NO. A05-45

State of Minnesota

In Supreme Court

Nancy Becker and Michael Becker, individually
and as parents and guardians of
Nykkole E. Becker f/k/a Nykkole E. Rossini,

Appellants,

Minnesota Department of Human Services,

Appellant,

vs.

Mayo Foundation,

Respondent.

JOINT BRIEF OF AMICI MINNESOTA HOSPITAL ASSOCIATION, MINNESOTA MEDICAL ASSOCIATION, THE AMERICAN MEDICAL ASSOCIATION, MINNESOTA ORTHOPAEDIC SOCIETY, AMERICAN ASSOCIATION OF ORTHOPAEDIC SURGEONS, AMERICAN COLLEGE OF EMERGENCY PHYSICIANS, AND AMERICAN ACADEMY OF PEDIATRICS, MINNESOTA CHAPTER

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INTRODUCTION AND INTEREST OF AMICI[1]

Unquestionably, the policy of the State of Minnesota is, and should be, to require the reporting of neglect, and physical or sexual abuse of children. The Legislature explicitly set forth this statutory policy when it passed the first version of the Child Abuse Reporting Act ("CARA") in 1965. In passing CARA, the Legislature also evaluated the best way to carry out the policy of protecting Minnesota children through mandatory reporting. In doing so, the Legislature and governor decided that the appropriate sanction for not reporting would be the imposition of a criminal penalty, pursuant to an action brought by a public prosecutor. Appellants and their supporting Amici now seek to judicially undo the Legislature's work by summarily imposing civil liability as a penalty for failing to report suspected abuse. Our organizations and our members are directly involved in patient care and, like everyone else, want to end child abuse. We firmly believe that in the public interest of sound health care policy, such a radical change to CARA should only be made by the Legislature after due consideration of all factors relating to such a change and legislative agreement that such a change is indeed in the best interests of Minnesota's children.

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[1] Pursuant to Rule 129.03, the undersigned counsel certifies that no counsel for a party to this case authored this brief in whole or in part and no one made a monetary contribution to the preparation or submission of this brief other than the Minnesota Hospital Association, the Minnesota Medical Association, the American Medical Association, the Minnesota Orthopaedic Society, the American Association of Orthopaedic Surgeons, the American College of Emergency Physicians, and the American Academy of Pediatrics, Minnesota Chapter.

Appellants also seek to expand the legal definition of "special relationship" to impose, for the first time, a duty on hospitals to protect patients from harm that occurs outside the hospital. We believe such an extension is contrary to well-established Minnesota law.

Our seven Amici Curiae submitting this brief have a sincere and demonstrable interest in the well-reasoned and orderly development of sound health care policy. All of our organizations have been directly involved in developing legislative policy to assist society in providing the highest quality health care. In particular, the Minnesota Medical Association ["MMA"] and the Minnesota Hospital Association ["MHA"] recently worked with the Department of Health and the Legislature to enact the Minnesota Adverse Health Care Events Reporting Act (Minn. Stat. § 144.706, *et. seq.*), a unique statute designed to require public reporting of unexpected adverse health events, the first of its kind in the country. Each of the remaining five Amici has an affirmative commitment to engage in the analysis and advocacy necessary to ensure that laws affecting the delivery of health care are enacted and revised only after due consideration of the basis for, and effects of, such laws or changes therein. While all seven of our organizations agree that child abuse is dreadful and steps should be taken to eliminate it, we also believe that legislative changes (if necessary) must occur within the context of thorough analysis, including legislative study and hearings.

Minnesota Hospital Association

MHA is a statewide organization comprised of almost all hospitals in the State of Minnesota, including 136 acute care hospitals and 22 health systems. MHA's objective

is to provide leadership toward the advancement of sound healthcare policy. MHA's efforts focus on access to healthcare, consumer value, and improving the quality of care in the state. MHA serves its members as one of the State's most influential, trusted and respected leaders in healthcare policy and advocacy and is a valued resource for health care information.

The Minnesota Medical Association

MMA is a professional association representing approximately 10,000 physicians, residents, and medical students in the State of Minnesota. MMA seeks to promote excellence in healthcare, to insure a healthy practice environment, and to preserve the professionalism of medicine through advocacy, education, information and leadership. Founded in 1853, MMA and its members work together to safeguard the quality of medical care and the future of the medical profession.

The American Medical Association

The AMA is an Illinois non-profit corporation, comprised of approximately 245,000 physicians, residents, and medical students. The AMA is the largest medical society in the United States. Its objects are to promote the science and art of medicine and the betterment of public health. Its members practice in every state, including Minnesota, and in every field of medical specialization. The AMA was founded in 1847 to promote the science and art of medicine and the betterment of public health, and these remain its core purposes.[2]

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[2] The AMA joins this brief on its own behalf and as a representative of the Litigation Center of the AMA and the State Medical Societies. The Litigation Center is a

Minnesota Orthopaedic Society

The Minnesota Orthopaedic Society ("MOS") is a statewide professional organization comprised of approximately 260 orthopaedic surgeons and residents. MOS was incorporated to further the advancement of the diagnosis, treatment, teaching, and research of diseases and disabilities in the field of orthopaedic surgery in Minnesota. MOS also works to advance the field of orthopaedic surgery as it relates to socioeconomic change. MOS provides educational opportunities and legislative monitoring to safeguard and promote the practice of orthopaedic surgery in the State of Minnesota.

American Association of Orthopaedic Surgeons

The American Association of Orthopaedic Surgeons ("AAOS") is a non-profit 501(c)(6) corporation founded in 1997 by the American Academy of Orthopaedic Surgeons. The Association engages in health policy and advocacy activities on behalf of musculoskeletal patients and the profession of orthopaedic surgery. The Association has approximately 28,000 members across the world. Members of the Association include pediatric orthopaedists, concerned with the diagnosis, care, and treatment of musculoskeletal disorders in children.

American College of Emergency Physicians

The American College of Emergency Physicians ("ACEP") is a nonprofit, voluntary professional and educational society of nearly 24,000 emergency physicians

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coalition of the AMA and private, voluntary, non-profit state medical societies, including the MMA, formed to represent the views of organized medicine in the courts.

practicing in the United States and other countries. Founded in 1968, ACEP is the nation's oldest and largest association of emergency physicians. ACEP fosters the highest quality of emergency medical care through the education of emergency physicians, other health care professionals, and the public; the promotion of research; the development and promotion of public health and safety initiatives; and the provision of leadership in the development of health care policy.

American Academy of Pediatrics, Minnesota Chapter

The American Academy of Pediatrics, Minnesota Chapter is a 501(c)(6) tax exempt organization. The Minnesota Chapter was founded in 1948 and currently has over 800 members in the state. The membership consists of Fellows of the American Academy of Pediatrics, Candidate Fellows, Pediatric Residents, Medical Students, and Affiliated Members. The Minnesota Chapter is committed to achieving the optimal health, safety and well-being of Minnesota's infants, children, and adolescents and its members dedicate their efforts and resources to these goals. The Minnesota Chapter accomplishes its mission by engaging in advocacy for infants, children, and adolescents, professional education, advocacy for pediatricians, public education, and membership service.

* * *

The interests of our seven organizations are primarily public in nature because they involve the delivery of health care in general. The parties will naturally focus on the particular facts of the case as those facts bear on the rulings below. We have no interest in the particular dispute between these litigants. However, our primary concern is that

the Court's consideration of this case could result in a drastic change in the law outside the appropriate channels. We believe that only the Legislature should decide whether CARA should provide for a civil cause of action, and then only after considerable research, hearings, study and policy analysis. Thus, we seek to provide some broader perspective on the issues of law and policy that should guide this Court's decision in analyzing whether to create a new cause of action under CARA when the Legislature plainly did not provide for one.

Since our members include hospitals and healthcare professionals, a decision by this Court could implicate private interests as well. However, because our practitioner members serve the public, we believe that recognizing a statutory civil claim based on failure to report would affect the public interest more than the private interests of the members of our organizations. Nonetheless, the greatest concern remains that recognizing a civil cause of action will override the intent of the Legislature when it already determined that the sanction for failure to report should be a criminal penalty, not civil liability.

In addition to advocating for civil liability under CARA, Appellants and their supporting Amici also seek to expand the definition of "special relationship" to impose liability on hospitals for the acts of others occurring outside the hospital. No cases in Minnesota have recognized such a relationship. We are concerned that if the Court were to expand the definition of "special relationship," our members could be held liable for injuries occurring to patients outside of their custody and control, a result which is plainly contrary to Minnesota law.

ARGUMENT

I. ESTABLISHING A CIVIL CAUSE OF ACTION IS WITHIN THE EXCLUSIVE PURVIEW OF THE LEGISLATURE.

A. Judicial Restraint is Appropriate When the Legislature has Spoken.

In establishing the Child Abuse Reporting Act, the Legislature expressly and appropriately declared that "the public policy of this state is to protect children whose health or welfare may be jeopardized through physical abuse, neglect or sexual abuse." Minn. Stat. § 626.556, subd. 1. The Legislature stated further that "it is the policy of this state to require the reporting of neglect, physical or sexual abuse of children in the home, school, and community setting . . ." *Id.* In order to carry out the public policy set forth in CARA, the Legislature defined terms relevant to the statute, identified mandatory reporters, determined penalties for failure to report, and established a system for reporting child abuse while at the same time maintaining confidentiality as appropriate. *Id.* at subd. 1-15. In defining, identifying, and providing the best means for reporting child abuse, the Legislature did not, as Appellants and certain Amici appear to assert, overlook the issue of civil liability. The statute is extensive, and its plain language demonstrates that civil liability for failure to report was purposely excluded by the Legislature.

The legislatively-adopted penalty for failing to report child abuse under CARA could not be more clear:

> **Failure to Report.** (a) a person mandated by this section to report who knows or has reason to believe that a child is neglected or physically or sexually abused, as defined in subd. 2, or has been neglected or physically or sexually abused within the preceding three years, and fails to report, is guilty of a misdemeanor.

Minn. Stat. § 626.556, subd. 6 (emphasis added).[3]

Other provisions in CARA contain clear evidence that the Legislature considered possible civil liability:

> **Malicious and Reckless Reports.** Any person who knowingly or recklessly makes a false report under the provisions of this section shall be liable in a civil suit for any actual damages suffered by the person or persons so reported and for any punitive damages set by the court or jury, plus costs and reasonable attorneys fees.

Minn. Stat. § 626.556, subd. 5 (emphasis added). If the Legislature had wanted to create a civil remedy for failure to report, it simply would not have specifically provided civil damages for filing malicious and reckless reports, yet remained silent about civil damages for failing to report.[4] Such a strained interpretation would render subdivision 5 superfluous.

CARA's Subdivision 4 provides immunity from any civil or criminal liability that otherwise might result from making a voluntary or mandated report if the reporter is acting in good faith. Thus, it is evident from the plain language of the statute that the Legislature anticipated the possibility of civil suits for reporting but not for failing to report. Contrary to the positions offered by Appellants and their Amici, one simply may not assume this was a legislative oversight and essentially redraft the statute, when the

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[3] Curiously, Appellants' brief makes the sweeping assertion that, "A physician's obligation under the statute is merely to report the suspected child abuse. The legislature intended penalties – civil and criminal – for those who do not." (Appellants' Brief, p. 16). However, their brief does not offer even one citation for this bold assertion.

[4] Of course, as this case attests, common law remedies for medical malpractice exist, regardless of the Court's decision in this matter.

Legislature obviously considered, and elected not to include, civil liability in other contexts.

The Legislature's awareness of the possibility of a civil cause of action is also evident in the Vulnerable Adults Act, Minn. Stat. § 626.557 ("VAA"). The VAA articulates the State's public policy in a manner remarkably similar to CARA:

> **Subd. 1. Public Policy.** The legislature declares that the public policy of the state is to protect adults who, because of physical or mental disability or dependency on institutional services, are particularly vulnerable to maltreatment;
>
> * * * *
>
> In addition, it is the policy of this state to require the reporting of suspected maltreatment of vulnerable adults . . .

This legislatively-stated public policy is virtually identical to that set forth in CARA. In the VAA, however, the Legislature reached a very different result in determining how to implement Minnesota's public policy. While CARA states that "a person mandated by this section to report . . . fails to report, is guilty of a misdemeanor," the Vulnerable Adults Act expressly provides a damage remedy:

> **Subd. 7. Failure to Report.** A mandated reporter who negligently or intentionally fails to report <u>is liable for damages caused by the failure</u>. Nothing in the subdivision imposes vicarious liability for the acts or omissions of others.

Minn. Stat. § 626.556, subd. 7 (emphasis added).

The precise reasons why the Legislature decided to use different enforcement tools in the two statutes is not clear but, for purposes of this appeal, those reasons are largely insignificant. The decision could have been based on any one of many factors, such as resources available to the child and vulnerable adult populations, the populations

themselves, the desire to impose a higher/criminal threshold on failing to report abuse of minors, or potentially thousands of other considerations. The bottom line is that for whatever reason, the Legislature chose different methods for enforcing the critical need to report abuse or neglect of two vulnerable populations.[5] Absent constitutionality concerns, it is not the Court's role to reconcile or second-guess the Legislature's reasoned decision making. Rather, this Court's role is to interpret and apply the law the Legislature established.

Any second-guessing by the Court of legislative decision making in this case is especially inappropriate as the legislatively-drafted penalty for failing to report under CARA is clear. As this Court has stated, "no room for judicial construction exists when the statute speaks for itself." *Commissioner of Revenue v. Richardson*, 302 N.W.2d 23, 26 (Minn. 1981), cited in *Green Giant Company v. Commissioner of Revenue*, 534 N.W.2d 710, 712 (Minn. 1995). However, even if there were room for judicial construction or interpretation, the Court may not supply that which the Legislature purposely omits or inadvertently overlooks. *Green Giant*, 534 N.W.2d at 712; citing *Wallace v. Commissioner of Taxation*, 289 Minn. 220, 184 N.W.2d 588 (1971). Thus, even when the Minnesota Supreme Court finds a section of a statute to be "poorly written" and "ambiguous" in providing for a number of different interpretations, the Court should not further interpret the statute but instead signal to the Legislature that it

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[5] Without going into detail, the implications for failing to report are only two of many differences between the two statutes. For example, the VAA includes "accident" and "therapeutic conduct" exceptions for reporting suspected abuse or neglect of a vulnerable adult. *See* Minn. Stat. § 626.557, Subd. 3a.

may wish to re-examine or clarify its intentions. *See, e.g., In Re Imlay v. City of Lake Crystal*, 453 N.W.2d 326, 334 (Minn. 1990) (declining to provide its own interpretation of collateral source benefits in ambiguous statute, noting that the Legislature may wish to re-examine the issue).

The Legislature has provided guidance for interpretation of its statutes by the courts:

> The object of all interpretation and construction of laws is to ascertain and effectuate the intention of the legislature. Every law shall be construed, if possible, to give effect to all its provisions.
>
> When the words of a law in their application to an existing situation are clear and free from all ambiguity, the letter of the law shall not be disregarded under the pretext of pursuing the spirit.

Minn. Stat. § 645.16 (emphasis added). *See also* Minn. Stat. § 645.17 (courts should presume the legislature intends the entire statute to be effective and certain). This legislative mandate prohibits the very result that Appellants and their supporting Amici seek -- the establishment of a remedy specifically not provided for under the statute.

A corollary to the principles set forth above is the doctrine of judicial restraint. The principles of judicial restraint forbid courts from creating new causes of action which the Legislature has not expressed or implied. *Bruegger v. Faribault County Sheriff's Department*, 497 N.W.2d 260, 262 (Minn. 1993); *Larson v. Dunn*, 460 N.W.2d 39, 47 (Minn. 1990). In this case, the intent of the Legislature to provide exclusively for a criminal penalty for "failure to report" under CARA is clear. The Court should not create

a civil cause of action where the Legislature declined to do so, particularly without the input of the many concerned parties (including ourselves) on this issue.

B. The Legislature is Uniquely Qualified to Evaluate and Implement Changes to CARA.

The very arguments propounded by Appellants and the Amici who support the judicial establishment of a civil cause of action under CARA highlight why any consideration of modifying the statute to impose civil liability under CARA should be left to the Legislature. Appellants and their supporting Amici argue -- without any factual support -- that by imposing civil liability, the reporting of child abuse will increase. These arguments appear to be based on a disappointingly cynical assumption that medical providers are not in favor of reporting child abuse. These arguments also assume that increased reporting equals increased accurate reporting.

The assumptions underlying these arguments may be unfounded, may contain a grain of truth, or may be absolutely accurate. The proper way to determine that, however, is to have hearings, study and analysis of the precise issue by the Minnesota Legislature. At those hearings, the Legislature could evaluate statistics regarding mandatory reporting, hear the stories of those affected by child abuse, listen to the experiences and opinions of healthcare workers and other mandatory reporters, and assess the input from experts in the prevention of child abuse. After such hearings, the Legislature could determine whether the addition of civil liability for failing to report under CARA would help, or hinder, the furtherance of the policy of reporting and preventing child abuse. However, until that process occurs, it would be unwise and

inconsistent with Minnesota case law (and the legislatively-enacted statute itself), for this Court simply to mandate civil liability when such a notion has not been approved by the Legislature.

Our organizations have all been active in the development of legislation that affects health care by providing our insights regarding how changes in the law impact the delivery of quality health care. Certainly, we would want the Legislature to hear our insights on this issue as well. Judicially-imposed civil liability (absent the appropriate legislative process) for failure to report under CARA would prevent the necessary discussion on a number of issues that potentially affect health care policy and the delivery of health care:

1. How would the potential for civil liability affect the relationship between health care providers and their patients?

2. Would the potential for civil liability actually lead to increased or decreased reporting?

3. Would increased reporting be accurate reporting?

4. Would the potential for civil liability lead to better recognition and treatment of injuries associated with child abuse?

5. If increased reporting occurred, would it be an appropriate use of state resources to investigate every single report or use those resources for other abuse-prevention techniques?

In addition to these broad "cause and effect" questions that are appropriate for legislative analysis, the Legislature also would need to evaluate more practical questions regarding the propriety of civil liability under CARA:

1. Should health care providers be immune from civil liability if based on their expertise (in pediatrics, emergency medicine, radiology, orthopaedics,

etc.) they fail to report an injury that is sometimes associated with child abuse because in their medical judgment they determine the injury was the result of another cause?

2. Should the consequences of a failure to report be tempered by public prosecutorial discretion?

3. Would a claim under CARA require expert review similar to that required by Minn. Stat. § 145.682?

4. Should health care providers be entitled to limited liability under CARA?

5. Who may assert a cause of action based on failure to report?

6. Is there vicarious liability for failure to report? (*See* Minn. Stat. § 626.557, subd. 7.)

7. What limitations period should apply to a claim based on failure to report?

8. How long after reaching adulthood may individuals bring a cause of action based on an incident of unreported abuse during childhood?

The issues set forth above are some of the many difficult questions for the Legislature to consider that extend well beyond the scope of permissible judicial review. Given the undeniable fact that there may be both unforeseen policy ramifications as well as practical questions regarding civil suits under CARA, it is clear that these issues are for the Legislature to decide. As enacted by the Legislature, CARA does not impose a civil remedy. With all due respect, it would be wrong for the Court to circumvent the legislative process and do so now.

II. THE COURT SHOULD NOT EXTEND THE DEFINITION OF SPECIAL RELATIONSHIP TO PATIENTS WHO HAVE NOT BEEN ADMITTED TO THE HOSPITAL.

As this Court has noted more than once, there is no common law duty to protect another person. *See, e.g., H.B. by Clark v. Whittemore*, 552 N.W.2d 705, 709 (Minn.

1996). The narrow exception to this general rule occurs only when there is a "special relationship." This Court has defined the special relationship exception to apply only to (1) common carriers, (2) innkeepers, (3) landowners or tenants of land who hold the land open to the public, and (4) persons who have custody of another person under circumstances in which that other person is deprived of normal opportunities of self-protection. *Id.*

Appellants argue the Court should find a special relationship with the hospital here. We concur with the Respondent that the facts of this case do not provide a legal basis for the "special relationship" under the fourth exception set forth above. Because some of our members are hospitals that would be affected by the expansion of the definition of "special relationship," we wish to highlight the distinction between admitted and non-admitted patients as it relates to this issue.

This Court has recognized that a special relationship may exist between a hospital and a patient sufficient to create a duty on the part of the hospital to protect that patient. *See Donaldson v. Young Women's Christian Assoc. of Duluth*, 539 N.W.2d 789, 792-93 (Minn. 1995) (stating that the relationship has been found "where an institution such as a hospital or jail has physical custody and control of the person to be protected.") However the only Minnesota cases recognizing a special relationship with a hospital involve patients who have been admitted to the hospital and either lacked the ability to protect themselves or were harmed by another patient. *See, e.g., Clements v. Swedish Hospital*, 252 Minn. 1, 7, 89 N.W.2d 162, 166 (1958) and *Mesedahl v. St. Luke's Hospital Association*, 194 Minn. 198, 200, 259 N.W. 819, 820 (1935) (recognizing that a hospital

may have a duty to use reasonable care to prevent the suicide of an inpatient but refusing to impose liability when hospital lacked expertise in assessing risk.); *Sylvester v. Northwestern Hospital of Mpls.*, 236 Minn. 384, 389-90, 53 N.W.2d 17, 20-21 (1952) and *Roettger v. United Hospitals of St. Paul, Inc.*, 380 N.W.2d 856, 859 (Minn. App. 1986) (recognizing duty to protect one inpatient from another). In all of these cases, the patient had been admitted to the hospital and then was exposed to harm in the hospital.

The cases cited above parallel this Court's holding in *Tomfohr v. Mayo Foundation*, 450 N.W.2d 121 (Minn. 1990) which addressed the comparative fault implications of a relationship between a hospital and an inpatient who committed suicide. In that case, the Court held that the jury should not compare the fault of the patient with that of the hospital because the hospital had assumed a duty by admitting and continuing to care for the patient. *Id.* at 124-25. Citing *Mesedahl, Clements, and Sylvester*, the Court reasoned that in admitting the patient, the hospital had undertaken the duty to protect the patient from the very harm that occurred.

From a purely legal perspective, the distinction between events occurring in the hospital and those occurring outside the hospital is critical. The cases recognizing a special relationship have all involved harm that occurs in the custodial setting of the hospital. The present case, like any case involving an emergency room visit, generally involves harm that has occurred outside of the hospital. Essentially, Appellants seek to impose civil liability on hospitals for acts committed by third parties outside the hospital, well beyond the "custodial" requirement established by this Court. Contrary to *Donaldson* and the accompanying decisions of this Court, under Appellants' analysis a

hospital would now become liable for the acts of third parties that occur in times and places where the hospital has no physical custody and control of the patient. This would not be a situation in which the hospital could be liable for protecting a patient assaulted in her hospital bed, but one in which the hospital would be liable for events occurring far removed in time and place. Such an interpretation would be plainly contrary to the special relationship exceptions articulated by this Court in the past. The law simply does not and should not countenance the legal duty necessary to impose civil liability in this context.

CONCLUSION

Absent a finding of unconstitutionality, this Court has never unilaterally changed the legislatively-established law of this State. The eminently worthy goal of preventing child abuse is not as simple as imposing civil liability on a mandatory reporter merely to create a remedy, especially when the Legislature already has spoken on the consequences for failing to report. It would be wrong for this Court to do so now.

Dated: 24 May 06

BASSFORD REMELE
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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 132.01, subd. 3(c) of the Minnesota Rules of Civil Appellate Procedure, this certifies that Amici's Brief contains 4,484 words, which is in compliance with the 7,000 word limit. The brief was created using Microsoft Word 2003 and complies with the typeface requirements of Rule 132.01.

Dated: 24 Mar 06

Mark R. Whitmore (License #232439)