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

OPENING BRIEF ON THE MERITS

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

2. Does CANRA (Penal Code 11166(a)) create an objective standard under which mandated reporters are required to make a report "whenever the mandated

reporter, in his or her professional capacity or within the scope of his or her employment, has knowledge of or observes a child whom the mandated reporter knows or reasonably suspects has been the victim of child abuse or neglect" or, as the Court of Appeal held, does this section allow a mandated reporter to withhold a report as long as she claims she subjectively (and even unreasonably) believed no abuse occurred, and in reaching that erroneous holding did the Court of Appeal improperly apply discretionary immunity to a mandatory duty?

STATEMENT OF FACTS

A. Child Abuse Is Suspected by Family Members.

On the evening of September 21, 2008, Lauri Hanson picked up her then two year-old son B.H. after a court-ordered weekend visitation with the boy's father. Ms. Hanson immediately noticed disturbing bruises on B.H.'s right forehead, right eye, left forehead, left eye, and a cut on his left eye, and was told that he had fallen down the stairs at a fast food restaurant. (AA428-431,487-503.)

Upon returning home, Ms. Hanson changed B.H.'s clothing and saw that B.H. also had disturbing bruises on his left thigh, right thigh, mid-upper chest, right chest, mid-lower back, mid-upper back, lower right back and lower right side of his abdomen/flank. Christy Kinney, who was the woman who raised Ms. Hanson and with whom she and B.H. were living, advised her to photograph the injuries. (AA428-429.) Photographs were taken by Ms. Hanson on September 22 at 2:34 p.m. (AA428-431,487-503,553-597.)

Ms. Hanson and B.H. lived with Ms. Kinney, who considered herself a mother to Ms. Hanson and a grandmother to B.H. because Ms. Hanson had lived with her for periods of time when Ms. Hanson was a youth. (AA476-478.) When Ms. Kinney returned home from work and saw with her own eyes the suspicious injuries, she asked B.H. how he got the bruises depicted on the photos, and B.H. told Ms. Kinney he had fallen out of a truck. (AA474-477.) Ms. Kinney then had her natural daughter (Jennifer Kinney) also take photographs of B.H.'s injuries. (AA500-503,517-522.) These photographs were taken on September 22 between 2:35 and 7:35 p.m. (AA415,500-503,517-522,553-597.) The bruises depicted on these photographs were witnessed by eight of B.H.'s family members/friends on that date.
(AA428-431,484-486,500-503,517-522,525-527,530-532,535-537,540-541,545-547.)

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

Ms. Kinney was deeply disturbed about the bruises all over the child's body and suspected that the bruises were caused by Sharples, so she called 911 to report suspected child abuse at 10:14:22 p.m. (AA470-471,474-475.) San Bernardino County sheriff's department employee who was the 9-1-1 operator, Officer Nicole Kinkade, spoke to Ms. Kinney on behalf of the law enforcement agency, received the suspected child abuse report from Ms. Kinney and made a record of the information which formed the basis of the suspected child abuse report received from Ms. Kinney:

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

(AA470-471.) Officer Kinkade, after speaking with Ms. Kinney, classified the report made to the sheriff's department with the code "**273R**" – the Penal Code number for child abuse and the San Bernardino sheriff's department internal code for a Child Abuse Report. (AA470-471,506-507.) Officer Kinkade then recorded the report as a "CHILD ABUSE RPT." and communicated the receipt of the

Kinney report to Deputy Swanson over the sheriff's department's computer aided dispatch (CAD) as a "**CHILD ABUSE RPT.**" (AA470-471,506-507.) It is undisputed the sheriff's department never cross-reported the report of suspected child abuse it received from Christy Kinney to the child welfare services agency either immediately by phone, fax or electronic transmission or within 36 hours via a written report, as required by Cal. Penal Code 11166(k).[1] (AA442,640,643-644,669-670.)

C. In Addition to Failing to Cross-report the Kinney Report to Child Welfare Services Pursuant to 11166(k), the Sheriff's Department Dispatches a Deputy Who Observes B.H.'s Condition That as She and Her Supervisor Later Admit Should Have Caused the Deputy to Suspect Child Abuse; Nevertheless, the Deputy Downgraded the Child Abuse Report, Failed to Individually Report Pursuant to 11166(a), and as a Result of All These Failures Tragedy for B.H. Was Imminent.

Deputy Swanson, an employee of the San Bernardino sheriff's department, responded to the dispatch regarding Ms. Kinney's call. (AA446.) Swanson understood that she was responding to a "CHILD ABUSE RPT." (AA444-445.)

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[1]Statutory references are to the Penal Code unless otherwise noted.

She went to the Kinney home, arrived at 11:32:05 p.m. on 9/22/2008, and then spoke with Ms. Kinney and looked at B.H.. (AA71.) Ms. Kinney asked Deputy Swanson to take photographs of B.H., and Swanson, who agreed with Kinney that the injuries to B.H. were extreme, went out to her patrol car to get a camera, returned from the patrol car with a camera, and then took photographs of B.H.'s bruises. (AA414,432,481-482, 483.)[2]

Upon leaving the Kinney residence, Deputy Swanson returned to her patrol car and made additional entries into the CAD system. However, whereas Officer Kinkade had dispatched the Kinney call as a "child abuse" report (AA470-471) and Deputy Swanson had understood it to be a child abuse report (AA444-445,466-467,470-471), Deputy Swanson downgraded the incident from a CHILD ABUSE RPT. to a "miscellaneous incident" at 11:52:16 p.m. on September 22, 2008, which was 20 minutes and 11 seconds after her arrival at the Kinney house. (AA447-450,468, 471.) At her deposition, Deputy Swanson testified that "miscellaneous" describes minor incidents such as a "barking dog." (AA451.)

However, Deputy Swanson's typewritten report that she kept at the sheriff's department did include references to a cut and bruising above B.H.'s right eye, and small old bruises on his upper right arm and back. (AA311-313,470-471.)

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

Nevertheless, Deputy Swanson decided on her own, without discussion with anyone else or knowledge of any prior contacts between her department and anyone related to B.H., that the call from Ms. Kinney was simply part of an on-going custody dispute between B.H.'s parents. (AA452-456.) Therefore, she testified, she did not report the Kinney call to child welfare services. (AA440-442,456.)

Deputy Swanson is aware that, as a deputy sheriff and pursuant to the California Penal Code, she is a mandated reporter of suspected child abuse. (AA437-438.) In fact, she has been trained to report child abuse allegations even when the same have been determined to be unfounded. (AA469.) Her understanding of the mandated reporting law is that "if a child abuse is suspected, it has to be reported to CPS [child protective services]." (AA439.) Nevertheless, she has never reported to child protective services an alleged child abuse incident that she has investigated but in which she has not made an arrest. (AA440-441.) It is her practice to report only those child abuse allegations that lead to someone's arrest. (AA440-442.) Deputy Swanson's practice is contrary to proper law enforcement practices. (AA598-603.)

Neither Deputy Swanson nor anyone else at the sheriff's department reported to any other agency the fact that Christy Kinney had called to report suspected child abuse of B.H., or that Ms. Kinney's report was being investigated.

(AA442,640,643-644,669-670.) This is also contrary to proper law enforcement practices. (AA598-603.)

Despite Deputy Swanson's claim she subjectively did not suspect child abuse from observing B.H.'s condition, there is ample evidence objectively that she should have and, therefore, that her duty to report was triggered as required by the holding in *Alejo v. City of Alhambra* (1980) 75 Cal.App.4th 1180, 1193-1194 and the language in 11166(a):

- Deputy Swanson admitted that she would have had a duty to report suspected child abuse if B.H. appeared as he did in the photographs which were forensically verified to have been unaltered and taken just four hours before she arrived. (AA464,553-597.)
- Sergeant Bohner agreed that Swanson would have to report and the child would have been taken into protective custody within hours if B.H. appeared as he did in those photographs. (AA510-514.)
- Plaintiff's law enforcement expert (Carl Lewis) and the County's child welfare services worker (Leann Ashlock) agreed that the condition of B.H. would have caused a reasonable officer in Swanson's position to suspect child abuse and triggered a duty to report. (AA599-611,622-623.)
- Christy Kinney testified that B.H. looked exactly as he did in those verified photographs at the moment Deputy Swanson was there, and

seven other persons testified that is how B.H. appeared immediately before and after Deputy Swanson arrived.

(AA482,484-485,517-522,525-527,530-532,535-537,540-541,545-547.)

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

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

Despite grave concerns about leaving B.H. with Sharples any further, Lauri Hanson was required to do so by a family court order. (AA643-644.) On October 18, 2008, Sharples again beat and this time catastrophically injured B.H.. (AA548-552,627-628,660-666.) B.H.'s head injury was so severe that surgeons had to remove a portion of his skull to permit the brain to herniate beyond the skull's boundaries. (AA661-662.) B.H. also suffered retinal hemorrhages. (AA663.) Mark Massi, M.D., the forensic pediatrician at Loma Linda Hospital who examined B.H.'s case for purposes of the resulting child abuse investigation, opined that B.H.'s injuries were inflicted by another person and involved "abusive head trauma," or "shaken baby syndrome." (AA664-665.) Sharples is a co-defendant in default in this action.

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

Leann Ashlock is a social worker with the County of San Bernardino's child welfare services agency given responsibility for investigation of cases under Section 300 of the Welfare and Institutions Code (i.e. child abuse and neglect cases) known as Department of Children's Services (referred to hereafter as "DCS") and has investigated approximately 1000 physical, sexual, or emotional abuse cases. (AA614-615.) Ms. Ashlock had had contact with B.H.'s parents over the summer of 2008 – after Sharples had refused to return B.H. after a visit – in which she facilitated an agreement between Sharples and Hanson regarding Sharples' visitation with B.H.. (AA617-618.) She was also aware of prior reports of suspected child abuse involving B.H., which were investigated by her agency. (AA641-644.) In short, this child was on Ms. Ashlock's radar well prior to September 22, 2008. (AA641-644.)

Because Respondents did not cross-report Ms. Kinney's call to child welfare services, Ms. Ashlock knew nothing about the September 22, 2008 report of suspected abuse until after B.H. was permanently injured and hospitalized on October 18, 2008. (AA619,633-658.)

Unlike the unlawful practice of the San Bernardino sheriff's department, DCS has a practice consistent with CANRA, to cross-report to law enforcement in all cases of reported abuse in which the report does not originate with law enforcement. (AA616.) Ms. Ashlock testified that DCS would have followed up a cross-report within at most ten days of receiving it, which would have been well in advance of October 18. (AA 627-629.) She testified that had she seen B.H.'s condition in the September 22, 2008 photographs, DCS would have prevented Sharples from any further unsupervised visitation with B.H. (AA 622-623, 625.) Also, DCS could have removed B.H. from both parents and petitioned the court for appropriate protective orders that would have included only supervised parental visitation. (AA620-624,632.) In short, DCS would have taken action that would have kept B.H. from being unsupervised in his father's home on October 18, 2008 if she had been informed that he had the suspicious bruises depicted in the photographs:

Q: Seeing that child, was there any way that — would you have let Louis Sharples be unsupervised with that child before you had made a final determination of what had happened to him?
A. If I had seen him in this situation?
Q. Yes.
A. I would have done anything in my power to help Lauri protect her son.
Q. Okay. And that includes taking steps not to let Louis Sharples be with him unsupervised?
A. Correct. Yes.

(AA625.) She was outraged by the sheriff's department's failure to cross-report the Kinney September 22, 2008 child abuse report, as set forth and highlighted in bold in her jurisdictional report:

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

(AA630-631,640,644; emphasis added to last three paragraphs.)

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

On September 11, 2009, Appellant filed his complaint against the Respondents (County, Swanson, Bohner and Sharples) and Sharples. (AA1-36.) The complaint alleges throughout that the County's sheriff's department violated CANRA (Penal Code 11164-11173), including the mandatory duty of the sheriff's department, itself, to cross-report under 11166(k) and of Swanson to report under 11166(a). (AA18,19,20,21,22,28,29,30,31,32.)[3] The Respondents moved for summary judgment and/or summary adjudication, contending its deputy could not be second-guessed for her inadequate investigation; however, they failed to move for summary judgment of Appellant's allegations that the law enforcement agency itself had failed to cross-report pursuant to 11166(k). (AA42-58.) Appellant opposed the County's motion for summary judgment on all grounds raised in the motion, and added argument that the sheriff's department violated 11166(k) even

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

though the County failed to include that in its motion.

(AA365,368,369,374,375,383,384.) In granting summary judgment the trial court failed to address Appellant's argument that the County violated 11166(k) because it was not addressed in the Respondents' motion. (RT18-19.) Appellant objected to the proposed order granting summary judgment because neither the motion nor the Court's ruling addressed Appellant's argument that the sheriff's department violated 11166(k). (AA707,708,709,710.) The trial court granted summary judgment nonetheless, and judgment was entered in favor of Respondents on August 11, 2011. (AA791-792.)

On appeal, Appellant clearly and fully argued in his opening and reply briefs that the sheriff's department violated 11166(k). (AOB1,3,33,34,35,6,37,47; ARB1,2,4,5,23,24,25,26,27,28,29,30,31.) Appellant even pointed this out in his letter to the court requesting an additional 15 minutes to explain CANRA to the panel (See Letter to Court of Appeal at pp.1,2,3,4,5,6,7,12,13).

G. The Court of Appeal's opinion and Petition for Review.

In an unpublished opinion, the Court of Appeal affirmed. Appellant filed a petition for rehearing detailing the many errors within the Court of Appeal's opinion. The Court denied rehearing. A timely petition for review was filed. The petition for review was granted.

ARGUMENT

I. PENAL CODE 11166(k) DOES CREATE A MANDATORY DUTY REQUIRING A LAW ENFORCEMENT AGENCY TO CROSS-REPORT TO THE RELEVANT CHILD WELFARE SERVICES AGENCY WHENEVER IT RECEIVES A REPORT OF KNOWN OR SUSPECTED CHILD ABUSE.

A. A Mandatory Duty of a Government Agency Is Established Pursuant to Government Code 815.6.

In California, governmental tort liability is based on statute. (*Washington v. County of Contra Costa* (1995) 38 Cal.App.4th 890; Gov. Code §815.) Government Code § 815.6 is one such statute. It provides: "Where a public entity is under a mandatory duty imposed by an enactment that is designed to protect against the risk of a particular kind of injury, the public entity is liable for an injury of that kind proximately caused by its failure to discharge the duty unless the public entity establishes that it exercised reasonable diligence to discharge the duty." Thus, the statute sets forth a three-pronged test for determining whether liability may be imposed on a public entity: " '(1) an enactment must impose a

mandatory, not discretionary, duty . . . ; (2) the enactment must intend to protect against the kind of risk of injury suffered by the party asserting Gov. Code §815.6 as a basis for liability ...; and (3) breach of the mandatory duty must be a proximate cause of the injury suffered.'" (*Becerra v. County of Santa Cruz* (1998) 68 Cal.App.4th 1450, 1458.)

In interpreting a statute, a Court's first task "... is to ascertain the intent of the Legislature so as to effectuate the purpose of the law," and "[i]n determining such intent, a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose.... The words of the statute must be construed in context, keeping in mind the statutory purpose, and statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387.)

B. Penal Code 11166(k) Contains the Elements Necessary to Impose a Mandatory Duty.

Penal Code 11166(k) creates a mandatory duty for a law enforcement agency to cross-report every report of suspected child abuse it receives, to the

relevant child welfare services agency given responsibility for investigation of cases under Section 300 of the Welfare and Institutions Code (i.e. child abuse and neglect cases). In this case, the law enforcement agency was the County of San Bernardino sheriff's department and the agency given responsibility for investigation of case under Section 300 of the Welfare and Institutions Code in the County of San Bernardino was DCS. As set forth below, 11166(k) places the public entity under an obligatory duty to act (i.e. a ministerial cross-report of a report of suspected abuse of a child from the law enforcement agency to DCS), with the purpose of preventing the specific type of injury that occurred (i.e. further abuse of children – in this case, the exact same very young child who was being subject to a classic scenario of serial abuse with escalating degree of severity – culminating in irreversible brain damage).

C. The Purpose of Penal Code 11166(k) Is to Mandate Immediate and 36-hour Follow-up Communication of Child Abuse Reports from Law Enforcement to Child Welfare Services in Order to Allow Both Agencies to Work Collectively to Protect Children from Further Abuse. The Legislature Never Intended That Law Enforcement Conduct an Investigation into the Child Abuse Report Before Cross-reporting to Child Welfare Services. In Fact, it Was Recognized That Time Was of the Essence to Prevent Repeat, Escalating Abuse, and the Notion That Law Enforcement Could Investigate Before Cross-reporting Never Made it past Preliminary Inclusion in a Predecessor Bill Which Was Never Enacted.

As a society, we have deemed "'[t]he prevention of sexual exploitation and abuse of children [to be] a government objective of surpassing importance.'" (*In re Duncan* (1987) 189 Cal.App.3d 1348, 1359, citing *New York v. Ferber* (1982) 458 U.S. 747, 757.) As for public policy, the law certainly recognizes a policy of preventing future child abuse. *Randi W. v. Muroc Joint Unified School District* (1997) 14 Cal.4th 1066, 1078. One of society's highest priorities is to protect children from sexual or physical abuse. (*Muroc, supra*; *Barela v. Superior Court* (1981) 30 Cal.3d 244, 254 [178 Cal. Rptr. 618, 636 P.2d 582] [duty of all citizens

to protect children from sexual abuse]. Furthermore, authorities point out the most serious injuries and greatest numbers of deaths from child abuse occur to children three years of age and under. (*Alejo v. City of Alhambra* (1980) 75 Cal.App.4th 1180, 1185 citing Comment, Reporting Child Abuse: When Moral Obligations Fail (1983) 15 Pacific L.J. 189, 190, fn. 12.)

In California, that objective and priority was turned into legislation at the behest of the California Office of Attorney General, which drafted and championed the legislation into enactment with the sponsorship of Sen. Omer Rains in 1980, through Senate Bill 781. After the Conference Committee on Senate Bill 781 made amendments to that bill, which were accepted by the legislature, Senate Bill 781 was approved by Governor Edmund G. Brown, Jr., on September 25, 1980, and recorded by the Secretary of State on September 26, 1980 as Chapter 1071 of the Statutes of 1980. The law was entitled the Child Abuse and Neglect Reporting Act (CANRA) (§ 11164 et seq .) and was expressly enacted to protect children from abuse and neglect. (§ 11164.) To that end, CANRA's primary focus is to rectify the problem of inadequate child abuse reporting. (§ 11164 et seq.; *Krikorian v. Barry* (1987) 196 Cal.App.3d 1211, 1217.) One of the important inadequacies which CANRA sought to correct was the lack of communication and coordination of information concerning child abuse reports between law enforcement agencies and child welfare services agencies. The legislative intent and history provide a perfect picture of what the Office of the

Attorney General and the legislature was intending to do when CANRA, including 11166(k), was enacted:

> "SEC. 5. In reenacting the child abuse reporting law, it is the intent of the Legislature to clarify the duties and responsibilities of those who are required to report child abuse. **The new provisions are designed to foster cooperation between child protective agencies** and other persons required to report. **Such cooperation will insure that children will receive the collective judgment of all such agencies and persons regarding the course to be taken to protect the child's interest.**"

The new mandated duty to "cross-report" (i.e. to share an initial report of suspected child abuse between law enforcement and child welfare services) was one of the driving forces behind the implementation of CANRA, as confirmed by the Office of the Attorney General in the legislative history:

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

(Assem. Com. On Criminal Justice, Public Hearing on Child Abuse Reporting, November 21, 1978, Senate Bill 781, Chapter 1071, Statutes of 1980 (1977-1978 Reg. Sess.), testimony of Deputy Attorney General Michael Gates, pp. 6, 7, 11, 23

(emphasis added).)[4] Further legislative history found within the Enrolled Bill Report from the Dept. of Social Services reveals that the mandated cross-reporting from law enforcement to child welfare services was new (i.e. not previously mandated by the predecessors to 11166(k) – 11161.5 and 11161.6) and the purpose of which was to increase 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.**" (MJN, #PE-19 and 20.)

It was well-recognized by those in support of the legislation, including the Office of the Attorney General and the State Bar of California, that increased child abuse

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[4] The citation to published portions of legislative materials, including transcripts of a public legislative hearing and committee reports, regulations and administrative forms, is proper. (*Quelimane Co., Inc. v. Stewart Title Guar. Co.* (1998) 19 Cal.4th 26, 45 ["A request for judicial notice of published [legislative] material is unnecessary. Citation to the material is sufficient"]; *Sheyko v. Saenz* (2003) 112 Cal.App.4th 675, 693 [judicial notice of published regulations and agency forms].) Such materials referred to in this brief are attached to plaintiff's motion for judicial notice ("MJN"), which is filed contemporaneously with this brief out of an abundance of caution and for the Court's convenience. Plaintiff notes it has the full legislative history of Senate Bill 781, which is voluminous, and will provide it to the Court upon request. (See *People v. Cole* (2006) 38 Cal.4th 964, 989 [Court's "complete review of the Knox-Keene Act's voluminous legislative history"].)

reporting was significant to prevent abuse of children – and that it was foreseeable and generally recognized that the same children were often subject to repeat abuse:

> **"Repeated instances of abuse of the same child tend to lead to progressively more severe results, including death, brain damage, and disabling emotional handicaps. It's not a tiny fraction of the child population we're talking about either.** Approximately 10% of all trauma seen in emergency rooms affecting children under three years of age is inflicted (Holter/Froedman, Pediatrics, Vol. 42, March 1976), p. 128.). **Studies show that reinjury rates after initial abuse run as high as 50%-60%.** (Ebbin, Battered Child Syndrome at LA County Hospital; Skinner/Castle "78 Battered Children: A retrospective study, London Natl. Society for the Prevention of Cruelty to Children (1969). (MJN, #B-9.)

The introduced version of Senate Bill 781 proposed the following language regarding law enforcement agencies:

> "(f) A law enforcement agency shall immediately report by telephone every instance of suspected child abuse reported to it to the agency given responsibility for investigation of cases under Section 300 of the Welfare and Institutions Code and shall send a written report thereof within 36 hours to such agency." (MJN, SB 781, pp. 6-7.)

The June 19th version of the bill proposed to amend the above by adding the clauses "or as soon as practically possible" and "of receiving the information concerning the incident." (*Id.* At pp. 4-5.) The next amended version, dated July 9th, deleted the subdivision designation to make the language the second paragraph of subdivision (f) and added "county social services and" to the above quoted language. (*Id.* At pp. 6-7.) No additional changes were made and the bill was enacted into law.

Similar language, including the phrase, "reported to it," appeared in Assembly Bill 3431 and Senate Bill 1614, both of which were preceding bills concerning child abuse reporting that were not enacted but which contained many similar characteristics as Senate Bill 781. Prior to the June 22, 1978 amendments to Senate Bill 1614, proposed section 11166(f) stated, "every instance of suspected child abuse which it investigates ..." (emphasis added).) However, while subdivision (e) in AB 3431 version did include the phrase "reported to it" in discussing the county welfare department's responsibilities to cross-report to law enforcement – the mirror section for law enforcement 16666(f), did not. (Id.) A letter from Donald Fibush, Volunteer Advocate For Children, addressed the change in a letter to Assembly Member Ellis, stating:

> "Sec.11166(f) should reas [sic] the same as (e). **The written report to the County Welfare Department should not have to wait for "the conclusion of the investigation". In many instances the family could be needing prompt social services or one already receiving social services and the agency should be fully informed in writing as soon as possible.**" (MJN, #5P-18.)

As we know, the final version of 11166(f) that was enacted in 1980 as part of Senate Bill 781, and which was the actual precursor to 11166(k) that was in effect at the time this immediate action arose in 2008, had no allowance for any time period for law enforcement to conduct a law enforcement investigation before cross-reporting to child welfare services. The above suggestion by Mr. Fibush in his analysis of the predecessor bill (AB 3431) on August 8, 1978, that law

enforcement's duty to cross-report be the same as social services' obligation, and that the duty not be contingent on law enforcement first conducting an investigation, is the last vestige of any reference to the notion that law enforcement should investigate a report it received before cross-reporting to child welfare services. That notion (i.e. that law enforcement should or could investigate before cross-reporting) never became law.

D. The Mandatory Cross-Reporting Between Law Enforcement and Social Services Has Been Recognized by Courts.

Although not previously addressed in a case at the Supreme Court level, the mandatory nature of cross-reporting of initial reports like Christy Kinney's between the sheriff's department and DCS is a reporting process in California that has been recognized by the Courts as early as 1986:

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

(*Planned Parenthood Affiliates v. Van de Kamp* (1986) 181 Cal.App.3d 245, 259-260, citing § 11167.5, § 11165.6, subd. (c)(2).) All initial reports of suspected

child abuse received by a law enforcement agency or a child welfare service agency are to be cross-reported to each agency from the other agency pursuant to 11166(k) and 11166(j), respectively, and it is only thereafter during the conduct of an "active investigation" as defined by DOJ Regulation 901 that an initial report is determined to be substantiated, inconclusive or unfounded. (*Jacqueline T. v. Alameda County Child Protective Services* (2007) 155 Cal.App.4th 456: Department of Justice Regulation 901; 11169, 11165.12.)

E. The Mandatory Duty of a Law Enforcement Agency to Cross-report All Reports of Suspected Child Abuse to the Child Welfare Services Agency Pursuant to 11166(k) Is Crucial to the Safety of California's Children Because upon Receipt of That Cross-report Child Welfare Services Is Required to Stand Ready at All Times Specifically to Protect Children and must Respond to That Report Either Immediately If a Child Is in Immediate Danger or Within 10 Days, at the Latest.

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

> "...**Any of those agencies shall accept a report of suspected child abuse or neglect whether offered by a mandated reporter or another person....** Agencies that are required to receive reports of suspected child abuse or neglect **may not refuse to accept a report of suspected child abuse or neglect from a mandated reporter or another person** unless otherwise authorized pursuant to this section, and **shall maintain a record of all reports received.**"

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

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

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

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

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

> **"f) As used in this chapter, emergency response services consist of a response system providing in-person response, 24 hours a day, seven days a week, to reports of abuse, neglect, or exploitation, as required by Article 2.5 (commencing with Section 11164) of Chapter 2 of Title 1 of Part 4 of the Penal Code for the purpose of investigation pursuant to Section 11166 of the Penal Code and to determine the necessity for providing initial intake services and crisis intervention to maintain the child safely in his or her own home or to protect the safety of the child. County welfare departments shall respond to any report of imminent danger to a child immediately and <u>all other reports</u> within 10 calendar days."**

A county's child welfare department simply cannot respond immediately to **<u>any</u>** report of imminent danger, or even within ten days to **<u>all</u>** other reports of suspected child abuse, if a law enforcement agency fails to cross-report **<u>all</u>** reports of suspected child abuse which it receives to child welfare services. Stated another way, a county's child welfare department cannot respond to a report of which it was never informed. The legislature never intended that some percentage of reports of suspected child abuse would be kept from or not responded to by a county welfare department. There is no statute which states that serious reports get responded to and less serious ones do not get responded to – and that is because the Office of the Attorney General which sponsored CANRA, and the legislature which enacted it, understood that child abuse often presents itself in an escalating pattern wherein "repeated instances of abuse of the same child tend to lead to progressively more severe results, including death, brain damage, and disabling emotional handicaps" and that "studies show that reinjury rates after initial abuse

run as high as 50%-60%." The legislature intended each and every report of suspected child abuse to be responded to by the county welfare department. There simply are no exceptions in any statute or CANRA, and there is absolutely no trace in any legislative history or any statute that the legislature intended a law enforcement agency to serve as a child abuse triage unit and evaluate which child abuse reports were worthy of being responded to by a county's child welfare services agency. Therefore, in order to ensure that a county's child welfare services agency responds to every report of suspected child abuse, and because the legislature pursuant to 11169 also designated law enforcement agencies – in addition to county child welfare service agencies - to receive child abuse reports (such as the one given by Christy Kinney in this action), there can be no interpretation of 11166(k) other than it is mandatory that all reports received by law enforcement be cross-reported to a county's child welfare services agency as required by 11166(k). Otherwise, there will be reports of suspected child abuse (like Christy Kinney's report in this action) which will never come to the attention of a county's child welfare services agency, which will never be responded to – either as an immediate danger or even within 10 days - and which will, as in this case, result in a helpless child being subject to repeat, escalating and catastrophic child abuse.

F. The Mandatory Duty to Cross-report Set Forth in 11166(k) Has Clear Guidelines in Plain Language Which Require the Sheriff's Department as a Law Enforcement Agency Make Two Ministerial Cross-reports at Two Distinct Time Frames of All Reports it Receives: Immediately and a Follow-up Within 36 Hours of Having Received the Original Report.

11166(k) requires that the law enforcement agency itself inform child welfare services about every initial report of suspected child abuse it receives from any person at the following junctures:

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

reasonably should have known that the minor was in danger of abuse. [11166(k)], and;

2) **within 36 hours of <u>receiving the information concerning the incident</u> it shall send, fax, or electronically transmit a written report thereof** to any agency to which it makes a telephone report under this subdivision [11166(k)].

G. The Mandatory Duty to Cross-report Pursuant to 11166(k) Has a Clear Triggering Event: the Receipt of a Report of Suspected Child Abuse from a Mandated Reporter Pursuant to 11166(a) or a Non-mandated Reporter Pursuant to 11166(g). It Is Not Triggered by a Law Enforcement Agency's Designated Employee First Investigating and Then Subjectively Substantiating the Report and Deciding Whether to Cross-report.

When interpreting statutes, the Court ascertains the intent of the enacting legislative body so that it may adopt the construction that best effectuates the purpose of the law. (*City of Santa Monica v. Gonzalez* (2008) 43 Cal.4th 905, 919.) The Court begins with the plain, commonsense meaning of the language used by the Legislature and if the language is unambiguous, the plain meaning controls. (*Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52

Cal.4th 499, 519.) Courts consider first the words of the statute because " ' "the statutory language is generally the most reliable indicator of legislative intent." ' " (*People v. King* (2006) 38 Cal.4th 617, 622.) [W]henever possible, significance must be given to every word [in a statute] in pursuing the legislative purpose, and the court should avoid a construction that makes some words surplusage." (*Agnew v. State Bd. Of Equalization* (1999) 21 Cal.4th 310, 330.) This Court has held that words in a statute """should be construed in their statutory context""" (*People v. King, supra,* 38 Cal.4th at p. 622) and that Courts "may reject a literal construction that is contrary to the legislative intent apparent in the statute or that would lead to absurd results" (*Simpson Strong-Tie Co., Inc. v. Gore* (2010) 49 Cal.4th 12, 27) or "would result in absurd consequences that the Legislature could not have intended." (*In re J. W.* (2002) 29 Cal.4th 200, 210; *People v. Leiva* (2013) 56 Cal.4th 498, 506.)

The language of 11166(k) is clear, concise and commonplace with respect to when the cross reports must be made. First, a cross-report must be made "immediately" or "as soon as practicably possible" upon receipt of the report. Second, a follow-up written cross-report must be made "within 36 hours of having received the information concerning the incident" – which is the time the agency has received the report, because that is the time at which the agency receives the information to cross-report. This plain, commonplace language is entirely consistent with the previously-expressed legislative intent and history to foster

cooperation between law enforcement and child welfare services so that children would receive the "collective" judgment of both agencies to protect the interest of children, and to require that cross-reporting be done quickly (immediately and then a written follow-up within 36 hours of having received the information) and in every case so that every case can be investigated by a county's child welfare services immediately for a child in imminent danger or within 10 days at the latest for all other reports in order to prevent repeat, escalating abuse of children.

Appellant's proffered interpretation of 11166(k) is also the correct reading of the actual language used in 11166(k) when compared to the what it would read like if one were to insert language consistent with the Defendant's interpretation; namely, that a law enforcement agency's employee must first perform an investigation into and its employee must subjectively substantiate an instance of known or suspected abuse reported to the agency before the agency's duty to cross-report to a county's child welfare services agency is triggered.

First, 11166(k) requires that "**every**" instead of "***some***" known or suspected instance of child abuse or neglect reported to a law enforcement agency be cross-reported. If the legislature had intended a law enforcement agency to only-cross report those reports which law enforcement investigated and which it substantiated, then 11166(k) would not state "every", it would state "some" or "only those reports which law enforcement investigated and substantiated."

Second, 11166(k) requires that every known or suspected instance of child abuse or neglect "**reported** to it" instead of "***investigated*** by it" be cross-reported. The item which is being cross-reported is the instance of known or suspected child abuse being "reported" by the reporter (mandated or non-mandated), not something which may later be "investigated" by the law enforcement agency. Therefore, whether the instance of abuse is later investigated by the law enforcement agency, or not, it was nevertheless still reported to the agency and, therefore, must be cross-reported simply because it was received.

Third, 11166(k) clearly and unequivocally only requires that a law enforcement agency cross-report instances of known or suspected abuse "**reported to it.**" So, if one were to assume *arguendo* that the reference to "known" or "suspected" in 11166(k) refers to known or suspected by the law enforcement agency versus known or suspected by the mandated or non-mandated reporter (such as Christy Kinney), 11166(k) still requires that this known or suspected instance of abuse be "reported to it" before the instance can or needs to be cross-reported to child welfare services. Therefore, unless and until the law enforcement agency hypothetically first **reported to itself**, the duty to cross-report is not yet and never will be triggered. The words "reported to it" which are in 11166(k) must be afforded at least some meaning because it is a well-settled maxim of statutory construction that a court must avoid a construction that renders any part meaningless or extraneous, *Woosley v. State of California* (1992) 3

Cal.4th 758, 775-776, or which suggests that the legislature engaged in an idle act. *Elsner v. Uveges* (2004) 34 Cal.4th 915, 935. The purpose of CANRA was to increase reporting between law enforcement and child welfare services, not to waste time or resources by requiring law enforcement to report to itself before cross-reporting. In the end, a court must adopt the construction most consistent with the apparent legislative intent and most likely to promote rather than defeat the legislative purpose and to avoid absurd consequences. *In re J. W., supra,* 29 Cal.4th at p. 213. A duty of a mandated reporter to initially report child abuse pursuant to 11166(a) is triggered by knowing or suspecting child abuse. A duty of a law enforcement agency to cross-report pursuant to 11166(k) is triggered by having an instance of known or suspected child abuse "reported to it", so unless and until a law enforcement agency has an instance of known or suspected child abuse reported to it, the law enforcement agency will never have to cross-report pursuant to 11166(k).

Fourth, Penal Code 11166.3, which must be read in conjunction with 11166(k) as they are both part of CANRA, is further proof that CANRA does not envision law enforcement waiting until completing an investigation before informing child welfare services -- because the trigger is the "**start**" versus "completion" of an investigation:

> "11166.3. (a) The Legislature intends that in each county the law enforcement agencies and the county welfare or probation department shall develop and implement cooperative arrangements

in order to coordinate existing duties in connection with the investigation of suspected child abuse or neglect cases. **The local law enforcement agency having jurisdiction over a case reported under Section 11166 shall report to the county welfare or probation department that it is investigating the case within 36 hours after starting its investigation.**"

The legislature would not require a law enforcement agency pursuant to 11166.3 to tell child welfare services within 36 hours of starting an investigation of a report of suspected abuse pursuant to 11166.3 if it intended law enforcement to first complete its investigation before doing the initial cross-reporting referenced in 11166(k). Interpreting CANRA to require compliance with 11166.3 and requiring a law enforcement agency to designate a deputy to investigate and subjectively substantiate a report of child abuse before cross-reporting in conformity with 11166(k), could produce a completely absurd result. Under that scenario, pursuant to 11166.3, law enforcement would have to first inform child welfare services within 36 hours of starting its investigation that it "is" investigating a report of suspected child abuse that it has received, even if the assigned deputy had not yet completed her investigation and regardless of the deputy's subjective ultimate opinion about the validity of the report. Pursuant to Respondents' interpretation of 11166(k), the law enforcement agency would have to then cross-report to child welfare services when the assigned deputy's investigation was done (which could easily be in excess of 36 hours after the initial report was received via 9-1-1, and could potentially be in excess of 10 days which

would thus preclude a county's child welfare department from responding to all reports of suspected abuse within 10 days of being reported pursuant to Welf. & Instit. Code, § 16501). Under that scenario, child welfare services would first learn that there is an ongoing investigation into an unsubstantiated report of child abuse per 11166.3 (and thus, by default, learn about the report), but could not yet receive the "initial" cross report per 11166(k) because the assigned deputy had not completed her subjective analysis of the report received and substantiated the report. That is absurd – meaning, that law enforcement could have to inform child welfare services that it is investigating a report of suspected child abuse but that the law enforcement agency can't yet cross-report the report of suspected child abuse to child welfare services because law enforcement has not yet substantiated it so the child welfare services will learn about the report not from the initial cross-report, as intended by 11166(k), but rather by the investigative cross-report of 11166.3. This Court should adopt Appellant's construction which is consistent with the express legislative intent and most likely to promote rather than defeat the legislative purpose and to avoid absurd consequences. (*In re J. W., supra,* 29 Cal.4th at p. 213.)

If the legislature intended 11166(k) to require a law enforcement agency to "investigate" and "substantiate" a report it received before preparing and transmitting its own agency's report about its own agency's investigation of the initial report, the Legislature certainly was capable of stating so, and, in fact, did

mandate just such type of conduct in certain situations. For example, see 11165.14 (entitled "Investigation of Child Abuse Complaint"), which requires that law enforcement investigate and transmit a substantiated report of alleged abuse at school to the school district or board of education. No such language is found in 11166(k).

H. The Two Times That the 11166(k) Cross-reporting Was Due in this Action.

In this action, Christy Kinney's suspected child abuse report to the sheriff's department via her 9-1-1 call was received by the sheriff's department on September 22, 2008 at 10:14:22 p.m. The Kinney suspected child abuse report was properly received and recorded as a child abuse report by the sheriff's department, pursuant to the authority vested in it by 11165.9, and was entitled "CHILD ABUSE RPT.", and assigned the code "273R" which is the penal code for child abuse and the internal code used by the sheriff's department to categorize the child abuse reports it receives. Therefore, 11166(k) required that the sheriff's department immediately as of 10:14:22 p.m. on September 22, 2008, or as soon as practicably possible thereafter, make the initial cross-report to the county's child welfare services agency by telephone, fax or electronic transmission.

The follow-up "written" cross report required by 11166(k) was due within 36 hours of receiving the information concerning the incident. Therefore, because the information concerning the incident was received on September 22, 2008 at 10:14:22 p.m., the subsequent written follow-up report was required to be sent, faxed or electronically transmitted no later than thirty-six (36) hours thereafter, or by September 24, 2008 at 10:14:22 a.m.

This construction of 11166(k) allows for a uniform application of the law based on time of receipt of the initial report. Further, it provides for quick cross-reporting which will allow child welfare services to respond immediately to children in imminent danger and to all other children within 10 ten days from the date on which the initial report was made. Last, this interpretation is consistent with the legislative intent to foster and increase communication of child abuse reports between law enforcement and child welfare services in every case of reported child abuse in California so that the children at risk can have the benefit of the "collective" judgment of both agencies. Under no scenario does CANRA permit, nor should this Court allow a law enforcement agency ever to withhold a report of suspected abuse of a child from child welfare services. Not only because that would violate CANRA, but also because it would cripple the State of California's Child Abuse Central Index (CACI), as set forth below.

I. The Mandatory Cross-reporting Required by 11166(k) Is a Ministerial, Operational Function.

In this action, as set forth above, there is no dispute that the sheriff's department received a report of suspected child abuse of B.H. from Christy Kinney on September 22, 2008. Appellant is **not** alleging, nor does this Court need to decide in this action, that the Respondent's sheriff's department violated a mandatory duty to have received/accepted what Kinney reported to the sheriff's department as a report of suspected child abuse of B.H. Respondents did receive/accept and make a record that the report which it received from Christy Kinney was a "CHILD ABUSE RPT." and categorized it as such "273R". The two (2) sheriff's department employees (Kincaid and Swanson) knew that was what Christy Kinney was reporting, and Christy Kinney testified that was what she was reporting. There is no dispute about that in this action.

The very limited mandatory duty alleged pursuant to 11166(k) in this action is that **once** the sheriff's department received the report of suspected abuse of B.H. from Christy Kinney (i.e. the Kinney report) **then** the sheriff's department was mandated to ministerially and operationally cross-report the Kinney report to DCS in the two ways set forth in clear language therein:

1) immediately, or as soon as practicably possible, it shall report by telephone, fax, or electronic transmission, and

2) within 36 hours of receiving the information concerning the incident it shall send, fax, or electronically transmit a written report thereof to any agency to which it makes a telephone report under this subdivision [11166(k)].

Completion of those two functions amounts to nothing more than a ministerial, clerical transfer of information from a law enforcement agency to child welfare services. Further, the only information which the Respondent's law enforcement agency needs to cross-report to the child welfare services agency pursuant to 11166(k) is information which the law enforcement agency is already mandated to both receive/accept and make a record of pursuant to 11165.9. Therefore, the alleged mandatory duty of 11166(k) in this action simply required the ministerial transfer of the information to child welfare services which the law enforcement agency already had accepted/received and already had made a record of from Christy Kinney. Indeed, this is asking nothing more of the Respondent's law enforcement agency than the Respondent's child welfare services agency already appropriately did pursuant to 11166(j) when a report of suspected abuse of B.H. (i.e. scratches on B.H.'s neck) was called into DCS in July 2008 and was thereafter cross-reported from DCS to the sheriff's department consistent with DCS' practice in all cases of suspected child abuse reports called into its agency. (AA 614.)

The failure of a government agency to record or transfer information is the most ministerial and operational of government activities, and clearly can

constitute a breach of a mandatory duty pursuant to 815.6. *Bradford v. State of California* (1973) 36 Cal.App.3d 16 [111 Cal.Rptr. 852] [the obligatory language of sections 11116.6 and 11117 of the Penal Code imposed a mandatory duty on the Bureau of Criminal Identification and Investigation to add a disposition report that criminal charges against plaintiff had been dismissed to his criminal record and to transfer that disposition report within 30 days to the Federal Bureau of Investigation].

There can be little doubt but that Office of the Attorney General designed and sponsored, and the legislature thereafter enacted CANRA because they recognized that preventing child abuse was of such great societal importance that they intended to make the reporting and cross-reporting of child abuse a mandatory duty. Both 11166(a) and 11166(k) contain express mandatory language (i.e. "shall"). Further, the legislature has expressly acknowledged that CANRA was intended to impose a state-mandated local program. See Digest to AB 1241, 2000 Amendments to CANRA. Additionally, courts have already had the opportunity to and therein have acknowledged that mandated reporting of suspected child abuse pursuant to 11166(a) by "mandated" reporters identified in 11165.7 is a mandatory duty. *Alejo v. City of Alhambra* (1999) 75 Cal.App4th 1180; *Jacqueline T. v. Alameda County Child Protective Services*, 155 Cal.App.4th 456, 472-473. Where there exists a recognized mandatory duty for a mandated reporter to report pursuant to 11166(a), and the express purpose of CANRA is to prevent the further

abuse of children by fostering cooperation between all agencies which receive those initial reports from either a mandated reporter pursuant to 11166(a) or a non-mandated reporter pursuant to 11166(g), it would defeat the express purpose of CANRA to hold that while there did exist a mandatory duty to report child abuse pursuant to 11166(a) to a law enforcement agency, that the same law enforcement agency which is required to receive that report and make a record of it pursuant to 11165.9 would then have discretion as to whether or not to cross-report that report to child welfare services pursuant to 11166(k). To permit a law enforcement agency discretion whether or not to cross-report would thwart CANRA's express intent to afford a child the "collective judgment" of all agencies (law enforcement and child welfare services) and would obstruct child welfare services from thereafter timely responding to the initial report as required by WIC 16501, which is precisely what occurred in this tragic case and which will certainly occur in future cases if 11166(k) is not found to create a mandatory duty to cross-report.

J. After the Initial Cross-report Required by 11166(k) Is Performed, Then the Law Enforcement Agency Is Afforded Discretion to Designate One of its Deputies Who Can Make His/her Own Subjective Determination Whether or Not to Deem the Report "Substantiated" Pursuant to 11169 and Transmit it to the Department of Justice after Conducting an "Active Investigation."

There is discretion afforded to employees of law enforcement agencies under CANRA to find initial reports of child abuse substantiated or unfounded, however, the time and purpose for that discretionary finding is found in 11169 rather than in 11166(k). Section 11169 provides that an agency specified in 11165.9 (including a sheriff's department) is required to forward to the Department of Justice (DOJ) a report in writing on Department of Justice form SS 8583 after the agency's investigator conducted an "active investigation" and determined that an initial report received was "substantiated", as defined by 11165.12. While it is clear that the obligation to forward the SS 8583 to the DOJ is the agency's obligation and not an individual investigator's obligation, it is likewise clear that CANRA at this juncture seeks the subjective opinion of the agency's investigator as to how he/she subjectively interpreted the evidence of his/her "active investigation":

> (b) "Substantiated report" means **a report that is determined by the investigator who conducted the investigation to constitute child abuse or neglect,** as defined in Section 11165.6, based upon evidence that makes it more likely than not that child abuse or neglect, as defined, occurred.

This is completely different than the cross-reporting requirement of 11166(k). The purpose of a 11169 report is to inform CACI, which is intended to be a repository of child abuse reports to be used by persons who will inquire of the DOJ in the future as to whether there exist any prior reports involving a certain child or potential perpetrator. *See* 11170. It is significant to note that a 11169 report, unlike the 11166(k) cross-report, is not due "immediately", nor by fax, nor within 36 hours or any certain time, nor with any degree of urgency whatsoever that would imply that the completion of it was considered time sensitive for the potential immediate protection of the child who was the subject of the report. This lack of urgency or a time constraint for the 11169 report is also entirely consistent with the DOJ's rigorous definition of what constitutes an "active investigation", which is set forth in DOJ regulation 901:

> "(a) "Active Investigation" means the activities of an agency in response to a report of known or suspected child abuse. For purposes of reporting information to the Child Abuse Central Index, the activities shall include, **at a minimum**: assessing the nature and seriousness of the suspected abuse, **conducting interviews of the victim(s) and any known suspect(s) and witness(es); gathering and preserving evidence**; determining whether the incident is substantiated, inconclusive or unfounded; and preparing a report that will be retained in the files of the investigating agency."

This case provides a perfect example of why the cross-reporting requirement of 11166(k) is not triggered by or dependent on the law enforcement agency designating an investigator to conduct an "active investigation" and determining whether a report is substantiated. In this case, Swanson was the only person assigned by the Respondent's sheriff's department to investigate the Kinney report. As set forth above, Swanson completed her involvement in the investigation of the Kinney report in twenty (20) minutes and eleven (11) seconds, during which time she admittedly did not interview the known suspect (Sharples) or any known witnesses (e.g. again, Sharples, who was with B.H. when he was injured and perhaps Lauri Hanson, who had custody of B.H. before Sharples; further, Christy Kinney was admittedly not a witness to the alleged abuse, or the occurrence of the injury, but rather simply the non-mandated reporter of the suspected abuse). Likewise, Swanson did not preserve any evidence (e.g. either the photographs taken by Lauri Hanson or her sister, Jennifer Kinney, or the photographs taken by Swanson (as testified to by Kinney) or even to take photographs of the bruises if one were to believe Swanson that she did not take photographs.) To do the minimum investigation required by the DOJ would have required Swanson to track down, at least, Sharples, and to take or collect the photographs taken by Lauri Hanson and her sister, Jennifer Kinney as evidence of the alleged abusive injuries) and this may have taken several days. Conducting an "active investigation" can certainly be hard, detailed and extensive law

enforcement work, and certainly is not something which can be done before an "immediate" cross-report is due pursuant to 11166(k), or likely even before the follow-up written report is due within 36 hours.

K. The Child Abuse Central Index (CACI) Relies on Child Abuse Investigation Reports Filed Pursuant to 11169 as its Lifeblood, and These Reports Are No Longer to Be Filed by a Law Enforcement Agency. Therefore, for Policy Reasons, Absent Mandatory Cross-reporting of All Reports of Suspected Child Abuse Received by Law Enforcement to Child Welfare Services, CACI Will Become less than it Was Envisioned to Be for Child Abuse Prevention.

The end point of the CANRA's reporting system is called the Child Abuse Central Index (CACI). In short, it is a repository of all child abuse reports on DOJ Form SS 8583 forwarded by an agency identified in 11165.9 and authorized pursuant to 11169, and is meant to be used as a resource by certain permitted categories of agencies which are investigating child abuse cases and/or performing functions whereby they are trying to ensure that children are not exposed to potential child abusers. CACI is maintained by the Department of Justice. Of significance, pursuant to 11169(b) as of January 1, 2012, the investigative reports

which form the basis of CACI are no longer allowed to come from law enforcement agencies: police or sheriff's departments. Therefore, unless law enforcement agencies are mandated pursuant to 11166(k) to cross-report all reports of suspected child abuse which they receive to county welfare departments, county welfare departments will not be able to investigate the reports of abuse lawfully received by law enforcement agencies pursuant to 11165.9 and will not, therefore and thereafter, be able to investigate or, in the case of a substantiated report, be able to forward SS 8583 reports of substantiated investigations with the Department of Justice. This will, obviously, deplete CACI of substantiated reports and will make CACI less informative, less valuable and even potentially falsely reassuring to those relying upon it to be a thorough and reliable resource.

II. PENAL CODE SECTION 11166, SUBDIVISION (A), DOES NOT APPLY TO LAW ENFORCEMENT AGENCIES THAT RECEIVE INITIAL REPORTS OF CHILD ABUSE.

A. 11166(a) Applies Exclusively to the Initial Reports of Suspected Child Abuse Required of a Mandated Reporter. A Law Enforcement Agency Is Not a Mandated Reporter. Therefore, 11166(a) Does Not Apply to a Law Enforcement Agency.

The express terms of 11166(a) clearly dictate that a "mandated reporter" shall make a report to "an agency specified in 11165.9."

A "mandated reporter" is defined in 11165.7. This code section contains the exclusive list of "mandated reporters", which is currently limited to forty-four (44) categories of persons who perform specific jobs which involve interaction with children. Neither a law enforcement agency, nor any entity or employer for that matter, is nor ever has been listed as a "mandated reporter" in 11165.7. For illustrative purposes related to this action, Swanson, who was employed as a deputy sheriff by the County of San Bernardino's sheriff's department, was a mandated reporter because she was an "employee" of the county sheriff's department. 11165.7(a)(34).

There is no corresponding subsection of 11165.7(a), however, which identifies a "county sheriff's department" or any employer as a mandated reporter.

Words and phrases are construed according to the context and the approved usage of the language, but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, are to be construed according to such peculiar and appropriate meaning or definition. (Civil Code 13.) Both the terms "mandated reporter" and "agency" are technical words and phrases which are defined in the succeeding code sections of CANRA (11165.7 and 11165.9) and, accordingly, are to be construed according to such peculiar and appropriate meaning or definition. 11166(a) does not apply to law enforcement agencies and, therefore, there is no follow-up report required of a law enforcement agency pursuant to 11166(a).

B. The Initial Report(s) Required of a Person Who Is a Mandated Reporter Pursuant to 11166(a) Are Not Reports Which CANRA Envisioned Being Made by a Law Enforcement Agency.

In addition to the fact that a law enforcement agency is not included within the definition of a mandated reporter in 11165.7, there is further indicia within CANRA that an agency was never envisioned as being the person who made the original report required by 11166(a).

The standard which dictates whether a mandated reporter is required to report pursuant to 11166(a) is defined as follows:

> "(1) For purposes of this article, "reasonable suspicion" means that it is objectively reasonable for **a person to entertain a suspicion,** based upon facts that could cause a **reasonable person in a like position**, drawing, when appropriate, on **his or her training and experience,** to suspect child abuse or neglect...."

A law enforcement agency is not a person, cannot entertain a suspicion, and certainly does not have training or experience – let alone training or experience to which the legislature would refer to by gender (i.e. "his" or "her"). Are some agencies masculine and some feminine? Quite obviously not, and those are all characteristics which a person would possess or activities in which a person would be capable of engaging, but not an inanimate agency.

Additionally, 11168 requires that written reports required of a mandated reporter pursuant to 11166(a) be submitted on Department of Justice (DOJ) approved forms. The approved form SS 8572 entitled "Suspected Child Abuse Report") requests information from the mandated reporter which could only be provided by an individual, such as the mandatory reporter's "name", "title", "category of mandated reporter" and requests whether the reporter "witnessed" the incident. Further, the DOJ form asks for the reporter's "signature". Those items cannot be provided by an entity, rather only by a human being who has a name, title, fits within a category set forth in 11165.7(a)(1)-(44), could potentially witness child abuse and who has a signature.

Further, this initial 11166(a) form referenced by 11168 clearly is not the form issued by the law enforcement agency after any investigation conducted by law enforcement because this form (SS 8572) states "Do NOT submit a copy of this form to the Department of Justice (DOJ). The investigating agency is required under Penal Code section 11169 to submit to DOJ a Child Abuse Investigation Report (Form SS 8583) if 1) an active investigation was conducted and 2) the incident was determined not to be unfounded."

Likewise, section 11169 also makes clear that the only form, if any, to be sent to the DOJ by a law enforcement agency which actively investigated a report of suspected child abuse would be the form dictated by the DOJ for such an investigation. That form is SS 8583, not SS 8572. Further, form SS 8583 was only to have been sent by a law enforcement to the DOJ secondary to an "active investigation" into initial report by a mandated reporter (or non-mandated reporter) and if the report was found by the investigating agency to be substantiated.

1. **In addition to the clear language of 11166(a), CANRA is replete with further indicators that there is a recognized distinction between human beings who are mandated reporters and the employers which employ them and which are <u>not</u> mandatory reporters and, therefore, <u>not</u> subject to the reasonable suspicion reporting standard of 11166(a) when making cross-reports required by 11166(k).**

CANRA makes a bright line distinction between the duties of inanimate entities (i.e. employer and public/private organizations) and the duties of the employee who is the mandated reporter – which is further indicia that an employer such as the County of San Bernardino sheriff's department – could never be a mandated reporter with obligations under 11166(a). For example, Penal Code 11166.5 requires each mandated reporter identified in 11165.7 to sign a statement provided by his/her employer prior to commencing employment confirming that the employee realizes that she/she is a mandated reporter. In addition to the fact that the County of San Bernardino's sheriff's department is not listed in 11165.7 as a mandated reporter, the County of San Bernardino sheriff's department is also not the "employee" of anyone and cannot give itself a statement to sign. Further, an employer is required to provide provisions of CANRA to the employee – meaning

that CANRA recognizes a distinction between employee and employer and, again, it would make no sense whatsoever that the sheriff's department would provide itself with copies of the relevant penal code sections of CANRA. Additionally, Penal Code 11166(I) makes clear that the mandatory reporting duties under 11166(a) are "individual" and no employee who makes such a report can be compelled to make his or her identity known to the employer. Finally, the original version of 11166(a), until amended in 2000 when "mandated reporters" became defined in 11165.7 and the moniker "child protective agency" was replaced and the respective agencies simply identified by their respective agency names in 11165.9, also clearly set forth that it was the "employee of a child protective agency" whose duty it was to report to a "child protective agency". Simply put, there is no obligation of any agency identified in 11165.9 to report to itself pursuant to 11166(a).

III. IN AN ISSUE TOTALLY UNRELATED TO THE DUTY OF THE AGENCY TO CROSS-REPORT SECONDARY TO 11166(k), THE SECONDARY ISSUE OF DEPUTY SWANSON'S INDIVIDUAL MANDATED REPORTER DUTY OWED IN THIS ACTION PURSUANT TO 11166(a) SHOULD BE ANALYZED PURSUANT TO AN "OBJECTIVE" STANDARD PURSUANT TO PENAL CODE 11166(a). FURTHERMORE, TO APPLY A SUBJECTIVE STANDARD WOULD APPLY DISCRETIONARY IMMUNITY TO A MANDATORY DUTY.

Appellant acknowledges that Deputy Swanson's negligent acts and omissions and her individual liability pursuant to 11166(a), and the County's vicarious liability therefore pursuant to 815.2, are an entirely separate issue from the law enforcement agency's own mandatory duty as an agency to cross-report pursuant to 11166(k). The law enforcement agency had its own, unrelated and separate duty, addressed through the preceding paragraphs of this brief, to cross-report the Christy Kinney report to child welfare services pursuant to 11166(k).

That said, Deputy Swanson as a mandated reporter herself is in the exact same position in this action as "Officer Doe" was in the case of *Alejo v. City of Alhambra* (1999) 75 Cal.App.4th 1180, which held that 11166(a) provided that

"Officer Doe had a mandatory duty to investigate *and then report if it was objectively reasonable for him to suspect child abuse.*" *Id.* at 75 Cal.App.4th 1193-1194. (Emphasis added.) The 2000 legislation amending various sections of the Child Abuse and Neglect Reporting Act, including Penal Code section 11166, confirmed the intended continued validity of *Alejo* because it expressly states that "[t]his act is not intended to abrogate the case of *Alejo v. City of Alhambra* (1999) 75 Cal.App.4th 1180," (Stats. 2000, ch. 916, § 34.) Appellant is entitled to an objective, versus subjective, analysis of whether there existed a triable issue of material fact as to whether Deputy Swanson breached her own individual duty to report under 11166(a).

Penal Code 11166(a), states "For purposes of this article, "reasonable suspicion" means that it is objectively reasonable for a person to entertain a suspicion, based upon facts that could cause a reasonable person in a like position, drawing, when appropriate, on his or her training and experience, to suspect child abuse or neglect...." *Alejo* held that CANRA imposes <u>two</u> independent mandatory duties on such individual reporters who are law enforcement officers that receive a report of suspected child abuse from someone such as the grandfather in *Alejo* or the de facto grandmother (Kinney) in this case: (1) "a duty to investigate"; and (2) "a duty to take further action when an objectively reasonable person in the same situation would suspect child abuse. Further action would entail reporting the 'known or suspected instance of child abuse to a child protective agency

immediately or as soon as practically possible by telephone' and preparing and sending 'a written report thereof within 36 hours of receiving the information concerning the incident.'" *Alejo v. City of Alhambra, supra,* 75 Cal.App.4th at p. 1186. In this case, although what Swanson did during the twenty (20) minutes and eleven (11) seconds on September 22, 2008 after she arrived at the Kinney house and before she downgraded the Kinney report from a 'CHILD ABUSE RPT." to a "MISCELLANEOUS INCIDENT" may not even satisfy the level of "investigation" contemplated by *Alejo, supra,* Appellant does not question for purposes of this argument whether or not what Swanson did was an "investigation" as contemplated by *Alejo, supra.*

Appellant does not question whether what Swanson did was an investigation because that is immaterial to analyzing whether she owed Appellant a duty to report under 11166(a). 11166(a) does not require that a mandated reporter investigate anything at all before his or her duty to report is triggered. While the *Alejo* court found an implied duty to investigate in that case where there was no investigation, that is not the scenario in this case and Appellant is basing his allegations against Swanson individually based solely on whether a reasonably prudent person in Deputy Swanson's position, receiving the information she received from Christy Kinney and observing the condition of B.H. at that time while she was with him in the Kinney house, would have entertained a suspicion that B.H. was abused or neglected and, thereby, would have her duty to report

triggered pursuant to 11166(a). This question (i.e. whether a reasonably prudent person in Swanson's position would have entertained that suspicion) is a question of fact to be determined at trial. (See *Alejo v. City of Alhambra, supra,* 75 Cal.App.4th at page 1189.) Appellant presented ample evidence that an objectively reasonable law enforcement officer would have entertained the suspicion that B.H. had been abused if he looked like he appears in the photographs at the time Deputy Swanson saw him.

Respondents have urged that the subjective impressions of Deputy Swanson control as a matter of law. Indeed, the Court of Appeal adopted that argument to rule as a matter of law that she acted in an objectively reasonable manner:

> "Having investigated the incident, it was objectively reasonable for Deputy Swanson to conclude the situation did not involve child abuse, even if that conclusion, in the exercise of Deputy Swanson's judgment, was in error."

There are clear legal problems with that position. First, 11166(a) does not require that Swanson "conclude" the situation involved child abuse before she was required to report; rather, all that a mandated reporter has to do pursuant to 11166(a) is "entertain a suspicion." Swanson did not lose her mandated reporter designation of 11165.7(a)(34) simply because she was also a law enforcement officer assigned by the sheriff department to investigate the report of child abuse made by Christy Kinney, any more than Officer Doe in *Alejo* lost his designation as a mandated reporter when he was assigned by the Alhambra police department

to investigate the report of child abuse made by the grandparent in that case. As a mandated reporter, it is immaterial what Swanson ultimately would have hypothetically subjectively "concluded" if she were deemed an investigator pursuant to 11169 and if she hypothetically conducted an "active investigation" as an investigator defined by DOJ guideline 901. Swanson admittedly did not perform an investigation which met that DOJ guideline for the reasons set forth above, however, that is immaterial to this issue because Appellant is not questioning whether the law enforcement agency should have issued a 11169 report to the DOJ based on Swanson's knowledge and observations gained during her twenty (20) minutes and eleven (11) seconds at the Kinney house. Likewise, it is not a precondition for a mandated reporter who happens to be a law enforcement officer to either a) be deemed an "investigator" pursuant to 11169 by his or her employer/ law enforcement agency, or b) first conduct an "active investigation" pursuant to DOJ regulation 901 and determine as an "investigator" that a report was "substantiated", per 11169 and 11165.12 in order to "entertain a suspicion" that a child has been subject to abuse, which is the only trigger for 11166(a) report.

Second, an "objectively reasonable" analysis is not based simply on accepting Swanson's "subjective" belief as true as a matter of law. This is a question of fact to be determined at trial. *Romo v. Southern Pacific Transportation Co.* (1977) 71 Cal.App.3d 909, 915. In this case, there are facts in doubt; namely, the appearance of B.H. when Deputy Swanson saw him, along with whether

Swanson acknowledged to Kinney that B.H.'s injuries were too severe for the history provided and whether Swanson herself took and destroyed photographs.

Third, the Respondents and the Court of Appeal's opinion incorrectly equate Swanson's subjective state of mind with objective reasonableness as a matter of law. Why would the fact that Swanson performed an investigation *ipso facto* have made her failure to report pursuant to 11166(a) objectively reasonable? It would not under 11166(a), and there is no logic, reason or authority for that deduction. The duty to report under 11166(a) is not even dependent on an investigation, but rather, what the mandated reporter observes or knows.

CANRA was enacted to rectify the subjective/personal observation problem that was made evident by *Landeros v. Flood* (1976) 17 Cal.3d 413, 415. The Legislature revised the reporting standard to require reporting by designated professions whenever there exists a "reasonable suspicion" of child abuse. (§ 11166, subd. (a).) The purpose of this change was to remove impediments to reporting engendered by the "personal observation" requirement of *Landeros v. Flood, supra,* 17 Cal.3d at page 415. (State Bar of Cal., Rep. on Assem. Bill No. 2497, supra, pp. 1-2; Legis. Counsel's Dig., Sen. Bill No. 718, 3 Stats. 1980 (Reg. Sess.) Summary Dig., p. 333.) *Krikorian v. Barry* (1987) 196 Cal.App.3d 1211, 1217.

There has been no authority in California for the subjective standard urged by Respondents for Swanson since 1980. In fact, the Court of Appeal's opinion

even acknowledged that *Alejo* and CANRA have an objective standard, but then illogically stated that while there is an obligation to report where abuse is reasonably suspected, there is no duty to report when abuse is not suspected:

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

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

Ultimately, neither the Respondents nor the Court of Appeal disputed whether Deputy Swanson owed a duty to report. The appellate opinion even stated as much, and Swanson admitted that she would have had to report if B.H. looked like he did in those photographs. So, too, did her supervisor, and Appellant's law enforcement expert and the county's child welfare service worker. The operative question thus would be a factual issue: namely, whether B.H.'s appearance in the photographs taken four hours before Deputy Swanson was at Christy Kinney's home accurately depicts his appearance at the time Deputy Swanson was at Christy Kinney's home. Deputy Swanson testified that those photographs do not

accurately depict B.H.'s appearance, and Christy Kinney testified that those photographs accurately depict his actual condition. If the trier of fact finds they did accurately depict his condition, Deputy Swanson had an obligation to report pursuant to 11166(a). This cannot be determined as a matter of law. Deputy Swanson's convenient denial at her deposition that B.H. did not look like he did in those photographs is not dispositive as a matter of law, especially when Appellant has photographic evidence and multiple eyewitnesses confirming his appearance – and even Swanson herself acknowledged multiple areas of bruising in her report.

The duty to report child abuse is mandatory under section 11166(a) if a reasonable person in Deputy Swanson's position would have suspected such abuse is a mandatory duty. (*Alejo* at 1186.) There is no discretion involved in initiating the reporting process related to child abuse here as in *Alejo*, and does not involve a basic policy decision, and therefore the immunity of Government Code section 820.2 does not attach. (*Alejo* at 1194.) Such a mandatory duty cannot be discretionary because it "entails the fulfillment of enacted requirements." (See, e.g., *Wheeler v. County of San Bernardino* (1978) 76 Cal.App.3d 841, 849., *Ramos v. County of Madera* (1971) 4 Cal.3d 685.) Furthermore, even assuming hypothetically that discretionary immunity applied to Deputy Swanson in this action, this does not obviate direct liability imposed by section 815.6 upon the law enforcement agency for its own violation of a mandatory duty under 11166(k). This argument completely overlooks the Legislative Committee comment to

section 815: "In general, the statutes imposing liability are cumulative in nature, i.e., if liability cannot be established under the requirements of one section, liability will nevertheless exist if liability can be established under the provisions of another section." *Bradford v. State of California* (1973) 36 Cal.App 3d 16, 20. If statutes imposing liability are cumulative, the fact that derivative liability under section 815.2 may be nullified by an employee immunity in no way affects direct liability based on section 815.6. Such liability could only be negated by a statutory entity immunity. (Gov. Code, § 815, subd. (b).) There is no such entity immunity, however.

CONCLUSION

For the foregoing reasons, plaintiff and appellant respectfully urges the Court to reverse the Court of Appeal's judgment.

Dated: December 12, 2013

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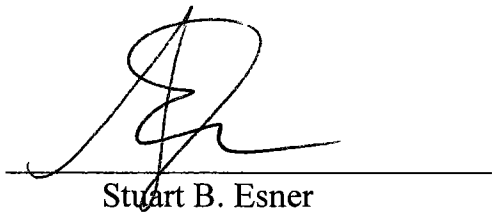

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