

**IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY,
PENNSYLVANIA**

MICHELLE SEEBOLD
Plaintiff

vs.

PRISON HEALTH SERVICES, INC,
Defendant

:
: **CIVIL ACTION**
:
: **NO. 07-00024**
:
:
:

OPINION

This Opinion comes by way of Defendant’s Preliminary Objections and Plaintiff’s Preliminary Objections to Defendant’s Preliminary Objections. Defendant argues that Plaintiff’s Complaint fails to state a cognizable cause of action, specifically due to the fact that Defendant owes no duty to Plaintiff. Plaintiff argues that Defendant’s Preliminary Objections were untimely and therefore should be stricken.

DISCUSSION

On July 30, 2008, Plaintiff served upon Defendant notice indicating Plaintiff’s intention to seek a judgment by default for failure of Defendant to file a timely responsive pleading. On August 4, 2008, Defendant, through former counsel, requested an extension of time in which to file a responsive pleading. On August 6, 2008, Plaintiff’s counsel granted Defendant an extension of time, until September 5, 2008, to file an Answer only. On September 5, 2008, Defendant filed Preliminary Objections, raising a demurrer to the sole count in the complaint.

The Pennsylvania Supreme Court has stated that Pa.R.Civ.P 1026, regarding the time within which a responsive pleading must be filed “is not mandatory but permissive. We have held that late pleadings may be filed ‘if the opposite party is not prejudiced and

justice requires. Much must be left to the discretion of the lower court.” Fisher v. Hill, 368 Pa. 53, 81 A.2d 860 (1951). Considering the fact that there was a change of counsel and an extension granted by Plaintiff, this Court finds that the Plaintiff would not be prejudiced and justice requires the Court to allow the late filing of Defendant’s Preliminary Objections.

Defendant argues that Plaintiff’s Complaint fails to state a cause of action against Defendant as Defendant owes no duty to Plaintiff, prison guard. In determining whether a duty exists, the Courts of this Commonwealth look at the following factors: (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 consequence of imposing a duty upon the actor, and (5) the overall public interest in the proposed solution. Althaus v. Cohen, 562 Pa. 547, 553 (2000).

Plaintiff argues that this Court should apply the holding in Dimarco v. Lynch Homes-Chester County, Inc., 583 A.2d 422 (Pa. 1990) to the facts of the case at bar which, Plaintiff argues, would impose a duty on Defendant to the Plaintiff. In DiMarco, Plaintiff argued that it was negligent for the Defendants, medical professionals and organizations, not to have warned the Plaintiff that having sexual relations within six months of exposure to hepatitis could cause her sexual partner to contract same. In finding that the Defendant’s did owe such a duty, the court relied in part on the Restatement (Second) of Torts, 324A(c), which provides:

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 the physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if: (c) the harm

is suffered because of reliance of the other or the third person upon the undertaking.

The Court went on to say, “When a physician treats a patient who has been exposed to or who has contracted a communicable and/or contagious disease, it is imperative that the **physician give his or her patient the proper advice about preventing the spread of the disease...** The duty of a physician in such circumstances extends to those ‘within the foreseeable orbit of risk of harm.’ Id. at 424. The Court further stated that, “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...” Id. (Emphasis Added)

The facts of DiMarco and the instant case are fundamentally distinguishable. In the case at bar, the Plaintiff, a prison guard at SCI Muncy alleges that she contracted a disease from a prison inmate and that the treating physician and prison health service entity should have given notice to Plaintiff not the patient. In DiMarco, it was the physician’s failure to give certain notices to the patient herself that gave rise to the physician’s duty to a third party. Applying the holding of DiMarco to the instance case would be a “stretch”.

A preliminary objection in the form of a demurrer tests the legal sufficiency of a pleading. Ins. Adjustment Bureau, Inc. v. Allstate Ins. Co., 860 A.2d 1038, 1041 (Pa. Super. 2004). A demurrer will be granted when it is clear from the facts that the party has failed to state a claim upon which relief may be granted. Sunbeam Corp. v. Liberty Mut. Ins. Co., 781 A.2d 1185, 1191 (Pa. 2001).

What Plaintiff is asking of this Court is to interpret the Restatement (Second) and the holding of DiMarco in a way in which the Courts of this Commonwealth have never done. That is, Plaintiff wishes this Court to hold that a healthcare provider owes a duty to warn all potential third parties that could conceivably come in contact with a patient whom they have treated for a contagious or communicable disease. This Court is unwilling to traverse the uncharted waters of a health care provider's duty to third parties without a map and compass provided by the Pennsylvania Supreme Court or legislature. This Court does not believe a trial judge should extend a Restatement of the Law to create a cause of action in favor of prison guards against a state contractor/health provider for services provided to inmates behind prison walls. Applying the factors from Althaus, supra, the Court has great concern about the consequence of imposing a new duty and the overall public interest implicated. Therefore the Court finds that Plaintiff has failed to state a claim upon which relief may be granted.

ORDER

WHEREFORE, this __ day of December, 2008, it is hereby ORDERED and DIRECTED that Plaintiff's Preliminary Objections are OVERRULED and Defendant's Preliminary Objections are SUSTAINED. Plaintiff's Complaint is hereby DISMISSED.

By The Court,

Judge Richard A. Gray

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