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 EMANUEL HOSPITAL & HEALTH CENTER, dba Legacy Emanuel Pediatric Development and Rehabilitation Clinic; and MARY K. WAGNER, M.D.,
Defendants-Respondents, Petitioners on Review,

and

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

Multnomah County Circuit Court No. 110911971
Court of Appeals No. A151978
Supreme Court No. S063902

PETITIONERS METROPOLITAN PEDIATRICS, LLC, LEGACY EMANUAL HOSPITAL & HEALTH CENTER, AND MARY K. WAGNER, M.D.'S JOINT REPLY BRIEF ON THE MERITS

Review of the Court of Appeals' Decision on Appeal from the Judgment of the Multnomah County Circuit Court
Honorable Jean Kerr Maurer, Judge

Date of Decision:	December 30, 2015
Author of Opinion:	Haselton, C.J.
Joining in Opinion:	Lagesen, P.J., and Schuman, J.

[Counsel Information on Next Page]

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William A. Gaylord, OSB No. 731043
Linda K. Eyerman, OSB No. 761306
Gaylord Eyerman Bradley, PC
1400 SW Montgomery Street
Portland, OR 97201
Telephone: 503-222-3526
bill@gaylordeyerman.com

Craig A. Nichols, OSB No. 830700
Nichols & Associates
4614 SW Kelly Avenue, Suite 200
Portland, OR 97239
Telephone: 503-224-3018
craig@craignicholslaw.com

Kathryn H. Clarke
P.O. Box 11960
Portland, OR 97211
Telephone: 503-460-2870
Kathrynclarke@mac.com

Attorneys for Plaintiffs-Appellants, Respondents on Review

Michael J. Estok, OSB No. 090748
Paul Silver, OSB No. 783791
Alice Newlin, OSB No. 084314
Lindsay Hart, LLP
1300 SW 5th Avenue, Suite 3400
Portland, OR 97201-5640
Telephone: 503 226-7677
mestok@lindsayhart.com

Attorneys for Defendants-Respondents, Petitioners on Review Metropolitan Pediatrics, LLC, and Mary K. Wagner, MD

Lindsey H. Hughes, OSB No. 833857
Robert M. Keating, OSB No. 731620
Hillary A. Taylor, OSB No. 084909
Keating Jones Hughes, P.C.
One SW Columbia Street, Suite 800
Portland, OR 97258
Telephone: 503-222-9955
lhughes@keatingjones.com
htaylor@keatingjones.com

Attorneys for Defendants-Respondents, Petitioners on Review Legacy Emanuel Hospital & Health Center

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PETITIONERS METROPOLITAN PEDIATRICS, LEGACY, AND DR. WAGNER'S JOINT REPLY BRIEF ON THE MERITS

INTRODUCTION

In their response, plaintiffs avoid controlling authority and common sense in an attempt to justify a novel tort claim that defies precedent. Plaintiffs also downplay the drastic and negative effects that the opinion below would have on the practice of medicine. Merely stating that the impact is insignificant does not make it so. Rather, the trial court correctly dismissed the plaintiffs' claims, and defendants ask this Court to reach the same conclusion.

ARGUMENT IN REPLY

I. A Physician Cannot Be Sued for Medical Malpractice by Non-Patients.

In their response, plaintiffs ignore and do not address much of the legal authority and discussion in defendants' opening brief on the nature of malpractice claims and the scope of the practice of medicine in Oregon. Instead, plaintiffs promote their claims by taking self-contradictory positions, arguing, for example, (i) that this is a case of ordinary common-law "negligence" while acknowledging it is based on "health care providers breach[ing] the applicable standard of care" (Pls' Brf at 1), or (ii) that the *Fazzolari* foreseeability standard is the basis for liability to the parents (*Id.* at 15) while admitting it was the "special relationship" between defendants and their patient Manny "that gave rise to defendants' duty to exercise reasonable

care" in the first place (*Id.* at 7).

Defendants respond to specific arguments raised by plaintiffs:

A. Medical Malpractice Is a Distinct Type of Negligence.

Plaintiffs seek to avoid the significant legal authority against their claims by re-styling this case as simply "negligence", and suggesting there is no distinction whatsoever between medical malpractice claims and ordinary common-law negligence claims. *See* Pls' Brf at 6. This is of course contrary to how plaintiffs described this case in the trial court. *See, e.g.,* Amended Complaint (describing claims in caption as being for "Professional Negligence"); Pls' Response to Defs' Rule 21 Motions, at p. 1 ("This is a medical negligence case arising from a delayed diagnosis of Duchenne muscular dystrophy…").

It is also contrary to Oregon law. There are countless Oregon appellate opinions denoting claims as "medical malpractice", "medical negligence", or "professional negligence." This is *not* to say that a medical malpractice claim is the opposite of an ordinary negligence claim, or that the two have nothing in common. But the distinction exists, and it is perhaps best illustrated by the fact that Oregon courts apply a specific four-part test for liability in professional negligence cases, whereas a different, five-part test is applied in ordinary negligence cases. *See* Defs' Brf at 28-30.

These two lines of cases may have similarities, but they have their

differences as well. Most notably, the concept of "duty" is retained in malpractice cases, as unmistakably confirmed by *Mead v. Legacy Health System*, 352 Or 267, 283 P3d 904 (2012). As discussed at length in the opening brief, this concept of "duty" retains its significance in malpractice claims because liability arises out of a "special relationship" that is governed by the laws, regulations, and professional standards of the practice of medicine. As noted, liability for a breach of the professional standard of care necessarily only extends to those the physician has "undertaken" to treat.

Seeking to erase any distinction between these types of claims, plaintiff cites to two cases: *Ritter v. Sivils*, 206 Or 410, 293 P2d 211 (1956) and *Ellis v. Springfield Women's Clinic*, 67 Or App 359, 678 P2d 268 (1983). But neither case supports plaintiffs' view of the law. *Ritter*, for example, described itself as being "a malpractice action." *Id.* at 411. The quoted excerpt simply comments on the similarities with a negligence claim given that a malpractice action is "based upon" a theory of negligence. *Id.* at 413. But it did not purport to erase any and all distinctions between the two.

Similarly, in *Ellis*, the court stated: "This is an action for medical malpractice." *Ellis*, 67 Or App at 361. The language quoted by plaintiffs about it being "an action for ordinary negligence" was in connection with a discussion about how "the motivations of the defendants" were irrelevant, as malpractice claims do not require any bad faith or subjective intent to commit harm. *See id.*

at 362. *Ritter* and *Ellis* in no way support a conclusion that malpractice claims are not governed by a "duty"-based analysis but are governed by the "special relationship" between a physician and her patient, as all of the subsequent case law has confirmed. To contend otherwise is an affront to over a century and a half of Oregon law and subverts ORS 677.095 and *Fazzolari's* adherence to the special relationship that forms the basis for claims for medical negligence.

That the concept of "medical malpractice" or "professional negligence" poses an existential threat to plaintiffs' claims is not a reason to abandon wholesale Oregon law of medical malpractice claims against physicians.

B. The Requirement of "Duty" through a Physician-Patient Relationship Cannot Be Established Through Defendants' Relationship With Manny.

Plaintiffs try to avoid the barrier posed by *Mead* and the other malpractice cases on "duty" by arguing that the "necessary predicate" of a physician-patient relationship is satisfied by the past physician-patient relationship between defendants and Manny, even if the plaintiffs themselves were never parties to such a relationship. That theory fails for a host of reasons.

First, it is contrary to the legal test stated by Oregon cases, which have uniformly required that the "duty" is specifically owed from the physician *to the plaintiff*, and not to some other patient. *See, e.g.*, *Mead*, 352 Or at 276 ("without a physician-patient relationship, there can be no duty *to the plaintiff*, and hence no liability") (italics added); *id.* at 276 n.7 ("physician's duty extends

only to those persons whom he or she agrees to treat…") (italics added); *Mead v. Legacy Health Sys.*, 231 Or App 451, 457, 220 P3d 118 (2009) ("at the outset, plaintiff is required to establish that *she* and defendant had a physician-patient relationship") (italics added).

Second, Oregon courts have dismissed claims for this reason in cases involving the identical scenario, *i.e.,* a non-patient seeking to sue a defendant physician for personal injuries arising from the physician's treatment of a patient. *See e.g.*, *Speiss v. Johnson*, 89 Or App 289, 748 P2d 1020 (1988) (affirming dismissal of a "medical malpractice" claim brought by a husband against the defendant physician that had a physician-patient relationship with his wife), *aff'd by equally divided court*, 307 Or 242, 765 P2d 811 (1988).

Another example with this same result was *Norwest v. Presbyterian Intercommunity Hospital*, 293 Or 543, 652 P2d 318 (1982), authored by Justice Linde. In *Norwest*, a child sought to sue the defendant physicians for the child's own injuries as a result of the physicians' medical malpractice toward the actual patient, the child's mother. *Id.* at 545. After an exhaustive and well-reasoned analysis on analogous claims and other considerations, the Court determined that the child was unable to pursue this claim against the physicians as a matter of law:

> "Plaintiff's injury, however, does not result from the defendants' negligent treatment of himself but as a consequence of their negligent treatment of his mother. He may be able to show that defendants reasonably should

> expect this consequential injury to a child if they caused the kind of injury to a young woman that the complaint alleges here. The obstacle to plaintiff's action is that ordinarily negligence as a legal source of liability gives rise only to an obligation to compensate the *person immediately injured, not anyone who predictably suffers loss in consequence of that injury*, unless liability for that person's consequential loss has a legal source besides its foreseeability."

Id. at 659 (italics added).

There is no reasoned basis to depart from *Norwest* here, *i.e.*, to allow the non-patient parents to sue for their personal injuries when they were not a patient or the "person immediately injured" by the defendants' alleged medical malpractice. Notably, neither of the exceptions envisioned by the above quotation in *Norwest* applies here: (a) there is no allegation that defendants engaged in intentional or outrageous conduct to expand the sphere of potential plaintiffs; and (b) plaintiffs have not identified any other "legal source" for a claim against defendants "besides its foreseeability."[1] *Id.* The present case

[1] It is obvious from plaintiffs' brief that they rely upon nothing "besides…foreseeability" to justify stating a claim against defendants, which is insufficient in the context of medical malpractice. As previously noted, plaintiffs in cases like *Zavalas*, *Docken*, and *Cain* had all identified a "legal source" for a claim against the defendants that was separate from and beyond a theory of medical malpractice, and that was something "besides" foreseeability on its own. *See* Defs' Brf at 22-27. Plaintiffs' attempt, for example, to analogize *Zavalas* to this case is hardly convincing when the *Zavalas* plaintiffs themselves argued that *Zavalas* was "not a medical malpractice case," but rather based their claims upon the common-law tort duty to protect third parties from foreseeable physical injuries, which duty is not applicable to the present case. *See* Defs' Brf at 25 & Appendix.

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should be dismissed on the same grounds.

Third, plaintiffs' analogies to wrongful death claims, ORS 30.020, and a parent's ability to maintain an action for injury to a child, ORS 31.010 and loss of consortium claims are inapt. Those are claims created by the Legislature, not by the courts. *See Norwest*, 293 Or at 562-567 (discussing those three claims in same context). Those claims are also analytically distinct as they flow derivatively from the injuries sustained by the actual patient of the physician. In other words, a wrongful death claim compensates the statutory beneficiaries for the loss of consortium and services as a result of the injuries caused by the physician to the patient (the decedent). A claim may be brought only "if the decedent might have maintained an action, had the decedent lived." ORS 30.020(1). Just as those analogies were found to be inapt in *Norwest*, they are inapt to the present case as well.

Fourth, and, finally, plaintiffs offer no authority to justify the novel and sweeping statement by the Court of Appeals that a "professional standard of care owed to a patient *requires the physician to exercise care on behalf of nonpatients.*" *Tomlinson v. Metropolitan Pediatrics, LLC*, 275 Or App 658,

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With regard to *Cain v. Rijken*, 300 Or 706, 717 P2d 140 (1986), although it is true that defendants' opening brief mistakenly stated that the defendant was the "state's Psychiatric Security Review Board" as opposed to Providence hospital, the *Cain* opinion is unambiguous that it based liability *not* on common-law tort concepts but upon the specific statutory duty placed on Providence under ORS 161.336 to control the actions of the charge to prevent him from causing physical injuries to others. *Id.* at 717-18.

673, 366 P3d 370 (2015) (italics added).[2] As discussed in the opening brief (*see* Defs' Brf at 18-19), this troubling statement: (a) is without any authority or basis in law or fact; (b) conflicts with the well-established requirement of an "undertaking" by a physician toward a patient to impose the duty of meeting a professional standard of care; and (c) undermines the Oregon statutes and regulations that define and regulate the practice of medicine.

Rather, plaintiffs double down, making the remarkable assertion that defendants owed a professional standard of care *only* to the parents, and not to the patient Manny, "because there is no treatment" for DMD, and further suggesting that the only professional reason for defendants to have even tested Manny for DMD was to enable the parents "to prevent the birth of other children suffering from the same affliction." *See* Pls' Brf at 15-16. Such a "*Through the Looking Glass*" view of medical practice is not tenable. Defendants were pediatric care providers who undertook to treat the child (Manny) only, and so defendants' professional duties were necessarily focused on *Manny*'s health and well-being.

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[2] Plaintiffs' primary responsive argument is that defendants misquoted the Court of Appeals and also took the quotation out of context. *See* Pls' Brf at 10-11. That is incorrect; defendants have correctly quoted the Court of Appeals and correctly described its analysis. Although it is true that defendants' opening brief contained a typographical error with an incorrect pinpoint citation to this quote in the opinion below (*i.e.*, citing to page 672 rather than to the correct page of 673), it should be evident that defendants were referencing the text on page 673 of the opinion, as that page contains the quoted sentence, as well as the fact that the quoted sentence was central to the Court of Appeals' analysis and ultimate holding on this issue. *See id.* at 673.

A parent or caregiver brings a child to a pediatrician to address the child's symptoms. The pediatrician undertakes to treat symptoms and create a differential of possible diagnoses. If it is unknown what causes the child's symptoms, then there may not be an obvious diagnostic test to be done; rather, symptoms are treated and options explored as the disease process declares itself over time. Developmental delays involving the muscular system can have myriad of sources, causes, and presentations. When a diagnosis is made, it is done for the purpose of helping that child.

Plaintiffs argue "there is no treatment" for DMD and thus there is only "prevention of recurrence" by early diagnoses of children that have it. That is an inaccurate statement without expert support. To exalt plaintiffs' statements to expert analysis would result in bad law based on a misunderstanding of medicine. Diagnosis of the disease, for example, allows appropriate specialists to be involved who might otherwise not be, in order to better assess and prolong the person's life. Much of medicine is aimed at improving quality of life and easing suffering, not curing disease. Palliative care is a critical component of medicine. To say there is no reason to diagnose Manny for his own sake devalues his life and his providers' obligation in treating him.

Plaintiffs' argument is analogous to suggesting that once a person is diagnosed with a cancer, no further care is warranted because it may be incurable. Physicians treat their patients whether they have a life expectancy of

three or 30 years, and regardless of whether a patient has a terminal illness, a chronic condition, or an acute injury. It is patient-centered care that physicians and patients alike strive for.

Plaintiffs suggest that DMD can be kept from "recurring" by preventing the birth of more children with the disease. Perhaps this argument is an unintended result of the finessing of facts to fit a novel theory of law, or perhaps not. Either way, suggesting that those who are alive now with a genetic condition should have been "prevented" is deeply troubling. To say that the only treatment is "prevention" seeks the Court's imprimatur that life with a genetic disability, here DMD, is not a life worth living, reminding of an unfortunate and long since abandoned history. *Buck v. Bell* 274 US 200, 207 (1927) (approving forced sterilization with the words "three generations of imbeciles is enough").

Certainly, there are personal choices involved in determining whether to carry a pregnancy to term. However, on the benefits of living a life despite the presence of a disability, *see, e.g.*, Mattlin, "A Disabled Life Is Worth Living," The New York Times (Oct. 5, 2016). By arguing that the only reason to diagnose a child is so that more children with the genetic condition will not be born distorts the duty of medical providers and the role of medicine. It cannot be as plaintiffs suggest, that the physician's duty to her *patient* is overtaken by a duty to her parents, particularly when advances in science and development of

treatment options may offer positive effects for quality of life. *See, e.g.*, https://www.mda.org/eteplirsen (describing that on September 19, 2016, the drug Eteplirsen, the first disease-modifying drug for treating some forms of DMD, has been fast-tracked for approval by the FDA) (last accessed Oct. 14, 2016).

These are difficult questions, and the court need not address them here because black-letter law requires a physician-patient relationship between the plaintiff and the defendant to state a medical malpractice claim. Also dispositive is the fact that "negligence as a legal source of liability gives rise only to an obligation to compensate the person immediately injured, not anyone who predictably suffers loss in consequence of that injury…." *Norwest*, 293 Or at 659. For all of the above reasons, the Court of Appeals should be reversed, and the trial court's dismissal of these claims should be reinstated.

II. Plaintiffs' Claims for Emotional Distress Damages Also Fail.

A. This Case Is Controlled by *Curtis*.

If this Court disagrees with the above analysis and allows this claim based on defendants' treatment of Manny to proceed, then the framework of *Curtis v. MRI Imaging Services II*, 327 Or 9, 956 P2d 960 (1998), must be analyzed. Plaintiffs fail to successfully argue to the contrary, and also sidestep the Court of Appeals' unanticipated and confusing pronouncement of a "special relationship" in this case. Instead, plaintiffs now promote the "legally protected

interest of informed reproductive choice" as the savior of their medical malpractice claims. The Court of Appeals created this theory, and no one—not the court below, nor plaintiffs in response—has articulated the basis or scope of this alleged "right" that somehow is to give rise to civil tort liability against defendants. The omission is telling.

A medical provider's duty to protect against emotional distress is "no greater than that of the population at large." *Curtis*, 327 Or at 15. Under *Curtis*, medical providers do not operate under a general duty to avoid any emotional harm that foreseeably might result from their conduct. *Id.* at 16. But that is exactly what plaintiffs' claim for noneconomic damages is seeking. Plaintiffs do not allege that defendants owed them as parents a specific duty to protect them from the emotional distress they allege. (Nor could they, given that there is not even a "standard of care" owed to the non-patient parents.) Plaintiffs conflate these concepts, making it difficult to determine exactly what legal principle they rely on to support viability of any claims.

Regardless, the question of what is owed to whom is governed by the standard of care which does not, in this case, include a question of foreseeability. Allowing non-patients to recover for emotional distress based on a standard of care not owed to them, without a concomitant physical injury, would greatly expand the class of persons to whom medical providers could be liable, as defendants explained in their opening brief.

Instead of justifying their position with legal authority, plaintiffs suggest that defendants did not argue below that a legally-protected interest cannot be the basis for their damages. This is inaccurate, and a distraction. Defs' Joint Response Brf (A151978) at 40 ("plaintiffs have no claim for violation of reproductive rights or any legally protected interest"). Defendants argued below and argue on review that plaintiffs cannot state a claim against them for interference with reproductive choice. Defs' Brf, 42-47.

This Court should not be swayed by the argument that any time a "legally protected interest" is violated emotional distress damages are recoverable. *Philibert* OTLA Amicus Br, Appdx, 7. That is not an accurate statement of law and even if it were, the effect would be to eviscerate the existing limits on tort liability. The premise that any and all "interests" ought to be protected amongst private actors would create a general duty to avoid the occurrence of all emotional distress—a result as absurd as it is impossible.

B. *Philibert* is Not Dispositive.

Neither party in this case is asking the court to revisit the physical impact rule, nor should it. The Court of Appeals' analysis on this issue is consistent with case law. *Paul v. Providence*, 351 Or 587, 599, 273 P3d 106 (2012) (holding that allegations of increased susceptibility to physical injury are insufficient). However, plaintiffs cite to *Philibert v. Kluser*, 274 Or App 195, *rev allowed*, 358 Or 833 (2016), and attach the OTLA's amicus brief from that

case.

Defendants do not understand the issue in *Philibert* to be the same as here, as *Philibert* addresses whether there is liability to a third-party witness to a death of a sibling in an ordinary negligence case. Thus, the two cases are dissimilar, as the present case is a medical malpractice action where liability is defined by the relational duty of the parties.

Tort law recognizes the need for limits, particularly in cases of alleged negligent as opposed to intentional conduct. Oregon law does not recognize a general right to be free from emotional injury. Even when such damages are permitted, they are often limited. *See, e.g.*, ORS 31.710(1); *Horton v. OHSU*, 359 Or 168 (2016). The physical impact rule represents a limit on what might otherwise be boundless liability to third parties upset by a physician's actions or happenstance. Further, the legislature knows how to create cause of action, and it has not abrogated the physical impact rule or expanded the duty of a physician codified in ORS 677.095.

CONCLUSION

The decision of the Court of Appeals allowing the parents' claims to proceed should be reversed, and the decision of the trial court dismissing plaintiffs' claims should be reinstated.

Dated this 20th day of October, 2016.

LINDSAY HART, LLP

By: /s/ Michael J. Estok
Michael J. Estok, OSB No. 090748
mestok@lindsayhart.com
Attorneys for Defendants-Petitioners on Review Metropolitan Pediatrics, LLC, and Mary K. Wagner, M.D.

KEATING JONES HUGHES, P.C.

By: /s/ Hillary A. Taylor
Lindsey H. Hughes, OSB No. 833857
lhughes@keatingjones.com
Hillary A. Taylor, OSB No. 084909
htaylor@keatingjones.com
Attorneys for Defendants-Petitioners on Review Legacy Emanuel Hospital & Health Center

CERTIFICATE OF COMPLIANCE

Brief Length

I certify that (1) this brief complies with the word-count limitation on ORAP 5.05(2)(b)(E); (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 3,561 words; and (3) the size of the type in this brief is not smaller than 14 point for both text of the brief and footnotes as required by ORAP 5.05(4)(f).

/s/ Michael J. Estok
Michael J. Estok, OSB No. 090748

CERTIFICATE OF FILING AND SERVICE

I certify that on October 20, 2016, I filed the foregoing **PETITIONERS METROPOLITAN PEDIATRICS, LLC, LEGACY EMANUAL HOSPITAL & HEALTH CENTER, AND MARY K. WAGNER, M.D.'S JOINT REPLY BRIEF ON THE MERITS**

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I further certify that on October 20, 2016, I served the foregoing **PETITIONERS METROPOLITAN PEDIATRICS, LLC, LEGACY EMANUAL HOSPITAL & HEALTH CENTER, AND MARY K. WAGNER, M.D.'S JOINT REPLY BRIEF ON THE MERITS** by means of electronic service through the court's e-filing system to the following:

William A. Gaylord
Linda K. Eyerman
Gaylord Eyerman Bradley, PC
bill@gaylordeyerman.com

Kathryn H. Clarke
Kathrynclarke@mac.com

Craig A. Nichols
Nichols & Associates
craig@craignicholslaw.com

Attorneys for Plaintiffs-Respondents on Review

Travis Evia
Zemper Eiva Law
travis@zempereiva.com

Attorney for Amicus Curiae Oregon Trial Lawyers Assn.

LINDSAY HART, LLP

By: Michael J. Estok
Michael J. Estok, OSB No. 090748
mestok@lindsayhart.com
Attorneys for Defendants-Petitioners on Review