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 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.

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QUESTIONS PRESENTED AND PROPOSED RULES OF LAW

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?

First Proposed Rule of Law:

To state a claim for medical malpractice against a physician, the plaintiff must have had a physician-patient relationship with the defendant physician.

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?

Second Proposed Rule of Law:

Oregon law does not permit recovery of emotional distress damages in a medical malpractice action absent either physical injury or a heightened and specific duty by the defendant to protect against the plaintiff s emotional harm.

NATURE OF THE ACTION, RELIEF SOUGHT, AND NATURE OF THE JUDGMENT

This action presents a claim for medical malpractice by plaintiffs Kerry and Scott Tomlinson against a pediatrician (Mary K. Wagner, MD), an associated clinic (Metropolitan Pediatrics), and a pediatric center

operated by Legacy. Plaintiffs seek to recover economic and noneconomic damages for injuries that are personal to them, including their own subjective emotional pain and suffering. That said, it is undisputed that no plaintiff has ever had a physician-patient relationship with any defendant, and that no defendant ever undertook to engage in the practice of medicine to any degree toward any plaintiff.

On June 25, 2011, the trial court judge (Hon. Jean Maurer) dismissed the case on Rule 21 motions, most notably due to the admitted lack of a physician-patient relationship in a medical malpractice case. ER 30-35. On December 30, 2015, the Court of Appeals reversed and remanded.[1] After rejecting defendants' basis for dismissal based on the lack of physician-patient relationship, the Court of Appeals went on to reject defendants' alternative objection to claims for non-economic damages given the lack of a physical impact or a specific duty to protect against their emotional harm. Defendants promptly filed a petition to this Court, which allowed review on June 30, 2016.

[1] The Court of Appeals did affirm the dismissal of the claims brought by a third plaintiff, Edward Tomlinson, whose own petition for review was subsequently accepted by this Court. *See* S063956. Issues relating to Edward Tomlinson's claim will be addressed in separate merits briefing. For the purposes of this brief, the term "plaintiffs" refers only to Kerry and Scott Tomlinson.

STATEMENT OF HISTORICAL AND PROCEDURAL FACTS

Kerry and Scott Tomlinson gave birth to a son (Manny) in 2003. When Manny was a child, he was a patient of a pediatrician (defendant Dr. Wagner) and a pediatric center operated by defendant Legacy. ER 3. According to the Amended Complaint, Manny exhibited developmental abnormalities but defendants, in treating him, failed to adequately or timely diagnose Manny's symptoms. *Id.* In October 2010, when he was seven years old, Manny was diagnosed with Duchenne's muscular dystrophy ("DMD"), a genetic disorder. *Id.*

Reading those allegations in the Amended Complaint, it is important to note that Manny is not (and never has been) a party to this case. Plaintiffs do not allege that defendants caused or contributed to Manny's DMD, as they did not. Plaintiffs also conceded below that Manny did not sustain any injury from any alleged delay by defendants in diagnosing his DMD. *See* Opening Brief in Court of Appeals at 1, n1 (confirming Manny did not sue because he had no injury caused by any "diagnostic delay" by defendants).

Rather, the plaintiffs in this case are Manny's parents, Kerry and Scott Tomlinson, *in their individual capacities*. ER 4. It is undisputed that neither of them has ever been a patient of any defendant. In other words, neither of them ever received any treatment, counseling, or diagnosis from

any defendant. Conversely, no defendant has ever undertaken to engage in the practice of medicine in any respect toward them.

Plaintiffs nevertheless filed suit on the theory that an earlier DMD diagnosis by defendants for Manny would have factored into their own personal and marital reproductive actions and choices, contending that they would have decided to "not produce" any more children if they knew that Manny had DMD. Here, Manny's DMD was diagnosed in October 2010, but in 2008 the parents had conceived and delivered another son, Teddy, who was subsequently found to also have DMD. (Teddy was similarly never a patient of any defendant.) The parents thus allege that absent defendants' medical malpractice to Manny, they would have used contraception or abortion to prevent the birth of Teddy in 2008. In asserting this theory, plaintiffs seek damages that are *personal to them*, such as economic damages for costs associated with parenting Teddy and noneconomic damages for their own subjective emotional distress caused by their failure to prevent the birth of Teddy.

In their Amended Complaint, plaintiffs needed to articulate some basis for a claim for relief against defendants arising from this theory. *Cf. Landis v. Wick*, 154 Or 199, 209-10, 57 P2d 759 (1936) ("Proof of negligence in the air, so to speak, will not do") (internal quotation omitted). Plaintiffs, the masters of their complaint, selected exactly one basis:

medical malpractice. *See* ER 1 (describing case in caption as "Professional Negligence"). All of plaintiffs' specifications of negligence were based on defendants' alleged failure to engage in the practice of medicine toward Manny or toward them at the minimum level of the professional standard of care. ER 4-5. In other words, plaintiffs sought to recover on medical malpractice claims even though they had never been patients of the defendants.

In dismissing plaintiffs' case on Rule 21 motions, the trial court judge noted that "[t]his is a medical malpractice case" and that the applicable case law made the court "convinced that in this case of medical negligence, the plaintiffs must allege the existence of a physician-patient relationship to survive a Motion of Dismissal." ER 28 & 30.

In reversing that dismissal, the Court of Appeals acknowledged that plaintiffs' complaint was premised on "breache[s] of the professional standard of care that [defendant providers] owed to Manny", but instead of considering whether non-patients can sue for medical malpractice, it materially reframed the issue as being whether non-patients "are categorically foreclosed from asserting a negligence claim against the physician." *Tomlinson v. Metropolitan Pediatrics, LLC*, 275 Or App 658, 660 & 671, 366 P3d 370 (2015). Then, in considering the adequacy of plaintiffs' amended complaint, the Court of Appeals applied the

"foreseeability"-driven standard of *Fazzolari* rather than the "duty"-framed analysis used in medical malpractice cases. *See id.* at 676 (quoting and applying five-part test used on *Fazzolari* common-law negligence claims).[2] Based on this analysis, the Court of Appeals concluded that plaintiffs had adequately stated a claim against defendants.

The Court of Appeals' opinion also went on to uphold the plaintiffs' claims for noneconomic damages despite the absence of physical injury based on a conclusion that the amended complaint sufficiently alleged that defendants' conduct had infringed upon plaintiff's "legally protected interest" in "making informed reproductive choices" about "whether and when to have children." *Id.* at 678-81.

SUMMARY OF ARGUMENT

Plaintiffs' lawsuit is one for medical malpractice against physicians who never engaged in the practice of medicine toward them. The nature of this claim is unmistakable: plaintiffs' complaint denotes itself as being a medical malpractice case; all of plaintiffs' allegations are necessarily and explicitly predicated on the professional duty of care owed by a physician to a patient while engaged in the practice of medicine; and plaintiffs below have never disputed the characterization of their claims as being medical

[2] The Court of Appeals avoided quoting to *Fazzolari* directly by taking its quotation from *Solberg v. Johnson*, 306 Or 484, 490-91, 760 P2d 867 (1988). However, immediately after the quoted excerpt in *Solberg* is a citation to *Fazzolari*. *See id.*

malpractice claims. *Cf. Curtis v. MRI Imaging Servs. II*, 327 Or 9, 13, 956 P2d 960 (1998) ("In our view, the most obvious claim stated by the pleadings is a straightforward claim for medical malpractice").

The law governing medical malpractice claims is well established in Oregon and is logically connected to the laws and regulations that govern the practice of medicine. Over 100 years of precedent, most recently applied by this Court in *Mead v. Legacy Health System*, 352 Or 267, 283 P3d 904 (2012), establishes that absent a physician-patient relationship between plaintiff and defendant, "there can be no duty to the plaintiff, and hence no liability" *for medical malpractice*. *Id.* at 276. Even if considerations of "foreseeability" under *Fazzolari v. Portland School District No. IJ*, 303 Or 1, 734 P2d 1326 (1987), could possibly be relevant in determining the *scope* of the duty owed from a physician to a patient, these considerations can never supply the *existence* of such a duty.

This straightforward analysis disposes of all of plaintiffs' claims, as the trial court correctly held. To avoid this outcome, plaintiffs engage in overly-broad readings of ordinary negligence (*i.e.,* non-medical malpractice) cases in a manner that is not only incorrect, but that would implicitly overrule extensive precedent from this Court and strike down various Oregon statutes (such as the Good Samaritan Law and the laws defining the practice of medicine). Plaintiffs' reading would dramatically—

and negatively—impact the day-to-day practice of medicine in this state, without any involvement by the Legislature or input from stakeholders within the medical community. The Court should therefore reject plaintiff's invitation to revolutionize medical malpractice law in Oregon, as well as the Court of Appeals' implicit acceptance of that revolution.

In addition, even assuming that plaintiffs' claims could survive this first objection (which they cannot), the Court of Appeals committed further error in allowing plaintiffs to pursue claims for their subjective emotional distress damages. In *Curtis v. MRI Imaging Services II,* 327 Or 9, 956 P2d 960 (1998), this Court established a precise analytical framework for the validity of such damages in claims for professional negligence—*i.e.,* requiring the presence of either (a) a physical impact or (b) a heightened and specific duty to protect the plaintiff against psychic harm, which duty is not present even in an ordinary physician-patient relationship—but the Court of Appeals failed to apply that framework.

Instead, the Court of Appeals authorized non-economic damages based on a theory that defendants had the obligation to protect plaintiffs' "legal interest in making informed reproductive choices", a theory with no basis in law or in the allegations of plaintiffs' complaint. *Tomlinson*, 275 Or App at 682. This theory also paradoxically required the Court of Appeals to find the existence of a "heightened" or "special" responsibility

or duty owed from defendants to plaintiffs, even though it was conceded that plaintiffs have never even been defendants' patients. *Id.* at 683. In addition to being bad law, the opinion below represents bad policy, and its conclusions should be reversed.

ARGUMENT

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

The crux of the practice of medicine is the physician-patient relationship. Physicians do not endeavor to treat the universe or to treat abstract concepts; rather, they undertake to treat *patients*. That special relationship between a physician and his or her patient gives rise between them to specific rights, privileges, protections, and most importantly here, *duties*, including the duty to protect against injury to a patient caused by the physician's practice of medicine falling below the professional standard of care.

Although medical malpractice is a species of negligence, medical malpractice claims have a unique history and are governed by a differing set of standards and considerations when compared to ordinary negligence claims. This distinction has survived with clarity within Oregon, where medical malpractice claims have been governed by one standard (as recently explained in *Mead*) while ordinary negligence claims are governed by another (*Fazzolari*). The Court of Appeals' opinion erases this distinction and, for the first time in Oregon law, allows a non-patient to sue a physician for medical malpractice.

As detailed below, such an approach is incorrect as a matter of legal precedent and highly problematic as a matter of policy.

A. Medical Malpractice Claims Require a "Duty" Owed to the Plaintiff as a Patient of the Physician.

In *Mead,* decided only four years ago, this Court unequivocally held: "In Oregon, as in most states, a physician-patient relationship is a necessary predicate to stating a medical malpractice claim." *Mead*, 352 Or at 276. For medical malpractice claims, the existence of a specific "duty" *owed from the defendant to the plaintiff* is a necessary element of proof; thus, "without a physician-patient relationship, *there can be no duty to the plaintiff*, and hence no liability." *Id.* (italics added).[3]

This statement of black-letter law on "duty" in medical malpractice claims is as old as Oregon itself. *Accord Conway v. Pacific University*, 324 Or 231, 239-40, 924 P2d 818 (1996) (noting that "Oregon law imposes such a duty upon certain professionals in actions toward their clients [such as] physicians toward their patients"); *Stevens v. Bispham*, 316 Or 221, 227, 851 P2d 556, 560 (1993) (noting that in malpractice action, plaintiff must allege and prove "a duty that runs from the defendant to the plaintiff"); *Son v. Ashland Cmty. Healthcare Svcs.*, 239 Or App 495, 506, 244 P3d 835

[3] In *Mead*, the Court of Appeals below similarly noted that "claims for medical malpractice will lie only for negligence committed in the context of a physician-patient relationship" and that "at the outset, plaintiff is required to establish that *she* and defendant had a physician-patient relationship. *Mead v. Legacy Health Sys.*, 231 Or App 451, 457, 220 P3d 118 (2009) (italics added).

(2010) (finding requisite "duty" in medical malpractice cases only "[w]hen a physician-patient relationship exists", *i.e.*, where there is a "duty that runs from the defendant to the plaintiff"), *rev denied*, 350 Or 297, 255 P3d 489 (2011).

Before looking at the numerous cases that have dismissed medical malpractice claims for lack of "duty" in Oregon, it is worth briefly considering the nature of a medical malpractice claim:

1) Background on medical malpractice claims.

This Court has noted that medical malpractice claims "antedated" ordinary, common-law negligence claims, and that they are governed by a different logic:

> "The proposition that a physician's duty *extends only to those persons whom he or she agrees to treat* derives from cases implying a duty on the physician's part to 'use reasonable and ordinary care and diligence' as *an incident of an agreement to provide medical treatment*. *See, e.g., Leighton v. Sargent*, 27 NH 460, 471 (1853) (implying a duty to use due care and diligence as part of a contract to provide medical services to a patient)."

Mead, 352 Or at 276, n 7 (italics added).

Thus, even though medical malpractice is today considered a tort claim, it is inextricably linked to the concept of an "agreement" by a physician to "provide medical treatment" to a specific patient. Physicians may have highly-specialized knowledge from many years of education and experience, but they are not required to share that knowledge with those whom they have never

agreed to treat. The Restatement (Second) of Torts correctly phrases a physician's "duty" in terms of what services they have "undertaken" to provide:

> "one *who undertakes to render services* in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities."

Id. §299A (italics added); ORS 677.095 (describing "duty of care" as using "that degree of care, skill and diligence that is used by ordinarily careful physicians in the same or similar circumstances in the community of the physician or a similar community").

Whether there is an "undertaking" by the physician toward a patient is "a matter of contract between the parties, and the terms of the undertaking are either stated expressly, or implied as a matter of understanding." *Id.* §299A at cmt. c.; *see also* W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS 32, at 186-87 (5th ed 1984) (noting that physician's duty to "have and use the knowledge, skill and care ordinarily possessed and employed by members of the profession" arises "by undertaking to render medical services" in a particular instance, and that "[i]n the absence of such an [undertaking], the doctor does not warrant or insure either a correct diagnosis or a successful course of treatment").

This historical understanding of "duty" for medical malpractice claims is in harmony with the actual practice of medicine as governed by Oregon's

statutes and regulations. The Oregon legislature, for example, has defined "[w]hat constitutes the practice of medicine", which occurs whenever a physician:

> "Offer[s] or *undertake[s]* to diagnose, cure or treat in any manner, or by any means, methods, devices or instrumentalities, any disease, illness, pain, wound, fracture, infirmity, deformity, defect or abnormal physical or mental condition *of any person*."

ORS 677.085(4) (italics added); *see also* ORS 677.010(4) (defining "diagnose" as "to examine *another person* in any manner to determine the source or nature of a disease or other physical or mental condition") (italics added); ORS 677.097 (describing informed consent procedures for "patients"). Nothing in the Oregon statutory scheme envisions physicians owing a professional duty of care toward *non-patients*.

Thus, 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. *See generally Mindt v. Winchester*, 151 Or App 340, 345, 948 P2d 334 (1997) (noting it is "axiomatic that a physician, merely because of his trade, does not have a greater responsibility in nonmedical matters than that of the general public. An action for medical malpractice will only lie for activities in which the defendant was involved in the practice of medicine") (internal quotation omitted), *rev denied*, 327 Or 431, 966 P2d 222 (1998).

2) Liability arising out of other unique relationships between physician and patient.

Illustrative of the above principles are two scenarios in which medical malpractice claims have been asserted against physicians where an "undertaking" toward a patient may be lacking.

The first scenario is in the context of an Independent Medical Examination (IME), where a physician is using his or her professional judgment to evaluate a patient but only at the request of an employer, insurance company, or opposing party in a lawsuit. Courts considering this issue have routinely held that IME physicians owe no "duty" of professional care to the non-patient examinee, and consequently cannot be sued for medical malpractice. *See generally* 10 ALR 3d 1071; *see also, e.g., Erpelding v. Lisek*, 2003 WY 80, 71 P3d 754, 757 (Wyo 2003) (holding that physician performing IME for benefit of plaintiff's employer did not owe a duty of care to examinee; adding that "this conclusion is in accord with virtually every other court that has considered this issue."); *Hafner v. Beck*, 185 Ariz 389, 916 P2d 1105 (Ariz Ct App 1995) (finding no physician-patient relationship within context of IME and concluding that physician's duty of care ran only to the carrier that had hired the physician to perform the IME, and not to the patient).

The second scenario relates to emergency medical assistance under the so-called Good Samaritan Law, ORS 30.800, which is a limited exception to the general rule that a physician is not required to render aid to non-patients, no

matter how greatly such care is needed. *See generally* Restatement (Second) of Torts §314 ("The 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"). The Good Samaritan Law leaves this important rule in place, as it carves out limited liability (based on "gross negligence") only in situations where the physician "*voluntarily*" chooses to render the emergency medical care. ORS 30.800(1)(a) & (b) (italics added). The statute also emphasizes that potential liability for medical malpractice when such aid is rendered can go *no further* than the scope of treatment that the physician had actually undertaken to provide to the patient:

> "The giving of emergency medical assistance by a person does not, of itself, establish a professional relationship between the person giving the assistance and the person receiving the assistance insofar as the relationship carries with it any duty to provide or arrange for further medical care for the injured person after the giving of the emergency medical assistance."

ORS 30.800(3).

B. Oregon Law Rejects Medical Malpractice Claims for Lack of "Duty" Where the Plaintiff Was Not the Defendant's Patient.

Following the above authority, Oregon courts have dismissed medical malpractice claims whenever a plaintiff could not establish "duty" by showing that the defendant had undertaken to provide medical services to the plaintiff. The facts of these cases are instructive, and the trial court here was correct in dismissing the present case on these same grounds:

- *Mead* (2012). The plaintiff asserted a "medical malpractice" claim against an on-call neurosurgeon who had consulted with and given advice to plaintiff's treating physician on the necessity of a surgery given plaintiff's symptoms and MRI results. *Id.*, 352 Or at 276 & 269-71. The viability of this claim turned entirely on the requirement of "duty", *i.e.*, was there a physician-patient relationship between plaintiff and the defendant neurosurgeon (or, stated differently, had the neurosurgeon undertaken to treat the plaintiff)?[4] *Id.* at 276-77. The court found as a matter of law that no physician-patient relationship existed between them, and so affirmed the dismissal of plaintiff's claims as a result of "no duty." *Id.* at 269 & 285-86.

- *Speiss v. Johnson*, 89 Or App 289, 748 P2d 1020 (1988), *aff'd by equally divided court*, 307 Or 242, 765 P2d 811 (1988). The defendant was a psychiatrist who engaged in a sexual relationship with his patient (Sharon) during the course of her treatment. *Id.* at 292. Sharon's husband filed a claim for "medical malpractice" against the

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[4] The plaintiff in *Mead* contended the existence of an "implied" physician-patient relationship based on the facts and circumstances of the case. *Id.* at 276. The court noted that "implied" relationships can exist where the "physician who has not personally seen a patient either knows or reasonably should know that he or she is diagnosing a patient's condition or treating the patient." *Id.* at 279. In the present case, plaintiffs have *not* alleged or contended the existence of an "implied" physician-patient relationship between them and defendants, nor could they. Rather, plaintiffs have repeatedly admitted the absence of any physician-patient relationship with defendants.

physician, alleging that the physician's negligent conduct within his physician-patient relationship had caused him injury. *Id.* But, critically, the husband did "not allege that *he* ever consulted with or received any treatment" from the physician. *Id.* (italics in original). The dismissal of this claim was readily affirmed because "[q]uite simply, plaintiff has no doctor-patient relationship with Johnson [the physician], Johnson never treated him and he has, therefore, no claim on that basis." *Id.*

- *Sullenger v. Setco Northwest, Inc.*, 74 Or App 345, 702 P2d 1139 (1985). The plaintiff sued a pediatrician who had been told about the plaintiff's symptoms by another physician, and who had even observed the plaintiff in the hospital, but declined to manage the case, "stating that the child appeared to be recovering." *Id.* at 347. In dismissing this "medical malpractice" case, the court expressly rejected the plaintiff's contentions that "it is the foreseeability of harm which gives rise to a duty and that the question of foreseeability in a given case is one for the jury to decide." *Id.* at 347-48. Rather, the court correctly noted that foreseeability of harm "does not determine the existence of such a duty" of care in a medical malpractice case. *Id.* To the contrary, "the duty of reasonable care owed by a doctor to a patient arises out of the doctor-patient relationship; *there is no duty to render care in the absence of such a relationship*." *Id.* (italics added).

C. Plaintiffs' Claims Are Not Cognizable Due to Lack of "Duty".

In bringing medical malpractice claims while conceding the lack of a physician-patient relationship with defendants, plaintiffs' claims necessarily fail under the above standards. There is simply no allegation—nor could there be—that any defendant ever "undertook" to treat any plaintiff here, or that any defendant ever engaged in the practice of medicine toward any plaintiff. In response, plaintiffs have offered two theories upon which to find the existence of "duty", both of which are incorrect:

1) "Duty" to non-patients based on duties owed to an actual patient.

Plaintiffs first try to satisfy *Mead*'s "necessary predicate" by noting that defendants *did* treat one patient—Manny—and so owed Manny the duty to practice medicine within the professional standard of care, even if he was not a plaintiff. They then contend that defendants owed a professional standard of care *to plaintiffs* by virtue of their duties owed to non-party Manny. The Court of Appeals apparently agreed with this logic, erroneously conluding that a "professional standard of care owed to a patient *requires the physician to exercise care on behalf of nonpatients*." 275 Or App at 672 (italics added).

But the Court of Appeals provided no citation in support of this novel and sweeping theory. Such a hypothetical "professional standard of care owed * * * to exercise care on behalf of nonpatients" is not supported by any existing Oregon law. Rather, this theory is contrary to all of the above case law, which

has consistently and soundly required an "undertaking" by the physician to provide treatment, diagnosis, or medical services to *the plaintiff*. *Mead,* 352 Or at 279. By way of example, this theory was not followed in *Speiss*, discussed above, wherein there was *a* physician-patient relationship present (*i.e.,* between the defendant physician and the wife), but the husband's medical malpractice claim was still barred as a matter of law because there was no allegation that "*he* ever consulted with or received any treatment" from the physician. *Speiss*, 89 Or App at 292 (italics in original).

The Court of Appeals' theory also undermines the Oregon statutes and regulations that define and regulate the practice of medicine. As noted, the practice of medicine under ORS Chapter 677 relates to actions taken by a physician towards his or her *patient*. *Cf. Mindt*, 151 Or App at 345 ("An action for medical malpractice will only lie for activities in which the defendant was involved in the practice of medicine") (internal quotation omitted).

Another reason why the Court of Appeals' theory cannot stand is that this alleged professional duty of care owed to non-patients has not been pled in plaintiffs' complaint. For medical malpractice claims, plaintiffs are required to plead all ultimate facts which form the basis their complaint, particularly on issues where expert testimony is required given Oregon's prohibition on expert discovery. *E.g., Orendino v. Clark*, 240 Or 518, 519, 402 P2d 527 (1965). Thus, questions arise: what is the nature and scope of this new professional duty

owed to non-patients? What is its legal source, and where is its foundation within the scientific field of medicine? None of these issues were pled or addressed in plaintiffs' Complaint.

Similarly, the fact that plaintiffs had a parental relationship with the patient (Manny) has *not* been pled or asserted by plaintiffs as a basis to find the requisite element of "duty" to proceed on a medical malpractice claim. Even if it were to be pled, it would still be inadequate, as the point remains conceded that defendants never undertook to treat or advise the parents in any respect, let alone on their intensely-private reproductive options and decisions. The lack of a physician-patient relationship with the defendants should have been emphasized to plaintiffs by the defendants' very title of "pediatrician", with pediatrics generally defined as "of or relating to the medical care or illnesses of children." *See* "pediatric", at http://www.merriam-webster.com/dictionary/pediatric (last accessed on August 4, 2016).

It might thus be reasonable for the parents to expect to obtain information about their child's medical condition for the benefit of their child, but it would be patently unreasonable for the parents to expect the pediatrician to gratuitously provide them with medical advice or treatment on their own personal issues. The defendants never undertook to provide such advice here, and there was never any express *or* implied physician-patient relationship between them. *See Mead*, 352 Or at 279 (noting that an implied physician-

patient relationship exists when the physician "either knew or reasonably should have known that he or she was diagnosing the patient's condition or providing treatment to the patient").

It is for this reason that virtually every "wrongful birth" case from jurisprudence across the country is not relevant to the present case. Such cases involve defendants like "prenatal health care providers" or "genetic counselors" who gave "negligent advice or treatment" to their actual patients, *i.e.*, the parents, including the mother who was pregnant at the time of the medical treatment. *See generally Kassama v. Magat*, 368 Md 113, 792 A2d 1102 (2002) (cataloging wrongful birth claims and related theories).

For the very few "wrongful birth" cases nationally found by plaintiffs that involve a pediatrician treating a child, *all* of these cases involved direct representations from the physicians to the parents on genetic issues, including specific representations on the parents' reproductive risks in having additional children. *See, e.g., Molloy v. Meier*, 679 NW2d 711, 714 (Minn 2004) (physician specifically represented to mother that child's development delay was not genetic and that "the risk that [mother] might give birth to another child like S.F. was extremely remote"); *Lininger v. Eisenbaum*, 764 P2d 1202, 1203 (Colo 1988) (physician was asked by parent if first child's blindness was genetic because "they were unwilling to have another child", to which the physician counseled parent in response that the blindness was non-hereditary);

Schroeder v. Perkel, 432 A2d 834, 837 (NJ 1981) (parents specifically asked about cystic fibrosis, and physician represented and counseled parents that child "couldn't possibly have cystic fibrosis").

Thus, contrary to the present case, the physicians in all of these cases "undertook" to provide some counseling and advice to the parents, even specifically on their reproductive choices. Nothing of the sort exists here.

Lastly, the Court of Appeals' theory that the defendants failed "to advise them as to the reproductive consequences of [a DMD] diagnosis" (*Tomlinson*, 275 Or App at 684) becomes extremely problematic in light of the fact that there *was no DMD diagnosis* at that time for defendants to share. The Court of Appeals, by reversing, has imposed a tort duty on pediatricians to advise non-patients of a diagnosis regardless of whether the pediatrician was in fact aware of that diagnosis. This leads to the incongruous situation, where, as here, a physician cannot be sued by her patient for medical malpractice, but can be sued by others (even strangers) for those identical acts. But, as discussed above, this incongruous situation cannot stand as a result of the unambiguous case law on "duty" in medical malpractice cases, along with the State of Oregon's definition of the practice of medicine.

2) "Duty" based on legal theory other than malpractice.

It is important to emphasize that all of the above discussion on the "necessary predicate" of a physician-patient relationship is limited to

medical malpractice claims, which is the only type of claim presented by this case. It is therefore inaccurate to re-cast defendants' arguments in this case as contending that "under no circumstances can a physician ever be liable to liable to a nonpatient third party." *Tomlinson*, 275 Or App at 674. Physicians can be sued by strangers just as any member of the public can sometimes be sued by strangers; the fact of an M.D. or D.O. degree does not offer some kind of general immunity against tort liability.

Thus, a physician who commits a sexual battery in a patient room with a non-patient can be liable in tort, but not for medical malpractice. *Cf.*, *Mindt*, 151 Or App at 345. A physician who causes a car crash and injures a stranger while driving to the hospital to see a patient can be liable for negligence, but not for medical malpractice. A physician who inadvertently discloses the private medical information of his co-worker's patient (but not his own patient) can also be liable to that non-patient on breach of privacy tort claims, but not for medical malpractice.[5]

[5] By way of additional examples, physicians can also be sued by non-patients on specific and narrow types of claims, such as a spouse suing for "loss of consortium" damages (or a wrongful death claim filed by a personal representative for loss of consortium damages to statutory beneficiaries under ORS 30.020) or a parent with custody of a child maintaining an action for the injury of the child under ORS 30.010. *See generally Beerbower v. State*, 85 Or App 330, 335 (1987) (holding that recoverable damages under ORS 30.010 by parents are limited to pecuniary loss only). Needless to say, the present case does not involve analogous claims or bases for damages.

Another accepted tort theory is the duty in limited circumstances to control the conduct of a third person to prevent foreseeable physical injuries to others. *See* Restatement (Second) of Torts §§315-320 (describing duty); *Buchler v. Oregon Corrections Div.*, 316 Or 499, 505-06, 853 P2d 798 (1993). This tort "duty" could possibly be applied to physicians, just as it may apply to tavern keepers, employers, social hosts, and others in the community. *E.g., Campbell v. Carpenter*, 279 Or 237, 566 P2d 893 (1977). Thus, a physician who had could have prevented foreseeable physical injuries to others to be inflicted by a dangerous patient could potentially be held liable under this theory, but that is not a claim for medical malpractice.

With regard to *Zavalas v. Department of Corrections*, 124 Or App 166, 861 P2d 1026 (1993), *rev denied*, 319 Or 150 (1994), upon which the Court of Appeals heavily relied below, the opinion may have been wrongly decided, and it may have been ambiguously worded, but it unquestionably presented a claim arising out of this last theory, *i.e.*, the duty to control the conduct of a third person to prevent foreseeable injuries, and not out of medical malpractice. The situation in *Zavalas* is in no way analogous to the present case.

In other words, however the parties characterized their claims and defenses, the *Zavalas* plaintiffs did not sue the physician because he breached professional standards of care owed to his patient which caused injury to his

patient, but rather because the physician created a public danger of physical harm to others by giving Xanax to an obvious drug addict who would drive around town while under its influence. In the precise words of the *Zavalas* plaintiffs at the time: "This is not medical malpractice case." Appendix at 7.[6]

Zavalas was therefore no different from the scenario of tavern keeper or social host over-serving a patron with alcoholic beverages and then letting the patron drive home. Notably, the Court of Appeals' discussion in the *Zavalas* opinion did not engage or rely upon a single medical malpractice case. Rather, *all* of the case authority in *Zavalas* related to the common-law tort duty to protect third parties from foreseeable physical injuries.[7] *See id.* at 172-73; *see also Faverty v. McDonald's Restaurants*, 133 Or App 514, 892 P2d 703 (1995) (subsequent case citing *Zavalas* for liability of employer for failure to control the conduct of an employee to prevent them from causing foreseeable physical injuries to others).

The other cases relied upon by plaintiffs similarly all turned on duties that are distinct from medical malpractice claims. *See, e.g., Cain v. Rijken*, 300

[6] Elsewhere in the *Zavalas* plaintiffs' brief on appeal, they explicitly defined the issue as being the appropriate standard for "negligence claims [that] are not based on the physician/patient relationship." Appendix at 2.

[7] Likewise, in the *Zavalas* plaintiffs' brief on appeal, the lawyers justified imposing a tort duty on a defendant's "contributing to the conduct of a third party, who then injures plaintiff" by citing to other cases involving the tort duty to control a third person to prevent him or her from causing foreseeable physical injuries to others, including a case against a tavern owner for over-serving a patron. *See* Appendix at 14.

Or 706, 717 P2d 140 (1986) (finding that 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); *Docken v. Ciba-Geigy*, 86 Or App 277, 739 P2d 591 (1987) (finding physician could be sued by non-patient on products liability theory[8] because the physician, along with the defendant drug manufacturer and distributor, failed to provide adequate and necessary warnings on the risks associated with a drug prescribed to the decedent's brother), *rev denied*, 304 Or 405, 745 P2d 1225 (1987);[9] *Bradshaw v. Daniel*, 854 SW2d 865, 870 (Tenn 1993) (in finding that a physician had a duty to protect a spouse against foreseeable physical harm by informing her of the patient-husband's life-threatening disease to which the spouse may have also been exposed, specifically noting that this theory of negligence was

[8] Notably, Oregon law allows products liability claims to be brought against manufacturers, sellers, and distributors alike regardless of whether the plaintiff had privity of contract with any of those entities or individuals. *See* ORS 30.900; 30.920(2)(b); *Strandholm v. General Constr. Co.*, 235 Or 145, 156-57, 382 P2d 843 (1963).

[9] Further, *Docken* does not provide any support for the specifications made by plaintiffs in paragraphs 10(e) and 11(e) in the amended complaint, wherein plaintiffs contend that defendants failed "to advise and counsel" them about the risks of DMD in future children. *See* 86 Or App 277. Such allegations are not analogous to "failure to warn" cases about dangerous products. Rather, these allegations fit squarely within the mold of plaintiffs' medical negligence allegations – *i.e.*, that defendant medical providers failed to "advise and counsel" the parents about their own medical issues and risks (such as diagnosing an innate genetic condition residing within the mother), as if a physician-patient relationship had existed between them.

different from a theory of "medical malpractice", and that a physician-patient relationship was therefore not strictly necessary).

None of those cases stands for the proposition that a physician's medical malpractice to a patient gives rise to a claim for medical malpractice by a non-patient. Plaintiffs' reading of those cases proves too much, as it would logically follow that this Court committed error in *Mead* by dismissing a medical malpractice claim for lack of physician-patient relationship without following cases like *Zavalas* or *Docken*. In other words, if *Zavalas* and *Docken* in fact re-wrote the centuries of case law on medical malpractice claims, then this Court's detailed analysis in *Mead* on whether or not the parties' interactions constituted a physician-patient relationship was all in vain. When the on-call neurosurgeon in *Mead* was consulted about a patient over the phone and told of his concerning symptoms, it certainly would have been foreseeable to that neurosurgeon that significant consequences—and even injury to the plaintiff—could have occurred as a result of the statements he made or refrained from making. Plaintiffs' (mis-)reading of *Zavalas* would have allowed liability against that on-call neurosurgeon based on the mere possibility of potential harm to a patient (which possibility, in the medical field, is omnipresent) without regard of the central question on whether it was *his* patient, *i.e.,* someone that he had undertaken to treat. This reading cannot be squared with the well-established law governing medical malpractice claims.

D. The Court of Appeals Mistakenly Applied *Fazzolari.*

In addition to failing to dismiss for lack of duty under *Mead*, the Court of Appeals erred in applying *Fazzolari* to a medical malpractice case and suggesting that the foreseeability of harm could give rise to the requisite "duty."

Notably, the opinion below explained the familiar dichotomy between those cases governed by *Fazzolari* (common-law negligence cases) and those cases that are not (cases arising from certain "special relationships"), but then failed to indicate *to which category the present case belonged*. 275 Or App at 671-72. Later in the opinion, however, without giving any reasoning or explanation, it revealed its view that the present case is governed by *Fazzolari*. *Id.* at 676 (quoting and applying five-part test for ordinary negligence claims under *Fazzolari*).

This application ran afoul of the well-established rule that in medical malpractice cases, "a different standard [*i.e.*, not *Fazzolari*] applies," and that the requisite "duty" is present *only* "[w]hen a physician-patient relationship exists" between the plaintiff and defendant, as discussed above. *Son*, 239 Or App at 506; *accord Stewart v. Kids Inc.*, 245 Or App 267, 276, 261 P3d 1272 (2011) (noting "for purposes of determining the scope of duties in 'special relationship' cases, pre-existing case law has survived *Fazzolari*") (internal quotation omitted), *rev dismissed as improvidently allowed*, 353 Or 104 (2012).

As a result, medical malpractice cases do not apply the *Fazzolari* five-part test (quoted in *Tomlinson*, 275 Or App at 676), but rather apply a four-part test retaining the requirement of "duty", *i.e.,* a physician-patient relationship. *See Son*, 239 Or App at 506; *Smith v. Providence Health & Services—Oregon*, 270 Or App 325, 329, 347 P3d 820 (2015) (same; describing standard as "well established"), *rev granted on other grounds*, 357 Or 743 (2015); *Moser v. Mark*, 223 Or App 52, 55-56, 195 P3d 424 (2008) (same); *Zehr v. Haugen*, 318 Or 647, 653-54, 871 P2d 1006 (1995) (same).

This distinction is *not* to say that "the foreseeability standard of *Fazzolari* plays no role" whatsoever in a medical malpractice case. *See Oregon Steel Mills, Inc. v. Coopers & Lybrand, LLP*, 336 Or 329, 341, 83 P3d 322 (2004). Rather, the concept of foreseeability, if applicable in medical malpractice cases, could only regard the "*scope*" of duties owed from a physician to a patient, including which harms to a plaintiff were "reasonably foreseeable." *Id.* (italics in original). But the key point is that foreseeability in a medical malpractice case *cannot* establish or supply the "*existence* of a duty of care on the part of defendant." *Id.* (italics in original); *accord Sullenger*, 74 Or App at 348 (holding that for medical malpractice claims, foreseeability "does not determine the existence of such a duty" of care owed by a physician to a nonpatient; rather, "there is no duty to render care in the absence of a "physician-patient" relationship").

Indeed, although the Court in *Oregon Steel Mills* considered the concept of "foreseeability" in an accounting malpractice claim, it was only to analyze the questions of causation and injury, as there was *no dispute* in that case on the existence of a "duty" or "special relationship" between the plaintiff and defendant, who had been in an accountant-client relationship during the alleged malpractice in question. *Id.*, 336 Or at 332.[10]

Thus, it is a misreading of *Fazzolari* to read out the requirement of a "special relationship" for claims premised on a special relationship, one variety of which is medical malpractice. Physicians are not subjected to heightened standards to the general public as a result of their specialized training, knowledge, and experience. Rather, their professional duties are owed to their patients, and to their patients alone.

E. The Rules Governing Medical Malpractice Claims Should Not Be Re-Invented.

This case should not be used as an occasion to rewrite the well-established precedent governing medical malpractice claims, or, by extension, to change the practice of medicine in the State of Oregon. None of the

[10] The same rule applies in legal malpractice cases. *Hale v. Groce*, 30 Or 281, 744 P2d 1289 (1987) (holding that a non-client could only assert a legal malpractice claim against an attorney on a "third-party beneficiary" theory); *Yoshida's Inc. v. Dunn Carney Allen Higgin & Tongue, LLP*, 272 Or App 436, 456, 356 P3d 121 (2015) (same), *rev denied*, 358 Or 794, 370 P3d 502 (2016). The opinion below only cited to the Court of Appeals opinion in *Hale*, which suggested that foreseeability alone may suffice (*see* 275 Or App at 674-75), but that analysis was supplanted and not followed by this Court on review.

considerations for overruling prior cases have been advanced by plaintiffs and none are present. *See Couey v. Athens*, 357 Or 460, 485, 355 P3d 866 (2015). Physicians, as well as their employers and insurers, have always relied on the physician-patient relationship to define and limit the potential exposures from their medical care.

If ORS Chapter 677 is going to be expanded to require physicians to engage in professional standards of care toward non-patients (as the Court of Appeals' opinion indicates), then such a change should come through the Legislature in consultation with knowledgeable stakeholders, such as medical boards, professional organizations, and individual physicians who are familiar with the day-to-day practice of medicine. Anything else risks undermining the legislature's policy-driven protections already in place that limit physician exposure for liability for patient care. *See, e.g.,* ORS 12.110(4) (five-year statute of repose for claims for injuries "arising from any medical, surgical or dental treatment").

The opinion below has created the potential for physician liability to non-patient third parties based on a failed or late diagnosis, *even where the actual patient does not have a cognizable medical malpractice claim against the physician*. This unprecedented expansion of liability must be corrected.

The key question in medical malpractice cases is not whether a physician's treatment choice would foreseeably result in harm to a patient, but

rather whether the conduct was within the standard of care required of a reasonably careful physician acting in the same or similar circumstances in the same or similar community. ORS 677.095. Physicians are often confronted with several possible treatment options, each of which poses its own unique and sometimes significant risks of harm to the patient. Potential side-effects from various medications would be just one example. Physicians use their professional judgment in assessing these alternatives and weighing the trade-offs, and a physician can satisfy the professional standard of care (and thus not commit medical malpractice) even if injury or a bad outcome results to the patient, and even whether, with hindsight, a better alternative might have been selected.

Yet, with this expansion of liability, a physician must take into account whether the best treatment for a patient should be given if it might result in emotional distress to a non-patient. The physician-patient relationship is not, and must not be, subjected to influences outside medical decision-making in the best interests of the patient, such as by weighing potential liability to family members for the emotional distress they might experience with a bad, but not unanticipated, outcome to the patient.

Tort liability must have a source, and not all unfortunate or even tragic events result in legally-cognizable harm. *Lowe v. Phillip Morris USA, Inc.*, 344 Or 403, 410, 183 P3d 181 (2008) ("Not all negligently

inflicted harms give rise to a negligence claim"); *Norwest v. Presbyterian Intercommunity Hosp.*, 293 Or 543, 569, 652 P2d 318 (1982) ("[O]rdinarily 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"). For medical malpractice claims, the requirement of a physician-patient relationship between the plaintiff and the defendant comports with unambiguous precedent, the realities of the practice of medicine, and common sense.

Ignoring the Court's precedents, the Court of Appeals failed to explore the serious ramifications and paradoxes in allowing non-patients to sue for medical malpractice. If defendants here were legally obligated to undertake to gratuitously offer reproductive counseling to the non-patient parents (an area which, incidentally, is outside of their medical specialty of pediatrics), then are physicians now obliged to undertake to gratuitously treat a non-patient who suffers an ankle fracture in the clinic's parking lot? If physicians are now obliged to give advice to non-patients based on foreseeability of harm, what remains of Oregon's Good Samaritan Law, ORS 30.800, or of the general rule that a physician can elect to *not* treat a patient?

The fact that plaintiffs' case arises from a familial relationship does not limit these endless problems. For example, if Manny had been living with foster parents, would defendants have been obliged to search out and find the "biological parents" (*cf.* 275 Or App at 684) to warn them against having more kids? If defendants here were obliged to inform plaintiffs of Manny's (as yet unknown) DMD diagnosis and to gratuitously advise them on its implications on plaintiffs' own sexual and reproductive choices, are physicians now obliged in such circumstances to inform other family members as well? Or just those relatives who are of child-bearing age and ability? Or just those relatives who personally hold the opinion that they would not risk having any more children in the face of a 50% chance of a genetic disorder in the child?

If a patient, a mother, is incorrectly diagnosed with breast cancer, and the non-patient daughter thereafter chooses to have a mastectomy to eliminate risks to herself, does the daughter have a claim for medical malpractice against the mother's physician when it is discovered that the

mother is in fact free from breast cancer?[11] Does the physician's care of the mother give rise to claims to all family members for the emotional distress they have experienced as a result of the misdiagnosis? Can a non-patient husband now bring a medical malpractice claim against a physician for his own subjective emotional distress caused by the physician's misdiagnosis of his wife?

The answer to all of these questions has always been a common-sense "no", and that outcome should not be changed today. This Court should affirm the long-standing and important principle that a physician can only be sued by a patient for medical malpractice.

II. Additionally, Plaintiffs' Proposed Emotional Distress Damages Are Not Cognizable.

Even assuming plaintiffs could establish the presence of a "duty", as discussed above, their claims for emotional distress damages still fail because

[11] That the Court of Appeals' opinion below could be argued to support such a claim is perhaps demonstrated by *Horton v. Oregon Health & Science University*, 277 Or App 821, 373 P3d 1158 (2016), which allowed a mother to sue her child's physicians where the medical malpractice allegedly committed by those physicians toward that child resulted in the mother having to donate a portion of her liver to help the child survive. *See id.* *Horton* was issued just a few months after *Tomlinson* and heavily relied on that opinion. *See id.* at 827. Although *Horton* involved different facts than the present case, it nevertheless shows a concerning drift by the Court of Appeals away from the important requirement of a physician-patient relationship to state a medical malpractice claim. In light of this Court's decision in *Horton v. OHSU,* 359 Or 169, __P3d __, (2016), issued one week after the Court of Appeals opinion, the defendants filed a motion to dismiss and vacate the Court of Appeals opinion. The motion is currently being briefed and is pending.

they do not comply with the physical impact rule and no duty to plaintiffs to avoid emotional harm is alleged. The Court of Appeals' decision cannot be reconciled with this Court's cases and is erroneous in several significant ways.

First, it used an incorrect legal framework by failing to follow *Curtis*. Then, without provocation, the court announced a "special relationship" between the parties. Next, it improperly concluded that plaintiffs pleaded infringement of a right to "informed reproductive choices." Then the court, leaping further, stated there is an additional test, whether the interest is "of sufficient importance as a matter of public policy to merit protections from emotional impact." *See* 275 Or App at 681-84 (internal quotation omitted). Suggesting it is appropriate for the court to decide this question and create liability anew based on its view of public policy, it did so. Finding the newly created right of informed reproductive choice sufficiently important, *ipse dixit*, the Court of Appeals reversed the trial court.

This Court should correctly apply the law and affirm the trial court's dismissal of plaintiffs' claims. Reversal is required because plaintiffs failed to plead a physical injury or a heightened duty to protect against emotional harm. There is no special relationship alleged between the parties and no basis on which to hold a legally protected interest in "informed reproductive choice" serves to except this case from application of *Curtis* and longstanding rules

governing when emotional distress is actionable for allegedly negligent conduct.

A. *Curtis* Sets the Standard for Recovery of Noneconomic Damages in a Medical Malpractice Action.

In this case for medical malpractice, the damages recoverable are dictated by settled law. Oregon law does not permit recovery of emotional distress damages based on negligence in the absence of physical injury or some recognized exception to the general rule. *Paul v. Providence Health System-Oregon*, 351 Or 587, 597, 273 P3d 106 (2012). The Court of Appeals recognized this but created a new exception for this case. 275 Or App at 679.

This Court considered the availability of emotional distress damages in medical malpractice cases in *Curtis v. MRI Imaging Services II*, 327 Or 9, 956 P2d 960 (1998). *Curtis* requires something more than a physician-patient relationship to give rise to a claim for emotional distress, and it provides the analytical lens for this case. Under *Curtis*, the first question is whether the physical impact rule is satisfied. *Id.* at 14-15. If it is not, the second question is whether the plaintiff has "plead[ed] and prove[n] a standard of care that includes a duty to protect against psychic harm." *Rathgeber v. James Hemenway, Inc.*, 335 Or 404, 415, 69 P3d 710 (2003) (citing *Curtis*, 327 Or at 14-15). There is no other question to be addressed. If a plaintiff has done neither, the claim fails.

This Court affirmed *Curtis* in *Rathgeber*. There, the plaintiffs sought emotional distress damages in a professional malpractice claim against their real estate agent after the agent allegedly pressured the plaintiffs into purchasing a property later found to have defects. 335 Or at 408. The Court began by noting "[w]e first address the proper analytical framework within which to analyze plaintiffs' claim for emotional distress damages." *Id*. at 416. The Court concluded that "the reasoning in *Curtis* [applies] to *all types of professional malpractice*, not just to medical malpractice", and "the professional malpractice analysis in *Curtis* is the proper framework within which to analyze this case." *Id*. at 416-17 (italics added).

This Court in *Rathgeber* explained,

> "It is always foreseeable that some emotional harm might result from the negligent performance of real estate professional services, as it might from legal, accounting, or other varieties of professional malpractice. That possibility, however, cannot give rise to emotional distress damages unless a standard of care that includes the duty to protect a client from emotional harm governs the professional's conduct."

Id. at 418. The Court expressly rejected the alternative framework that considered whether a defendant had violated a plaintiff's "legally protected interest." *Id*. at 416.

Under *Curtis* and *Rathgeber*, "legally protected interests" are not part of the analysis. *Id.* Rather, when the claim is one based on a professional relationship—here, the physician-patient relationship with the plaintiffs'

child—it is that relationship that determines the physician's duty and liability. Here that question is whether the relationship with Manny gives rise to a heightened duty to protect his non-patient parents from emotional harm even where there is no violation of the duty owed to Manny. It does not, and there was no allegation that it did.

B. Plaintiffs' Claims Fail Under *Curtis*.

When *Curtis* is applied, plaintiffs' claims for emotional distress damages must be dismissed. Plaintiffs do not allege a physical impact. Instead they allege each "has suffered and will continue to suffer from extraordinary physical demands in caring for, transporting and assisting Teddy, resulting in *increased susceptibility to physical injury*, and severe emotional distress[.]" ER 6 (italics added). The trial court and Court of Appeals correctly held those allegations are insufficient to satisfy the physical impact rule. 275 Or App at 680; *see also Paul*, 351 at 599-600.

Plaintiffs also fail to allege that defendants owed them a heightened duty to protect them from emotional distress suffered as a result of Teddy's birth. Plaintiffs' failure to satisfy the legal standard should have been the end of the inquiry. The Court of Appeals departed from *Curtis* and *Rathgeber* when it failed to address whether any heightened duty to plaintiffs had been pled and looked instead to a legally protected interest.

C. There is No Special Relationship Between the Parties.

These plaintiffs and these defendants are not in a special relationship. This Court should reverse the Court of Appeals' decision to the contrary. Plaintiffs rely on the physician-patient relationship between their elder son Manny and defendants as the springboard for their own medical malpractice claims. This is not disputed. At no point did plaintiffs ask the trial court or Court of Appeals to recognize, for the first time, a special relationship between a non-patient parent and a medical provider. Yet, that is what the Court of Appeals did.

The Court of Appeals baldly states there is a "special relationship" between plaintiffs and defendants, providing sparse explanation:

> "the Tomlinsons have sufficiently alleged a special relationship between themselves and defendants in which defendants owed them a heightened duty of care that gave rise to a legally protected interest in making informed reproductive choices."

Tomlinson, 275 Or App at 683. The court cites to *Shin v. Sunriver Preparatory School, Inc.,* 199 Or App 352, 111 P3d 762, *rev denied*, 339 Or 406, 122 P3d 64 (2005), for what characteristics such relationships have. But nothing in *Shin* supports a conclusion that a special relationship existed between the parties here. Nothing in this record or the law supports the conclusion reached below.

The court created a special relationship between medical providers and the parents of their minor patients, without being asked and without the

question being developed by the parties or even presented to the trial court. This leaves a telling gap in the court's reasoning.

The special relationship involved in a medical malpractice case has been, and should remain, that between a physician and a patient. When a patient sues for breach of the professional standard of care, the claim is for medical malpractice and it fits into that body of governing law. The plaintiff cannot make the claim otherwise by labels or arguments about foreseeability. Here, the Court of Appeals created another special relationship to give rise to the same claim, but one apparently governed by different rules. There is no guidance or reasoning provided as to what the relationship created entails, those it extends to, *e.g.*, all family members or just parents, or what the physician is obligated to do as a result. The court's inability to articulate in favor of this newly created special relationship is evidence that its creation was ill advised.

There is no explanation by the court as to how the defendants owed a duty to the parents of their patient Manny to protect the parents' individual emotional well-being, separate and apart from the defendants' duties to their minor patient. There is also no guidance as to what the duty is or when it is owed. The circumstances of this case are unusual, and the bench and bar are left without a rule to apply in a principled way to future cases. The circular analysis employed makes no sense. To state the "special relationship" gives

rise to the legally protected interest and that the reverse is also true is a tautology.

It was improper for the Court of Appeals to announce an undefined new special relationship based on a theory that was not presented to the trial court, or the Court of Appeals, and is not a part of this case. *Klutschkowki v. PeaceHealth,* 354 Or 150, 169, 311 P3d 461 (2013) (declining to reconsider prior decisions without being asked by the parties). This Court should reverse.

D. Protected Interests are Not Involved. Even if They Were, There is No Interest in "Informed Reproductive Choice" That Gives Rise to Tort Liability Here.

Informed reproductive choice is not an exception to the physical impact rule. This Court should reverse the Court of Appeals because under *Curtis* and *Rathgeber*, in a professional malpractice case, the analysis does not involve "legally protected interests", as discussed above. Even if the Court were to somehow hold that it does, it should not create a new interest giving rise to liability for causing emotional upset to a non-patient by virtue of a failure to advise about facts, unknown to the provider, that could affect or impact reproductive choices.

This Court should reject plaintiffs' claim for $10 million in noneconomic damages because they lost an opportunity to make an informed choice – to not give birth to Teddy. First, Oregon's law of negligence does not permit recovery for lost chances or opportunities. *See Smith v. Providence Health & Servs—*

Oregon, 270 Or App 325, 347 P3d 820, *rev allowed*, 357 Or 743, 361 P3d 608 (2015). Second, it is unclear what right plaintiffs, the mother and father of Teddy, relied on that was interfered with by defendants' alleged negligent omission to Manny, which caused Manny no harm. Plaintiffs amorphously referenced *Roe v. Wade* and *Griswold v. Connecticut,* but failed to flesh out the "right" that defendants allegedly infringed. The Court of Appeals was unable to elucidate its holding, showing its unstable foundation.

The opinion below entirely ignores the Supreme Court opinion in *Curtis* which differs significantly in its reasoning. *Tomlinson*, 275 Or App at 681. Instead, relying on its own reasoning in *Curtis*, the Court of Appeals reached the conclusion that there was infringement of a legally protected interest. *Compare Curtis*, 327 Or at 13-15 *with Curtis*, 148 Or App 607, 618, 941 P2d 602 (1997). Then, citing out-of-state and federal law, the Court of Appeals below concluded that an infringement of the right to informed reproductive decision making was sufficient "as a matter of public policy to merit protection." *Tomlinson*, 275 Or App at 685 (internal quotation omitted). The only Oregon case relied on for that proposition is *Lockett v. Hill,* 182 Or App 377, 51 P3d 5 (2002), which is not explained in the opinion. The Court, quoting dicta from *Lockett*, stated:

> "we must determine whether that interest is 'of sufficient importance as a matter of public policy to merit protection from emotional impact.'"

Tomlinson, 275 Or App at 685. The reasons for the lack of explanation are evident when *Lockett* itself is examined.

Lockett was a case involving an action by cat owners against a dog owner whose dog killed their cat. The cat owners sought damages for their emotional distress and loss of companionship of their pet. An ordinary negligence case, the court held that the cat owners failed to identify an interest sufficient to justify the award of damages for emotional distress in the absence of physical injury. *Id.*, 183 Or App at 380-81. *Lockett* does not supply grounds for the expansion of liability against defendants in this case.

The court below went on to discuss decisions of other courts regarding public policy rationales behind the newly-discovered interest, before writing:

> "Moreover, there 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 the infringement."

Tomlinson, 275 Or App at 686. That statement is without citation, authority, or explanation. The Court of Appeals ignored this Court's precedent and made its own policy determination. It did so without regard to the requirement that tort liability must have a source in duty and a limit to those it is owed, as discussed above. The court presumed, by its language, that defendants had genetic information that they failed to share with the parents. Those are not the facts of this case.

The right created by the Court of Appeals is grounded in the special relationship it also creates. This illustrates again its fragility in the law. By grounding the "interest" or "right" in the relationship between the pediatrician and the parents of a minor patient, the court undermines its own logic because the existence of its right is dependent on that relationship. The right to privacy does not exist by virtue of other relationships; it exists plain and simple.

Plaintiffs do not allege that defendants infringed on a federal constitutional privacy right, and yet, that right served as a basis for the court's decision as it pointed to *Roe v. Wade*, 410 US 113, 93 S Ct 705, 35 L Ed 2d 147 (1973), and *Griswold v. Connecticut,* 381 US 479, 85 S Ct 1678, 14 L Ed 2d 510 (1965). *See Tomlinson*, 275 Or App at 686. *Roe* and *Griswold* do not create tort liability against private medical providers *vis-à-vis* an individual's right to make "informed" reproductive choices. Those cases involved the constitutionality of states' laws prohibiting the use of contraception or abortion. They can hardly be said to stand for the proposition that in the circumstances presented here, plaintiffs had a constitutionally-protected right to be informed of what Manny's medical providers did not know, or that such right is actionable against these private defendants. Plaintiffs do not bring a claim alleging defendants infringed upon their constitutional right to an abortion, nor could they. *Wood v. Ostrander*, 879 F2d 583, 587 (9th Cir 1989), *cert denied,* 498 US 938, 111 S Ct 341, 112 L Ed 2d 305 (1990) (to state a claim under 42

USC §1983 for violation of a federal constitutional right, plaintiff must allege the conduct complained of was committed by a person acting under the color of state law).

Further, there is no explanation on what right the mother and father had that defendants violated, or the contours thereof. Does everyone have a right to "informed" reproductive choice? If so, where does that right come from and how do we know when it is protected against intrusion? Does it apply to first-time parents who as adults do not seek care from pediatricians, but might otherwise want reproductive counseling? What about those who are yet to become pregnant but never see a doctor? Can a non-patient sue a physician who fails to diagnose a sibling of a genetic condition relating to fertility if they have the same condition and are unable to conceive and endure emotional distress while trying to no avail?

A rule creating a new interest and giving rise to liability for emotional harm experienced by a non-patient plaintiff is dubious at best and at worst has no limiting principle. Again, who holds the right to "informed" reproductive choice?[12] Does it apply equally to the mother who can choose to terminate a

[12] Take Tennessee for example, where its Supreme Court has refused to expand a claim for "disruption of family planning" even though the state recognizes the right to procreation as fundamental. *Rye v. Women's Care Ctr. of Memphis*, *MPLLC*, 477 SW3d 235, 271-73 (Tenn 2015) (acknowledging that Tennessee recognizes a fundamental right of procreation, but concluding that Tennessee law does not confer any right of action or remedial damages for disruption of family planning due to impairment of reproductive capacity).

pregnancy, *and* to the father who cannot? Does it extend to other service providers, not just doctors? Does the right inure to all family members, siblings, parents, lovers, or potential partners of a patient that a physician treats? That is, do physicians have an obligation to call up the partner of a patient after a diagnosis of any condition that could affect pregnancy or offspring, be it cancer, mental illness, or HIV, and let him or her know the consequences for his or her own separate reproductive future or else risk tort liability? Consider also the person who seeks sterilization intending not to tell his or her partner about the decision. Is a disclosure by the provider to be made notwithstanding the fact that it violates numerous state and federal privacy protections and could subject the provider for liability on other grounds? *See, e.g.,* 42 USC §1320d-6 & §1320d-9; 42 CFR Parts 160 and 164; ORS 192.553; *Humphers v. First Interstate Bank,* 298 Or 706, 719-20, 696 P2d 527 (1985).

The opinion below opens the door to all of the above questions providing no answers, but only the potential for expanded tort liability without limits. Those examples, and the unprecedented liability that could follow, demonstrate why the Court of Appeals' expansion of liability without foundation in fact or allegation cannot stand up to scrutiny and should be rejected.

CONCLUSION

Based on the foregoing, defendants ask this Court to accept their proposed rules of law, resulting in the reinstatement of the trial court's

dismissal of plaintiffs' medical malpractice claims as a result of no physician-patient relationship between plaintiffs and defendants, as well as the alternative dismissal of plaintiffs' claims for noneconomic damages due to the lack of any physical impact and any duty by defendants to protect against plaintiffs' psychic harm.

Dated this 18th day of August, 2016.

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CERTIFICATE OF COMPLIANCE

Brief Length

I certify that (1) this brief complies with the word-count limitation on ORAP 5.05(2)(b); (2) the word count of this brief (as described in ORAP 5.05(2)(a)) is 11,552 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).

Michael J. Estok, OSB No. 090748

CERTIFICATE OF FILING AND SERVICE

I certify that on August 18, 2016, I filed the foregoing **PETITIONERS METROPOLITAN PEDIATRICS, LLC, LEGACY EMANUAL HOSPITAL & HEALTH CENTER, AND MARY K. WAGNER, M.D.'S JOINT BRIEF ON THE MERITS**

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I further certify that on August 18, 2016, I served the foregoing **PETITIONERS METROPOLITAN PEDIATRICS, LLC, LEGACY EMANUAL HOSPITAL & HEALTH CENTER, AND MARY K. WAGNER, M.D.'S JOINT BRIEF ON THE MERITS** by means of electronic service through the court's e-filing system to the following:

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CONCLUSION

For the reasons set forth hereinabove, the trial court erred in granting Smith's motion for summary judgment on the grounds that Smith owed no duty to these plaintiffs. This matter should be reversed and remanded for trial, and plaintiffs should be awarded their costs and disbursements incurred herein.

Respectfully Submitted,

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