S213066
4th.Dist. No. E054516

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

B.H., A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, L.H.,
Plaintiff and Appellant,

vs.

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

APPEAL FROM THE SUPERIOR COURT OF SAN BERNARDINO COUNTY
HON. DONALD R. ALVAREZ, JUDGE
SUP. CT. NO. CIVDS 913403

REPLY BRIEF ON THE MERITS

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INTRODUCTION

Plaintiff/Appellant's reply brief addresses first the actual substance of the Child Abuse and Neglect Reporting Act (CANRA), including the issues of great statewide importance related to Penal Code §§11166(k) and 11166(a). Second, the brief addresses the unmeritorious waiver arguments raised by the Defendants/Respondents for the first time in their answer brief concerning Plaintiff's tort claim form and his complaint.

ARGUMENT

I. PENAL CODE §11166(k) EXPRESSLY REQUIRES THE COUNTY'S SHERIFF'S DEPARTMENT TO CROSS-REPORT TO THE RELEVANT CHILD WELFARE SERVICES AGENCY WHENEVER IT RECEIVES A REPORT OF KNOWN OR SUSPECTED CHILD ABUSE.

A. Discretionary Immunity Is Inapplicable to a Mandatory Duty And, Further, Discretionary Immunity of an Employee Is Inapplicable to a Mandatory Duty of an Entity.

The County's argument that all child abuse reports received by a law enforcement agency must first be filtered through the "§11166(a) reasonable suspicion filter" of an individual law enforcement agency employee before the agency must accept a report and cross-report a report is immaterial to the question before this Court, because even if derivative liability under Gov. Code §815.2 could be nullified by employee immunity, this in no way affects direct entity liability based upon Gov. Code §815.6, as direct entity liability can only be negated by a statutory entity immunity.

Gov. Code §815(b). Mandatory duty of an entity is not subject to discretionary immunities of an employee because it entails the fulfillment of enacted requirements of an entity, not an individual. *Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710, 722.

B. An Entity's Mandatory Duty May Be Owed Entirely Apart from Any Antecedent Act, Discretionary or Otherwise, of One of its Employees.

Mandatory duties of an entity have routinely been found under §815.6 where the entity failed to comply with a statutory mandate - irrespective of any employee's individual role in assisting the entity in carrying out its mandate. *Sullivan v. County of Los Angeles* (1974) 12 Cal.3d 710); *Bradford v. State of California* (1973) 36 Cal.App.3d 16; *Shakespeare v. City of Pasadena* (1964) 230 Cal.App.2d 375; *Morris v. County of Marin* (1977) 18 Cal.3d 901; *Trewin v. State of California* (1984) 150 Cal.App.3d 975 and *Johnson v. Mead* (1987) 191 Cal.App.3d 156; *Elson v. Public Utilities Commission* (1975) 51 Cal.App.3d 577; *Braman v. State of California* (1994) 28 Cal.App.4th 344.

The employee's antecedent acts leading up to the existence of a threshold fact in those cases were immaterial with respect to the entity's

mandatory duty once the threshold fact came to exist. For example, in *Trewin, supra* at 981 and *Johnson, supra* at 160, the Court held that once the threshold fact has been established (i.e. person applying for a drivers license is disqualified), then the agency has a mandatory duty to refuse to issue a license.

In *Braman, supra,* the existence of a threshold fact (i.e. person applying to purchase a gun is disqualified) triggers a mandatory duty of the state to notify a gun dealer. *Braman, supra* at 350. The duty was mandatory regardless of any discretion an employee may have had, if any, in determining whether the applicant to purchase the gun met exclusionary criteria. *Id.* Further, a mandatory duty for an entity will be found to exist even where the employee of the entity may have to ask a question or two in order to establish the existence of the threshold fact (i.e. was there liability insurance? (*Elson*); or workers compensation insurance? (*Morris*)).

In this case, the threshold fact which triggered the cross-reporting requirement of §11166(k) was the receipt of a child abuse report by the law enforcement agency from Christy Kinney by telephone on 9/22/2008 at or near 22:14 hours. The agency (not an employee) had an obligation to receive and make a record of this report pursuant to §11165.9. In this case, all the agency's designated employee did was complete the ministerial task of receiving and recording that Christy Kinney's report was a "CHILD

ABUSE RPT.", which she did. That is not at issue in this case. The agency's computer then did the rest, assigning the appropriate report code for a CHILD ABUSE RPT., which was "273R". The receipt of that child abuse report required no discretionary analysis by the agency or its telephone operator/employee, any more so than the agencies or employees in any of the aforementioned cases. Once that report had been received via telephone, there was no discretion afforded by the clear language and timing requirements of §11166(k) and other aspects of CANRA that the report be cross-reported immediately and again in writing within 36 hours of receipt of the information – all before a law enforcement investigation is completed (e.g. §11166(k) requires that a cross report be made immediately and §11166.3 requires notification that investigation has been started, not completed). "Statutes in *pari materia* should be construed together." *People v. Caudillo* (1978) 21 Cal.3d 562, 585.

C. A Law Enforcement Agency's Duty to Act upon a Child Abuse Report (i.e. to Receive it and Share its Contents with Another Agency) Is Premised upon *Receipt* of the Report.

1. A law enforcement agency must accept all reports of child abuse.

Accepting a report of suspected child abuse is created by Penal Code §11165.9 and §11166(b)(5), and has nothing to do with an individual mandated reporter's obligation pursuant to §11166(a). The duty to accept and keep records of the initial report of suspected child abuse runs to the agency, not to any employee of an agency: §11165.9 states:

> "...Any of those **AGENCIES** shall accept a report ....
>
> ...**AGENCIES** that are required to receive reports... and shall maintain a record of **ALL reports received**."

To accept the County's argument, one would have to interpret §11165.9 to read that its sheriff's department could not even accept a report of suspected child abuse or neglect unless its employee who received the call first agreed with the reporter that the child had been abused. That, however, is

impossible pursuant to the terms of §11166(a), which, according to the County, govern every action of its employees. First, the employee receiving the 9-1-1 call could not "know" if the child was abused unless he/she saw it. Second, §11166(a) limits a mandated reporter's duty to report to when he/she has "knowledge of or observes" a child whom the employee knows of or reasonably suspects has been the victim of child abuse or neglect. Neither the agency nor its employee receiving the 9-1-1 call knows whether the child has been abused, and has not observed the child.

Further, the agency may not refuse to accept a report. The child abuse report made by telephone by Christy Kinney on 9/22/2008 at 22:14 to the agency **had** to be accepted by the agency, whether the employee designated by the agency to answer the agency's phone agreed with Christy Kinney or not.

2. A law enforcement agency must make a record of all reports of child abuse received.

Penal Code §11165.9 requires that the law enforcement agency shall maintain a record of "all reports received" from the caller, not received from the person employed by the agency to answer the phone. In order to comply with this requirement, all such reports must be categorized as child

abuse reports because if the agency receiving the report re-categorized it, such action would violate the terms of the statute.

CANRA requires accepting reports, sharing reports and that this should occur even when it is legally impossible for an agency to investigate a report:

> "...Any of those agencies shall accept a report of suspected child abuse or neglect whether offered by a mandated reporter or another person, or referred by another agency, **even if the agency to whom the report is being made lacks subject matter or geographical jurisdiction to investigate the reported case**, unless the agency can immediately electronically transfer the call to an agency with proper jurisdiction. When an agency takes a report about a case of suspected child abuse or neglect in which that agency lacks jurisdiction, the agency shall immediately refer the case by telephone, fax, or electronic transmission to an agency with proper jurisdiction.

CANRA does not tie the duty to accept a child abuse report, to categorize it as a child abuse report or to share it, with the ability or duty to investigate the report, and, therefore, the duty to share a report is not in any way even potentially tied to §11166(a).

3. A law enforcement agency receives an "initial" report. A mandated reporter makes an "initial" report. Therefore, a law enforcement agency's employee who receives the 9-1-1 call or who later investigates the report on behalf of the agency cannot thereafter make a second "initial" report. Once an "initial" report is made, the agencies take over.

The person on the phone (*i.e.* Christy Kinney or a mandated reporter) reporting child abuse to the agency is calling in the "initial" report. In this case, as in *Jacqueline T. v. County of Alameda* (2007) 155 Cal.App.4th 456, 473, the County was a *receiver* of Kinney's "initial" child abuse report by telephone, and neither the County nor its employees who either answered the 9-1-1 call or investigated it thereafter could ever act as an "initial" reporter per §11166.

A mandated (or non-mandated) reporter makes an initial report, and then once the initial report is made, the agency which receives the report has a mandated duty to cross-report it pursuant to §11166(k) (formerly (g)):

"...**Once a report is made, responsibilities shift and governmental authorities take over**. Proceeding up the line,

> the Act requires county welfare departments to report suspected child abuse **by telephone immediately** or as soon as practically possible to the appropriate law enforcement agency, the agency responsible for Welfare and Institutions Code section 300 investigations, and the district attorney. (§ 11166, subd. (g).) The welfare department must **follow-up the call with a written report to the same agencies within 36 hours of receiving the information.** (§11166, subd. (g).) **The Act also imposes reciprocal duties on law enforcement agencies who first receive a report.** (§11166, subd. (g).) The focus of the Act is, as such, directed toward discovering suspected child abuse and, to that end, encouraging reporters to spread the word as quickly as possible without fear of suit **so that independent governmental agencies can remove the child from immediate danger** and investigate."

James W. v. Superior Court (1993) 17 Cal.App.4th 246, 254.

CANRA does not envision or permit a lapse of time between receipt of a report by a law enforcement agency and the "immediate" cross-report of that report to the child welfare agency because that would obliterate the opportunity to protect a child from immediate danger while a thorough law enforcement deputy was completing an

"active investigation" pursuant to DOJ standards, driving around town tracking down multiple witnesses for statements and collecting other evidence that could take weeks to collect.

4. There is no reason for a law enforcement agency to re-filter an initial report of child abuse through its employees because every report which it receives is already required to be based upon the reporter's reasonable suspicion.

The County's argument that all reports must be screened by law enforcement employees for "reasonable suspicion" before they are cross-reported ignores the fact that every report which comes into a law enforcement agency is already required to be based upon the knowledge or reasonable suspicion of the reporter. A report either comes in from a mandated or non-mandated reporter pursuant to §11166(a) or (g), and both subsections require the reporter to report only instances of abuse or neglect of a child whom the reporter "knows or reasonably suspects" has been a victim. Further, there are penalties for persons who report in violation of the constraints of CANRA. *See* §11172. Therefore, there is no basis to

presume that a law enforcement agency re-filter child abuse reports it receives before cross-reporting.

D. The County Completely Miscites the Testimony of Deputy Attorney General Gates with Respect to CANRA. In Fact, the Cited Testimony Corresponds to Another Deputy Attorney General's Testimony Which Further Corroborates That §11166(k) Was Intended to Require Cross-reporting of All Reported Cases.

The citation on page 51 of the County's brief to Mr. Gates' testimony does not concern cross-reporting of initial reports pursuant to §11166(k). His testimony concerning cross-reporting is found instead on pp. 11-12, as cited in Plaintiff's Opening Brief (AOB, p. 20) The County fails to acknowledge the context of Gates' testimony at that point in the hearing, which was in response to a legislator's question after 13 pages of statement/testimony from June Sherwood and Robert Woods, also from the Office of the Attorney General (OAG), about which reports make their way into the permanent Child Abuse Central Index (CACI) pursuant to Penal Code §11169, and also about CANRA's requirement for initial cross-reporting. The use of the term "unfounded" by Gates is a specific reference

to the restriction of §11169 that "unfounded" reports not be made to the OAG/DOJ on Form S8583, Child Abuse or Severe Neglect Indexing Form, Sections B and C (See Plaintiff's first Motion for Judicial Notice). Also, in addition to determining the context of the testimony on p. 38, it is clear from Ms. Sherwood's testimony on pp. 30-32 that Mr. Gates had **already testified** about cross-reporting (i.e. before pp. 30-32) because she refers to his preceding testimony when she says he "**has indicated**:"

> "And three, the increased cooperation and communication between law enforcement social service personnel and mandated reporters as well as community volunteers has minimized the burn out factor and the frustration and has made it possible for the system to respond to the increased workload. Moreover to argue against more effective reporting procedures which will inform all child protective service agencies and insure more complete statewide suspected child abuse files is to argue I guess on the basis that it will result in taking valuable time of case workers of child protective agencies which flies in the face of our primary responsibility for the protection of the child and weakens the informed decision making possible to the agencies by knowledge of prior history and through inter-agency

cooperation. **Next I would like to comment briefly on the provisions of S.B. 1614 as contained in Section 11166, subsections E and F, requiring immediate reporting by telephone and written reports within 36 hours by county welfare or county probation to the law enforcement agency having jurisdiction over the case and the requiring of the same procedure from law enforcement agencies to county welfare. These provisions, as Mr. Gates has indicated,** clarify the present reporting procedure in order to insure, first that all parties who have investigatory and decision making responsibilities in the handling of child abuse cases as defined in the legislation child protection service agencies which are police or county sheriff's department, county welfare department or county probation department. That these agencies will be made aware of suspected cases requiring such investigation and decision making and second that the local law enforcement agency having jurisdiction will be a party to such an investigation and decision making. As noted above we have found that in some cases law enforcement agencies have not been immediately notified. This later situation may have occurred as a result of what

> appears to be an effort on the part of some people involved in child abuse matters to reserve the handling of child abuse as the exclusive province of social workers. Mr. Gates quoted from the federal provisions. Those holding this view argue that child abuse is not a crime but a non-criminal problem best handled by treatment, and believe that other government agencies such as police, prosecutors and courts should come into the situation only when the social service worker makes the judgment that they are needed. We in the Attorney General's Office strongly oppose any effort to allow single specialized groups to presume to make all the judgments necessary to protect the safety of children in child abuse cases. Such an approach is parochial and short sighted and fails to take into account the interest of society in general and of the child in particular.....

(See Plaintiff's Motion for Judicial Notice filed herewith, Ex. 1.)

E. Additional Legislative History Confirms That the Inclusion of Mandatory Cross-reporting of Initial Reports Was Intentional.

Further legislative history found within the Enrolled Bill Report from the Dept. of Social Services reveals that mandated cross-reporting from law enforcement to child welfare services was new (i.e. not previously mandated by the predecessor code to §11166(k) – which were §11161.5 and §11161.6). The purpose was to increase the speed and response capabilities of child welfare service agencies to protect children who are identified in reports of abuse:

> "...current law requires health/welfare to immediately cross-report to law enforcement and probation. #4. Require law enforcement agency which receives a report of child abuse shall immediately report this to the county social services department. This is not currently not [sic] mandated. It will provide for more rapid response capabilities by the designated county social service agency."

(See Plaintiff's first Motion for Judicial Notice.)

F. The County Misconstrues the DSS Regulations with Respect to Their Connection to Cross-reporting Pursuant to §11166(k).

The cited DSS regulation manual page was not before the trial court, has not been made part of the record and is not part of the appellate record and, therefore, may not be considered on appeal. 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 218, pp. 4208-4209. In any event, the County miscites it to stand for a proposition which it does not stand. 31-105.116 does not mention cross-reports to law enforcement pursuant to §11166(k) because it does not pertain to that code section. The regulation lists the code sections which provide authority for it, referring only to WIC §§10553, 10554, 16208 and 16504. Further, a "referral to another community agency" does not include cross-reporting to a law enforcement agency, rather it describes the process whereby a child welfare agency intake worker determines that a child or family might benefit from services (i.e. counseling) and this is actually defined in DSS Regulation 31-002:

> "(2) "Referral to community agency" means informing another service agency that a child and/or that child's family desires or requires that agency's services; and assisting the child and/or family to avail themselves of such services."

(Motion for Judicial Notice filed herewith, Ex. 2.) A sheriff's department is not an agency that provides services for children or families.

G. *Alejo* Found Two Duties for a Law Enforcement Officer in Deputy Swanson's Position.

For the reasons set forth in Plaintiff's Opening Brief on the Merits, the case of *Alejo v. City of Alhambra* (1999) 75 Cal.App4th 1180 remains viable law which sets forth the two duties of a deputy such as Officer Doe in *Alejo* and Deputy Swanson in this action based on an objective standard. Also, while the second of the duties identified in *Alejo*—the duty to file a report "when an objectively reasonable person in the same situation would suspect abuse"—requires the exercise of some judgment, it is **not** one that involves the exercise of "discretion". *County of Los Angeles v. Superior Court* (2012) 209 Cal.App.4th 543.

II. THE COUNTY'S ARGUMENT THAT PLAINTIFF DID NOT "PROPERLY RAISE" THE CLAIM THAT THE COUNTY VIOLATED ITS MANDATORY DUTY TO CROSS-REPORT PURSUANT TO SECTION 11166(K) IS FRIVOLOUS; THIS COURT SHOULD DISPOSE OF THE COUNTY'S CLAIM OF WAIVER IN ITS OPINION REVERSING THE SUMMARY JUDGMENT.

A. Plaintiff's Claim That the County, Through its Sheriff's Department, Breached a Mandatory Duty to Cross-report the Report of Suspected Child Abuse it Received from Christy Kinney to its Child Welfare Department, Was Properly Preserved for Appeal to this Court.

An issue properly preserved below may be reviewed on appeal. *People v. Scott* (1994) 9 Cal.4th 331, 351. A legal issue is preserved by raising the point in the trial court and offering the pertinent facts, events, documents, or other matters into evidence and including them in the record on appeal. (See 9 Witkin, Cal. Proc. 5th (2008) Appeal, §§334, 400, pp. 385, 458, and authority cited therein.) Here, the record is replete with references to Plaintiff's preservation of the claim/issue that the County,

through its sheriff's department, breached a mandatory duty to cross-report the report of suspected child abuse it received from Christy Kinney pursuant to §11166(k) of CANRA:

- Plaintiff alleged this in the Complaint, including but not limited to, the following paragraphs of his complaint: ¶¶ 59,60,61,62,63,64, 65,66,67,68,88,89,90,91,92,93,94,95 and 96. (AA 18-22, 28-32.)

- Plaintiff then argued this in his opposition to the motion for summary judgment and/or adjudication, at the following pages of the record: (AA 365,368-369,374-375,383-384.)

- Plaintiff also argued at the summary judgment hearing that the court's ruling failed to address an entire second half of Plaintiff's complaint, and then argued in his objection to the proposed order granting summary judgment that the ruling failed to address the second half of his complaint; namely, that the County, through its sheriff's department, violated §11166(k) – and that the court had actually only granted summary adjudication because it had not addressed §11166(k). (AA707-710.)

- Plaintiff then argued this in his opening brief on appeal. (AOB, pp. ii, 1,3,33-37,47.)

- Plaintiff then argued this in his reply brief on appeal. (ARB 1-2,4-5,23-31.)

- In response to the Court of Appeal's 16 page tentative opinion which did not even mention §11166(k) in one sentence, Plaintiff again pointed out this allegation in his letter to the court requesting an additional 15 minutes to explain this violation. (Letter to Court of Appeal dated June 10, 2013, at pp.1-7,12-13.)

- Plaintiff then argued this in his Petition for Rehearing in the Court of Appeal. (Petition for Rehearing at pp. i. ii, iii, v, 1-39,43.)

- Plaintiff then argued this in his Petition for Review in this Court. (Petition for Review at pp. i- iii, 16-29.)

- Plaintiff then argued this in his Opening Brief on the Merits in this Court. (Opening Brief at pp. ii-iv, 15-46.)

Further, the Order granting review did not limit Plaintiff from arguing or briefing that issue. CRC 8.516(a)(1) & (2). To further illustrate the frivolousness of the County's claim of waiver, just a highlight of the headings alone that are contained in Plaintiff's trial and appellate documents[1] expressly set forth Plaintiff's claim that the County, through its sheriff's department, breached a mandatory duty to cross-report the report of suspected child abuse it received from Christy Kinney pursuant to

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[1]These headings are in addition to the 61 references in the record before oral argument took place in the Court of Appeal. The Court of Appeal ignored these 61 references and stated erroneously in its Opinion that the first time that Plaintiff raised this issue was at oral argument in the Court of Appeal (*see* Court of Appeal Opinion at pp. 12 and 15).

§11166(k). (See, e.g, AOB 33 ["D. The independent duty of the Sheriff's Department – a law enforcement agency – to immediately cross-report to the San Bernardino DCFS upon receipt of every known or suspected instance of child abuse reported to it, and within 36 hours after starting its law enforcement investigation"], ARB 23 ["The Independent Duty of the Sheriff's Department – a Law Enforcement Agency – to Immediately Cross-report to the San Bernardino DCFS upon Receipt of Every Known or Suspected Instance of Child Abuse Reported to It, and Within 36 Hours after Starting its Law Enforcement Investigation"], 27 ["Penal Code section 11166(k) and 11166.3 specifically provide that such law enforcement agencies must 'cross-report' every known or suspected instance of child abuse or neglect to the local child welfare agency (such as the DCS), as well as to inform DCS that the law enforcement agency has begun an investigation of the report of suspected child abuse"], AA382 ["VII. Penal code section 11166 mandates cross-reporting all instances of suspected abuse reported *to* law enforcement agencies, not just those suspected *by* law enforcement"].

Further, the most significant factor demonstrating that the County has deliberately misrepresented whether Plaintiff raised this issue in the trial court and court of appeal is that the County **REPLIED** to this issue – both

in its reply brief in support of its motion for summary judgment (AA686-692) and in its brief on appeal (*see* RB, pp. 24-37).

B. This Issue Will Be Decided by this Court Because it Was Within Plaintiff's Petition for Review and this Court Has Not Otherwise Limited the Issues to Be Briefed or Argued.

Plaintiff's petition for review contained the issue that the County, through its sheriff's department, breached a mandatory duty to cross-report the report of suspected child abuse it received from Christy Kinney pursuant to §11166(k). (See Petition for Review, at pp. i-iii, 16-29) The Respondent failed to file an answer to the petition addressing this or any requesting "additional issues for review", as was permitted by CRC 8.504(c) and, therefore, the County waived the right to request that any additional issues be reviewed. In granting the petition, this Court had authority to specify issues to be briefed and argued, but did not. CRC 8.516(a)(1) & (2). In fact, the Court in its weekly issues summary highlighted this as an issue it would be deciding:

> This case presents the following issues: (1) Does Penal Code section 11166, subdivision (k), create a mandatory duty

requiring a law enforcement agency to cross-report to the relevant social services agency whenever it receives a report of known or suspected child abuse? (2) If so, when is that duty triggered? . . .

http://www.courts.ca.gov/documents/supreme/actions/SL111313.PDF"

However, there is **not one single reference anywhere in the record over the past five years** of any affirmative defense or argument from the County that Plaintiff's tort claim failed to comply with Gov. Code §910 or §945.4 and/or that the Complaint varied from the tort claim and the County has, thus, waived the right to now raise those defenses. The issues to be decided by this Court are delimited by Plaintiff's petition (CRC 8.504(b)(1), the Respondents' answer to the petition (CRC 8.504(c) and this Court's order (if any) limiting the issues to be decided (CRC 8.516 (1). This Court need not decide every issue the parties raise or the court specifies (CRC 8.516(b)(3)), but may decide an issue if the case presents the issue. CRC 8.516(b)(2). It is axiomatic that the failure to preserve a point below constitutes a waiver of the point. *Menefee v. County of Fresno* (1985) 163 Cal.App.3d 1175, 1182. This rule is rooted in the fundamental nature of our adversarial system: The parties must call the court's attention to issues they deem relevant. *North Coast Business Park v. Nielsen Construction Co.*

(1993)17 Cal.App.4th 22, 28. A litigant may not raise a new theory for the first time on appeal. *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 847; 9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 399 & 400, pp. 451-453; Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 1998) §8:229, pp. 8-106 to 8-107.) *Brown v. Boren* (1999) 74 Cal.App.4th 1303, 1316.

Affirmative defenses must be separately stated, and must refer to the causes of action to which they relate in a manner by which they may be intelligently distinguished. CCP 431.30(g); see *Hata v. Los Angeles County Harbor/UCLA Medical Center* (1995) 31 Cal.App.4th 1791, 1805. If not raised in the answer, matters constituting an affirmative defense are waived and deemed irrelevant at trial. *Hata, supra*, at 1805. An affirmative defense that fails to specify both the applicable statute and subdivision raises no issue and presents no defense. *Davenport v. Stratton* (1944) 24 Cal.2d 232, 246-247.

Plaintiff was required to and did allege the presentation of his claim in the Complaint in order to maintain the action. *Chase v. State* (1977) 67 Cal.App.3d 808; *State v. Superior Court* (2004) 32 Cal.4th 1234, 1239; AA 5. The motion for summary judgment, which sought dismissal of any cause of action in the Complaint, necessarily included a test of the sufficiency of the complaint, and its legal effect was the same as a demurrer or motion for

judgment on the pleadings. *American Airlines v. County of San Mateo* (1996) 12 Cal.4th 1110, 1118; *People v. $20,000 U.S. Currency* (1991) 235 Cal.App.3d 682, 691; *Hejmadi v. Amfac, Inc.* (1988) 202 Cal.App.3d 525, 535-536. The motion was devoid of any attack on the tort claim, or that the claim varied from the complaint, and this also constituted a waiver of those potential affirmative defenses.

Further, Plaintiff's complaint could not have been be dismissed upon a motion for judgment on the pleadings, as a court's task in ruling on such a motion is set forth in California Judges Benchbook: Civil Trials (1981) section 9.37, page 295 (Cal. Center for Jud. Education and Research): "In ruling on a defendant's motion for judgment on the pleadings, the court cannot consider any matter outside the complaint.... If the necessary facts are contained in the complaint, the objection that they are defectively set forth, or are in an ambiguous or uncertain form, is unavailing. Some fact essential to the cause of action must be entirely absent. *Hibernia Sav. & Loan Soc'y v. Thornton* (1897) 117 Cal. 481, 482; *see* also *Welshans v. Santa Barbara* (1962) 205 Cal.App.2d 304, 305; *Builders' Control Serv., Inc. v. North Am. Title Guar. Co.* (1962) 205 Cal.App.2d 68, 73. The tort claim was and is not part of the complaint, nor part of any record before this court or the trial court, and may not be considered. 6 Witkin, Cal. Procedure (2d ed. 1971) Appeal, § 218, pp. 4208-4209.

Further, at no time on appeal did the County ever argue that the claim was defective or that the complaint varied from the claim. This Court should now decline to entertain those defenses. *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 726; *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 682. Further, the Court should rule that the failure to preserve those defenses below constitutes a waiver thereof. *Menefee, supra at* 1182.

C. This Court's Decision That the County, Through its Sheriff's Department, Breached a Mandatory Duty to Cross-report the Report of Suspected Child Abuse Which it Received from Christy Kinney Pursuant to §11166(k), Would Clearly Not Constitute an "Advisory" Opinion.

If not already waived, Plaintiff would request that the Court exercise its power to decide the issue of whether Plaintiff's claim conformed with Gov. Code §§910 and 945.4, and whether the Complaint varied from the claim form in a material manner, as part of "any issue presented by the case" in order to avoid any future mischaracterization of the Court's opinion as "advisory" (CRC 8.516(b)(2). *Cedars-Sinai Med. Ctr. v. Super.Ct. (Bowyer)* (1998) 18 Cal.4th 1, 5–7, & fn. 2. The Court's

unanimous decision to grant review of Plaintiff's petition reflects the Court's determination that the issues Plaintiff raised have sufficient statewide importance to warrant an opinion from this Court, and that this case presents those issues. *People v. Braxton* (2004) 34 Cal.4th 798, 809. This case is of such statewide importance for California's children that it is in the public interest to decide all such issues in this case at this time rather than let it return to the local superior court for any further ruling. CRC 8.516(b)(2); *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 654–655; *Cedars-Sinai Med. Ctr. v. Superior Court, supra,* 18 Cal.4th at 6.

D. Plaintiff's Tort Claim Complied with Gov. Code §§910 and 945.4, and the Complaint Conforms with the Claim, Pursuant to this Court's Holding in *Stockett.*

The purpose of §§910 and 945.4 is "to provide the public entity sufficient information to enable it to adequately investigate claims and to settle them, if appropriate, without the expense of litigation." *City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 455. Consequently, a claim need not contain the detail and specificity required of a pleading, but need only "fairly describe what [the] entity is alleged to have done." *Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407, 1426. While the claim should give the

government entity notice sufficient for it to investigate and evaluate the claim, the statute is not intended to eliminate meritorious actions. *Blair v. Superior Court* (1990) 218 Cal.App.3d 221, 225. The claims statute "should not be applied to snare the unwary where its purpose has been satisfied." *Elias v. San Bernardino County Flood Control Dist.* (1977) 68 Cal.App.3d 70, 74.

The Court addressed claim requirements in *Stockett v. Association of Cal. Water Agencies Joint Powers Ins. Authority* (2004) 34 Cal.4th 441, 446. In this case, as in *Stockett, supra*, while there may be several theories related to a singular cause of action, there is only one cause of action for Plaintiff, namely for personal injury he sustained on October 18, 2008. A cause of action refers to invasion of a primary right. *Bay Cities Paving & Grading, Inc., v. Lawyers Mutual Ins. Co.* (1993) 5 Cal.4th 854, 860. The "primary right" is simply the plaintiff's right to be free from the particular injury suffered. *Hindin v. Rust* (2004), 118 Cal.App.4th 1247, 1258. Where a complaint seeks recovery for the same personal injury under several different legal theories, there is still only a single cause of action. *Barrett v. Superior Court* (1990) 222 Cal.App.3d 1176, 1182. The claim in this case is for a singular cause of action for personal injury B.H. suffered on October 18, 2008, and contains the fundamental facts and failures to act by the Defendants which proximately caused the injury on October 18,

2008. The fundamental facts and failure to act as it relates to the theory that the County is liable to Plaintiff for breach of mandatory duty proscribed by §11166(k) of its law enforcement agency to cross-report the report of suspected child abuse which Christy Kinney made to the agency by telephone on September 22, 2008 are as follows:

- Christy Kinney called the County of San Bernardino Sheriff's Department by telephone on September 22, 2008, to report the suspected child abuse of Plaintiff.

- The Sheriff's Department failed to cross-report the report of suspected child abuse which it received by telephone by Christy Kinney.

- Plaintiff was injured on October 18, 2008 due to the aforementioned failure of the County of San Bernardino Sheriff's Department to timely cross-report the aforementioned Kinney suspected child abuse report to the County of San Bernardino's Department of Childrens Services (DCS), so that DCS could then investigate, intervene and protect Plaintiff from the further child abuse which ultimately occurred on October 18, 2008.

In this case, Plaintiff's claim informed the County of those fundamental facts and failures to act, as well as listed the persons and the agency which could be responsible for those failures. The claim stated, in pertinent part:

"...This was not the first time that B.H. was injured by his father, Louis Sharples, Jr. For example, Lauri Hanson reported that she witnessed suspicious bruising on B.H. after one of the first weekend visits after the court order was initiated in 2008. At that time, B.H. had a bruise on his head and bitemark on his back. Sharples claimed that this occurred because B.H. hit his head on a coffee table and that his 16-month-old half-sibling bit B.H. on the back. The next time that Lauri Hanson noted injuries was when B.H. returned from a visit with Sharples that took place the weekend of September 20-22, 2008. B.H. was returned on September 22, 2008, with very suspicious bruises and injuries. **Upon B.H.'s return, and at the request of Lauri Hanson, Christy Kinney, who was Lauri's previous guardian and the person with whom Lauri and B.H. lived, placed a telephone call on September 22, 2008 at or near 2214 hours, to the to the San Bernardino County Sheriff's Department to report the concerns that B.H. was a child who had been abused and injured while under the care of Louis Sharples, Jr**.....

Plaintiff's claim continued:

Deputy Sheriff Swanson, Deputy Sheriff Bohner, Does 1-100, **the County of San Bernardino and the County of San Bernardino Sheriff's Department, despite their duties (*note plural*) as mandatory reporters of child abuse pursuant to California's Child Abuse and Neglect Reporting Act (art. 2.5, §§ 11164-11174.3), were negligent and negligent per se in failing to** investigate, report **and cross-report the child abuse of B.H. of which they were informed on September 22, 2008, by Christy Kinney pursuant to the phone call she made, as set forth above,** and which was further witnessed in person by K. Swanson on the same date, and which was made known to Jeff Bohner on or after September 22, 2008 and before September 25, 2008.....

* * *

The aforementioned Act created **several** mandatory **duties** (***note plural***)which were breached by Swanson, Bohner, Does 1-100, **the County of San Bernardino and the County of San Bernardino Sheriff's Department....**

* * *

... there was a mandatory duty owed by Swanson, Bohner,

Does 1-100, **County of San Bernardino and County of San Bernardino Sheriff Department** to comply with the investigation and reporting requirements of section 11166, subdivision (a), **and the other statutes** ***(note plural)*** set forth above.

* * *

But for the aforementioned failures ***(note plural)*** **of** Swanson, Bohner, Does 1-100, **the County of San Bernardino and the County of San Bernardino Sheriff's Department, the applicable child welfare workers** ***(e.g.*** **including but perhaps not limited to Leann Ashlock, Human Services/Department of Children's Services, 1504 S. Gifford Avenue, San Bernardino, CA 92415 (909) 386-1300) would have investigated the child abuse and injuries, would have discovered that the injuries inflicted on B.H. were inconsistent with the account provided by Louis Sharples, Jr., and further, coupled, with the prior history of injury to B.H. of which Ms. Ashlock and her Department were aware, would have responded, intervened and protected B.H. from the injuries and damages caused to B.H. on October 18, 2008,** with

appropriate petitions, actions and court orders, as permitted by law and in accordance with Department regulations between September 22, 2008 and October 18, 2008. Child welfare workers responding to a child abuse report are governed by statutory standards. Welfare & Institutions Code section 16501, subdivision (f) provides when a county welfare department receives a report of child abuse under section 11166 it "shall respond to any report of imminent danger to a child immediately and all other reports within 10 calendar days." **In B.H.'s case, the subsequent beating took place on October 18, 2008, which was thirty (30) days after Christy Kinney's report of child abuse on September 22, 2008. Thus, the county welfare department and Ms. Ashlock would have had ample time to respond and provide B.H. with protection from further abuse had** Deputy Swanson, Deputy Bohner, Does 1-100, **County of San Bernardino and County of San Bernardino Sheriff's Department, reported the facts to the applicable child welfare workers (*e.g.* including but perhaps not limited to Leann Ashlock, Human Services/Department of Children's Services (DCS), 1504 S. Gifford Avenue, San**

Bernardino, CA 92415 (909) 386-1300) which were related by Christy Kinney....

As can be seen from the facts and history set forth above, Lauri Hanson did everything in her power to protect her son, B.H., but Deputies Swanson, Bohner, Does 1-100, County of San Bernardino and County of San Bernardino Sheriff's Department clearly let her and B.H. down and violated mandatory duties (*note plural*) owed to B.H. ....

(County's Motion for Judicial Notice, Ex. 2.)

Plaintiff's complaint set forth these same fundamental facts and failures to act by the County's sheriff department with respect to the cause of action for personal injury which occurred on October 18, 2008; and specifically with respect to the theory that the County is liable for its sheriff's department's breach of mandatory duty pursuant to §11166(k) to cross-report the report of suspected child abuse which it received from Christy Kinney on September 22, 2008 to DCS, and that this failure proximately caused B.H. to be injured on October 18, 2008. *See* Plaintiff's Complaint at including but not limited to ¶¶ 30, 46, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68 (AA 18,19,20,21,22,28,29,30,31,32), highlighted in pertinent part below:

"30. Because B.H. had very suspicious-looking bruises and other injuries when he returned to Lauri Hanson's care on September 22, 2008, Ms. Hanson asked Christy Kinney, with whom she and B.H. lived and who had previously been Laurie's guardian, **to call defendant COUNTY OF SAN BERNADINO Sheriff's Department to report concerns that B.H. had been abused and injured while under SHARPLES' care. Christy Kinney made a telephone call to Defendant COUNTY OF SAN BERNADINO Sheriff's Department on September 22, 2008 at or near 2214 hours, to convey these concerns**.

47. Plaintiff is informed and believes and thereon alleges that the Defendants **COUNTY OF SAN BERNARDINO**, CITY OF YUCAIPA, K. SWANSON, JEFF BOHNER and DOES 1-100, at all times herein **failed to fulfill their mandatory** duties (***note plural***) to inform child protection employees, personnel and agencies, to provide such employees, personnel and agencies with information and statements, to sign reporting statements, to investigate, to report **and to cross-report** as required by the State of California in, but without limitation, California Penal Code §§ 11166.5, **11166**, and as further

detailed in case law such as Alejo v. City of Alhambra (1999) 75 Cal.App4th 1180 (1999), and Landeros v. Flood, 17 Cal.3d 399 (1976).

60. Defendants **COUNTY OF SAN BERNARDINO** and CITY OF YUCAIPA, by and **through the COUNTY OF SAN BERNARDINO's Sheriff's Department, as a law enforcement agency, owed and breached the mandatory duty owed to B.H. to suspect child abuse of B.H. upon and following receipt of the information given to said defendants by Christy Kinney on September 22, 2008 concerning the child abuse of B.H.**, injuries from which abuse were witnessed and photographed by K. SWANSON as set forth in this Complaint, **pursuant to California Penal Code §11166(k)** and Alejo v. City of Alhambra, 75 Cal.App.4th 1180 (1999), **and to immediately, or as soon as practicably possible, report to the county welfare or probation department every known or suspected instance of child abuse or neglect reported to them which is alleged to have occurred as a result of the action of a person responsible for the child's welfare, or as the result of the failure of a person responsible for the child's welfare to adequately protect the minor from abuse when the person responsible for the child's welfare knew or reasonably should have**

known that the minor was in danger of abuse, as it concerned B.H..

61. Defendants **COUNTY OF SAN BERNARDINO** and CITY OF YUCAIPA, by and **through the COUNTY OF SAN BERNARDINO's Sheriff's Department, as a law enforcement agency, owed and breached the mandatory duty owed to B.H. to suspect child abuse of B.H. upon and following receipt of the information given to said defendants by Christy Kinney on September 22, 2008 concerning the child abuse of B.H.**, injuries from which abuse were witnessed and photographed by K. SWANSON as set forth in this Complaint, **pursuant to California Penal Code §11166(k)** and Alejo v. City of Alhambra, 75 Cal.App.4th 1180 (1999), **and to also send, fax, or electronically transmit a written report thereof within 36 hours of receiving the information concerning the incident involving B.H. to any agency to which they were to make a telephone report under this subdivision**.

62. **Defendants COUNTY OF SAN BERNARDINO**, CITY OF YUCAIPA, K. SWANSON, JEFF BOHNER and DOES 1-100 **failed**

to report **and cross-report** the visible physical injuries to and child abuse of B.H. **that Christy Kinney reported to them and that she placed them on notice on September 22, 2008** to the District Attorney, the Department of Justice and **to the County of San Bernardino Human Services/Department of Children's Services (*e.g.* the applicable child protective agency which would investigate the allegations of child abuse).**

63. **Defendants COUNTY OF SAN BERNARDINO**, CITY OF YUCAIPA, K. SWANSON, JEFF BOHNER and DOES 1-100, **despite** (1) their duties as mandatory reporters of child abuse and (2) **their being law enforcement agencies** and officers, **as those roles are described in California's Child Abuse and Neglect Reporting Act, (art. 2.5, §§ 11164-11174.3), were negligent and negligent per se in failing to** investigate, report and **cross-report the child abuse of B.H. of which they were informed on September 22, 2008 by Christy Kinney in the telephone call she made as described above,** the injuries from which abuse were witnessed in person by K. SWANSON on the same date, and were made known to JEFF BOHNER on or after September 22, 2008 and before September 25, 2008.

68. In this case, **the injuries that Defendant SHARPLES inflicted on B.H. on October 18, 2008 were or should have been foreseeable to** Deputy SWANSON, Deputy BOHNER, DOES 1-100, COUNTY OF SAN BERNARDINO **and COUNTY OF SAN BERNARDINO'S Sheriff's Department, at the time of the September 22, 2008 child abuse report by Christy Kinney**. As the *Landeros* court noted, child abuse is generally not an isolated, atypical event "but part of an environmental mosaic of repeated beatings and abuse that will not only continue but will become more severe unless there is appropriate medicolegal intervention." (*Id.* at p. 412) **In this case, if they had been informed as mandated by law, the responsible child welfare workers (*e.g.* including but perhaps not limited to Leann Ashlock, Human Services/Department of Children's Services, 1504 S. Gifford Avenue, San Bernardino, CA 92415 (909) 386-1300) who had had previous contact with SHARPLES and B.H., and who were already aware of prior suspicious injuries likely inflicted by SHARPLES on B.H. on July 2, 2008, would have intervened to protect B.H. in a manner that would have prevented the injuries inflicted on October 18, 2008.**

73. The aforementioned tortious acts and omissions, negligence, negligence per se and **breach of mandatory duties (*note plural*)** of the Defendants SWANSON, BOHNER, DOES 1-100, **COUNTY OF SAN BERNARDINO** and CITY OF YUCAIPA, **were a substantial factor in causing and were a direct, legal and proximate cause of the injuries and general and special damages suffered by Plaintiff B.H., as set forth in the general allegations of this Complaint and incorporated herein in full.**"

There is no requirement in Gov. Code §910 or §945.4 that a claimant set forth the actual code sections or theories upon which he bases his cause of action, only the fundamental facts and failures to act which create the factual basis for the cause of action. *Stockett, supra* at 447. Nonetheless, Plaintiff went above and beyond the requirement of §§910 and 945.4 and identified the applicable statutes for the Respondent (i.e. Penal Code sections 11164-11174.3). Plaintiff also provided non-required references to case law, and stated that CANRA "contains an elaborate **system** for reporting and **cross-reporting** known and suspected cases of child abuse for the purpose of "protect[ing] children from abuse." (§11164, subd. (a).) This Legislative scheme is summarized in Planned Parenthood Affiliates v.

Van de Kamp (1986) 181 Cal.App.3d 245, ***257-260***." The cited portion of *Planned Parenthood* contained the following explanation:

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

As the immediate case is one of first impression in California, there was and is no cited case law on §11166(k) so Plaintiff did not cite to any case law on §11166(k). The only published reference to anything related to §11166(k) at the time this tort claim was served was a brief reference in *Alejo* to that code subsection before the letters in the subsections were re-named (i.e. (k) used to be (i)). Therefore, a reference to the predecessor statute (§11166(i)) was also included in the tort claim, although again not required.

The provision of case law and the applicable range of code sections applicable to the theories underlying the cause of action (i.e. Penal Code sections 11164-11174.3), while not required by code, provided the County additional information as backdrop for their investigation. Certainly, a reasonable investigation by the County would have included members of its risk management department not only reading all of the underlying facts set forth in the tort claim, but asking their attorneys for a copy of the cited

portions of *Planned Parenthood* if they did not understand the **elaborate system of cross-reporting which Plaintiff informed them was violated**. The County took only eight working days to presumably thoroughly evaluate the tort claim between March 20, 2009 and April 2, 2009. (Plaintiff's Motion for Judicial Notice filed herewith, Ex. 3.)

Also, the gratuitous provision of applicable code sections (11164 - 11174.3) was certainly precise enough to assist the County to investigate the claim. By comparison, the Respondent's Ninth Affirmative Defense, which is ostensibly providing the legal basis for the County's last minute claim that Plaintiff's tort claim was not specific enough, insufficiently failed to cite facts or the applicable statute and subdivision (See *Davenport v. Stratton* (1944) 24 Cal.2d 232, 246-247; *Brown v. World Church* (1969) 272 Cal.App.2d 684, 691):

> "**NINTH AFFIRMATIVE DEFENSE**
>
> (Failure to Comply with Government Tort Claims Procedures)
>
> 10. These answering Defendants allege Plaintiff's claims are barred, in whole or in part, for failure to comply with the provisions of Government Code ***sections 900 et seq***."

(AA 39.) That includes no facts, and the range of code sections "*900 et seq*" includes 195 code sections, and countless more subsections. That insufficiency may be challenged at any time pursuant to CCP §430.80(b). Putting that aside, if the County felt that its Ninth Affirmative Defense

wasn't devoid of facts or code sections and subsections required to comply with actual pleading requirements, then Plaintiff's reference within his claim form to Penal Code sections 11164 – 11174.3, when provision of the same was not even required by Gov. Code 910, was certainly specific enough to assist the County in its investigation before it chose to reject the claim.

CONCLUSION

For the foregoing reasons and the reasons stated in the opening brief on the merits, Plaintiff respectfully urges this Court to reverse the Court of Appeal's judgment.

Dated: March 4, 2014

THE KEANE LAW FIRM, P.C.
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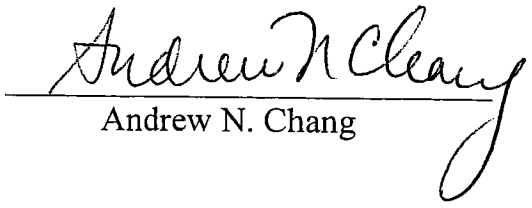
CERTIFICATE OF WORD COUNT

This Reply Brief on the Merits contains approximately 8,397 words per a computer generated word count.



Andrew N. Chang

PROOF OF SERVICE

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

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

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Carol Miyake