thence west along said avenue 60 feet to a stake, corner of said avenue and a proposed 12 foot alley; thence south along said alley, 267 feet to a stake in the center of Kennedy Street; thence east along the center of said Kennedy Street, 60 feet to the place of beginning.

TRACT NO. 2:

BEGINNING at a stone on a line between land of the school district of Guilford Township and Tract No. 1; thence along Tract No. 1, running in a southerly direction, 45 feet to a stone; thence east along Kennedy Street, 10 feet to an iron pin; thence north 43 feet 2 inches to a stone, the place of beginning.

CONTAINING 214 square feet, more or less.

BEING the same real estate conveyed to Carl L. Seylar, Sr. and Margaret P. Seylar, husband and wife, by deed of Robert L. Pine and Sherry A. Pine, husband and wife, dated December 16, 1988 and recorded in Franklin County Deed Book 976, Page 513.

Improved with a two story frame dwelling and having a street address of 140 Kennedy Street, Marion, Pennsylvania 17235.

TERMS

As soon as the property is knocked down to purchaser, 10% of the purchase price or 10% of all costs, whichever may be the higher, shall be delivered to the Sheriff. If the 10% payment is not made as requested, the Sheriff will direct the auctioneer to resell the property.

The balance due shall be paid to the Sheriff by NOT LATER THAN June 19, 1995 at 4:00 PM, prevailing time. Otherwise all money previously paid will be forefeited and the property will be resold on June 23, 1995, 1:00 PM, prevailing time, in the Franklin County Court House, Jury Assembly Room, Chambersburg, Franklin County, Pennsylvania, at which time the full purchase price or all costs, whichever may be the higher, shall be paid in full.

Robert B. Wollyung
Sheriff

Franklin County
Chambersburg, PA

5/19, 5/26, 6/2/95

ESTATE OF LYNN S. WITTHOEFT, ET AL. V. KISKADDON, C.P. Franklin County Branch, A.D. 1994 - 46

Defendant is seeking a demurrer arguing that a physician does not owe a duty of care toward a third party for acts committed by a patient simply because he had a duty to report that patient to a state agency.

1. A preliminary objection in the nature of a demurrer can only be sustained and the action dismissed in cases which are clear and free from doubt.

2. All properly pleaded facts and inferences reasonably deductible from the complaint are admitted.

3. In order to successfully plead a cause of action in negligence against a doctor as a third party, it must be established that 1) the doctor owed the third party a duty of care; 2) the doctor breached the duty; 3) the third party was injured; and 4) the injuries were proximately caused by the doctor's breach of duty.

4. Although a physician may have a duty to a third party, that does not necessarily mean that the physician owes a duty to all third parties.

5. A physician's duty to report a patient to a state agency does not necessarily include a duty to report to third parties.

Mark David Frankel, Esquire, Attorney for Plaintiffs
Craig A. Stone, Esquire, Attorney for Defendant

OPINION AND ORDER

WALKER, P.J., March 21, 1995:

FINDINGS OF FACT

This action arises from a motor vehicle accident which occurred on July 6, 1993. Helen J. Myers, operating a motor vehicle, was traveling southbound on Walker Road, approaching Limekiln Drive. At the same time, Lynn S. Witthoeft was traveling southbound on Walker Road, approaching Limekiln Drive, but on a bicycle. Ms. Myers' vehicle allegedly struck Ms. Witthoeft's bicycle causing injuries to Ms. Witthoeft which resulted in her death. Plaintiff, Ms. Witthoeft's spouse, has alleged that the direct and proximate cause of the accident was Ms. Myers' inability to see.

Plaintiff has alleged that Ms. Myers was a patient of Dr. Kiskaddon's at all times relevant to this action. It is further alleged that Dr. Kiskaddon examined Ms. Myers in March of 1983, which

examination revealed that she had a visual acuity of 20/80 combined. Plaintiff filed this action against the defendant alleging that he failed to inform Ms. Myers that she was not legally authorized to drive a motor vehicle in Pennsylvania and that he failed to report the results of Ms. Myers' examination to the Department of Transportation as required by law.

Plaintiff's complaint consists of three counts: survival action, wrongful death action and punitive damages. Plaintiff is seeking loss of consortium as part of his wrongful death action.

Defendant has filed preliminary objections in the nature of a demurrer to the complaint as well as to specific allegations in the complaint. Defendant has presented a series of four questions to be answered by the court. These questions are:

> A. Whether the entire complaint must be dismissed for failure to state a claim upon which relief can be granted because Helen J. Myers was not a foreseeable victim of Dr. Kiskaddon's alleged acts of omission?
>
> B. In the alternative, whether paragraphs 18(a) through (d) of the complaint fail to state a claim upon which relief can be granted because no duty recognized under Pennsylvania law is alleged therein?
>
> C. Also in the alternative, whether plaintiff's claim for loss of consortium in paragraph 22(c) of the complaint must be dismissed for failure to state a claim upon which relief can be granted in a wrongful death action?
>
> D. Also in the alternative, whether count III of the complaint for punitive damages must be dismissed for failure to state a claim upon which relief can be granted?

DISCUSSION

I. STANDARD OF REVIEW FOR A PRELIMINARY OBJECTION IN THE NATURE OF A DEMURRER

A preliminary objection in the nature of a demurrer can only be sustained and the action dismissed in cases which are clear and free from doubt; all properly pleaded facts and inferences reasonably deductible from the complaint are admitted. *Realty Group*

Associates, Inc. v, Divosevic, 408 Pa. Super. 326, 596 A.2d 880 (1991).

> A demurrer can only be sustained where the complaint is clearly insufficient to establish the pleader's right to relief. *Firing v. Kephart*, 466 Pa. 560, 353 A.2d 833 (1976). For the purpose of testing the legal sufficiency of the challenged pleading a preliminary objection in the nature of a demurrer admits as true all well-pleaded, material, relevant facts, *Savitz v. Weinstein*, 395 Pa. 173, 149 A.2d 110 (1959); *March v. Banus*, 395 Pa. 629, 151 A.2d 612 (1959), and every inference fairly deductible from those facts, *Hoffman v. Misericordia Hospital of Philadelphia*, 439 Pa. 501, 267 A.2d 867 (1970); *Troop v. Franklin Savings Trust*, 291 Pa. 18, 139 A. 492 (1927). The pleader's conclusions or averments of law are not considered to be admitted as true by a demurrer. *Savitz v. Weinstein*, supra.
>
> Since the sustaining of a demurrer results in a denial of a pleader's claim or a dismissal of his suit, a preliminary objection in the nature of a demurrer should be sustained only in cases that clearly and without a doubt fail to state a claim for which relief may be granted. *Schott v. Westinghouse Electric Corp.*, 436 Pa. 279, 259 A.2d 443 (1969); *Botwinick v. Credit Exchange, Inc.*, 419 Pa. 65, 213 A.2d 349 (1965); *Savitz v. Weinstein*, supra; *London v. Kingsley*, 368 Pa. 109, 81 A.2d 870 (1951); *Waldman v. Shoemaker*, 367 Pa. 587, 80 A.2d 776 (1951). If the facts as pleaded state a claim for which relief may be granted under any theory of law then there is sufficient doubt to require the preliminary objection in the nature of a demurrer to be rejected. *Packler v. State Employment Retirement Board*, 470 Pa. 368, 371, 368 A.2d 673, 675 (1977); *see also Schott v. Westinghouse Electric Corp.*, supra, [436 Pa.] at 291, 259 A.2d at 449.

County of Allegheny v. Commonwealth of Pennsylvania, 507 Pa. 360, 372, 490 A.2d 402, 408 (1985); *see also Graham v. Harleysville Insurance Co.*, 429 Pa. Super 444, 448, 449, 632 A.2d 939, 941 (1993).

II. WHETHER THE ENTIRE COMPLAINT MUST BE DISMISSED FOR FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED BECAUSE HELEN J. MYERS WAS NOT A FORESEEABLE VICTIM OF DR. KISKADDON'S ALLEGED ACTS OR OMISSION?

Preliminarily, the court feels that it should clarify this particular question presented. Defendant questions the foreseeability of Helen J. Myers as a victim of defendant's alleged acts or omission. The court surmises that defendant has misstated his question and wanted to question the foreseeability of Lynn S. Witthoeft as a victim of defendant's alleged acts or omission. The court will proceed on that assumption.

In order to successfully plead a cause of action in negligence against a doctor as to a third party, it must be established that 1) the doctor owed the third party a duty of care; 2) the doctor breached the duty; 3) the third party was injured; and 4) the injuries were proximately caused by the doctor's breach of duty. *Reilly v. Tiergarten, Inc.*, 430 Pa.Super. 10, 633 A.2d 208 (1993). The initial determination of whether Dr. Kiskaddon owed a duty to Lynn S. Witthoeft hinges on whether as a third party, she was a foreseeable victim of Dr. Kiskaddon's acts or omission.

Counsel has not cited any cases factually on point with the instant case. However, counsel has cited three cases which generally concern the legal question presented, whether a doctor owes a duty of care to a third party.

In *DiMarco v. Lynch Homes*, 525 Pa. 558, 583 A.2d 422 (1990), the Pennsylvania Supreme Court held that a physician did owe a duty of care to a third party. The physician in *DiMarco* failed to properly advise a patient who had been exposed to a communicable disease and consequently the disease was passed on to a third party who relied on the advice of the physician. Although the court held that the physician had a duty to the third party, it did not hold that the physician had a duty to all third parties. The court limited its holding to a certain class of individuals, those who were physically intimate with the patient.

In *Dunkle v. Food Service East, Inc.*, 400 Pa.Super. 58, 582 A.2d 1342 (1990), the Superior Court of Pennsylvania held that a doctor did not have a duty to warn a third party as to the dangerousness of his patient because the patient did not threaten to harm the said third party.

In *Crosby v. Sultz*, 405 Pa.Super. 527, 592 A.2d 1337 (1991), the Superior Court of Pennsylvania failed to find that a physician had a

duty of care to a third party. In *Crosby*, the court held that the physician was under no duty to report his patient to the Department of Transportation. The relevant portion of the statute involved in *Crosby* required the doctor to report his patient to the Department of Transportation only under certain circumstances. The patient in *Crosby* had not experienced any periods of unconsciousness as a result of his diabetic condition in at least the six months prior to the accident. Therefore, the patient had not manifested characteristics which would have led the physician in believing that his patient was unsafe to drive a motor vehicle and the physician had no duty to report to the Department.

The court in *Crosby* went further and expanded on a scenario where the doctor had a duty to disclose a patient's name to the Department of Transportation. The court noted that a duty to report to a state agency does not include a duty to report to all third parties. "Reporting the patient to the proper authorities when necessary is very different from imposing upon a treating physician the duty of protecting the entire public from any harm that might result from his/her patient's action." *Crosby* at 540, 592 A.2d 1344.

Taking plaintiff's allegations as true, Dr. Kiskaddon had an affirmative duty to report Ms. Myers to the Department of Transportation pursuant to 67 Pa.Code Section 83.3(c) and 75 Pa.C.S.A. Sections 1517-1518. Title 67 Pa.Code Section 83.3(c) provides that "[a] person with visual acuity of less than 20/70 combined vision with best correction is not authorized to drive." However, defendant's duty to report ran only to the Department of Transportation.

This court is of the opinion that the present case is more akin to *Crosby* than the other cases cited by counsel as that case also involved a statutory duty. Although the physician in *Crosby* was under no duty to report his patient to the Department of Transportation and Dr. Kiskaddon was under such a duty, the rationale utilized by the Superior Court is applicable to the case before us now.

A special relationship did not exist between Dr. Kiskaddon and Ms. Witthoeft as existed in *DiMarco*. Ms. Witthoeft was not readily identifiable as a third party victim, nor did Ms. Witthoeft rely and act upon any advice given to Ms. Myers. Furthermore, the present case

does not involve a communicable disease which is easily transmittable only to a specific group.

Although this court is concerned that physicians may become lax in reporting patients to state agencies as required by law, it is not the duty of the court to enforce the laws which the Legislature enacts. Other avenues are available to ensure that such laws are complied with.

CONCLUSION

As this court is of the opinion that Ms. Witthoeft was an unforeseeable party, this court finds that Dr. Kiskaddon owed no duty to her. Therefore, plaintiff has failed to meet the initial requirement to maintain a cause in negligence against Dr. Kiskaddon. Consequently, the court need not address the additional questions presented by plaintiff.

ORDER OF COURT

March 21, 1995, defendant's preliminary objection in the nature of a demurrer as to the defendant, James C. Kiskaddon, is granted.