S213066
4th Dist. No. E054516

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

Plaintiff, Petitioner,

vs.

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

Defendants, Respondents.

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

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ANSWER BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(CAL. RULES OF COURT, RULE 8.208)

There are no interested entities or persons to list in this certificate (Cal. Rules of Court, rule 8.208(e)(3)).

DATED: February 13, 2014

Respectfully submitted,
LYNBERG & WATKINS
A Professional Corporation

By: _____

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I. STATEMENT OF FACTS

B.H. was born on August 4, 2006. At all times his mother, Lauri Hanson and father, Louis Sharples, lived separately. B.H. and his mother lived in the home of a friend, Christy Kinney, who has been described as a "former guardian." (*See*, Appellant's Appendix ("AA") 9). Sharples lived with his girlfriend and their 18-month-old son. (AA 106, 961; 167).

In 2008, Sharples and Hanson had an informal agreement that Sharples would have custody of B.H. every other weekend. (AA 60, 88-90; 108-109). On September 17, 2008, the family law court entered a custody order which increased Sharples' custody of B.H. to every weekend. (AA 61; 85-87; 108-109).

Sharples and Hanson had a tumultuous relationship with allegations of parental misconduct and child abuse going back and forth. In early July 2008, Sharples was scheduled to have custody of B.H. for five days starting July 1. (AA, 61; 93-95). On July 2, Sharples called the San Bernardino Sheriff's Department and reported that B.H. appeared to have been abused by his mother. On this particular occasion, he described bruises on B.H.'s neck "as if he had been choked." He also reported that this was not the first time the child was brought to him with suspicious bruising. (AA 174). During the investigation, Sharples told the assigned deputy that he and B.H.'s mother had an ongoing custody battle and that he was going to court to get full custody of B.H. (AA 191).

The next day, after learning of Sharples' allegations against her, Hanson called the San Bernardino welfare department and alleged that Sharples had filed a false report of child abuse against her with law

enforcement. She then charged that, in fact, it was Sharples who abused B.H. and had done so on multiple occasions although she had not made previous reports. (AA 228). Hanson also complained that Sharples was breaching the custody order, and that she, too, was returning to court to seek *ex parte* relief. (*Id.*)

The sheriff's deputy who responded to Sharples' report interviewed him, and also observed B.H. He noted vertical marks on the boy's neck but was unable to get any information directly from the child because of his age. Sharples told the deputy that he had not spoken to Hanson about the marks. He also told the deputy that this had happened on prior occasions. He said that, when confronted, Hanson simply responded B.H. "trips a lot." (AA 201).

The deputy later interviewed Hanson, and she denied that B.H. had any scratches on his neck when she dropped him off with Sharples. Based on this conflicting information, as well as his personal observations, the deputy documented the allegations as "inconclusive," ending law enforcement's intervention at that time.

Hanson's counter-allegations of child abuse against Sharples were separately investigated by a social worker. (AA 64-65; 232). She interviewed both Sharples and Hanson and, like the deputy, she noted that the allegations of abuse came in the midst of a bitter custody dispute. Hanson also told the social worker about Sharples' abuse allegations, which Hanson said were false. Hanson did claim she was aware of a scratch on B.H.'s shoulder when she left him with Sharples on July 1, but she denied there were scratches on his neck.

Several days later, after the interview of Hanson, the social worker interviewed Sharples and visited with B.H. She noted that

B.H. looked "healthy and adequately cared for," and did not note any marks or bruising. (AA 232). She then discussed the custody issue raging between Hanson and Sharples, and urged Sharples to allow Hanson to have custody of B.H. as before. She reported that Sharples "...did not appear malicious, but rather young and inexperienced." (*Id.*) Sharples ultimately agreed to resume shared custody pending further court action. The social worker documented in her file that "...the situation is a custody battle and the allegations of physical abuse are unfounded." (*Id.*) That concluded the welfare department's action. On September 17, 2008, the family law court entered the order referenced above: primary custody of B.H. with the mother, and custody every weekend plus one mid-week visit for the father. (AA 107-109).

On September 22, when Hanson picked up B.H. from the first weekend visit following that court order, she called Kinney and said B.H. had some unexplained bruising. (AA 110-111; 257-258). Kinney asked Hanson if B.H. should see a doctor, but Hanson declined stating that she had a doctor's appointment scheduled for him the next day. (AA 153). Before dropping B.H. at the Kinney residence and leaving again, Hanson took several photographs of the boy at Kinney's suggestion. (AA 148-149; 150; 257-258; 349-351; 353-359). Hanson then left B.H. with Kinney, and went to school. Hanson did not return to B.H. after class, but instead went to a party until 3:00 a.m. the next morning. (AA 151; 261; 262; 115-116; 262-263).

Later that evening, in Hanson's absence, Kinney called the Sheriff's Department and reported that she and Hanson were in a

custody dispute with B.H.'s father, and that "...[Hanson's] ex-boyfriend has her son on weekends...and he came back this weekend really beat up. He's got bruises, like, all over his forehead." (AA 274). The sheriff's dispatch operator offered medical attention, but Kinney declined, explaining that the boy would be taken to his doctor the next day. Kinney further explained that she felt obligated to report the incident so she "...just need[ed] to report that it was done." (AA 275). Finally, she stated that B.H.'s father explained B.H. fell out of a vehicle, while Sharples' girlfriend said he fell down some stairs, raising her suspicions that the boy had been abused. (AA 276).

Deputy Swanson was dispatched to the Kinney residence with only the following information: A two-year-old juvenile presently at Kinney's address had been at his father's home for the weekend. The father was identified by name and partial address only. The child's mother was not with the child at the time of the call, and child's "grandmother" (Kinney) was advised by the child "...that he fell at a fast food place on some stairs," but the grandmother (identified by name and address) disbelieved this and "...[felt] the bruises [were] from the father hitting [the] juv[enile]." (AA 315). The deputy was also told that medical attention was offered and declined because the boy had a scheduled doctor's appointment the next day. Finally, the dispatch message noted that Kinney requested a deputy "for RPT [Report]." (*Id.*)

When Deputy Swanson arrived at the Kinney home, B.H. was in bed asleep. He was awakened and brought to the deputy, and she visually observed what she could, but noted that B.H. was still partially asleep and not terribly cooperative. (AA 289-300). The

deputy spent twenty minutes in the home with Kinney and B.H., and then went to her police car and ran computer checks on Hanson and Sharples. (AA 287-288). Swanson returned to the house, left her card with Kinney, and requested that she have Hanson call her as soon as she came home. (AA, 290-291; 294; 301-302; 304-305). Deputy Swanson never heard from Hanson or Kinney again, and it was later revealed that B.H. was not taken to his medical appointment. (AA 302; 306-307)

After three days and no further communication from Kinney, Hanson, or B.H.'s doctor, Deputy Swanson prepared her report noting that:

> [B.H.] is Kinney's grandson. Over the weekend, [B.H.] was at visitation with his father, Louis Sharples. When [B.H.] returned from visitation, Kinney discovered [B.H.] had a cut and bruising above his right eye. He also had small bruises, which appear to be old, on his upper right arm and on his back. Kinney contacted Sharples, who told her [B.H.] had fallen while at Wienerschitzel and bumped his head. Kinney and her daughter, Lauri Hanson, are in an ongoing custody dispute with Sharples. Kinney requested documentation of the incident. Case for information only at this time and forward to station files.

(AA 281-282; 311-313).

Based on the information she had at that point, Swanson did not suspect parental abuse had occurred and "cleared" the case. She submitted her report to her supervisor, and no further investigation or

reporting occurred. (AA, 281-282; 283; 285; 289; 298; 303; 311-313; 315; 318; 321-323).

In mid-October, Hanson left B.H. with Sharples for the weekend. (AA 93-95). On that Saturday afternoon, Sharples called "9-1-1" and reported B.H. had fallen, hit his head, and would not wake up. (AA 331). Emergency personnel responded, and B.H. was taken to Loma Linda University and admitted for emergency treatment for severe head trauma. (AA 164-165; 336-338). Sharples was arrested and charged with criminal child abuse. This civil action was also initiated. Although Sharples was acquitted of all criminal charges, he never appeared in this civil action, and a default was entered.

In this lawsuit, Plaintiff's claims have transformed over time. In their first iteration, Plaintiff wrote in his government tort claim that the deputy breached her mandatory duty to **investigate** Kinney's abuse allegations. (Motion for Judicial Notice ("MJN"), Exhibit "2," Tort Claim, 3:4-18). Alternatively, Plaintiff claimed that a jury should decide whether it was reasonable for the deputy not to suspect child abuse following her investigation. Plaintiff claimed that the deputy breached her "duty" **to suspect abuse**, and therefore to cross-report to the district attorney, the Department of Justice, and DCS. (*Id.* at 8:21).

Plaintiff later advanced two claims not contained anywhere in his tort claim: 1) that Deputy Swanson, breached a mandatory duty to immediately report Kinney's call to the County welfare department; and 2) that pursuant to *Cal. Penal Code* § 11166(k) of the Child Abuse and Neglect Reporting Act ("CANRA"), the Sheriff's

Department, as an entity separate and apart from its employees, breached its mandatory duty to report Kinney's call immediately to the County welfare department. (Plaintiff's Opening Brief on the Merits ("Opening Brief"), 13-14).

II. OVERVIEW OF THE ACT

In 1980, Senate Bill 781 was added to the *Penal Code* as the Child Abuse and Neglect Reporting Act. The Act, *inter alia*, designated who is required to report suspected abuse or neglect ("mandated reporters"); what those reporters are required to report ("mandated reports"); when the duty to report is triggered; and where the reports are to be made. Forty-four categories of professions and occupations were designated as mandated reporters. *Cal. Penal Code* § 11165.7. What was required to be contained in their "mandated reports" is spelled out in *Cal. Penal Code* § 11167 (a)-(b). When the reporting duty is triggered is found in *Cal. Penal Code* § 11166(a). And finally, *Cal. Penal Code* § 11165.9 specifies where abuse reports are to be directed. *Id.* ("Any police department, sheriff department, probation department if designated by the County to receive mandated reports, or the County welfare department.")

In 1986, in the seminal case of *Planned Parenthood Affiliates of California v. John K. Van De Kamp* (1986) 181 Cal.App.3d 245, the Court of Appeal was tasked to make determinations about CANRA's legislative purpose and effect based on a scenario similar to the one Plaintiff advances to this Court. In that case, a fourteen-year-old patient confided to her doctor that she was involved in a consensual sexual relationship with an age-appropriate male, and she denied abuse. *Id.* at 257. The question was then whether a physician, as a

mandated reporter under the Act, was required to make a blanket, non-discretionary report of "reasonably suspected" child abuse, even if he did not actually suspect the child was in an abusive relationship.

The court observed that, fundamentally, with this broad based reporting scheme, "the Legislature acknowledged the need to distinguish between instances of abuse and those of legitimate parental control." *Id.* at 258. Thus, "[t]o strike the 'delicate balance' between child protection and parental rights the Legislature relies on the judgment and experience of the trained professionals to distinguish between abusive and non-abusive situations." *Id.* Those trained professionals, the mandated reporters in the Act, "...are presumed to be uniquely qualified to make informed judgments when suspected abuse is not blatant." *Id.* at 259, citing Comment, Reporting Child Abuse: When Moral Obligations Fail (1983) 15 Pacific L.J. 189, 214.

On pain of criminal prosecution, CANRA requires a mandated reporter, when he or she "entertain[s] a suspicion" of child abuse or neglect, to make a mandated report to one of several governmental agencies. *Cal. Penal Code* § 11166(a); *Cal. Penal Code* § 11165.9. The Act also permits, but does not require, anyone else to make a report if abuse is suspected. *Cal. Penal Code* § 11166(g) ("Any other person who has knowledge or reasonably suspects [a child has been abused] **may** report...") (Emphasis added). Records of mandated reports are required to be maintained by these agencies. *Cal. Penal Code* § 11165.9 ("Agencies that are required to receive reports...from a mandated reporter...shall maintain a record of all reports received.")

The Act creates a screening process of reporting, investigation, and cross-reporting to minimize the risks associated with misreporting suspected abuse[1] or not reporting actual abuse. In addition, the Act carefully identifies those professionals best able to make informed judgments about what is, or is not, an abusive situation. The Act requires that mandated reports be made to agencies whose employees, by training and experience, are best suited to investigate those reports. *Alejo v. City of Alhambra* (1999) 25 Cal.App.4th 1180, 1187 ("Suffice it to say, the whole system depends on professionals such as doctors, nurses, school personnel and peace officers who initially receive reports of child abuse to investigate and where warranted, report those accounts to the appropriate agencies.") "A child protective agency[2] receiving the initial child abuse report then conducts an investigation. The Legislature intends an investigation be conducted on every report received." *Planned Parenthood, supra,* 181 Cal.App.3d at 259-260.

Every employee of **every** California law enforcement agency is designated to be both a mandated reporter, and also an employee of an agency tasked with receiving reports of known or suspected abuse under § 11165.9. *Cal. Penal Code* § 11165.7(a) provides: "As used in this article, 'mandated reporter' is defined as any of the following:

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[1] Over reporting of abuse to public agencies ultimately works against children in danger. *See generally*, Steven J. Singley, Failure to Report Suspected Child Abuse: Civil Liability of Mandated Reporters (1998) 19 J.Juv.L 236.

[2] "Employees of 'child protective agencies' consist of police and sheriff's officers, welfare department employees and county probation offices. (§11165, subd. (k).)" *Planned Parenthood, supra,* 181 Cal.App.3d at 258.

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> (34) an employee of any police department, county sheriff's department, county probation department, or County welfare department.

Similarly, section 11165.9 provides in part:

> reports of suspected child abuse or neglect shall be made by mandated reporters...to any police department or sheriff's department not including a school district police or security department, county probation department, if designated by the county to receive mandated reports, or county welfare department.

The Act obligates those agencies to accept reports of suspected child abuse, whether from a mandated reporter or "any other person," i.e. from anyone. *Cal. Penal Code* § 11166(g); *See also, Cal. Penal Code* § 11165.9 ("Any of these agencies shall accept a report of suspected child abuse or neglect whether offered by a mandated reporter or another person...")

A. Deputy Swanson's Duty to Report

In this case, it is undisputed that Kinney was not a mandated reporter, and that on September 22, 2008, she called the Sheriff's Department stating she believed B.H.'s father may have abused him. She also told the 9-1-1 operator that she and the boy's mother were in a custody dispute with the father. That information was then electronically dispatched to Deputy Swanson's computer terminal in her patrol car. (AA 315).

Plaintiff argued for the first time on appeal that under CANRA, the deputy was required to immediately report Kinney's suspicions to the district attorney and the appropriate welfare agency before even investigating the call. (Plaintiff's Opening Brief, 56)("11666(a) does not require that a mandated reporter investigate anything before his or her duty to report is triggered.") However, the decision Plaintiff cites for this proposition actually states precisely the opposite:

> First, the statute imposes a duty to investigate. Although section 11166 subdivision (a) does not use the term investigate, it clearly envisions some investigation in order for an officer to determine whether there is reasonable suspicion to support the child abuse allegation and to trigger a report to the county welfare department and the district attorney under section 11166(i)[3] and the Department of Justice under section 11169(a).

Alejo, supra, 25 Cal.App.4th at 1186. Similarly, the court in *Planned Parenthood* declared that "[the] Legislature intends an investigation to be conducted on **every report received**." *Planned Parenthood, supra,* 181 Cal.App.3d at 259 (Emphasis added). This makes perfect sense given that "[a] fundamental part of the reporting law is to allow the trained professional to determine an abusive from a non-abusive situation." *Planned Parenthood, supra,* 181 Cal.App.3d at 272.

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[3] At the time of this decision, 11166(i) had the same language as is now found in § 11166(k).

Plaintiff nevertheless argues that an allegation of child abuse by **any** person (a non-mandated reporter), to **any** mandated reporter, such as **any** employee of a sheriff's department, creates a mandatory duty for that employee to immediately report the allegation to the agencies identified in *Cal. Penal Code* § 11165.9 (law enforcement, welfare, district attorney). As Plaintiff would interpret the Act, if Kinney, or anyone for that matter, told the family doctor (a mandated reporter[4]) that a child, any child, had been abused, the doctor would presumably be obligated to immediately report suspected child abuse to a child protective agency without so much as an examination of the child. In this case then, the 9-1-1 operator who answered Kinney's call, as a mandated reporter, was duty-bound to immediately report whatever Kinney claimed to those agencies as if it were a mandated report.[5]

If Plaintiff's theory is correct, then the reporting threshold of "knows or reasonable suspects" found in section 11166(a) is meaningless. Section 11166(a) triggers a mandated reporter's duty to report allegations of abuse "whenever the mandated reporter, in his or her professional capacity...knows or reasonably suspects [child abuse]." *Cal. Penal Code* § 11166(a). Plaintiff, however, reads this language out of the Act by arguing that every accusation of child abuse **from anyone** to a mandated reporter must, without exception, be immediately reported to the other child protective agencies: probation, welfare, and the district attorney.

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[4] *See, Cal. Penal Code* § 11165(23)

[5] "Any report made by a mandated reporter...shall be known as a mandated report." *Cal. Penal Code* § 11166(a)(3).

In addition to the impracticality of Plaintiff's position, the difficulty with this argument lies in the statute itself. It is, of course, the court's province to construe the laws enacted by the Legislature, and in so doing, courts endeavor to ascertain and effectuate the Legislature's intent. *DeYoung v. San Diego* (1983) 147 Cal.App.3d 11, 18; *People v. Starr* (2003) 106 Cal. App. 4th 1202, 1207 (The interpretation of a statute is a judicial function, as a statute's meaning is a pure issue of law.); *Apple Computer, Inc. v. County of Santa Clara Assessment Appeals Bd.* (2003) 105 Cal. App. 4th 1355, 1370.

To be sure, courts must be guided by several principles in statutory construction: 1) give effect to the entire statute; 2) avoid a construction that renders some words as surplusage; and 3) find a construction that harmonizes all the sections of the statute. *Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist.* (1978) 21 Cal. 3d 650, 658-659; *see also, Cal. Civ. Proc. Code* § 1858 ("In the construction of a statute...where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.")

The foregoing principles doom Plaintiff's proffered interpretation of the Act. First, without exception, **every** "employee of any police department, county sheriff's department, county probation department, or county welfare department is a mandated reporter." *Cal. Penal Code* §11165(a)(34). Further, the Act very clearly obligates **every** mandated reporter to "...make a report to an agency specified in section 11165.9 [police department or welfare department] **when the mandated reporter...has knowledge of or observes** a child whom the **mandated reporter knows or**

reasonably suspects has been the victim of child abuse or neglect." *Cal. Penal Code* § 11166(a) (Emphasis added). Thus, for example, when the non-mandated reporter alleges abuse of a child to the family doctor, the doctor, as a mandated reporter, is not obliged to report that bare allegation until further inquiry by him or her leads the doctor "in his or her professional capacity" to "reasonably suspect" child abuse. *Cal. Penal Code* § 11166(a).

Plaintiff's theory, that "§ 11166(a) does not require that [Swanson] 'investigate anything' before her duty to report is triggered" (Plaintiff's Opening BR. at 56) in this case means that Swanson was mandated to cross-report based only on what initially appeared on her mobile computer terminal:

> Entry: Text: 2 YO JUV WAS AT FATEHRS [SIC] HOUSE FOR THE WEEKEND AND CAME HOME WITH BRUISES ON HIS FOREHEAD...LUIS SHARPLES DOB UNK 19YO LIVES AT UNK ADDR ON CALIFORNIA ST...MOTHER OF JUV IS LORI HANSON DOB 12071988 IS NOT AT LOC...RP IS THE GRANDMOTHER, STS JUV TOLD HER THAT HE FELL OUT OF THE FATHERS TRK, RP SPOKE TO FATHERS GF WHO STS THE JUV FELL AT A FAST FOOD PLACE ON SOME STAIRS, RP FEELS THE BRUISES ARE FRM THE FATHER HITTING JUV. REQ DEP FOR RPT

(AA 315).

With this, and despite never having even met the reporting party, the alleged victim, or any member of the alleged victim's

family, Plaintiff argues that Deputy Swanson was mandated to immediately report child abuse to the district attorney and welfare department pursuant to section 11165.9. In addition to completely eliminating the triggering provisions of section 11166(a), Plaintiff's interpretation would also render section 11167 largely meaningless: "[r]eports of suspected child abuse pursuant to section 11166...**shall** include the name, business address, and telephone number of the **mandated reporter**...and the information that gave rise to the **reasonable suspicion** of child abuse..." *Id.* (Emphasis added). In this scenario, there was **no** mandated reporter, and certainly none with a "reasonable suspicion" of child abuse.

Interestingly, the only provision in this Act that spells out reporting requirements when the initial allegation comes from a non-mandated reporter requires very limited reporting, and only if the allegations are "substantiated." In section 11165.14, the legislature addressed a situation, all too common today, where a student's parent or guardian (a non-mandated reporter) complains to a school or an agency designated in section 11165.9 (law enforcement, probation or welfare) of abuse to his or her child occurring at a school site. The Act specifically provides that the "appropriate law enforcement agency" investigate the complaint and "...shall transmit a **substantiated** report of that information to the appropriate school district or county office of education." *Id.* (Emphasis added). If the Act also intended much broader immediate reporting based on the complaint alone before any investigation, this section would so provide.

The crux of CANRA is the informed decision by those judged most capable to spot what is, and what is not, in their professional capacity, reasonably suspected to be child abuse. That judgment call must be informed by whatever the mandated reporter feels is necessary: that a doctor, for example, take whatever action necessary to determine whether, in his or her professional capacity, he or she reasonably suspects child abuse. If this were not the case, and **every** allegation of suspected child abuse from any person was to be immediately reported throughout the system, the "fundamental part of the reporting law [ ] to allow the trained professional to determine an abusive from a non-abusive situation" would be lost entirely. *Planned Parenthood, supra,* 181 Cal.App.3d at 272.

In short, the important provisions contained in section 11166(a) are eliminated by Plaintiff's construction of the deputy's duties under CANRA. This unfiltered system of reporting was already considered and rejected by the Court of Appeal in *Planned Parenthood.* Beyond the plain language of the statute, the *Planned Parenthood* court recognized the societal toll that would result from indiscriminate reflexive cross-reporting. *Planned Parenthood Affiliates*, *supra*, 181 Cal.App.3d at 258-259 ("[T]he Legislature recognizes that the reporting of child abuse ... involves a delicate balance between the right of parents to control and raise their own children by imposing reasonable discipline and the social interest in the protection and safety of the child ... .")

B. Deputy Swanson's "Duty" To Suspect Abuse

As an alternative to the claim that Swanson had an immediate duty to report Kinney's call, Plaintiff argues that a jury should decide

if Swanson was reasonable when she did not suspect abuse. (Plaintiff's Opening Brief, 57)("This question (i.e. whether a reasonably prudent person in [respondent's] position would have entertained that suspicion) is a question of fact to be determined at trial.") This argument lacks merit and ignores numerous opinions which uniformly hold that the decision whether abuse is suspected, and the investigation that informs that decision, are discretionary acts covered by immunities in the *Government Code*.

Cal. Gov. Code § 820.2 provides:

> Except as otherwise provided by statute, a public employee is not liable 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 such discretion be abused.

Cal. Gov. Code § 821.6 provides:

> A public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause.

The Court of Appeal in this case correctly determined that the deputy's decision-making as to whether or not she suspected child abuse was unquestionably a discretionary act: "the decision to not cross-report was tantamount to a decision to not prosecute, when it was the product of an investigation the decision was grounded on the judgment, expertise and discretion of the investigating Sheriff's deputy." (Opn., 9-10). The case law is uniformly in accord with this

view. In fact, Plaintiff has cited **no** case law in support of his interpretation of the Act in this regard, and for good reason – there is none.

In *Jacqueline T. v. The Alameda County Child Protective Services* (2007) 155 Cal.App.4th 456, allegations of child abuse were reported to various child protective agencies by family members. Each report was investigated, but after each investigation the social worker decided she did not suspect abuse, and therefore returned the girl to her father's custody.

Following a vicious assault on the child by her father, a civil suit was initiated presenting similar claims to those advanced here. The trial court rejected defense claims of immunity and denied summary judgment. The Court of Appeal, however, issued an alternative writ of mandate reversing that decision and directed the trial court to enter summary judgment in favor of the defendants[6] based on both the discretionary (*Cal. Gov. Code* § 820.2) and prosecutorial immunity (*Cal. Gov. Code* § 821.6). *Id.* at 459. Following an unsuccessful petition for review to this Court, final judgment in favor of the defendants was entered.

On appeal from that judgment, the court again reviewed this issue noting that in the prior decision "we concluded that both County and employees were immune from liability under two statutes – *Government Code* § 821.6 and/or § 820.2. In so concluding, we reasoned that 'the investigation of child abuse and the decision of

[6] The Defendants were a County Child Protective Services Agency (Welfare Department) and two of its social workers.

what action, if any, should be taken are uniquely governmental functions. [fn omitted]. A decision to remove a child from his/her home or not to do so and the investigation that informs that decision involved precisely the kind of 'sensitive policy decision[s] that require judicial abstention to avoid affecting a coordinated governmental decision making or planning process. (*Barner [v. Leeds* (2000) 24 Cal.4th 676,] 688[, 102 Cal.Rptr.2d 97, 13 P.3d 704].)" *Id.* at 463-464.

The court rejected the argument that the investigation and decision regarding whether abuse was suspected were "operational," not discretionary, decisions, and thus, not protected by *Cal. Gov. Code* § 820 and/or § 821.6. *Id.* at 466. In rejecting this contention, the *Jacqueline T.* court pointed out that:

> Several appellate courts, however, have rejected such reasoning. Those courts have held that a social worker's[7] decisions relating to, as here, the investigation of child abuse, removal of a minor, and instigation of dependency proceedings, are discretionary decisions subject to immunity under section 820.2, and/or prosecutorial or quasi-prosecutorial decisions subject to immunity under section 821.6. (E.g., *Alicia T. v. County of Los Angeles* (1990) 222 Cal.App.3d 869, 882-883, 271 Cal.Rptr. 513 [county and its social workers held immune from liability under "either or both of [sections 820.2 and 821.6]" for alleged

[7] Welfare employees and law enforcement agency employees are treated the same in CANRA. *Cal. Penal Code* § 11165(34); and *Cal. Penal Code* § 11165.9. They are both mandated reporters and employees of agencies designated to receive reports of child abuse.

negligence in investigating report of child molestation] [*Alicia T.*]; *Jenkins v. County of Orange* (1989) 212 Cal.App.3d 278, 282-283, 260 Cal.Rptr. 645 [county and its social workers held immune from liability under section 821.6 for "fail[ing] to use due care by not thoroughly investigating the child abuse report and fail[ing] to weigh and present all the evidence"] [*Jenkins*]; *Newton v. County of Napa* (1990) 217 Cal.App.3d 1551, 1559-1561, 266 Cal.Rptr. 682 [citing section 820.2 in holding county immune from liability for actions "necessary to make a meaningful investigation" of child abuse] [*Newton*]; *County of Los Angeles v. Superior Court* (2002) 102 Cal.App.4th 627, 633, 644-645, 125 Cal.Rptr.2d 637 [county held immune from liability under section 820.2 for alleged negligent placement and supervision of child in foster home where child was sexually molested] [*Terrell R.*]; [county held immune from liability under § 820.2 for alleged negligent placement and supervision of child in foster home where child was sexually molested]; see also *Ronald S. v. County of San Diego* (1993) 16 Cal.App.4th 887, 899, 20 Cal.Rptr.2d 418 [county held immune from liability under section 821.6 for negligent selection of an adoptive home for a dependent child] [*Ronald S.*].) Such courts have reasoned that "[c]ivil liability for a mistaken decision would place the courts in the 'unseemly position' of making the county accountable in damages for a 'decisionmaking process' delegated to it by statute." (E.g., *Newton, supra*, 217 Cal.App.3d at p. 1560, 266 Cal.Rptr. 682. See also *Ronald S., supra,* 16 Cal.App.4th at p. 897, 20 Cal.Rptr.2d 418["[t]he nature of the investigation to be

> conducted and the ultimate determination of suitability of adoptive parents [by social workers] bear the hallmarks of uniquely discretionary activity"].)

Id.

Plaintiff ignores all of these decisions entirely, and argues instead that whether Deputy Swanson's failure to suspect abuse was "reasonable"[8] is a "question of fact to be determined at trial." (Plaintiff's Opening Brief, 58). Plaintiff relies on *Alejo* in this connection. The Court of Appeal below, however, correctly observed that *Alejo* is not authoritative on the question of whether the decision-making following a child abuse investigation is, or is not, discretionary within either *Cal. Gov. Code* § 820.2 or *Cal. Gov. Code* § 821.6 because that issue simply was not before the *Alejo* court. In *Alejo*, no investigation occurred, and the *Alejo* court found that to be a breach of the mandatory duty to investigate reports of suspected child abuse. *Alejo* never even addressed the implications of the immunities in *Cal. Gov. Code* §§ 820.2 and 821.6, and whether either applied to the public employee's decision making post-investigation because no investigation ever occurred. (Opn., 10).

The Court in *Jacqueline T.* correctly observed that: "Such courts have reasoned that '[c]ivil liability for a mistaken decision would place the courts in the 'unseemly position' of making the County accountable in damages for a 'decision-making process'

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[8] *Cal. Penal Code* § 11166(a)(1) provides in part: "Reasonable suspicion" means that it is objectively reasonable for a person in a like position, drawing, when appropriate, on his or her training and experience, to suspect child abuse or neglect."

delegated to it by statute. *Jacqueline T., supra*, 155 Cal.App.4th at 466, citing *Newton v. County of Napa*, 217 Cal.App.3d 1551, 1560, and *Ronald S. v. County of San Diego* (1993) 16 Cal.App.4th 887, 897 ("[t]he nature of the investigation to be conducted and the ultimate determination of suitability of adoptive parents [by social workers] bear the hallmarks of uniquely discretionary activity").

In *Newton,* a County was held to be immune from liability for the manner in which its employees investigated reports of alleged child abuse, which included "failure to properly, thoroughly and completely investigate the source and basis for the underlying [child abuse] complaint." *Newton, supra*, 217 Cal.App.3d at 1561-1562, fn. 5 (Italics omitted). Thus, not surprisingly, the Court of Appeal in this case reached the same conclusion: that the deputy's decision-making in not suspecting abuse after her investigation was discretionary and therefore, protected by the aforementioned immunities. (Opn., 15-16).

The Court of Appeal also looked to a case decided after *Jacqueline T.*, *Ortega v. Sacramento County Department of Health and Human Services* (2008) 161 Cal.App.4th 713. *Ortega* affirmed summary judgment in favor of a County and two of its social workers in a case the court aptly described as a "tragic case [that] will make you sad." *Id* at 715. In *Ortega,* a child became the victim of attempted murder and life-threatening permanent injuries at the hands of her father just four days after a "lousy" investigation into repeated allegations that her father was abusing her. Following the social worker's investigation and clearly erroneous decision that child abuse was not suspected, the child was returned to her father's custody.

Four days later, he "savagely attacked [her] stabbing her with a knife in her heart and lung." *Id.* at 719. Plaintiff charged that the County and its social workers breached mandatory duties related to the investigation and decision-making regarding whether abuse was suspected.

Rejecting those arguments, the *Ortega* court specifically pointed out that the process of "conducting an investigation and making a determination about potential risk to the child are not ministerial duties, and both involve a formidable amount of discretion, notwithstanding that the investigation was 'lousy'...and clearly the determination was the wrong one. However, that is what § 820.2 immunity does – it immunizes discretionary decisions whether or not such discretion be abused." *Id.* at 728. The court recognized that "the Legislature has chosen to immunize government employees from liability for discretionary acts, whether or not such discretion be abused. The Legislature has determined that government could not function if its employees were subject to liability for their discretionary acts, even where that discretion is exercised badly." *Id.* at 716.

The recent case of *Christina C. v. County of Orange* (2013) 220 Cal.App.4th 1371 reached a similar result. *Christina C.* also involved social workers' decisions, which did not end well, concerning child custody issues in the midst of allegations of severe child abuse. The trial court granted summary judgment in favor of the County and its employees. The Court of Appeal agreed, noting that "...under the immunity afforded social workers in *Government Code* section 820.2, it is irrelevant whether Defendants were correct in their decisions or

even whether they abused their discretion." *Id.* at 1377. The *Christina C.* court observed further that "the trial court properly determined Defendants were entitled to judgment as a matter of law based on the immunity that shields discretionary decisions by public employees." The court pointed out that "[t]he immunity applies even to 'lousy' decisions in which the worker abuses his or her discretion, including decisions based on 'woefully inadequate information.'" *Id.* at 1381. Thus, "[s]ection 820.2 specifies no exception for malice...the same wide discretion applies even if [the social workers] were grossly incorrect...As the *Ortega* court explained, 'claims of improper evaluation cannot divest a discretionary policy decision of its immunity." *Id.* at 1381 (Citations omitted).

It is not surprising that Plaintiff's argument does not mention any of the foregoing decisions. Likewise, it is not surprising that Plaintiff cites no authority suggesting that the extraordinarily difficult and sensitive job assigned to public employees who must deal with abuse allegations, often in the midst of chaotic family conditions, does not involve the exercise of discretion. There are none because "[t]he Legislature has determined that government could not function if its employees were subject to liability for their discretionary acts, even where the discretion is exercised badly." *Ortega, supra,* 161 Cal.App.4th at 716.

Determining whether child abuse is suspected and whether there will be governmental intervention into otherwise intensely private family relations is a uniquely governmental function which, of necessity, calls upon the training and expertise of the public

employees entrusted with that heavy responsibility.[9] The consequences of erroneous decisions, either way, are substantial. At a minimum, one and perhaps multiple agencies will investigate each report of suspected abuse, which alone is intrusive and can be very traumatic. Reports then become documented and must be maintained by the agencies involved. *Cal. Penal Code* § 11166.

There is an unavoidable risk of error because judging the meaning and intent behind interpersonal relations involving children is fraught with difficulty and requires the deliberate, professional, and experienced exercise of discretion. It truly would be "unseemly" to have courts and juries second guess these difficult choices years later and with the nearly perfect clarity of hindsight. There are sound reasons for these immunities, and this case falls squarely within them.

III. THE SHERIFF'S DEPARTMENT'S DUTY TO REPORT UNDER CANRA

Plaintiff argues that section 11166(k) of CANRA obligates every police and sheriff's department, separate and apart from the employees of those departments, to immediately report every allegation of child abuse which comes to the agency from any person, without regard to whether abuse is reasonably suspected. (Plaintiff's Opening Brief, 29)("§ 11166(k) requires that the law enforcement

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[9] Indeed, Plaintiff recognized the horrors of false reporting in his own life. (*See*, AA 6)("Further, after SHARPLES...intentionally and fraudulently attempted to conceal the fact that he had caused injury to [B.H.] by making a false report in violation of California Penal Code § 11166 on July 2, 2008, to the Defendant COUNTY OF SAN BERNARDINO, through its Sheriff's Department, stating that Lauri Hanson had inflicted the aforementioned scratches on [B.H.]")

agency itself inform child welfare services about every initial report of suspected child abuse it receives from any person...") As a threshold matter, this claim was not properly set out in the governmental tort claim as required by *Cal. Gov. Code* § 945.4.

A. The Claim Against the Sheriff's Department Predicated Upon A Violation of Section 11166(k) Was Not Properly Raised.

As the Court of Appeal noted, "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[10]." (Opn., 12). This theory, that the department alone had an independent reporting duty, was never raised in the trial court because it was never alleged in the Complaint or the government tort claim. Nevertheless, it has now become the focal point of Plaintiff's arguments here.

The Court should decline Plaintiff's invitation to issue what is an advisory opinion interpreting section 11166(k) because it is not an issue properly in controversy here. *See, California Rule of Court, rule* 8.516(b)(2)(Supreme Court may decide issues "if the case presents the issue."); *Younger v. Superior Court* (1978) 21 Cal. 3d 102, 119 ("[t]he rendering of advisory opinions falls within neither the functions nor

[10] Plaintiff did argue in his Opening Brief to the Court of Appeal that subdivision (k) imposes a separate and distinct duty on the Sheriff's Department. As such, the Court of Appeal erred when it made this observation but was correct that this issue was never raised in the trial court.

jurisdiction of this court."); *In Re Governship* (1979) 26 Cal. 3d 110,116 ("It is well settled that rendering "advisory opinions" is not a judicial duty imposed by article III, section 3, or article VI, sections 10 or 11 of the Constitution.").

1. The Government Tort Claim

Plaintiff's government tort claim never presented the issue of whether section 11166(k) imposed a mandatory reporting duty on the San Bernardino Sheriff's Department, as an entity, to immediately cross-report every claim of child abuse received in the department.

It is well settled that in order to bring a claim against a governmental entity, a plaintiff must first file a government tort claim setting forth his or her claims in a manner sufficient to provide the entity with an opportunity to investigate those claims, as a prerequisite to the filing of a lawsuit. *See, Cal. Gov. Code*, §945.4. In particular,

> [S]ection 945.4 requires **each cause of action** to be presented by a claim complying with section 910, while section 910, subdivision (c) requires the claimant to state the "date, place and other circumstances of the occurrence or transaction which gave rise to the claim asserted." If the claim is rejected and the plaintiff ultimately files a complaint against the public entity, the facts underlying **each cause of action in the complaint must have been fairly reflected in a timely claim.**

Stockett v. Association of Cal. Water Agencies Joint Powers Ins. Authority (2004) 34 Cal. 4th 441, 447 (Emphasis added); *see, Fall River Joint Unified Sch. Dist. v. Superior Court* (1988) 206 Cal. App.

3d 431, 434 ("[T]he factual circumstances set forth in the written claim must correspond with the facts alleged in the complaint"); *Donahue v. State of California* (1986) 178 Cal. App. 3d 795, 802-803 (claim alleging negligence in permitting uninsured motorist to take driving test cannot support action also alleging negligence in failing to direct or control motorist during driving test); *Doe 1 v. City of Murrieta* (2002) 102 Cal. App. 4th 899, 920 ("a claim . . . must set forth all the legal and factual bases that will be asserted in any subsequent lawsuit"); *Shoemaker v. Myers* (1992) 2 Cal. App. 4th 1407, 1426 ("[a] theory of recovery not included in the tort claim may not thereafter be maintained").

A lawsuit against a public entity is confined to those factual circumstances and theories of recovery explicitly set forth in the tort claim, and any theories of recovery or causes of action not specifically set forth in the claim are **barred** as a matter of law under *Cal. Gov. Code* § 945.6.

California courts have repeatedly reaffirmed the importance of compliance with *Cal. Gov. Code* § 945.4 as a prerequisite to imposing liability upon a public entity, recognizing that "[t]he primary function of [section 945.4] is to appraise the governmental body of imminent legal action so that it may investigate and evaluate the claim and where appropriate, avoid litigation by settling meritorious claims." *Elias v. San Bernardino County Flood Control District* (1977) 68 Cal. App. 3d 70, 74. As further explained by this Court, "[o]nly where there has been a 'complete shift in allegations, usually involving an effort to premise civil liability on acts or omissions committed at different times or by different persons than those described in the

claim,' have courts generally found the complaint barred." *See*, *Stockett v. Association of California Water Agencies Joint* (2004) 34 Cal. 4th 441, 447 (internal citations omitted). This type of "complete shift" is precisely what has occurred here. Indeed, Plaintiff now advocates a position that is contrary to the claims set forth in his tort claim.

Plaintiff presented his claim on March 9, 2009. However, the claim failed to raise the theory of a duty on the Sheriff's Department to immediately cross-report. Plaintiff's tort claim contained 13 pages of detailed facts forming his claims against the County of San Bernardino. Specifically, the tort claim alleged that "Deputy Sheriff K. Swanson, Deputy Sheriff Jeff Bohner and Does 1-100 failed to investigate the suspicious visible physical injuries and child abuse of [B.H.] which Christy Kinney reported to them on September 22, 2008," and further that "Deputy Sheriff K. Swanson, Deputy Sheriff Jeff Bohner and Does 1-100 failed to report and cross-report the visible physical injuries and child abuse of [B.H.] which Christy Kinney reported to them." (MJN, Tort Claim, 3). The tort claim specifies that the legal basis for these claims is section 11166(a) of CANRA: "Section 11166 subdivision (a) imposes two mandatory duties on a police officer who receives an account of child abuse. First the statute imposes a duty to investigate . . . the statute also imposes a duty to take further action when an objectively reasonable person in the same situation would suspect child abuse . . . The duty to investigate and report child abuse is a mandatory duty under section 11166, subdivision (a). .." (MJN, Tort Claim, 4). Thus, in the tort claim the **only** theory asserted was that the individual employees

breached duties under section 11166(a) to first investigate, and then cross-report.

What the tort claim does not allege is that the Sheriff's Department itself breached a duty to immediately cross report the initial Kinney 9-1-1 call, with no investigation. The tort claim actually states the exact opposite –"The whole system depends on professionals such as the sheriff departments who initially receive reports of child abuse to investigate and, **where warranted**, report those accounts to the appropriate agencies." (MJN, Tort Claim, 5) (Emphasis added). Moreover, despite citing numerous provisions of CANRA, nowhere in the tort claim is section 11166(k) even mentioned, let alone any claim that Plaintiff intended to seek damages directly against the Sheriff's Department based solely on an alleged violation of its independent mandatory duty to cross report under that section.

Plaintiff's failure to give fair notice of this claim precluded investigation and litigation of this issue before the trial court. Rather, the focus was what was actually alleged in the tort claim – whether sheriff's employees failed to properly investigate and report, not what the department did or did not do, separate from its employees. As such, Plaintiff's failure to include this theory in the tort claim bars his recovery on such a theory. *See*, *Hernandez v. Garcetti* (1998) 68 Cal App 4th 675, 679 ("Section 945.4 precludes a lawsuit for damages against a governmental entity when the plaintiff has not followed the claims procedure required by the Tort Claims Act.")

2. The Complaint

Plaintiff's Complaint also fails to allege that the San Bernardino Sheriff's Department, apart from its employees, breached **its** duty to report under section 11166(k).

There are only two causes of action asserted in the Complaint against the County. The first is that mandatory duties were breached pursuant to *Cal. Gov. Code* § 815.6, and the second is that the Department is liable for the negligent actions of its employees under *Cal. Gov. Code* § 815.2. The identical allegations appear under both causes of action.

These causes of action are preceded by forty-four paragraphs of general allegations. Nowhere in these preliminary allegations is section 11166(k) ever referenced, and there are no allegations that the County and/or its Sheriff's Department is directly liable for failing to immediately cross-report. Rather the allegations are "Defendant K. Swanson, Jeff Bohner, and Does 1-100 failed to properly report and/or cross report" and again that "despite their both being mandated reporters pursuant to applicable statutory and common law, Defendant Swanson and her supervisor Defendant Bohner failed to report [B.H's] injuries to the District Attorney or Department of justice, and failed to make a cross-report to the Department of Children Services (DCS)." (AA 10, 12). Plaintiff alleged that the individual employee Defendants failed to report, not that the department breached a separate and distinct independent duty to report.

It is not until paragraphs 59, 60, and 61 that Plaintiff makes his only mention of subsection (k)[11]. (AA 18-19). However, Plaintiff broadly alleges **all** Defendants breached a mandatory duty, and then recites the statutory provisions of (k). When Plaintiff actually sets forth the factual allegations which form the basis of these alleged statutory violations, he clarifies "[t]he intent of the system is to protect children from abuse. The system depends on professionals e.g. employees of sheriffs' departments such as Swanson and Bohner and Does 1-100, and law enforcement agencies, such as the County of San Bernardino and City of Yucaipa to **investigate** initial reports of suspected child abuse and **where warranted** as it was in this case concerning [B.H.], to report accounts of abuse to appropriate child welfare agencies." (AA 20)(Emphasis added). Thus, as with his tort claim, Plaintiff's allegations from the outset concerned the failure of individuals to investigate which led to a failure to report. Plaintiff never alleged that reporting by the department itself was required prior to, and regardless of, any investigation.

Given the foregoing, this claim should not be addressed here. *See*, *Pierce v. Pac. Gas & Elec. Co.* (1985) 166 Cal. App. 3d 68, 78 ("The general and long-standing rule is that a party must recover on the cause of action he has alleged in his complaint and not on another cause of action disclosed by the evidence.")

[11] Duplicate allegations can be found in paragraphs 88, 89 and 90 under the Second Cause of Action. (AA 28-29)

3. The Trial Court

Defendants filed their summary judgment based on the issues that were raised by Plaintiff's tort claim, as reflected in the Complaint, that Defendants "failed to discharge its mandatory duty to **investigate** the Kinney report on September 22, and, that the County Defendants then failed to discharge its mandatory duty to cross-report known or suspected abuse." (AA 52)(Emphasis added). Defendants argued that these claims were barred by the immunities set forth in *Cal. Gov. Code* §§ 815.2, 820.2 and 821.6.

In opposition to summary judgment, Plaintiff claimed Defendants were missing the point because "Government Code Section 815.6 imposes a mandatory duty on law enforcement agencies to report to designated county child protective services agencies all reports of suspected child abuse reported to law enforcement. Contrary to the way in which Defendants have crafted their argument, this duty is not derivative of the duty to investigate." (AA 374). Thus, for the **first time**, Plaintiff raised a claim that there was an automatic immediate duty to report, even without any investigation. However, Plaintiff still focused on the duties allegedly breached by Deputy Swanson, not independently by the Department. Specifically, Plaintiff argued that "the issue in the present case is not the quality of Deputy Swanson's investigation but her admitted failure to either cross-report to DCFS herself or to cause her department to cross-report to DCFS the fact that Christy Kinney had reported child abuse." (AA 377).

While this argument did represent a significant departure from Plaintiff's tort claim and Complaint, which clearly alleged that cross

reporting was only required "where warranted" and only after investigation, it would have been improper for Defendants to introduce new evidence and new defenses such as Plaintiff's departure from their tort claim in a reply. [12] Defendants therefore responded by arguing that Plaintiff's reading of section 11166(k), which required a deputy to report even absent any suspected abuse by that deputy, would essentially render *Cal. Penal Code* § 11166(a) meaningless. (AA 688). The trial court thereafter granted Defendants' summary judgment, and did not consider Plaintiff's new claim regarding § 11166(k). (AA 789-790). Plaintiff appealed. (AA 797-800).

Before the Court of Appeal, Plaintiff argued that the individual deputies had a mandatory duty under section 11166(a) to investigate, and under section 11166(k) to report. Plaintiff also asserted "in addition to, and separate apart from, Deputy Swanson's mandatory duties . . . law enforcement agencies such as the San Bernardino County Sheriff's Department have duties as a mandated reporter." (Appellant's Opening Brief, 33). As explained in Respondents' Brief, this was the **first time** Plaintiff claimed the Sheriff's Department itself had a duty to immediately report independent and irrespective of any of its employees. Defendants requested that the Court of Appeal decline to consider this new argument on appeal. *See*, *Greenwich S.E., LLC v. Wong* (2010) 190 Cal. App. 4th739, 767 ("Appellant has

[12] Plaintiff's failure to comply with the Tort Claims Act was raised in Defendants' Answer. (AA 39). Had the trial court denied Defendants' Motion for Summary Judgment on this section 11166(k) issue, Defendant would have then been afforded the opportunity to litigate this new issue in the trial court.

waived any such claim by failing to raise it in the trial court below."); (Respondents' Brief, 32-34).

The Court of Appeal agreed with Defendants that the issue was never addressed at the trial court level but, nonetheless considered the claim finding that although "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 an investigation." The Court of Appeal went further, explaining that "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 such a suspicion, based on facts that could cause a reasonable person to suspect child abuse or neglect. Such 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." (Opn., 14-15)(Emphasis added).

While the lower court's reasoning is correct, this Court need not address this claim because it was never properly considered by the trial court. To the extent Plaintiff argues that the section 11166(k) claim against the department was somehow inferentially raised in the tort claim, that issue too should be litigated first in the trial court. *See*, *Hernandez, supra,* 68 Cal App 4th 675.

B. Section 11166(k) Does Not Require Immediate Reporting by a County Sheriff's Department.

Even if the issue had been timely raised, and was properly before this Court, Plaintiff's proffered construction of section 11166(k) is wrong. Plaintiff argues that the Sheriff's Department, **as an entity** separate and apart from every one of its employees, breached its mandatory duty to immediately report Kinney's allegations in her 9-1-1 call. (Plaintiff's Opening Brief, 29-30). Plaintiff premises his argument on section 11166(k) which in part provides:

> 11166 (k) 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...

The contention is that this section "...creates a mandatory duty for a law enforcement agency to cross-report every report of suspected child abuse it receives..." (Plaintiff's Opening Brief, 16). Plaintiff contends that CANRA "never intended that law enforcement conduct an investigation into [a] child abuse report before cross-reporting to child welfare services." (Plaintiff's Opening Brief, 18). To be clear, Plaintiff contends § 11166(k) provides, without exception, that "...it is mandatory that all reports received by law enforcement be cross-reported..." (Plaintiff's Opening Brief, 28). The "triggering event" to

the mandatory duty to immediately cross-report to the welfare department under section 11166(k), according to Plaintiff, is the **receipt** of **any** allegation of child abuse from **anyone**. (Plaintiff's Opening Brief, 30). Plaintiff contends the agency's duty is absolute, and requires **the agency itself** – not any of its employees – to cross-report every allegation of child abuse received from anyone. (Plaintiff's Opening Brief, 28) ("...it is mandatory that all reports received by law enforcement be [immediately] cross-reported to a county welfare services agency..."[t]he Legislature intended each and every report of suspected child abuse to be reported to the county welfare department. There simply are no exceptions in any statute or CANRA.")

Plaintiff argues that the Sheriff's Department's duty to report to the welfare department arose "...immediately as of 10:14:22 p.m. September 22, 2008..." (Plaintiff's Opening Brief, 37). This is the recorded time when the Kinney call was received by the sheriff's dispatch operator, Nicole Kindle. (AA 315). The allegations Kinney reported were then known only by one employee of the department – that dispatch operator.

Every employee of the sheriff's department, including Nicole Kindle, however, is a mandated reporter, and mandated reporters are only required to report abuse when he or she "knows or reasonably suspects" abuse has occurred. *See Cal. Penal Code* §§ 11165.7(34) and 11166(a). Recognizing this, Plaintiff has strenuously denied ever claiming that the dispatch operator was required to report Kinney's call to the welfare department. (Plaintiff's Petition for Rehearing, 31) ("[Plaintiff] has never alleged that Nicole Kindle, the 9-1-1- operator

as an individual employee owed a duty to cross-report under § 11166(k).") The difficulty arises because at 10:14:22 p.m. on September 22, 2008, Kinney's allegation of abuse was known in the sheriff's department **only** by Nicole Kindle. If she had no duty to report as a mandated reporter, and accepting Plaintiff's observation that "a law enforcement agency is not a person [and] cannot entertain a suspicion...," and is not a mandated reporter[13] (AA 50, 48), the question arises – how can a law enforcement agency discharge a mandatory duty to report except through its employees? It cannot. *Brown v. Poway Unified School Dist.* (1993) 4 Cal.4th 820, 836 ("...an entity must act through its employees..."); *C.A. v. William S. Hart Union High School Dist.* (2012) 53 Cal.4th 861, 824-825 ("...[r]espondents are correct insofar as they state public entities always act through individuals."); *Black v. Bank of America* (1994) 30 Cal.App.4th 1, 6 ("A corporation is, of course, a legal fiction that cannot act at all except through its employees and agents."); *Karst v. Vickers* (N.D. 1989) 444 N.W.2d 698, 700 ("An inanimate object can neither have nor breach a duty of care."); *Lippman v. City of Miami* (S.D. Fla. 2010) 724 F.Supp.2d 1240, 1259-60 ("Plaintiff has provided no authority for extending [case law] to include a duty of care to inanimate objects.")

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[13] It is noteworthy that in the Court of Appeal Plaintiff took the opposite position: "in addition to, and apart from Deputy Swanson's mandatory duties as a reporter under § 11166(a) and § 11165.7 subd (34), law enforcement agencies such as SBSD have duties as a mandated reporter." (Appellant's Opening Brief, 33).

Put another way, if **none** of the department's employees are required to take a specific action – how can the department itself be under a mandatory duty to take that same action? Even more to the point, if this puzzling separation of responsibility was intended by the Legislature, one would expect this to be clearly spelled out in the legislation. It is not.

CANRA establishes a broad-based system of reporting and cross-reporting suspected child abuse which is designed to separate credible reports from those based maliciously on false information or just on well-meaning misperceptions.[14] Toward that end, CANRA designated people employed in the 44 specific professions and occupations to be "mandated reporters" who the Legislature judged had the training, experience and expertise to be best able to make informed decisions about what is, and is not, suspected to be an

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[14] In a comprehensive national survey and analysis of abuse reporting laws it is pointed out that **over-reporting** is a very real problem. "There has been a backlash against child abuse reporting laws due to the big number of reports that are not substantiated – 75% of the over three million received each year by child protective services." Further, it was pointed out that in 2008 "...56.6% of intentionally false reports come from the non-professional...sources." Thomas L. Hafemeister, Castles Made of Sand? Rediscovering Child Abuse and Society's Response (2010) 36 Ohio N.U.L.Rev. 819, 900-901.

Another commentator observed "...child protection agencies are devoting a substantial amount of their time investigating unfounded reports." And further, "This is a self-perpetuating problem. Because CPS workers' case loads are heavy, they have less time and resources to investigate each report." Steven J. Singley, Failure to Report Suspected Child Abuse: Civil Liability of Mandated Reporters (1998) 19 J.Juv.L 236, 239-240.

abusive situation. In short, the Legislature imposed this heavy responsibility on those most able to interpret the ambiguities of interpersonal relations, and make informed judgments about whether they reasonably suspect abuse or neglect as defined in the Act. Thus, the Legislature provided that every employee of every law enforcement agency in California is a mandated reporter. *Cal. Penal Code* § 11165.7(34).

Plaintiff's construction of section 11166(k), however, allowing for no threshold screening of allegations of abuse made by anyone and received by anyone in a law enforcement agency ignores, and disrupts, the entire reporting scheme in the Act. Plaintiff's argument is that a law enforcement agency is uniquely obligated to report to the county welfare department **any** bare allegation of child abuse coming into the department (albeit necessarily received by an employee who is a mandated reporter). Thus, Plaintiff claims that **any** call to **any** police department – whether from a well-intentioned store clerk at a mall, a malicious estranged spouse, or even a misguided angry juvenile – must, by some mechanism, be immediately reported to the "welfare services agency" by that inanimate police department even though **none** of its employees are under the same obligation. (Plaintiff's Opening Brief, 28).

Plaintiff's construction of section 11166(k) ignores, and is entirely at odds with, the plain language of the statute as a whole and indeed, even section 11166(k) itself. Plaintiff fails to explain how communication to, or from, an inanimate police department can occur unless through an employee of that department. Similarly, Plaintiff does not explain how that inanimate police department can report to

anyone, if not through its employees. Yet, this separation between the duty imposed on law enforcement agencies *vis-a-vis* their employees is, and must be, central to Plaintiff's argument. This is so because under section 11166(a), mandated reporters – i.e. **every employee** of **every** law enforcement agency – are duty-bound to receive allegations of abuse and to investigate as needed to decide whether abuse is reasonably suspected, and **only if** abuse is suspected to cross-report.

Under Plaintiff's theory, however, employees of law enforcement agencies are simultaneously mandated reporters and non-mandated reporters. The contradiction in Plaintiff's argument is apparent. On the one hand, Plaintiff argues that the Sheriff's Department is not a mandated reporter as defined under the Act. (Plaintiff's Opening Brief, 52) ("...there is a recognized distinction between human beings who are mandated reporters and the employers which employ them which are **not** mandatory reporters...") (Emphasis in original) On the other hand, Plaintiff argues that the Sheriff's Department is mandated to make blanket, nondiscretionary reports under the Act. (Plaintiff's Opening Brief, 15) ("Penal Code 11166(k) does create a mandatory duty requiring a law enforcement agency to cross-report..."). Thus, under the Act, according to Plaintiff, the Sheriff's Department is mandated to report **every** accusation of abuse though emphatically **not** a mandated reporter under the Act.[15]

[15] Plaintiff took the opposite position below. *See* footnote 13 *supra.*

Plaintiff fails to address the implication of his reading of section 11166(k) when viewed in the light of parallel language in section 11166(j) which provides:

> A county probation or welfare department shall immediately, or as soon as practicably possible, report by telephone, fax, or electronic transmission to the law enforcement agency having jurisdiction over the case, to the agency given the 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.

Cal. Penal Code § 11166(j).

This section, applicable to welfare and probation departments, is nearly identical to section 11166(k). However, unlike section 11166(k), this section does not limit what must be reported to allegations "reported to it." Thus, under this section, welfare and probation departments are required to report to the appropriate law enforcement agency, as well as any agency "given the responsibility for investigation of cases under section 300 of the *Welfare and Institution Code;* and the district attorney's office, **every** known or suspected instance of child abuse..." *Id.* Thus, as Plaintiff would have it, **every** employee of these departments (though each is also a mandated reporter), is nonetheless required, on behalf of their respective departments **only**, to **immediately** report every allegation of abuse or neglect of which that employee is **aware,** regardless of the source of the allegation or whether it is even credible on its face.

This construction of section 11166(k) (and presumably § 11166(j)), even if theoretically possible, renders the central reporting provision of the Act (§ 11166(a)) meaningless. Section 11166(a) provides that, "...a mandated reporter [every employee of every agency referenced in § 11166(k) and § 11166(j)] **shall** make a report to an agency specified in § 11165.9 [police or sheriff's department, county probation department, or the county welfare department] **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 who a mandated reporter **knows or reasonably suspects** has been the victim of child abuse and neglect." If Plaintiff's construction of the Act is correct, then substantial revisions to this, and virtually all of the key reporting requirements in the Act would be required.

Rewriting the Act is, however, not the province of the courts. In the construction of a statute, the office of the judge is simply to ascertain and declare what the text chosen by Legislature means, "not to insert what has been omitted, or to omit what has been inserted. . .." *Cal. Civ. Proc. Code* § 1858.

The judicial role in a democratic society is fundamentally to interpret laws, not to write them, as the function of a court is to declare the law and not to make it. *Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal. 4th 553, 578; *Treppa v. Justice's Court of No. Three Tp., Lake County* (1934) 1 Cal. App. 2d 374, 377. Thus, under the guise of construction a court should not rewrite the law (*Drouet v. Superior Court* (2003) 31 Cal. 4th 583, 593), add to it what has been omitted (*People v. Harper* (2003) 109 Cal. App. 4th

520, 524), or insert qualifying provisions not included (*Mares v. Baughman* (2001) 92 Cal. App. 4th 672, 677), omit from it what has been inserted (*County of Santa Barbara v. Connell* (1999) 72 Cal. App. 4th 175, 180), give it an effect beyond that gathered from the plain and direct import of the terms used (*Estate of Tkachuk* (1977) 73 Cal. App. 3d 14, 18), or read into it an exception, qualification, or modification that will nullify a clear provision or materially affect its operation (*Realmuto v. Gagnard* (2003) 110 Cal. App. 4th 193, 203) so as to make it conform to a presumed intention not expressed (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.* (1998) 17 Cal. 4th 553, 573) or otherwise apparent in the law (*Bruce v. Gregory* (1967) 65 Cal. 2d 666, 674). In short, courts are called upon to construe statutes as they have been enacted. *Topa Ins. Co. v. Fireman's Fund Ins. Companies* (1995) 39 Cal. App. 4th 1331, 1341.

Plaintiff's construction of section 11166(k), and presumably also section 11166(j), would require substantial revisions of **every** key reporting feature of CANRA – i.e. **who** is mandated to report, **what** is required to be reported, **when** reports must be made and **where** the reports are to be submitted as follows:

1. Who is mandated to report:

Plaintiff urges that section 11166(k) (and by inference, § 11166(j)), apply only to departments, not the employees of the departments. Those entities alone, must cross-report **any** report of suspected abuse in disregard of section 11166(a). However, since an agency can only act through its employees, all of whom are mandated reporters, the following revisions would be necessary to support Plaintiff's interpretation of sections 11166(j) and (k):

11165.7. (a) As used in this article, "mandated reporter" is defined as any of the following:

***

(13) A public assistance worker **[Except a public assistance worker employed by a welfare department who pursuant to §11166(j), is reporting a non-mandated report received from any person on behalf of the welfare department only].**

***

(15) A social worker, probation officer, or parole officer **[Except a social worker or probation officer employed by a welfare or probation department who pursuant to § 11166(j), is reporting a non-mandated report received from any person on behalf of the welfare or probation department only].**

***

(19) A peace officer, as defined in Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, who is not otherwise described in this section **[Except a peace officer employed by a law enforcement agency who pursuant to § 11166(k), is reporting a non-mandated report received from any person on behalf of the agency only]**.

***

(34) An employee of any police department, county sheriff's department, county probation department, or county welfare

department [**Except an employee of any police, county sheriff's, county probation, or county welfare department who pursuant to § 11166(j) or § 11166(k), is reporting a non-mandated report received from any person on behalf of the department only**].

2. What must be reported:

What information must be contained in reports pursuant to section 11166 (which includes sub-sections 11166(a); 11166(j) and 11166(k)) would likewise require substantial revision to accommodate Plaintiff's construction. Thus, section 11167 of the statute in pertinent part, would, at a minimum, need to be revised as follows:

> 11167. (a) Reports of suspected child abuse or neglect pursuant to Section 11166 or Section 11166.05 shall include the name, business address, and telephone number of the mandated reporter; the capacity that makes the person a mandated reporter; and the information that gave rise to the reasonable suspicion of child abuse or neglect and the source or sources of that information. [***Except non-mandated reports received by any employee of any agency specified in section 11165.9 when such reports are reported to the agencies specified in § 11166(j) or § 11166(k) on behalf of the department only***].

3. When reporting is mandatory:

The overarching theme of the reporting system – the triggering events for reporting suspected abuse –requires substantial change, if not elimination entirely, to accommodate Plaintiff's construction.

Section 11166(a) quite clearly **only** triggers reporting when a mandated reporter knows of, or reasonably suspects, abuse or neglect, as defined in the Act. Plaintiff however argues that some **agencies**, despite employing only mandated reporters, have no credibility threshold before the **agency** must cross-report allegations of abuse to various other governmental agencies. The following revision to section 11166(a) is required to accommodate this construction:

> 11166. (a) Except as provided in subdivision (d), and in Section 11166.05, a mandated reporter shall make a report to an agency specified in Section 11165.9 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. [***This provision does not apply to a mandated reporter employed by a county probation department, a county welfare department or any law enforcement agency when such employee is cross-reporting a non-mandated report which was received from any person on behalf of a department or agency only pursuant to § 11166(j) or § 11166(k). Such report shall contain only the contents of the non-mandated report and be reported to the law enforcement agency having jurisdiction over the case, to the agency given the responsibility for investigation of cases under Section 300 of the Welfare and Institution Code, and to the District Attorney's office even if abuse or neglect is not known or suspected by the reporting employee of such department or agency...***]

4. Where reports must be made:

And finally, Plaintiff urges that the immediate reporting of non-mandated reports received by a sheriff's department must be reported to the welfare department. (Plaintiff's Opening Brief, 29). This reading, however, is more limited than is presently called for in section 11666(k) which requires reporting not just to the county welfare department, but also to the District Attorney's office. Similarly, pursuant to the parallel provision, section 11166(j), reports from the probation or welfare departments are to be directed to the law enforcement agency with jurisdiction, any other agency given responsibility for investigation of cases under section 300 of the *Welfare and Institution Code*, and to the district attorney's office. Plaintiff, however, ignores the language in section 11166(k), and the entirety of section 11166(j), and argues that law enforcement agencies are uniquely required to reflexively report to the welfare department. (Plaintiff's Opening Brief, 28)("...it is mandatory that all reports received by law enforcement be cross-reported to a county's welfare agency...")

As demonstrated above, every important feature of the reporting system laid out in CANRA regarding the who, what, when and where of reporting is placed in complete disarray under Plaintiff's proffered interpretation of section 11166(k). This explains the absence of any published judicial support for this construction of the Act.

In addition, the Act emphasizes that it is directed to "individuals," persons able to bring their individual skills, training and expertise to bear on often confusing factual situations, and "in his or

her professional capacity," make an informed assessment of the situation. *Cal. Penal Code* § 11166(i)(1) ("the reporting duties under this section [§ 11166] are individual..."); *Cal. Penal Code* § 11166(h) ("when two or more persons, who are required to report...); *Cal. Penal Code* § 11165(35)(mandated reporters are "employee[s] of any police department..."). As Plaintiff has pointed out, an inanimate police department is incapable of action, thought, judgment or suspicion of abuse. An inanimate police entity is also not punishable in the penal code and cannot breach a duty. *See Karst v. Vickers* (N.D. 1989) 444 N.W.2d 698, 700 ("An inanimate object can neither have nor breach a duty of care."); *Lippman v. City of Miami* (S.D. Fla. 2010) 724 F.Supp.2d 1240, 1259-1260 ("Plaintiff has provided no authority for extending [case law] to include a duty of care to inanimate objects."). The inescapable reality is that an agency of government – be it law enforcement, welfare or probation – can only take action, any action, through the efforts of employees on the job, in the course and scope of their employment.

Finally, this is a *Penal Code* statute and, as such, carries the threat of severe criminal penalties – imprisonment and monetary fines for violations. Perhaps recognizing this, Plaintiff makes the point that inanimate agencies such as sheriff's **departments** are not listed as mandated reporters in section 11165.7, and thus are presumably under no threat of criminal prosecution (assuming criminal prosecution of a governmental agency were even possible). (*See e.g.* Plaintiff's Opening Brief, 48, 50). However, every employee of those departments **is** a mandated reporter, and criminal sanctions are most certainly applicable to them.

§ 11166(c) provides in part:

> (c) **Any mandated reporter** who fails to report an incident of known or reasonably suspected child abuse or neglect as required by this section is guilty of a misdemeanor punishable by up to six months confinement in a county jailor by a fine of one thousand dollars ($1,000) or by both that imprisonment and fine. [16]

For example, in this case the 9-1-1 operator, the sheriff's designated point of initial contact for incoming calls from anyone, including the Kinney call, was a mandated reporter. With this in mind, even though that 9-1-1 call by Kinney was not a mandated report, under Plaintiff's construction of section 11166(k), that 9-1-1 operator would be under threat of prosecution for not reporting Kinney's call on behalf of the Sheriff's Department. That operator is a mandated reporter and she "...fail[ed] to report...as required by this section..." Thus, to accommodate Plaintiff's construction of section 11166(k), and to avoid this absurd result, a substantial modification of section 11166(c) is also necessary:

> (c) Any mandated reporter who fails to report an incident of known or reasonably suspected child abuse or neglect as required by this section is guilty of a misdemeanor punishable by up to six months confinement in a county jailor by a fine of one thousand dollars ($1,000) or by both that imprisonment and fine. [***Except any employee of a county probation***

[16] These penalties are substantially increased if serious bodily injury or death result from the breach.

> ***department, a county welfare department, or any law enforcement agency who pursuant to §11166(j) or § 11166(k), is required to report a non-mandated report on behalf of such department or agency only ...***]

The legislative history contains telling testimony dealing with the issue of indiscriminate reporting regardless of knowledge or suspicion. The testimony of Michael Gates, Deputy Attorney General for the State of California Office of Attorney General (sponsor and author of the bill), given at the hearing before the Assembly Committee on Criminal Justice when the bill was being debated, is further evidence that the Plaintiff's interpretation of section 11166(k) is wrong:

> MR. GATES: Okay, let me explain this. **If in fact it is determined on the spot, if you get a report by a neighbor and the police respond or the welfare responds and they find out that the report was totally erroneous and that there was a satisfactory explanation for the noises they heard, or whatever, and there is no child abuse there, it is apparent then that you are not going to have it reported.** That's what it says. In other words, if it could be determined immediately that it is unfounded, they won't report, but if they can't determine it immediately and there is further investigation, then you report it and you get a status report follow-up and then purge the file accordingly.

(MJN, Exh. "1," Assem. Com. On Criminal Justice, Public Hearing on Child Abuse Reporting, November 21, 1978, Senate Bill 781, Chapter

1071, Statutes of 1980 (1977-1980 Reg. Sess.), testimony of Deputy Attorney General Michael Gates, pp. 38)(Emphasis added). The Deputy Attorney General described the very situation faced here by the Sheriff's Department. The testimony by Mr. Gates clearly contemplates that an investigation and discretionary assessment of the situation must occur before reporting. Otherwise, there could be no "determination" that a report was "totally erroneous" or had a "satisfactory explanation," or "whatever." *Id.* Thus, at least in the Attorney General's view, a report is not always required where the allegations are disbelieved.

Not only is Plaintiff's view of the reporting requirements inconsistent with CANRA, but as a practical matter, it would entail reporting back and forth to governmental agencies and prosecutors of **any and every** suggestion of child abuse heard by **any** employee of **any** police, welfare, or probation department. A simple phone call from any source whatsoever to any police department employee would, without more, trigger immediate reporting throughout the entire system (welfare, probation, district attorney), with all of the intrusive consequences that necessarily follow an allegation of child abuse or neglect: listing in governmental records, intrusive investigations, and further chaos in the family. As the Court of Appeal properly observed, "Sheriff's Departments are receivers of reports of abuse – not reporters of abuse." (Opn., 14); *Jacqueline T. v. Alameda Cnty. Child Protective Servs.*, 155 Cal. App. 4th 456, 473 (2007) ("County [was the] alleged *receiver[]* of three reports of alleged child abuse from third parties rather than the reporters

themselves.") "As such, they could not have breached a mandatory duty to report (or cross-report)." (Opn., 14).

The interpretation advanced by Plaintiff is also fatally confusing as it makes employees of the sheriff, welfare and probation departments simultaneously both mandated reporters and non-mandated reporters (i.e. "any other persons"). According to the Plaintiff, at 10:14:22 p.m. when Kinney called the Sheriff's dispatch – then and there – that dispatch operator (a mandated reporter) who is compelled to sign a statement assuring that she understands and will comply with her duty to report under section 11166, must nevertheless ignore the "known or suspected" threshold for reporting (in section 11166(a)) which specifically applies to her, and indiscriminately cross-report whatever Kinney said in the call.

Plaintiff's construction of section 11166(k) would require still additional reconciliations i.e. rewrites. For example, CANRA requires that **every** employer of any mandated reporter create a statement to be signed by each of its mandated reporter employees attesting that each employee "has knowledge of the provisions of § 11166 and will comply with those provisions." *Cal. Penal Code* § 11166.5(a)(1). This section, however, would therefore require a substantial exception if Plaintiff's interpretation was correct because those employees in any agency referenced in section 11166(j) or (k) would also have the duty to report **any** allegation of abuse without regard to section 11166(a).

Similarly, sections 11166(f) and (g) which provide that a mandated reporter acting in his or her "private capacity and not in his or her professional capacity or within the scope of his or her

employment" is "any other person" under the Act and therefore **may**, but is not mandated to report even known or suspected abuse. These paragraphs too would require a rewrite to acknowledge that all employees in the agencies identified in sections 11166(j) and (k), even when acting **within** the course and scope of their employment **must** nevertheless report every non-mandated allegation of child abuse regardless of section 11166(a).

The correct reading of section 11166(k) harmonizes it with both sections 11166(a), and 11167, and avoids the disruptive caveats required to be inferred in the other sections discussed above. Thus, in Defendants' (and the Court of Appeal's) view, section 11166(k) requires that every **mandated report** i.e. "known or suspected report of abuse reported to it" be reported out to the other agencies. Such a construction harmonizes the reporting features of who, what, when and where reports are required, and requires no inferential reconciliations of the Act.

Finally, Plaintiff's interpretation of the Act is also not supported when viewed in conjunction with the California Statewide Child Welfare Services Manual, the Manual of Policies and Procedure as promulgated by the California Department of Social Services.[17] While there is no question that the Act outlines reporting duties to and between child protection agencies, there is also no question that scarce resources are involved. Thus, under Chapter 31-105.116, a child welfare agency is authorized to "evaluate out" a referral, and make **no**

[17] The Child Welfare Services Manual can be accessed online at: http://www.dss.cahwnet.gov/ord/PG309.htm.

cross-report to any other agency. In other words, a child welfare agency is **not** obligated to make blanket nondiscretionary reports of all child abuse allegations to law enforcement and other agencies.

Welfare and Institutions Code § 16501(f), cited by Plaintiff, which requires that a child welfare agency "respond to any report of imminent danger to a child immediately and all other reports within 10 calendar days," is not inconsistent with the Social Services' Manual of Policies and Procedure, Chapter 31-105.116. A child welfare agency's ability to "evaluate out" a referral "with no referral to another community agency" does not mean that the agency does no investigation. Manual of Policies and Procedure, Chapter 31-105.116. Rather, the decision by the welfare agency to "evaluate out, with no referral to another community agency" must be supported by "rationale for the decision." *Id.*; Chapter 31-105.117. An investigation, therefore, is indeed contemplated by the agency worker prior to any determination that an allegation of abuse was either unfounded, inconclusive or somehow resolved such that the agency can "evaluate out" the referral without cross-reporting to any other agency.

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IV. CONCLUSION

Based upon the foregoing authorities and arguments, Defendants respectfully request that the Court affirm the Court of Appeal's judgment.

DATED: February 13, 2014

LYNBERG & WATKINS
A Professional Corporation

By: _____

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CERTIFICATE OF WORD COUNT

(CAL. RULES OF COURT, RULE 8.204(c)(1))

The text of this brief consists of **13,930** words as counted by the Microsoft Office Word 2010 version word-processing program used to generate this brief.

DATED: February 13, 2014

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of eighteen and not a party to the within action; my business is 1100 Town & Country Road, Suite 1450, Orange, California 92868, (714) 937-1010.

On February 13, 2014, I served the foregoing document described as **(CORRECTED) RESPONDENTS' BRIEF** on the interested parties by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

Christopher J. Keane, Esq. **THE KEANE LAW FIRM, P.C.** 548 Market Street, Suite 23851 San Francisco, CA 94104 (Attorneys for Plaintiff Brayden Hanson, a minor, by and through his Guardian ad Litem, Lauri Hanson)	Stuart B. Esner, Esq. Andrew N. Chang, Esq. **ESNER, CHANG & BOYER** 234 East Colorado Boulevard Suite 750 Pasadena, California 91101 (Attorneys for Plaintiff Brayden Hanson, a minor, by and through his Guardian ad Litem, Lauri Hanson)
Hon. Donald R. Alvarez San Bernardino County Superior Court 303 West Third Street Dept S32 San Bernardino, CA 92415	Clerk's Office California Supreme Court 350 McAllister Street San Francisco, CA 94102-3600 (8 paper copies)
Clerk's Office California Court of Appeal Fourth Appellate District, Division Two 3389 Twelfth Street Riverside, CA 92501	

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

Executed on February 13, 2014, at Orange, California.

CHRISTINE HARRIS

AMENDED PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of eighteen and not a party to the within action; my business is 1100 Town & Country Road, Suite 1450, Orange, California 92868, (714) 937-1010.

On February 13, 2014, I served the foregoing document described as **ANSWER BRIEF ON THE MERITS** on the interested parties by placing a true copy thereof enclosed in sealed envelopes addressed as follows:

Christopher J. Keane, Esq. **THE KEANE LAW FIRM, P.C.** 548 Market Street, Suite 23851 San Francisco, CA 94104 (Attorneys for Plaintiff Brayden Hanson, a minor, by and through his Guardian ad Litem, Lauri Hanson)	Stuart B. Esner, Esq. Andrew N. Chang, Esq. **ESNER, CHANG & BOYER** 234 East Colorado Boulevard Suite 750 Pasadena, California 91101 (Attorneys for Plaintiff Brayden Hanson, a minor, by and through his Guardian ad Litem, Lauri Hanson)
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Clerk's Office California Court of Appeal Fourth Appellate District, Division Two 3389 Twelfth Street Riverside, CA 92501	

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

Executed on February 13, 2014, at Orange, California.

CHRISTINE HARRIS