

## STATE OF MINNESOTA

## IN SUPREME COURT

A05-45

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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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**REPLY BRIEF OF APPELLANTS AND SUPPLEMENTAL APPENDIX**

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## I. Introduction

This is the most important case ever for protecting the rights of the most innocent and vulnerable people in our society—abused children.

If the respondent's arguments have any merit, abused children will have no meaningful opportunity for justice in Minnesota. Nykkole's claims against the respondent are based on its statutory violation of the Child Abuse Reporting Act (CARA) and common law medical malpractice.<sup>1</sup> The court of appeals found that despite this Court's holding in *Radke*, respondent's violation of CARA is not actionable. The court of appeals recognized that Nykkole had a right to bring a medical malpractice claim. But, it said that Nykkole and the State are prohibited from presenting their best evidence to prove the causation element of that common law claim.

Thus, if the court of appeals' decision is allowed to stand, the most vulnerable people in our state will be deprived of any remedy and the State, through its taxpayers, rather than the tortfeasors, will forever pay the huge costs to care for these beaten and abused children.

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<sup>1</sup> One of respondent's friends suggests that Appellants never made a claim for respondent's statutory violation as mandatory reporters. While the Complaint did not cite CARA, it did state that respondent was responsible as a "mandatory reporter." A. App. 118-19. The Minnesota Defense Lawyers' claim is rendered even more worthless by the fact that respondent moved to strike the "mandatory reporter" claims from the Complaint based on CARA. See A. App. 20-21; A. Supp. App. 18-28, 29-35.

## II. *Radke* Recognizes A Civil Claim Under CARA

This Court in *Radke* recognized that CARA “clearly and repeatedly requires the performance of mandatory acts . . . ‘to protect children whose health or welfare may be jeopardized through physical abuse . . . .’” *Radke v. County of Freeborn*, 694 N.W.2d 788, 797 (Minn. 2005) (quoting Minn. Stat. § 626.556, subd. 1). However, respondent attempts to trivialize this Court’s conclusion that “[g]iven this express intent, it is incongruous to conclude that the legislature intended to impose criminal penalties on those persons who fail to report as mandated under the statute, but intended that there be no duty on the part of the county welfare department or its employees to investigate or act on the reports.” *Radke*, 694 N.W.2d at 798 (emphasis in original). This Court went on to specifically state “[w]e believe that the statute, taken as a whole, leads to the inescapable conclusion that respondent county and its employees had a duty to act.” *Id.*

Respondent’s interpretation of CARA would lead to a more striking incongruity under these facts. In *Radke*, this Court recognized the legislature’s express intent requiring child protection workers to act immediately when they receive specific reports of abuse or neglect. CARA’s subjects are not only the local welfare agency, but also professionals “engaged in the practice of the healing arts, . . . [and] hospital administration. . . .” *See* Minn. Stat. § 626.556, subd. 3(1). The court of appeals’ opinion creates confusion and diminishes the clear reasoning of this Court’s *Radke* decision.

*Radke*’s reasoning should be carried forward to harmonize the law and provide a unified and consistent application to all of the statutory mandates which clearly requires that all of the statute’s subjects have a duty to act, including respondent, and that there is

responsibility to pay damages for failure to act. Taken as a whole, CARA also leads to the inescapable conclusion that the respondent should be civilly responsible for Dr. Rosekrans' refusal to act.<sup>2</sup>

The respondent also discounts this Court's reasoning in regard to the significance of CARA's grant of immunity to those "person[s] with responsibility for performing duties under the statute if the person is 'acting in good faith' and 'exercising due care.'" *Radke*, 694 N.W.2d at 798-99. Appellant's arguments relating to CARA's immunity provision does not "turn the statute on its head," as argued by the respondent, *see* R. Brief at 12, but rather similarly provides protection to all mandatory reporters. This supports applying *Radke* to health care providers. The legislature has been aware of this Court's interpretation of CARA since April of 2005 and convened twice since then and has not even attempted to limit personal liability of mandatory reporters and government employees.

### **III. Respondent's Comparison Of CARA To Other Statutory Provisions Is Misplaced And Without Merit.**

Respondent suggests that it should avoid responsibility under CARA because of the Vulnerable Adults Reporting Statute (VARA), Minn. Stat. § 626.557. *See* R. Brief at 13-14. VARA explicitly provides a civil remedy for failure to report abuse of vulnerable adults. Respondent believes that if the legislature intended a civil remedy for choosing not to report suspected child abuse under CARA, the legislature would have said so, as it

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<sup>2</sup> Respondent would like the Court to believe that its Dr. Rosekrans is a child abuse expert. *See* R. Brief at 4-5. However, by respondents' own admission, Dr. Rosekrans is not even an "authority" in the area. A. Supp. App. at 15.

did in VARA. In the same vein, respondent argues that because CARA explicitly provides for civil liability for falsified reports, Minn. Stat. § 626.556, subd. 6, the legislature must have intended, again by silence, that health care providers should be immune from civil suit for choosing not to report the suspected abuse.

Based on compelling public interests, this Court in *Radke* unanimously rejected respondent's claim that it should escape responsibility for its violation of CARA. It held that despite no explicit legislative statement that CARA provides a civil remedy for the wrong, injured children do, in fact, have an opportunity for justice. This Court must reject respondent's claim. Any other outcome eviscerates the legal principles and public policy upon which CARA is based and *Radke* was decided.<sup>3</sup>

#### **IV. The Presence Of A Misdemeanor Does Not Preclude A Civil Claim**

CARA says that if a mandatory reporter (e.g., health care provider) fails to report suspected abuse, the health care provider can be charged with a misdemeanor. Respondent claims that the legislature's provision of this potential misdemeanor charge means that the legislature intended, once again by its silence, to forbid abused children from having their day in court when they suffer injuries as a direct result of the health

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<sup>3</sup> Respondent's reliance on pre-*Radke* court of appeals decisions is misplaced. In the unpublished decision of *S.L.D. v. Kranz*, 1996 WL 146360 (Minn. App. Apr. 2, 1996), the court found no civil cause of action under CARA for the county's failure to conduct an investigation. *Radke* explicitly overrules *S.L.D.* In *Meyer v. Lindala*, 675 N.W.2d 635 (Minn. App. 2004), no special relationship was found. The inquiry in *Kuelbs v. Williams*, 609 N.W.2d 10 (Minn. App. 2000), was whether the alleged child abuser, not the abused child, had a civil cause of action under CARA.

care provider's choice not to report the suspected abuse.<sup>4</sup> Aside from the fact that respondent cites not one case where any health care provider has ever been even charged with such a misdemeanor, the claim must fail.<sup>5</sup>

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<sup>4</sup> Respondent's reference to *State v. Grover*, 437 N.W.2d 60 (Minn. 1989), is irrelevant. *Grover* was a criminal case against an elementary school principal in which the inquiry was whether the reporting requirement was unconstitutionally vague and overbroad. This Court found it was not.

<sup>5</sup> Respondent also cites cases from other jurisdictions which are distinguishable from the present case. See, e.g., *Doe v. D'Agostino*, 367 F. Supp. 2d 157, 176 (D. Mass. 2005) (plaintiff's claim against teacher and school board based on the reporting act "appears to be grounded in negligence" and thus was barred by the Massachusetts Tort Claims Act); *Cuyler v. United States*, 362 F.3d 949 (7th Cir. 2004), cert. denied 543 U.S. 988 (2004) (no civil cause of action for reporting abuse to first child when second child dies at hands of abuser); *Isley v. Capuchin Province*, 880 F. Supp. 1138, 1148 (E.D. Mich. 1995) (Wisconsin courts had not decided the issue of whether a civil suit is allowed based on violation of reporting statute and even if there were a civil claim, plaintiff did not present sufficient evidence to establish such a violation); *Doe v. Marion*, 605 S.E.2d 556, 562 (S.C. App. 2004) (holding that the Child Abuse Reporting Act, in direct contradiction to *Radke*, created a duty owed to the general public, not to specific individuals, and consequently, it did not create a private cause of action in favor of individuals); *Fulton-DeKalb Hosp. Auth. v. Reliance Trust Co.*, 608 S.E.2d 272, 274 (Ga. App. 2004) (passing on deciding whether the Georgia Reporting Act creates a civil cause of action and finding undisputed evidence that the abused child's death was not the proximate result of the breach of any legal duty owed by the hospital); *Arbaugh v. Board of Educ.*, 591 S.E.2d 235, 240 (W. Va. 2003) (declining to extend civil liability when, among other reasons, required report rests on individual's judgment which may be based on rumor, innuendo, or second-hand reports; however, the court recognized a common-law claim where the failure to report would be admissible); *Perry v. S.N.*, 973 S.W.2d 301, 309 (Tex. 1998) (sole issue was whether parents "may maintain a cause of action for negligence per se" based on reporting statute. The court held they could not, and because the plaintiffs did not appeal the adverse decision on their common law negligence claims, the court would not consider whether Texas should impose a common law duty to report or prevent child abuse) (emphasis added); *Marquay v. Eno*, 662 A.2d 272, 282 (N.H. 1995) (common law remedies available to plaintiff are adequate, thus declining to recognize a new "constitutional tort" under the reporting statute); *C.B. v. Bobo*, 659 So.2d 98, 102 (Ala. 1995) (Child Abuse Reporting Act created a duty owed to the general public, not to specific individuals, and, consequently, did not create a private cause of

Footnote continued on next page . . .

In *Zerby v. Warren*, 210 N.W.2d 58 (Minn. 1973),<sup>6</sup> a 14-year-old boy died after sniffing toxic glue. A hardware store sold the glue to the decedent's 13-year-old friend, who in turn, made it available to the deceased boy. The sale of the glue was in violation of Minn. Stat. § 145.40, which prohibited the sale of glue to minors. The statute's only stated remedy for such an illegal sale was a misdemeanor, but the court allowed the child's parents to seek a civil remedy.

Given our State's compelling interest to protect our children, this Court not only allowed the civil claim, but held that the violation of the statute imposed absolute liability. *Zerby*, 210 N.W.2d at 62. The reasons for holding the defendant responsible in *Zerby* are identical to those in the present case. In order to determine if the subject of the statute would be held absolutely responsible, this Court recognized that "it must be found that the legislative purpose of such a statute is to protect a limited class of persons from

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... footnote continued from prior page

action in favor of individuals); *Kansas State Bank & Trust Co. v. Specialized Trans. Svcs.*, 819 P.2d 587, 603 (Kan. 1991) (Kansas Mandatory Child Abuse Reporting Act was intended to protect the public and did not create a duty to individuals injured as a result of its violation); *Fischer v. Metcalf*, 543 S.2d 785, 790 (Fla. App. 1989) (abused child was not in special class to receive the special benefit of the omnibus statute expansively titled "Protection from Abuse, Neglect, and Exploitation," which included not only neglected or abused children, but also the elderly population, and persons suffering from myriad disabilities, and spouses suffering domestic violence); *Borne v. Northwest Allen County School Corp.*, 532 N.E.2d 1196 (Ind. App. 1989) (Indiana Reporting Act imposed a duty merely for the benefit of the public); *Valtakis v. Putnam*, 504 N.W.2d 264, 267 (Minn. App. 1993) (the appellant's sole argument was that respondents failed to report suspected sexual abuse of him when it was first discovered. The undisputed facts before the court demonstrated that "respondents sufficiently complied with the reporting requirements of the statute.").

<sup>6</sup> *Zerby* is one of the cases cited in *Doe v. Brainerd Int'l Raceway, Inc.*, 533 N.W.2d 617 (Minn. 1995), which respondent relies on in its brief. See R. Brief at 12.

their own inexperience, lack of judgment, inability to protect themselves or to resist pressure, or tendency toward negligence.” *Id.* (emphasis added, citations omitted). This Court went on to state: “this legislative intent can be deduced from the character of the statute and the background of the social problem and the particular hazard at which the statute is directed.” *Id.* (citations omitted). This Court held that the “obvious legislative purpose” of the statute was to protect children. *Id.*

Exactly like the glue statute, CARA’s express purpose is to protect our children. Just like the glue statute, the relevant part of CARA expressly provides for only a misdemeanor criminal sanction for a mandatory reporter’s decision not to report suspected child abuse. Just like *Zerby*, the respondent in the present case must be held accountable for refusing to report as mandated by CARA.<sup>7</sup>

#### **V. Common Law Medical Malpractice Claim Is Separate From Private Cause Of Action Under CARA**

The courts below recognized that the Appellants’ common law medical malpractice claim is independent of their claim based on respondent’s violation of CARA. The only expert evidence in the record at trial was testimony that a doctor’s common law duty to report suspected abuse preexisted CARA and exists today

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<sup>7</sup> *Zerby* cannot be distinguished in any meaningful way based on the fact that the county chose not to bring a misdemeanor action against respondent in the present case for its violation of CARA. In pursuing the criminal action against Nykkole’s birth father, the county elicited the help of respondent’s doctors, who testified at the criminal trial that, among other things, “It’s possible that it could snow in July in Rochester and . . . it’s equally possible that the August 17th spinal fracture of the humerus was an accidental trauma.” A. Supp. App. 16-17. Thus, it is not surprising that a county would choose not to bring misdemeanor charges when it relies on health care providers to testify in felony cases against people who are allowed repeated opportunities to beat children.

independent of CARA. A. App. 87-91 (Testimony of Dr. Carolyn Levitt). In its attempt to avoid responsibility for its negligence (as found by the jury), respondent cites its own pre-CARA duty requiring it to report information to protect a child's safety. Respondent recognizes, separate and apart from CARA, that it must disclose its concerns of suspected abuse when "it becomes necessary in order to protect the welfare of the individual . . . ." American Medical Association, Principles of Medical Ethics § 9 (1957). See R. Brief at 20; R. App. at 89. This is consistent with CARA's mandate that health care providers immediately report suspected child abuse to protect the welfare of children.

Also, the respondent and its friends apparently believe that the child's interest in protecting the confidentiality of her medical records is more important than her interest in being protected from ongoing beatings. CARA, *Radke*, organizations like the AMA, and common sense dictate that protecting innocent children from abuse takes priority over any concerns about the confidentiality of a child's medical records.

Respondent also cites *Doe v. Brainerd*, 533 N.W.2d at 620, in which this Court recognized that a "statute might be relevant in one of two other ways: it might itself create a civil cause of action or it might provide the standard of care to be applied where a common law duty exists." A good example of this is *Bentley v. Carroll*, 734 A.2d 697 (Md. 1999), in which a patient brought a medical malpractice claim alleging negligent failure to prevent repeated incidents of child abuse. The Maryland Supreme Court held that the plaintiff was entitled to have a jury instruction on the reporting requirements of the Maryland Child Abuse Act because she was a member of the class intended to be protected by the Act and causation of injuries could be inferred from the Act's stated

purpose to redress previous abuse and ensure against any future incidence. The Maryland Supreme Court criticized the trial court for not allowing the jury to hear about the obligation of medical personnel to report suspected child abuse:

Perhaps most egregious was that the jurors in this case were in no way instructed by the trial court as to the obligation of physicians to report suspected child abuse, whether couched as a statutory duty or a professional requirement. To the extent it places a statutory reporting duty on physicians, the Maryland Child Abuse Act, now contained in the Code in large part within the Family Law Article, §§ 5-701, to 5-715, is thus incorporated as part of the general standard of care expected of and within the medical profession in the treatment of child patients.

*Bentley*, 734 A.2d at 706 (emphasis added). *See also Draper v. Westerfield*, 181 S.W.3d 283 (Tenn. 2005).<sup>8</sup>

Respondent goes on to claim that it should be able to avoid responsibility to pay for its negligence because allowing such claims on behalf of abused children would encourage too many reports of abuse, some of which may be unfounded. *See R. Brief* at 20-21. Respondent's claim does present a public policy choice. Is our State more concerned about: (a) encouraging mandatory reporters to err on the side of child safety and report all suspected abuse, thus running the risk of overburdening social services departments; or (b) discouraging mandatory reporters from reporting suspected child

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<sup>8</sup> Here, the district court's ruling to deny a private cause of action under CARA and to exclude evidence of failure to report, also denied the Beckers and State a common-law negligence claim. Minnesota courts follow the presumption that statutory law is consistent with common law. *In re Shetsky*, 60 N.W.2d 40, 45 (Minn. 1953). To abrogate the common law, the abrogation must be by express wording or necessary implication. *Id.*

abuse to diminish the work load of social services, thus running the risk that some children, like Nykkole, will continue to be abused? Ultimately, which will cost our State more: adequately funding social service departments or eternally paying the health care costs for our abused children and their catastrophic injuries?

**VI. Appellants Timely Raised Respondent's Special Relationship With Nykkole**

Appellants timely raised the special relationship issue in their Memorandum of Law in support for a new trial. *See* A. App. 34-35. All "papers filed in the trial court, the exhibits, and the transcript of the proceedings" comprise the record on appeal. Minn. R. Civ. App. P. 110.01. This issue was timely raised, considered by the courts below, *see Becker v. Mayo Found.*, 2005 WL 3527163, at \*4 (Minn. App. Dec. 27, 2005) (unpublished), and properly presented to this Court.

**VII. Appellants Made Sufficient Offer Of Proof As To How Respondent's Negligence Directly Caused Nykkole's Injuries**

The district court's ruling prohibiting all evidence of respondent's legal, medical, or ethical requirements to report suspected child abuse was error. The exclusionary pre-trial order was so sweeping that it effectively eliminated Appellants' common law negligence claim. Appellants stated, on repeated occasions, that the district court's exclusion of all evidence having anything to do with reporting and what would have happened as a result of the report, prejudiced their ability to establish causation in their medical malpractice claim. Appellants raised the issue in their Complaint, A. App. 115-21, in their Response to the Defendant's Motion to Dismiss and to Strike, A. Supp. App. 1, in their Petition for Discretionary Review, A. Supp. App. 10, in their written and oral

responses to Defendant's Motion *in Limine* Regarding Child Abuse Reporting, A. App. 59-61, and in their offer of proof of expert testimony at trial, A. App. 41-42, 45-46, 54-55.

These repeated assertions put the court on notice that Appellants attempted to prove that respondent's decision not to treat Nykkole by reporting her abuse was a direct cause of her devastating injuries. A party successfully makes an offer of proof by telling the district court what the proposed testimony will be and need not actually examine witnesses to produce the testimony. *See, e.g., Santiago v. State*, 644 N.W.2d 425, 442 (Minn. 2002); *Uhlman v. Farm Stock & Home Co.*, 148 N.W. 102 (Minn. 1914) (no formal offer of proof necessary where substance of proposed testimony is apparent from cross examination).

From the outset, Appellants were precluded from developing reporting-related evidence in discovery and presenting such evidence at trial. The rulings were definitive; any further attempt by Appellants to develop, let alone introduce, such evidence about reporting would have been futile. Such repeated assertions were sufficient to alert the district court to the materiality of the proposed evidence and the context in which it would be used. *See* Minn. R. Evid. 103.

Minnesota case law reveals that an offer of proof may take multiple forms. *See Santiago*, 644 N.W.2d at 442 (offer of proof could consist of oral representations on the record, a 9-1-1 tape, summaries of expected witness hearings, memorandum of law, and oral representations during evidentiary hearings). It is not the formality of the offer that is important but that the district court is aware of the substance of the evidence. *Id.* A

formal offer of proof is unnecessary where the nature and impact of the proposed evidence is apparent from the record. *See, e.g., State v. DeZeler*, 41 N.W.2d 313, 321 (Minn. 1950) (“An exclusion of evidence, even though it be technically erroneous, is deemed to be without prejudice . . . unless the record discloses that the purpose and substance of the evidence have in some way . . . been made known to the trial court) (emphasis added); *State v. Lane*, 582 N.W.2d 256, 259 (Minn. 1998) (“if the problem has been brought to the attention of the trial court, and the court has indicated that in no uncertain terms what its views are, to require an objection would exalt form over substance”). Appellants were clear from the beginning that evidence of reporting was crucial to prove their common law negligence claim.

#### **VIII. Appellants Were Prejudiced By Evidentiary Errors**

Respondent claims that even though it was negligent, there was no evidence that its negligence caused Nykkole’s injuries. However, as noted above, Appellants were forbidden from presenting any evidence about reporting or how the report of Nykkole’s suspected abuse would have led to protecting her.<sup>9</sup>

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<sup>9</sup> Respondent claims that there was no evidence that the county has any more resources to protect Nykkole than the respondent itself. *See* R. Brief at 24. However, Appellants were prohibited from presenting any evidence as to what county resources would have been brought to bear. Regardless of what respondent might think of the extent of its resources, the County’s resources include police power, search warrants, and investigators. *See* A. App. 41-42. Contrary to what the trial court found, the jury did not “know full well of what measures were available to protect Nykkole from further abuse.” A. App. 30.

The exclusion of any evidence whatsoever about reporting substantially prejudiced Appellants.<sup>10</sup> To demonstrate prejudice from an evidentiary exclusion sufficient to receive a new trial “it must appear that such evidence might reasonably have changed the result of the trial if it had been admitted.” *Covey v. Detroit Lakes Printing Co.*, 490 N.W.2d 138, 143 (Minn. App. 1992); *see also Poppenhagen v. Sornsin Constr. Co.*, 220 N.W.2d 281, 282 (Minn. 1974) (same). While counsel was able to bring in limited information about the ability of respondent to hospitalize Nykkole,<sup>11</sup> such an option was temporary, if even available in Nykkole’s case, and not best evidence of causation.

The court’s decision to exclude the mandatory reporting evidence leaves a structural gap in the case presented to the jury. Respondent summarily concedes that the doctors and nurses are “mandatory reporters with social workers, child care providers,

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<sup>10</sup> Respondent’s reliance on *Boland v. Garber*, 257 N.W.2d 384 (Minn. 1977), is misplaced. In *Boland*, appellants objected to the exclusion of a hospital policy requiring the presence of a physician-assistant during surgery. *Id.* at 385. The exclusion of this information was not reversible error because “the medical experts never testified, even by implication, that the absence of a physician-assistant during the initial surgical procedure for removal of the gallbladder was causally related to Boland’s ultimate demise.” *Id.* at 387. The underlying evidence to establish a causal connection was admissible in *Boland*. Here, all reporting-related evidence necessary to prove causation was excluded even though Appellants made every effort to alert the district court to the materiality of the excluded evidence. Elimination of this key causation evidence constituted prejudicial error.

<sup>11</sup> In fact, the exclusionary order was so broad that Appellants were not allowed to bring in any information about resources available to protect Nykkole outside of respondent’s walls. A. App. 60-62 (“Again based on the discussions we had in chambers, to the extent the testimony is offered that referral to services available in Mayo to assist a doctor in diagnosing and treating the patient, including services which might include social services or family services for consultation or advice, that testimony would be permitted.”) (emphasis added).

teachers, law enforcement officers and clergy.” *See* R. Brief at 9. Respondent had an obligation to “immediately report,” which the legislature has described “as soon as possible but in no event longer than 24 hours.” *See* Minn. Stat. § 626.556, subd. 3(2)(e). This obligation not only helps establish respondent’s duty of care, but would have given the jury the ability to connect the respondent’s negligence to Nykkole’s injury. The only evidence of causation in the record for the jury’s consideration pointed to Nykkole’s parents. The jury was not allowed to make a factual determination based on respondent’s failure to report because of the trial court’s misunderstanding and misapplication of CARA.

Respondent argues that the jury should not have been allowed to consider information about its decision not to report even though it is relevant to the standard of care in treating and diagnosing Battered Child Syndrome. Respondent seems to concede that it does have the statutory obligation to report, *see* R. Brief at 9-10, but for policy reasons the jury should not be allowed to consider its statutory responsibility. However, in its obligation to treat Nykkole according to accepted standards of medical practice, respondent would necessarily have to comply with the law. In excluding this evidence, the jury was prohibited from linking the respondent’s negligence to the cause of the injury inflicted by the third party. The jury should have been allowed to hear about the standard precautionary efforts—notably respondent’s duty to report in compliance both with CARA and standard medical practices—that could have been utilized to protect Nykkole.

This Court also must be mindful of the overriding public policy expressed by the legislature regarding the protection of children: “The legislature hereby declares that the public policy of this state is to protect children whose health or welfare may be jeopardized . . . In furtherance of this public policy it is the intent of the legislature under this section . . . to provide, when necessary, a safe temporary or permanent home environment for physical or sexually abused or neglected children.” Minn. Stat. § 626.556, subd. 1. It is this public policy that respondent violated! Nykkole was not provided with the necessary safe environment, in part, due to respondent’s negligence. The jury, at a minimum, should have been allowed to know about this public policy and the mandatory reporting responsibility of the respondent under these circumstances.

The flaw in the trial court’s analysis and the court of appeals’ affirmance of that exclusionary rule is apparent in the court of appeals’ reasoning. This statutory mandate, or what the court of appeals identifies as “reporting related evidence,” was transformed by the court of appeals to be non-mandatory evidence, which was not admitted into evidence on a “discretionary call basis.” *Becker*, 2005 WL 3527163, at \*5. The court of appeals reached this conclusion even though it found the evidence was not only relevant but also acknowledged that “the jury would have gotten a fuller picture and respondent would not have been prejudiced.” *Id.* The court of appeals thus erroneously became a fact finder and failed to correct the exclusionary error of the court below.

Moreover, the court of appeals’ reasoning makes no sense. First, it held that “we make it clear that the jury could have been told about the reporting evidence, or the lack thereof, as relevant.” *Id.* It then went on to find no reversible error, even though “the

jury did find negligence, just not causation.” *Id.* The court of appeals did properly hold that “causation, like negligence itself, is a fact issue . . . except when the facts are undisputed and are reasonably susceptible of that one inference.” *Id.* at \*6 (quoting *Smith v. Kahler Corp.*, 211 N.W.2d 146, 151 (Minn. 1973)). Likewise, the court properly held that “proximate cause is a fact issue ordinarily left to the jury and its decision will stand unless reviewing the evidence in the light most favorable to the verdict, the verdict is manifestly and properly contrary to the evidence be it as a whole.” *Becker* at \*6. The flaw in the court of appeals’ decision is the missing report-related link, which removed a fact issue from the evidence that the jury was allowed to consider.

The court of appeals seems troubled by the result it reached. It noted that “[t]he tragic facts of this case are hard to swallow. Nykkole is a child who ‘slipped through the cracks.’” *Id.* at \*3. However, Nykkole slipped through the cracks because respondent chose not to alert outside authorities of suspected child abuse, even though respondent would have been granted immunity for doing so in good faith, had the report ultimately been unsubstantiated.

The court of appeals also erred in affirming the district court’s finding that the “evidence presented was adequate for the jury to conclude that respondent’s negligence was the cause of Nykkole’s injuries but the jury found otherwise.” *Id.* at \*5. The court of appeals then compounds the error by affirming the factual finding of the district court “. . . that even if the evidence excluded were allowed, it would not have changed the outcome.” *Id.* This conclusion is pure speculation, and both the district court and the court of appeals substituted their fact finding for facts that should have been presented to

and determined by the jury. The court of appeals incorrectly finds “the jury could have found the negligence in not reporting or spotting the abuse sooner, but then reasonably gone on to find that the doctors and nurses did not ‘cause the injuries,’ they were caused by the parents.” *Id.* at \*6. This flawed reasoning highlights the importance of the missing link relating to the statutory and common-law obligation to report. This error significantly prejudiced Appellants. Allowing such reporting-related evidence for Appellants to develop their common-law medical malpractice claim and statutory violation claim “might reasonably have changed” the result of the trial. *See Covey*, 490 N.W.2d at 143. A new trial is required to correct these evidentiary errors.

## IX. Conclusion

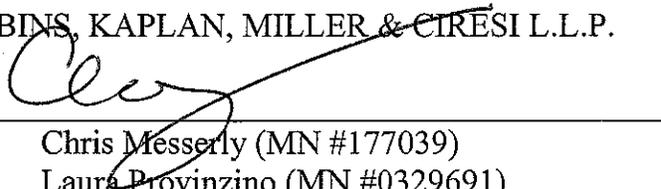
If the court of appeals' decision is allowed to stand, the most vulnerable people in our society—abused children—will have no opportunity for justice. Abused children should have an opportunity for their day in court against all subjects of CARA, including health care professionals, who choose not to perform their mandatory duties. The court of appeals' decision should be overruled and because the jury has already determined that this respondent was negligent, this case should be remanded for discovery and trial on the issues of causation and damages alone.

Dated: June 8, 2006.

Respectfully submitted,

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**CERTIFICATE**

Pursuant to Rule 132.01, subd. 3(a)(1), the undersigned set the type of the foregoing brief in Times New Roman, a proportional 13-point font, on 8-1/2 x 11 inch paper with written matter not exceeding 6-1/2 x 9-1/2 inches. The resulting principal brief contains 3,867 words, as determined by employing the word counter of the word-processing software, Microsoft Word 2003, used to prepare it.

Dated this 8 day of June, 2006.

Respectfully submitted,

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).