Physician Owes Duty of Care to Third Party When His Negligence in Failing to Warn Patient Not to Drive Contributes to Third Party's Injury.

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NEGLIGENCE—THIRD PARTY LIABILITY—Physician Owes Duty of Care to Third Party When His Negligence in Failing To Warn Patient Not To Drive Contributes to Third Party's Injury.

Gooden v. Tips,
651 S.W.2d 364 (Tex. App.—Tyler 1983, no writ).

Eugene Tips, M.D., prescribed the drug Quaalude[1] for his patient, Edith Goodpasture.[2] While Goodpasture was driving her car under the influence of the drug, she struck the plaintiff, Earl Gooden.[3] Gooden brought suit against Dr. Tips,[4] alleging that he was negligent both in prescribing the drug to his patient and in failing to warn her not to operate a vehicle while taking the medication.[5] The trial court granted Dr. Tips' motion for summary judgment,[6] and Gooden appealed to the Tyler Court of Appeals.[7] Held—*Reversed and remanded.* A physician owes a duty of care to a third party when his negligence in failing to warn a patient not to drive contributes to the third party's injury.[8]

Duty relates to the question of whether an individual is obligated to act

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1. *See* Gooden v. Tips, 651 S.W.2d 364, 365 (Tex. App.—Tyler 1983, no writ). Quaalude, generically known as methaqualone, is "a sedative and hypnotic resembling short-acting barbituates." STEDMAN'S MEDICAL DICTIONARY 772 (Lawyers' 3d ed. 1972).

2. *See* Gooden v. Tips, 651 S.W.2d 364, 365 (Tex. App.—Tyler 1983, no writ). Goodpasture had been a patient of Dr. Tips for approximately twenty years prior to the accident. *See id.* at 365.

3. *See id.* at 365.

4. *See id.* at 365. The action was originally brought against Goodpasture, but the plaintiff amended the petition to make Dr. Tips a defendant after learning during discovery proceedings that Goodpasture was under the influence of Quaalude at the time of collision. *See id.* at 365.

5. *See id.* at 365. Dr. Tips was treating Goodpasture for a number of medical problems, including drug abuse and depression. *See id.* at 365. The plaintiff alleged that Dr. Tips was aware that Goodpasture had a past history of abusing drugs; thus, he could not expect her to take the prescription in the intended manner. *See id.* at 365.

6. *See id.* at 365. Dr. Tips alleged that since there was no doctor-patient relationship between himself and the plaintiff, he owed the plaintiff no duty of care. *See id.* at 365.

7. *See id.* at 365.

8. *See id.* at 369-70. The court stated that Dr. Tips had a duty to warn Goodpasture not to drive under the circumstances alleged. *See id.* at 370. The case, however, was remanded for a determination of whether this duty was breached. *See id.* at 370. Only if Dr. Tips failed to issue a warning could a breach occur. *See id.* at 370. Furthermore, the court explicitly stated that Dr. Tips had no duty to prevent Goodpasture from driving, if she so desired. *See id.* at 370.

according to a legal standard of care towards another,[9] and a person cannot be held liable for negligence by one to whom he owes no duty.[10] Generally, a duty to exercise ordinary care is owed to all foreseeable parties.[11] A duty to exercise a certain standard of care may also be created by contract;[12] however, courts have traditionally limited such a duty only to the parties to the contract.[13] This relationship to the contract, known as priv-

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9. *See, e.g.,* Merluzzi v. Larson, 610 P.2d 739, 742 (Nev. 1980) (duty is to comport with appropriate standard of care in light of apparent risk); Wytupeck v. Camden, 136 A.2d 887, 893 (N.J. 1957) (duty is obligation to conform to particular standard of conduct towards another); Lumpkins v. Thompson, 553 S.W.2d 949, 952 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.) (duty is conforming to act as ordinary person would in same circumstances); *see also* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 324 (4th ed. 1971) (duty relates to obligation to act with reasonable care towards another).

10. *See* Dobbins v. Missouri, K. & T. Ry., 91 Tex. 60, 62, 41 S.W. 62, 63 (1897) (no duty to keep property safe for trespassers, so no possible negligence); Thompson v. Graham, 333 S.W.2d 663, 667 (Tex. Civ. App.—Eastland 1960, writ ref'd n.r.e.) (no duty to bolt stairs, failure to do so not negligence); Lone Star Gas Co. v. Kelly, 166 S.W.2d 191, 192 (Tex. Civ. App.—Fort Worth 1942, no writ) (no duty to odorize gas so failure to do so not negligence); Wichita Falls & S.R. Co. v. Hesson, 151 S.W.2d 270, 275 (Tex. Civ. App.—Eastland 1941, writ dism'd judgmt cor.) (failure of railroad to maintain signal light and bell not negligence because no duty to do so); Texas Elec. Serv. Co. v. Hawthorne, 135 S.W.2d 531, 532-33 (Tex. Civ. App.—Fort Worth 1939, writ dism'd judgmt cor.) (failure to warn another of approaching car not negligence because no duty to do so); Independent E. Torpedo Co. v. Carter, 131 S.W.2d 125, 126 (Tex. Civ. App.—Eastland 1939, no writ) (no duty to fill oil well with water before shooting the well, so failure to do so not negligence); Freeman v. B.F. Goodrich Rubber Co., 127 S.W.2d 476, 479 (Tex. Civ. App.—Dallas 1939, writ dism'd by agr.) (failure to read and understand affidavit not negligence because no duty to do so); Hughes Prod. Co. v. Hagan, 114 S.W.2d 326, 331 (Tex. Civ. App.—El Paso 1937, writ dism'd) (no duty to make property safe so no negligence in failing to do so).

11. *See* Hale v. Crestline Realty, Inc., 173 A.2d 500, 502 (Conn. 1961) (injury to trespassers not foreseeable so no duty owed); Joyce v. Nash, 630 S.W.2d 219, 222-25 (Mo. Ct. App. 1982) (harm to customer unforeseeable so no duty arose); Genell, Inc. v. Flynn, 358 S.W.2d 543, 546-47 (Tex. 1962) (apartment manager could not foresee injuries to child so no liability); Watkins v. Davis, 308 S.W.2d 906, 909 (Tex. Civ. App.—Dallas 1957, writ ref'd n.r.e.) (injury must be reasonably foreseeable consequence of negligence); Anderson v. Green Bay & W. R.R., 299 N.W.2d 615, 617 (Wis. Ct. App. 1980) (duty established when reasonable person could foresee harm). *But see* Richards v. Stanley, 271 P.2d 23, 27-29 (Cal. 1954) (duty not necessarily created by foreseeable risk).

12. *See* Montgomery Ward & Co. v. Scharrenbeck, 146 Tex. 153, 157, 204 S.W.2d 508, 510 (1947). "A party to a contract owes a common-law duty to perform with care, skill, reasonable expendience and faithfulness the thing agreed to be done, and a negligent failure to observe any of these conditions is a tort, as well as a breach of the contract." *Id.* at 510; *see also* Westbrook v. Watts, 268 S.W.2d 694, 697 (Tex. Civ. App.—Waco 1954, writ ref'd n.r.e.) (duty created by contract must be performed with reasonable care); Panhandle Gravel Co. v. Wilson, 248 S.W.2d 779, 782 (Tex. Civ. App.—Amarillo 1952, writ ref'd n.r.e.) (failure to perform duty created by contract with reasonable care results in tort and breach of contract).

13. *See* Winterbottom v. Wright, 152 Eng. Rep. 402, 402-03 (Ex. D. 1842). In *Winterbottom* the defendant contracted with the owner of a mail coach to keep it in repair.

ity,[14] automatically placed an injured third party beyond the realm of foreseeability.[15] The predominate rationale underlying the traditional requirement of privity was to protect the defendant from unlimited liability.[16]

The erosion of the privity doctrine began in the area of products liability.[17] In 1852, an exception to the privity defense was recognized if the

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See id. at 403. As a result of the defendant's negligence the coach collapsed and a passenger was injured. *See id.* at 403. The court held that because the passenger was not a party to the contract he could not recover in tort. *See id.* at 402-03; *see also* Savings Bank v. Ward, 100 U.S. 195, 199-200 (1879) (attorney cannot be liable to those not in privity); Weimar v. Yacht Club Point Estates, Inc., 223 So. 2d 100, 103 (Fla. Dist. Ct. App. 1969) (breach of duty created by contract bars claim to one not in privity); Chemical Cleaning, Inc. v. Brindell-Bruno, Inc., 186 So. 2d 389, 392 (La. Ct. App. 1966) (party not in privity cannot sue in tort for breach of duty created by contract); Bisson v. John B. Kelly, Inc., 170 A. 139, 142 (Pa. 1934) (if duty breached was created by contract only those in privity can recover). *But see, e.g.,* Nelson v. Union Wire Rope Corp., 199 N.E.2d 769, 779 (Ill. 1964) (duty depends on foreseeability, not privity); Marine Ins. Co. v. Strecker, 100 So. 2d 493, 496 (La. 1957) (lack of privity no longer bars action in tort); Howell v. Betts, 362 S.W.2d 924, 925 (Tenn. 1962) (rule of no recovery in tort for lack of privity no longer exists).

14. Bonfils v. McDonald, 270 P. 650, 653 (Colo. 1928). The term "privity of contract" has been defined as "that connection or relationship which exists between two or more contracting parties." *Id.* at 653 (quoting BLACK'S LAW DICTIONARY 943).

15. *See, e.g.,* Weimar v. Yacht Club Point Estates, Inc., 223 So. 2d 100, 103 (Fla. Dist. Ct. App. 1969) (only those in privity can recover in tort for breach of duty created by contract); Chemical Cleaning, Inc. v. Brindell-Bruno, Inc., 186 So. 2d 389, 392 (La. Ct. App. 1966) (no privity, no cause of action in tort for breach of duty created by contract); Bisson v. John B. Kelly, Inc., 170 A. 139, 142 (Pa. 1934) (breach of duty created by contract allows recovery in tort to only those in privity, even if harm foreseeable); *see also* Ward, *Professional Malpractice: The Extent of Liability In Texas and Elsewhere,* 42 TEX. B.J. 117, 120 (1979) (foreseeable injured party not in privity cannot recover for breach of duty created by contract); Comment, *Liability Of Architects And Engineers To Third Parties: A New Approach,* 53 NOTRE DAME LAW. 306, 311 (1977) (no privity, no recovery from professional for negligence).

16. *See* Ultramares Corp. v. Touche, 174 N.E. 441, 444-45 (N.Y. 1931) (privity requirement protects defendant from indeterminate liability); *see also* Rozny v. Marnul, 250 N.E.2d 656, 661 (Ill. 1969) (quoting rationale in *Ultramares);* Anderson v. Boone County Abstract Co., 418 S.W.2d 123, 127 (Mo. 1967) (rationale in *Ultramares* stated); Comment, *Liability Of Architects And Engineers To Third Parties: A New Approach,* 53 NOTRE DAME LAW. 306, 312-13 (1977). The privity doctrine is also supported by the reasoning that those who do not pay for a professional's services should not enjoy the benefit of duties created by those services. *See id.* at 313.

17. *See* Thomas v. Winchester, 57 Am. Dec. 455, 458-59 (N.Y. 1852); *see generally* Ward, *Professional Malpractice: The Extent of Liability In Texas and Elsewhere,* 42 TEX. B.J. 117, 120 (1979) (privity first ignored in products liability); Comment, *Liability Of Architects And Engineers To Third Parties: A New Approach,* 53 NOTRE DAME LAW. 306, 308 (1977) (products liability first disregarded privity); Comment, *Lawyers' Negligence Liability To Non-Clients: A Texas Viewpoint,* 14 ST. MARY'S L.J. 405, 407 (1983) (first exception to privity arose in products liability).

product involved was extremely dangerous.[18] The privity requirement was completely abandoned in this area in 1916, when Judge Cardozo held in *MacPherson v. Buick Motor Co.*[19] that a manufacturer of negligently-made products would be liable for the reasonably foreseeable harm to third parties, regardless of an absence of privity.[20] The reasoning of the court established a framework for the change from a privity-based standard to a negligence-based standard in products liability cases.[21]

Privity has continued to be a controversial issue in cases involving third party liability of professionals, all of whom are held to a higher standard of care than the ordinary person.[22] Not until recently have the courts begun to disregard the requirement of privity in this area.[23] The *MacPherson* rationale was first extended in a case involving economic injury of a third party by a professional in 1922.[24] In 1931, however, Judge Cardozo refused to extend the *MacPherson* rationale to the accounting profession in

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18. *See* Thomas v. Winchester, 57 Am. Dec. 455, 458-59 (N.Y. 1852). Thomas bought a bottle of poison from a druggist which was negligently mislabeled by the defendant manufacturer as harmless. *See id.* at 455. The court cited cases upholding the privity doctrine but distinguished *Thomas* on the basis that death or serious harm was almost inevitable. *See id.* at 458.

19. 111 N.E. 1050 (N.Y. 1916).

20. *See id.* at 1055. MacPherson was thrown from his car when a negligently manufactured wheel collapsed. *See id.* at 1051. No privity between MacPherson and the manufacturer existed because MacPherson purchased the car from the dealer; thus only the dealer and manufacturer were in privity. *See id.* at 1051.

21. *See id.* at 1053. Judge Cardozo stated that the principle of *Winchester* "is not limited to poisons, explosives, and things of like nature" but also applied when there is "knowledge of danger" which is "not merely possible, but probable." *Id.* at 1053.

22. *See* Heath v. Swift Wings, Inc., 252 S.E.2d 526, 529 (N.C. Ct. App. 1979). Professionals are not only required to conduct themselves as reasonable persons but are also required to possess a minimum standard of knowledge and care in their particular profession. *See id.* at 529; City of East Grand Forks v. Steele, 141 N.W. 181, 181-82 (Minn. 1913) (accountants' standard); Surf Realty Corp. v. Standing, 78 S.E.2d 901, 907 (Va. 1953) (architects' standard); Kaiser v. Suburban Transp. Sys., 398 P.2d 14, 16 (Wash. 1965) (physicians' standard); Ward v. Arnold, 328 P.2d 164, 167 (Wash. 1958) (attorneys' standard).

23. *See* Heyer v. Flaig, 449 P.2d 161, 165, 74 Cal. Rptr. 225, 229 (1969) (attorneys may be liable to third parties); Howell v. Fisher, 272 S.E.2d 19, 26 (N.C. Ct. App. 1980) (engineers may be liable to third parties); Inman v. Binghamton Housing Auth., 143 N.E.2d 895, 898-99, 164 N.Y.S.2d 699, 703-04 (1957) (architects may be liable to third parties); Shatterproof Glass Corp. v. James, 466 S.W.2d 873, 876 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.) (accountants may be liable to third parties); Kaiser v. Suburban Transp. Sys., 398 P.2d 14, 16 (Wash. 1965) (physicians may be liable to third parties).

24. *See* Glanzer v. Shepard, 135 N.E. 275, 277 (N.Y. 1922). In *Glanzer,* the defendant, a certified public weigher, was hired by a seller of beans to certify their weight so that the plaintiff-buyer would know how much to pay. *See id.* at 275. The actual weight of the beans was less than what was certified and the defendant knew that the plaintiff was relying on the weight stated. *See id.* at 275. The plaintiff thus paid a greater amount than he owed. *See id.* at 275. The court ignored the lack of privity and applied a standard negligence test,

Ultramares Corp. v. Touche,[25] and instead relied on the strict privity requirement.[26] In the last decade the majority of jurisidictions have rejected the *Ultramares* rationale and have based accountants' third party liability on whether the harm was foreseeable.[27] Another group of professionals, lawyers, have enjoyed a privity shield from third party suits in the majority of jurisdictions,[28] although the privity defense in the legal profession seems to be in a state of transition.[29] A third group, architects, belong to a profession in which the harm to a third party can be either economic or physical.[30] In the landmark case of *Inman v. Binghamton Housing Authority,*[31] it

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holding the defendant liable because the plaintiff was a reasonably foreseeable individual. *See id.* at 277.

25. 174 N.E. 441 (N.Y. 1931).

26. *See id.* at 447. *Ultramares* involved creditors who relied on negligently prepared financial statements prepared by public accountants hired by the borrower. *See id.* at 442-43. The creditors suffered economic injury because of their reliance. *See id.* at 443. The court reasoned that allowing third party recovery based on a negligently prepared audit would "expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Id.* at 444. Judge Cardozo distinguished *Glanzer,* stating that in *Glanzer* there was more than the providing of a service "in the expectation that the one who ordered the certificate would use it thereafter . . . *[Glanzer]* was a case where the transmission of the certificate to another . . . [was] the end and aim of the transaction. . . ." *Id.* at 445. It has been said that "Cardozo weakened his opinion by making distinctions where there were no differences." Seavey, *Mr. Justice Cardozo And The Law Of Torts,* 52 HARV. L. REV. 372, 400 (1939).

27. *See* Rhode Island Hosp. Trust Nat'l Bank v. Swartz, Bresenoff, Yavner & Jacobs, 455 F.2d 847, 851 (4th Cir. 1972); Seedkem, Inc. v. Safranek, 466 F. Supp. 340, 343-44 (D. Neb. 1979); Rusch Factors, Inc. v. Levin, 284 F. Supp. 85, 92-93 (D.R.I. 1968); Ryan v. Kanne, 170 N.W.2d 395, 402-03 (Iowa 1969); Bonhiver v. Graff, 248 N.W.2d 291, 297 (Minn. 1976); Aluma Kraft Mfg. v. Elmer Fox & Co., 493 S.W.2d 378, 383-85 (Mo. Ct. App. 1973); Shatterproof Glass Corp. v. James, 466 S.W.2d 873, 880 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.). *But see* Stephens Indus. v. Haskins & Sells, 438 F.2d 357, 360 (10th Cir. 1971) (no privity, no recovery).

28. *See* Savings Bank v. Ward, 100 U.S. 195, 205-06 (1879) (attorneys not liable to third parties unless fraud shown); Favata v. Rosenberg, 436 N.E.2d 49, 51 (Ill. App. Ct. 1982) (no third party liability for attorneys); McDonald v. Stewart, 182 N.W.2d 437, 440 (Minn. 1970) (attorney immune from negligence liability to non-clients); Graham v. Turcotte, 628 S.W.2d 182, 184 (Tex. App.—Corpus Christi 1982, no writ) (no privity of contract so no liability for attorney); *see also* Comment, *Lawyers' Negligence Liability To Non-Clients: A Texas Viewpoint,* 14 ST. MARY'S L.J. 405, 405 (1983) (majority of states limit duty to client).

29. *See* Ward, *Professional Malpractice: The Extent of Liability In Texas and Elsewhere,* 42 TEX. B.J. 117, 121 (1979). The privity doctrine has been most frequently disregarded in cases where the plaintiff was an intended beneficiary of the attorney's client. *See, e.g.,* Heyer v. Flaig, 449 P.2d 161, 165, 74 Cal. Rptr. 225, 229 (1969) (attorney held liable to intended beneficiary of will for negligently failing to make testamentary change); Stowe v. Smith, 441 A.2d 81, 84 (Conn. 1981) (attorney who negligently drafted will for client liable to intended beneficiary); McAbee v. Edwards, 340 So. 2d 1167, 1170 (Fla. Dist. Ct. App. 1976) (intended beneficiary of negligently drafted will may recover from attorney).

30. *See* Detweiler Bros. v. John Graham & Co., 412 F. Supp. 416, 418 (E.D. Wash.

was alleged that an architect negligently designed an apartment by failing to provide a stairrail, resulting in injury to the third party plaintiff.[32] The court dismissed the case because no negligence was found, but adopted the rationale used in *MacPherson.*[33] Since *Inman,* the majority of jurisdictions addressing this question have abandoned the requirement of privity in third party negligence actions against architects.[34]

In the medical profession, third party injury is usually physical rather than economic.[35] To date, the medical profession has enjoyed the greatest protection from negligence liability to third parties.[36] Courts in at least seven jurisidictions, however, have held that a doctor may be liable, despite a lack of privity, to foreseeable third parties.[37]

1976) (damages for misrepresentation of pipe quality); A.R. Moyer, Inc. v. Graham, 285 So. 2d 397, 398 (Fla. 1973) (economic injury incurred from building project); Miller v. DeWitt, 226 N.E.2d 630, 635 (Ill. 1967) (roof collapsed on plaintiffs); Laukkamen v. Jewel Tea Co., 222 N.E.2d 584, 586 (Ill. App. Ct. 1966) (supermarket pylon fell on plaintiff); Craig v. Everett M. Brooks Co., 222 N.E. 2d 752, 753 (Mass. 1967) (economic injury caused by inaccurate measurements); Simon v. Omaha Pub. Power Dist., 202 N.W.2d 157, 160 (Neb. 1972) (plaintiff fell through hole in floor).

31. 143 N.E.2d 895, 164 N.Y.S.2d 699 (1957).

32. *See id.* at 897-98, 164 N.Y.S.2d at 702.

33. *See id.* at 899, 164 N.Y.S.2d at 703-04. The court stated that:

> [T]here is no reason to believe that the law governing liability . . . should be, or is, in any way different where real structures are involved instead of chattels. There is no logical basis for such a distinction. . . . The principle inherent in MacPherson v. Buick Motor Co. case . . . cannot be made to depend upon the merely technical distinction between a chattel and a structure built upon the land.

Id. at 899, 164 N.Y.S.2d at 703-04.

34. *See* Detweiler Bros. v. John Graham & Co., 412 F. Supp. 416, 420 (E.D. Wash. 1976) (lack of privity no bar to tort action brought by contractor against architect); Peerless Ins. Co. v. Cerney & Assoc., 199 F. Supp. 951, 955 (D. Minn. 1961) (surety not in privity can recover in negligence action against architect for economic injury); A.R. Moyer, Inc. v. Graham, 285 So. 2d 397, 402 (Fla. 1973) (absent privity, contractor may still bring action against architect for economic damage); Laukkamen v. Jewel Tea Co., 222 N.E.2d 584, 588 (Ill. App. Ct. 1966) (privity not prerequisite for tort action against engineers for physical harm); Craig v. Everett M. Brooks Co., 222 N.E.2d 752, 755 (Mass. 1967) (economic recovery against engineer allowed contractor not in privity).

35. *See* Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185, 187 (D. Neb. 1980) (suit arose because of third party's death); Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 339-40, 131 Cal. Rptr. 14, 19-20 (1976) (action for third party's death); Bradley Center, Inc. v. Wessner, 287 S.E.2d 716, 719 (Ga. Ct. App. 1982) (third party's death basis for action); Freese v. Lemmon, 210 N.W.2d 576, 577 (Iowa 1973) (bystander struck by car brought action); McIntosh v. Milano, 403 A.2d 500, 502-03 (N.J. Super. Ct. Law Div. 1979) (action arose from third party's wrongful death); Kaiser v. Suburban Transp. Sys., 398 P.2d 14, 15 (Wash. 1965) (action stemmed from bus passenger's injury).

36. *See* Ward, *Professional Malpractice: The Extent of Liability In Texas and Elsewhere,* 42 TEX. B.J. 117, 124 (1979).

37. *See* Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185, 193-94 (D. Neb. 1980) (psychotherapist's failure to control patient proximate cause of third party's death); Tarasoff v.

In *Gooden v. Tips,*[38] a case of first impression in Texas,[39] the Tyler Court of Appeals considered whether a physician owed a duty to the public to warn a patient not to drive when the physician knew or should have known that the drug prescribed had an intoxicating effect.[40] The court held that under the particular facts alleged such a duty existed when the harm was foreseeable,[41] but stressed that its holding was limited only to a duty to warn, not to control, the patient.[42] In concluding that there was only a duty to warn, the court relied on three cases from other jurisdictions involving facts similar to those in *Gooden,*[43] and on two Texas statutes

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Regents of Univ. of Cal., 551 P.2d 334, 339-40, 131 Cal. Rptr. 14, 19-20 (1976) (psycotherapist's failure to warn third party resulted in her death); Bradley Center, Inc. v. Wessner, 287 S.E.2d 716, 723 (Ga. Ct. App. 1982) (failure of hospital to control patient caused third party's death); Freese v. Lemmon, 210 N.W.2d 576, 578 (Iowa 1973) (failure to diagnose patient cause of third party's injury); McIntosh v. Milano, 403 A.2d 500, 514-15 (N.J. Super. Ct. Law Div. 1979) (psychiatrist's failure to warn third party resulted in third party's injury); Wharton Transp. Corp. v. Bridges, 606 S.W.2d 521, 525-26 (Tenn. 1980) (failure to perform physical exam properly resulted in third party's injury); Kaiser v. Suburban Transp. Sys., 398 P.2d 14, 16 (Wash. 1965) (failure to warn of drug's effect caused third party injury).

38. 651 S.W.2d 364 (Tex. App.—Tyler 1983, no writ).

39. *See id.* at 366.

40. *See id.* at 366. Directly following this statement of the issue the court restated the issue in a broader manner: "[I]s the physician under a duty to take whatever steps are reasonable under the circumstances to reduce the likelihood of injury to third parties who may be injured by that patient because said patient is under the influence of an intoxicating drug prescribed by the physician?" *Id.* at 366.

41. *See id.* at 369.

42. *See id.* at 370. The court made it clear that its holding was distinguished from those in cases requiring the doctor to control his patient. *See id.* at 370; Lipari v. Sears, Roebuck & Co., 497 F. Supp. 185, 193 (D. Neb. 1980) (psychotherapist had duty to control patient); Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 339-40, 131 Cal. Rptr. 14, 19-20 (1976) (psychotherapist had duty to control patient); Bradley Center, Inc. v. Wessner, 287 S.E.2d 716, 723 (Ga. Ct. App. 1982) (hospital had duty to control patient); McIntosh v. Milano, 403 A.2d 500, 514-15 (N.J. Super. Ct. Law Div. 1979) (psychiatrist had duty to control patient). Thus, if the patient drove despite the warning, the physician would not be required to prevent him from doing so. *See* Gooden v. Tips, 651 S.W.2d 364, 370 (Tex. App.—Tyler 1983, no writ).

43. *See* Freese v. Lemmon, 210 N.W.2d 576, 577-78, 580 (Iowa 1973). In *Freese,* the plaintiff was a bystander who was struck by a motorist who suffered an epileptic seizure and lost control of his car. *See id.* at 577-78. The plaintiff brought action against the motorist's physician for failing to correctly diagnose the cause of a previous seizure and for failing to warn the motorist not to drive. *See id.* at 578. The court held that a cause of action did exist against the physician. *See id.* at 580. In Wharton Transp. Corp. v. Bridges, 606 S.W.2d 521 (Tenn. 1980), Wharton, a truck company, employed a driver who subsequently was involved in a wreck injuring several people. *See id.* at 522. The injured parties recovered from Wharton, and Wharton in turn sued a physician who had given the driver a pre-employment physical and certified the driver as fit. *See id.* at 522. Wharton claimed that negligently undisclosed disabilities of the driver were the proximate cause of the wreck and subsequent injuries. *See id.* at 522. The court held that the physician could be held liable to

requiring a physician to protect others from certain infections.[44] A brief concurrence found that this "limited duty to warn" rule was unnecessary because a cause of action arose under the common law.[45]

The decision of the Tyler Court of Appeals in *Gooden* is consistent with a modern trend in other jurisdictions addressing third party liability of physicians.[46] While courts have discussed the privity relationship in determining third party liability of other professionals,[47] the Tyler court only briefly mentioned it.[48] By relying solely on a test of foreseeability, the court essentially disposed of the doctrine of privity without an initial determination of its applicability to physicians.[49] This failure to discuss the issue of privity in a case of first impression provides little insight for other courts in determining third party liability of physicians under different circumstances.

The Tyler court unnecessarily avoided the issue of privity.[50] Instead of relying solely on the three out-of-state cases involving physicians, the court

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third parties who suffered reasonably foreseeable injuries stemming from the physician's negligence. *See id.* at 527. The plaintiff in Kaiser v. Suburban Transp. Sys., 398 P.2d 14 (Wash. 1965) was a passenger on a bus. *See id.* at 15. The driver of the bus lost consciousness due to a drug prescribed by his physician and ran the bus into a telephone pole, thereby injuring the plaintiff. *See id.* at 15. The plaintiff sued the bus company and, in the alternative, the physician. *See id.* at 15. The bus driver testified that the physician failed to give him warning of any side effects the drug might have. *See id.* at 15. The court held that there was sufficient evidence to submit the issue to the jury to determine the physician's negligence because, if the physician failed to issue a warning, the harm to the plaintiff would have been a foreseeable type. *See id.* at 16.

44. *See* TEX. REV. CIV. STAT. ANN. art. 4445, §§ 1, 4 (Vernon 1976) (requires physician who diagnoses or treats case of gonorrhea, syphilis or chancroid to report to health officials); TEX. REV. CIV. STAT. ANN. art. 4477-11, §§ 4, 4A, 5 (Vernon Supp. 1982-1983) (requires physician who treats or diagnoses case of tuberculosis to report to health officials). The court stated that a duty imposed upon a physician to protect the public was not a new concept because these statutes require a physician to report to a health official, who in turn undertakes precautions to protect the public from infection. *See* Gooden v. Tips, 651 S.W.2d 364, 370-71 (Tex. App.—Tyler 1983, no writ).

45. *See* Gooden v. Tips, 651 S.W.2d 364, 372 (Tex. App.—Tyler 1983, no writ) (Colley, J., concurring).

46. *See* Freese v. Lemmon, 210 N.W.2d 576, 580 (Iowa 1973); Wharton Transp. Corp. v. Bridges, 606 S.W.2d 521, 527 (Tenn. 1980); Kaiser v. Suburban Transp. Sys., 398 P.2d 14, 16 (Wash. 1965).

47. *See, e.g.,* Inman v. Binghamton Housing Auth., 143 N.E.2d 895, 898-99, 164 N.Y.S.2d 699, 703-04 (1957) (discussing and abandoning privity doctrine as to architects); Shatterproof Glass Corp. v. James, 466 S.W.2d 873, 879 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.) (discussing and rejecting privity requirement as to accountants); Bell v. Manning, 613 S.W.2d 335, 338-39 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.) (discussing and upholding privity doctrine as to lawyers).

48. *See* Gooden v. Tips, 651 S.W.2d 364, 368 (Tex. App.—Tyler 1983, no writ).

49. *See id.* at 369-70.

50. *See id.* at 369-70.

could have strengthened its decision by noting similar cases that involved other professions but which dealt with the issue of privity.[51] Common elements exist between third party recovery against architects and against physicians in that the harm sustained can be physical, the risk is foreseeable, a third party is injured, and the proximate cause of the harm is the professional's negligence in rendering a service for the client or patient.[52] Since the majority of courts have abandoned the requirement of privity in negligence suits against architects, analogy dictates that a cause of action against physicians should not turn on the issue of privity alone.[53] Moreover, Texas, along with the majority of jurisdictions, recognizes third party liability against accountants in the absence of privity when the injury involved is purely economic.[54] Although it has been argued that no distinction should be made between physical and purely economic harm in third party suits,[55] courts have been more lenient in allowing recovery for physical injuries.[56] It only seems logical that having allowed recovery for third party economic injuries,[57] Texas courts should not hesitate to permit third

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51. *See* Inman v. Binghamton Housing Auth., 143 N.E.2d 895, 898-99, 164 N.Y.S.2d 699, 703-04 (1957) (architects may be liable to third parties); Shatterproof Glass Corp. v. James, 466 S.W.2d 873, 876 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.) (accountants may be liable to third parties). Texas, however, conforms to the majority view that lawyers are not liable to third parties. *See* Graham v. Turcotte, 628 S.W.2d 182, 184 (Tex. App.—Corpus Christi 1982, no writ).

52. *Cf.* Ward, *Professional Malpractice: The Extent of Liability In Texas and Elsewhere,* 42 TEX. B.J. 117, 120 (1979) (noting the common elements between third party recovery in products liability suits and third party recovery from architects).

53. *See* Freese v. Lemmon, 210 N.W.2d 576, 579-80 (Iowa 1973) (privity not an issue in determing physician's third party liability); Wharton Transp. Corp. v. Bridges, 606 S.W.2d 521, 527 (Tenn. 1980) (lack of privity not controlling in physician's third party liability); Kaiser v. Suburban Transp. Sys., 398 P.2d 14, 16 (Wash. 1965) (foreseeability of harm not privity determines physician's third party liability).

54. *See* Shatterproof Glass Corp. v. James, 466 S.W.2d 873, 876 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.) (third party recovery allowed for economic damage caused by reliance on negligently prepared audit); *see also, e.g.,* Seedkem, Inc. v. Safranek, 466 F. Supp. 340, 343-44 (D. Neb. 1979) (recovery allowed for third party injury caused by reliance on recklessly prepared accounting documents); Bonhiver v. Graff, 248 N.W.2d 291, 297 (Minn. 1976) (third party recovery allowed for accounting firm's negligence in failing to discover officers who were embezzeling funds from insurance company); Aluma Kraft Mfg. v. Elmer Fox & Co., 493 S.W.2d 378, 383-85 (Mo. Ct. App. 1973) (recovery allowed for damages to third party due to reliance on negligently prepared audits).

55. *See* Bresser, *Privity?—An Obsolete Approach To The Liability Of Accountants To Third Parties,* 7 SETON HALL 507, 512-13 (1976). Because the privity doctrine does not preclude recovery when physical injuries are incurred by third parties, the same result should follow for economic injures. *See id.* at 512.

56. *See* James, *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal,* 25 VAND. L. REV. 43, 44 (1972).

57. *See* Shatterproof Glass Corp. v. James, 466 S.W.2d 873, 876 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.).

party recovery for physical harm solely because of a lack of privity.[58]

The main support underlying the privity doctrine as applied to physicians is to protect the physician from unlimited liability.[59] The negative consequence of this policy, however, is an outright bar on all third party claims against negligent physicians.[60] By replacing privity with an ordinary negligence standard, the requirement of foreseeability of the harm still effectively shields the physician from unlimited liability and at the same time allows an injured third party a cause of action against the physician whose negligence was the proximate cause of the injury.[61] While extending this burden to physicians may cause their expenses to increase to an even greater amount, these additional costs can in turn be passed on to the public.[62] This approach complies with the policy that it is more just for the public to bear the cost of an injury than the sole injured party.[63]

Although the Tyler Court of Appeals failed to confront the privity doctrine in *Gooden,* the court was correct in holding that an injured third party could bring a cause of action against a physician who failed to warn his patient not to drive while taking prescribed drugs, if the physician's negligence was the proximate cause of the third party's injury. Rather than applying the privity doctrine which disallows recovery even for foreseeable injuries to third parties, an ordinary negligence standard was used. A negligence standard properly upholds the purpose behind the privity requirement in that liability is still limited; it is limited to only those injuries which are foreseeable. In addition, the negligence standard effectively places the moral blame on the blameworthy party. It has been said that

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58. *See* Gooden v. Tips, 651 S.W.2d 364, 370 (Tex. App.—Tyler 1983, no writ).

59. *Cf.* Ultramares Corp. v. Touche, 174 N.E. 441, 444 (N.Y. 1931) (liability of indeterminate amount would result if no requirement of privity); *see also* Rozny v. Marnul, 250 N.E.2d 656, 661 (Ill. 1969) (quoting rationale in *Ultramares);* Anderson v. Boone County Abstract Co., 418 S.W.2d 123, 127 (Mo. 1967) (stating rationale in *Ultramares);* Comment, *Liability Of Architects And Engineers To Third Parties: A New Approach,* 53 NOTRE DAME LAW. 306, 313 (1977) (purpose of privity to protect against unlimited liability).

60. *See* Ward, *Professional Malpractice: The Extent of Liability In Texas and Elsewhere,* 42 TEX. B.J. 117, 120 (1979). A physician whose acts were the proximate cause of a third party's injury would be excused from all liability if privity were required, regardless of how negligently he acted. *See id.* at 120; Comment, *Liability Of Architects And Engineers To Third Parties: A New Approach,* 53 NOTRE DAME LAW. 306, 311 (1977) (no privity with professional, no recovery).

61. *See* Gooden v. Tips, 651 S.W.2d 364, 369-70 (Tex. App.—Tyler 1983, no writ).

62. *Cf.* Rusch Factors, Inc. v. Levin, 284 F. Supp. 85, 91 (D.R.I. 1968). In the accounting profession the risk of loss to third parties is more fairly distributed by placing the burden on the accountants rather than innocent third parties. *See id.* at 91. Accountants will, in turn, pass the cost of increased insurance rates to cover the risk on to the entire consuming public. *See id.* at 91.

63. *See* G. CALABRESI, THE COSTS OF ACCIDENTS 39 (1970). Accident losses are less burdensome if they are spread among a large number of people. *See id.* at 39.

when the purpose of the law ceases to exist, so too should the law.[64] It only follows that the doctrine of privity should be abandoned when applied to physicians.

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64. *See* Holmes, *The Path Of The Law,* 10 HARV. L. REV. 457, 469 (1897).