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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(San Joaquin)

JOHN DOE, Plaintiff and Appellant, v. THE ROMAN CATHOLIC BISHOP OF STOCKTON et al., Defendants and Respondents.	C064094 (Super. Ct. No. 39-2009-00205174-CU-PO-STK)

Another alleged victim of sexual abuse comes before this court, appealing the dismissal of a lawsuit that seeks to hold Catholic Church entities liable for child sexual abuse perpetrated by one of their priests decades ago.

Plaintiff John Doe claims his suit is timely under the common law "delayed accrual" rule as recognized in *Evans v. Eckelman* (1990) 216 Cal.App.3d 1609 (*Evans*), or under the

current version of Code of Civil Procedure section 340.1,[1] because he did not recover memory of the abuse and its connection to his psychological injuries until he was well into middle age. He maintains this position despite the fact that his lawsuit was filed well after the one-year "revival window" that the Legislature created during the calendar year 2003 within which to bring lapsed claims against nonabuser defendants who knew or had reason to know their agents or employees were molesting children. (§ 340.1, subds. (b)(2), (c).)

We have weighed in on the issue on previous 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; *Jane Roe 21 v. Defendant Doe 1* (2010) (Dec. 7, 2010, C062505) [nonpub. opn.], review granted Mar. 2, 2011, S189814.) On each occasion, 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

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

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.)

Four of our decisions are on hold by the California Supreme Court pending final adjudication in the lead case of *Quarry v. Doe I* (2009) 170 Cal.App.4th 1574, review granted June 10, 2009, S171382 (*Quarry*).[2]

Until the high court resolves the issue, we continue to adhere to the position we have taken in our prior decisions. To avoid repetition, we will not restate our views at length, but shall summarize them and briefly respond to the major arguments offered by plaintiff Doe.

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, accepting as true all material facts properly pleaded. *(Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 543.) Read in that light,

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2 In *Quarry*, the Court of Appeal, First Appellate District, Division Four, reached a diametrically opposite result from *Hightower* and the four 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.)

plaintiff's July 9, 2009 amended complaint for damages discloses the following pertinent allegations.

Plaintiff John Doe (a fictitious name to protect his privacy) was born in May 1965. Defendants The Roman Catholic Bishop of Stockton and the Pastor of St. Anne Church (collectively the Church) are religious institutions operating a Catholic school that plaintiff and his family once attended.[3] The Church employed Father Oliver O'Grady (who is not a party to this action) as a priest and spiritual and secular counselor at the parish where plaintiff attended religious school.

From 1971 through 1974, plaintiff was sexually molested on multiple occasions by Father O'Grady. The abuse took place during confessionals, counseling and tutoring sessions, and rides in Father O'Grady's automobile.

Plaintiff alleges that the Church knew of Father O'Grady's sexual misconduct, yet concealed it from its parishioners and failed to report him to law enforcement.

As a victim of the molestations, plaintiff became subject to "psychological coping mechanisms" that prevented him from "being able to know and meaningfully connect the psychological and emotional injuries" which were occurring "and would in the future continue to occur and develop in him." It was only in December 2006, that plaintiff discovered "the causal

[3] The Church entities were served as fictitious defendants John Roe 1 and John Roe 2, respectively.

relationship between his adulthood injuries and the molestation."

Based on these allegations, plaintiff pleaded causes of action for negligence, negligent supervision and failure to warn, fraud, and fraudulent concealment. He sought damages for emotional distress, loss of income and other harm.

PROCEDURAL BACKGROUND

Plaintiff filed suit on March 2, 2009. The Church filed a demurrer, based on a failure to state a cause of action and expiration of the statutes of limitations set forth in sections 340 and 340.1. The trial court sustained the demurrer without leave to amend and judgment was entered.

DISCUSSION

I. "Equitable Delayed Accrual" Has Been Supplanted by Statute

Plaintiff, who is now in his fifties, attempts to state a tort claim against the Church based upon sexual abuse perpetrated against him by Father O'Grady in the 1970's, when plaintiff was between six and nine years of age. He alleges that the Church knew of Father O'Grady's sexual misconduct, yet failed to protect him from the priest's predatory behavior. He further alleges he did not recover memory of the abuse and its connection to his psychological injuries until December 2006. He filed this action in 2009, more than 32 years after the childhood sexual abuse allegedly inflicted upon him had ceased.

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 (*John R.*); *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), as amended by Stats. 1982, ch. 517, § 97, p. 2334; *DeRose v. Carswell* (1987) 196 Cal.App.3d 1011, 1015.)

Since the last molestation of plaintiff took place in 1974 when he was still a minor, he had until his 19th birthday to file suit. He did not. Thus, the statute of limitations expired on his claim against the Church in May 1984 when he 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.) Thus, the amendments had no effect on plaintiff's lapsed[4] claim.

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), amended by Stats. 1998, ch. 1032, § 1, p. 7785; *Shirk*, *supra*, 42 Cal.4th at p. 208.) Because plaintiff was in his thirties when the law became operative, his claim was still time-barred. (*Hightower*, *supra*, 142 Cal.App.4th at pp. 765-766.)

The 2002 amendment to section 340.1, which is the focal point of this case, changed the law again. (Stats. 2002, ch. 149, § 1.) 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 section 340.1, subdivision (b)(2)—those who knew or should have known of the abuse, yet failed to protect the victim (subdivision (b)(2) defendants). As to these 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,

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[4] 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.*).)

whichever is later; and (2) for victims whose claims were otherwise time-barred on January 1, 2003, the statute of limitations was "*revived*," as long as suit was filed within one year of January 1, 2003. (§ 340.1, subd. (c), italics added.)

Plaintiff's complaint against the Church invokes the statute of limitations applicable to subdivision (b)(2) defendants, 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.).

Since plaintiff fell into the category of individuals whose claims against nonperpetrator defendants such as the Church were time-barred, the 2002 amendment granted him a one-year time window in which to bring suit. He failed to avail himself of that opportunity.

Plaintiff argues that he may nevertheless take advantage of the common law delayed discovery rule, which "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action." (*Norgart v. Upjohn Co.* (1999) 21 Cal.4th 383, 397.) His main authority is *Evans*, *supra*, 216 Cal.App.3d 1609. *Evans* was a case where adult plaintiffs sued their uncle and former foster father for sexual abuse they suffered in their childhood. (*Id.* at p. 1612.) They

claimed that "'psychological blocking mechanisms'" such as fear, internalized shame, disassociation and repression caused them to be unaware, for decades, of both the sexual abuses and the psychological injuries they caused. (*Id.* at p. 1613.) The Court of Appeal, First Appellate District, Division Five, applied the common law delayed accrual rule applicable to fiduciary relationships to hold the complaint sufficient to withstand a demurrer based on the statute of limitations. (*Id.* at pp. 1614-1616.) "We conclude that the purposes of the statute of limitations and the rationale of the delayed discovery rule as it has developed in our courts require that accrual of a cause of action for child sexual abuse by a parent or similar figure of authority be delayed until the plaintiff knows or reasonably should know of the cause of action." (*Id.* at p. 1617.)

Evans was decided in early 1990, at a time when section 340.1 gave courts express permission to apply common law delayed discovery principles to lawsuits alleging child molestation. Former subdivision (d) of the statute then 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*, *supra*, 216 Cal.App.3d at p. 1614, italics added.) *Evans* quoted that section and relied on it as a legislative imprimatur for its decision. (*Ibid.*)

Four years after *Evans*, when the Legislature liberalized the limitations period to commence actions for childhood sexual abuse, it also *eliminated* the provision that had allowed courts to apply the common law delayed accrual rule.[5] That 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.) "'Where the Legislature omits a particular provision in a later enactment related to the same subject matter, such deliberate omission indicates a different intention which may not be supplanted in the process of judicial construction.'" (*Hoschler v. Sacramento City Unified School Dist.* (2007) 149 Cal.App.4th 258, 269, quoting *Kaiser Steel Corp. v. County of Solano* (1979) 90 Cal.App.3d 662, 667.)

"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

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[5] In 1990, the Legislature reenacted former section 340.1, subdivision (d) in substantially the same form as subdivision (*l*). The 1994 amendment deleted the entire provision from the statute. (See Historical and Statutory Notes, 13C West's Ann. Code Civ. Proc. (2006 ed.) foll. § 340.1, pp. 172-173.)

periods that may apply. (*Aetna Cas. & Surety Co. v. Pacific Gas & Elec. Co.* (1953) 41 Cal.2d 785, 787.) By removing its previous sanction of equitable theories of delayed discovery, we must presume the Legislature intended to supplant the common law delayed discovery rule 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 cognizable delayed discovery rule is the one the Legislature explicitly provided for in section 340.1.

II. Section 340.1 Is Not Retroactive as to Subdivision (b)(2) Defendants

Plaintiff alternatively argues that he may take advantage of the delayed accrual rule in effect in 2006 when he discovered his repressed memory, rather than the one that existed at the time he was sexually molested. Under this line of reasoning, the fact that his cause of action expired under then-existing law is irrelevant because his cause of action had not even *accrued* until he recovered his memory and connected it to his psychological injuries, by which time the Legislature had conveniently amended the statute.

Plaintiff's argument amounts to an assertion that 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 lapsed. But, as the court stated in *Hightower*, such a construction would obliterate the "clear distinction" 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 individuals whose claims were not yet time-barred, while allowing victims whose claims were time-barred a limited one-year window of opportunity within which to bring suit.

This 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. (Civ. Code, § 3; *McClung v. Employment Development Dept.* (2004) 34 Cal.4th 467, 475; *Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1209.)[6] Furthermore, "a legislative change in the statute of limitations is presumed *not*

[6] The Church has requested judicial notice of legislative background materials pertaining to the 2002 amendment of section 340.1. We grant the unopposed request, but our decision does not depend on those materials.

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.)

Plaintiff attempts to distinguish *Hightower* by the fact that the plaintiff there had "*always known*" he had been abused, and therefore was not, like plaintiff, able to take advantage of the delayed discovery rule heralded by the 2002 amendment. It is true that the *Hightower* court noted, "[e]ven if Hightower's interpretation were correct," he could not take advantage of delayed accrual because he was not blamelessly ignorant of his sexual abuse. (*Hightower*, *supra*, 142 Cal.App.4th at p. 768.) However, that portion of the ruling was clearly dictum. The holding of the case turns squarely on the *Hightower* court's interpretation of the 2002 amendment to section 340.1, to which we here subscribe.

III. Equitable Estoppel Does Not Apply

Plaintiff's last argument is that the doctrine of equitable estoppel is available to prevent the Church from invoking the statute of limitations defense. He asserts that "it would be inequitable for [defendant] to benefit from its own wrongful conduct by asserting the statute of limitations as a defense

. . . when it was the action of [defendant] that prevented the victim from coming forward during the statutory period." (Citing *John R.*, *supra*, 48 Cal.3d at p. 446.)

Equitable estoppel is not available to plaintiff. The doctrine is based on the principle that a defendant who takes some *affirmative act* to discourage a plaintiff from filing a timely claim may thereafter be estopped from raising the statute of limitations as a defense. (*John R.*, *supra*, 48 Cal.3d at p. 445; *Christopher P. v. Mojave Unified School Dist.* (1993) 19 Cal.App.4th 165, 170.) Thus, in *John R.*, the plaintiff alleged that a teacher who had molested him used threats and intimidation to prevent him from reporting it to the authorities. (*John R.*, *supra*, 48 Cal.3d at p. 445.)

Here, there is no allegation that the Church engaged in any affirmative conduct to prevent plaintiff from filing his claim in a timely manner. On the contrary, plaintiff alleges that he *did not realize* that something wrongful had occurred or that he had been psychologically harmed until he was well into adulthood. It is inconceivable that the Church discouraged or prevented plaintiff from seeking redress for injuries of which he was not even aware. (*K.J. v. Arcadia Unified School Dist.* (2009) 172 Cal.App.4th 1229, 1240.) Plaintiff's own pleadings prevent him from invoking equitable estoppel to avoid the statute of limitations. (*Ibid.*)

DISPOSITION

The judgment is affirmed. The Church defendants shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

BUTZ, J.

We concur:

BLEASE, Acting P. J.

HULL, J.