

CASE NO. A05-45

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**STATE OF MINNESOTA  
IN SUPREME COURT**

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

*Appellants,*

Minnesota Department of Human Services,

*Appellant,*

vs.

Mayo Foundation,

*Respondent.*

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**BRIEF OF AMICUS CURIAE  
SURVIVORS NETWORK MINNESOTA**

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## INTRODUCTION

Child Abuse is one of the most prevalent and costly forms of violence in our society today. Many of its victims are essentially without a voice. Some are too young to speak. Others are too devastated from the abuse to be able to speak about it until decades later. The Minnesota Legislature recognized this when it enacted The Minnesota Child Abuse Reporting Act (“CARA”). CARA specifically requires certain professionals to report suspected child abuse. It also explicitly mentions immunity from civil liability. This indicates that the legislature sought to give victims of child abuse a voice through those that are able to speak and at the same time provide an incentive to err on the side of reporting - immunity from liability. Because of the explicit indications that the legislature intended a civil cause of action for failure to report, this Court should recognize that CARA provides a cause of action when a professional required to report under CARA fails to do so.

This brief provides the perspectives of survivors of abuse and their supporters. The Survivors Network Minnesota (“Survivors Network”) is a volunteer self-help organization of survivors of sexual abuse and their supporters. Our board of directors is a broad, diverse group of child advocates, including survivors, mental health professionals, attorneys, ministers, professors, and leaders in our community. Survivors Network is committed to working to end the cycle of abuse.<sup>1</sup>

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<sup>1</sup>This Amicus Brief was authored by Survivors Network Minnesota and its counsel, Michael G. Finnegan of Jeff Anderson & Associates, P.A. No other persons or entities made any monetary contributions to the preparation or submission of the brief.

**I. CARA Provides a Voice for Victims of Child Abuse Who Lack a Voice Because They Are Too Young to Speak, Too Traumatized to Speak, or Too Ashamed and Embarrassed about the Abuse to Speak.**

**A. Victims of child abuse are often unable to speak about the abuse.**

There are numerous reasons why children that suffer child abuse are unable to speak about being abused. The first reason is the one that is most obvious - the child, like Nykkole in the case at bar, is simply too young to speak. Some of the children in the group are like Nykkole who was literally too young for any speech. Other children in this group are able to speak but lack the cognitive development to verbalize the abuse. These children are around the age of three or four. Although these three and four year olds can technically speak they often do not have the capacity to verbalize the abuse that they are suffering.

In addition to some victims being too young to have a voice, child abuse by definition silences many of its victims, even if they are old enough to speak. "Studies of clinical and nonclinical populations of adults reveal that fewer than half of victims tell anyone [about the abuse] at the time of abuse." Lucy Berliner and Diana Elliott, *Sexual Abuse of Children*, in AMERICAN PROFESSIONAL SOCIETY ON THE ABUSE OF CHILDREN ("APSAC") HANDBOOK ON CHILD MALTREATMENT, 2nd ed., 30-31 (2002)(citations omitted). This does not account for children that never tell of their abuse. Some of the various reasons that abused children are unable to speak about the abuse include:

- Sometimes abusers threaten the victims, telling them such horrible things as they will go to hell if they tell, that all of their friends will find out, or even that the child and their family will be physically harmed if they tell about the abuse. See Rochelle F. Hanson et. al., *Factors Related to the Reporting of*

*Childhood Rape*, 23 CHILD ABUSE & NEGLECT 564 (1999);

- Children may be told by the abuser to keep the abuse a secret. See DALE ROBERT REINERT, SEXUAL ABUSE AND INCEST 34-35 (1997);
- Victims sometimes feel shame and embarrassment about the abuse, making the victim feel to blame for the abuse. Many victims feel that the abuse was their fault or something that they caused to happen. Mary L. Paine & David J. Hansen, *Factors Influencing Children to Self-Disclose Sexual Abuse*, 22 CLINICAL PSYCHOL. REV. 274-75 (2002);
- Abusers may also manipulate the family into thinking that the abuser is someone who can be trusted and respected. In fact only 4% of child sex abusers are strangers. WISCONSIN COALITION AGAINST SEXUAL ASSAULT, CHILD SEX ABUSE, *available at* <http://www.wcasa.org/resources/factsheets/childsax.html> (last visited February 13, 2005) (citations omitted). A child may see how much their family respects and trusts the abuser and be fearful of not being believed;
- Some abusers shower the child with attention and buy the child gifts, making the child feel special. The child often feels that disclosing the abuse will end the gifts and attention;
- Often abusers manipulate the child victim into thinking that the relationship is built on mutual love. See MAXINE HANCOCK & KAREN BURTON MAINS, CHILD SEXUAL ABUSE: HOPE FOR HEALING 33 (1987) (citations omitted);
- Many children lack the cognitive ability to recognize that these acts were abuse and harmful. See MARGARET O. HYDE & ELIZABETH H. FORSYTH, M.D., THE SEXUAL ABUSE OF CHILDREN AND ADOLESCENTS 10 (1997);
- Some children that are sexually abused are very confused by the physical sensations that accompany physical acts. For many the abuse is their first sexual encounter. The body releases chemicals which tell it that the sexual acts are a good thing, something pleasurable.

In addition to age and these explicit reasons that children that are abused lack a voice, the difficulty is also compounded because of the lifelong nature of many of the injuries that

result from the abuse. Hundreds of research studies have conclusively shown that child abuse can alter a child's physical, emotional, cognitive and social development and impact their physical and mental health throughout their lifetime. For example, a recent study found that “20% to 35% of maltreated children had suffered from a serious injury defined as ‘long-term impairment of physical, mental, or emotional capacities or requiring professional treatment aimed at preventing such long term impairment.’” David Kolko, *Child Physical Abuse*, in APSAC HANDBOOK ON CHILD MALTREATMENT, 2nd ed., 30-31 (2002)(citations omitted). Another well designed recent study examined the impact of childhood sexual abuse, a subset of child abuse. The study reaffirmed that childhood sexual abuse has a profound negative impact throughout the victim’s life. Nelson et. al., *Association Between Self-reported Childhood Sexual Abuse and Adverse Psychosocial Outcomes: Results From a Twin Study*, ARCH. GEN. PSYCHIATRY, 59(2), 139-45, available at [http://genepi.qimr.edu.au/staff/nick\\_pdf/CV321.pdf](http://genepi.qimr.edu.au/staff/nick_pdf/CV321.pdf) (last visited February 13, 2005). This study examined both members of nearly 2000 same-sex twins (1159 female and 832 male). Id. at 139. Twins were used to separate the effects of childhood sexual abuse from possible negative effects of family background, such as parental alcohol related problems, fighting and conflict, physical abuse, and neglect. Id. at 143-44. The study looked at same sex twin pairs where one of the twins was sexually abused as a child and one was not. Id. at 139. The study found that a person with a history of childhood sexual abuse had an increased risk for subsequently occurring adverse outcomes of:

- major depression,
- suicide attempt,
- conduct disorder,
- alcohol and/or nicotine dependence,
- social anxiety,
- rape after the age of 18 years old, and
- divorce.

Id. at 142.

Almost twice as many women who were abused as children suffer from major depression.

Id. at 143. For men, major depression was over one and a half times more likely for children that were sexually abused than for those boys that were not. Id. Children who were sexually abused were roughly five times more likely to attempt suicide than those children who did not suffer abuse. Id. The survivors of abuse have to deal with these negative outcomes. Many of these survivors struggle just to live to the next day. These negative outcomes make it all the more improbable that the children will be able to disclose the abuse.

**B. A decision acknowledging a civil cause of action based upon CARA’s duty to report will give a voice to the thousands of Minnesota children who the legislature sought to protect.**

CARA explicitly states the public policy behind its enactment. “The legislature hereby declares that the public policy of this state is to protect children whose health and welfare may be jeopardized through physical abuse, neglect, or sexual abuse.” MINN. STAT. 626.556, subd. 1 (2005). “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 settings.” Id. In Radke, this Court recognized this when it concluded that “[f]rom the clear language of

CARA, it is manifest that the legislature intended to provide safety and protection for children in abusive and neglectful situations.” Radke v. County of Freeborn, 694 N.W.2d 788, 798 (Minn. 2005).

Reporting of abuse is a primary vehicle for prevention. Society wants to encourage early reporting. The longer that reporting is delayed, the longer that children are at risk and more frequently tragedies like the one involving Nykkole will happen. The problem is that children that are abused often lack a voice to speak about the abuse. CARA gives these voiceless victims a chance to speak out and be heard through the most trusted and respected people in our society - teachers, doctors, clergy, etc. These are the professionals that see these children outside of the home and often outside of the abuse. These are the people that have the opportunity and duty to stop the cycle of abuse.

In addition to the public policy behind CARA being in support of a civil cause of action, the language of CARA itself implies a civil cause of action. CARA basically mandates two overall duties: 1) the duty to make a report and 2) the duty to take appropriate action when a report is made. MINN. STAT. 626.556 subds. 3, 10. Radke noted that the language of CARA was clear about the duty to take appropriate action after a report leading to the “inescapable conclusion that [those taking the reports] had a duty to act.” Radke, 694 N.W.2d at 798. The duty to report is just as inescapable under CARA. The statute states that certain people including medical professionals “shall immediately report the information to the local welfare agency.” MINN. STAT. 626.556 subd. 3. Accordingly, just as this Court

recognized that CARA provided a duty to take reasonable steps once a report is made, this Court should recognize that CARA also provides a duty to make the report in the first place. The second duty, the duty to act, is dependant on the duty to report. There would be nothing to act upon if there were no reports.

Even more telling of the legislature's intention regarding civil liability than requiring certain people to report, is the fact that CARA explicitly discusses immunity from civil liability. CARA states:

Subd. 4. Immunity from liability. (a) The following persons are immune from any **civil liability** or criminal liability that otherwise might result from their actions, if they are acting in good faith:

(1) any person making a voluntary or mandated report . . .

MINN. STAT. 626.556 subd. 4 (emphasis added).

The legislature obviously contemplated civil liability for the very inactions that this are the basis of this appeal. If the legislature was under the impression that there is no civil liability associated with the duty to report, it would have been wholly unnecessary to provide for immunity from civil liability because this would have already been the law.

Acknowledging the legislature's indication that there should be a civil cause of action for failure to report under CARA will prevent children from suffering further abuse and ultimately aid in preventing tragedies like Nykkole's situation. Making this acknowledgment would encourage institutions such as hospitals to implement sufficient training programs so that the professionals could better recognize abuse and have consequences for the failure to report. These professionals are the voice of abused children who are unable to speak and

acknowledging a civil cause of action will result in more voices being heard.

**II. Although the Media Is Flooded with Information about the Rising Costs of Health Care Due to an Increasing Number of Malpractice Lawsuits, These Costs Pale in Comparison to the Hundreds of Millions of Dollars That this State Spends Each Year to Deal with the Aftermath of Child Abuse.**

In recent years the public has been inundated with a barrage of information about the rising costs of health care. One of the primary reasons given by politicians and the media for these rising costs is the rising number of malpractice lawsuits. In reality, however, the number of malpractice cases has very minimal impact on the costs of health care. The United States Congressional Budget Office concluded that limiting liability for malpractice claims by 25% to 30% would only result in a roughly 0.4% decrease in health care costs. CBO Report, *Limiting Tort Liability for Medical Malpractice*, Jan. 8, 2004, available at <http://www.cbo.gov/showdoc.cfm?index=4968&sequence=0> (last visited April 20, 2006). The reason for this is that the malpractice cases only make up a fraction of costs associated with overall health care costs.

Unlike the minimal costs associated with an increasing number of malpractice cases, the costs associated with child abuse are staggering. "Child Maltreatment is among the most prevalent and far reaching forms of violence in Minnesota." Minnesota Department of Health Fact Sheet, *Children and Adolescents Child Abuse and Neglect*, August 2004. The Department of Health also concluded that:

The impact of child maltreatment on society as a whole includes national and state legislation; physical and mental health care; residential treatment; special education services; law enforcement; adjudication and incarceration of

juvenile and adult criminals; family stress and the loss of earnings or poverty resulting from disability or other incapacity to secure and maintain employment (or both) and of the capacity to parent.

Id.

“Altogether, child physical abuse affects hundreds of thousands of children annually, with physical trauma ranging from mild (e.g., bruising) to the very severe (e.g., broken bones, skull fractures), including fatalities. However, the impact extends well beyond physical and emotional injury to the individual child and family and includes consequences for society in general.” David Kolko, *Child Physical Abuse*, in *APSAC HANDBOOK ON CHILD MALTREATMENT*, 2nd ed., 23 (2002) (citations omitted).

There have been a number of studies that have sought to quantify the costs associated with child abuse. The Minnesota Department of Health estimated that the cost of child maltreatment response was over 295 million dollars in 1993 alone. Minnesota Department of Health, *Healthy Minnesotans: Public Health Improvement Goals 2004*, September 1998. Last year, Wisconsin estimated that child abuse and neglect cost the state 673.3 million dollars or 1.8 million dollars per day. Children’s Trust Fund website at <http://wctf.state.wi.us/home/Cost%20Analysis.htm> (last visited March 27, 2006).

In addition to these state estimates, in 2001 Prevent Child Abuse America collected statistical data on the annual costs associated with child abuse and neglect in the United States. Suzette Fromm, *Total Estimated Cost of Child Abuse and Neglect in the United States: Statistical Evidence*, Prevent Child Abuse America 2001. The organization admittedly

used the most conservative estimates available to determine the direct and indirect costs. The data was staggering, with the direct costs estimated at over 24 billion dollars and the indirect costs estimated at over 69 billion dollars.<sup>2</sup>

**Total Annual Direct Costs of Child Abuse and Neglect in the United States**

<b>DIRECT COSTS</b>	<b>Estimated Annual Costs</b>
Hospitalization	6,205,395,000
Chronic Health Problems	2,987,957,400
Mental Health Care System	425,110,400
Child Welfare System	14,400,000,000
Law Enforcement	24,709,800
Judicial System	341,174,702
<b>Total Direct Costs</b>	<b>\$24,384,347,302</b>

**Total Annual Indirect Costs of Child Abuse and Neglect in the United States**

<b>INDIRECT COSTS</b>	<b>Estimated Annual Cost</b>
Special Education	223,607,830
Mental Health and Health Care	4,627,636,025
Juvenile Delinquency	8,805,291,372
Lost Productivity to Society	656,000,000
Adult Criminality	55,380,000,000
<b>Total Indirect Costs</b>	<b>\$69,692,535,227</b>

**TOTAL DIRECT AND INDIRECT COSTS ----- \$ 94,076,882,529**

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<sup>2</sup>Another research study estimated that the costs associated with child maltreatment in 1993 was over 11 billion dollars. Courtney, M.E., *The Economics, CHILD ABUSE & NEGLECT*, 23, 975-86 (1999).

These state and national estimates of the costs associated with child abuse show that this is a multi-billion dollar problem. The prevention of this problem and therefore a reduction in these costs should be of greater concern than the minimal costs associated with a possible modest increase in the number of lawsuits.

**III. A Special Relationship Should Exist Between a Young Infant and the Medical Provider Who She Repeatedly Saw for Injuries That Are Common Indicators of Child Abuse.**

There are two factors which determine whether there is a legal duty to act for the protection of another: 1) the relationship of the parties, and 2) the foreseeability of the risk involved. Donaldson v. Young Women's Christian Assoc. of Duluth, 539 N.W.2d 789, 792 (Minn. 1995). The Court of Appeals put weight on the fact that Nykkole was not an inpatient at the hospital to determine that the relationship was not sufficient to require the hospital to act. Becker v. Mayo Foundation, 2005 WL 3527163 (Minn. Ct. App. Dec. 27, 2005). However, regardless of whether the child was placed in inpatient care, the general nature of a child being seen at a medical office, as well as the facts of this case establish that there was a special relationship.

A child or young infant, like Nykkole, requires greater protection and a greater duty than an adult who is inpatient at a hospital. Most adults are able to make choices and decisions on their own. A child, especially an infant, is incapable of functioning on their own. This makes them particularly vulnerable. Moreover, “[f]or infants and young children who are not in schools or day care, medical visits may provide the only opportunity for an

adult outside of the family to interact with the child. Therefore, the medical office is an important setting for the primary identification of child abuse.” Carole Jenny, *Medical Issues In Child Sexual Abuse*, in APSAC HANDBOOK ON CHILD MALTREATMENT, 2nd ed., 235 (2002) (citations omitted). For Nykkole, her hospital visits were her only chance at someone protecting her because the abuse and neglect was occurring within the family home. Because infants are especially vulnerable and medical visits are often the only opportunity to detect abuse, a special relationship should be recognized.

In addition to the very nature of a child’s relationship with a medial provider, there is a special relationship here because Nykkole was repeatedly seen at Mayo for child abuse type injuries. On August 17, 1997, Nykkole was seen at Mayo for a spiral fracture of her arm. (A. App. 92-93.) Only 17 days later, Nykkole was seen again for the broken arm. (A. App. 101-04.) Only 8 days after her second hospital visit, Nykkole was seen again at Mayo. This time Nykkole had vomited ten times that day. She was cool to the touch, sleepy, and thin in appearance. (A. App. 69, 99.) Here, Mayo chose not to perform any of the tests that are warranted upon the slightest suspicion of child abuse, such as a skeletal exam. Nykkole’s fourth visit happened only four days later. (A. App. 74.) At this point it was too late. Nykkole would no longer be able to eat, communicate, or experiencing the things that other children get to experience.

The hospital had custody of Nykkole on these four occasions. It is custody, not inpatient stays, that is a key for a special relationship. Accordingly, the relationship between

a young infant and a hospital that takes custody of a child four times within the first two months of the child's life for violent injuries is such that this Court should recognize a special duty for medical providers.

In addition to the relationship, there is ample evidence that the risk here was foreseeable to Mayo. It admitted that the signs that Nykkole exhibited, a spiral fracture and repeated vomiting, were signs of child abuse. (A. App. 93, 100.) Moreover, Mayo admitted that if it missed these signs of abuse, there was a good possibility that the abuse would worsen. (A. App. 98.) Therefore, because further abuse was foreseeable and the relationship was of a sufficient nature, this Court should recognize that a medical provider has a special duty towards a young infant that is repeatedly taken into custody at the hospital for injuries consistent with child abuse.

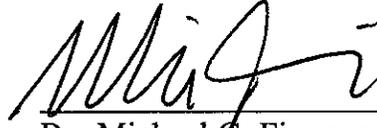
### **CONCLUSION**

Survivors Network respectfully requests that this Court recognize the legislature's intent and acknowledgment that there is a civil cause of action for failure to report under CARA, that the costs associated with child abuse are astronomical, and that there is a special relationship between a young infant and the medical provider which repeatedly takes her into its custody because of injuries consistent with child abuse.

Date: April 20, 2006

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that the Brief of Amicus Curiae Survivors Network Minnesota in Case No. A05-45 complies with Minnesota Rules of Appellate Procedure 132.01, Subd. 3(c)(1) and that the brief contains 3482 words. The brief was prepared on Word Perfect 10.0.

  
\_\_\_\_\_

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Appeal No.: A05-0045

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 ) ss.  
COUNTY OF RAMSEY )

**AFFIDAVIT OF SERVICE BY MAIL**

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Therese A. Swick

Subscribed and sworn to before me  
this 20th day of April, 2006.

Erin M. Dalluge  
Notary Public

