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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

JANE ROE 21, Plaintiff and Appellant, v. DEFENDANT DOE 1 et al., Defendants and Respondents.	C062505 (Super. Ct. No. CV033950)

This is another in a series of appeals wending their way through the appellate courts, in which adult plaintiffs have sought to hold Catholic Church entities liable for child sexual abuse perpetrated by their clergy decades ago.

These plaintiffs argue that their lawsuits are timely under the "delayed discovery rule" of Code of Civil Procedure section 340.1,[1] because they did not recover memory of the abuse and its connection to their psychological injuries until they were well into middle age. They maintain this position despite the fact that their lawsuits were filed well after the one-year "revival

[1] Undesignated statutory references are to the Code of Civil Procedure.

window" that the Legislature established during the calendar year 2003, to bring lapsed claims against nonabuser defendants who knew or had reason to know their agents or employees were molesting children. (§ 340.1, subd. (b)(2), (3).)

This court has weighed in on the issue on three prior occasions. (*K.J. v. Roman Catholic Bishop of Stockton* (2009) 172 Cal.App.4th 1388, review granted June 24, 2009, S173042; *D.D. v. Roman Catholic Bishop of Stockton* (Aug. 12, 2009, C057260) [nonpub. opn.], review granted Nov. 10, 2009, S176451; *L.A. v. Roman Catholic Bishop of Stockton* (Aug. 12, 2009, C057895) [nonpub. opn.], review granted Nov. 10, 2009, S176483.) Each time we agreed with the result reached by the Second Appellate District, Division Eight, in *Hightower v. Roman Catholic Bishop of Sacramento* (2006) 142 Cal.App.4th 759. *Hightower* held that childhood sexual molestation claims against nonabuser entity defendants that were time-barred before January 1, 2003, remain time-barred unless the victims filed suit during the one-year revival window, even if they did not recover their memory of the abuse until after the window period closed. (*Hightower*, at pp. 767-768.)

All three of our decisions--*K.J.*, *D.D.*, and *L.A.*--are being held by the California Supreme Court pending final adjudication in the lead case of *Quarry v. Doe 1* (2009) 170 Cal.App.4th 1574, review granted June 10, 2009, S171382.[2]

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[2] In *Quarry*, the First Appellate District, Division Four, reached a diametrically opposite result from *Hightower* and the

We shall adhere to the position we took in our three prior decisions and affirm the judgment. Because the ultimate resolution of this issue now lies with the state high court, we will not restate our position at length. We shall merely summarize the main points and briefly respond to some of the major arguments offered by Roe.

FACTUAL BACKGROUND

Because this appeal arises from a judgment of dismissal following the sustaining of a demurrer without leave to amend, we give the complaint a reasonable interpretation, and accept as true all material facts properly pleaded. (*Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 543.) Read in that light, the first amended complaint discloses the following pertinent allegations.

Plaintiff Jane Roe 21 (hereafter Roe, a fictitious name to protect her privacy) was born in June of 1964. Beginning in fifth grade, Roe attended a Catholic school in Lodi operated by defendants The Roman Catholic Bishop of Stockton and the Pastor of St. Anne Church (collectively the Church).[3] The Church

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three cases we decided. Review was granted by the California Supreme Court, which then placed a hold on our cases. In another case held for the Supreme Court's decision in *Quarry*, the same panel that decided *Hightower* reaffirmed its holding, while considering and rejecting several new arguments that counsel have developed since *Hightower* was decided. (*Doe v. Roman Catholic Bishop of San Diego* (2009) 178 Cal.App.4th 1382, review granted Feb. 3, 2010, S178748.)

[3] The Church entities were not named in the complaint, but were later substituted as Doe defendants.

employed Father O'Grady, who was a "priest, counselor and spiritual leader" at the parish where Roe attended services and was a student.[4]

Beginning in 1972 and continuing until 1976, Roe was sexually molested on multiple occasions by Father O'Grady, usually in an office, a quiet classroom, or in the confessional. The abuse consisted of inappropriate hugging, kissing and sexual touchings. Father O'Grady molested dozens of other children during his tenure as a priest. He was eventually convicted of child molestation, sent to prison and deported to Ireland. The Church knew of Father O'Grady's propensities for sexual abuse of minors prior to the time Roe was molested, yet failed to protect her from his horrendous conduct. Despite its knowledge of his nefarious history as a serial child molester, the Church assigned Father O'Grady to parishes where he continually had access to children. It also continually encouraged and induced Roe to have contact with O'Grady in an unsupervised environment.

During the time she was molested, Roe developed "various psychological coping mechanisms" which made her "incapable of ascertaining the wrongfulness of [Father] O'Grady's sexual conduct toward her." As a result, Roe "completely repressed all memory of the sexual abuse" at the time of the molestations.

In November 2006, Roe was reading a magazine article describing Father O'Grady's sexual misconduct with other minor

[4] Father O'Grady is not a party to this action.

children. This brought up "painful and disturbing memories of her own sexual molestation at the hands of [Father] O'Grady." As a result, Roe recovered her memory of the abuse, which had been previously repressed.

Father O'Grady's tortious conduct, of which the Church was aware, caused Roe to suffer shock, emotional distress, embarrassment and loss of self-esteem, all of which caused her economic and psychological damage.

Based on these allegations, Roe pleaded many causes of action, including negligence, fraud, breach of fiduciary duty, and failure to warn. The final count accuses the Church of making a child available to another for sexual misconduct, in violation of Penal Code section 266j.

PROCEDURAL BACKGROUND

Roe filed suit on October 31, 2007. The Church filed a demurrer, including failure to state a cause of action and the statute of limitations bars set forth in sections 340 and 340.1. The trial court sustained the demurrer with leave to amend.

Roe then filed an amended complaint on November 21, 2008, based upon the same essential allegations. The trial court sustained the demurrer, this time without leave to amend.

Judgment was entered and Roe appeals.

DISCUSSION

I. The Delayed Discovery Rule Does Not Apply to Roe

Plaintiff Roe, who is now in her forties, is attempting to state a tort claim against the Church based upon sexual abuse perpetrated against her by one of its priests in the 1970's, when she was between eight and 12 years of age. She alleges that the Church knew of the priest's past history and reputation as a serial child molester yet failed to protect children such as Roe from his predatory behavior. Roe alleges she repressed all memory of the abuse until 2006. She filed this action in 2007, more than 30 years after the childhood sexual abuse had ended. Still, she claims she may take advantage of the "three years [from] the date of discovery" rule set forth in section 340.1, subdivision (a).

"Section 340.1 sets forth a special statute of limitations for victims of childhood sexual abuse." (*County of Los Angeles v. Superior Court* (2005) 127 Cal.App.4th 1263, 1268.) It therefore prevails over more general statutory limitations periods that may apply. (*Aetna Cas. & Surety Co. v. Pacific Gas & Elec. Co.* (1953) 41 Cal.2d 785, 787.)

Roe's complaint invokes the statute of limitations applicable to nonperpetrator defendants who knew or should have known that their agent or employee was sexually abusing children, yet failed to protect victims such as plaintiff. These defendants are specifically identified in section 340.1 subdivision (b)(2), i.e., persons or entities who had "reason to

know" or were "on notice, of any unlawful sexual conduct by an employee, volunteer, representative, or agent, and failed to take reasonable steps, and to implement reasonable safeguards, to avoid acts of unlawful sexual conduct . . . ." (§ 340.1, subd. (b)(2), added by Stats. 2002, ch. 149, § 1; see *Doe v. City of Los Angeles*, *supra*, 42 Cal.4th at p. 545.) We will refer to these defendants as subdivision (b)(2) defendants or nonperpetrator defendants.

As a general rule, a cause of action for childhood sexual abuse accrues at the time of molestation. (*John R. v. Oakland Unified School Dist.* (1989) 48 Cal.3d 438, 443-446; *Doe v. Bakersfield City School Dist.* (2006) 136 Cal.App.4th 556, 567, fn. 2.) Prior to the enactment of section 340.1 in 1986, courts applied former section 340, which provided for a one-year statute of limitations for child sexual abuse claims. Courts also applied section 352, which tolled the running of the statute while the plaintiff was a minor, such that the action could be timely brought on or before the plaintiff's 19th birthday. (See former § 340, subd. (3); *DeRose v. Carswell* (1987) 196 Cal.App.3d 1011, 1015.)

Since the last molestation of Roe took place in 1976 when she was still a minor, she had until her 19th birthday to file suit. She did not. Thus, the statute of limitations expired on Roe's claim against the Church in June 1983 when she turned 19.

In 1986, the Legislature enacted section 340.1, which broadened the statute of limitations on claims for childhood

sexual abuse. (Former § 340.1, added by Stats. 1986, ch. 914, § 1, pp. 3165-3166; see *Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 207 (*Shirk*).) The statute was amended on subsequent occasions--each time opening the temporal door a little wider for victims of childhood sexual abuse to bring suit, but only against perpetrators. (*Shirk*, at pp. 207-208.)

In 1998, the Legislature, for the first time, enacted an extended limitations period for bringing tort claims against nonperpetrators of sexual abuse who were nevertheless a "legal cause" of the abuse. However, the amendment carried a firm time cap, requiring suit to be brought no later than the victim's 26th birthday. (§ 340.1, former subd. (b)(1), amended by Stats. 1998, ch. 1032, § 1; *Shirk*, *supra*, 42 Cal.4th at p. 208.) Because Roe was in her thirties when the law became operative, it had no effect on her lapsed claim.[5] (*Hightower*, *supra*, 142 Cal.App.4th at pp. 765-766.)

The 2002 amendment, which is the focal point of this case, changed the law again. The amendment retained the age 26 cutoff for actions against all nonabuser defendants (§ 340.1, subds. (a), (b)(1)) *except* a limited class of nonperpetrators described in subdivision (b)(2)--those who knew or should have known of the abuse, yet failed to protect the victim. As to these

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[5] In this opinion, we use the term "lapsed" to "describe a cause of action against which the limitations period has run, but which no court has adjudicated." (*David A. v. Superior Court* (1993) 20 Cal.App.4th 281, 284, fn. 4 (*David A.*).)

defendants, the Legislature created two time caps: (1) a new limitations period of age 26 or three years from the date of discovery of adult-onset emotional harm, *whichever is later* (delayed discovery rule); and (2) for victims whose claims were otherwise time-barred on January 1, 2003, the statute of limitations was "*revived*," provided suit was commenced within one year of January 1, 2003. (§ 340.1, subd. (c).)

Roe argues the delayed discovery rule applies to *any* victim of a subdivision (b)(2) defendant who discovers that his or her psychological injuries were caused by childhood sexual abuse, regardless of whether his or her molestation claims had previously lapsed. However, as the court stated in *Hightower*, such a construction would obliterate the "clear distinction" that the Legislature drew between plaintiffs whose claims were time-barred and those whose were not. (*Hightower*, *supra*, 142 Cal.App.4th at pp. 767-768.) It would also render the one-year revival provision meaningless. Why, one must ask, would the Legislature expressly revive time-barred claims against subdivision (b)(2) defendants for a limited one-year period if it had *also* intended, in the same bill, to impose a delayed discovery rule as to *all* claims, regardless of whether they were time-barred? The only interpretation of the 2002 amendment that makes logical sense is that the Legislature intended the delayed discovery rule against nonperpetrator defendants to operate prospectively as to those whose claims were not yet time-barred,

while allowing victims whose claims were time-barred a limited one-year window within which to bring suit.

Our interpretation is consistent with the settled rules of statutory construction. In general, statutes are presumed to operate prospectively unless (1) they contain express language of retroactivity, or (2) other sources provide a clear and unavoidable implication that the Legislature intended retroactive application. (§ 3; *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 475; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1209.) Furthermore, "a legislative change in the statute of limitations is presumed *not* to revive lapsed claims unless the amending act expressly mandates such an effect. (*Gallo v. Superior Court* [(1988)] 200 Cal.App.3d [1375,] 1378; *Barry v. Barry* (1954) 124 Cal.App.2d 107, 112.) If the Legislature wishes to revive lapsed claims, it should so declare in 'unmistakable terms.' (See *Douglas Aircraft Co.* [*v. Cranston* (1962)] 58 Cal.2d [462,] 466.) Otherwise such claims will be left to lie in repose." (*David A.*, *supra*, 20 Cal.App.4th at p. 286.)

We need not respond to each of Roe's arguments to the contrary. Suffice it to say that the 2002 amendment of section 340.1 contains no express language of retroactivity *except* that provision which opens up a revival window for a limited one-year period and Roe does not point to anything in the legislative history of the statute that shows unmistakably, and without resort to speculative inferences, that the Legislature intended

the delayed discovery rule to operate retroactively to revive *all* claims against subdivision (b)(2) defendants, regardless of whether they were time-barred when the amendment took effect.

For all of these reasons, we adhere to the position we have taken previously that the delayed discovery rule does not apply to claims such as Roe's that were time-barred when the 2002 enactment came into effect. Because she failed to avail herself of the one-year revival window in 2003, Roe's claim remained time-barred.

II. Other Arguments

For the sake of completeness, we address Roe's arguments that do not depend either on an unreasonably strained interpretation of the language of the 2002 amendment[6] or on its murky and inconclusive legislative history.

A. Equitable Delayed Discovery

Roe contends that, regardless of the discovery rule set forth in section 340.1, her action is timely under common law equitable delayed discovery principles. (See *Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397-398.) In earlier times, subdivision (d) of the 1986 version of section 340.1 and

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[6] For the first time in his reply brief and at oral argument, counsel for Roe claimed that the phrase "as of" in the first sentence of subdivision (c) must be construed to mean "on or after." Owing to considerations of fairness, we decline to consider an argument raised so belatedly. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.) We do pause to note, however, that the Legislature had no trouble using the phrase "on or after" on several occasions in the same statute, thereby showing that it knew exactly how to use those words when it so intended.

subdivision (l) of the 1990 version expressly permitted judicial application of delayed discovery exceptions to the running of the limitations period.[7] However, that provision was stripped out of section 340.1 as part of the 1994 amendment. (See Historical and Statutory Notes, 13C West's Ann. Code Civ. Proc. (2006 ed.) foll. § 340.1, pp. 172-173.) The deletion has been preserved in all subsequent amendments to the statute. "'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 [disapproved on a separate ground in *People v. Chun* (2009) 45 Cal.4th 1172, 1186], quoting *People v. Valentine* (1946) 28 Cal.2d 121, 142.) By removing its previous sanction of equitable theories of delayed discovery, we must presume the Legislature intended to supplant common law delayed discovery with the *statutorily defined* discovery rule that it put in place in 1994. (*City of Irvine v. Southern California Assn. of Governments* (2009) 175 Cal.App.4th 506, 522.) Thus, the only "delayed discovery" rule that can be recognized is the one the Legislature provided for in section 340.1.

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[7] The provision stated: "'*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.*'" (*Evans v. Eckelman* (1990) 216 Cal.App.3d 1609, 1614, quoting former § 340.1, subd. (d), italics added.)

B. Subdivision (u)

Roe also places great emphasis on the fact that in the 2002 amendment, the Legislature retained section 340.1, former subdivision (s) as subdivision (u). Subdivision (u) (originally enacted as subdivision (s) in 1999) states, in relevant part: "The amendments to subdivision (a) of this section, enacted at the 1998 portion of the 1997-98 Regular Session, shall apply to any action commenced on or after January 1, 1999, and to any action filed prior to January 1, 1999, and still pending on that date, including any action or causes of action which would have been barred by the laws in effect prior to January 1, 1999." (Italics added.) Roe argues that by preserving subdivision (u) in 2002, the Legislature signaled an intent to apply the delayed discovery rule retroactively to all claims against nonperpetrator defendants.

This theory ignores the fact that the language of the subdivision refers *only* to the amendments to subdivision (a) enacted in the 1997-1998 Regular Session. That legislation *capped the limitations period at age 26* as to nonperpetrators whose acts were a "legal cause" of the abuse. Subdivision (u) says nothing about the new class of nonperpetrator defendants that was created by the 2002 amendment.

When, for the first time, it lifted the age 26 cap and introduced a delayed discovery rule as to a new class of nonperpetrator defendants defined in subdivision (b), the Legislature could easily have made the rule applicable to claims that would "otherwise have been barred" by preexisting laws.

Instead, it revived time-barred claims for only a limited one-year period. Subdivision (u) does not aid Roe's cause.

C. Vicarious Liability

Roe's next creative argument posits the theory that the Church is liable for Father O'Grady's misconduct through the doctrine of vicarious liability, triggering the statute of limitations applicable to the perpetrator himself rather than his employer, i.e., the Church.

The contention fails. There is nothing in the allegations of the complaint that would warrant the inference that sexually abusing young children either fell within the course and scope of Father O'Grady's priestly duties, or could reasonably be foreseen as an "outgrowth" of such duties. Consequently, the doctrine of respondent superior does not apply. (*Rita M. v. Roman Catholic Archbishop* (1986) 187 Cal.App.3d 1453, 1461.)

The argument also ignores the bedrock principle that specific statutes of limitations prevail over more general ones that might otherwise apply. (*Aetna Cas. & Surety Co. v. Pacific Gas & Elec. Co.*, *supra*, 41 Cal.2d at p. 787.) Here the Legislature has created a specific statute of limitations for institutions such as the Church who knew of its agent's or employee's propensity for sexual misconduct against minors but failed to protect a child victim. This special statute of limitations necessarily takes precedence over more general ones, such as those based on vicarious liability.

D. Penal Code section 266j

Roe's final argument is that the Church may be found liable as a perpetrator rather than a nonperpetrator entity having control over the perpetrator because she has sufficiently alleged that the Church committed the crime of child procurement under Penal Code section 266j. Roe reasons that since Code of Civil Procedure section 340.1's definition of "childhood sexual abuse" includes a violation of Penal Code section 266j,[8] a person who violates that code section must be considered a perpetrator. Accordingly, the applicable limitations for her claim is the one for causes of action against perpetrators of sexual abuse, i.e., three years from the date of discovery or age 26, whichever is later. (§ 340.1, subd. (a)(1).) The argument does not fly.

Penal Code section 266j provides in relevant part: "Any person who intentionally gives, transports, provides, or makes available, or who offers to give, transport, provide, or make available to another person, a child under the age of 16 for the purpose of any lewd or lascivious act as defined in [Penal Code] Section 288, or who causes, induces, or persuades a child under the age of 16 to engage in such an act with another person, is guilty of a felony . . . ."

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[8] Section 340.1, subdivision (e) states: "'Childhood sexual abuse' as used in this section includes any act committed against the plaintiff that occurred when the plaintiff was under the age of 18 years and that would have been proscribed by Section 266j of the Penal Code . . . ."

A person cannot be convicted of child procurement without proof of a sexual purpose. (*People v. Bautista* (2005) 129 Cal.App.4th 1431, 1437.) A violation of Penal Code section 266j requires that the procurement of the child be "*for the purpose* of any lewd or lascivious act as defined in [Penal Code] Section 288 . . . ." (Italics added.) While the complaint charges that the Church made Roe "available" to Father O'Grady, under no reasonable construction does it charge that it *intentionally* made her available for a *sexual purpose*. On the contrary, the allegations, construed as a whole and in a common sense manner, plead that the Church knew of Father O'Grady's propensity for child molestation, but turned a blind eye to it. While such conduct may evince negligence or even recklessness, it is plainly not an intentional act of child procurement. Under no stretch of the imagination can the complaint be read to allege that the Church provided child victims to one of its priests with the specific intent that he commit acts of molestation upon them. Penal Code section 266j has no application here.

DISPOSITION

The judgment is affirmed.

BUTZ, J.

We concur:

RAYE, Acting P. J.

CANTIL-SAKAUYE, J.