COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT
No. SJC-11533

SUFFOLK, SS

ROBERT ROE Nos. 1-11,
Plaintiffs-Appellants

v.

CHILDREN'S HOSPITAL MEDICAL CENTER, and
MICHAEL MOE Nos. 1-10,
Defendants-Appellees

ON APPEAL FROM A JUDGMENT
OF THE SUFFOLK SUPERIOR COURT

AMICUS BRIEF OF INTERVENOR NATIONAL CENTER FOR VICTIMS OF CRIME

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Did the Trial Court err in granting Defendant's Motion to Dismiss?

STATEMENT OF THE CASE

Amicus National Center for Victims of Crime adopts appellant's Statement of the Case.

STATEMENT OF FACTS RELEVANT TO APPEAL

Amicus National Center for Victims of Crime adopts appellant's Statement of the Facts Relevant to Appeal.

SUMMARY OF THE ARGUMENT

Every person has a duty of ordinary care to others, which duty can be breached by acting or by failing to act. The determination of ordinary care is a jury determination. The Medical Center was aware that Dr. Levine molested minors during his routine pediatrician examinations of them. The jury was entitled to determine if the hospital's failure to warn the appropriate authorities was a breach of the duty of ordinary care and if that breach could be a proximate cause of damage to other boys from sexual assault by Levine.

Both Massachusetts' mandatory reporter and duty to report physician misconduct statutes set standards for hospitals, the breach of which is negligence and which the jury may consider as a proximate came of injury to subsequent victims. The American Academy of Pediatrics [1] has acknowledged the harm to child victims and the need to protect future child victims in its

[1] Courts routinely rely upon the Academy of Pediatrics and its policies and guidelines when making determinations of issues raised in child abuse and child sexual abuse cases. *See e.g., Com. of Massachusetts v. Colon*, 64 Mass. App. Ct. 303, 832 N.E.2d 1154 (2005) (finding expert qualified to testify on child sex abuse when certified as pediatrician by American Academy of Pediatrics): *State v. Greene*, 951 So.2d 1226 (La. App. 5 Cir. 2007) (holding trial court's admissibility of pediatric expert correct in sexual abuse case where witness testified American Academy of Pediatrics had section on child abuse and neglect): *Hall v. State of Mississippi*, 611 So. 2d 915 (Miss. 1992) (finding trial court properly allowed expert testimony of pediatrician about child sexual abuse when witness was member and fellow of American Academy of Pediatrics): *Maryland Dept. of Human Resources v. Bo Peep Day Nursery*, 565 A.2d 1015 (Md. 1989) (accepting *amicus* brief filed by People Against Child Abuse, Md. Chapter of American Academy of Pediatrics in reversing circuit court and remanding for entry of judgment affirming final decision to revoke childcare license for sexual abuse of children): and *In re MaKenna S.*, H14CP10010201A. Conn. Sup Ct., August 31, 2011 (terminating parental rights based, in part, on position of Academy of Pediatrics regarding diagnosis of abusive head trauma).

national policy statement. The Court should reverse and remand this action because the hospital by failing to perform its non-delegable statutory duty to report Dr. Levine's child sexual abuse is subject to liability to his subsequent patients.

ARGUMENT

I. PROCEDURAL BACKGROUND

Because this case was resolved by the granting of a motion to dismiss, all allegations in the complaint were taken as true. Mass. R. Civ. P. 12(b)(6). Plaintiffs alleged that defendant Children's Hospital Medical Center was aware as early as 1967, and thereafter, that Dr. Levine, their employee, had sexually abused boys by manipulating their genitals during routine pediatric examinations at the hospital, [Complaint, ¶'s 23, 24, 44 and 45] and that Children's Hospital Medical Center failed to warn any of Levine's patients of his pedophilic tendencies and failed, as a mandatory reporter, to report the abuse to the proper authorities, [Complaint, ¶'s 31-34, 47]. The failure to report allowed Levine's licensure in North Carolina and led to his abuse of several plaintiffs from North Carolina, all of whom were boys at the time of the abuse.

The Trial Court ruled that as a matter of law, violation of the mandatory reporter statute, G.L. c. 119, §51A, was not negligence. The Court held that because the abuse did not arise out of Levine's employment at Children's Hospital Medical Center, but rather after he left his employment there, there was no duty to prevent abuse or to warn of abuse, nor was there liability for failure to report abuse.

Likewise, the trial court held that as a matter of law, violation of G.L. c. 112, §5F, which requires health care providers, including hospitals, to report complaints relating to the improper practice of medicine, was also not negligence. These holding are erroneous.

II. THE COURT SHOULD REVERSE AND REMAND THIS ACTION FOR TRIAL BECAUSE THE SPECIAL RELATIONSHIP REQUIREMENT DOES NOT APPLY AND ONLY A JURY CAN ANSWER THE QUESTION OF GENERAL NEGLIGENCE

It is undisputed that there can be no recovery by plaintiffs if the defendant owed them no duty. However, this court has recognized the unquestioned principle that every actor has a duty of reasonable care to avoid foreseeable physical harm to others. *Remy v. MacDonald*, 440 Mass. 675 (2004). Given that, and given that the plaintiffs had a constitutional right to a jury trial, it was error for the Court to have made the determination that no duty existed, because in so doing the Court determined what was reasonable. The amount of care necessary to constitute reasonable care is greater, when there is greater potential danger to the victim. *Commonwealth v. Angelo Todesca Corp*., 446 Mass. 128, 842 N.E.2d 930 (2206), *quoting Goldstein v. Gontarz*, 364 Mass. 800, 805, (1974): *Altman v. Aronson*, 231 Mass. 588, 591-592 (1919): *Aleo v. SLB Toys USA, Inc. & others*, 466 Mass. 398, 410 (2013): *Lauteri v. Bae*, 2003 Mass. Super Lexis 290, *Scott v. Marshall*, 90 Ohio App. 347, 105 NE2d 281 (1951). Children, especially children of tender years, are entitled to greater protection because of their inability to perceive risk and their inability to protect themselves. Protection of victims of child sexual abuse is an important policy of this state. *Doe v. Sex Offender Registry Board No. 972 v. Sex Offender Registry Board*, 428 Mass. 90 (1998).

Under Massachusetts law, to recover under an ordinary negligence claim, a plaintiff must show "the existence of an act or omission in violation of a …duty owed to the plaintiffs by the defendant." *Cottam v. CVS Pharmacy*, 436 Mass. 316, 320 (2002), quoting *Dinsky v. Framingham*, 386 Mass. 801, 804 (1982). To determine whether the defendant owes the plaintiffs a duty of reasonable care is a question of law that is decided "by reference to existing social values and customs and appropriate social policy." *Cremins v. Clancy*, 415 Mass. 289, 292 (1993). Every actor has a duty to exercise

reasonable care to avoid physical harm to others. *Remy v. MacDonald, supra,* 440 Mass. 675, 677 (2004). A defendant owes a duty of care to **all** persons who are foreseeably endangered by his conduct, with respect to all risks which make the conduct unreasonably dangerous." *Jupin v. Kask,* 447 Mass. 141, 147(2006). Under this analysis, the Supreme Judicial Court of Massachusetts has found a physician had a duty to a pedestrian who was killed by a driver whose doctor failed to warn of the dangerous side effects of medication prescribed to the driver. *Coombes v. Florio,* 450 Mass. 182. 187 (2007). In *Coombes, supra,* this Court found ordinary negligence principles applied, and there was no need to show a special relationship existed between the defendant-physician and the plaintiff-pedestrian. *Id.* This case is just like *Coombes v. Florio, supra.* The law of ordinary negligence precludes the special relationship requirement. *Coombes v. Florio, supra,*450 Mass. at 187. Defendant argues that the plaintiffs cannot show a "special relationship" between them and defendant hospital. This argument is misplaced. Because such a relationship is not required to show ordinary negligence, the trial court's conclusion is erroneous; this Court should reverse and remand. Plaintiffs filed suit under ordinary negligence princples. *Coombes v. Florio, supra.*

Plaintiffs have also shown that defendant had a statutory duty to report pedophilic conduct of its physicians under mandatory reporting statutes. Indeed, based on public policy to protect children from future harm, medical providers in the American Academy of Pediatrics' own policy requires reporting of medical providers' sexual abuse of child patients. *Pediatrics*, Official Journal of the American Academy of Pediatrics Policy Statement Protecting Children from Sexual Abuse by Health Care Providers (June 27, 2011). Mandatory reporting by medical providers of child abuse

and neglect – including sexual abuse – is the law, and evinces the public policy of all 50 states, Guam, American Samoa, Virgin Islands, and Puerto Rico. *See* Child Welfare Information Gateway. (2012). Mandatory *reporters of child abuse and neglect.* Washington, DC: U.S. Department of Health and Human Services, Children's Bureau.[2] Indeed, pedophiles often select a profession such as pediatrics because it allows access to children. Carolyn Moore Newberger and Eli Newberger, M.D., When the Pediatrician Is a Pedophile, *Sexual Exploitation of Patients By Health Professionals*, A.W. Burgess & C.R. Hartman, editors, New York: Praeger, 1986, 99-106.[3]

The public policy of Massachusetts and the American Academy of Pediatrics is that medical providers shall report all child abuse and neglect, including sexual abuse, for investigation. The Mission Statement of the Massachusetts Board of Registration in Medicine "is to ensure that only qualified physicians are licensed to practice in the Commonwealth of Massachusetts and that those physicians and health care institutions in which they practice provide to their patients a high standard of care, and support an environment that maximizes the high quality of health care in Massachusetts." http://www.mass.gov/eohhs/gov/departments/borim/mission-statement.html. Physicians licensed to practice medicine in Massachusetts have been stripped of their medical license for sexually abusing patients. *See, e.g., Gretchen Voss*, Head Games, Boston Magazine, July 2005.[4]

Based on policy considerations and ordinary negligence standards, a reasonable jury could find that defendant was negligent for failing to report Dr.

[2] https://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.pdf
[3] http://www.elinewberger.com/articles/archive/ped-pedophile.html
[4] http://www.bostonmagazine.com/2006/05/head-games/

Levine's sexual abuse of child patients at defendant's hospital. Had the reports been made, an investigation would have ensued and it is likely Dr. Levine would have lost his license to practice medicine for his misconduct, or a report of his misconduct would have been made on a national registry. It follows that Dr. Levine probably would not have been granted a license to practice in North Carolina where he harmed plaintiffs. As the American Academy of Pediatrics states in its policy that all suspected sexual abuse by medical providers must be reported: "When children are abused by those who are entrusted with their medical care, the profession has the responsibility to take the necessary actions to protect future patients from harm by those providers." *Pediatrics, supra,* at page 7. Under ordinary negligence principles, defendant had a duty to report the sexual abuse Dr. Levine inflicted on child patients while working for defendant so as to prevent harm to future child patients. *Id.*

A jury is more than capable of determining what is reasonable – jurors do so all the time. *See, e.g., Johnson v. Summers,* 411 Mass. 82, 88, 577 N.E.2d 301 (1991); *Foley v. Matulewicz,* 17 Mass. App. Ct. 1004, 1005, 459 N.E.2d 1262 (1984); *Noble v. Goodyear Tire & Rubber Co.,* 34 Mass. App. Ct. 397, 402 n.2, 612 N.E.2d 250 (1993). These children's abuse was not only foreseeable, it was inevitable. An unchecked, untreated pedophile, with continual secret access to vulnerable young boys, will not stop on his own. Had defendant reported the sexual abuse – as it was required to do by law – an investigation would have either stripped Dr. Levine of his license to practice medicine or have placed Dr. Levine's conduct on a database for future employers to research.

III. THERE IS NO REQUIREMENT OF A SPECIAL RELATIONSHIP FOR PLAINTIFFS TO SUCCEED IN THEIR CLAIM OF ORDINARY NEGLIGENCE

In deciding the Motion to Dismiss in favor of Defendant, the Trial Court relied on *Lev v. Beverly Enterprises-Massachusetts, Inc.*, 457 Mass. 234 (2010) for the proposition that absent a "special relationship" between the preventer and the molester, there is no duty to prevent physical harm. The reliance on *Lev v. Beverly Enterprises-Massachusetts, Inc., supra,* is misplaced. As argued *supra,* this case is one of ordinary negligence; a special relationship is not required, and a jury should decide the case. *Coombes v. Florio,* 450 Mass. 182 (2007). As framed by plaintiffs, the case before this Court is one of ordinary negligence and limited to defendant's failure to warn of Dr. Levine's pedophilic conduct. *Id.*

Failure to warn is different from failure to prevent. The distinction is significant. See *TA. v. Allen* 447 PaSuper 302, 669 A 2d 360 (1995) concurring and dissenting opinion of Judge Olszewski and *Santana v. Rainbow Cleaners, Inc.*, 969 A2d 653 (R.I. 2009).

The duty of a person or entity with specialized knowledge not available to the general public of a risk of child sexual abuse by a particular individual to warn potential victims has been recognized in numerous cases. *Doe v. Batson* 338 S.C. 291, 525 SE2d 909 (1999) vacated in part for other reasons *Doe v. Batson* 345 S.C. 316 (mother liable for failing to warn neighbor children of mother's adult son's pedophilia); *Pamela L v. Farmer* 112 Cal App 3d 206, 169 Cal Rptr. 282 1980 Cal Lexis 2446 (wife who knew of husband's pedophilia had duty to warn neighbor children); *Funkhouser v. Wilson* 89 Wn App 644, 950 P2d 501, 1998 Wash App Lexis 43 (church elders liable to girls where they knew church member's child sexual abuse predilections, even when activity was not

church related) and the landmark case of *J.S. v. R.T.H.*, 155 NJ 330, 714 A2d 924 (1998) (wife liable to neighbor children where wife knew of husband's proclivities).

J.S. v. R.T.H. establishes several points fully applicable to this case:

1. "determination of duty is a question of fairness and public policy" 714 A2d at 928;
2. "When the defendant's actions are relatively easily corrected and the harm sought to be prevented is serious, it is fair to impose a duty" 714 A2d at 929;
3. There is a strong public policy against child sexual abuse;
4. Foreseeability can be established where there have been previous offenses committed against children of similar age, same sex, at the same location, with people who were known to the abuser, and the failure of any previous intervention, treatment or arrest. 714 A2d at 928.

Defendant also argues that allowing this case to go forward would "open the floodgates of litigation." This is not true. If defendant reports sexual abuse of its medical providers, as already required by law, then its duty is complete. Defendant would have no concern of litigation if it did the one, simple act it must do to protect itself from liability: report sexual abuse of medical providers. If we really do have a strong public policy against child sexual abuse, we need to avoid insulating the cowardly from liability for failing to report it. Reporting the sexual abuse protects defendant from a so-called "flood of litigation" and protects future child patients, the very people mandatory reporting laws and the American Academy of Pediatrics policy are designed to protect.

IV. VIOLATION OF STATUTE/NEGLIGENCE *PER SE*

The current status of the law in Massachusetts is that violation of a statute is not negligence *per se*, *Cremins v. Clancy*, 415 Mass. 289 at 295, 612 NE2d 1183 (1993), but rather some evidence of negligence *Juliana v. Simpson*, 461 Mass. 527, 962 NE2d 175 (2012). It is respectfully submitted that this holding is erroneous. All competent adults owe a duty of ordinary care to everyone else. Ordinary care requires that a person act as a reasonably prudent person would in similar circumstances. All persons are required to obey the law. It cannot be seriously argued that a reasonably prudent person is excused from following the law. Thus violation of law is negligence *per se*. The more nuanced question is, when is negligence per se the proximate cause of damages? Thus the failure of a motorist to have working tail lights at night is not the proximate cause of a head on collision, even though failure to have working tail lights after dark is illegal and negligent.

The distinction is crucial because while courts determine the existence of duty, the jury determines proximate cause. If the defendants wish to assert that their failure to report child abuse was not a proximate cause of plaintiff's injuries, they may do so, but they are not entitled to claim that failing to follow a statute is not negligent. See *Prosser, Law of Torts* 4th Ed §36. *Restatement of Torts* 2d Secs 285 and 286. Even under the more restrictive standard of *Juliana v. Simpson*, infra, this violation of statute is great evidence of negligence.

Nor is the Court's decision that the mandatory reporter statute is not designed to protect minor children reasonable. Where state statutes establish public policy, the statutes are "highly relevant" to duty analysis. *Vintmilla v. National Lumber Co.*, 84

Mass. App. Ct. 493 at 500 (2013). The policy behind the mandatory reporter laws is to give warning to those who are in power so that they can implement action to prevent future harm. It is precisely children that the statute is designed to protect. Certainly minors cannot be expected to protect themselves. Every state has a mandatory reporting statute for child abuse. Child Welfare Information Gateway, www.childwelfare.gov/systemwide/laws_policies/statutes/manda.pdf.

There is a strong public policy against child sexual abuse, the law requires reporting child sexual abuse and there is no counterbalancing public utility for failing to report child sexual abuse. Therefore, it is reasonable to conclude that failure to report suspected child abuse can be chargeable negligence. It has been so held. See *Yates v. Mansfield Board of Education*, 102 Ohio St. 3d 205, 808 NE2d 861, 2004 Ohio 2491. That case is on point as the defendants therein were held liable to future abuse victims for failing to report abuse of current victims.

V. REBUTTAL OF APPELLEE'S ARGUMENT

The hospital has written a creditable brief, but it has numerous flaws. The hospital "knocks down the straw man," by stating that no employer has been held liable for the acts of the employee after the employee leaves employment. This is not a case of negligent credentialing, nor of negligent supervision, nor a case of failure to control. It is a case of failure to warn by an entity with specialized knowledge of special risk not known to the general public of the strong probability of sexual abuse and severe emotional damage to one of the most vulnerable strata of our society – young children. When analyzed in this perspective, it is obvious that the primary "strong public policy" in this case, is not to insulate cowardly health care professionals from liability under the

guise of not wanting to expand the concept of "special relationship" [pg. 33 of Appellee's Brief], but rather to protect children from sexual abuse.

The appellee overplays its hand by claiming that plaintiffs want them to assume an "insurmountable burden" [Appellee's Brief, pg. 12] when in fact all it had to do to avoid liability in this case was to discharge its duty as a mandatory reporter, as required by law, by making a simple report to the proper authorities of its knowledge that Levine was a child abuser.

The trial court's granting of a motion to dismiss based upon its conclusion that the failure to follow the mandatory reporter law is not a proximate cause of the children's abuse is an invasion of the province of the jury, which has the right to determine proximate causes. Because there is no requirement for plaintiffs to show a special relationship to prove ordinary negligence – *Coombes v. Florio, Supra* – this case should be reversed and remanded.

Lastly, while the appellee has cited two cases where somehow State Supreme Courts have insulated church congregations from liability for failure to report knowledge of abuse within the congregation there is contrary authority, *Funkhouser v. Wilson* 89 Wn App 644, 950 P2d 501, 1998 Wash App Lexis 43, which appellant respectfully submits is better reasoned authority. There have been numerous cases where courts have found various Catholic Archdioceses liable for sexual abuse of children where bishops reassigned pedophilic priests with full knowledge that the priests would have contact with other children. In *Wisniewski v. Diocese of Belleville,* 943N.E.2d 43 (Ill. App. 5 Dist. 2011), the Court of Appeal of Illinois, Fifth District, upheld a jury verdict finding the archdiocese liable for the sexual abuse of a future child victim because evidence showed

that the archdiocese knew the priest-pedophile had sexually abused other children. *Wisniewski v. Diocese of Belleville,* 943 N.E.2d 43 (Ill. App. 5 Dist. 2011). Although defendant in this case did not reassign the doctor, defendant did nothing to prevent the pediatrician from ever doing harm again. By not reporting Dr. Levine's conduct, defendant tacitly permitted him to seek employment elsewhere and continue his sexual abuse of other child patients. If defendant had reported Dr. Levine's sexual abuse, the abhorrent conduct would have been reported on a national registry, or an investigation would have caused Dr. Levine to lose his medical license – and that would have kept other children, including plaintiffs, safe.

CONCLUSION

A simple report by hospital personnel to the appropriate law enforcement authorities, as required by law, that there was credible evidence that Dr. Levine was molesting helpless boys could have prevented over 20 years of uncontrolled child molestation. We proclaim that we have a strong public policy against child sexual abuse, and that we want to reduce the incidence of this horrible blight. That being the case, it is only reasonable, indeed necessary, to determine that the failure of a competent adult or institution to report specialized knowledge unknown to the general public, that a particular person posed a significant risk of causing serious emotional injury to helpless children, is actionable.

CERTIFICATION PURSUANT TO MASS. R. APP. P. 16(k)

I, Darrell L. Heckman, Esquire, certify that the foregoing Amicus Brief of Intervenor National Center for Victims of Crime, filed herewith, complies with the provisions of Mass. R. App. P. 16(k).

_____
DARRELL L. HECKMAN, ESQUIRE

_____
NINAMARY BUBA MAGINNIS, ESQUIRE
by telephonic authorization

CERTIFICATE OF SERVICE

I, Darrell L. Heckman, Esquire, certify that on this date, I served the within document in the above-entitled action by mailing a copy thereof, postage prepaid, to the following:

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