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November 6, 2015

SUPREME COURT
FILED

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Frank A. McGuire Clerk

Deputy

Hon. Chief Justice of California
and Associate Justices of the
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: Depublication of *S.M. v. Los Angeles Unified School Dist.* (2015) 240 Cal.App.4th 543

Dear Justices:

The Association of Defense Counsel of Northern California and Nevada ("ADC-NCN") and the Association of Southern California Defense Counsel ("ASCDC") respectfully submit this request for depublication of the Court of Appeal's opinion pursuant to Rule 8.1125 of the California Rules of Court.

Interest of the Requesting Organizations

The Association of Defense Counsel of Northern California and Nevada ("ADC-NCN") is an association of almost 800 attorneys primarily engaged in the defense of civil actions. ADC-NCN members have a strong interest in the development of substantive and procedural law in California, and extensive experience with employment matters. The Association's Nevada members are also interested in the development of California law because Nevada courts often follow the law and rules adopted in California. ADC-NCN has appeared as amicus in numerous cases.

The Association of Southern California Defense Counsel ("ASCDC") is the nation's largest regional organization of lawyers who specialize in defending civil actions. ASCDC counts as members approximately 1000 attorneys in Southern and Central California. ASCDC is actively involved in assisting courts on issues of interest to its members. It has appeared as amicus curiae in numerous cases before both this Court (see, e.g., *Howell v. Hamilton Meats & Provisions, Inc.* (2011) 52 Cal.4th 541; *Village Northridge Homeowners Assn. v. State Farm Fire & Casualty Co.* (2010) 50 Cal.4th 913; *Reid v. Google, Inc.* (2010) 50 Cal.4th 512) and the Courts of Appeal (see, e.g., *Burlage v. Superior Court* (2009) 178 Cal.App.4th 524).

The two Associations are separate organizations, with separate memberships and governing boards. They coordinate from time to time on a number of matters of shared interest, such as this request.

Why This Decision Should Be Withdrawn From Publication

This decision should be withdrawn from publication, at least in part, because it conflicts with existing law. Arguably, that satisfies some of the criteria for publication: e.g., the decision "[m]odifies … an existing rule of law," "[a]dvances a new interpretation," and "creates an apparent conflict in the law." (Cal. Rules of Court, rule 8.1105(c)(3), (4), (5).) But the decision does not explain its departure from settled law, and does not "criticize … with reasons given" the existing rule. (Cal. Rules of Court, rule 8.1105(c)(3).) Further, the rule it sets forth is of nearly boundless liability.

The existing rule of law on "negligent supervision" is whether the employer "knew or should have known that [name of employee] was [unfit/[or] incompetent] and that this [unfitness/[or] incompetence] created a particular risk to others." (CACI 426.) The Court of Appeal decision would replace this well-established standard with a more lenient test of whether the employee "had the potential" to injure others. As this Court has recognized, "potential" means "possible." (See, e.g., *Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 300; *Aerojet-General Corp. v. Transport Indemnity Co.* (1997) 17 Cal.4th 38, 59.) Because "all things are possible" (*Jones v. Ortho Pharm. Corp.* (1985)163 Cal.App.3d 396, 403, citation omitted), the Court of Appeal's formulation affords no limits on liability, and would change the test from "negligent supervision" to "being the employer of a bad actor" – which would impose strict, indeed practically absolute, liability for the employer. And because negligent supervision claims exist outside the employment context as well (see, e.g., *Margaret W. v. Kelley R.* (2006) 139 Cal.App.4th 141, 156–157 [claim asserted against parent who hosted sleepover of

daughter's friends, from which friend left with some boys who thereafter assaulted her]), there could be no liability for negligent supervision].

Bad facts sometimes make bad law. So it would appear happened here. The case involves a middle school teacher having sex with a student. The teacher was convicted. In the resulting tort case for negligent supervision, the school district persuaded the trial court to modify CACI 426 to require, instead of proof that the employer knew or should have known the employee was "unfit or incompetent," more particularized proof that the employer knew or should have known the employee had a "dangerous propensity to sexually abuse minors." The school district won a judgment after jury trial.

The Court of Appeal reversed on multiple grounds, including one that could eliminate any defense to any negligent hiring claim.

> The trial court correctly ruled that plaintiff was *not* required to show that Hermida was unfit to be a teacher because he had committed prior acts of sexual misconduct. The trial court undercut its ruling, however, when it defined Hermida's unfitness as a "dangerous propensity to sexually abuse minors." [¶] There is a reasonable probability that the jury misunderstood the propensity phrase to require prior acts of sexual misconduct. ... Plaintiff was only required to prove that Hermida had the *potential* for sexually abusing minors.

(2015 Cal.App.Lexis 814 *25, italics in original.)

The Court of Appeal is incorrect. Plaintiff was required to prove that Hermida's employer "knew or should have known" of his particular "unfitness." The jury instruction on "propensity" was a perfectly proper means of describing what the employer "knew or should have known" as a precondition to liability. There is nothing in the definition of "propensity" that requires proof of past similar acts. In fact, this Court and the Court of Appeal have used "propensity" as the test in similar cases. (See, e.g., *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 878 ["knew or should have known of the dangerous propensities of the employee who injured the plaintiff"]; *Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, 395 [rejecting claim where "there was no information accessible to the Scouts that would cause them to suspect" that the scoutmaster "had a propensity to molest children"]; *Romero v. Superior Court (Ryan N.)* (2001) 89 Cal.App.4th 1068, 1080 ["notwithstanding the special relationship between the Romeros and the teenage invitees, the Romeros did not owe a duty of care to supervise

Ryan at all times during her visit, to warn her, or to protect her against Joseph's sexual assault, because there no evidence from which the trier of fact could find that the Romeros had prior actual knowledge of Joseph's propensity to sexually assault female minors."])

Instead, the decision lowers the standard (without authority) to merely having the "potential" to sexually assault female minors: "Hermida's acts of openly hugging female students could be found to have shown such potential, as could his rearrangement of the furniture in his classroom to create a hidden alcove, his lying on his back on one of the tables in his classroom while two female students were sitting at the next table, and his discussion of his personal life, including drinking and problems with his girlfriend, with his female students." (2015 Cal.App. Lexis 814 at *25, italics in original.)

The Court of Appeal pointed out that plaintiff here could not prove past acts, and was concerned that "no first victim of a predatory teacher would have a remedy, since he or she could not prove propensity." (2015 Cal.App. Lexis 814 at **24-25.) This concern is understandable, but overstated and not a good argument for rendering a decision outside the law on negligent supervision. Obviously, it may be more difficult for a "first victim of a predatory teacher" to win recovery (against the teacher's employer, though not against the teacher), but that is because it is also less likely that an employer would have "known or should have known" that the teacher would be predatory. The desire to afford a remedy should not lead to an abandonment of standards and allowing liability to include something about which the employer neither knew nor could have had reason to know.

In fact, decisions in this area generally, and with respect to sexual molestation of minors particularly, have heretofore been uniform in holding that "should have known" means something more than "had the potential."

For example, *Doe v. City of Los Angeles* (2007) 42 Cal.4th 53 involved the statute of limitations for sex abuse claims, which also has a "knew or had reason to know" standard. (Code Civ. Proc., § 340.1.) Plaintiffs alleged childhood sexual abuse by a LAPD officer while they were in Explorer Scouts. This Court ruled that "reason to know" means that "the actor has knowledge of facts from which a reasonable man of ordinary intelligence or one of the superior intelligence of the actor would either infer the existence of the fact in question or would regard its existence as so highly probable that his conduct would be predicated upon the assumption that the fact did exist." (42 Cal.4th

at p. 547, citing *John B. v. Superior Court* (2006) 38 Cal.4th 1177.) This Court ruled that the *Doe* plaintiffs "failed to satisfy the further requirement that the nonperpetrator defendant have knowledge or notice of the perpetrator's past unlawful sexual conduct." (*Doe*, 42 Cal.4th at 548.) "Knowledge or notice of misconduct by Kalish that created a risk of sexual exploitation is not enough." (*Id.* at 552.)

The evidence of "should have known" in *Doe* was considerably stronger than in the present case, yet this Court found it insufficient even at the pleading stage to allow the case to continue. In *Doe*, the officer repeatedly violated both Scouting and police rules against one-on-one fraternization. Further, "there are allegations that other police officers were aware of [the molesting officer's] pedophilic tendencies ... because of his open interest in young boys, the favoritism he showed to certain of the scouts, including plaintiffs, his inappropriate fraternization with some scouts, including plaintiffs, both on the job and at his home, his alleged association with a known pornographer, and his trips to Thailand, where he was observed in the company of a young boy." (42 Cal.4th at p. 552.) The officer showed favoritism to one of the boys by showering together at the police academy as late as 3 or 4 am. (*Id.* at 335.) *Doe* held these allegations inadequate because they "fail to allege that defendants had knowledge of [the molester's] past unlawful sexual conduct with minors, which is the prerequisite for imposing upon these defendants liability for his subsequent sexual abuse of plaintiffs. That defendants had knowledge or notice of misconduct by [the molester] that created a risk of sexual exploitation is not enough" to show that the employer had actual knowledge or had reason to know. (*Id.* at p. 552.)

It is worth noting that the statute in *Doe* refers to "knew or had reason to know, *or was otherwise on notice*." The italicized words are not in the negligent hiring CACI and afford a broader test. Yet *Doe* held that plaintiffs failed even under that more liberal test.

Similarly, *Santillan v. Roman Catholic Bishop of Fresno* (2012) 202 Cal.App.4th 708 approved a jury instruction that requires much more to establish liability than the Court of Appeal's decision in *S.M.*

> Knowledge of conduct *which is innocuous or which is ambiguous* is not by itself notice of 'unlawful sexual conduct' or of a tendency or propensity to engage in such conduct. [¶] Ambiguous conduct is conduct which is capable of being understood in two senses, where one sense might suggest a tendency or propensity to engage in 'unlawful sexual conduct' with a child, but where another sense might suggest innocent conduct or might suggest wrongful conduct that did not involve a tendency or propensity to engage in 'unlawful sexual conduct' with a child.

(*Santillan*, 202 Cal.App.4th at 718-719, emphasis added.) Therefore,

> an employer's knowledge of conduct by the perpetrator *that is ambiguous* as to whether the perpetrator has committed unlawful sexual conduct *is insufficient to satisfy the reason to know standard* when determining whether an entity such as an employer can be held liable for an employee's acts of sexual abuse.

(*Santillan*, 202 Cal.App.4th at p. 720, emphasis added.) Because even the "strong warning signs of a sexual interest in minors were not enough under *Doe* to satisfy the notice requirement of section 340.1, then surely the employer's knowledge of conduct by the perpetrator that is ambiguous on the issue, without more, is also insufficient." (*Santillan*, 202 Cal.App.4th at p. 721.)

Virtually all of the conduct cited by the Court of Appeal is, at most, ambiguous or innocuous. Even if it is likely inappropriate to talk to middle schoolers about the teacher's own girlfriend or boyfriend, that does not "involve a tendency or propensity to engage in 'unlawful sexual conduct' with a child." As set forth in another decision finding no liability for unlawful sexual conduct "[t]here is nothing about the fact a licensed social worker employed by a county was driving a van owned by that county that shows any *propensity* for sexual misbehavior."(*Z.V. v. County of Riverside* (2015) 238 Cal.App.4th 889, 903, italics in original.)

Santillan cited *Federico v. Superior Court (Jenry G.)* (1997) 59 Cal.App.4th 1207. In *Frederico* the employer had *actual knowledge* that the employee had twice been

convicted of sexual abuse of minors. (59 Cal.App.4th at 1213.) The perpetrator's conduct while at the employer "involved the touching of children in a manner which in hindsight they interpreted as inappropriate or indicative of Kaslar's deviant sexual proclivities." That evidence was insufficient because the events "were not explicitly sexual, consisting of such occurrences as an unusually prolonged handshake, an overly friendly pat on the shoulder, or, on one occasion, Kaslar having a younger child sit in his lap. Such contact was, at the time it occurred, ambiguous at worst and did not result in any complaints to defendant by the children involved or their parents." (*Id.* at 1216.) "Thus, even if the incidents described could be deemed a warning sign that Kaslar's continued employment might pose a risk to minors, they cannot be used to impose liability for negligence on defendant, who had no actual knowledge, or reason to suspect, that they had occurred." (*Ibid.*) *Federico* thus directed summary judgment for the employer.

Under the *S.M.* Court of Appeal's new relaxed "potential" standard, the result in *Doe*, *Santillan*, *Federico* and many other cases would be different. Because the rulings in those cases correctly state the law, the *S.M.* decision does not, and therefore, should be removed from publication.

Every employee has the "potential" to misbehave. That should not make their employer responsible for their misbehavior. (*See* generally *Virginia G. v. ABC Unified School Dist.* (1993) 15 Cal.App.4th 1848, 1851, 1855 [while junior high school teacher's molestation not imputed to the school district, there is potential liability "if individual District employees responsible for hiring and/or supervising teachers knew or should have known of [the teacher's] prior sexual misconduct toward students, and thus, that he posed a reasonably foreseeable risk of harm to students under his supervision, including Virginia G."])

There are other aspects of this decision the Associations do not contest or address, including evidence of the victim's prior sexual history and issues related to comparative fault. The portions of the opinion relating to the test to be used in assessing "negligent

hiring/supervision," however, are inconsistent with existing law, create potential havoc for employers and others potentially subject to negligent supervision claims, and should be removed from citable precedent

Respectfully submitted,

ASSOCIATION OF DEFENSE COUNSEL OF NORTHERN CALIFORNIA AND NEVADA

By: 

DON WILLENBURG
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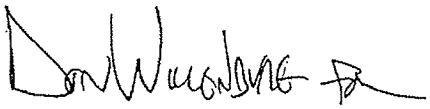
ASSOCIATION OF SOUTHERN CALIFORNIA DEFENSE COUNSEL

By: 

LAURA REATHAFORD
Venable LLP

cc: See attached Service List

PROOF OF SERVICE

S.M. v. Los Angeles Unified School Dist.
240 Cal.App.4th 543

I am employed in the County of Alameda, State of California. I am over the age of 18 and not a party to the within action. My business address is Gordon & Rees LLP, 1111 Broadway, Suite 1700, Oakland, CA 94607. On November 6, 2015, I served a true and correct copy of the following document(s) on the attached list of interested parties:

LETTER REQUESTING DEPUBLICATION

(X) By placing true copies of the document listed above in a sealed envelope with postage thereon fully prepaid, in UNITED STATES mail in the State of California at Oakland, addressed as set forth below:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury under the laws of the State of California and of the United States that the above is true and correct. I declare that I am employed in the office of a member of the Bar of the within court at whose direction this service was made.

Executed on November 6, 2015 at Oakland, California.

/s/ Eileen Spiers
Eileen Spiers

SERVICE LIST
SINAI M., a minor v. LAUSD
LASC No.: BC477194 • COA No.: B253983

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