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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

CHRISSY VOVOS PULIDO, Plaintiff and Appellant, v. NORWALK-LA MIRADA UNIFIED SCHOOL DISTRICT, Defendant and Respondent.	B269579 (Los Angeles County Super. Ct. No. BC538729)

APPEAL from a judgment of the Superior Court of Los Angeles County. Margaret M. Bernal, Judge. Reversed and remanded.

Allemand Law Group and James Allemand for Plaintiff and Appellant.

McCune & Harber and Joseph W. Cheung for Defendant and Respondent.

The issue presented in this appeal is whether a minor plaintiff suing a school district for damages suffered as a result of alleged childhood sexual abuse that occurred on March 8, 2012, must comply with the claim presentation and filing requirements of the Government Claims Act (Gov. Code, §§ 905, 910, 945.6), or whether her claims come within an exception to the claim presentation and filing requirements accorded by Government Code section 905, subdivision (m). We hold that the statutory exception applies to the minor's state law claims against the school district and that the trial court erred by sustaining, without leave to amend, the school district's demurrer to those claims. We therefore reverse the order dismissing the school district from this action.

BACKGROUND

On August 28, 2012, plaintiff and appellant N.P. (plaintiff), a minor, and her guardian ad litem, Chrissy Vovos Pulido (Pulido), filed a claim under Government Code section 910 with defendant and respondent Norwalk-La Mirada Unified School District (the District) for damages and other relief as the result of an alleged sexual assault against plaintiff on March 8, 2012, by a substitute teacher named Ted Nishihara during school hours at Los Coyotes Middle School. On September 28, 2012, the District sent plaintiff a notice rejecting her claim and advising her that she had six months in which to file a court action based on the claim.

Plaintiff did not file her initial complaint against the District and Nishihara until March 7, 2014, more than 17 months after the District's notice rejecting her claim. In her operative second amended complaint, plaintiff, through Pulido, asserted causes of action for sexual assault, sexual battery, intentional infliction of emotional distress, negligence, and violations of section 1681 of title 20 of the United States Code (Title IX),

section 1983 of title 42 of the United States Code (section 1983), Government Code section 11135, and Civil Code section 51.9.

The District demurred to plaintiff's second amended complaint on the grounds that Pulido lacked standing to bring the action, and that the complaint failed to state compliance with the Government Claims Act (Gov. Code, § 945.6) and failed to allege facts sufficient to state a cause of action. Plaintiff opposed the demurrer, arguing that her complaint was timely under Code of Civil Procedure section 340.1,[1] and that Government Code section 905, subdivision (m) excepted her claims from the requirements of the Government Claims Act. Plaintiff further argued that she had alleged facts sufficient to support each of her causes of action and that Pulido had standing to assert those causes of action as plaintiff's guardian ad litem.

After hearing argument from the parties, the trial court sustained the District's demurrer without leave to amend as to all causes of action and dismissed the District from the action with prejudice.

This appeal followed.

DISCUSSION

I. Standard of review

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. We give the complaint a reasonable interpretation, reading it as a whole and its parts in their context. [Citation.]" (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) "When a demurrer is sustained, we determine whether the complaint states facts sufficient to state a cause of action. [Citation.] And when it is sustained without leave to amend, we decide whether there is a reasonable

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[1] All further statutory references are to the Code of Civil Procedure, unless otherwise stated.

possibility that the defect can be cured by amendment: if it can be, the trial court has abused its discretion and we reverse. [Citation.]" (*Ibid.*) The legal sufficiency of the complaint is reviewed de novo. (*Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.)

II. State law claims

The trial court ruled that all of plaintiff's state law claims against the District were barred as untimely under the Government Claims Act. Plaintiff contends those claims were excepted from the statutory claim presentation and filing requirements by Government Code section 905, subdivision (m).

A. Applicable legal framework

1. Government Claims Act

Subject to certain exceptions listed in Government Code section 905, "[b]efore suing a public entity, the plaintiff must present a timely written claim for damages to the entity. [Citations.]" (*Shirk v. Vista Unified School Dist.* (2007) 42 Cal.4th 201, 208 (*Shirk*).) Under Government Code section 911.2, "[a] claim relating to a cause of action for death or for injury to person" must be presented no later than six months after accrual of the cause of action. (Gov. Code, § 911.2, subd (a).) Once a claim has been presented and rejected, a plaintiff has six months in which to file a lawsuit. (Gov. Code, § 945.6.) These statutory time periods are generally not tolled while the plaintiff is a minor. (Code Civ. Proc., § 352, subd. (a); *A.M. v. Ventura Unified School Dist.* (2016) 3 Cal.App.5th 1252, 1257 (*A.M.*); *K.J. v. Arcadia Unified School Dist.* (2009) 172 Cal.App.4th 1229, 1238 (*K.J.*).) The claim presentation and filing requirements imposed by the Government Claims Act are not merely procedural, but are a condition precedent to maintaining a cause of action and a necessary element of a plaintiff's cause of action. (*S.M. v. Los*

Angeles Unified School Dist. (2010) 184 Cal.App.4th 712, 717 (S.M.).)

2. Section 340.1

Section 340.1 "'sets forth a special statute of limitations for victims of childhood sexual abuse.' [Citations.]" (*A.M., supra,* 3 Cal.App.5th at p. 1257, quoting *K.J., supra,* 172 Cal.App.4th at p. 1238.) Subdivision (a) of section 340.1 provides in pertinent part: "(a) In an action for recovery of damages suffered as a result of childhood sexual abuse, the time for commencement of the action shall be within eight years of the date the plaintiff attains the age of majority or within three years of the date the plaintiff discovers or reasonably should have discovered that psychological injury or illness occurring after the age of majority was caused by the sexual abuse, whichever period expires later, for any of the following actions: [¶] (1) An action against any person for committing an act of childhood sexual abuse. [¶] (2) An action for liability against any person or entity who owed a duty of care to the plaintiff, where a wrongful or negligent act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff. [¶] (3) An action for liability against any person or entity where an intentional act by that person or entity was a legal cause of the childhood sexual abuse which resulted in the injury to the plaintiff."

Subdivision (b)(1) of section 340.1 imposes an outside time limit on actions against third parties under subdivisions (a)(2) and (a)(3) by providing that such actions must be brought before the plaintiff's 26th birthday: "No action described in paragraph (2) or (3) of subdivision (a) may be commenced on or after the plaintiff's 26th birthday." (§ 340.1, subd. (b)(1).)[2]

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[2] Although not relevant here, this outside time limit is also subject to an exception. Section 340.1, subdivision (b)(2) states that the age cutoff in subdivision (b)(1) "does not apply if the

3. *Shirk* and the enactment of Government Code section 905, subdivision (m)

In *Shirk*, the California Supreme Court concluded that section 340.1 did not toll or alter the time period for presenting a claim under the Government Claims Act and held that a timely claim is a prerequisite to bringing an action for childhood sex abuse against a public entity. (*Shirk, supra*, 42 Cal.4th at pp. 212-213.)

"In direct response to *Shirk,* the Legislature enacted Government Code section 905, subdivision (m)" which "eliminates the claim presentation requirement for '[c]laims made pursuant to Section 340.1 . . . for the recovery of damages suffered as a result of childhood sexual abuse.' [Citation.]" (*A.M., supra,* 3 Cal.App.5th at p. 1258.) The exemption accorded by Government Code section 905, subdivision (m) applies "to claims arising out of conduct occurring on or after January 1, 2009."

"The legislative history behind the new Government Code section 905, subdivision (m) makes clear the Legislature overruled [*Shirk*] only prospectively due to fiscal considerations. A committee report explained: 'This bill is intended to address the *Shirk* decision by expressly providing that childhood sexual abuse actions against public entities are exempted from the government tort claims requirements and the six-month notice

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person or entity knew or had reason to know, or was otherwise 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 in the future by that person, including, but not limited to, preventing or avoiding placement of that person in a function or environment in which contact with children is an inherent part of that function or environment." (§ 340.1, subd. (b)(2); *A.M., supra,* 3 Cal.App.5th at p. 1259.)

requirement. It is identical to SB 1339 (Simitian), except that this bill applies prospectively only, to claims arising out of conduct occurring on or after January 1, 2009. . . .' [Citations.]" (*Rubenstein v. Doe No. 1* (2017) 3 Cal.5th 903, 221.)

B. Government Code section 905, subdivision (m) applies to plaintiff's state law claims

The District argues that the exemption accorded by Government Code section 905, subdivision (m) and Code of Civil Procedure section 340.1 does not apply to plaintiff, who was a minor when she commenced the instant action. Section 340.1, the District maintains, gives only adult plaintiffs an extended statute of limitations in which to commence a civil action based on childhood sex abuse. These same arguments were considered and rejected by Division Six of this court in *A.M.*

In *A.M.*, a minor plaintiff sued the Ventura Unified School District for negligently allowing male students to abuse her while at school. The plaintiff did not file a claim with the school district before commencing her action, and the trial court entered summary judgment against the plaintiff for failure to comply with the Government Claims Act. (*A.M., supra,* 3 Cal.App.5th at pp. 1254-1255.) Division Six reversed, holding that section 340.1 provided the applicable limitations period for the plaintiff's claims, and that she was exempt from the filing requirements of the Government Claims Act under Government Code section 905, subdivision (m). (*A.M.,* at pp. 1254.) The court in *A.M.* explained:

> "Section 340.1 provides that, with certain exceptions not applicable here, an action against a third party for damages arising from childhood sexual abuse must be brought before age 26. [Citation.] Here, it is undisputed that appellant is making a claim of sexual abuse that occurred during her childhood and that was brought before the age of

> 26. Nothing in the statutory language implies that the action cannot be brought while the plaintiff is still a minor. If that were the case, a childhood sexual abuse claim discovered shortly before the plaintiff's 18th birthday would be subject to the government claim presentation requirement, while a claim discovered shortly after that birthday would be exempt under Government Code section 905, subdivision (m). We must refrain from an interpretation of a statute that would result in absurd consequences. [Citation.]"

(*A.M., supra*, 3 Cal.App.5th at pp. 1262-1263.)

The District concedes that the plain language of section 340.1 supports the *A.M.* court's interpretation that the limitations period for filing an action based on childhood sexual abuse expires on the plaintiff's 26th birthday. The District argues, however, that the court in *A.M.* did not consider the legislative history to section 340.1,[3] which evinces an intent to protect adult plaintiffs and not children.

Notwithstanding the District's assertion to the contrary, the court in *A.M.* considered and discussed the legislative history to section 340.1 (*A.M., supra*, 3 Cal.App.5th at pp. 1259-1260) and rejected the argument that a minor plaintiff was not in the class of persons for whom section 340.1 was enacted: "We recognize that the primary purpose of section 340.1 is to extend the statute of limitations for adults who discover they had been abused as children, but respondents cite no persuasive authority suggesting that section 340.1, subdivision (a)(2) does not apply to situations in which the abuse is discovered while the plaintiff is still a minor. [Citation.]" (*A.M.*, at p. 1262.) Nothing in the

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[3] We granted the District's request for judicial notice of the legislative record associated with section 340.1

legislative record presented by the District in this appeal persuades us that the *A.M.* court's interpretation of section 340.1 was misguided or incorrect.

The District cites *S.M., supra*, 184 Cal.App.4th 712, *V.C. v. Los Angeles Unified School Dist.* (2006) 139 Cal.App.4th 499 (*V.C.*), and other cases in which the courts determined that a cause of action accrues for the purpose of the claim filing requirement when the plaintiff learns of the purported sexual abuse as support for its position that the minor plaintiff in this case was subject to the statutory claim presentation and filing requirements. Those cases are inapposite because the alleged incidents of abuse at issue in those cases predate the effective date of Government Code section 905, subdivision (m). (See *S.M., supra*, at pp. 715-716; *V.C., supra*, at pp. 504-505.) The court in *S.M.* itself noted: "In apparent recognition of the dilemma faced by families of children abused by public school officials, the law has changed. For claims described in . . . section 340.1 for the recovery of damages suffered due to childhood sexual abuse occurring after January 1, 2009, the tort claim presentation requirement no longer applies. [Citations.]" (*S.M., supra*, at pp. 721-722, fn. 6.)

Application of Government Code section 905, subdivision (m) to sex abuse claims brought by a minor plaintiff is further supported by the legislative history of that statute. As the court in *A.M.* observed: "[T]he legislative history of Government Code section 905, subdivision (m) confirms that the purpose of that section was '"to ensure that victims severely damaged by childhood sexual abuse are able to seek compensation from those responsible, whether those responsible are private or public entities."' (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 640 [(2007-2008 Reg. Sess.) as amended June 8, 2008], at p. 3.) The author of the legislation explained this would be

accomplished 'by specifically exempting Section 340.1 civil actions for childhood sexual abuse from government tort claim requirements, thereby treating Section 340.1 actions against public entities the same as those against private entities.' [Citation.] Our decision is consistent with this intent." (*A.M., supra*, 3 Cal.App.5th at p. 1264.)

We find the court's analysis in *A.M.* to be persuasive and apply it here to hold that Government Code section 905, subdivision (m) excepted plaintiff's state law claims against the District from the claims presentation and filing requirements of the Government Claims Act. We are unpersuaded by the District's argument that plaintiff's initial presentation of a claim under Government Code section 910 made the exception accorded by Government Code section 905, subdivision (m) inapplicable in this case.

The trial court erred by sustaining, without leave to amend, the demurrer to plaintiff's state law claims against the District.

III. Federal law claims

As we discuss, the trial court did not err by sustaining, without leave to amend, the District's demurrer to plaintiff's federal causes of action for violation of Title IX and section 1983.

A. Violation of Title IX

Title IX prohibits sex discrimination under any education program or activity receiving federal funds. The statute provides in relevant part: "No person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." (Title IX, subd. (a).)

A school district may be held liable for damages under Title IX for the sexual harassment of a student by one of the district's teachers. (*Franklin v. Gwinnett County Pub. Sch.* (1992) 503 U.S.

60, 74-75.) Such liability may be imposed, however, only when "an official of the school district who at a minimum has authority to institute corrective measures on the district's behalf has actual notice of, and is deliberately indifferent to, the teacher's misconduct." (*Gebser v. Lago Vista Indep. Sch. Dist.* (1998) 524 U.S. 274, 277 (*Gebser*).) Deliberate indifference means "that an official who is advised of a Title IX violation refuses to take action to bring the recipient into compliance. The premise . . . is an official decision by the recipient not to remedy the violation." (*Gebser*, at p. 290.)

In *Gebser*, the United States Supreme Court applied the foregoing standard and held that a high school student could not maintain a Title IX damages claim against the school district for sexual abuse by a teacher because the only official alleged to have had information about the teacher's conduct was the school principal, and the nature of that information consisted of a complaint from parents of other students charging the teacher with having made inappropriate comments during class. The court in *Gebser* concluded that such information was "plainly insufficient" to alert the principal to the possibility that the teacher was engaged in sexual conduct with a student. (*Gebser, supra*, 524 U.S. at p. 291.)

The Supreme Court in *Gebser* rejected the plaintiff's argument that the school district's alleged violation of Department of Education regulations requiring the school district to promulgate and publish an effective policy and grievance procedure for sexual harassment claims established the requisite actual notice and deliberate indifference elements of a Title IX damages claim. (*Gebser, supra*, 524 U.S. at p. 291-292.) The court stated: "We have never held . . . that the implied private right of action under Title IX allows recovery in damages for

violation of those sorts of administrative requirements." (*Gebser*, at p. 292.)

Plaintiff's allegations in the instant case are nearly identical to those found by the court in *Gebser* to be "plainly insufficient" to constitute actual notice of a Title IX violation. In her second amended complaint, plaintiff alleges that a principal at another school where Nishihara taught -- not the middle school attended by plaintiff -- had actual knowledge that Nishihara had, on one occasion, commented on the size of a student's thighs. The alleged comment, while perhaps inappropriate, was insufficient to constitute actual notice of the alleged sexual abuse. (*Gebser, supra*, 524 U.S. at p. 291.) Plaintiff's allegations that the District failed to comply with federal Department of Education regulations requiring a school district to adopt and publish grievance procedures for student and employee complaints about sexual harassment are similarly insufficient to establish actual notice of or deliberate indifference to the alleged sexual abuse. (*Id.* at p. 292.)

The trial court did not err by sustaining the District's demurrer to plaintiff's cause of action for damages under Title IX.

B. Violation of section 1983

Section 1983 provides in pertinent part: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Plaintiff's federal civil rights claim against the District under section 1983 is fatally flawed because the District is

immune from liability pursuant to the 11th Amendment of the federal constitution. (*Kirchmann v. Lake Elsinore Unified School Dist.* (2000) 83 Cal.App.4th 1098, 1115 [California school district as "arm of the state" not subject to liability under section 1983 claim]; *McAllister v. Los Angeles Unified School Dist.* (2013) 216 Cal.App.4th 1198, 1207 [same].) The trial court did not err by sustaining the District's demurrer to plaintiff's section 1983 cause of action.

C. No leave to amend

Plaintiff fails to suggest how she would amend her second amended complaint to correct the defects noted above. The burden of proving a reasonable possibility of amending the complaint to state a cause of action "is squarely on the plaintiff." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The trial court did not err by sustaining the District's demurrer without leave to amend as to plaintiff's federal causes of action.

DISPOSITION

We reverse the order dismissing the District from this action and remand the matter to the trial court for further proceedings on plaintiff's state law claims for childhood sexual abuse. The parties shall bear their respective costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
HOFFSTADT