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IMMEDIATE STAY OF TRIAL REQUESTED

S_____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

S.M., A MINOR, BY AND THROUGH HER GUARDIAN AD LITEM, SOCORRO M.,
Plaintiff and Petitioner,

v.

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

LOS ANGELES UNIFIED SCHOOL DISTRICT,
Real Party in Interest.

AFTER A DECISION BY THE CALIFORNIA COURT OF APPEAL
SECOND APPELLATE DISTRICT, DIV. 5, CASE NO. B337359
HON. RICHARD FRUIN, TRIAL JUDGE
LOS ANGELES COUNTY SUPERIOR COURT CASE NO. BC704733

PETITION FOR REVIEW AND REQUEST FOR IMMEDIATE STAY OF MAY 21, 2024 TRIAL

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ISSUE PRESENTED

The issue in this case requires some context. Evidence Code Section 1106 "erects an absolute bar to the admission of evidence of specific instances of plaintiff's sexual conduct" with third parties to prove consent or absence of injury. (*Patricia C. v. Mark D.* (1993) 12 Cal.App.4th 1211, 1216.) Subdivision (e) of that section contains a narrow exception which applies to evidence "to *attack the credibility of the plaintiff* as provided in Section 783." In *Doe v. Superior Court* (*Mountain View School Dist.*) (2023) 15 Cal.5th 40, this Court concluded that this exception applied only to allow the defendant to challenge the credibility of the "plaintiff as a witness." (*Id*. at p. 62.) Here, in an action involving sexual abuse of a 12-year-old child by school personnel, the trial court has allowed the defendant school district to introduce evidence of subsequent abuse *through at least five witnesses*, even though that evidence has absolutely no tendency to call Plaintiff's credibility as a witness into question. The evidence is being admitted to dispute Plaintiff's claimed distress – precisely what Section 1106 is designed to protect against. Worse, the court permitted its admissibility without conducting a proper inquiry under *any* of the three steps required under Section 783.

While the trial court's order permitting this evidence to be paraded at trial defies every aspect of this Court's holding in *Mountain View,* the Court of Appeal nevertheless summarily denied writ relief citing to cases standing for the principle writ review is typically not warranted to challenge evidentiary rulings and that in limine rulings are without prejudice to being reconsidered. This gives rise to the following issue:

Do the cases justifying denial of writ review concerning run-of-the-mill evidentiary rulings apply to rulings that strip sexual assault victims of the California Rape Shield protections found in Evidence Code Section 1106 and stringent protections afforded under Section 783?

INTRODUCTION: WHY REVIEW AND AN IMMEDIATE STAY OF TRIAL ARE WARRANTED

This case arises out of the sexual abuse of a 12 year old intellectually disabled child by an employee of Defendant Los Angeles Unified School District ("the District"). Joshua Estrada, a teacher's assistant, *repeatedly* sexually assaulted Plaintiff Jane Doe. On April 29, 2024, the trial court ruled that evidence of a sexual assault suffered by Plaintiff years later ***will be admitted at trial***. The scope of the court's order is breathtaking, authorizing the District to question *more than five witnesses* about the subsequent assault. While California's rape shield laws forbid admissibility of such evidence, the trial court ruled otherwise.

On May 8, 2024, Plaintiff filed a Petition for Writ of Mandate challenging this Order and requesting an immediate stay trial was scheduled for Monday, May 20, 2024. On May 10, 2024 the Court denied the immediate stay explaining that it intended to rule by the trial date. On *Friday afternoon, May 17, 2024*, the Court summarily denied Plaintiff's writ Petition citing to cases standing for the general principle that writ review is typically not warranted to challenge evidentiary rulings and that in limine rulings are without prejudice to being reconsidered.

Intervention and an immediate stay by this Court is necessary to prevent the disclosure of this deeply personal information which will prejudicially effect the trial of this matter. **An immediate stay is necessary as trial is set to begin May 21, 2024,** with the FSC on May 20, 2024.

The Court of Appeal appears to have treated the subject evidentiary ruling as being no different than the myriad types of other evidentiary rulings that arise before or after trial. But that is not correct. Plaintiff explained why the evidentiary ruling in this case destroys the protections the Legislature has afforded Plaintiffs seeking recovery because of sexual

abuse under Evidence Code sections 1106 and 783. Those protections are designed to spare a plaintiff from enduring a trial exposing his or her other sexual conduct as the price to pay for seeking relief from the defendant.

This Court recently recognized the need to intervene through a writ proceeding, when as here, a trial court permits a school district to introduce evidence of a subsequent sexual assault in a case involving childhood sexual abuse without strictly following the dictates of Evidence Code sections 1106 and 783. (*Doe v. Superior Court (Mountain View School Dist.)* (2023) 15 Cal.5th 40, 50-53.)

In *Mountain View*, the Court made it abundantly clear that it is only when limited evidence of other abuse is relevant to challenge the credibility of the plaintiff as a witness that such evidence *may* be admitted, but *only* if the trial court first strictly complies with the requirements of Evidence Code sections 1106 and 783. However, under no circumstances can that evidence be introduced as "substantive evidence." In the Court's words: "Viewing this scheme as adopted in 1985 as a whole and giving full effect to all of its words and parts [citation], **it is clear that section 1106, subdivision (a), precludes admission of evidence concerning a plaintiff victim's sexual conduct *as substantive evidence* 'in order to prove consent by the plaintiff or *the absence of injury to the plaintiff*.'"** (*Id.* at p. 57 (emphasis added).) Thus, Section 1106 *explicitly* forbids a defendant from setting forth evidence of a separate and independent sexual assault to argue a concurrent cause of the damages suffered. (*Ibid*.)

Mountain View further explained that, while other sexual conduct cannot be admitted as *substantive evidenc*e to prove that the plaintiff was not as damaged as he or she claims, Section 1106, subsection (e), permits limited use of such evidence for the purpose of *impeaching a plaintiff's testimony* only where a defendant has complied with the rigorous requirements detailed in Section 783. The Court noted that evidence that is

inadmissible under subdivision (a) "'*can become* admissible for impeachment,'" under subdivision (e) where the party seeking to admit the evidence "'makes a sworn offer of proof concerning *the relevance of the sexual conduct of the complaining witness to attack her credibility*,'" and if sufficient, a hearing is held out of jury's presence at which time the plaintiff may be questioned regarding the offer of proof, and if after the hearing, and following a "special informed review and scrutiny," the court finds the evidence of plaintiff's sexual conduct relevant and not unduly prejudicial. (*Mountain View*, at pp. 57-59, 64-71.)

Although the trial court here was acutely aware of *Mountain View* and held numerous hearings on the issue of the admissibility of the subsequent sexual assault, the court ultimately failed to heed the core protections prescribed by Sections 1106 and 783 and in fact erred at each of the three stages dictated by Section 783. *First*, the District's offers of proof did not demonstrate that evidence of the later abuse would be relevant to attack the credibility of Plaintiff as a witness, which *Mountain View* holds is the singular relevant inquiry. In her deposition, Plaintiff acknowledged the later abuse and the harm it caused. She *never* testified that all of her emotional distress was caused by Estrada – a fact critical to the Supreme Court's analysis in *Mountain View* to demonstrate that the evidence is relevant to the credibility of the plaintiff as a witness. Thus, the matter should not have proceeded past the initial inquiry under Evidence Code section 783 (a) and the District's motion should have then been denied.

Second, when the matter nevertheless proceeded to a hearing under Evidence Code section 783, the Court disregarded the narrow purpose of that hearing. Section 783, subdivision (c) provides: "If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing *allow the questioning of the plaintiff regarding the offer of proof made by the defendant*."

Although, per the Court's Order, Plaintiff and her mother were present at the Section 783 hearing, the court ultimately decided it could resolve the issue *on its own* review of deposition testimony and interrogatory responses. Plaintiff was therefore not questioned regarding the District's offers of proof. Ultimately, the Court ruled that evidence of the later abuse was admissible and that the matter should proceed to a hearing under Evidence Code section 352, because it interpreted interrogatory responses verified by Plaintiff's guardian ad litem (her Mother) as alleging that Plaintiff's emotional distress resulted solely from the subject abuse. Even though Plaintiff could not even introduce these responses at trial, even though Plaintiff directly testified in deposition that the later abuse occurred and that she suffered harm from it, and even though Plaintiff's counsel unequivocally represented that Plaintiff would not claim that all of her distress was caused by the initial abuse alone, the Court ruled that evidence of that later abuse was relevant to challenge Plaintiff's credibility as a witness because of the interrogatory responses. This too was wrong and again the matter should have ended there.

Third, when the matter nevertheless proceeded to the Section 352 hearing, there was no "careful scrutiny" of the alleged probative value of the evidence as it pertains to Plaintiff's credibility against the prejudice caused by the unwarranted intrusion into Plaintiff's private life. Again, there was nothing inconsistent about Plaintiff's testimony to impeach.

These failures to heed the procedural protections guaranteed by section 783 unquestionably justifies writ review, as made abundantly clear in *Mountain View* when it reversed the trial court's ruling permitting similar evidence "via a single minimally invasive question" directed at plaintiff herself. (*Mountain View*, 15 Cal.5th at p. 66.) The sheer breadth of the order here confirms that the District's purpose in admitting such evidence is *not* to impeach Plaintiff's testimony but to argue an alternative source of

the damages she seeks. The trial court said as much at the last hearing but then ultimately adopted the District's proposed order allowing questioning of five witnesses. (See Exh. 36, p. 1032 ["So it seems to me that what the defendants want to do in their proposed order is to establish the details of the second sexual assault and then argue to the jury that they have to give consideration to whether the second sexual assault *is the cause of her emotional distress* …. So I would have to throw out most of this order because I think that it's essentially, establishing circumstances, which the statute and the Supreme Court have said are not appropriate with respect to a plaintiff pleading harm caused by a sexual assault."].)

The court's finding here that the subsequent sexual abuse suffered by Plaintiff is admissible and indeed may be discussed *by no less than five witnesses* (including Plaintiff, her mother, her sister, the perpetrator of the subsequent sexual assault, the detective that investigated the assault and the experts) is the very "back door" admission of sexual conduct evidence barred by subdivision (a). The evidence permitted to be paraded before the jury on May 20, 2024 has nothing to do with attacking the credibility of *Plaintiff's testimony*. It is all about damages. The manner in which the court applied the limited credibility exception essentially swallows the Legislature's "absolute bar" of such evidence under Section 1106, subdivision (a).

Unless this Court issues a stay and either accepts review, or remands the matter to the Court of Appeal to grant writ review, Plaintiff will have to endure a trial where evidence is introduced in direct violation of the protections afforded under Section 1106 and 783.

STATEMENT OF FACTS

This case arises from the sexual abuse of Plaintiff, a special needs student, by a teacher's assistant, which occurred on the school campus when she was just twelve years old. (Exh. 1, pp. 10-11.) In Plaintiff's operative complaint, she alleges negligence in the supervision and retention of the District's employee, Joshua Jacob Estrada. (Exh. 1, pp. 13-15.) As alleged in the complaint, the District failed to take disciplinary action against Estrada, despite complaints of serious misconduct made against him. (Exh. 1, p. 13.) Due to the District's negligence, Plaintiff was subjected to repeated sexual abuse by Estrada. (Exh. 1, pp. 11, 13-14.) Plaintiff alleges emotional distress damages. (Exh. 1, pp. 10, 17.)

Years after Estrada's sexual assault of Plaintiff, she was sexually assaulted by her sister's boyfriend. (Ex. 3, p. 38; Ex. 4, pp. 94-95.) Plaintiff has readily provided this information in deposition. (Id.)

In the District's "Motion in Limine No. 2 for an Order Allowing Evidence that Plaintiff Was Sexually Assaulted in Approximately 2019" it sought to have evidence submitted to "impeach Plaintiff's *likely claim* that all of her claimed emotional distress was caused by" the sexual abuse by Estrada. (Exh. 3, p. 36.) In support of that motion, the District submitted the Declaration of Diana Cho, which it claimed contained an Offer of Proof as to the evidence the District claimed justified introduction of evidence of the later abuse Plaintiff suffered, described in detail below. In summary, that Declaration provided that Plaintiff claimed that she suffered abuse from the subject abuse and also acknowledged that she suffered distress from the subsequent abuse. (Exh. 4, pp. 46-48.)

Because this Court was then considering the scope and applicability of Evidence Code sections 1106 and 783 in *Mountain View*, the trial court deferred consideration of the issues raised in this motion. On July 27, 2023, this Court issued its Opinion in *Mountain View*. Following that Opinion,

Plaintiff and the District both filed supplemental briefing regarding the impact of that decision on the analysis of this issue. (Exhs. 11-18.)

Included in those supplemental papers, the District submitted a Declaration of Erin Uyeshima, as a second purported offer of proof under Section 783. That Declaration largely repeated what had already been submitted by the District in its earlier Cho Declaration. (Exh. 16; see also Exh. 23)

The Court then held a hearing on the issue whether the District's Offer of Proof was sufficient to proceed to a hearing under Section 783, subdivisions (b) and (c). (Exhs. 26, 27.)

The Court agreed with the District that its offer of proof was sufficient to proceed with a Section 783 hearing, making clear the evidence of the later abuse was relevant to Plaintiff's claim (in contrast to being relevant to Plaintiff's credibility as a witness). The Court stated: "*The testimony is clearly relevant to whether all of plaintiff's emotional distress was caused by the 2016 sexual assault.*" (Exh. 28, p. 840.) The Court concluded that "[a] hearing . . . is required so that the evidence that plaintiff admits to suffering emotional injuries stemming for a separate sexual assault in 2019 may be analyzed by this Court under section 1106, subdivisions (a) and (e) and as well under sections 783 and 352." (Exh. 28, pp. 840-841.)

The matter then proceeded to a hearing under Section 783, subdivision (c)) providing: "If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the plaintiff regarding the offer of proof made by the defendant."

Per the Court's order, Plaintiff and her guardian were in court, prepared to testify at the section 783 hearing. (Exh, 40, pp. 854-855.) The District also had subpoenaed the other witnesses (whom the Court

ultimately ruled could testify at trial) including, Plaintiff's sister, the therapist, and the Detective who investigated the later abuse. Exh, 40, pp. 857-858.) However, at the hearing, ***the Court ruled that there was no need to call live witnesses*** and that it would instead review relevant interrogatory responses verified by Plaintiff's guardian which were relied on by the District during the section 783 hearing. (Exh. 40, pp. 872, 882, 892, 912.)

Following this hearing, the Court issued an Order granting this aspect of the District's motion and directing the matter to then proceed to the third stage of the analysis: whether and what evidence should be admitted about the later abuse under a "probing" Evidence Code section 352 inquiry. In reaching this conclusion, the Court focused on certain interrogatory responses verified by Plaintiff's guardian ad litem (her Mother) which the Court interpreted as alleging that Plaintiff's emotional distress resulted solely from the subject abuse. The Court ruled: "Because the Guardian Ad Litem has spoken for the Plaintiff in the verified Form Interrogatory responses in this manner, the Court finds that the type of evidence proposed by the School District (about the 2018-19 sexual assaults by Esteban Vasquez, the emotional damage caused by those assaults, and the medical treatment received) is relevant to impeach the Plaintiff. See, *Doe v. Superior Court*, at 56-57." (Exh. 32, p. 955.)

The matter then proceeded to the Section 352 hearing. At that hearing, the Court examined the District's proposed order (described above) *listing seven witnesses* who would be asked probing and far-reaching questions concerning the later abuse Plaintiff suffered. The Court correctly observed: "I would have to throw out most of this order because I think that it's, essentially, establishing circumstances, which the statute and the supreme court have said are not appropriate with respect to a plaintiff pleading harm caused by a sexual assault." (Exh. 36, p. 1032.)

However, after taking the matter under submission, **the Court signed an order allowing each of the witnesses identified in the District's proposed order to be questioned as to the subsequent abuse**. While that Order contemplated questioning of these witnesses that was narrower than in the District's original proposed order, it nevertheless allowed the District to characterize the later abuse as a "rape," which would no doubt leave the jury with an impression that force was used against Plaintiff's will, forcing Plaintiff to elect between sacrificing her protections under sections 1106 and 783, or allowing the jury to evaluate the matter under a false impression of the nature of the later abuse. (See Exh. 36.)

On May 8, 2024, Plaintiff filed a Petition for Writ of Mandate challenging this Order and requesting an immediate stay trial was scheduled for Monday, May 20, 2024. On May 10, 2024 the Court denied the immediate stay explaining that it intended to rule by the trial date.

On the afternoon of Friday, May 17, 2024, the Court summarily denied Plaintiff's writ Petition citing to cases standing for the general principle that writ review is typically not warranted to challenge evidentiary rulings and that in limine rulings are without prejudice to being reconsidered.

ARGUMENT

I.

WRIT REVIEW AND A STAY ARE ESSENTIAL TO RESTORE THE PROTECTIONS TO WHICH PLAINTIFF IS ENTITLED UNDER SECTIONS 1106 AND 783

Contrary to the Court of Appeal's ruling, writ review is absolutely critical to prevent the District from forcing the disclosure of highly personal evidence of a separate incident of sexual abuse Plaintiff experienced, so that the District could claim that the abuse Plaintiff suffered by a District employee did not cause her claimed injury. Transforming the trial into a referendum of Plaintiff's subsequent abuse will deprive her of the protections of Section 1106 and 783. Once that happens, it cannot be corrected.

An immediate stay is necessary pending resolution of this Writ is warranted. (See Rule of Court, 8.486, subd. (a)(7)(C); *People ex rel. Lockyer v. Superior Court* (2004) 122 Cal.App.4th 1060, 1071 [discovery ruling ordering the production of privileged matter is reviewable by writ because once privileged information is disclosed it cannot be undone on appeal].)

In its Order summarily denying the writ petition, the Court of Appeal cited to three cases: Two standing for the principle that normally "neither a writ of prohibition nor a writ of mandate will lie to resolve an issue as to the admissibility of evidence." (*People v. Mun. Ct. (Ahnemann)* (1974) 12 Cal. 3d 658, 660–61; *Laurie S. v. Superior Ct.* (1994) 26 Cal. App. 4th 195, and one for the proposition that a" ruling on a motion *in limine* is not generally binding on the trial court, which is free to reconsider its ruling at the time the challenged evidence is offered. . . ." (*People v. Karis* (1988) 46 Cal. 3d 612, 635, fn 16.)

While these cases may justify denial of writ review concerning run-of-the-mill evidence, that is not true here. As now explained, evidentiary ruling in this case strips Plaintiff of the protections the Legislature has afforded Plaintiffs seeking recovery because of sexual abuse under Evidence Code sections 1106 and 783. Those protections are designed to spare a plaintiff from enduring a trial exposing his or her other sexual conduct as the price to pay for seeking relief from the defendant.

Mountain View underscores both the importance of strict compliance with Section 783 and why writ review is review is warranted where, as here, a trial court fails to faithfully comply with that section.[1]

II.

UNDER THE SUBJECT ORDER, TRIAL OF THIS MATTER WILL SHIFT FROM AN EXAMINATION OF THE DISTRICT'S NEGLIGENCE INTO A PLATFORM TO EXAMINE A SEPARATE ACT OF ABUSE PLAINTIFF SUFFERED TO PROVE ABSENCE OF INJURY IN CONTRAVENTION OF SECTION 1106

A. Section 1106 Contemplates a Three Step Procedure That Must Be Strictly Followed Before Evidence of the Plaintiff's Sexual Conduct is Admitted.

Evidence Code Section 1106 "erects an absolute bar to the admission of evidence of specific instances of plaintiff's sexual conduct" with third parties to prove consent or absence of injury. (*Patricia C. v. Mark D.* (1993) 12 Cal.App.4th 1211, 1216.) Section 1106, subdivision (a)

[1] Indeed, this Court's *Mountain View* Opinion resulted from a writ proceeding where, as here the Court of Appeal initially summarily denied the plaintiff's petition. This Court initially compelled the Court of Appeal to grant writ review, and it then granted review following the Court of Appeal's Opinion on the merits.

broadly declares: "In any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, opinion evidence, reputation evidence, and evidence of specific instances of the plaintiff's sexual conduct, or any of that evidence, *is not admissible by the defendant in order to prove* consent by the plaintiff *or the absence of injury to the plaintiff*, unless the injury alleged by the plaintiff is in the nature of loss of consortium." (Italics added.)

Section 1106, subdivision (e) contains a narrow exception providing: "This section shall not be construed to make inadmissible any evidence offered to *attack the credibility of the plaintiff* as provided in Section 783."

Thus, by its express terms, Section 1106(e) must be read in conjunction with section 783. This Court has held that the trial court's discretion to admit sexual history evidence is "narrow []." (*People v. Fontana* (2010) 49 Cal.4th 351, 363.) To this end, the Supreme Court has explained that: "**Great care must be taken to insure that this [credibility] exception** to the general rule barring evidence of a complaining witness' prior sexual conduct … **does not impermissibly encroach upon the rule itself and become a '*back door*' for admitting otherwise inadmissible evidence**." (*Ibid*, quoting *People v. Rioz* (1984) 161 Cal.App.3d 905, 918-919) [emphasis added].)

In order to avoid this "back door" risk, the trial court's inquiry under section 783 must be "more probing" than the "garden-variety weighing" ordinarily contemplated by Evidence Code section 352. (*Mountain View, supra*, 15 Cal.5th at p. 70.)

In *Mountain View*, the Court described that "section 1106, subdivision (e), *may* permit admission of evidence that would otherwise be excluded under section 1106, subdivision (a). But such admissibility is subject to the procedures set out in section 783 and especially careful review and scrutiny under section 352. As we shall explain, the Legislature

devised section 783 to protect against unwarranted intrusion into the private life of a plaintiff who sues for sexual assault, by identifying and circumscribing evidence that may be admitted to attack such a person's credibility. Correspondingly, section 352, as applied in this setting, requires special informed review and scrutiny, designed to protect such a plaintiff's privacy rights and to limit the introduction of evidence concerning such a person's sexual conduct." (*Id* at p. 47.)

The initial step a defendant must satisfy is described in section 783, subdivisions (a) and (b):

> (a) A written motion shall be made by the defendant to the court and the plaintiff's attorney stating that the defense has an offer of proof of the relevancy of evidence of the sexual conduct of the plaintiff proposed to be presented.
>
> (b) The written motion shall be accompanied by an affidavit in which the offer of proof shall be stated.

(Evid. Code, § 783.)

It is thus only when the defendant first satisfies this offer of proof requirement, that the Court conducts an actual hearing pursuant to section 783. Here, the District failed to clear this first hurdle in seeking introduction of evidence that Plaintiff was victimized by subsequent abuse.

B. The Trial Court Erroneously Concluded That the District's "Offer of Proof" Satisfied Its Initial Burden Under Section 1106(e), Justifying a Hearing Under Section 783.

The District first purported to provide its offer of proof in the form of a Declaration by Diana Cho in support of its Motion in Limine Number 2. (Exh. 4, pp. 45-126.) It then submitted a virtually identical declaration of Erin Uyeshima in support of its supplemental papers filed after the Supreme Court rendered *Mountain View*. (Exh. 16, pp. 352-467; Exh. 18, pp. 475-590.) Finally, after the Court afforded the District an opportunity

to again supplement its offer of proof, it simply submitted the Declaration of Rodolfo Ruiz attaching the earlier Uyeshima declaration (Exh. 23, pp. 656-776.) Those Declarations each contain the following:

1. Plaintiff alleges that she suffers from severe emotional distress due to the abuse by Estrada on December 7, 2016, as described in her responses to form interrogatories 6.1 – 6.4.
2. Plaintiff's mother confirms witnessing Plaintiff's distress.
3. Plaintiff testified in deposition about her distress.
4. Plaintiff obtained mental health treatment to deal with her distress. This treatment initially took place between March 19, 2018 to May 1, 2018.
5. Plaintiff also sought treatment at a second provider for that same distress from Marc 19, 2018 to August 21, 2018
6. The District learned that Plaintiff was separately abused in approximately 2019. On May 16, 2019 Plaintiff sought treatment for the distress caused by this second abuse.

(Exh. 4, pp. 46-48; Exh. 16, pp. 353-355; Exh. 18, pp. 476-478; Exh. 23, pp. 657, 660-662.)

These claimed Offers of Proof did not satisfy the District's burden to warrant a section 783 hearing in the first place. To understand why, it is first important to bear in mind that when section 783 references "the relevancy of evidence of the sexual conduct of the plaintiff proposed to be presented" it is referring to the *relevance of that evidence to the credibility of the plaintiff as a witness under section 1106(e)*.

The District argued its claimed Offers of Proof are constructed on the premise that they should be allowed to introduce evidence of the second assault, because it is "relevant" to Plaintiff's claim, not just Plaintiff's credibility as a witness. (Exh. 22, pp. 651-652.) The trial court appears to have agreed. In its order directing a section 783 hearing, the Court ruled: "*The testimony is clearly relevant to whether all of plaintiff's emotional distress was caused by the 2016 sexual assault.*" (Exh. 28, p. 840, italics added.)

But, just because certain testimony is relevant to whether all of plaintiff's emotional distress was caused by the abuse, which is the subject of the action, is not the standard. It is *always* true that *only* relevant evidence is admissible. (Evidence Code § 350 ["No evidence is admissible except relevant evidence."]) Thus, even *without section 1106*, the subject evidence could not be admitted unless it was first relevant to the issues in the action. But, as already explained under section 1106(b) "evidence of conduct which constitutes sexual harassment, sexual assault, or sexual battery, opinion evidence, reputation evidence, and evidence of specific instances of the plaintiff's sexual conduct, or any of that evidence, *is not admissible by the defendant in order to prove . . . the absence of injury to the plaintiff* . . . ." (Italics added.)

The subject exception in Section 1106, subdivision (e) concerns only an "*attack the credibility of the plaintiff* as provided in Section 783." Likewise, section 783 provides that the procedures in that section apply "if evidence of sexual conduct of the plaintiff is offered to attack *credibility of the plaintiff* under Section 780. . . ." (italics added.) As *Mountain View* explained:

> subdivision (a) of section 1106 does not contemplate categorical exclusion of evidence concerning "other sexual conduct" when that evidence is sought to be admitted under the same section's subdivision (e) to challenge the credibility *of the plaintiff* as provided in section 783.

(*Mountain View*, 15 Cal.5th at p. 62, italics added.)

While *Mountain View* rejected the plaintiff's argument in that case that sections 1106 and 783 only allow evidence of the plaintiff's sexual conduct if it is relevant to prove that the plaintiff is offering "false testimony," when it did so, it left no doubt that the evidence must be relevant to the plaintiff's credibility *as a witness*. The following passage, in which the emphasis is by *Mountain View* itself, proves as much:

> The sections apply whenever a plaintiff's credibility *as a witness* is at issue — such as when memory or accuracy may be disputed. When evidence regarding a plaintiff's credibility concerns that person's sexual conduct, the requirements of sections 783, 780, and 352 work together to prevent admission of evidence that is unnecessarily harassing, irrelevant, or unduly prejudicial.

(*Mountain View,* 15 Cal.5th at p. 62, original italics.)

The Court took care (by use of its italics) to differentiate between a challenge to Plaintiff's claim itself and a challenge to Plaintiff's credibility "as a witness." This can be accomplished either by demonstrating that the plaintiff's testimony is false or challenging the plaintiff's memory, accuracy of the like. But the plaintiff's sexual conduct *in and of itself* cannot be used to impeach her credibility. Instead, there must be something else coincident with the sexual conduct that bears on the plaintiff's credibility as a witness. (*People v. Franklin*(1994) 25 Cal.App.4th 328, 335.)

Under the District's position and the trial court's initial ruling directing a section 783 hearing, however, a victim's later sexual abuse is admissible because such abuse is relevant to what distress was caused by the abuse which forms the basis for the plaintiff's action. But that same thing would be true in all cases. The protections afforded by the legislature would always be swallowed up by the standing "relevance" the District asserts here.

As one Court has described with respect to a similar argument:

> An essential aspect of the damage *in any case* of sexual harassment, sexual assault or sexual battery is the *outrage, shock and humiliation of the individual abused. We cannot conceive of a circumstance where a cause of action for sexual assault, battery, or harassment could accrue devoid of any consequential emotional distress.* [Citations]

(*Mendez v. Superior Court* (1988) 206 Cal.App.3d 557, 573, disapproved of on other grounds by *Williams v. Superior Court* (2017) 3 Cal.5th 531.)

Thus, an offer of proof under section 783 must demonstrate that the evidence of the plaintiff's other sexual conduct which the defendant seeks to introduce will have a tendency to prove that the plaintiff's anticipated testimony lacks credibility. Nothing in the District's offer of proof demonstrated that evidence of Plaintiff's subsequent abuse would serve that purpose in the least.

Initially, the District relied on Plaintiff's responses to form interrogatories to show that "[t]hroughout this litigation, Plaintiff asserted that she suffers from severe emotional distress as a result if being inappropriately touched by [Estrada], a special education assistant. . . ." (Exh. 4, p. 46) and that Plaintiff "received psychological treatment" for that abuse as well as later abuse by the boyfriend of her sister. (Exh. 4, p. 47.)[2]

These interrogatory responses do not demonstrate that Plaintiff is going to offer testimony whose credibility will be called into question by evidence of the later abuse. Initially, evidence of the 2019 abuse could not be used to challenge the credibility of the interrogatory response itself as Plaintiff could not admit that interrogatory at trial, only the District could. (Code Civ. Proc., § 2030.410.)

There is nothing in sections 1106 and section 783 that allows a defendant to simply set up the issue by introducing an interrogatory response by the plaintiff (which the defendant claims is false) and then arguing that, because it had offered that response in evidence, it is then also

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[2] In connection with subsequently conducted 783 hearing, the District relied on still other interrogatory responses. Since those interrogatory responses were not relied on by the District in the verified offer of proof required to proceed to the section 783 hearing, Plaintiff will discuss those responses in the next section of this Petition addressing the section 783 hearing.

entitled to submit evidence that will impeach the credibility of the very evidence that only it could introduce.

Second, even if Plaintiff were to testify at trial precisely as these interrogatories are answered, then it would not be the case that evidence of the later abuse would be relevant to attack the *credibility* of any of this. Again *Mountain View* is instructive.

There, the Court concluded that it could not affirm the trial court's ruling allowing the admission of the subject evidence even though it did not conduct a hearing under section 783. Key to the Court's determination that it was necessary for the trial court to have held a section 783 hearing, was whether the Plaintiff was going to claim that "100% of her emotional distress damages" stemmed from the abuse which was the subject of that action. (*Mountain View*, 15 Cal.5th at pp. 65, 68.)

The Court that it could not affirm the trial court's section 352 analysis in that case, even though it did not hold a proper section 783 hearing, because "it appears that the trial court viewed the inquiry into prejudicial effect under section 352 as posing a mere garden-variety evidentiary question, without bearing in mind the applicable special considerations governing that inquiry in the current setting." (*Id.* at p. 68.)

Here, nothing in the interrogatory responses referenced by the District in its offers of proof suggests that Plaintiff is going to claim that 100% of her abuse related exclusively to the earlier abuse for which the District is responsible. (Indeed, as will be explained all of the deposition testimony by Plaintiff's witnesses – including by Plaintiff – truthfully acknowledges the later abuse and concurs that Plaintiff suffered emotional distress from that abuse.) Nor is there anything in the District's offer calling into question Plaintiff's "memory or accuracy" which this Court explained would also be a proper inquiry under sections 1106 and 783. (Id at pp. 62-63.)

Next, the District's Offers of Proof referenced Plaintiff's deposition testimony. (Exh. 4, pp. 46, 83-102.) But in that deposition testimony, Plaintiff readily acknowledged the later abuse and agreed that she suffered distress from it. (Exh. 4, pp. 46, 94-95, 99; Exh. 16, pp. 353-354, 404-405, 409; Exh. 18, pp. 476-477, 527-528, 532; Exh. 23, pp. 660-661, 711-712, 716.) The District thus cannot rely on this testimony as an offer of proof that Plaintiff will testify at trial that 100% of her emotional distress was caused by the abuse which is the subject of this action or that her recollection is inaccurate.

The trial court appears to have recognized the significance of *Mountain View*'s focus on the fact that the plaintiff in that case asserted that 100% of her distress was caused by the abuse for which the defendant was claimed to be responsible. Thus, in its order directing that a section 783 be conducted, the Court stated:

> Even after admitting plaintiff testified that the emotional distress she suffered and continues to suffer derives in part from the sister's boyfriend's conduct in 2019, plaintiff's counsel contends that the 2019 conduct is not admissible to evaluate plaintiff's damages claims. To clarify the point, the court asked plaintiff's counsel:
>
> So, you're saying that, because all of her emotional distress is due to the first sexual assault, that defendant is precluded from having a hearing or from impeaching the plaintiff or asking at trial whether or not a part of her emotional distress is due to a subsequent sexual incident.
>
> Ms. Masry: Yes. Exactly.

(Exh. 28, pp. 840.)

Based on this alleged concession by Plaintiff's counsel the Court first concluded that evidence of the 2019 abuse "is clearly relevant to whether all of plaintiff's emotional distress was caused by the 2016 sexual assault." (Exh. 28, p. 840.) But the Court appears to have misunderstood what Plaintiff's counsel was actually agreeing to. In the reporter's

transcript of the hearing referenced in the order, this is what was actually said:

> So you're saying that, because plaintiff has ***not*** claimed that all of her emotional distress is due to the first sexual assault, that defendant is precluded from having a hearing or from impeaching the plaintiff or asking at trial whether or not a part of her emotional distress is due to a subsequent sexual incident?
>
> Ms. Masry: Yes. Exactly. And that's because of the code sections of evidence code 1106 and the supreme court in the Doe case affirming that.

(Exh. 27, p. 807, emphasis added.)

Plaintiff's counsel was agreeing to precisely the opposite of what the Order recites and this agreement actually destroys the District's Offers of Proof that evidence of the subsequent abuse should be admitted because Plaintiff was claiming that 100% of distress was the result the abuse which is the actual subject of this action. And Plaintiff's counsel made this clear more than once, during the subject proceedings: "[Plaintiff], and no expert, no witness in this case has ever testified that 100 percent of her injuries were caused by the assault by Estrada. That has not been presented. . . ." (Exh. 36, p. 1031.)

Accordingly, the offer as to Plaintiff's anticipated testimony does not justify admission of evidence of the later abuse to challenge Plaintiff's credibility as a witness. In view of this fact, it is not relevant what the other the testimony of the other witnesses relied on by the District in its Offers of Proof will say. The credibility of these witnesses is not the inquiry for purposes of section 1106 and 783. To repeat what those sections expressly state and what *Mountain View* made clear: It is *Plaintiff's* credibility as a witness that is the sole basis for allowing the admission of evidence that is otherwise expressly excluded under section 1106(a).

C. Even if the Court Correctly Concluded that the District Satisfied Its Burden of Justifying that a Section 783 Hearing was Warranted, then the Court's Ruling Must Still Be Vacated Because the Evidence Submitted at the 783 Did Not Permit Admission of the Subject Evidence at All.

In its order finding a section 783 hearing was warranted, the Court directed that Plaintiff and her guardian were in court, prepared to testify at the section 783 hearing. (Exh, 40, pp. 854-858.) At the hearing, the Court ruled that there was no need to call live witnesses and that it would instead review relevant interrogatory responses verified by Plaintiff's guardian which were relied on by the District during the section 783 hearing. (Exh. 40, pp. 872, 882, 892, 912.)

In sum, the Court stated that it would issue a formal order, but left no doubt that the matter would proceed to a section 352 hearing, due to (1) the fact that, in her deposition, Plaintiff truthfully testified that there second sexual abuse occurred and that it harmed her and (2) interrogatory responses verified by Plaintiff's guardian responding "no" to the question asking "[a]t any time after the INCIDENT, did you sustain injuries of the kind for which you are now claiming damages?" and describing the professional treatment Plaintiff received attributable to the subject abuse. (Exh. 32.) The Court then issued an Order consistent with what it stated at the hearing. (Exh. 32, pp. 953-955.)

This ruling was also erroneous, and the matter should not have proceeded to a section 352 hearing. Section 783, subdivision (c) provides: "If the court finds that the offer of proof is sufficient, the court shall order a hearing out of the presence of the jury, if any, and at the hearing allow the questioning of the plaintiff regarding the offer of proof made by the defendant."

Thus, the one and only purpose of the section 783 hearing itself is to allow the examination of the Plaintiff to test the offer of proof provided by the Defendant under section 783, subdivisions (a) and (b), that led to the section 783 hearing in the first place. *This did not happen*. While Plaintiff was present, the District elected not call her as a witness.

Instead, the Court relied on certain interrogatory responses and deposition excerpts from a number of witnesses (including Plaintiff) purporting to justify admission of evidence of the later abuse. This is not what section 783 contemplates and as already explained, *Mountain View* was clear that this statutory procedure must be faithfully followed. This procedural irregularity itself warrants writ relief, just as in *Mountain View*. But there is more.

In addition, the evidence relied on by the trial court did not warrant proceeding to the section 352 hearing. The manner in which the Court framed its order reflects that, at this point in the proceedings, it appears to have recognized that the key issue is in fact the credibility of Plaintiff as a witness. Thus, the Court found it necessary to link the interrogatory responses (which the Court viewed as attributing the distress to the subject abuse) to Plaintiff herself even though they were verified by Plaintiff's mother acting as Plaintiff's guardian ad litem. But, as already explained, even if those interrogatory responses could be linked to Plaintiff herself, it is not proof that at trial Plaintiff will testify that 100% of the abuse with which she suffers was because of the subject abuse. Plaintiff's direct deposition testimony proves as much. She truthfully testified that the later abuse occurred and that she suffered distress from it. As already referenced, this was repeatedly reinforced by Plaintiff's counsel at the hearings on this matter where she unequivocally stated: "[Plaintiff], and no expert, no witness in this case has ever testified that 100 percent of her

injuries were caused by the assault by Estrada. That has not been presented. . . .” (Exh. 36, p. 1031.)

It cannot be overemphasized that, at this stage of the inquiry, the only issue the Court should have evaluated is whether the evidence of the later abuse was relevant to Plaintiff’s credibility as a witness. There is nothing in the Court’s ruling following the section 783 demonstrating that in fact the introduction of that evidence would serve that purpose.

D. The Trial Court Also Failed to Engage in the Required “Probing Inquiry” Under Section 352, Effectively Entitling the District to Convert This Trial into a Referendum on the Later Abuse – Precisely What Section 1106 Was Designed to Protect Against.

Having found that the evidence of the later abuse was somehow relevant to the Plaintiff’s credibility, the Court scheduled a hearing to evaluate the admission of the evidence under section 352. Case law is clear that, under sections 1106 and 783, the section 352 analysis is much more rigorous than in other settings. Thus, *Mountain View* concluded that the fact the trial court in that case had performed a garden variety section 352 analysis in determining whether the evidence of other sexual activity in that case should be admitted, would not justify affirmance of the order in that case because the trial court did not perform that analysis under sections 1106 and 783. The Court explained that the trial court must *“undertake a more probing inquiry by considering whether the discovery or adjudication process is being used to harass, intimidate, or unduly invade the privacy of the complainant. In doing so, a trial court must bear in mind its obligation to act as a gatekeeper, and to be guided by the Legislature's special statements concerning the purpose of the shield provisions: to protect a victim's right of privacy and prevent unnecessary intrusion into complainants’ personal sexual lives both in civil discovery and in civil judicial proceedings*.” (*Mountain View*, *supra*, 15 Cal.5th at pp. 70–71.)

In the District's proposed order filed in anticipation of the section 352 hearing, it left no doubt that it would be attempting to obliterate these guard rails to protect a plaintiff-victim of sexual abuse. In that proposed order, the District described questions of Plaintiff asking probing questions as to the later abuse including where and when Plaintiff was "raped," whether Plaintiff's sister was home at the time, whether Vasquez (who committed the subsequent abuse) was arrested, whether he went to prison, Plaintiff's interactions with the police, Plaintiff's interactions with her therapist, and the list went on. (Exh. 24, pp. 778-779.) But the District did not stop there. It also described probing questions of (1) Plaintiff's mother, (2) Plaintiff's sister, (3) Vasquez – the person who abused Plaintiff, (4) Plaintiff's expert psychologist, (5) Plaintiff's therapist, and (6) the Detective who investigated the later abuse. (Exh. 24, pp. 780-784.)

Contrast this with *Mountain View*, where "[t]he trial court apparently understood the District as seeking to admit evidence concerning plaintiff's 2013 molestation as relevant concerning only damages and via a single minimally invasive question." (*Mountain View*, 15 Cal.5th at p. 66.) While the defendant in that case proceeded to seek to expand the scope of what it could introduce, the trial court's understanding in that case – which still prompted a writ matter that proceeded all the way to this Court – demonstrates the care that must be taken to limit what evidence of separate sexual conduct could be introduced.

At the section 352 hearing itself, the trial court appears to have appreciated the care required in performing the section 352 analysis in this setting (Exh. 36, p. 1032) but the Court signed an order that did what it had recognized was not appropriate: allowing each of the witnesses identified in the District's proposed order to be questioned as to the subsequent abuse.

Although the Order concluded that "for all witnesses, the Court concludes that the School District will not be allowed to question the

witnesses about specific sexual acts committed by Esteban Vasquez against Plaintiff" (Exh. 38, p. 1059), that limitation is in fact no protection at all. As the Order states, the District will be entitled to question numerous witnesses whether Vasquez "raped and/or sexually assaulted" Plaintiff, leaving the unmistakable impression that Plaintiff was physically forced into a sexual relationship with him. While what took place was unlawful and despicable because of Plaintiff's age and her condition, this impression will be false and serves to underscore the prejudice by the subject evidence. In the guise of protecting Plaintiff, her claim will be unfairly harmed – that is unless she is forced to open the door to introducing additional evidence about the Vasquez abuse as the price she has to pay to seek recovery from the District. This is precisely what section 1106 is designed to prevent. If this were the law, then victims such as Plaintiff will need to think long and hard before seeking recovery – knowing that by doing so they are opening the door to the disclosure of such highly personal and private other matters.

For the reasons already described, if any evidence of the later abuse is to be introduced, then it must be limited to only that evidence necessary for the District to be able to question Plaintiff's credibility as a witness. (*Mountain View*, 15 Cal.5th at p. 68.)

In its earlier Opinion in *Vinson v. Superior Court* (1987) 43 Cal.3d 833, 843, this Court highlighted the Legislature's concern that exploration of victim's sexual past has the potential to discourage complaints and "[w]ithout protection against it, individuals whose intimate lives are unjustifiably and offensively intruded upon might face the 'Catch-22' of invoking their remedy only at the risk of enduring further intrusions into the details of their personal lives in discovery ...." (*Vinson, supra*, 43 Cal.3d at p. 843, citing Stats. 1985, ch. 1328, § 1.) In its analysis of whether good cause had been demonstrated, this court acknowledged the federal and state constitutional considerations involved in any inquiry into a plaintiff's

sexual history, and highlighted that a plaintiff's right to a protected zone of privacy includes one's sexual conduct. (*Id*. at pp. 841-843; see also *Mendez v. Superior Court* (1988) 206 Cal.App.3d 562, 566.) Rejecting the defendant's argument that the plaintiff waived her right to privacy by bringing the civil action for emotional distress damages, the Supreme Court explained: "**We cannot agree that *the mere initiation of a sexual harassment suit, even with the rather extreme mental and emotional damage* plaintiff claims to have suffered, functions to waive all her privacy interests, exposing her persona to the unfettered mental probing of defendants' expert**." (*Id*. at p. 841 (emphasis added).)

While Plaintiff strenuously argues that no evidence of her later abuse should be allowed because it is simply not relevant to challenge her credibility as a witness, in the event any such evidence is allowed, then under the above principles, that evidence should be severely restricted to ensure it is necessary to challenge the credibility of Plaintiff as a witness. Viewed in this manner, there is no possible reason why the District should be able to question Plaintiff's mother, her sister, her therapist, her expert, or the Detective who investigated the subsequent abuse before the jury to repetitively parade facts about the later abuse before the jury. Rather, if the Court concludes that any evidence as to the subsequent abuse then it should be limited, minimally invasive questioning of Plaintiff as to whether she was abused by Vasquez and whether she suffered harm as a result of that abuse.

CONCLUSION

For the foregoing reasons, Plaintiff urges the Court to grant Review or remand this matter to the Court of Appeal to review her writ petition on its merits.

Dated: May 19, 2024

MASRY LAW FIRM, APC

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ESNER, CHANG, BOYER & MURPHY

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CERTIFICATE OF WORD COUNT

This brief contains 8,338 words per a computer generated word count.

s/ Stuart B. Esner
Stuart B. Esner

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

S.M., A MINOR, BY AND THROUGH HER GUARDIAN AD LITEM, SOCORRO M., Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; LOS ANGELES UNIFIED SCHOOL DISTRICT, Real Party in Interest.	B337359 (Super. Ct. No. BC704733) (Richard Fruin, Judge) ORDER

The immediate stay request is denied. The court intends to rule on the petition for writ of mandate by May 20, 2024.

Lamar W. Baker, Acting P.J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

S.M., A MINOR, BY AND THROUGH HER GUARDIAN AD LITEM, SOCORRO M., Petitioner, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; LOS ANGELES UNIFIED SCHOOL DISTRICT, Real Party in Interest.	B337359 (Super. Ct. No. BC704733) (Richard Fruin, Judge) **ORDER**

THE COURT:

The court has read and considered the petition for writ of mandate filed May 8, 2024. The petition is denied. (*People v. Municipal Court (Ahnemann)* (1974) 12 Cal.3d 658, 660; *Laurie S. v. Superior Court* (1994) 26 Cal.App.4th 195, 203; see also *People v. Karis* (1988) 46 Cal.3d 612, 634, fn. 16 ["a ruling on a motion in limine is not generally binding on the trial court,

which is free to reconsider its ruling at the time the challenged evidence is offered"].)

BAKER, Acting P.J. KIM, J. LEE, J.*

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* Judge of the San Bernardino County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

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 the within action; my business address is 234 East Colorado Boulevard, Suite 975, Pasadena, CA 91101.

On the date set forth below, I served the foregoing document(s) described as follows: **PETITION FOR REVIEW AND REQUEST FOR IMMEDIATE STAY OF MAY 21, 2024 TRIAL**, on the interested parties in this action by placing ___ the original/ X a true copy thereof enclosed in a sealed envelope(s) addressed as follows:

SEE ATTACHED SERVICE LIST

☒ BY ELECTRONIC SERVICE VIA TRUEFILING Based on a court order, I caused the above-entitled document(s) to be served through 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 Filing Receipt Page/Confirmation will be filed, deposited, or maintained with the original document(s) in this office.

☒ STATE I declare under penalty of perjury that the foregoing is true and correct.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on May 19, 2024 at Honolulu, Hawaii.

s/ Kelsey Wong
Kelsey Wong

SERVICE LIST

S.M. v. Superior Court of California, County of Los Angeles

(S_____ | B337359 | BC704733)

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