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NO. A05-45

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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,  
 and Minnesota Department of Human Services,

*Appellants,*

vs.

Mayo Foundation,

*Respondent.*

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**BRIEF AND APPENDIX OF AMICUS CURIAE  
 CHILDREN'S LAW CENTER OF MINNESOTA**

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## **STATEMENT OF INTEREST**

### **A. Children's Law Center of Minnesota**

Children's Law Center of Minnesota ("CLC") is a nonprofit organization whose mission is to promote the rights and interests of Minnesota's children in the judicial, child welfare, health care and education systems.<sup>1</sup> CLC carries out its mission in three ways: (1) by providing direct representation for children in discrete projects; (2) by advocating and participating in state-wide efforts to reform and improve the child protection and juvenile justice systems; and (3) by training volunteer lawyers and other child advocates to represent children.

CLC actively participates on state-wide committees such as the Children's Justice Initiative, the Juvenile Justice Advisory Committee, and the CHIPS Public Defender Workgroup, among others, and nationally, on the American Bar Association Section of Litigation Children's Rights Litigation Committee Working Group that encourages lawyers nationwide to do pro bono work for children. CLC is also a founding member of the National Children's Law Network, which is made up of eight member organizations nationwide and whose goals include the improvement of the quality of counsel and representation provided to

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<sup>1</sup> This brief was written entirely by counsel for amicus, as listed on the cover. No outside contributions were made to the preparation or submission of this brief.

children and the identification of concrete outcomes and measures for children. From 1996 to 1998, CLC provided technical support and research assistance to the Ramsey County District Court as it implemented a pilot project to combine juvenile and family court functions.

Children have rights and legal protections, but they need someone to speak on their behalf to protect and promote these important rights and interests. The services that CLC provides center on the rights of children to have a voice in their own future and to be secure in their person and environment. CLC has extensive experience with children who have been abused physically and/or sexually, or neglected and who have come to the attention of the county and the courts because a report of abuse or neglect was made and there was a subsequent investigation in which maltreatment was determined.

**B. Historical treatment of child abuse reporting.**

The existence of child abuse in our society is a difficult problem that defies easy solutions. In their treatise, *THE BATTERED CHILD* (2<sup>nd</sup> ed. U. Chi. Press, 1974), Drs. Ray E. Helfer<sup>2</sup> and C. Henry Kempe<sup>3</sup> describe child abuse as it spanned the centuries. There were beatings to drive out

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<sup>2</sup> Department of Pediatrics, University of Colorado Medical Center.

<sup>3</sup> University of Colorado School of Medicine.

evil spirits, to enforce learning, and for chastisement. (*Id.* at 3.) It had always been taken for granted that parents had the right to treat their children as they saw fit. The Lady Abergane is said to have severely beaten her own seven-year-old in a fit of passion; when the father complained, she threw the child to the ground so violently that he was killed. (*Id.* at 4.) There was also social acceptance for the mutilation of children and infanticide. The apprenticeship system in colonial America was responsible for many battered children who were “bound out” at ages as young as four years old. Many of these children died at the hands of their masters. During the Industrial Age, children as young as five worked sixteen hours at a time, sometimes with irons riveted around their ankles to keep them from running away. (*Id.* at 12.) They were starved, beaten, and in many other ways mistreated. (*Id.*) Many children died, were injured, or became seriously ill because of the demands or danger of their work. Josiah Quincy wrote in 1801 that he found children ages 4 to 10 employed in the cotton mills to be both physically and emotionally battered. (*Id.*) Attempts to protect children depended upon individual interventions rather than organized community efforts.

In the late 1860s in New York, the abuse of little “Mary Ellen” by her adoptive parents finally stirred community action. Mary Ellen was beaten regularly and was seriously malnourished. Concerned church

workers were unable to convince local authorities to take legal action against the parents, who were legally entitled to punish their child as they saw fit. Because no laws protected children from parental abuse, the church workers appealed to the Society for the Prevention of Cruelty to Animals (SPCA). The SPCA had Mary Ellen removed from her parents on the grounds that she was a member of the animal kingdom and her case could be included under the laws against animal cruelty. (*Id.* at 13.) Because of this incident, the Society for the Prevention of Cruelty to Children was the first of many such societies formed to protect children in the 1870s.

Legislatures have periodically enacted laws prohibiting specific kinds of abuse against children—infanticide invoking the most punishment, although the penalty for killing illegitimate infants was less severe. (*Id.* at 15.) One of the most important medical-legal contributions of the 17th century was the discovery that fetal lungs will float on water after respiration has taken place, evidencing that a baby was born alive before it was killed. (*Id.*) Indeed, the medical field continued to pave the way for greater detection and recognition of abused children. Pediatric radiology provided objective proof that infants and children who were too young to talk had indeed suffered severe physical

trauma. The first reports were published in 1946<sup>4</sup> but it was not until 1955 that it was reported that the trauma noted on x-rays was in many cases willfully inflicted. (*Id.* at 18.) Alarmed at the large number of children suffering from non-accidental injury admitted to his hospital, Dr. Kempe proposed the term, “the battered child syndrome,” to call attention to the problem. And, in 1961, the American Academy of Pediatrics conducted a symposium on the problem of child abuse. The American Humane Society uncovered 662 cases in a single year, 27 percent of these cases represented fatalities and many more had permanent brain damage. (*Id.* at 19.) A study in Kansas in 1964 of 85 abuse cases found that 70 percent of the children were younger than three years old, and 32 percent were younger than six months old. (Ray E. Helfer & C. Henry Kempe, *THE BATTERED CHILD* (U. Chi. Press, 1ST ed. 1969) at 28.)

According to Dr. Kempe, child abuse was not often diagnosed due to the reluctance on the part of physicians to consider abuse as a cause of the child’s injuries as well as because of unfamiliarity with certain aspects of fracture healing. (C.H. Kempe, F.N. Silverman, B.F. Steele, William Droegenmueller and H.K. Silver, *The Battered Child Syndrome*,

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<sup>4</sup> See Dr. J. Caffey, *Multiple Fractures in the Long Bones of Children Suffering from Chronic Subdural Hematoma*, 56 *Am. J. Roentgenology* 163 (cited in Helfer and Kempe, *THE BATTERED CHILD* at 16).

181 J. Am. Med. Ass'n, No.1 (1962) (Amici's Appendix ("A.A.") at 1). He has observed, "To the informed physician, the bones tell a story the child is too young or too frightened to tell." (*Id.* at 18.) Dr. Kempe also noted:

A physician needs to have a high initial level of suspicion of the diagnosis of the battered-child syndrome in instances of subdural hematoma, multiple unexplained fractures at different stages of healing, failure to thrive, when soft tissue swellings or skin bruising are present, or in any other situation where the degree and type of injury is at variance with the history given regarding its occurrence or in any child who dies suddenly.

(*Id.* at 20.) He further advised, "Regardless of the physician's personal reluctance to become involved, complete investigation is necessary for the child's protection so that a decision can be made as to the necessity of placing the child away from the parent until matters are fully clarified." (*Id.* at 20-21.) With regard to management, Dr. Kempe was specific:

The principal concern of the physician should be to make the correct diagnosis so that he can institute proper therapy and make certain that a similar event will not occur again. He should report possible willful trauma to the police department or any special children's protective service that operates in his community. . . . In many states the hospital is also required to report any case of possible unexplained injury to the proper authorities.

(*Id.* at 23.) Dr. Kempe warned, "In many instances the prompt return of the child to the home is contraindicated because of the threat that additional trauma offers to the child's health and life. . . . Therefore, the

bias should be in favor of the child's safety; everything should be done to prevent repeated trauma, and the physician should not be satisfied to return the child to an environment where even a moderate risk of repetition exists." (*Id.* at 24.) "Above all," he wrote, "the physician's duty and responsibility to the child requires a full evaluation of the problem and a guarantee that the expected repetition of trauma will not be permitted to occur." (*Id.*)

Because of the groundwork laid by Kempe and other pediatricians and social workers, several states passed laws dealing with child abuse. In 1965, Minnesota was among the first of the states to pass laws requiring the reporting of maltreatment of minors. Minnesota's law focused on reporting by physicians and other health care workers:

**Subd. 1. Declaration of purpose.** The purpose of this section is to provide for the protection of minor children who have had physical injury inflicted upon them, by other than accidental means, where the injury appears to have been caused as a result of physical abuse or neglect.

**Subd. 2. Who makes report and to whom made.** Any physician, surgeon, person authorized to engage in the practice of healing, superintendent or manager of a hospital, nurse and pharmacist, whether such physicians, surgeons, persons engaged in the practice of healing, superintendent or manager of any hospital, nurse and pharmacist be licensed or not, shall immediately report all cases of physical injury to children which come to their attention where the injury appears to have been caused as a result of physical abuse or neglect. Such cases shall be reported to the appropriate police authority and the county welfare agency. . . .

**Subd. 3. Nature and content of report.** An oral report shall be made immediately by telephone or otherwise and followed as soon thereafter as possible by a report in writing, to the appropriate police authority and the county welfare agency. Such report shall contain the names and addresses of the child and his parents or other persons responsible for his care, if known, the child's age, the nature and extent of the child's injuries, including any evidence of previous injuries, and any other information helpful in establishing the cause of the injuries and the identity of the perpetrator.

...

**Subd. 7. Penalty for violation.** Anyone knowingly and willingly violating the provisions of this section is guilty of a misdemeanor.

Minn. Stat. § 626.554 (1965).

Except for minor amendments, this statute remained in effect until 1975 when Minnesota conformed to the 1974 federal Child Abuse Prevention Treatment Act. At that time, Minnesota Statute § 626.554 was repealed and replaced with Minnesota Statute § 626.556. The provision governing the persons mandated to report was broadened:

A professional or his delegate who is engaged in the practice of the healing arts, social services, hospital administration, psychological or psychiatric treatment, child care, education or law enforcement who has knowledge of or reasonable cause to believe a child is being physically or sexually abused shall immediately report the information to the local welfare agency or police department.”

Minn. Stat. § 626.556, subd. 3 (Supp. 1975). While the penalty for failure to report was still a misdemeanor, it applied to “any person

required to report” and added “suspected physical or sexual child abuse.”

It stated:

**Subd. 6. Failure to report.** Any person required by this section to report suspected physical or sexual child abuse who willfully fails to do so shall be guilty of a misdemeanor.<sup>5</sup>

The current version of subdivision 6 has been somewhat modified:

**Subd. 6. 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 . . . and fails to report is guilty of a misdemeanor.

Minn. Stat. § 626.556, subd. 6 (2005).

**C. Children’s Law Center’s interest in this case**

CLC submits this brief because of the critical issues at stake for Minnesota’s children. There continues to be a compelling need to enforce the child abuse reporting mandated by the statute. Most victims of child abuse in Minnesota are children aged birth to two years old who cannot speak for themselves.<sup>6</sup> In 2004, birth parents accounted for 73 percent

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<sup>5</sup> These earlier versions of the statute imposed criminal liability on those who failed to take *any* of the actions mandated by the statute, including reporters who failed to report and county welfare agencies who failed to act on reports. See Minn. Stat. § 626.554, subd. 7. When the statute was re-codified, the penalty provision was moved and re-worded so that it applied only to those who failed to “report.” See Minn. Stat. § 626.556, subd. 6 (1976).

<sup>6</sup> Minn. DHS, *Minnesota’s Child Welfare Report 2004, Section I—Minnesota’s Child Maltreatment Report for 2004*, at 8. On-line at: [www.dhs.state.mn.us/main/groups/children/documents/pub/DHS](http://www.dhs.state.mn.us/main/groups/children/documents/pub/DHS).

of all offenders; they were responsible for 66 percent of physical abuse<sup>7</sup> determinations. (*Id.* at 11.) Eleven deaths occurred as a result of maltreatment in 2004, seven from physical abuse. There were 39 victims of life-threatening injury, 13 from physical abuse, and 154 sustained serious injury, 87 from physical abuse. Apparent health impairment occurred in 119 victims, three from physical abuse. (*Id.* at 12.)

Minnesota has a strong interest in protecting these children. As the Minnesota statute recognizes,<sup>8</sup> without the physician's help in telling the child's story—particularly in children too young to speak—that story of abuse could go untold and the child remain vulnerable to further harm. Every year, child abuse destroys the lives of innocent children and costs the citizens of Minnesota millions of dollars for health care for the abused children.

Although the incidence of child abuse is rising,<sup>9</sup> reports by health practitioners are relatively infrequent. The Department of Human

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<sup>7</sup> Besides covering physical abuse, the DHS Report covers sexual abuse and neglect as well.

<sup>8</sup> Minnesota law and public policy “is to protect children whose health or welfare may be jeopardized through physical abuse, neglect, or sexual abuse.” Minn. Stat. § 626.556.

<sup>9</sup> The Third National Incidence Study of Child Abuse and Neglect (NIS-3), a congressionally mandated study, notes that there have been substantial and significant increases in the incidence of child abuse and neglect from 1986 to 1996 with an upward trajectory. *Third National Incidence Study of Child Abuse*, [www.healthieryou.com/cabuse.html](http://www.healthieryou.com/cabuse.html).

Services (DHS) reports that in 2004, there were 17,294 reports of maltreatment involving 22,475 Minnesota children.<sup>10</sup> Although mandated reporters submitted more than 75 percent of the reports, health practitioners comprised only eight percent of those who made reports. (*Id.* at 7.) Similarly, in 2002, there were 17,805 reports of maltreatment in Minnesota involving 26,388 children.<sup>11</sup> More than 75 percent of the reports were from mandatory reporters, but health practitioners submitted only seven per cent of the mandated reports. (*Id.* at 7.)

These statistics tend to show that the number of child abuse cases is large but the number of child abuse reports by health practitioners is small. At the same time, it appears that the misdemeanor penalty for failure to report is rarely invoked. Except for one case filed in 2002, there has not been any prosecution of mandated reporters for failing to report. (A.A. at 10).

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The lower incidence of maltreatment among children younger than two may reflect an under-coverage of this age group, because children this age have less contact with community professionals. (*Id.* at 9.)

<sup>10</sup> Minn. DHS, “Minnesota’s Child Welfare Report 2004, Section I – Minnesota’s Child Maltreatment Report for 2004,” at 1-28. On-line at: [www.dhs.state.mn.us/main/groups/children/documents/pub/DHS](http://www.dhs.state.mn.us/main/groups/children/documents/pub/DHS).

<sup>11</sup> See Minn. DHS, “Minnesota’s Child Welfare Report 2002, Section I,” *supra* note 10.

## ARGUMENT

### I. Standard of review

Whether a statute implies a civil cause of action is a question of law that this Court reviews *de novo*. *Lewis-Miller v. Ross*, 710 N.W.2d 565 (Minn. 2006)(Court construes statutes *de novo*). Whether the trial court erred in excluding evidence is reviewed for abuse of discretion. *Bergh & Mission Farm, Inc. v. Great Lakes Transmission Co.*, 565 N.W.2d 23, 26 (Minn. 1997) (citing *Uselman v. Uselman*, 464 N.W.2d 130, 138 (Minn. 1990)).

### II. This Court Should Impose Civil Liability on Violators of CARA's Mandatory Reporting Requirements.

Appellant Nykkole E. Becker ("Nykkole") suffered serious and permanent injuries as the result of child abuse that might have been prevented if physicians employed by Respondent Mayo Foundation ("Respondent") had fulfilled their duty under the Child Abuse Reporting Act, Minn. Stat. § 626.556 ("CARA")<sup>12</sup> to report their suspicions of abuse to authorities. This Court should recognize a civil cause of action under CARA by an injured child, such as Nykkole, to recover her damages against mandatory reporters who violate their statutory duty to report. Recognition of a private cause of action would encourage reports of

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<sup>12</sup> The statute is also referred to as the "Reporting of Maltreatment of Minors Act."

suspected child abuse. These reports are one of the only ways to prevent abuse-related injuries and death of infants and children and thus advance the purposes of CARA.

To determine whether a private cause of action can be implied from a statute, the Court considers three factors: “(1) whether the plaintiff belongs to the class for whose benefit the statute was enacted; (2) whether the legislature indicated an intent to create or deny a remedy; and (3) whether implying a remedy would be consistent with the underlying purposes of the legislative enactment.” *Cort v. Ash*, 422 U.S. 66, 78 (1975). Here, all three factors are met.

**A. CARA was enacted to protect children like Nykkole who are victims of child abuse.**

The first factor for finding an implied private right of action is met in this case because Nykkole falls squarely within the class of persons for whose benefit the statute was enacted. This Court held in *Radke v. County of Freeborn*, 694 N.W.2d 788 (Minn. 2005), that CARA was adopted for the express purpose of ensuring a safe environment for abused and neglected children. *Id.* 796-97. The Court explained that:

The acts mandated in CARA are not for the protection of the public or even children in general, but are mandated for the protection of a particular class of persons—children who are identified in suspected abuse or neglect reports received by the county.

*Id.* at 797. Nykkole, an infant victim of child abuse who should have been the subject of a report to the county, is a member of the class the statute was enacted to protect.

**B. The legislative scheme indicates an intent to create a remedy that ensures that reports are made.**

The second factor for finding an implied private right of action is also met in this case because the legislative scheme will only work if a civil remedy is created. By enacting CARA, the legislature made reports of child abuse by physicians mandatory:

Subd. 3. Persons mandated to report. (a) A person who knows or has reason to believe a child is being neglected or physically or sexually abused, as defined in subdivision 2, . . . shall immediately report the information to the local welfare agency, agency responsible for assessing or investigating the report, police department, or the county sheriff if the person is: (1) a professional or professional's delegate who is engaged in the practice of the healing arts, social services, hospital administration, psychological or psychiatric treatment, child care, education, correctional supervision, probation and correctional services, or law enforcement.

Minn. Stat. § 626.556, Subd. 3. Both the police department and the welfare agency must respond immediately to protect a child who is the subject of a CARA report. Significantly, the statute does not provide immunity for a physician who *fails* to make a required report. *Id.*

The purpose of the statute—to prevent further injury to an abused child—cannot be carried out unless (i) physicians who suspect abuse make reports; and (ii) the authorities who receive reports take action.

Given the importance of these mandatory acts under the statutory scheme, civil liability should attach to a failure to perform. This Court has already recognized that the statute implies a civil cause of action against county authorities who breach their duty to act on a report of abuse. *Radke v. County of Freeborn*, 694 N.W.2d 788 (Minn. 2005). As the Court pointed out there, the children protected by CARA are “uniquely vulnerable persons” because they are alleged to have suffered abuse or neglect in the privacy of their homes, often at the hands of a parent or other family member, and cannot protect themselves. *Id.* at 797. The Court continued that the statute created mandatory acts for the protection of these children, including that the county act on child abuse reports. Because the statute created a duty to act on child abuse reports, the Court held that the statute implied a private cause of action for breach of that duty. *Id.* at 798.

Similarly in the case of mandatory reporters, such as physicians, the recognition of a civil cause of action for failure to report in the first instance will ensure that purpose of the statutory scheme will be carried out. Although the statute contains a modest criminal penalty for failure to report—a misdemeanor citation—that penalty is insufficient to enforce compliance for three reasons. First, it cannot be effectively enforced because prosecutors have insufficient resources to devote to proving a

violation beyond a reasonable doubt, particularly where such a minor penalty is involved. Indeed, there has been only one prosecution over the last four years. (A.A. 10.)

Second, the possibility of imposition of a small fine (even if it were a real possibility) is an insufficient deterrent to overcome physicians' natural reluctance to investigate and report a suspicious injury. (See Kempe, et al., *The Battered Child Syndrome*, 181 J. Am. Med. Ass'n 17, 19 (1962) (A.A. at 1).<sup>13</sup> As noted above, only a small percentage of child abuse reports come from physicians.<sup>14</sup>

Third, and most importantly for this case, the misdemeanor is imposed on the individual physician, not on an entity like the Respondent here. Accordingly, the hospital has no incentive to create mandatory procedures to assure that its employees comply with their duty to report. Yet, it is the hospital's adoption of policies and procedures that will have the most impact on reporting behavior. Absent the recognition of civil liability, Respondent is exposed to no

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<sup>13</sup> By enacting the statute, the legislature recognized that (i) physicians and hospitals are specially equipped to detect instances of child abuse; and (ii) they need some incentive to overcome their reluctance to diagnose abuse and report it. (See Allan H. McCoid, *The Battered Child and Other Assaults Upon the Family*, 50 Minn. L. Rev. 1, 26-43 (1965)).

<sup>14</sup> Minn. DHS, "Minnesota's Child Welfare Report 2004, Section I – Minnesota's Child Maltreatment Report for 2004," at 1-28. On-line at: [www.dhs.state.mn.us/main/groups/children/documents/pub/DHS](http://www.dhs.state.mn.us/main/groups/children/documents/pub/DHS).

consequences whatsoever for turning a blind eye to its employees' violations of their duty.

Accordingly, just as the statutory scheme requires the imposition of civil liability on county social service agencies, so too the effectiveness of the scheme requires imposition of civil liability on physicians for breach of their duty to report.

**C. Imposition of civil liability promotes the statute's purpose to protect battered children.**

The third factor for implying civil liability is also met here because imposing civil liability would promote the purposes underlying the statute. Child abuse destroys the lives of innocent children and costs the citizens of Minnesota millions of dollars in providing health care for injured children. CARA's purpose is "to protect children whose health or welfare may be jeopardized through physical abuse, neglect, or sexual abuse." Minn. Stat. § 626.556, subd. 1. Furthermore, CARA is intended to facilitate "a safe temporary or permanent home environment for physically or sexually abused or neglected children." (*Id.*) In addition, the legislature expressly provided that its policy was to "require the reporting of neglect, physical or sexual abuse of children in the home, school, and community settings . . . require an investigation when the report alleges substantial child endangerment; and to provide protective,

family support, and family preservation services when needed in appropriate cases.” (*Id.*)

To avoid the most severe consequences of child abuse, i.e., serious injury or death, it is necessary to intervene in the child’s life as early as possible. Thus, the legislative purposes are carried out by requiring those most likely to have information about possible child abuse to report that information to authorities so they can intervene before more serious injury occurs.

Permitting civil lawsuits for violation of the duty to report promotes these statutory purposes by ensuring that mandatory reporters, when they suspect child abuse, actually make a report to the authorities. This Court recognized in *Radke* that the interests at stake certainly warrant imposing civil liability as a means to enforce the statutory scheme. It is only by assuring that reports are made that the statute can operate to protect children from serious injury and death.

In sum, all three *Cort v. Ash* factors militate in favor of imposing civil liability on mandatory reporters who breach their statutory duty to report abuse. Accordingly, this Court should reverse and remand the case for a determination by the jury whether Respondent breached its statutory duty to report.

**III. Medical Professionals Have a Common Law Duty to Report Child Abuse.**

**A. The district court erred by excluding evidence of the physicians' standard of care.**

The district court also erred in this case by excluding evidence that (i) the physicians' standard of care includes the duty to report child abuse to county authorities; and (ii) the duty was breached in this case. The lower courts' decisions were based on the determination that physicians have no such duty as a matter of law. This decision was incorrect.

The court's conclusion that there was no common law duty to report child abuse was incorrect because the scope of a physician's duties must be established, not by the court, but by expert testimony regarding the duties of a physician. To establish medical malpractice, a plaintiff must introduce expert testimony demonstrating (1) the standard of care recognized by the medical community as applicable to the particular defendant, (2) that the defendant departed from that standard, and (3) that the defendant's departure was a direct cause of the plaintiff's injuries. *Fabio v. Bellomo*, 504 N.W.2d 758, 762 (Minn. 1993) (citing *Plutshack v. University of Minnesota Hospitals*, 316 N.W.2d 1, 5 (Minn.1982)). The determination of the scope of the applicable standard

of care cannot be decided as a matter of law by the court in the absence of expert testimony.

Here Appellants offered proof through expert witnesses, that the standard of care included the duty to report child abuse. (A. App. 49-57, 87-91.) *See also* Kempe, et al., 181 *The Battered Child Syndrome*, J. Am. Med. Ass'n 17, 23 (July 7, 1962) (physician's treatment of battered child includes reporting child abuse to authorities). In addition, the experts would have testified that this duty was breached and that the report would have led to the removal of Nykkole from her parent's custody, thus preventing further harm. (A. App. 41-42, 43-48.) This evidence was erroneously excluded. *See also* *Landeros v. Flood*, 551 P.2d 389 (Cal. 1976).

**B. Respondent owed Nykkole a special duty to report abuse.**

The enactment of CARA provides additional support for the conclusion that a physician's duty to her patient includes a duty to report abuse, the breach of which constitutes negligence. Although a person generally has no duty to act for the protection of another, the existence of a legal duty to act depends on two factors: (1) the relationship of the parties, and (2) the foreseeability of the risk involved. *Gilbertson v. Leininger*, 599 N.W.2d 127, 130 (Minn.1999). A "special relationship" giving rise to a legal duty to protect another exists where

one person has “custody of another person under circumstances in which that other person is deprived of normal opportunities of self-protection.” *Harper v. Herman*, 499 N.W.2d 472, 474 (Minn.1993). “Typically, the plaintiff is in some respect particularly vulnerable and dependent on the defendant, who in turn holds considerable power over the plaintiff’s welfare.” *Donaldson v. Young Women’s Christian Ass’n of Duluth*, 539 N.W.2d 789, 792 (Minn. 1995); *cf. Harper*, 499 N.W.2d at 474-75. Furthermore, a special relationship may arise when one individual’s safety has in some way been entrusted to another and that the other has accepted that entrustment. *Radke v. County of Freeborn*, 694 N.W.2d 788 (Minn. 2005) (special duty created by statute that sets forth mandatory acts for the protection of a particular class of persons); *Andrade v. Ellefson*, 391 N.W.2d 836, 842 (Minn. 1986) (same); *Erickson v. Curtis Inv. Co.*, 447 N.W.2d 165, 168 (Minn. 1989); *Lundman v. McKown*, 530 N.W.2d 807, 820 (Minn. Ct. App. 1995), *rev. denied* (Minn. May 31, 1995) (special relationship existed between diabetic boy and a Christian Science nurse and practitioner who were child’s caregivers).

The first prong of the test for finding a “special” duty to protect Nykkole is met here because physicians and hospitals have special relationships with children who seek their care. First, as this Court has recognized, children are “especially vulnerable.” *Radke*, 694 N.W.2d at

797. See also *Laska v. Anoka County*, 696 N.W.2d 133 (Minn. Ct. App. 2005) (day care provider owes duty to infant where infant's safety entrusted to her). While she was in the care of the hospital, Nykkole was entirely dependent upon the hospital for her protection. Second, hospitals and physicians are particularly suited to protecting injured children because they are specially trained to detect child abuse and to take action to protect abused children. Indeed, hospitals *alone* are in a position to protect infants like Nykkole: she could not tell anyone what had happened to her and, because of her age, would not likely come into contact with any other mandatory reporter, such as a teacher or day care provider. Nykkole was entirely dependent upon the hospital's staff to use their specific training and expertise in detecting the signs of child abuse, to report to authorities. Thus, the district court erred when it held that the hospital had no special duty simply because Nykkole was not harmed while she was in the hospital.

The second prong of the test for finding a duty to protect Nykkole—whether her injury was foreseeable—is also met here. Nykkole's injury was foreseeable given the well-known facts about child abuse. As has been recognized by multiple authorities, and was the case here, abusers often repeat their crime. See, e.g., B. Schmitt, *Battered Child Syndrome*

*(Abuse & Neglect)*, CURRENT PEDIATRIC DIAGNOSIS & TREATMENT, 855 (7<sup>th</sup> Ed. 1982).

Given her vulnerability and the fact that Respondent's physicians were specially trained to detect child abuse, and the foreseeability of harm if the physicians failed to report the abuse, they owed Nykkole a duty to protect her by reporting what they knew, or should have known, was abuse. The trial court erred by excluding evidence of this duty and its breach. A new trial is required.

**IV. The Court erred in excluding evidence of causation.**

The trial court's exclusion, not only of evidence of the failure to report, but also evidence of the steps that the county would have taken if a report had been made, was erroneous. Appellant's experts were prepared to testify that the doctors' report would have prompted authorities to place Nykkole in a safe environment. (*See, e.g.*, A. App. 41-42.) By excluding the evidence, the jury was deprived of the only evidence that provided a causative link between the failure to report and Nykkole's damages.

The Court of Appeals points out in its opinion that there was evidence from which the jury could have concluded that the doctors were

guilty of negligence,<sup>15</sup> but the existence of that evidence does not cure the erroneous exclusion of other evidence that linked the failure to report with Nykkole's injury. Indeed, the exclusion of this evidence explains the jury verdict: the jury may have found negligence based on the doctors' other failures to diagnose and treat Nykkole's injuries but could not find that these failures caused the injuries because they did not know that Nykkole would have been placed in a safe environment if the doctors had made the required report. Indeed, Nykkole's injuries could *only* have been prevented by reporting the abuse. The court's conclusion that this evidence would not have changed the outcome was erroneous.

The error in excluding the evidence was not harmless. If the jury had heard the evidence it would have been compelled to conclude that the doctors' negligence proximately caused Nykkole's damages.

Negligence is the proximate cause of an injury when the defendant ought, in the exercise of ordinary care, to have anticipated that the act was likely to result in injury. In other words, the defendant is liable for any injury proximately resulting from the act, even though it could not have anticipated the particular injury that did happen. *Mickelson v.*

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<sup>15</sup> Overreliance on remorse, failing to interview parents separately, inadequate use of in-house services to diagnose, failure to perform diagnostic tests, failure to diagnose lack of weight gain and failure to protect while doing child abuse assessment. 2005 WL 3537163 at \*5 (A. App. 5.)

*Kernkamp*, 230 Minn. 448, 42 N.W.2d 18 (1950); *Christianson v. Chicago, St. Paul, Minneapolis & Omaha Railway Co.*, 67 Minn. 94, 97, 69 N.W. 640, 641 (1896). Here, the physicians owed Nykkole a duty to report. Their breach of that duty proximately caused the injury to Nykkole because the injury she suffered was the very injury that was foreseeable as a result of the failure to report. *Cf. Palsgraf v. Long Island RR Co.*, 222 App. Div. 166 (N.Y. App. Div. 1928), *rev'd* 162 N.E. 99 (N.Y. 1928).

Furthermore, the jury could not properly conclude that there was a superseding intervening cause in this case. An intervening act is not superseding unless (1) its harmful effects occurred after the original negligence; (2) it has not been brought about by the original negligence; (3) it actively worked to bring about a result that would not otherwise have followed from the original negligence; and (4) it was not reasonably foreseeable by the original wrongdoer. *Kroeger v. Lee*, 270 Minn. 75, 78, 132 N.W.2d 727, 729-30 (1967). The failure to report, by its very nature, precludes the application of superseding cause. As noted above, if the jury were to find a negligent failure to report, it would have already determined that the injury was foreseeable, precluding the application of superseding cause. Moreover, in such a case, the alleged intervening cause (parental abuse) was brought about by the failure to “treat” the child abuse by reporting the abuse and thereby protecting the child from

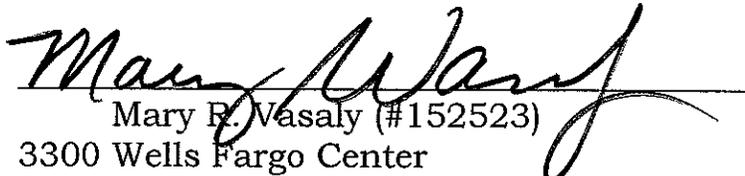
her parents. Accordingly, there can be no superseding intervening cause in such a case.

### **CONCLUSION**

For all of the reasons outlined above, amicus curiae Children's Law Center of Minnesota respectfully urges this Court to hold that a civil claim exists for negligence in failure to report under Minn. Stat. § 626.556. The Court of Appeals' judgment should be reversed, and the matter remanded to the district court for a new trial.

Dated: April 24, 2006

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MINNESOTA**

CASE NO. A05-45

STATE OF MINNESOTA  
IN SUPREME COURT

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Nancy Becker & Michael Becker, individually  
and as parents and guardians for Nykkole E.  
Becker, f/k/a/ Nykkole E. Rossini, and  
Minnesota Department of Human Services,

Appellants,

vs.

Mayo Foundation,

Respondent.

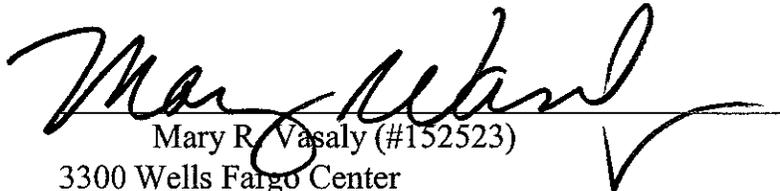
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I hereby certify that this brief conforms to the requirements of  
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