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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

JOSEPH C. HUDSON et al.,

Plaintiffs and Appellants,

v.

COUNTY OF FRESNO,

Defendant and Appellant.

F067460

(Super. Ct. No. 09CECG03295)

COUNTY OF FRESNO,

Petitioner,

v.

THE SUPERIOR COURT OF FRESNO
COUNTY,

Respondent;

JOSEPH C. HUDSON,

Real Party in Interest.

F065798

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Bruce M. Smith, Judge. ORIGINAL PROCEEDINGS; petition for writ of mandate.

Baradat & Paboojian, Warren R. Paboojian, Jason S. Bell, Matthew C. Pierce; Dowling Aaron, Lynne Thaxter Brown, Stephanie Hamilton Borchers; and James M. Makasian for Plaintiffs, Appellants and Real Party in Interest.

Steven B. Stevens and Steven B. Stevens for Consumer Attorneys of California as Amicus Curiae on behalf of Plaintiffs and Appellants.

Weakley & Arendt, James D. Weakley, Leslie M. Dillahunty and Roy C. Santos for Defendant, Appellant and Petitioner.

Horvitz & Levy, Lisa Perrochet, Robert H. Wright and Steven S. Fleischman for Association of Southern California Defense Counsel as Amicus Curiae for Defendant and Appellant.

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In 2009, 10-year-old Seth Ireland died after being beaten by his mother's boyfriend, Lebaron Vaughn. Seth's father and Seth's younger half brother's guardian sued the County of Fresno (County) for negligence, alleging the County received numerous reports that Seth was being physically abused yet failed to prevent him from being beaten to death by Vaughn. This appeal involves the jury's determination that the County was 65 percent responsible for \$8.5 million in noneconomic damages suffered by Seth's father and his half brother as a result of his death.

The jury found that (1) County negligently violated mandatory duties imposed by regulations in the California Department of Social Services Manual of Policies and Procedures for Child Welfare Services (DSS Manual); (2) the violations were a substantial factor in causing injury to plaintiffs; and (3) Vaughan, the person who beat Seth, was 25 percent responsible for the injuries, while Seth's mother was 10 percent responsible and County was 65 percent responsible. The trial court ordered a new trial limited to the issue of apportionment of responsibility.¹

¹ In 2011, Vaughn pled guilty to second degree murder and was sentenced to 15 years to life in prison. Rena Ireland, Seth's mother, pled guilty to child endangerment

County argues that plaintiffs cannot prove proximate cause, an essential element of their cause of action, and therefore judgment should be entered in County's favor. Based on our Supreme Court's recent decision in *State Dept. of State Hospitals v. Superior Court* (2015) 61 Cal.4th 339 (*Novoa*), we conclude proximate cause is a question of fact that cannot be decided as a matter of law based on the record before us. Therefore, the issue of proximate cause does not provide a basis for avoiding a retrial.

However, we conclude a new trial is required for all issues because the jury's answers to the liability questions in the special verdict about violations of mandatory duties are irreconcilably inconsistent. The inconsistencies resulted from the jury finding general provisions of the regulations, which referred to specific provisions, had not been violated and then later finding the specific provisions had been violated.

The parties also dispute whether a quality assurance report prepared by County after an investigation into the child's death is subject to discovery. The trial court granted a motion to compel discovery of the report. We conclude that County has failed to establish the trial court abused its discretion by compelling production of the report. County forfeited its objections to the production of the report by (1) failing to raise the asserted privileges in a timely manner and (2) concealing the fact that such a report existed.

We therefore (1) modify the trial court's order granting a new trial to include all issues and affirm that order as modified and (2) affirm the trial court's order granting the motion to compel.

and was sentenced to six years in prison. In closing argument to the jury, plaintiff's counsel argued that both Vaughn and Ireland had acknowledged their responsibilities and paid their debts, while County had not. He urged the jury to allocate 70 percent responsibility to County for Seth's death.

FACTS

County operates through local agencies, including the Department of Child and Family Services, which is now known as County's Department of Social Services. This department employs approximately 400 social workers and just under 300 of them work in child welfare related programs. For purposes of this opinion, the department is referred to as CPS, an acronym for Child Protective Services.

Plaintiff Joseph Hudson is the natural father of Seth, who was born in 1998. Rena Ireland is the mother of Seth and his younger half brother, who was born in 2001.² Seth's brother is a plaintiff in this lawsuit, appearing through his guardian ad litem and natural father, Alex Williams.

From 2002 until January 2007, Hudson lived with Rena, Seth and Seth's brother. In the summer of 2007, Rena's boyfriend, Lebaron Vaughn, moved in with her and the two boys. At first, Vaughn did not hit Seth. Within a few months, Vaughn began to hit Seth and Rena.

The evidence presented at trial, viewed in the light most favorable to plaintiffs, shows that during the five months before Seth's death, CPS received at least eight separate reports from people who suspected that Seth was being abused.³ These reports are described below.

First Report. On August 17, 2008, Rena and Vaughn took Seth to the Fresno Police Department headquarters to report that Seth had been beaten by his father on

² We refer to Rena and Seth Ireland by their first names for the sake of clarity.

³ In general terms, Chapter 31-100 of the DSS Manual requires a social worker to determine, based on the information obtained from the reporting party, whether the report warrants a response or is "evaluated out" (i.e., does not require a response). When the decision is made to respond, the social worker must choose which type of response is appropriate—an immediate response where CPS responds within 48 hours or a response within 10 days (deemed a "10-day Referral"). In this case, the reports were determined to not require a response or to warrant a response within 10 days.

August 15, 2008, and received a bruise on his inner thigh. This report appears to have been a strategy adopted by Vaughn to preempt any report of child abuse that Hudson might have made against him or Rena.⁴ Officer Aguilar spoke with them at the police station about the allegations. Seth told different versions of what had happened. Rena's statements were confused and she eventually told Officer Aguilar that she had caused the bruise. As a result, Rena was cited with misdemeanor abuse. Officer Aguilar did not believe Seth was in danger at that time and did not place a hold on him.

Officer Aguilar interviewed Hudson by telephone about the allegations and Hudson denied striking his son and described for Officer Aguilar what Seth had told him about the bruise a few days earlier. The first time Hudson asked Seth about the bruise, Seth told him he bumped into something. The next day when Hudson asked again, Seth would not answer and Hudson let it drop.

Officer Aguilar testified that in situations resulting in charges of abuse the police department's protocol is to forward a copy of the police report to CPS. Officer Aguilar testified that no one from CPS contacted him about his report.

Officer Hernandez was assigned to follow up on the report and investigate the citation against Rena. On August 28, 2008, he reviewed the report and photographs, did a criminal history search, and spoke with Hudson. He also spoke with Camille Wilson, CPS's liaison to the police and sheriff's departments. The initial report did not mention CPS and Officer Hernandez felt CPS should have been involved. Wilson confirmed that CPS had been notified and she told Officer Hernandez that there would be follow up with the family by CPS.

⁴ Rena testified at trial that she went to the police station and blamed Seth's bruise on Hudson because Vaughn told her to do it and later, at Vaughn's direction, told the police that she had caused the bruise. Rena also testified that she was afraid of Vaughn.

Officer Hernandez reached the conclusion that the incident did not rise to the level of a crime, characterizing it as discipline. Based on this conclusion, Officer Hernandez sent Rena a form indicating the charges would not be pursued.

Second Report. The evening of August 18, 2008, after Hudson spoke with Officer Aguilar, Hudson called CPS. CPS does not have a record of this call, but Hudson's claim that he made the call is referred to in a subsequent emergency response referral information form completed by CPS and dated August 27, 2008, which states: "Father further states that he made phone call to CPS that evening on 08/18/08."

Third Report. On August 27, 2008, Julie Injety, a court-appointed mediator, met with Hudson, Rena and Seth to mediate the issue of who would be given custody of Seth. Injety spoke with Seth alone and he showed her bruises on his stomach and leg. Seth told Injety that his father had poked him in the stomach with a fork and had burned him with a crack pipe. During the time Injety saw Seth, his demeanor changed. At times, he was animated and happy. At other times, he was distressed, crying and tearful.

Injety suspected child abuse, called the CPS Care Line, and spoke with Melissa Castro, a social worker assigned to the hotline. Injety asked Castro if someone could come and assist her in interviewing Seth. Castro told her that no one would be able to come. Injety reiterated her request because she was uncertain about her custody recommendation and how best to safeguard Seth that day. Injety asked that a CPS supervisor consider the matter and, in a subsequent phone call with Castro, was told that the request for assistance could not be granted.

The next day, Injety faxed a completed suspected child abuse report to CPS, which stated her concerns and observations involving Seth. In the report, Injety stated her recommendation to the court was for the mother to have temporary sole custody of Seth, pending the completion of psychological evaluations of the parents. Injety also recommended the parents return to mediation after the evaluations.

As a result of the contact with Injety, Castro completed the emergency response referral information form dated August 27, 2008, and assigned the matter a referral number. The form mentioned the report made at police headquarters on August 17, 2008, and stated Castro located no CPS history in the Child Welfare Services Case Management System (CMS), a statewide computer system. After consulting with the program manager, Castro designated the matter for a 10-day response.

Katie Wettlaufer, a CPS social worker, was assigned the referral generated by Injety's contacts with Castro. On September 3, 2008, Wettlaufer went to the elementary school attended by Seth and his brother. She interviewed the brothers separately. These interviews appear to be the first CPS contact with the family. During the interview, Seth told the social worker that he felt safe at home, his father is the only one that causes him fear, and he does not want to go back to his father's house. Seth also told her that his father spansks him a lot with a belt. Seth stated that his father and his father's wife smoke crack, described what crack looks like, and stated his father occasionally hit him after smoking.

After interviewing the boys, Wettlaufer contacted a child abuse reporting line for Madera County and made a report against Hudson based on Seth's statements about physical abuse and drug use. That same day, Wettlaufer attempted to contact Rena and Vaughn at the family's apartment. No one answered the door, so Wettlaufer left a business card in the screen door.

On September 9, 2008, Wettlaufer made contact with Rena, Vaughn, Seth and his brother at their home. Wettlaufer asked Rena about the referral allegations that she hit Seth with a belt and left marks on his leg. Rena told the social worker that (1) she was in a rough custody battle with Seth's father; (2) she was confused by the police and admitted to hitting Seth because she thought they were asking about ever hitting him, not the specific incident; (3) she usually disciplined Seth by sending him to his room, but had

spanked him with her hand; and (4) she did not use drugs, but thought Hudson had drug issues.

Based on her investigation and the conflicting stories presented, Wettlaufer was unable to determine who caused Seth's bruise. She determined the risk that Seth would be physically abused by his mother were low. Wettlaufer completed her written assessment of the case on October 6, 2008, which documented her conclusion that the allegations of abuse were inconclusive.

During her testimony at trial, Wettlaufer acknowledged that she made contact with the boys seven days after the referral, but did not make contact with an adult until 12 days after the referral.

Fourth Report. On September 19, 2008, Hudson called CPS because Rena was not letting him see or talk to Seth, he believed the children were missing school, and he knew a neighbor had reported hearing Vaughn threaten Seth with violence. Maria Meza was the social worker assigned to the hotline and took Hudson's call. Meza completed an emergency response referral information form dated September 19, 2008. The box on form labeled "EVALUATE OUT" was marked with an "X." An "Evaluate Out" determination means no investigation is initiated. The "SCREENER NARRATIVE" included with the form stated that Hudson told Meza he had talked to a next-door neighbor who told him that Rena's boyfriend was getting into his son's face and verbally threatening him. The screener narrative also stated, "Advised father, that he should go back to family court, if the mother is not abiding by the court orders and is not allowing him to have his visits with his son. [¶] This will be for documentation only and evaluated out." The form also reflected that Meza checked on the computer system and the history showed on open referral.

The computer showed the referral was open even though Wettlaufer had completed her interviews with the boys and the visit to the home to speak with Rena 10

days earlier on September 9, 2008. It would be another 27 days (October 6, 2008) before Wettlaufer's written assessment of her investigation was typed into the computer system.

Fifth Report. On October 12, 2008, Cynthia Potts, the neighbor who shared a wall with the unit occupied by Rena, Vaughn, Seth and his brother, placed a call to CPS. The social worker who took the call completed an emergency response referral information form. According to the screener narrative, Potts stated that she heard (1) Rena and Vaughn arguing and fighting, (2) banging on the walls, (3) Vaughn yelling at the children, and (4) the children screaming "stop." Potts said she had called the police two days earlier and they did nothing. Potts also stated that she suspected the children are afraid to talk when their mother and Vaughn are present. The form indicated the matter would be referred for a 10-day investigation, which was a noncrisis response that would assess the safety of the minors.

Wettlaufer was again assigned to investigate the referral. On October 21, 2008, she went to the elementary school and interviewed the two boys. She did not observe any visible marks or bruises on Seth. Seth denied being physically abused, stating he could not remember the last time he or his brother got a spanking. When Wettlaufer spoke with Seth's brother, she notice a scab on his forehead that appeared to be very old and peeling. He said that he fell off his skateboard and his mother had put medicine on it.

Later that day, Wettlaufer went to the boy's home, knocked several times on the door, received no answer and left a card on the door.

Three days later, on October 24, 2008, Wettlaufer went to the home and met with Rena, Vaughn and the two boys. Rena denied the allegations reported by the neighbor and stated the police have never been to her home for any domestic violence calls. She also stated her belief that the report came from a neighbor who is related to the father of her youngest son. Vaughn stated the neighbor had been giving them constant stress and had left harassing notes on their door. Vaughn stated he had contacted the civil court and was filing an action for harassment against the neighbor. Vaughn also stated the situation

with Seth's father and the visits caused Seth a lot of stress and caused Seth to start acting out, wetting the bedding, and being depressed.

Wettlaufer did not speak with Hudson or Potts about the allegations. Based on her investigation, Wettlaufer concluded the "allegations appear to be unfounded."

Sixth Report. On November 12, 2008, the principal of Seth's school phoned CPS. When later asked about CPS's response, the principal stated, "There was no one available to talk to me, and they would call me back." CPS did not return her call that day, so the principal faxed a suspected child abuse report to CPS on November 13, 2008. The report stated that, on October 30, 2008, Vaughn told the principal he was moving the children to a new school so he could get medication for Seth, who needed mental and behavioral help, and "both children have come to school with bumps and bruises on head."⁵ The principal was concerned because Seth did not exhibit any problems at school, had no known health problems, and Seth's mother was not around when Vaughn made the claims.

The social worker who handled the principal's report designated the matter for a 10-day response. The matter was again assigned to Wettlaufer. On November 20, 2008, and December 5, 2008, Wettlaufer went to the home, knocked on the door, received no answer, and left a card asking Rena to call her.

Seventh Report. On December 13, 2008, while the investigation of the principal's report was open, Rena and Vaughn took Seth and his brother to Fresno Community Medical Center, claiming Seth was suicidal and needed to see a doctor. The registered nurse who dealt with them stated Vaughn was aggressive and angry and she tried to

⁵ During oral argument, counsel for County stated the principal had accepted the children's explanation of the bruises and was concerned with the children being taken out of school. The evidence does not support counsel's statement. The report's explicit reference to bumps and bruises (1) shows the principal was concerned about physical abuse that went beyond improper medication or missing school and (2) notified County about the possibility of physical abuse of a type that leaves bumps and bruises.

reassure Vaughn that they were going to get a doctor as soon as possible. When Vaughn left with Rena and the children before seeing a doctor, the registered nurse called the Fresno Police Department and contacted a social worker who worked for the hospital in the emergency department. The social worker told the nurse that there already was an open case on them.

Eighth Report. On December 26, 2008, Deputy Nulick met with Rena, Vaughn, Seth and his brother at the Fresno County jail. Rena and Vaughn wanted to leave the children at the jail. Vaughn told the deputy that the children were acting crazy and were out of control. Vaughn also gave Deputy Nulick a card from a social worker at CPS and told the deputy that they were already working with a social worker named Valdez. Deputy Nulick had concerns about the safety of the children and called CPS to inquire if there were any open cases.

The social worker who took Deputy Nulick's telephone call was Traci Morales. Morales told the deputy that there were two open referrals under investigation. Morales felt the matter did not rise to the level of abuse or neglect and made the decision that CPS would not investigate the matter. Morales, however, provided the information to Wettlaufer by sending her an email.

December 29, 2008. On this date, (1) Morales received her supervisor's approval to evaluate out the matter reported by Deputy Nulick; (2) Wettlaufer reported making a third attempt at an in-person contact at the Ireland apartment, but received no answer when she knocked on the door; and (3) Vaughn severely beat Seth.

On January 6, 2009, Seth died. He was 10 years old.

PROCEEDINGS

In September 2009, Hudson filed a wrongful death action against County. The operative pleadings are Hudson's first amended complaint and the first amended complaint of Seth's younger brother, which was filed by his guardian ad litem. These pleadings alleged County negligently failed to investigate or otherwise respond to

reported instances of child abuse and neglect as mandated by statute and regulations in the DSS Manual.

In September 2012, County filed a motion for summary judgment or, in the alternative, summary adjudication. The issues County sought to adjudicate were that (1) County complied with the DSS Manual regulations, (2) the regulations cited by plaintiffs provided no basis for mandatory duty liability, (3) the local policy and procedure guidelines were not a basis for mandatory duty liability, (4) County was absolutely immune from liability, and (5) County had no duty to control the actions of Vaughn. In December 2012, the trial court denied the motion.

A jury trial began in January 2013 and concluded in February. The jury found County was 65 percent responsible, Vaughn 25 percent responsible, and Rena 10 percent responsible for damages totaling \$8.5 million.

County filed motions for new trial and judgment notwithstanding the verdict. In April 2013, the trial court denied the motion for judgment notwithstanding the verdict and “granted a New Trial on the sole issue of apportionment of damages between Lebaron Vaughn, Rena Ireland and The County of Fresno for the reasons stated on the record on that date.”⁶

In May 2013, County appealed from the order granting a partial new trial and from the order denying its motion for summary judgment. In June 2013, plaintiffs filed notices of appeal or cross-appeal to challenge the order granting a new trial and request the reinstatement of the judgment.

⁶ Although Code of Civil Procedure section 657 requires the reasons for the new trial to be stated in writing, not incorporated by reference (*Twedt v. Franklin* (2003) 109 Cal.App.4th 413, 418-419), we need not address this issue or the other claims of error in plaintiffs’ cross-appeal because we are granting a new trial on all issues based on the irreconcilable verdict, and do not reach the trial court’s decision to grant a limited new trial.

DISCUSSION

The fundamental question presented to the jury was whether County followed the regulations in chapter 31-100 of the DSS Manual when it handled the reports that Seth and his brother had been physically abused. That question could not be resolved without a determination of what the regulations required County to do, an issue on which the parties continue to disagree.

Our analysis of the regulations in the DSS Manual begins with an overview of the general principles governing (1) a public entity's liability for violating mandatory duties and (2) the proper interpretation of a public entity's regulations.⁷

I. IMMUNITY AND MANDATORY DUTIES

A. Statutory Provisions—Mandatory Duty

Under California's Government Claims Act (Gov. Code, § 810, et seq.),⁸ public entities are not liable for injuries arising out of their acts or omissions, except as provided by statute. (§ 815, subd. (a); see *Hoff v. Vacaville Unified School Dist.* (1998) 19 Cal.4th 925, 932 (*Hoff*)). In this case, plaintiffs rely upon the liability created by section 815.6, which 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.” (Italics added.)

This provision was codified in 1963 and has remained unchanged since its adoption. (Stats. 1963, ch. 1681, § 1, p. 3268.) The Law Revision Commission

⁷ Some of the principles governing the interpretation of regulations have not been explicitly identified and analyzed by the parties. Nonetheless, we regard the subissues relating to those principles as having been “proposed” for purposes of Government Code section 68081 and have not requested supplemental briefing because the parties have presented arguments about the meaning of the regulations.

⁸ All unlabeled statutory references are to the Government Code.

Comment to this section states: “This section declares the familiar rule, applicable to both public entities and private persons, that failure to comply with applicable statutory or regulatory standards is negligence unless reasonable diligence has been exercised in an effort to comply with those standards. [Citations.]” (Cal. Law Revision Com. com., 32 pt. 1 West’s Ann. Gov. Code (2012 ed.) foll. § 815.6, p. 289.)

The California Supreme Court recently stated that under section 815.6 “the government may be liable when (1) a mandatory duty is imposed by enactment, (2) the duty was designed to protect against the kind of injury allegedly suffered, and (3) breach of the duty proximately caused injury.” (*Novoa, supra*, 61 Cal.4th at p. 348; see *Braman v. State of California* (1994) 28 Cal.App.4th 344, 349 [interpreting § 815.6 as creating a rebuttable presumption of negligence where plaintiff demonstrates the three statutory elements].)

B. Immunities for Discretionary Action

County contends it is absolutely immune from liability based on section 820.2, which provides that “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.” (See *Kemmerer v. County of Fresno* (1988) 200 Cal.App.3d 1426, 1435 [express immunity for public employee extends to county].) County also relies on the quasi-prosecutorial immunity in section 821.6, which states that a public employee is not liable for injuries caused by instituting any administrative proceeding within the scope of his or her employment.

We do not discuss these immunities at length because they must be read in harmony with the liability acknowledged by section 815.6. If an employee violated a mandatory duty as described in section 815.6, that employee did not exercise discretion vested in him or her for purposes of section 820.2. Thus, an analysis that draws the line

between mandatory duties and discretionary actions will determine the applicability of both section 815.6 and section 820.2.

C. Case Law Principles Addressing Mandatory Duty

Section 815.6 refers to “a mandatory duty imposed by an enactment.” This language has led the California Supreme Court to consider a variety of “enactments” and whether they imposed a “mandatory duty.” (See *Novoa, supra*, 61 Cal.4th 339 [statute governing civil commitment of sexually violent predators]; *Guzman v. County of Monterey* (2009) 46 Cal.4th 887 (*Guzman*) [regulations for state’s safe drinking water program]; *Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490 (*Haggis*) [municipal ordinance addressing development of property in landslide zone]; *Hoff, supra*, 19 Cal.4th 925 [Education Code provision relating to supervision of pupils]; *Creason v. Department of Health Services* (1998) 18 Cal.4th 623 (*Creason*) [statute creating neonatal testing program].)⁹ The principles set forth in these cases will guide our analysis of whether the regulations in the DSS Manual created any mandatory duties.

1. *Regulations are Enactments*

Initially, we note that section 815.6’s reference to “an enactment” encompasses state regulations adopted pursuant to the Administrative Procedure Act (§ 11340 et seq.). (§§ 810.6 [definition of enactment], 811.6 [definition of regulation].) An example of state regulations that imposed a mandatory duty on a county are the regulations adopted by the California Department of Public Health to implement the Safe Drinking Water Act (Health & Saf. Code, § 116270 et seq.). (See *Guzman, supra*, 46 Cal.4th at pp. 900, 911-912 [rejected existence of an *implied* mandatory duty in drinking water regulations and remanded to Court of Appeal to determine whether regulations created *express* mandatory duties]; *Guzman v. County of Monterey* (2009) 178 Cal.App.4th 983 [on

⁹ All of these cases involved demurrers, except *Hoff*, which presented the question of the existence of a mandatory duty in a motion for nonsuit.

remand, Court of Appeal determined regulations imposed mandatory duty on county to review data in water quality reports].)

2. *Intent and Interpretation*

The California Supreme Court's recent cases demonstrate that the question whether an enactment imposes a mandatory duty involves an inquiry into intent—the Legislature's in the case of a statute and the promulgating agency's in the case of a regulation. (See *Novoa, supra*, 61 Cal.4th at p. 349; *Guzman, supra*, 46 Cal.4th at pp. 910-911.) This inquiry into whether a statute or regulation was intended to impose a mandatory duty presents a question of interpretation to the court. (*Creason, supra*, 18 Cal.4th at p. 631.)

In determining legislative or regulatory intent, the enactment's language is a most important guide. (*Novoa, supra*, 61 Cal.4th at p. 349.) Nonetheless, other factors are relevant to whether the language was intended to foreclose a public entity from exercising discretion. (*Ibid.*) For instance, the function and apparent purpose of each cited enactment are factors relevant to determining whether a mandatory duty was created. (*Guzman, supra*, 46 Cal.4th at p. 898.) Furthermore, the language, function and purpose of a particular enactment must be considered in the context of the whole statutory or regulatory scheme. (*Id.* at pp. 900, 905.)

Here, plaintiffs have emphasized the many uses of the word "shall" in the regulations and the mandatory nature of that word. This argument does not take us far because of the Supreme Court's often repeated statement that the inclusion of the word "shall" in an enactment does not necessarily create a mandatory duty. (*Novoa, supra*, 61 Cal.4th at p. 349; see *Guzman, supra*, 46 Cal.4th at pp. 898-899 and cases cited therein.) In other words, the intent to create a mandatory duty is not clearly expressed simply by the use of the helping or auxiliary verb "shall"—the other language in the enactment must

be clear and specific as well. The Supreme Court has described the establishment of a mandatory duty 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. [Citation.] 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. [Citation.]” (*Haggis, supra*, 22 Cal.4th at p. 498.)

Restating the proposition that an enactment must *require a particular* act be taken or not taken, the court stated (1) the enactment must affirmatively impose the duty and provide implementing guidelines, (2) the duty must be phrased in *explicit and forceful* language, and (3) there must be some *specific* statutory mandate. (*Novoa, supra*, 61 Cal.4th at pp. 348-349.)

After analyzing the particularity and specificity of any acts required to be taken or not taken, the next step of the inquiry should focus on whether the enactment in question requires the public entity to render a considered decision—that is, one requiring its expertise and judgment. (*Novoa, supra*, 61 Cal.4th at p. 349; *Guzman, supra*, 46 Cal.4th at p. 899.) Mandatory duties do not involve the exercise of judgment or expertise in reaching a decision about what action, if any, to take.

The foregoing principles and the references to specific, explicit and forceful language might lead one to infer that a mandatory duty can never be implied. The Supreme Court, however, has not adopted this bright line rule. Therefore, we turn to principles relating to implied mandatory duties.

3. *Implied Mandatory Duties*

In *Guzman*, the Supreme Court addressed only whether the drinking water regulations in question imposed an “*implied* duty to instruct a water system to notify consumers of water contamination.” (*Guzman, supra*, 46 Cal.4th at p. 911.) The court concluded no such implied mandatory duty existed, but did not categorically reject the

possibility that mandatory duties may be created by implication. Instead, the court discussed and did not disapprove of two cases in which implied duties were recognized by the Court of Appeal. (*Id.* at pp. 902, 904-905.)

In *Alejo v. City of Alhambra* (1999) 75 Cal.App.4th 1180 (*Alejo*), the Court of Appeal determined a statute imposed two mandatory duties on a police officer who received an account of child abuse—an implied duty to investigate and an express duty to file a report of child abuse when an objectively reasonable person in the same situation would suspect abuse. (*Id.* at pp. 1186-1188; see *Guzman, supra*, 46 Cal.4th at p. 905.) The duty to investigate was not expressed, but the court concluded an investigation was clearly envisioned by the statute so the officer could determine whether there was a reasonable suspicion of child abuse, the determination that triggered the express duty to file a report. (*Alejo, supra*, 75 Cal.App.4th at p. 1186.) The Supreme Court approved this conclusion by stating: “As the statutory scheme clearly contemplated, the officer’s express duty to report was *necessarily predicated* on the officer first investigating the accounts of child abuse. [Citation.]” (*Guzman, supra*, at p. 905, italics added.) Therefore, an implied mandatory duty exists where “an express duty is necessarily predicated or dependent on” that implied duty. (*Ibid.*)

In *Walt Rankin & Associates, Inc. v. City of Murrieta* (2000) 84 Cal.App.4th 605 (*Rankin*), the Court of Appeal read three statutes in conjunction and determined they imposed an implied duty on the city to confirm the surety providing the payment bond on a public works project was an ““admitted surety insurer”” for purposes of Code of Civil Procedure section 995.310. (*Rankin, supra*, at p. 621; see *Guzman, supra*, 46 Cal.4th at p. 905, fn. 13.) That statute provided that “a bond shall be executed by ... one sufficient admitted surety insurer.” (Code Civ. Proc., § 995.310.) Former Civil Code section 3247 required that a payment bond for a public works contract be filed with, and approved by, the officer or public entity that awarded the contract. (*Rankin, supra*, at p. 615.) The Court of Appeal stated, “As the public entity is the one required to approve the

subject bond, it stands to reason that the public entity must be the one to require compliance with Code of Civil Procedure section 995.310.” (*Id.* at p. 621.) The recognition of this implied mandatory duty to require compliance (i.e., to require a bond executed by an admitted surety insurer) was approved by the Supreme Court: “In *Rankin*, the city alone had the duty to ensure that its public works projects were properly bonded; thus, it was reasonable to impose the specific duty under Code of Civil Procedure section 995.310.” (*Guzman, supra*, at p. 905, fn. 13.) Thus, *Rankin* provides an example of a specific duty implied from (1) a general statutory duty and (2) a specific statutory requirement with no express enforcement mechanism—the implied mandatory duty became the mechanism to enforce compliance with the statutory requirement.

Based on the foregoing, it appears that there are three categories of implied mandatory duties: (1) an implied duty that is a necessary predicate of an express mandatory duty, such as the implied duty to investigate recognized in *Alejo*; (2) an implied duty that necessarily follows or flows from an express mandatory duty;¹⁰ and (3) a specific implied duty that is derived from a general duty and other requirements of the enactment, such as the duty identified in *Rankin*.

4. *Mandatory Duties to Act and Discretionary Implementation*

Another significant aspect of drawing the line between mandatory duties and discretionary functions arises where the enactment requires a public entity or official to exercise discretion. In these situations, the failure to act violates a mandatory duty because the public entity is not authorized to ignore the requirement, yet acting incompetently violates no duty. In other words, the specifics of how the duty is

¹⁰ When compared to the first category, this category reverses the sequence of performance of the duties. In the first, the implied duty must be performed in order to perform to the express duty. Here, an express duty, taken in the context of the entire enactment, necessarily requires the subsequent performance of the implied duty. For example, the duty to initiate task X within a stated period of time might imply a duty to complete task X.

implemented is left to the public entity's discretion. This distinction between a threshold duty to act and implementing the duty by exercising discretion is illustrated by *Creason*.

Creason involved a statutory provision stating that a unit of the Department of Health Services "shall have the responsibility of designating tests and regulations" used in a neonatal program. (Health & Saf. Code, § 125000, subd. (a).) This provision imposed a mandatory duty to establish a neonatal testing program, which included designating the tests to be used. (*Novoa, supra*, 61 Cal.4th at p. 349.) The Department of Health Services did not violate these threshold duties because it established the program and designated tests. As to the implementation of the duty to designate tests, the statutory language stating that the "tests ... shall be in accordance with accepted medical practices." (Health & Saf. Code, § 125000, subd. (a).) The plaintiffs alleged that the state had a mandatory duty to exercise reasonable diligence in the formulation of testing procedures. (*Creason, supra*, 18 Cal.4th at p. 627.) The Supreme Court rejected such a mandatory duty, concluding that the statutory scheme gave the state substantial discretion in formulating appropriate testing standards despite the fact the Legislature specified certain general principles (e.g., "accepted medical practice") to guide the exercise of that discretion. (*Id.* at pp. 631-632.) In *Novoa*, the court discussed the plaintiffs' argument that the way the department exercised its judgment in designating the test and implementing procedures caused their daughter's injuries. (*Novoa, supra*, at p. 350.) The court stated that formulation of the tests and reporting standards was discretionary and could not give rise to liability. (*Ibid.*) The court recognized a distinction between a mandatory duty to *designate* tests and the discretionary selection or formulation of the test. Thus, *Novoa* distinguished between a threshold duty to act that is mandatory and implementing acts that are discretionary.

5. *Question of Law*

The inquiry into legislative or regulatory intent to determine whether an enactment creates a “mandatory duty” for purposes of section 815.6 presents a question of interpretation for the courts that is a question of law subject to independent review on appeal. (*Haggis, supra*, 22 Cal.4th at p. 499.)

In *Guzman*, the Supreme Court cited *Manriquez v. Gourley* (2003) 105 Cal.App.4th 1227, at pages 1234 to 1235, for the proposition that the rules of statutory construction also govern the interpretation of regulations adopted by administrative agencies. (*Guzman, supra*, 46 Cal.4th at p. 898.) This statement, while adequate for many cases, is incomplete because certain specific principles apply only to the interpretation of regulations. Therefore, we will review the principles of interpretation that apply to regulations.

II. INTERPRETATION OF REGULATIONS

When a dispute about the meaning of a regulation arises, the first step is to identify the type of regulation in question. Once that issue is resolved, the specific principles governing the interpretation of that type of regulation are applied by the court.

A. Categorizing the Regulations

1. *Basic Principles*

The two categories of administrative regulations recognized by California law are (1) quasi-legislative regulations and (2) interpretive regulations. (*In re Cabrera* (2012) 55 Cal.4th 683, 687 (*Cabrera*) [the two categories are a ““black letter”” proposition]; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10 (*Yamaha*).) Quasi-legislative regulations are those that an agency has promulgated pursuant to the lawmaking authority delegated to it by the Legislature. (*Cabrera, supra*, at p. 687.) Agencies that adopt quasi-legislative rules or regulations are truly “making law” and such regulations have the dignity of statutes. (*Yamaha, supra*, at p. 10.)

In contrast, an interpretive regulation sets forth an agency's legal opinion regarding the meaning and legal effect of a statute. (*Yamaha, supra*, 19 Cal.4th at p. 11; 9 Witkin, Cal. Procedure (5th ed. 2008) Administrative Proceedings, § 139, p. 1270.)

2. *Authority for Adoption of DSS Manual*

Properly categorizing the regulations in chapter 31-100 of the DSS Manual involves an examination of the statutory authority underlying the adoption of those regulations. (Cf. *Guzman, supra*, 46 Cal.4th at pp. 900-901 [statutory basis for drinking water regulations].)

In Welfare and Institutions Code section 10554, the Legislature gave California's Department of Social Services (Department) the general authority to adopt regulations. The statute requires the Department's regulations to be adopted in accordance with the procedures contained in California's Administrative Procedures Act, section 11340 et seq., and states such regulations need not be printed in the California Code of Regulations so long as they are included in the Department's publications.

Welfare and Institutions Code section 16500 provides that (1) the Department and county welfare departments shall establish a public system of child welfare services; (2) each county shall establish a specialized organizational entity within the court welfare department that has sole responsibility for operating the child welfare services program;¹¹ and (3) the Legislature intends, in providing for this system of child welfare services, that all children are entitled to be safe and free from abuse and neglect.¹² This directive to establish a child welfare services system necessarily authorizes the Department to adopt regulations to implement that system.

¹¹ County addressed this requirement for a specialized organizational entity by creating CPS.

¹² This legislative statement that children are entitled to be safe and free from abuse leads us to conclude that the DSS Manual regulations were "designed to protect against the risk of [the] particular kind of injury" experienced in this case—namely, the death of a child as a result of physical abuse. (§ 815.6.)

Therefore, the Department adopted the regulations in chapter 31-100 of the DSS Manual pursuant to its general authority to adopt regulations and the directive contained in Welfare and Institutions Code section 16500.

3. *DSS Manual Regulations Are Quasi-Legislative*

The statutes authorizing the adoption of the DSS Manual and the content of the regulations in chapter 31-100 of the DSS Manual clearly demonstrate that those regulations are law making and not merely interpretive of existing statutory provisions. In other words, the regulations created specific legal requirements that do not exist outside the regulations. Therefore, we conclude the regulations in chapter 31-100 of the DSS Manual are quasi-legislative.

This conclusion is not disputed by plaintiffs. Indeed, plaintiffs have argued that the DSS Manual imposed certain mandatory duties on County. For this argument to be true, the regulations contained in the DSS Manual would have to be quasi-legislative in nature. (See *Wilson v. County of San Diego* (2001) 91 Cal.App.4th 974, 982 [manual in question did not impose mandatory duties on county or its employees]; *Scott v. County of Los Angeles* (1994) 27 Cal.App.4th 125, 145 [regulations in the DSS Manual relating to supervision of children in foster care have “the force of law”].) In other words, interpretive regulations do not create mandatory duties, but merely describe what has been created by a statute.¹³

Therefore, we conclude the rules of law that govern the interpretation of quasi-legislative regulations apply to the analysis of the meaning of the regulations in chapter 31-100 of the DSS Manual.

¹³ Interpretive regulations are not necessarily irrelevant to the question of the existence of a mandatory duty because they might provide insight into whether a mandatory duty is implied by the statute.

B. Rules for Interpreting Quasi-Legislative Regulations

1. *Deference to Agency's Interpretation*

A general principle of California law is that the interpretation of a regulation is ultimately a question of law for the courts. (*Environmental Law Foundation v. Beech-Nut Nutrition Corp.* (2015) 235 Cal.App.4th 307, 329.) Usually, courts resolve questions of law by conducting an independent review. (E.g., *Twedt v. Franklin*, *supra*, 109 Cal.App.4th at p. 417.) This independent review is subject to a significant restriction when the meaning of a quasi-legislative regulation is in dispute. (*Cabrera*, *supra*, 55 Cal.4th at p. 687 [quasi-legislative regulations are subject to very limited review].) The California Supreme Court has held that, when certain conditions are met, an agency's interpretation of its own quasi-legislative regulations is controlling so long as that interpretation is not "clearly unreasonable." (*Id.* at p. 690.) The conditions to the application of the "clearly unreasonable" test are that the quasi-legislative regulations (1) must address matters within the agency's expertise and (2) must not plainly conflict with a statutory mandate. (*Id.* at pp. 690-691; see *Calderon v. Anderson* (1996) 45 Cal.App.4th 607, 613 [Departments' interpretation of its regulations governing the in-home supportive services program is controlling unless plainly erroneous or inconsistent with the regulation].)

III. MANDATORY DUTIES IMPOSED BY REGULATIONS

Ordinarily, the next step of our analysis would be to address each of the 21 regulatory provisions listed in the special verdict and determine whether they imposed any mandatory duties and, if so, the scope of those duties. The scope of a duty is important because some mandatory duties are very narrow due to the provision requiring the public entity to exercise discretion in addressing a particular matter. In those situations, so long as the public entity does not ignore its obligation to address the matter, there is no breach of a mandatory duty resulting from a lack of competency in exercising

the relevant discretion. (*Novoa, supra*, 61 Cal.4th at p. 350; *Creason, supra*, 18 Cal.4th at pp. 627-628.)¹⁴

In this case, we do not resolve the many questions related to the existence of mandatory duties because (1) a full retrial is required due to inconsistencies in the special verdict and (2) we are reluctant to create “law of the case” when the appellate record does not contain all of the provisions that are, or might be, relevant to an interpretation of the DSS Manual regulations. For example, the appellate record contains exhibit 149, which consists of pages 53 through 62 of the DSS Manual. It does not appear that any other pages from the DSS Manual are part of the appellate record. The pages provided contain sections 31-101 through 31-125 of the DSS Manual regulations, but do not contain the definitions set forth in section 31-002. As a result, we cannot confirm whether the definition of the often-used term “in-person investigation” that appears in the jury instructions accurately reflects the regulatory definition or whether it was taken out of context.

In addition, there may be other provisions in the DSS Manual that provide context for the some of the 21 regulatory provisions and, as a result, those other provisions might affect the interpretation. For example, the provisions in sections 31-201, 31-205 and 31-206 of the DSS Manual address the process for assessing a child for the development of a

¹⁴ In *Novoa*, the court described the *Creason* decision by stating the Department of Health Services would have failed to discharge a mandatory duty if it had taken no action to designate neonatal tests. In contrast, because the formulation of tests was left to the department’s discretion and judgment, its choice of tests and the way it exercised its judgment in designating those tests could not violate a mandatory duty for purposes of section 815.6. (*Novoa, supra*, 61 Cal.4th at p. 350.)

The court in *Novoa* provided a second example of how a public entity that ignores a mandatory step that precedes an exercise of discretionary authority might be liable under section 815.6: “For instance, if DMH failed to evaluate an inmate at all, or neglected to forward a request for civil commitment after two evaluators found an inmate to be an SVP, a cause of action would not necessarily be barred” (*Novoa, supra*, 61 Cal.4th at p. 356.)

case plan. These regulations were mentioned in plaintiffs' complaints and County's motion for summary adjudication. These and other regulations governing the steps after intake and investigation might provide insight into how the initial steps are to be completed.

Therefore, based on the rules of interpretation that specific provisions of statutes and regulations should be construed in the context of the entire statutory or regulatory scheme and should be harmonized with the other provisions, we conclude that the absence of the regulatory definitions and other provisions that establish the context for the 21 regulatory provisions in question means any interpretation we might render would be incomplete. It does not appear that justice would be served by incomplete interpretations becoming law of the case. (See generally, 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 459, p. 515 [nature of the doctrine of "law of the case"].) Rather, the parties should have an opportunity on remand¹⁵ to support their interpretation of the regulations by identifying and providing (1) any relevant definitions, (2) other regulatory provisions and (3) interpretative notices and other documents issued by the Department that show how the Department has construed its regulations. As to the latter category, we do not attempt to resolve the dispute over what interpretation, if any, the Department intended to express in the "ALL COUNTY INFORMATION NOTICE" dated December 1, 2006, and what inferences relating to the Department's intent may be drawn from the October 2011 report of the California State Auditor.

IV. CONSISTENCY OF SPECIAL VERDICTS

Although we cannot interpret the regulations in question and identify, provision by provision, the scope of each mandatory duty that may have been created, we can apply the rules governing the interpretation of quasi-legislative regulations, to the extent

¹⁵ It might be appropriate for the trial court on remand to consider allowing additional discovery into the Department's interpretation of its own regulations and the level of formality used to express that interpretation.

necessary, to analyze the jury's answers in the special verdict to questions about whether County violated particular provisions in the regulations and determine whether those answers were consistent.

A. Basic Principles of Law Governing Inconsistent Verdicts

Subdivision 6 of Code of Civil Procedure section 657 provides that a new trial may be granted if the verdict "is against law." Inconsistent verdicts are "against law" for purposes of the statute and, therefore, constitute proper grounds for a new trial. (*Morris v. McCauley's Quality Transmission Service* (1976) 60 Cal.App.3d 964, 970.) An inconsistent verdict may occur because the answers within a special verdict cannot be reconciled. (*City of San Diego v. D.R. Horton San Diego Holding Co., Inc.* (2005) 126 Cal.App.4th 668, 682 (*Horton*)). In other words, inconsistency is established when there is no possibility of reconciling the answers in the special verdicts with each other. (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 357 (*Singh*)).

B. Standard of Review

The consistency of special verdicts is analyzed as a matter of law. (*Horton, supra*, 126 Cal.App.4th at p. 678.) Therefore, appellate courts conduct an independent review of the jury's answers to the questions in a special verdict. (*Collins v. Navistar, Inc.* (2013) 214 Cal.App.4th 1486, 1500 [special verdict's correctness subject to de novo review].) When conducting this independent review, we do not infer findings and do not indulge any presumption in favor of upholding the special verdicts. (*Orthopedic Systems, Inc. v. Schlein* (2011) 202 Cal.App.4th 529, 542.)

Once an inconsistency is identified, appellate courts are not allowed to choose which of the inconsistent answers in the special verdict to implement. (*Singh, supra*, 186 Cal.App.4th at p. 358.) Consequently, the proper remedy for an inconsistent special verdict is a new trial. (*Ibid.*)

C. Overview of the Special Verdict

Question No. 1 of the special verdict asked, “Did Defendant, County of Fresno, violate any of its mandatory duties under the DSS Manual 31 series as set forth below in Question No. 2?” The jury answered, “Yes.”

Question No. 2 stated, “If you find one or more mandatory duties were violated, please specify the regulation number(s) below by placing an “X” or check mark next to the number of the regulation violated.”

The special verdict then listed the specific number for 21 different regulations from Chapter 31-100 of the DSS Manual. The regulation numbers were listed under headings contained in the regulations: (1) general matters (31-101), (2) emergency response protocol (31-105), (3) in-person investigations by the social worker (31-110), (4) in-person investigation within 10 calendar days (31-120), and (5) investigation requirements (31-125). Other than the headings, no other description of the regulations were contained in the special verdict form.

The jury responded to Question No. 2 in the special verdict by placing an “X” next to 14 of the 21 regulations listed and, as directed, proceeded to the next question.¹⁶

Question No. 3 asked: “Was the violation of any one or more of The County of Fresno’s mandatory duties a substantial factor in causing injury to the plaintiffs?” The jury answered, “Yes.”

Question No. 4 asked whether the County of Fresno made reasonable efforts to perform any of the mandatory duties that the jury found had been violated. The jury found a reasonable effort had been made as to only one of the 14 regulations that it found

¹⁶ Plaintiffs state that the 14 violations can be organized into four categories. Specifically, County (1) failed to determine whether child welfare services were necessary for Seth within a 30-day period; (2) did not properly execute its emergency response protocols; (3) did not conduct an in-person investigation within 10 days; and (4) failed to have in-person contact with the children and at least one adult with information regarding the allegations.

had been violated. That particular regulation, DSS Manual regulation 31-101.3.31, required the completion of “an Emergency Response Protocol, as described in Section 31-105.”¹⁷

As to damages, the special verdict reflects the jury’s findings that Hudson suffered past and future noneconomic damages totaling \$5.0 million and Seth’s brother suffered noneconomic damages totaling \$3.5 million.

Question No. 7 of the special verdict asked the jury to apportion responsibility for these damages. The jury found County was 65 percent responsible for plaintiffs’ harm, while Lebaron Vaughn was 25 percent responsible and Rena Ireland was 10 percent responsible.

D. Findings Relating to General Duty to Respond

DSS Manual regulation 31-101.1 sets forth the general requirement that “[t]he county shall respond to all referrals for service which allege that a child is endangered by abuse, neglect, or exploitation.”

The jury did not place an “X” next to the number of this regulation in the special verdict, which means the jury found that County did not violate the duty to respond provided for in this regulation.

¹⁷ We note that this regulation is contained in Section 31-101, which addresses general matters, and refers to Section 31-105’s requirements for completing an emergency response protocol. The special verdict form also asked whether specific provisions in Section 31-105 of the DSS Manual were violated and, if so, whether a reasonable effort had been made to perform. This combination of a general question that referred to Section 31-105, followed by questions about specific provisions in Section 31-105, produced an overlap or redundancy that created the possibility for inconsistent answers, which we conclude ultimately occurred. We note that the parties stipulated to the form of the jury verdict that was submitted to the jury, with the exception of plaintiffs’ objection to including Question No. 4. This verdict form, coupled with utilizing a verbatim repetition of the DSS Manual regulations in instruction 423, created a recipe ripe for inconsistent conclusions.

County argues the jury's finding should be interpreted to mean that "County *properly* responded to all referrals of alleged child abuse, neglect or exploitation." (Italics added.) The finding, in County's view, is irreconcilable with the jury's findings that County violated other regulations that imposed specific requirements on County's investigation.

We disagree with County's position that the finding County did not violate a duty in DSS Manual regulation 31-101.1 means it *properly* responded to all referrals—that is, all of County's actions complied with all applicable regulations.

DSS Manual regulation 31-101.1 states that County "shall respond to all referrals" It does not state that County shall *properly* respond to referrals or that County shall respond to referrals "as described in Sections 31-110, 31-120 and 31-125."¹⁸ Thus, we reject County's interpretation of the special verdict to mean the jury found it *properly* responded to the referrals. DSS Manual regulation 31-101.1 requires only that County respond, it does not indicate the specific actions that should be included in the response or when the response should be made. As a result of this lack of specificity, it was possible the jury found that County did respond and thereby satisfied DSS Manual regulation 31-101.1, but that County violated particular requirements contained in other regulations mandating how and when certain tasks are to be completed.

Therefore, we conclude the jury's finding that DSS Manual regulation 31-101.1 was not violated can be reconciled with its findings that County violated specific regulations governing (1) investigations and (2) the completion of emergency response protocols.

¹⁸ These sections address (1) in-person investigations, (2) in-person investigations within 10 calendar days, and (3) investigation requirements, respectively. Had these sections been mentioned in DSS Manual regulation 31-101.1, that regulation would have been parallel to the provisions discussed below.

E. Findings Relating to Emergency Response Protocol

1. *Role of Agency's Interpretation in Creating Mandatory Duty*

We are aware of no published decision that has rejected or applied the “clearly unreasonable” standard when considering whether a regulation imposes a mandatory duty for purposes of section 815.6. This lack of precedent may result from the fact that a public official or employee faced with applying an ambiguous regulation is exercising judgment as to what the regulation means and, therefore, is not simply following explicit and forceful language that usually is a prerequisite to the creation of a mandatory duty.

The present case is atypical because some of the uncertainties created by ambiguous language in the child welfare services regulations have been addressed formally by the Department in documents labeled “All County Information Notices.” These notices appear to set forth the Department’s interpretation of its own regulations and, as a result, declare what the Department intended its regulations to require.¹⁹ Thus, to the extent that notices were in place during 2008 and address a regulation relevant to the actions or inaction of CPS, we conclude those notices are relevant to determining whether a regulation imposes a mandatory duty. This conclusion is based on the rationale that a social worker need not exercise his or her judgment as to what a regulation means when the interpretive notice identifies the particular action to be taken or not taken.

We further conclude that the Department’s formal written interpretations of the regulations in chapter 31 of the DSS Manual are subject to the “clearly unreasonable” test stated in *Cabrera, supra*, 55 Cal.4th at page 690. The “clearly unreasonable” test applies because the administration of the child welfare services system has been delegated to the

¹⁹ Discerning the intent of the promulgating agency is the primary goal of interpreting regulations to determine if a mandatory duty was created. (See I.C.2, *ante*, [intent and interpretation].)

Department by the Legislature and the handling of reports of child neglect and abuse is a matter that falls within the expertise of the Department.

1. Findings Relating to Section 31-101

DSS Manual regulation 31-101.3 provides that “[t]he social worker shall respond to a referral by one of the following methods: [¶] .31 Completing an Emergency Response Protocol, as described in Section 31-105. [or] [¶] ... [¶] .33 Conducting an in-person investigation initiated within 10 calendar days from the date the referral was received, as described in Section 31-120.”

The jury found County did not violate regulation 31-101.3 or 31-101.3.33, but did violate regulation 31-101.3.31’s mandatory duty of “[c]ompleting an Emergency Response Protocol, as described in Section 31-105.” In addition to finding a violation, the jury later found that County made a reasonable effort to perform this duty.

2. Findings Relating to Section 31-105

The jury’s finding that the County violated regulation 31-101.3.31 by not completing emergency response protocols “as described in Section 31-105”, but made a reasonable effort to perform that duty (which shields it from statutory liability), must be compared to its later findings about specific provisions in Section 31-105 to determine if the findings are internally consistent.

The special verdict listed five specific provisions in Section 31-105 and the jury was asked if County violated a mandatory duty in any of those provisions. The jury found County violated mandatory duties in DSS Manual regulations 31-105.2.21, 31-105.2.212 and 31-105.21.213, and had not made reasonable efforts to perform those duties.

DSS Manual regulation 31-105.2 requires completion of the emergency response protocols and provides:

“.21 The Emergency Response Protocol form, or approved substitute, is complete when the social worker has recorded enough

information as specified in Section 31-105.1 to document the decision as to whether or not to make an in-person investigation and shall include: [¶] ... [¶]

“.212 The rationale for evaluating out the referral, and

“.213 The supervisor approval.”

3. *Comparison of Inconsistent Findings*

In its findings relating to DSS Manual section 31-101, the jury found that, although the County had failed to complete an Emergency Response Protocol as described in DSS Manual section 31-105, the County made a reasonable effort to perform that duty. Despite these broad findings, the jury also found in its responses relating to DSS Manual regulation 31-105 that County had violated, and had *not* made a reasonable effort to perform, specific mandatory duties in DSS Manual regulations 31-105.2.21, 31-105.2.21.212 and 31-105.2.21.213, which also relate to completing an emergency response protocol.

These findings are inconsistent. On the one hand, in its response to DSS Manual regulation 31-101.3.31, the jury found reasonable effort had been made to complete the emergency response protocol in accordance with DSS Manual section 31-105. On the other hand, the jury found specific provisions in DSS Manual section 31-105 had been violated without a reasonable effort to perform. The broad finding in response to DSS Manual regulation 31-101.3.31 regarding DSS Manual section 31-105 cannot be reconciled with the findings about the specific provisions. In short, the jury was asked overlapping questions and gave different, irreconcilable answers to those questions. The answers were not ambiguous and thus susceptible to being resolved by interpretation.

4. *Forfeiture of Inconsistencies*

Plaintiffs contend that County forfeited its argument that the special verdict was ambiguous and inconsistent by failing to raise those arguments with the trial court before the jury was discharged.

One secondary authority describes the forfeitures of defects in a special verdict as follows: “[W]hile failure to object to a verdict before the discharge of a jury and to request clarification or further deliberation precludes a party from later questioning the validity of that verdict if the alleged defect was apparent at the time the verdict was rendered and could have been corrected, *the principle does not apply where the verdict itself is inconsistent.*” (4 Cal.Jur.3d (2015) Appellate Review, § 188, p. 251, fn. omitted, italics added.)

Some courts have described the parameters of the forfeiture principle by emphasizing the distinction between (1) verdicts that are merely ambiguous and (2) those that are either hopelessly ambiguous or inconsistent. For instance, the court in *Little v. Amber Hotel Co.* (2011) 202 Cal.App.4th 280 stated:

“Prior to the jury’s discharge, the trial court is obliged upon request to ask the jury to correct or clarify a potentially ambiguous or inconsistent verdict. [Citation.] If the verdict is ‘merely ambiguous,’ a party’s failure to seek clarification of the verdict before the jury is discharged may work a forfeiture of the purported defect on appeal, ‘particularly if the party’s failure to object was to reap a “technical advantage” or to engage in a “litigious strategy.”’ [Citations.] However, absent a forfeiture, courts may properly interpret a ‘merely ambiguous’ verdict in light of the pleadings, evidence, and instructions. [Citation.] In contrast, if the special verdicts are “hopelessly ambiguous” or inconsistent, failure to seek clarification from the jury does not create a forfeiture, and the proper remedy is ordinarily a retrial on the issues underlying the defective verdict. [Citation.]” (*Id.* at pp. 299-300.)

Other courts have stated that the failure to object will not result in a forfeiture where the special verdict is “fatally inconsistent.” (*Morris v. McCauley’s Quality Transmission Service, supra*, 60 Cal.App.3d at p. 972; see *Advance Rumely Thresher Co. v. McCoy* (1931) 213 Cal. 226, 231-232 [finding that buyer elected to rescind sales contract and finding that seller breached a contractual obligation to furnish free repair work and keep on hand repair parts were not “fatally inconsistent”].)

Based on our earlier determination that the jury's answers to overlapping questions about the emergency response protocol were inconsistent (as opposed to ambiguous), we conclude that exception to the requirement for an objection before discharge of the jury applies in this case. Under the exception, County did not forfeit its objections to the inconsistency in the answers to the special verdict's questions about the emergency response protocol.

5. *Failure to Present a Reasoned Argument*

Plaintiffs present the following argument in response to County's position that the answers to the questions in the special verdict were inconsistent:

“Additionally, to the extent County attempts to argue that the verdict is fatally inconsistent, County makes more of a sufficiency of the evidence argument with respect to most of its claims of error in the verdict, and fails to make any reasoned argument on appeal on how the verdict is fatally inconsistent.”

Plaintiffs have accurately described a significant portion of the discussion presented by County in its appellant's opening brief under the heading “*The Jury's Verdict is Ambiguous and Inconsistent.*” Much of the discussion set forth on pages 34 through the first paragraph on page 36 of appellant's opening brief relates to what the evidence and testimony did or did not include.

Notwithstanding County's many arguments that the evidence presented was contrary to the jury's findings of violations of specific regulations, we conclude that County has adequately presented the claim of error that the jury's finding about County's attempts to comply with DSS Manual regulation 31-101.3.31 (“Completing an Emergency Response Protocol, as described in Section 31-105”) were inconsistent with the findings that County did not make a reasonable effort to perform the duties in DSS Manual regulations 31-105.2.21, 31-105.2.21.212 and 31-105.2.21.213.

County's brief expressly identified the specific regulations and findings that it contended were inconsistent by stating: “Although the jury found that County's attempts

to comply with 31-101.3.31 (Completing Emergency Response Protocol, as described in § 31-105) was reasonable, they also found the County had failed to comply with 31-105.2.21, 31-105.2.21.212 and 31-105.2.21.213.” On the next page of its opening brief, County argued: “In the present matter, the jury’s finding ... that the County’s attempts to comply with a requirement of ‘completing an Emergency Response Protocol, as described in Section 31-105’ (Reg. 31-101.3.31) was reasonable is irreconcilable with its findings that the County violated other regulations concerning the emergency response protocol” These two statements, when read together, adequately present the argument that the finding that County had made a reasonable effort to perform the duty set forth in DSS Manual regulation 31-101.3.31 was inconsistent with the subsequent findings that County had not made a reasonable effort to perform the duties of completing an emergency response protocol in accordance with DSS Manual regulations 31-105.2.21, 31-105.2.21.212 and 31-105.2.21.213.

Therefore, while County’s argument about the inconsistency is not a model of clarity, we conclude it was sufficient to identify the inconsistency in the jury’s findings that County was challenging on appeal.

F. Finding Relating to In-Person Investigations within 10 Calendar Days

Our analysis of the jury’s findings regarding the duty to perform in-person investigations within 10 calendar days, pursuant to DSS Manual regulation 31-101.3.33, has parallels to the foregoing analysis of the findings related to the emergency response protocol. In particular, the jury made a finding of compliance with a general provision followed by findings that specific provisions were violated. As with the findings related to the emergency response protocol, these findings are irreconcilable.

1. *Finding Relating to DSS Manual Regulation 31-101.3.33*

DSS Manual regulation 31-101.3.33 provides that one method by which a social worker shall respond to a referral is by “[c]onducting an in-person investigation initiated

within 10 calendar days from the date the referral was received, as described in Section 31-120.” The jury found that County did not violate this regulation.

In light of DSS Manual regulation 31-101.3.33’s use of the phrase “as described in Section 31-120,” the question presented is whether the jury’s findings that County violated regulations in DSS Manual section 31-120 are consistent with its finding that County did not violate DSS Manual regulation 31-101.3.33.

2. *Findings Relating to Section 31-120*

The jury found County violated all three provisions of DSS Manual section 31-120 listed in the special verdict—DSS Manual regulations 31-120.1, 31-120.1.11 and 31-120.1.12. DSS Manual regulation 31-120.1 provides in full:

“The social worker shall conduct an in-person investigation of the allegation of abuse, neglect, or exploitation within 10 calendar days after receipt of a referral when:

“.11 The emergency response protocol indicates that an in-person investigation is appropriate and the social worker has determined that an in-person immediate investigation is not appropriate.

“.12 The law enforcement agency making the referral does not state that the child is at immediate risk of abuse, neglect, or exploitation and the social worker determines that an in-person immediate investigation is not appropriate.”

3. *Potential Inconsistency in the Findings*

The jury’s findings contain a potential inconsistency. The jury found that a social worker complied with DSS Manual regulation 31-101.3.33 by conducting an in-person investigation *initiated* within 10 calendar days from the receipt of the referral, yet also found that County’s social workers violated DSS Manual regulations 31-120.1, 31-120.1.11 and 31-120.1.12 by failing to conduct an in-person investigation of the allegation of abuse, neglect or exploitations within 10 calendar days after receipt of a referral.

The regulations are worded differently and the difference creates a possible basis for reconciling the findings. DSS Manual regulation 31-101.3.33 refers to investigations *initiated* within 10 calendar days. The other regulations do not use “initiated” or variations of that word. Instead, the language in DSS Manual regulation 31-120.1 states that the social worker “shall conduct an in-person investigation” within 10 calendar days. If “initiated” is interpreted to mean “started” or “begun” and the phrase “shall conduct an in-person investigation” is interpreted to mean something more than just starting or beginning the investigation, then the findings by the jury could be reconciled under the theory that the jury found the investigation had been initiated within 10 days, but County failed to take the additional actions necessary to “conduct an in-person investigation ... within 10 calendar days.”

However, as described below, we conclude that, when the regulations are interpreted in accordance with the principles set forth in part II of this opinion and the information in the record, the finding that DSS Manual regulation 31-101.3.33 was not violated cannot be reconciled with the findings that DSS Manual regulations 31-120.1, 31-120.1.11 and 31-120.1.12 were violated.

4. *Resolving the Ambiguity in the Regulations*

The appellate record contains the Department’s “ALL COUNTY INFORMATION NOTICE” dated December 1, 2006. The notice states that DSS Manual sections 31-115 and 31-120 and regulation 31-110.3 “specify when in-person immediate and 10-day investigations shall be conducted” and appears to set forth the Department’s position of the meaning of those provisions by stating: “If the referral was identified as requiring a 10-day response, the investigation must have been *attempted or completed* by the end of the tenth day after the referral was received (the day the referral was received is counted as day one).” (Italics added.)

In effect, the Department appears to have interpreted the regulatory provision about “an in-person investigation initiated within 10 calendar days” and the provision stating a social worker “shall conduct an in-person investigation of the allegation of abuse, neglect, or exploitation within 10 calendar days” to mean that the investigation, at a minimum, must have been *attempted* by the end of the 10th day. (DSS Manual regulations 31-101.3.33 & 31-120.1.)

Plaintiffs challenge County’s reliance on the interpretation set forth in the Department’s notice by arguing that “County does not explain how the language ‘conduct an in-person investigation’ (31-120.1; 31-101.3) could be interpreted to mean ‘attempt an in-person investigation.’” Plaintiffs support this argument by citing to a jury instruction that defined an “in-person investigation” as “a face-to-face response by a social worker for the purpose of determining the potential for or the existence of any condition that could cause harm to a child and result in the need for services.”²⁰ Plaintiffs’ supplemental letter brief also refers to the October 2011 report of the California State Auditor and interprets the report’s criticism of attempted visits as making clear that the Department interprets the regulations to require actual in-person contact, not attempts at contact.

Based on the record before us, we cannot definitively resolve the specific meaning of the regulations addressing in-person investigations within 10 days from the referral. That meaning will have to be resolved on remand and there might be additional discovery into the Department’s intent that will be relevant to the trial court’s resolution of that meaning.²¹ Nevertheless, for purposes of this appeal and the question of inconsistency,

²⁰ Plaintiffs claim this definition was based on DSS Manual regulation 31-002(e)(7), but the regulatory definitions are not part of the appellate record and we cannot confirm the accuracy of the definition in the jury instruction. (See pt. III, *ante*.)

²¹ Administrative agencies have some leeway to change how they interpret their own regulations, which means an agency is not locked into its first interpretation. (2 Am.Jur.2d (2015) Administrative Law, § 73; see *Perez v. Mortgage Bankers Assn.* (2015)

we can conclude that DSS Manual regulations 31-101.3.33 and 31-120.1 require the same thing with respect to an in-person investigation within 10 days of the referral. Because the regulations require the same thing, the jury's finding that one regulation was not violated is inconsistent with its finding that the other regulation was violated. Again, the jury was asked overlapping questions and gave different, irreconcilable answers to those questions.

As with the inconsistency involving the emergency response protocol, this inconsistency was not forfeited by County's failure to raise it with the trial court before the jury was discharged and was adequately raised in County's opening brief. (See pt. IV.E.4 and IV.E.5, *ante*.)

5. *Unconstitutionally Vague*

County argues that the provisions in DSS Manual regulations 31-101.3.33 and 31-120.1 regarding the initiation and conduct of in-person investigations are unconstitutionally vague and, therefore, are void. We reject this argument.

County quotes at length findings and declarations made by the Legislature in 1979 in connection with the enactment of California's Administrative Procedures Act. (See § 11340.) In County's view, the express legislative findings that supported the enactment of the Administrative Procedures Act support its position that the regulations in chapter 31 of the DSS Manual are unclear, unnecessarily complex and confusing.

County's argument about legislative findings makes little sense. The Administrative Procedures Act was enacted in 1979 to address the problem of unclear and overly complex regulations. (Stats. 1979, ch. 567, § 1.) The regulations in the DSS

575 U.S. ___ [135 S.Ct. 1199, 1203] [notice and comment procedures of federal Administrative Procedures Act do not apply when an agency issues a new interpretation of a regulation that deviates significantly from the agency's previous interpretation].) One limitation on this leeway is that the new interpretation must not be inconsistent with plain language of the regulation. (*Butts v. Board of Trustees of the California State University* (2014) 225 Cal.App.4th 825, 842, fn. 14.)

Manual were adopted *pursuant to the Administrative Procedures Act* (Welf. & Inst. Code, § 10554) and, therefore, were subject to procedures designed to address the problem of confusing or unclear language. Therefore, the Legislature’s general finding that the language of many unspecified regulations adopted *before* the enactment of the Administrative Procedures Act were unclear and unnecessarily complex is not a legislative finding that regulations subsequently adopted by the Department under the act also are unclear. (§ 11340, subd. (b).)

Moreover, County’s claim that the regulations are unconstitutional and therefore invalid stands outside the legislatively established procedures for challenging the validity of regulations. (See § 11342.2 [validity of regulations].) The Administrative Procedures Act—specifically, section 11350—provides that “[a]ny interested person may obtain a judicial declaration as to the validity of any regulation . . . by bringing an action for declaratory relief in the superior court in accordance with the Code of Civil Procedure.” Here, County has not followed this procedure or otherwise made the Department a party to this litigation. As a result, the Department is not present and able to defend the invalidity of its regulations.

In addition, the “rule of judicial restraint that counsels against rendering a decision on constitutional grounds if a statutory basis for resolution exists” (*NBC Subsidiary (KNBC-TV), Inc. v. Superior Court* (1999) 20 Cal.4th 1178, 1190) and the fact that the administrative regulations could have been challenged on the statutory ground of lack of clarity (*Sims v. Department of Corrections and Rehabilitation* (2013) 216 Cal.App.4th 1059, 1077 [courts entertain claims that regulations lack clarity]) provide another basis for not considering County’s constitutional claims.

On remand, our conclusion that County’s constitutional challenge is procedurally inappropriate should not be interpreted to mean that County cannot argue that ambiguities in the regulations prevented them from imposing mandatory duties because the public

employees applying the regulations had to exercise their judgment in determining how to apply the regulations.

G. Other Inconsistencies

Based on our reading of the appellate briefs, it does not appear that County has challenged other findings in the special verdicts on the ground those findings were inconsistent.

H. Remedy

The remedy for inconsistent answers in a special verdict is a new trial because appellate courts are not allowed to enter a judgment that implements one inconsistent answer and nullifies the other. (*Singh, supra*, 186 Cal.App.4th at p. 358.) Here, the inconsistencies in the special verdict relate to the question of liability. Therefore, the proper remedy is a new trial as to all issues—that is, liability, causation, damages and apportionment of responsibility.

V. FACTUAL AND LEGAL CAUSATION

Section 815.6 provides that “the public entity is liable for an injury of that kind *proximately caused* by its failure to discharge the [mandatory] duty ...” (Italics added.) Thus, proximate cause is one of the three elements a plaintiff must prove to establish the public entity’s liability under section 815.6. (*Novoa, supra*, 61 Cal.4th at p. 348.)

A. Contentions

County contends that plaintiffs cannot establish the proximate cause element under the facts presented. County argues that, as a matter of law, its action or inactions were not a substantial factor in causing injury to the plaintiffs. In County’s view, there is no evidence that Seth or his brother would have been removed from the home on December 26, 2008, or any other time before the December 29th beating. Thus, County concludes: “It cannot be said that the failure of Wettlaufer or any other social worker to make in-

person contact with the family was a substantial factor in producing the plaintiffs' alleged injuries.”

Plaintiffs contend that causation is a question of fact, the jury's finding of causation is supported by substantial evidence, and therefore the issue cannot be decided as a matter of law. Plaintiffs contend there was only one discretionary determination between the breaches of mandatory duties and their harm—namely, the social worker's determination to remove Seth from the home because he was in immediate danger. Plaintiffs argue this one discretionary determination does not provide a sufficient basis for this court to decide there was no proximate causation as a matter of law.

Plaintiffs also challenge the accuracy of County's position that no evidence was presented to show Seth would have been removed from the home if mandatory duties had been performed by referring to the testimony of their retained expert witness, who testified that a reasonable social worker would have removed Seth before the beating.

B. Causation and Its Components

1. *General Principles*

Proximate cause has two components—one factual and one legal. (*Novoa, supra*, 61 Cal.4th at pp. 352-353.) Cause in fact exists if the act is a necessary antecedent of an event, which is referred to as “but-for” causation. (*Id.* at p. 352.) Factual causes of an event can be traced back to the dawn of humanity. (*Id.* at p. 353.) Consequently, California courts have imposed additional limits in the form of legal (i.e., proximate) cause. (*Ibid.*) The legal limitations are based on (1) the degree of connection between the conduct and the injury and (2) public policy considerations. (*Ibid.*)

Generally, whether a party's negligence caused the plaintiff's injury presents a question of fact. (*Hoyem v. Manhattan Beach City Sch. Dist.* (1978) 22 Cal.3d 508, 520.) This general rule also applies to whether an injury was “proximately caused by” a public entity's breach of a mandatory duty for purposes of section 815.6. (*Novoa, supra*, 61

Cal.4th at p. 353.) The general rule that causation is determined by the trier of fact is subject to an exception. Appellate courts may decide proximate causation as a matter of law if the evidence presented permits reasonable minds to come to just one conclusion. (*Ibid.*; see *Grisham v. Philip Morris U.S.A., Inc.* (2007) 40 Cal.4th 623, 637; *Conte v. Wyeth, Inc.* (2008) 168 Cal.App.4th 89 [question of fact for jury may be decided as a matter of law by court only when there is no room for a reasonable difference of opinion].)

2. *Deciding Causation as a Matter of Law*

In *Novoa, supra*, 61 Cal.4th 339, the Supreme Court concluded, as a matter of law, that both the factual and legal aspect of proximate cause could be decided as a matter of law against the plaintiff. In that case, the plaintiff sued the State Department of Mental Health (DMH), claiming that the rape and murder of her sister by a paroled inmate was caused by DMH's failure to discharge mandatory duties imposed by the Sexually Violent Predators Act (SVPA) (Welf. & Inst. Code, § 6600 et seq.). (*Novoa, supra*, 61 Cal.4th at p. 344.) The plaintiff alleged that if DMH had performed its duties properly, the inmate would not have been released on parole and, therefore, could not have murdered her sister.

The Supreme Court reviewed the procedures set forth in the SVPA and concluded the DMH had a mandatory duty to designate two mental health professionals to conduct a full evaluation of inmates referred to it by the Department of Corrections. (*Novoa, supra*, 61 Cal.4th at p. 350.) DMH violated this mandatory duty because it used a single evaluator, who reviewed the records received from the Department of Corrections and determined the inmate was suitable for release. (*Id.* at p. 346.) The court acknowledged this violation and identified five links in the causal chain between DMH's failure to appoint a second evaluator and the possible retention of the inmate in custody as a sexually violent predator (SVP):

“Even if DMH had conducted a full evaluation by appointing a second evaluator, [1] the second evaluation would have had to disagree with the first and conclude that Pitre was an SVP; [2] two independent evaluators would then have had to agree that he was an SVP; [3] the designated counsel would have had to make a discretionary decision to file a civil commitment petition; and [4] the trial court would have had to make a discretionary probable cause determination.” (*Id.* at p. 355.)

The fifth and last event necessary for the civil commitment of the inmate was a finding by a trier of fact under the reasonable doubt standard that the inmate was an SVP. (*Novoa, supra*, 61 Cal.4th at p. 355; see Welf. & Inst. Code, § 6604.) Thus, to prevail on the proximate causation element, the plaintiff had to establish a “subsequent unbroken series of discretionary findings contradicting the first evaluator’s conclusion and leading to civil commitment.” (*Novoa, supra*, at pp. 355-356.) The court concluded “that under the facts pleaded here, proximate cause is absent as a matter of law.” (*Id.* at p. 355.)

In *Novoa*, the court also provided guidance about the implications of its conclusion that there was no proximate cause under the facts of that case: “We do not hold that the intervention of *any* discretionary decision between breach of a mandatory duty and a subsequent injury will always foreclose a finding of proximate cause.” (*Novoa, supra*, 61 Cal.4th at p. 356.)

The decision in *Novoa* was filed after the appellate briefing in the present case was complete. Consequently, we requested the parties to provide supplemental briefing addressing how the analysis of proximate cause adopted in *Novoa* applied to the facts of this case. In particular, we asked counsel to specify the events in the chain of causation that linked each alleged breach of a mandatory duty to Vaughn’s fatal beating of Seth.

C. Analysis of Causation

County argues that proximate cause cannot be proven in this case because (1) the particulars of an investigation are committed to the discretion of the social worker and (2) the decision to remove a child from the home is a discretionary decision. In County’s view, no matter what the investigation might have entailed, it would be pure speculation

for a jury to find that Seth would have been removed from the home prior to the December 29, 2008, beating.

Assuming that the social worker's duty to investigate included a mandatory duty to have face-to-face contact within 10 days of the referral, the information that would have resulted from that contact is uncertain because the specific questions asked by the social worker would have been discretionary. Additional uncertainty relates to whether the information obtained would have caused the social worker to make the discretionary determination that Seth was in immediate danger and needed to be removed from the home.²² Therefore, we agree with County that there were discretionary steps between the alleged breach of the duty to investigate within 10 days and the harm suffered in this case.

Next, we conclude that the discretionary aspects of the way CPS handled Seth's case are insufficient as a matter of law to foreclose a finding of proximate cause. In short, the discretionary implementation of the post-contact investigation and of any decision to remove Seth from the home does not attenuate the causal chain to the extent that the five discretionary determinations identified in *Novoa* weakened the connection between DMH's failure to use two evaluators and the murder of the plaintiff's sister. The last of the five determinations in *Novoa*—a jury finding beyond a reasonable doubt that the inmate was an SVP—involves a very different threshold than the discretionary determinations in this case.

As to a more specific analysis of proximate cause in this case, that analysis necessarily involves an evaluation of the connection between the violations of specific

²² Under subdivision (a)(2) of Welfare and Institutions Code section 306, a social worker may take a child into temporary custody where “the social worker has reasonable cause to believe that the minor ... is in immediate danger of physical ... abuse.” Wettlaufer confirmed during plaintiffs' direct examination that she could contact the police and ask that a child be removed from the home.

mandatory duties and the beating that killed Seth. As discussed earlier, the exact parameters of the mandatory duties imposed upon County by the DSS Manual cannot be determined on the record before this court. Without that foundation, we cannot determine as a matter of law that *all* potential breaches of those duties were not a proximate cause of Seth's death.

Therefore, the causation issue does not provide a basis for this court to direct a judgment in favor of County notwithstanding the verdict obtained by plaintiffs.

VI. EXCESSIVE DAMAGES

County argues that the combined award of \$8.5 million by the jury was the result of passion and prejudice and was not supported by the evidence. County contends the excessive damages entitle it to a new trial.

Since we have determined that other grounds require a new trial on all issues, we need not decide whether the claim of excessive damages provides a separate ground for ordering a new trial.

VII. EVIDENTIARY ISSUES

A. Testimony by Plaintiffs' Expert

Plaintiffs presented testimony of their retained expert, Joseph Bongiovanni, Ph.D., an emergency response social worker for Contra Costa County with 15 years of experience in that position and a doctorate in clinical psychology.

When asked about compliance with the investigation requirements in DSS Manual regulation 31-110.3 and whether "you have to go out within ten days and do a face-to-face interview," Bongiovanni answered, "Yes." Bongiovanni also testified that if the children cannot be found within the 10-day period, the investigation does not stop and the social worker should continue to try to locate the children to see if they are safe.

In response to a question about whether Seth and his brother "should have been removed from the house well before December 26 of 2008," Bongiovanni answered, "In

my opinion they should have been removed, or at least a nondetaining petition should have been filed with the court.”

1. Contentions

County contends the admission of this and other testimony by Bongiovanni was improper opinion testimony. County argues that, contrary to the immunity applicable to discretionary decisions by public employees set forth in sections 820.2 and 821.6, plaintiffs’ expert incorrectly lead the jury to believe that County could be liable for any decision not to take steps to remove Seth and his brother.

Plaintiffs contend that all the testimony by Bongiovanni referenced by County’s opening brief “relates to how the County’s investigations failed to comply with certain mandatory duties; it does not relate to the quality of the investigations, which are discretionary functions.” Plaintiffs assert that to prove public agency liability under section 815.6, they were required to establish the breach of a specific mandatory duty, causation, and the failure to exercise reasonable diligence in the discharge of the duty. Plaintiffs contend that the expert’s opinions were relevant to both the issue of causation and the issue of whether County “exercised reasonable diligence to discharge the duty.” (§ 815.6.)

2. Opinion Regarding Causation and Reasonable Efforts

In *Alejo, supra*, 75 Cal.App.4th 1180, the court addressed the issue of causation related to a police officer’s failure to investigate or report child abuse. (*Id.* at p. 1190.) The court stated that whether the county welfare department would have taken steps to protect the child from physical abuse if a report had been made was “a question of fact to be determined at trial through expert testimony.” (*Id.* at p. 1192.) Therefore, we reject the position that expert testimony regarding causation is improper opinion testimony that should be excluded. Similarly, we reject the argument that expert testimony regarding whether a public employee made reasonable efforts to fulfill a mandatory duty is

inadmissible opinion testimony. (*Ibid.* [expert testimony allowed on the question of how a reasonably prudent social worker would have responded to report allowed].)

We note that the *Alejo* decision was discussed in *Guzman* and was not mentioned by the majority in *Novoa*. Therefore, we conclude it remains good law. Consequently, on remand, plaintiffs may present expert opinion testimony on the issues of causation and reasonable efforts.

3. *Mandatory Duties*

To the extent that Bongiovanni testified about the existence of mandatory duties, it would appear that such opinion testimony is improper because the existence of a mandatory duty is a question of law decided by the courts, not by the jury based on an expert's interpretation of the regulations. Therefore, such testimony should not be allowed on remand.²³

B. Recordings of Potts's 911 Calls

County contends the trial court erroneously allowed recordings of telephone calls placed by Cynthia Potts to be played for the jury. County argues "the recordings should have been excluded pursuant to Evidence Code §§ 210 and 352."

It is axiomatic that an appellant has the burden of establishing error. Ordinarily, an appellant seeking to establish evidentiary error will attempt to satisfy that burden by (1) identifying the applicable standard of review, (2) providing a citation to the volume and page of the reporter's transcript where the evidence in question was presented the jury,²⁴ (3) identifying the objections to the evidence that appellant presented to the trial

²³ To the extent that plaintiffs contend an implied mandatory duty or duties exist, an expert's view, outside the presence of the jury, of how that implication is necessary might be useful to the trial court's determination of the existence and scope of a particular duty.

²⁴ Such citations to the record are required by the rule that states appellate briefs must "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." (Cal. Rules of Court, rule 8.204(a)(1)(C).) In the present case, County has not provided the required citations.

court, (4) describing the rationale the trial court gave when it admitted the evidence, and (5) presenting arguments as to why that rationale and, thus, the admission of the evidence was contrary to law. County has omitted most of these steps in claiming recordings of 911 calls were erroneously admitted and, as a result, has not established an error occurred.

1. *Standard of Review*

Appellate courts apply the abuse of discretion standard when evaluating rulings regarding relevancy under Evidence Code section 210 and undue prejudice under Evidence Code section 352. (*Donlen v. Ford Motor Co.* (2013) 217 Cal.App.4th 138, 147.) Therefore, for County to carry the burden of affirmatively demonstrating error, it must show the trial court abused its discretion.

2. *Relevancy*

There are at least two reasons why County has failed to show the trial court abused its discretion when it determined the recordings were relevant. First, County has not identified the court's rationale for its determination that the evidence was relevant. Second, even if County had referenced the trial court's determination "that there is probative value to the tape as it reflects on the credibility of Ms. Potts McClendon," the arguments presented by County do not contradict the trial court's determination by showing that (1) Potts's credibility was not an issue in the lawsuit or (2) the tapes did not tend to prove or disprove Potts's testimony was credible.

3. *Undue Prejudice*

Evidence Code section 352 authorizes trial courts to exclude evidence if its probative value is substantially outweighed by the danger of undue prejudice. County's attempt to establish error under this statute is incomplete because it has ignored one-half of the weighing process—namely, the probative value of the recordings on the issue of Potts's credibility. As a result, County has not shown the balance struck by the trial court

when it completed its weighing of probative value against undue prejudice was arbitrary, capricious or patently absurd. (*Donlen v. Ford Motor Co.*, *supra*, 217 Cal.App.4th at p. 150.)

C. Potts's Cell Phone Records

County contends the trial court erred in denying its request for judicial notice of Potts's cell phone records for the period of May 1, 2008, through September 30, 2008. The trial court indicated the records consisted of approximately 2,100 entries presented in an Excel format on a disk, not paper. County contends these records would have impeached Potts's trial testimony that between January 2008 and October 2008, she called CPS at least 10 times.

County refers to the trial court's January 2013 written report of its in camera review of the records to Potts's Sprint cell phone. The written report stated the court had searched the records using two methods and failed to locate any calls to 911 or the two numbers for CPS's Care Line. We note that the trial court's report also stated, "Should the parties have any other suggestions for any other means of searching the document, the court will certainly do so."

County also supports its position by referring to a February 5, 2013, declaration of a Sprint employee stating the records provided in December were true and correct copies of records maintained by Sprint during the regular course of its business.

In response to County's argument that the denial of its request for judicial notice of the in camera report or cell phone records was error, plaintiffs refer to statements made by the trial court at the outset of trial. In one such statement, the court indicated to the attorneys that, although he reviewed the records, he wanted to avoid becoming a witness in the trial.

County's attempt to establish an erroneous denial of its request for judicial notice does not cite (1) any statutory provision that would require the trial court to take judicial

notice of the results of its in camera review of business records or (2) any similar principle established by case law. (See Evid. Code, §§ 451 [matters that must be judicially noticed], 452 [matters that may be judicially noticed].) Thus, County has not shown that the denial of its request violated a rule of law making judicial notice compulsory.

VIII. CLOSING ARGUMENT

A. Argument about Sending County a Message

County argues Hudson’s counsel acted improperly during closing argument by invoking the “golden rule” argument.

1. *Basic Principles*

The “golden rule” argument, also known as the “surrogate victim” argument, is made when “counsel asks the jury to place itself in the victim’s shoes and award such damages as they would charge to undergo equivalent pain and suffering.” (*Collins v. Union Pacific Railroad Co.* (2012) 207 Cal.App.4th 867, 883.) Plaintiffs’ attorney did not ask the jurors to place themselves in the shoes of Hudson or Seth’s brother and therefore did not make a “golden rule” argument.

In its reply brief, County acknowledges that the arguments made by Hudson’s counsel were not a traditional golden rule argument in its strictest sense, but was a request that the jury “send a message” rather than decide the case based on an impartial evaluation of the evidence.

Arguments that urge the jury to “send a message to the community” by its verdict are discussed in a practice guide, which states that the argument may be appropriate in a punitive damages case, but may be improper in other cases, particularly when made in the context of the amount of damages to be awarded. (Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2014) ¶ 13:197, p. 13-47, citing *Nishihama v. City and County of San Francisco* (2001) 93 Cal.App.4th 298, 305.)

2. *Contentions of the Parties*

In County's view, the following statements made during closing argument by plaintiffs' counsel are the equivalent of asking the jury to send a message: "We cannot have this, as a society. This is why this case is so important. This is why your decision is so important. *We have to tell CPS in a verdict* that we'll not tolerate this. We will not tolerate for 45, 46 days that you're going to lose track of kids." (Italics added.)

In plaintiffs' view, this argument was proper because at no time did their counsel ever tell the jury it should "send a message to the County" or insinuate that County should be punished for its acts or failures to act. Instead, plaintiffs assert their counsel properly asked that County be held accountable for its violations of mandatory duties.

3. *Analysis*

First, plaintiffs' counsel did not use the phrase "send a message" in closing argument. Nonetheless, the sentence "We have to tell CPS in a verdict that we'll not tolerate this" communicates the same idea.

Second, counsel made the statement about telling CPS in a verdict during his discussion of liability, not damages. Thus, counsel did not ask that the message be sent through the award of inflated damages, which was the improper type of argument described in *Nishihama v. City and County of San Francisco*, *supra*, 93 Cal.App.4th at page 305. That court also stated that when the request to send a message is "a plea for a verdict of liability," the argument is not improper. (*Id.* at p. 306.)

Third, counsel's arguments urging the jury to hold County "accountable" were not improper. Being held "accountable" is the same as being held "responsible" and the jury was charged with the task of determining County's responsibility for plaintiffs' injuries.

Fourth, the trial court dealt with the possibility that the jury might interpret the tell-CPS-in-a-verdict argument as a request for inflated damages by re-reading the punitive damages instruction to the jury after the rebuttal argument.

Based on the foregoing circumstances, it is unlikely that counsel's tell-CPS-in-a-verdict argument had an improper effect on the verdict. Therefore, that argument does not provide an additional ground for ordering a new trial.

IX. DISCOVERY WRIT REGARDING QUALITY ASSURANCE REPORT

CPS includes a unit called the Child Welfare Quality Assurance Division. Generally, when a child under CPS supervision dies or is seriously injured, the Quality Assurance Division conducts an investigation and prepares a report.

After Seth died, the Quality Assurance Division conducted an investigation and prepared a report relating to him and his brother (QA report). The QA report is the subject of a discovery dispute. The trial court rejected County's claims that the QA report was privileged and issued an order compelling its production.

In September 2012, County filed a petition for writ with this court seeking to vacate the trial court's order directing County to produce a report by the Fresno County Child Welfare Quality Assurance Division.

In October 2012, we stayed the order directing the QA report be produced and subsequently issued an order to show cause.

A. History Relevant to Discovery Issues

1. *First Demand for Production of Report*

In April 2010, about six months after filing this lawsuit, Hudson propounded a demand for production of documents, set one, that requested County to produce all documents related to Seth and his case. The demand covered the entire CPS file for Seth as well as "all memos, reports, documents or other writings in regard to any recommendations by any organization to defendants in the handling of the Seth Ireland case," and all written reports pertaining to Seth.

We conclude that the QA report is a written report pertaining to Seth and, therefore, Hudson's demand for production of documents reached the QA report.

County objected to each request in the demand for production on the ground it sought documents subject to a juvenile court protective order dated February 9, 2010. County stated that, due to the protective order, it was “unable to produce the demanded documentation absent an order expressly authorizing the release.”

We note two things about County’s response. First, County did not object to the demand on the ground that one or more of the documents requested were protected by the privileges that it now asserts apply to the QA report. Second, County’s objection based on the protective order was not a ground for failing to produce the QA report because (as shown by later proceedings) the protective order did not cover the QA report.

County’s objection to Hudson’s demand for production of documents caused Hudson to file a petition pursuant to Welfare and Institutions Code section 827 requesting the release of documents relating to a minor. Before ruling on the petition, the juvenile court received the entire CPS file, which did not contain the QA report. The juvenile court (1) conducted an *in camera* review of the documents provided by County, (2) determined that certain information in the documents should be redacted, (3) specified the portions to be redacted, and (4) ordered County to disclose the redacted documents to Hudson for use in this litigation. The juvenile court’s review and order did not address the QA report because, as stated in County’s reply, “The QA report is not part of or contained in those records subject to the 827 petition.” Therefore, Hudson did not obtain a copy or learn of the existence of the QA report as a result of the juvenile court proceedings for the release of documents covered by the protective order.

2. *Other Demands for Production*

Hudson served a second and third set of demands for the production of documents. In responding, County did not produce the QA report, disclose its existence, or set forth County’s position that the QA report was privileged. Furthermore, the objections made in County’s written responses did not raise the privileges or the exemptions in the

California Public Records Act (§ 6250, et seq.) now asserted by County as grounds for not producing the QA report.

3. *Wettlaufer's Deposition*

During the September 26, 2011, deposition of Wettlaufer, Hudson's attorney quoted his request for the production of all written reports pertaining to Seth and asked, "And, Counsel, you've said that you've produced all that?" The defense attorney answered, "Yes" and stated after a follow-up question, "Everything that we have has been produced via the 827 Petition."

This response by defense counsel did not alert Hudson's attorney to the existence of the QA report. Instead, it created the impression that there were no documents covered by the demand for the production of documents that had not been produced.

In Hudson's view, County's written discovery responses and counsel's oral statement at Wettlaufer's deposition were "a strategy of deliberating hiding the existence of the QA Report from [Hudson] throughout discovery."

4. *Subsequent Depositions*

In the spring of 2012, Hudson's attorney learned of the existence of the QA report. On April 12, 2012, Hudson's attorney deposed Wendy Osikafo as the person most knowledgeable regarding an audit of CPS. Osikafo was the supervisor of the Quality Assurance Division from 2006 until the fall of 2010. Her declaration stated the division was established in 2005 to improve the provision of social work services and is comprised of social workers whose duties are to perform various functions such as audits, program reviews, investigations and various special projects.

Osikafo brought three documents to the deposition relating to state audit investigations of County's child welfare services. One state audit document referred to a review being done, which apparently prompted plaintiffs' counsel to ask questions about a review and report. Osikafo testified that the Quality Assurance Division does three

major things, one of which is to conducting a full review of critical incidents. A critical or “sentinel” incident is when a child dies or is severely injured. Osikafo testified that “any time a child dies or is severely injured we conduct a full review in anticipation of possible litigation, and prepare a report for our risk management and our counsel. That’s the primary. We also are looking to see if there is anything that can be improved within the system, or learn[ed] from as a result.” Osikafo indicated the process starts immediately, so an actual threat of litigation is not what triggers the investigation by the Quality Assurance Division. After Seth was killed, the Quality Assurance Division conducted an investigation.

On May 30, 2012, Hudson’s attorney deposed Catherine Huerta, the director of CPS at the time Seth died. Huerta testified that, to her knowledge, the QA report was the only investigative report done in connection with the death. In her capacity as director, Huerta did no investigation beyond reviewing and analyzing the QA report. She also testified that investigations occur immediately after the death of a child in CPS’s care.

5. *Specific Demand for QA Report*

The day after Osikafo’s deposition, Hudson propounded a demand for production of documents, set four, that requested County to “produce any and all Quality Assurance Reports regarding Seth.”

County’s written response objected to the request “as being vague and ambiguous, overbroad and unintelligible” and as seeking “documentation that is protected from disclosure and subject to the attorney-work product and attorney-client privilege, litigation privilege and is confidential pursuant to Government Code section 6254.”

6. *Motion to Compel*

In June 2012, Hudson filed a motion to compel production of the QA report. Hudson argued the QA report was not protected by the attorney-client privilege because the dominant purposes for the preparation of the report was not for use by County’s

defense attorneys. Hudson also argued the QA report (1) was not attorney work product because the report was not prepared by an attorney or an agent of an attorney and (2) was not protected from disclosure by the Public Records Act.

County's opposition to the motion to compel argued the QA report was confidential and immune from discovery (1) as a record of a peer review body protected by subdivision (a) of Evidence Code section 1157; (2) as a record pertaining to pending litigation protected by subdivision (b) of section 6254; (3) by subdivision (a) of section 6254; (4) by Civil Code section 47; and (5) the attorney-client privilege.

On September 4, 2012, the trial court issued a tentative ruling indicating the motion to compel production of the QA report would be granted. The next day, a hearing was held on the motion.

During the hearing, the trial court asked defense counsel about County's disclosure of the existence of the QA report and the belief that it was privileged. Defense counsel described the history of the discovery as follows:

“[Plaintiffs] initially requested the entire file, and we couldn't disclose that because of the need for an 827 petition. We went through the civil process, and you have to go through the juvenile process. Um, with regard to various reports, I'm sure that objections were raised. There was never requested to receive any sort of a privilege l[og], so I'm not sure if they actually requested the QA report or something of that sort until it actually came out in deposition testimony, and then [plaintiffs] expressly requested it.”

This statement by defense counsel addressed two points relevant to this discovery dispute. The first point relates to when Hudson made a request covering the QA report. Counsel stated she was not sure if a request “of that sort” was made before the existence of the QA report came out during depositions. As set forth in part IX.A.1, *ante*, Hudson's demand for production, set one, reached the QA report. The demand requested all written reports pertaining to Seth and was made about two years before the depositions of Osikafo and Huerta.

The second point relates to defense counsel’s statement that “I’m sure that objections were raised” and her next statement that there was never a request for a privilege log. Each statement was literally true. However, by making the statements together, defense counsel implied that the objections made included some privileges and plaintiffs were remiss in not requesting a privilege log. That implication is not accurate—the written objections made to the first three demands for production of documents contained no assertions of privileges that would have alerted plaintiffs to request a privilege log.

7. *Trial Court’s Order*

On September 6, 2012, the trial court issued a written order granting the motion to compel and directing County to turn over to plaintiff the QA report and other specified items within 20 days of the order.

The trial court expressly found that County had not demonstrated litigation was seriously contemplated in this case when the QA report was prepared and sent to counsel. The court also found the QA report had not been prepared by lawyers and the investigators who did prepare it were not working as legal advisors to the Quality Assurance Division. The trial court concluded that, because the QA Report was independently prepared by County, turning it over to counsel did not convert it into a privileged communication. As to the Public Records Act, the court impliedly found that the public interest served by withholding the document did not clearly outweigh the public interest served by disclosure.

B. Standard of Review

County’s petition for a writ of mandate set forth grounds as to why writ relief was appropriate. County, however, did not address the standard of review that applies to orders compelling discovery. As a result, County’s attempts to demonstrate trial court

error have not taken into account the deference appellate courts give to the trial court's findings of fact, whether express or implied.

Appellate courts review a trial court's determination of a motion to compel under the abuse of discretion standard. (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733.) As to questions of law, an abuse of discretion is shown if the trial court applied the wrong legal standard. (*Ibid.*) Also under the abuse of discretion standard, the trial court's express and implied findings as to disputed facts will be upheld on appeal if supported by substantial evidence. (*Ibid.*; *People ex rel. Dept. of Corporations v. SpeeDee Oil Change Systems, Inc.* (1999) 20 Cal.4th 1135, 1143 [under abuse of discretion standard of review, appellate court must accept trial court's express or implied findings of fact supported by substantial evidence].)

C. Waiver or Forfeiture of Objections

1. *Contentions of the Parties*

Hudson's return to the order to show cause contends that County's failure to timely disclose the existence of the QA report and set forth objections with the timely disclosure waived County's rights to object to the production of the QA report on any ground, including privileges. (See Code Civ. Proc., §§ 2031.240, 2031.300.)

During oral argument, counsel for County argued that the QA report was exempt from *disclosure* by section 6255 (the "public interest" or "catchall" exemption in the California Public Records Act [§ 6250, et seq.]) and that exemption means County was not required to disclose its existence when responding to discovery. Counsel cited *Wilson v. Superior Court* (1996) 51 Cal.App.4th 1136 to support this argument.

2. *Principles Related to Waiver*

The requirements in the Civil Discovery Act, Code of Civil Procedure section 2016.010 et seq., "have been generally construed as meaning that if a party contends a demand for the production of documents is violative of a privilege, an objection on that

ground, specifying the protected items and the particular privilege alleged to apply, must be included in the *initial response* to a production request or deposition question, or may be deemed waived. [Citations.]” (*Deary v. Superior Court* (2001) 87 Cal.App.4th 1072, 1078-1079, italics added; see Weil & Brown, Cal. Practice Guide: Civil Procedure Before Trial (The Rutter Group 2015) ¶ 8:1476.1, p. 8H-31 [waiver by failure to object].)

For example, in *Stadish v. Superior Court* (1999) 71 Cal.App.4th 1130, the defendant did not assert the trade secrets privilege in its response to the plaintiff’s demand for production of documents. (*Id.* at p. 1141.) The court concluded the defendant had a statutory obligation to object in a timely fashion to the production of documents on the basis of the trade secret privilege. (*Ibid.*) Based on the failure to satisfy this statutory obligation, the court concluded that the defendant, “as a matter of law, waived its right to assert the trade secret privilege as to the documents ... sought in [plaintiff’s] request for production of documents.” (*Ibid.*)

Since July 1, 2005, the statutory obligation for specific objections has been set forth in subdivision (b) of Code of Civil Procedure section 2031.240. (Stats. 2004, ch. 182, § 23.) Under that subdivision, if a party responding to a demand for production objects to producing an item or category of item, “the response shall do both of the following: [¶] (1) Identify with particularity any document, tangible thing, land, or electronically stored information falling within any category of item in the demand to which an objection is being made. [¶] (2) Set forth clearly the extent of, and the specific ground for, the objection. If an objection is based on a claim of privilege, the particular privilege invoked shall be stated.” (Code Civ. Proc., § 2031.240, subd. (b).)

3. *Objections Deemed Waived*

First, we consider County’s legal argument that no objection was necessary when it responded to the discovery because the QA report was exempt from disclosure under section 6255. We reject this argument and conclude the exemption addresses disclosure

of the contents of a document, not does not justify withholding objections to discovery and thereby concealing the document's existence. County's reliance on *Wilson v. Superior Court, supra*, 51 Cal.App.4th 1136, is misplaced because that case involved a newspaper's request for documents under the Public Records Act and did not involve a discovery request or address the possibility that objections to the discovery could be deemed waived. (*Id.* at p. 1139.) Consequently, the court did not adopt the principle that section 6255's exemption from disclosure allows a governmental entity to forgo raising objections to a discovery request that reaches a document the entity claims is exempt. Moreover, we will not adopt such a principle because doing so would allow governmental entities to keep the existence of documents secret and their assertion of the exemption would be insulated from judicial scrutiny.

Second, we consider the factual basis for the conclusion that County is deemed to have waived its objections to the production of the QA report. The record shows that (1) the QA report was covered by Hudson's first demand for production of documents, (2) County objected to the first demand by raising the juvenile court's protective order, (3) this objection did not encompass the QA report because that document was not subject to the protective order, and (4) County's response to Hudson's first demand for production did not identify with particularity the QA report and did not state the privileges or Public Record Act exemptions now invoked by County to protect the QA report from disclosure. Bluntly stated, until the spring of 2012 defense counsel did not disclose the existence of the QA report or the specific privileges claimed to justify their decision not to produce the report. Therefore, we conclude that County forfeited its objections to the production of the QA report by failing to raise the privileges in a timely manner and, in addition, by concealing the fact there was a QA report. (*Deary v. Superior Court, supra*, 87 Cal.App.4th at pp. 1078-1079; *Stadish v. Superior Court, supra*, 71 Cal.App.4th at p. 1141.)

Therefore, County is not entitled to a reversal of the order compelling production of the QA report.

DISPOSITION

The trial court's order granting a new trial is modified to include all issues, not just the issue of apportionment of responsibility. As modified, the order is affirmed.

County's petition for writ of mandate is denied.

The parties shall bear their own costs on appeal.

Franson, J.

WE CONCUR:

Hill, P.J.

Gomes J.