

No. A05-0045

STATE OF MINNESOTA
IN SUPREME COURT

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

Appellants,

v.

Mayo Foundation,

Respondent.

RESPONDENT'S BRIEF AND APPENDIX

ROBINS, KAPLAN, MILLER & CIRESI LLP

Chris A. Messerly, #177039

Laura M. Provenzino, #329691

2800 LaSalle Plaza

800 LaSalle Avenue

Minneapolis, Minnesota 55402-2015

(612) 349-8500

ATTORNEYS FOR APPELLANTS

DORSEY & WHITNEY LLP

Paul B. Klaas #56327

Gillian Brennan #314444

Bartholomew Torvik #335289

Suite 1500

50 South Sixth Street

Minneapolis, MN 55402-1498

(612) 340-2600

FREDRIKSON & BYRON, P.A.

Ann E. Decker, #139701

200 South Sixth Street

Suite 4000

Minneapolis, MN 55402-1425

(612) 492-7000

ATTORNEYS FOR RESPONDENT
MAYO FOUNDATION

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STATEMENT OF THE LEGAL ISSUES

- I. Did the Court of Appeals err in holding that Minnesota’s Child Abuse Reporting Act (“CARA”) provides criminal penalties, but not civil liability, for those who fail to report child abuse?**

Apposite Authorities:

Minn. Stat. § 626.556.

Radke v. County of Freeborn, 694 N.W.2d 788 (Minn. 2005).

Larson v. Dunn, 460 N.W.2d 39 (Minn. 1990).

Bruegger v. Faribault County Sheriff's Dept., 497 N.W.2d 260 (Minn. 1993)

- II. Did the Court of Appeals err in upholding the District Court’s evidentiary ruling that barred Appellants from offering evidence that Mayo doctors can report child abuse to county social services workers, but that permitted Appellants to offer evidence and argue that Mayo itself had ample resources to protect any children that its doctors reasonably believed were being abused?**

Apposite Authorities:

Covey v. Detroit Lake s Printing Co., 490 N.W.2d 138 (Minn. Ct. App. 1992).

Poppenhagen v. Sornsin Const. Co., 220 N.W.2d 281 (Minn. 1974).

Mutual Service Cas. Ins. Co. v. Overholser, 58 N.W.2d 268 (Minn. 1953).

III. Did the Court of Appeals err in upholding the District Court’s denial, as both unfounded and untimely, of Appellants’ claim that hospitals should have a “special duty” for children injured at home?

Apposite Authorities:

H.B. by Clark v. Whittemore, 552 N.W.2d 705 (Minn. 1996).

Cracraft v. City of St. Louis Park, 279 N.W.2d 801 (Minn. 1979).

STATEMENT OF THE CASE

Brian Rossini was convicted of physically abusing and permanently injuring his infant daughter, Nykkole. He is in prison.

Nykkole was later adopted by Appellants Nancy and Michael Becker, who sued Mayo Foundation alleging that Mayo doctors’ negligence caused Nykkole’s injuries and seeking money damages. The claim was tried to a jury for two weeks during January, 2004.

At trial, Appellants sought to introduce evidence concerning a doctor’s duty to report suspected child abuse under CARA. That was not permitted by the District Court because, both before and after this Court’s decision in *Radke v. County of Freeborn*, 694 N.W.2d 788 (Minn. 2005), mandatory reporters faced criminal culpability under CARA, but not civil liability, for failing to report known abuse, it being well-established that there is no common law duty to report. *See Meyer v. Lindala*, 675 N.W.2d 635 (Minn. Ct. App. 2004); *Kuelbs v. Williams*, 609 N.W.2d 10 (Minn. Ct. App. 2000); *S.L.D. v. Kranz*, 1996 WL 146360 (Minn. Ct. App., Apr. 2, 1996).

The District Court, nonetheless, permitted evidence at trial that Mayo doctors could hospitalize Nykkole and could call on social services and other resources available to aid the doctors in assessing abuse and protecting children. The District Court's precise order *in limine* was:

[T]o 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 for consultation or advice, that testimony would be permitted; to the extent that any such testimony might be offered to show compliance or failure to comply with internal Mayo policies or certainly with legal requirements for reporting, that will not be allowed.

Respondent's Appendix ("R.A.") at 9-10.

Both of Appellants' experts then testified at trial that the Mayo doctors could have hospitalized the child until it was safe for her to return home, and Appellants' lawyer argued enthusiastically that the Mayo doctors caused the child's injuries because they could have, and should have, taken her away from her birth parents and kept her in the hospital. *See, e.g.*, R.A. at 11-13, 14, 63.

The jury found the Mayo doctors negligent, in some unspecified way, but determined that their negligence was not the cause of the child's injuries. *See* R.A. at 90-91. Appellants moved for a new trial, which was denied. Appellants' Appendix at 15. Appellants appealed to the Court of Appeals. The Court of Appeals unanimously affirmed.

STATEMENT OF THE FACTS

Nykkole E. Rossini was born on July 26, 1997, to Sabryna Koob and Brian Rossini at Rochester Methodist Hospital.

August 17, 1997: Broken Arm Diagnosed as Accidental

On August 17, 1997, at the age of three and one-half weeks, Nykkole was brought to the emergency room at Saint Marys Hospital by Ms. Koob and Mr. Rossini, who reported that Nykkole had fallen out of Mr. Rossini's arms after she "spasmed" while being fed.¹ *See* R.A. at 2. As Mr. Rossini reenacted in his video deposition, the child squirmed out of Mr. Rossini's grasp as he was in the process of standing up from a low couch, reaching forward with his other arm to grab a burp towel. *See* R.A. at 43, 68-69; Court Exh. D (Videotaped Deposition of Brian Rossini, taken April 18, 2003). In an effort to keep Nykkole from falling to the floor, Mr. Rossini caught Nykkole by her left arm; he did keep her from falling to the floor, but, in doing so, he broke her arm. *See* R.A. at 1, 2-4.

Dr. Julia Rosekrans was Nykkole's principal doctor in the Saint Marys Hospital ER on August 17. *See id.* Dr. Rosekrans is board certified in both pediatrics and emergency medicine, and she has devoted decades of her life and career to the prevention and diagnosis of child abuse. *See* R.A. at 17; *see generally* Defendant's Exh. 106. She served for many years as medical director of the Miami-Dade County Child Abuse Program and, after joining the Mayo medical staff, as chair of Mayo's Child Abuse and

¹ Nykkole's "spasm" (Appellants' Brief at 8) was actually thought to be an infant "startle reflex" (or Moro's reflex), well known to pediatricians and parents. R.A. at 22, 59.

Maltreatment Subcommittee as well as Mayo's Child Abuse Task Force. *See* R.A. at 18, 19; Defendant's Exh. 106 at 2, 3.

By August 17, 1997, after 20 years as a pediatric ER doctor with special experience in the prevention and diagnosis of child abuse, Dr. Rosekrans had diagnosed and reported hundreds of cases of child abuse. *See* R.A. at 40-41. She was called upon that day, as she had been hundreds of times before, to determine whether a child's injury was accidental or intentionally inflicted—a sad determination that must be made in ERs everywhere, every day.

Dr. Rosekrans and her pediatric resident, Dr. Sarah Brandt, examined Nykkole, talked with the parents, and ordered an x-ray of Nykkole's left arm.² *See* R.A. at 2, 20, 21. Nykkole had no injuries, other than bruising on her left forearm and, it appeared, a broken left arm. *See* R.A. at 21. The x-ray confirmed that Nykkole had a broken arm, so Drs. Rosekrans and Brandt called Dr. Gregory Alberton, an orthopedic resident. *See* R.A. at 24, 25. He also examined Nykkole; he found and documented that there was no "ecchymosis" (bruising) other than that on the left forearm. *See* R.A. at 1, 52.

Each of these doctors separately asked Mr. Rossini to describe the incident in which Nykkole startled and began to fall. *See* R.A. at 22, 45, 51. When Mr. Rossini did so, he described a sequence of events that would cause precisely the injuries that Nykkole

² Mayo's Emergency Room record concerning the August 17 visit, on two occasions, includes an R with a circle around it (the medical symbol for "right") in describing the injured arm, rather than an L with a circle around it (the medical symbol for "left"). *See* R.A. at 2. That documentation error was negligent, in the opinion of Mayo's own outside expert, Dr. Stephen Selbst, (R.A. 60), but, because it was just an obvious mistake, it did not cause Nykkole any harm. Dr. Selbst testified on January 30, 2004, just hours before the jury returned their verdict of negligence, but no causation.

had—bruising on the left forearm (where Mr. Rossini said he caught Nykkole as she fell) and a specific type of bone fracture called a “spiral fracture” (because, as Mr. Rossini described it, Nykkole’s startle reflex spun her out of his arms). *See* R.A. at 26, 42, 46-47, 53, 54.

The matching of the history to the injury is one of the key elements of distinguishing accidental injury from intentionally inflicted injury in children. *See id.* Mr. Rossini’s ability to explain a medical finding (a “spiral fracture”) that he did not know, and that could only be detected with x-rays, was one of the more compelling reasons that Dr. Rosekrans, Dr. Alberton, and Dr. Brandt all believed that the August 17 incident was an accident, not abuse—a belief they all hold to this day. *See* R.A. at 26, 46, 55; *see also* Court Exh. D (Videotaped Deposition of Brian Rossini, taken April 18, 2003 (again, re-enacting the August 17 incident, and, again, precisely explaining all of Nykkole’s findings, even those he could not possibly have known)).

Thus, three Mayo doctors (Dr. Julia Rosekrans, Dr. Sarah Brandt, and Dr. Gregory Alberton) and one Mayo nurse (Sherry Ritter, R.N.) considered whether Nykkole’s injury had been caused by accident or by abuse. *See* R.A. at 26, 42, 44, 53, 54. They unanimously concluded that the injury was indeed accidental. *See id.*; *see also* R.A. at 25. Dr. Alberton applied a splint to Nykkole’s broken arm, and she left the hospital with her parents. *See* R.A. at 50-51, 54.

September 3, 1997: Splint Removed

Nykkole’s parents brought her for a follow-up appointment with Dr. William Shaughnessy in Mayo’s Orthopedic Clinic on September 3, 1997. *See* R.A. at 56. Dr.

Shaughnessy did not suspect abuse on this visit³ (R.A. at 58), and, at trial, no one suggested that he had any grounds to suspect abuse on this visit. Dr. Shaughnessy removed Nykkole's splint, and she left with her parents.

September 11, 1997: No Symptoms

On September 11, 1997, Nykkole's mother brought her to the emergency room at Saint Marys Hospital with a history of vomiting or "spitting up." *See* R.A. at 6-8. Dr. Rosekrans was again Nykkole's primary ER doctor, and Dr. Rosekrans herself spent about 50 minutes evaluating Nykkole. *See id.*; *see also* R.A. at 33. Dr. Rosekrans performed a full physical examination of an unclothed Nykkole, including her head, chest, abdomen and extremities. *See* R.A. at 6-8; 32-39. For about 20 minutes, Dr. Rosekrans fed Nykkole: first water, then infant formula. *See* R.A. at 39. Nykkole did not

³ Appellants' recitation of the facts as to the September 3 visit (Appellants' Br. at 9) misleadingly quotes Dr. William Shaughnessy's testimony at Brian Rossini's criminal trial four years later. Dr. Shaughnessy was then able to speak with 20/20 hindsight, knowing that Nykkole was abused on September 17, which hindsight, of course, he did not have at the time of the visit on September 3. *See* R.A. at 58. During trial, in fact, Appellants' counsel stated that "we're making no claims that any orthopedist did anything wrong" and "No one has ever criticized an orthopedist and they will not be criticized in closing." R.A. at 61, 62. Now, in their Brief to this Court, Appellants do criticize orthopedists Dr. Shaughnessy and Dr. Alberton because they supposedly "chose not to report suspected abuse" and instead "sent Nykkole home to the suspected abuser." Those criticisms are not merely unsupported by the evidence; they were explicitly forewarned at trial, by Appellants' own counsel.

“spit up”; she ate normally; she had no fever⁴; her weight was in normal range for her age; her fontanel was not swollen.⁵ See R.A. at 27-31. As documented in the medical record, Dr. Rosekrans found that Nykkole was an “alert, attentive infant;” her color was “good;” her cry tone was “normal;” her chest was “clear;” eardrums “clear;” and heart rate was “regular.” R.A. at 6-8, 31. In fact, on this visit, Nykkole had no symptoms whatever. See R.A. at 567, 568. She went home with her mother.

September 15, 1997: Multiple Injuries, Implausible Explanation

On September 15, 1997, Nykkole’s mother brought her to the emergency room at Saint Marys Hospital with multiple serious injuries and no plausible explanation. See

⁴ Appellants’ description of Nykkole’s symptoms on September 11 ranges from highly misleading, to simply false, to unstuck in time. For example, Appellants say that, on September 11, Nykkole was “cool to the touch.” Appellants’ Brief at 9. That is true, but it is highly misleading to suggest that is a symptom of child abuse. The undisputed testimony at trial was that “cool to the touch” is a healthy sign, simply meaning that Nykkole, by touch, did not have a fever. See R.A. at 48. On other occasions, Appellants’ description of Nykkole’s symptoms is simply false. Appellants say “Respondent’s physicians admitted she likely had [a bruise on her head] on her earlier visit.” Appellants’ Brief at 10. Dr. Rosekrans, however, was the physician who saw Nykkole on her earlier visit (September 11). She had no bruise then. See R.A. at 40, 49. And, throughout Appellants’ description of Nykkole’s symptoms, the timeline gets reversed and 20/20 hindsight is used. For example, in their description of Nykkole’s symptoms on September 11, Appellants note that “Nykkole’s ribs were broken.” The only basis for that statement, however, was an extrapolation backwards from x-rays that were indicated and taken on September 15. See R.A. at 39. On September 11, Nykkole had no symptoms whatever. Only by twisting the testimony upside down, or making time run backwards, can Appellants achieve their rhetorical flourish that “Nykkole did everything she could to alert her doctors to her abuse.” That is just rhetoric, though, contradicted by both the medical and the legal record.

⁵ The fontanel is the “soft spot” on top of an infant’s head where the skull is still joining and hardening. It will swell if there has been brain injury, and a swollen fontanel is characteristic of “shaken baby” syndrome. On September 11, however, as Dr. Rosekrans testified, and as the ER record confirms, Nykkole’s fontanel was normal. See R.A. at 31.

R.A. at 40. Mayo physicians believed the injuries were not accidental and reported their suspicions of abuse to the Olmsted County authorities. *Id.*

STANDARD OF REVIEW

Statutory interpretations are questions of law, subject to de novo review by this Court. However, evidentiary rulings at trial are left to the discretion of the trial court. A trial court's exclusion of evidence will only be reversed if the exclusion constituted a clear abuse of discretion that prejudiced Appellants at trial. *See Peterson v. BASF Corp.*, 711 N.W.2d 470, 482-83 (Minn. 2006).

ARGUMENT

I. THIS COURT HAS NOT ADDED, AND THIS COURT SHOULD NOT ADD, CIVIL LIABILITY TO THE CRIMINAL CULPABILITY ALREADY FACED BY THOSE WHO DO NOT REPORT CHILD ABUSE UNDER CARA

A. *Radke v. County of Freeborn* Did Not Add Civil Liability to the Criminal Culpability Already Faced by Those Who Do Not Report Child Abuse Under CARA

The Child Abuse Reporting Act requires “mandatory reporters” to contact county officials if they reasonably believe that a child is being subjected, for example, to “physical abuse.” “Mandatory reporters” include doctors, nurses, social workers, child care providers, teachers, law enforcement officers, and clergy. *See* Minn. Stat. § 626.556, subd. 3(a). “Physical abuse” includes “any physical injury, mental injury, or threatened injury inflicted by a person responsible for the child’s care on a child other than by accidental means, or any physical or mental injury that cannot reasonably be explained by the child’s history of injuries.” *See* Minn. Stat. §626.556, subd. 2(g).

The Minnesota legislature specified that any mandatory reporter “who knows or has reason to believe that a child is neglected or physically or sexually abused...is guilty of a misdemeanor.” Minn. Stat. § 626.556, subd. 6(a). Criminalizing a failure to report was a harsh choice, but, as this Court held in *State v. Grover*, 437 N.W.2d 60, 65 (Minn. 1989), the legislature had the right to impose a criminal sanction, instead of a civil one, should a mandatory reporter violate CARA:

In summary, the issue is not whether this court agrees with the legislature’s chosen solution to this admittedly difficult problem of encouraging the reporting of child abuse. Although commentators are in disagreement about the wisdom of the legislature’s criminally punishing negligent conduct of this sort, the legislature is clearly free to do so.

This Court has never held, suggested, or implied that mandatory reporters should face civil liability in addition to the criminal penalties chosen by the Legislature. Indeed, in *Radke v. County of Freeborn*, 694 N.W.2d 788, 798 (Minn. 2005), this Court explicitly recognized again that “the legislature intended to impose criminal penalties on those persons who fail to report as mandated under the statute.”

In *Radke*, however, this Court did address and resolve a statutory incongruity between mandatory reporters (who face criminal consequences) and those to whom they report (who used to face no consequences at all). This Court resolved the incongruity in *Radke* by imposing civil liability on county child protection workers and those who receive reports. This Court held:

[I]t 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 there be no duty on the part of the county welfare department or its employees

to act on the reports Accordingly, we hold that a cause of action can be maintained *for negligence in the investigation of child abuse and neglect reports* as required under CARA.

Radke, 694 N.W.2d at 798 (emphasis added).

Appellants now suggest that the Court of Appeals “puzzlingly”⁶ held that those who fail to report can be prosecuted, while those who fail to investigate reports can be sued. There is, of course, nothing “puzzling” about that distinction. CARA itself distinguishes those who fail to report from those who fail to respond, and this Court, in *Radke*, clearly and repeatedly made that same distinction. *See id.*

Making that distinction does not grant “judicial immunity to those medical professionals who fail to report,” as Appellants argue. *See* Appellants’ Brief at 16. Rather, medical professionals who fail to report under CARA are guilty of a crime, for which they can be prosecuted, convicted, and imprisoned. That was the Legislature’s harsh choice, but it was the Legislature’s choice to make.

B. This Court Should Not Add Civil Liability to the Criminal Culpability Already Faced by “Mandatory Reporters” Under CARA

Appellants now urge this Court to add a private cause of action to the criminal culpability imposed by CARA upon mandatory reporters. Under this Court’s precedents, “a criminal statute does not automatically give rise to a civil cause of action unless the

⁶ The Court of Appeals’ December 27, 2005 opinion was unanimous. Nonetheless, Appellants’ *ad hominem* attack singles out Judge Randall as the “disingenuous,” “flagrant,” and “creative” author of the opinion, and notes darkly that “Judge R.A. Randall authored both the Court of Appeals decision in this case as well as [the Court of Appeals decision in *Radke*].” *See* Appellants’ Brief at 6.

statute expressly or by clear implication so provides.” *Larson v. Dunn*, 460 N.W.2d 39, 47 n.4 (Minn. 1990); *see also Doe v. Brainerd Intern. Raceway, Inc.*, 533 N.W.2d 617, 620-21 (Minn. 1995) (“In the present case, the statute is a criminal provision which, by its plain language, does not expressly or impliedly create a tort duty.”); *Bruegger v. Faribault County Sheriff’s Dept.*, 497 N.W.2d 260, 262 (Minn. 1993) (“Principles 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.”).⁷

There is no evidence that the Minnesota legislature intended civil liability to be added to criminal culpability. Certainly, as Appellants argue, the statute was passed in an effort to benefit abused children. But any evidence that the Minnesota Legislature clearly implied that private lawsuits were permitted is entirely lacking.

Appellants argue that legislative intent to provide a civil cause of action against doctors is implicit in CARA’s grant of civil immunity for the act of reporting. That is not so. In fact, that argument turns the statute on its head. CARA explicitly shields mandatory reporters from liability if they *do* report a suspicion of child abuse in good

⁷ Appellants cite the United States Supreme Court’s decision in *Cort v. Ash* as the test for determining whether a private right of action can be implied from CARA. *See Cort v. Ash*, 422 U.S. 66, 78 (1975); *see also Flour Exch. Bldg. Corp. v. State*, 524 N.W.2d 496, 498 (Minn. Ct. App.1994), *review denied* (Minn. Feb. 14, 1995). This Court, however, has never cited—much less adopted—that case. Moreover, the U.S. Supreme Court has subsequently narrowed *Cort v. Ash* to make clear, among other things, that the intent of Congress is the crucial and dispositive factor for analysis. *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979) (“The central inquiry remains whether Congress intended to create, either expressly or by implication, a private cause of action”); *Thompson v. Thompson*, 484 U.S. 174, 188 (1988) (Scalia, J., concurring) (arguing that *Cort v. Ash* has “been effectively overruled by our later opinions”).

faith, even if it turns out to have been a false suspicion. Doctors, therefore, are shielded from defamation lawsuits if they mistakenly (but in good faith) report to county officials that someone has been abusing a child. *See, e.g., Bol v. Cole*, 561 NW.2d 143, (Minn. 1997) (doctor would be immune from defamation claim if he reported to proper authorities, but he is not immune as to reports made to a parent). CARA's grant of civil immunity does not have anything to do with doctors who *do not* report. Not reporting is covered by Minn. Stat. §626.556, subd. 5, which specifies criminal culpability, not civil liability.

Accordingly, there is no evidence whatever that the Minnesota Legislature intended CARA to say anything other than the words that actually appear in the statute. The Legislature made its harsh choice of criminal culpability for failure to report in Minn. Stat. 626.556, subd. 5, and that choice should not be upset, undercut, or augmented by this Court. *See Bruegger*, 497 N.W.2d at 262.

C. The Minnesota Legislature Knew How to Add Civil Liability to Criminal Culpability; It Did So Elsewhere, But Not For Failure to Report Under CARA

The Legislature certainly knew how to impose civil liability on mandatory reporters for failure to report, if it wanted to do so. In fact, the Legislature *did* impose civil liability on mandatory reporters, for a *different wrong* (making a reckless report) in the *immediately adjacent subdivision* of the Child Abuse Reporting Act. A side-by-side comparison of Minn. Stat. 626.556, subd. 5 and subd. 6, reprinted below without addition, subtraction, or ellipses, makes the point conclusively:

Subd. 5. **Malicious and reckless reports.** Any person who knowingly or recklessly makes a false report under the provisions of this section *shall be liable in a civil suit* for any actual damages suffered by the person or persons so reported and for any punitive damages set by the court or jury, plus costs and reasonable attorney fees.

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, as defined in subdivision 2, or has been neglected or physically or sexually abused within the preceding three years, and fails to report *is guilty of a misdemeanor.*

(Emphasis added).

The Legislature also knows how to impose civil liability for failures to make statutorily required reports. In fact, in the *immediately adjacent section* of Minnesota's statutes, Minn. Stat. § 626.557, the Legislature *did* impose civil liability (rather than criminal culpability) on mandatory reporters of abuse of *vulnerable adults*. Again, a side-by-side, unedited comparison of the sanctions sections of the Child Abuse Reporting Act and the Vulnerable Adults Reporting Act, makes the point conclusively:

Minn. Stat. § 626.556, 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, as defined in subdivision 2, or has been neglected or physically or sexually abused within the preceding three years, and fails to report *is guilty of a misdemeanor.*

Minn. Stat. § 626.557, Subd. 7. **Failure to report.** A mandated reporter who negligently or intentionally fails to report *is liable for damages* caused by the failure. Nothing in this subdivision imposes vicarious liability for the acts or omissions of others.

(Emphasis added).

D. The Minnesota Legislature's Choice of Criminal Culpability, Not Civil Liability, for Failures to Report Under CARA is Typical; Virtually All Other Courts in States with Similar Statutes Have Rejected Efforts to Have Civil Liability Added by the Judiciary

Minnesota's choice of criminal sanctions rather than civil liability for failures to report child abuse is not unusual. It is precisely consistent with the 1963 Children's Bureau Model Act, on which nearly every state modeled its version of CARA. See R.A. at 86 ("6. Penalty for Violation. Anyone knowingly and willfully violating the provisions of this Act shall be guilty of a misdemeanor."). In accordance with the Model Act and 43 out of 50 states, Minnesota provides only criminal sanctions for failure to report. Efforts, like this one, to persuade the courts of Minnesota's sister states to imply a civil action into statutes with criminal sanctions, have been undertaken in fourteen states, and have failed in twelve. See *Doe v. D'Agostino*, 367 F.Supp.2d 157 (D. Mass. 2005); *Cuylar v. United States*, 362 F.3d 949 (7th Cir. 2004); *Isely v. Capuchin Province* 880 F.Supp. 1138, (E.D. Mich. 1995) (interpreting Wisconsin's child abuse reporting statute); *Doe v. Marion*, 605 S.E.2d 556 (S.C. App. 2004); *Fulton-DeKalb Hosp. Auth. v. Reliance Trust Co.*, 608 S.E.2d 272 (Ga. App. 2004); *Arbaugh v. Bd. of Educ.*, 591 S.E.2d 235 (W.Va. 2003); *Perry v. S.N.*, 973 S.W.2d 301 (Tex. 1998); *Marquay v. Eno*, 662 A.2d 272 (N.H. 1995); *C.B. v. Bobo*, 659 So.2d 98 (Ala. 1995); *Kansas State Bank and Trust Co. v. Specialized Trans. Svcs.*, 819 P.2d 587 (Kan. 1991); *Fischer v. Metcalf*, 543 So.2d 785

(Fla. App. 1989); *Borne v. Northwest Allen County School Corp.*, 532 N.E.2d 1196 (Ind. App. 1989).⁸

Most of these courts found that their respective state legislatures expressed no *intent* to imply a civil cause of action. In some of these states, a comparison like that between Minn. Stat. § 626.556, subd. 5 (civil liability for a reckless report of child abuse) and subd. 6 (criminal culpability for a failure to report child abuse) was dispositive of legislative intent. For example, in *Doe v. Marion*, the Court of Appeals of South Carolina confronted a precise parallel to Minnesota's statutes:

The reporting statute of [South Carolina Statutes] Section 20-7-510 does not purport to establish civil liability for the failure to report. The statute is silent in that regard. However, a subsequent, related statute imposes liability for making a false report. As such it can reasonably be determined the legislative intent was for the reporting statute **NOT** to create civil liability.

Id. (emphasis in original); *see also Marquay v. Eno*, 662 A.2d at 278 (holding that New Hampshire's child abuse reporting act does not reflect legislative intent to create a private cause of action because "where the legislature has intended that civil liability flow from the violation of a statute, it has often so provided"); *C.B. v. Bobo*, 659 So. 2d at 102 (holding that legislative intent to create a civil cause of action for failing to report abuse was lacking where other related provision of the Alabama statute expressly provided for civil remedies).

⁸ The Minnesota Court of Appeals also so held in *Valtakis v. Putnam*, 504 N.W.2d 264 (Minn. Ct. App. 1993).

In other states, the Legislature's failure to broaden the remedies available in statutes (like Minnesota's CARA)⁹ that had been on the books for a long time and that had been frequently amended in other regards was dispositive. In interpreting Kansas' child abuse reporting act, for example, the Kansas Supreme Court stated:

If the legislature had intended to grant a private right of action in K.S.A. 38-1522 it would have specifically done so. The statute was revised in 1983, 1985, 1986, 1987, and 1988. The legislature has not utilized the amendment opportunities to add a private cause of action. No private cause of action exists. . . .

Kansas State Bank & Trust Co. v. Specialized Trans. Svcs, Inc., 819 P.2d at 604.

Similarly, in Florida, the Court of Appeals there in *Fischer v. Metcalf* noted that the legislature had amended Florida's child abuse reporting act a number of times without adding a civil cause of action to the penalty provision. For this reason, the court held that the Florida legislature did not intend for a civil cause of action to exist:

The legislature has had ample opportunity to broaden the penalty for failure to report or to add a companion civil remedy. The unchanged nature of the penalty, in the face of repeated reenactments and revisions, implies an intention on the part of the legislature *not* to provide a private right of action.

Id; see also *Cuyler v. United States*, 362 F.3d at 955 (Illinois law).

E. The Choice Between Criminal Culpability and Civil Liability Is, Properly, a Legislative Choice

⁹ Minnesota's original version of CARA was enacted in 1965. It has been amended, in other regards, more than 100 times. It has been interpreted, by the Minnesota Court of Appeals, on four occasions, to impose criminal, not civil, sanctions for failures to report. *Meyer v. Lindala*, 675 N.W.2d 635 (Minn. Ct. App. 2004); *Kuelbs v. Williams*, 609 N.W.2d 10 (Minn. Ct. App. 2000); *S.L.D. v. Kranz*, 1996 WL 146360 (Minn. Ct. App., Apr. 2, 1996); *Valtakis v. Putnam*, 504 N.W.2d 264, 266 (Minn. Ct. App. 1993).

All of these courts expressed concern that creating new crimes and torts is properly the role of the state legislatures, not the state courts. This concern is fully justified, particularly with regard to a matter as important and as difficult as child abuse, where legislatures are far better equipped to hear from all perspectives and make a reasoned judgment as to how child abuse can best be combatted. It would be a terrible place to make a mistake, and a mistake is very possible.

In this case, Appellants argue that “[r]ecognition of a civil cause of action will only serve to further encourage reporting and further protect at-risk children like Nykkole Becker.” Appellants’ Brief at 20. That belief, which many of Appellants’ amici share, is directly contradicted by the scholarly source Appellants rely on five pages earlier in their own brief, *i.e.*, Steven J. Singley, *Failure to Report Suspected Child Abuse: Civil Liability of Mandated Reporters*, 19 J. Juv. L. 236, 246 (1998) (*cited in* Appellants’ Brief at 15, n. 9).

Appellants’ own source, Mr. Singley, strongly opposes implying civil liability into child abuse reporting statutes, and strongly believes that doing so will injure children in need:

This Comment contends that imposing civil liability upon mandatory reporters for failing to report suspected abuse is counter-productive to protecting children at risk; current criminal sanctions are sufficient to compel compliance by reporters. Particularly, this Comment will argue that subjecting mandated reporters to such liability substantially contributes to the case overload of Child Protective Services (hereafter CPS) and to unsubstantiated reports, which ultimately work against children in danger

[M]any states favor a policy of early and non-discretionary reporting. They accomplish this by granting immunity for reports made and imposing criminal penalties for failing to report suspected abuse. However, some states take this further and allow civil actions under the child abuse reporting laws. This, in large measure, contributes to the high number of unfounded reports that waste the time of CPS and ultimately hurt children in genuine need of assistance. Therefore, state legislators ought to expressly declare that no civil actions may be brought against a mandated reporter who, in good faith, fails to report suspected child abuse. Professional sanctions in cases of willful failure to report and criminal punishments are adequate to compel reporting, not to mention the fact that most people who work with children would report suspected child abuse even if there were no negative consequences for failing to do so.

Id. at 237, 270-71.¹⁰

It is not for Mayo to tell this Court whether the opinions of Appellants' lawyers and several of Appellants' amici are correct, or whether the diametrically opposite opinions of Appellants' expert sources are correct. Whether more reporting would be induced, whether more reporting would be good, or whether more reporting would "ultimately hurt children in genuine need of assistance," *id.* at 270, are serious issues, worthy of continuing discussion, with all knowledgeable parties and points of view represented.

That discussion, properly, should occur in hearings before the Minnesota Legislature.¹¹ No one favors child abuse; everyone wants to minimize it. As the total

¹⁰ The author of the other law review article cited by Appellants also does not recommend that mandatory reporters be exposed to civil liability. Victor I. Vieth, *Passover in Minnesota: Mandated Reporting and the Unequal Protection of Abused Children*, 24 Wm Mitchell L. Rev. 131 (1998) (proposing instead, among other things, that all persons with knowledge of abuse be mandated to report and that more resources be allocated to investigate reports of abuse).

disagreement among the Appellants, their amici, and their sources starkly illustrates, a decision as to whether civil liability would place more or fewer children at risk is and should be legislative. The Minnesota Legislature made its choice in Minn. Stat.

§626.556, subd. 6; this Court should not amend it, for this Court is not able to assess whether it would do more harm or good.

II. THERE IS NO COMMON LAW DUTY TO REPORT CHILD ABUSE; CARA CREATED THAT DUTY, AND IMPOSED CRIMINAL SANCTIONS, NOT CIVIL LIABILITY, FOR BREACH OF THAT DUTY

The Appellants maintain that doctors have a pre-CARA common-law duty to report child abuse to governmental authorities. But they cite no authority for that proposition, and, in fact, the opposite is true.

In the years leading up to CARA's enactment, the American Medical Association imposed upon physicians the ethical principle of confidentiality:

A physician may not reveal the confidences entrusted to him in the course of medical attendance, or the deficiencies he may observe in the character of patients, *unless he is required to do so by law* or unless it becomes necessary in order to protect the welfare of the individual or of the community.

¹¹ If this Court were to create a new cause of action for failure to report child abuse, it certainly should not be applied retroactively to this case. As *Hoff v. Kempton*, 317 N.W.2d 361 (Minn. 1982) held, retroactive application is only appropriate where there is not a new principle of law, where it furthers the purpose of the statute, and where it would be equitable. Here, all Minnesota courts have always held that there is no civil cause of action under CARA, so it would certainly be a "new principle of law." And, retroactive application will not serve the statutory purpose of protecting children. These events occurred in 1997. Retroactive application, even if civil liability did increase reporting, and even if that is good prospectively, will not have any effect on actions taken by Nykkole's doctors back in 1997.

R.A. at 89 (American Medical Association, Principles of Medical Ethics § 9 (1957) (emphasis added)).

The physician's duty of confidentiality has been codified by Minnesota statute, preventing doctors from testifying regarding their patients:

A licensed physician or surgeon, dentist, or chiropractor shall not, without the consent of the patient, be allowed to disclose any information or any opinion based thereon which the professional acquired in attending the patient in a professional capacity, and which was necessary to enable the professional to act in that capacity. . . .

Minn. Stat. § 595.02, subd. (d).

So, before CARA's express provision that child abuse is not a topic protected by the physician-patient privilege (Minn. Stat. § 626.556, subd. 8), physicians had no legal or ethical duty to report abuse. To the contrary, they were barred.

CARA was enacted, in part, to eliminate this bar created by the physician-patient privilege and because of "the apparent failure of physicians and hospitals to make disclosures of information concerning possible child abuse to the legal authorities." *See* Allan H. McCoid, "Battered Child and Other Assaults Upon the Family, Part One," 50 *Minn. L. Rev.* 1, 27 (1965) (discussing CARA). Mr. McCoid's *Minnesota Law Review* article further explained:

The mandatory reporting acts appear to be designed to overcome the disinclination of physicians and hospital personnel to make reports of cases of possible child abuse. . . . By pointing to the problem *and imposing a duty on the physician to make reports*, the statute may serve to alert the physician to signs of abuse which might otherwise be ignored or overlooked.

Id. at 36-37 (emphasis added).

So, CARA, and similar laws in other states, were enacted precisely because it was *not* standard practice to report suspected child abuse to county officials. That practice was spawned by CARA, not common law, and there is no private right of action under CARA. Moreover, there is no indication that CARA has failed. In fact, as Appellants' expert Singley notes, "*professional sanctions and criminal punishments are adequate to compel reporting.*" Singley, *Failure to Report Suspected Child Abuse: Civil Liability of Mandated Reporters*, 19 J. Juv. L. 236 at 270-71 (emphasis added).

III. THE JURY'S FINDING THAT MAYO DID NOT CAUSE NYKKOLE'S INJURIES WAS PROPERLY UPHOLD

There is no evidence that, if Mayo had reported abuse earlier, Nykkole's injuries would have been spared. There are only Appellants' speculations.

First, because Appellants did not request a special verdict, there is no way to determine what the jury found to be negligent. For example, the jury could have found that the "L vs. R" documentation error in the Mayo medical record regarding Nykkole's August 17 visit was negligent. Indeed, Mayo's own outside expert conceded that there was negligent documentation, and he did so just a few hours before the jury's verdict was reached. *See supra* p. 5, note 2. That negligence, however, did not cause Nykkole's injury, as even Appellants' experts conceded. *See, e.g.*, R.A. at 15, 16; *see also* Appellants' Appendix at 30 (Order denying Motion for New Trial ("Nor are plaintiffs entitled to a new trial based on speculation about how the jury reached its conclusions"))).

Second, even if one were to assume that the negligence the jury found was a failure to know or have reason to believe that child abuse occurred (the CARA condition precedent to reporting), Appellants offered no proof that calling the county earlier would have prevented the abuse.¹² Without that showing, Appellants cannot prove prejudice, and, therefore, cannot be granted another trial. *See Covey v. Detroit Lakes Printing Co.*, 490 N.W.2d 138, 143 (Minn. Ct. App. 1992); *Poppenhagen v. Sornsin Const. Co.*, 220 N.W.2d 281, 285 (Minn. 1974); *Mutual Service Cas. Ins. Co. v. Overholser*, 58 N.W.2d 268, 270, (Minn. 1953). Specifically, in the absence of an offer of proof, the District Court's ruling excluding the reporting related evidence is *per se* non-prejudicial. *See Boland v. Garber*, 257 N.W.2d 384 (Minn. 1977).

¹² An offer of proof is a prerequisite to both motions for new trial and appeals based on exclusions of evidence at trial. *See Minn. R. Evid.* 103(a)(2); *State v. Bd. of Education*, 277 N.W.2d 524, 528 (Minn. 1979) (a decision excluding evidence cannot be reviewed unless the party seeking its admission makes an offer of proof of the evidence at trial); *Di Re v. Central Livestock Order Buying Co.*, 91 N.W.2d 453 (Minn. 1958) (motion for a new trial cannot be based on facts not in evidence and on hearsay statements founded on records not in evidence). Even if exclusion of evidence was erroneous, no relief can be granted, because the error cannot be deemed prejudicial in the absence of an offer of proof *during* the trial. *See, e.g., Tweith v. Duluth M. & I.R. Ry Co.*, 66 F.Supp. 427, 431 (D. Minn. 1946) (new trial will not be granted for exclusion of evidence in absence of an offer of proof made at the time of exclusion); *Wozniak v. Luta*, 103 N.W.2d 870, 875 (Minn. 1960) (even if exclusion of testimony of plaintiff, an eight-year-old boy, was erroneous, failure to offer proof during trial as to what the testimony would be precluded finding that exclusion was prejudicial); *Garey v. Michelsen*, 35 N.W.2d 750 (Minn. 1949) (where ruling excludes evidence and party fails to make an offer of proof during trial, the exclusion of the evidence is not prejudicial, even if erroneous).

Third, according to the proof that Appellants did offer at trial, the county did not have resources any more extensive than the Mayo doctors already had available to them at Mayo itself.

In fact, at trial the Appellants offered evidence that the Mayo doctors themselves could have taken Nykkole away from her birth parents, had they believed she was being abused, without any involvement by the county whatever. *See, e.g.*, R.A. at 11-13, 14. Appellants elicited testimony, from Mayo's witnesses as well as their own experts, describing Mayo's duty and ability to keep Nykkole safe from future harm.

For example, one of the Appellants' experts, Dr. Carolyn Levitt, offered extensive testimony regarding Mayo's abilities to protect Nykkole:

Q. You said something a moment ago about protecting the baby while you assess these factors [that may disclose an abusive household]. What do you mean by that?

A. Putting the baby in the hospital; arranging for other care, like family care, if this has to take some time to evaluate. But certainly in a case like this with a child this young with an injury to the arm the—people within the hospital social services would have an opportunity if the child were admitted to spend some time, the nurses would have some time to watch this family interact with this baby and care for the baby. . .

Q. Dr. Levitt, before we were breaking we were talking about hospitalizing a child. Did the standard of care require the Mayo Clinic to hospitalize Nykkole Becker on August 17th?

A. Yes, not for the injury itself and the care of that but I think because of the—the high risk of that type of

injury to be due to abuse there would need to be time to determine whether that child would be safe to go home.

R.A. at 11, 12.

The jury also heard from Appellants' other principal medical expert witness, Dr.

Walker, who agreed with Dr. Levitt:

- Q. What immediate options are available for protecting a child when abusive injuries are identified by objective evidence?
- A. The most direct one is hospitalization.
- Q. And tell us about that? Just admit the patient?
- A. Admit the patient to the hospital if—if that's the—the thing that—that will keep the patient safe, admitting the patient to the hospital. Then allowing other folks within the hospital to do their psychosocial assessment, to do a number of the other sorts of investigations and—and assessments that need to be done.

R.A. at 14.

Based upon this evidence, Appellants' lead counsel argued to the jury that, if Mayo had believed Nykkole was being abused, Mayo's own custody and resources could protect the child indefinitely: "If nothing else, just hospitalize the baby. Run some tests. Make sure the baby's okay. Get your resources involved to protect the baby." R.A. at 63.

After presiding over the trial and hearing the same evidence as the jury, Judge Birnbaum wrote in his order denying Appellant's motion for new trial:

The jury knew full well what measures were available to protect Nykkole Becker from further abuse and that Mayo

staff did not take advantage of them because they did not reach the threshold of diagnosing abuse on August 17 or September 11. That is the case Plaintiffs were entitled to try. They were unhampered in their effort to do so.

Appellants' App. at 46.

IV. APPELLANTS' REQUEST THAT THIS COURT SHOULD FIND A "SPECIAL RELATIONSHIP" BETWEEN MAYO AND NYKKOLE SUCH THAT MAYO WOULD BE RESPONSIBLE FOR INJURIES NYKKOLE SUFFERED AT HOME IS BOTH UNTIMELY AND INCORRECT

Appellants would have this Court rule that Mayo had a "special relationship" with Nykkole, which gave rise to a duty to protect her from future harm from third parties, specifically, her parents, at home. Appellants never raised this issue at trial and, in any event, this "special relationship" exception to the general rules of tort liability does not apply here. Accordingly, Appellants make an untimely invocation of an inapplicable doctrine.

A. *Untimely*

Appellants did not allege the existence of a "special relationship" in the Complaint. Nor did they argue it at trial or request a "special relationship" jury instruction. Instead, Appellants waited until after they lost at trial to broach the topic, by mentioning it, once, in the middle of a single paragraph in their motion to the District Court for a new trial. See Pl. Mem. Law Mot. New Trial at 17; Appellants' App. at 34-35.

By then, it was too late: "A party may not raise an issue for the first time in a motion for a new trial." *In re Trusteeship of Trust of Williams*, 631 N.W.2d 398, 407 (Minn. Ct. App. 2001); *Stumne v. Village Sports and Gas*, 243 N.W.2d 329, 330 (Minn.

1976) (“Theories not raised at trial cannot be raised for the first time on appeal.”); *cf. Marriage of Gottsacker v. Gottsacker*, 664 N.W.2d 848, 859 (Minn. 2003). Appellants may appeal only the theories of liability they tried, not the ones they wish they had.

B. Inapplicable

There is no common law duty to protect another person. *See, e.g., H.B. by Clark v. Whittemore*, 552 N.W.2d 705, 709 (Minn. 1996). A narrow exception to this general rule exists where there is a so-called “special relationship.” This Court has “carefully carved out the outer boundaries” of the special relationship exception, making clear that it applies only to: (1) common carriers, (2) innkeepers, (3) landowners or tenants of land who hold the land open to the public, and (4) persons who have custody of another person under circumstances in which that other person is deprived of normal opportunities of self-protection. *Id.* Appellants argue that the last of these circumstances was present here.

It was not. Nykkole was not in the custody of Mayo doctors when she was injured. She was at home, with her parents. Accordingly, the Court of Appeals correctly held that a hospital has no “special relationship” with an outpatient, and there was therefore no “special relationship” between Mayo and Nykkole.

Certain of Appellants’ amici confuse the common law “special relationship” exception with the “special duty doctrine” articulated in *Cracraft v. City of St. Louis Park*, 279 N.W.2d 801, 806 (Minn. 1979), and applied in *Radke*. *See, e.g., MTLA Br.* at 7-13. *Cracraft* is applicable only to municipalities. *See H.B. by Clark*, 552 N.W.2d at 709 (rejecting the dissent’s attempt to use “inapplicable statutory analysis” to find special

relationship under CARA). This is why no published Minnesota case has ever found that any statute imposes a “special duty” on private citizens under *Cracraft*. Appellants themselves correctly do not advance the argument that CARA creates a “special duty” under the *Cracraft / Radke* line of cases.

Finally, there is no reason to extend the special relationship doctrine to cover medical personnel. Doctors, nurses, and hospitals can be sued for malpractice if they are negligent in caring for a patient. This Court should not expose doctors, nurses, and hospitals to lawsuits for injuries intentionally inflicted by someone else somewhere else.

CONCLUSION

The Minnesota Child Abuse Reporting Act, Minn. Stat. §626.556, subd. 6(a), made it a crime to fail to report child abuse to county social workers. However, if the county workers ignored the report, they faced no sanction whatever. This Court, in *Radke v. County of Freeborn*, 694 N.W.2d 788 (Minn. 2005), addressed that “incongruity” by holding that county workers may be sued civilly.

The Legislature itself, directly and explicitly, imposed the criminal sanction on mandatory reporters. That was a harsh choice, but, as this Court has held, it was a choice the Legislature was entitled to make.

This Court has not added, and this Court should not add, civil liability to the criminal culpability already faced by those who do not report child abuse. There is no evidence that adding civil liability will improve child protection, and, at least according to Appellants’ cited authority, adding civil liability would “hurt children in genuine need of assistance.” The Legislature’s choice of criminal culpability should be respected.

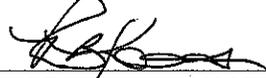
Doctors can be sued for medical malpractice, if they render negligent medical care in the hospital. They should not also be exposed to “special relationship” claims for injuries inflicted by others elsewhere.

The Court of Appeals opinion upholding the District Court’s judgment and the jury’s verdict should be affirmed.

Respectfully submitted,

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DORSEY & WHITNEY LLP



Paul B. Klaas # 56327

Gillian Brennan # 314444

Bartholomew Torvik # 335289

Suite 1500

50 South Sixth Street

Minneapolis, MN 55402-1498

(612) 340-2600

FREDRIKSON & BYRON, P.A.

Ann E. Decker, # 139701

200 South Sixth Street

Suite 4000

Minneapolis, MN 55402-1425

(612) 492-7000

OF COUNSEL:

Agnes Schipper, Esq.

Mayo Clinic Legal Department

200 First Street SW

Rochester, MN 55905

ATTORNEYS FOR RESPONDENT

MAYO FOUNDATION

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).