In the Supreme Court of the State of California

STATE DEPARTMENT OF STATE HOSPITALS, et al.,

Petitioners,

v.

SUPERIOR COURT OF LOS ANGELES COUNTY,

Respondent.

ELAINA NOVOA, Individually and as Personal Representative, etc., Real Party in Interest.

Case No. S 215132

Second Appellate District, Case No. B248603
Los Angeles County Superior Court, Case No. BC487936
Hon. John L. Segal, Judge

ANSWER BRIEF ON THE MERITS

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INTRODUCTION

The Sexually Violent Predator Act (SVPA), Welfare and Institutions Code, sections 6600, et seq., and the subsequently enacted "Jessica's Law," give state agencies the broad discretion to determine which inmates are likely to qualify as sexually violent predators, decide whether to release or parole those inmates, and make recommendations as to which inmates should be the subject of civil commitment proceedings. This entire process is clothed in discretionary immunity, in particular the immunity afforded by Government Code section 845.8, subdivision (a), which protects public entities and their employees from liability for any decision to parole or release a prisoner. The Court of Appeal correctly ruled that, in general, the evaluation process under the SVPA does not create a mandatory duty under Government Code section 815.6.

Without immunity, these agencies, the Department of Corrections and Rehabilitation (CDCR) and Department of State Hospitals (DSH), would be unable to perform their rehabilitative functions. The threat of civil liability would keep the prison doors shut, and no inmates would be paroled. While re-offenses by paroled prisoners do sometimes occur, despite this risk "the Legislature has concluded that the benefits to society from rehabilitative release programs mandate their continuance." (*Thompson v. County of Alameda* (1980) 27 Cal.3d 741, 758.) Although correct in granting Defendants' petition for a writ of mandate, the Court of Appeal erred in ruling that Defendants were not entitled to immunity under Government Code section 845.8, subdivision (a) based on this Court's opinion in *Perez-Torres v. State of California* (2007) 42 Cal.4th 136.

Liability for breach of mandatory duty under Government Code section 815.6 does not arise where the state or its agencies make discretionary policy level as opposed to ministerial operational decisions. The discretionary decision to parole a prisoner represents a compromise of

competing policy considerations "entrusted by statute to a coordinate branch of government, *that compels immunity from judicial reexamination.*" (*Johnson v. State of California* (1968) 69 Cal.2d 782, 795 (emphasis added).) In *Creason v. State Department of Health Services* (1998) 18 Cal.4th 623, and *Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, this Court held that where the law provides immunity for the acts the plaintiff alleges, the failure to fulfill a statutory requirement, however explicit, is not a breach of mandatory duty. The Court should rule likewise here.

Plaintiff and Petitioner Elaina Novoa alleges that in 2007, Defendants and Respondents, the DSH, Stephen Mayberg and Cliff Allenby, improperly recommended that a parolee, Gilton Pitre, who was referred to the DSH by the CDCR for evaluation as a possible sexually violent predator, not be referred for proceedings to determine whether he should be civilly committed as a sexually violent predator pursuant to the SVPA. Tragically, after he was paroled, Pitre raped and murdered the decedent, Alyssa Gomez.

Plaintiff's suit alleges that the Defendants breached a mandatory duty under Government Code section 815.6 because, in evaluating the legal and diagnostic criteria to determine whether Pitre qualified as a sexually violent predator, the DSH assigned one mental health professional rather than two to review Pitre's case. Plaintiff alleges the SVPA required the DSH to conduct a "full evaluation" in all cases referred to it by the CDCR by assigning the review to two evaluators who would have to concur for the DSH to recommend civil confinement. Instead, the DSH created an intermediate level of administrative and clinical review whereby a single licensed psychologist would screen and eliminate those cases which did not sufficiently meet the criteria for a full evaluation under the SVPA. The SVPA did not explicitly prohibit this intermediate level of review and the

DSH did not breach a mandatory duty in implementing it since the overall duty imposed on the DSH by the SVPA is discretionary, not mandatory. The Court of Appeal therefore erred in finding that a requirement to take certain procedural steps in the process of making a discretionary determination breached a mandatory duty.

Defendants also do not make the ultimate decision to confine a person as a sexually violent predator. If the DSH finds that an inmate meets the criteria for civil confinement under the SVPA, the DSH recommends to the county counsel that a civil commitment petition be filed. The person will be committed as a sexually violent predator only if the county counsel agrees with that recommendation and files a petition, the superior court finds it to be supported by probable cause, and a jury finds the elements of the petition proven beyond a reasonable doubt. Each of these discretionary hurdles that follow the DSH's recommendation break the chain of proximate causation, as the Court of Appeal correctly held. The decision of the Court of Appeal should be affirmed on those grounds.

To the extent this Court finds that Plaintiff has alleged sufficient facts to establish proximate cause, the Court should alternatively affirm the ruling on the grounds that Defendants are protected by immunity, and that Plaintiff has not pled a cause of action for breach of mandatory duty.

STATEMENT OF FACTS

Plaintiff Elaina Novoa is the personal representative of the estate of her deceased sister, Alyssa Gomez. (Exhibit 9, at p. 138.)[1] According to Plaintiff's Second Amended Complaint (SAC), in 2007, an inmate named Gilton Pitre was paroled by the CDCR. (Exhibit 9, at p. 139.) Four days

[1] References herein are to the Exhibits submitted in support of the Petition for Writ of Mandate, etc. filed in the Court of Appeal.

after he was paroled, Pitre raped and murdered the decedent, then aged 15. (Exhibit 9, at p. 146.)

Plaintiff alleges that Pitre, a "known sexual predator," should have been screened before he was paroled to determine whether he should be civilly committed pursuant to the SVPA, Welfare and Institutions Code sections 6600 et seq. (Exhibit 9, at p. 146.) Under the framework set forth in the SVPA, the CDCR was required to screen inmates like Pitre who are eligible for parole and refer those who potentially qualified as sexually violent predators to the DSH, for a "full, clinical evaluation by two mental health professionals." (Exhibit 9, at p. 140.) The CDCR was required to conduct a preliminary screen based on the inmate's history and offense to determine if the inmate was likely to be a sexually violent predator. (Exhibit 9, at p. 142.) If the CDCR identified the inmate as a potential sexually violent predator, he was to be referred to the DSH to conduct a "full evaluation" to determine whether the inmate met the criteria to be committed as a sexually violent predator under the statute. (Exhibit 9, p. 142.)

Plaintiff's SAC alleges that the SVPA required the DSH to conduct a "full evaluation" on all inmates referred to it by the CDCR by appointing two practicing psychiatrists or psychologists, or one practicing psychiatrist and one practicing psychologist. Both evaluators must concur for the DSH to refer the case for civil commitment proceedings. (Exhibit 9, at p. 143.) If both evaluators do not agree, the inmate must be evaluated by a second set of psychologists or psychiatrists who are "independent professionals," i.e., not state government employees. (Exhibit 9, at p. 143.) In addition, to reviewing the inmate's complete records, Plaintiff alleges that according to a standardized assessment protocol, "if the offender is willing," both professional evaluators must conduct an "in-person examination" of the potential sexually violent predator before diagnosing the offender with a

qualifying mental disorder. (Exhibit 9, p. 142.) Plaintiff concedes, however, that "[a] potential SVP cannot be compelled to participate in a clinical evaluation against his will . . ." (Exhibit 9, at p. 143.)

According to the SAC, the DSH, did not conduct a "full evaluation" of Pitre's case before he was released. Instead, the DSH conducted a preliminary review called a "Memorandum of Understanding" (MOU) screening, previously called a "Level II screening."[2] (Exhibit 9, at p. 144.) This "intermediate level of review" screened cases sent by the CDCR to determine whether a "full evaluation" was required. (Exhibit 9, at pp. 144-145.) This protocol formed one of three levels of review at the DSH. All cases sent to the DSH by the CDCR were subject to a "Level I" screening. Those cases not closed at Level I, were referred to "Level II." A licensed psychologist conducted all Level II screenings and in some cases could close a case with a Level II evaluation, or refer the case on for a Level III evaluation. (Exhibit 9, at p. 168.) The Level II evaluation consisted of a review of available records to provide an opinion whether the inmate met the criteria for a sexually violent predator under the applicable law, a "risk assessment based on that review, and a preliminary clinical diagnosis." (*Ibid.*) The Level II evaluation did not involve an interview with the inmate, but relied instead on the inmate's score on an actuarial risk assessment instrument called the "Static-99" as well as a "review of additional empirically derived risk factors that may increase or decrease the inmate's overall risk." (*Ibid.*)

Plaintiff alleges that in 2007, Pitre was deemed "clear" for release by the DSH pursuant to the Level II protocol and paroled by the CDCR.

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[2] Petitioner alleges that in 2011, the DSH ceased using the Level II screening protocol, and began using the MOU screening process, which Petitioner alleges is the same as the Level II screening.

(Exhibit 9, at p. 146.) Pitre had been imprisoned eleven years earlier for assaulting and raping his female roommate. (Exhibit, at p. 139.) Aside from the prior rape conviction, the SAC does not identify any other characteristics that would have qualified Pitre as a sexually violent predator.[3] The SAC infers, but does not expressly allege, that the CDCR determined that Pitre's case warranted review by the DSH as a potential sexually violent predator. The SAC likewise infers, but does not expressly allege, that Pitre's case underwent the Level I and Level II screenings at the DSH to determine whether he qualified as a sexually violent predator, but was determined by the evaluator to not warrant further review.[4] After he was released from prison, Pitre raped and killed the decedent. He is now serving a life sentence for rape and murder. (Exhibit 9, at p. 146.)

The SAC alleges that, had Pitre not been released, the decedent would be alive today. (Exhibit 9, at p. 147.) According to the SAC, upon receiving a referral from the DSH with two positive evaluations, the district attorney would have filed a petition for civil commitment, as it has done in

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[3] The Level II screening guidelines list the following criteria to be considered in assessing a risk of re-offense:

- Onset of offending
- Duration (total time span)
- Persistence
- Time since most recent offense
- Lack of deterrence by consequences
- Level of violence used
- Use of weapons
- Sadistic features/sexual sadism
- Other sexual deviancy.

(Exhibit 9, at pp. 168-169.)

[4] The SAC alleges that in 2007, Pitre was "deemed 'clear' for release under the current DMH paper screening." (Exhibit 9, p. 146.) Until 2011, according to the SAC, the screening procedure included the Level II screening, not the MOU screening.

every case with two positive evaluations, and "almost all" cases like Pitre's go to trial. (Exhibit 9, pp. 152-153.)

PROCEDURAL HISTORY

On July 6, 2012, Plaintiff filed a complaint in the Los Angeles County Superior Court against Defendants and Respondents DSH and Allenby, alleging causes of action for: (1) breach of mandatory duty under Government Code section 815.6, (2) wrongful death, (3) survivorship under Code of Civil Procedure section 377.30, and (4) negligence and negligence per se. In addition, Plaintiff sought a writ of mandate under Code of Civil Procedure section 1085, compelling the Defendants to comply with their duties under the SVPA. (Exhibit 1.)

On August 12, 2012, Defendants filed a demurrer to the complaint. (Exhibit 2.) Plaintiff voluntarily amended the complaint on September 11, 2012, to include Defendant Mayberg, and alleged causes of action for: (1) breach of mandatory duty, (2) negligence per se, and (3) writ of mandate. (Exhibits 3, 4.)

On October 30, 2012, the Superior Court sustained Defendants' demurrer to Plaintiff's first amended complaint with leave to amend on the grounds that plaintiff had not sufficiently alleged the element of causation. (Exhibit 8.)

On January 7, 2013, Plaintiff filed a SAC, alleging again causes of action for: (1) breach of mandatory duty, (2) negligence per se, and (3) writ of mandate. On February 8, 2013, Defendants again filed a demurrer to the SAC, contending that Plaintiff had not sufficiently alleged a cause of action for breach of mandatory duty, failed to allege facts showing proximate cause, and that the SAC was barred by Government Code section 845.8, subdivision (a). (Exhibit 10.)

On April 15, 2013, the Superior Court overruled Defendants' demurrer. The court ruled that Section 845.8 does not apply where the

theory of liability is based on breach of a mandatory duty. The Superior Court further ruled that Plaintiff had pled sufficient facts to establish a cause of action for breach of mandatory duty, and that plaintiff's injuries were proximately caused by the failure to conduct the "full evaluation" required by the SVPA. (Exhibit 16.)

On May 10, 2013, Defendants filed a petition for writ of mandate, prohibition, supersedeas, or other appropriate relief with the Court of Appeal. Defendants contended the Superior Court erred in overruling the demurrer on the grounds that Plaintiff had not pled facts sufficient to support a cause of action for breach of mandatory duty pursuant to Government Code section 815.6, and that due to the multiple discretionary hurdles that existed between the alleged failure to fully evaluate Pitre and the decedent's death, Plaintiff could not establish causation as a matter of law. (Petition for Writ of Mandate, etc., p. 4.) Defendants further contended that Government Code section 845.8, subdivision (a) immunized the state and its employees for any injury resulting from determining whether to parole or release a prisoner.

On May 22, 2013, the Court of Appeal issued an order to show cause and set the matter for oral argument. Following the submission of opposition and reply briefs, the case was argued and submitted. On October 30, 2013, the Court of Appeal held in a published opinion, *State Department of State Hospitals v. Superior Court* (2013) 220 Cal.App.4th 1503, that the DSH did not have a mandatory duty to conduct a "full evaluation" under the SVPA. Since that obligation requires a "normative or qualitative assessment" in terms of whether it has been fulfilled, the DSH's obligation to conduct the full evaluation was discretionary, not mandatory. (*Id.* at p. 1518.) Although Plaintiff alleged that the DSH's "paper screening" of potential parolees was inadequate, and that the SVPA required an "in person" screening as part of the "full evaluation," the Court

of Appeal rejected this contention, finding that nothing in the SVPA required such an evaluation. (*Id.* at p. 1519.) Insofar as the SVPA required Defendants to designate two psychiatrists or two psychologists to conduct the full evaluation, the Court of Appeal found this to be a mandatory duty that was sufficiently alleged in the Complaint. (*Id.* at p. 1520.)

The Court of Appeal further held, however, that Plaintiff had not sufficiently alleged that breach of the mandatory duty to designate two psychologists or psychiatrists to conduct the evaluation proximately caused the Plaintiff's damages. The court examined a line of cases, including *Whitcombe v. County of Yolo* (1977) 73 Cal.App.3d 698, *Fleming v. State of California* (1995) 34 Cal.App.4th 1378, and *State of California v. Superior Court (Perry)* (1984) 150 Cal.App.3d 848, and concluded that Defendants' alleged breach of a mandatory duty to designate two evaluators was not the proximate cause of the decedent's death.

Accordingly, the court sustained the petition for writ of mandate as to Plaintiff's causes of action for breach of mandatory duty and negligence per se. This petition for review followed.

ARGUMENT

I. DEFENDANTS DID NOT BREACH A MANDATORY DUTY UNDER GOVERNMENT CODE SECTION 815.6.

The SVPA does not create a mandatory duty within the meaning of Government Code section 815.6. The authority given to the CDCR and DSH to recommend or not recommend civil commitment proceedings is discretionary, and furthermore is immunized pursuant to Government Code section 845.8, subdivision (a). This Court has previously looked to whether the acts complained of by the plaintiff are protected by immunity in terms of evaluating whether a mandatory duty exists. Even though the SVPA provides that the DSH "shall" conduct a "full evaluation" in all cases referred to it by the CDCR, this language is not dispositive. The evaluation

itself is a discretionary act. A requirement to take certain procedural steps in the process of making a discretionary determination cannot form the basis for a mandatory duty. The SAC therefore fails to state a cause of action for either breach of mandatory duty or negligence per se.

A. The Entire Screening Process For Parolees Under the SVPA is Discretionary.

The SVPA sets forth a statutory scheme giving discretion to state agencies in determining whether to recommend civil confinement for a parolee as a sexually violent predator. Although certain steps within the process are required, overall the legislation vests considerable discretion in the state agencies that implement it.

Welfare and Institutions Code, section 6601, subdivision (a)(1), provides that "*[w]henever* the Secretary of the Department of Corrections and Rehabilitation determines" that an inmate about to be released from prison "may be a sexually violent predator" he or she may refer that person to be screened by the CDCR and Board of Parole Hearings to determine whether "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" the person "is likely to be a sexually violent predator" as defined by the SVPA. (Emphasis added).

"*If* as a result of this screening" the CDCR or Board of Parole Hearings determines that the person is likely to be a sexually violent predator, the CDCR "shall refer" the person to the DSH for a "full evaluation" of whether the person meets the criteria of a sexually violent predator within the meaning of the statute. (Welf. & Inst. Code, § 6601, subd. (b) (emphasis added).)

The "full evaluation" must be conducted in accordance with a "standardized assessment protocol, developed and updated by the State Department of Mental Health, to determine whether the person is a sexually

violent predator." (Welf. & Inst. Code, § 6601, subd. (c).) "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." (*Ibid.*)

The "full evaluation" must be conducted by "two practicing psychiatrists or psychologists, or one practicing psychiatrist and one practicing psychologist, designated by the Director of Mental Health." (Welf. & Inst. Code, § 6601, subd. (d).) If both evaluators concur that the person meets the criteria as a sexually violent predator, the Director of Mental Health "shall" forward a request to the county counsel where the person was convicted that a civil commitment petition be filed. (*Ibid.*) If both evaluators do not concur that the person meets criteria, the Director of Mental Health "shall arrange for further examination of the person by two independent professionals" who are not state government employees and who meet certain professional requirements. (Welf. & Inst. Code, § 6601, subd. (e).) If both independent evaluators concur that the person meets criteria as a sexually violent predator, the case is referred to the county's designated counsel. "If the county's designated counsel concurs" with the Director of Mental Health's recommendation, he or she shall file a civil commitment petition. (Welf. & Inst. Code, § 6601, subd. (i).) The petition must be filed while the inmate is in lawful custody, either before his scheduled release date, or during a 45-day hold based on a showing of "good cause." (*In re Lucas* (2012) 53 Cal.4th 839, 846.)

Once a civil commitment petition is filed, the superior court must hold a hearing to determine if the petition is supported by probable cause. (Welf. & Inst. Code, § 6602, subd. (a).) If the court determines that there is probable cause, both the petitioner and the alleged sexually violent predator

have a right to demand trial by jury. (Welf. & Inst. Code, § 6603, subds. (a) and (b).) The trier of fact must determine "beyond a reasonable doubt" that the person meets the criteria for a sexually violent predator. (Welf. & Inst. Code, § 6604.)

The steps in seeking civil commitment therefore vest considerable discretion in the State and its agencies at every turn. Although the DSH must designate two mental health professionals to conduct the "full evaluation," there is no requirement that they find the person they evaluate to be a sexually violent predator. While the SVPA specifies that the evaluation be conducted according to a protocol, the law makes no specific mandate as to the form of the protocol, beyond requiring that it include an "assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense . . ." (Welf. & Inst. Code, § 6601, subd. (c).) Indeed, the protocol itself states that it involves "the exercise of independent, professional clinical judgment by the licensed psychiatrist or licensed psychologist." (Exhibit 9, at p. 160.) There is no requirement that the county counsel or district attorney file a petition in all cases referred pursuant to the SVPA. A petition need be filed only "[i]f" he or she concurs with the recommendation.

On this discretionary framework, it was an error for the Court of Appeal to engraft a finding of mandatory duty onto the SVPA with respect to only one part of the process – the designation of two mental health professionals to conduct the "full evaluation."

B. The "Full Evaluation" Itself is Discretionary And Therefore Not a Mandatory Duty Under Government Code Section 815.6.

Plaintiff contends the DSH had a mandatory duty to perform a "full evaluation" on every inmate identified by the CDCR as likely to be a sexually violent predator. (Petitioner's Opening Brief (POB), p. 7.)

However, since the "full evaluation" itself, whether conducted by one evaluator or two, is completely discretionary, it cannot form the basis for a cause of action under Government Code section 815.6. It is a duty to investigate, rather than a duty to take action.

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.

In *Guzman v. County of Monterey* (2009) 46 Cal.4th 887, this Court set forth the elements of liability under Government Code section 815.6 as follows:

> First and foremost, application of section 815.6 requires that the enactment at issue 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. It is not enough, moreover, that the public entity or officer have been under an obligation to perform a function *if the function itself involves the exercise of discretion.*

(*Id.* at p. 898 (emphasis added) (citations omitted).)

> Second, but equally important, section 815.6 requires that the mandatory duty be 'designed' to protect against the particular kind of injury the plaintiff suffered. The plaintiff must show the injury is '"one of the consequences which the [enacting body] sought to prevent through imposing the alleged mandatory duty."'

(*Guzman, supra*, at p. 898.) The issue of whether a particular statute imposes a mandatory duty is a question of statutory interpretation. (*Ibid.*)

Plaintiff contends that Welfare and Institutions Code section 6601 creates a very specific "mandatory duty" that goes far beyond what the Court of Appeal held and is not supported by the statute. She claims the

DSH 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." Plaintiff argues that the DSH complied with the first, but not the second or third duties. (POB, p. 11.) Plaintiff concedes the DSH has "developed a protocol for full evaluation,"[5] (POB, p. 11), but then argues that the Court of Appeal erred in holding that since the DSH has discretion in formulating the standard assessment protocol, "this precludes a finding there is a mandatory duty to conduct the evaluation at all." (POB, p. 13.)

The Court of Appeal ruled that, "[w]hether defendants satisfied their obligation under the SVPA to conduct a full evaluation necessarily requires a normative or qualitative assessment. The general obligation to conduct a full evaluation therefore is not mandatory for purposes of Government Code section 815.6." (*State Department of State Hospitals, supra,* at p. 1518.) Plaintiff contends that the SVPA's mandate which requires that the DSH conduct the evaluation in "accordance with a standardized assessment protocol" pursuant to Welfare and Institutions Code section 6601, subdivisions (a) through (d) constitutes mandatory language sufficient to require the DSH to develop a protocol and assign two evaluators to apply it in conducting the "full evaluation." (POB, p. 14.) These general standards are, however, the same type of general discretion vesting language this Court has in prior cases held do not impose a mandatory duty.

In *Guzman, supra*, 46 Cal.4th 887, the Court held that regulations which required that the county monitor water quality and adopt standards

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[5] A copy of what Plaintiff alleges is the DSH's Standardized Assessment Protocol is attached to her SAC. (Exhibit 9, at pp. 160-165.)

for drinking water contaminants described a discretionary function and did not create a mandatory duty. The plaintiffs alleged that the county failed to perform certain duties under the Safe Water Drinking Act, which they alleged would have prevented them from drinking contaminated water. (*Id.* at p. 893.) They argued the county had a duty to respond to water monitoring reports, which implied a duty to notify residents of any reported water contamination. (*Ibid.*) Like the protocol at issue here, the plaintiffs in *Guzman* alleged that the county had a duty not only to monitor the reports, but "establish a system to assure the data submitted by water suppliers be reviewed for compliance." (*Id.* at p. 896.) The Court of Appeal held that although the operator of the water system had the express duty to notify consumers of any water contamination, the county as the primary agency had an implied mandatory duty to notify consumers. (*Id.* at p. 902.) This Court disagreed, holding that although the county was required to review and respond to reports of water contamination, it did not follow that the county had a mandatory duty to instruct the water system to notify the affected consumers. (*Id.* at p. 904.) The duty to investigate did not impose a mandatory duty to take action. (*Ibid.* (citing *Brenneman v. State of California* (1989) 208 Cal.App.3d 812, 818).) The county's response to a report of contamination could also be "varied." It could cite or fine the noncomplying water system, conduct hearings, or use the district attorney to initiate a court enforcement action. "These various options underscore that a local primary agency has discretionary authority in this context." (*Guzman, supra,* at p. 906.)

They duty to assess the potential dangerousness of a parolee is not a mandatory duty under Government Code section 815.6, but rather a discretionary duty to investigate. In *Brenneman, supra,* 208 Cal.App.3d 812, the court held that the duty to assess the "risks and needs" of a parolee did not trigger a mandatory duty because that process did not trigger any

specific administrative action, and the state's decision how to use that data was clearly discretionary. (*Ibid.*) Importantly, the enactment in that case did not require a specific administrative action to occur as a result of the evaluation; that is, potential subsequent measures to be taken were discretionary. (*Ibid.*) Indeed, the court noted that:

> The reassessment process does not automatically trigger any specific requirement of administrative action, let alone action that would have prevented [the parolee's] attack on [decedent]. The state's decision as to how data gained in the reassessment should affect supervision of the parolee is clearly discretionary . . . The duty to conduct a reassessment is essentially a duty to investigate. A "mandatory statutory duty to 'investigate' . . . may not reasonably be read as imposing a mandatory duty . . . to *take action* . . . ."

(*Ibid.* (citing *State of California, supra,* 150 Cal.App.3d at p. 858 (emphasis in original)).)

Likewise, this Court in *Haggis, supra,* 22 Cal.4th 490, treated the duty of a municipality to assess and record substandard soil conditions as a discretionary rather than mandatory duty. The plaintiff sued the City of Los Angeles for damages sustained to his home in an earthquake. The plaintiff alleged the city breached a mandatory duty to record a certificate of substandard condition. Had the city recorded the required notice, the plaintiff alleged he would not have purchased the property or suffered the ensuing damage. (*Id.* at p. 501.) The Municipal Code section at issue, like the SVPA, gave the city officer "the discretion 'to initially conduct an inspection and then to make the expert determination whether land was unstable to the degree that a notice should be issued and a certificate should be recorded." (*Id.* at p. 502.) In *Haggis*, the municipal ordinances "read as a whole, provide[d] the City with such significant discretion to issue or withhold permits as to make Government Code section 815.6 in applicable." (*Id.* at p. 992.) The code sections at issue "explicitly call[ed]

upon the judgment, expertise and discretion" of the City's staff to conduct the evaluations and therefore did not create a mandatory duty within the meaning of Government Code section 815.6. (*Id.* at p. 993.)

Likewise, in *Creason, supra*, 18 Cal.4th 623, the plaintiff sued for damages allegedly arising from the state's failure to diagnose and report timely that she was suffering from congenital hypothyroidism. (*Id.* at p. 626.) The plaintiff alleged that the state owed a mandatory duty under the Hereditary Disorders Act to test newborn children for certain genetic and congenital disorders, including hypothyroidism, that the State Department of Health services was required to conduct such tests "in accordance with accepted medical practices" and that such tests must be "accurate, provide maximum information, and . . . provide results that are subject to minimum misinterpretation." (*Id.* at p. 629.) The State argued that, under the Hereditary Disorders Act, the formulation of standards for testing and reporting test results is a discretionary function. (*Id.* at p. 631.) This Court agreed. Although the statutes contained mandatory language, the statutory scheme gave the state substantial discretion in formulating, and reporting, appropriate testing standards for hypothyroidism. (*Id.* at p. 631.) Like the SVPA testing protocol at issue here, which gives the CDCR discretion to determine initially which parolee "may" likely be a sexually violent predator, and gives full discretion to the evaluators appointed by the DSH to make that determination, "the Legislature left the selection of necessary and appropriate testing and reporting standards to the sound discretion of the Director, guided by certain 'principles' that the Director should consider in drafting those standards." (*Id.* at p. 632.)

The duty of a child welfare worker to assess the risks to a child is not a mandatory duty either. In *Ortega v. Sacramento County Dept. of Health and Human Services* (2008) 161 Cal.App.4th 713, the plaintiff argued the defendants breached a mandatory duty contained in a regulation which

stated that a social worker investigating a referral to Child Welfare Services "shall determine the potential for or the existence of any condition which places the child . . . at risk." In finding that this language did not impose a mandatory duty, the court explained that Government Code section 815.6 applies only to duties which are "manifestly ministerial, because they amount only to obedience to orders which leave the officer no choice. . . . Such actions have been found nondiscretionary, and thus not immunized, because they entail the fulfillment of enacted requirements." (*Id.* at p. 728.) The language at issue in *Ortega*, however, merely required the defendants to conduct an investigation and determine the risk to the child. "Neither of these are ministerial duties, and both involve a formidable amount of discretion." (*Ibid.*)

In *De Villers v. County of San Diego* (2007) 156 Cal.App.4th 238, 259, the plaintiff sued for wrongful death, alleging the county breached a mandatory duty to guard against the theft of drugs which were subsequently used to murder the decedent. The court held that provisions of the Code of Federal Regulations that require "effective" controls to "guard against theft" did not create a mandatory duty, but constituted mere "'general guidelines' that afford discretion on how to design and implement safeguards against theft." "[W]hen the statutorily prescribed act involves debatable issues over whether the steps taken by the entity *adequately* fulfilled its obligation, we believe the act necessarily embodies discretionary determinations by the agency regarding how best to fulfill the mandate." (*Id.* at pp. 260-261 (emphasis in original).)

Like the standards described in the cases above, the SVPA gives the CDCR and DSH discretion to determine whether a parolee "may" be a sexually violent predator. This process is discretionary every step of the way. The decision whether to forward the inmate's case for a "full evaluation" by the DSH is a discretionary decision made by the CDCR.

(Welf. & Inst. Code, § 6601, subd. (b).) Once the CDCR determines that a parolee is likely to be a sexually violent predator, the person is referred to the DSH for a full evaluation of whether the person meets the criteria in Welfare and Institutions Code section 6600. The "full evaluation" by the two mental health professionals appointed by the DSH to conduct the "full evaluation" is also discretionary, which the SAC acknowledges. (Welf. & Inst. Code, § 6601, subds. (c), (e); Exhibit 9, at p. 160.) The DSH is granted broad discretion to make this determination utilizing professional judgment, as well as tests, instruments and risk factors applicable to the particular patient on a case by case basis. (Cal. Code Regs., tit. 9, § 4005.)

The statute does not require that the evaluators use any particular method of assessment, except that the assessment be conducted in accordance with a "standardized protocol." This assessment includes an "assessment of diagnosable mental disorders, as well as various factors known to be associated with the risk of reoffense among sex offenders." (Welf. & Inst. Code, § 6601, subd. (c).) Even though Welfare and Institutions Code section 6601, subdivision (d) provides that the evaluation conducted in Section 6601, subdivision (c) shall be conducted by two practicing psychiatrists or psychologists, or one practicing psychiatrist and one practicing psychologist, the statute does not state how those duties should be implemented. Whether the DSH properly fulfilled these duties is open to "a normative or qualitative debate over whether it was adequately fulfilled" and therefore does not support a cause of action for breach of a mandatory duty under Government Code section 815.6.

The DSH's duty is further not "mandatory" within the meaning of Government Code section 815.6 according to *Guzman* and *Brenneman* since no mandatory duty to take action follows from the "full evaluation" conducted pursuant to Welfare and Institutions Code section 6601, subdivision (c). The statute does not establish a mandatory duty to take

action, only to conduct an assessment, after which the evaluators have discretion whether to conclude that the individual may likely be a sexually violent predator, and if both evaluators concur, the DSH will refer the case to the District Attorney to commence a civil commitment petition. But, the evaluators are not required to so conclude.

Plaintiff contends that the express language of the SVPA requires that the DSH conduct a full evaluation in every case referred to it by the CDCR. While the word "shall" may indicate a mandatory duty, it is not dispositive. (*Ibid.*) Other factors may indicate that apparently obligatory language "was not intended to foreclose a government entity's or officer's exercise of discretion." (*Id.* at p. 899.) The Legislature's use of mandatory language is not the dispositive criteria. Instead, the courts have found the enactment created a mandatory duty under Government Code section 815.6 "only where the statutorily commanded act did not lend itself to a normative or qualitative debate over whether it was adequately fulfilled." (*Id.* at pp. 549-550 (emphasis in original).) .) "The key question is whether the obligation involves an exercise of discretion." (*County of Los Angeles v. Superior Court* (2012) 209 Cal.App.4th 543, 549.)

Plaintiff further contends that instead of applying the standardized assessment protocol, the DSH conducts a cursory partial record review. In the Court of Appeal, Plaintiff argued the SVPA required an "in-person" evaluation. The Court of Appeal correctly concluded that "[n]othing in the SVPA specifically requires such an evaluation." "Whether defendants conduct an in-person evaluation is a basic policy decision within their sound discretion. Defendants therefore did not breach a mandatory duty by allegedly conducting a 'paper' evaluation instead of an in-person evaluation." (*State Department of State Hospitals, supra*, 220 Cal.App.4th at p. 1519.) The Court of Appeal further appropriately refused to consider a 2008 legislative finding Plaintiff contended required "clinical"

evaluations, noting it was not applicable to the 2007 version of the SVPA at issue here. (*Ibid.*) The "mandatory nature of the duty must be phrased in explicit and forceful language." (*Guzman, supra*, 46 Cal.4th at p. 894 (quoting *In re Groundwater Cases* (2007) 154 Cal.App.4th 659, 689).) The SVPA does not require that the DSH conduct any "in person" evaluation of a parolee. Here, again, Plaintiff fails to identify any such requirement in the SVPA.

Accordingly, the "full evaluation" itself is a discretionary evaluation and cannot be the basis of a mandatory duty under Government Code section 815.6.

C. The Intermediate Level of Review Used by the DSH to Screen Cases Referred by the CDCR and Select Those Eligible For a Full Evaluation Did Not Breach a Mandatory Duty.

Plaintiff alleges that Defendants breached a mandatory duty to assign two evaluators to conduct the "full evaluation" required by Welfare and Institutions Code section 6601, subdivision (d), instead creating an intermediate screening process using a single psychologist to determine which cases qualified for a full evaluation. (Exhibit 9, at p. 143.) Although the SVPA states that two evaluators "shall" be used, such language is not dispositive as to whether there is a mandatory duty. (*Guzman, supra*, at p. 898-899.) When read in the context of a discretionary statutory framework, the designation of a single reviewer to conduct the Level II screening prior to conducting a full evaluation does not constitute breach of a mandatory duty.

Nothing in the SVPA requires the CDCR or DSH to conduct a "full evaluation" in order to determine that an inmate would *not* qualify as a sexually violent predator. The intent of the SVPA is to require a full evaluation, with the concurrence of two mental health professionals, in order to support a request for a civil commitment petition which is

forwarded to the county counsel who determines whether to concur in the recommendation. The superior court thereafter issues an order finding probable cause to conduct a full adversarial hearing to determine whether the inmate is a sexually violent predator. (Welf. & Inst. Code, § 6601, subd. (k); *People v. Badura* (2002) 95 Cal.App.4th 1218, 1222.) These statutes constitute "an unambiguous statutory prefiling requirement 'that a petition for commitment or recommitment may not be filed unless two evaluators, appointed under the procedures specified in section 6601, subdivisions (d) and (e), have concurred that the person currently meets the criteria for commitment under the SVPA.'" (*Reilly v. Superior Court* (2013) 57 Cal.4th 641, 647.) "Where this initial requirement is not met, the commitment may not proceed." (*Ibid.*)

The purpose of having two licensed health professionals concur in the recommendation to file a petition is to support the finding of probable cause to hold a hearing. However, the converse is not true. A "full evaluation" and the concurrence of two licensed professionals following an "in-person" assessment is not required in order to determine that an inmate does *not* qualify as a sexually violent predator and that the inmate should therefore be released. Indeed, the SVPA contemplates that the initial screening to make such a determination is made by the CDCR according to a screening instrument developed by the DSH. The CDCR screens parolees before referring them to the DSH and may release them at that stage without the full evaluation provided for in Welfare and Institutions Code, section 6601 subdivision (c) if the CDCR determines the parolee is not likely to be a sexually violent predator. (Welf. & Inst. Code, § 6601, subd. (b).) But, a "full evaluation" is not required at this stage, and if the CDCR determines that the inmate does not meet the qualifications, the inmate does not proceed to the next stage of the screening by the DSH and is released. (Welf. & Inst. Code, § 6601, subd. (b).) Thus, the SVPA does not require a

"full evaluation" in order to *release* an inmate. A "full evaluation" is required only to support the decision to forward a request for a civil commitment petition to the county counsel. (Welf. & Inst. Code, § 6601, subd. (d).) Since no statutory language mandates a full evaluation before releasing a parolee, it is not a mandatory duty that can create liability under Government Code section 815.6.

D. Since the Legislature Has Chosen to Immunize Decisions to Parole or Release a Prisoner, The Alleged Improper Evaluation of a Parolee Under the SVPA Cannot Give Rise to a Cause of Action for Breach of Mandatory Duty.

This Court has also looked to whether statutory immunity has been provided for the acts the plaintiff alleges breached a mandatory duty in deciding whether the defendant's duties under the statute were mandatory or discretionary. (*Guzman*, *supra*, at p. 899, fn. 7.) The entire statutory scheme set forth in the SVPA, as well as the specific statutory immunity provided by Government Code section 845.8, subdivision (a), shows the Court of Appeal erred in ruling that only one piece of law creates a mandatory duty under Government Code section 815.6.

In *Johnson*, *supra,* 69 Cal.2d 782, the Court held that, "section 845.8 of the Government Code specifically provides for *immunity with respect to the general decision to parole a prisoner*." (*Id.* at p. 795, fn. 9 (emphasis added).) The Court distinguished between policy level decisions to parole or release a prisoner which create a risk to "each member of the general public" that the state's rehabilitative efforts have failed, versus those whose "direct and continuous contact with the parolee drastically increases the dangers to them." (*Id.* at p. 799.) Based on this distinction, only negligent actions "subsequent" to the decision to parole or release a prisoner, such as failure to warn a specific person of the dangers posed by the parolee, will result in liability. (*Id.* at pp. 795-796.)

In *Creason, supra*, 18 Cal.4th 623, the Court found no mandatory duty to devise accurate testing and reporting standards for hypothyroidism since the State was protected from liability by Government Code section 855.6, which provided a specific immunity for injuries caused by failure to make a physical or mental examination, except for the purpose of diagnosis or treatment. (*Creason, supra*, at pp. 635-636.)

The Court concluded:

> We find it highly unlikely the Legislature intended that an asserted breach of the guiding principles or policies would afford a basis for state liability under Government Code section 815.6. The drafting of rules, regulations, and standards by the government agency charged with that responsibility would unquestionably fall in the category of discretionary "basic policy decisions" for which governmental agencies usually are insulated from civil liability.

(*Ibid.* (citing *Johnson, supra*, 69 Cal.2d at pp. 793-794).) Furthermore, although the Court pointed out that the question of state *immunity* from suit is ordinarily a separate issue, the immunity statutes "are instructive in determining whether 'mandatory acts' liability should be imposed." (*Id.* at p. 633.)

> As we stated in *Johnson*, this immunity is usually extended to the "planning" rather than the "operational" levels of decisionmaking, i.e., "those areas of quasi-legislative policy-making which are sufficiently sensitive to justify a blanket rule that courts will not entertain a tort action alleging that careless conduct contributed to the governmental decision."

(*Ibid.* (quoting *Johnson, supra*, 69 Cal.2d at p. 794).) The standards upon which the plaintiff's claim was based, required testing programs that produced "accurate" results and "maximum information" in accordance with "accepted" medical practices. The Court reasoned, "[w]e doubt the Legislature intended through this general language to open the courts to

wide-ranging claims attacking the accuracy or medical acceptance of state-developed testing and reporting standards." (*Id.* at p. 634.)

In *Haggis*, *supra*, 22 Cal.4th 490, the Court held that a Municipal Code section requiring inspection of the plaintiff's property "creates a mandatory duty." (*Id.* at p. 502.) Nevertheless, the Court held the plaintiff's cause of action was barred by the immunity provided for by Government Code section 818.6, which provides: "A public entity is not liable for injury caused by its failure to make an inspection, or by reason of making an inadequate or negligent inspection, of any property . . ." The Court ruled Section 818.6 "immunizes the City from liability for failing, after an inspection, to take the additional step of recording with the county recorder the information so discovered." (*Id.* at p. 504.) Thus, the plaintiff failed to allege breach of a mandatory duty because the failure to inspect was otherwise protected by a statute providing immunity.

The interim screening process created by the DSH was used to assess cases referred to it by the CDCR and determine whether to recommend that those parolees be civilly confined as sexually violent predators. (Exhibit 9, at p. 144.) The DSH created two additional levels of review before cases were considered at the Level III, or full evaluation. (Exhibit 9, at p. 168.) The Level II screening utilized, among other things, an actuarial risk assessment to make a preliminary clinical diagnosis and assess the inmate's overall risk of re-offense. (*Ibid.*) The Level II guidelines were implemented to "describe considerations to take into account when making decisions in Level II evaluations about which cases require a Level III evaluation, and those that can be closed at a Level II evaluation." (*Ibid.*)

The interim review process did not *replace* the "full evaluation," but rather set up an administrative review and clinical screening to rule out any offenders who did not sufficiently meet the criteria to warrant a full evaluation. The SVPA was enacted in 1995. According to the SAC, when

Jessica's law was passed in 2006, it broadened the pool of potential sexually violent predators who could be eligible for civil commitment. (Exhibit 9, at p. 141.) The year before Jessica's law was passed, the CDCR referred 636 potential sexually violent predators to the DSH for review. (*Ibid.*) The year after the law was passed, the number of referred offenders increased by *over fifteen times* that number to 9,853, more than had been referred by the CDCR since the inception of the SVP program. (*Ibid.*) A reasonable inference to draw from the SAC is that the DSH lacked the resources to conduct a full evaluation, with two to four mental health professionals on *every* case referred to it by the CDCR. Implementation of the Level I and II screening protocol to manage the influx of cases efficiently therefore represented a "resolution of policy considerations, entrusted by statute to a coordinate branch of government, that compels immunity from judicial reexamination." (*Johnson, supra*, at p. 795.)

Plaintiff will contend that the "full evaluation" requires the DSH to assign two mental health evaluators, and that this mandatory duty was clearly breached. A direction that the DSH "shall" conduct a part of the sexually violent predator assessment in a certain way does not make violation of that section a breach of mandatory duty because to do so would be to create liability for a decision to parole or release a prisoner contrary to the immunity afforded by Government Code section 845.8. In *Ortega, supra*, 161 Cal.App.4th 713, the minor plaintiff who was stabbed by her father after she was released from temporary custody, brought an action against the state agency for allegedly failing to perform a mandatory duty to fully investigate the risks of releasing her. The plaintiff argued that the defendants breached ministerial duty to gather specific sources of facts related to their investigation. The court rejected the purported exception the plaintiff attempted to create to discretionary immunity under Government Code section 820.2, explaining:

> [T]he collection and evaluation of information is an integral part of "the exercise of discretion" immunized by section 820.2. The distinction urged by plaintiff would eviscerate section 820.2 immunity, because in every case there would have to be a trial on the step-by-step actions which comprised the investigation forming the basis for an exercise of discretion. This is an untenable result.

(*Id.* at p. 733.) In *Haggis*, *supra*, 22 Cal.4th 490, the Court likewise concluded that imposing liability for failing to record the result of the inspection would frustrate the purpose of the immunity statute:

> In the present case, . . . allowing liability for failure to fully report, by recordation, the results of an inspection, while immunizing the failure to make an inspection at all, would have the effect, contrary to the evident legislative intent, of discouraging municipal safety and health inspections.

(*Id.* at p. 505.)

A similar expansion of liability and "step-by-step" analysis of the basis for decisions to parole or release a prisoner is precisely what the plain language of Government Code section 845.8, subdivision (a) forbids. The Court of Appeal erred in creating a mandatory "step" out of the "full evaluation" process which otherwise is completely discretionary. No decision on either end of the process could possibly result in liability for the state. If the CDCR determined that a particular parolee was not likely to be a sexually violent predator and did not refer the case to the DSH, no liability could arise from that parolee's re-offense. (*Thompson, supra,* 27 Cal.3d at p. 748 (County afforded immunity for decision to release prisoner).) Likewise, the DSH could incur no liability for recommending that a parolee not be confined as a sexually violent predator since such decision would be protected by discretionary immunity under Government Code sections 820.2 and 845.8. According to *Haggis*, *supra*, it would frustrate the purpose of immunity under Section 845.8 to immunize failing to recommend civil confinement at all, but allow liability for failure to fully

conduct the evaluation as a part of making the recommendation itself. Whether the decision to not recommend civil confinement was made by a single licensed psychologist pursuant to the Level II screening protocol, or by two evaluators pursuant to Welfare and Institutions Code section 6601, subdivision (d), the decision is no less a basic policy decision to release or parole an inmate that is entitled to immunity.

The SAC points out that, in the years since Jessica's Law was passed, 28,228 offenders were referred to the DSH by the CDCR as potential sexually violent predators, and out of those only 6,055 (21.4%) underwent a "full evaluation," meaning the remaining cases were determined by the DSH to not meet the criteria as being sexually violent predators. (Exhibit 9, at p. 146.) These numbers allow a reasonable inference that the CDCR was over inclusive in referring inmates for review, as evident by the fifteen-fold increase in the number of referrals following passage of Jessica's Law. The SAC, closely read, does *not* allege whether each of the 28,228 referrals represented a single inmate, or whether inmates previously screened by the DSH were referred by the CDCR more than once. The SAC also does *not* allege that by employing a "full evaluation" rather than the Level II screening, a percentage of the 28,229 offenders greater than 21.4% would have been referred by the DSH for civil commitment proceedings following the necessary concurrence of two evaluators. The 21.4% cited in the SAC were merely "flagged" as "potential" sexually violent predators. The SAC does not mention, nor does it allege, what portion of the 21.4% were actually the subject of successful civil commitment proceedings. And, Pitre's case is the *only* instance of re-offense for a sexually predatory crime identified in the SAC. Plaintiff's thorough research and allegations certainly would have mentioned others, if any there were.

When viewed in the context of the entire SVPA, the DSH's duty to assign two evaluators to conduct the "full evaluation" of cases referred to it

by the CDCR is therefore not a mandatory duty that will create a cause of action under Government Code section 815.6

II. PLAINTIFF FAILED TO ALLEGE SUFFICIENT FACTS TO ESTABLISH HER INJURIES WERE PROXIMATELY CAUSED BY DEFENDANTS' ALLEGED FAILURE TO PROPERLY EVALUATE PITRE

A. The Court May Rule As a Matter of Law That Plaintiff Has Not Sufficiently Alleged Proximate Cause Where the Facts Are Undisputed.

In an action for breach of a mandatory duty under Government Code section 815.6, the plaintiff's injuries must be proximately caused by the defendant's failure to discharge the mandatory duty. Ordinarily, proximate cause is a question of fact which cannot be resolved from the allegations of a complaint. However, "where the facts are such that the only reasonable conclusion is an absence of causation, the question is one of law, not of fact." (*Weissich v. County of Marin* (1990) 224 Cal.App.3d 1069, 1084; *Stasulat v. Pacific Gas & Elec. Co.* (1937) 8 Cal.2d 631, 638.) Causation may be decided as a matter of law where the facts are undisputed. (*Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205.) A mere possibility that the defendant's actions caused injury is insufficient. Where the question of causation "remains one of pure speculation or conjecture" it becomes the duty of the court to resolve the issue. (*Ibid.*)

> Proximate cause is legal cause, as distinguished from the laymen's notion of actual cause, and is always, in the first instance, a question of law. . . . Proximate cause is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produced the injury [or damage complained of] and without which such result would not have occurred.

(*Walt Rankin & Associates, Inc. v. City of Murrieta* (2000) 84 Cal.App.4th 605, 626 (quoting *State of California v. Superior Court* (1984) 150 Cal.App.3d 848, 857).)

Thus, although Plaintiff contends that the Court of Appeal erred in ruling as a matter of law that she had not sufficiently alleged causation (POB, at p. 17), the court was correct to do so since no reasonable conclusion could have been drawn otherwise based on the facts alleged in Plaintiff's SAC.

B. The Court of Appeal Correctly Followed *Whitcombe*, *Fleming*, and *Perry* in Holding That Plaintiff Failed to Allege Sufficient Facts to Show That Evaluation of Pitre By One, Rather Than Two, Evaluators Proximately Caused Her Loss.

The Court of Appeal correctly held that Plaintiff failed to sufficiently allege the element of proximate cause.

In *Whitcombe*, *supra*, 73 Cal.App.3d at p. 708, the plaintiff similarly argued that the defendants' alleged inaction in keeping and presenting reports about the probationer's record caused him to be released on bail, proximately causing the plaintiff's injuries. (*Ibid.*) The court found these allegations incurably speculative.

> Even had the court reviewed Gibson's record, it remained under no obligation to revoke probation. And if it had not, the proximate cause of appellant's injuries would, at best, be the court's considered discretion; manifestly an act immunized from liability under Government Code section 845.8, subdivision (a). . . . Thus, the requirement of section 815.6 that the injury be proximately caused by the failure to discharge the duty, is not satisfied.

(*Ibid.*)

In *Fleming*, *supra*, 34 Cal.App.4th 1378, the defendants' demurrers were sustained because the alleged breach of mandatory duty by the defendants to cause the parolee to be arrested for violation of his parole conditions was not a proximate cause of injury to the plaintiffs. Incarceration would have involved procedural steps requiring the exercise of discretion that would have broken the causal chain. (*Id.* at p. 1384.)

In *Perry, supra*, 150 Cal.App.3d 848, the court held that the real estate commissioner's failure to investigate the plaintiffs' complaints concerning a real estate licensee did not proximately cause the licensee's allegedly unlawful appropriation of plaintiffs' funds. The court found that the commissioner had a mandatory duty to investigate the complaint under the Business and Professions Code (*Id.* at p. 854), and that the statute was intended to protect against the risk of injury the plaintiffs suffered (*Id.* at p. 856), but that the plaintiff could not show proximate cause as a matter of law. (*Id.* at p. 857.) As the court explained:

> The commissioner's mandatory statutory duty to "investigate" the Robinson complaint may not reasonably be read as imposing a mandatory duty on the commissioner to take action in the event the commissioner's investigation discloses evidence of wrongdoing. Indeed, the Business and Professions Code specifically allows the commissioner discretion as to what action, if any, he deems appropriate to deal with transgressing licensees.

(*Id.* at p. 858.) Even if the commissioner sought to revoke the licensee's license, the licensee had a right to a quasi-judicial evidentiary hearing prior to suspension or revocation of the license, after which the hearing officer would make recommendations the commissioner was not bound to accept, and the licensee could compel judicial review of the decision. (*Ibid.*) The court concluded: "The causal link is thus tenuous at best." (*Id.* at p. 859.)

Here, there is likewise no clear chain of causation between the alleged failure to conduct a "full evaluation" and the decedent's death because multiple discretionary hurdles remained before Pitre could have been confined as a sexually violent predator. The evaluation by the two professionals designated by the DSH is completely discretionary and breaks the chain of causation. The psychologist who conducted the Level II screen apparently concluded Pitre did not meet the criteria under the SVPA to be civilly committed. Even if the DSH had appointed *two* evaluators to review

Pitre's case, Plaintiff assumes the second reviewer would have disagreed with the first, invoking the tie breaking procedure in which two independent psychologists or psychiatrists would have to review Pitre's case, and *both* would have to concur he met the criteria for the DSH to recommend civil confinement. (Welf. & Inst. Code, § 6601, subd. (f).) Like the real estate commissioner in *Perry, supra*, the evaluators had a duty to investigate only, not to make any specific recommendation. The evaluators' decision not to recommend civil confinement would further be entitled to immunity under Government Code section 845.8, subdivision (a).

More discretionary hurdles would have to thereafter be cleared for Pitre to be civilly confined as a sexually violent predator. First, the county counsel would have to concur with the recommendation of the DSH and file a civil commitment petition. The county's designated counsel "may," but is not required to, file a petition for commitment. (Welf. & Inst. Code, § 6601, subd. (h).) The county counsel will file a civil commitment petition only if he or she concurs with the recommendation. (Welf. & Inst. Code, § 6601, subd. (i).) Next, the superior court would have to find the petition to be supported by probable cause (Welf. & Inst. Code, § 6601.5), after which the trier of fact would have to find beyond a reasonable doubt that all the elements of the petition had been established. There are no clear mandatory requirements for any of these persons to take action.

Plaintiff attempts to distinguish *Fleming*, *Whitcombe*, and *Perry*, claiming the courts in those cases found no mandatory duty existed. (POB 21.) The court in *Perry* did, in fact, find that the defendant breached a mandatory duty, but ruled that plaintiff could not establish proximate cause. (*Perry, supra*, at p. 854.) Plaintiff also contends that in those cases no mandatory action was required after the defendants failed to perform their requisite duties. Here, Plaintiff argues, if both evaluators concurred that

Pitre met the criteria to be confined as a sexually violent predator, the DSH had a subsequent duty to refer the inmate for civil confinement proceedings. (POB, p. 21.) This argument overlooks, however, the discretionary nature of the "full evaluation" which like the duty imposed on the commissioner in *Perry* was a duty to "investigate" only, not take action. Moreover, this argument ignores the discretionary acts of third parties that break the chain of causation between the alleged failure to designate two evaluators and any ultimate decision to civilly confine Pitre as a sexually violent predator.

C. The Authorities Cited by Plaintiff Do Not Compel Reversal of the Court of Appeal's Well-Reasoned Decision That Plaintiff Failed to Sufficiently Allege Proximate Cause.

Plaintiff's reliance on *Alejo v. City of Alhambra* (1999) 75 Cal.App.4th 1180 is misplaced. In *Alejo*, the defendants argued that whether an investigation or report of suspected child abuse would have prevented further abuse of the minor plaintiff was speculative because it was unknown what the child welfare workers would have done with the officer's report had it been made. (*Alejo*, *supra*, 75 Cal.App.4th at p. 1191.) The court held that the plaintiff was able to allege causation between the defendant's failure to make a report of suspected child abuse and the plaintiff's injuries because the defendant conducted no investigation at all.

> The complaint in the case before us alleges that despite Hector's account of Alec's abuse, Officer Doe performed *no investigation* and *made no report* and, as a result, Alec suffered further abuse. Therefore, the necessary linkage between the mandatory duty and the injury is established for pleading purposes.

(*Id.* at p. 1189 (emphasis added).) The court rejected the defendant's argument that it was "unknowable" what the child welfare workers would have done with the officer's report had it been made because welfare

workers responding to a child abuse report are governed by statutory standards which required that they respond to any report of imminent danger to a child immediately, and all other reports within 10 days. (*Id.* at p. 1191.)

Here, by contrast, the DSH *did* designate a psychologist to evaluate Pitre's case under the Level II screen who determined he did not qualify for full evaluation as a sexually violent predator and should be released. Like *Fleming, Brenneman,* and *Whitcombe, supra*, the presence of this and other discretionary and immunized acts breaks the chain of causation. Unlike the child welfare workers in *Alejo, supra*, neither the evaluators nor the county counsel upon receipt of a referral from the DSH were required to take any action. The failure to perform the "full evaluation" cannot be a basis for liability, any more than failing to refer the assailant to a court to revoke his probation as were the facts in *Whitcombe, supra.* The subsequent decisions by the district attorney whether to seek a civil commitment petition, by the superior court in finding probable cause to support the petition, and by the trier of fact to sustain the petition, all break the causal chain.

Henderson v. Newport-Mesa Unified School District (2013) 214 Cal.App.4th 478, also does not compel a contrary result. The plaintiff there brought an action against the school district for failure to give her "first priority" in rehiring after a layoff. (*Ibid.* at p. 484.) The plaintiff alleged the defendant filled three positions with candidates that had less experience than her. Therefore, the defendant's failure to accord her "first priority" in filling these positions was the proximate cause of her not being rehired. (*Ibid.* at p. 497.)

Plaintiff likewise relies on *Landeros v. Flood* (1976) 17 Cal.3d 399, to establish causation. There, the plaintiff, a minor, was taken to be examined by a physician, Flood, who failed to diagnose her with battered child syndrome. (*Id.* at pp. 405-406.) As a result of the defendant's negligence

in not making the diagnosis, nor making a report to law enforcement, the plaintiff was returned to the custody of her mother and her mother's common law husband who resumed physically abusing her. (*Id.* at p. 406.) The court held that the abuse was not a "superseding cause" of the plaintiff's injury relieving the defendant of liability if it was reasonably foreseeable. (*Ibid.* (citing Rest.2d Torts, § 440).) *Landeros* did not address the issue here, whether discretionary immunized decisions regarding custody of the plaintiff's assailant breaks the causal chain.

Finally, *Braman v. State of California* (1994) 28 Cal.App.4th 344, also does not help Plaintiff establish causation. In *Braman*, the court held that the State's failure to block a handgun purchase following a failed background check proximately caused the decedent's suicide with that firearm. (*Id.* at p. 356.) There, the court found the statute compelling the investigation removed all discretion from the Department of Justice in conducting investigations regarding the purchasers of the type of firearm involved in that case. (*Id.* at pp. 351-352.) Moreover, by extending the category of persons prohibited from purchasing a firearm to those known to pose a danger to themselves, the Legislature clearly contemplated that failure to perform the mandatory duty would result in liability. (*Id.* at p. 356.) No question of intervening discretionary acts by a third party, as was the case in *Whitcombe, Fleming,* and *Perry* were present in *Braman* because the decedent's suicide was expressly considered by the Legislature to be a foreseeable consequence of a breach of the Department's statutory duty when the law was amended to expand the nature of the background check investigation. (*Ibid.*)

Even if the DSH designated two evaluators to conduct a full evaluation, it is not foreseeable that both evaluators would agree Pitre qualified for civil confinement as a sexually violent predator. In conducting the Level II screen, the one psychologist who did review the

case evidently concluded that Pitre did not meet the criteria for confinement which is why he was released. It likewise is not foreseeable that the county counsel would agree with a recommendation of the DSH to initiate a civil confinement action since the county counsel and district attorney have prosecutorial discretion whether to file a petition. Finally, the superior court and trier of fact independently assess the elements of the petition, and an ultimate decision finding that Pitre would have met the criteria as a sexually violent predator beyond a reasonable doubt and been civilly confined cannot be considered foreseeable as a matter of law.

III. THE COURT OF APPEAL ERRED IN HOLDING THAT THE IMMUNITY AFFORDED BY GOVERNMENT CODE SECTION 845.8, SUBDIVISION (A) DOES NOT APPLY WHERE PLAINTIFF ALLEGES BREACH OF A MANDATORY DUTY.

Defendants petitioned the Court of Appeal to reverse the Superior Court's order overruling their demurrer to Plaintiffs' SAC on the grounds that Defendants are protected from liability by the immunity afforded by Government Code section 845.8, subdivision (a).[6] The Court erred in not sustaining the petition on this basis.

A. Government Code Section 845.8, Subdivision (a) Broadly Provides Immunity For Any Decision or Recommendation to Parole or Release a Prisoner, Even Where a Mandatory Duty is Breached.

Section 845.8 provides, in relevant part:

> Neither a public entity nor a public employee is liable for: (a) Any injury resulting from determining whether to parole or

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[6] The Court has not specified the issues to be briefed. Although not included within Petitioner's statement of issues, the question of immunity under Government Code section 845.8 was addressed in Respondents' demurrer, as well as by the Court of Appeal and is "fairly included" within the issue of breach of mandatory duty pursuant to Government Code section 815.6. (Cal. Rules of Court, rule 8.520(b)(3).)

> 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.

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." (Cal. Law Revision Com. com., West's Ann. Gov. Code, § 845.8 (1980 ed.), at p. 416.)

The conduct afforded immunity under this section is extensive. "[A]ll acts within the ambit of release procedures are immunized from tort liability." (*Whitcombe*, *supra*, 73 Cal.App.3d at p. 715 (quoting *State of California v. Superior Court* (1974) 37 Cal.App.3d 1023, 1027-1028).) The scope of the immunity provided for in Section 845.8, subdivision (a) extends to "both those empowered to confine, and those authorized to request or recommend confinement." (*Whitcombe*, *supra*, at p. 713 (citing *Tarasoff v. Regents of the University of California* (1976) 17 Cal.3d 425, 448).) Section 845.8 immunity applies even in circumstances where a mandatory duty has been breached. (*Whitcombe, supra*, 73 Cal.App.3d at p. 713; *Fleming, supra*, 34 Cal.App.4th at p. 1383 ("allegations of negligent supervision of the parolee and breach of a mandatory duty to conduct a reassessment of his risks and needs . . . *fit 'squarely* under Government Code section 845.8, subdivision (a).' . . ." (emphasis added)); *Brenneman*, *supra*, 208 Cal.App.3d at p. 821 (same).)

In *Whitcombe*, *supra*, the plaintiffs were assaulted and injured by a probationer, Gibson, who was released on bail. (*Id.* at p. 703.) They alleged that the defendants failed to discharge mandatory duties specified by the Penal Code to investigate and report acts of the assailant which

would have resulted in his probation being revoked. (*Ibid.*) The *Whitcombe* court held, according to *Johnson, supra*, that "only subsequent 'ministerial' actions implementing the basic policy decisions may form the basis for negligence." (*Id.* at p. 705.) However, there "the alleged acts were inherently part of their decision not to revoke Gibson's probation and as such are immunized from liability under Government Code sections 845.8, subdivision (a), and 846." (*Id.* at pp. 708-709.)

In *Martinez v. State of California* (1978) 85 Cal.App.3d 430, the plaintiff sued the state for the wrongful death and violation of civil rights of his 15-year old daughter after she was kidnapped and murdered by a parolee, Thomas, who had been released five months earlier. (*Id.* at p. 434.) The plaintiff argued that the state's employees were negligent in "performing ministerial acts of release" and that Section 845.8 conferred only discretionary rather than absolute immunity. The court rejected the plaintiff's contention, explaining:

> *In making a decision to release a prisoner the actual decision, including the ministerial act of applying established rules and regulations to the particular case in question, is covered by governmental immunity.* Not covered are *ministerial acts in carrying out the decision to release* the person, and an allegation of negligence must be determined on a case-by-case basis. In this count Martinez does not allege negligence occurring after the decision to release Thomas. The complaint, by reference, incorporates allegations from the first count that: the employees knew Thomas had tortured the girls during the attempted rapes; he had been declared an untreatable MDSO; it had been recommended he not be paroled; he had received no psychiatric treatment; and, had no psychiatric evaluation within 30 days of his request. *All of these acts or omissions are part of the discretionary act of releasing a prisoner and come within the government's immunity.*

(*Id.* at p. 435 (emphasis added) (citations omitted).) Thus, the *Martinez* court likewise applied the above distinction recognized in *Johnson, supra.* The actual decision to parole or release is protected by an absolute

immunity, including all acts or omissions that are a part of that determination. The actual decision to parole is protected by immunity, for reasons of public policy. As the court explained:

> There is no sure formula for the members to know when a convict is rehabilitated and ready to reenter society. Yet it is important for the well-being of both society and the individual, to release persons as soon as they are rehabilitated. It is to society's advantage to try a variety of rehabilitative efforts and to use the maximum flexibility in facilitating the individual's reentry into society. In order to accomplish these aims it is necessary for public officials to make these decisions without fear they will be liable if they are wrong.

(*Id.* at pp. 436-437.) To impose liability would have "a chilling effect on the decision making process," and would "prolong incarceration unjustifiably for many prisoners." (*Ibid.*)

In *Brenneman, supra*, the court followed *Martinez*, and *Whitcombe, supra*, holding that the plaintiff's claim against the state for breach of an alleged mandatory duty to conduct a "formal reassessment" of a parolee was barred by the immunity in Section 845.8, subdivision (a). (*Brenneman, supra*, at p. 820.) "[M]inisterial implementation of correctional programs . . . can hardly, in consideration of the imposition of tort liability, be isolated from discretionary judgments made in adopting such programs." (*Ibid.* (quoting *County of Sacramento v. Superior* Court (1972) 8 Cal.3d 479, 485).) Similarly, in *Fleming, supra*, 34 Cal.App.4th at p. 1383, the court followed *Brenneman*, *Martinez*, and *Whitcombe*, to conclude that no exception to the immunity afforded by Section 845.8 exists where the plaintiff has alleged breach of a mandatory duty.

The Court of Appeal erred in not following *Fleming*, and *Brenneman*, with respect to Section 845.8, and concluding that "[i]nstead, both cases held that the defendants did not owe a mandatory duty to the plaintiffs." (*State Department of State Hospitals, supra*, at p. 1517.) Where a case is

decided on alternative grounds, each ground is equally valid and constitutes an alternative holding in support of the judgment. (*Varshock v. California Dept. of Forestry and Fire Protection* (2011) 194 Cal.App.4th 635, 646, fn. 7.) Moreover, "[a] correct principle of law may be announced in a given case, although it may not be necessary to there apply it." (*Smith v. County of Los Angeles* (1989) 214 Cal.App.3d 266, 297.) *Fleming*, *Brenneman*, and *Whitcombe* all correctly state the law with regard to Section 845.8, subdivision (a) immunity, even though the courts in those case also found the defendants had not breached a mandatory duty.

Analysis of Plaintiff's SAC indicates her claim is barred by the immunity set forth in Section 845.8, subdivision (a), according to *Whitcombe*, *Martinez*, *Brenneman*, and *Fleming*. The basis for plaintiff's claim against the defendants is that they "unlawfully cleared Pitre . . . to be released into the public." (Exhibit 9, at p. 137.) According to the SAC, Defendants "cleared" Pitre without properly evaluating him under the SVPA by conducting a full psychiatric evaluation. (*Ibid.*) The SAC does not allege the Defendants had any prior or continuing relationship with Plaintiff or the decedent, or that the decision to release Pitre posed any risk greater to her than to the general public. Rather, Plaintiff alleges the *manner* of Defendants' evaluation of Pitre was insufficient. The acts of the Defendants were therefore "inherently a part of the process involved in determining whether to release and do not involve any conduct subsequent to that determination" and are therefore entitled to immunity, regardless of whether plaintiff alleges that decision breached a mandatory or "ministerial" duty.

Although plaintiff alleges the Defendants had a mandatory duty to conduct a "full evaluation" in evaluating the risk posed by Pitre's release, these allegations are no different than those rejected in a score of cases in which the plaintiffs all argued that the *manner* of assessing the risks posed

by the parolee's release was insufficient and the defendants failed to consider sufficient information before making a determination to release an inmate. Since Plaintiff's allegations of breach of mandatory duty concern the actual decision to release Pitre, and the state's application of rules and regulations to the decision to release, Plaintiff's claim falls squarely within the immunity provided for in Government Code section 845.8, subdivision (a).

B. This Court's Previous Decision in *Perez-Torres v. State of California* Does Not Prevent Defendants From Invoking Discretionary Immunity For Recommending That Pitre Not be Civilly Confined As a Sexually Violent Predator.

The Court of Appeal held that Defendants were not entitled to immunity under Section 845.8 based on this Court's holding in *Perez-Torres v. State of California* (2007) 42 Cal.4th 136, which the Court of Appeal interpreted as rejecting the argument that Section 845.8, subdivision (a) applies even where a mandatory duty has been breached. The Court of Appeal interpreted *Perez-Torres* incorrectly.

Perez-Torres did not concern the issue presented here; whether Government Code section 845.8, subdivision (a) provides immunity where the plaintiff has alleged a cause of action for breach of mandatory duty. There, the plaintiff was mistakenly arrested by state parole agents after he was misidentified as a parolee in a police database. (*Id.* at p. 139.) Twenty days after he was arrested, the parole officer discovered the mistake had been made and the state parole hold was lifted on plaintiff, however, an INS hold was not lifted until five days later, at which point plaintiff was released from jail. (*Id.* at p. 158.) Plaintiff sued the state and its parole agents for interference with the exercise of legal rights pursuant to Civil Code section 52.1, false imprisonment and negligence. (*Id.* at p. 159.) He

did not sue for breach of mandatory duty pursuant to Government Code section 815.6.

The Court held that the decision to revoke parole, even though mistakenly applied to plaintiff, was a basic policy decision within the scope of the immunity afforded by Section 845.8. (*Perez-Torres*, *supra*, 42 Cal.4th at pp. 141-142.) The Court held that all acts that are part of the discretionary decision to release, parole, or revoke parole are immunized by Government Code section 845.8. (*Ibid.*) But, the state officials were not immunized for negligent acts taken *after* that discretionary decision has been made – i.e., negligent acts that were not part of the discretionary decision to release or not release.

> After that basic policy decision was made, however, the state defendants' conduct in keeping plaintiff in jail after they knew or should have known that he was the wrong man was—like the failure in *Johnson* to warn the foster parents of the youth's dangerous propensities—an action implementing the basic policy decision and thus outside the statutory immunity, making it subject to legal redress on the question of negligence by the state.

(*Id.* at p. 145.) Here, all of the acts or omissions on which Plaintiff's claim is based are part and parcel of the discretionary decision whether or not to release the inmate, and that is precisely what Government Code section 845.8, subdivision (a) is designed to immunize. *Perez-Torres* thus did not reject the contention Defendants make here.

This Court has held that even where a breach of mandatory duty is alleged, statutory immunity can nonetheless control. For example, in *Haggis*, *supra*, 22 Cal.4th 490, and *Creason*, *supra*, 18 Cal.4th 623, this Court likewise held that specific statutory immunities barred the plaintiffs' claims for breach of mandatory duty. In *Haggis*, *supra*, the Court the held that the plaintiff's cause of action for breach of mandatory duty arising from failure to record a certificate of substandard condition was barred by

the immunity afforded by Government Code section 818.6 for any injury caused by failure to make an inspection. (*Id.* at pp. 503-504.) In *Creason, supra*, the Court held that, even if the plaintiff's complaint stated a cause of action for breach of a mandatory duty based on failure to formulate standards to test for congenital disorders, the defendant was immune from suit based on Government Code section 855.6. "If a specific immunity statute applies, it 'cannot be abrogated by a statute which simply imposes a general legal duty or liability. . . ." (*Id.* at p. 635 (quoting *Caldwell v. Montoya* (1995) 10 Cal.4th 972, 986).)

The Court of Appeal therefore erred in not sustaining the petition for writ of mandate based on Government Code section 845.8, subdivision (a).

CONCLUSION

Based on the foregoing, Defendants and Respondents respectfully request that the decision of the Court of Appeal be affirmed insofar as that decision directed the Superior Court to sustain Respondent's demurrer to Plaintiff's second amended complaint without leave to amend as to the Plaintiff's causes of action for breach of mandatory duty and negligence per se.

Dated: May 30, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached Answer Brief on the Merits uses a 13 point Times New Roman font and contains 13,489 words.

Dated: May 30, 2014

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DECLARATION OF SERVICE BY OVERNIGHT COURIER

Case Name: **Elaina Novoa, et al. v. Calif. Dept. of Mental Health, et al.**
No.: **California Supreme Court Case No. S 215132**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 300 South Spring Street, Suite 1702, Los Angeles, CA 90013.

On May 30, 2014, I served the attached **ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with the **FEDERAL EXPRESS OVERNIGHT MAIL**, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 30, 2014, at Los Angeles, California.

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Declarant

Deborah Stephens
Signature

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