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KATZ, J., dissenting. I disagree with the majority's conclusion that the defendant, the Village for Families and Children, Inc., did not owe a duty of care to Raegan McBride, the deceased two year old daughter of the plaintiff, Patrice Ward.[1] Specifically, I would conclude that the defendant's failure to report allegations of abuse by Kathy Greene, the operator of a child day care with whom the defendant contracted, in violation of General Statutes (Rev. to 1997) §§ 17a-101[2] and 17a-101a,[3] constituted negligence per se.[4] In my view, a statutorily mandated reporter pursuant to § 17a-101 (b); see footnote 2 of this opinion; who unreasonably fails to report allegations of child abuse, owes a duty of care to both the abused child and to other children who come into the care of the alleged abuser at or near the time of the abuse. Accordingly, I respectfully dissent.

I begin by setting forth the facts that form the background to this issue, as alleged in the plaintiff's amended complaint.[5] The defendant is a private placement agency contracted by the state to provide day care and foster care services to children in the Hartford area. The defendant first placed a child with Greene in a day care capacity in September, 1983, and later that month received a report from that child's caretaker alleging that Greene had struck the child in the face. Greene closed her day care operation the following month. The defendant did not report the allegation to the department of children and families (department).

In 1988, the defendant again hired Greene as a day care provider. In April, 1990, Greene also contracted with the defendant to become a foster parent, and the defendant placed the first foster child in Greene's care in July, 1990. Soon after this placement, the foster child indicated to several persons that, on separate occasions, Greene had beaten her and had pulled her hair out of her scalp. In response, the defendant filled out a critical incident report[6] and sent a social worker to meet with the child. At this meeting, in the presence of Greene, however, the child recanted her story. After further reports of abuse, the child was removed from Greene's home. In 1994, a two year old child sustained a cut on his penis while in Greene's day care. Greene's explanation for the injury was that the child had been cut while on a slide; however, neither the child's pants nor his diaper were torn. The child's mother removed him from Greene's care and reported the incident to the defendant. The defendant did not report the incident to the department. The relationship between the defendant and Greene continued until 1995, when the defendant eliminated its entire day care program. During the course of this relationship, Greene applied for and renewed her day care license with the department of

public health four times.

Until McBride's death in February, 1997, the defendant continued to place foster children with Greene, notwithstanding continued allegations of abuse. Specifically, the allegations included that: Greene's daughter had slapped and bitten a baby in Greene's care; Greene had bent a child's fingers backward; and Greene had thrown a child across the room by grabbing his neck. Many of these allegations were never reported to the department.

In December, 1996, the plaintiff began inquiring about day care facilities for McBride. In January, 1997, after contacting the department of public health's hotline and learning that no complaints had been made against Greene for abuse, the plaintiff placed McBride in Greene's care. In early February, 1997, the defendant placed an eleven year old foster child with Greene. Shortly thereafter, the foster child complained of being hit twice by Greene, once with a wooden spoon and once with Greene's hand. Although the defendant filled out a critical incident report, it did not report these incidents to the department. On February 24, 1997, after the plaintiff had dropped McBride off at Greene's house for the day, Greene fractured McBride's skull, resulting in her death. With these facts in mind, I turn to the issue of whether the trial court properly granted the defendant's motion for summary judgment on the ground that it did not owe a duty of care to McBride.

"The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury." (Internal quotation marks omitted.) *Maffucci* v. *Royal Park Ltd. Partnership*, 243 Conn. 552, 566, 707 A.2d 15 (1998). "The existence of a duty is a question of law and only if such a duty is found to exist does the trier of fact then determine whether the defendant [breached] that duty in the particular situation at hand." (Internal quotation marks omitted.) *Mendillo* v. *Board of Education*, 246 Conn. 456, 483, 717 A.2d 1177 (1998). "If a court determines, as a matter of law, that a defendant owes no duty to a plaintiff, the plaintiff cannot recover in negligence from the defendant." *RK Constructors, Inc.* v. *Fusco Corp.*, 231 Conn. 381, 384–85, 650 A.2d 153 (1994).

It is well settled that, "under general principles of tort law, [that] a requirement imposed by statute may establish the applicable standard of care to be applied in a particular action. . . . [I]n order to establish liability as a result of a statutory violation, a plaintiff must satisfy two conditions. First, the plaintiff must be within the class of persons protected by the statute. . . . Second, the injury must be of the type which the statute was intended to prevent. . . .

"Negligence per se operates to engraft a particular legislative standard onto the general standard of care

imposed by traditional tort law principles, i.e., that standard of care to which an ordinarily prudent person would conform his conduct. To establish negligence, the jury in a negligence per se case need not decide whether the defendant acted as an ordinarily prudent person would have acted under the circumstances. [It] merely decide[s] whether the relevant statute or regulation has been violated. If it has, the defendant was negligent as a matter of law.'' (Citations omitted; internal quotation marks omitted.) *Gore* v. *People's Savings Bank*, 235 Conn. 360, 375–76, 665 A.2d 1341 (1995).

I begin with the second prong of the negligence per se test—whether the injury was of the type that the statute is designed to prevent—because that prong is not seriously in dispute. The statement of purpose of the child welfare statutory scheme, which is set forth in § 17a-101 (a) and discussed further herein, clearly reflects an intent to protect children from abuse. Indeed, this provision is contained in chapter 319a of the General Statutes, entitled ''Child Welfare,'' under part I, which sets forth provisions addressing ''Dependent and Neglected Children.'' The entire statutory scheme provides for both remedial and prophylactic measures targeted toward ascertaining whether abuse has occurred and preventing future abuse. McBride, a two year old child who was fatally injured by Greene, her day care provider, clearly sustained the type of injury intended to be prevented by the statute. Indeed, rather than contest the fact that McBride's injury satisfied this prong of the negligence per se test, the defendant focuses solely on the issue of the scope of liability—whether McBride is in the class of persons the statute intended to protect—which is the first prong of the test. Similarly, the majority does not suggest that the harm inflicted on McBride—a fractured skull at the hands of her day care provider—is not the type of harm that § 17a-101 was enacted to prevent.

Therefore, I turn to the first prong of the negligence per se test, that is, whether McBride is within the class of persons that § 17a-101 is intended to protect. In making this determination, I look to that particular statute, as well as the statutory scheme as a whole, of which § 17a-101 is merely one of the many measures taken by the legislature to protect children from abuse. I would conclude that, as a child in Greene's care at or near the time of the alleged abuse that the defendant failed to report, some of which I previously have set forth herein, McBride was within that class of protected persons.

First, the public policy set forth in § 17a-101 indicates that the reporting statutes apply to all similarly situated children whose health and welfare may be affected, which, in the present case, would include McBride. The statute provides in relevant part: ''The public policy of this state is: To protect *children* whose health and

welfare *may be adversely affected* through injury and neglect . . . and for [this purpose] *to require the reporting of suspected child abuse*, investigation of such reports by a social agency, and provision of services, where needed, to such child and family." (Emphasis added.) General Statutes § 17a-101 (a). This language indicates that the reporting statute is not merely a remedial statute designed to isolate and punish child abusers, but it is also a prophylactic statute. Put another way, the policy articulated in § 17a-101 (a) is not to protect only children who are suspected of being abused or neglected, but *any* child who *may be* subjected to abuse or neglect. Interpreting the statute to include only those children who have already been injured or neglected would be incongruous with a policy to protect children whose health and welfare *may* be so adversely affected.

Indeed, other sections within the statutory scheme bolster the position that §§ 17a-101 and 17a-101a are intended to protect all children similarly situated who are at risk of being abused. After a statutorily mandated reporter generates an initial report of suspected abuse, pursuant to § 17a-101a, General Statutes § 17a-101g (c) provides in part that "[i]f the Commissioner of Children and Families, or his designee, has probable cause to believe that the child or any other child in the household is in imminent risk of physical harm from his surroundings and that immediate removal from such surroundings is necessary to ensure the child's safety, the commissioner, or his designee, shall authorize any employee of the department or any law enforcement officer to remove the child *and any other child similarly situated from such surroundings* . . . ." (Emphasis added.) This language indicates an intent to protect not just children on behalf of whom reports have been received, but also children similarly situated, that is, all children in the care of the suspected abuser. Accordingly, the protective measures set forth in § 17a-101g (c) are consistent with the policy articulated in § 17a-101 (a)—to protect *all* children from potential abuse, not just children who already have been subjected to suspected abuse.

Moreover, General Statutes § 17a-101i[7] requires the suspension, with pay, of an employee accused of child abuse, if after an investigation, the department has reasonable cause to believe that the child has been abused. Had the legislature been concerned *solely* with protecting the particular child who allegedly had been abused, it could have taken the less drastic measure of requiring that the accused employee not have contact with the child in question. Instead, the legislature required that the employee be suspended, thereby removing him or her from the presence of *all* the children at the place of employment. Similarly, the statutory scheme provides for the revocation of a child care license as a preventive measure against further abuse of children other than the child already suspected of

having been abused. See General Statutes § 17a-151. I interpret these directives, therefore, as protecting not only the allegedly abused child, but also all children similarly situated to that child.

Second, an implicit goal of this statutory scheme is to encourage the reporting of alleged incidents of child abuse. Indeed, the child welfare system cannot work without such reporting, as the regulation and licensing of child care providers and the prevention of abuse require information that, in many cases, can be provided only by the persons statutorily designated as mandated reporters. See General Statutes § 17a-145 et seq. Therefore, to ensure that these mandated reporters fulfill this duty, the legislature insulated them from certain liabilities that might arise as a result of reporting instances of child abuse and neglect. Specifically, it limited liability for inaccurate reports made in good faith; General Statutes (Rev. to 1997) § 17a-101e (b);[8] and prevented employers from retaliating against an employee for making a report of child abuse. General Statutes § 17a-101e (a).[9] By providing such protections to statutorily mandated reporters, it is evident that the legislature sought to allay fears of adverse repercussions that might be associated with reporting. In other words, these protections are designed to encourage reporters to err on the side of caution, by making reports of abuse, even if they only *suspect* that abuse is occurring.

The majority points to two provisions in the child welfare statutory scheme that prescribe the nature of the event that triggers the reporting requirement; General Statutes (Rev. to 1997) § 17a-101a; see footnote 3 of this dissenting opinion; and the information that the reporter must provide in the report; General Statutes § 17a-101d; as support for its conclusion that a duty is owed solely to the child who is the subject of the report—the child of whom abuse already is suspected. Although these provisions address only the child who is the subject of the report, other provisions addressing the purpose and ramifications of reporting as I previously have discussed bear directly on the issue of duty.

Indeed, the majority recognizes that the statutory scheme prescribes further measures that could suggest a duty that extends beyond the child that is the subject of the report. See General Statutes § 17a-101j (b) (investigation by commissioner of children and families of allegations of abuse and, after finding reasonable cause to substantiate report, notification of state agency responsible for licensure of child care institution or facility); General Statutes § 17a-101g (authorizing department after investigating report of abuse to remove from household all children in imminent risk of harm). The majority dismisses these provisions, however, because they depend on actions by independent

entities other than the mandated reporter and, therefore, the possibility of preventing abuse of children other than those who are the subject of the report is ''remote and speculative'' in that these other children are ''not readily identifiable.'' This reasoning is circular. According to the majority, the class of other children likely to be at risk of abuse is not identifiable because no investigation took place, and no investigation leading to the disclosure of children at risk of abuse took place because no report was filed.

The majority also relies for support on General Statutes § 17a-101k and its supporting regulation, which impose confidentiality requirements on the disclosure of reports of abuse, limiting the persons to whom such information can be disclosed. The majority concludes that, because this information is not available to the public at large, parents of children who also are in the care of the alleged abuser do not have access, and therefore do not benefit from, this information. This reasoning is equally flawed because it goes to the issue of causation, not duty. Although a parent may not receive the information and thereby *directly* benefit from the report, the actions by state agencies upon receipt of information in the mandated report otherwise may prevent future instances of abuse by revoking the abuser's child care license; see General Statutes § 17a-151; or by suspending or terminating the employment of the abuser. See General Statutes § 17a-101i.

Accordingly, I would conclude that children similarly situated to a child of whom abuse reasonably is suspected are within the class of persons that the statute is intended to protect. This construction is supported by analogy to an area of our common law wherein we have had to delineate the scope of a foreseeable class of victims. We have determined that, in order to impose liability on a municipal employee who presumptively enjoys immunity in the performance of discretionary governmental acts, a plaintiff must show the existence of circumstances that ''make it apparent to the public officer that his or her failure to act would be likely to subject an identifiable person to imminent harm . . . .'' (Internal quotation marks omitted.) *Mulligan* v. *Rioux*, 229 Conn. 716, 728, 643 A.2d 1226 (1994), on appeal after remand, 38 Conn. App. 546, 662 A.2d 15 (1995); *Burns* v. *Board of Education*, 228 Conn. 640, 645, 638 A.2d 1 (1994); *Sestito* v. *Groton*, 178 Conn. 520, 528, 423 A.2d 165 (1979). ''We have construed this exception to apply not only to identifiable individuals but also to narrowly defined identified classes of foreseeable victims.'' *Burns* v. *Board of Education*, supra, 646. ''In delineating the scope of a foreseeable class of victims exception to governmental immunity, our courts have considered numerous criteria, including the imminency of any potential harm, the likelihood that harm will result from a failure to act with reasonable care, and the identifiability of the particular victim. E.g., *Evon* v.

Andrews, [211 Conn. 501, 507–508, 559 A.2d 1131 (1989)]. Other courts, in carving out similar exceptions to their respective doctrines of governmental immunity, have also considered whether the legislature specifically designated an identifiable subclass as the intended beneficiaries of certain acts; see, e.g., *Halvorson* v. *Dahl*, 89 Wash. 2d 673, 676, 574 P.2d 1190 (1978); whether the relationship was of a voluntary nature; *McLeod* v. *Grant County School District*, 42 Wash. 2d 316, 319, 255 P.2d 360 (1953); the seriousness of the injury threatened; *Irwin* v. *Ware*, [392 Mass. 745, 756, 467 N.E.2d 1292 (1984)]; the duration of the threat of injury; id.; and whether the persons at risk had the opportunity to protect themselves from harm. Id.'' *Burns* v. *Board of Education*, supra, 647–48.

Applying these factors to the circumstances of this case, I would conclude that '' '[c]onsiderations of public policy [that] . . . undergird the judicial determination of the scope of duty in the law of negligence' ''; *Jacoby* v. *Brinckerhoff*, 250 Conn. 86, 97, 735 A.2d 347 (1999); likewise suggest that children in the care of an abuser, *at or near the time* that another child's abuse went unreported by a mandatory reporter, are intended beneficiaries of §§ 17a-101 and 17a-101a. It should be apparent to any statutorily mandated reporter that his or her failure to act, when there is a reasonable basis on which to conclude that abuse has occurred, would be likely to subject other children then in the abuser's care to imminent harm.[10] These children are similarly situated to the child who has been abused and are equally deserving of protection.

Moreover, concluding that the defendant had a duty of care to children similarly situated to other children allegedly abused by Greene, like McBride, is consistent with the goal of the statutory scheme—the protection of children. ''An equally compelling function of the tort system is the prophylactic factor of preventing future harm . . . . The courts are concerned not only with compensation of the victim, but with admonition of the wrongdoer.'' (Internal quotation marks omitted.) *Lodge* v. *Arett Sales Corp.*, 246 Conn. 563, 579, 717 A.2d 215 (1998). In my view, the use of a negative incentive—specifically, that the failure to report reasonable suspicions of abuse will result in potential liability—in the absence of good faith, is consistent with the statutory scheme and helps promote this state's public policy of protecting all children from abuse.

Finally, I recognize that there exists a legitimate concern of attenuation, that is, that the attenuation between a defendant's conduct and a plaintiff's harm is too remote, as a matter of public policy, to impose a duty. See *Gomes* v. *Commercial Union Ins. Co.*, 258 Conn. 603, 616–17, 783 A.2d 462 (2001). That is not the case here. Greene's conduct demonstrated a pattern of abuse, the last known incident occurring within a few

weeks of McBride's death. In the present case, we need not decide to what extent *every* child who has in the past or will at some time in the future come into the care of a suspected abuser falls within the class of persons that the statutory child abuse scheme is intended to protect. In this particular case, McBride clearly was imminently at risk.

Accordingly, I respectfully dissent.

[1] The plaintiff, Patrice Ward, individually and in her capacity as administratrix of the estate of Raegan McBride, her two year old daughter, filed the underlying action against the Village for Families and Children, Inc., Kathy Greene, the department of public health and Stephen A. Harriman, in his capacity as commissioner of public health. Because the issue on appeal pertains only to the Village for Families and Children, Inc., we refer to the Village for Families and Children, Inc., as the defendant in this dissenting opinion. References herein to the plaintiff are to Ward in both her individual capacity and as administratrix of her daughter's estate.

[2] General Statutes (Rev. to 1997) § 17a-101 provides in relevant part: "(a) The public policy of this state is: To protect children whose health and welfare may be adversely affected through injury and neglect; to strengthen the family and to make the home safe for children by enhancing the parental capacity for good child care; to provide a temporary or permanent nurturing and safe environment for children when necessary; and for these purposes to require the reporting of suspected child abuse, investigation of such reports by a social agency, and provision of services, where needed, to such child and family.

"(b) The following persons shall be mandated reporters . . . any person paid to care for a child in any public or private facility, day care center or family day care home which is licensed by the state. . . ."

Since 1997, the statute has been amended to add other persons as mandated reporters under § 17a-101 (b). See Public Acts 2002, No. 02-138, § 12; Public Acts 2002, No. 02-106, § 3; Public Acts 2000, No. 00-49, § 6.

[3] General Statutes (Rev. to 1997) § 17a-101a provides: "Any mandated reporter, as defined in section 17a-101, who in his professional capacity has reasonable cause to suspect or believe that any child under the age of eighteen years is in danger of being abused or has had nonaccidental physical injury, or injury which is at variance with the history given of such injury, inflicted upon him by a person responsible for such child's health, welfare or care or by a person given access to such child by such responsible person, or has been neglected, as defined in section 46b-120, shall report or cause a report to be made in accordance with the provisions of sections 17a-101b to 17a-101d, inclusive. Any person required to report under the provisions of this section who fails to make such report shall be fined not more than five hundred dollars."

[4] Although the plaintiff never invoked explicitly the term *negligence per se* as the basis for liability in her amended complaint, the language of both her brief and her amended complaint indicate that she is relying on the defendant's failure to report the incidents of alleged abuse in violation of §§ 17a-101 and 17a-101a as a basis for liability. Moreover, it is clear that the trial court looked to these provisions to determine whether the defendant owed a duty of care to McBride. Indeed, despite footnote 10 of its opinion, the majority implicitly recognizes that §§ 17a-101 and 17a-101a may form the basis for negligence per se by concluding that "the class of persons protected by § 17a-101 is limited to those children who have been abused or neglected and are, or should have been, the subject of a mandated report."

[5] Because this appeal comes to us on a judgment rendered on the defendant's motion for summary judgment, we view the facts in the light most favorable to the plaintiff, the nonmoving party. *Pelletier* v. *Sordoni/Skanska Construction Co.*, 264 Conn. 509, 514, 825 A.2d 72 (2003).

[6] From the context of the record, it appears that a critical incident report is a type of internal report used by the defendant when incidents of abuse are alleged.

[7] General Statutes § 17a-101i provides in relevant part: "(a) Notwithstanding any provision of the general statutes to the contrary, after an investigation has been completed and the Commissioner of Children and Families, based upon the results of the investigation, has reasonable cause to believe that a child has been abused by a school employee who holds a certificate, permit or authorization issued by the State Board of Education, the commis-

sioner shall notify the employing superintendent of such finding and shall provide records, whether or not created by the department, concerning such investigation to the superintendent who shall suspend such school employee. Such suspension shall be with pay and shall not result in the diminution or termination of benefits to such employee. Within seventy-two hours after such suspension the superintendent shall notify the local or regional board of education and the Commissioner of Education, or the commissioner's representative, of the reasons for and conditions of the suspension. The superintendent shall disclose such records to the Commissioner of Education and the local or regional board of education or its attorney for purposes of review of employment status or the status of such employee's certificate, permit or authorization. . . .

"(b) After an investigation has been completed and the Commissioner of Children and Families, based upon the results of the investigation, has reasonable cause to believe that a child has been abused by a staff member of a public or private institution or facility providing care for children or private school, the commissioner shall notify the executive director of such institution, school or facility and shall provide records, whether or not created by the department concerning such investigation to such executive director. Such institution, school or facility may suspend such staff person. Such suspension shall be with pay and shall not result in diminution or termination of benefits to such employee. Such suspension shall remain in effect until the incident of abuse has been satisfactorily resolved by the employer of the staff person. If such staff member has a professional license or certification issued by the state, the commissioner shall forthwith notify the state agency responsible for such license or certification of the staff member and provide records, whether or not created by the department, concerning such investigation. . . ."

[8] General Statutes (Rev. to 1997) § 17a-101e (b) provides: "Any person, institution or agency which, in good faith, makes the report [of abuse or neglect] pursuant to sections 17a-101a to 17a-101d, inclusive, and section 17a-103 shall be immune from any liability, civil or criminal, which might otherwise be incurred or imposed and shall have the same immunity with respect to any judicial proceeding which results from such report provided such person did not perpetrate or cause such abuse or neglect."

In 1997, the legislature amended § 17a-101e (b) by adding a provision also to immunize a mandated reporter who in good faith *does not* make a report of abuse or neglect. Public Acts 1997, No. 97-319. § 12. Therefore, in cases involving negligence per se pursuant to § 17a-101, as in the present case, the defendant may avoid liability upon proof of a valid excuse or justification. See 2 Restatement (Second), Torts § 288A, pp. 32–33 (1965). A mandatory reporter who negligently has failed to act in accordance with the statute may assert good faith as an excuse and thereby avoid liability. See *Sanderson* v. *Steve Snyder Enterprises, Inc.*, 196 Conn. 134, 150, 491 A.2d 389 (1985).

The majority relies upon the 1997 amendment as evidence that the legislature was concerned about overreporting and that recognizing a broader class to include victims like McBride would overburden the system contrary to legislative intent. The legislative history indicates, however, that the legislature merely was attempting at that time to add "some balance" in recognition of the many unsubstantiated claims that require investigation. See 40 H.R. Proc., Pt. 18, 1997 Sess., p. 6586, remarks of Representative Robert Farr; id., p. 6594, remarks of Representative Ellen Scalettar. Nothing in this history reflects a diminution in legislative concern about *underreporting*. Indeed, the provision ensuring confidentiality of abuse reports; see General Statutes § 17a-101k; further indicates that the legislature wanted to encourage even the reporting of abuse that ultimately might not be substantiated. Finally, I note that it is evident that the failure to report abuse when there is a reasonable basis to conclude it has occurred is far greater than the ramifications of overreporting such claims, even when some of those claims ultimately prove to be false.

[9] General Statutes § 17a-101e (a) provides: "No employer shall discharge, or in any manner discriminate or retaliate against, any employee who in good faith makes a report pursuant to sections 17a-101a to 17a-101d, inclusive, and 17a-103, testifies or is about to testify in any proceeding involving child abuse or neglect. The Attorney General may bring an action in Superior Court against an employer who violates this subsection. The court may assess a civil penalty of not more than two thousand five hundred dollars and may order such other equitable relief as the court deems appropriate."

[10] Indeed, under the majority's reasoning, the mandated reporter would owe no duty to a sibling of a child who had been abused unless the reporter

knew that the abuser in fact had other children in his care.