

STATE OF MICHIGAN  
IN THE SUPREME COURT

LALE ROBERTS and JOAN ROBERTS,

Plaintiffs-Appellees,

vs.

KATHRYN SALMI, L.P.C., an individual,  
d/b/a SALMI CHRISTIAN  
COUNSELING,

Defendant-Appellant.

Supreme Court No.:

Court of Appeals No.: 316068

Houghton County Circuit Court  
Case No.: 12-15075-NH

**APPLICATION FOR LEAVE TO APPEAL BY DEFENDANT-APPELLANT  
KATHRYN SALMI, L.P.C., D/B/A SALMI CHRISTIAN COUNSELING**

**NOTICE OF FILING SUPREME COURT APPLICATION**

**NOTICE OF HEARING**

**EXHIBITS**

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**STATEMENT IDENTIFYING THE JUDGMENT  
APPEALED FROM AND RELIEF SOUGHT**

Defendant Kathryn Salmi, L.P.C., d/b/a Salmi Christian Counseling, seeks leave to appeal from and/or peremptory reversal of the Court of Appeals' published December 18, 2014 decision reversing the grant of summary disposition by Houghton County Circuit Judge Thomas L. Solka (Court of Appeals' decision, attached as Exhibit 1).

This is a medical malpractice action in which plaintiffs Lale and Joan Roberts allege that defendant Kathryn Salmi, a licensed professional counselor, was negligent in improperly implanting or reinforcing false memories of physical and sexual abuse in the mind of their daughter, identified in the complaint as "K," which plaintiffs claim resulted in their own emotional distress, lost wages and medical expenses.

Defendant sought summary disposition in this action on the ground that plaintiffs' claim fails as a matter of law where Ms. Salmi owed no duty to the plaintiffs with respect to claims of negligence toward "K," and, alternatively, plaintiffs cannot come forward with admissible evidence to establish that the treatment provided by Ms. Salmi was negligent where the counselor-client privilege barred plaintiffs any access to "K's" records. Defendant also submitted that Michigan has not and should not recognize a cause of action by family members for emotional distress damages arising out of care and treatment provided to others, and, alternatively, that plaintiffs' claim is essentially one for "alienation of affection," which has been statutorily abolished in this State. The trial court granted defendant's motion, holding that dismissal was proper due to the absence of a legal duty owed to the parents under Michigan law. The trial court held that whether this cause of action should be allowed in this State is a question of policy, which is better left to the Legislature or the appellate courts of this State.

The Court of Appeals reversed the grant of summary disposition in a published opinion (Judges William B. Murphy, Michael J. Kelly, and David H. Sawyer), holding that Michigan recognizes a duty of care to third parties who might foreseeably be harmed by a mental health professional's use of techniques that cause his or her patient to have false memories of sexual abuse. The Court held that the relationship between a mental health professional and his or her patient's parents weighs in favor of imposing a limited duty because it is "entirely foreseeable" that the use of suggestive techniques to recover memories (such as plaintiffs allege were used here) might result in the creation of false memories of abuse by the patient's parents. *Slip op* at 7. The Court further held that balancing the policy considerations also weighs in favor of recognizing that a mental health professional has a limited duty to his or her patient's parents to ensure that the health professional's treatment does not give rise to false memories of childhood sexual abuse, concluding that recognizing a limited duty of care to third parties would not unduly burden a mental health professional's ability to diagnose and treat his or her patients for trauma originating from childhood sexual abuse. *Slip op* at 10.

Finally, the Court rejected defendant's remaining arguments, holding that whether plaintiffs will be unable to secure the evidence necessary to prove their claim as a result of the counselor-client privilege is premature because the parties have not yet had an adequate opportunity to conduct discovery, and holding that just because plaintiffs' claim involves to some extent the alienation of "K's" affections does not transform plaintiffs' claim into one for alienation of affection. *Slip op* at 14-15.

Defendant submits that the question of whether a mental health professional owes a duty of care to third parties to refrain from using allegedly negligent mental

health techniques that cause his or her patient to have “false” memories of sexual abuse involves legal principles of major significance to the State’s jurisprudence. MCR 7.302(B)(3). The Court of Appeals’ holding, in a published decision that will control all cases brought by third parties against mental health professionals who allegedly provide negligent treatment of the patient that gives rise to false memories of childhood sexual abuse, is an incorrect interpretation of Michigan law on the issue of duty that now subjects mental health providers and other licensed health professionals to liability by third-parties, based solely upon allegedly negligent care and treatment provided to the health professional’s non-party patient. As held by other states in rejecting the imposition of a duty under these circumstances, the imposition of a duty to nonpatient third parties would create an inherent conflict between the therapist and the client and place therapists in the precarious position where they would have to answer to competing demands from, and divide their loyalty between, their client and nonpatient third parties who are adversely affected by decisions of the patient made in response to counseling.

Additionally, defendant submits that the Court of Appeals’ decision is clearly erroneous and will cause material injustice, so as to warrant relief by this Court pursuant to MCR 7.302(B)(5). The Court of Appeals erred in holding that defendant owed plaintiffs, the parents of her patient, a separate legal duty with respect to the care and treatment rendered to her patient such that defendant could be liable to the plaintiffs in a malpractice action. Rather, defendant’s sole legal duty was owed to her patient, and defendant owed plaintiffs no separate legal duty. Additionally, the imposition of a duty of care to third parties will potentially compromise the patient-therapist relationship and

is wholly inconsistent with the duty of confidentiality that every therapist owes to his or her patients. The Court's holding that plaintiffs can recover damages for their emotional distress over "false" allegations of sexual abuse also is inconsistent with prior case law holding that family members have no independent claim for their own emotional distress over care and treatment provided to a family member. In fact, plaintiffs' claim is essentially one for "alienation of affection," which has been statutorily abolished in this state by MCL 600.2901.

Therefore, defendant respectfully requests that this Honorable Court grant leave to appeal and hear this case on the merits, and/or peremptorily reverse the Court of Appeals' decision and reinstate the trial court's grant of summary disposition.

**STATEMENT OF QUESTIONS PRESENTED**

- I      WHETHER THE COURT OF APPEALS ERRED IN EXTENDING THE DUTY OF CARE OWED BY A MENTAL HEALTH PROFESSIONAL TO NONPATIENT THIRD PARTIES SUCH THAT THE MENTAL HEALTH PROFESSIONAL COULD BE LIABLE TO THE THIRD PARTIES IN A MALPRACTICE ACTION FOR ALLEGEDLY CAUSING HIS OR HER PATIENT TO HAVE “FALSE” MEMORIES OF SEXUAL ABUSE, THUS CREATING A CAUSE OF ACTION NEVER BEFORE RECOGNIZED IN THIS STATE?**
- II     WHETHER SUMMARY DISPOSITION SHOULD BE AFFIRMED ON THE ALTERNATIVE GROUND THAT PLAINTIFFS CANNOT ESTABLISH A PRIMA FACIE CASE OF MALPRACTICE WHERE PLAINTIFFS CANNOT COME FORWARD WITH ADMISSIBLE EVIDENCE REGARDING THE TREATMENT PROVIDED TO THEIR DAUGHTER?**
- III    WHETHER SUMMARY DISPOSITION SHOULD BE AFFIRMED ON THE ALTERNATIVE GROUND THAT PLAINTIFFS HAVE NO INDEPENDENT CLAIM FOR THEIR OWN DAMAGES FOR THEIR OWN EMOTIONAL DISTRESS OVER CARE AND TREATMENT PROVIDED TO THEIR DAUGHTER UNDER MICHIGAN LAW?**
- IV    WHETHER, ALTERNATIVELY, SUMMARY DISPOSITION SHOULD BE AFFIRMED ON THE GROUND THAT PLAINTIFFS’ CLAIM IS ESSENTIALLY ONE FOR “ALIENATION OF AFFECTION,” WHICH HAS BEEN STATUTORILY ABOLISHED IN THIS STATE?**

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**CONCISE STATEMENT OF MATERIAL PROCEEDINGS AND FACTS**

Kathryn Salmi, L.P.C., d/b/a Salmi Christian Counseling, seeks leave to appeal from and/or peremptory reversal of the Court of Appeals' published December 18, 2014 decision reversing the grant of summary disposition by Houghton County Circuit Judge Thomas L. Solka (Court of Appeals' decision, attached as Exhibit 1). The trial court's order granting summary disposition was entered on January 18, 2013, after a hearing held on January 10, 2013 (1/18/13 order, attached as Exhibit 2; TR 1/10/13).

Defendant sought summary disposition in this medical malpractice action on the basis that Ms. Salmi owed no duty to the plaintiffs with respect to claims of negligence toward "K," and, alternatively, plaintiff cannot come forward with admissible evidence to establish that the treatment provided by Ms. Salmi was negligent where the counselor-client privilege barred plaintiffs any access to "K's" records. Defendant also submitted that Michigan has failed to recognize a cause of action by family members for emotional distress damages arising out of care and treatment provided to others, and, alternatively, that plaintiffs' claim is essentially one for "alienation of affection," which has been statutorily abolished in this State. The facts relevant to these issues are set forth below and, except as otherwise indicated, are based solely upon the allegations in the complaint<sup>1</sup>.

**Underlying Facts**

This is a medical malpractice action in which plaintiffs allege that defendant was negligent in improperly implanting or reinforcing false memories of physical and sexual

<sup>1</sup> Defendant does not concede the accuracy of these facts, but will utilize these facts for purposes of this appeal only.

abuse in the mind of their daughter, identified in the complaint as “K,” which plaintiffs claim resulted in their own emotional distress, lost wages and medical expenses.

As set forth in the lower court record, “K’s” date of birth is July 21, 1991 (TR 1/10/13). Plaintiffs sent their daughter “K” to attend counseling sessions with defendant Kathryn Salmi, a licensed professional counselor, in early July 2009, for the purpose of addressing mental and psychological issues stemming from an assault at the hands of a George Coppler (complaint, ¶¶ 10-11). Plaintiffs allege that Ms. Salmi engaged in a therapy known as Recovered Memory Therapy with “K,” which plaintiffs contend resulted in “K” claiming that she began to remember things that she “is adamant of actually having happened to her,” including purportedly false allegations of severe physical and sexual abuse by her father and mother (*Id.*, ¶¶ 12-16, 19). Plaintiffs attended a joint counseling session with “K” on July 14, 2009, at which time “K” confronted plaintiffs with her accusations of “severe physical and sexual abuses” (*Id.*, ¶¶ 14-16).

Ms. Salmi reported allegations of abuse to Child Protective Services on September 15, 2009, which, along with the Michigan State Police, investigated both plaintiffs (complaint, ¶¶ 17-18). Both investigations were eventually dropped and the Baraga County Prosecuting Attorney’s office declined to prosecute (*Id.*, ¶ 20).

Plaintiffs allege that “K” has severed all ties with plaintiffs and has made further complaints to police and in the community against plaintiffs (*Id.*, ¶ 21). Plaintiffs allege that, as a result of the negligence of Ms. Salmi, they “have and will suffer damages” including pain, suffering and disability; medical, psychiatric and psychological expenses;

lost wages; loss of enjoyment of life; as well as humiliation, mortification, and embarrassment; anxiety (*Id.*, ¶ 22).

In their single-count complaint filed January 9, 2012, plaintiffs allege “Negligence or Malpractice” by Ms. Salmi in failing to properly diagnose and treat their daughter (*Id.*, Count I). Plaintiffs allege that Ms. Salmi improperly introduced religious themes and activated these themes into therapy; improperly implanted or reinforced false memories of physical and sexual abuse in “K’s” mind by use of hypnosis, age regression and other psychotherapy techniques<sup>2</sup>; failed to disclose to “K” and to plaintiffs when “K” was still a minor of the availability of other forms of treatment as well as the risks and benefits of the treatment used by Ms. Salmi; and failed “to properly handle the transference and counter-transference existing in the therapy relationship” (*Id.*, ¶ 27).

At the time defendant filed the answer to plaintiffs’ complaint, defense counsel sent plaintiffs’ counsel correspondence requesting that plaintiffs dismiss the case on the basis that plaintiffs have failed to state a claim upon which relief can be granted under Michigan law (4/19/12 correspondence, attached as Exhibit A to defendant’s motion for protective order). Plaintiffs’ counsel instead scheduled the deposition of “K” for Friday, May 4, 2012 (notice and subpoena, attached below as Exhibit B to defendant’s motion for protective order).

Defendant thereafter filed an emergency motion for a protective order, seeking to adjourn the deposition so as to allow defendant to file, and the court to decide, a motion

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<sup>2</sup> Although assumed true for purposes of appeal, as set forth in the affidavit of meritorious defense signed by Ms. Salmi, Ms. Salmi does not use Repressed or Recovered Memory Therapy as plaintiffs suggest, nor has she been trained in hypnosis and does not employ that technique in her practice (affidavit of meritorious defense).

for summary disposition (motion for protective order). In the motion, defense counsel submitted that she has spoken with “K” by telephone regarding the deposition, and “K” was “extremely agitated” about having to appear for a deposition in a case brought by her birth parents, and “K” anticipated that the deposition would be “traumatic” (*Id.*, ¶ 6, p 2). Defense counsel further submitted that “K” had indicated that she has cut off all contact with the plaintiffs and has changed her name, and she “absolutely abhors the thought that she might be forced to share any personal information with her birth parents” (*Id.*).

Defendant filed two letters from “K’s” treating therapists in support of the motion, wherein “K’s” treaters indicated that the deposition was not in the best interest of their patient and could result in psychological trauma (5/3/12 letters).

Plaintiffs filed a response, arguing that “K’s” testimony is “the key” to obtaining the medical records necessary to pursue their claim (response to motion for protective order, ¶ 7, p 2).

Following a hearing held on May 3, 2012<sup>3</sup>, the trial court entered an order granting the motion for a protective order, adjourning “K’s” deposition “until further order of the court” (5/3/12 order).

### **Motion For Summary Disposition And Trial Court’s Decision**

Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(8), seeking dismissal of all of plaintiffs’ claims (motion for summary disposition). In the motion, defendant submitted that dismissal is proper where plaintiff cannot come

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<sup>3</sup> Plaintiffs, the appellants in the Court of Appeals, did not order the transcript of the hearing on defendant’s motion for protective order as required by MCR 7.210(B)(1)(a).

forward with admissible evidence to establish that the treatment provided by Ms. Salmi was negligent where the counselor-client privilege barred plaintiffs any access to “K’s” records (*Id.*). Additionally, defendant submitted that plaintiffs’ claim fails as a matter of law where Ms. Salmi owed no duty to the plaintiffs with respect to claims of negligence toward “K,” and, alternatively, Michigan has not and should not recognize a cause of action by family members for emotional distress damages arising out of care and treatment provided to others. Finally, defendant submitted that plaintiffs’ claim is essentially one for “alienation of affection,” which has been statutorily abolished in this State (*Id.*).

Plaintiffs responded to the motion by arguing that they seek damages relating to the purportedly negligent treatment provided by Ms. Salmi to their daughter “K,” including being falsely labeled as child molesters and the “stigma that such a label carries with it” (plaintiff’s response, pp 1-2). Plaintiffs argued that it was not clear whether “K” will assert the counselor-client privilege, although counsel conceded that the court entered a protective order preventing “K’s” deposition in this matter (*Id.*, p 4).

Defendant also filed a reply brief, wherein defendant submitted that plaintiffs cannot establish that “K’s” memories are false, which is an essential element of plaintiffs’ claim (reply brief).

The hearing on defendant’s motion occurred before Houghton County Circuit Court Judge Thomas L. Solka on January 10, 2013 (TR 1/10/13). At the hearing, the court granted defendant’s motion on the ground of the absence of a legal duty owed to the parents under Michigan law (*Id.*, pp 38-39). The court held that whether this cause

of action should be allowed in this State is a question of policy, which is better left to the Legislature or the appellate courts of this State (*Id.*, pp 39-40).

The order granting defendant's motion for summary disposition was entered on January 18, 2013 (1/18/13 order, Exhibit 2).

Plaintiffs filed a motion for reconsideration on February 7, 2013, to which defendant filed a response (motion for reconsideration; defendant's response to motion for reconsideration). Plaintiffs also filed a reply brief (reply in support of motion for reconsideration). The trial court issued an opinion and order denying plaintiff's motion for reconsideration on April 15, 2013 (4/15/13 order, attached as part of Exhibit 2).

### **Court Of Appeals Proceedings And Decision**

Plaintiffs filed a claim of appeal in the Court of Appeals on May 6, 2013 (claim of appeal). After briefing and oral argument, the Court reversed the grant of summary disposition in a published opinion decided December 18, 2014 (Judges William B. Murphy, Michael J. Kelly, and David H. Sawyer). The Court held that Michigan recognizes a duty of care to third parties who might foreseeably be harmed by a mental health professional's use of allegedly improper techniques that cause his or her patient to have false memories of sexual abuse. *Roberts v Salmi*, \_\_ Mich App \_\_ (2014) (attached as Exhibit 1). The Court held that the relationship between a mental health professional and his or her patient's parents weighs in favor of imposing a limited duty because it is "entirely foreseeable" that the use of suggestive techniques to recover memories might result in the creation of false memories of abuse by the patient's parents. *Slip op* at 7. The Court further held that a balancing of policy considerations also weighs in favor of recognizing a limited duty by a mental health professional to his

or her patient's parents to ensure that the health professional's treatment does not give rise to false memories of childhood sexual abuse, concluding that recognizing a limited duty of care to third parties would not unduly burden a mental health professional's ability to diagnose and treat his or her patients for trauma originating from childhood sexual abuse. *Slip op* at 10.

Finally, the Court rejected defendant's remaining arguments, holding that whether plaintiffs will be unable to secure the evidence necessary to prove their claim as a result of the counselor-client privilege is premature because the parties have not yet had an adequate opportunity to conduct discovery, and holding that just because plaintiffs' claim involves to some extent the alienation of "K's" affections does not transform plaintiffs' claim into one for alienation of affection. *Slip op* at 14-15.

Judge Sawyer dissented from the majority's opinion, holding that the issue of whether a duty should be recognized under the circumstances of this case is best left to the Legislature.

Defendant submits this application for leave to appeal in support of her position that the Court of Appeals erred in reversing the trial court's grant of summary disposition. Defendant respectfully requests that this Honorable Court grant leave to appeal and hear this case on the merits, and/or peremptorily reverse the Court of Appeals' decision reversing the trial court.

## STANDARD OF REVIEW

A motion for summary disposition brought under MCR 2.116(C)(8) tests the legal sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 119; 597 NW2d 817 (1999). All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant. *Id.* A motion under MCR 2.116(C)(8) is considered only on the pleadings and may be granted only where the claims alleged are “so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.” *Id.* at 119-120.

A trial court’s ruling on a motion for summary disposition brought pursuant to MCR 2.116(C)(8) is reviewed de novo. *Id.* at 118.

## ARGUMENT

**I THE COURT OF APPEALS ERRED IN EXTENDING THE DUTY OF CARE OWED BY A MENTAL HEALTH PROFESSIONAL TO NONPATIENT THIRD PARTIES SUCH THAT THE MENTAL HEALTH PROFESSIONAL COULD BE LIABLE TO THE THIRD PARTIES IN A MALPRACTICE ACTION FOR ALLEGEDLY CAUSING HIS OR HER PATIENT TO HAVE “FALSE” MEMORIES OF SEXUAL ABUSE, THUS CREATING A CAUSE OF ACTION NEVER BEFORE RECOGNIZED IN THIS STATE.**

The Court of Appeals erred in extending the duty of care owed by a mental health professional to nonpatient third parties such that the mental health professional could be liable to the third parties in a malpractice action for allegedly causing his or her patient to have “false” memories of sexual abuse, thus creating a cause of action never before recognized in this state.

Contrary to the Court of Appeals’ holding, the relationship between the nonpatient plaintiffs and their daughter’s counselor does not support imposition of a duty here. Cases from other jurisdictions, rejecting the invitation to create the exact cause of action allowed by the Court of Appeals here, reflect the judiciary’s recognition that the

societal interest in encouraging treatment of child abuse victims and maintaining the trust and confidence so essential to the psychotherapy relationship dictates against the imposition of a duty of care to third parties. The therapist's fear of liability to a parent (or other third party) would discourage therapists to explore the possibility that their patient was abused or to treat patients who were – or who believe they were – abused.

Moreover, recognition of the cause of action necessarily requires intrusion into the especially confidential realm of the psychotherapeutic relationship and, as argued in this case, possible involuntary waiver of the therapist-patient privilege and violation of the patient's privacy rights. For the reasons set forth below, the problem of divided loyalties and the strong public interest in maintaining the confidential nature of counselor-client communications both weigh against imposing a duty of care toward nonpatient third parties.

**A. Ms. Salmi Owed No Duty To The Nonpatient Plaintiffs Under The Common Law.**

There can be no tort liability unless the defendant owed the plaintiff a duty. *Hill v Sears, Roebuck & Co*, 492 Mich 651, 660; 822 NW2d 190 (2012). As a general rule, there is no duty that obligates one person to aid or protect another. *Id.* Generally, a duty may arise from a statute, a contractual relationship, or by operation of the common law. *Id.* at 660-661.

At common law, whether a legal duty exists is a question of whether the relationship between the actor and the plaintiff gives rise to any legal obligation on the actor's part to act for the benefit of the subsequently injured person. *Id.* at 661. The ultimate inquiry in determining whether a legal duty should be imposed is whether the

social benefits of imposing a duty outweigh the social costs of imposing the duty. *Id.*

As this Court recognized in *Buczowski v McKay*, 441 Mich 96; 490 NW2d 330 (1992):

Duty is actually a “question of whether the defendant is under any obligation for the benefit of the particular plaintiff” and concerns “the problem of the relation between individuals which imposes upon one a legal obligation for the benefit of the other.” *Friedman v Dozorc*, 412 Mich 1, 22; 312 NW2d 585 (1981); Prosser & Keeton, Torts (5th ed), § 53, p 356. “Duty’ is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.” *Id.*, p 358. See also *Friedman v Dozorc*, *supra*, and *Antcliff v State Employees Credit Union*, 414 Mich 624, 631; 327 NW2d 814 (1982). [*Buczowski v McKay*, 441 at 100-101 (footnotes omitted)].

Factors relevant to the determination whether a legal duty exists include the relationship of the parties, the foreseeability of the harm, the burden on the defendant, and the nature of the risk presented. *Hill*, 492 Mich at 661. This Court has recognized that, before a duty can be imposed, the most important factors to be considered are the relationship of the parties and the foreseeability of the harm. *Id.* If either of these two factors is lacking, then it is unnecessary to consider any of the remaining factors. *Id.*

A majority of states in which this same issue has been litigated have rejected the parents’ cause of action against a mental health provider for allegedly negligent diagnosis and treatment of their children, resulting in “false” allegations of sexual abuse, based upon a lack of duty owed to the parents.

In *Doe v McKay*, 700 NE2d 1018 (Ill, 1998) (case law from foreign jurisdictions attached as Exhibit 3), a case involving substantially similar facts as the instant action, the Supreme Court of Illinois rejected the plaintiff-parent’s negligence claim based upon the lack of a legally recognized duty to the plaintiff, holding that the duty of due care owed by a health care professional runs only to the patient and not to third parties. In *Doe*, the plaintiff-parent brought an action against the psychologist who provided mental

health treatment to his daughter, alleging that the psychologist's malpractice resulted in his daughter's false accusations of sexual abuse against the plaintiff. The court held that approval of plaintiff's cause of action would mean that mental health professionals could be subject to suit by any nonpatient third party who is adversely affected by personal decisions perceived to be made by a patient in response to counseling. *Doe* at 1023. The court further held that any rule imposing a duty of care to third parties would potentially compromise the patient-therapist relationship and could also be inconsistent with the duty of confidentiality that every therapist owes to his or her patients. *Id.*

Specifically, the court held that the imposition of a duty under these circumstances would create an inherent conflict between the therapist and the client and place therapists in the precarious position where they would have to answer to competing demands from, and divide their loyalty between, their client and nonpatient third parties who are adversely affected by decisions of the patient made in response to counseling. *Id.* at 1023. The Illinois Supreme Court in *Doe v McKay* held that these competing demands would have a destructive impact on the patient-therapist relationship, as follows:

Concern about how a course of treatment might affect third parties could easily influence the way in which therapists treat their patients. Under a rule imposing a duty of care to third parties, therapists would feel compelled to consider the possible effects of treatment choices on third parties and would have an incentive to compromise their treatment because of the threatened liability. This would be fundamentally inconsistent with the therapist's obligation to the patient. As one court has noted, "[D]octors should be free to recommend a course of treatment and act on the patient's response to the recommendation free from the possibility that someone other than the patient might complain in the future." *Lindgren v Moore*, 907 F Supp 1183, 1189 (ND Ill, 1995). Hoping to avoid liability to third parties, however, a therapist might instead find it

necessary to deviate from the treatment the therapist would normally provide, to the patient's ultimate detriment. This would exact an intolerably high price from the patient-therapist relationship and would be destructive of that relationship. [*Doe v McKay*, 700 NE2d at 1023-1024].

Similarly in *Trear v Sills*, 69 Cal App 4th 1341 (Cal, 1999), the California Court of Appeals rejected a patient's parent's cause of action for professional malpractice against a therapist on the basis of the absence of any professional duty having been voluntarily assumed toward the parent. The court held that, because of the inherently adversarial nature of the therapeutic problems posed by possible childhood sexual abuse, the therapist's duty cannot extend to a possible abuser. *Trear* at 1349 (emphasis provided). The court observed that "defensive" therapy "practiced under the sword of liability if a therapist is wrong about a recovered memory can hardly serve the person to whom the therapist's duty unquestionably does run: the patient." *Id.* at 1355-1356.

In *Flanders v Cooper*, 706 A2d 589 (Me, 1998), the Supreme Court of Maine similarly rejected a claim by the parent of a patient of the defendant, a licensed physical therapist who treated the plaintiff's daughter for temporomandibular joint syndrome and whom plaintiff alleged practiced beyond the scope of his license, for implanting false memories of sexual abuse perpetrated by the plaintiff into the mind of plaintiff's daughter. The court held that to recognize a cause of action by the parent would result in a health care professional, who suspected that a patient had been the victim of sexual abuse and who wanted to explore that possibility in treatment, having to consider the potential exposure to legal action by a third party who committed the abuse. *Flanders* at 591. The court held that it was not willing to sanction the intrusion on the

professional-patient relationship, even in light of allegations of implantation of false memories of sexual abuse. *Id.*

See also *PT v Richard Hall Mental Health Care Center*, 837 A2d 436 (NJ, 2002) (holding that the parent of a child allegedly misdiagnosed as having been sexually abused could not maintain an action against the mental health professional who made the diagnosis where there was no relationship from which any duty owed to the parent might be derived); *Paulson v Sternlof*, 15 P3d 981 (Okla, 2000) (rejecting the plaintiff-parent's claim based upon the fact that the defendant psychologist owed no duty to plaintiff; "[w]ithout the necessary doctor-patient relationship, [defendant] simply had no duty to Appellant that, if breached, could be the basis of a malpractice claim"); *Bird v WCW*, 868 SW2d 767 (Tex, 1994) (holding that a mental health professional owes no duty to a parent to not negligently misdiagnose a condition of the child).

As held by the courts in each of these decisions, this Court should hold that plaintiffs have no malpractice claim against Ms. Salmi due to the lack of a legally recognized duty owed to the plaintiffs. Such a holding is consistent with appellate court decisions within this state holding that a physician's duty in a medical malpractice action runs solely to the physician's patient, not third party family members with whom there is no physician-patient relationship. See e.g. *Malik v Wm Beaumont Hospital*, 168 Mich App 159, 168-169; 423 NW2d 920 (1988) (no claim by brother who had undergone surgery to donate kidney to sister for negligence in the performance of surgery on the sister; no physician-patient relationship between the brother and the physician who performed sister's surgery, and thus no duty owed by the physician to the brother).

**B. The Existence Of The Duty Of Confidentiality Owed By The Counselor To The Client, And The Client's Concomitant Right To Confidentiality, Also Weighs Against Extending The Duty Of Care To Nonpatient Third Parties.**

Furthermore, the existence of the duty of confidentiality owed by the counselor to the client, and the client's concomitant right to confidentiality, also weighs against the finding of a duty in favor of nonpatient third parties.

According to the Court of Appeals, if the mental health professional "utilizes inappropriate treatment techniques or inappropriately applies otherwise proper techniques, which cause the patient to have a false memory of sexual abuse by a parent, the mental health professional may be liable to the patient's parents for the harms occasioned by the false memories." *Roberts v Salmi*, \_\_ Mich App \_\_ (2014) (*Slip op* at 12). In order to establish a claim for breach of this duty, the Court held that a plaintiff must show that the mental health professional breached the applicable standard of care in the selection or use of a therapeutic technique or combination of techniques, that the improper use of the therapy or therapies caused the patient to have false memories of childhood sexual abuse by the parent or parents, and that the existence of the false memories caused the parents' damages. *Slip op* at 12-13.

The difficulty with the Court's holding is that both the Medical Records Access Act, MCL 333.26261, et seq, and the Health Insurance Portability and Accountability Act (HIPAA), 42 USC §§ 1320d, et seq, bar any right of access to psychotherapy records. Additionally, both the counselor-client privilege set forth in MCL 333.18117, and the statute protecting privileged communication, MCL 330.1750, bar disclosure of confidential communications between plaintiffs' daughter and Kathryn Salmi, a licensed professional counselor.

As further discussed below, because of the counselor-client privilege, MCL 333.18117, Ms. Salmi cannot reveal confidential communications revealed to her by “K.” As such, plaintiffs cannot obtain the information necessary to prove their case and Ms. Salmi cannot properly defend the present action because these communications are privileged and are subject to disclosure only under very specific circumstances, none of which are applicable here.

On the basis of these statutory protections, this Court should decline to find a duty in favor of nonpatient third parties.

**1. Both the Medical Records Access Act and HIPAA bar any right of access to psychotherapy records.**

The Medical Records Access Act, MCL 333.26261 et seq, establishes the right of a patient or a patient’s authorized representative to examine or obtain the patient’s medical record. MCL 333.26265(1). “Medical record” is defined in MCL 333.26263(i) as “information oral or recorded in any form or medium that pertains to a patient’s health care, medical history, diagnosis, prognosis, or medical condition and that is maintained by a health care provider or health facility in the process of caring for the patient’s health.” Not only are plaintiffs not the patient or the patient’s authorized representative, but the definition of “health care provider” specifically excludes a psychiatrist, psychologist, social worker or professional counselor who provides only mental health services. MCL 333.26263(e). Therefore, there is no right of access to mental health records from a licensed professional counselor such as Ms. Salmi under Michigan law.

Similarly, the HIPAA Privacy Rule sets forth an individual’s right of access to protected health information (PHI), grounds for denial of access to records, and the process for objecting to the denial of access, in 45 CFR 164.524. The Rule generally

allows an individual to have access to medical records. The Rule specifically provides, however, that an individual does not have the right of access to psychotherapy notes. 45 CFR 164.524(a)(1)(i). Under this provision, the denial of access to psychotherapy records by a covered entity (such as a hospital or health care provider) is unreviewable<sup>4</sup>. 45 CFR 164.524(a)(2)(i). Therefore, there is no basis under Michigan or federal law for plaintiffs to obtain “K’s” psychotherapy records from Ms. Salmi.

**2. Both the counselor-client privilege and the statute protecting privileged communications bar disclosure of confidential relations and communications between a client and a licensed professional counselor.**

The relationship between a mental health professional and a patient receives particularly strong statutory protection in this State. MCL 333.18117 sets forth the counselor-client privilege, as follows:

For the purposes of this part, the confidential relations and communications between a licensed professional counselor or a limited licensed counselor and a client of the licensed professional counselor or a limited licensed counselor are privileged communications, and this part does not require a privileged communication to be disclosed, except as otherwise provided by law. Confidential information may be disclosed only upon consent of the client, pursuant to section 16222 if the licensee reasonably believes it is necessary to disclose the information to comply with section 16222, or under section 16281. [emphasis supplied].

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<sup>4</sup> Although 45 CFR 164.524 generally allows a parent to have access to the medical records pertaining to his or her minor child, as his or her minor child’s “personal representative,” when the access is not inconsistent with State or other law, there is an exception set forth in HIPAA’s Privacy Rule that a provider may choose not to treat a parent as a “personal representative” when the provider reasonably believes, in his or her professional judgment, that the child has been or may be subjected to domestic violence, abuse or neglect, or that treating the parent as the child’s “personal representative” could endanger the child, or is not in the child’s best interest. 45 CFR 164.502(g)(5)(i) and (ii). Michigan has a similar provision set forth in MCL 333.26265(2)(e) for when disclosure of medical records is likely to have an adverse effect on the patient.

The counselor-client privilege statute clearly and unambiguously envisions that a licensed professional counselor is not required to disclose privileged communications, except as required by law or as otherwise allowed under the statute<sup>5</sup>. While the Legislature incorporated in §18117 three instances when a disclosure of confidential patient information may occur, none of the three exceptions set forth in the second sentence of §18117 apply here. Therefore, the confidential relations and communications between a licensed professional counselor such as Kathryn Salmi and her client are “privileged communications,” and Ms. Salmi is not required to disclose the privileged communications “except as otherwise provided by law<sup>6</sup>.”

Additionally, the admissibility of privileged communications is governed by MCL 330.1750, which provides that privileged communications “shall not be disclosed” in civil cases or proceedings, including even the fact that the patient has been examined or treated or undergone a diagnosis, unless the patient has waived the privilege. While the statute contains several exceptions to the waiver requirement in §1750(2), none of the circumstances allowing for admission of privileged communications set forth in §1750(2) apply here. Therefore, under §1750, the privileged communications between Ms. Salmi, a licensed professional counselor, and plaintiffs’ daughter “K” cannot be disclosed in this civil action.

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<sup>5</sup> Examples of disclosures that are required by law would be a mental health professional’s duty to disclose a patient’s communicated threat of violence against a third person under MCL 330.1946, or the duty to report suspected child abuse under MCL 722.623.

<sup>6</sup> There is no contention by plaintiffs here that the disclosure of “K’s” privileged information is otherwise required by law.

In *In re Petition of Attorney General for Investigative Subpoenas*, 282 Mich App 585, 597; 766 NW2d 675 (2009), the Court of Appeals underscored the importance of the relationship between a therapist and his or her client, holding that the Legislature's purpose in enacting the psychologist-patient privilege statute, MCL 333.18237, was to protect the confidential nature of the psychologist-patient relationship, "a setting widely recognized as particularly sensitive and in which confidentiality is an essential ingredient of successful treatment."

The counselor-client privilege set forth in MCL 333.18117 is no less important in protecting the sensitive and confidential relationship between the counselor and the patient and should be construed in the same manner as the psychologist-patient privilege. As in *In re Petition*, imposing a duty in favor of nonpatient third parties and allowing a nonpatient to bring a cause of action against another person's therapist would be contrary to this state's broad policy of protecting confidential information and the therapist-patient relationship.

See also *Baker v Oakwood Hospital Corp*, 239 Mich App 461, 463; 608 NW2d 823 (2000) (holding that the physician-patient privilege is an absolute bar that prohibits the unauthorized disclosure of nonparty patient medical records); *Steiner v Bonanni*, 292 Mich App 265, 274; 807 NW2d 902 (2011) (recognizing that there are only limited exceptions to Michigan's general nondisclosure requirements and there is no Michigan rule for nonconsensual disclosure of nonparty patient information in judicial proceedings); *Dorris v Detroit Osteopathic Hospital Corp*, 460 Mich 26; 594 NW2d 455 (1999) (holding, in the consolidated *Gregory* case, that a hospital cannot be compelled to reveal the name of a nonparty patient who allegedly assaulted the plaintiff, even for

purposes of identifying a potential defendant in a medical malpractice/tort action, where the patient has neither voluntarily nor impliedly waived the privilege, based upon “strong public policy reasons”; “[t]he concept of privilege . . . supersedes even the liberal discovery principles of this state”).

There is no question that plaintiffs cannot obtain from the defendant the confidential communications between their daughter and Ms. Salmi, nor can Ms. Salmi disclose the content of these confidential communications or even the fact that she treated this patient, absent a waiver of the counselor-client privilege by their daughter. See *Doe v McKay*, 700 NE2d at 1024 (holding that, unless waived by the patient, the therapist’s duty of confidentiality would restrict the therapist in the manner in which she could respond to the plaintiff’s allegations). Plaintiffs here failed to come forward with an authorization for release of their daughter’s records and it is clear from the allegations in the complaint that plaintiffs will not be able to provide such a release, given that their daughter has severed all ties with them and continues to make further complaints to police and in the community against plaintiffs based upon her allegations of severe physical and sexual abuse (complaint, ¶¶ 15, 19, 21). Plaintiffs’ inability to proceed with their case, and Ms. Salmi’s inability to defend this action, due to the existence of the duty of confidentiality owed by the counselor to the client weighs against the finding of a duty in favor of nonpatient third parties.

While the Court of Appeals cited to cases from other jurisdictions that have allowed the type of action the Court of Appeals’ decision now allows the plaintiffs here to bring, the stringent statutory protection afforded to the therapist-client relationship in Michigan must preclude the recognition of this cause of action in this State.

**C. As A Matter Of Public Policy, This Court Should Reject The Imposition Of A Duty In Favor Of Nonpatient Parents/Third Parties That Intrudes Upon The Privacy Rights Of Patients, Particularly Patients Who Are Or Believe Themselves To Be Victims Of Sexual Abuse.**

As a matter of public policy, this Court should reject the imposition of a duty in favor of nonpatient parents/third parties that intrudes upon the privacy rights of patients, particularly patients who are or believe themselves to be victims of sexual abuse.

This Court has repeatedly rejected the imposition of a duty as a matter of public policy. See *Williams v Cunningham Drug Stores, Inc*, 429 Mich 495, 501; 418 NW2d 381 (1988) (holding that a merchant's duty of reasonable care does not include providing armed, visible security guards to deter criminal acts of third parties based in part on the public interest in imposing such a duty); *Buczowski v McKay*, 441 Mich 96, 108; 490 NW2d 330 (1992) (holding that, as a matter of policy, a retailer did not have a legal duty to protect a member of the general public from the criminal acts of the defendant); *Hill v Sears, Roebuck & Co*, 492 Mich 651, 669-670; 822 NW2d 190 (2012) (holding that an appliance installer's duty does not include the duty to taken any action with respect to an uncapped gas line, holding that the social benefits of imposing a duty do not outweigh the social costs).

In the present matter, "K" has not recanted her allegations of abuse against her parents. In fact, plaintiffs allege in the complaint that "K" has severed all ties with her parents and continues to assert that the abuse occurred (complaint, ¶¶ 12-16, 19, 21; motion for protective order, ¶ 6, p 2). If this suit were allowed to go forward, this Court would be subjecting "K" to questioning in an adversarial proceeding (either at deposition or at trial) by those she accuses of severe physical and sexual abuse. It should not be the policy of this State to allow this to occur, even in litigation where the Court must

assume as true the facts as alleged in the complaint that the defendant is responsible for implanting “false” memories of abuse.

The analysis of duties owed by the defendant must proceed from the assumption that the abuse occurred or, if nothing else, that “K” “adamantly believes” that the abuse occurred (complaint, ¶ 12). Plaintiffs, as the alleged abusers, whether wrongly accused or not, seek to have a duty run to them at the expense of the therapeutic relationship beneficial to “K” and “K’s” rights of confidentiality. Given this State’s broad policy of protecting victims of physical and sexual abuse, see MCL 722.621 et seq, the need to protect “K” from even the possibility of further psychological trauma and abuse by her alleged abusers, including abuse in the context of litigation, should override any recognition of a right of the accused abuser.

The potential for litigation abuse is illustrated by the arguments set forth by the plaintiffs in their attempt to obtain discovery in this matter, including the attempted scheduling of the deposition of “K.” In support of the emergency motion to quash the deposition of “K”, defendant submitted two letters from “K’s” treating therapists, wherein “K’s” treaters indicated that the deposition was not in the best interest of their patient and could result in psychological trauma (5/2/12 and 5/3/12 letters). Defense counsel also submitted that she had spoken with “K” and “K” was “extremely agitated” about having to appear for a deposition, anticipated that the deposition would be “traumatic,” and she “absolutely abhors the thought that she might be forced to share any personal information with her birth parents” (motion for protective order, ¶ 6, p 2). Despite having this information, plaintiffs’ counsel argued at the hearing on defendant’s motion for

summary disposition that it was unclear whether “K” was asserting the privilege<sup>7</sup>, and then delineated the methods that could be used to obtain information regarding “K’s” privileged medical information even if she were to assert the privilege, as follows:

[BY PLAINTIFFS’ COUNSEL:] So even – I’m getting ahead of myself here, but we don’t know that she’s going to assert the privilege. There’s nothing on the record establishing that.

You know, it could be as simple as bring her in, can you tell us about your therapy with Ms. Salmi?

No, it’s privileged, I’m not talking about it.

Then we go into discussing these other – Well, did you talk to anybody about it, have you ever disclosed it to anybody? You know, we can send investigators out to talk to friends and people that she knows, to find out if she ever talked to or disclosed anything regarding her therapy.

Once that disclosure happens, the privilege disappears. [TR 1/10/13, p 24 (emphasis added)].

This type of systematic harassment advocated by plaintiffs’ counsel, utilized by the very people “K” accuses of physical and sexual abuse and under the pretext of conducting “discovery” during litigation, should not be sanctioned by this Court.

This Court therefore should decline to recognize a duty to the plaintiffs as against public policy. See *Zamstein v Marvasti*, 240 Conn 549 (Conn, 1997) (rejecting plaintiff’s request for the court to recognize that mental health professionals who evaluate children for evidence of sexual abuse owe a duty to the person suspected of committing

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<sup>7</sup> As set forth below, it is defendant’s position that “K” asserted the privilege when she indicated to defense counsel that she “absolutely abhors the thought that she might be forced to share any personal information with her birth parents,” which prompted defense counsel to file an emergency motion for protective order to prevent plaintiffs from taking “K’s” deposition in this matter (motion for protective order, ¶ 6, p 2). The trial court thereafter granted defendant’s motion, holding that “K’s” deposition “is adjourned until further order of the Court” (5/3/12 order).

the abuse to exercise reasonable care in the performance of the evaluation, as contrary to the public policy of the state).

**D. Given That The Recognition Of Plaintiffs' Cause Of Action Has Such Significant Public Policy Implications, Recognition Of This Cause Of Action Is, At A Minimum, For The Legislature Of This State.**

Given that the recognition of plaintiffs' cause of action has such significant public policy implications – allowing plaintiffs to impose upon the psychotherapeutic relationship their daughter had with her counselor, thus violating the patient's privacy rights in the process – defendant respectfully submits that recognition of this cause of action is, at a minimum, for the Legislature of this state. In *Henry v Dow Chemical Co*, 473 Mich 63, 68-69; 701 NW2d 684 (2005), this Court rejected plaintiff's medical monitoring claim on the basis that the court lacked "sufficient information to assess intelligently and fully the potential consequences of recognizing" such a claim, and deferring this case "to the people's representatives in the Legislature, who are better suited to undertake the complex task of balancing the competing societal interests at stake." This Court specifically recognized in *Henry* that Legislatures are in the best position to consider difficult public policy issues, as follows:

Legislatures are in the best position to consider far-reaching and complex public policy issues. First, they can gather facts from a wide range of sources to help lawmakers decide whether the law should be changed and, if so, what sorts of changes should be made. Second, legislatures make law prospectively, which gives the public fair notice about significant legal changes. . . . Third, they must be sensitive to the will of the public; if they are not, the public can vote them out of office. In our democratic system, if far-reaching public policy decisions are to be made, the public should have the opportunity to evaluate those changes and express their agreement or disagreement in the voting booth.

Courts, on the other hand, are best suited to make incremental changes over time. Judges decide cases one at a time. Their information-gathering is limited to one set of facts in each lawsuit, which is shaped and limited by arguments from opposing counsel who seek to advance purely

private interests. Second, judges “make law” retroactively. This creates notice and fairness problems. Third, there is no “public light” placed on judicial lawmaking. Judges in many states are appointed, not elected. The public has no voice in and must accept judicial will. When judges are elected, the public is generally unaware of the legal opinions the judges have written or the impact of those opinions on society. [*Henry*, 473 Mich at 92, n 24, citing Schwartz & Lorber, *State Farm v Avery: State court regulation through litigation has gone too far*, 33 Conn L R 1215, 1219-1220 (2001).]

Here, the Court of Appeals created a new cause of action in favor of third parties to a psychotherapeutic relationship, which, as other courts have recognized, will necessarily compromise the psychotherapeutic relationship. *Doe v McKay, supra; Trear v Sills, supra*. Defendant respectfully submits that the Court of Appeals had no foundation for its bald assertion below that the recognition of a limited duty of care to third parties would not “unduly burden” a mental health professional’s ability to diagnose and treat his or her patients for trauma originating from childhood sexual abuse. *Roberts v Salmi*, \_\_\_ Mich App \_\_\_ (2014) (*Slip op* at 10). Certainly the courts of this state are not in the best position to make this determination. Rather, as this Court held in *Henry*, recognition of a previously unrecognized cause of action, having such significant public policy implications, should be left to the Legislature.

This is particularly true where a tort remedy is available to a patient who believes that he or she has been the victim of professional negligence. Although the Court of Appeals below held that the failure to recognize a duty to nonpatient third parties “might encourage the continued use of questionable therapeutic techniques on uninformed patients,” *Slip op* at 11, defendant submits that the use of competent professional judgment by mental health professionals already is encouraged by allowing a medical malpractice action by the patient, and there is no need to extend the duty to third parties in order to accomplish the goal of securing appropriate patient care. The Court’s

creation of a theory of liability on behalf of the nonpatient parents is an unwarranted expansion of liability. Defendant respectfully submits that the Court of Appeals simply had no basis for its assertion that the extension of a duty to third parties will reduce the likelihood that negligent therapy methods will be used.

Additionally, a patient who brings suit upon the belief that his or her counselor committed malpractice would place his or her own treatment at issue, thus waiving the statutory privilege protecting the counselor-client communications. MCR 2.314; see also MCL 600.2912f. Under those circumstances, the confidentiality concerns set forth above would no longer restrict the counselor in defending the action.

**II SUMMARY DISPOSITION SHOULD BE AFFIRMED ON THE ALTERNATIVE GROUND THAT PLAINTIFFS CANNOT ESTABLISH A PRIMA FACIE CASE OF MALPRACTICE WHERE PLAINTIFFS CANNOT COME FORWARD WITH ADMISSIBLE EVIDENCE REGARDING THE TREATMENT PROVIDED TO THEIR DAUGHTER.**

Summary disposition should be affirmed on the alternative ground that plaintiffs cannot establish a prima facie case of malpractice where plaintiff cannot come forward with admissible evidence regarding the treatment provided to their daughter. While this issue was not one of the grounds specifically identified by the trial court as a basis for summary disposition, this Court will not reverse the trial court's grant of summary disposition where the trial court reaches the correct result, albeit for the wrong reason.

*Klooster v Charlevoix*, 488 Mich 289; 795 NW2d 578 (2011).

**A. Plaintiffs Cannot Establish A Prima Facie Case Of Malpractice Where "K" Asserted Below The Counselor-Client Privilege Set Forth In MCL 333.18117.**

As set forth above, "K" asserted the counselor-client privilege, MCL 333.18117, when she indicated to defense counsel that she "absolutely abhors the thought that she might be forced to share any personal information with her birth parents," prompting

defense counsel to file an emergency motion for protective order to prevent plaintiffs from taking “K’s” deposition in this matter (motion for protective order, ¶ 6, p 2). The trial court properly granted the motion for protective order, thereby precluding the deposition of “K” (5/3/12 order).

Given “K’s” assertion of privilege, even if this Court were to affirm the Court of Appeals’ holding that Ms. Salmi owed a duty to plaintiffs, plaintiffs’ inability to obtain a waiver of the privilege from their daughter “K” for the disclosure of her records means that plaintiffs cannot proceed with their case. In other words, even assuming Ms. Salmi owed a duty to plaintiffs individually to refrain from using techniques during her care and treatment of “K” that may cause false memories, plaintiffs could not establish a breach of that duty or causation absent “K’s” mental health records.

Here, the Court of Appeals held below that in order to establish a claim for breach of this duty, plaintiffs must show that the mental health professional breached the applicable standard of care in the selection or use of a therapeutic technique or combination of techniques, that the improper use of the therapy or therapies caused the patient to have false memories of childhood sexual abuse by the parent or parents, and that the existence of the false memories caused the parents’ damages. *Roberts v Salmi*, \_\_ Mich App \_\_ (2014) (*Slip op* at 12-13). Ms. Salmi attested to the fact in her affidavit of meritorious defense that she does not use Recovered Memory Therapy as plaintiffs allege (affidavit of meritorious defense). In order to prove that Ms. Salmi did, in fact, negligently utilize the type of therapy she is alleged to have used here, Recovered Memory Therapy, plaintiffs necessarily would require disclosure of “K’s” counseling records to determine whether Ms. Salmi actually utilized this type of therapy. Plaintiffs,

however, are precluded from obtaining “K’s” records to prove the merit of such a claim given “K’s” assertion of the privilege. Establishing specifics as to “K’s” treatment is an essential element of plaintiffs’ claim and cannot be proved under these circumstances.

Where plaintiffs cannot produce any physical, documentary, or testimonial evidence relating to “K’s” medical or mental health history, plaintiffs will be unable to create a prima facie case of medical malpractice. Plaintiffs cannot establish what defendant did incorrectly and how defendant’s acts caused injury to the plaintiffs. The trial court therefore properly granted summary disposition where plaintiffs are unable to create a genuine issue of material fact for trial regarding the standard of care, a breach of the standard of care, causation, and damages where plaintiffs cannot introduce any evidence regarding “K’s” medical or mental health history. See *Paul v Lee*, 455 Mich 204, 207; 568 NW2d 510 (1997); *Locke v Pachtman*, 446 Mich 216, 223-229; 521 NW2d 786 (1994).

**B. There Is No Merit To Plaintiffs’ Argument Below That “K” Waived The Privilege Set Forth In MCL 333.18117.**

Although plaintiffs argued below that “K” may have waived the privilege set forth in MCL 333.18117, apparently by making statements to police officers and/or others, there is no merit to plaintiffs’ argument. In *People v Stanaway*, 446 Mich 643, 684; 521 NW2d 557 (1994), this Court held that the Legislature expressly provided that in the case of psychologists and psychiatrists, the privilege must be expressly waived by the privilege holder. This is because the privilege is an absolute privilege. See also *Steiner v Bonanni*, 292 Mich App 265; 807 NW2d 902 (2011) (holding that there is no Michigan rule for nonconsensual disclosure of nonparty patient information in judicial proceedings).

“K” is not a party in this suit. Therefore, she has not and will not be placing her mental or physical condition in controversy under MCR 2.314, such that a waiver of the privilege will occur<sup>8</sup>. In fact, “K” objected to the taking of her deposition in this matter and the deposition was blocked by an order of the trial court, which is further evidence that “K” has not expressly waived the privilege.

Because there has been no express waiver of the privilege, “K’s” therapy records are absolutely protected by the counselor-client privilege and plaintiffs are not entitled to discovery of “K’s” records. Neither “K” nor Ms. Salmi can be compelled to reveal, either through testimony or the release of records, the facts that plaintiffs need to establish in order to support their claim, e.g. what the patient said at various times to the therapist, what information the therapist was given by the patient or the family about the patient, what the therapist elicited or observed of the patient at the various appointments, the nature of the treatment given, the reason such treatment was given, whether the treatment caused the “memories” to arise, or the observed or reported effects of the treatment. Absent the ability to come forward with this information, plaintiffs cannot pursue their claim.

There also is no merit to plaintiffs’ reliance upon the narrow exception to this absolute privilege carved out in *People v Stanaway, supra*. In *Stanaway*, the criminal defendants sought access to the mental health records of the victims/witnesses in their cases. The Court there was forced to balance the state’s compelling interest in

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<sup>8</sup> Even if “K” had placed her physical or mental condition in controversy under MCR 2.314 (which is denied), the only effect of her asserting the privilege in the course of this litigation is that “**K**” cannot introduce evidence relating to her mental or physical condition.

protecting the confidentiality of counseling records with a criminal defendant's federal and state constitutional rights to obtain evidence necessary to his defense in a criminal trial. There, the Court held that where there was a "reasonable probability" that the victim's medical records contained information that was essential to the defense, it was appropriate for the Court to conduct an in camera review of the records. *Id.* at 649-650. The Court concluded that "[c]ommon-law and statutory privileges may have to be narrowed or yielded if those privileges interfere with certain constitutional rights of defendants." *Id.* at 668-669 (emphasis added).

The exception to confidentiality set forth in *Stanaway*, and more importantly the justification underlying this exception, is inapplicable here and should not be extended to allow disclosure of privileged materials in the context of a civil action. There is a significant distinction between a criminal defendant's federal and state constitutional rights to obtain evidence relevant to his defense in a criminal trial and these plaintiffs' desire to obtain confidential information to support their allegations in a civil matter. Plaintiffs are voluntarily bringing this cause of action on their own behalf; they are not compelled to do so. Plaintiffs' interest in invading their daughter's privacy right is to obtain money damages, not the more serious interest of avoiding a criminal conviction and the related loss of liberty. Plaintiffs are not in a position similar to that of a criminal defendant, against whom the state is prosecuting in a proceeding that is involuntary to the defendant. Moreover, in the state of Michigan, plaintiffs do not have an established "right," much less a constitutional "right," to bring a civil action for the damages they seek.

In fact, the Court of Appeals has rejected similar attempts to extend the holding in *Stanaway* beyond application to defendants in criminal cases. See *In re Request for Investigative Subpoena*, 256 Mich App 39, 50-51; 662 NW2d 69 (2003) (holding that the constitutional due-process right to a fair trial asserted by the defendant is greater than the right asserted by the prosecutor to obtain statutorily privileged information during the course of a criminal investigation; “Because the procedure established in *Stanaway* resulted from a concern that is not present in this appeal, a criminal defendant's assertion of his constitutional right to a fair trial, we reject the prosecutor's attempt to apply that decision to the facts of the instant case and thereby abrogate the legislatively created privilege”). As in *In re Request*, the underlying concern for a criminal defendant's right to a fair trial present in *Stanaway* is not present here. This Court therefore should similarly reject the plaintiffs' attempt to apply the decision in *Stanaway* to this case to abrogate the legislatively-created counselor-client privilege set forth in MCL 333.18117.

In short, there is no way for plaintiffs to establish the facts necessary to prove their claim without intruding into the psychotherapeutic relationship between “K” and the defendant. Without “K's” waiver of the privilege, or this Court's declaration that “K's” right to privacy and the psychotherapy privilege must yield to their right to pursue a civil suit for money damages, it is impossible for plaintiffs to establish that Ms. Salmi was professionally negligent during her sessions with “K.”

**C. Additionally, Any Testimony By Plaintiffs Or Another Third Party As To What “K” Told Them Regarding Her Treatment Is Inadmissible Hearsay.**

Additionally, any testimony by plaintiffs or another third party regarding what treatment was given to “K” is inadmissible hearsay. Any statements purportedly made

by “K” to her parents or any other third party regarding the treatment provided by Ms. Salmi are inadmissible hearsay—out-of-court statements offered to prove the truth of the matter asserted. MRE 801, 802. Furthermore, these purported statements do not fall within any of the exceptions to the hearsay rule. Therefore, any testimony by plaintiffs or another third party regarding “K’s” purported statements would be inadmissible, and plaintiffs would be unable to create a genuine issue of material fact for trial. See *Maiden v Rozwood*, 461 Mich 109, 125; 597 NW2d 817 (1999) (holding that inadmissible evidence cannot establish a genuine issue of material fact for trial). As such, the trial court properly granted summary disposition as to plaintiffs’ claims.

**III SUMMARY DISPOSITION SHOULD BE AFFIRMED ON THE ALTERNATIVE GROUND THAT PLAINTIFFS HAVE NO INDEPENDENT CLAIM FOR THEIR OWN DAMAGES FOR THEIR OWN EMOTIONAL DISTRESS OVER CARE AND TREATMENT PROVIDED TO THEIR DAUGHTER UNDER MICHIGAN LAW.**

Summary disposition should be affirmed on the alternative ground that plaintiffs have no independent claim for their own damages for their own emotional distress over care and treatment provided to their daughter under Michigan law. As set forth above, this Court will not reverse the trial court’s decision where the trial court reaches the correct result. *Klooster, supra*.

Plaintiffs’ claims are based on the alleged improper treatment of a third person, their daughter, by licensed professional counselor Kathryn Salmi. Parents of children who are injured by allegedly improper medical treatment have no independent claim for their own emotional distress or loss of consortium, other than through a “bystander” claim for negligent infliction of emotional distress (which plaintiffs did not plead and otherwise cannot establish here). The trial court therefore properly dismissed plaintiffs’ claims for damages for their own emotional distress.

It is well established that, generally, family members of patients do not have a claim for damages for allegedly improper medical care and treatment provided to a family member, even when the family member is directly involved in the treatment process. See *Malik v Wm Beaumont Hospital*, 168 Mich App 159, 168-169; 423 NW2d 920 (1988) (no claim by brother who had undergone surgery to donate kidney to sister for negligence in the performance of surgery on the sister; claim is essentially one for loss of consortium, not available to a sibling); *Young v Oakland General*, 175 Mich App 132; 437 NW2d 321 (1989) (grandson of the decedent has no claim for intentional infliction of emotional distress based on giving of blood transfusion to decedent, a Jehovah's Witness; only duty to properly obtain consent runs to the patient, not to family members).

Plaintiffs seek damages for their own emotional distress and lost wages and medical expenses as a result of allegedly negligent treatment rendered to their daughter. Under Michigan law, however, a claim by a parent for emotional injury as a result of a tort committed upon a child is a claim for loss of consortium that is barred as a matter of law. *Malik, supra* (claim of emotional distress by brother regarding loss of kidney as a result of malpractice upon sister is properly characterized as a claim of loss of consortium, and not available to a sibling); *Sizemore v Smock*, 430 Mich 283; 422 NW2d 666 (1988) (a parent has no claim for emotional distress, i.e. loss of consortium, for injury to child).

**IV ALTERNATIVELY, SUMMARY DISPOSITION SHOULD BE AFFIRMED ON THE GROUND THAT PLAINTIFFS' CLAIM IS ESSENTIALLY ONE FOR "ALIENATION OF AFFECTION," WHICH HAS BEEN STATUTORILY ABOLISHED IN THIS STATE.**

Alternatively, summary disposition should be affirmed on the ground that plaintiffs' claim is essentially one for "alienation of affection," which has been statutorily abolished in this State by MCL 600.2901.

MCL 600.2901 provides:

The following causes of action are abolished:

- (1) The alienation of the affections of any person, animal, or thing, capable of feeling affection, whatsoever;

"Alienation" is defined as "a withdrawing or separation of a person or his affections from an object or position of former attachment." Webster's New Collegiate Dictionary. Although the Court of Appeals held below that plaintiffs' claim to recover for their own injuries caused by Ms. Salmi's alleged malpractice is not barred by MCL 600.2901, *Roberts v Salmi*, \_\_ Mich App \_\_ (2014) (*Slip op* at 14-15), plaintiffs' claim falls within the definition of "alienation" and is not a cognizable claim under Michigan law.

In *Nicholson v Han*, 12 Mich App 35; 162 NW2d 313 (1968), the plaintiff and his wife consulted the defendant, a physician, in his role as a psychiatrist and marriage counselor. The marital situation deteriorated, and the wife began a relationship with the physician. Plaintiff husband brought an action charging the defendant physician with using the doctor-patient relationship to seduce the wife under theories of breach of contract, malpractice, assault and battery, negligence and fraud. The plaintiff claimed that he suffered the loss of his spouse's society, services, and comfort by means of unlawful or tortious conduct of the defendant. *Id.* at 43. The trial court granted summary

disposition on all counts, and the Court of Appeals affirmed, finding that regardless of the label applied by plaintiff to his claim, the essence of the claim was one for alienation of affections, and abrogated by law. *Id.* at 43-44.

The statutory bar extends to claims where tortious interference with the parent/child relationship is claimed. *Miller v Kretschmer*, 374 Mich 459; 132 NW2d 141 (1965). In *Miller*, this Court rejected the assertion that the statute was intended to abolish only the traditional cause of action for alienation of affections recognized at common law. The *Miller* Court applied the statute to hold that no claim existed in favor of a minor against a person who wrongfully induced one of her parents to desert her and leave the family home. This Court declared:

The re-enactment of the above section, as modified by the legislature, has unquestionably spelled out a legislative decision to abolish all actions for alienation of affections, including those of minor children against a person who has induced one of their parents to leave the family home. [*Id.* at 461 (emphasis added)].

The Court in *Miller* reiterated that the statute extends to claims involving interference in the child/parent relationship in *Berger v Weber*, 411 Mich 1, 15; 303 NW2d 424 (1981). In *Berger*, this Court took up the issue of when a child might recover for the loss of society and companionship of a negligently injured parent. The *Berger* Court acknowledged that Michigan recognizes several similar claims (e.g. spouse for injury to spouse), but had not recognized a cause of action in favor of a child against the tortfeasor who injured the parent. In concluding that such a cause of action is cognizable in Michigan, this Court compared the statutory abrogation of a claim for alienation of affection:

Another objection to the child's cause of action raised by defendants-appellants is that it would be anomalous to allow a child to recover for negligent invasion of his family interest when he is specifically prohibited

from recovery for intentional, direct invasion of his family interest under MCL 600.2901(1); MSA 27A.2901(1), which bars suits for alienation of affections.

We do not regard this as anomalous. One may recover for negligent injury or death of a spouse and a child may recover for the negligent death of a parent even though both be barred from recovery for the intentional, direct invasion of the family interest occasioned by alienation of affection. *Berger* at 15 (emphasis added).

This Court thus acknowledged that the statutory abrogation of a claim for “alienation of affections” extends to cases like the instant one, where the plaintiff parents claim a direct invasion of the family interest by a tortfeasor. Plaintiffs’ allegations here fall squarely within the intended scope of the statutory bar. Plaintiffs maintain that Ms. Salmi directly interfered with their relationship with their daughter. Therefore, regardless of the label applied by plaintiffs to their claim, plaintiffs’ cause of action has been abolished in Michigan, and the trial court therefore properly dismissed plaintiffs’ claim.

**RELIEF REQUESTED**

WHEREFORE defendant respectfully requests that this Honorable Court grant leave to appeal and hear this case on the merits, and/or peremptorily reverse the Court of Appeals' decision and reinstate the trial court's grant of summary disposition.

Respectfully submitted,

KITCH DRUTCHAS WAGNER  
VALITUTTI & SHERBROOK

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Dated: January 27, 2015

STATE OF MICHIGAN  
IN THE SUPREME COURT

LALE ROBERTS and JOAN ROBERTS,

Plaintiffs-Appellees,

vs.

KATHRYN SALMI, L.P.C., an individual,  
d/b/a SALMI CHRISTIAN  
COUNSELING,

Defendant-Appellant.

Supreme Court No.:

Court of Appeals No.: 316068

Houghton County Circuit Court  
Case No.: 12-15075-NH

**NOTICE OF HEARING**

PLEASE TAKE NOTICE that the attached Application for Leave to Appeal will be brought on for hearing before the Supreme Court on February 17, 2015.

Respectfully submitted,

KITCH DRUTCHAS WAGNER  
VALITUTTI & SHERBROOK

BY: /s/ Beth A. Wittmann

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STATE OF MICHIGAN  
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Defendant-Appellee.

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**NOTICE OF FILING SUPREME COURT APPLICATION**

Jerry Zimmer  
Clerk of the Court  
Michigan Court of Appeals

Clerk of the Court  
Houghton County Circuit Court  
401 E. Houghton Avenue  
Houghton, MI 49931

PLEASE BE ADVISED that an Application for Leave to Appeal by defendant-appellant Kathryn Salmi, LPC, an individual, d/b/a Salmi Christian Counseling, has been filed with the Michigan Supreme Court.

Respectfully submitted,

KITCH DRUTCHAS WAGNER  
VALITUTTI & SHERBROOK

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**CERTIFICATE OF SERVICE**

I hereby certify that on January 27, 2015, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing to the following: Zachary C. Kemp, Esq. (zach@thekemplawfirm.com).

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