[J-72-2011] [MO: Saylor, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

MICHELLE SEEBOLD,	:	No. 9 MAP 2011
	:	
Appellee	:	Appeal from the Order of the Superior
	:	Court dated 12/1/09 at No. 20 MDA 2009,
	:	reconsideration denied 2/12/10, which
v.	:	vacated and remanded the order of the
	:	Lycoming County Court of Common
	:	Pleas, Civil Division at No. 07-00024
PRISON HEALTH SERVICES, INC.,	:	dated 12/4/08
	:	
Appellant	:	ARGUED: September 13, 2011

DISSENTING OPINION

MR. JUSTICE McCAFFERY **DECIDED: December 28, 2012**

I respectfully dissent. The Majority states that we granted review to "consider whether a physician who treats prison inmates has a duty at common law to warn specific corrections officers that a particular inmate has a communicable disease." Majority Slip Opinion at 1. In fact, we granted review of four distinct questions:

> a. Does a physician have a duty to a third party with whom he has no doctor/patient relationship when he negligently diagnoses his patient, an inmate, as not having a contagious disease?
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> b. Does a physician have a duty to warn third parties who may come into contact with an inmate with a contagious disease that the inmate has a contagious disease [sic] to tell the third parties and how to avoid contracting the infectious disease from the inmate?

c. Did the Superior Court impermissibly expand the holding of this Court in Di Marco v. Lynch Homes-Chester County, Inc., 525 Pa. 558, 583 A.2d 422 (199[0])?

d. Did the Superior Court impermissibly expand its own decision in Troxel v. A.I. DuPont Institute, 450 Pa.Super. 71, 675 A.2d 314 (Pa.Super. 1996) app'l den. 546 Pa. 668, 685 A.2d 547 (1996) to require that a physician warn third parties where previously the Superior Court had limited that duty to only advise a patient how to avoid spreading the infectious disease that he or she had?

Seebold v. Prison Health Services, Inc., 13 A.3d 461 (Pa. 2011).

I believe that the Majority's paraphrase of the issues before us leads it to focus on the second question, which essentially asks whether the physicians working for Prison Health Services, Inc. ("PHS") owed a duty to warn Appellee. I respectfully suggest that the outcome of this case turns on the answer to the first question posed on appeal, which question focuses on whether the PHS physicians owed a duty to Appellee when determining whether inmates had MRSA.[1] In analyzing that question, I conclude that the PHS physicians did owe such a duty to take reasonable care to protect prison guards such as Appellee from acquiring a MRSA infection from infected inmates.

The second question, however, regarding whether the PHS physicians owed a duty to warn third parties about avoiding contracting MRSA, is not really pertinent at this stage of the litigation. In my view, the alleged failure to warn was a result of the physicians' alleged failure to properly diagnose MRSA, and therefore pertains more to causation and damages than to duty. That is, the physicians' alleged failure to properly

[1] By seeking and obtaining allowance of appeal on the first question, which Appellant phrased, Appellant waived any contention that Appellee's Complaint, which is not a model of clarity, did not assert a duty to properly diagnose MRSA.

diagnose MRSA in infected inmates caused the physicians to be unaware of the need and their duty to warn. I therefore conclude that, as applied to the allegations of this case only, any duty to warn is subsumed into the duty the physicians owed to Appellee to properly diagnose MRSA in infected inmates. Finally, with respect to the last two questions, I conclude that imposing a duty here is proper under both DiMarco, supra, and Troxel, supra.

My conclusion that the PHS physicians owed Appellee a duty to take proper steps to diagnose MRSA in infected inmates is consistent with, and amply supported by, our precedents. "[T]he legal concept of duty of care is necessarily rooted in often amorphous public policy considerations, which may include our perception of history, morals, justice and society." Althaus ex rel. Althaus v. Cohen, 756 A.2d 1166, 1169 (Pa. 2000). To guide courts' considerations of the duty question, we set forth in Althaus a non-exclusive list of factors (sometimes referred to as the "Althaus factors") to be considered when determining whether a duty in negligence exists in a particular case: (1) the relationship between the parties; (2) the social utility of the actor's conduct; (3) the nature of the risk imposed and foreseeability of the harm incurred; (4) the consequences of imposing a duty upon the actor; and (5) the overall public interest in the proposed solution.

In DiMarco v. Lynch Homes-Chester County, Inc., 583 A.2d 422 (Pa. 1990), we held that a patient's sexual partner, who had contracted hepatitis from the patient, had a cause of action against a doctor who had advised the patient inaccurately on how to avoid transmitting hepatitis. In reaching that conclusion, we focused on the paramount public interest in preventing the spread of infectious disease. Id. at 424. We explained that we imposed the duty because physicians know what steps to take to protect third parties from communicable diseases, and they therefore play a crucial role in protecting

those "within the foreseeable orbit of risk of harm." Id. (quoting Doyle v. S. Pittsburgh Water Co., 199 A.2d 875, 878 (Pa. 1964)). We then set forth the general rule that a physician owes a duty to a third party who is likely to be harmed if the physician gives inaccurate advice to a patient:

> If a third person is in that class of persons whose health is likely to be threatened by the patient, and if erroneous advice is given to that patient to the ultimate detriment of the third person, the third person has a cause of action against the physician, because the physician should recognize that the services rendered to the patient are necessary for the protection of the third person.

DiMarco, supra at 424-25 (footnote omitted).

The DiMarco rule, which was underscored by the Superior Court's subsequent holding in Troxel v. A.I. duPont Institute, 636 A.2d 1179 (Pa.Super. 1994), is that a physician's duty of care is owed not only to his or her patient, but also to identifiable third parties who will suffer if a physician negligently errs in the handling of a case of infectious disease. See also Estate of Witthoeft v. Kiskaddon, 733 A.2d 623, 628 (Pa. 1999) (recognizing that the role of physicians in protecting the public from communicable diseases was central to our decision in DiMarco); Matharu v. Muir, 29 A.3d 375 (Pa.Super. 2011) (en banc) (holding that physicians owed a duty to protect an infant against Rh-sensitization).

The rule I derive from DiMarco and the policies underpinning that decision, lead me to conclude that PHS's physicians did owe a duty to Appellee. Appellee has alleged that: PHS contracted to provide medical services to the inmates at SCI-Muncy; PHS's staff members were at all times acting within the scope of their employment with PHS; PHS staff members failed to take steps necessary to protect prison staff from acquiring MRSA from infected inmates; Appellee was a guard at SCI-Muncy whose duties

included strip-searching inmates; and Appellee acquired a MRSA infection while working as a guard at SCI-Muncy from an infected inmate, and suffered personal injuries as a result.

Those allegations are sufficient to impose a duty here. In this case, as in DiMarco, we are confronted with a claim that a physician's mishandling of a case of an infectious disease resulted in the patient transmitting the disease to a third person, here, Appellee. Appellee was "in that class of persons whose health [was] likely to be threatened by the patient" because, as explained above, prison guards come into close contact with prisoners on a routine basis.[2] DiMarco, supra at 425. Additionally, the public interest in preventing the spread of infectious disease weighs in favor of imposing the duty here, as in DiMarco. Imposing a duty here is fully consistent with DiMarco and Troxel.

Finally, I must respectfully disagree with the Majority that Section 324A of the Restatement (Second) of Torts does not support Appellee's position. Section 324A states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or

[2] Although Appellee's complaint does not make such an allegation explicitly, the fact that prison guards frequently touch or otherwise come into contact with inmates is implicit in the allegation that Appellee was a corrections officer at SCI-Muncy, who, at one point, conducted strip-searches of inmates. See Complaint, ¶2; R.R. 2a. Making all reasonable inferences in favor of Appellee, I would infer Appellee's regular, close contact with inmates from the express allegations of Appellee's job duties.

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Restatement (Second) of Torts § 324A.

The Majority determines that Section 324A has no application here because it "merely provides for reasonable care to be taken vis-à-vis the original undertaking and establishes liability to certain third-parties where such care is lacking." Majority Slip Opinion at 21. But that is precisely what Appellee has alleged. Appellee essentially claims that PHS's physicians failed to take reasonable care when diagnosing MRSA in inmates under their care – i.e., when performing their "original undertaking." Their failure to exercise such reasonable care allegedly resulted in Appellee contracting a contagious disease from which Appellee relied on the physicians to protect her by competently treating the inmates. I believe that the Majority is able to reach the opposite conclusion, however, by disregarding the full allegations of Appellee's Complaint, and by not answering the first question on which we granted review. As I read the Complaint, its allegations support the finding of a duty consistent with DiMarco, Troxel, and Section 324A of the Restatement, and I must respectfully dissent.