S215132

IN THE
SUPREME COURT OF CALIFORNIA

ELAINA NOVOA, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ALYSSA GOMEZ, DECEASED,

Plaintiff and Petitioner,

vs.

CALIFORNIA DEPARTMENT OF MENTAL HEALTH; CLIFF ALLENBY, AND STEPHEN MAYBERG,

Defendants and Respondents.

After a Decision by the Court of Appeal
Second Appellate District, Division Three
Case No. B248603

Vacating an Order of the Superior Court of Los Angeles County
The Honorable John L. Segal
Case No. BC487936

PETITIONER'S OPENING BRIEF ON THE MERITS

SHOOK, HARDY & BACON L.L.P.
One Montgomery, Suite 2700
San Francisco CA 94104
Tel: 415-544-1900

Chris Johnson (SBN 183289)
cjohnson@shb.com
Patrick J. Gregory (SBN 206121)
pgregory@shb.com
M. Kevin Underhill (SBN 208211)
kunderhill@shb.com
Rachael M. Smith (SBN 257866)
rxsmith@shb.com
Jared L. Palmer (SBN 287974)
jlpalmer@shb.com

Attorneys for Elaina Novoa, Plaintiff and Petitioner

IN THE
SUPREME COURT OF CALIFORNIA

ELAINA NOVOA, INDIVIDUALLY AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ALYSSA GOMEZ, DECEASED,

Plaintiff and Petitioner,

vs.

CALIFORNIA DEPARTMENT OF MENTAL HEALTH; CLIFF ALLENBY, AND STEPHEN MAYBERG,

Defendants and Respondents.

After a Decision by the Court of Appeal
Second Appellate District, Division Three
Case No. B248603

Vacating an Order of the Superior Court of Los Angeles County
The Honorable John L. Segal
Case No. BC487936

PETITIONER'S OPENING BRIEF ON THE MERITS

SHOOK, HARDY & BACON L.L.P.
One Montgomery, Suite 2700
San Francisco CA 94104
Tel: 415-544-1900

Chris Johnson (SBN 183289)
cjohnson@shb.com
Patrick J. Gregory (SBN 206121)
pgregory@shb.com
M. Kevin Underhill (SBN 208211)
kunderhill@shb.com
Rachael M. Smith (SBN 257866)
rxsmith@shb.com
Jared L. Palmer (SBN 287974)
jlpalmer@shb.com

Attorneys for Elaina Novoa, Plaintiff and Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

STATUTES

OTHER AUTHORITIES

STATEMENT OF ISSUES

1. Under the Sexually Violent Predator Act, before an inmate who "may be a sexually violent predator" can be released, the Department of Mental Health must conduct a "full evaluation" of that person to determine whether he should be civilly committed and treated, rather than set free. Has the agency complied with the Legislature's mandate if it merely has an expert conduct a limited review of the inmate's file?

2. If the inmate harms someone after being released without the mandatory full evaluation, under what circumstances may a court hold as a matter of law at the pleading stage that the injured party could never establish "proximate cause" in an action against the agency?

INTRODUCTION

Between January 2007 and July 2010, the Department of State Hospitals (the Department)[1] allowed the release of more than 22,173 sexual criminals into our communities without the complete risk evaluations mandated by statute. (Exhibits ISO Opposition of Real Party in Interest Elaina Novoa to Petition for Writ of Mandate Prohibition, Supersedeas, or Other Appropriate Relief (Ct. App. Writ Opp.), Ex. A, ¶ 34.) Instead of conducting its legally required full evaluations, the Department employs a cost-saving and unlawful paper screening procedure to evaluate potential sexually violent predators (SVPs) before they are released from prison. (*Id.* at ¶¶ 28-35.) The Department's practices violate California law, result in the improper release of literally tens of thousands of potential SVPs in the general public, and most importantly, they jeopardize the health and safety of all Californians, especially children. (*Id.* at ¶ 27.)

Petitioner Elaina Novoa respectfully requests that this Court reverse, in part, the judgment of the California Court of Appeal, Second District. The Court of Appeal correctly found that the Department has a mandatory duty to designate two mental health professionals to evaluate an inmate identified as an SVP. (Petition for Review (Pet. Rev.), App. A, p. 17.) However, this limited finding of a mandatory duty required by the Department is too narrow under the Sexually Violent Predator Act (SVPA) and must be expanded so that the Department complies with the statute. Additionally, the Court of Appeal erred when it held Respondents' alleged breach of their mandatory duty to assign two mental health professionals did not proximately cause Ms. Novoa's injuries. (*Id.* at p. 21.)

[1] Since Plaintiff initiated the lawsuit below, the Department of Mental Health changed its name to the Department of State Hospitals.

First, the SVPA was enacted with the purpose of protecting the public from SVPs and providing predators with rehabilitation. To accomplish this dual mission, the Legislature unambiguously imposed numerous mandatory duties on the Department and the Department of Corrections and Rehabilitation (Corrections). The Department renders the SVPA meaningless in application because it conducts an unauthorized intermediate screening using a single evaluator who only reviews a paper record that runs back in time to the inmate's last offense. The statue explicitly requires the Department develop a standardized assessment protocol to be applied by two evaluators after a likely SVP has been referred to it by Corrections. Allowing the Department to simply perform a second screen of the inmate's partial file does not comply with the SVPA in its plain language or intent because it creates an additional, unauthorized barrier to civilly committing an SVP and results in more predators being released into society.

Second, the trial court was correct in finding Ms. Novoa has the right to proceed with her case because she has sufficiently pled causation at the pleading stage. (Ct. App. Writ Opp., Ex. J at p. 193.) This Court should follow the precedent it set in *Landeros v. Flood* (1976) 17 Cal.3d 399 (*Landeros*). Following this Court's decision in *Landeros*, other courts, including the California Court of Appeal, Second District, in *Alejo v. City of Alhambra* (1999) 75 Cal.App.4th 1180, 1192 (*Alejo*), recognized the pleading stage is not the proper stage to decide a plaintiff's ability to establish proximate cause in instances where a state agency's failure to perform a mandatory duty results in a member of the public being harmed. (*Ibid.*) To hold that the distance between Respondent's alleged breach of a mandatory duty is too tenuous with Ms. Novoa's injuries at the pleading stage means that any plaintiff injured by the Department's willful disregard

of its mandatory duties is precluded from recovery. This holding not only inhibits the goals of the SVPA, but encourages state actors to willfully ignore their mandatory duties when subsequent discretion is involved because they are shielded from any liability.

STANDARD OF REVIEW

An order overruling a demurrer is reviewed de novo on appeal. (*Teva Pharmaceuticals USA, Inc. v. Superior Court* (2013) 217 Cal.App.4th 96, 102.) "The reviewing court accepts as true all facts properly pleaded in the complaint in order to determine whether the demurrer should be overruled." (*Id.* [quoting *Boy Scouts of America National Foundation v. Superior Court* (2012) 206 Cal.App.4th 428, 438]; see also *In re Farm Raised Salmon Cases* (2008) 42 Cal.4th 1077, 1089 ["We apply a de novo standard of review because this case was resolved on demurrer. . ." (citation omitted)].)

STATEMENT OF FACTS

Gilton Pitre was a convicted rapist released from prison in 2007. (Ct. App. Writ Opp., Ex. A at ¶ 36.) Because Corrections deemed him likely to be a continuing threat, the SVPA required that he be fully evaluated by two experts before being released. (*Id.* at ¶¶ 36, 51-56.) If the evaluation found that he was likely to engage in acts of sexual violence without treatment and custody, he would not be released, but rather would be civilly committed for further treatment. (*Id.* at ¶¶ 25, 57.) Pitre in fact was evaluated by only one expert, who conducted an abbreviated screening based only on paperwork. (*Id.* at ¶¶ 28-36.) He was then released. (*Id.* at ¶¶ 1, 11, 64.) Four days later, Pitre raped and murdered 15-year-old Alyssa Gomez. (*Id.* at ¶¶ 1, 36.)

Ms. Novoa, Alyssa's sister, sued the Department as well as its former and acting Directors for negligence, negligence per se, and writ of

mandate. (Ct. App. Writ Opp., Ex. A at pp. 13-22.) Ms. Novoa's suit is based on Welfare and Institutions Code section 6600 *et seq.* (SVPA), enacted in 1995 to provide a framework for California's sexually violent predator civil commitment program. (*Id.* at ¶ 13.) Under this framework, Corrections must screen inmates who are eligible to be paroled or released from prison, and it must refer inmates whom they have flagged as potential SVPs to the Department for a full, clinical evaluation by two mental health professionals. (*Id.* at ¶ 14.) If the two evaluators agree that the inmate has a diagnosable mental disorder and is likely to reoffend upon release, a request for civil commitment is then made by the Director of the Department. (*Id.* at ¶ 25.)

The SVPA does not authorize the Department to conduct paper screenings with a single evaluator once a potential SVP is referred to it by Corrections. (Ct. App. Writ Opp., Ex. A at ¶ 32.) Despite the requirements enumerated in the SVPA, the Department continues to employ its paper screening of inmates, resulting in a majority of potential SVPs never receiving a full evaluation. (*Id.* at ¶¶ 33-34.) Many of the prisoners who only receive the paper screening reoffend upon their release. (*Id.* at ¶ 35.)

PROCEDURAL HISTORY

On October 2, 2012, Respondents demurred to Ms. Novoa's First Amended Complaint. The trial court sustained the demurrer as to all three causes of action with leave to amend, and Ms. Novoa filed a Second Amended Complaint on January 7, 2013. On February 8, 2013, Respondents again demurred, claiming Ms. Novoa had failed to plead facts sufficient to constitute a cause of action because Welfare and Institutions Code section 6601 did not impose any mandatory duties, or if it did, any alleged breach of such a duty was not a legal cause of her injuries.

Additionally, Respondents alleged they are shielded from liability for their conduct under Government Code sections 820.2, 845.8 and 856(a).

The Honorable John L. Segal issued an order overruling Respondents' second demurrer on April 15, 2013. Judge Segal found that sections 6601(c)-(d) impose a mandatory duty upon the Department to "use two evaluators to formulate and apply a standardized assessment protocol that considers specific factors under sections 6601(c)-(d)." (App. A at p. 4.) The ruling stated that because Respondents had failed to perform a mandatory duty, immunity under Government Code sections 820, 845.8, and 856(a) did not apply. (*Id.* at pp. 6-7.) Relying on *Alejo*, 75 Cal.App.4th at p. 1192, Judge Segal found that Petitioner had pled facts sufficient to allege causation. (*Id.* at pp. 4-5.) With the shield of immunity lowered, the lower court held that Ms. Novoa sufficiently alleged causes of action for: (1) breach of mandatory duty under Government Code section 815.6 against the Department; (2) negligence and negligence per se against the Department and former Director of the Department, Stephen W. Mayberg; and (3) a writ of mandate against the Department and acting Director Cliff Allenby, "requiring the Department [] to conduct an in-person, 'full clinical, psychiatric evaluation by two qualified psychologists and/or psychiatrists' in compliance with Jessica's Law."[2] (*Id.* at pp. 1-8.)

On May 10, 2013, Respondents petitioned for a writ of mandate asking the Court of Appeal to overturn Judge Segal's order and sustain their demurrer without leave to amend. Oral argument was held on July 17, 2013, and the Court of Appeal issued its opinion on October 30, 2013. Ms.

[2] In November 2006, 70% of the California electorate voted to pass Jessica's Law (introduced as Proposition 83), a landmark law designed to strengthen California's civil commitment program for SVPs. Jessica's Law broadened the pool of potential SVPs by amending Welfare and Institutions Code section 6601, subdivisions (a)(1)-(2). (Ct. App. Writ Opp., Ex. A at ¶¶ 16-17.)

Novoa petitioned for rehearing on November 13, 2013, but the court of appeal denied the petition on November 18, allowing the opinion to become final on November 29, 2013. The opinion ordered a writ of mandate "directing the superior court to (1) vacate the order dated April 15, 2013 and (2) enter a new order sustaining [Respondents'] demurrer to the [negligence and negligence *per se*] causes of action [] without leave to amend and overruling their demurrer to the [writ of mandate] cause of action in the second amended complaint." (Pet. Rev., App. A at p. 25.) The Court of Appeal rejected *Alejo* and adopted the reasoning in *Whitcombe v. County of Yolo* (1977) 73 Cal.App.3d 698 (*Whitcombe*), and its progeny to find the proximate cause between Respondents' alleged breach of a mandatory duty and Petitioner's injures to be too tenuous to support a cause of action based on Government Code section 815.6. (Pet. Rev., App. A at p. 21.)

As a result, Ms. Novoa filed a Petition for Review with this Court on December 9, 2013, seeking to expand the scope of the mandatory duties imposed on the Department and to overturn the Court of Appeal and reinstate the lower court's finding that causation had been sufficiently pled. On February 11, 2014, this Court granted Ms. Novoa's Petition for Review.

ARGUMENT

I. The Department Has a Mandatory Duty to Perform Full Evaluations on Every Inmate Referred Using an Established Protocol.

The Court of Appeal correctly held that Respondents "breached their mandatory duty to designate two psychologists or psychiatrists, or one of each, to conduct a full evaluation of an inmate identified by Corrections as likely to be a sexually violent predator." (Pet. Rev., App. A at pp. 2-3.) However, the Court of Appeal's holding is too narrow in scope to affirmatively establish the mandatory duties at issue in this case to give the

SVPA its full effect. Overlooking the Department's other relevant duties enables the Department to continue performing cursory evaluations so long as two evaluators participate. The SVPA sets forth three critical mandatory duties relevant to Ms. Novoa's case: (1) a duty to legally develop a protocol for conducting a full evaluation; (2) a duty to have two evaluators complete a full clinical evaluation of Pitre using the protocol once he was referred by Corrections; and (3) a duty to refer Pitre to the District Attorney for civil commitment proceedings should both evaluators find Pitre positive under the protocol. (Welf. & Inst. Code § 6601, subds. (c)-(d).) The Court of Appeal's narrow finding of a single mandatory duty under the SVPA conflicts with this Court's recognition that a civil commitment cannot proceed without strict compliance with all of the SVPA's provisions. (See *Reilly v. Superior Court* (2013) 57 Cal.4th 641, 646-49 (*Reilly*).)

For an act to be considered "mandatory" under Government Code section 815.6, "the enactment at issue [must] be *obligatory*, rather than merely discretionary or permissive, in its directions to the public entity; it must require, rather than merely authorize or permit, that a particular action be taken or not taken." (*Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 499 [emphasis in original].) The language of the statute is "'the most important guide'" in determining whether the legislature intended an act to be mandatory. (*Ibid.* [citing *Morris v. County of Marin* (1977) 18 Cal.3d 901, 910-11, fn. 6].) There are, however, other factors–such as the function and purpose of the enactment–that bear on the question of whether a statutory act was intended to be mandatory or discretionary. (*Id.*; see also *Guzman v. County of Monterey* (2009) 46 Cal.4th 887, 898.)

There can be no question that the express language of the SVPA indicates that the duty to conduct a full evaluation on every inmate referred from Corrections is mandatory and that in conducting a full evaluation, the

evaluators are required to apply a standard protocol that has been developed and updated by the Department. (See Welf. & Inst. Code § 6601, subds. (b)-(c).) However, the issue the Court of Appeal had with finding a mandatory duty to conduct a full evaluation lies in the fact that there is some discretion in *how the duty is carried out and the result obtained.* The court did not even address whether other factors, which are discussed more fully below, indicate whether or not the duty to conduct a full evaluation is mandatory or permissive.

As this Court has noted, the line between a mandatory and discretionary act "is sometimes difficult to draw," especially when the statutory scheme does involve some discretion. (*Guzman*, *supra*, 46 Cal.4th at p. 899.) Here, even though the Department has some discretion in developing the full evaluation protocol (so long as it meets the statutory requirements) and the evaluators have discretion in using their professional judgment to reach a conclusion about a particular inmate, this does not change or undermine the fact that the Department has a mandatory obligation to conduct full evaluations using a standard protocol in the first place. Moreover, nothing in the jurisprudence of this Court or other California courts alters this result.

Thus, the court below erred in refusing to find that the Department has a mandatory duty to conduct a full evaluation using a standard protocol on every referral from Corrections. *First*, the express language of the statute indicates that full evaluations are mandatory. *Second*, the fact that there is some discretion in how the evaluation is carried out does not foreclose a finding that the Department has a mandatory duty to initiate and conduct a full evaluation. *Last*, factors that the court below did not consider, such as the purpose and intent of the statute, weigh in favor of finding a mandatory duty.

A. The Express Language of the SVPA Requires Full Evaluations Using an Established Protocol on Every Inmate Referred From Corrections.

To only find a mandatory duty exists for two evaluators to perform a full evaluation but no duty exists for developing and applying a protocol contravenes the plain language and process of the SVPA and provides Ms. Novoa with only a Pyrrhic victory. It also conflicts with this Court's interpretation of the SVPA just last year. (*Reilly*, 57 Cal.4th at pp. 646-49.) In *Reilly*, this Court reviewed the steps required to seek a civil commitment under the SVPA once Corrections conducts an initial screening of an inmate and identifies him or her as a potential SVP. (*Id.* at pp. 646-48.) Reviewing the commitment process as a whole, this Court concluded that unless two evaluators jointly concur that the inmate meets the established criteria for civil commitment, a commitment request cannot go forward. (*Id.* at p. 647.)

When the Legislature enacted the SVPA, it established express roles for Corrections and the Department. Corrections performs an initial assessment based on "the person's social, criminal, and institutional history" to determine whether that person is a likely SVP. (Welf. & Inst. Code § 6601, subd. (b).) Then, "[i]f as a result of this screening it is determined that the person is likely to be a sexually violent predator," Corrections must refer the inmate to the Department for the second level of review, or a "full evaluation." (*Ibid.*) Once the inmate has been referred for a full evaluation, the Department "shall evaluate that person with a standardized assessment protocol" to determine if the inmate has a diagnosable mental disorder, and "the person shall be evaluated by two practicing psychiatrists or psychologists, or one practicing psychiatrist and one practicing psychologist." (*Id.* at § 6601, subds. (c)-(d).) The protocol "shall require assessment of diagnosable mental disorders, as well as

various factors known to be associated with the risk of re-offense among sex offenders." (*Id.* at § 6601, subd. (c).)

California courts have long found the use of the word "shall" in a statute to impose a mandatory duty. (See *Alejo*, 75 Cal.App.4th at pp. 1185-87 [finding the language "*shall* report the known or suspected instance of a child abuse" to be "imperative language" that imposed a mandatory duty]; *State v. Superior Court* (*Perry*) (1984) 150 Cal.App.3d 848, 854-55 [finding that the language "*shall*, upon the verified complaint in writing of any person, investigate . . ." constituted language of a mandatory duty: "'the statutory language makes quite clear that the Legislature intended the statutory requirements to be obligatory rather than permissive [citation]'"].) Ignoring the mandatory nature of "shall" in the statute and instead focusing "on whether the statutorily required act lends itself to a normative or qualitative debate over whether it was adequately fulfilled" undermines the statute in its entirety.

Thus, the statutory language of section 6601 is clear on what the Department's mandatory duties are. It must: (1) develop a protocol that defines how the evaluators must conduct a full evaluation; (2) conduct a full evaluation on every referral using two mental health professionals who apply the protocol; and (3) refer inmates found to be likely SVPs pursuant to the protocol for civil commitment. At the time that Pitre was referred for a full evaluation, the agency failed to perform the second and third mandatory duties listed above. Although the agency had developed a protocol for a full evaluation, it did not require that its evaluators apply that protocol on every referral. Instead, the agency required only one evaluator

to perform a limited review of the inmate's records, which was not in accordance with the standardized assessment protocol for a full evaluation.[3]

Courts should not construe statutes in a way that would render certain provisions unnecessary or redundant. (*Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334, 345.) If, as the Court of Appeal suggests, the Department is not required to do anything more than review the same records that were already reviewed by Corrections pursuant to section 6601(b), this would make the Department's role duplicative and unnecessary under 6601(c) and would turn the phrase "full evaluation" into "meaningless surplussage." (See *Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1135.) There is no statutory authorization for the development and application of a screening protocol less than that for a full evaluation, and to hold otherwise undermines the stated purpose of the statute. If the Department does not have a mandatory duty to develop a protocol and the evaluators do not have a mandatory duty to apply the protocol in conducting a full evaluation, then the Department can assign two evaluators without any guidance despite clear statutory language saying otherwise.

---

[3]The Department developed an illegal, intermediate-level screening to be applied by a single evaluator prior to referral to two evaluators and the application of the protocol for a full evaluation. Indeed, in the vast majority of cases, the Department conducts a cursory, partial record review, previously termed a Level II screening and now called a Memorandum of Understanding or "MOU" screening, of potential SVPs before they are allowed to be released back into the community without ever having a full evaluation as mandated under section 6601. (Ct. App. Writ Opp., Ex. A at ¶¶ 27, 31, & pp. 32-46.) Furthermore, the Department's standard assessment protocol, the one required under the SVPA, does not even mention, or provide guidelines for, a MOU screening. (*Id.* at ¶ 32.)

B. Although There is Some Discretion in How to Carry Out a Full Evaluation, There is No Discretion in Whether to Conduct the Full Evaluation.

The Court of Appeal's holding that the duty to conduct a full evaluation pursuant to a standardized protocol is not mandatory because it "requires a normative or qualitative assessment" is flawed. The lower court held that once an inmate is referred by Corrections, the Department has no discretion to "use two evaluators to formulate and apply a standardized assessment protocol that considers specific factors under sections 6601(c)-(d). Sections 6601(c)-(d) impose a mandatory duty." (App. A at pp. 3-4.) However, the Court of Appeal reasoned that because the Department has some discretion in *how to conduct* a full evaluation, this precludes a finding that there is a mandatory duty to conduct the evaluation at all. (See Pet. Rev., App. A at p. 16.)

But, simply because a law permits discretion in its application does not mean that it does not impose a mandatory duty. (*Johnson v. State of California* (1968) 69 Cal.2d 782, 793.) The Court of Appeal relied on *de Villers v. County of San Diego* (2007) 156 Cal.App.4th 238, 259 (*de Villers*), and *Ortega v. Sacramento County Dept. of Health & Human Services* (2008) 161 Cal.App.4th 713, 728 (*Ortega*), to support its holding, but this reliance was misplaced. In these cases, the courts found that the statutes at issue did not impose any mandatory duties.

De Villers, involved a lawsuit against a county by the family of a husband murdered by his wife. (156 Cal.App.4th at p. 243.) The wife was a county employee who took fentanyl from the medical examiner's office to use in murdering her husband. (*Id.* at pp. 244-45.) While working at the medical examiner's office, the wife began having an affair with her supervisor, who knew she had relapsed into methamphetamine use. (*Ibid.*) The operations administrator for the medical examiner's office heard

rumors of the affair, but he did not ask the wife's supervisor about it or examine their email exchanges. (*Id.* at p. 244.) The family of the deceased husband brought a wrongful death action alleging the county negligently supervised the wife and breached a mandatory duty to protect against drug theft from the medical examiner's office pursuant to a federal statute. (*Id.* at p. 247.) The court found liability under Government Code section 815.6 did not apply because the purpose of the statutory scheme at issue was not to protect against the harm suffered. (*Id.* at p. 263 [The court held that "[h]ere, the primary purpose of the enactment appears to be to prevent theft of drugs, not to protect the public against the risk of criminal attack by a drug thief."].)

The court in *Ortega*, emphasized the discretion a county child protection agency had in conducting an investigation and determining the potential risk to a child. (161 Cal.App.4th at p. 728.) The *Ortega* court found that such discretionary decisions are immunized. (*Ibid.*) However, the investigation at issue was not mandated by statute, but contained in a Department of Social Services' manual of policies and procedures. (*Ibid.*) Furthermore, the regulation's language discussed by the court made no reference to a social worker having an initial mandatory duty to conduct any kind of investigation.

In contrast to the duties in *de Villers* and *Ortega* the SVPA's language explicitly requires that Corrections shall screen an inmate prior to release and if the person is likely to be a SVP, he or she shall be referred to the Department for a full evaluation by two mental health evaluators in "accordance with a standardized assessment protocol." (Welf. & Inst. Code § 6601, subds. (a)-(d).) Regardless of any discretion involved in applying the protocol, the statute explicitly requires the Department develop a protocol and that they assign two evaluators to conduct a full evaluation

pursuant to the protocol. Unlike *Ortega*, the issue here does not concern the discretion involved in conducting an assessment, but rather the actual performance of that assessment. Dismissing the Department's mandatory duties to develop a protocol and have evaluators conduct full evaluations pursuant to that protocol because the evaluation process itself contains a normative assessment is a misapplication of the law and should be reversed.

C. Finding Additional Mandatory Duties is Consistent with the Statute's Purpose.

Furthermore, the Court of Appeal's ruling frustrates the purpose of the SVPA and puts California citizens at risk. The purpose of the SVPA is to confine and treat offenders not yet ready for release into the general population. Thus, the purpose of the SVPA is different than that of parole statutes designed to help offenders reintegrate into society. This Court has recognized that the Legislature unambiguously declared the purpose for the statute's 1995 enactment was two-fold – to protect the public and to provide treatment to mentally ill inmates:

> [A] small but extremely dangerous group of sexually violent predators that have diagnosable mental disorders can be identified while they are incarcerated. ***These persons are not safe to be at large and if released represent a danger to the health and safety of others in that they are likely to engage in acts of sexual violence.*** . . . It is the intent of the Legislature that once identified, these individuals, if found to be likely to commit acts of sexually violent criminal behavior beyond a reasonable doubt, be confined and treated until such time that it can be determined that they no longer present a threat to society.

(Ct. App. Writ Opp., Ex. A at p. 4; see also *Moore v. Superior Court* (2010) 50 Cal.4th 802, 814-15 ["The SVPA targets a select group of convicted sex offenders whose mental disorders predispose them to commit sexually violent acts if released following punishment for their crimes. The Act

confines and treats such persons until their dangerous disorders recede and they no longer pose a societal threat." (internal citation omitted)].)

Indeed, the Department is aware it has mandatory duties. A recent letter from Respondent Allenby, acting Director of the Department, acknowledges that Welfare and Institutions Code section 6601, subdivision (d), requires individuals flagged by Corrections as potential SVPs "be evaluated by two practicing psychologists or psychiatrists designated by the [Department] Director." (Ct. App. Writ Opp., Ex. K at p. 195.) Respondent Allenby also acknowledges that if the two evaluators agree that an individual is an SVP, the "[Department] is *required* to forward to the individual's county of commitment a request for a petition to be filed for commitment to a state hospital." (*Id.* at p. 196 [emphasis added].)

The Department's cursory file review of inmate referrals from Corrections thwarts the legislative intent of the SVPA. This process has released thousands of flagged inmates without ever having a full evaluation, despite the fact that the Legislature has deemed that full evaluations are necessary to determine whether or not an inmate has a diagnosable disorder and should be released or referred for civil commitment. (Ct. App. Writ Opp., Ex. A at ¶¶ 22-27, 33-34, .) It is not for the agency to determine otherwise. Nonetheless, the court of appeal's opinion tacitly approves the Department's ineffectual and illegal cursory paper screens, allowing the agency to continue to evade an important legislative and popular mandate. (See *Superior Court v. County of Mendocino* (1996) 13 Cal.4th 45, 53 ["The executive branch, in expending public funds, may not disregard legislatively prescribed directives and limits pertaining to the use of such funds."].)

Finally, due process requires a full evaluation be more than just a cursory paper evaluation. Failure to conduct full clinical evaluations could

potentially result in inmates being incorrectly flagged as potential SVPs. For instance, a simple filing mistake could cause a prisoner to be misidentified as an SVP and to then be confirmed as an SVP by the single evaluator who reviews the incorrect and/or incomplete paper file. If a mistakenly identified SVP is detained only an extra day past his or her original sentence, it still amounts to an unlawful detainment.

II. The Superior Court Was Correct to Follow *Alejo* to Find Petitioner Sufficiently Alleged Causation at the Pleading Stage Because to Hold Otherwise Would Preclude Any Lawsuits Against the Department for Breach of Its Mandatory Duties Under the SVPA.

Causation is rarely decided at the pleading stage. The issue of causation "is an issue of fact unless reasonable minds could draw only one conclusion." (*Braman v. State* (1994) 28 Cal.App.4th 344, 356 (*Braman*); see also *Smith v. Workers' Comp. Appeals Bd.* (1981) 123 Cal.App.3d 763, 773 ["Causation is a question of fact unless the issue is so clear that reasonable minds could not differ."].) This principle is true in cases involving a breach of a mandatory duty. In *Alejo*, the court held that causation in a breach of mandatory duty case involving the duties to investigate and report a reasonable suspicion of child abuse could not be decided at the pleading stage. (75 Cal.App.4th at p. 1192.)

In overruling Respondents' argument that causation was too speculative here, the trial court correctly applied *Alejo*. Similar to *Alejo*, Ms. Novoa alleged in her complaint that the state agency breached a mandatory duty to conduct a full evaluation on Pitre and that had the evaluators found him positive to be a SVP, the state agency had a duty to take action, or refer him for civil commitment. (Ct. App. Writ Opp., Ex. A at ¶¶ 53-63.) Despite these similarities, the Court of Appeal declined to follow *Alejo* and found that causation could not be pled as a matter of law. (Pet. Rev., App. A at p. 21.)

The Court of Appeal erred in its holding. The jurisprudence of this Court and courts below provide that in cases where a breach of a mandatory duty is alleged, causation should not be decided at the pleading stage. The line of cases on which the Court of Appeal relied, *Whitcombe* et al., *did not* involve mandatory duties similar to those found in the SVPA, a distinction the Court of Appeal failed to discern. But, even if *Alejo* is not distinguishable from *Whitcombe* and a split of opinion does exist among the courts, this Court should adopt the rationale in *Alejo*. To do otherwise would permit Respondents to continue their unlawful practices without any redress for victims and their families and would undermine the purpose and intent of Government Code section 815.6.

A. In Breach of Mandatory Duty Cases, Courts Have Repeatedly Held That Causation Should Not Be Decided at the Pleading Stage.

Consistent with the general principle that causation is a question of fact for the jury, courts that have examined whether a plaintiff had pled sufficient facts at the pleading stage that a breach of a mandatory duty caused the plaintiff's harm have answered that question in the affirmative.

To start, this Court in *Landeros* held that "the trial court in the case at bar could not properly rule as a matter of law that the defendants' negligence was not the proximate cause of plaintiff's injuries." (17 Cal.3d at p. 412.) There, plaintiff sued a doctor and a hospital for failing to recognize that she was being abused by her parents and report that information to the proper authorities pursuant to a mandatory duty under Penal Code section 11160 et seq. (*Id.* at pp. 405-07.) This Court found that plaintiff should have the opportunity to prove through expert testimony that a reasonably prudent physician would have properly assessed the plaintiff's injuries and reported them to the appropriate authorities. (*Id.* at p. 410.)

In *Henderson v. Newport-Mesa Unified School District* (2013) 214 Cal.App.4th 478 (*Henderson*), a statute mandated consideration of a teacher for an available position, but did not "ultimate[ly] guarantee [] employment." (*Id.* at p. 497.) To plead causation, the teacher plaintiff needed to allege facts showing that positions were available and that the plaintiff was more qualified than other applicants. (*Ibid.*) The court held that such facts, "if proved, are sufficient to demonstrate the District's alleged failure to comply with its mandatory obligation" and would provide "the proximate cause of her not being rehired." (*Ibid.*)

Cases have also specifically addressed causation in breach of mandatory duty cases where the state agency had a duty to conduct some type of inquiry or assessment and also had a duty to take action based on the outcome of the inquiry or assessment. In *Braman*, plaintiff alleged that the Department of Justice (DOJ) had breached a mandatory duty to conduct an investigation into prospective handgun sales and to block the handgun sale if the person was not eligible to possess a handgun. (28 Cal.App.4th at p. 348.) Plaintiff's husband, who was not eligible to possess a handgun due to his mental illness, nonetheless purchased a handgun and committed suicide. (*Id.* at p. 347.) Despite the fact that the DOJ had considerable discretion in how to carry out its background investigation, the court found that causation was a question of fact for the jury. (*Id.* at p. 356.)

Alejo reached a similar result as the *Braman* court, even though the cases involved different statutory schemes. The plaintiff in *Alejo* sued the city and a police officer for failing to carry out their mandatory duty to investigate and report known or suspected child abuse under Penal Code section 11164, otherwise known as the Child Abuse and Neglect Reporting Act (CANRA). (75 Cal.App.4th at pp. 1184-86.) Similar to the SVPA, CANRA was passed with the intention and purpose of protecting children

from abuse. (*Id.* at p. 1185.) Plaintiff reported abuse against his son, but defendants failed to initiate an investigation. (*Id.* at p. 1184.) Although defendants contended that causation was too speculative because it was "unknowable" what would have resulted from the investigation, the court rejected this argument. (*Id.* at p. 1191.) The court found that because the plaintiff child's subsequent severe beating occurred six weeks after his father had reported the child abuse, "the county welfare department would have had ample time to respond and provide [plaintiff] with protection from further abuse" had the facts related by the father been reported. (*Id.* at pp. 1191-92.) Moreover, "it is not difficult to believe the county welfare department would have taken affirmative steps to protect [plaintiff]. Whether or not the department would have done so is not a matter of speculation but a question of fact to be determined at trial through expert testimony." (*Id.* at p. 1192.)

Although these cases involve different statutory schemes and facts, they share a commonality in that a breach of a mandatory duty was alleged. If a breach of a mandatory duty is alleged, this presumptively establishes that causation has been sufficiently pled. This is because in order for a mandatory duty to exist, the statute at issue must have been enacted to protect against the type of harm that is the subject of plaintiff's complaint. (*Haggis, supra*, 22 Cal.4th at p. 399.) If a statute has been enacted to protect against a particular type of harm, then that harm is a foreseeable consequence if the statutory duties are not carried out. (See *Braman*, 28 Cal.App.4th at p. 356.) That the harm is a foreseeable consequence of an act should satisfy causation at the pleading stage.

B. The Cases Relied on by the Court of Appeal are Distinguishable from Petitioner's Case.

The Court of Appeal adopted the rationale of *Whitcombe*, *Perry*, and *Fleming v. State of California* (1995) 34 Cal.App.4th 1378 (*Fleming*), in

finding that Ms. Novoa's causation allegations were too speculative at the pleading stage, and refused to apply cases that had reached an opposite conclusion. However, the cases cited by the court of appeal regarding causation are distinguishable. None of the cases found mandatory duties present or involved processes governed by statutory standards. In fact, none of the cases found a breach of a mandatory duty, and where such a duty was alleged, no mandatory actions followed the fulfillment of that duty. *Fleming*, *Perry*, and *Whitcombe* all involved claims that the defendants failed to perform one requisite duty and there was no mandatory action required after that duty was fulfilled. (See *Fleming*, 34 Cal.App.4th at pp. 1383-84 [alleging that defendant failed to hold and arrest parolee who violated the terms of his parole, without providing for any mandatory subsequent action]; *Perry*, 150 Cal.App.3d at p. 860 [noting that defendant only had a duty to investigate and was not required to take a specific action at the conclusion of the investigation]; *Whitcombe*, 73 Cal.App.3d at p. 708 [holding that "[w]hile the court must consider a probation officer's report, it is not bound by that report and recommendation . . . ."].) The individuals in those cases were free to exercise considerable discretion after they had fulfilled their initial duty.

In contrast, the Department had an initial duty to conduct a full evaluation and if the two evaluators found a positive at the conclusion of those evaluations, it had a subsequent duty to refer the inmate for civil commitment. This is unlike *Fleming*, *Whitcombe*, and *Perry* where there were no subsequent duties to act after an investigation. Instead, the case at bar is more similar to *Alejo* and *Braman* where the state agency had a mandatory duty to conduct an initial investigation at the conclusion of which the agency was required to take action. For example, the state officer in *Alejo* was required to report child abuse to the appropriate

authorities if his investigation uncovered that a child was likely being abused. (75 Cal.App.4th at pp. 1188-89.) Similarly, in *Braman*, the state was required to block the sale of a handgun if a background investigation revealed the person was not eligible to possess a handgun. (28 Cal.App.4th at p. 350.)

In sum, the Court of Appeal failed to distinguish *Whitcombe* et al. from the case at bar. In doing so the court's decision has potentially created a split of opinion between *Alejo* et al. and *Whitcombe* et al., without sufficient justification as to why *Whitcombe* applies to Ms. Novoa's case. This Court should resolve any potential split in favor of *Alejo* for the reasons above and for the additional reason that the Court of Appeal's decision essentially nullifies Government Code section 815.6. Government Code section 815.6 was enacted to provide individuals harmed when a state actor fails to fulfill a legally mandated duty:

> 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.

To preclude injured parties from bringing suit under this statue at the pleading stage because proximate cause is allegedly too tenuous would deprive them of any opportunity to obtain relief and render the statute meaningless.

CONCLUSION

To properly effect the purpose of the SVPA, the Department was charged with the mandatory duty of identifying SVPs and referring them to the local DA for civil commitment hearings. The SVPA imposes a mandatory duty on the Department to assess every potential SVP identified and referred to it by Corrections using two qualified mental health

professionals. The Department has a mandatory duty to develop a protocol for those full evaluations and to see to it that the mental health professionals use that assessment protocol to determine if the inmate meets the criteria for an SVP (e.g., does that inmate have a mental disorder and because of that disorder, are they at significant risk of reoffending). The Court of Appeal's decision should be reversed in part and the trial court's order overruling Respondents' demurrer should be reinstated.

Additionally, as this Court and the more recent *Alejo* decision have established, proximate cause is a question of fact which should not be resolved at the pleading stage. (See 75 Cal.App.4th at p. 1192.) The Court of Appeal erroneously followed the *Whitcombe* line of cases which are distinguishable from the case at bar. To the extent there is a split of authority, this Court should resolve the split and adopt the rationale in *Alejo*. Rejection of *Alejo* leaves those harmed by the Department's breach of mandatory duties imposed by the SVPA without an ability to obtain proper redress because no case could proceed past the pleading stage. Ms. Novoa humbly requests that this Court reverse the decision of the Court of Appeal and also find the Department's mandatory duties under the SVPA broader in scope.

DATED: March 13, 2014

Respectfully submitted,

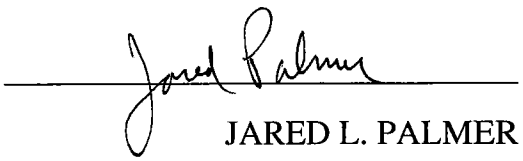
SHOOK, HARDY &
BACON L.L.P.
One Montgomery, Suite
2700
San Francisco, California
94104
415.544.1900

Patrick J. Gregory
Chris Johnson
M. Kevin Underhill
Rachael M. Smith
Jared L. Palmer

Attorneys for Petitioner
Elaina Novoa, Individually
and as Personal
Representative of the
Estate of Alyssa Gomez,
Deceased

STATEMENT OF COMPLIANCE WITH WORD LIMIT

Pursuant to Rule of Court 8.504(d)(1), the attached petition, excluding tables and attachments, contains 7,296 words as counted by the Microsoft Word program used to create it.



JARED L. PALMER

APPENDIX A

RULING ON SUBMITTED MATTER
DEPT. 50
APRIL 15, 2013

NOVOA v. CALIFORNIA DEPT. OF MENTAL HEALTH, ET AL.
CASE NO. BC487936

DEFENDANTS' DEMURRER TO SECOND AMENDED COMPLAINT

I. Background

Plaintiff Elaina Novoa is the surviving sister of Alyssa Gomez, who was 15 years old when Gilton Pitre raped and murdered her in 2007, four days after he had been released from prison. Second Amended Complaint, ¶¶ 1, 5. Pitre was incarcerated for raping his female roommate in 1996. Id., ¶ 11. The Department of Mental Health released Pitre in 2007 based on an "abbreviated paper screening process" called an "MOU review." Id., ¶ 2. Plaintiff alleges that the "MOU review" is an "illegal cost-saving mechanism that circumvents the legally mandated *full* psychiatric evaluation, conducted by *two* qualified professions, required by Jessica's Law." Id. Plaintiff alleges that in fact Pitre was released "without being personally evaluated by *even one* psychiatrist or psychologist to determine the likelihood that he would commit another heinous, predatory offense and whether to recommend him for civil commitment." Id. Plaintiff alleges that had the Department of Mental Health performed the mandatory duties required by Jessica's Law, "Alyssa would be alive today." Id., ¶¶ 3, 40. Plaintiff alleges that the Department of Mental Health has escalated its "paper screening" procedure since Alyssa Gomez's murder, and has improperly released 22,173 more sexually violent predators. Id., ¶ 12.

Plaintiff, the personal representative of Alyssa Gomez and her heirs, has sued the California Department of Mental Health, its Acting Director Cliff Allenby, and its former Director Stephen Mayberg. Id., ¶¶ 5, 44-46. Plaintiff alleges causes of action for (1) breach of mandatory duty under Government Code section 815.6 against the Department of Mental Health, (2) negligence and negligence per se against the Department of Mental Health and Mayberg, and (3) a writ of mandate against the Department of Mental Health and Allenby, requiring the Department of Mental Health to conduct an in-person, "full clinical, psychiatric evaluation by two qualified psychologists and/or psychiatrists" in compliance with Jessica's Law. Defendants demur.

II. Discussion

A. Breach of Mandatory Duty

Government Code section 815.6 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." Cases interpreting Government Code section 815.6 "have noted that it establishes a three-pronged test for determining whether liability may be imposed on a public entity: (1) the enactment in question must impose a mandatory, not discretionary, duty; (2) the enactment must be intended to protect against the kind of risk of injury suffered by the party asserting the statute as the basis of liability; and (3) the breach of duty must be a proximate cause of the plaintiff's injury." In re Groundwater Cases, 154 Cal. App. 4th 659, 688-89 (2007). "The plaintiff must show the injury is 'one of the consequences which the [enacting body] sought to prevent through imposing the alleged mandatory duty.'" Haggis v. City of Los Angeles, 22 Cal. 4th 490, 499 (2000). Whether "a particular statute is intended to impose a mandatory duty, rather than a mere obligation to perform a discretionary function, is a question of statutory interpretation for the courts." People v. Superior Court, 159 Cal. App. 4th 301, 308 (2008).

1. Mandatory Duty

On the first element, defendants argue that the duty imposed by Jessica's Law (the SVPA, or Welf. & Inst. Code § 6601) is discretionary and not mandatory. Not so, at least for the specific provision at issue here. Welfare and Institutions Code section 6601(a) provides that if the "Secretary of the Department of Corrections and Rehabilitation determines that an individual who is in custody under the jurisdiction of the Department of Corrections and Rehabilitation, and who is either serving a determinate prison sentence or whose parole has been revoked, may be a sexually violent predator, the secretary shall . . . refer the person for evaluation in accordance with this section." Welf. & Inst. Code § 6601(a). The Department of Corrections and Rehabilitation and the Board of Parole Hearings are required to screen each person "based on whether the person has committed a sexually violent predatory offense and on a review of the person's social, criminal, and institutional history," in accordance "with a structured screening instrument developed and updated by the State Department of State Hospitals in consultation with the Department of Corrections and Rehabilitation." Id., § 6601(b). " If as a result of this screening it is determined that the person is likely to be a sexually violent predator, the Department of Corrections and Rehabilitation shall refer the person to the State Department of State Hospitals for a full evaluation of whether the person meets the criteria in Section 6600." Id.

If referred to the Department of State Hospitals for a "full evaluation" by the Department of Corrections and Rehabilitation and the Board of Parole Hearings, the Department of State Hospitals "shall evaluate the person in accordance with a standardized assessment protocol, developed and updated by the State Department of State Hospitals, to determine whether the person is a sexually violent predator as defined in this article. The standardized assessment protocol shall require assessment of diagnosable mental disorders, as well as various factors known to be associated with

the risk of reoffense among sex offenders. Risk factors to be considered shall include criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder." Id., § 6601(c). The evaluation under section 6601(c) must be conducted by "two practicing psychiatrists or psychologists, or one practicing psychiatrist and one practicing psychologist, designated by the Director of State Hospitals." Id., § 6601(d) (emphasis added). "If both evaluators concur that the person has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody, the Director of State Hospitals shall forward a request for a petition for commitment under Section 6602 to the county designated in subdivision (i)." Id. If only one concludes the person has a diagnosed mental disorder so that he or she is likely to engage in acts of sexual violence without appropriate treatment and custody, the Director of State Hospitals must arrange for further examination of the person by two more independent professionals. Id., § 6601(e). A petition to request commitment "shall only be filed" if both independent professionals concur that the person meets the criteria for commitment specified in subdivision (d). Id., § 6601(f). If the "Department of State Hospitals determines that the person is a sexually violent predator as defined in this article, the Director of State Hospitals shall forward a request for a petition to be filed for commitment under this article to the county, which may file a petition for commitment in the superior court." Id., § 6601(h). If the "county's designated counsel concurs with the recommendation, a petition for commitment shall be filed in the superior court of the county in which the person was convicted of the offense for which he or she was committed to the jurisdiction of the Department of Corrections and Rehabilitation." Id., § 6601(i).

Plaintiff alleges that defendant breached a mandatory duty based on Welfare and Institutions Code section 6601(d) because only one mental health professional conducted the evaluation. Second Amended Complaint, ¶ 54. Section 6601(d) requires that the evaluation under section 6601(c) be performed by "two practicing psychiatrists or psychologists, or one practicing psychiatrist and one practicing psychologist, designated by the Director of State Hospitals, one or both of whom may be independent professionals as defined in subdivision (g)." Welf. & Inst. Code § 6601(d). The duty to have an evaluation performed by two health professionals is mandatory, and involves no discretion (as to the number of health professional opinions required). See County of Los Angeles v. Superior Court, 209 Cal. App. 4th 543, 549-50 (2012) (mandatory "statutorily commanded act [does] not lend itself to a normative or qualitative debate over whether it was adequately fulfilled")).[1] Contrary to defendants' argument that

1. The Department is allowed to exercise discretion in formulating and applying the "standardized assessment protocol" called for under section 6601(c), which goes to plaintiff's allegation, for instance, that the "full evaluation" requires an "in-person evaluation." Second Amended Complaint, ¶ 53. There is no language in section 6601 requiring an in-person evaluation by the Department; rather the Department is required to develop and update a standardized assessment protocol to determine whether the person is a sexually violent predator, which "shall require assessment of diagnosable

section 6601 does not provide "implementing guidelines," it does. Cf. Guzman v. County of Monterey, 46 Cal. 4th 887, 898 (2009) (courts find mandatory duty only if the enactment "affirmatively imposes the duty and provides implementing guidelines"); Brenneman v. State of California, 208 Cal. App. 3d 812, 818 (1989) (no mandatory duty because statute in that case mandated a parolee "reassessment process" which did not "automatically trigger any specific requirement of administrative action."). Under section 6601, if the Department of Corrections and Rehabilitation and the Board of Parole Hearings made the appropriate finding under section 6601(b), then the Department must use two evaluators to formulate and apply a standardized assessment protocol that considers specific factors under sections 6601(c)-(d). Sections 6601(c)-(d) impose a mandatory duty.

2. Causation

Defendants also challenge the third element, causation. As before, defendants rely principally on Fleming v. State of California, 34 Cal. App. 4th 1378 (1995), where the court held that the police defendants' failure to arrest a suspect (Atwood) was not the cause of an injury later perpetrated by Atwood because "arrest without a period of incarceration would not necessarily have prevented the crime," and because "[i]ncarceration . . . would have involved procedural steps involving the exercise of discretion and thus have broken the causal chain." Fleming, 34 Cal. App. 4th at 1384. Fleming, however, cited State of California v. Superior Court, 150 Cal. App. 3d 848 (1984), where the court found no causation in a mandatory duty case against the real estate commissioner for monies converted by a real estate licensee after the commissioner had failed to investigate a written complaint by a consumer. State of California, 150 Cal. App. 3d at 858-59. Because the statute in that case merely required an investigation, and not any particular action, the commissioner could have exercised his discretion not to impose any penalty, or to impose a penalty that would not have prevented the alleged conversion. Id. The State of California court found that the "causal link is . . . tenuous at best." Id. at 859.

In Alejo v. City of Alhambra, 75 Cal. App. 4th 1180 (1999), the causation question was whether a police officer's negligence in investigating a credible report of child abuse from the child's father, where future abuse was the foreseeable result of the child remaining in his current custody. The Alejo court noted that unlike "police officers responding to a robbery report, welfare workers responding to a child abuse report are governed by statutory standards. Welfare and Institutions Code section 16501,

---

mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders," including the following risk factors: criminal and psychosexual history, type, degree, and duration of sexual deviance, and severity of mental disorder. Any allegation that the Department was required to perform an in-person evaluation is not based on any mandatory duty arising from Welf. & Inst. Code section 6601.

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.'" Id. at 1191; see id. at 1193 ("there is no discretion involved in initiating the investigating and reporting process itself."). The court noted that "[c]onsidering the allegations set forth in the complaint, such as the physical abuse suffered by Alec, his black eye and the drug use by his mother and Gonzalez, it is not difficult to believe the county welfare department would have taken affirmative steps to protect Alec." Id. at 1192. The court held that under those circumstances, "[w]hether or not the department would have done so is not a matter of speculation but a question of fact to be determined at trial through expert testimony" and that the causation question could not be resolved on the pleadings. Id.

Thus, the issue is whether plaintiff has alleged sufficient facts that, assumed true on demurrer, establish causation. In evaluating the first amended complaint, the court, Hon. Joseph Kalin, sustained defendants' prior demurrer with leave to amend based on Fleming because unlike the plaintiff in Alejo, plaintiffs here had not alleged circumstances, apparent at the time Pitre was evaluated by the Department and before the rape and murder of Alyssa Gomez, that would make it "not difficult to believe" that two mental health professionals would have agreed to institute civil commitment proceedings, that county counsel would have instituted proceedings, and that the court ultimately would have civilly committed Pitre. Now, however, plaintiff has added allegations, including that any two competent evaluators would have determined that Pitre should be civilly committed based on the nature of the 1996 rape and attempted murder for which he was incarcerated, that the district attorney would have filed a petition for civil commitment if forwarded and supported by two evaluations, that the case would have gone to trial because these types of cases go to trial in "almost all" cases, and that had Pitre been in the process of civil commitment he could not have killed Alyssa Gomez four days after his release date. Second Amended Complaint, ¶¶ 57-64. Liberally construing the complaint with a view to substantial justice under Code of Civil Procedure section 452, the court concludes that plaintiff has added sufficient factual allegations that sufficiently (although barely) allege causation. See Alejo, 75 Cal. App. 4th at 1192 (fact that the subsequent events involved discretionary acts does not determine question of causation because although the officer would have had discretion in performing the child abuse investigation, the plaintiff alleged facts that, assumed true, showed that an investigation would have led to a report to a county department, which would have taken steps to protect the child, and thereby established causation between the failure to investigate and the plaintiff's injuries).

The defendants' demurrer to the first cause of action is overruled.

B. Negligence & Negligence Per Se

Defendants argue that they do not owe a duty to plaintiff in negligence, and in any event cannot liable for common law negligence. See Guzman, 46 Cal.4th at 897 ("Under the Government Claims Act (Gov.Code, § 810 et seq.), there is no common law tort liability for public entities in California; instead, such liability must be based on statute"). This argument is unpersuasive. Plaintiffs claim negligence per se based on the alleged violation of Welfare and Institutions Code section 6601. Second Amended Complaint, ¶¶ 69-89. As discussed above, Mayberg's duties as Director of the Department of State Hospitals under section sections 6601(d)-(h) are mandatory and therefore give rise to a duty in negligence per se. See Alejo, 75 Cal. App. 4th at 1184-85. As plaintiff alleges in paragraph 96 of the second amended complaint, under Government Code section 815.2 a "public entity is liable for injury proximately caused by an act or omission of an employee of the public entity within the scope of his employment if the act or omission would, apart from this section, have given rise to a cause of action against that employee or his personal representative." The second cause of action is not based on common law negligence. The demurrer to the second cause of action is overruled.

C. Immunity

Defendants also argue that they are immune under Government Code sections 820.2, 845.8, and 856(a).

1. Gov't Code § 820.2

Section 820.2 provides: "Except as otherwise provided by statute, a public employee is not liable for an injury resulting from his act or omission where the act or omission was the result of the exercise of the discretion vested in him, whether or not such discretion be abused." As explained above, this case involves a mandatory duty, not a discretionary one.

2. Gov't Code § 856(a)

Section 856(a) provides: "Neither a public entity nor a public employee acting within the scope of his employment is liable for any injury resulting from determining in accordance with any applicable enactment: [¶] (1) Whether to confine a person for mental illness or addiction. [¶] (2) The terms and conditions of confinement for mental illness or addiction. [and ¶] (3) Whether to parole, grant a leave of absence to, or release a person confined for mental illness or addiction." As plaintiff again correctly argues, section 856(c) contains a carve-out for the immunity conferred by sections 856(a)-(b): "Nothing in this section exonerates a public employee from liability for injury proximately caused by his negligent or wrongful act or omission in carrying out or failing to carry out: [¶] (1) A determination to confine or not to confine a person for mental

illness or addiction. [¶] (2) The terms or conditions of confinement of a person for mental illness or addiction. ¶ [or] (3) A determination to parole, grant a leave of absence to, or release a person confined for mental illness or addiction." As explained above, plaintiff alleges that defendants wrongfully failed to carry out their mandatory duties relating to a determination to continue to confine Pitre. This allegation falls under the exclusion to immunity pursuant to section 856(c).

3. Gov't Code § 845.8

Section 845.8 provides: "Neither a public entity nor a public employee is liable for: [¶] (a) Any injury resulting from determining whether to parole or release a prisoner or from determining the terms and conditions of his parole or release or from determining whether to revoke his parole or release." As plaintiff correctly argues, "[t]he statutes declaring immunity for damages caused by law enforcement failures encompass only discretionary law enforcement activity"; the "immunity statutes do not bar liability for breach of a mandatory law enforcement duty." Alejo, 75 Cal. App. 4th at 1194 (citing Morris v. County of Marin, 18 Cal. 3d 901, 916-17 (1977). As explained above, plaintiff's theories of liability are based on a mandatory duty.

Defendant's argument on reply, citing Caldwell v. Montoya, 10 Cal. 4th 972, 987 n.8, does not dictate a different result. Defendant correctly states that Alejo cited Morris for the rule quoted in the preceding paragraph, and that the Supreme Court disapproved Morris in Caldwell v. Montoya, 10 Cal. 4th 972, 987 n.8. But that does not mean that the rule from Alejo no longer applies. Caldwell held only that public employees have immunity for discretionary acts within the scope of their employment, and that this rule "applies even against liabilities imposed by prohibitory state statutes of general application such as FEHA." Caldwell, 10 Cal. 4th at 986-89. Indeed, Caldwell distinguishes Morris because it "involved a direct claim . . . authorized by section 815.6, which declares that a public entity is liable for certain injuries caused by its failure to discharge a 'mandatory duty.'" Caldwell, 10 Cal. 4th at 987 n.8. Moreover, the Legislative Committee Comment to section 845.8 states that section 845.8 "is a specific application of the discretionary immunity recognized in California cases and in Section 820.2. The extent of the freedom that must be accorded to prisoners for rehabilitative purposes and the nature of the precautions necessary to prevent escape of prisoners are matters that should be determined by the proper public officials unfettered by any fear that their decisions may result in liability." Gov't Code § 845.8, Law Rev. Commission Comment. Thus, Caldwell holds that a public employee is immune from liability for an injury resulting from a discretionary act within the course of his or her employment, as set forth in Government Code section 820.2 (one specific application of which is set forth in section 845.8). Caldwell does not apply because, as explained above, plaintiff's theories of liability are based on a mandatory duty.

D. Writ of Mandate

Finally, defendants argue that plaintiff has failed to state a cause of action for writ of mandate because a writ of mandate can only compel performance of a duty that is purely ministerial, and cannot control an exercise of an official's discretion. See Ridgecrest Charter School v. Sierra Sands, 130 Cal. App. 4th 986, 1002 (2005). As discussed above, section 6601 imposes mandatory and ministerial duties by requiring the Department to use two mental health professionals under sections 6601(c)-(d). The demurrer to the third cause of action is overruled.

III. Disposition

The demurrer is overruled. Defendants are to answer within ten days. The clerk is to give notice.

CERTIFICATE OF SERVICE

I, Patricia Giatis am employed in the City and County of San Francisco, in the State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is Shook, Hardy & Bacon L.L.P., One Montgomery, Suite 2700, San Francisco, California, 94104.

I am readily familiar with Shook, Hardy & Bacon L.L.P.'s practice for collection and processing of documents for mailing with **USPS**, which is to deposit documents the same day as the day of collection in the ordinary course of business.

On March 13, 2014, I served the following document(s):

- **PETITIONER'S OPENING BRIEF ON THE MERITS**

on the parties in this action by placing a true copy thereof in a sealed envelope with the United States Postal Service addressed as follows:

Attorneys for Defendants: State of California, acting by and through the California Department of Mental Health and Cliff Allenby Stephen W. Mayberg

Kamala D. Harris
Attorney General of California
Pamela J. Holmes
Supervising Deputy Attorney General
Paul F. Arentz
Deputy Attorney General
300 South Spring Street, Suite 1702
Los Angeles, CA 90013

Second Appellate District Court Division 3
Clerk of Court
Ronald Reagan State Building
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

Hon. John L. Segal
Los Angeles County Superior Court
111 N. Hill Street, Dept 50
Los Angeles, CA 90012

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this declaration was executed on March 13, 2014, at San Francisco, California.

Patricia Giatis

PATRICIA GIATIS