IN THE SUPREME COURT OF THE STATE OF OREGON

KERRY TOMLINSON and SCOTT TOMLINSON, individually, and KERRY TOMLINSON as guardian ad litem for her minor son Edward Tomlinson,
Plaintiffs-Appellants, Respondents on Review

v.

METROPOLITAN PEDIATRICS, LLC, an Oregon limited liability corporation; LEGACY CENTER, an Oregon non-profit Corporation, dba Legacy Emanuel Pediatric Development and Rehabilitation Clinic; and MARY K. WAGNER, M.D.,
Defendants-Respondents, Petitioners on Review

and

LEGACY EMANUEL HEALTH CENTER, an Oregon non-profit corporation, dba Legacy Emanuel Health Center, and SHARON D. BUTCHER, CPNP,
Defendants.

Multnomah County Circuit Court No. 1109-11971
Court of Appeals No. A151978
Supreme Court No. S063902

PLAINTIFFS' RESPONSE BRIEF ON THE MERITS

On Review of the Opinion of the Court of Appeals on December 30, 2016
by Haselton, Chief Judge, with Lagesen, Presiding Judge, and Schuman, Senior Judge
in an Appeal from the Judgment of the Multnomah County Circuit Court
The Honorable Jean Kerr Maurer, Judge

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Introduction

This is an action for negligence. Plaintiffs Kerry and Scott Tomlinson allege that the defendant health care providers breached the applicable standard of care by failing to diagnose their elder son developmental delay as being caused by a genetic abnormality that results in a debilitating, progressive and ultimately fatal neuromuscular disorder. Because defendants did not take the steps necessary to make a diagnosis, the Tomlinsons were not informed of the substantial risk (a 50-50 chance) that another male child would have the same disorder; before they knew the risk, they had another son (plaintiff Edward Tomlinson, hereafter who is also afflicted. Both the parents and seek compensation for the extraordinary economic liabilities and the noneconomic consequences of progressive disease.

The trial court dismissed the action, ruling that plaintiffs had no cognizable claims against defendants. The Court of Appeals reversed as to the parents, holding that defendants could indeed be liable to the parents for a foreseeable harm to them resulting from defendants' negligent failure to diagnose disorder, and that responsibility could properly include compensation for the parents' mental and emotional suffering from caring for a second disabled child. *Tomlinson v. Metropolitan Pediatrics, LLC,* 275

Or App 658 (2015). This court has granted defendants' petition to review those holdings. [1]

Questions Presented and Proposed Rules of Law

The First Question

Can a physician be liable for medical malpractice (here, negligent failure to diagnose a patient) to a third party, including a parent, who has never been a patient of the defendant physician?

Proposed Rule of Law

As plaintiffs pointed out in their response to defendants' Petition, this question is overly broad, and has an obvious answer: Yes, non-patients can and do, on a regular basis, sue medical providers for negligent treatment of a patient that foreseeably causes harm to non-patients. For instance, every wrongful death action, and every claim for loss of consortium, and every parent's claim for damage to a child (ORS 30.010), is brought by a non-patient and seeks compensation for the damages caused them by medical negligence. This case presents no basis for not applying the same rule where foreseeable harm occurs to family members when a pediatrician negligently fails to diagnose a child. Under Oregon law, physicians who fail to exercise

[1] The Court of Appeals affirmed as to claim; this court granted plaintiffs' petition to review that issue, and it is the subject of separate merits briefing.

reasonable care in the treatment of a patient are liable to those who are foreseeably harmed as a result.

The Second Question

Can a plaintiff sue for emotional distress damages caused by medical malpractice in the absence of a physical impact or a heightened and specific duty by the defendant to protect against the plaintiff's emotional harm?

Plaintiffs submit that the adjectives, "heightened and specific," are both inappropriate and unnecessary modifiers. *See Curtis v. MRI Imaging Services II*, 327 Or 9 (1998). Furthermore, the question as phrased has omitted an additional basis for the recovery of damages for a psychological or emotional injury. Plaintiffs suggest an alternative phrasing from their Opening Brief to the Court of Appeals:

Do parents have a viable claim for economic and noneconomic damages against the health care providers whose failure to exercise reasonable care to diagnose the cause of their child's developmental delay has foreseeably deprived them of the ability to make an informed choice not to conceive and bear a second child with the same catastrophic disability?

Proposed Rule of Law

A plaintiff, in the absence of a physical impact, may recover damages for an emotional injury caused by negligence (including medical negligence) if the applicable standard of care includes a duty to guard against a recognized risk of a particular adverse consequence, including mental and emotional suffering, or if the negligence has foreseeably infringed on a legal right, or legally protected interest, of the plaintiff. Under either theory, plaintiffs have alleged a viable claim.

Comments on Defendants' Statement of Facts

Beyond the first paragraph, defendants' Statement of Facts is long on argument. Defendants' Merits at 3-6. To the extent the court needs an additional factual background in addition to the brief summaries that appear in almost every brief, plaintiffs refer the court to the Court of Appeals opinion for a summary of plaintiffs' allegations, 275 Or App at 661-664, as well as a detailed history of the arguments in the trial court, 275 Or App at 664-67.

The Court of Appeals did not "materially reframe the issue" (Defs Merits at 5), when it asked if non-patients "are categorically foreclosed" from pursuing negligence claims against a physician; that's exactly what defendants have urged since day one in this lawsuit, and it is what they are

saying when they continue to assert that the lack of a physician-patient relationship between defendants and plaintiffs is fatal to their negligence claims.

Summary of Argument

Plaintiffs allege that defendants failed to exercise reasonable care in accordance with the standard of their profession when they treated but failed to diagnose the disorder causing the developmental delay of the child plaintiffs brought to them for diagnosis. Underlying the standard of care that requires physicians to do diagnostic testing in the circumstances is the prevention of foreseeable recurrences of the same genetic affliction. The harm caused these parents was foreseeable, and the basis for the standard which defendant violated. Plaintiffs have stated a claim for negligence.

Plaintiffs' negligence claims are premised on a violation of a standard of care that is designed to prevent the harm to families that occurred here. In addition, defendants' conduct infringed on plaintiffs' legally protected right to make an informed choice about childbearing, a right as firmly grounded outside the realm of negligence as others already acknowledged in negligence law. Plaintiffs have stated a valid claim for non-economic damages.

Argument

Throughout their opening brief, defendants insistently refer to plaintiffs' claims as ones for "medical malpractice," a drumbeat meant to underline their theme that negligence actions against physicians are in a special class of their own, with their own particular rules. Defendants even describe their treatment of a patient as "practice **toward**" a particular person, claiming that no defendant "has ever undertaken to engage in the practice of medicine in any respect **toward**" the parents. Defendants suggest that physicians practice medicine in a cocoon of their own construction: A person "whom a physician has not *'offered'* or *'undertaken'* to treat cannot assert that the physician has engaged in the practice of medicine *toward them*, let alone that the physician did so negligently." Defs Merits at 13 (emphasis added).

This attitude, which permeates defendants' approach to the legal questions presented in this case, finds little support in Oregon law. This court said sixty years ago that "[m]alpractice actions are based upon negligence and [] they do not differ in their essential elements from any other kind of action in which recovery is sought on charges that the alleged tortfeasor failed to exercise due care." *Ritter v. Sivils*, 206 Or 410, 413 (1956). *See also Ellis v. Springfield Women's Clinic*, 67 Or App 359, 362

(1984)(An instruction that suggests that a physician is not liable for a "good faith" error in judgment allows the jury "to consider the motivations of the defendants" in determining whether they were negligent, and "such a consideration has no place in an action for ordinary negligence.").

The Court of Appeals' recognition of the validity of the Tomlinsons' claims is consistent with, and indeed required by, Oregon law. Defendants' claims that recognition of the Tomlinsons' claim "implicitly overrule[s] extensive precedent," "strike[s] down statutes," will "dramatically affect the day-to-day practice of medicine," and "revolutionize[s] medical malpractice law in Oregon" are exercises in bombast, and are based on their own misconstruction of Oregon law.

I. There was a physician-patient relationship that gave rise to defendants' duty to exercise reasonable care – the care required by their profession – to avoid foreseeable harm.

In their opening brief in the Court of Appeals, plaintiffs began their argument with a fairly lengthy discussion of Oregon law supporting the proposition that the physician-patient relationship with gave rise to defendants' obligation to exercise reasonable care, and as described in *Fazzolari v. Portland School Dist. No. 1J*, 303 Or 1 (1987), foreseeability defines the scope of defendants' responsibility for its breach. Plaintiffs'

Opening Brief page 11-23. Plaintiffs went on to discuss cases from other jurisdictions holding that

> a physician's duty may extend beyond the interests of a patient to members of the immediate family of the patient who may be adversely affected by a breach of that duty. *Schroeder v. Perkel*, 432 A2d 834, 838 (NJ 1981), quoted in Plaintiffs' Opening Brief at 24.

See also Plaintiffs' Reply Brief at 1-9. Plaintiffs will not repeat that briefing and simply notes that it is consistent with the Court of Appeals' view of Oregon law summarized in its opinion. 275 Or App at 671-674.

Plaintiffs make the following responses to defendants' latest briefing on this issue.

Defendants overstate the significance of Mead.

Defendants assert here (Defs Merits at 10, 16) as they did to the Court of Appeals (Resp Br at 10-11), that *Mead v. Legacy Health System*, 352 Or 267 (2012) determines the issue in their favor. The court in *Mead* stated that "a physician-patient relationship is a necessary predicate to stating a medical malpractice claim," *Id.* at 277, and then went on to discuss at length the analytical process necessary to determine whether there is an "implied" physician-patient relationship between a patient in a medical facility and an on-call specialist who never sees the patient. *Id.* at 277-284. Ultimately, it

was a question of fact for a jury to determine whether an implied relationship existed. *Id.* at 284.

But *Mead* never says that where the "necessary predicate" of a physician-patient relationship exists, a violation of the standard of care that causes foreseeable harm to third parties is not actionable. And that's what the Court of Appeals points out in its opinion in this case, when it observes that *Mead* did not hold that a non-patient is "categorically precluded from stating a negligence claim against a physician where the professional standard of care requires the physician to exercise care on behalf of non-patients." 275 Or App at 673. Defendants simply make too much of statements in *Mead,* and in other cases, that are phrased consistent with the facts in the particular case. When the plaintiff is the patient, it is not too surprising that a reference to a physician-patient relationship is phrased as a relationship between plaintiff and defendant.

Plaintiffs in this case allege negligence in the context of a physician-patient relationship with a violation of the standard of care that required defendants to take the steps necessary to diagnose the cause of developmental delay. That breach caused foreseeable harm to the Tomlinson family, and the foreseeability of precisely that harm was a major

reason underlying the standard of care that defendants violated. *Mead* is not inconsistent with the Court of Appeals holding.

Defendants misrepresent what the Court of Appeals says.

Defendants contend (Defs Merits at 5) that the Court of Appeals "materially reframed" the issue when it stated that the question was:

> [W]hether non-patients who allege that they were foreseeably harmed as a result of a physician's breach of a standard of care are categorically foreclosed from asserting a negligence claim against the physician. 275 Or App at 671.

That appears to be exactly the question raised by defendants' motion and argued in both courts below.

Defendants then fault the Court of Appeals for "erroneously concluding that a 'professional standard of care owed to a patient *requires the physician to exercise care on behalf of non-patients,*'" citing 275 Or App at 672 and adding the italics. Defs Merits at 18. The quote is inaccurate; the sentence it quotes from the opinion refers to a "professional standard of care owed to a patient **that** requires" care on behalf of non-patients, and defendants seem to have misplaced the bold-faced word. Even more significantly, the phrase is not the court's "conclusion," but a summary of *defendants'* contentions with which the trial court had agreed when it ruled in their favor. 275 Or App at 672. Thus the fact that defendants go on to

complain that the Court of Appeals "provided no citation in support of this novel and sweeping theory," Defs Merits at 18, is, at the very least, somewhat ironic.

Defendants mischaracterize the cases on which the Court of Appeals relies.

The Court of Appeals found analogous precedent in its decision in *Zavalas v. Dept. of Corrections,* 124 Or App 166 (1993), *rev den* 319 Or 150 (1994), where a physician's negligence in prescribing medication to a patient who historically abused drugs resulted in an automobile accident. Defendants spend a fair amount of time arguing that the case is irrelevant and that the claims made in it had no relationship to medical negligence, even attaching a brief from the case as an appendix in an attempt to prove that point. *See, e.g.,* Defs Merits at 24-25 and Appendix A. The Court of Appeals in *Zavalas* thought otherwise, and said so clearly: it "reject[ed] defendant's position that under no circumstances can a physician ever be liable to a non-patient third party." 124 Or App at 173.

Defendants similarly mischaracterize *Docken v. Ciba-Geigy,* 86 Or App 277, *rev den* 304 Or 405 (1987), as a product liability action, which it undeniably was as far as the manufacturer was concerned. Defs Merits at 26). The court in *Docken* eliminated the product liability against the

physician because he had not sold the drug; but as to a claim of *medical negligence by the physician*, it was a jury question as to whether the harm to another family member was foreseeable.

In a footnote in its opinion in this case, the Court of Appeals took issue with defendants' attempts to "distinguish" the cases on which it relied, and pointed out: "[B]oth involved negligence claims alleging that a physician's breach of the standard of care in the context of a physician-patient relationship foreseeably caused harm to third persons." 275 Or App at 675, fn 8. That observation has not prevented defendants from reiterating their error.

There are other examples. Defendants urge that the Court of Appeals opinion in *Spiess v. Johnson*, 89 Or App 289, *aff'd by an equally divided court*, 307 Or 242 (1988) has relevance to this case, because the plaintiff in *Spiess* had sued his wife's psychiatrist for engaging in a sexual relationship during the course of her treatment, and the court rejected the claim. Defs Merits at 16-17. Defendants do not disclose that a major rationale for the decision rejecting the claim was that the allegations of negligence were indistinguishable from the legislatively-abolished tort of alienation of affections. *See* 275 Or App at 673, fn 6 (pointing out this basis for the court's decision in *Spiess*).

Defendants even mis-state the issue presented in *Cain v. Rijken*, 300 Or 706 (1985), which according to defendants found that the "state's Psychiatric Security Review Board could be liable for breach of its *statutory* duty under ORS Chapter 161 to control the conduct of its patient to prevent physical harm to others." Defs Merits at 26 (emphasis in text). That is not correct. *Cain* also involved a claim against Providence Health Center for negligently supervising Rijkin, a psychiatric patient who had been released by the PSRB to its day treatment program; as a result the patient caused an automobile accident that killed plaintiff's decedent. The court concluded that a statute that gave Providence the authority to take the patient into custody if he posed a substantial danger imposed on Providence the obligation to supervise the patient for the protection of the public. *Id* at 718-19. The question then became one of foreseeability -- whether Providence should have foreseen that Rijken posed a substantial risk of the kind of harm suffered by Cain – and that question was for the jury. *Id.* at 719-21.

Defendants persist in a basic misunderstanding of the interaction between a "special relationship" and foreseeability.

Defendants are adamant that "foreseeability" is irrelevant to the question presented in this case. They argued to the Court of Appeals that *Fazzolari's* "facts-driven foreseeability analysis" did not apply because it "conflate[s] ordinary negligence with medical negligence claims, which are based on a physician's standard of care" in treating a patient. Defs Br at 11. Now they concede, for the first time, that "foreseeability" may "play a role," but only regarding the "scope" of the duties owed, and not the existence of a special relationship. Defs Merits at 29-30. They continue to assert that the law requires a "special relationship" between defendants and

parents that did not exist, and foreseeability is therefore irrelevant. And that assertion is based on language from *Mead,* and *Sullenger v. Setco Northwest, Inc.*, 74 Or App 345 (1985), in both of which the question was whether there was any relationship, with any patient, that obligated the defendants to exercise care.

In *Oregon Steel Mills, Inc., v. Coopers & Lybrand,* 336 Or 329 (2004), a case defendants cite without acknowledging its significance (Defs Merits at 29), this court was clear:

> Even when a special relationship is the basis for the duty of care owed by one person to another, this court has held that,

> if the special relationship (or status or standard of conduct) does not prescribe a particular scope of duty, then "common law principles of reasonable care and foreseeability of harm are relevant." 336 Or at 342 (quoting *Cain v. Rijken*, 300 Or at 717), quoted with approval in *Fazzolari*, 303 Or at 16-17.

The court went on to say: "[U]nder *Fazzolari*, *Cain*, and *Buchler*,[2] when a plaintiff alleges a special relationship as the basis for the defendant's duty, the scope of that duty may be defined or limited by common-law principles such as foreseeability." 336 Or at 342. In all three of those cases, there was indeed a "special relationship" that obligated the defendant to exercise care, and the scope of that obligation was measured by foreseeability. And in both *Cain* and *Buchler*, the question was whether the harm to third parties, who were not themselves in the special relationship that gave rise to the obligation to exercise reasonable care, was foreseeable.

The Court of Appeals reached the right result.

Plaintiff has consistently pointed out (*see* Pl Open Br at 4, fn 1) that prevention of recurrence of Duchenne muscular dystrophy is dependent on an early diagnosis in children afflicted with it. is not a party to this lawsuit: he suffered no substantial harm from the delay in diagnosis, because there is no treatment. The reason the standard of care requires diagnostic

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[2] *Buchler v. State of Oregon*, 316 Or 499 (1993), discussed in Pl Open Br at 17.

testing of children who show developmental delay – the standard of care that plaintiffs allege defendants violated – is for the information it provides to the patient's family and, as in this case, to prevent the birth of other children suffering from the same affliction. In fact, the only treatment of the disease is prevention.

Defendants have never said that the injury to the Tomlinsons wasn't a foreseeable result of a failure to diagnose. They certainly have never suggested that they had no obligation to reach a diagnosis. They argue that it does not matter, because the parents weren't the patient. Do they have no obligation to communicate with parents because they are not the patient?

Defendants seem to believe that a pediatrician treats children in a vacuum – and that the parent who hires them and requests and authorizes the treatment doesn't exist. Defendants assert that it is "patently unreasonable for parents to expect a pediatrician's advice on their own personal issues" (Defs Merits at 20); plaintiffs suggest that it is equally unreasonable for pediatricians to pretend that they are not accustomed to diagnosing genetic causes of the problems presented by the children they treat, and are not aware of the standard of care that requires them to inform the parents of this diagnosis. Defendants contend that a focus on foreseeability will "read out the requirement of a 'special relationship,'" and subject physicians "to

heightened standards to the general public," which no one is suggesting. *Id.* at 30. They accuse the parents of seeking "gratuitous reproductive counseling," Defs Merits at 33, when all they needed to hear from defendants was the diagnosis that defendants should have made.

Plaintiffs' claims are premised on a violation of the standard of care that defendants were required to meet in their treatment of who was certainly their patient; the foreseeability of the risk of the harm that occurred – the birth of another child with an untreatable, progressive and fatal disorder -- underlies the very standard of care that plaintiffs allege defendants breached. The Court of Appeals was correct in concluding that plaintiffs have a viable negligence claim against defendants.

II. Plaintiffs have stated valid claims for noneconomic damages.

Plaintiffs allege that as a result of defendants' negligence they have "suffered and will continue to suffer extraordinary physical demands in caring for" and "increased susceptibility to physical injury" as a result of those demands, as well as "severe emotional distress." Open Br ER 6 (Amended Complaint ¶¶ 14, 15). The Court of Appeals acknowledged that the Tomlinsons "must engage in physical activity" to care for but found that was not a physical "impact" sufficient to support a claim for emotional distress. 275 Or at 680. Plaintiffs don't agree with that

assessment, but acknowledge that their major noneconomic harm is the emotional injury.

Plaintiffs have consistently argued that those emotional damages are recoverable under Oregon law, because defendants' negligent care invaded their right to make an informed choice not to have another child. Plaintiffs contended that an infringement of a legally protected interest in making an informed reproductive choice is as sufficient a basis for the recovery of emotional distress damages as conduct that infringes on the right to privacy (*Hinish v. Meier & Frank Co.*, 166 Or 482 (1941)), or the right to the custody of one's child (*McEvoy v. Helikson*, 277 Or 781 (1977)), or the right to the use and enjoyment of real property (*Edwards v. Talent Irrigation Dist.* 280 or 307 (1977)), or the right to control disposition of a family member's remains (*Hovis v. Burns*, 243 Or 607 (1966)).

The Court of Appeals agreed that plaintiffs alleged an infringement of their "legally protected interest" in making informed reproductive choices, therefore entitling them to recover damages for "purely psychic injury." 275 Or App at 680.

In the Court of Appeals, the defendants never addressed plaintiffs' arguments regarding an infringement of a legally protected interest.

In their answering brief in the Court of Appeals, defendants took issue with plaintiffs' arguments on essentially three grounds: (1) that case law demonstrated "there can be no recovery in negligence for emotional distress absent physical injury" (Resp Br at 40); (2) that there was no recovery under Oregon law for "lost opportunity" (*Id.*); and (3) that none of the cases plaintiffs cited were medical negligence cases, and therefore were inapposite.[3] Resp Br at 41. The first point is a mis-statement, the second is an irrelevancy, and the third simply assumes that the rule is no more general than the context in which it was raised. Defendants provided no other rationale for refusing to consider an infringement of plaintiffs' interest in making an informed reproductive choice a sufficient basis for an award of damages for psychic injury.

[3] Plaintiffs relied on *McEvoy v. Helikson,* 277 Or 781, 532 P2d 540 (1977), where the court held that plaintiff could claim emotional distress damages from his former wife's attorney for conduct that interfered with his legally recognized right (established by a court order) to custody of his child. Defendants dismissed it because it did not involve medical negligence, but also stated that its holding was superseded by *Moore v. Willis,* 307 Or 254 (1988). That is simply inaccurate.

Defendants now contend, for the first time, that an infringement of a "legally protected interest" cannot be a basis for recovering emotional distress damages from a physician.

In their ongoing search for a basis to make unique rules for medical practitioners, defendants now contend that a recognized basis for the recovery of emotional distress damages is not available at all in medical negligence actions, basing that assessment on two opinions of this court.

In *Curtis v. MRI Imaging Services*, 327 Or 9 (1998), plaintiff suffered a severe claustrophobic reaction during an MRI procedure, and sought damages for his psychological and emotional injuries. The plaintiff argued that he had a legally protected interest that arose out of the physician-patient relationship. *Id.* at 12. The court held that "medical professionals do not have a "general duty" to avoid any foreseeable emotional harm that might occur, **but**

> where the standard of care in a particular medical profession recognizes the possibility of adverse psychological reactions or consequences as a medical concern and dictates that certain precautions be taken to avoid or minimize it, the law will not insulate persons in that profession from liability if they fail in those duties, thereby causing the contemplated harm. *Id.* at 16.

Defendants repeatedly characterize this as "a heightened duty," Defs Merits at 39, and courts sometimes do as well. *See* 275 Or at 683. It is not. It is

simply a duty to exercise reasonable care – to comply with the standard of care – to avoid a particular and foreseeable emotional harm

In *Rathgeber v. James Hemenway, Inc.*, 335 Or 404 (2003), plaintiffs brought an action against their real estate agency for emotional distress damages resulting from the purchase of property with defects that defendants allegedly should have discovered before the sale was complete. Plaintiffs argued that defendants had infringed on their legally protected interests created by the statutes that govern real estate agencies. *Id.* at 415. The court found that "the proper analytical framework" was *Curtis*, where it had rejected an argument for a legally protected interest that would have resulted in doctors having a "general duty to guard against emotional harm." The plaintiffs argument for a legally protected interest arising from the governing statutes would have had the result the court avoided in *Curtis*: a general duty to guard against emotional harm in all instances. The court therefore held that plaintiffs needed to allege a standard of care that required precautions to avoid or minimize emotional distress, and plaintiffs had not done so.

Curtis and *Rathgeber* do not stand for the proposition that an infringement of a legally protected interest can never be relevant to determine the viability of an emotional distress claim against a physician or

against a real estate agent. Both cases rejected the argument that a legally protected interest in being free from emotional distress arises, *ipso facto*, from the relationship in question – between the doctor and the patient, or between the real estate agent and the client – and therefore makes emotional distress damages available for any claim, without any legally protected interest apart from the usual elements of the negligence claim.

In contrast, plaintiffs here assert a legally protected interest in reproductive choice, an interest that exists apart from the elements of a negligence claim. Recognition of such an interest does not have the result that concerned the court in both *Curtis* and *Rathgeber*; it does not mean that emotional distress damages will be available in every medical negligence claim despite the absence of physical impact.

Plaintiffs also point this out: *Curtis* involved a piece of medical machinery known to cause claustrophobic reactions. This case involves a need for early diagnosis to prevent the trauma of bearing yet another child doomed to suffer and die from Duchenne muscular dystrophy. In both cases, the foreseeability of the harm is reflected in the standard of care. As plaintiffs have already mentioned, an early diagnosis of Duchenne muscular dystrophy makes no material difference to the child; the standard of care requires the test in order to prevent what happened here. The standard of

care recognizes the substantial risk of another child with Duchenne "and dictates that certain precautions be taken to avoid or minimize it" (*Curtis*, 327 Or at 16, quoted above), precisely because it also recognizes, just as the law does, the parents' legally protected interest in reproductive choice.

The Court of Appeals reached the right result.

The Court of Appeals summarized as follows the case law regarding "legally protected interests, as follows:

> Oregon courts have recognized "legally protected interests" arising from a variety of sources: (1) interests recognized by common law; (2) interests arising from statutes; (3) interests arising from court orders; and (4) interests arising from special relationships. 275 Or App at 681 (citations omitted).

This list may, in fact, be too short. Plaintiffs have attached in the Appendix to this brief portions of an *Amicus Curiae* brief submitted by the Oregon Trial Lawyers Association in *Philibert v. Kluser*, Supreme Court No. S063738; addressing a similar issue – whether children who are in the zone of danger but suffer no physical impact when their younger brother was killed in an intersection can recover for an emotional injury – the author of that brief has provided an extremely thorough summary of Oregon law that may be of assistance to the court in this case as well. What is clear is that the category of "legally protected interests" is certainly broad enough to

include a right to hear from a physician a critical diagnosis of one child that directly affects the decision whether or not to have another.

The Court of Appeals said:

> [T]here can be little doubt that informing parents of their child's genetic condition so that they can make informed reproductive decisions is an obligation imposed to avoid the severe emotional distress that is the direct consequence of its infringement. 275 Or App at 686.

Defendants criticize this statement for lack of "citation, authority, or explanation," accusing the Court of Appeals of "ignor[ing] this Court's precedent" to make "its own policy determination." Def Merits at 44.

In the first place, the Court of Appeals was discussing in general terms whether and why parents' legally protected interest is sufficiently important to require protection, and in the second place the court turned immediately to another court (the New Jersey court in *Berman v. Allan,* 404 A2d 8, 16 (NJ 1979)) for an explanation of the "nature of the infringement of that interest:" the psychic injury that the parents suffer. Defendants then state that the court's comment "presumes" by its terms "that defendants had genetic information that they failed to share with the parents," and complain that "those are not the facts of this case." But plaintiffs' allegations of negligence make clear that defendants *should* have had that genetic

information to share and didn't. Defendants' criticisms of the Court of Appeals decision are without merit.

Conclusion

The Court of Appeals reached the right result. The physicians who "undertook" – at the request of the parents – to diagnose developmental delay did not exercise reasonable care to do so, and therefore failed to provide information to the parents that was critical to their decision to have another child. Both the economic and noneconomic harm to these parents was foreseeable, and the foreseeability of that harm was the primary reason the standard of care required defendants to take the steps they did not take. Plaintiffs have stated a claim for negligence.

This court should affirm the Court of Appeals. The judgment of the trial court should be reversed, and the case remanded for trial.

Respectfully submitted,

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