IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION 7

T. ROE, a dependent individual, by and through his guardian ad litem, TWYNLETTE THOMPSON Plaintiffs and Appellants, v. CENTINELA VALLEY UNION HIGH SCHOOL DISTRICT; ANDY MEHTA, an individual; and JUAN GUTIERREZ, an individual, Defendants and Respondents	Court of Appeal No. B311456 Superior Court No. BC683738

Appeal from an Order
of the Superior Court, County of Los Angeles
Hon. Gary Y. Tanaka, Judge, Dept. B, (310) 787-3722

APPELLANT'S OPENING BRIEF

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COURT OF APPEAL SECOND **APPELLATE DISTRICT, DIVISION** P

COURT OF APPEAL CASE NUMBER: B311456

SUPERIOR COURT CASE NUMBER: BC683738

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APPELLANT/ PETITIONER: T.T., a dependent individual by and through his guardian ad litem, TWYNLETTE THOMPSON

RESPONDENT/ REAL PARTY IN INTEREST: CENTINELA VALLEY UNION HIGH SCHOOL DISTRICT et. al.,

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): [X] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party *(name*): T.T. through guardian ad litem,TWYNLETTE THOMPSON

2. a. [X] There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	**Nature of interest *(Explain):***
(1)		
(2)		
(3)		
(4)		
(5)		

[ ] Continued on attachment 2.

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Date: 12-10-2021

Yana G. Henriks
(TYPE OR PRINT NAME)

(SIGNATURE OF APPELLANT OR ATTORNEY)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

TREATISES

APPELLANT'S OPENING BRIEF

INTRODUCTION

"Statistics show that 1 percent of the U.S. population have developmental disabilities…and the sexual exploitation and abuse of those individuals continues to be a major problem." *People v. Vukodinovich*, C074871, at *2 (Cal. Ct. App. June 29, 2015) (quoting Reed, Criminal Law and the Capacity of Mentally Retarded Persons (1997) 83 Va. L.Rev. 799, 801). The Legislature has declared that dependent adults are a disadvantaged class, that cases of abuse of these persons are seldom prosecuted as criminal matters, and few civil cases are brought in connection with this abuse due to problems of proof, court delays, and the lack of incentives to prosecute these suits. Welf. & I. Code, §15600, sub (h).

This appeal presents legal and public policy issues that bear an uncanny resemblance to those confronted by the appellate court in *In re Carmen O*. (1994) 28 Cal.App.4th 908 (*Carmen O*.) – the difference being only whether a child and a developmentally delayed adult, with a mental capacity of a seven-year-old, are legally equivalent for purposes of creating a judicial hearsay exception. As the court in *Carmen O.,* recognized, there are difficulties with proving child sexual abuse: the frequent lack of physical evidence, the limited verbal and cognitive abilities of child victims, and the fact that children are often unable or unwilling to act as witnesses because of the intimidation of the courtroom setting. All of the same hold true for developmentally impaired adults who have the mental capacity of a child.

The public policy underlying child hearsay exceptions applies with

equal force to developmentally disabled adults. This appeal raises an issue of first impression in California, although a solution has already been crafted by several states using both statutory law and evidentiary exceptions. It is time for California to do the same.

STATEMENT OF THE CASE

T.T., a developmentally delayed and intellectually disabled adult male, by and through his guardian ad litem, filed a complaint in November 2017 alleging sexual molestation, dependent adult abuse and battery by special education teacher Andy Mehta ("Mehta") and teacher's aide Juan Gutierrez ("Gutierrez"). (1JA 38, 49-50). In addition, the complaint alleged that Centinela Valley Union High School District ("CVUHSD") and Leuzinger High School negligently failed to protect T.T. and failed to properly screen and supervise Mehta and Gutierrez – all of which caused T.T to suffer physically and emotionally. (1JA 42-43, 44, 46.) While discovery was on-going, CVUHSD, Gutierrez, and Mehta filed motions for summary judgment. (1JA 55-80, 122-172) On August 24, 2020, the trial court continued all three motions pursuant to Cal. Civ. Code 437c(h). 6JA 2186. The parties submitted supplemental briefing (6JA 2188-8JA 3337) and a hearing on the motions was held on January 11, 2021. Later that day, the court granted CVUHSD, Gutierrez, and Mehta's motions for summary judgment. (8JA 3355). After sustaining all of Defendants' objections to the deposition testimony of T.T.'s mother and his doctors, the trial court found that Plaintiff was not "able to demonstrate the existence of a hearsay exception that would allow for the introduction of hearsay testimony merely based on the party's disability" and failed to put forth "admissible evidence of the underlying offensive conduct." (8JA 3360-3361, 3363).

The court entered judgment in favor of Gutierrez on January 20,2021 (8JA 3364-3367) and in favor of CVUHSD and Mehta on February 3, 2021. (8JA 3372-3376). Plaintiff's motion to set aside the order granting Defendants' summary judgment motions was denied and this appeal ensued. 8JA 3386.

STATEMENT OF APPEALABILITY

This appeal is from the judgment of the Los Angeles CountySuperior Court and is authorized by the Code of Civil Procedure, section 904.1.

STATEMENT OF FACTS

Plaintiff attended Leuzinger High School and participated in a program for special needs students. Leuzinger High School is located within Centinela Valley Union High School District (CVUSD). During the 2012-2013 school year, Juan Gutierrez worked at the high school as a teacher's aide (JA 3429: 10-12) and Andy Mehta was Plaintiff's special education teacher during the 2015-2016 school year. JA 3469: 20-22.

1. Twynlette Thompson's Deposition Testimony

Twynlette Thompson ("Thompson") is the mother and guardian ad litem of T.T. (JA 33). On or around the evening of August 11, 2016, Thompson went into T.T.'s room. T.T. told Thompson that, "Mr. G and Mr. Mehta touched [my] pee pee…and bootie-bootie." 9JA 3468: 19-21; 9JA 3498-3499. Thompson testified that T.T. told her that the touching was under his clothes and happened in the "classroom bathroom and school bathroom." 9JA 3489: 2-13; 9JA 3480: 1-6; 9JA 3499: 11-22. Although, she could not specify whether one or both teachers touched T.T. in one or

both bathrooms, she confirmed that T.T. "said [the touching happened] in both bathrooms." 9JA 3480: 9-14. She also testified that T.T. told her Mr. G. touched him more than once. 9JA 3480: 15-25. Thompson asked T.T. why he never told her before. T.T. responded that he was sacred. (9JA RT 3486: 14-18).

On August 12, 2016, Thompson contacted the Los Angeles Sheriff's Department (LASD) and reported that T.T. had been sexually molested. 9JA 3519. Thompson reported that Mr. Mehta and Mr. G. inappropriately touched T.T. multiple times over a span of years. 9JA 3519: 1-12.

2. Deputy Huynh's Deposition Testimony and LASD Incident Report

Quang Huynh was a deputy for the Los Angeles Sheriff's Department. 6JA 2261, 2264. He testified that he had received training on how to write an investigative report and was instructed to write down the exact statement that was given to him at the time from the victim or informant in his notebook. 6JA 2269: 1-23. He also received training on questioning special needs victims and collecting information. 6JA 2270:20-2271:7. He testified that he first determines whether a special needs victim can distinguish between the truth and a lie before he begins questioning. 6JA 2271: 11- 15.

Deputy Huynh was dispatched to a "sexual battery" service call at the Thompson home. 6JA 2274: 1-11. Upon arrival, Thompson told Deputy Huynh that her son, T.T. suffered from a mild retardation and had the mental capacity of a seven-year-old. 6JA 2276: 13-15, 20-21. She explained to Deputy Huynh that T.T. told her that he was touched by his teacher in a bathroom. 6JA 2276: 16-18.

Deputy Huynh proceeded to speak with T.T. directly for

approximately 20-30 minutes. 6JA 2276: 18-19; 6JA 2285: 12-14. Based on his training, knowledge and experience, Huynh was able to assess that T.T. understood the difference between a truth and a lie. 6JA 2283-2284. He testified that T.T. was able to communicate with him and tell him what happened. 6JA 2279: 12-13. Deputy Huynh testified that T.T. told him that he was touched by Mehta on his penis area but couldn't recall when it happened due to his mental condition. 6JA 2277: 18-20. It was Huynh's assessment that T.T.'s difficulty communicating the dates or times of the abuse were due to his mental condition. 6JA 2279: 19-23. T.T. however told deputy Huynh that he felt scared when Mehta touched him. 6JA 2277: 21-22. During Deputy Huynh's deposition testimony, he referenced the LASD Incident Report he wrote dated August 12th and August 13th of 2016 including the handwritten narrative recording both Thomson and T.T.s statements during the service call. 6JA 2264.

3. Dr. Samantha Liberman's Deposition Testimony

Dr. Samantha Liberman conducted individual psychiatric therapy sessions with T.T. between September 2016 and February 2017. 4JA 1045: 1- 4. Liberman testified that she kept therapy notes within the scope and course of treating her patients. 4JA 1057:1-3. In her notes, she typically made distinctions to clarify whether it was "patient's mother," Thompson or "patient," T.T. who made a particular statement. 4JA 1057-58. She confirmed that in T.T.'s initial session he provided only "yes" or "no" responses, but during the course of treatment, he was able to formulate complete sentences. 4JA 1055: 16-22. According to Liberman's therapy notes, T.T. expressed that he did not want to return to school because of "mean teachers." 4JA 1051. In one session, Liberman noted that "[p]atient developed stories regarding Star Wars characters and discussed them being scared." 4JA 1061. Libermen testified that in her practice and training, it is

common for "kid" victims of trauma to express themselves through projecting themselves and their feelings onto characters and stories. 4JA 1061. Based on what was reported to her and what was observed, she diagnosed T.T. with moderate major depressive disorder. 4JA 1052, 1056.

4. Dr. Yuri Tsutsumi's Deposition Testimony

Dr. Yuri Tsutsumi conducted individual psychiatric therapy sessions with T.T. between November 2018 and February 2019. 4JA 1036 -1039. During her deposition testimony she referred to the therapy notes that she wrote to document T.T.'s sessions. 4JA 1022, 1025. She confirmed that at the time that she wrote the notes, her memory was better than at the time of her deposition. 4JA 1028-1029. Based on her notes, T.T. reported to her that he got anxious when he was outside because he feared encountering his teachers that abused him. 4JA 1025: 1- 18. She confirmed that T.T. "initiated speaking about trauma," during the sessions, but did not go into specific detail. 4JA 1026-1027. The only traumatic events she was aware of or recalled T.T. discussing with her was the abuse by the teachers. 4JA 1027: 18- 25.

5. T.T.'s Deposition Testimony

On December 17, 2019, T.T. was deposed for several hours, beginning at 9:39 am and ending at 4:12 pm, with a scheduled lunch and intermittent breaks. (9JA 3424). Initially, he was engaging and answered most questions. Opposing counsel asked various questions to assess T.T.'s credibility and competence for truthfulness. 9JA 3433. Although T.T. had trouble comprehending or was unresponsive when asked directly about the meaning of the words "truth," and "lie", his responses clearly indicated he understood the difference. RT 10:20 -11:20. Despite his willingness to answer questions at the commencement, he struggled with questions regarding dates, timeframes, ages, and chronological order. Cf 9JA 3431.

T.T continued to display his very literal and candid character when he responded that he, "forgot the driver name," after being asked "who brought you here today?" Plaintiff counsel, Ms. Freidenberg had to explain that a ride share service was called so that Plaintiffs could attend the deposition. RT 11:22-25.

As opposing counsel began to ask specific questions about his experiences with Defendants, and feelings of sadness, T.T. expectantly became less responsive. 9JA 3433, 3462-63. Instead of answering, he often displayed signs of nervous laughter (9JA 3446, 3451), later explained by Dr. Lakes. Despite his uneasiness, T.T. confirmed that Mr. G. was a teacher's assistant in his class (9JA 3451), that they had talked (9JA 3434), and that Mr. G. touched him in the bathroom. 9JA 3430, 3432.

> **SZETO:** Did Mr. G ever touch you?
>
> **T.T**.: Yeah

9JA 3430. When forced to revisit where Mr. G touched him, T.T immediately called for his mom. 9JA 3430: 6-7. After taking a short break, opposing counsel proceeded.

> **SZETO:** T., in 2012 did Mr. G. do anything that you didn't like?
>
> **T.T**.: Yeah

9JA 3430.

> **SZETO:** T. did you ever tell your mom or you grandma about Mr. G.?
>
> **T.T**. Yeah
>
> **SZETO**: And what did you tell them?
>
> **T.T.** (No response)
>
> **SZETO**: T. do you like Mr. G?
>
> **T.T**. No.

SZETO: And why don't you like him?

T.T. Because he was mean to me in the bathroom.

SZETO: Was it the bathroom at Leuzinger High School.

T.T. Yeah.

9JA 3431.

When prodded to talk more about what happened in the bathroom, T.T responded that he forgot the bathroom story. 9JA 3432. However, immediately after, he again confirmed, that Mr. G. touched him in the bathroom. 9JA 3432: 14-15.

Similarly, he answered in the affirmative when asked whether Mr. Mehta did something to him that he didn't like. 9JA 3442: 13-14.

MCDONALD: T., did Mr. Mehta ever do anything that you didn't like?

T.T: Yeah.

MCDONALD: What did he do that you didn't like?

T.T.: He did something bad to me in the bathroom.

MCDONALD: What did he do to you bad in the bathroom?

T.T. (No response.)

Afterwards, he became unresponsive, and refused to tell opposing counsel what Mr. Mehta did to him that he didn't like (9JA 3443) but confirmed that he told his mom what happened. 9JA 3449 :2-4.

MCDONALD: Did you tell your mom that Mr. Mehta did something bad to you in the bathroom?

T.T. Yeah.

He was also able to confirm that the bathroom was at school and

near his classroom. 9JA 3445: 14-20. Although many questions went unanswered at the close of the deposition, he testified that he has seen a doctor and told the doctor that he was feeling sad. 9JA 3460.

6. Dr. Kimberly Lakes Declaration and Expert Report

Dr. Lakes is a licensed psychologist specializing in trauma, physical, and sexual abuse. 3JA 845 ¶ 1. To complete her report, she interviewed Thompson, administered tests, reviewed medical records and therapy notes, and clinically evaluated T.T. for approximately 4.5 hours over two days[1]. 3JA 845-846 ¶¶2- 3, 3JA 847 ¶6. T.T. was evaluated alone by Dr. Lakes while Thompson waited nearby. 3JA 862-863. ¶52 a. After collecting all the data, Dr. Lakes reported no indication that T.T. exaggerated any symptoms and found no indication that he was encouraged to malinger for financial gain. 3JA 863 ¶ 52 b.

To assess cognition, she administered the WAIS-IV, a standardized, normed test of intelligence and cognitive functioning. 3JA 852 ¶ 24. As measured by the WAIS-IV, T.T.'s overall IQ score fell in the Extremely Low range when compared to other adults his age (FSIQ = 50, <1st percentile).3JA 851-852 ¶ 23.

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[1] Dr. Lakes evaluation took place on or about May 23, 2020, approximately five months after T.T.'s deposition testimony.

Lakes summarized the results of her evaluation as follows:

> a. T.T. is intellectually disabled and has limited verbal comprehension and functional communication skills (WAIS-IV, EVT-3, PPVT-5, and Vineland-III).
> b. T.T. exhibits substantial functional impairment and limited coping skills (Vineland-III).
> c. T.T. currently exhibits emotional symptoms, including depression, somatic, and posttraumatic stress symptoms (Vineland-III Internalizing Symptoms, BASC-3 Depression and Somatization, CAPS-5). His mother's report describes behavioral changes consistent with depressive symptoms as well as anxiety associated with the alleged abusers.
> d. T.T. reports high levels of Social Stress (BASC-3).
> e. T.T. demonstrates psychological naïveté and below average insight into his behavior, thoughts, and emotions, which is consistent with substantial intellectual disability.
> f. T.T.'s affect was at times incongruent. For example, he lowered his eyes, turned his head to the side, and laughed during the discussion of the alleged abuse.
> g. T.T. was at times non-responsive during testing, particularly when tasks in the tests were very difficult for him or when he did not know an answer.
> h. T.T.'s ability to read out loud indicates that he has some capacity for learning functional skills with repetition and practice.

3JA 853 ¶ 27.

Dr. Lakes also provided an assessment of T.T.s report of the abuse. 3JA 861 ¶ 46 - 3JA 862 ¶ 50. During her interview with him she asked T.T "what happened?" In response, he stated he was a "little scared" to talk about it. 3JA 861 ¶ 47. After encouragement, he stated, they "touched this" and pointed to his groin area. 3JA 861 ¶ 47. Lakes reported that T.T. laughed (seemingly nervously) and avoided eye contact. 3JA 861 ¶ 47. When she asked how T.T. felt about telling her, T.T. said "embarrassed," and stated, "I felt bad" and "afraid." 3JA 861 ¶ 47. He stated, "I was afraid

they would hurt me." 3JA 861 ¶ 47. When Dr. Lakes asked T.T. to share further details, he indicated that it had happened in the bathroom. 3JA 861 ¶ 47. When Lakes asked who had touched his private parts, he responded, "Mr. Mehta and Mr. G." 3JA 861 ¶ 47. T.T. told Dr. Lakes that it happened more than one time and that other students were present, but not all the time. 3JA 861 ¶ 47.

When asked whether he still thinks of what happened to him, T.T. told Dr. Lakes he is "afraid a lot" that someone else will touch him, he thinks of it in bed and is "very a lot" afraid, and "afraid if [he] see somebody who is like [his] teacher." 3JA 861 ¶48. He explained to Dr. Lakes that he is upset if he has to take the bus route he took with the teachers, sees men like them, or goes to the mall they visited. 3JA 861 ¶48. Dr. Lakes concluded that T.T. "exhibits a fear of men," "anxiety regarding separation from his mother," and that "his inability to answer questions at his deposition, especially questions related to his sexual abuse, may at least in part be due to the attorneys being male." 3JA 866 ¶57 b.

When asked about physical reactions to such reminders, he reported that he has had a "headache" and "tummy ache." 3JA 861-862 ¶ 48. He reported to Dr. Lakes that he does not like to think about school and wants to "avoid" the teacher. 3JA 861-862 ¶ 48. T.T. then told Dr. Lakes, "they went to jail." 3JA 861-862 ¶ 48.

Dr. Lakes concluded that criteria were met for Post-traumatic Stress Disorder (PTSD) and that T.T. showed "moderate severity with slight improvement." 3JA 862 ¶ 49. Based on her extensive review of materials, training, knowledge, experience, testing, T.T.'s mental health history, parent and clinician observations, and self-reporting, Dr. Lakes issued the following DSM-5 Diagnoses: (1) Intellectual Disability, Moderate (319; F71), (2) Post-traumatic Stress Disorder (309.81; F43.10), and (3) Major

Depressive Disorder, Moderate (296.22; F32.1). 3JA 863 ¶ 53.

ARGUMENT

I. THE TRIAL COURT ERRED BY (1) EXCLUDING ADMISSIBLE EVIDENCE ON HEARSAY GROUNDS AND (2) FAILING TO DRAW REASONABLE INFERENCES FROM T.T.'S TESTIMONY IN THE LIGHT MOST FAVORABLE TO PLAINTIFF.

A. The Standard of Review.

The trial court erred in finding that Plaintiff did not submit admissible evidence to show that he was abused. The trial court completely disregarded T.T.'s deposition testimony and excluded evidence of statements made by T.T. to his mother, law enforcement, and licensed medical professionals as "inadmissible" hearsay. In doing so, the trail court determined there was "no competent evidence to show the existence of a triable issue of material fact."

On appeal, the trial court's decision granting a motion for summary judgment is reviewed *de novo. Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244. The reviewing court "need not defer to the trial court and are not bound by the reasons for [its] summary judgment ruling." *Knapp v. Doherty* (2004) 123 Cal.App.4th 76, 84. All evidence is viewed in a light favorable to plaintiff as the losing party. *Saelzler v. Advanced Group* 400 (2001) 25 Cal.4th 763, 768. Evidentiary doubts or ambiguities are also resolved in favor of the non-moving party. *Marshak v. Ballesteros* (1999) 72 Cal.App.4th 1514, 1517. "[T]o determine whether

there is a triable issue, [the appellate court] review[s] the evidence submitted in connection with summary judgment, with the exception of evidence to which objections have been *appropriately* sustained." (Emphasis added.) (*Frittelli, Inc. v. 350 North Canon Drive, LP* (2011) 202 Cal.App.4th 35, 41.)) When a party is prejudiced by the exclusion of admissible evidence, "a reviewing court would be empowered, and indeed ***obliged***, to acknowledge the error" and review the evidence. *Mamou v. Trendwest Resorts, Inc*. (2008) 165 Cal.App.4th 686, 711. Importantly, an appellate court has discretion to consider an issue raised for the first time on appeal if it presents a pure question of law on undisputed evidence. *Mitchell v. United National Ins. Co.* (2005) 127 Cal.App.4th 457, 470-71 (citing *Waller v. Truck Ins. Exchange, Inc*. (1995) 11 Cal.4th 1, 24.).

Although courts are split regarding the proper standard of review for the trial court's evidentiary rulings in connection with motions for summary judgment, (*Orange Cnty. Water Dist. v. Sabic Innovative Plastics United States*, *LLC* (2017) 14 Cal.App.5th 343, 368), the California Supreme court has agreed that *de novo* review is appropriate when judgment is made on the papers. *Reid v. Google, Inc*. (2010) 50 Cal.4th 512) ("Because summary judgment is decidedid entirely on the papers, and presents only a question of law, it affords very few occasions, if any, for truly discretionary rulings on questions of evidence.") (*Id*. at p. 535) [quoting the opinion of the appellate court].) See also *Pipitone v. Williams* (2016) 244 Cal.App.4th 1437, 1451 (we interpret *Reid's* practical effect on review of a summary judgment, in which evidentiary issues, and all issues, are decided on papers alone, to be the application of *de novo* review.)

The trial court's erroneous oversight and exclusion of evidence is grounds for reversal if the error was prejudicial. Evid. Code, § 354, subd.

(a)[2] [judgment shall not be reversed due to the erroneous exclusion of evidence unless the error resulted in a miscarriage of justice].

B. **Sustaining Defendants' Objections to Thompson's Deposition Testimony on Hearsay Grounds was improper under *Ohio v. Roberts*.**

1. Exceptions to the Hearsay Rule May be Found in Judicial Decisions

Evidence Code section 1200, subdivision (b) states: "*Except as provided by law*, hearsay evidence is inadmissible. (Emphasis added)" Evid. Code § 1200 (b). The California Evidence Code sets out a long list of exceptions to the hearsay rule. However, "[e]xceptions to the hearsay rule are not limited to those enumerated in the Evidence Code." *In re Malinda S*. (1990) 51 Cal.3d 368, 376. The "*law*" referred to in §1200(b) includes the law "established by judicial decisions as well as by constitutional and statutory provisions." *In re Cindy L* (1997) 17 Cal.4th 15, 26 (quoting Recommendation Proposing an Evidence Code, 7 Cal. Law Revision Com. Rep. at p. 44)); Evid. Code § 160.

One such "law established by judicial decision" is the test set forth in *Ohio v. Roberts* (1980) 448 U.S. 56, 66[3]. *Roberts* held that non-testimonial hearsay statements could be admitted at trial when *either*: (1)

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[2] Unless otherwise stated, all references to code sections refer to the California Evidence Code.

[3] *Crawford v. Washington* (2004) 541 U.S. 36 overruled *Roberts* only to the extent *Roberts* allowed admission of testimonial hearsay. *Crawford* did not bar admission of nontestimonial hearsay if the statement satisfied **either** of Robert's above two prongs. (*Crawford*, 541 U.S. at pp. 60-61, 68-69.)

'the evidence falls within a firmly rooted hearsay exception' ***or*** *(2)* the statements contain 'particularized guarantees of trustworthiness' such that adversarial testing would add little to the statements' reliability**.** (Emphasis added.) See *People v. Eccleston* (2001) 89 Cal.App.4th 436 (analyzing the "particularized guarantees of trustworthiness" when the applicable exception was not firmly rooted.). The latter portion of this rule has been recognized in the Federal Rules of Evidence and codified in various states as the "residual hearsay" exception[4]. FRE 807. Although California's extensive statutory scheme does not contain a residual hearsay exception, the evidence code does not conflict with or foreclose its application. In fact, the contrary is true; whether a statement contains 'particularized guarantees of trustworthiness, outside of any statutory exception, deserves consideration.[5] If the statement is determined to be trustworthy, the statement is an admissible exception to the prohibition against hearsay under *Ohio v. Roberts* as "provided by [judicial] law." See Evid. Code § 1200 (b).

2. The Circumstances Surrounding T.T.'s Statements to Thompson had Special Indicia of Reliability and Guarantees of Trustworthiness.

The trial court sustained Defendants' objections to portions of Thompson's testimony which recounted T.T.'s statements about the abuse

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[4] "The residual hearsay exception …accommodates ad hoc instances in which statements not otherwise falling within a recognized hearsay exception might nevertheless be sufficiently reliable to be admissible at trial." *Idaho v. Wright* (1990) 497 U.S. 805, 817.

[5] An appellate court has discretion to consider an issue raised for the first time on appeal if it presents a pure question of law on undisputed evidence. *Mitchell v. United National Ins. Co*. (2005) 127 Cal.App.4th 457, 470-71.

as hearsay - without consideration of whether the statements bore 'particularized guarantees of trustworthiness.' Although trustworthiness is a "constitutional requirement" and its application is generally unnecessary when reviewing out-of-court nontestimonial statements in a non-criminal case, it is nevertheless a longstanding exception to the hearsay rule. See *Idaho v. Wright* (1990) 497 U.S. 805, 820. ("If the declarant's truthfulness is so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility, *then the hearsay rule does not bar admission of the statement at trial*.") In *In re Lucero* L. (2000) 22 Cal.4th 1227, the Supreme court held that juvenile court jurisdiction could be validly asserted when the sole evidence was the uncorroborated hearsay statement of a minor who was legally incompetent to testify. In *Lucero*, the minor's hearsay statement of parental molestation was contained in the case worker's report. The court found the minor's "'truthfulness ... so clear from the surrounding circumstances that the test of cross-examination would be of marginal utility.'" *Id.* at 1249 (quoting *Idaho v. Wright*, 497 U.S. at 820).

Applying this standard when state law exceptions are insufficient ensures all relevant evidence is admitted (Evid. Code, § 351) and fully protects any due process rights owed to defendants. See *People v. Otto* (2001) 26 Cal.4th 200, 210 (victim hearsay statements must contain special indicia of reliability to satisfy due process.) In essence, if it would be admissible in a case against a criminal defendant where life and liberty are at stake, there's no legal justification why it should not pass muster in a civil case. The state law rules of evidence were not meant to preclude relevant, reliable, and trustworthy evidence.

"Whether 'particularized guarantees of trustworthiness' exist is determined by examining 'the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of

belief.'" *People v. Roberto* V. (2001) 93 Cal.App.4th 1350, 1374). Only the circumstances that surround the making of the statement are relevant. *Idaho v. Wright* (1990) 497 U.S. 805, 819. States have considerable leeway in the consideration of appropriate factors. *Id*. at 822. In establishing the child hearsay exception, the *Cindy* court considered circumstances surrounding the statement, not only its spontaneity, but also the precociousness of the child's knowledge of sexual matters, and the lack of motive to lie. 17 Cal.4th at 34. In *United States v. Iron Shell* (8th Cir. 1980) 633 F.2d 77, the Eighth Circuit considered, factors such as (1) The lapse of time between the event and the declarations; (2) the age of the declarant; (3) the physical and mental state of the declarant; (4) the characteristics of the event; and (5) the subject matter of the statements. *Id.* 85-86. The U.S. Supreme Court also mentioned certain considerations that "relate to whether hearsay statements made by a child witness in a sexual abuse case are reliable . . . [and] also whether such statements bear 'particularized guarantees of trustworthiness'" including: (1) spontaneity and consistent repetition; (2) the mental state of the declarant; (3) use of terminology unexpected from a child of that age; and (4) lack of a motive to fabricate. *Id*. at 821-822. These same factors are applicable here in the context of a "child-like" intellectually disabled adult declarant.

Considering these factors, the circumstances under which T.T. made his statement lend support for the trustworthiness of the hearsay. It is undisputed that T.T. had the mental and emotional capacity of about a seven-year-old. His comprehension and communication abilities are moderately to significantly limited. For Defendants to attempt to credit him with the ability to fabricate an ongoing allegation of sexual abuse and maintain the lie over the course of multiple years is non sensical. In fact, the record indicates he has demonstrated the ability to differentiate between

the truth and a falsehood on multiple occasions and honest even to a literal sense. The dynamics of the relationship between T.T. and defendant's must also be considered. Not only do teachers owe a duty of care to their students, but they hold a position of power and control over them which can be easily used to manipulate or intimidate. See *State v. Sorenson* (1988) 143 Wis.2d 226 (evaluating attributes including age, ability to communicate verbally, to comprehend the statements or questions of others, to know the difference between truth and falsehood, and any fear of punishment, retribution or other personal interest, such as the relationship with the defendants.)

Second, the timing and spontaneity of T.T.'s statements indicate trustworthiness. T.T. made the unprovoked statements to his mother in the middle of August, about 2 months after school ended, but just before school was to start again. T.T. feared returning to school. His fear of returning to school outweighed the fear, and embarrassment of telling his mother what happened and forced his disclosure. In *Iron Shell*, the Eighth Circuit held in a child sexual abuse case that "[t]he lapse of time between the startling event and the out-of-court statement although relevant is not dispositive…." *Id*. at 85. The Fourth Circuit also recognized that, "children do not necessarily understand sexual contact by adults to be shocking, especially when the adult is a… figure from whom the child desires …. affection. Even if the child is aware of the nature of the abuse, significant delays in reporting this abuse may occur because of confusion, guilt, and fear on the part of the child." *Morgan v. Foretich* (4th Cir. 1988) 846 F.2d 941 (citing Note, A Comprehensive Approach to Child Hearsay Statements in Sex Abuse Cases, 83 Colum.L.Rev. 1745, 1756 (1983)). T.T. stated numerous times to multiple witnesses that he was scared. Considering T.T.'s limited mental and verbal capabilities and his fears concerning disclosure, T.T.'s

statements concerning his teachers, made just before he would have been required to return to the abuse, indicates reliability in conjunction with other factors supporting the veracity of his statements.

Additional support for the trustworthiness of the hearsay is found in the content of T.T.'s statements. His description and method of giving his statements included pointing to his groin area, and "speaking in a vocabulary that definitely belonged to a child which adds a 'ring of verity to [his] declarations.'" *Morgan*, 846 F.2d 941 (quoting *United States v. Nick* (9th Cir. 1979) 604 F.2d 1199, 1204.).

Lastly, T.T. had no motive to fabricate when he explained what happened to Thompson. His statements to Thompson were made while he was at home in his room. The circumstances do not indicate that his statements were reactionary, influenced or prompted. Not only is Thompson T.T.'s mother and guardian ad litem, but she is T.T.s provider, protector, caregiver, and one of few people T.T. turns to when he feels anxious or scared. This was evidenced in his deposition when he yelled out for Thompson after being asked to describe his abuse. Thompson was T.T.'s confidant – someone T.T. trusted immensely. This particular of set circumstances render T.T.s statements to Thompson particularly worthy of belief and his "truthfulness ... so clear that the test of cross-examination would be of marginal utility." *Lucero*, at 1249 (quoting *Idaho v. Wright*, 497 U.S. at p. 820). T.T.'s statements to Thompson are therefore admissible hearsay sufficient to support a triable issue of material fact.

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C. **Sustaining Defendant Mehta's Objections to the LASD Report on Hearsay Grounds was Improper.**

1. The LASD Report is Not Hearsay.

"Documents not offered for the truth of the matter asserted are, by definition, not hearsay." *Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 316. Here Plaintiff offered the report, **not** to prove that Mehta touched his penis, but to prove that T.T. made a report of allegations against Mehta. Even if deemed hearsay, an exception applies.

2. The LASD Report is Admissible under Cal. Evid. Code § 1280.

Even assuming that the LASD report is considered hearsay, an exception applies.

Evidence Code §1280 states in pertinent part as follows:

> Evidence of a writing made as a record of an act … or event is not made inadmissible by the hearsay rule when offered in any civil … proceeding to prove the act, … or event if: (a) The writing was made by and within the scope of duty of a public employee; (b) The writing was made at or near the time of the act, condition, or event; (c) The sources of information and method and time of preparation were such as to indicate its trustworthiness.

Cal. Evid. Code § 1280. Under this exception, the statements of those who prepare an official record concerning their personal observations pursuant to their official duty to observe and accurately report facts are admissible. See *Nevarrez v. San Marino Skilled Nursing and Wellness Centre* (2013) 221 Cal. App. 4th 102, 121–122; *Sherrell v. Kelso* (1981) 116 Cal.App.3d Supp. 22, 32-36. Here Deputy Huynh made a writing documenting an act or event – namely the act of T.T. making a report of sexual abuse, not the sexual abuse itself. Deputy Huynh did so in his capacity as an LASD

deputy within a day of T.T. making the report. He testified to the various trainings he received to ensure the trustworthiness and accuracy of his reporting. Accordingly, the failure to admit Deputy Huynh's Incident Report (and the deposition testimony in support thereof governing his conversations with Plaintiff) under Evid. Code § 1280 was improper.

D. T.T.'s Deposition Testimony Sufficed as Competent Evidence to Show a Triable Issue of Material Fact for Each of Plaintiff's Causes of Action.

Courts are required to view the facts and draw reasonable inferences "in the light most favorable to the party opposing the [summary judgment] motion." *United States v. Diebold, Inc*. (1962) 369 U.S. 654, 655. When the facts contained within depositions allow contradicting inferences to be drawn, the court must consider the evidence in favor of the non-moving party. *Id*. If a reasonable factfinder could draw inferences from the evidence which support Plaintiffs' causes of action, summary judgment is improper. *Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 838 ("a summary judgment cannot properly be affirmed unless a contrary view would be unreasonable as a matter of law in the circumstances presented.) The rule continues that the moving party's evidence must be strictly construed, while the opposing party's evidence must be liberally construed. *Id*. citing 6 Witkin, Cal. Procedure (4th ed. 1997) Proceedings Without Trial, § 218, p. 630. Only when the inferences are indisputable may the court decide the issues as a matter of law. *Id*.

If the evidence is in conflict, the factual issues must be resolved by trial. "Any doubts about the propriety of summary judgment . . . are generally resolved against granting the motion, because that allows the

future development of the case and avoids errors." *Id*. at 839 quoting Henley, Action Guide, Making and Opposing a Summary Judgment Motion, p. 15 (Cont.Ed.Bar 1998). Viewing T.T.'s deposition testimony in this light, each of the underlying causes of action[6] are sufficiently supported to require the factual issues to be resolved by trial.

1. Plaintiff's Claim for Assault and Battery is Supported By T.T.s Testimony.

a. Battery

The essential elements of a cause of action for civil battery are: (1) defendant touched plaintiff, or caused plaintiff to be touched, with the intent to harm or offend plaintiff; (2) plaintiff did not consent to the touching; (3) plaintiff was harmed or offended by defendant's conduct; and (4) a reasonable person in plaintiff's position would have been offended by the touching. CACI No. 1300; accord, BAJI No. 7.50. Notably, Plaintiffs' first cause of action is only for battery and not sexual battery. Battery involves offensive or harmful touching of *any part* of plaintiff's person, not necessarily an intimate part. *Cf.* Civ. Code, § 1708.5.

T.T testified, not once but twice, that Mr. G touched him and described the location of the incident as being "in the bathroom." 9JA 3430:1-3, 9JA 3432:14-15. When asked whether he "liked Mr. G," he answered "No," "because he was mean to me in the bathroom." 9JA 3431: 11-23. It can be easily inferred from common sense that a reasonable person would not consent to and be highly offended by someone they didn't

[6] Despite finding "constructive knowledge" sufficient, the court dismissed the causes of action against the school district and individual defendants based upon the same finding; that Plaintiffs presented no "admissible evidence of the underlying offensive conduct."

like touching them- especially in a private, secluded, space like a bathroom. By describing Gutierrez' actions as "mean," T.T. provided sufficient testimonial evidence to infer that "defendant [Gutierrez] intended to touch the plaintiff in a harmful or offensive manner," and that T.T was indeed offended – or at the very least emotionally harmed by his actions. *So v. Shin* (2013) 212 Cal.App.4th 652, 668-669; CACI Nos. 1300, 1301. Drawing all inferences in favor of Plaintiffs, there is sufficient competent evidence to put this issue before a jury.

Similarly, T.T. testified that Defendant Mehta did something bad to him in the bathroom. 9JA 3449: 2-4. T.T. confirmed that he told his mother what happened. 9JA 3449 2-4. T.T.'s statements to Thompson[7], supplement his deposition testimony and provide competent evidence of underlying offensive conduct by Defendant Mehta.

T.T. testified that both Gutierrez and Mehta's conduct occurred while at Leuzinger High School. Viewing the evidence in the light most favorable to Plaintiff leads to a reasonable inference that the tortious conduct occurred during school hours, while Defendants were responsible for the oversight, care, and safety of T.T. The facts here support an inference that Defendants were acting while in the scope of their employment.

Even assuming the intentional acts of Defendants fall outside of their scope of their employment, California case law has held that school districts may still be vicariously liable. *C.A. v. William S. Hart Union High School District* (2012) 53 Cal.4th 861, 868 (concluding that a school district may be liable "through respondeat superior for the negligence of

[7] T.T.'s statements to Thompson are admissible hearsay. See Argument I.B.2 *supra*.

other employees who were responsible for hiring, supervising, training, or retaining" the tortfeasor employee.). Ample case authority establishes that school personnel owe students under their supervision a protective duty of ordinary care, for breach of which the school district may be held vicariously liable. *C.A. v. William S. Hart Union High School District* (2012) 53 Cal.4th 861, 865 (citing *Dailey v. Los Angeles Unified Sch. Dist*. (1970) 2 Cal.3d 741, 747; *Leger v. Stockton Unified School Dist*. (1988) 202 Cal.App.3d 1448, 1458–1461.). Pursuant to Gov. Code § 815.2 (a) Leuzinger High School and CVUHSD are liable for the injury proximately caused by breaching the duty of ordinary care.

b. Assault

An assault involves a threat to touch any part of plaintiff's person, but no actual contact is required. A civil assault is any act intended to cause apprehension of harmful or offensive contact to a person and does cause an apprehension of such immediate contact. *Lowry v. Standard Oil Co*. (1944) 63 Cal.App.2d 1, 6-7. A defendant who commits a battery has necessarily committed an assault. See *People v. Fuller* (1975) 53 Cal.App.3d 417, 421. Where the evidence is sufficient to cause a triable issue as to battery, it is necessarily sufficient for assault.

2. Plaintiff's Claim for IIED is Supported By T.T.'s Testimony

To prevail on an intentional infliction of emotional distress cause of action, a plaintiff must establish "(1) outrageous conduct by the defendant, (2) intention to cause or reckless disregard of the probability of causing emotional distress, (3) severe emotional suffering and (4) actual and proximate causation of the emotional distress." *Wong v. Jing* (2010) 189 Cal.App.4th 1354, 1376. The outrageous element requires conduct outside of the bounds of that tolerated in a civilized society and . . . "of a nature which is especially calculated to cause, and does cause, mental distress."

Chang v. Lederman (2009) 172 Cal.App.4th 67, 86-87. The court determines, on a case-by case basis, whether Defendants' conduct may be regarded as so extreme and outrageous as to permit recovery. *Fowler v. Varian Assocs., Inc.* (1987) 196 Cal.App.3d 34, 44. Nonetheless, courts have recognized certain circumstances that increase the likelihood that a defendant's conduct will be viewed as outrageous. In particular IIED recovery has been granted when a defendant in a position of power acts with the special knowledge that the plaintiff is vulnerable and has no way to protect himself or herself. See *Alcorn v. Anbro Engineering, Inc*. (1970) 2 Cal.3d 483, 498, fn. 2 (highlighting cases and comments that emphasize the significance of the relationship between the parties in determining whether liability should be imposed); *Spinks v. Equity Residential Briarwood Apartments,* (2009) 171 Cal.App.4th 1004, 1046 (Evidence of vulnerability is relevant in considering whether defendants acted outrageously); *Symonds v. Mercury Savings Loan Assn.* (1990) 225 Cal.App.3d 1458, 1469 (Defendant's actions may rise to the level of outrageous conduct where defendant knows the plaintiff is susceptible to emotional distress because of her physical or mental condition.) California law has defined vulnerability to include "incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, or dependency." See Welfare and Institutions Code section 15610.70. The court of appeal has also recognized the "unique vulnerabilities" of special needs students. *M.W. v. Panama* Buena Vista Union School Dist. (2003) 110 Cal.App.4th 520.

No stretch of the imagination is required in this case. Egregious conduct is evident in cases where teachers molest, inappropriately touch, or abuse their students,- especially those with special needs. *See Doe v. Claiborne County ex rel. Claiborne County Board of Education* (6th

Cir.1996) 103 F.3d 495, 506-07 ("the magnitude of the liberty deprivation that sexual abuse inflicts upon the victim is an abuse of governmental power of the most fundamental sort; it is an unjustified intrusion that strips the very essence of personhood.") When making all reasonable inferences in favor of T.T., and against Defendants, it is clear that the touching of a special needs student in a school bathroom, by a male teacher fully aware of the student's developmental condition would cause the student severe emotional distress. Not only is T.T. limited in his ability to verbalize the extent of his harm but he is also limited in his ability to obtain any recourse because of it. This would be extremely distressing for any person. T.T's attempt at explaining what happened, and his immediate cry out for his mom when questioned about Defendant's conduct is evidence in and of itself of his vulnerabilities and severe emotional distress. Accordingly, the court erred in fining no triable issue of material fact as to Plaintiff's IIED claim.

3. Plaintiffs' Claim for Gender Violence is Supported by T.T.'s Testimony.

Gender violence is defined as "the use, attempted use, or threatened use of physical force against the person or property of another, committed at least in part based on the gender of the victim" **or** "a physical intrusion or physical invasion of a sexual nature under coercive conditions." Cal. Civ. Code 52.4. If the touching is determined to be of a sexual nature, any intimidating physical interference or invasion is sufficient – it need not be violent, severe or cause bodily harm.

T.T.'s deposition testimony serves as competent evidence of a battery- as argued above. A battery, by definition, includes " 'any wrongful act committed by means of physical force against the person of another even [if] only the feelings of such person are injured by the act..' " *People*

v. Myers (1998) 61 Cal.App.4th 328, 335, quoting *People v. Rocha* (1971) 3 Cal.3d 893, 899–900. The only question that remains is whether inferences can be made from T.T.'s testimony that the touching was done in a sexual coercive nature. First, T.T.'s statements to Thompson were admissible hearsay and supplement his deposition testimony as competent evidence the touching was under a sexual coercive nature. However, even if the court finds otherwise, the fact that the touching was done in a private and secluded place like a bathroom, as opposed to the hallway or classroom, creates such an inference. Further, T.T.'s disposition, uneasiness, and cry out for his mom after being asked "what bad thing Mehta did to [him] in the bathroom," also creates an inference that the touching was done in a sexual and coercive nature.

4. Plaintiffs' Claim for Dependent Adult Abuse is Supported by T.T.'s Testimony

Defendants physically abused T.T., a dependent adult, within the meaning of Cal. Welf. & Inst. Code Section 15610.63(e)(1) by committing sexual battery as defined in Section 243.4 of the Penal Code. Penal Code § 243.4 (e)(1) states that "[a]ny person who touches an intimate part of another person, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of misdemeanor sexual battery." Cal. Pen. Code § 243.4(e)(1). As used in this subdivision, "touches" means physical contact with another person, whether accomplished directly, through the clothing of the person committing the offense, or through the clothing of the victim. Cal. Pen. Code §243.4(e)(2). As argued in depth above, T.T.'s testimony, when viewed in the light most favorable, provides evidence of a nonconsensual touching (battery) by Defendants of a sexual nature based on the surrounding circumstances, sufficient enough to create a triable issue

of material fact.

II. THE ERRONEOUS EXCLUSION OF EVIDENCE WAS PREJUDICIAL AND A MISSCARIAGE OF JUSTICE

An error in admitting or excluding evidence warrants reversal if the error resulted in a miscarriage of justice. Cal. Const., art. VI, § 13; Code Civ. Proc., § 475; Evid. Code, §§ 353, 354.) To determine whether an evidentiary error has resulted in a miscarriage of justice, " 'the entire cause, including the evidence'" must be examined to determine whether " 'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.'" *Alexander v. Community Hospital of Long Beach* (2020) 46 Cal.App.5th 238, 258.

The trial court granted Defendants' motions for summary judgment based on the finding that Plaintiffs "failed to put forth admissible evidence of the underlying offensive conduct." It did so after ruling that no hearsay exception applied "that would allow for the introduction of hearsay testimony merely based on the party's disability." Had the court considered the hearsay exception established by judicial decision, and considered the trustworthiness of T.T.'s out-of-court statements, T.T.'s statements to Thompson would have supplied sufficient evidence of a triable issue of material fact for each of Plaintiff's causes of action against individual Defendants, and in turn, against public entity Defendants on a vicarious liability theory for the negligence of employees who were responsible for hiring, supervising, training, or retaining" the tortfeasor employees. The erroneous exclusion of T.T.'s statements to Thompson on hearsay grounds was extremely prejudicial to this case, as inclusion would have prevented a

grant of summary judgment.

Even if the trial court's exclusion of T.T.'s statements to Thompson -specifically that Defendants touched his private areas multiple times in the bathroom of Leuzinger High School- was not erroneous, T.T.'s deposition testimony alone is sufficient to prevent the grant of summary judgment. Had the court viewed T.T.'s deposition testimony in the light most favorable to Plaintiff, making reasonable inferences and resolving evidentiary doubts and ambiguities in his favor it would have found that Plaintiffs had put forth admissible evidence of the underlying offensive conduct, and summary judgment would have been improper at this stage of the proceedings. It is therefore reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.

III. THIS APPELLATE COURT HAS AUTHORITY TO RECOGNIZE AN ADDITIONAL HEARSAY EXCEPTION FOR DEVELOPMENTALLY DISABLED VICTIMS OF ABUSE

The California Supreme Court emphasized and reaffirmed the "power of the judiciary in developing new hearsay exceptions." *In re Cindy L* (1997) 17 Cal.4th 15, 27. In deciding the case, the Supreme court discussed the Legislative intent in allowing the courts to maintain this power:

The Legislature, when it adopted the Evidence Code incorporating many rules originating at common law, chose to allow courts to continue to perform their common law function in a manner consistent with statute.

Although not explicit in its justification, we can suppose that the Legislature determined that courts, by virtue of their position in administrating the rules of evidence on a day-to-day basis, would be in a good position to further develop the law of hearsay to respond to new evidentiary problems. The Legislature could have chosen to make hearsay law the exclusive province of statute, as it has done for the most part in the area of evidentiary privileges. (Citations omitted). It has chosen not to do so.

In re Cindy L (1997) 17 Cal.4th 15, 27. The Supreme court further explained that even though hearsay is an area of law that is now governed by an extensive statutory scheme, " it may nonetheless be appropriate for courts to create hearsay exceptions for classes of evidence for which there is a substantial need, and which possess an intrinsic reliability that enable them to surmount constitutional and other objections that generally apply to hearsay evidence." *Id*. at, 28. Several other states have already determined there is a "substantial need" for a hearsay exception for out-of-court statements made by developmentally disabled victims of abuse. See *Vermont Rules of Evid., V.T.R.E*. 804a (recognizing a hearsay exception for proceedings in which the child **or** person with a mental illness or developmental disability is a putative victim of sexual abuse.); *MINN. STAT.* § 595.02, Subd. 3 (making out-of-court statement by a child under the age of ten years **or** a person who is mentally impaired describing any act of sexual contact act of physical abuse admissible under certain circumstances); *Florida Evid. Code* 90.803(24) (creating a hearsay exception of "disabled adults" describing any act of abuse or neglect.)

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A. A Substantial Need Exists for Adoption of a Specific Hearsay Exception for Individuals with Intellectual Disabilities

Courts have long concluded that "there is a compelling need for admission of hearsay arising from young sexual assault victims' inability or refusal to verbally express themselves in court when the child and the perpetrator are sole witnesses to the crime." *State v. Sorenson* (Wis. 1988) 143 Wis. 2d 226, 243. Victims who have the mental capacity of a child present the same concerns. In determining competence to stand trial, an appellate court found "no significant difference between an incompetent adult who functions mentally at the level of a 10- or 11-year-old due to a developmental disability and that of a normal 11-year-old whose mental development and capacity are likewise not equal to that of a normal adult." *Timothy J. v. Superior Court*, (2007) 150 Cal.App.4th 847, 861.

In 2018, the Mississippi Law Journal published an article entitled "Hearing The Unheard: Crafting A Hearsay Exception For Intellectually Disabled Individuals," which encouraged states to adopt a specific hearsay exception for individuals with intellectual disabilities. *Geter A*. (2018) Hearing the Unheard: Crafting a Hearsay Exception for Intellectually Disabled Individuals, Mississippi Law Journal, 87 MISS. L.J. 469. The article pointed out that although some states have adopted hearsay exceptions for specific classes of vulnerable members of society, many limit the exception to children under a certain age, which could range from children under ten to children under the age of sixteen. *Id* at 475, fn 21. California currently falls in this category.

California Evidence Code § 1253 provides, in substance, that hearsay statements of a child victim describing any act, or attempted act, of

child abuse or neglect are admissible if the statement was made for purposes of medical diagnosis or treatment and describes medical history as reasonably pertinent to diagnosis or treatment. Evid. Code §1253. This section however applies only to a statement made by a victim who is a minor at the time of the proceedings, provided the statement was made when the victim was under the age of 12.*Id*. Indeed, the trial court acknowledged this exception in relation to T.T.s statements to Dr. Liberman and Dr. Tsutsumi but found that they were inadmissible because Plaintiff's chronological age was over 12. This finding precluded admission of the statements made by T.T. to his doctors, even though the statements were being made for purposes of medical diagnosis or treatment and contained special indicia of reliability.

B. **Appellant's Proposed Hearsay Exception**

Appellant proposes that at the very least this court should expand Calif. Evid. Code §1253 to also include those developmentally disabled victims that have the mental capacity equivalent to a minor at the time of the proceeding, allowing admission of statements made by a developmentally or intellectually disabled adult who functions at a mentally capacity under the age of 12. However, if after determining the exceptional need, the court agrees that a broader exception is warranted, Appellant requests that the court adopt the exception modeled after Vermont Rules of Evidence V.T.R.E. 804a. as follows:

> **Hearsay Exception; Putative Victim Age 12 Or Under; Person With A Mental Illness Or Developmental Disability**
>
> (a) Statements by a person who is a child 12 years of age or under or who is a person with a mental illness as defined in [Insert appropriate Cal. Statute] or developmental

disability as defined in [Insert appropriate Cal. Statute] at the time the statements were made are not excluded by the hearsay rule if the court specifically finds at the time they are offered that:

(1) the statements are offered in a civil, criminal, or administrative proceeding in which the child or person with a mental illness or developmental disability is a putative victim of sexual assault under [insert Calif. Statute], aggravated sexual assault under [insert Calif. Statute], aggravated sexual assault of a child under 13 [insert Calif. Statute], lewd or lascivious conduct under [insert Calif. Statute], lewd or lascivious conduct with a child under 13 [insert Calif. Statute], incest under 13 [insert Calif. Statute], abuse, neglect, or exploitation under [insert Calif. Statute], sexual abuse of a dependent adult under [insert Calif. Statute], any offense in which bodily injury or serious bodily injury is an element as defined in [insert Calif. Statute], or wrongful sexual activity and the statements concern the alleged crime or the wrongful sexual activity; or the statements are offered in a juvenile proceeding involving a delinquent act alleged to have been committed against a child 13 years of age or under or a person with a mental illness or developmental disability if the delinquent act would be an offense listed herein if committed by an adult and the statements concern the alleged delinquent act; or the child is the subject of a petition alleging that the child is in need of care or supervision under [insert W.I.C section], and the statement relates to the sexual abuse of the child;

(2) the statements were not taken in preparation for a legal proceeding and, if a criminal or delinquency proceeding has been initiated, the statements were made prior to the defendant's initial appearance before a judicial officer

(3) the child or person with a mental illness or developmental disability is available to testify in court; and

(4) the time, content, and circumstances of the statements provide substantial indicia of trustworthiness.

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CONCLUSION

The trial court erroneously excluded admissible evidence on hearsay grounds and ignored the deposition testimony of Plaintiff in making its finding that no triable issue of material fact existed. This was prejudicial error of the highest magnitude when the result is a miscarriage of justice to a class of victims that deserve our protection. Plaintiffs-respectfully ask that this Court reverse the decision of the trial court,vacate the order granting Defendants' motions for summary judgment and remand the case back for further proceedings.

Respectfully submitted,

MCMURRAY HENRIKS, LLP

Dated: December 10, 2021 By: /s/ *[Yana G. Henriks]*
Yana G. Henriks
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 9,071 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

/s/ *[Yana G. Henriks]*
Yana G. Henriks

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1. At the time of service I was at least 18 years of age.

2. a. My [ ] residence [x] business address is *(specify)*:
   811 Wilshire Blvd., Ste. 1640, Los Angeles, CA 90017

   b. My electronic service address is *(specify):* sridgill@law-mh.com

3. I electronically served the following documents *(exact titles):*
   (1) APPELLANT'S OPENING BRIEF;
   (2) JOINT APPENDIX, FILES 1-9 OF 9, VOLUMES 1-9 OF 9, PP. 00001-3547; and
   (3) JOINT STIPULATION OF APPELLANTS AND RESPONDENTS RE: JOINT APPENDIX

4. I electronically served the documents listed in 3. as follows:
   (via TrueFiling e-service)
   a. Name of person served: Susan Lynn Oliver, Esq. & Emily Sacks Berman, Esq.
   On behalf of *(name or names of parties represented, if person served is an attorney)*:
   Defendants and Respondents CENTINELA VALLEY UNION HIGH SCHOOL DISTRICT and ANDY MEHTA

   b. Electronic service address of person served: soliver@tysonmendes.com;; eberman@tysonmendes.com

   c. On *(date):* Dec. 10, 2021

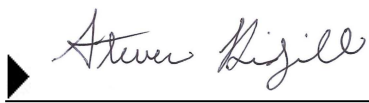
   [x] The documents listed in 3. were also served electronically on the persons and in the manner described below.

   I also electronically served (via TrueFiling e-service) the documents listed in 3. as follows:
   a. Name of person served: Kenneth Szeto, Esq.
   On behalf of: Defendant and Respondent JUAN GUTIERREZ
   b. Electronic service address of person served: ken@emergent.law; chrisyee@emergent.law
   c. On *(date)*: Dec. 10, 2021

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: Dec 10, 2021

Steven Ridgill
(TYPE OR PR NT NAME OF PERSON COMPLETING THIS FORM)



(SIGNATURE OF PERSON COMPLET NG THIS FORM)

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