S213066

COPY 2

S_____
4th.Dist. No. E054516

IN THE SUPREME COURT

STATE OF CALIFORNIA

B.H., A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, LAURI HANSON,

Plaintiff and Appellant,

vs.

COUNTY OF SAN BERNARDINO, CITY OF YUCAIPA, K. SWANSON, JEFF BOHNER, LOUIS KELLY SHARPLES II,

Defendants and Respondents.

Appeal from the Superior Court of San Bernardino County
Case No. CIVDS 913403
Hon. Donald R. Alvarez, Judge

PETITION FOR REVIEW

ESNER, CHANG & BOYER
Andrew N. Chang, Bar No. 84544
Stuart B. Esner, Bar No. 105666
234 East Colorado Boulevard, Suite 750
Pasadena, California 91101
Telephone: (626) 535-9860

Attorneys for Plaintiff and Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

MISCELLANEOUS

ISSUES PRESENTED

1. Whether, under the clear text of CANRA (Penal Code section 11166(k)) as well the legislative history explaining why that provision was enacted, a law enforcement agency had a mandatory duty to immediately, or as soon as practicably possible, cross-report to the county's child protective services agency every known or suspected instance of child abuse or neglect reported to it, and to follow that cross-report with an additional written cross-report within 36 hours of receiving the information concerning the incident or, as the Court of Appeal held, despite the use of mandatory language in the statute, the law enforcement agency had discretion whether to make a cross report to the child protective services agency, an agency specifically tasked with protecting children?

2. Does CANRA (Penal Code section 11166(a)) create an objective standard under which mandated reporters are required to make a report "whenever the mandated reporter, in his or her professional capacity or within the scope of his or her employment, has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect" or, as the Court of Appeal held, does this section allow a mandated reporter to withhold a report as long as she claims she subjectively (and even unreasonably) believed no abuse occurred,

and in reaching that erroneous holding did the Court of Appeal improperly apply discretionary immunity to a mandatory duty?

WHY REVIEW SHOULD BE GRANTED

As a society, we have deemed "'[t]he prevention of sexual exploitation and abuse of children [to be] a government objective of surpassing importance.'" (*In re Duncan* (1987) 189 Cal.App.3d 1348, 1359, citing *New York v. Ferber* (1982) 458 U.S. 747, 757.)

The Child Abuse and Neglect Reporting Act (CANRA) (§ 11164 et seq.) was expressly enacted to protect children from abuse and neglect. (§ 11164.) To that end, CANRA's primary focus is to rectify the problem of inadequate child abuse reporting. (§ 11164 et seq.; *Krikorian v. Barry* (1987) 196 Cal.App.3d 1211, 1217.)

The issues presented for review concern the two most important aspects of child abuse reporting:

1. The requirement of cross-reporting of initial reports between a law enforcement agency and child protective services agency is a critical component of CANRA that has been recognized since its enactment:

> "**The child protective agency receiving the initial report must share the report with all its counterpart child protective agencies by means of a system of cross-reporting. An initial report to a probation or welfare department is shared with the local police or sheriff's department, and vice versa.** Reports are cross-reported in almost all cases to the office of the district attorney.

(§ 11166, subd. (k); *Planned Parenthood Affiliates v. Van de Kamp* (1986) 181 Cal.App.3d 245, 259-260.)

CANRA's system of immediate cross-reporting and 36-hour follow-up written cross-reporting by law enforcement to child protective services is absolutely critical because child protective services is mandated to intervene on all reports of imminent danger immediately, and to follow up on all other reports within an absolute drop dead time limit of 10 days. The San Bernardino County Sheriff's Department's failure to comply with CANRA's cross-reporting requirements to the San Bernardino County's child protective services agency (called Department of Children's Services, or DCS) caused the breakdown of the system that resulted in irreversible brain damage to this 5 year-old plaintiff and, unless rectified by this Court, countless future children in this and perhaps many other counties in California will be at risk of similar catastrophic child abuse.

2. Likewise, CANRA imposes an objective standard, requiring the 40 categories of mandated reporters to make a report of abuse "whenever the mandated reporter, in his or her professional capacity or within the scope of his or her employment, has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect." (Pen. Code, § 11166, subd. (a); *Alejo v. City of Alhambra* (1999) 75 Cal.App 4th 1180.)[1] The Legislature in subsequent amendment to CANRA in 2000 expressly recognized the

---

1 This Court discussed *Alejo* with approval in *Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 904-905.

desired continued validity of *Alejo*.

The Court of Appeal's opinion below utterly ignored these two crucial components of CANRA and affirmed a summary judgment that, unless corrected by this Court, will result in a tragic miscarriage of justice. The largest law enforcement agency in the largest county in the State of California does not know how to interpret or implement the critical cross-reporting mechanism of CANRA. The Court of Appeal for the Fourth District, Division Two has demonstrated that it too does not understand what CANRA expressly says and how it works.

This petition presents this Court with the ideal and timely opportunity to address an issue of statewide concern to our society that, as the United States Supreme Court recognizes, encompasses a "government objective of surpassing importance," while also preventing a grave injustice to this brain-damaged minor plaintiff and other present and future helpless victims of child abuse.

STATEMENT OF FACTS

A. Child Abuse Is Suspected by Family Members.

On the evening of September 21, 2008, Lauri Hanson picked up her five year-son Brayden after a court-ordered weekend visitation with the boy's father. Ms. Hanson immediately noticed disturbing bruises on Brayden's right forehead, right eye, left forehead, left eye, and a cut on his

left eye, and was told that he had fallen down the stairs at a fast food restaurant. (AA 428-431, 487-503.) Upon returning home, Ms. Hanson changed Brayden's clothing and saw that Brayden also had disturbing bruises on his left thigh, right thigh, mid-upper chest, right chest, mid-lower back, mid-upper back, lower right back and lower right side of his abdomen/flank. Christy Kinney, who was the woman who raised Ms. Hanson and with whom she and Brayden were living, advised her to photograph the injuries. (AA 428-429.) Photographs were taken by Ms. Hanson on September 22 at 2:34 p.m. (AA 428-431, 487-503, 553-597.)

Ms. Hanson and Brayden lived with Ms. Kinney, who considered herself a mother to Ms. Hanson and a grandmother to Brayden because Ms. Hanson had lived with her for periods of time when Ms. Hanson was a youth. (AA 476-478.) When Ms. Kinney returned home from work and saw with her own eyes the suspicious injuries, she asked Brayden how he got the bruises depicted on the photos, and Brayden told Ms. Kinney that he had fallen out of a truck. (AA 474-477.) Ms. Kinney then had her natural daughter (Jennifer Kinney) also take photographs of Brayden's injuries. (AA 500-503, 517-522.) These several photographs were taken on September 22 between 2:35 and 7:35 p.m. (AA 415, 500-503, 517-522, 553-597.) The bruises depicted on these photographs were witnessed by eight of Brayden's family members/friends on that date. (AA 428-431, 484-486, 500-503, 517-522, 525-527, 530-532, 535-537, 540-541, 545-547.)

B. A Report of Suspected Child Abuse Is Made to and Received and Recorded by the Sheriff's Department.

Ms. Kinney was deeply disturbed about the bruises all over the child's body and suspected that the bruises were caused by Sharples, so she called 911 to report suspected child abuse at 10:14 p.m. (AA 470-471, 474-475.) San Bernardino County Sheriff's employee, Officer Nicole Kinkade, spoke to Ms. Kinney and recorded the following observations in the Sheriff's Computer Aided Dispatch system:

> "2 year old juvenile was at father's house for the weekend and came home with bruises on his forehead. Luis Sharples date of birth unknown, 19 year old lives at unknown address on California Street. Mother of juvenile is Lori Hanson DON 12/07/1988 is not at location. Reporting party is the grandmother, states juvenile told her that he fell out of the father's truck. Reporting party spoke to father's girlfriend, who states the juvenile fell at a fast food place on some stairs. Reporting party feels the bruises are from the father hitting the juvenile. Requesting deputy for report."

(AA 470-471.) Officer Kinkade, after speaking with Ms. Kinney, classified the report made to the Sheriff's Department as "**273R**" – the penal code number for child abuse – and which was a report of child abuse. (AA 470-471, 506-507.) Officer Kinkade then dispatched it as a "**CHILD ABUSE RPT.**" (AA 470-471, 506-507.) It is undisputed that the Sheriff's Department never cross-reported the report of suspected child abuse it received from Christy Kinney to the child protective services agency either immediately by phone, fax or electronic transmission or within 36 hours via a written report, as required by Cal. Penal Code 11166(k). (AA 442, 640, 643-644, 669-670.)

C. In Addition to Failing to Cross-report the Kinney Report to Child Protective Services, the Sheriff's Department Dispatches a Deputy Who Observes Brayden's Condition That as She and Her Supervisor Later Admit Should Have Caused the Deputy to Suspect Child Abuse; Nevertheless, the Deputy Downgraded the Child Abuse Report, Did Not Report, and as a Result of All These Failures Tragedy for Brayden Was Imminent.

Deputy Swanson, an employee of the San Bernardino Sheriff's Department, responded to the dispatch regarding Ms. Kinney's call. (AA 446.) Swanson understood that she was responding to a "CHILD ABUSE RPT." (AA 444-445.) She went to the Kinney home, spoke with Ms. Kinney, and looked at Brayden. (AA 71.) Ms. Kinney asked Deputy Swanson to take photographs of Brayden, testified that Swanson went out to her patrol car to get a camera, returned from the patrol car with a camera and then took photographs of Brayden's bruises. (AA 414, 432, 481-482.) Swanson later testified that she did not take photographs.[2] (AA 453.)

Upon leaving the Kinney residence, deputy Swanson returned to her patrol car and made additional entries into the CAD system. However, whereas Officer Kinkade had dispatched the Kinney call as a "child abuse" incident (AA 470-471) and Deputy Swanson had understood it to be a child abuse report (AA 444-445, 466-467, 470-471), Deputy Swanson

---

[2] Deputy Swanson denied at her deposition that she took pictures of Brayden, and denied any conversation with Ms. Kinney about photographs. (AA 453.)

downgraded the incident to a "miscellaneous incident." (AA 447-450, 468.) At her deposition, Deputy Swanson testified that "miscellaneous" describes minor incidents such as a "barking dog." (AA 451.)

However, Deputy Swanson's typewritten report that she kept at the Sheriff's Department did include references to a cut and bruising above Brayden's right eye, and small old bruises on his upper right arm and back. (AA 311-313, 470-471.) Nevertheless, Deputy Swanson decided on her own, without discussion with anyone else or knowledge of any prior contacts between her department and anyone related to plaintiff, that the call from Ms. Kinney was simply part of an on-going custody dispute between Brayden's parents. (AA 452-456.) Therefore, she testified, she did not report the Kinney call to child protective services. (AA 440-442, 456.)

Deputy Swanson is aware that, as a deputy sheriff and pursuant to the California Penal Code, she is a mandated reporter of suspected child abuse. (AA 437-438.) In fact, she has been trained to report child abuse allegations even when the same have been determined to be unfounded. (AA 469.) She understands that the purpose of the mandated reporting law is that "if a child abuse is suspected, it has to be reported to CPS [child protective services]." (AA 439.) Nevertheless, she has never reported to child protective services an alleged child abuse incident that she has investigated but in which she has not made an arrest. (AA 440-441.) It is her practice to report only those child abuse allegations that lead to someone's arrest. (AA 440-442.) Deputy Swanson's practice is contrary to

proper law enforcement practices. (AA 598-603.)

Neither Deputy Swanson nor anyone else at the Sheriff's Department reported to any other agency the fact that Christy Kinney had called to report suspected child abuse of Brayden, or that Ms. Kinney's report was being investigated. (AA 442, 640, 643-644, 669-670.) This is also contrary to proper law enforcement practices. (AA 598-603.)

Despite Deputy Swanson's claim she subjectively did not suspect child abuse from observing Brayden's condition, there is ample evidence objectively that she should have and, therefore, that her duty to report was triggered as required by the holding in *Alejo v City of Alhambra,* 75 Cal.App.4th 1180, 1193-1194 and the language in 11166(a):

- Deputy Swanson admitted that she would have had a duty to report suspected child abuse if Brayden appeared as he did in the photographs which were forensically verified to have been unaltered and taken just four (4) hours before she arrived. (AA 464, 553-597.)
- Deputy Bohner agreed that Swanson would have to report and the child would have been taken into protective custody within hours if Brayden appeared as he did in those photographs. (AA 510-514.)
- Plaintiff's law enforcement expert (Lewis) and the County's child protective services worker

(Ashlock) agreed that the condition of Brayden would have caused a reasonable officer in Swanson's position to suspect child abuse and trigger a duty to report, too. (AA 599-611, 622-623.)

- Christy Kinney testified that Brayden looked exactly as he did in those verified photographs at the moment Deputy Swanson was there, and seven other persons testified that is how Brayden appeared immediately before and after Deputy Swanson arrived. (AA 482, 484-485, 517-522, 525-527, 530-532, 535-537, 540-541, 545-547.)

Therefore, there is a genuine issue of material fact as to how Brayden looked at the time the deputy saw him.

D. Brayden Is Savagely Beaten by His Father Resulting in Permanent Brain Damage.

Despite grave concerns about leaving Brayden with Sharples any further, Lauri Hanson was required to do so by a family court order. (AA 643-644.) On October 18, 2008, Sharples again beat and this time catastrophically injured Brayden. (AA 548-552, 627-628, 660-666.) Brayden's head injury was so severe that surgeons had to remove a portion

of his skull to permit the brain to herniate beyond the skull's boundaries. (AA 661-662.) Brayden also suffered retinal hemorrhages. (AA 663.) Mark Massi, M.D., the forensic pediatrician at Loma Linda Hospital who examined Brayden's case for purposes of the resulting child abuse investigation, opined that Brayden's injuries were inflicted by another person and involved "abusive head trauma," or "shaken baby syndrome." (AA 664-665.) Sharples is a co-defendant in default in this action.

E. The Law Enforcement Agency's Failure to Cross-report to Child Protective Services as CANRA Requires Was a Legal Cause of Brayden's Catastrophic Brain Damage.

Leann Ashlock is the social worker with the County of San Bernardino's child protective services agency (internally referred to as "DCS", or Department of Children's Services) who has investigated approximately 1000 physical, sexual, or emotional abuse cases. (AA 614-615.) Ms. Ashlock had had contact with Brayden's parents over the summer of 2008 – after Sharples had refused to return Brayden after a visit – in which she facilitated an agreement between Sharples and Hanson regarding Sharples' visitation with Brayden. (AA 617-618.) She was also aware of prior reports of suspected child abuse involving Brayden, which were investigated by her agency. (AA 641-644.) In short, this child was on Ms. Ashlock's radar well prior to September 22, 2008. (AA 641-644.)

Because defendants did not cross-report Ms. Kinney's call to child protective services, Ms. Ashlock knew nothing about the September 22, 2008 report of suspected abuse until after Brayden was permanently injured and hospitalized on October 18, 2008. (AA 619, 633-658.)

Unlike the apparent practice of the San Bernardino Sheriff's Department, San Bernardino's child protective services agency's practice is, consistent with CANRA, to cross-report to law enforcement in all cases of reported abuse in which the report does not originate with law enforcement. (AA 616.) Ms. Ashlock testified that the child protective services agency would have followed up a cross-report within at most ten days of receiving it, which would have been well in advance of October 18. (AA 627-629.) She testified that had she seen Brayden's condition in the September 22, 2008 photographs, the child protective services agency would have prevented Sharples from any further unsupervised visitation with Brayden. (AA 622-623, 625.) Also, the child protective services agency could have removed Brayden from both parents and petitioned the court for appropriate protective orders that would have included only supervised parental visitation. (AA 620-624, 632.) In short, the child protective services agency would have taken action that would have kept Brayden from being unsupervised in his father's home on October 18, 2008 if she had been informed that he had the suspicious bruises depicted in the photographs:

> Q: Seeing that child, was there any way that — would you have let Louis Sharples be unsupervised with that child before you had made a final determination of what had happened to him?
> A. If I had seen him in this situation?

Q. Yes.
A. I would have done anything in my power to help Lauri protect her son.
Q. Okay. And that includes taking steps not to let Louis Sharples be with him unsupervised?
A. Correct. Yes.

(AA 625.) She was outraged by the Sheriff Department's failure to cross-report the Kinney September 22, 2008 child abuse report, as set forth and highlighted in bold in her jurisdictional report:

> **"Deputy Swanson, however, did not make a cross report to the Department of Children's Services, despite her duty as a mandated reporte[r], therefore, the injuries [of September 22] were not investigated."** (Emphasis in original.)
>
> * * *
>
> ...Furthermore, **injuries to Brayden while in the care of the father had become a pattern, and he had suffered significant injuries, which were not cross-reported to DCS, approximately three weeks prior to the day on which he was irreparably brain damaged....**
>
> * * *
>
> **...She was unable to get law enforcement to take the situation seriously on several occasions. Even when the child had obvious bruising and injury to his face, Deputy Swanson, despite being a mandated reporter, failed to make a cross report to DCS, which would initiate intervention and an investigation by DCS.** On several occasions, Ms. Hanson appealed to the Family Law Court and expressed her concerns, but her concerns were ignored. By virtue of the court order, she was forced to allow the child to visit the father unsupervised, despite the child's cries and obvious fear of going, and despite the fact that he had already sustained injuries while in the care of the father. **Ms. Hanson's hands were tied. She tried to protect her son but was not given the support by those who had the power to stop the abuse from happening."**

(AA 630-631, 640, 644, Emphasis added to last three paragraphs.)

F. From its Commencement, this Action Has Been Based on Both the Mandatory Duty of Cross-reporting Breached by the Sheriff's Department as a Law Enforcement Agency and the Mandatory Duty of Reporting Breached by its Deputy (Swanson) as a Mandated Reporter.

On September 11, 2009, plaintiff filed his complaint against the County, Swanson, Bohner and Sharples. (AA 1-36.) The complaint alleges throughout that the County's Sheriff's Department violated CANRA (Penal Code 11164-11173), including the mandatory duty of the Sheriff's Department, itself, to cross-report under 11166(k) and of Swanson to report under 11166(a). (AA 18, 19, 20, 21, 22, 28, 29, 30, 31, 32.)[3] The County moved for summary judgment and/or summary adjudication, contending its deputy could not be second-guessed for her inadequate investigation; however, the County failed to move for summary judgment of Plaintiff's allegations that the law enforcement agency itself had failed to cross-report pursuant to 11166(k). (AA 42-58.) Plaintiff opposed the County's motion for summary judgment on all grounds raised in the motion, and added argument that the Sheriff's Department violated 11166(k) even though the County failed to include that in its motion. (AA 365, 368, 369, 374, 375,

---

3

It is necessary for plaintiff to detail how thoroughly and consistently he argued below that the Sheriff's Department violated its mandatory duty to cross-report under section 11166(k), because the Court of Appeal in its opinion erroneously contends plaintiff never presented this theory until oral argument! (Opn., at p. 12, 15.)

383, 384.) The trial court granted summary judgment, however failed to address the Plaintiff's argument that the County violated 11166(k) because it was not addressed in the Defendants' motion. (RT 18-19.) Plaintiff objected to the proposed order granting summary judgment because neither the motion nor the Court's ruling addressed Plaintiff's argument that the Sheriff's Department violated 11166(k). (AA 707, 708, 709, 710.) The trial court granted summary judgment nonetheless, and judgment was entered in favor of Defendants on August 11, 2011. (AA 791-792.)

On appeal, plaintiff clearly and fully argued in his opening and reply briefs that the Sheriff's Department violated 11166(k) (AOB 1, 3, 33, 34, 35, 36, 37, 47; ARB 1, 2, 4, 5, 23, 24, 25, 26, 27, 28, 29, 30, 31.) Plaintiff even pointed this out in his letter to the court requesting an additional 15 minutes to explain CANRA to the panel (Letter to Court of Appeal at pp. 1, 2, 3, 4, 5, 6, 7, 12, 13).

G. The Court of Appeal's Opinion.

In an unpublished opinion, the Court of Appeal affirmed. The numerous errors in that opinion are laid out below. Plaintiff filed a petition for rehearing detailing those errors. The Court denied rehearing. This petition follows.

ARGUMENT

A. Penal Code Section 11166(k) – a Separate and Independent Mandatory Duty of the Sheriff's Department to Cross-report to the Child Protective Services Agency.

1. This mandatory duty of the law enforcement agency, separate from the duty to investigate and the deputy's duty to report, has been recognized by the court since 1986.

The cross-reporting of initial reports like Christy Kinney's between law enforcement and child welfare services is a well-established process in California that has been recognized by the Courts since 1986:

> **"The child protective agency receiving the initial report must share the report with all its counterpart child protective agencies by means of a system of cross-reporting. An initial report to a probation or welfare department is shared with the local police or sheriff's department, and vice versa.** Reports are cross-reported in almost all cases to the office of the district attorney.... **A child protective agency receiving the initial child abuse report then conducts an investigation."**

Planned Parenthood Affiliates v. Van de Kamp, supra, 181 Cal.App.3d 245, 259-260, citing § 11167.5, § 11165.6, subd. (c)(2); see AOB 35-36.)

2. The legislative history of CANRA supports this independent mandatory duty of the law enforcement agency notwithstanding the duties of the individual law enforcement officer.

The cross-reporting of "initial" reports received was one of the driving forces behind the implementation of CANRA, as confirmed by the Office of the Attorney General in the legislative history:

> "Because if a policeman or social worker makes that decision by themselves, they do not have the expertise that is required by all of those agencies collectively to make that decision.... **I want alternative reporting in the sense that either agency, if the police gets the report first, we provide that they immediately advise D.P.S.S. and vice versa. If D.P.S.S. gets it, they immediately advise police....It is just the idea of people being apprised and getting a follow-up because the next time it may be the police who respond, and if they know the welfare worker responded last week, that is going to be significant to them and vice-versa. And that is why we have provided that in both cases, each agency reports to the other."**

(Assem. Com. On Criminal Justice, Public Hearing on Child Abuse Reporting, November 21, 1978, Senate Bill 781, Chapter 1071, Statutes of 1980 (1977-1978 Reg. Sess.), testimony of Deputy Attorney General Michael Gates, pp. 6, 7, 11, 21 (emphasis added)

3. This mandatory duty required the Sheriff's Department as a law enforcement agency to make three (3) cross-reports.

In summary, irrespective of anything required from an individual law enforcement officer, CANRA requires that the law enforcement agency itself inform child protective services about every initial report of suspected child abuse it receives from any person at the following junctures:

1) **immediately, or as soon as practicably possible, *it* shall report by telephone, fax, or electronic transmission** to the agency given responsibility for investigation of cases under Section 300 of the Welfare and Institutions Code and to the district attorney's office **every known or suspected instance of child abuse or neglect reported to *it***; law enforcement agency shall report to the county welfare or probation department **every known or suspected instance of child abuse or neglect reported to *it*** which is alleged to have occurred as a result of the action of a person responsible for the child's welfare, or as the result of the failure of a person responsible for the child's welfare to adequately protect the minor from abuse when the person responsible for the child's welfare knew or reasonably should have known that the minor was in danger of abuse. [11166(k)];

2) **within 36 hours of receiving the information concerning the incident *it* shall send, fax, or electronically transmit a written report thereof** to any agency to which it makes a telephone report under this

subdivision [11166(k)], and;

3) **within 36 hours of starting its investigation,** it **shall report** to the county welfare or probation department **that it is investigating the case** [11166.3].

This language is mandatory and ministerial, requiring nothing other than passing along information at distinct times after a law enforcement agency receives a report of suspected child abuse.

4. This separate mandatory duty of a law enforcement agency to accept and cross-report all reports of suspected child abuse to the child protective services agency is crucial to the safety of California's children because upon receipt of that cross-report child protective services must respond to that report either immediately or within 10 days, at the latest.

Pursuant to Penal Code 11165.9, a child protective services agency (which includes both a law enforcement agency such as the San Bernardino Sheriff Department, and a child protective services agency, Department of Children's Services) must accept a report of suspected abuse or neglect from non-mandated reporters, like Christy Kinney:

> **"...Any of those agencies shall accept a report of suspected child abuse or neglect whether offered by a mandated reporter or another person**.... Agencies that are required to receive reports of suspected child abuse or neglect **may not refuse to accept a report of suspected child abuse or neglect from a mandated reporter or another person**

unless otherwise authorized pursuant to this section, and shall maintain a record of all reports received."

Also, Penal Code 11166(b)(5) states:

> "Nothing in this section shall supersede the requirement that a mandated reporter first attempt to make a report via telephone, **or that agencies specified in Section 11165.9 accept reports from mandated reporters and other persons as required."**

Per 11166(g), Christy Kinney was "another person" who was permitted to report known or suspected abuse/neglect:

> "(g) **Any other person who has knowledge of or observes a child whom he or she knows or "reasonably suspects" has been a victim of child abuse or neglect may report the known or suspected instance of child abuse or neglect to an agency specified in Section 11165.9...."**

Upon a law enforcement agency's receipt of a report of suspected child abuse from someone such as Ms. Kinney, timely law enforcement agency cross-reporting to child protective services is critical for children's safety because unlike law enforcement which has total discretion to start its investigation of the report whenever it wishes, child protective services has no such discretion and is mandated to stand ready at all times, and to begin investigation within definite time periods proscribed by WIC 16501(f):

> "f) As used in this chapter, emergency response services consist of a response system providing in-person response, 24 hours a day, seven days a week, to reports of abuse, neglect, or exploitation, as required by Article 2.5 (commencing with Section 11164) of Chapter 2 of Title 1 of Part 4 of the Penal Code for the purpose of investigation pursuant to Section 11166 of the Penal Code and to determine the necessity for providing initial intake services and crisis intervention to

> maintain the child safely in his or her own home or to protect the safety of the child. **County welfare departments shall respond to any report of imminent danger to a child immediately and <u>all</u> <u>other</u> <u>reports</u> within 10 calendar days.**"

Child protective services cannot respond immediately to imminent danger, or even within ten days to all other reports of suspected abuse, if a law enforcement agency fails to cross-report **<u>all</u>** reports of suspected child abuse which it receives to child protective services.

B. The Court of Appeal's Opinion Utterly Ignores the Express Language of 11166(k), Rules of Statutory Construction, the Legislative History and Intent of CANRA, and Case Law.

1. The Court of Appeal's opinion imposes an imagined precondition on the cross-reporting expressly required under 11166(k) which is not found in CANRA or any case; namely that a "law enforcement agency" must withhold informing child protective services pursuant to 11166(k) of a report of suspected child abuse received from a non-mandated reporter pursuant to 11166(g) until "after an investigation of the reported abuse has been undertaken" and not unless a "reasonable suspicion" "arises in the mind of an employee of a law enforcement agency."

In one blind stroke, the Court of Appeal eviscerates CANRA by holding that a law enforcement agency must withhold informing child protective services of a report of suspected child abuse received from a non-mandated reporter until "after an investigation of the reported abuse has been undertaken" and not unless a "reasonable suspicion" "arises in the mind of an employee of a law enforcement agency." (Opn., at pp.14-15.)

First, 11166(k) does not include any language which requires an investigation by law enforcement before cross-reporting.

Second, the legislature would not require law enforcement to tell child protective services within 36 hours of starting an investigation of a report of suspected abuse pursuant to 11166.3 if it intended law enforcement to first complete its investigation before doing the cross-report referenced in 11166(k), as the Court of Appeal's opinion holds. Under that scenario child protective services would first learn that there is an ongoing investigation into an unsubstantiated report of child abuse per 11166.3 (and, by default, learn about the report), but could not yet receive the "initial" cross report per 11166(k) according to the Fourth District, Division Two, because the assigned deputy had not completed her subjective analysis of the report received and substantiated the report. That is absurd. The Court of Appeal's opinion simply cannot be squared with 11166.3 or 11166(k).

Third, the Court of Appeal cites cases to support its holding, but those cases in fact militate against its holding because they had the type of immediate, pre-investigation cross-reporting of the initial report of suspected abuse between law enforcement and child protective services that is missing in this case – meaning both agencies were informed of the alleged report of child abuse initially received by the other child protective services agency. In *Jacqueline T. v. Alameda County Child Protective Services* (2007) 155 Cal.App.4th 456, the court explained this very clearly:

> **"Finally, as set forth above, the relevant version of Penal Code former section 11166, subdivision (i) required a county welfare department to "immediately, or as soon as practically possible" cross-report by telephone to certain public agencies "every known or suspected instance of child abuse," and to then submit certain written reports within 36 hours. Here, it is undisputed that Employees**

> **cross-reported to the Newark Police Department each of the three reports of alleged abuse it received. It is further undisputed that, following receipt of each of those cross-reports, the Newark Police Department determined based on the evidence that the abuse allegations were unsubstantiated."**

Jacqueline T., supra, at 473. Of extreme importance to the determination of this case, there was **cross-reporting** between the police and child protective services on **each of the three (3) reports of alleged abuse** made in *Jacqueline T.* **even though** the individual investigators found the reports to be **unsubstantiated**:

> "[The first report].....Yee **cross-reported the alleged abuse** to the Newark Police Department, which decided not to pursue any action at that time. Ultimately, Yee concluded in a written investigative narrative that the child abuse allegations were unsubstantiated, noting in doing so that parents were engaged in a "messy child custody fight."
>
> [The second report]... Like Yee, Richards also **cross-reported the alleged abuse** to the Newark Police Department. In doing so, Richards spoke to the officer assigned to the case, Detective Ramirez, who informed her that she was familiar with the family and had decided against pursuing a criminal investigation at that time, noting the family was dealing with several custody issues. Ultimately, Richards deferred further investigation due in part to the ongoing and contentious family court proceedings and mediation. But Richards kept the matter open until 2000, when the third report of suspected abuse was received.
>
> [The third report]... **In response to the third report**, Richards **again cross-reported** to the Newark Police Department, speaking to Detective Ramirez on July 7, 2000. County, in conjunction with the Newark Police Department and the Alameda County District Attorney's Office, then arranged for Child Abuse Listening, Interviewing and Coordination Center (CALICO) interviews of Roes 1 and 2, which were conducted one-on-one by a forensic child interviewer on July 13, 2000. **Ultimately, all three agencies—County, the Newark Police Department and the Alameda County District Attorney's Office—concluded**

based on the evidence that the sexual abuse allegations were unsubstantiated."

Jacqueline T., supra, at 461-462. That is exactly how cross-reporting of the "initial report" is supposed to work – all child protection agencies and the district attorney share the original report – regardless of whether they ultimately conclude the initial report is "unsubstantiated."

The Court of Appeal's opinion in this case, however, repeatedly cites *Jacqueline T., supra,* and *Ortega v. Sacramento County Dept of Health and Human Services* (2008) 161 Cal.App.4th 713, in a grossly incorrect manner by indicating that the *Jacqueline T.* court held that there was no duty of an agency to cross-report under 11166(k) when that is untrue. First, and expressly to the contrary, *Jacqueline T.* actually assumed a breach of mandatory duty to cross-report! *Jacqueline T., supra,* at 473. Second, the issue in *Jacqueline T.* was not whether cross-reports were mandatory, but whether the mandatory cross-reports which were made were made timely enough within the constraints of the statute (i.e. within 36 hours). *Id.* Third, cross-reports were actually made in both *Jacqueline T.* and *Ortega*, unlike this case. Fourth, *Jacqueline T.* was decided not on duty but on lack of proximate cause because the agency receiving the cross-report in that case concluded the allegations were unsubstantiated and, therefore, it would presumably not have intervened and protected the child from further abuse. Fifth, *Jacqueline T.* deals with an individual employee's immunity pursuant to Cal. Govt. Code 820.2 and 821.6, which are individual immunity code sections. Those are **not** immunity sections which immunize a governmental

agency for its own acts or omissions under 11166(k). Sixth, *Jacqueline T.* expressly deals with 11166(a), and not the alleged agency liability under 11166(k). The mandatory duty of an individual to report under 11166(a) is different than the mandatory duty of an agency to cross-report under 11166(k).

An appellate decision is not authority for everything said in the court's opinion, but only for the points actually involved and decided. *Santisas v. Goodin* (1998) 17 Cal.4th 599, 620; see also *People v. Knoller* (2007) 41 Cal.4th 139, 154-155. Review is warranted by this Court not only on the important question of law concerning the proper construction of CANRA but also to correct this flagrant misapplication of precedent construing CANRA.

2. Unlike the initial reporting standards set forth in 11166(a) and 11166(g), there is no objective reasonableness standard for the cross-reporting requirement in 11166(k). The only trigger is the receipt of a report of suspected child abuse by the law enforcement agency.

The language of 11166(k) requires that a law enforcement agency make a report to child protective services "immediately or as soon as practicably possible" by telephone, fax or electronic transmission of "**every** known or suspected instance of child abuse or neglect ***reported to it.***" There is **no** language in the statute which permits investigation of the report

before "immediately" notifying child protective services, nor is there language permitting some reports to not be cross-reported. Further, a law enforcement agency itself would not know or suspect child abuse, because the agency as an inanimate object would not be capable of knowing or suspecting abuse. Also, the agency cannot have a report reported to it by itself. These reports are coming *from* human beings (mandated reporters and non-mandated reporters) *to* the law enforcement agency.

A mandated reporter's duty pursuant to 11166(a) is triggered by whether she entertains a "reasonable suspicion." Quite differently, an agency's duty pursuant to 11166(k) is triggered by time. First, the agency must phone, fax or electronically transmit child protective services immediately or as soon as practicably possible upon receipt of the report. A law enforcement agency cannot immediately cross-report a report to child protective services if it must first investigate the report. Second, the agency must send a follow-up written report within 36 hours of "**receiving** the information concerning the incident," and not within 36 hours of "investigating" the information it received.

The Court of Appeal's injection of an extra time period for the law enforcement agency to first investigate the report before cross-reporting renders the express statutory time requirements meaningless. It is a well-settled maxim of statutory construction that a court must avoid a construction that renders any part meaningless or extraneous, *Woosley v. State of California* (1992) 3 Cal.4th 758, 775-776, or which suggests that the legislature engaged in an idle act. *Elsner v. Uveges* (2004) 34 Cal.4th

915, 935.

11166.3 is further proof positive that CANRA does not envision law enforcement waiting until completing an investigation before informing child protective services because the trigger is the "start" versus "completion" of an investigation:

> "11166.3. (a) The Legislature intends that in each county the law enforcement agencies and the county welfare or probation department shall develop and implement cooperative arrangements in order to coordinate existing duties in connection with the investigation of suspected child abuse or neglect cases. **The local law enforcement agency having jurisdiction over a case reported under Section 11166 shall report to the county welfare or probation department that it is investigating the case within 36 hours after starting its investigation.**"

In this case, the Kinney report was dispatched for investigation by the law enforcement agency at 23:13:31 and the deputy was on the scene at 23:32:05 on 9/22/2008. At the latest, by 11:32:05 on 9/24/2008, which was 36 hours from the time the deputy was on the scene, the agency should have at least informed child protective services that it had **started** its investigation.

Further, contrary to the Court of Appeal's opinion at page 13, plaintiff **never** alleged or argued that the individual dispatcher, Nicole Kindle breached a duty pursuant to 11166(k); plaintiff has always alleged that the **agency** did. (AOB 34-38, ARB 27-31.)

In short, there is no language in CANRA which permits a law enforcement agency to withhold telling a child protective services agency that it has received and/or is investigating a report of suspected child abuse.

Such an interpretation is a complete bastardization of CANRA, yet that is exactly what the Court of Appeal's opinion held.

3. The opinion confuses and conflates the distinct, express cross-reporting duties of a "law enforcement agency" under 11166(k) with the individual initial reporting duties of a mandated reporter under 11166(a).

California Penal Code 11166(k) is limited to the obligations of a "law enforcement agency" and does not impose any duty on a "mandated reporter." A "law enforcement agency" is not a mandated reporter. The exclusive list of mandated reporters is set forth at Cal. Penal Code 11165.7. A "mandated reporter" is a human being performing one of forty-four (44) jobs involving interaction with children. The express inanimate language of 11166(k) further clarifies that the simple cross-reporting duties imposed by that code section apply to the law enforcement agency instead of an individual deputy sheriff or law enforcement officer: "reported to ***it***" and "to which ***it*** makes a report." This obligation runs to an agency versus an individual because reports of suspected child abuse can only be received by a "child protection agency." (Cal. Penal Code 11165.09.) Further, this makes sense from a practical perspective because most persons (mandated or non-mandated reporters) will be communicating his/her report of suspected child abuse either to a law enforcement agency by calling 9-1-1 or to child protective services reporting hotline, instead of a random police

officer or child protective service worker walking the street.

The term "law enforcement agency" should be interpreted as being different from the term "mandated reporter" when interpreting the duties of CANRA. The words of a statute must be given a plain and commonsense meaning unless the statute defines the words to give them a special meaning. *People v. Nelson* (2011) 200 Cal.App.4th 1083.

4. The opinion applies a "subjective" standard as opposed to the "objective" standard when determining whether a duty was owed by a mandated reporter of child abuse pursuant to Penal Code 11166(a) and *Alejo v. City of Alhambra* (1999) 75 Cal.App 4th 1180, and improperly applies discretionary immunity to a mandatory duty.

The Court of Appeal's opinion uses an inappropriate "subjective" analysis (i.e. meaning whatever Deputy Swanson subjectively wanted to do or not do was appropriate) versus the "objective" analysis required by Penal Code 11166(a) and *Alejo v. City of Alhambra* (1999) 75 Cal.App 4th 1180. As set forth in *Alejo, supra,* "Officer Doe had a mandatory duty to investigate *and then report if it was objectively reasonable for him to suspect child abuse." Id.* at 75 Cal.App.4th 1193-1194. (Emphasis added.) Deputy Swanson is in the exact same position in this case as Officer Doe was in the *Alejo* case. Further, the 2000 legislation amending various sections of the Child Abuse and Neglect Reporting Act, including Penal

Code section 11166, confirmed the continued validity of *Alejo* because it expressly states that "[t]his act is not intended to abrogate the case of *Alejo v. City of Alhambra* (1999) 75 Cal. App. 4th 1180, (Stats. 2000, ch. 916, § 34).

Penal Code 11166(a), states "For purposes of this article, "reasonable suspicion" means that it is objectively reasonable for a person to entertain a suspicion, based upon facts that could cause a reasonable person in a like position, drawing, when appropriate, on his or her training and experience, to suspect child abuse or neglect...." Case law is settled that CANRA imposes two independent mandatory duties on such individual reporters: (1) "a duty to investigate"; and (2) "a duty to take further action when an objectively reasonable person in the same situation would suspect child abuse. Further action would entail reporting the 'known or suspected instance of child abuse to a child protective agency immediately or as soon as practically possible by telephone' and preparing and sending 'a written report thereof within 36 hours of receiving the information concerning the incident.'" *Alejo v. City of Alhambra, supra,* 75 Cal.App.4th at p. 1186. As the *Alejo* Court held, whether a reasonably prudent person in Deputy Swanson's position, receiving Ms. Kinney's information and observing the condition of the child, would have suspected child abuse and submitted a report is a question of fact to be determined at trial. See *Alejo v. City of Alhambra, supra,* 75 Cal.App.4th at page 1189.

Appellant presented ample evidence that an objectively reasonable law enforcement officer would have entertained the suspicion that Brayden

had been abused if he looked like he appears in the photographs at the time Deputy Swanson saw him. Further, Kinney testified that Swanson agreed with her that the injuries looked severe and that she took pictures, too. (AA 483.)

The Court of Appeal's opinion, however, turns this objective standard on its head and instead relies solely on subjective impressions of Deputy Swanson to rule as a matter of law that she acted in an objectively reasonable manner:

> "Having investigated the incident, it was objectively reasonable for Deputy Swanson to conclude the situation did not involve child abuse, even if that conclusion, in the exercise of Deputy Swanson's judgment, was in error." (*Jacqueline T. v. Alameda County Child Protective Services, supra.,* 155 Cal.App.4th at pp. 476-477.)

There are clear legal problems with that statement in the opinion. First, 11166(a) does not require that Swanson "conclude" the situation involved child abuse before she was required to report; rather, all that a reporter has to do is "entertain a suspicion." Swanson did not lose her mandated reporter designation simply because she also was the law enforcement officer assigned to investigate the report of child abuse made by Christy Kinney, any more than Officer Doe in *Alejo* lost his designation as a mandated reporter when he was assigned by the Alhambra police department to investigate the report of child abuse made by the grandparent in that case. As a mandated reporter, it is immaterial whether Swanson ultimately "concluded" that the report was "unfounded" per 11169 and 11165.12, and Appellant does not seek to invade the discretion of her

ultimate conclusions after she finished investigating the report of suspected abuse by Kinney. The operative test is whether there was evidence for her to "entertain a suspicion" and be required to report as a mandated reporter under 11166(a).

Second, an "objectively reasonable" analysis is not based simply on accepting the defendant's "subjective" belief as true as a matter of law. This is a question of fact to be determined at trial. *Romo v. Southern Pacific Transportation Co.* (1977) 71 Cal.App.3d 909, 915. In this case, there are facts in doubt; namely, the appearance of Brayden when Deputy Swanson saw him, along with whether Swanson acknowledged to Kinney that Brayden's injuries were too severe for the history provided and whether Swanson herself took and destroyed photographs.

Third, the opinion incorrectly equates the defendant's subjective state of mind with objective reasonableness as a matter of law. Why would the fact that Swanson performed an investigation ipso facto have made her failure to report objectively reasonable? It would not under 11166(a), and there is no logic, reason or authority for that deduction.

CANRA was enacted to rectify the subjective/personal observation problem that was made evident by *Landeros v. Flood* (1976) 17 Cal.3d 413, 415. The Legislature revised the reporting standard to require reporting by designated professions whenever there exists a "reasonable suspicion" of child abuse. (§ 11166, subd. (a).) The purpose of this change was to remove impediments to reporting engendered by the "personal observation" requirement of *Landeros v. Flood, supra,* 17 Cal.3d at page 415. (State Bar

of Cal., Rep. on Assem. Bill No. 2497, supra, pp. 1-2; Legis. Counsel's Dig., Sen. Bill No. 718, 3 Stats. 1980 (Reg. Sess.) Summary Dig., p. 333.) *Krikorian v. Barry* (1987) 196 Cal.App.3d 1211, 1217.

There has been no authority in California for the subjective standard applied in the Court of Appeal's opinion since 1980. In fact, the opinion even acknowledges that *Alejo* and CANRA have an objective standard, but then illogically states that while there is an obligation to report where abuse is reasonably suspected, there is no duty to report when abuse is not suspected:

> "However, while the language of the statute does require a mandated reporter to send a follow-up report where the mandated reporter knows or reasonably suspects a child has been the victim of abuse or neglect, it does not create a general mandatory duty "to take further action" where child abuse is not suspected."

(Opn., at p. 9.) The statute [11166(a)] cannot simultaneously apply and not apply, and the opinion reflects the Court's confusion about the required ministerial, initial reporting requirement under 11166(a) versus the more complex, discretionary determination of the investigator's ultimate conclusion that the initial report was "unfounded" per 11169 and 11165.12.

Ultimately, the issue is not <u>whether</u> Deputy Swanson owed a duty to report. The appellate opinion states as much, and Swanson admits that she would have had to report if Brayden looked like he did in those photographs. So did her supervisor, and Plaintiff's law enforcement expert and the county's child protective service worker. The operative question is a <u>factual</u> issue: namely, whether Brayden's appearance in the photographs

taken four (4) hours before Deputy Swanson was at Christy Kinney's home accurately depicts his appearance at the time Deputy Swanson was at Christy Kinney's home. Deputy Swanson testified that those photographs do not accurately depict Brayden's appearance, and Christy Kinney testified that those photographs accurately depict his actual condition. If the trier of fact finds they did accurately depict his condition, Deputy Swanson had an obligation to report pursuant to 11166(a) and *Alejo, supra.* If the trier of fact does not so find, then Deputy Swanson had no obligation to report pursuant to 11166(a). This cannot be determined as a matter of law. Deputy Swanson's convenient denial at her deposition that Brayden did not look like he did in those photographs is not dispositive as a matter of law, especially when Plaintiff has photographic evidence and multiple eyewitnesses confirming his appearance – and even Swanson herself acknowledged multiple areas of bruising in her report.

The duty to investigate and report child abuse is mandatory under section 11166(a) if a reasonable person in Deputy Swanson's position would have suspected such abuse is a mandatory duty. *Alejo* at 1186. There is no discretion involved in initiating the investigating and reporting process related to child abuse here as in *Alejo*, and does not involve a basic policy decision, and therefore the immunity of Government Code section 820.2 does not attach. *Alejo* at 1194. Such a mandatory duty cannot be discretionary because it "entails the fulfillment of enacted requirements." See, e.g., *Wheeler v. County of San Bernardino* (1978) 76 Cal.App.3d 841, 849, *Ramos v. County of Madera* (1971) 4 Cal.3d 685.

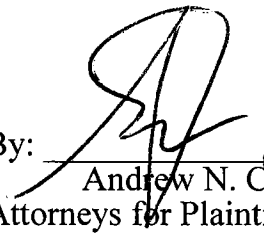
CONCLUSION

For the foregoing reasons, Plaintiff-Appellant respectfully urges this Court to grant review.

Dated: August 29, 2013

Respectfully submitted,

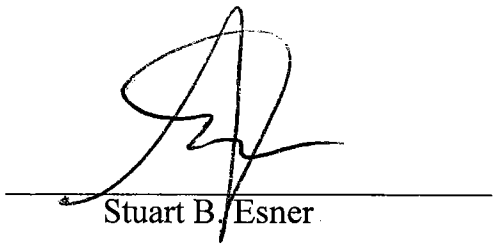
ESNER, CHANG & BOYER



By: _____
Andrew N. Chang
Attorneys for Plaintiff-Appellant

CERTIFICATE OF WORD COUNT

This Petition for Review contains approximately 8,352 words per a computer generated word count.



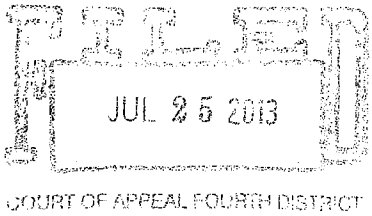
Stuart B. Esner

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO



B.H., a minor, etc.,

Plaintiff and Appellant,

v.

COUNTY OF SAN BERNARDINO et al.,

Defendants and Respondents.

E054516

(Super.Ct.No. CIVDS913403)

OPINION

APPEAL from the Superior Court of San Bernardino County. Donald R. Alvarez, Judge. Affirmed.

The Keane Law Firm, Christopher J. Keane; Esner, Chang & Boyer, Stuart B. Esner and Andrew N. Chang for Plaintiff and Appellant.

Lynberg & Watkins, Norman J. Watkins, Shannon L. Gustafson and Pancy Lin Misa for Defendants and Respondents.

In September 2008, when B.H. was two years old, his mother, L.H., noticed bruises on B.H.'s face and body when he returned from visitation with L.S. (father).

L.H.'s former foster mother[1] reported the injuries to the San Bernardino County Sheriff's Department. A sheriff's deputy examined the child, determined there was an ongoing custody dispute, and concluded there was no need for further investigation. A month later, B.H. received a devastating head injury while in the care of his father which will permanently disable him.

L.H., as guardian ad litem, filed a lawsuit against the County of San Bernardino, the City of Yucaipa, Deputy Sheriff Kimberly Swanson, and her supervisor, Sergeant Jeff Bohner,[2] for violation of the Child Abuse and Neglect Reporting Act (CANRA), for not cross-reporting his injuries to the Department of Children and Family Services (DCFS). The trial court granted summary judgment in favor of the public entities and employees (the County defendants); plaintiff appealed.

On appeal, plaintiff claims (1) there were triable issues of material fact as to whether the sheriff's deputy had a mandatory duty to cross-report suspected child abuse to DCFS, and (2) the court erred in ruling that the county and the sheriff's deputy were immune from liability for their discretionary functions.

---

[1] Mother had no formal foster parent-child relationship with C.K., but referred to her as her mother, or adoptive mother. C.K. was a friend of mother's father who "wrote over custody [of mother] to her," when mother was 13. For convenience and lack of a better term, we will refer to C.K. as mother's former foster mother.

[2] Father was also named in the suit for battery and child abuse, but he was not involved in the summary judgment motion or this appeal.

BACKGROUND

Plaintiff's complaint asserts two causes of action against the County defendants, and two causes of action against father, whose actions directly caused plaintiff's injuries. Our review is limited to those causes of action involving the liability of the County defendants, which were the subject of the summary judgment motion.

Plaintiff, B.H., was born in August 2006, and lived with his mother, L.H., in the home of L.H.'s former foster mother. In 2008, by an informal agreement, father had custody of plaintiff every weekend. On July 2, 2008, father reported to the County of San Bernardino Sheriff's Department that plaintiff arrived for a visit with unexplained bruises on his neck. A sheriff's deputy investigated the incident and determined the allegations were inconclusive. When the mother learned of this report the next morning, July 3, 2008, she contacted DCFS and informed the intake operator that her son had been abused by an unknown person. Mother also informed DCFS that father refused to return custody of plaintiff to her and that she was pursuing an ex parte order to regain custody.

On July 9, 2008, a DCFS social worker responded to mother's July 3d report, interviewing mother at her residence, and visiting father at his. The social worker facilitated a meeting between mother, father, and B.H. on July 22, 2008. At that meeting, the parents agreed that father would relinquish B.H. to mother that day, and then resume his regular weekend visits until a further court hearing, which was scheduled for August 6, 2008. The social worker concluded that the situation was a custody battle and the allegations of physical abuse were unfounded.

On September 17, 2008, a formal court order was made, providing that father would have custody every weekend, plus one two-hour visit midweek. On September 22, 2008, mother picked up plaintiff from a visit with his father and noticed bruises on his face. When mother got home, she talked to her former foster mother and they took pictures of the bruises on B.H. Then mother left to go to an evening class, and after class, she went to a party until 2:30 or 3:00 a.m. Mother suspected child abuse, but wanted to speak with father before making any report.

While mother was out, the former foster mother contacted the sheriff's department and reported that plaintiff had come home from a visit with his father with bruises on his forehead. The dispatcher asked if the child required medical attention, but the former foster mother declined because the child had a doctor's appointment the next day. The former foster mother informed the dispatcher that she was making the report because she was instructed to do so.

Sheriff's Deputy Kimberly Swanson responded to the residence while mother was gone and plaintiff was in the care of mother's former foster mother. When Deputy Swanson arrived, plaintiff was asleep, so the former foster mother woke him and brought him to the deputy to observe. Deputy Swanson examined plaintiff's head, face, upper body, and arms. Deputy Swanson observed that plaintiff had a scratch and bruising near his right eye and temple, and a small older bruise on his right arm, which possibly occurred during a fall. Deputy Swanson did not see any bruises on the child's forehead or torso when she examined him.

Deputy Swanson went out to her patrol vehicle and ran a computer record check on the parents. In the meantime, the former foster mother had put plaintiff back to bed. When Deputy Swanson returned to the house, she left her card with mother's former foster mother and requested that plaintiff's mother call her when she returned home.

Deputy Swanson filled out a report in which she recounted that father had informed the former foster mother that plaintiff had fallen and bumped his head while at Wienerschnitzel. The report concluded that there was an ongoing custody dispute between the parents, that the former foster mother requested documentation of the incident and that the case was "for information only at this time and forward to station files." Deputy Swanson left a card for mother to contact her when she returned home, but mother never did. The deputy cleared the case, and her report was reviewed and approved by her supervisor, Sergeant Jeff Bohner.

After September 22, 2008, mother did not allow plaintiff to visit with his father. However, on October 11, 2008, mother allowed a visit. On October 18, 2008, father called his live-in girlfriend at work to report that plaintiff had fallen, hit his head, and would not wake up. Father's girlfriend rushed home. When she got home, the girlfriend noticed plaintiff was stiff and asked the father whether he had called the mother or 911 yet. Father then called 911, and subsequently the girlfriend called mother to report the injury.

Emergency personnel responded to father's residence and transported plaintiff to Loma Linda University Hospital where plaintiff was treated for severe head trauma.

Plaintiff suffered seizures and was still unconscious upon arrival at the hospital, where a craniectomy was performed, removing a portion of the child's skull to relieve pressure in the brain from swelling. Plaintiff suffered subdural hematoma, cerebral edema, and subfalcine herniation[3] caused by intracranial pressure. A consulting forensic pediatrician determined that the injuries were inflicted, the result of child abuse. The pediatrician concluded that father's explanation that the child was knocked backwards from a standing position onto a carpeted floor by a 16-month old half-sibling was not credible.

On September 11, 2009, plaintiff, through mother, as his guardian ad litem, filed a complaint against the County of San Bernardino, the City of Yucaipa, Deputy Swanson, Sergeant Bohner, and father. The causes of action against the county, city, and sheriff's department personnel alleged breach of mandatory duty to report child abuse, pursuant to Government Code section 815.6 (first cause of action), and negligence, under theories of res ipsa loquitur and negligence per se, pursuant to Government Code section 815.2 (second cause of action).

Defendant made a general appearance by way of answer and general denial on November 20, 2009, asserting several affirmative defenses, including governmental immunities. On November 10, 2010, defendant filed a motion for summary judgment.

---

[3] Subfalcine herniation is the most common cerebral herniation pattern, characterized by displacement of the brain beneath the free edge of the falx cerebri due to raised intracranial pressure. (http://radiopaedia.org/articles/subfalcine_herniation [as of 5/1/2013]; Laine, Shedden, Dunn, Ghatak, *Acquired Intracranial Herniations: MR Imaging Findings*, 165 Amer. Journal of Roentgenology 967 (1995).)

The motion was heard on May 12, 2011, and the court orally ruled in favor of granting the motion. A formal order granting the motion was filed on July 14, 2011 On August 11, 2011, judgment was entered in favor of defendants County of San Bernardino, City of Yucaipa, Sergeant Jeff Bohner, and Deputy Kimberly Swanson. On September 8, 2011, plaintiff timely appealed.

DISCUSSION

Plaintiff argues on appeal that there were triable issues of fact as to whether defendants' failure to cross-report the child abuse report of September 22, 2008, violated their mandatory reporting duties under CANRA, precluding entry of summary judgment. As such, plaintiff asserts the trial court erroneously concluded defendants were immune from liability. We disagree.

a. Standard of Review

Summary judgment is properly granted when there are no triable issues of material fact and the moving party is entitled to judgment as a matter of law. (*Conroy v. Regents of University of California* (2009) 45 Cal.4th 1244, 1250; Code Civ. Proc., § 437c, subds. (b), (o).) A defendant meets his burden of showing that a cause of action lacks merit if he shows that one or more elements of the cause of action cannot be established, or that there is a complete defense to that cause of action. (Code Civ. Proc., § 437c, subd. (p)(2); *Ortega v. Sacramento County Dept. of Health & Human Services* (2008) 161 Cal.App.4th 713, 716.) The purpose of a motion for summary judgment is to discover whether the parties possess evidence which requires the fact-weighing procedures of a

trial. (*Soto v. County of Riverside* (2008) 162 Cal.App.4th 492, 496, quoting *City of Oceanside v. Superior Court* (2000) 81 Cal.App.4th 269, 273.)

We review the trial court's decision de novo, considering all of the evidence the parties offered in connection with the motion (except that which the court properly excluded) and the uncontradicted inferences the evidence reasonably supports. (*Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476, citing *Artiglio v. Corning Inc.* (1998) 18 Cal.4th 604, 612.) Because we review independently, or de novo, the trial court's stated reasons for granting summary judgment are not binding on us; we review the ruling, not the rationale. (*Soto v. County of Riverside, supra,* 162 Cal.App.4th at p. 496; *Kids' Universe v. In2Labs* (2002) 95 Cal.App.4th 870, 878.)

b. Whether Defendants Breached the Mandatory Reporting Duty by Failing to Cross-Report.

Penal Code section 11166, subdivision (a), requires a mandated reporter to make a report to a police department or sheriff's department, among other agencies, "whenever the mandated reporter, in his or her professional capacity or within the scope of his or her employment, has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect."

A mandated reporter has "reasonable suspicion" within the meaning of the act, when it is objectively reasonable for a person to entertain a suspicion, based upon facts that could cause a reasonable person in a like position, drawing, when appropriate, on his or her training and experience, to suspect child abuse or neglect. (Pen. Code, § 11166,

subd. (a)(1).) Penal Code section 11165.9 provides that reports of suspected child abuse or neglect shall be made by mandated reporters to any police department or sheriff's department. Peace officers and social workers are mandated reporters. (Pen. Code, § 11165.7, subds. (a)(15), (19).)

Plaintiff asserts that Penal Code section 11166, subdivision (a), imposes two mandatory duties on a police officer who receives an account of child abuse: (a) the duty to investigate, and (b) the duty to take further action when an objectively reasonable person in the same situation would suspect child abuse. (*Alejo v. City of Alhambra* (1999) 75 Cal.App.4th 1180, 1186.) However, while the language of the statute does require a mandated reporter to send a followup report where the mandated reporter knows or reasonably suspects a child has been the victim of child abuse or neglect, it does not create a general mandatory duty "to take further action" where child abuse is *not* suspected.

The statement from *Alejo,* upon which plaintiff bases his argument, is at odds with the accepted notion that where a statute calls for the exercise of judgment, expertise, and discretion, it does not create a mandatory duty within the meaning of Government Code section 815.6. (*Jacqueline T. v. Alameda County Child Protective Services* (2007) 155 Cal.App.4th 456, 477.)

Here, it is undisputed that Deputy Swanson investigated the report of suspected abuse. The decision to not cross-report was tantamount to a decision to not prosecute, where it was the product of an investigation. The decision was grounded on the

judgment, expertise and discretion of the investigating sheriff's deputy. Penal Code section 11166, subdivision (a), limits the mandatory duty to take further action to situations in which "an objectively reasonable person in the same situation would suspect child abuse." (See *Alejo v. City of Alhambra, supra,* 75 Cal.App.4th at p. 1186.) Having investigated the incident, it was objectively reasonable for Deputy Swanson to conclude the situation did not involve child abuse, even if that conclusion, in the exercise of Deputy Swanson's judgment, was in error. (*Jacqueline T. v. Alameda County Child Protective Services, supra,* 155 Cal.App.4th at pp. 476-477.)

Plaintiff's extensive reliance on the holding of *Alejo v. City of Alhambra, supra,* 75 Cal.App.4th 1180, in arguing that Deputy Swanson's failure to cross-report constituted a violation of the mandatory duty to cross-report to CFS, is misplaced. That case did not involve a failure to follow up, so it is inapposite. An appellate decision is not authority for everything said in the court's opinion, but only for the points actually involved and actually decided. (*Santisas v. Goodin* (1998) 17 Cal.4th 599, 620; see also *People v. Knoller* (2007) 41 Cal.4th 139, 154-155.)

In *Alejo,* the father of a child became concerned when he observed severe facial bruising to and surrounding the child's eye. The child's mother's explanations did not dispel his concern. (*Alejo v. City of Alhambra, supra,* 75 Cal.App.4th at p. 1183.) Three days later, a neighbor informed the father that mother and her boyfriend were using drugs and abusing the child, prompting father to call the police. (*Ibid.*) Despite the report, the police did not conduct any investigation into whether the child was being abused. Six

weeks later, the child was severely beaten, resulting in permanent disability. (*Id.* at p. 1184.) The *Alejo* case involved a total failure to investigate, in violation of Penal Code section 11166, subdivision (a). It did not involve a situation in which a deputy conducted an investigation but concluded there was no child abuse.

The present case is more on point with *Ortega v. Sacramento County Dept. of Health & Human Services, supra,* 161 Cal.App.4th 713. In *Ortega,* a child sued the social services agency for returning her to the custody of her father following an incident in which the father had abused phencyclidine (PCP) and had been arrested following a disturbance. (*Id.* at p. 717.) The father had a history of domestic violence and drug use, and he had previously lost custody of the child a few years earlier when he was arrested on outstanding warrants in the child's presence. (*Ibid.*)

After investigating the incident, and learning that the father had taken the PCP in the child's presence, as well as learning of his violent and unstable history, the social services agency returned the child to the father's custody. A few days later, the father savagely attacked the child, stabbing her in the heart and lung, causing enormous physical and emotional injuries. (*Ortega v. Sacramento County Dept. of Health & Human Services, supra,* 161 Cal.App.4th at p. 718.) The child sued the county social services agency for breach of the mandatory duty to fully and adequately investigate, but the court granted summary judgment in favor of the defendant.

On appeal, the Third District Court of Appeal concluded the defendants complied with the mandatory duties by conducting an investigation, although it was characterized

as "lousy," and by making a determination about potential risk to the child, although it was the wrong one. (*Ortega v. Sacramento County Dept. of Health & Human Services, supra,* 161 Cal.App.4th at p. 728.) Similarly, in the present case, it is undisputed that Deputy Swanson investigated the report, concluding that there was no child abuse after learning the report was being made for informational purposes in an ongoing child custody battle.

There are strong policy reasons to follow *Ortega* and to disregard the dicta of *Alejo.* If no discretion is to be involved in the decision to prefer charges or cross-report to CFS, any report of child abuse would inevitably result in someone's arrest and prosecution, with possible loss of child custody, as the exercise of a ministerial duty. This would have far-reaching implications for an already overburdened child welfare system and an equally overburdened judicial system. The decision to cross-report, like the decision to arrest, is an inherently discretionary decision by an officer exercising judgment and expertise.

Penal Code section 11166, subdivision (a), does not create an express duty to cross-report so the County defendants did not violate a mandatory duty.

At oral argument, plaintiff argued that a separate and independent duty to cross-report is imposed by Penal Code section 11166, subdivision (k), an argument not presented in the trial court and not raised in the opening or reply briefs. Ordinarily, a new theory may not be presented for the first time at oral argument. (*AmeriGas Propane, L.P. v. Landstar Ranger, Inc.* (2010) 184 Cal.App.4th 981, 1001 [Fourth Dist., Div.

Two].) Nevertheless, we have considered the issue and find it does not affect our analysis.

Penal Code section 11166, subdivision (k), provides that "[a] law enforcement agency shall immediately, or as soon as practicably possible, report by telephone, fax, or electronic transmission to the agency given responsibility for investigation of cases under Section 300 of the Welfare and Institutions Code and to the district attorney's office *every known or suspected instance of child abuse or neglect reported to it*, except acts or omissions coming within subdivision (b) of Section 11165.2, which shall be reported only to the county welfare or probation department." [Italics added.] The subsection goes on to require law enforcement agencies to "report to the county welfare or probation department every known or suspected instance of child abuse or neglect reported to it which is alleged to have occurred as a result of the action of a person responsible for the child's welfare, or as the result of the failure of a person responsible for the child's welfare to adequately protect the minor from abuse when the person responsible for the child's welfare knew or reasonably should have known that the minor was in danger of abuse."

Plaintiff argues that this subdivision imposed on the sheriff's department dispatcher the mandatory duty to cross-report the allegation of abuse to DCFS, even before the dispatcher sent Deputy Swanson to investigate the allegations. We disagree. In *Jacqueline T. v. Alameda County Child Protective Services, supra,* 155 Cal.App.4th 456, the court rejected the notion that the decision to cross-report was a ministerial,

mandatory duty. (*Id.* at p. 466.) That court concluded that the failure to conduct a reasonable and diligent investigation and to timely cross-report to other agencies were incidental to the agency's investigations, within the scope of their employment, and thus covered by immunity. (*Id.* at p. 468.)

The court in *Jacqueline T.* also distinguished the child welfare agency and law enforcement agencies from mandatory reporters covered by Penal Code section 11166, subdivision (a), explaining that the former were the alleged *receivers* of reports from mandated reporters, and not reporters themselves. As such they could not have breached a mandatory duty to report (or cross-report). (*Jacqueline T. v. Alameda County Child Protective Services, supra,* 155 Cal.App.4th at p. 473.) Finally, that case held that because the plaintiff could not, as a matter of law, establish that the failure to cross-report was a proximate cause of the plaintiff's injuries, as required by Government Code section 815.6, the agency employees were immune, as was the agency. (*Jacqueline T.,* at pp. 469, 473.)

Although the language of Penal Code section 11166, subdivision (k), uses the word "shall" in requiring a law enforcement agency to cross-report, we do not interpret this to require mandatory agency action in the absence of investigation. The statutory language providing that the law enforcement agency "shall" cross-report "every known or suspected instance of child abuse reported to it," implies that the duty to cross-report arises only after an investigation results in the determination that abuse is known or that it is objectively reasonable for a person to entertain a suspicion, based on facts that could

cause a reasonable person to suspect child abuse or neglect. (Pen. Code, § 11166, subd. (a)(1).) Such a reasonable suspicion could only arise in the mind of an employee of a law enforcement agency after an investigation of the reported abuse has been undertaken.

We disagree with the notion, not raised in the trial court or in the opening brief, that Penal Code section 11166, subdivision (k), creates a separate, independent, and mandatory duty to cross-report, the violation of which creates a separate basis of liability under Government Code section 815.6.

c. ***Whether Defendants' Actions Are Entitled to Governmental Immunity.***

Government Code section 815.6 provides that where a public entity is under a mandatory duty, it is liable for an injury caused by his failure to discharge the duty unless it establishes it exercised reasonable diligence to discharge the duty. Government Code section 815.6's liability for breach of a mandatory duty applies to ministerial duties imposed by statutes and regulations. (*Ortega v. Sacramento County Dept. of Health & Human Services, supra,* 161 Cal.App.4th at p. 728; see also *Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, 141.) To prove a violation under Government Code section 815.6, the plaintiff must plead the existence of a specific statutory duty. (*Jacqueline T. v. Alameda County Child Protective Services, supra,* 155 Cal.App.4th at p. 471.)

However, Government Code section 820.2 provides for immunity to a public employee for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not that discretion

was abused. Government Code section 821.6 expressly immunizes a public employee for injury caused by instituting or prosecuting any judicial or administrative proceeding with the scope of his employment, even if he acts maliciously and without probable cause.

Government Code section 821.6 is not limited to the act of filing a complaint; it also extends to actions taken in preparation for formal proceedings, including investigation. (*County of Los Angeles v. Superior Court* (2009) 181 Cal.App.4th 218, 229; *Amylou R. v. County of Riverside* (1994) 28 Cal.App.4th 1205, 1209-1210.) Investigation is an essential step toward the institution of formal proceedings, so it is cloaked with immunity. (*Amylou R.*, at p. 1210.)

Investigations are thus considered to be part of judicial and administrative proceedings for purposes of Government Code section 821.6 immunity. (*Richardson-Tunnell v. Schools Ins. Program for Employees* (*SIPE*) (2007) 157 Cal.App.4th 1056, 1062, citing *Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 1436-1437.) The immunity extends to investigations even if there is a later decision not to initiate a prosecution. (*Richardson-Tunnell,* at p. 1062, citing *Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1293; see also *Gillan v. City of San Marino* (2007) 147 Cal.App.4th 1033, 1048.)

As discussed in the previous section, defendants complied with the mandatory reporting duty of investigating the child abuse report. The gravamen of plaintiff's claim is that the County defendants failed to follow up with a cross-report to CFS. However, as

we have shown, there is no specific statutory duty to cross-report where the investigation concludes there was no child abuse.

The present case is quite similar to *Ortega v. Sacramento County Dept. of Health & Human Services, supra,* 161 Cal.App.4th 713, where the court concluded that a claim of inadequate investigation was precluded by the statutory immunity. The court observed that claims of improper evaluation cannot divest a discretionary policy decision of its immunity. (*Id.* at p. 733, citing *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 983-984.) "[T]he collection and evaluation of information is an integral part of 'the exercise of the discretion' immunized by section 820.2." (*Ortega,* at p. 733.)

Here, Deputy Swanson responded to the dispatch, examined the child, and determined there was no child abuse. Whether the investigation was adequate or not, and whether the deputy's conclusion was incorrect, Deputy Swanson's failure to cross-report is covered by the immunity provided by Government Code section 821.6. If the employee is immune, so, too, is the county. (*Jacqueline T. v. Alameda County Child Protective Services, supra,* 155 Cal.App.4th at pp. 468-469.)

Summary judgment was properly granted.

DISPOSITION

The judgment is affirmed. Respondents are entitled to costs on appeal.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

RICHLI
J.

MILLER
J.

PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California and over the age of eighteen years. I am not a party to the within action. My business address is 234 East Colorado Boulevard, Suite 750, Pasadena, California 91101.

I am readily familiar with the practice of Esner, Chang & Boyer for collection and processing of correspondence for mailing with the United States Postal Service. In the ordinary course of business, such correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, the same day I submit it for collection and processing for mailing. I served the document(s) listed below by placing a true copy thereof in a sealed envelope with postage thereon fully prepaid, addressed as follows:

Date Served: August 29, 2013

Document Served: Petition for Review

Parties Served:

Norman J. Watkins, Esq.
Shannon L. Gustafson, Esq.
Lynberg & Watkins
1100 Town & Country Road, Suite 1450
Orange, CA 92868
(Attorneys for Defendants County of San Bernardino; Sergeant Jeffrey Bohner, Deputy Kimberly Swanson, and City of Yucaipa)

Hon. Donald R. Alvarez
San Bernardino County Superior Court
303 West Third Street, Dept S32
San Bernardino, CA 92415
(Trial Judge)

Clerk's Office
Court of Appeal
Fourth Appellate District, Division Two
3389 Twelfth Street
Riverside CA 92501

(BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Pasadena, California.

Executed on August 29, 2013, at Pasadena, California.

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

Carol Miyake