STATE OF MICHIGAN
IN THE SUPREME COURT

ADRIANA LEE, as Personal Representative of the Estate of RUFUS YOUNG, JR.,

Plaintiff–Appellee,

v

DETROIT MEDICAL CENTER, CHILDREN'S HOSPITAL, DR. AHM MAHBOBUL HUQ, DR. JAYSHREE RAO, DR. VINCE TRUONG, LIFE SPAN CLINICAL SERVICES, KRISTIN RYESON DZAHRISTOS, and TARA HALL,

Defendants–Appellants,

and

JENNIFER WRAYNO, BARBARA FRIEDL, FAY FLUELLEN,

Defendants.

Case No. 139814

Court of Appeals
Case No. 282268

Wayne County Circuit Court
Case No. 04-438626-NO
Honorable Warfield Moore, Jr.

BRIEF OF AMICUS CURIAE MICHIGAN STATE MEDICAL SOCIETY IN SUPPORT OF APPLICATIONS FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF INTEREST OF MICHIGAN STATE MEDICAL SOCIETY

Amicus Curiae Michigan State Medical Society ("MSMS") is a professional association that represents the interests of over 15,000 physicians in the State of Michigan. Organized to promote and protect the public health and to preserve the interests of its members, MSMS has a continuing interest in issues which affect the medical profession and the patients it serves. Over the course of many years, this Court has graciously allowed MSMS to share its views when legal issues affecting physicians have been presented. The pending application for leave to appeal, arising in the context of truly tragic facts, presents an urgent issue for judicial review.

In a July 14, 2009 published opinion, the Court of Appeals divided over the question of whether a claim for violation of a physician's statutory duty to report child abuse could be stated outside the parameters of a medical malpractice action. *Lee v Detroit Medical Center*, 285 Mich App 51; 775 NW2d 326 (2009). Defendants argued that because the alleged failure to report occurred during medical treatment and required the exercise of medical judgment, the claim had to proceed as an action for medical malpractice, rather than ordinary negligence.[1] The majority [Whitbeck, J., and Owens, J.] disagreed:

> [T]he plain language of the statute contradicts defendants' argument. The statute expressly states that it applies to more than just medical doctors. Indeed, it applies to several occupations outside of the medical field, e.g., social workers, any person employed in a professional capacity by any office of the friend of the court, school counselors and administrators, teachers, members of the clergy, and regulated child care providers. These persons do not have any medical education or training, and yet they also are mandated by statute to make the same determination based on the same standard: "reasonable cause to suspect child abuse or neglect." Therefore, because the same standard is applied to individuals

[1] The two-part test applied by this Court in *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 422; 684 NW2d 864 (2004), for distinguishing a medical malpractice claim from an action for ordinary negligence asks whether the action occurs within the course of a professional relationship and whether the claim raises questions involving the exercise of medical judgment.

> outside the medical field, the determination as to whether there is reasonable cause to suspect abuse or neglect does not require the use of medical judgment.

Id. at 62. Doctors, the majority added, are "left with little, if any, discretion in reporting" and "if there is any '*reasonable cause to suspect'* abuse or neglect, the doctor must report it immediately and let [child protective services] investigate the case to determine the validity of the information provided." *Id.* at 63. If the doctor is later sued for "wrongful reporting," the act provides "statutory immunity from civil liability" to a person who reports in good faith. *Id.* at 64.

With all due respect, MSMS does not agree with the conclusion reached by the majority in this case and shares the concerns of Judge O'Connell that the decision will lead to "unintended" and "untenable" consequences, including the untoward effect of requiring a doctor to report injuries that might cause a lay person to have a reasonable suspicion of abuse, if the physician's medical judgment leads him to believe that reasonable cause does not in fact exist. While some categories of mandatory reporters may be required to presume reasonable cause, physicians are trained to make decisions based upon their professional medical judgment and "objective evidence."[2]

Further, the majority opinion creates a conflict between the mandatory reporting statute and the common law and statutory protections inherent in a medical-malpractice cause of action. The standard of care – as articulated by expert testimony – is the touchstone of physician liability where the exercise of medical judgment is at issue. A physician cannot be separated from his or

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[2] As Judge O'Connell explained, "The majority implies that because doctors have immunity for all false reporting claims, they are relieved of the duty of *finding* objective evidence of abuse and therefore are simply held to a layperson's standard of *presuming* abuse and reporting it. I suspect that most medical schools and most doctors will be interested in this new presumed abuse standard. Fortunately, I am of the opinion that doctors must *find* objective evidence that abuse has occurred, and the act of *finding* abuse, in my opinion, involves medical judgment." *Id.* at 72-73.

her medical judgment when the question is whether that physician had reasonable cause to suspect abuse or neglect, as Plaintiff's own experts concede. As Judge O'Connell observed, "plaintiff's expert witnesses … noted that in the setting of a hospital emergency room or a doctor's office, a doctor's medical judgment is essential to determine if there is a 'reasonable suspicion of abuse.'" *Id.* at 75, fn 3. Medical judgment is "'beyond the realm of common knowledge and experience'", *Id.* at 74, and requires expert testimony.

All of these issues are of imminent concern to the medical profession. For these reasons, which are more fully explained below, MSMS urges this Court to grant leave to appeal and/or to peremptorily reverse or reverse after hearing, the Court of Appeals' decision.

STATEMENT OF FACTS

Lacking an independent knowledge of the underlying facts, MSMS relies upon the Statement of Facts within the Applications for Leave to Appeal filed by Defendants-Appellants.

STATEMENT OF QUESTION PRESENTED

Should this Court grant leave to consider whether an action against a physician for failure to report child abuse requires the plaintiff to establish, through expert testimony, that the failure to report was a breach of the standard of care?

Defendants-Appellants say "yes."
MSMS says "yes."
The Trial Court would say "yes."
The Court of Appeals would say "no."
Plaintiffs-Appellees would say "no."

ARGUMENT

I. This Court Should Grant Leave to Appeal and Hold That An Action Against a Physician for Failure to Report Child Abuse Requires the Plaintiff to Establish, Through Expert Testimony, that the Failure to Report Was a Breach of the Standard of Care.

To warrant consideration, an application for leave to appeal from a Court of Appeals' decision must involve a legal principle of major significance to the state's jurisprudence, be clearly erroneous and cause material injustice, or conflict with a Supreme Court decision or another decision of the Court of Appeals. MCR 7.302(B). The pending applications satisfy this criteria. The standard that governs a physician's liability for failure to report child abuse or neglect is an issue of immense public importance. The opinion rendered by the Court of Appeals' majority requires physicians to ignore their training, experience and professional judgment in determining whether reasonable cause to suspect child abuse exists, and is not supported by the mandatory reporting statute.

MSMS does not question the importance and necessity of mandatory child abuse reporting requirements. Indeed, it was "[l]eaders in the medical profession [that] first brought the plight of the 'battered child' to public attention:"

> In 1946, Caffey provided the first serious medical report on the problems of possible child abuse and neglect by noting the frequent link between subdural hematoma and fracture of the long bones in children.[1] The most conclusive and influential study was produced in 1961 by Kempe and others who found hundreds of children severely injured by their parents. The condition was given a new medical term by the authors, "the battered child syndrome."[2]

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[1] Caffey, "Multiple Fractures in the Long Bones of Children Suffering from Chronic Subdural Hematoma, " 56 *American Journal of Roentgenology* 163 (1946).

[2] Kempe, Sliverman, Steele, Droegemueller, and Silver, "The Battered Child Syndrome," 181 *A.M.A. Journal* (1962).

Michigan Child Welfare Law, Chap. 1 "Reporting" at 3, Exhibit A.[3] By 1963, the Model Child Protection Act, which included mandatory reporting, was published by the United States Children's Bureau of the Department of Health, Education and Welfare, and "within three years every state [including Michigan] had enacted a reporting law – many patterned after the Children's Bureau Model." *Id.* (footnote omitted).

Over the next decade, other forms of child maltreatment and concomitant concerns led to enactment of the U.S. Child Abuse Prevention and Treatment Act in 1974. *Id.* The Act established criteria for federal funding and led states to amend their laws to qualify, expanding the reporting requirement to child neglect as well as abuse, and providing for immunity, penalties, custody provisions, central registries, and the abrogation of certain privileges.

Michigan enacted its Child Protection Law, MCL 722.621 et. seq., in 1975. In fiscal year 2008, 124,716 child protective service reports were received by the Michigan Department of Human Services. *See* Children's Protective Services 2008 Trends Report Summary, Exhibit B, at 1. Sixty percent (or 74,439) of the complaints were investigated, and 24 percent of the investigations resulted in a CPS finding of child abuse and/or neglect by a preponderance of the evidence, prompting either a petition for court action, initiation of a protective services case, or the provision of community-based services to the family. *Id.*[4]

Given the innocent children the law is designed to protect, a desire to err on the side of caution is understandable. However, the Court of Appeals' decision goes too far. The law does

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[3] This chapter is available at www.michigan.gov/documents/MCWLChap1_33835_7.pdf

[4] As in the legal context, this standard requires that there be more evidence (at least 51 percent) indicating that an incident of abuse or neglect did occur than the evidence suggesting it did not. *Id.* at 4.

not demand physicians to step outside their professional capacity when deciding whether there is reasonable cause to suspect abuse. Physicians have been made mandatory reporters precisely because of their professional milieu. The statute does not expect or demand that they ignore their medical judgment when deciding whether to report; thus, an action for failing to report can only proceed as a claim for medical malpractice. The Court of Appeals' decision must be reversed.

A. The Standard of Review Applicable to the Underlying Issue is De Novo.

The underlying appeal raises a question of statutory interpretation which this Court reviews *de novo*. *Parkwood Limited Dividend Housing Ass'n v State Housing Development Authority*, 468 Mich. 763, 767; 664 NW2d 185 (2003).

B. The Mandatory Reporting Standard Does Not Negate the Exercise of Medical Judgment to Determine Whether Reasonable Cause to Suspect Abuse Exists.

To determine whether a claim sounds in ordinary negligence or medical malpractice, a court must ask two fundamental questions: (1) whether the claim pertains to an action that occurred "within the course of a professional relationship"; and (2) whether the "claim raise[s] questions of medical judgment" beyond the realm of common knowledge and experience. *Bryant v. Oakpointe Villa Nursing Centre, Inc.*, 471 Mich at 422; 684 NW2d 864 (2004). If both questions can be answered affirmatively, "the action is subject to the procedural and substantive requirements that govern medical malpractice actions." *Id.*

In *Lee*, the majority opinion asked the right questions, but resolved them incorrectly. By merging the reporting standard with the standard that subjects a physician to civil liability for a failure to report, the majority failed to recognize that a physician exercises medical judgment when determining whether a reasonable suspicion of abuse exists. Because the determination

involves the exercise of medical judgment, it is beyond the capability of the jury and requires expert standard of care testimony. This is the hallmark of an action for medical malpractice.

MCL 722.623, Section 3 of the Child Protection Law, provides in pertinent part:

> (1) An individual is required to report under this act as follows:
>
> (a) A physician, dentist, physician's assistant, registered dental hygienist, medical examiner, nurse, person licensed to provide emergency medical care, audiologist, psychologist, marriage and family therapist, licensed professional counselor, social worker, licensed master's social worker, licensed bachelor's social worker, registered social service technician, social service technician, a person employed in a professional capacity in any office of the friend of the court, school administrator, school counselor or teacher, law enforcement officer, member of the clergy, or regulated child care provider ***who has reasonable cause to suspect child abuse or neglect*** shall make immediately, by telephone or otherwise, an oral report, or cause an oral report to be made, of the suspected child abuse or neglect to the department…

Id. (emphasis added). MCL 722.633 addresses the consequences of a failure to report, stating in pertinent part:

> (1) A person who is required by this act to report an instance of suspected child abuse or neglect and who fails to do so is ***civilly liable for the damages proximately*** caused by the failure.

Id. (emphasis added).

Whether a physician "is required by [the] act to report" depends upon the existence of "reasonable cause to suspect child abuse or neglect." That is not a simple inquiry. Throughout our jurisprudence, "reasonable" has always meant reasonable ***under the circumstances***. *See e.g.*, *McKinney v Yelavich*, 352 Mich 687, 691-692; 90 NW2d 883 (1958) (stating that the standard for negligence "is that of a reasonably prudent man acting under the same or similar circumstances."); *Bishop v St. John's Hosp*, 140 Mich App 720, 724; 364 NW2d 290 (1984) ("Under a theory of ordinary negligence, the jury is competent to decide what a reasonable person would do under the circumstances.") As this Court explained in *Lince v Monson*, 363 Mich 135, 139; 108 NW2d 845 (1961):

> In the ordinary negligence case a question is presented whether an ordinary, careful and prudent person would have done as defendant ***did under the circumstances***. Presumably a jury of 12 persons, drawn from and representing a cross section of the community, is competent to judge that question, on the basis of its own knowledge and experience, and to determine negligence or freedom therefrom accordingly.

Id. (emphasis added).

The concept of "reasonableness" is not foreign to physician liability; indeed, the common law has long held that the physician-patient relationship gives rise to a duty of ***reasonable*** care. *See e.g., Lockridge v Oakwood Hospital*, 285 Mich App 678, 682 (2009). But whether a physician has met this duty of reasonable care is not measured by reference to an ordinary, careful and prudent person. Rather, a physician's duty of reasonable care is judged by what a physician of like training and experience would do under the circumstances. To impose liability, it must be shown that the physician "departed from that standard of care which is known as customary medical practice and is attested by professional testimony." *Skeffington v Bradley*, 366 Mich 552, 556; 115 NW2d 303 (1962). Stated otherwise, a duty of reasonable care is the "duty to exercise that degree of skill, care and diligence exercised by members of the same profession, practicing in the same or similar locality, in light of the present state of medical science." *Bryant*, 471 Mich at 424. This is what "reasonable" means to a physician.

This Court explained the basis for judging physicians by this standard in *Skeffington*, stating:

> The most persuasive reason for this legally necessitous rule was considered at length in Professor McCoid's contribution to the recent "Symposium on Professional Negligence" which appears in 12 Vanderbilt L Rev 535-824. Turning to page 608 of the reference we find that helpful exposition:
>
> "The 'preferred position' granted by the courts to the medical profession (and to other professions) may be in recognition of the peculiar nature of the 'professional' activity. The qualified practitioner of medicine has undertaken long years of study to acquire knowledge of man, his body and its illnesses and the means of combating such ailments, coupled with an intensive training of the

> senses and mind of the physician to respond to stimuli in a manner best described as 'the healing art.' A large measure of judgment enters into the practice of this art. That judgment should be free to operate in the best interests of the patient. If the 'judge' is himself to be judged by some outsider who relies on after-acquired knowledge of unsatisfactory results or unfortunate consequences in reaching a decision as to liability, the medical judgment may be hampered and the doctor may become hesitant to rely upon his developed instinct in diagnosis and treatment. If, on the other hand, the doctor knows that his conduct is to be evaluated in terms of what other highly trained medical practitioners would have done or would accept as competent medical practice, he is more likely to pursue his own judgment when he is confident of the diagnosis and line of treatment, and is more likely to provide good medical service for his patient."

Id. at 555-556.

Nothing in the mandatory reporting statute changes this dynamic. The fact that the statute requires all mandatory reporters to report if they have reasonable cause to suspect abuse does not mean that they come upon "reasonable cause" in the same way.[5] It is the physician-patient relationship that renders a physician a mandatory reporter, and irrespective of the means employed by other mandatory reporters, physicians exercise medical judgment when assessing the causes of a patient's injuries. Indeed, in *Rathburn v Children's Hospital*, unpublished opinion per curiam of the Court of Appeals (Case No. 250126) dated March 1, 2005, the Court of

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[5] Each professional should be judged according to its own standards. *See e.g.*, *Becker-Witt v Board of Examiners of Social Workers*, 256 Mich App 359, 363; 663 NW2d 514 (2003), an action challenging revocation of a social worker's license for incompetence. The licensing board argued that its action was supported by plaintiff's violation of the child reporting statute. The Court of Appeals agreed, stating:

> Here, the trial court's rulings assumed that petitioner violated subsection 3(1) of the Child Protection Law – a statutory provision that is professionally relevant to social workers. Indeed, we believe that respondent could find that failing to comply with this professionally relevant statutory provision ***was a failure to conform to a minimal standard of acceptable practice.*** Accordingly, respondent could have found that petitioner committed an act demonstrating "incompetence" under the Occupational Code.

Appeals held that a claim for erroneously reporting a suspicion of abuse stated a claim for medical malpractice. The Court explained:

> The allegations in plaintiff's complaint raise questions of medical judgment during the course of defendants' professional relationship with Justin. Plaintiff alleges that defendants failed to investigate Justin's prior medical history adequately before suspecting that plaintiff abused or neglected him. Thus, the trial court did not err in concluding that the complaint sounded in medical malpractice …

Similarly, other actions against physicians for *making* an erroneous report (as opposed to failing to report) rely for support on allegations of misdiagnosis. For example, in deciding whether immunity barred an action for erroneous reporting in *Awkerman v Tri-County Orthopedic Group, PC,* 143 Mich App 722, 727; 373 NW2d 204 (1985), the Court observed that "the reports were filed due to an allegedly ***negligent diagnosis*** of the cause of the minor plaintiff's frequent bone fractures" (emphasis added). Similarly, in upholding immunity in *Pranis v Sendi,* unpublished opinion per curiam of the Court of Appeals (Case Nos. 227459, 228311) dated October 29, 2002, the Court said that plaintiff's affidavits "while suggestive of possible ***negligence in diagnosis***, simply did not demonstrate that defendants acted in bad faith by making the child abuse report" (emphasis added). Erroneous diagnoses and misinterpretation or disregard of medical information was also alleged as the basis for an erroneous report in *McNeil v Metinko,* unpublished opinion per curiam of the Court of Appeals (Case Nos. 194595, 194596) dated March 13, 1998.

This recognition that a decision to report emanates from a diagnosis (which implicitly entails the exercise of medical judgment) applies equally to decisions not to report. The process through which a physician determines whether there is reasonable cause to suspect that an injury was the result of abuse does not change when the answer is "yes", rather than "no." Nor should it be differently viewed in hindsight.

C. The Statute Contemplates That Physicians Will Be Acting in Their Professional Capacity in Deciding Whether to Report.

The majority erred in categorizing physicians with other mandatory reporters with respect to liability for failure to report. Physicians are included as mandatory reporters in their professional capacity, because of their expertise and professional relationship with the child. The *Mandated Reporter's Resource Guide*, which is "designed to assist mandated reporters in understanding their responsibilities under the Child Protection Law," explains that "[m]andated reporters are an essential part of the child protection system since they have an ***enhanced capacity***, ***through their expertise and direct contact*** with children, to identify suspected child abuse and neglect." *Resource Guide*, Exhibit C, at 1 (emphasis added).[6] The "enhanced capacity" in which the physician acts cannot be removed from the task he or she is assigned to perform and the "expertise" he brings to that task. Consequently, in determining whether a physician violated his statutory duty, it is necessary to determine through expert testimony whether a reasonably prudent physician with like training and circumstances would have had reasonable cause to suspect abuse.

Even the statute acknowledges that a physician will, of necessity, exercise medical judgment when determining whether to make a report. MCL 722.626(3) provides that "[i]f a report is made by a person *other than a physician*, or if the physician's report is not complete, the department *may request a court order for a medical evaluation* of the child" (emphasis added). The clear implication of this directive is that a *medical evaluation* will have already been accomplished if *the report **is** made by a physician*. In fact, the *Child Protective Services Manual*

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[6] *See also, What Is a Mandated Reporter?*, at http://www.michigan.gov/dhs/0,1607,7-124-5452_7119_44443-157836--,00.html (listing mandated reporters and stating, "These people are mandated reporters and have established relationships with children ***based on their profession***") (emphasis added). See Exhibit D.

makes this explicit. In reciting the guidelines for determining whether a medical examination is needed, the *Manual* states, "***Some reports of suspected abuse or neglect will originate in a hospital or physician's office, and the medical examination will have already been completed***." *See Child Protective Services Manual*, Medical Examination and Assessment at 1, Exhibit E (emphasis added). A "medical examination" requires the exercise of medical judgment, the propriety of which can only be assessed in the context of the standard of care.

This exercise of medical judgment by mandatory physician reporters is confirmed by the form the Michigan Department of Human Services has developed for making a report. *See* Report of Actual or Suspected Child Abuse or Neglect, DHS-3200 (Rev. 11-08), Exhibit F. The form and accompanying instructions clearly distinguish between reports made by "medical personnel" and reports made by other mandatory reporters, such as social workers, school administrators, counselors, teachers and the like. The instructions direct that "[t]he reporting person is to fill out as completely as possible items 1-21" and "[o]nly medical personnel should complete items 22-30." See Instructions DHS-3200 (Rev. 2-08), Exhibit F.

Items 1-21 are the date, identities of the child and his or her parents, address, phone, name of alleged perpetrator and his or her relationship to the child, persons living with the child when the abuse or neglect occurred, the address where the abuse or neglect occurred, the injury, conditions and reason for the suspicion of abuse/neglect, the source of the complaint and information regarding the reporter. Items 22-30, on the other hand, are clearly the findings which follow a physical and diagnostic examination. These items are reflected on the form as follows:

TO BE COMPLETED BY MEDICAL PERSONNEL WHEN PHYSICAL EXAMINATION HAS BEEN DONE

22. Summary report and conclusions of physical examination (Attach Medical Documentation)		
23. Laboratory Report		24. X-Ray
25. Other (specify)		26. History or physical signs of previous abuse/neglect YES NO
27. Prior hospitalization or medical examination for this child DATES		PLACES
28. Physician's Signature	29. Date	30. Hospital (if applicable)

Indeed, the Michigan Court of Appeals has implicitly acknowledged that reports of suspected child abuse implicate medical judgment and training. In *Awkerman v Tri-County Orthopedic Group, P.C.*, 143 Mich App 722, 373 NW2d 204 (1985), the Court held that a physician who in good faith reports a case of suspected child abuse is immune from liability for damages arising from the filing of the report even where the report is erroneous as a result of the physician's malpractice. *See also, O'Heron v Blaney,* 583 SE2d 834 (Ga. 2003), where the Court concluded that the "reasonable cause" trigger of Georgia's mandatory reporting statute "requires an objective analysis," explaining that "[t]he relevant question is whether the information available at the time would lead a reasonable person ***in the position of the reporter*** to suspect abuse." *Id.* at 873 (emphasis added) (footnote omitted). The California child protection law expressly defines "reasonable suspicion" in a manner that considers whether it is "objectively reasonable for a person to entertain a suspicion, based upon facts that could cause a reasonable person ***in like position*** … to suspect child abuse." Cal. Penal Code § 11166(a) (West Supp. 1997) (emphasis added).

This Court has recognized that the "reasonable suspicion" standard, as applied to health care providers, differs from that applicable to a lay person. In *Sanchez v Lagoudakis*, 458 Mich

704; 581 NW2d 257 (1998), this Court held that because a food service employer had a reasonable suspicion that an employee had AIDS, the employer had the right to require the employee to undergo testing to determine if an opportunistic infection in a communicable form was present, as permitted by the Public Health Code. The employee argued that the employer's action was a constructive discharge in violation of the Handicappers' Civil Rights Act. However, this Court deemed its decision consistent with the reasoning of the United States Supreme Court in a case involving AIDs under the Americans With Disabilities Act, stating:

> In *Bragdon v. Abbott*, 524 U.S. 624; 118 S.Ct. 2196; 141 L.Ed.2d 540 (1998), the Court addressed the question whether, under the ADA, courts should "defer to the health care provider's professional judgment, as long as it is reasonable in light of then-current medical knowledge?" *Id.*, 118 S.Ct. 2209-2210. The Court found the question, as it relates to health care professionals, involves two levels of inquiry: (1) whether the judgment was, indeed, reasonable, and (2) whether courts should defer to that judgment. *Id.*, 118 S.Ct. 2210 … The *Bragdon* Court, like the Public Health Code and regulations thereunder, ***recognizes differing levels of sophistication that exist between professions in public health or health care and food-service employers*** … Thus, *Bragdon* imposes a standard of objective reasonableness in light of current medical knowledge on health care professionals while recognizing the *Arline* Court's appropriate observation that less sophisticated employers, like defendant here, may require the expert assistance of a physician to determine whether and to what extent an employer may allow an employee to continue to work. ***In balancing the HCRA and the Public Health Code, we find that a "reasonable" suspicion of AIDs standard best effectuates the intent underlying both acts. We note, however, that what is objectively reasonable for a health care professional will not necessarily be the same as what is objectively reasonable for a lay employer.***

Id. at 721, fn 19 (emphasis added). *See also, Esson v Department of Corrections,* unpublished opinion per curiam of the Court of Appeals (Case No. 196012) decided October 7, 1997, stating that the Department of Corrections defines "reasonable suspicion" as "suspicion based on a specific fact or facts, and rational inference drawn from those facts, ***based upon the knowledge and experience*** of Corrections staff …"

All of this points to error in the majority's opinion. A physician cannot be separated from his education, training and experience. Civil liability for failure to report a reasonable

suspicion of child abuse must be determined in the context of the physician's medical judgment. The statute does not evidence a contrary intent.

D. Other States Have Treated An Action Against a Physician for Failure to Report As a Claim for Medical Malpractice.

Courts have rejected the notion that an action for failure to report child abuse falls outside the parameters of medical malpractice/standard of care analysis. In *David M v Beverly Hospital*, 131 Cal App 4th 1272, 1275 (2005), the Court held that an action against a defendant physician and hospital for failing to report suspected child abuse constitutes a claim for professional negligence within the meaning of the more restrictive statute of limitations of the California Medical Injury Compensation Reform Act. The Court explained:

> Plaintiff's contention that the applicable limitations period is three years under section 338, subdivision (a), which is tolled during the period of his minority under section 352, subdivision (a), is without merit. The fundamental problem with that contention is that the present action is one for professional negligence, a situation specifically defined and encompassed by the applicable statute of limitations in section 340.5.
>
> As defined in section 340.5, subdivision (2), professional negligence "*means a negligent act or omission to act by a health care provider in the rendering of professional services, which act or omission is the proximate cause of a personal injury* or wrongful death, provided that such services are within the scope of services for which the provider is licensed and which are not within any restriction imposed by the licensing agency or licensed hospital." (Italics added [in original]). Plaintiff alleges that in defendant doctor's capacity as a physician at defendant hospital he negligently omitted to act in a manner he should have regarding the rendering professional medical services to plaintiff. Thus, section 340.5 on its face applies to the present situation.
>
> Plaintiff urges that the general three-year statute of limitations and its tolling should apply because "[t]he failure to report suspected child abuse is more than mere professional negligence." To the contrary, the conduct alleged in the present case is professional negligence and nothing more.

Id. at 1277-78.[7]

In *First Commercial Trust Co. v Rank*, 915 SW2d 262 (Ark. 1996) (Glaze, J., concurring), the Arkansas statute required that "any physician, dentist, medical personnel, teacher, day care worker, *inter alios*, having 'reasonable cause to suspect that a child has been

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[7] The Connecticut court reached a different conclusion in *Geising v Blefeld*, 2002 Conn Super LEXIS 1413 (2002). In *Geising*, defendant moved to strike plaintiff's claim for failure to report bruises and lacerations because the medical malpractice certificate of good faith was lacking. Although it denied the motion, the Court recognized that a different result might inhere at a later stage in the proceeding or if the evidence alleged to trigger reporting required expert evidence. *Id.* at *12, 15-16. The Court explained:

> The court is aware of the fact that in this upsetting area there is a certain medical expertise which purports to be able to diagnose certain injuries as being the result not of accident but of intentional actions due to the pattern of injuries, their frequency, location, appearance, etc. But this is a motion to strike and the court is obligated to give the complaint every favorable inference. This is not to say that the issue cannot be revisited at a later time if discovery makes it clear that expert testimony and expert observations just mentioned of this type will be involved in this case or that the plaintiff will seek to rely on special skills possessed by a physician to establish that the injuries inflicted were, in fact, not accidental or that the nature of the injuries were such that they should have given a physician as opposed to a layperson reason to suspect they were intentionally inflicted.

Id. at *11-12. The Court's reservation was even more pronounced with respect to allegations that abuse was evidenced by a failure to thrive and lack of weight gain:

> Such an allegation falls within the definition of abused child in § 46b-120, where it says such a child may be in a condition resulting from "maltreatment such as but not limited to malnutrition … deprivation of necessities." The problem is that this latter finding especially if it is sought to be supported by evidence of lack of weight gain would seem to require expert testimony or call on the special skills of a physician to reach the necessary conclusion of malnutrition and perhaps whether, as to this child, lack of weight gain has medical significance on the question of malnutrition…[C]ounsel on both sides might be well advised to bring this matter before the court prior to trial or at the conclusion of discovery by way of a motion in limine or a motion for summary judgment or to dismiss.

Id. at 13-14. In *Lee*, the appendix filed in support of Plaintiff's Court of Appeals' brief, including multiple articles from various medical journals as well as the depositions of medical experts, demonstrates Plaintiff's reliance upon medical expertise to establish reasonable cause to suspect abuse and neglect.

subjected to child maltreatment…shall immediately notify central intake or law enforcement.'" *Id.* at 269, *quoting* Ark. Code Ann. §§ 12-12-507(b). In applying this statute, Justice Glaze observed:

> ***The standard of care is what a physician in Stecker's position should have reasonably suspected. The burden was on the estate to show that Stecker breached that standard of care, and at what point in time, she had an absolute duty to report her suspicions.***

Id. (footnote omitted). Similarly, considering a claim for failure to report child abuse in *Aman v Cabacar*, 2007 U.S. Dist LEXIS 66582 (D.S.D. Sept. 6, 2007), the Court deemed reasonable cause to be an issue for the jury, adding "[g]enuine issues of material fact exist as to whether failing to order an x-ray and discover the child's broken legs was reasonable."

The same analysis is appropriate here. The civil liability provision of the Child Protection Law must be reconciled with the law which governs medical malpractice actions. Different statutes are to be construed in a manner that gives reasonable effect to both, *House Speaker v State Administrative Bd,* 441 Mich 547, 568-569; 495 NW2d 539 (1993), "without repugnancy, absurdity, or unreasonableness." *Michigan Humane Society v Natural Resources Comm*, 158 Mich App 393, 401; 404 NW2d 757 (1987).

MCL 600.2912a sets forth the standard applicable to a physician and codifies the common law elements required for a medical malpractice action. *Craig v Oakwood Hospital*, 471 Mich 67, 86; 648 NW2d 296 (2004). It was added to the medical malpractice statute in 1977 and later amended in 1993. The statute provides in pertinent part that in an action alleging malpractice, the plaintiff must prove that in light of the state of the art existing at the time:

> (a) The defendant, if a general practitioner, failed to provide the plaintiff the recognized standard of acceptable professional practice or care in the community in which the defendant practices or in a similar community, and that as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.

> (b) The defendant, if a specialist, failed to provide the recognized standard of practice or care within that specialty as reasonably applied in light of the facilities available in the community or other facilities reasonably available under the circumstances, and as a proximate result of the defendant failing to provide that standard, the plaintiff suffered an injury.

When promulgating this section of the statute, the Legislature did not make an exception for actions against physicians for failure to report child abuse.[8] Nor is there any language in the Child Protection Law which exempts its civil liability provision from otherwise applicable statutes governing physician liability. In enacting new laws, the Legislature is presumed to have knowledge of existing laws on the same subject and to have considered the effect of new laws on existing statutes. *Walen v Dep't of Corrections*, 443 Mich 240, 248-249; 505 NW2d 519 (1993). If the Legislature intended to apply a different standard of care to physicians who fail to report, it would have expressed that intent. There is no language in either statute indicating an intent by the Legislature to apply different standards to physicians acting in their professional capacity. Because a physician necessarily exercises medical judgment in assessing reasonable cause, the only way to reconcile the child protection statute with the medical malpractice statute is to apply the same standard of care to physicians under both statutes.

E. The Court of Appeals Decision Will Require the Application of Different Liability Standards to the Same Conduct, and Have Other Untoward Consequences.

As Judge O'Connell expressed, the *Lee* decision will have unintended and untenable consequences. Physicians are trained to make decisions on the basis of sound medical judgment and objective evidence, and to conform their actions to the standard of care. The *Lee* decision disregards this imperative and subjects physicians to a dichotomous standard. In the context of

[8] MCL 600.2912 was enacted in 1961 and became effective in 1963. Prior codifications became law in 1865, 1897 and 1915.

reporting, a physician must report if a lay person would do so, even though the physician's medical judgment (as established by expert testimony) might dictate otherwise. In the context of patient evaluation and treatment, however, the physician must adhere to his training and investigate differential causes for an injury (as the standard of care would require). Both contexts occur at the same time; indeed, the occasion to report arises from the concurrent evaluation and treatment. For this, the physician could be sued for malpractice, for failure to report, or for wrongful reporting, each of which would apply a different standard to the same conduct. This cannot be what the Legislature intended. As this Court recited in *Skeffington,* a physician's judgment "should be free to operate in the best interests of the patient" and if "the 'judge' is himself to be judged by some outsider who relies on after-acquired knowledge of unsatisfactory results or unfortunate consequences … medical judgment may be hampered." 366 Mich at 555-556.

Further, it is not going too far to surmise that a physician's immunity for good faith reporting could be jeopardized if the decision to report is made in disregard of the physician's medical judgment. In *Estiverne v Esernio-Jenssen*, 581 F Supp 2d 335 (EDNY 2008), defendants argued that they were entitled to immunity from liability for plaintiffs' state law claims arising from an erroneous report. Under the statute, good faith was to be presumed as long as the reporter was acting in the discharge of his duties and the liability did not result from willful misconduct or gross negligence. *Id*. at 347. Among the allegations relied upon by the court as sufficient to avoid immunity, if true, was that the "diagnosis of child abuse was not

supported by *any* medical evidence" and, the physician "disregarded the medical assessment of a colleague." *Id*. at 348.[9]

Finally, the *Lee* majority's directive will potentially result in a flood of unsubstantiated reports that will render child protection agencies increasingly unable to protect children in real danger.

RELIEF REQUESTED

For these reasons, Michigan State Medical Society requests that this Court grant Defendants-Appellants' Applications for Leave to Appeal and peremptorily reverse, or reverse after hearing, the Court of Appeals' decision.

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[9] Although Michigan's immunity provision merely states that the reporter is presumed to have acted in good faith, that distinction is not relevant here. *Estiverne* cited the above allegations, among others, as evidence of bad faith and willful misconduct.