IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

JANE DOE 30's Mother, Individually, and as Parent Guardian, and Next Friend of JANE DOE 30, a Minor Child, Individually, and on behalf of all others similarly situated,	)	
Plaintiffs,	)	C.A. No. N10C-05-023 JRS
v.	)	&
EARL B. BRADLEY, M.D.; BAY BEES PEDIATRICS, P.A., a Delaware Corporation; BEEBE MEDICAL CENTER, INC., a Delaware Corporation; MEDICAL SOCIETY OF DELAWARE, a Delaware Corporation; MEDICAL SOCIETY OF DELAWARE INSURANCE SERVICES, INC., a Delaware Corporation; JAMES P. MARVEL, JR., M.D.; CAROL A. TAVANI, M.D.; LOWELL F. SCOTT, JR., M.D.; and LOWELL F. SCOTT, M.D., P.A.,	)	C.A. No. N10C-10-317 JRS
Defendants.	)	

Date Submitted: October 21, 2010
Date Decided: January 21, 2011

MEMORANDUM OPINION.

Upon Consideration of
Motion for Judgment on the Pleadings
Brought By Defendants Medical Society of Delaware,
Medical Society of Delaware Insurance Services, Inc.,
James P. Marvel, Jr., M.D., and Carol A. Tavani, M.D.

GRANTED.

Bruce L. Hudson, Esquire, LAW OFFICES OF BRUCE L. HUDSON, Wilmington, Delaware; Ben T. Castle, Esquire and Craig A. Karsnitz, Esquire, YOUNG CONAWAY STARGATT & TAYLOR, LLP, Wilmington, Delaware. Attorneys for Plaintiffs.

Collins J. Seitz, Jr., Esquire and Matthew F. Boyer, Esquire, CONNOLLY BOVE LODGE & HUTZ, LLP, Wilmington, Delaware. Attorneys for Defendants Medical Society of Delaware, Medical Society of Delaware Insurance Services, Inc., James P. Marvel, Jr., M.D. and Carol A. Tavani, M.D.

SLIGHTS, J.

I.

In this opinion, the Court considers the scope of a physician's duty to report to appropriate authorities that another physician might be engaged in conduct that could endanger the health, welfare or safety of that physician's patients or the public at large. The issue arises in the context of highly disturbing allegations that a Delaware physician, Earl B. Bradley, M.D. ("Dr. Bradley"), engaged in physical and sexual abuse of possibly hundreds of his pediatric patients at his medical practice in Lewes, Delaware. Plaintiffs, Jane Doe 30 (a minor child) and Jane Doe 30's mother, bring this action on behalf of a putative class comprising "hundreds" of Dr. Bradley's patients and their parents who seek compensatory and exemplary damages against not only Dr. Bradley and his medical practice, Bay Bees Pediatrics, P.A., but also Beebe Medical Center ("Beebe"), where Dr. Bradley allegedly had privileges and was employed to practice medicine, the Medical Society of Delaware ("the Medical Society") and its affiliate, Medical Society of Delaware Insurance Services, Inc.,[1]

[1]The Complaint says nothing that implicates the Medical Society of Delaware Insurance Services, Inc. in any wrongdoing, particularly when viewed through the more focused lens of "special" pleading. *See* Del. Super. Ct. Civ. R. 9(b)("In all averments of . . . negligence, the circumstances constituting . . . negligence shall be stated with particularity.") Accordingly, the claims against this entity are dismissed without prejudice. As discussed below, plaintiffs shall be given leave to amend their complaint and, in so doing, they may restate their claims against the Medical Society of Delaware Insurance Services, Inc. with particularity.

James P. Marvel, Jr., M.D., Carol A. Tavani, M.D., Lowell F. Scott, Jr. M.D. and Dr. Scott's medical practice. As to those defendants other than Dr. Bradley, plaintiffs allege that each defendant owed the members of the class both a common law and statutory duty to report information they each knew or should have known about Dr. Bradley's unprofessional conduct to appropriate state regulatory and/or law enforcement agencies. According to the plaintiffs, the defendants' breach of this duty was a proximate cause of their injuries.

The Medical Society and two of its members, Drs. Marvel and Tavani (collectively "the Medical Society defendants"), move for judgment on the pleadings ("the motion") on the grounds that they owed no common law or actionable statutory duty to the plaintiffs to take any action to report Dr. Bradley's misconduct to appropriate authorities. They argue that plaintiffs' allegations against them boil down to an alleged failure to act (more precisely a failure to report) and that such nonfeasance will give rise to an actionable common law claim only in instances where they maintain a so-called "special relationship" (as defined in the law) with either the plaintiffs or with Dr. Bradley. According to the Medical Society defendants, no such "special relationship" exists here.

With regard to the alleged violation of statutory duties, the Medical Society defendants acknowledge, for this motion only, that the failure to report a fellow physician suspected of abusing patients might constitute a violation of certain Delaware statutes and subject them to the sanctions set forth therein. But they contend that such violations cannot, as a matter of Delaware law, give rise to a private right of action against them on behalf of Dr. Bradley's patients since no such right was contemplated by the General Assembly.

The Court has carefully considered the Medical Society defendants' motion and the plaintiffs' response. Because the Court finds that the Medical Society defendants have correctly stated Delaware law, and that under Delaware law they owe neither a common law nor an actionable statutory duty to these plaintiffs to report Dr. Bradley's alleged misconduct, the Motion for Judgment on the Pleadings must be **GRANTED.**

II.

Plaintiff, Jane Doe 30, is twelve years old and a former patient of Dr. Bradley.[2] She has sustained physical, mental and emotional damages as a result of abuse

[2]On a motion for judgment on the pleadings, the Court must accept all well pled facts in the Complaint as true. *See Jadczac v. Assurant, Inc.*, 2010 WL 445607, at *1 (Del. Super. Ct.). Accordingly, this factual summary sets forth pertinent allegations in the Complaint as if they were true facts. Each of the defendants, except Dr. Bradley, filed answers to the Complaint in which they deny all allegations of wrongdoing. For his part, Dr. Bradley has yet to file a responsive pleading in this case.

perpetrated against her by Dr. Bradley at his medical practice in Sussex County, Delaware. She and her mother seek to represent a class of potentially hundreds of former patients of Dr. Bradley and their parents in pursuing compensatory and exemplary damages against Dr. Bradley, his medical practice and other defendants for harm proximately caused by Dr. Bradley's abusive conduct.

Defendant, Beebe, is a hospital operating in Lewes, Delaware. Dr. Bradley maintained privileges to practice medicine at Beebe, was a member of the Beebe hospital staff and, at times relevant to the plaintiffs' claims, acted as an agent of Beebe in the practice of medicine. "Between 1994 and 2009, [] Beebe had information and reports of unprofessional conduct concerning defendant Bradley which endangered the public health, safety and welfare [] which were not reported either to [the Delaware Board of Medical Licensure and Discipline (the "Board") or the Delaware Division of Child Protective Services ("CPS")]."[3]

According to its Opening Brief, the Medical Society is a non-profit organization of physicians in Delaware the primary purpose of which is to "guide, serve and support Delaware Physicians, promoting the practice and profession of

[3]Compl. ¶¶ 19, 21-22, 30-31, 40.

medicine to enhance the health of our communities."[4] The Medical Society has no statutory or regulatory authority to sanction or discipline Delaware physicians. Such authority rests solely with the Board.[5]

Drs. Marvel and Tavani are Delaware physicians who, according to the Opening Brief, are members of the Medical Society and serve on the Medical Society's Physicians' Health Committee. "The mission of the Delaware Physicians' Health Program is to assist physicians, residents, medical students, physician assistants and physician assistant students who may have health problems which if left untreated, could adversely affect their ability to practice medicine safely."[6] The program "provides confidential consultation and support" to eligible medical

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[4] *See* http://www.medicalsocietyofdelaware.org/AboutMSD.aspx. It is important to note here that the Complaint offers little background information regarding the Medical Society or the Medical Society defendants beyond their names and information relevant to service of process. *See e.g.* Compl. at ¶¶ 6-8, 18, 20, 22, 30-32, 35-36. In their Opening Brief, the Medical Society defendants offer some additional background with citations to the Medical Society's website. *See* Opening Br. at 3-4. In their Answering Brief, plaintiffs state that they "do not take exception" to the Medical Society defendants' statement of facts and they make no mention of the fact that the Medical Society defendants have made factual contentions outside of the pleadings to frame the factual context of their various arguments. *See* Answering Br. at 3. As will be discussed below, the Court's standard of review limits the extent to which it can venture beyond the pleadings to decide this motion. For now, however, the Court will recite the relevant and apparently undisputed facts from the Medical Society's Opening Brief for the sole purpose of offering some background regarding the identity of the moving defendants *sub judice.*

[5] *See* 24 DEL. C. § 1701 *et seq.*

[6] *See* http://www.medicalsocietyofdelaware.org/PhysiciansHealth.aspx.

professionals "facing health concerns."[7]

Either in the course of their work with the Physicians' Health Committee, or otherwise in the course of their professional activities, between 2004 and 2009, Drs. Marvel and Tavani obtained "information and reports of unprofessional conduct concerning defendant Bradley which endangered the public health, safety and welfare" and "information or reports . . . of suspected abuse against children . . . ."[8] They failed to report this information to either the Board or CPS.[9]

Plaintiffs allege that as a proximate result of Beebe's and the Medical Society defendants' failure to report Dr. Bradley's unprofessional and/or abusive conduct to appropriate authorities, Dr. Bradley "was permitted to continue in the practice of medicine in the State of Delaware . . . which put him in a position of intimate contact and trust with his child patients whom he repeatedly abused, including Jane Doe 30."[10] Needless to say, plaintiffs allege that Dr. Bradley's conduct has caused

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[7] *Id.*

[8] Complaint ¶¶ 20-22, 30-31, 40. The Complaint does not specify the context or capacity in which the Medical Society or Drs. Marvel and Tavani obtained information of Dr. Bradley's "unprofessional conduct" or "suspected abuse" of his patients.

[9] *Id.*

[10] *Id.* at ¶35.

substantial physical and emotional harm to his patients and their families.[11]

III.

The Medical Society defendants make three arguments in support of their motion: (1) they cannot be held liable for the tortious acts of Dr. Bradley because they owed no common law duty to the plaintiffs in that they did not maintain a legally cognizable special relationship with either Dr. Bradley or any of his alleged victims; (2) they cannot be held civilly liable under either the Medical Practice Act (the "MPA")[12] or the Child Abuse Prevention Act (the "CAPA")[13] because neither of these statutory schemes creates a private right of action for the benefit of these plaintiffs against health care professionals who might be in violation of the reporting statutes contained therein; and (3) even if they owe a common law or statutory duty to the plaintiffs, they are immune from suit in this case per the immunity provisions of the MPA.[14]

In response, plaintiffs argue that: (1) the facts presented here justify an extension of existing common law principles to recognize that a special relationship

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[11] *Id.* at ¶¶38-40.

[12] *See* 24 DEL. C. § 1731A.

[13] *See* 16 DEL. C. § 903.

[14] *See* 24 DEL. C. § 1768.

does exist between the Medical Society defendants and a Delaware-licensed physician that would justify the imposition of a duty upon them to take reasonable steps (including reporting the physician to appropriate authorities) to prevent that physician from causing harm to his patients or the public in instances where they know or should know that a risk of such harm exists; (2) the reporting obligations imposed upon the Medical Society defendants by the MPA and CPA impose upon the Medical Society defendants a legal duty to Dr. Bradley's patients, the violation of which can create a private right of action against the Medical Society defendants for the benefit of Dr. Bradley's patients who were harmed by his abuse; and (3) the Medical Society defendants cannot avail themselves of the statutory immunity provision of the MPA because: (a) they were not acting as "medical peer reviewers" when they failed to report Dr. Bradley's misconduct to the Board or to CPS; and (b) their failure to report will not advance the purpose of the statutory immunity which is to improve the quality of medical care in Delaware by encouraging physicians to discuss and improve upon bad medical outcomes.

The Court will address the parties' contentions *seriatim* after briefly considering the applicable standard of review.

IV.

A motion for judgment on the pleadings may be filed "[a]fter the pleadings are closed but within such time as not to delay the trial."[15] "All well [pled] allegations of fact from the [complaint] are accepted as true [and] all reasonable inferences are construed in favor of [the plaintiff]."[16] In this regard, however, the "briefs, containing assertions of fact and inferences drawn therefrom not present in the pleadings, cannot be considered as part of the pleadings for the purpose of considering this motion."[17] Indeed, when considering a motion under Rule 12(c), the Court must decline to construe facts not clearly alleged in the complaint or to decide disputed issues of fact, but rather must confine its review to deciding issues of law as framed by the well pled allegations in the complaint.[18]

Rule 12(c) does provide a mechanism by which a motion for judgment on the pleadings may be converted to a motion for summary judgment when "matters outside the pleadings are presented to and not excluded by the Court . . . ."[19] In this case,

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[15]Del. Super. Ct. Civ. R. 12(c).

[16]*Jadczac v. Assurant, Inc.*, 2010 WL 445607, at *1 (Del. Super. Ct.).

[17]*Fagnani v. Integrity Fin. Corp.,* 167 A.2d 67, 75 (Del. 1960).

[18]*See Id.*

[19]Del. Super. Ct. Civ. R. 12(c).

however, the parties have not presented "matters outside the pleadings," but rather have presented factual contentions and arguments outside the pleadings in the statements of fact and legal arguments within their briefs.[20] Accordingly, there is no need to invoke Superior Court Civil Rule 56 because the only "matter" properly before the Court is the plaintiffs' Complaint.

V.

The Medical Society defendants' motion calls the threshold question of whether they owed a legal duty to the plaintiffs. In the tort context,[21] "[w]hether a duty exists is entirely a question of law to be determined . . . by the court."[22] In the

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[20]Plaintiffs did request that the Court refer to and take judicial notice of the report of the "Attorney General's Office In Re: The Investigation of Failures to Report Allegations of Unprofessional Conduct and Child Abuse Against Dr. Earl Bradley Under Delaware Law Prior to 2008, dated May 17, 2010, and Widener Law School Dean Linda L. Ammons' Report, Independent Review of the Earl Brian Bradley Case, dated May 10, 2010." *See* Answering Br. at 1. Neither of these reports was appended to the Answering Brief, nor were any specific references made to the reports in the arguments raised therein. Setting aside the questions of admissibility and the procedural propriety of referring to these reports at this stage of the litigation, the Court declines to refer to these reports without more specific guidance from the plaintiffs as to precisely what the Court should be looking for and where it can be found. For their part, the Medical Society defendants would have the Court refer to the Medical Society's website for facts beyond those alleged in the Complaint. This reference is useful as far as it goes - - providing background facts regarding the organization - - but it lends nothing to the contention that Drs. Marvel and Tavani learned any information regarding Dr. Bradley while serving on a peer review committee for the Medical Society. This factual contention is supported neither by the Complaint nor the Medical Society website.

[21]"Broadly speaking, a tort is a civil wrong, other than breach of contract, for which the court will provide a remedy in the form of an action for damages." W. Page Keeton, PROSSER & KEETON ON TORTS, § 2 (5TH ed. 1984).

[22]*Kuczynski v. McLaughlin*, 835 A.2d 150, 153 (Del. Super. Ct. 2003).

common law, "[d]uty is essentially a question of whether the relationship between the actor and the injured person gives rise to any legal obligation on the actor's part for the benefit of the injured person . . . ."[23] When the relationship between the parties is such that the law should recognize that one party must act for the benefit of another, the common law will impose a legal duty upon that party to do so in a reasonable manner.[24] A legal duty may also be imposed when a defendant violates "a statute enacted for the safety of others . . . [and] the plaintiff [is] a member of the class of persons for whose protection or benefit the statute was enacted."[25] Claims based on alleged violations of a duty created by statute are styled negligence *per se*.[26]

In this case, the plaintiffs contend that the Medical Society defendants owed to them and have breached a legal duty imposed both by the common law and by statute. Accordingly, the Court will first address whether the Medical Society defendants owed a duty to the plaintiffs grounded in the common law of Delaware. The Court will then address whether the Medical Society defendants' alleged violation of the MPA or CAPA can give rise to a claim of negligence *per se*.

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[23] *Id.* (citations omitted).

[24] W. Page Keeton, PROSSER & KEETON ON TORTS, § 53 (5TH ed. 1984).

[25] *Friedel v. Osunkoya*, 994 A.2d 746, 756 (Del. 2010).

[26] *Id.*

A. Plaintiffs' Complaint Does Not Allege Facts That Would Allow The Court To Impose A Common Law Duty Upon The Medical Society Defendants To Prevent Dr. Bradley From Causing Harm To The Plaintiffs

Plaintiffs rest their common law claims against the Medical Society defendants upon the factual allegation that these defendants "had information and reports of unprofessional conduct concerning [Dr. Bradley] which endangered the public health, safety, and welfare" and "had information and reports of [] suspected abuse [perpetrated by Dr. Bradley] against children . . . ."[27] They then allege that the Medical Society defendants failed to report the "information and reports" they had about Dr. Bradley to either the Board or CPS and that this failure was a proximate cause of their injuries.[28] In order meaningfully to address whether this factual scenario, as pled in the Complaint, will give rise to a legally cognizable duty running from the Medical Society defendants to the plaintiffs, the Court must first determine whether the plaintiffs have pled "malfeasance" or "nonfeasance" against these defendants. In Delaware, the distinction dictates the direction in which the Court's common law duty analysis must proceed.[29]

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[27]Compl. ¶¶20, 22.

[28]*Id.* at ¶¶ 35-36.

[29]*Riedel v. ICI Americas Inc.,* 968 A.2d 17, 22 (Del. 2009).

1. Plaintiffs Have Alleged Nonfeasance Against The Medical Society Defendants

"Generally, to determine whether one party owed another a duty of care, [Delaware courts] follow the guidance of the Restatement (Second) of Torts (hereinafter "the Restatement Second")."[30] According to § 284 of the Restatement Second:

> Negligent conduct may be either:
>
> > (a) an act which the actor as a reasonable man should recognize as involving an unreasonable risk of causing an invasion of an interest of another, or
> >
> > (b) a failure to do an act which is necessary for the protection or assistance of another and which the actor is under a duty to do.[31]

The distinction between negligent acts and negligent omissions is further considered in the Restatement Second at § 302:

> A negligent act or omission may be one which involves an unreasonable risk of harm to another either through
>
> > (a) the continuous operation of a force started or continued by the act or omission, or

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[30] *Id.* (citations omitted).

[31] Restatement (Second) of Torts § 284.

> (b) the foreseeable action of the other, a third person, an animal, or a force of nature.[32]

In *Riedel,* our Supreme Court explained the Restatement Second's disparate treatment of negligent acts and negligent omissions in the context of § 302 and ultimately concluded that Delaware has and continues to recognize the legal difference between so-called "malfeasance" (a negligent act) and "nonfeasance" (a negligent omission):

> Although Comment (a) to § 302 notes that § 302 'is concerned only with the negligent character of the actor's conduct, and not with his duty to avoid the unreasonable risk[,]' the comment proceeds to explain the dissimilar duties owed by 'one who merely omits to act' versus 'one who does an affirmative act.' As Comment (a) explains, 'anyone who does an affirmative act is under a duty to others to exercise the care of a reasonable man to protect them against an unreasonable risk of harm to them arising out of the act.' On the other hand, 'one who merely omits to act' generally has no duty to act, unless 'there is a special relationship between the actor and the other which gives rise to the duty.'[33]

Section 314 completes the Restatement Second's general discussion of nonfeasance by succinctly stating the general rule that, "[t]he fact that the actor realizes or should realize that action on his part is necessary for another's aid or protection does not itself impose upon him a duty to take such action."[34]

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[32]*Id.* at § 302.

[33]*Id.* (citing Restatement (Second) of Torts § 302 cmt. a.).

[34]Restatement (Second) of Torts § 314.

Comment c to § 314 goes on to explain: "The rule stated in this Section is applicable irrespective of the gravity of the danger to which the other is subjected and the insignificance of the trouble, effort, or expense of giving him aid or protection." This general rule has deep roots in the common law.[35] Deans William Prosser and W. Page Keeton explain the rationale of the "no duty to act" rule as follows:

> In the determination of the existence of a duty, there runs through much of the law a distinction between action and inaction . . . . [T]here arose very early a difference, still deeply rooted in the law of negligence, between 'misfeasance' and 'nonfeasance' - that is to say, between active misconduct working positive injury to others and passive inaction or failure to take steps to protect them from harm. The reason for the distinction may be said to lie in the fact that by 'misfeasance' the defendant has created a new risk of harm to the plaintiff, while by 'nonfeasance' he has at least made his situation no worse, and has merely failed to benefit him by interfering in his affairs.[36]

To be sure, the general rule that "one who omits to act generally has no duty to act"[37] is not without controversy. One certainly could mount a compelling argument that "as a matter of inarticulate common sense, it is wrong for one person

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[35]*See* Francis H. Bohlen, *The Moral Duty to Aid Others as a Basis of Tort Liability*, 56 U. Pa. L. Rev. 217, 219 (1908)("[t]here is no distinction more deeply rooted in the common law and more fundamental than that between misfeasance and non-feasance, between active misconduct working positive injury to others and passive inaction, a failure to take positive steps to benefit others, or to protect them from harm not created by any wrongful act of the defendant.").

[36]W. Page Keeton, PROSSER & KEETON ON TORTS § 56, at 373 (5th ed. 1984).

[37]*Riedel,* 968 A.2d at 22 (citations and external quotes omitted). *See also Naidu v. Laird,* 539 A.2d 1064, 1072 (Del. 1988) ("Generally, there is no duty to control the conduct of a third person to prevent him from causing harm to another . . . .").

to stand by as another suffers an injury that could easily be prevented."[38] "Perhaps the most common argument for a duty to [act in certain instances] is based on the view that individuals have a moral obligation to aid others."[39] The expert swimmer who watches from the shore as a child drowns may, with good reason, be chastised for exhibiting morally repugnant, unreasonable and, indeed, outrageous conduct.[40] Nevertheless, while the moral implications of a failure to act in certain situations are compelling, particularly in cases involving child victims, Delaware courts have been careful to draw a bright line between a moral obligation to act, which will not necessarily subject a defendant to liability for failing to act, and a legal obligation (or duty) to act, the breach of which will subject the defendant to tort liability.[41]

There is good reason not to fuse a moral obligation to act with a legal duty to act:

> Once one decides that as a matter of statutory or common law duty, an individual is required under some circumstances to act at his own cost for the exclusive benefit of another, then it is very hard to set out in a principled manner the limits of social interference with individual liberty . . . . Even if the rule starts out with . . . modest ambitions, it is

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[38]Ernest J. Weinrib, *The Case for a Duty to Rescue*, 90 Yale L.J. 247, 260 (1980).

[39]Steven J. Heyman, *Foundations of the Duty to Rescue,* 47 Vand. L. Rev. 673, 741 (1994).

[40]*See* Richard A. Epstein, *A Theory of Strict Liability,* 2 J. Legal Stud. 151, 201 (1973); Restatement (Second) of Torts § 314 cmt. c (proffering the example of the drowning swimmer and reiterating the general rule that there is no legal duty to save that swimmer).

[41]*See generally Riedel,* 968 A.2d at 20-22.

difficult to confine it to those limits.[42]

Professor Epstein's point - - that imposing a duty to act upon a defendant who did not create the harm would tread precariously upon accepted notions of individual liberty - - emphasizes the distinction between moral wrong and legal wrong.[43] Society may well have every reason to be outraged by a party's failure to act for the benefit of another. But it is another thing entirely to say that society's outrage translates automatically to a right on the part of the alleged victim to compel the non-actor, through operation of law, to pay financial reparations.[44]

Notwithstanding the common law's reluctance to deviate from the general rule that "one who omits to act generally has no duty to act,"[45] the common law has

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[42]Richard A. Epstein, *A Theory of Strict Liability,* 2 J. Legal Stud. 151, 198 (1973). More than a century ago, Lord Thomas B. Macaulay made the argument in more practical terms: "It is true that the man who, having abundance of wealth, suffers a fellow creature to die of hunger at his feet, is a bad man - a worse man, probably, than many of those for whom we have provided very severe punishment. But we are unable to see where, if we make such a man legally [liable], we can draw the line." Thomas B. Macaulay, *Report Upon the Indian Penal Code,* in *7 Works of Lord Macaulay* 493-94 (H. Trevelyn ed., 1866). *See also Union Pac. Railway v. Cappier*, 72 P. 281, 282 (Kan. 1903)(**"**It is the omission or negligent discharge of legal duties only which come within the sphere of judicial cognizance. For withholding relief from the suffering, for failure to respond to the calls of worthy charity, or faltering in the bestowment of brotherly love on the unfortunate, penalties are found not in the laws of men, but in that higher law, the violation of which is condemned by the voice of conscience, whose sentence of punishment for the recreant act is swift and sure.").

[43]Richard A. Epstein, *A Theory of Strict Liability,* 2 J. Legal Stud. 151, 198-99 (1973).

[44]Theodore M. Benditt, *Liability for Failing to Rescue,* 1 Law & Phil. 391, 410 (1982).

[45]*Riedel,* 968 A.2d at 22 (citations and external quotes omitted).

developed exceptions to the general rule which have now been enumerated in the Restatement Second, Sections 314A and 316 through 324A.[46] Each of these exceptions address "special relationships" between the non-actor and others that will give rise to a duty of care.[47] Like the general rule itself, the exceptions have not emerged in a vacuum, but rather reflect a common sense appreciation of the "customary patterns of behavior associated with each [human] relationship."[48]

In this case, plaintiffs allege that the Medical Society defendants have failed to act in that they failed to report Dr. Bradley's unprofessional conduct or suspected abuse of his patients to appropriate authorities. These allegations amount to allegations of nonfeasance. In the absence of an available exception to the general rule, therefore, the Medical Society defendants had no common law duty to act, *i.e.*, no duty to report Dr. Bradley.

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[46]*See Riedel,* 968 A.2d at 22 (citing Restatement (Second) Torts §§ 314A, 316-324A).

[47]*Id.*

[48]*See* James A. Henderson, Jr., *Process Constraints in Tort*, 67 Cornell L. Rev. 901, 940 n. 187 (1982).

2. The Plaintiffs Have Not Pled Facts That Would Implicate An Exception To The General Rule That The Medical Society Defendants Had No Common Law Duty To Act For Their Protection

a. The Restatement (Third) of Torts

In *Riedel,* the Supreme Court confined its duty analysis in a case of alleged nonfeasance to the exceptions to the "no duty to act" rule set forth in the Restatement Second.[49] In so doing, the Supreme Court flatly rejected the "concept of duty" as expressed in the Restatement (Third) of Torts.[50] This rejection was the product of the court's concern that the Restatement (Third) of Torts' approach to common law duty dilutes the importance of the relationship between the tort defendant and others with whom he interacts, and instead focuses almost exclusively on the foreseeability of harm resulting from the defendant's conduct.[51] The court also expressly rejected the Restatement (Third) of Torts' allowance of causes of action - - e.g., dram shop liability - - "that directly contravene[] the primacy of the legislative branch in resolving [the public policy implications of imposing a common law legal duty to

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[49]*See Riedel,* 968 A.2d at 26.

[50]*Id.* at 20 ("At this time, we decline to adopt any sections of the Restatement (Third) of Torts. The drafters of the Restatement (Third) of Torts redefined the concept of duty in a way that is inconsistent with this Court's precedents and traditions.").

[51]*Id.* at 20 (rejecting, *inter alia,* Restatement (Third) of Torts § 37, which deemphasizes the focus on relationships and emphasizes the focus on foreseeable consequences).

act]."[52]

Given the Supreme Court's clear direction that the Restatement Second, not the Restatement (Third) of Torts, shall govern the common law duty analysis in Delaware, this Court will confine its inquiry to the Restatement Second.[53]

b. The Restatement (Second) of Torts

i. Restatement Second § 315

The exceptions to the "no duty to act" rule cabined within the Restatement Second focus on the relationships that exist between the defendant and either the person who is the source of the danger or the person who is foreseeably placed at risk by the danger.[54] Of these exceptions, the parties have focused principally upon Restatement Second § 315, which provides an exception to the general rule that "there is no duty to control the conduct of a third person to prevent him from causing

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[52]*Id.* at 20. In this regard, *Riedel* specifically rejected Restatement (Third) of Torts § 38, which provides that a court may "decide that an affirmative duty exists [at common law] when a statute requires an actor to act for the protection of another." *Id.* at n.8. This section will be discussed in more detail below in the context of plaintiffs' claim that the MPA and CAPA implicate a common law duty of care.

[53]The Supreme Court left open the possibility that it might reconsider whether to adopt some or all of the Restatement (Third) of Torts provisions at a later time. *Id.* at 20 ("***At this time,*** we decline to adopt any sections of the Restatement (Third) of Torts.") (emphasis supplied). Whether *vel non* that "time" has come is not for this Court to say.

[54]*Id.* at 22-23.

harm to another."[55] Section 315 provides:

> There is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless:
>
> > (a) a special relation exists between the actor and the third person [in this case, Dr. Bradley] which imposes a duty upon the actor to control the third person's conduct, or
> >
> > (b) a special relation exists between the actor and the other [in this case, the plaintiffs] which gives to the other a right to protection.[56]

Delaware courts have not hesitated to find a duty to act based upon § 315 when the requisite "special relationship" between the actor and a third person or actor and the plaintiff was pled in the complaint and/or established in the summary judgment record.[57] In each of these cases, the "special relationship" was well articulated and/or

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[55]*Naidu*, 539 A.2d at 1072.

[56]Restatement (Second) of Torts § 315.

[57]*See e.g. Naidu,* 539 A.2d 1072-73 (special relationship existed between psychotherapist and his patient such that, in certain circumstances, psychotherapist would have a duty to control his patient); *Harden v. Allstate Ins. Co.,* 883 F.Supp. 963, 971(D. Del. 1995) (special relationship existed between neurologist and epileptic patient such that neurologist had a duty to take steps to prevent his patient from operating a motor vehicle); *Shively v. Ken Crest Centers for Excep. Pers.,* 2001 WL 209910, **5-6 (Del. Super. Ct.) (special relationship existed between operator of a half-way house for mentally challenged individuals with adjustment problems and the residents such that operator had a duty to take steps to prevent residents from causing harm to others.). *But see Reidel,* 968 A.2d at 24-26 (no special relationship existed between employer and employee that would trigger a duty of employer to third parties to prevent employee from spreading asbestos fibers on his work clothing); *Furek v. University of Delaware*, 594 A.2d 506, 517 (Del. 1991) (no special relationship existed between a University and its students that would trigger a § 315 duty).

clearly evident in the record. And, in each of these cases, the "special relationship" was of a nature where the court readily could determine that the defendant "was in a unique position to control the conduct"[58] of the third person who allegedly caused harm to the plaintiff.

The Delaware approach to § 315 is directly in accord with the intent of the Restatement Second's Reporters. At Comment a to § 315, the Reporter's Notes state that the affirmative duty to act arises because the "actor [the defendant] [has] control of a third person ... and [is] under a duty to exercise such control, as stated in §§ 316-320."[59] Indeed, each of the Restatement Second sections identified in the Reporter's Notes to § 314 involve relationships made "special" by virtue of the degree of control the actor/defendant is able to exercise over the third party.[60]

In contrast to the Delaware cases that have applied § 315 to find a duty, plaintiffs have failed in their Complaint to allege any facts that would suggest that the Medical Society defendants maintained a special relationship with either Dr. Bradley

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[58]*Shively,* 2001 WL 209910, *6.

[59]Restatement (Second) of Torts § 314 cmt. a.

[60]*See e.g.* Restatement (Second) of Torts § 316 (duty of parent to control conduct of child); Restatement (Second) of Torts § 317 (duty of master to control conduct of servant); Restatement (Second) of Torts § 318 (duty of possessor of land to control conduct of licensee); Restatement (Second) of Torts § 319 (duty of those in charge of persons having dangerous propensities); Restatement (Second) of Torts § 320 (duty of persons having custody of another to control his conduct).

or any of his patients such that they would owe a duty to the patients to take steps to prevent Dr. Bradley from harming them.[61] Indeed, the Complaint says nothing, by allegation or inference, of the relationship between the Medical Society defendants and Dr. Bradley or his patients. Beyond identifying the Medical Society defendants by name, supplying information for service of process and, as to Drs. Marvel and Tavani, indicating that they are medical doctors licensed to practice in Delaware, the Complaint says nothing of the context or manner in which the Medical Society defendants knew or should have known of Dr. Bradley's misconduct. Based on these scant allegations in the Complaint, the Court cannot glean that any relationship, much less a special relationship, existed between the Medical Society defendants and Dr. Bradley or his patients such that § 315 would impose a duty upon these defendants to protect Dr. Bradley's patients from Dr. Bradley himself.[62]

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[61] *Cf. Naidu,* 539 A.2d at 1070-71 (discussing the psychiatrist's ability to delay the release of his psychiatric patient from a medical facility until the patient was sufficiently stable as to not be a risk to others); *Harden*, 883 F.Supp. at 967-68 (discussing the neurologist's past experience with his patient driving with uncontrolled seizures and his ability to direct her not to do so and through direct observation to determine if she continued to drive notwithstanding his instructions); *Shively,* 2001 WL 209910, at * 3 (discussing the group home's ability to "supervise" its residents and to remove them from the home if it was determined that they posed a threat to neighbors or the community).

[62] In so holding, the Court is expressly determining that the relationship that exists between and among physicians licensed to practice within Delaware, without more, is not sufficient to trigger a § 315 duty. Likewise, the relationship that exists between the Medical Society (or any professional trade organization) and physicians (or members of the profession comprising the trade organization), without more, is not a "special relationship" within the meaning of § 315. To the extent that the Medical Society defendants obtained information regarding Dr. Bradley through the so-called (continued...)

In this case, the plaintiffs allege not that the Medical Society defendants failed to take reasonable measures to control Dr. Bradley or even that they were in a position to exercise such control, but rather that they failed to discharge their statutory obligation to report information about Dr. Bradley to appropriate authorities so that *those authorities* could, in turn, exercise control over Dr. Bradley. These allegations, standing alone, do not implicate § 315 nor do they implicate any other notion of common law duty recognized in Delaware.

To cap off the analysis of § 315, the Court must address plaintiffs' argument that the Medical Society defendants' violation of the MPA and/or CAPA creates the special relationship between each of the Medical Society defendants and Dr. Bradley by virtue of the reporting requirements in the statutes and the connection the physicians all have to one another as licensed Delaware physicians.[63] Plaintiffs argue that the special relationship envisioned by § 315 may be triggered by "diverse levels of control" that might be exercised by "the actor" (here, the Medical Society

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[62](...continued)
Physician's Health Committee of the Medical Society, as suggested in the Medical Society's Opening Brief (and not disputed in the plaintiffs' Answering Brief), it is difficult to imagine how this "relationship" would qualify as a special relationship as contemplated by § 315.

[63]Answering Br. at 10-11.

defendants) over the third party (here, Dr. Bradley).[64] The Medical Society defendants, in response, argue that the Court cannot create a common law duty based upon a statutory violation, particularly when to do so would be contrary to the Restatement Second and existing Delaware common law principles. After carefully considering the arguments, for the reasons discussed below, the Court is satisfied that the statutory obligation to report does not equate to a common law duty to act.

At the outset of this analysis, the Court must reiterate what has already been stated: the Supreme Court of Delaware has expressly rejected the Restatement (Third) of Torts in *Riedel*.[65] Thus, this Court may not look to Restatement (Third) of Torts § 38 as a basis to conclude that the alleged violations of the MPA or CAPA may, alone, serve as the basis for imposing a common law duty upon the Medical Society defendants to report information regarding Dr. Bradley's misconduct or suspected child abuse to appropriate authorities.[66] This provision, like many others in the Restatement (Third) of Torts, represents a more "expansive approach for

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[64] *Id.* at 11.

[65] *Riedel*, 968 A.2d at 20.

[66] *See* Restatement (Third) of Torts § 38 ("When a statute requires an actor to act for the protection of another, the court may rely upon that statute to decide that an affirmative duty exists and its scope.").

creating duties"[67] than has been recognized in Delaware, and it is not for this Court to determine whether the time has come, as plaintiffs contend, to embrace the broad view of the duty question embodied in the Restatement (Third) of Torts.

Without Restatement (Third) of Torts § 38, plaintiffs can point to no authority that would support their contention that the Court can employ a statutory violation as the sole basis for imposing a common law duty of care upon a tort defendant. Having carefully studied Delaware law, the Court is satisfied that it may not turn to a statutory violation to impose a common law duty of care that is otherwise unknown in the common law. Something more than a statutory violation is required.

ii. Restatement Second § 319

In addition to § 315, Delaware courts recognize that a duty to act may arise when "[o]ne who takes charge of a third person whom he knows or should know to be likely to cause bodily harm to others if not controlled is under a duty to exercise reasonable care to control the third person to prevent him from doing such harm."[68] Here again, the Complaint fails to plead any facts that would suggest the Medical

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[67] *Riedel,* 968 A.2d at 21.

[68] Restatement (Second) of Torts, § 319. *See Furek,* 594 A.2d at 519 (recognizing § 319 but holding that "fraternities, or their individual members, [do not] fall[] within the class of persons whose dangerous activities impose a special duty under § 319"); *Shively,* 2001 WL 209910, at *6 (applying § 319).

Society defendants had "take[n]charge" of Dr. Bradley after learning of his dangerous propensities such that they could be charged with a duty to control him under § 319. These facts might exist, but plaintiffs have not yet pled them in their Complaint.

iii. Restatement Second § 323

Plaintiffs also cite *Furek v. University of Delaware*[69] in support of their contention that a common law duty to act may be imposed upon the Medical Society defendants. With this citation, the plaintiffs may be on to something. In *Furek,* the Court considered the claim of a University of Delaware student who sought damages from the University and others for injuries he sustained during a fraternity hazing incident on campus. The court commenced its duty analysis by determining that there was no special relationship between either the University and the fraternity or the University and the injured student that would justify the imposition of a duty under § 315.[70] The court's duty inquiry did not stop there, however. The court went on to review evidence of the University's involvement in regulating hazing activities among its fraternities and ultimately concluded that the University owed a duty to

[69]594 A.2d 506 (Del. 1991).

[70]*Furek,* 594 A.2d at 517-18.

Furek under Restatement Second § 323,[71] which recognizes that "one who assumes direct responsibility for the safety of another through the rendering of services in the area of protection" will owe a duty to perform that responsibility reasonably.[72] The court determined that the University's knowledge of the dangers of hazing, its promulgation of policies to discipline students found to be involved in hazing, and its regular communication of these policies to the fraternities on campus and to the student body at large, combined to create "an assumed duty" to protect students (including Furek) from the dangerous hazing rituals practiced by fraternities chartered by the University.[73]

As noted in Comment a to § 323, the duty to act may be implicated by any undertaking to render services:

> This Section applies to ***any*** undertaking to render services to another which the defendant should recognize as necessary for the protection of the other's person or things. It applies whether the harm to the other ... results from the defendant's negligent conduct in the manner of performance of his undertaking, or from his failure to exercise

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[71]Restatement (Second) of Torts § 323 provides: "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm, or (b) the harm is suffered because of reliance of the other or the third person upon the undertaking."

[72]*Furek*, 594 A.2d at 520.

[73]*Id.*

> reasonable care to complete it or to protect the other when he discontinues it.[74]

And, as explained in *Furek,* the scope of the duty is not limited to particular, identified individuals; the duty recognized in § 323 can extend to all individuals subject to "the known dangers" of the conduct from which the defendant has undertaken an obligation to protect.[75]

At first glance, § 323 looks like a good fit here. The Medical Society defendants each were required to report professional misconduct or suspected child abuse under the circumstances set forth in the MPA and CAPA. One could view these statutory reporting obligations as an "undertaking" by the mandated reporters to perform the services (reporting) identified in the statute. But, there are at least two flaws in this construction of § 323. First, § 323 contemplates a voluntary undertaking that is either gratuitous or for consideration.[76] The performance of a statutory mandate alone cannot reasonably be characterized as "gratuitous." Second, the Complaint alleges no facts from which it reasonably can be inferred that the Medical Society defendants voluntarily assumed an undertaking, over and above the statutory

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[74]Restatement (Second) of Torts, § 323. cmt. a (emphasis supplied).

[75]*Furek*, 594 A.2d at 520 ("§ 323 provides a basis for the University's assumed obligation toward Furek, *and all students subjected to the known dangers of hazing* . . . .") (emphasis supplied).

[76]Restatement (Second) of Torts § 323 cmt. a.

reporting mandate, to perform any services on behalf of either these plaintiffs specifically or Delaware's medical patient population at large. These facts may exist, but they are not yet pled in the complaint.

According to the Medical Society defendants, even if the plaintiffs were able to plead facts of a voluntary undertaking of the kind recognized in § 323, their common law claims still would not be viable because the statutory reporting requirements do not allow for a private right of action. Stated differently, because the MPA and CAPA cannot give rise to a claim of negligence *per se* for failing to report Dr. Bradley as required by these statutes, the Court may not impose a common law duty to fulfill these same statutory mandates. The Court will address the negligence *per se* issue separately. With respect to the Medical Society defendants' contention that the Court's decision on the negligence *per se* question must control the Court's common law duty determination, the Court cannot agree.

In *Harden,* the court addressed whether a Delaware statute that required physicians to report epileptic patients to the division of motor vehicles could form the basis of a claim for negligence *per se* in cases where a physician violated the statute.[77] The court determined that a violation of the reporting statute could not be tendered

[77] *Harden*, 883 F.Supp at 969-70.

as negligence *per se.*[78] Nevertheless, the court found that the physician owed a common law duty to the plaintiffs to take reasonable measures to control his patient and to prevent her from driving if she was dangerous.[79] In so holding, the court recognized that the imposition of the common law duty comported with existing notions of duty as recognized in Delaware.[80]

In *Toll Bros., Inc. v. Considine,*[81] the court determined that violations of OSHA regulations could not give rise to negligence *per se* but could, under the circumstances, be presented to the jury as evidence of the defendant's violation of his common law duty by clarifying the applicable standard of care.[82] The court directed that plaintiff's claims proceed based on "common law negligence standards" even though there were apparent violations of OSHA.[83]

In *Haverford P'ship v. Stroot*,[84] the court considered whether a landlord's alleged violation of a landlord/tenant code could form the basis of both a common

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[78] *Id.* at 970.

[79] *Id.* at 972.

[80] *Id.* (citing *Naidu* and relying upon Restatement Second § 315).

[81] 706 A.2d 493 (Del. 1998).

[82] *Id.* at 498.

[83] *Id.*

[84] 772 A.2d 792 (Del. 2001).

law negligence claim and a negligence *per se* claim. As to the common law negligence claim, the court held that casting a claim as a "common law negligence claim" does not "prevent a plaintiff from relying on a statute as the source of defendant's duty."[85] Because the alleged statutory violations fit within an existing common law duty framework, the court allowed the common law claims to proceed on that basis.[86]

As discussed below, plaintiffs' negligence *per se* claims fail as a matter of law. This failure, however, does not *ipso jure* preclude the plaintiffs from pleading common law negligence claims if they are able to do so within a recognized common law framework.

3. Plaintiffs May Amend Their Complaint to State Common Negligence Claims Under Restatement Second §§ 319 and/or 323.

In this case, plaintiffs may be able to plead a common law claim of negligence against the Medical Society defendants, based upon §§ 319 and/or 323, that include violations of the MPA and CAPA as components of their factual predicates. As noted

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[85] *Id.* at 798.

[86] *Id.* It should be noted here that the court disagreed with the landlord's bald assertion that the landlord tenant code could not, under any circumstances, form the basis of a negligence *per se* claim. Ultimately, the court determined that it was not necessary to decide this question because the negligence *per se* claim was "duplicative" of the common law negligence claim. *Id.*

above, they have not yet done so. The Court has discerned nothing in Delaware law, however, that would prevent them from trying. As stated, common law negligence claims "remain unaffected" by arguably applicable statutes, even when such statutes cannot, as a matter of law, form the basis of negligence *per se*.[87]

Given the scant pleading in the plaintiffs' initial Complaint, the Court cannot say at this time that granting leave to amend would lead to a futile result.[88] Accordingly, based on the foregoing, the Court will dismiss plaintiffs' existing common law claims against the Medical Society defendants without prejudice, as good cause exists to support a finding that dismissal with prejudice would not be just under the circumstances, and will grant leave to amend the Complaint to plead facts that would state a common law claim of negligence under Restatement Second §§ 319 and/or 323.[89] Of course, the Medical Society defendants may renew their motion to test the sufficiency of the amended claims or to raise any other available legal defenses.

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[87] *Id.*

[88] *See E.I. duPont de Nemours & Co. v. Allstate Ins. Co.*, 2008 WL 555919 (Del. Super.) (discussing futility and noting that leave to amend should be granted if other elements of Rule 15 can be satisfied and if the amended complaint could survive a motion to dismiss).

[89] *See generally Braddock v. Zimmerman*, 906 A.2d 776 (Del. 2006)(discussing leave to amend after dismissal of a complaint).

B. Plaintiffs' Complaint Does Not State A Viable Claim of Negligence *Per Se*

Although their Complaint does not distinguish between common law and statutory duties, it appears that plaintiffs' showcase claims of negligence against the Medical Society defendants may well be their claims of negligence *per se.* As noted above, they point to two statutory provisions, one within the MPA and one within the CAPA, which they allege imposed a duty upon the Medical Society defendants to report Dr. Bradley's abuse of his patients to appropriate authorities.[90] First, plaintiffs cite to the mandatory reporting provision within the MPA which states, in pertinent part:

> (a) Any person may report to the Board, in writing, information that the reporting person reasonably believes indicates that a person certified and registered to practice medicine in this State is or may be guilty of unprofessional conduct . . . . The following ***have an affirmative duty to report*** such information to the Board in writing within 30 days of becoming aware of the information:
>
> (1) All persons certified to practice medicine under this chapter; [ ]
>
> (3) The Medical Society of Delaware.[91]

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[90]Compl. ¶¶ 18-22, 30-33.

[91]24 DEL. C. § 1731A (emphasis supplied).

As the plaintiffs correctly observe, this provision of the MPA imposed an "affirmative duty" upon Drs. Tavani and Marvel, as "persons certified to practice medicine under [the MPA]," and "the Medical Society of Delaware" to report to the Board "information that [they] reasonably believe[d] indicate[d] that [Dr. Bradley] [was] or may be guilty of unprofessional conduct."[92]

Next, plaintiffs cite to the mandatory reporting provision within the CAPA, which states, in pertinent part:

> Any person, agency, organization or entity who knows or in good faith suspects child abuse or neglect ***shall make a report*** in accordance with § 904 of this title [to CPS]. For purposes of this section, "person" shall include, but shall not be limited to, any physician . . . school employee, social worker . . . [or, as of June 30, 2010] the Medical Society of Delaware . . . .[93]

This provision is intended to further the purpose of the CAPA, as expressed in 16 DEL. C. § 901, "to ensure the best interest and safety of the child":

> It is the intent of the General Assembly that the primary purpose of the child welfare policy of this State shall be to ensure the best interest and safety of the child . . . by ***mandating that reports of such abuse or neglect be made to the appropriate authorities*** and by requiring the child protection system to seek and promote the safety of children who

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[92] *Id.*

[93] 16 DEL. C. § 903 (emphasis supplied).

are the subject of such reports of abuse or neglect . . . .[94]

Once again, as correctly observed by the plaintiffs, each of the Medical Society defendants was required to fulfill the purpose of the CAPA by reporting to CPS their knowledge or good faith suspicion that Dr. Bradley was abusing his pediatric patients.

Both the MPA and CAPA contain their own enforcement schemes. In the MPA, at 24 DEL. C. §1731(b)(22), the General Assembly provides that the Board may discipline a physician if it finds a "willful failure to report . . . as required by § 1731A." The Board may also impose a fine "not to exceed $10,000 for the first violation, and not to exceed $50,000 for any subsequent violation [of the reporting requirement]."[95] Although initially providing criminal sanctions for failing to abide by its mandatory reporting requirements, the CAPA now provides a series of graduated civil penalties for "knowing" violations.[96] For a first offense, the offender may be fined up to $10,000; for subsequent offenses, the offender may be fined up to $50,000.[97] The offender may also be required to pay for the costs of enforcement

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[94] 16 DEL. C. § 901 (emphasis supplied).

[95] 24 DEL. C. § 1731A(i).

[96] *See* 77 Del. Laws ch. 121, § 1.

[97] 16 DEL. C. § 914(a).

of the statute, including attorney's fees.[98]

According to the plaintiffs, both the MPA and CAPA create statutory duties of care, the breach of which will expose the violator to civil liability in tort. The Medical Society defendants counter that neither the MPA nor the CAPA give any indication that the General Assembly intended to create a private right of action through which aggrieved parties could seek redress for statutory breaches in Delaware's civil courts. They argue that this Court should be hesitant to interpret the public policy of this State as favoring a private right of action when physicians fail to perform their reporting duties under either the MPA or CAPA because, in Delaware, such public policy pronouncements are reserved exclusively for the General Assembly.

To address the parties' contentions, the Court will first consider whether plaintiffs' claims fit within Delaware's configuration of the negligence *per se* doctrine. The Court will then examine whether there is sufficient indication that the General Assembly intended to create a private right of action for violations of the MPA or CAPA such that the plaintiffs' claims of negligence *per se* should be permitted to proceed.

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[98] 16 DEL. C. § 914(b).

1. Negligence *Per Se*

"Negligence *per se* is a doctrine that developed at common law, although the term does not have a uniform meaning in the tort jurisprudence of most states."[99] The concept recognizes "that a legislative body may substitute its enactments for the general negligence standard of conduct required of a reasonable person."[100] Thus, "[w]hen a statute provides that under circumstances particular acts shall or shall not be done, it may be interpreted as fixing a standard of care for all members of the community, from which it is negligence to deviate."[101] In Delaware, "to establish that a defendant has been negligent *per se* a plaintiff must show (1) that the statute ... invoked by plaintiff embodies a 'standard of conduct designed to protect from injury or harm a class of persons of which the plaintiff is a member,' (2) that the defendant is a person required to conform to the minimum standards so imposed, and (3) that the defendant has in fact deviated from those standards."[102]

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[99] *Toll Bros., Inc.,* 706 A.2d at 495.

[100] *Id.*

[101] *Id.* (citations omitted).

[102] *Harden*, 883 F.Supp. at 969 (citations omitted). *See also* Restatement (Second) of Torts § 286, which is entitled "When Standard of Conduct Defined By Legislation or Regulation Will Be Adopted" and provides: "The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part (a) to protect a class of persons which includes the one whose interest is invaded, and (b) to protect the particular interest which is invaded, and (c) to protect that interest (continued...)

In this case, the statutory reporting obligations set forth in the MPA and CAPA are clear and unambiguous. The statutes charge certain identified reporters with the obligation to disclose information regarding a physician's professional misconduct (MPA) or suspected abuse of children (CAPA) to appropriate authorities. Arguably, the purpose of these statutes, as implied by the language of the MPA and expressed in § 901 of the CAPA, is to protect a "class of persons" (patients of Delaware physicians [MPA] and children [CAPA]) of which these plaintiffs are members from an identified harm (patient abuse and child abuse) that these plaintiffs allegedly have suffered. The statutes also arguably reflect an intent to impose responsibilities upon a class of persons or entities (mandatory statutory reporters) of which these defendants are members to take reasonable measures to protect patients and children.[103] On initial consideration, therefore, one might readily conclude that violations of the MPA and CAPA reporting statutes satisfy the elements of negligence *per se* in Delaware.

The question remains, however, whether the standard of conduct set forth in the MPA and CAPA should be imposed upon the Medical Society defendants as legal

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[102](...continued)
against the kind of harm which has resulted, and (d) to protect that interest against the particular hazard from which the harm results."

[103]*Id.*

duties, the breach of which will automatically (assuming causation) lead to civil liability.[104] In other words, the question presented is whether violations of the reporting standards set forth in the MPA and CAPA will give rise to a "private right of action" against the violator(s). Not surprisingly, plaintiffs answer "yes" and the Medical Society defendants answer "no."

2. The Private Right of Action

Neither the MPA nor the CAPA expressly state whether the General Assembly intended to create a private right of action for the benefit of those who allege that a defendant's violation of the statutes - - in this case the reporting provisions of the statutes - - has caused them compensable harm.[105] Thus, any private right of action

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[104] *See Kuczynski v. McLaughlin,* 835 A.2d 150, 153 (Del. Super. Ct. 2003) (noting the tendency of courts and practitioners to "blend the concept of duty and standard of conduct" and clarifying that duty triggers the "legal obligation"in the first instance while the standard of conduct (or standard of care) guides the fact finder in determining if the obligation was met).

[105] The General Assembly's silence in this regard is noteworthy given that our legislature has frequently expressed its intent to create, or not to create, a private cause of action in other statutory contexts. *See e.g.* 18 DEL. C. § 6856(3)(a) (recognizing a private "cause of action" against a physician who sexually abuses a child patient); 16 DEL C. § 4219(a) (recognizing a "private right of action" for consumers damaged by a violation of the health spa regulations); 24 DEL. C. § 2409(a) (recognizing a civil cause of action for "any person" damaged by a violation of the wiretap statute); 6 DEL. C. § 4909A (recognizing consumer's right to prosecute "common law or statutory actions" for violations of the auto repair fraud prevention statute); 6 DEL. C. § 2525 (recognizing a "private cause of action" for victim's of the consumer fraud act); 5 DEL. C. § 2745(b) (recognizing a "private cause of action" for those damaged by violation of check cashing statute and regulations); 6 DEL. C. § 2583(a) (recognizing a "cause of action to recover damages" for "elderly persons" damaged by violations of the prohibited trade practices act); 19 DEL. C. § 1113(a) (recognizing employee's right to pursue "a civil action" for violations of wage statute); 18 DEL. C. § 3339(h) (noting that a violation (continued...)

derived from these statutes must be implied by the Court. This, of course, poses significant difficulty for the Court because it must, by necessity, attempt to divine (with little-to-no objective evidence) the intent of the General Assembly in connection with a question, the answer to which, either way, will have significant consequences. As Dean Prosser notes in his hornbook,

> Many courts have . . . purported to find in the statute a supposed 'implied,' 'constructive,' or 'presumed' intent to provide for tort liability . . . . In the ordinary case inquiries into legislative intent are pure fiction, concocted for the purpose. The obvious conclusion must usually be that when the legislature said nothing about it, they either did not have the civil suit in mind at all, or deliberately omitted to provide for it.[106]

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[105](...continued)
of statute requiring insurers to supply certain health insurance "shall not be deemed to create a private cause of action."); 10 DEL. C. § 8145 (a) (recognizing right to "cause of action" based upon the sexual abuse of a minor by an adult); 14. DEL. C. § 4111(c) (denying "cause of action or claim for relief" against any school officer or employee for participation in or disclosures about students' educational records); 6 DEL. C. § 3405 (denying any person or any energy service company a "private right of action" for violations of contracts providing service and fuel for residential heating systems); 11 DEL. C. § 6518(h) (denying "any right, entitlement, or a private cause of action" for any public or private party against the Adult Correction Healthcare Review Committee); 18 DEL. C. § 535 (denying "private cause of action" for any violations of nondisclosure of nonpublic personal information). This list is by no means exhaustive or even representative of the numerous instances throughout the Delaware Code in which the General Assembly has expressly addressed the private right of action issue. *Cf. Arbaugh v. Bd. of Educ. County of Pendleton*, 591 S.E.2d 235, 239 n.3 (W.Va. 2003) (noting that "child abuse reporting statutes in some states expressly create a private right of action. These states include Arkansas, Colorado, Iowa, Michigan, Montana, New York and Rhode Island.").

[106]W. Page Keeton, PROSSER & KEETON ON TORTS § 36, at 220-21 (5th ed. 1984). *See also* Ezra R. Thayer, *Public Wrong and Private Action,* 27 Harv. L. Rev. 317, 331-32 (1914) ("[I]t is a dubious and dangerous thing for the courts to speculate as to unexpressed legislative intent and create private remedies by implication...."); *Brett v. Berkowitz*, 706 A.2d 509, 512 (Del. 1998) ("A (continued...)

In *Brett,* our Supreme Court considered whether a private right of action was created by two criminal statutes - - the offensive touching and sexual harassment statutes - - in the context of plaintiff's tort claims against a defendant for injuries suffered as a result of alleged sexual harassment.[107] The court noted that "[w]hen a statute does not expressly create or deny a private remedy," the court's task it to determine "whether or not the requisite legislative intent is implicit in the text, structure or purpose of the statute."[108] In this regard, the court noted that "the intent to create a private remedy may be inferred where a statute was obviously enacted for the protection of a designated class of individuals."[109] The court went on to hold that since the criminal statutes at issue were designed to protect the "public at large," and not "a designated class of individuals," it would not infer a legislative intent to allow for "civil redress for personal damages" as a result of proven violations of the

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[106](...continued)
statutory remedy will be available only if legislative intent to provide such a remedy is present. A statute does not grant a private right of action simply because it has been violated and a person harmed."); 57A AM. JUR. 2d *Negligence* § 723 (1989) ("Finding a statutory violation does not automatically lead to recovery of damages. A statute creates no liability to the person injured unless it discloses an intention, express or implied, that from disregard of the statutory command, a liability for resultant damage arises, which would not exist but for the statute.").

[107]*Brett,* 706 A.2d at 512.

[108]*Id.*

[109]*Id.*

criminal statutes.[110]

Applied here, *Brett* might suggest that at least the CAPA and perhaps the MPA create private rights of action for violations of their reporting mandates. With respect to the CAPA, one could read its provisions as intending to protect a "designated class of individuals" (*i.e.*, children) of which plaintiff, Jane Doe, is a member.[111] With respect to the MPA, it is more difficult to determine whether its provisions are intended to protect the public at large or a particular segment of the public (*i.e.*, present or future patients).[112] In any event, according to the Medical Society defendants, the Court must look beyond the scope of the statutory protections and focus on the significant public policy issues at stake here. Given the nature and extent of these issues, the Medical Society defendants contend that, in keeping with Delaware precedent, the Court must defer to the General Assembly to determine whether to recognize a private right of action against health care providers for failing to perform their statutory reporting functions. They point to a series of decisions

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[110]*Id.* at 512-13.

[111]*But see Doe v. Marion*, 645 S.E.2d 245, 248-49 (S.C. 2007) (holding that similar child abuse reporting statute was enacted "for the protection of the public and not for the protection of an individual's private right."); *C.B. v. Bobo,* 659 So.2d 98, 102 (Ala. 1995) (same).

[112]The Court observes, without deciding, that "patients" likely encompasses the "public at large" given that all members of the public at one point or another are consumers of health care and may well be the next patient of any particular health care provider.

from our Supreme Court addressing the viability of dram shop liability in Delaware in which the court recognized the significant public policy issues at hand and yielded to the General Assembly to recognize a private right of action against so-called "dram shops" for those injured when the dram shop negligently serves alcohol to impaired patrons.[113] The Court will discuss these decisions in turn.

In *Wright,* the plaintiff was injured after leaving a tavern when, as a pedestrian, he attempted to cross a busy highway and was struck by a car. He alleged that the tavern served him alcohol after he was clearly impaired. The court rejected the claim on several grounds. First, the court relied upon a series of decisions from other jurisdictions in which the courts held that "a patron who is injured as a result of his voluntary intoxication does not have a cause of action against the tavern operator at common law."[114] Next, the court noted that significant public policy considerations were implicated by the recognition of dram shop liability and that the General Assembly was best situated to "gather the empirical data and to make the fact finding necessary to determine what the public policy should be as to a Dram Shop law, and

[113] *See Wright v. Moffit,* 437 A.2d 554 (Del. 1981) (noting that a "dram shop is a place where spiritous liquors are sold by the dram or drink."); *Samson v. Smith*, 560 A.2d 1024 (Del. 1989); *Shea v. Matassa*, 918 A.2d 1090 (Del. 2007).

[114] *Wright,* 437 A.2d at 555.

the scope of any such law."[115] Finally, and most significantly here, the court rejected plaintiff's argument that existing statutes, including one which directed dram shops to "refuse to sell alcoholic liquors to any [intoxicated] individual," created a private right of action.[116] In this regard, the court concluded that plaintiff "was not within the protected class of persons to which the statutes were directed" because the statutes were intended to "protect the public in general . . . ."[117] To support this conclusion, the court was able to point to legislative history revealing, *inter alia*, that a "civil remedy provision" had been removed from one of the statutes at issue.[118]

In *Samson*, the court addressed the question arguably left unanswered by *Wright*: can a third party injured by an intoxicated dram shop patron bring a private action against the dram shop for negligence?[119] The court answered "no," reiterating its holding in *Wright* and emphasizing that "[t]he policy question regarding the propriety of judicial creation of a cause of action in an area subject to specific statutory regulation, is the same today as it was when *Wright* was decided eight years

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[115] *Id.* at 556.

[116] *Id.* at 557.

[117] *Id.*

[118] *Id.* at 558.

[119] *Samson*, 560 A.2d at 1025-26.

ago."[120] The court went on to observe that it was not suggesting dram shop liability was bad public policy or otherwise improper. Rather, it was simply recognizing that "the General Assembly is in a far better position than this Court to . . . determine what the public policy should be as to a Dram Shop law . . . ."[121]

In *Shea*, the court returned once again to consider the viability of dram shop liability in Delaware in the context of a tragic automobile accident in which a dram shop patron, driving with a .336 blood alcohol concentration, crossed a highway median and crashed his car head-on into a Delaware State Police cruiser killing the trooper/operator.[122] Sitting *en banc,* and with the benefit of *amicus* briefing, the court considered whether to reverse its earlier decisions in which it had rejected dram shop liability in Delaware. The court characterized its earlier decisions as "an unbroken line of cases" in which the court recognized that the "significant public policy considerations" implicated by dram shop liability are "best left to the General Assembly."[123] The court then reviewed failed efforts to pass dram shop liability legislation and the alternative legislative measures that had passed (*e.g.*, lowering "the

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[120]*Id.* at 1027.

[121]*Id.*

[122]*Shea*, 918 A.2d at 1092.

[123]*Id.* at 1093-94. *See also id*. at 1095 (noting judicial reluctance to interfere in areas where "the General Assembly has actively and expansively regulated").

blood alcohol legal limit" and creating administrative sanctions for servers who serve alcohol to intoxicated patrons) as support for the notion that the General Assembly did not intend to create dram shop liability in Delaware.[124]

After restating its rejection of dram shop liability, the court in *Shea* considered whether to adopt common law "social host liability" in light of plaintiff's claim that the intoxicated driver had consumed alcohol earlier in the day at a private reception. Once again, the court declined to extend the common law to recognize the claim, or to base it upon existing statutes, noting that the General Assembly was best positioned to provide a forum "where such controversial public policy issues might be resolved through societal consensus."[125]

The Medical Society defendants urge the Court to follow the rationales of *Wright, Samson* and *Shea*, and argue that the court should be all the more inclined to defer to the General Assembly when, as here, a plaintiff is advocating for the extension of a statutory duty to act in a nonfeasance context when the common law would impose no such duty.[126] They point to the detailed regulatory and enforcement

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[124] *Id.* at 1094-95.

[125] *Id.* at 1097 (noting that social host's inability to control the conduct of his guests after they leave the gathering presented the concern that imposing liability under such circumstances would "lead to significant financial burdens") (citation omitted).

[126] *See* 1 Dan B. Dobbs, *The Law of Torts* § 134, at 318 n.18 (2001) (noting courts' general (continued...)

provisions contained within both the MPA and CAPA to argue that the General Assembly has already expressed its preference for the manner in which violations of these statutes are to be addressed.[127] Moreover, they point to the fact that the General Assembly recently passed substantial revisions to both the MPA and CAPA, including their reporting provisions, and yet chose not to recognize a private right of action for violations of either Act.[128]

Although the built-in regulatory schemes of the MPA and CAPA are not dispositive of legislative intent,[129] in this case, when coupled with other considerations, they are compelling. At the outset of discerning legislative intent, the

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[126](...continued)
reluctance to recognize a statutory duty to "protect plaintiff from some third person" when the common law imposes no such duty). *See also Riedel,* 968 A.2d at 20-21 (in rejecting plaintiff's claim of nonfeasance, the court notes that the General Assembly decides matters of "social policy ... not the court[s]").

[127]*See, e.g.,* 24 DEL. C. §§ 1713, 1731(b), 1731A(i) (vesting in the Board authority to fine, suspend or revoke licensure and otherwise discipline offending physicians); 16 DEL. C. § 914 (providing for civil penalties for failing to discharge statutory reporting obligations).

[128]*See e.g.* 77 Del. Laws ch. 321, §§ 1, 2 (providing for Board discipline of offending physicians and increasing fines for violation of MPA's reporting statute); 77 Del. Laws ch. 320 § 6 (converting penalties for violation of the CAPA requirements from criminal to civil sanctions and increasing civil fines). *Accord Marquay v. Eno*, 662 A.2d 272, 278 (N.H. 1995) (refusing to find a private right of action in a mandatory child abuse reporting statute, the court noted that the penalty provisions of the statute had been amended since its enactment without any reference to a private right of action).

[129]*See* 57A AM. JUR. 2d *Negligence* § 700 (1989) ("The fact that a statute provides for a penalty for its violation does not preclude an action for an injury due to such violation, at least where the penalty is not payable to the person injured.").

Court cannot lose sight of what the plaintiffs seek to do here. At the risk of redundancy, plaintiffs seek to impose upon the Medical Society defendants a duty to act that otherwise does not exist, the violation of which will give rise to civil liability.[130] They do not allege that these defendants have taken affirmative action but have done so in a negligent manner that has caused them harm. Instead, they allege a failure to act. Although perhaps in a nuanced way, in the CAPA at least, the General Assembly appears to have appreciated the distinction. At § 908, the General Assembly provides that when a mandated reporter takes the affirmative step of making a report of child abuse, and does so in a manner that exhibits a lack of "good faith," that reporter is not immune from liability, "civil or criminal," for having made such a report.[131] In other words, the General Assembly has determined that malfeasance in the process of performing the statutorily mandated report may subject the reporter to "civil liability" in a "judicial proceeding."[132] No such provision, however, is made for nonfeasance, *i.e.*, a failure to report. For nonfeasance, in both the MPA and CAPA, only the statutory penalties are mentioned as sanctions.

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[130] *See Marquay,* 662 A.2d at 277 (holding that more careful scrutiny is required when a plaintiff is asking the court to recognize a claim under a statute that does not exist in the common law).

[131] 16 DEL. C. § 908(a).

[132] *Id.*

Moreover, it cannot go without saying that, like the provisions of the Alcoholic Beverage Control Act addressed in *Wright* and its progeny,[133] the reporting statutes in the MPA and CAPA do not offer any assurances that the General Assembly fully considered and addressed the public policy issues implicated by the recognition of a private right of action. For instance, on their face, both the MPA and CAPA require the reporter to exercise judgment before making the report - - in the MPA, the reporter must "reasonably believe" that his information "indicates that a [physician] ... may be guilty of unprofessional conduct;" in the CAPA, the reporter must "know or in good faith supect[] child abuse." Yet the statutes offer no direction to the courts (or the reporters) as to how these standards should be applied in the tort context. Will civil liability follow, for instance, if the physician does not report information acquired "through rumors, innuendo or second-hand reports?"[134] As the court noted in *Arbaugh*, "[t]he diverse backgrounds, professions, and occupations represented in the statutorily defined class of persons required to report make it all the more difficult to define what conduct is required in various conceivable situations."[135]

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[133] *Wright*, 437 A.2d at 557.

[134] *Arbaugh v. Bd. of Educ. County of Pendleton*, 591 S.E.2d 235, 240 (W.Va. 2003) (refusing to recognize a private right of action based on a statute that required certain classes of individuals to report suspected child abuse).

[135] *Id.* In this regard, it should be noted that there would be no principled basis upon which to "carve out" any of the other statutory reporters, including, under the CAPA, "nurses, school (continued...)

The Court also acknowledges the Medical Society defendants' point that the penalty provisions of both the MPA and CAPA confound the application of these statutory schemes as tort duties of care. The MPA punishes a "wilful failure to report to the Board when required by § 1731A(a)."[136] For its part, the CAPA punishes for "knowing violat[ions]" of the reporting requirements in § 903.[137] Both penalty statutes punish intentional misconduct, not negligent or even reckless misconduct. These penalty provisions suggest that a private right of action sounding in negligence was not intended. In any event, in the absence of clear statutory direction as to the extent to which these penalty provisions may limit or otherwise affect any civil claims that were intended to flow from violations of the reporting statutes, the Court cannot meaningfully frame the duty to which these defendants would be held in this tort action.

Given that what plaintiffs seek here is the "creat[ion] [of] a large and new field of tort liability beyond what existed at common law without clear legislative direction

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[135](...continued)
employees (including teachers), social workers, psychologists and medical examiners," from any holding that recognized a private right of action for statutory violations.

[136]24 *Del. C.* § 1731(b)(22).

[137]16 *Del. C.* § 914.

to do so,"[138] the Court must conclude that neither the MPA nor the CAPA create a private right of action for the benefit of those who allege to have been injured by a failure to report unprofessional physician conduct or known or suspected child abuse. This conclusion is consistent with the conclusion reached by the vast majority of jurisdictions that have considered the question.[139]

C. The Court Need Not and Cannot Address The Medical Society Defendants' Statutory Immunity Defense At This Stage of The Litigation

As their final argument, the Medical Society defendants contend that they are, by statute, immune from plaintiffs' claims, whether based in the common law or in the provisions of the MPA and CAPA. According to the Medical Society defendants, they were acting as medical peer reviewers at all times relevant to the claims raised in the Complaint and are entitled, therefore, to the statutory immunity set forth in the MPA. Specifically, they cite to 24 DEL. C. § 1768(a) which provides, in pertinent part:

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[138] *Freehauf v. School Bd. Of Seminole Cty.*, 623 So.2d 761, 764 (Fla. App., 5th Dist. 1993) (declining to find a private right of action in a child abuse reporting statute).

[139] *See* Veilleux, *Validity, construction, and application of state statute requiring doctor or other person to report child abuse,* 72 A.L.R.4th 782, § 11 (1989) (compiling cases); *Arbaugh*, 591 S.E.2d at 241 (noting that the majority of jurisdictions have found no private right of action); *Freehauf,* 623 So.2d at 764 (same); *Marquay*, 662 A.2d at 278 (same).

> The Board of Medical Practice and the Medical Society of Delaware, their members, and the members of any committees appointed by the Board or the Society . . . and members of other peer review committees or organizations whose function is the review of medical records, medical care, and physicians' work, with a view to the quality of care . . . are immune from claim, suit, liability, damages or any other recourse, civil or criminal, arising from any act, omission, proceeding or determination undertaken or performed ... so long as the person acted in good faith and without gross or wanton negligence in carrying out the responsibilities, and privileges of the offices conferred by law upon them . . . .

In response, plaintiffs contend that the Medical Society defendants "made individual determinations to ignore their duties to report" under the MPA and CAPA and that § 1768 does not "confer immunity on the Medical Society defendants for these individual determinations."[140] Plaintiffs also contend that conferring immunity upon these defendants would frustrate the purpose of the MPA generally, and § 1768 specifically, because immunity under the circumstances presented here would not improve the quality of medical care in Delaware.[141]

The Court declines to address the statutory immunity issue at this time for two equally conspicuous reasons. First, the Court has determined to dismiss the Complaint with leave to amend the common law claims. If plaintiffs are unable to

[140] Answering Br. at 15-16.

[141] *Id.*

plead a viable common law claim per the directions in this opinion, then there will be no need to address the immunity defense. Second, even if the Complaint as pled survived this motion for judgment on the pleadings, there would be no basis in the Complaint for the Court to determine whether the statutory immunity in § 1768 was available to the Medical Society defendants. As stated several times in this opinion, the Complaint says nothing of the context in which these defendants allegedly acquired the information that would have triggered their obligation to report under the MPA or CAPA. The Complaint simply alleges that they acquired the undisclosed information and that they had a duty to report it. No inference can be drawn from these allegations that the Medical Society defendants were performing a peer review function when plaintiffs allege they should have reported under the MPA or CAPA. Consequently, the Court cannot apply § 1768(a) to the facts as pled.

VI.

It is difficult to imagine a set of facts more disturbing than those alleged in plaintiffs' Complaint. If their allegations are proven, the Court and the community will be confronted with the unthinkable reality that a Delaware physician systematically abused hundreds of his pediatric patients while in his medical office -- an environment theretofore considered by most patients to be sheltered and staffed by society's most compassionate professionals. Needless to say, if these allegations

are proven with the requisite degree of competent proof, then our civil justice system can and should offer redress.

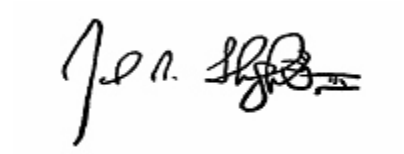
The allegations against the Medical Society defendants, while also disturbing, present a more complicated legal landscape. They invoke common law claims of nonfeasance that traditionally have been carefully circumscribed, and they introduce statutory claims that have never been tested in Delaware, calling upon the Court to tread in territory traditionally left for the General Assembly. The Court has identified one door through which the plaintiffs' common law claims might pass, although not on the facts pled in the Complaint *sub judice.* The Court will grant leave to amend the Complaint within twenty (20) days to plead facts that would implicate a duty owed by the Medical Society defendants to the plaintiffs under Restatement Second §§ 319 and/or 323 and also to plead claims against the Medical Society of Delaware Insurance Services with particularity. As to the statutory claims, the Court has determined that it can discern no legislative intent in either the MPA or CAPA to provide for a private right of action for those who claim injury as a result of a physician's failure to perform the statutory reporting functions as specified therein. No amendment to the Complaint can cure this problem.

The Court is mindful that it has ventured into some uncharted waters and that, according to the plaintiffs' Complaint, its holdings here could affect not only the

claims of hundreds of Dr. Bradley's patients, but also several putative and as yet unidentified physician defendants. The Court is also mindful that its order is interlocutory given that the claims against non-moving defendants will continue. Accordingly, the Court takes this opportunity to observe that it would certify this order for interlocutory appeal to the Supreme Court of Delaware if requested to do so by either party. The order meets the criteria of Delaware Supreme Court Rule 42 in that it has determined a substantial issue (the effect of the MPA and CAPA on plaintiffs' claims), established a legal right (the Medical Society defendants' right to be free of civil liability under the MPA and CAPA for failing to report as required therein), addressed an issue of first impression as per Supreme Court Rule 41(b)(i) (the private right of action under the MPA and/or CAPA) and construed the MPA and CAPA in a manner not yet settled by the Supreme Court (as per Supreme Court Rule 41(b)(iii)).

Based on the foregoing, the Medical Society defendants' motion for judgment on the pleadings is **GRANTED** and the Complaint as to them is dismissed **without prejudice.** The plaintiffs are given leave to file an amended complaint within twenty (20) days of this opinion and order or any order from the Supreme Court of Delaware on interlocutory appeal returning the case to this Court's jurisdiction (if amendment is deemed necessary or appropriate at that time).

IT IS SO ORDERED.



Judge Joseph R. Slights, III