Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically RECEIVED on 9/13/2022 at 9:06:47 AM

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 9/16/2022 by Tao Zhang, Deputy Clerk

S272166

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

JANE DOE, A MINOR, BY HER GUARDIAN AD LITEM AGUSTINA KARINA FLORES, et al.,
Plaintiffs and Petitioners,

v.

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

v.

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

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

APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF; AND BRIEF

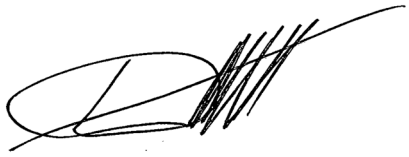
David M. Arbogast
ARBOGAST LAW
1800 E Garry Ave Suite 116
Santa Ana, CA 92705-5803
Phone/Fax: 714-988-1491
david@arbogastlaw.com

Attorney for Amicus Curiae Consumer Attorneys of California

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to Cal. Rules of Ct., rule 8.208, the Consumer Attorneys of California certifies that it is a non-profit organization with no shareholders. CAOC and its counsel certify that they know of no other entity or person that has a financial or other interest in the outcome of the proceeding that CAOC and its counsel reasonably believe the Justices of this Court should consider in determining whether to disqualify themselves under Canon 3E of the Code of Judicial Ethics.

Dated: September 12, 2022



David M. Arbogast

Attorneys for Amicus Curiae
Consumer Attorneys of California

TABLE OF CONTENTS

Page

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS 2

TABLE OF CONTENTS.....3

TABLE OF AUTHORITIES.....4

APPLICATION FOR PERMISSION TO FILE 6

I. INTRODUCTION 8

II. DISCUSSION.....9

A. The Court of Appeal Correctly Reversed the Trial Court on the Applicability of Evidence Code § 1106 and 783 as to the 2013 Sexual Assault 9

B. Under the Well-settled Rules of Statutory Interpretation, Evidence Code § 1106 Establishes an Absolute Bar to the Admission of Evidence of Instances of Other Sexual Conduct Involving a Plaintiff, Child Rape Victim 10

C. The Trial Court's Weak Evidence Code § 352 Balancing, Mistakenly Condoned by the Court of Appeal, Is Directly Contrary to the Legislatures Exceptionally Narrow Circumstances When Prior Sexual Conduct May Be Admitted to Attack a Sexual Abuse Victim's Emotional Distress Claim.....11

III. CONCLUSION 13

CERTIFICATE OF COMPLIANCE..... 15

DECLARATION OF SERVICE..... 16

TABLE OF AUTHORITIES

CASES

Page

Doe v. Superior Court,
(2021) 71 Cal.App.5th 2274 ..... 9, 11

Connerly v. State Personnel Bd.,
(2006) 37 Cal.4th 1169 6

Horiike v. Coldwell Banker Residential Brokerage Co.,
(2016) 1 Cal.5th 1024 6

Kesner v. Superior Court,
(2016) 1 Cal.5th 1132 6

Knoetten v. Superior Court,
(1990) 224 Cal.App.3d 11 13

Naranjo v. Spectrum Security Services, Inc.,
(2022) 13 Cal.5th 934 6

Noel v. Thrifty Payless, Inc.,
(2019) 7 Cal.5th 955 6

People v. Sinohui,
(2002) 28 Cal.4th 205 10

Regents of University of California v. Superior Court,
(2018) 4 Cal.5th 607 6

Serova v. Sony Music Entertainment,
(Aug. 18, 2022) 430 P.3d 1179, 2022 WL 3453395 6

T.H. v. Novartis Pharmaceuticals Corp.,
(2017) 4 Cal.5th 145 6

Vinson v. Superior Court,
(1987) 43 Cal.3d 833 10

STATUTES

Code of Civil Procedure § 2017.220 .....*passim*

Evidence Code § 783 .....*passim*

Evidence Code § 1106 .....*passim*

RULES OF COURT

Rules of Court, rule 8.520 subd. (f)(1).....6

Rules of Court, rule 8.520 subd. (f)(4).....7

OTHER

Chris Micheli, *Statutory Construction Guidelines for Bill Drafting in California*, 52 U. Pac. L. Rev. 457 (2021) 10

APPLICATION FOR PERMISSION TO FILE

Amicus curiae Consumer Attorneys of California (CAOC) respectfully seeks permission to file the accompanying brief as a friend of the Court. (Cal. Rules of Court, rule 8.520 subd. (f)(1).)

Founded in 1962, CAOC is a voluntary non-profit membership organization representing over 6,000 consumer attorneys practicing in California. CAOC's members represent individuals and small businesses in various types of cases including class actions and individual matters affecting such individuals and entities such as claims for personal injuries and property damage. CAOC has taken a leading role in advancing and protecting the rights of injured victims and employees in both the courts and the Legislature.

CAOC has participated as amicus curiae in numerous precedent-setting decisions shaping California law. (*See, e.g.*, *Serova v. Sony Music Entertainment* (Aug. 18, 2022) 430 P.3d 1179, 2022 WL 3453395; *Naranjo v. Spectrum Security Services, Inc.* (2022) 13 Cal.5th 93; *Noel v. Thrifty Payless, Inc.* (2019) 7 Cal.5th 955; *Regents of University of California. v. Superior Court* (2018) 4 Cal.5th 607; *T.H. v. Novartis Pharmaceuticals Corp.* (2017) 4 Cal.5th 145; *Kesner v. Superior Court* (2016) 1 Cal.5th 1132; and *Horiike v. Coldwell Banker Residential Brokerage Co.* (2016) 1 Cal.5th 1024.)

CAOC is familiar with the issues before this Court and the scope of their presentation in the parties' briefing. CAOC seeks to assist the Court by "broadening its perspective" on the context of the issues presented. (See *Connerly v. State Personnel Bd.* (2006)

37 Cal.4th 1169, 1177. The briefs submitted by Plaintiffs and Petitioners fully address the issues presented, namely, the importance of careful interpretation of the statutes so as to not lead to unintended consequences or do violence to their stated Legislative purposes.[1]

CAOC voices its strong opinion to ensure that California's Rape Shield statutes are interpreted broadly in favor of protecting the rights of victims of sexual violence and enforced according to the Legislature's intent and purpose of the statutes because use of such evidence is more often harassing and intimidating than genuinely probative. Accordingly, absent extraordinary circumstances, not present in the instant matter, evidence of other sexual conduct involving a victim of sexual abuse should not be permitted in discovery or at trial. (Code Civ. Proc. § 2017.220 [formerly § 2036.1] and Evid. Code §§ 783 and 1106.)

[1] No party or its counsel authored any part of this brief. Except for CAOC and its counsel here, no one made a monetary contribution, or other contribution of any kind, to fund its preparation or submission. (Cal. Rules of Ct., rule 8.520 subd. (f)(4).)

I. INTRODUCTION

To effectuate the Legislature's intent and purpose of California's Rape Shield Laws (Evid. Code §§ 1106, 783, and Code of Civ. Proc. § 2017.220) evidence of other sexual conduct is not admissible by the Defendant to prove absence of injury. Specifically, that plaintiff did not sustain emotional damage when her Elementary School teacher, Joseph Alfred Baldenebro, sexually abused her when she was just 8 years old.

Below, the Court of Appeal correctly reversed the trial court on the issue of whether Evidence Code §§ 1106 and 783 applied as to other sexual conduct, a subsequent 2013 sexual molestation. Nevertheless, the Court of Appeal found admissible the evidence the Legislature specifically enacted not admissible to show an absence of injury. Therefore, to correct the Court of Appeal's flawed holding, the opinion should be reversed.

Under the well-settled rules of statutory interpretation, Evidence Code section 1106 (a) establishes an absolute bar to the admission of a plaintiff's other sexual conduct. Sexual conduct involving plaintiff other than the rape of a child when she was just a fourth grader, should not have been allowed into evidence at trial to show absence of damage, the precise reason the Court let the subsequent molestation evidence into evidence.

The trial court's demonstrably weak Evidence Code section 352 balancing that the Court of Appeal mistakenly affirmed, is directly contrary to the Legislature's exceptionally narrow circumstances when prior sexual conduct may be admitted at trial to attack a sexual abuse victim's emotional damages claim. The

only circumstance where other sexual conduct may be admissible is when the other sexual conduct involved a crime of moral turpitude such as a prior false statement or prostitution.

Simply put, a rape victim should not have to endure offensive, harassing, intimidating, unjustifiable, and deplorable examination of other sexual conduct. Here, the sexual abuse when plaintiff was just 8 years old is what is at issue. Allowing other sexual conduct would be directly contrary to the Legislature's intent and purpose when it enacted California's Rape Shield Laws. The Court of Appeals opinion allowing a subsequent sexual molestation into evidence at trial must be reversed. Otherwise, California's Rape Shield Laws will be rendered meaningless.

II. DISCUSSION

A. The Court of Appeal Correctly Reversed the Trial Court on the Applicability of Evidence Code § 1106 and 783 as to the 2013 Sexual Assault.

CAOC believes it is important to note that the trial court's reversed finding, which agreed with the defendant in the trial court below where the School District argued Evidence Code §§ 783 and 1006 did not apply is absolutely correct. (*Doe v. Superior Court* (2021) 71 Cal.App.5th 227, 232.) The plain meaning of the term "plaintiff's sexual conduct" in sections 1106 and 783 (and Code of Civ. Proc. § 2017.220) clearly encompasses both voluntary and involuntary sexual conduct. The Court of Appeal then inexplicably affirmed the trial court's order admitting evidence of a subsequent 2013 molestation finding the trial court's weak Evidence Code Section 352 balancing sufficient. However, the Legislature had

already performed the balancing required. (*Vinson v. Superior Court* (1987) 43 Cal.3d 833, 843-844 [the Legislature codified the "balancing process" which "obviated the need [for the court] to engage in an individualized balancing …"] Accordingly, evidence of the 2013 subsequent "sexual conduct" plainly should have been excluded.

B. Under the Well-settled Rules of Statutory Interpretation, Evidence Code § 1106 Establishes an Absolute Bar to the Admission of Evidence of Instances of Other Sexual Conduct Involving a Plaintiff, Child Rape Victim.

The starting point of statutory interpretation is that when construing the statute "'[w]e begin with the words of a statute and give these words their ordinary meaning.' [Citation.] 'If the statutory language is clear and unambiguous, then we need go no further.'" (See *People v. Sinohui* (2002) 28 Cal.4th 205, 211; see also, generally, Chris Micheli, *Statutory Construction Guidelines for Bill Drafting in California*, 52 U. Pac. L. Rev. 457 (2021) (collecting cases).)

Plainly, "… specific instances of the **plaintiff's sexual conduct** … **is not admissible by the defendant** … **to prove** … **absence of injury to the plaintiff**, unless the injury alleged by the plaintiff is in the nature of loss of consortium." (Evid. Code § 1106(a) (bold added.) The instant matter does not involve a loss of consortium claim therefore, Evidence Code section 1106 (a) plainly excludes any evidence of the plaintiff's other sexual conduct. The

2013 subsequent "sexual conduct" involving plaintiff should have been excluded at trial.

While the Court of Appeal correctly observed that the Legislature had already performed the balancing required and concluded the prejudicial effect outweighs its probative value on the issue of the plaintiff's claimed emotional distress damages" (*Doe v. Superior Court*, 71 Cal.App.5th 227, 238-239), the Court went on to treat plaintiff's emotional damage claims stemming from the abuse by plaintiff's Elementary School teacher when she was just 8 years old as if it was a routine personal injury matter such as an auto collision or slip and fall injury incident. The Court's ultimate holding to allow the admission of other sexual conduct at trial to show the absence of emotional damage to plaintiff is plainly an absurd result that demands reversal.

C. The Trial Court's Weak Evidence Code § 352 Balancing, Mistakenly Condoned by the Court of Appeal, Is Directly Contrary to the Legislatures Exceptionally Narrow Circumstances When Prior Sexual Conduct May Be Admitted to Attack a Sexual Abuse Victim's Emotional Distress Claim.

Under the Court of Appeal's reasoning, the only circumstance when other "sexual conduct" would not be admissible in a case brought by a plaintiff alleging emotional distress damage against their alleged sexual abuser is when, there is no other sexual conduct. (*Doe v. Superior Court*,71 Cal.App.5th at 236, 239

[acknowledging the other sexual conduct is being offered for the precise reason the Legislature found it inadmissible "to show 'absence of injury'" but then finding the evidence "relevant to impeach her testimony" as to the emotional distress damages she sustained by the molestation when plaintiff was just 8 years old].) The Court of Appeal's reasoning defies logic and common sense. Simply put, there can be no dispute that evidence of "other sexual conduct" to show absence of damage is plainly inadmissible under Section 1106(a).

CAOC strongly believes Evidence Code Section 1106(e) is not an exception but rather, merely states the narrow circumstance when evidence is offered "to attack the credibility of the plaintiff as provided in Section 783." (Evid. Code § 1106(e).) Reading California Rape Shield Laws in their entirety, this exceptionally narrow circumstance can only mean when the purpose for which the other evidence is introduced may be admissible when offered for some reason other than to prove consent or "absence of injury." (Evid. Code § 1106(a).) Indeed, outside the context of when such other evidence raised a question of a plaintiff's moral turpitude (prostitution or prior false statements), CAOC has not found, and the District has not cited, any published case beyond these narrow circumstances. Indeed, it is hard to fathom when evidence of "other sexual conduct" could ever be admissible but under those narrow circumstances.

If affirmed, the Court of Appeal's holding will permit its "exception" to swallow "that which the Legislature has declared offensive, harassing, intimidating, unjustifiable, and deplorable."

(*Knoetten v. Superior Court* (1990) 224 Cal.App.3d 11, 15.) While it may be commonplace in personal injury actions such as auto collisions or slip and fall premises liability actions to allow the admission of other injury incidents to impeach the credibility of a plaintiff's claims for damages, generally, specifically, the Legislature has already performed the weighing required and found evidence of "other sexual conduct" in sexual assault cases inadmissible to prove "consent" or "absence of injury." (Evid. Code § 1106 (a).)

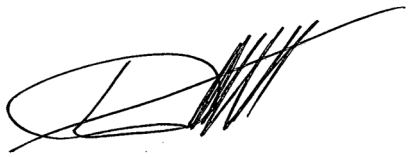
Because the inadmissible evidence has already been disclosed to the jury, there is no other remedy that can properly cure the grave missteps by the trial court and Court of Appeal. Specifically, sending this matter down to the trial court for a redo to order a fully compliant Section 783 briefing and hearing cannot possibly cure the poison that has already infected the jury below.

III. CONCLUSION

For the foregoing reasons discussed above and in the Plaintiff's briefs, CAOC strongly urges this Court to reverse the Court of Appeal. A rape victim should not have to endure offensive, harassing, intimidating, unjustifiable, and deplorable examination of other sexual conduct. The rape when plaintiff was just 8 years old is what is at issue. Allowing other sexual conduct would be directly contrary to the Legislatures intent and purpose when it enacted California's Rape Shield Laws.

Dated: September 12, 2022

Respectfully submitted,



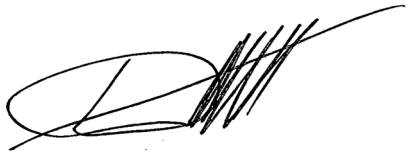
David M. Arbogast

Attorney for Amicus Curiae
Consumer Attorneys of California

CERTIFICATE OF COMPLIANCE

Pursuant to Cal. Rules of Ct., rule 8.204, subd. (c)(1), counsel of record certifies that this Application to File and Amicus Brief of Consumer Attorneys of California is produced using 13-point Times New Roman type, including footnotes, and contains 1,429 words. Counsel relies on the word count provided by Microsoft Word software program.

DATED: September 12, 2022



_____

David M. Arbogast

Attorney for Amicus Curiae
Consumer Attorneys of California

DECLARATION OF SERVICE

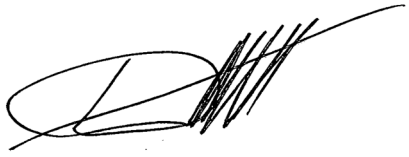
I, the undersigned, declare:

1. That declarant is, and was at the time of service, over the age of 18 years, and not a party to, or interested in, this legal action; and that declarant's business address is 1800 E Garry Ave., Suite 116, Santa Ana, CA 92705-5803.

2. That on the date indicated below, declarant served this **APPLICATION OF CONSUMER ATTORNEYS OF CALIFORNIA FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF; AND BRIEF** via TrueFiling at https://www.truefiling.com addressed to all parties appearing on the electronic service list for the above entitled case. The service transmission was reported as complete and a copy of the TrueFiling Receipt Page/Confirmation will be filed, deposited, or maintained with the original document(s) in this office.

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

Executed on this 12th day of September 2022 within the United States.



David M. Arbogast

Attorney for Amicus Curiae
Consumer Attorneys of California

Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 9/16/2022 by Tao Zhang, Deputy Clerk

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **david@arbogastlaw.com**

3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
BRIEF	S272166_ACB_CAOC_9-12-2022_Bookmarked

Service Recipients:

Person Served	Email Address	Type	Date / Time
Marina Maynez Esner, Chang & Boyer	mmaynez@ecbappeal.com	e-Serve	9/13/2022 9:06:46 AM
Dana Fox Lewis Brisbois Bisgaard & Smith 119761	Dana.Fox@lewisbrisbois.com	e-Serve	9/13/2022 9:06:46 AM
Sheeny Bang Esner, Chang & Boyer	sbang@ecbappeal.com	e-Serve	9/13/2022 9:06:46 AM
Kelsey Wong Esner, Chang & Boyer	kwong@ecbappeal.com	e-Serve	9/13/2022 9:06:46 AM
Lann Mcintyre Lewis Brisbois Bisgaard & Smith LLP 106067	lann.mcintyre@lewisbrisbois.com	e-Serve	9/13/2022 9:06:46 AM
David Arbogast Arbogast Law 167571	david@arbogastlaw.com	e-Serve	9/13/2022 9:06:46 AM
Ronald Labriola The Senators Firm, LLP	ron@thesenatorsfirm.com	e-Serve	9/13/2022 9:06:46 AM
Holly Boyer Esner Chang & Boyer 221788	hboyer@ecbappeal.com	e-Serve	9/13/2022 9:06:46 AM
Frederick Bennett Superior Court of Los Angeles County 47455	fbennett@lacourt.org	e-Serve	9/13/2022 9:06:46 AM
Stuart Esner Esner, Chang & Boyer 105666	sesner@ecbappeal.com	e-Serve	9/13/2022 9:06:46 AM
Jeffrey Miller Lewis Brisbois Bisgaard Smith, LLP	jmiller@lbbslaw.com	e-Serve	9/13/2022 9:06:46 AM

Wendy Dowse Lewis Brisbois Bisgaard & Smith LLP 261224	wendy.dowse@lewisbrisbois.com	e-Serve	9/13/2022 9:06:46 AM
Kevin Nguyen ESNER, CHANG & BOYER 322665	knguyen@ecbappeal.com	e-Serve	9/13/2022 9:06:46 AM
Luis Carrillo Carrillo Law Firm, LLP	lac4justice@gmail.com	e-Serve	9/13/2022 9:06:46 AM
Jeffry Miller Lewis Brisbois Bisgaard & Smith LLP 126074	jeff.miller@lewisbrisbois.com	e-Serve	9/13/2022 9:06:46 AM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

9/13/2022

Date

/s/David Arbogast

Signature

Arbogast, David (167571)

Last Name, First Name (PNum)

Arbogast Law

Law Firm