

STATE OF MINNESOTA

IN SUPREME COURT

A05-45

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

Appellants,

Minnesota Department of Human Services,

Appellant,

vs.

Mayo Foundation,

Respondent.

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## STATEMENT OF LEGAL ISSUES

- I. Whether *Radke v. County of Freeborn*, 694 N.W.2d 788 (Minn. 2005), allows a civil cause of action for a physician's negligent failure to immediately report suspected abuse of a child as required by the Minnesota Child Abuse Reporting Act (CARA).**

The Court of Appeals held that *Radke* does not apply to mandated reporters and that there is no cause of action for failure to report suspected abuse under CARA.

### **Apposite Authorities:**

*Radke v. County of Freeborn*, 694 N.W.2d 788 (Minn. 2005)  
Child Abuse Reporting Act, Minn. Stat. § 626.556

- II. Whether a plaintiff is permitted to present evidence related to a physician's failure to immediately report suspected child abuse as mandated under CARA in order to prove her common law medical malpractice claim.**

The Court of Appeals held that there is no cause of action for failure to report abuse under common law and that there was no abuse of discretion in excluding evidence of mandated reporting.

### **Apposite Authorities:**

*Radke v. County of Freeborn*, 694 N.W.2d 788 (Minn. 2005)  
Child Abuse Reporting Act, Minn. Stat. § 626.556  
*State v. Loss*, 204 N.W.2d 404 (Minn. 1973)  
*Bentley v. Carroll*, 734 A.2d 697 (Md. App. 1999)

- III. Whether a hospital which accepts responsibility for treating a vulnerable child owes that child a special duty to protect her from harm.**

The Court of Appeals held that, where the child is not an inpatient, the hospital owes no special duty to the child.

**Apposite Authorities:**

*Donaldson v. Young Women's Christian Ass'n of Duluth*, 539 N.W.2d 789 (Minn. 1995)

*Harper v. Herman*, 499 N.W.2d 472 (Minn. 1993)

*Sylvester v. Northwestern Hosp. of Minneapolis*, 53 N.W.2d 17 (Minn. 1952)

*Roettger v. United Hosps. of St. Paul, Inc.*, 380 N.W.2d 856 (Minn. App. 1986)

## STATEMENT OF THE CASE

This appeal arises from the Mayo Foundation's negligent failure to diagnose, treat, and report Nykkole Becker's Shaken Baby Syndrome.<sup>1</sup> In her first weeks of life, Nykkole made three trips to Respondent, presenting with significant signs of abuse. On each occasion, Respondent chose not to comply with its statutory and professional duties to diagnose the nature and extent of her injuries and chose to do nothing to safeguard her from future harm, including its decision not to report suspected child abuse. On Nykkole's fourth visit to Respondent, she was diagnosed with Shaken Baby Syndrome, which resulted in extensive brain and bodily injuries that globally and permanently incapacitate her.

On July 27, 2001, Nykkole's adoptive parents,<sup>2</sup> Nancy and Michael Becker, began a medical malpractice case against Respondent and its physicians, alleging that they had a duty to diagnose and treat Nykkole's abuse-related injuries and to treat Nykkole's condition in part by taking action to prevent further harm. As part of the duty to treat their daughter, the Beckers alleged in their complaint that Respondent had a duty to report suspicion of abuse to governmental authorities. While the district court allowed

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<sup>1</sup> "Shaken Baby Syndrome" or "Battered Child Syndrome" is "a term that is now widely recognized as a condition by which children are injured other than by accident." *State v. Loss*, 204 N.W.2d 404, 408 (Minn. 1973). Terms used throughout this brief include "Shaken Baby Syndrome," "Battered Child Syndrome," "child abuse," and "Non-accidental Trauma (NAT)."

<sup>2</sup> The parental rights of Nykkole Becker's birth parents were terminated. Nykkole's father was convicted of first- and third-degree assault for Nykkole's injuries. *Becker v. Mayo Foundation*, 2005 WL 3527163, at \*2 (Minn. App. Dec. 27, 2005) (unpublished).

the Beckers and State<sup>3</sup> to proceed with their medical malpractice case, the court prevented them from presenting the strongest evidence of Respondent's decision not to properly treat Nykkole: its decision not to report clear signs of child abuse. This was error and created a significant structural defect in the available proof on causation that the jury did not have an opportunity to consider.

Before trial, the district court denied presentation of this causation evidence based on its misunderstanding that the Minnesota Child Abuse Reporting Act (CARA), Minn. Stat. § 626. 556, does not provide a private, civil cause of action. The court determined that Respondent did not breach its duty to report abuse to authorities because CARA does not create a private, civil cause of action. The court also found that Respondent had no separate and preexisting common-law duty to report the suspected abuse to authorities in treating Nykkole's abuse-related injuries.

The Beckers promptly petitioned the Court of Appeals for discretionary review of the district court order. The petition was denied because "reversal would not obviate further proceedings in district court because other claims remain," and because the petitioners did not "establish that the ruling involves a legal issue of broad application on which interlocutory review is appropriate." A. App. 8. The case was tried in January 2004 after the court granted Respondent's Motion in Limine to exclude reference to "the Child Abuse Reporting Act and anything related to the Child Abuse Reporting Act,

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<sup>3</sup> The State of Minnesota, along with the Beckers, are seeking recovery of medical and other expenses associated with Nykkole Becker's treatment and care for Shaken Baby Syndrome.

including contacts outside the Mayo Clinic.” A. App. 58-61 (emphasis added). This ruling prevented the Beckers and State from presenting their best causation evidence to the jury—evidence as to how Respondent should have protected Nykkole by reporting her abuse to authorities, and how those authorities, in turn, would have prevented the incapacitating injuries with which Nykkole now lives. After trial, this court held that CARA does provide a private, civil cause of action. *Radke v. County of Freeborn*, 694 N.W.2d 788 (Minn. 2005).

After a nearly two-week trial, the jury found that Respondent was negligent. However, based on the limited evidence available to it, the jury believed that Respondent’s negligence was not the direct cause of Nykkole’s injuries. The Beckers and State sought a new trial without success. Because the trial court erroneously held that CARA does not provide a private cause of action for failure to report abuse, it ruled that the Beckers and State were not entitled to introduce report-related evidence at trial. A. App. 31-33. Plaintiffs appealed on January 7, 2005. However, before the Court of Appeals argument, the Supreme Court decided *Radke*, 694 N.W.2d at 788, which held that a violation of CARA established a private cause of action. As the Court of Appeals recognized, “The tragic facts of this case are hard to swallow.” *Becker v. Mayo Foundation*, 2005 WL 3527163, at \*3 (Minn. App. Dec. 27, 2005) (unpublished). “Nykkole is a child who ‘slipped through the cracks,’” *id.*, but then affirmed the lower court finding of lack of causation even though Respondent was negligent.

The Court of Appeals acknowledged that *Radke* recognized a private cause of action under CARA for failure to perform mandatory acts required by CARA *after* abuse

has been reported. Puzzlingly, it chose to limit *Radke* without any citation to authority or common sense, by declaring that there was no cause of action under the CARA for failure to report abuse:

[T]here is a difference between affirmative negligence, the failure to report [*sic*: investigate] abuse after it has been reported, and omission, the failure to report abuse. Although a private cause of action exists for failure to properly act after abuse has been reported, there is yet no Minnesota caselaw [*sic*] finding that common law created a cause of action for failure to report abuse.

*Becker*, 2005 WL 3527163, at \*3-4 (emphasis in original).

Here, the Court of Appeals ruled contrary to the Supreme Court's clear reasoning and holding in *Radke* and incorrectly revived its own pre-*Radke* analysis<sup>4</sup> to hold that a civil cause of action under CARA applies to some individuals identified in the CARA statute, but not to others. In addition, the Court of Appeals found there is no common-law duty to report child abuse and that Respondent owed no special duty to Nykkole because she was not an inpatient. The Beckers and State petitioned this court to confirm that *Radke* encompasses a private, civil cause of action against mandatory reporters who choose not to report abuse. In addition, the Beckers and State allege that the Court of Appeals erred in excluding evidence of Respondent's decision not to report abuse to

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<sup>4</sup> Note that Judge R.A. Randall authored both the Court of Appeals decision in this case as well as *Radke v. County of Freeborn*, 676 N.W.2d 295 (Minn. App. 2004). In fact, Judge Randall disingenuously referred to this court's decision as "*Radke II*" after acknowledging that "*Radke I*" had "been overruled," but proceeded to flagrantly and creatively revive the Court of Appeals' own pre-*Radke* (or "*Radke I*") holding.

develop the medical malpractice claim and in finding that no special relationship existed between Nykkole Becker and Respondent.

### **STATEMENT OF THE FACTS**

A healthy Nykkole Becker was born to Sabryna Koob and Brian Rossini at Respondent's hospital. Before Nykkole was even two months old, she had suffered multiple instances of severe physical abuse, which left her permanently incapacitated. Within her first two months, Nykkole made four separate visits to Respondent's hospital and clinic, seeking diagnosis and treatment for classic child abuse-related injuries including a broken upper arm, broken ribs, vomiting, listlessness, failure to gain weight, bruising, a fractured skull, and other serious and permanent injuries. As a newborn, Nykkole did everything she could to alert her doctors to her abuse. Each time she visited, Respondent's physicians misdiagnosed classic signs of abuse and chose not to report Nykkole's abuse-related injuries to local authorities. By the time Respondent finally made a diagnosis of abuse, on Nykkole's fourth visit, it was too late. The jury found Respondent negligent in its treatment of Nykkole, but was not allowed to hear the whole story to find how Respondent caused Nykkole's permanent incapacitation.

#### **First Visit—Broken Upper Arm—22 Days Old—August 17, 1997**

Nykkole first arrived at Respondent's emergency room with bruises on her left and right arms. She was diagnosed as having suffered a "comminuted spiral fracture of the mid left humerus" (the "long bone" of the arm). A. App. 92-93. Nykkole's birth father told a tale to Respondent's emergency room physician, Dr. Rosenkrans, that while he was reaching for a bottle to feed Nykkole, the three-week-old newborn "spasmed" out of his

arms. His story was that he grabbed her left arm to keep her from falling. A. App. 94. He also told this story to Dr. Brandt, the pediatric orthopedic resident, and Dr. Alberton, the attending orthopedist.

At trial, Rosenkrans admitted that a humerus fracture in a baby should have alerted her to consider child abuse. A. App. 93. Rosenkrans admitted that she considered that Nykkole was a victim of abuse. A. App. 93, 95. She further admitted that she knew that if she “missed” diagnosing the abuse there was a good possibility that Nykkole would return to the hospital with worse injuries. A. App. 98. Rosenkrans chose not to bother to corroborate the birth father’s story with any other source, and she chose not to question the parents separately about how Nykkole was injured. A. App. 96. Rosenkrans also admitted that she chose not to take a detailed personal history to rule out abuse. She chose not to seek out objective evidence, such as an x-ray or skeletal survey of Nykkole’s bones. A. App. 97. Instead, Rosenkrans, along with Brandt and Alberton, admitted that they chose to accept the suspected abuser’s story. They sent Nykkole home with the suspected abuser. They decided not to report suspected abuse.

### **Second Visit—Broken Arm—39 Days of Age—September 3, 1997**

Nykkole returned to Respondent’s clinic for additional care of her broken arm less than three weeks later. Dr. Shaughnessy recorded that Nykkole’s injury “apparently occurred when she was falling,” and that this “apparently led to the fracture.” A. App. 102. Shaughnessy had an opportunity to provide a thorough evaluation of Nykkole’s fracture, including interrogating the suspected abuser’s explanation, and to diagnose and treat the suspected abuse. Shaughnessy admitted that the humerus “is the

most commonly fractured bone in childhood battering injuries.” A. App. 101, 104. Shaughnessy even went so far as to testify: “It’s possible that it could snow in July in Rochester, and I think it’s equally possible that the August 17th spiral fracture of the humerus was an accidental trauma.” A. App. 103 (emphasis added). Shaughnessy chose not to report suspected abuse and sent Nykkole home to the suspected abuser.

### **Third Visit—Broken Ribs—47 Days of Age—September 11, 1997**

Nykkole returned to Respondent’s same emergency room a week later, again to the care of Rosenkrans. This time, baby Nykkole’s ribs were broken. She was cool to the touch, sleepy, and thin in appearance having only gained three ounces since she was first seen. A. App. 69, 99. Nykkole had vomited ten times that day. Rosenkrans admitted that she considered Shaken Baby Syndrome as a possible explanation for Nykkole’s vomiting after ruling out potential causes of illness. A. App. 100. She also knew that authoritative medical texts mandate a skeletal survey in all cases of suspected physical abuse in children less than two years of age. A. App. 112. Again, Rosenkrans chose not to perform a skeletal survey or other objective test to diagnose and treat Nykkole’s child abuse.

Rosenkrans admitted that at the time of Nykkole’s third visit, her ribs were fractured, which she testified was a “classic finding for child abuse.” A. App. 111 (emphasis added). Rosenkrans also admitted that at the time of this visit, Nykkole had head injuries, including blood on the brain. A. App. 113-14. Again, Respondent chose not to perform standard diagnostic and treatment procedures to detect and treat Nykkole’s

child abuse injuries. For the third time, Respondent's physicians sent Nykkole home to her abuser and chose not to report the abuse.

**Fourth Visit—Skull Fractures, etc.—51 Days of Age—September 15, 1997**

Nykkole made her fourth appearance to Respondent just four days later while “acting spacey.” A. App. 74. Nykkole was pale and listless and arrived smacking her lips and jerking her left arm and leg. *Id.* Her pupils were sluggish but reactive, and her eyes did not respond to movement. *Id.* She also had a “yellow-green-blue” bruise on the left side of her head, which Respondent's physicians admitted she likely had on her earlier visit. *Id.* On this fourth visit Respondent finally admitted Nykkole to the intensive care unit after a diagnosis of catastrophic injuries, including multiple skull fractures, bleeding in the brain, brain infarctions, a “fairly recent” avulsion fracture of her left leg,<sup>5</sup> and a suspected fracture of her right leg. A. App. 74-77. Now Respondent diagnosed Nykkole as a victim of Shaken Baby Syndrome and finally chose to report the series of abuse. Upon receiving the report, authorities immediately protected Nykkole by making sure her birth parents would never harm her again. However, it was too late. Nykkole is left with catastrophic permanent injuries. She has no functional use of her limbs. She cannot communicate. She cannot eat. She is totally incontinent. She needs care for all of her needs every minute of every day.

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<sup>5</sup> A fracture occurring when a joint capsule, ligament, tendon, or muscle is pulled from a bone, taking with it a fragment of the bone to which it was attached. AMERICAN HERITAGE STEDMAN'S MEDICAL DICTIONARY (2nd ed. 2004).

## STANDARD OF REVIEW

Construction of a statute on appeal is a legal question and subject to de novo review. *Lewis-Miller v. Ross*, 710 N.W.2d 565, 568 (Minn. 2006) (citations omitted). Whether the Court of Appeals erred as a matter of law in holding that CARA provided no private cause of action is a matter of law to be reviewed de novo.

Whether the Court of Appeals erred in finding no common-law negligence claim for failure to report is a matter of law. The court below committed evidentiary error in not admitting evidence of a failure to report suspected child abuse relevant to the medical malpractice claim. This court reviews evidentiary rulings to determine whether the lower court abused its discretion. *Uselman v. Uselman*, 464 N.W.2d 130, 138 (Minn. 1990). An error in excluding evidence is prejudicial when it appears “that such evidence might reasonably have changed the result of the trial if it had been admitted.” *Jenson v. Touche Ross & Co.*, 335 N.W.2d 720, 725 (Minn. 1983). Where a case is close on the facts, the rejection of competent and material evidence is reversible error. *Lamb v. Jordan*, 333 N.W.2d 852, 855 (Minn. 1983).

Whether the Court of Appeals erred in finding that Respondent did not have a special relationship with Nykkole is a matter of law. The existence of a legal duty to protect another person generally presents an issue for the court to decide as a matter of law. *Larson v. Larson*, 373 N.W.2d 287, 289 (Minn. 1985).

## ARGUMENT

### **I. THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN FINDING THAT THE CHILD ABUSE REPORTING ACT (CARA) DOES NOT PROVIDE A PRIVATE CAUSE OF ACTION AGAINST A PHYSICIAN WHO CHOSE NOT TO REPORT SUSPECTED CHILD ABUSE.**

#### **A. *Radke* Holds That a Violation of CARA Provides a Civil Cause of Action.**

This court in *Radke* held that a party may maintain a private cause of action for a violation of CARA. This court emphasized CARA's stated purpose to ensure a safe environment for children and held unequivocally that the statute does so by requiring mandatory acts:

The statute clearly and repeatedly requires the performance of mandatory acts. These mandatory acts prescribed by the statute are for the protection of a particular class of persons, . . . children who are identified as abused or neglected. In fact, the express public policy set forth in the statute is "to protect children whose health or welfare may be jeopardized through physical abuse, neglect or sexual abuse."

*Radke*, 694 N.W.2d at 797 (citing Minn. Stat. § 626. 556, subd. 1). This court found that clear and repeated requirements of mandatory acts were not for the protection of the public or even children in general "but are mandated for the protection of a particular class of persons." *Radke*, 694 N.W. 2d at 797 & n.4.<sup>6</sup>

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<sup>6</sup> As this court referenced, other courts considering the issue of whether a child protection statute creates a public duty or special duty have also concluded that such statutes are intended to protect a specific class of children, *i.e.* those suspected of suffering abuse or neglect. *See, e.g., Horridge v. St. Mary's County Dep't of Soc. Servs.*, 854 A.2d 1232, 1244 (Md. 2004) ("Clearly, the essential purpose of the statutory duties created by [the Maryland child abuse prevention statute] and the implementing regulations of the Department of Human Resources was to protect a specific class of children \* \* \*.");

Based on CARA's clear language "it is manifest that the legislature intended to provide safety and protection for children in abusive and neglectful situations and for the county social services department and its child protection workers to act immediately when they receive specific reports of abuse and neglect." *Radke*, 694 N.W.2d at 798 (citing Minn. Stat. § 626. 556, subd. 10(a)) (emphasis added). Similarly, the legislature *requires* medical professionals, like Respondent's physicians, to act immediately and report when they "know or have reason to believe that child abuse or neglect is occurring." Minn. Stat. § 626. 556, subd. 3(a). CARA's plain language embodies the legislature's intent to protect children by imposing duties.

As this court further recognized: "[t]he language suggests that the subject of the statute had a duty to act." *Radke*, 694 N.W.2d at 799. The Court of Appeals erred below in reasoning that "there is a difference between affirmative negligence, the failure to report [*sic*: investigate] abuse after it has been reported, and omission, the failure to report abuse." *Becker*, 2005 WL 3527163, at \*3. As this court found in *Radke*, CARA's requirements of the mandatory reporters and investigators are affirmative duties. The statutory scheme requires acts by both people to fulfill its purpose of protecting children from abuse and neglect. Thus, this distinction relied on by the Court of Appeals again is without precedent and inconsistent with this court's finding in *Radke* and with the statute.

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*Brodie v. Summit County Children Servs. Bd.*, 554 N.E.2d 1301, 1308 (Ohio 1990) ("[T]he action required by the statute is not directed at or designed to protect the public at large, but intended to protect a specific child who is reported as abused or neglected."); *Mammo v. State*, 675 P.2d 1347, 1351 (Ariz. App. 1983) (concluding that the Arizona child protection statute "is quite specific and sets forth duties on the part of protective services workers which are clearly for the protection of threatened individuals").

In reversing the Court of Appeals in *Radke*, this court unequivocally held that an individual may maintain a cause of action for negligence in the investigation and intervention of child abuse cases under CARA. 694 N.W.2d at 790. Notwithstanding this reversal, the Court of Appeals revived its reasoning from *Radke*, 676 N.W.2d 295 (Minn. App. 2004) (holding that CARA does not create a private cause of action), and in the process created an incongruent interpretation of CARA. This court held that there is a duty on the part of the county welfare department to investigate or act on child abuse reports and that they are subject to a civil cause of action for negligence under CARA for failing to do so. *Radke*, 694 N.W.2d at 798-99. The duty to report suspected abuse is the foundation of the CARA. Reporting is the only event that can initiate a process whereby child protective services conducts a thorough investigation and has tools at its disposal, including the removal of the child from her parents, to provide comprehensive protection.<sup>7</sup> Without that triggering duty, the statute is meaningless. Given the express intent of CARA, it is incongruous to conclude that the legislature intended to impose only criminal penalties on those persons who fail to report as mandated under the statute,<sup>8</sup> *see*

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<sup>7</sup> Protection of the child, however, is dependent on the authorities receiving an initial report of abuse. Absent a report, there will be no investigation “leaving the abused child without hope of protection, save the unlikely mercy of his perpetrator.” Victor I. Vieth, *Passover in Minnesota: Mandated Reporting and the Unequal Protection of Abused Children*, 24 WM. MITCHELL L. REV. 131, 133 (1998).

<sup>8</sup> We note that no criminal charges have been brought against the Respondent and its physicians for their failure to report suspected child abuse in Nykkole Becker’s case. Mandatory reporters are rarely, if ever, prosecuted.

Minn. Stat. § 626. 556, subd. 6(a), but intended that there be no civil duty to report, even though CARA provides civil immunity when making such reports. CARA states:

The following persons are immune from any civil or criminal liability that otherwise might result from their actions, if they are acting in good faith: (1) any person making a voluntary or mandated report under subdivision 3 or under section 626. 5561 or assisting in an assessment under this section or under 626.5561.

Minn. Stat. § 626. 556, subd. 4(a) (emphasis added).

To encourage reporting by eliminating the fear of potential lawsuits, CARA grants immunity from civil and criminal liability to a mandatory reporter submitting the report. CARA's protection of a mandatory reporter from both criminal and civil liability evidences the legislature's tacit recognition that a civil cause of action is permitted by the statute. Here, the legislature contemplated possible civil or criminal liability that could flow from a mandatory reporter's choice not to report. If a mandatory reporter acts in good faith and reports based on a reasonable suspicion of child abuse, a safe harbor is provided from both criminal and civil liability.<sup>9</sup> This is strong evidence of the legislature's consideration of and intent to allow a civil remedy. *See Lenz v. Coon Creek Watershed Dist.*, 153 N.W.2d 209 (Minn. 1967) (holding that a court must presume that the legislature did not intend a result that is absurd or unreasonable); Minn. Stat. § 645.17(1).

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<sup>9</sup> Every state affords immunity from criminal prosecution to one who reports; some also grant immunity from civil liability. *See* Steven J. Singley, *Failure to Report Suspected Child Abuse: Civil Liability of Mandated Reporters*, J. JUV. L. 236, 246 (1998). CARA's provision of civil immunity in addition to criminal immunity is strong evidence that the legislature contemplated a civil cause of action and wanted to provide protection to reporters who act in good faith.

Intervention is not possible until there has been detection. Health care providers are the first line of protection because they are most likely to come in contact with maltreated children. See American Medical Association, Council on Scientific Affairs, *AMA Diagnostic and Treatment Guidelines Concerning Child Abuse and Neglect*, 254 J. AM. MED. ASS'N 796, 797 (1985). They are both in the best position to recognize abuse and have a statutory obligation and professional responsibility to report. The legislature recognized the need for physicians to be in compliance with the mandatory requirement to report and eliminated the traditional physician-patient privilege. Minn. Stat. § 626.556, subd. 8; *State v. Odenbrett*, 349 N.W.2d 265, 268 (Minn. 1994) (holding that information which is sheltered by the statutory medical privilege loses its privileged status to the extent its disclosure is authorized by the CARA). A physician's obligation under the statute is merely to report the suspected child abuse. The legislature intended penalties—civil and criminal—for those who do not.

It would also be incongruous to hold county workers civilly liable for violating CARA and to let health care providers avoid their personal responsibility when they choose to violate the same law and its mandates! If allowed to stand, this anomaly will recur in similar cases around the state, thus granting judicial immunity to those medical professionals who choose not to report. Allowing this bifurcated statutory responsibility to persist is inconsistent with the legislature's intent. See Minn. Stat. § 645.17(2) ("The legislature intends the entire statute to be effective and certain."). The revival of the Court of Appeals' *Radke* decision in *Becker* not only creates confusion but diminishes the clarity of the Supreme Court's reasoning applied in interpreting CARA.

Recognizing the civil remedy against mandatory reporters who choose not to report abuse harmonizes the law and provides further protection to abused children. This court has already recognized that “the statute clearly and repeatedly requires the performance of mandatory acts.” *Radke*, 694 N.W.2d at 797. CARA’s emphasis on the repeated requirement of mandatory “acts” indicates the legislature’s intent to create affirmative responsibility for all mandated reporters and investigators, not just for one identified group or one identified responsibility. To allow the Court of Appeals opinion to stand is inconsistent with this court’s interpretation of CARA, which protects the most vulnerable citizens in society.

*Radke* recognized the legislature’s intent to provide a civil remedy against entities that violate their duties under CARA. 694 N.W.2d at 799. The Minnesota legislature has had almost a year to amend the statute if *Radke* were in any way inconsistent with its intent to provide a civil remedy. There has been no effort to do so despite the proposal of over 12 Senate bills and 7 House bills that reference CARA in the 2005-06 session.<sup>10</sup> Thus, the legislature recognized the court’s correct interpretation of CARA. *See, e.g., Johnson v. Trans. Agency, Santa Clara County*, 480 U.S. 616, 629 n.7 (1987) (“Congress has not amended the statute to reject our construction, nor have any such amendments

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<sup>10</sup> *See* Minnesota State Legislature, Senate Bill Information, 84th Legislative Session, 2005-06, *available at* <http://www.senate.leg.state.mn.us/> (last visited Apr. 2, 2006); House Bill Information, 84th Legislative Session, 2005-06, *available at* <http://www.senate.leg.state.mn.us/> (last visited Apr. 2, 2006). In fact, the legislature appears to buttress CARA by proposing the inclusion of correctional supervisors as mandatory reporters. *See* H.F. No. 1, 5th Engrossment, 84th Legislative Session (2005-06).

even been proposed, and we therefore may assume that our interpretation was correct.”); *Congdon v. Congdon*, 200 N.W. 76, 85-86 (Minn. 1924).

**B. Application of *Radke* is Retroactive and Supports the Beckers’ and State’s Request for a New Trial.**

This case was pending when *Radke* issued, and this court must apply the law decided in *Radke* as though it applied when the Beckers filed their original complaint in 2001. Absent special circumstances or specific pronouncements by the overruling court that its decision is to be applied prospectively only, the decision is to be given retroactive effect. See *State v. Baird*, 654 N.W.2d 105, 110 (Minn. 2002); *Hoff v. Kempton*, 317 N.W.2d 361, 363 (Minn. 1982). *Hoff* established that a decision will be applied retroactively unless each of the following three criteria is satisfied: (1) the decision must establish a new principle of law by overruling clear past precedent on which litigants may have relied; and (2) the court must weigh the merits and demerits in each case by looking to the history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation; and (3) the court must weigh the inequity or lack thereof imposed by retroactive application. 317 N.W.2d at 363 (citing *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971)).

Here, none of the three criteria is met. First, the district court and Court of Appeals noted that “not a single Minnesota case is cited for the proposition that a common law cause of action exist[s] . . . for a doctor’s failure to report abuse to a public authority.” *Becker*, 2005 WL 3527163, at \*3. The Court of Appeals acknowledged that the district court relied on the Court of Appeals decision in *Radke*, which held that no

private cause of action existed under CARA. *Id.* (citing *Radke*, 676 N.W.2d 295, 301 (Minn. App. 2004)). There was no clear precedent on whether a common law cause of action was permitted, and there was unsettled law as to whether CARA provided a private cause of action, with this court yet to announce that it does under *Radke*, 694 N.W.2d 788 (Minn. 2005). Second, retroactive application of a civil remedy against reporters and investigators who fail to comply with their statutory duty is consistent with the purpose and effect of CARA to protect children. *Radke*, 694 N.W.2d at 798-99. Finally, failure to apply *Radke* retroactively would reverse CARA's compelling public policy underpinnings and remove its protection from abused children like Nykkole.<sup>11</sup>

**C. The Beckers and State Meet the Test to Find a Civil Remedy for Child Abuse Suffered as a Result of Respondent's Choice Not to Report.**

The Beckers and State meet the three factors used to determine whether the violation of a statute permits a cause of action for a party who suffers damages as a result of noncompliance with the law. As articulated in *Cort v. Ash*, 422 U.S. 66, 78 (1975), and adopted in *Flour Exchange Bldg. Corp. v. State*, 524 N.W.2d 496, 499 (Minn. App. 1994), *rev. denied* (Minn. Feb. 14, 1995), the test provides a cause of action based on an analysis of:

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<sup>11</sup> The strong textual and policy arguments recognizing a civil remedy should not be denied over a concern that litigation floodgates will be opened if a civil remedy is recognized. This court has not found merit in the contention that allowing recovery in civil cases would produce a flood of similar litigation: "Assuming it to be true that to allow a right of recovery would increase litigation, that fact would be no valid reason for denying the right, for the plain reason that, if such [a tort] constitutes a legal wrong, there should be a remedy to obtain redress." *Miller v. Monsen*, 37 N.W.2d 543, 546 (Minn. 1949).

- a. Whether the plaintiff belongs to the class for whose benefit the statute was enacted;
- b. Whether the legislature indicated an intent to create or deny a remedy; and
- c. Whether implying a remedy would be consistent with the underlying purposes of the legislative enactment.

Nykkole falls squarely within the class for whose benefit CARA was enacted. *Radke* made clear that the legislature intended CARA to protect children from abuse. 694 N.W.2d at 797. Nykkole is unquestionably a member of that class for whose benefit the reporting statute was enacted, and the first part of the test is easily met.

The Minnesota legislature indicated an intent to create a civil remedy under CARA and no intent to deny such a right. The provision of a grant of civil as well as criminal immunity to good faith reporters, Minn. Stat. § 626. 556, subd. 4(a), is strong evidence that the legislature intended such a private civil remedy to result from the statute. The second part of the test is met.

Recognition of a civil cause of action will only serve to further encourage reporting and further protect at-risk children like Nykkole Becker. As this court held in *Radke*, 694 N.W.2d at 697, the children CARA aims to protect “are especially vulnerable 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.” A civil remedy is clearly consistent with CARA’s purpose to protect children from abuse. *See, e.g., Johnston v. L.B. Hartz Stores*, 277 N.W. 414 (Minn. 1938) (finding that permitting a civil recovery is a much more effective way of enforcing the law than any

other). The Beckers and State also meet the third part of *Cort v. Ash* to recognize a civil remedy for violations of CARA.

**II. THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN DENYING THE BECKERS AND STATE FROM PRESENTING FULLY THEIR NEGLIGENCE CASE THAT RESPONDENT DID NOT MEET ACCEPTABLE MEDICAL STANDARDS IN TREATING NYKKOLE'S SHAKEN BABY SYNDROME BY DECIDING NOT TO REPORT.**

The Beckers and State put forth a claim which, in its entirety, is a traditional medical malpractice claim. The courts below erred in finding the Beckers' and State's medical malpractice claim based only on or created by CARA and not also on the common law. A statutory right of action and a common law negligence action are two distinct bases of civil liability. *See Marquay v. Eno*, 662 A.2d 272, 277 (N.H. 1995) (distinguishing between the two causes of action). This court has long followed the presumption that statutory law is consistent with common law. *In re Shetsky*, 60 N.W.2d 40, 45 to abrogate common law, the abrogation must be by express wording or necessary implication. *Id.* The courts below compounded this initial error of law in using CARA to interfere with the common law claim and preclude development of causation testimony, *i.e.*, the failure to report.<sup>12</sup>

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<sup>12</sup> The Supreme Court of West Virginia, in declining to find a civil cause of action in its mandatory reporting statute, noted that "children harmed by such egregious circumstances [such as where a reporter has failed to report] are not without remedy, where in an otherwise proper case a cause of action may be brought based on negligence with the failure to report admissible as evidence in that context." *Arbaugh v. Bd. of Educ.*, 591 S.E.2d 235, 241-42 (W. Va. 2003). Here, in denying a private cause of action under CARA, the lower courts also denied a common-law negligence claim, effectively leaving the Beckers and State with no remedy.

Rulings in the courts below precluded the Beckers and State from showing the jury that Respondent would have prevented Nykkole's catastrophic injuries by conforming to accepted standards of medical practice in diagnosing and treating her abuse. As part of that standard of care, Respondent was obliged to report the suspected child abuse. *See, e.g., American Medical Association, 254 J. AM. MED. ASS'N at 796-800.* Here the Beckers and State were denied the opportunity to develop fully the medical malpractice case by not being able to bring in any evidence of Respondent's failure to report that existed separate and apart from CARA.

**A. The Court of Appeals Erred in Substituting Its Fact Finding for That of the Jury.**

The trial court's decision to exclude reporting-related evidence in this case was based on an erroneous view of the law. A. App. 60-61 ("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 obligation to treat Nykkole's child abuse by reporting it was a necessary part of complying with both the statutory law and accepted standards of medical practice. Reporting the abuse to proper authorities is not only for law enforcement purposes, but it is also to remove a vulnerable child from the dangerous situation. Respondent assumed the duty of care for Nykkole, and the jury recognized it was negligent. The court's erroneous ruling to eliminate evidence of the failure to report and the consequences of a report prohibited the jury from linking this negligence to Nykkole's ultimate injuries.

There are two theoretical grounds upon which a reasonable jury could have based its causation decision. First, the jury could have determined that even if Rosenkrans had recognized the abusive origin of Nykkole's injuries, she could have done nothing to prevent the catastrophic injuries Nykkole ultimately sustained. Second, the jury could have found the birth parents' subsequent acts of abuse constitute a superseding cause of Nykkole's injuries, breaking the chain of causation and relieving Respondent of liability for its original negligence.<sup>13</sup> The jury should have heard about the reporting requirement and the standard precautionary efforts that would have been immediately utilized to protect Nykkole.

The court barred the Beckers and State from presenting their best evidence of causation, thus imposing a structural and fatal defect in the plaintiffs' case. This error distorted and prejudiced the entire trial and left a huge gap in the causation picture. This gap made it impossible for the jury to connect the dots between Respondent's negligence and the abuse inflicted. Because no testimony was allowed of Respondent's reporting duties, the strongest evidence of causation in the record for the jury's consideration pointed exclusively to Nykkole's parents!

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<sup>13</sup> The Maryland Court of Appeals addressed a party's argument that one could not establish that a violation of the statute was the proximate cause of a child's injuries. It found that attaching too much significance to the actual incidents of abuse committed by third-party intentional tortfeasors as "superseding, intervening torts that broke any possible chain of causation between an alleged violation and the harm alleged . . . essentially denies the legislative purpose and desired beneficial effects" of the statute to redress previous abuse and to prevent future incidents. It found that the legislature's intended goals in enacting the Child Abuse Reporting Act, and specifically in imposing a duty on physicians to report suspected abuse, "are neither illusory nor fruitless." *Bentley v. Carroll*, 734 A.2d 697, 704 (Md. App. 1999).

Ironically, the Court of Appeals pointed out this flaw when it affirmed the district court on the issue of “reporting-related evidence . . . on a ‘discretionary call’ basis.” *Becker*, 2005 WL 3527163, at \*5. Although it held the evidence to be relevant and acknowledged that “the jury would have gotten a fuller picture and Respondent would not have been prejudiced . . .,” it did not find reversible error. *Id.* As this demonstrates, an error of law occurred in the Court of Appeals’ analysis and in the district court’s decision to exclude reporting evidence.

The Court of Appeals stated “the jury could have found the negligence in not reporting or spotting the abuse sooner, but then, reasonably gone on to find that the doctors and nurses did not ‘cause the injury’ [but that] they were caused by the parents.” *Id.* at \*6. While that observation may be accurate, the jury was never given the chance to make that factual determination. Causation is a fact question for a jury to decide. *Illinois Farmers Ins. Co. v. Tapemark Co.*, 273 N.W.2d 630, 633 (Minn. 1978). Rather, the district court and the Court of Appeals inappropriately became fact finders, speculating on facts that were not in the record. The Court of Appeals minimized the importance of this missing evidence by stating “the only thing that was excluded was the fact that Respondent did not alert outside authorities, *i.e.*, child protection authorities.” *Becker*, 2005 WL 3527163, at \*5. However, the error occurred by creating a void in the record relating to the reporting responsibilities, which unfortunately could then only lead to one conclusion on causation: that the injuries were caused by the parents and therefore not by Respondent.

**1. The Error of Law Prevented the Beckers and State From Developing Expert Testimony.**

The Beckers' and State's experts were prepared to testify that Respondent's duty to protect Nykkole from harm predated and existed independent of CARA. Drs. Carolyn Levitt<sup>14</sup> and Allen Walker<sup>15</sup> would have been able to establish that this independent duty to report was linked to Respondent's duty to treat Nykkole by protecting her from future harm. Absent the evidentiary bar erroneously imposed by the district court, the Beckers and State would have introduced expert reports and testimony to establish that, more likely than not, reporting would have resulted in Nykkole's protection from further harm from her parents.

The Beckers and State submitted to the court a summary of Dr. Levitt's expected testimony. Dr. Levitt would have testified that ". . . the required report of the suspected abuse to proper authorities would have led to immediate removal of Nykkole from her birth parents' custody. Subsequent investigation by the authorities would likely have led to ensuring that she would be placed in a safe environment and would not be further victimized by her birth parents." A. App. 43-48. Similarly, Dr. Walker's opinion was

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<sup>14</sup> Dr. Levitt is the Executive Director of the Midwest Regional Children's Advocacy Center and the Founder and Director of the Midwest Children's Resource Center, Children's Hospital and Clinics, in St. Paul, Minnesota. Respondent had previously honored Dr. Levitt as the Amberg-Helmholz Lecturer for her exceptional advocacy on behalf of battered children. She presented her honorary address titled "The Children's Advocacy Center Movement in the United States," at Respondent Mayo on October 5, 2001.

<sup>15</sup> Dr. Walker is the Director of the Division of Pediatric Emergency Medicine, Department of Pediatrics at Johns Hopkins University School of Medicine and an active staff member there.

that “the standard of care requires a physician to report suspected abuse in order to protect a child who due to young age is defenseless and unable to tell health care providers about the abuse. . . . Reporting the suspected abuse would likely have led authorities to investigate the abuse and protect the child pending investigation and subsequent findings of abuse.” A. App. 49-57.

After hearing this expert testimony, a reasonable jury would likely have concluded that Respondent had powerful resources at its disposal, which would have protected Nykkole from future harm. Respondent’s failure to treat Nykkole by not reporting was a direct cause of the later abuse she suffered and her resulting catastrophic injuries.

**2. The Error of Law Prevented the Beckers and State From Introducing Testimony on How Child Protection Would Have Acted to Protect Nykkole.**

The Beckers and State were also prevented from introducing the testimony of child protection employees as to the steps the Department of Human Services would have taken upon receiving a report of suspected child abuse from Respondent following Nykkole’s first, second, or third visit. This testimony would have established that a report from Respondent would have initiated child protection’s active involvement in Nykkole’s case, which would have more likely than not protected Nykkole from future harm. A. App. 41-42. As this court recognized in *Radke*, child protection workers are obliged by statute to investigate any report Respondent might have made and act for Nykkole’s protection. *Radke*, 694 N.W.2d at 796-97; Minn. Stat. § 626. 556, subd. 10(a) (“If the report alleges neglect, physical abuse, or sexual abuse by a parent, guardian, or individual functioning within the family unit as a person responsible for the child’s care,

the local welfare agency shall immediately conduct an assessment including gathering information on the existence of substance abuse and offer protective social services for purposes of preventing further abuses, safeguarding and enhancing the welfare of the abused or neglected minor, and preserving family life whenever possible.”) (emphasis added). Testimony from a child protection employee would have demonstrated to the jury that Respondent could have protected Nykkole by simply reporting suspicion of child abuse to the local authorities and that Respondent’s failure to do so was the cause of Nykkole’s later injuries.<sup>16</sup>

**3. The Error of Law Prevented the Beckers and State From Challenging Fully Respondent’s Defense.**

The court’s evidentiary ruling precluding the Beckers and State from asking about reporting duties also precluded them from questioning Respondent’s health care providers about the steps they would have taken if they had accurately diagnosed Nykkole’s child abuse symptoms on any of her three visits to Respondent’s hospital and clinic. The Beckers and State were not able to ask Respondent physicians about how they typically treat patients who present with classic signs of child abuse and how they would have treated Nykkole had they appropriately diagnosed abuse in her case. Without being able to establish for the jury the resources available for physicians and nurses, including the police and child protection, the jury was naturally left with the impression

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<sup>16</sup> Other courts have recognized that testimony of social service employees may play a key role in establishing that a physician’s failure to diagnose and treat child abuse by choosing not to report formed the legal cause of an abused child’s injuries. *See, e.g., Bentley v. Carroll*, 734 A.2d 697, 707-09 (Md. App. 1999); *First Commercial Trust Co. v. Rank*, 915 S.W.2d 262, 268 (Ark. 1996).

that Respondent lacked the authority or ability to prevent the horrible acts of violence that occurred after Nykkole's first three visits. The court's erroneous exclusion of evidence prevented the Beckers and State from describing the range of treatment options available to Respondent had it fulfilled its statutory and professional duties to report. This is particularly compelling because the truth of the matter is that the child protection procedures set out in CARA, which flow from a report of abuse, are the most significant way a child is protected from ongoing abuse. Given the trial court's decision to hide from the jury all evidence of reporting and its consequences, the Beckers and State were left with a claim that Respondent should have indefinitely hospitalized Nykkole for her safety. However, once a child's physical injuries are tended to, no hospital can legally take custody of a child for such purposes without the parents' consent. Thus, such an evidentiary restriction eliminated the Beckers' and State's ability to establish causation.

The Court of Appeals erred in allowing the negligence finding absent causation to stand in ruling that evidence of reporting was precluded as a matter of law and substituting its own fact-finding for that of the jury.

**B. The Cause of Action for Respondent's Negligent Failure to Diagnose and Treat Nykkole Becker's Child Abuse is Grounded in the Common Law.**

Respondent's duty to diagnose Nykkole's abuse and to treat her injuries by reporting the abuse to authorities both predated and exists independently of CARA and its predecessor. In fact, the guiding professional medical association directs that proper medical management of child abuse require that it be reported, even in the absence of a reporting statute. *See generally* American Medical Association, 254 J. AM. MED. ASS'N

at 796-800. Even the trial court in this case recognized the Beckers' and State's right to pursue a traditional medical malpractice claim against Respondent for its failure to diagnose and treat Nykkole's child abuse. Moreover, the jury recognized that Respondent negligently failed to properly care for baby Nykkole. Minnesota courts have not addressed the specific facts of this case.<sup>17</sup>

The Beckers and State alleged duties broader than those mandated by CARA, giving the medical malpractice claim a clear, non-statutory foundation.<sup>18</sup> The duty of a physician to report as part of the standard of care in treating Battered Child Syndrome predated the enactment of CARA and its predecessor statute of 1965. *See* Minn. Stat. § 626.554, repealed by Laws 1975, c. 221, § 2. The Court of Appeals erred as a matter of law by eliminating the Beckers' and State's ability to fully pursue their medical

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<sup>17</sup> The district court's own order, Memorandum 5, and case law from other jurisdictions provide clear evidence that such common-law claims may proceed regardless of whether a reporting statute governs some of Respondent's conduct. *See, e.g., Lipari v. Sears, Roebuck & Co.*, 497 F. Supp. 185 (D. Neb. 1980); *Tarasoff v. Regents of Univ. of California*, 551 P.2d 334 (Cal. 1976); *Furr v. Spring Grove State Hosp.*, 454 A.2d 414 (Md. App. 1983); *Bardoni v. Kim*, 390 N.W.2d 218 (Mich. App. 1986). Courts should strive continually to develop the common law in accordance with societal change. *See Vaughn v. Northwest Airlines, Inc.*, 558 N.W.2d 736, 744 (Minn. 1997); *Salin v. Kloempken*, 322 N.W.2d 736, 741 (Minn. 1982).

<sup>18</sup> The Beckers raised the following illustrations of negligence in their Complaint, A. App. 115-21, para. XIII, as examples but not limitations of Respondent's negligence: (a) Failure to adequately assess and document injuries associated with intentionally afflicted trauma; (b) Failure to recognize and treat signs and symptoms of head trauma in an infant with a history of suspicious traumatic injury; (c) Failure as a mandatory reporter to report suspected child abuse; (d) Failure to have in place hospital policies requiring hospital personnel to comply with mandatory reporting requirements; and (e) Failure to monitor activities of hospital staff to assume compliance with reporting of suspected child abuse. Claims (c)-(e) were stricken before trial.

malpractice claim. The court did so by refusing to allow the jury to hear about Respondent's common law duty to diagnose and treat Nykkole's abuse, in part, by reporting the harm.

**1. The Court of Appeals Erred by Limiting the Beckers and State From Developing Their Common Law Medical Malpractice Claim of Which Failure to Report Was the Crucial Piece of Evidence.**

The Beckers and State alleged and presented evidence at trial sufficient to render a jury finding of negligence that ranges beyond Respondent's violation of CARA:

- Respondent's decision not to attribute adequate significance to a spiral fracture of the humerus in a three-week-old infant, A. App. 78-81;
- Respondent's choice not to diagnose rib fractures in an infant who presented to the emergency room with inadequate weight gain, listlessness, and repeated vomiting, but with no other flu-like symptoms, A. App. 82-83, 107-110;
- Respondent's choice not to perform a thorough eye exam, A. App. 85;
- Respondent's decision not to perform a skeletal survey which would have revealed Nykkole's rib fractures, A. App. 86, 107-110;
- Respondent's choice not to interrogate the suspected abusers' story attempting to explain Nykkole's injuries, A. App. 80-81;
- Respondent's choice to rely on an inadequate personal history to rule out child abuse in Nykkole's differential diagnosis, A. App. 105;
- Respondent's choice not to conduct a full investigation and enlist the aid of other professionals in conducting a full evaluation into Nykkole's case, A. App. 106; and
- Respondent's decision not to treat Nykkole's abuse by hospitalizing her.

*See also Becker, 2005 WL 3527163, at \*5.*

Respondent's decision not to report suspected abuse was just one of the enumerable ways, but the most crucial way, that the diagnosis and treatment of Nykkole departed from the accepted standard of care in child abuse. Significantly, reporting was likely the only treatment that would have prevented Nykkole's catastrophic injuries. As Rosenkrans testified, "If a child has been abused and they come back another time, they're likely to come back injured worse."<sup>19</sup> A. App. 98. The district court and the Court of Appeals erred as a matter of law in allowing their misinterpretation of CARA to sweep too broadly to preclude the development of a common-law medical malpractice claim. This error significantly prejudiced the Beckers' and State's ability to prove that Respondent played a substantial part in bringing about Nykkole's ultimate injuries. *See* CIVJIG 27.10; 27.15.

## **2. Respondent's Duty to Report Child Abuse in Treating Battered Child Syndrome Predated CARA.**

Child abuse was recognized as a medical diagnosis in 1962 following the American Medical Association's publication. C. Henry Kempe, *The Battered Child Syndrome*, 181 J. AM. MED. ASS'N 17 (1962). This landmark publication noted that the discrepancy between the clinical findings and the history supplied by the parents was a major diagnostic feature of Battered Child Syndrome and warned physicians to have a high level of suspicion. This learned treatise also recommended the child be separated

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<sup>19</sup> Approximately ten percent of alleged accidents to children under age six are due to physical abuse. When such children are discharged by a provider of health care without appropriate parental counseling, they have a 50 percent risk of further injury and a 10 percent risk of trauma-induced death. B. Schmitt, "Battered Child Syndrome (Abuse and Neglect)," in CURRENT PEDIATRIC DIAGNOSIS & TREATMENT, 855 (7th ed. 1982).

from insufficiently protective parents when abuse appears to have occurred and that a complete investigation be undertaken for the child's protection. The principal concern of the physician should be to make the correct diagnosis so as to ensure that a similar event will not recur. The article also told the treating physician to report possible willful trauma to the police or any special children's protective services in the local community.

This article clearly aligned the physician's interests with the child and noted that the physician should not be satisfied to return the child to an environment where even a moderate risk of repetition of abuse exists. Based on this treatise, a model child abuse statute was developed by the U.S. Department of Health, Education and Welfare in 1963, and by 1967, all fifty states had enacted some form of a mandated reporting statute. *See Vieth*, 24 WM. MITCHELL L. REV. at 135. Minnesota adopted its predecessor to CARA in 1965. Similarly, Minnesota courts have long recognized the medical diagnosis of Shaken Baby Syndrome when children are injured other than by accident and the injury appears to have been caused by physical abuse or neglect. *See State v. Loss*, 204 N.W.2d 404, 408 (Minn. 1973) (noting that Battered Child Syndrome was a medical diagnosis first recognized in the late 1950s and early 1960s). *See also Landeros v. Flood*, 551 P.2d 389, 393 (Cal. 1976); *People v. Henson*, 304 N.E.2d 358, 363 (N.Y. 1973).

Out of the jury's hearing, medical experts testified that Respondent had a duty to protect Nykkole from harm that predated CARA and existed separate from any statute. A. App. 90-91. A medical expert referenced several authoritative medical articles, including those published in the *American Medical Association Journal of Diseases of Children*, the *Journal of the American Medical Association*, and the *New England*

*Journal of Medicine*, which established the physician's duty to report abuse to the appropriate community agencies. A. App. 87-90. The trial court and the Court of Appeals erred in holding that CARA precluded development of the Beckers' and State's case that even before passage of Minnesota's reporting statute, the established standard of care of a physician upon diagnosing child abuse included reporting the abuse to governmental authorities. See, e.g., Vincent J. Fontana *et al.*, "The Maltreatment Syndrome" in *Children*, 269 NEW ENG. J. MED. 1389-94 (1963) ("Every physician who has under his charge or care any wounds due to willfully inflicted injury . . . must report the case to the appropriate child-protective agency or law enforcement bureau in his community.") (emphasis added).

In the context of the medical profession, different from county employees whose duty to investigate clearly arises from statute, the duty to report abuse arises from the physician-patient relationship and the accepted treatment practices devised by physicians themselves. See, e.g., American Medical Association, 254 J. AM. MED. ASS'N at 796-800; David M. Pressel, *Evaluation of Physical Abuse in Children*, 61 AM. FAMILY PHYSICIAN 3057-64 (2000). The duty giving rise to the Beckers' and State's cause of action is not exclusive to CARA. Unique to a physician's role, reporting is both a statutory duty and a professional one. Even if CARA were not law, Respondent's physicians were required to take steps to keep Nykkole from harm. Those steps principally included the reporting of suspected abuse to authorities. This duty is based on accepted standards of medical practice.

Evidence of external reporting was indeed relevant to whether Respondent fulfilled its medical duty to treat Nykkole by protecting her from future harm. Evidence of Respondent's breach of one of its duties—reporting—coincides with the mandate of CARA but is not preempted by the statute. As such, the courts below erred in excluding reporting-related evidence that curtailed the Beckers' and State's medical malpractice claim and substantially prejudiced the Beckers and State from demonstrating causation. The Court of Appeals committed error in allowing the negligence finding to stand but preventing the presentation of evidence necessary for the jury to find causation.

**III. THE COURT OF APPEALS ERRED AS A MATTER OF LAW IN FINDING THAT RESPONDENT DID NOT HAVE A SPECIAL RELATIONSHIP WITH NYKKOLE BECKER OBLIGATING IT TO TAKE REASONABLY NECESSARY STEPS TO PROTECT HER FROM ABUSE.**

A legal duty to act for the protection of another person arises when a special relationship exists between the parties. *Erickson v. Curtis Inv. Co.*, 447 N.W.2d 165, 169 (Minn. 1989); Restatement (Second) of Torts § 314A (1965). The existence of a legal duty depends on the relationship of the parties and the foreseeability of the risk involved. *Donaldson v. Young Women's Christian Ass'n of Duluth*, 539 N.W.2d 789, 792 (Minn. 1995) (citing *Erickson*, 447 N.W.2d at 168-69). There are circumstances under which a special relationship giving rise to a duty to protect exists. One such circumstance found here is where a person is deprived of normal opportunities of self-protection. *Harper v. Herman*, 499 N.W.2d 472, 474 (Minn. 1993). In this case, Nykkole was particularly vulnerable, helpless, and dependent on Respondent physicians, who in turn held

considerable power over her welfare. *See, e.g.,* W. Page Keeton *et al.*, PROSSER AND KEETON ON THE LAW OF TORTS § 56, at 374 (5th ed. 1984).

In reaching the legal conclusion that a special relationship exists, the courts assume that the harm to be prevented by Respondent physicians—child abuse resulting in Battered Child Syndrome—is one that Respondent is in a position to protect against and should be expected to protect against. *See Erickson*, 447 N.W.2d at 168. Respondent has admitted that Nykkole’s injuries were foreseeable in light of the failure to diagnose Nykkole’s Battered Child Syndrome. Thus, the legal issue is whether the degree of dependence Nykkole had on Respondent and its treating physicians and the control Respondent exercised was sufficient to form a special relationship which created a duty on the part of Respondent to prevent Nykkole’s further abuse. While the Court of Appeals recognized “whether a special relationship exists here is no easy decision,” *Becker*, 2005 WL 3527163, at \*5, the court below erred in the ultimate finding that no such relationship existed.

The Court of Appeals erroneously placed significant weight on the fact Respondent chose to place Nykkole in Respondent’s emergency room and clinic room as opposed to one of its other patient rooms (*i.e.* “inpatient”). *Id.* However, Nykkole was completely vulnerable and dependent upon others for protection from harm regardless of where Respondent chose to place her. Her first visit to Respondent came when she was only three weeks old, defenseless, nonverbal, and at greatest risk of permanent physical injury. *See generally* B. Schmitt, CURRENT PEDIATRIC DIAGNOSIS & TREATMENT at 855. *See also* Kempe, 181 J. AM. MED. ASS’N at 18 (“To the informed physician, the bones

tell a story the child is too young or too frightened to tell.”). The American Academy of Pediatrics has established a policy to provide a protective environment while an appropriate evaluation of suspected child abuse is undertaken: “In communities without specialized centers for the care of abused children, the hospital inpatient unit becomes an appropriate setting for their initial management. Medical, psychosocial, and legal concerns may be assessed expeditiously while the child is housed in a safe haven awaiting final disposition by child protective services.” American Academy of Pediatrics, *Medical Necessity for the Hospitalization of the Abused and Neglected Child*, 101(4) PEDIATRICS 715-16 (1998).

This court has held that certain duties inherent in a special relationship could be found where an institution such as a hospital has custody and control of the person to be protected. *See, e.g., Clements v. Swedish Hosp.*, 89 N.W.2d 162, 165 (Minn. 1958); *Sylvester v. Northwestern Hosp. of Minneapolis*, 53 N.W.2d 17, 18 (Minn. 1952) (holding that hospital has a duty of reasonable care measured by the vulnerability of the patient and the foreseeability of the danger); *Roettger v. United Hosps. of St. Paul, Inc.*, 380 N.W.2d 856 (Minn. App. 1986). Courts are more likely to find such a relationship where the hospital’s personnel have special training and experience in recognizing a vulnerable circumstance, such as reasonable suspicion of child abuse, and are equipped to treat the circumstance. *See Donaldson*, 539 N.W.2d at 793.

Here, there was a continuation of the patient-physician relationship. That special relationship developed from the day Nykkole was born at Respondent’s hospital to the day she presented with her broken arm and bruises, through the day she presented with

broken ribs, and lasted through the day Respondent finally decided to report her abuse. Nykkole was brought to Respondent for care, and Respondent accepted responsibility to care for her and to protect her from harm. Respondent physicians provided medical services and had expertise at treating child abuse. Respondent physicians had access to Nykkole's medical history since birth and had special training in recognizing and treating Battered Child Syndrome. Simply put, Respondent was in the best position to protect Nykkole and to prevent her parents from continuing with the abuse. The relationship between Nykkole and Respondent physicians has the degree of dependence and control necessary to form a special relationship, which created a duty on the part of Respondent to protect Nykkole from harm. Respondent had a duty to hospitalize Nykkole or simply to comply with its statutory and common-law duties to report the suspected child abuse. Here, the Court of Appeals erred in affirming the jury's finding of negligence but no causation based on its error as a matter of law that Respondent and its physicians did not have a special duty to Nykkole to prevent future harm.

### CONCLUSION

Appellants Nancy and Michael Becker and the Minnesota Department of Human Services respectfully request this court reverse the Court of Appeals' decision in *Becker v. Mayo Foundation*, 2005 WL 3527163 (Minn. App. Dec. 27, 2005) (unpublished), and remand to the district court to proceed to retrial on the causation and damages issues based in part on finding (1) a private, civil remedy against mandatory reporters who violate the Child Abuse Reporting Act as held in *Radke v. County of Freeborn*, 694 N.W.2d 788 (Minn. 2005); (2) a plaintiff's ability to present evidence related to a

physician's failure to report child abuse as mandated to prove a common law medical malpractice claim; and (3) the hospital owes a special duty to a vulnerable child who is not an inpatient to protect the child from harm when it accepts responsibility for treating the child. This case should be remanded to the trial court for further discovery and for a trial on causation and damages.

Dated this 17th day of April, 2006.

Respectfully submitted,

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**CERTIFICATE**

Pursuant to Rule 132.01, subd. 3(a)(1), the undersigned set the type of the foregoing brief in Times New Roman, a proportional 13-point font, on 8-1/2 x 11 inch paper with written matter not exceeding 6-1/2 x 9-1/2 inches. The resulting principal brief contains 10,604 words, as determined by employing the word counter of the word-processing software, Microsoft Word 2003, used to prepare it.

Dated this 17th day of April, 2006.

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