IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

JAMES SAFECHUCK,
Plaintiff and Appellant
v.
MJJ PRODUCTIONS, INC., et al.,
Defendants and Respondents.

WADE ROBSON,
Plaintiff and Appellant,
v.
MJJ PRODUCTIONS, INC., et al.,
Defendants and Respondents.

California Court of Appeal, Second District, Division Eight Civil No. B309450
Appeal from Los Angeles County Superior Court, Case No. BC545264
California Court of Appeal, Second District, Division Eight
Civil Nos. B308602, B313436
Appeal from Los Angeles County Superior Court, Case No. BC508502
Honorable Mark A. Young, Judge Presiding

PETITION FOR REVIEW

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ISSUES PRESENTED

The published Opinion and Concurrence in these consolidated cases present at least two issues requiring review:

1. Do corporations and their individual employees have a duty—both fiduciary and negligence-based—to police, and warn others about, an employee's suspected off-hours misconduct unrelated to the employee's employment?

2. Can a plaintiff circumvent the statutory requirements for suing a decedent's estate based on the decedent's alleged intentional torts, by suing the decedent's solely-owned loan-out company on the theory that the loan-out company negligently failed to prevent the decedent from engaging in the allegedly tortious conduct?

INTRODUCTION

The published Opinion and Concurrence in this case create a sea-change in the law. They require employers to police their employees' off-duty conduct, unrelated to their employment, and occurring in their own homes; and to report any *suspicion* that employees have engaged in off-duty misconduct, to potentially confront the suspected wrongdoing employee directly, and to warn others who could hypothetically be harmed by *suspected*, but not known, misconduct. This newly-minted requirement blurs the line between intentional torts and negligence, and also effectively expands *respondeat superior* liability to misconduct

that this Court has all but categorically held is outside the scope of employment.

To be sure, such a change may allow plaintiffs harmed by an individual's misconduct to recover from a defendant with deeper pockets. But it will also force California employers into intrusive supervision of their employees' off-duty, private conduct in their own homes.

The new duty requiring warning about, and confrontation of, employees— including corporate superiors—is triggered *by suspicion alone*. That will necessarily lead to false accusations—after all, even the most reasonable suspicions are often wrong. Such false accusations will lead to defamation claims (the duty is not limited to mandated reporters who would be immune from such liability in many circumstances), along with employees being terminated for "warning" others of suspicions of serious misconduct that turn out to be false. Indeed, the Opinion *expressly acknowledges* that "the *likely* consequence of [reporting or confronting based on suspicions] would have been termination of employment." (Slip Opinion ("Op.") 25, italics added.) The Opinion cites no case, and we have found none, imposing a duty on an employee to take actions that will "likely" result in termination of the employee's employment. This is particularly concerning given that the Opinion conducts *no analysis whatsoever* of whether employees' reporting and "likely" termination would actually help alleged victims.

In short, the unique, new duties created by the Opinion and Concurrence will have significant ripple effects throughout

California. Making these effects even more pronounced, the Opinion and Concurrence do not meaningfully define the scope of the new duties they create, causing uncertainty for all California employers about what exactly they must do to protect themselves from potentially devastating liability where employers' conduct and the suspicious they supposedly should have had will often be measured years, or decades, later with the benefit of 20/20 hindsight. And this is not just limited to California employers trying to protect themselves from *future* liability. The Opinion and Concurrence's vague reasoning leaves companies potentially open to liability based on off-duty conduct, unrelated to employment, of employees from decades past.

The Opinion and Concurrence will also have significant consequences for closely-held or loan-out corporations, which are ubiquitous in this State, particularly (but not only) in the entertainment industry. Under the Opinion and Concurrence, a claimant can circumvent both the Probate Code's claim filing requirements and the Code of Civil Procedure's one-year post-death statute of repose for suing a decedent's estate based on decedent's intentionally tortious conduct, solely by alleging that the decedent, through his loan-out company, failed to control *his own* conduct.

Such suits filed years after a decedent's death are especially problematic. The Probate Code's claim filing requirements and the Code of Civil Procedure's one-year post-death statute of repose are designed to encourage expeditiously settling decedents' estates so that title to property can pass to

heirs and beneficiaries unencumbered by stale claims attached to that property. (*Dobler v. Arluk Med. Ctr. Indus. Grp., Inc.* (2001) 89 Cal.App.4th 530, 536.) Endorsing such an easy way to circumvent this carefully-crafted legislative scheme means estates may need to be held open for years—or even decades—longer than they are now. Neither an estate administrator nor a probate court could approve the distribution of property to beneficiaries without certainty that distributed property is not encumbered by liabilities like these.

Given their widespread impact, the published Opinion and Concurrence cry out for review. If liability is going to be expanded in such dramatic fashion, this Court is the tribunal that should do so. And if the Court is inclined to adopt duties along the lines of the Opinion and Concurrence, it should meaningfully define the scope of such duties so California employers can adjust their conduct accordingly—something the Opinion and Concurrence just did not do.

STATEMENT OF THE CASE

The Opinion involves claims of sexual misconduct during off-work hours, unrelated to any employment, made by two individuals against Michael Jackson years after Jackson died, and decades after the alleged misconduct. Neither Jackson nor his estate are defendants because the individuals did not comply with the Probate Code and Code of Civil Procedure requirements for suing them. Rather, the defendants are two entities that Jackson wholly owned and which he created for the purpose of providing his own personal services as a recording artist and pop

star, petitioners MJJ Productions, Inc. and MJJ Ventures, Inc. ("the Corporations"),

A. 2013/2014: Wade Robson and James Safechuck sue Michael Jackson's estate and loan-out corporations, alleging that Jackson molested them decades earlier.

Michael Jackson passed away on June 25, 2009. Four years later, in 2013, Wade Robson sued Jackson's estate and Jackson's wholly owned loan-out companies, MJJ Productions and MJJ Ventures. (Op. 3.) Robson alleged that Jackson had molested him in the early 1990s, and that the Corporations had failed to prevent the alleged molestation. (Op. 12-13.)[1]

The following year, in 2014, James Safechuck filed a suit making similar claims. (Op. 3, 10.)

B. 2015: The trial court dismisses plaintiffs' claims against Jackson's estate in final orders that plaintiffs do not appeal.

The Probate Code and Code of Civil Procedure impose strict requirements on filing claims and suits for money damages against a decedent's estate based on the decedent's conduct.

[1] Citations to Robson's Court of Appeal appendix are in the format [vol.]-Robson-RAA:[page] (redacted volumes) and [vol]-Robson-UAA:[page] (unredacted volumes). Citations to Safechuck's Court of Appeal appendix are in the format Safechuck-AA:[page]. Citations to the Corporations' respondents' appendix in *Safechuck* are in the format Safechuck-RA:[page].

The Probate Code requires filing a claim against a decedent's estate based on the decedent's personal liability within four months of letters being issued to a personal representative or 60 days of mailing of notice of administration. (Prob. Code, §§ 9000, 9002, 9100, 9103.) A civil suit against the estate is "forever barred" unless a timely claim is filed and then rejected, in whole or in part. (*Dobler*, *supra*, 89 Cal.App.4th p. 536; Prob. Code, § 9351.) Independently, the Code of Civil Procedure provides that no suit can be filed against a decedent's estate, based on a personal liability of a decedent, except within one year of the date of death, "and the limitations period that would have [otherwise] been applicable does not apply." (Code Civ. Proc., § 366.2, subd. (a).) This one-year period "shall not be tolled or extended for any reason except" in four limited circumstances, none of which apply here. (*Ibid.*, subd. (b).)

Plaintiffs did not file timely Probate Code claims against Jackson's estate, and they filed suit *many* years after Jackson's death. Their claims against Jackson's estate were thus doubly-barred. And indeed, in 2015, after extensive litigation, the trial court denied their petitions for leave to file late claims against the Jackson estate, and dismissed those claims. (6-Robson-RAA:3667-3688; Safechuck-Appendix to Motion for Judicial Notice 103-105, 113-126.)

Neither plaintiff appealed the trial court's orders dismissing his claims against the Estate. The dismissal orders are, thus, long-since final.

C. After dismissal of their claims against Jackson's estate, plaintiffs focus on their claims against Jackson's solely-owned loan-out companies.

After the court dismissed plaintiffs' claims against Jackson's estate, plaintiffs focused on Jackson's loan-out corporations. Each plaintiff alleged that he and his family had a close relationship with Jackson as a minor; that Jackson had repeatedly sexually abused him during the relationship; that the Corporations had a duty to protect plaintiffs from Jackson and prevent the alleged abuse; that some of the Corporations' employees had reason to *suspect* the abuse; and that the Corporations' employees facilitated the alleged abuse by, among other things, arranging transportation and travel arrangements, and enabling Jackson to be alone with him. (Safechuck-AA:6-59; 1-Robson-RAA:48-51; Op. 3-16.)

Each plaintiff's operative complaint alleged six causes of action: (1) intentional infliction of emotional distress; (2) negligence; (3) negligent supervision; (4) negligent retention/hiring; (5) negligent failure to warn, train, or educate; and (6) breach of fiduciary duty. (Op. 10-11.)

D. The trial court sustains the Corporations' demurrer as to Safechuck's claims, and grants summary judgment on Robson's claims.

The Corporations demurred to Safechuck's operative complaint, and moved for summary judgment on Robson's

operative complaint.[2] The trial court sustained the demurrer without leave to amend, and granted the summary judgment motion. (Op. 3; 9-Robson-RAA:7240-7252; Safechuck-AA:317-325.) Its rationale was largely the same in both cases:

● Plaintiffs' negligence causes of action fail because Jackson was both Corporations' sole shareholder, and the Corporations therefore had no legal ability to control his business affairs, let alone his conduct within his own home and other residences. (9-Robson-RAA:7248-7250; Safechuck-AA:321-322.)

● Plaintiffs' intentional infliction of emotional distress claim failed because they were attempting to hold the Corporations directly liable for child procurement, a theory of direct sexual abuse, and the statute of limitations for a direct abuse clam against entities (as opposed to natural persons) had expired. (9-Robson-RAA:7250-7251; Safechuck-AA:320-321.)

● Plaintiffs' breach of fiduciary duty claim failed because the allegations and evidence did not support a finding that the Corporations were plaintiffs' fiduciaries. (9-Robson-RAA:7251-7252; Safechuck-AA:318-320.)

[2] The trial court had previously granted summary judgment against Robson, and sustained a demurrer against Safechuck, on statute of limitations grounds under Code of Civil Procedure section 340.1; the Court of Appeal reversed those judgments and reinstated the claims when section 340.1 was amended while the appeals were pending. (*Safechuck v. MJJ Productions, Inc.* (2020) 43 Cal.App.5th 1094 [consolidated opinion also covering *Robson*].)

The trial court also ruled that Safechuck's specific negligence theories (negligence per se claim for failing to comply with the mandatory child abuse reporting statute; negligent supervision/retention/hiring; negligent failure to train/warn/educate) failed for more specific reasons. (Safechuck-AA:322-325.)

Each plaintiff appealed.

E. In a consolidated, published opinion, the Court of Appeal reverses the *Safechuck* and *Robson* judgments.

The Court of Appeal consolidated plaintiffs' appeals for oral argument and decision, and issued an opinion reversing both the *Safechuck* demurrer and the *Robson* summary judgment.[3] The Court of Appeal published the Opinion and a separate Concurrence.

1. The Opinion.

The Court of Appeal held, in relevant part:

● *Special relationship giving rise to duty*. The Corporations had a "special relationship" with plaintiffs giving rise to a duty to protect them from Jackson. The Opinion mentions various factors in reaching this finding, without specifying which, if any, would have been dispositive on its own. The mentioned factors include: (i) plaintiffs were minors; (ii) the Corporations sometimes

[3] The Opinion also affirmed the grant of discovery protective orders and an order sanctioning Robson's counsel. (Op. 30-36.) Those rulings are not at issue here.

employed them; (iii) the Corporations employed staff who worked at Jackson's residences; (iv) the Corporations adopted policies and procedures enabling Jackson to be alone with plaintiffs; and (v) employees of the Corporations were allegedly aware of a risk of molestation. (Op. 20-24.)

● *Nature of duty.* Any director or employee of the Corporations who suspected the possibility of abuse had a duty to warn plaintiffs, go to the police, and/or to confront Jackson himself, even if they would immediately have been fired for doing so: "Yes, the likely consequence of [taking these steps] would have been termination of employment or removal from the board of directors." (Op. 25.) The Corporations' directors and employees nonetheless "had a duty to jeopardize their positions and compensation to protect plaintiffs." (*Ibid.*) The Court conducted no inquiry into whether taking these steps, which it concedes would "likely" result in immediate removal, would have *actually* "protect[ed] plaintiffs."

● *Specific negligence claims.* The Corporations' specific arguments regarding Plaintiffs' claims for negligent hiring/supervision/retention and failure to warn do not support affirmance. (Op. 28; Robson Respondents' Brief (Robson RB) 66-70.) The Opinion did not explain its basis for rejecting the Corporations' arguments; it simply said that the Corporations' cited cases involved different facts and legal issues, "thus driving an entirely different duty analysis." (Op. 28.)

● *Fiduciary duty.* Because the Corporations had a "special relationship" with plaintiffs for *negligence* purposes, they also

owed plaintiffs a *fiduciary* duty, allowing plaintiffs to pursue their breach of fiduciary duty claims. (Op. 29.)

● *Intentional infliction of emotional distress*. There are triable issues as to whether the Corporations acted intentionally or with reckless disregard in allegedly making plaintiffs available to Jackson. (Op. 28-29.) The Opinion did not address the trial court's ruling that plaintiffs' claims amount to procurement/ direct abuse and are time-barred.

2. The Concurrence.

Justice Wiley joined the Opinion in full but also separately concurred. He opined:

● "For tort purposes, to treat Jackson's wholly-owned instruments as different from Jackson himself is to be mesmerized by abstractions. This is not an alter ego case. This is a same ego case. For tort purposes, Jackson's corporations *were* Jackson." (Concurrence (Conc.) 1.)

● Duty can be based on an after-the-fact determination of whether the defendant was in a cost-effective position to prevent harm: The Corporations owed plaintiffs a duty because "the expected benefit of investments in harm-avoidance outweighs the burden." (Conc. 1.) The Corporations "could have taken cost-effective steps to reduce the risk of harm": Specifically, "Jackson could have restrained *himself*" and, through the Corporations, could have "established codes of conduct to prohibit sexual relationships between adults and youths," "barred adults from being alone with youths," or "provided guards or chaperones to

prevent improper conduct by adults." (Conc. 3-4, italics in original.)

The Concurrence did not specify a legal basis for dismissing the corporate form as an "abstraction"—setting aside the corporate form is generally not something taken so lightly. The Concurrence does not explain why this *is not* an alter ego case, whether the criteria for alter ego liability are met here, or what a "same ego" case is. Nor did it explain how Jackson's loan-out corporations could have barred Jackson from being alone with youths, particularly when he was not working, the youths were not working, and Jackson was in the privacy of his own home.

The Concurrence also did not address how plaintiffs' claims can proceed on the basis that Jackson *is* the Corporations when the Probate Code claims-filing deadline and the statute of limitations for claims against a decedent's estate bar any claim against Jackson personally.

WHY REVIEW IS NECESSARY

A. Whether corporations have a duty to police, and warn others about, their employees' off-hours conduct, unrelated to their employment is a critical issue with sweeping, statewide implications.

The Opinion holds that the Corporations had a special relationship with plaintiffs and therefore had a duty to protect them from Jackson (Op. 20-28)—even though the alleged molestation occurred during off-hours at Jackson's *own personal*

residences or other private locations, and had nothing to do with Jackson's "employment" by the Corporations.

To justify that holding, the Opinion emphasizes the plaintiffs' claims that the Corporations sometimes employed plaintiffs, employed household staff at Jackson's residences, and "adopted polices and operations enabling Jackson to be alone with plaintiffs." (Op. 24.) But there is no indication that the alleged molestation occurred during Jackson's or plaintiffs' work hours (or even during periods when plaintiffs were allegedly employed), that it had anything to do with plaintiffs' work for the Corporations, or that the plaintiffs trusted Jackson because the Corporations somehow vouched for him.

The Opinion, thus, can and will be read as imposing a duty on employers to monitor, report, and warn about their employees' off-hours, non-work-related conduct, in employees' own homes, even when the contacts between employees and alleged victims did *not* arise out of any relationship with the employer. Whether such a duty exists, and what its contours are, requires this Court's review.

1. The Opinion imposes a new duty on corporate directors and employees to police, and warn about, an employee's behavior in his own home—even if they would be fired or face defamation liability for doing so.

The duties that the Opinion impose are sweeping.

The Opinion holds that the Corporations had a duty to prevent, or warn about, conduct that plaintiffs allege occurred in *private* locations: Jackson's *homes* (Neverland Ranch and condominiums, all of which he owned personally); Robson's home; Jackson's trailer (on a television commercial unrelated to the Corporations); and hotel rooms (not booked in the Corporations' names). (Op. 5-6, 12-13.)

Although the Opinion bases its duty holding in part on the fact that the Corporations sometimes employed plaintiffs, the Opinion does not link the duty to conduct that occurred during work hours; or to the *brief timeframes* that plaintiffs were allegedly employees (occurring long after the alleged molestation began); or to contacts *arising out of* any employment relationship. And although the Opinion bases the duty in part on the fact that Corporations' employees allegedly staffed Jackson's residences, and sometimes arranged transportation, the Opinion never indicates that the Corporations *controlled* the locations where the molestation allegedly occurred, nor does it limit the duty to conduct occurring at locations staffed by the Corporations' employees. Rather, the Opinion holds that the Corporations owed a broad duty to protect plaintiffs from Jackson, with no limitations regarding when or where alleged molestation occurred.

Moreover, the Opinion's duty falls on a broad swath of individuals: "*Any* director, employee, or other agent" who *suspected* abuse, (Op. 25, italics added), with suspicion even based on rumor and "gossip." (Op. 6.) And, according to the

Opinion, these individuals owed a duty to act even if they would have been immediately fired for doing so. They had a duty to issue warnings, go to the police, and even to confront Jackson about his alleged off-hours behavior in his own home even though "the likely consequence of [doing so] would have been termination of employment or removal from the board of directors." (Op. 25.) Put another way: They "had a duty to jeopardize their positions and compensation to protect plaintiffs." (*Ibid.*)

The Opinion's holding that employees must confront a suspected abuser directly, based solely on suspicion, is particularly troubling. Accusing someone of being a pedophile is among the most serious accusations a person can make. It is foreseeable that some would react to such accusations—true or not—in extreme, even violent, ways. The Opinion does not acknowledge this, or analyze whether the costs of requiring private citizens to accuse others of being pedophiles (based on suspicion alone, including rumor) outweighs the potential benefits of such a requirement.

The Opinion also does not analyze whether the steps it says employees should have taken would have made *any* difference or what level of suspicion triggers a duty to report, warn, or confront.[4] Nor does the Opinion cite any precedent for requiring employees to monitor and report on fellow employees' conduct in

[4] *All* of the alleged conduct in the *Safechuck* case occurred before Jackson was ever investigated or publicly accused of abusing others (and most of the alleged conduct in the *Robson* case occurred before then as well).

their own homes (especially the conduct of their boss or the employer's sole shareholder and sole director), or for requiring employees to take affirmative steps that will likely get them fired, sued, or worse. Just the opposite: The Opinion observes that "there are no comparable precedents." (Op. 24; see also Op. 2-3 ["[t]here is certainly no comparable case law to recite"]; Conc. 1 [duty involving corporations wholly owned by one person is a "question of first impression"].)

2. Given the newly-created duty's broad ramifications, this Court should consider whether it in fact exists.

The Opinion's new duty for employers and employees to monitor and report on employees' private conduct has broad ramifications for corporations and employees throughout the state. Among other things:

The Opinion's duty invades employee privacy. The Opinion requires employers to take affirmative steps to try to prevent their employees from committing tortious conduct, unrelated to their work, outside the workplace, and during off-hours. This includes adopting policies that impose restrictions on or require supervision of employees when they are off-the-clock in their own homes. And employees must report each other's *suspected*, off-the-clock misconduct—to the police; *and/or* to the alleged wrongdoer directly by confronting him or her; *and/or* directly to anyone who they think may be at risk (the Opinion is not clear on whether the duty is to choose among these, or to do all of them). These deeply invasive monitoring, confrontation, and

reporting requirements raise serious privacy issues, particularly given that the California constitution enshrines privacy as an inalienable right. (Cal. Const., art. I, § 1.)

The Opinion's duty heavily burdens employees and directors. As this Court recently re-affirmed, courts' "'duty analysis is forward-looking' in regard to policy issues surrounding burdens that would be placed on defendants." (*Kuciemba v. Victory Woodworks, Inc.* (2023) 14 Cal.5th 993, 1022.) The Opinion holds that the Corporations' employees and directors had a duty "to jeopardize their positions and compensation" by doing "something" such as issuing warnings, going to the police, or confronting Jackson. (Op. 25.) By extension, employees and directors of other companies have that same burden, any time they even *suspect* potential abuse.

This is a heavy forward-looking burden: Any employee or director who fails to report/warn/confront based on their suspicions faces potential tort liability—but anyone who *does* report, warn, and/or confront the alleged wrongdoer based on their suspicions will "likely" face termination (*ibid.*), and potential defamation liability to boot. (See, e.g., *Cuff v. Grossmont Union High School Dist.* (2013) 221 Cal.App.4th 582, 584-585, 590-591 [reversing dismissal of defamation action where school counselor provided boys' father with report that mother was abusing them; counselor was a mandated reporter, but she had no immunity under the mandated-reporter statute because report was to parent, not law enforcement].)

The Opinion's duty conflicts with the statutory mandated reporter framework. The Legislature has created a comprehensive regime for mandatory reporting of suspected child sexual abuse, the Child Abuse and Neglect Reporting Act ("CANRA"). (See Pen. Code, §§ 11164 et seq.) CANRA defines who is a mandated reporter, what level of suspicion triggers the reporting requirement, and to whom reports are made. (*Id.*, §§ 11166, 11165.7, 11165.9.) It requires that both the identity of the reporter and the report itself be kept confidential. (*Id.* §§ 11167, 11167.5.) And, it provides absolute civil and criminal immunity for any mandated reporter making a report pursuant to CANRA, but only qualified immunity for others making reports—non-mandated reporters have immunity only if they report to an authorized agency, and not if the report is later determined to have been false and made with reckless disregard for the truth. (*Id.*, §§ 11166, subd. (g), 11172, subd. (a).)

The above requirements make perfect sense. Where a reporting scheme is based on suspicion, there will inevitably be reports made where no abuse actually occurred. Thus, making the reports confidential and immunizing the reporters from potential liability are key to protecting the reporter and the reported, in addition to protecting potential victims.

The Opinion throws this all out the window. It turns directors and employees into mandated reporters regardless of whether the Legislature has defined them as such; it fails to define what level of suspicion triggers the requirement; it requires warning *anyone* who the director or employee believes

may be in danger rather than restricting reports to proper authorities, who are presumably trained in evaluating such reports and determining what action should be taken based on them; it even requires confronting the suspected abuser directly; it makes no provision for confidentiality (indeed, by definition, if a director or employee must warn others, there is no anonymity or confidentiality); and, by requiring reporting outside of CANRA's framework, it leaves reporters exposed to potential retaliation and defamation liability to the subject of the report.[5]

If the law is to change so that a general duty to warn exists for non-mandated reporters, this Court should define the contours of that duty so that individuals and organizations who

[5] The Opinion's approach also conflicts with other appellate decisions rejecting duties to warn for non-mandated reporters, including in cases where the molester was a *convicted pedophile*. For example, in *Conti v. Watchtower Bible & Tract Society of New York, Inc.* (2015) 235 Cal.App.4th 1214, a minor congregant of a church was molested by a congregant who church elders *knew had previously been convicted of molesting another child*. (*Id.* at pp. 1227-1231.) The Court of Appeal held that the relationship between church and congregant did *not* require the church to warn members of dangers posed by that adult congregant. (*Ibid.*) Requiring churches to continuously monitor members for inappropriate behavior, and to gauge what behavior justifies warning another member about possible harm, would be overly burdensome. (*Id.* at p. 1228.) Here, requiring employers to do the same with respect to employees poses the same, if not a heavier, burden. (See also *Eric J. v. Betty M.* (1999) 76 Cal.App.4th 715, 717 [parents who had been warned by probation officer that their convicted pedophile adult son would likely offend again had *no duty to warn* adult son's girlfriend about dangers he might pose to girlfriend's child, even though all three slept over at parents' house on several occasions].)

now have a reporting duty are on notice of what triggers the duty, who needs to be warned, and how and when the warning should be made.

The Opinion leaves open the possibility that an alleged wrongdoer must report himself. The Opinion repeatedly refers to "directors" having a duty to report, warn, and confront. But Jackson was *the sole director* of both Corporations until June 1994, long after the alleged abuse of Safechuck ended altogether, and after Robson's family was aware of allegations of abuse by Jackson. (See Op. 4-5 [abuse of Safechuck allegedly ended in 1992], 13 [Jackson was sole director of both Corporations until 1994], 30 [undisputed that Robson's mother was aware of allegations in 1993 that Jackson had molested another boy].) So, the Opinion can *only* be read to mean that Jackson was required to warn others about his own *alleged* criminal proclivities.

The Opinion's repeated references to *directors'* duties thus invites the conclusion that *Jackson*—the only director for most of the relevant period—had a duty to report himself, to warn others about his own alleged misconduct, etc. This raises Fifth Amendment and other public policy issues. (See *Kassey S. v. City of Turlock* (2013) 212 Cal.App.4th 1276, 1280 [imposing duty on mandatory reporters to self-report would violate Fifth Amendment].)

The Opinion creates new fiduciary relationships. The Opinion concludes that the Corporations and their employees and directors also had a *fiduciary* duty to protect the plaintiffs. (Op.

29.) The sum total of the Opinion's reasoning is that where there is a "special relationship" imposing a duty to protect and warn for *negligence* purposes, there is also necessarily a *fiduciary* relationship. (*Ibid.*) This analysis is unprecedented and unsupported.

The sole authority the Opinion cites for this conclusion is *City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 386. (Op. 19.) But *City of Hope* never says, or even hints, that every "special relationship" imposing a duty for purposes of *negligence* liability is also automatically a *fiduciary* relationship. More to the point: *City of Hope* says nothing about the topic at all. The case was not a negligence case.

Fiduciary relationships and negligence-based special relationships are entirely different concepts, stemming from different areas of tort law altogether. For example, this Court has recognized that while insurers and their insureds have special relationships imposing disclosure duties, "'[a]n insurer is *not* a fiduciary, and owes no obligation to consider the interests of its insured above its own.'" (*Village Northridge Homeowners Assn. v. State Farm Fire & Casualty Co.* (2010) 50 Cal.4th 913, 929, italics added.) The Opinion's fiduciary duty holding conflicts with *Village Northridge.* It will sow confusion. Given the large number of other situations where a negligence-cased special relationship may be found—including employers/ employees, prisons/inmates, innkeepers/guests, and common carriers/passengers—review is necessary to check this significant expansion of the fiduciary duty doctrine that is contrary to the careful and cautious approach to

recognizing new fiduciary relationships which has governed in this state since this Court's decision in *City of Hope*.

The bottom line. Because the Opinion is published, employers, employees, and directors throughout the State will be subject to its new duties. Before allowing this new regime with such significant implications for privacy rights, employees' liability exposure, and CANRA to take hold—and before vastly expanding the number of relationships deemed fiduciary as a matter of law—this Court should review whether these duties in fact exist.

3. Even if there is a duty, the Opinion leaves many unanswered questions that will have corporations and their agents struggling to understand its contours.

Not only are the Opinion's duty holdings dubious, they create more questions than they answer. For example:

● Who owes the duty of protection: Every employee in an organization? Employees above a certain level?

● Who is the duty owed to? All minor employees? Only minor employees who the employer also allegedly housed, fed, and cared for? Minor customers/clients/participants, even if they were not employees? Any minor who comes into contact with a corporation's employee?

● What exactly *is* the duty: Warning parents? Reporting to the police? Confronting the accused? Refusing to "facilitate" conduct? Adopting policies regarding chaperones? The Opinion

and Concurrence mention all of these as possibilities (Op. 25, 30; Conc. 3-4), without specifying whether an employer, employee, or director must do *all* of these things, *one* of these things, or something in between.

● Whose conduct must be reported/prevented: Only fellow employees? Customers/clients? One's *own* conduct (as the Concurrence holds, see Conc. 3)?

● What level of suspicion triggers the duty: Observing overt sexual conduct? There are no allegations, or evidence, to support that overt sexual conduct was ever witnessed. So, ambiguous interactions? Knowledge of a friendship between an adult and a minor? Hearing rumors? Do employees have to affirmatively *look for* suspicious conduct, or is the duty triggered only if they happen upon it?

● If rumors are enough to trigger the duty: Do the rumors have to be about on-the-clock conduct in the workplace, or also conduct in an employee's personal life outside of work?

● Who does an employee or director who suspects abuse have to tell: A supervisor? Law enforcement? The parents of every minor who may come into contact with the potential abuser? All of the above? And if the initial report doesn't trigger any action, does the employee/director have to keep reporting? Does the employee or director still have the duty after they are fired (an outcome the Opinion recognizes is "likely," Op. 25)?

● What types of workplaces trigger the duty? Does a restaurant manager who sees an adult employee leave with a

minor employee or customer owe a duty to protect the minor employee or customer after they leave? What about a hotel bellhop or janitor who sees an adult sharing a room with an unrelated minor?

● Does every person who a jury could find, *in retrospect*, should have suspected himself of criminal tendencies have a negligence-based duty not to form a loan-out company or to employ himself? (See Op. 28 [summarily rejecting the Corporations' arguments on negligent hiring, retention, and supervision], Conc. 3.)[6]

● What is the scope of the *fiduciary* duty owed by virtue of there being a "special relationship" (Op. 29)? How does it differ from the duty that subjects the defendant to negligence liability?

The bottom line. The Opinion leaves employers, employees, and directors in the dark about exactly what it is they need to do to comply with the Opinion's new-found duties.

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[6] Plaintiffs' negligent hiring, retention and supervision claims were based on allegations that the Corporations, created *by* Jackson to run aspects of his own business, were negligent by hiring Jackson, not firing him, not adequately investigating his "background," and not sufficiently supervising him. (1-Robson-RAA:83, 86; Safechuck-AA:53-54, 259-260.) The Opinion does not explain how the Corporations were in a position not to hire Jackson, to fire him, or to supervise him given that he had full power over the Corporations. In that regard, the Opinion conflicts with the bedrock principal that a negligent supervision claim necessarily requires a plaintiff to "show that a person *in a supervisorial position over the actor* had prior knowledge of the actor's propensity to do the bad act." (*Z.V. v. County of Riverside* (2015) 238 Cal.App.4th 889, 902, italics added.)

Accordingly, even if these duties exist, review is necessary to clarify their scope.

4. The Opinion's and Concurrence's duty analysis eviscerates the line between intentional misconduct and negligence; in so doing, it effectively creates *respondeat superior* liability in situations where this Court has categorically rejected it.

Both the Opinion and Concurrence endorse a theory that an alleged abuser can be liable for negligently failing to restrain himself from engaging in abuse. (See fn. 6, *ante*; Op. 28 [allowing claim that Jackson, through his loan-out company, should not have hired himself]; Conc. 3 ["Jackson could have restrained *himself*," italics in original].) This eviscerates the line between intentional misconduct and negligence, and will create havoc in insurance law, among other areas. Specifically:

Insurers generally cover negligence but not intentional torts. So, for example, they will not cover liability for intentional sexual assault. But now, intentional torts committed by an individual can be refashioned as that individual's negligent failure to restrain himself, or "negligent supervision" of himself. Opening the door to this recasting destroys the line between negligence and willful misconduct, eradicating California's jurisprudence on this distinction. Every child molestation claim could be repleaded as a molester's negligent supervision of himself, rendering toothless this Court's holding that "[t]here is no such thing as negligent or even reckless sexual molestation."

(*J. C. Penney Casualty Ins. Co. v. M. K.* (1991) 52 Cal.3d 1009, 1021.)

The analysis also effectively creates *respondeat superior* liability for sexual assault in certain circumstances, a theory that the Court has rejected. For example, in *Lisa M. v. Henry Mayo Newhall Memorial Hospital* (1995) 12 Cal.4th 291, the Court held that a hospital did not have *respondeat superior* liability for its ultrasound technician molesting a patient, because the technician's misconduct was outside the course and scope of employment, even though it took place in the hospital, while the technician was on duty, during a purported diagnostic exam. (*Id.* at pp. 294-295.) The Court stressed that "the connection between [the technician's] employment duties—to conduct a diagnostic examination—and his independent commission of a deliberate sexual assault was too attenuated, without proof of Hospital's negligence, to support allocation of plaintiff's losses to Hospital as a cost of doing business." (*Id.* at p. 305.)

Lisa M. recognized that the hospital had a duty of ordinary prudence—i.e., that it could be liable in negligence if one of its agents had reason to believe that the technician would engage in such conduct and then negligently failed to take reasonable safeguards to prevent it. (*Id.* at p. 306.) The technician was certainly on notice of *his own* criminal tendencies and the dangers that he posed, and could have "restrained *himself*," as the Concurrence said Jackson should have done here. (Conc. 3, italics in original.) Under the Opinion and Concurrence's reasoning, then, the hospital *would* have been liable, because the

technician—its employee/agent—failed "to take all measures dictated by ordinary prudence to protect against even such unusual sources of injury,"(*Lisa M.*, *supra*, 12 Cal.4th at p. 306)—namely, by failing to restrain himself. (Conc. 3.) Yet, this Court imposed no such liability. Rightfully so: No precedent permits merging the supervisor and the supervisee into the same person, thereby transforming an employee's criminal conduct into the employer's negligent supervision by asserting the employee should have supervised *himself*. The Opinion and Concurrence, thus, clash with *Lisa M.* and open the door to new species of employer liability.[7]

To be sure, some may distinguish the situation here, where the alleged perpetrator owned the company from other cases involving employees lower down in the command chain. Two points in response to such a distinction:

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[7] (See also *Farmer's Ins. Group v. County of Santa Clara* (1995) 11 Cal.4th 992, 1007 [sheriff deputy's sexual assaults of co-workers were not in course or scope of employment: "'[i]f an employee's tort is personal in nature, mere presence at the place of employment and attendance to occupational duties prior or subsequent to the offense will not give rise to a cause of action against the employer under the doctrine of respondeat superior'"]; *Juarez v. Boy Scouts of America, Inc.* (2000) 81 Cal.App.4th 377, 394 [California courts "have consistently held that under the doctrine of respondeat superior, sexual misconduct falls outside the course and scope of employment and should not be imputed to the employer"], disapproved on other grounds by *Brown v. USA Taekwondo* (2021) 11 Cal.5th 204, 222, fn. 9.)

● *First*, there is no *logical* basis in the law of negligence or *respondeat superior* for such a distinction. If a company's owner is under a negligence-based duty to "restrain himself" and supervise himself, why would lower level employees not be?

● *Second*, even if one were to arbitrarily draw the line at a company's owner or the highest actors in the company, this *effectively* would make all closely-held corporations vicariously liable for *all* intentional torts of their owners. This would significantly change the law, as it would make all such corporations *effectively* liable in *respondeat superior* for any torts of their owners, regardless whether there is a relationship between the tortious conduct and the corporation's business.

The bottom line is that if such reasoning is going to be adopted, this Court should clarify how that squares with its prior jurisprudence in this area. Likewise, if there is a logical distinction between a company's owner/highest-placed employees and other employees/agents for purposes of the negligence theories adopted by the Opinion and Concurrence, this Court should articulate them so as to avoid confusion in future cases.

B. Whether a plaintiff can circumvent the Probate Code and Code of Civil Procedure deadlines for suing a decedent's estate by suing the decedent's loan-out company is an important issue with statewide implications.

Not only does the Opinion warrant review because of its sweeping new duty applicable to companies of all sizes and forms,

there is also another aspect of the Opinion and Concurrence that requires review: Whether plaintiffs can circumvent the Probate Code and the Code of Civil Procedure requirements for claims against a decedent by suing the decedent's loan-out/personal-services corporation instead.

1. Plaintiffs sued the Corporations as an end-run around the statutory deadlines for bringing a claim against a decedent's estate (a deadline plaintiffs missed here).

All of plaintiffs' claims here stem from *alleged* criminal conduct by Jackson in the 1980s and 1990s. Jackson died in 2009. Plaintiffs did not sue until roughly four years later. (6-Robson-RAA:3672; Safechuck-RA:4.)

Both plaintiffs initially tried to sue Jackson for straightforward claims of intentional torts, via his Estate, but the trial court ruled they could not do so because they failed to comply with the Probate Code's and the Code of Civil Procedure's requirements for suing a decedent's estate. (See *Safechuck* Appendix to Motion for Judicial Notice 103-105, 113-126; 6-Robson-RAA:3667; Robson RB 30; Safechuck RB 19-20; see also Prob. Code, §§ 9000, 9002, 9100, 9103 [deadlines for presenting claim for a decedent's liability]; Code Civ. Proc., § 366.2 [statute of repose to sue estate based on decedent's liability is one-year from date of death, with certain exceptions not relevant here].)

Plaintiffs did not appeal the dismissals of their claims against the Estate. Instead, they tried an end-run. They sued the

Corporations—which Jackson created for the sole purpose of providing his personal services in the music industry, and which he wholly owned and controlled—for failing to protect them from the alleged abuse by Jackson.

2. Allowing suits against loan-out corporations for the principal's personal misconduct after the deadline to sue the estate circumvents the Legislature's probate deadlines.

The straightforward lawsuit on the facts alleged here would have been against Jackson and his Estate, for abuse. The Estate cannot shelter assets from any judgment in such a case, as the Corporations are part of Jackson's and the Estate's assets and would therefore be subject to any judgment against Jackson or the Estate.

But because plaintiffs missed their deadline to file that lawsuit (by a wide margin), they instead contorted tort law to sue Jackson's wholly-owned loan-out corporations on the ground that individuals employed by Jackson's companies (including Jackson himself) had to intervene in Jackson's home life to protect plaintiffs from him.[8]

[8] The Legislature revived certain childhood sexual abuse claims in 2020, but expressly did *not* revive claims that had been litigated to finality by January 1, 2020. (Code Civ. Proc., § 340.1, subd. (q).) Plaintiffs' claims against the Estate were litigated to finality in 2015, when the trial courts dismissed the claims as time-barred and the time to appeal those rulings elapsed without either plaintiff pursuing an appeal. (6-Robson-RAA:3667-3688;

The Opinion recognizes that a loan-out company's liability for its employees' and directors' failure to prevent its principal's conduct is a matter of first impression. (Op. 2-3, 24.) But now, the floodgates are open, and more suits are inevitable. And this is no one off situation never to arise again—loan-out and personal-service companies are ubiquitous in California; they are the standard way that services are provided in the entertainment industry. They are also commonly used by professionals, like doctors, lawyers, and accountants.

The Opinion blesses this approach by creating a path to liability against loan-out companies for failing to control or prevent conduct by their sole owner/principal—even though it is the sole owner/principal who has complete control over the company as a matter of law. (Corp. Code, §§ 300, 312, subd. (b), 603, subd. (d); Safechuck RB 38-40; Robson RB 37-38 [explaining that under the Corporations Code, a corporation's sole shareholder controls the board].)

The Probate Code and Code of Civil Procedure's carefully-crafted scheme is designed, among other things, "'to promote the expeditious distribution of the assets of a decedent's estate.'" (*Venturi v. Taylor* (1995) 35 Cal.App.4th 16, 24.)[9] Yet, if the

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Safechuck Appendix to Motion for Judicial Notice 103-105, 113-126.) Furthermore, nothing in section 340.1, as revised, would make it applicable to estates for reasons that are beyond the scope of this brief.

[9] (See also *Nathanson v. Superior Court* (1974) 12 Cal.3d 355, 365 [same]; *Tulsa Professional Collection Services, Inc. v. Pope* (1988) 485 U.S. 478, 479-480 [short claims filing deadlines are "are almost universally included in state probate codes" and promote

Opinion's analysis is allowed to stand, probate estates would likely need to be held open for many years—if not decades as will be the case here if these cases go forward—until final resolution of all claims against wholly-owned corporations based on the decedent's alleged personal misconduct. No responsible estate administrator could possibly implement a final distribution of an estate among various beneficiaries without knowing whether a particular asset is encumbered by liabilities such as these. And no probate court could approve such a plan in any event.

The result: Under the Opinion, plaintiffs no longer need to comply with the Probate Code and Code of Civil Procedure requirements for suing a decedent; they can instead wait years after the decedent is gone and memories have faded, and then go after the decedent's loan-out company. This runs afoul of the legislative scheme governing claims against a decedent based "on a liability of the [deceased] person." (Code Civ. Proc., § 366.2, subd. (a).) Review is necessary to resolve that conflict.

3. The Concurrence's "same ego" theory allows a plaintiff to sue a loan-out company for its principal's actions despite missing the statutory deadline to sue the principal's estate.

As just discussed, the Opinion enables an end-run for suits that are really based on a decedent's conduct, by reframing

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the states' "interest in facilitating the administration and expeditious closing of estates"].)

liability as being based on the failure of the decedent's loan-out company to prevent the conduct. (pp. 35–38, *ante*.) The Concurrence allows an even more glaring end-run.

The Concurrence says that the Corporations "*were* Jackson." (Conc. 1, italics in original.) It explains: Jackson "totally controlled" the Corporations; they were not an "alter ego," but rather the "same ego"; they "did his bidding and his alone"; and they were his "marionettes," with his fingers "h[o]ld[ing] every string." (*Ibid*.)[10]

It poses the question as whether Jackson, as the Corporations' "puppetmaster" could have avoided the harm plaintiffs allege that *he* inflicted on them. (Conc. 3.) It answers the question "yes," because "Jackson could have restrained *himself*" by exercising "self-control." (*Ibid.*, italics in original.)

In other words, under the Concurrence, if Jackson committed abuse, the Corporations are automatically liable because Jackson controlled them and could have restrained himself. This amounts to strict liability for a decedent's wholly-owned companies based purely on the decedent's acts. There need not be any showing that anyone *else* affiliated with the loan-out company had reason to suspect abuse, that anyone else could have prevented it, or that anyone else failed to do something to

[10] We have found no opinion in any state or federal court—except this one—referring to a "same ego" liability theory. The Concurrence does not explain what was meant by this turn-of-phrase and what its significance is. It is unclear what future courts will make of it.

prevent it. All that matters is that the loan-out company's owner allegedly committed abuse, and failed to stop himself. There is no meaningful difference between that and a suit directly against the decedent's estate. It is nonsensical to allow the former after the latter is time-barred.

Accordingly, to the extent the Opinion doesn't require inserting corporate functionaries (other employees, directors) into employees' personal lives (pp. 18-28, *ante*), it and the Concurrence allow circumventing the Probate Code and Code of Civil Procedure deadlines based on the same facts as a time-barred suit against the decedent's estate. The Court should review whether such an end-run is in fact permissible before a raft of suits against loan-out companies hits the judicial system.

CONCLUSION

The Opinion breaks new ground, in ways that have sweeping implications. It imposes a broad, but vaguely-defined, duty for employers, directors, and employees to warn/report about employees' off-hours conduct in their own homes—even if the reporter would be terminated for reporting, and with no analysis of whether the reporting would make any difference. It conflates a "special relationship" for *negligence* purposes with a *fiduciary* duty, when neither precedent nor logic supports this conflation. It clashes with this Court's precedent limiting employers' *respondeat superior* liability for their employees' intentional torts. And, it permits an end-run around Probate Code and Code of Civil Procedure requirements for suits against a decedent's estate. Review is necessary to examine these new

theories before they permeate the legal system—and, if any of the theories survives that examination, to provide parameters so that courts, the bar, corporations, and employees know where they stand. The petition should be granted.

Dated: September 26, 2023

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CERTIFICATION

Pursuant to California Rules of Court, rule 8.504(d)(1), (d)(3), I certify that this **PETITION FOR REVIEW** contains 7,973 words, not including the tables of contents and authorities, the caption page, signature blocks, or this Certification page.

Date: September 26, 2023 /s/Jonathan P. Steinsapir

Jonathan P. Steinsapir