STATE OF MICHIGAN

COURT OF APPEALS

ADRIANA LEE, Personal Representative of The Estate of RUFUS YOUNG, JR., Deceased,

Plaintiff-Appellant/Cross Appellee,

v

DETROIT MEDICAL CENTER and CHILDREN'S HOSPITAL,

Defendants-Appellees/Cross Appellants,

and

DR. AHM MAHBOBUL HUQ, DR. JAYSHREE RAO, and DR. VINCE TRUONG,

Defendants-Appellees,

and

LIFE SPAN CLINICAL SERVICES, KRISTIN RYESON DZAHRISTOS, TARA HALL, JENNIFER WRAYNO, BARBARA FRIEDEL, and FAY FLUELLEN,

Defendants.

FOR PUBLICATION
July 14, 2009

No. 282268
Wayne Circuit Court
LC No. 04-438626-NO

Advance Sheets Version

Before: Whitbeck, P.J., and O'Connell and Owens, JJ.

O'CONNELL, J. (*dissenting*).

I respectfully dissent. Although I appreciate the altruistic nature and concern for children's health and welfare that the majority displays in its opinion, the unintended consequences of the majority's opinion are untenable. The majority opinion creates a scenario that, in effect, requires doctors to report to the Department of Human Services (DHS) all injuries to any children in their care if there exists "reasonable cause to suspect abuse" according to an abstract, nonspecific standard, even if their medical judgment leads them to believe otherwise.

The majority strips doctors of the protections inherent in a medical-malpractice cause of action, which would hold a doctor to the standard of care in his profession when determining whether a "reasonable cause to suspect abuse" exists. By declaring that a doctor's failure to report suspected abuse sounds in ordinary negligence and not in medical malpractice, the majority essentially handicaps the doctors of this state, requiring them to report any circumstance in which a child in a doctor's care is discovered to have a bump or bruise that a layperson might find indicative of abuse, even if, upon examination, the doctor makes a medical determination that the injury is not a sign of abuse. When a doctor acting in his professional capacity, as has occurred in this case, has "reasonable cause to suspect child abuse," this suspicion necessarily arises from the doctor's professional *medical* determination that child abuse might have occurred. Accordingly, plaintiff's cause of action against Drs. Rao and Truong sounds in medical malpractice, not in negligence.[1]

The Role of Doctors in Our Society

(Finding abuse versus presuming abuse)

The majority opinion fails to take into account the obvious—that there exists a significant difference between the role of doctors in our society and the role of other professionals in society. Doctors are required to *find* objective evidence that abuse has occurred—that is their charge or role in our society. Doctors search for and find the cause and origin of medical issues in their patients. They cannot simply *presume* that abuse has occurred. Finding abuse requires medical judgment on the part of the doctor. Unlike in other professions, in the medical profession there exists a standard of care for each diagnosis and each patient. For a doctor to *presume* that abuse is the cause and origin of certain trauma would be a violation of the standard of care owed to that patient and to society in general.[2]

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[1] The majority essentially asserts that in the setting of a doctor's office or hospital emergency room, "reasonable cause to suspect abuse" does not require the use of medical judgment and, therefore, an action can be filed against the doctor for ordinary negligence. After the majority opinion in this case is released, I suspect that in order to avoid frivolous lawsuits for failure to report incidents under the statute, doctors will report all incidents involving a bump or bruise to the DHS, and the DHS will then be required to investigate all these claims.

[2] I concur with the majority opinion to the extent that if a patient walks into a doctor's office or an emergency room and reports that her boyfriend, stepfather, relative, or other person has been abusing a child, then, under those specific facts, the doctor is not required to find abuse and no medical judgment is involved.

The majority cites only two cases to support its position that "reasonable cause to suspect abuse" does not require medical judgment, *People v Cavaiani*, 172 Mich App 706, 715; 432 NW2d 409 (1988), and *Williams v Coleman*, 194 Mich App 606, 616-617; 488 NW2d 464 (1992). However, both cases are distinguishable from the present case. I note that *Cavaiani* is a criminal case, not a civil negligence case and therefore is of little assistance in the present case. More importantly, in *Cavaiani* the defendant, a psychologist and family therapist, was told by his

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Other professions, such as teachers and others named in the statute, upon observation of a student, or for that matter a report by a student, are entitled, without violating a standard of care, to presume abuse and are required to report that which they presume occurred. There exists no professional medical judgment involved in this process. Stated another way, one profession *presumes* abuse, the other is required to *find* objective evidence of abuse. In my opinion, to conflate the role of one profession within our society with that of another is simply a failure to comprehend the synergetic relationships of each part of our society. The majority implies that because doctors have immunity for all false reporting claims, they are relieved of the duty of *finding* objective evidence of abuse and therefore are simply held to a layperson's standard of *presuming* abuse and reporting it. I suspect that most medical schools and most doctors will be interested in this new presumed abuse standard. Fortunately, I am of the opinion that doctors must *find* objective evidence that abuse has occurred, and the act of *finding* abuse, in my opinion, involves medical judgment.

Discussion of the Case

Plaintiff's claims against Dr. Rao and Dr. Truong arise from their February 15, 2003, emergency room examinations of Rufus Young, Jr. Tara Hall, Rufus's foster mother, advised the doctors that Rufus had been exposed to drugs and alcohol before his birth and that his biological parents had physically abused him. Hall advised the doctors that Rufus had multiple problems, including a refusal to toilet train, an inability to gain weight, and a history of tremors and weight loss, and she advised them of an upcoming medical appointment to address Rufus's failure to thrive. Drs. Truong and Rao then examined Rufus and concluded, in their professional opinions, that there was no reason to suspect current abuse.

As the majority notes, there is no dispute in this case that there was a professional doctor-patient relationship between the doctors and Rufus, so this case turns on the medical judgment prong of the *Bryant* test, which is set forth in the majority opinion. *Bryant v Oakpointe Villa Nursing Ctr, Inc*, 471 Mich 411, 422; 684 NW2d 864 (2004). In this case, both Dr. Rao and Dr. Truong testified that they did not have reasonable cause to suspect abuse. Dr. Rao's original report noted that the diagnosis by Dr. Truong, a first-year resident at the time, was incorrect; Dr. Truong's report should have said that there were marks or scars on Rufus, not bruises. Dr. Rao also testified that if there had been bruises, she would have notified the social worker. Further, defendants noted that Rufus had a history of eczema and that a first-year resident could easily mistake eczema scars for marks caused by abuse.

In light of these facts, the doctors' failure to report illustrates my point: the doctors used their medical judgment to identify Rufus's symptoms and determine whether they were indicative of abuse. Drs. Rao and Truong made medical determinations on the basis of their different levels of expertise to determine whether the marks on Rufus's skin were scars or

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nine-year-old client that her father had fondled her breasts. As noted above, under this set of facts, the psychologist was not required to *find* objective evidence of abuse and no medical judgment is involved. In *Williams*, the defendants were social workers, not doctors, and therefore that case is of less assistance to the present case than *Cavaiani*.

bruises, and whether they were caused by eczema or abuse. These questions can only be answered after some application of medical knowledge or expertise—an individual cannot tell the difference between eczema and bruising, for example, without first learning how eczema and bruising form and how they appear on the skin during different stages of development and healing. Further, a first-year resident likely would not exhibit the same level of expertise as the attending physician in making this determination. Accordingly, a determination regarding whether marks on a child's body indicate abuse or are the result of some other medical condition constitutes a "medical judgment beyond the realm of common knowledge and experience," which is indicative of a cause of action for medical malpractice, not negligence.

The majority determines that because MCL 722.623 applies to several occupations outside the medical field, the cause of action against the individual doctors necessarily rests in ordinary negligence, not medical malpractice. Yet this is an overly simplistic reading of the statute. True, the statute mandates that teachers, child care providers, and others employed outside the medical field are also obligated to report child abuse if they have reasonable cause to suspect it. However, the majority fails to recognize that the capacity of an individual to have "reasonable cause to suspect child abuse" depends in large part on whether that individual is a physician, a counselor, a social worker, a teacher, or a member of one of the other listed professions.

For example, a teacher might conclude that a student who arrives in school with strange discolorations on his arms and face might have been bruised and, given this observation, she might have reasonable cause to believe that the student had been abused. Therefore, she would be required to report under the statute. Conversely, a doctor examining the discolorations on this child might determine that these same discolorations were not bruises, but flare-ups of eczema. Although a layperson might think that these discolorations were signs of abuse, the doctor, *through the exercise of his medical judgment*, would not have reasonable cause to believe that this child had been abused. Although the teacher's lack of medical expertise would render her suspicion of abuse or neglect reasonable, a doctor's exercise of his medical judgment could indicate that he did not have reasonable cause to suspect that a suspicious discoloration on the child's skin was indicative of abuse or neglect. When a physician acts in his professional capacity, his determination that he has reasonable cause to suspect child abuse or neglect necessarily arises from the exercise of his medical judgment; by extension, so does any failure to recognize such abuse or neglect[3]. This is not an ordinary negligence situation—a layperson

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[3] When addressing the question whether, in the setting of a hospital emergency room, "reasonable cause to suspect abuse" requires the use of medical judgment, the trial court answered in the affirmative, plaintiff's experts answered in the affirmative, and the individual defendants answered in the affirmative. Needless to say, I concur with the determination of defendants, plaintiff's experts, and the trial court.

In particular, I note that plaintiff's expert witnesses, Dr. Roy Antelyes and Dr. Robert Lerer, noted that in the setting of a hospital emergency room or a doctor's office, a doctor's medical judgment is essential to determine if there is a "reasonable suspicion of abuse." Dr. Antelyes testified as follows:

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Q. And how does the physician go about coming up with a suspicion of abuse?

A. Well, part of that has to do with your *education and experience*. Part of it has to do with the *historical data* that you have obtained from somebody who brought it to your attention. Part of it is your *physical examination and/or laboratory testing*. And I think I probably covered pretty much all of it. [Emphasis added.]

Dr. Robert Lerer testified:

Q. On February 15th, 2003, do you know if any of those bruises or marks on his body were fresh versus old?

A. No.

* * *

Q. Now every patient in the Children's Hospital emergency department that shows up with bruises, you don't automatically file a suspected child abuse form, do you?

A. No, no. I don't think so, and, you know, I've worked in the emergency room at various times in my career, although it's been more than fifteen years since I worked in the ER seeing patients, but the patients present to your office just like they do in the emergency department with bruises and so forth.

Not every child that has bruises has been abused. Children fall, sometimes children injure themselves in the course of play activities. Sometimes children, you know, fight and may be bruised in that particular fashion. So accidental injuries of any sort caused by whatever can produce bruises.

Q. How does the physician in the emergency department or in the office . . . determine whether or not the bruises are the type that should be reported to Protective Services?

A. First of all, *the history is very important.* If I have—and I'll give you some for instances to explain each point.

The history is very important. If you have a history of an event occurring and the bruise or bruises do not match the event, then you immediately become suspicious that you're not getting a true picture and, therefore, child abuse becomes prominent in your *differential diagnosis*, so that would be number one.

Number two, I think you tend to see what the social situation is like. Now, I have seen children bruised, indeed, I had one patient fatality where both parents

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cannot judge whether the doctor's actions were negligent in the way that he could judge the teacher's, because unlike the teacher, the doctor's determination whether abuse did or did not occur would arise from his understanding of the science behind the symptoms. An expert would be needed to explain how abuse could be recognized through a medical examination and whether a doctor's diagnosis or failure to recognize abuse comported with the standard of care. Therefore, any potential error in judgment on the part of a doctor in such a scenario sounds not in ordinary negligence, but in medical malpractice.

Although on the surface, the requirements of reporting suspected abuse under MCL 722.623 might appear to be identical regardless of the profession of the reporting individual, the process that each profession brings to the determination whether a reasonable cause to suspect that child abuse exists is significantly different. Conversely, the majority lays all its eggs in one basket: under the majority's theory, if a layperson can be sued for ordinary negligence for committing a certain act, then a doctor can be sued for ordinary negligence for committing the same act. This clearly defies the intent behind the medical malpractice cause of action, which establishes a process that is distinct from an ordinary negligence claim to bringing a cause of

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> were physicians, so I'm not implying that if you're in a low socioeconomic home, that you are more likely to be necessarily abused than if you come from a higher class family, but nevertheless, if you are in a chaotic home situation, if you have a single parent with a boyfriend in the home, then you become more suspicious in situations where you're thinking is this abuse or is this an accidental type of injury.
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> I think associated findings are also important, in my estimation. This child had one very important finding, and that is that from the time that he was placed in the foster home, he actually dropped weight.
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> *A. I don't think I can look at the pictures and exclude the possibility that some old eczema that is now healed has produced some hyperpigmented areas.*
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> *A. If the bruises have the appearance of being three months or older to the examining physician and some history is obtained by the examining physician that the biological family, known to be abusive or neglectful or both, did them and there's no further history elicited that the child currently is in an abusive foster home, then the physician might be justified under such circumstances as to not contact Protective Services under such a hypothetical.* [Emphasis added.]

This testimony indicates that a physician's determination of abuse is subjective, involving clinical findings and medical judgment. As such, it is beyond the common expertise of an ordinary person and requires medical testing to substantiate. Therefore, the cause of action is for medical malpractice, not ordinary negligence.

action against doctors for errors committed during the doctor-patient relationship, because such errors are often based on medical judgments beyond the realm of common knowledge and experience and require the introduction of expert testimony to ensure proper disposition of the claim.

In my opinion, this is clearly a medical malpractice cause of action because these doctors could not have determined whether Rufus's injuries were caused by abuse or something else unless they exercised their medical judgment. Therefore, they are entitled to defend themselves under the proper standard. Because plaintiff's claims of ordinary negligence against Drs. Rao and Truong should fail, her vicarious liability claims against the corporate defendants, which are premised on the ordinary negligence claims against the individual doctors, should fail as well.

The motion for summary disposition should have been granted. I would reverse and remand for proceedings consistent with this opinion.

/s/ Peter D. O'Connell