
NO. A05-45

State of Minnesota
In Supreme Court

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

Appellants,

v.

Mayo Foundation,

Respondent.

**BRIEF OF AMICUS CURIAE
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STATEMENT OF INTEREST

The Minnesota Defense Lawyers Association (“MDLA”), founded in 1963, is a non-profit Minnesota corporation whose members are trial lawyers in private practice.¹ MDLA devotes a substantial portion of its efforts to the defense of civil litigation. MDLA is affiliated with the Minnesota State Bar Association and Defense Research Institute. MDLA has grown to include representatives from over 180 law firms across Minnesota, with 800 individual members.

The MDLA has a public interest in protecting the rights of litigants in civil actions, promoting the high standards of professional ethics and competence, and improving the many areas of law in which its members regularly practice. For purposes of this case, those interests translate into supporting the position of Respondent Mayo Foundation (“Mayo”) for three reasons. First, Appellants should not be able to assert new arguments and causes of action that were not raised before the trial court. Second, the Child Abuse Reporting Act does not create a private cause of action with respect to physicians or other mandatory reporters, nor does it provide an appropriate or workable framework for establishing the standard of care of a mandatory reporter. Third, the practical implications may include over-reporting that could overwhelm the already limited resources available to the county agencies charged with investigating abuse

¹The undersigned counsel for the Amicus authored the brief in whole, and no persons other than the Amicus made a monetary contribution to the preparation or submission of the brief. This disclosure is made pursuant to Minn. R. Civ. App. P. 129.03.

claims. To that end and for the reasons articulated in this brief, the MDLA urges this Court to affirm the decision of the court of appeals.

ARGUMENT

A. THE PRIVATE RIGHT OF ACTION ISSUE IS NOT PROPERLY BEFORE THIS COURT; REGARDLESS, THE STATUTE DOES NOT EXPLICITLY OR IMPLICITLY CREATE A PRIVATE RIGHT OF ACTION

1. This Case Was Pled and Tried As a Negligence Action, Not a Statutory Right of Action Case

As the Appellants acknowledge in their brief, there is a difference between having a statutory cause of action and using a statute to define the standard of care in a negligence action. *See* Appellants Br. 21. Statutory claims and negligence claims are distinct and separate. The test for determining whether a statute grants a private cause of action to a plaintiff for its violation is different from the test used to determine whether a statute defines the standard of care applicable to a party. *See Bruegger v. Faribault County Sheriff's Department*, 497 N.W.2d 260, 261-62 (Minn. 1993) (discussing whether Crime Victim Reparations Act creates a private cause of action).

Review of the record in this case indicates Appellants framed their claim against Mayo as one for negligence. One of the areas of alleged negligence was Mayo's failure to report suspected abuse of Nykkole Becker and the lack of hospital policies concerning reporting of suspected child abuse. *Becker v. Mayo Foundation*, No. A05-45, 2005 WL 3527163, *2 (Minn. Ct. App. Dec. 27, 2005). Appellants did not include a statutory cause of action in their complaint. With this procedural posture, it would be improper for this Court to consider and rule upon whether the Child Abuse Reporting Act ("CARA")

creates a private cause of action in Minnesota. This Court should not rule upon an issue that was not properly pled and presented to the trial court for consideration, especially where the issue involves a separate and distinct cause of action than the case pled and tried at the trial court level. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

2. Even If the Issue Were Properly Before the Court, CARA Does Not Create a Private Cause of Action

Some statutes expressly create a private cause of action by expressly allowing private persons to sue for violation of the statute.² In such cases, the legislature has considered and affirmatively determined that a private plaintiff should be permitted to sue another party for violation of the statute. Such a claim is predicated on the statute, and not on principles of common law. Generally, a statute does not create a civil cause of action unless the statute imposes such liability “explicitly or by clear implication.” *Semrad v. Edina Realty, Inc.*, 493 N.W.2d 528, 532 (Minn. 1992). As the Court noted in *Bruegger*, “[p]rinciples of judicial restraint preclude us from creating a new statutory cause of action that does not exist at common law where the legislature has not either by the statute’s express terms or by implication provided for civil tort liability.” *Bruegger*, 497 N.W.2d at 262; *see also Larson v. Dunn*, 460 N.W.2d 39, 47 n.4 (Minn. 1990) (“a

² *See, e.g.*, Minn. Stat. § 604.12, subd. 3 (2004) (private action permitted for violation of statute prohibiting access to public place based upon clothing displaying wording); Minn. Stat. § 177.27, subd. 8 (2004) (civil action permitted for violation of certain labor standards); Minn. Stat. § 325F.665, subd. 9a (2004) (civil action permitted to enforce manufacturer’s statutory duty to honor warranty). These are just a few examples of numerous statutes that expressly permit a private cause of action.

criminal statute does not automatically give rise to a civil cause of action unless the statute expressly or by clear implication so provides”).

Here, it is undisputed that CARA does not, by its express terms, create a private cause of action against mandatory reporters who allegedly fail to report suspected child abuse. CARA provides that a mandatory reporter 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(a) (2004). The legislature could not have been any clearer in establishing the consequence for a mandatory reporter’s failure to report. This Court does not need to speculate as to what the legislature intended. The legislature determined that a criminal conviction with its attendant impact on the mandatory reporter’s professional status (including licensure) is the appropriate consequence and incentive for reporters to comply with CARA’s mandate.

Contrary to Appellant’s suggestion, this Court’s decision in *Radke v. County of Freeborn*, 694 N.W.2d 788 (Minn. 2005), did not recognize a private cause of action under CARA. *Radke* involved a negligence claim against Freeborn County and two of its child protection workers based on their investigation and handling of child abuse reports. *Radke* did not allege entitlement to a private cause of action under CARA. Rather, *Radke* claimed CARA created a special duty on the part of the county to exercise reasonable care in investigating reports of child abuse. This Court applied the familiar public duty/private duty analysis applicable to governmental entities set out in *Cracraft v. City of St Louis Park*, 279 N.W.2d 801 (Minn. 1979), concluding the County defendants owed *Radke* a special duty and that the negligence claim could proceed.

Not only do CARA's express terms preclude a private cause of action against mandatory reporters, but there is no basis on which the Court should imply such an action. As noted above, this Court and other Minnesota appellate courts have been extremely cautious about concluding that the legislature impliedly intended that the statute create a separate "statutory" cause of action in addition to other available common law actions. *See generally* Marshall Tanick, *If the Suit Fits . . . Implied Causes of Action in Minnesota*, 62-Feb Bench & B. Minn. 20 (February 2005).

Here, the legislative scheme provides no basis for implying a private cause of action for failing to make a mandatory report. First, it is unnecessary for the Court to imply anything because the legislature expressly provided a consequence for a mandatory reporter's failure to make a report—a criminal conviction. As the Court observed in *Radke*, the legislature's "express intent" was the imposition of criminal penalties. *Radke*, 694 N.W.2d at 798. Second, the legislature explicitly provided for civil liability for a person who "knowingly or recklessly makes a false report." Minn. Stat. § 626.556, subd. 5 (2004). In other words, the legislature knew how to make its intention to create civil liability known. It did not do so with respect to failure to make a mandatory report. The Court should not imply a private cause of action under these circumstances.

The practical impact of a private cause of action against mandatory reporters would be profound and provides additional support for the determination that CARA does not create a private cause of action. A broad range of people fall under CARA's reporting requirement. These "mandatory reporters" are not only physicians and other medical providers but also include school teachers, school social workers, police officers,

clergy members, probation officers, day care providers and social service workers. Minn. Stat. § 626.556, subd. 3 (2004). Many of these reporters have no knowledge as to how to diagnose and treat physical injuries and little training about abuse symptoms. The threat of civil liability is quite likely to lead to over-reporting of abuse suspicions. *See* section C., *infra*. While Amicus MDLA agrees that protecting children is the paramount goal, over-reporting may well compromise child safety. *Id.* Child protection resources are already strained. For all these reasons, it is appropriate that the legislature, which is in the best position to evaluate and balance competing policy considerations, defines the boundaries of civil liability under CARA.

B. CARA DOES NOT DEFINE THE STANDARD OF CARE TO WHICH A PHYSICIAN OR OTHER MANDATORY REPORTER IS HELD

As stated above, this case was pled and tried as a negligence action. Appellants sought to introduce evidence of the reporting requirements applicable to physicians and other mandatory reporters, apparently intending to show that the failure to report was negligence that caused the ultimate injuries. In essence, then, under the facts of this case, Appellants are claiming that the reporting requirements of CARA define and shape the standard of care that a physician owes to a patient.

While this Court has found, on some occasions, that certain statutes can define the standard of care in a negligence action, the nature of this particular statute—and the tenuous causation link between the required conduct and any ultimate injury—weigh heavily against using this criminal reporting statute as the standard of care for a physician or any other mandatory reporter.

In certain circumstances, a statute can define the standard of care one party owes to another party, and violation of that statute can be per se negligence. *See, e.g., Johnson v. Farmers and Merchants State Bank*, 320 N.W.2d 892, 897 (Minn. 1982). In determining whether a statute creates a standard of care, this Court considers the purpose of the statute, the interests it is intended to protect, and whether the injury could be proximately caused by its violation. *Johnson*, 320 N.W.2d at 897.

This Court has been very prudent and careful in determining whether it is appropriate, practical, and necessary to use a statute to define the standard of care that one party owes to another party. In fact, on several occasions and for a variety of reasons, this Court has rejected using a criminal or regulatory statute to define the standard of conduct in a common law negligence action. *See Johnson*, 320 N.W.2d at 897-98 (statute requiring bank to deliver insurance policy did not establish bank's standard of care); *Bills v. Willow Run I Apartments*, 547 N.W.2d 693, 695 (Minn. 1996) (landlord's violation of the Uniform Building Code is not per se negligence unless landlord, among other things, knew or should have known of the violation and failed to take reasonable steps to remedy the violation); *Mpls. Employees Ret. Fund v. Allison-Williams Co.*, 519 N.W.2d 176, 182-83 (Minn.1994) (refusing to supplant longstanding common-law standard of care applicable to brokers with statutory standard in Minnesota Securities Act); *see also In re Shigellosis Litigation*, 647 N.W.2d 1 (Minn. Ct. App. 2002) (finding Food, Drug, and Cosmetic Act, which prohibits sale of adulterated food, does not define standard of care applicable to food seller).

In *Bills v. Willow Run I Apartments*, for example, this Court rejected the argument that violation of the Uniform Building Code was negligence per se, and instead concluded that common-law landlord standards of liability apply. 547 N.W.2d at 695. This Court noted that Minnesota courts have long held landlords must have notice of a dangerous condition and an opportunity to remedy the violation, and use of the statute to define the standard would impute such knowledge to the landlord. *Id.*

For two reasons, it would be inappropriate to hold that CARA defines the standard of care that a physician owes to a patient. First, the potential causal link between the failure to report and the ultimate injury is too tenuous to support using the statute as the standard of care. Second, the common law duty that a physician owes to a patient is well-established and not subject to further expansion.

1. The Causal Link Between the Failure to Report and the Ultimate Injury is Too Tenuous and Not Appropriate to Submit to a Jury

As stated above, in deciding whether to adopt a criminal or other statute as the standard of care, one of the considerations is whether an injury can be proximately caused by a violation of the statute. *See Johnson*, 320 N.W.2d at 897. Here, a clear link between the failure to report and an ultimate injury is too tenuous and uncertain to permit the reporting statute to define the standard of conduct.

The most compelling support for this tenuous causal link is found in the reporting statute itself. CARA imposes a requirement on the mandatory reporter to report alleged abuse—but it does not impose a requirement on the mandatory reporter to protect, to investigate, or to remove the child from the care of the alleged abuser. Minn. Stat. §

626.556, subd. 3, 6-7 (2004). Once the required report is made, the mandatory reporter has no control or power over the conduct of the individuals who are required to act upon the report, i.e. the law enforcement officials and the county workers. *Id.*³ All further activity is essentially “out of the hands” of the mandatory reporter. Once the required report is made, the county worker has a whole host of options available to him or her that are not subject to the input or control of the mandatory reporter, including interviewing the child, an investigation, temporary or permanent removal from the home, an arrest of the alleged abuser, as well as other options. *See* Minn. Stat. § 626.556, subd. 3a, 10 (2004).

Because of the unique and limited nature of this statute, one cannot conclude that the failure to report will set in motion a chain of proximate and immediate causal events that result in the ultimate abuse. There are too many factors that can break the causal link or stretch it well beyond common law principles governing proximate cause. *See, e.g., Harpster v. Hetherington*, 512 N.W.2d 585, 85-86 (Minn. 1994) (rejecting “but for” causation as the test in negligence cases, as it can turn events, near and far, into eventual causes of an accident). In addition, it is simply unfair to hold a mandatory reporter causally responsible where the reporter has no power or control over the subsequent actions or inactions of others, including law enforcement officers, county workers, and the ultimate abuser. It would be impossible and speculative in a civil action to go back

³ The statute only provides that the mandatory reporter should receive a “summary of the disposition” of the report, unless such disclosure would be detrimental to the best interests of the child. Minn. Stat. § 626.556, subd. 3(d) (2004).

and reconstruct what would have happened in response to a mandatory report, considering the factors of time and space that influence what happens after a mandatory report.⁴

Appellants will undoubtedly counter that the issue of causation is one for the jury. In most cases, this is true. But here, the causation piece fits into the analysis of whether the statute defines the standard of conduct. *See Johnson*, 320 N.W.2d at 897 (setting out the four factors applicable to adoption of a criminal or regulatory statute as the standard of care). Where the causal link between the required conduct and an ultimate injury is simply too tenuous, it is not appropriate to let the jury consider an issue. This statute and the reporting requirements are such a situation, especially where there would typically be an intervening criminal act that would normally break any potential causal link. *See H.B. by Clark v. Whittemore*, 552 N.W.2d 705, 709 (Minn. 1996) (no common law duty to protect another person from the criminal acts of another).

In addition, if the statute defines the conduct, then the negligence case would be subject to comparative fault principles and would draw in not only the county worker, but others that had contact with the child (and a duty to act) over the time period between the

⁴ For example, the statute permits a report be made to one of four identified parties. Minn. Stat. § 626.556, subd. 7 (2004). A report can be oral or in writing. *Id.*, subd. 7. A report must be made “immediately” – which means “as soon as possible” – but not longer than 24 hours. *Id.*, subd. 3(e).

If the report is made to law enforcement, which is permissible, the law enforcement officer then forwards it on to the local welfare agency. *Id.*, subd. 7. The agency then determines whether to conduct a family assessment, and has a host of options available to pursue following up on the report. *Id.*, subd. 10.

failure to report and the ultimate injury. Presumably, an abused child would be exposed to other family members, a day care provider or teacher, the spouse of the abuser, and others that may also have had the opportunity and duty to prevent abuse and whose alleged fault should also be submitted to a jury. It could turn the trial of the matter into a virtual step-by-step consideration of every moment between the alleged failure to report and the ultimate injury.

In short, because of the tenuous link between a mandatory report and the ultimate injury, the intervening criminal act, and the inability of the mandatory reporter to control the subsequent acts of others, it would not be appropriate, practical, or necessary to conclude that the reporting requirements establish the standard of care in this case.

2. The Common Law Standard of Care for a Physician is Well-Established and Has Not Included the Duty to Report

As discussed in *Bills*, another consideration for whether to adopt a criminal statute as a standard of care in a civil action is a consideration of whether there are well-developed common law principles that govern the standard of care that are currently in place. *Bills*, 547 N.W.2d 694-95. Here, there is well-established Minnesota law that defines the standard of care that a physician owes to a patient. See 4A *Minnesota Practice*, CIVJIG 80.10 et seq. and use notes (1999) (discussing and articulating standard of care applicable to a physician and hospital under various circumstances). Like the *Bills* case, there is no reason to supplant the long-standing principles of common law governing the conduct of a physician with the statutory standard. To do so would impose a greatly-expanded duty that would potentially hold a physician (or other mandatory

reporter, such as a teacher or a priest) responsible for casual events over which they have no further control and which are not direct, immediate, or proximate.

In addition, if this Court determines that the reporting statute is the standard of care, it would essentially permit Appellants to create a private cause of action within the “framework” of a negligence action. In short, it would implicitly do what cannot be done explicitly, because the legislature already determined that criminal penalties are the appropriate sanction for violation of the statute. *See* Section A, *supra*.

C. THE USE OF CARA TO ESTABLISH A STANDARD OF CARE FOR MANDATORY REPORTERS COULD HAVE AN ADVERSE IMPACT ON THE LIMITED RESOURCES OF COUNTY WORKERS

If this Court permits either a statutory cause of action under CARA or concludes that CARA defines the standard of care applicable to a mandatory reporter, it could very well have the unintended consequence of overwhelming county investigators with potentially unfounded reports, taking critical resources away from those who need them most. In a rush to avoid civil liability (and with the promise of immunity for reporting under the statute), most employers will actively encourage their mandatory reporters to suspend their judgment and report questionable or marginal cases.

Although no one wants to see an abused child left without protection, the destructive effect of over-reporting cannot be ignored. As one commentator has written, civil liability “substantially contributes to the case overload of Child Protective Services and to unsubstantiated reports, which ultimately work against children in danger.” Steven J. Singley, *Failure to Report Suspected Child Abuse: Civil Liability of Mandated Reporters*, 19 J. Juv. L. 236, 237 (1998) (MDLA App. 1-25.) This process starts with

mandatory reporters' fear of civil lawsuits from failure to report suspected abuse. Curt Richardson, *Physician/Hospital Liability for Negligently Reporting Child Abuse*, 23 J. Legal Med. 131, 136 (2002). This fear, coupled with a vague understanding of reporting requirements, leads to unsubstantiated reports. *Id.*; Singley, *supra*, at 239 (MDLA App. 1-2.) Reporting may then result "where the reporter may have less than a reasonable suspicion of abuse." Singley, *supra*, at 242 (MDLA App. 3-4.)

Consequently, child protection agencies would be overburdened with an increased amount of reports to investigate. *Id.* at 239. They could be devoting significant amounts of time and resources to investigating unfounded reports. *Id.* (MDLA App. 1); Robert M. Reece, MD & Carole Jenny, MD, MBA, *Medical Training in Child Maltreatment*, 29 Am. J. Prev. Med. 266, 266 (2005) (stating that in 2003, about 906,000 children were substantiated victims of child abuse or neglect but 2.9 million referrals were received by CPS agencies). According to a 1996 report from the National Committee to Prevent Child Abuse, there was only a 31% substantiation rate of child abuse among data from 37 states. Reece, *supra*, at 268 (referencing the NCPCA report).

Time spent investigating unfounded claims will, in turn, deplete already scarce resources that could be used to help children in actual abusive situations. Reece, *supra*, at 268 ("No one foresaw that the numbers of reports would quickly outstrip the agencies' ability to provide services to these families and funding for this function has been, in most places, inadequate); Kathleen Coulborn Faller, *False Accusations of Child Maltreatment: A Contested Issue*, 29 Child Abuse & Neglect 1327, 1328 (2005) (stating

that there has been a 400% increase in the number of cases reported in the United States since 1976 but only a 60% increase in resources to investigate and intervene).

Child protection agencies' devotion of time investigating unfounded reports will leave them less time to devote to those children truly in need of their services. Richardson, *supra*, at 136. See also Singley, *supra*, at 237 (“[S]ubjecting mandated reporters to [civil] liability substantially contributes to the case overload of Child Protection Services ... and to unsubstantiated reports, which ultimately works against children in danger.”) (MDLA App. 1.) This result is contrary to the purpose of CARA, which is to “protect children whose health or welfare may be jeopardized through physical abuse, neglect, or sexual abuse.” Minn. Stat. § 626.556, subd. 1 (2004).

In sum, the criminal penalties in the reporting statute already ensure reporting. Imposing civil liability through a private cause of action or an expanded standard of care may lead to over-reporting, thus draining scarce county resources and potentially flooding the courts with civil lawsuits, despite the tenuous link between the alleged failure to report and the ultimate injury. Where the legislature has already determined that criminal penalties are the appropriate sanction for a failure to report, this Court should reject creating a private cause of action or concluding that the reporting statute impacts the standard of care that a physician or other mandatory reporter owes to another.

CONCLUSION

This Court must carefully consider the legal and practical ramifications of accepting the arguments advanced by Appellants. Here, any private cause of action under CARA should not be permitted, as it was never pled and the statute does not explicitly or implicitly provide for a private cause of action. In addition, the reporting statute should not establish the standard of care that a physician or other mandatory reporter owes to another. The criminal penalties imposed by the statute define the legislative choice for enforcement of the statute. Amicus MDLA respectfully request this Court affirm the trial court and court of appeals.

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).