, the Court of Appeal did not have the authority to ignore this legislative conclusion, but it did. And it did so without taking into account the consequences of its decision. While acting, in effect, as a three-person legislature, the First District ignored its opinion's impact on organizations in any way involved with children in California – religious entities, private schools, boys' and girls' clubs, Scouts, children's sports leagues, community service groups and others. The policy advocated by the *Quarry* Court would permanently leave those institutions to deal with

decades-old claims and their consequences, something the Legislature was unwilling to do.

Quarry must be reversed, *Hightower* confirmed, and clarity provided once again to those courts awaiting the decision of this Court. *See, Petition for Review, pages 14-16.*

DATED: August 11, 2009 FOLEY & LARDNER LLP

By: ___________________________
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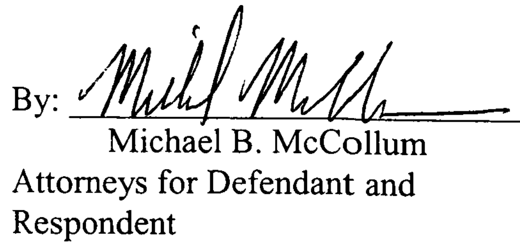
CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.504(d)

The text of this brief consists of 13,894 words, including footnotes, as counted by the word-processing program used to generate the brief.

DATED: August 11, 2009 FOLEY & LARDNER, LLP

By: 

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S171382

PROOF OF SERVICE

I am employed in the **County of Los Angeles, State of California**. I am over the age of 18 and not a party to this action; my current business address is **555 S. Flower Street, Suite 3500, Los Angeles, CA 90071-2411**.

On **August 11, 2009**, I served the foregoing document described as **OPENING BRIEF ON THE MERITS** on the interested parties in this action as follows:

X BY THE FOLLOWING MEANS:

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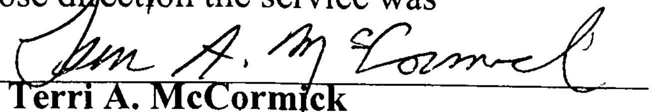
x I am readily familiar with the firm's practice of collection and processing correspondence for mailing with the United States Postal Service; the firm deposits the collected correspondence with the United States Postal Service that same day, in the ordinary course of business, with postage thereon fully prepaid, at **Los Angeles, California**. I placed the envelope for collection and mailing on the above date following ordinary business practices.

X Executed on **August 11, 2009**, at **Los Angeles, California**.

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

X I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.



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Clerk of the Court
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San Francisco, CA 94102
Case No. A120048

Superior Court of California
The Hon. Kenneth Mark Burr
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