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COURT OF APPEALS  
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STATE OF WASHINGTON  
By CP

NO. 27969-3

IN THE COURT OF APPEALS  
FOR THE STATE OF WASHINGTON  
DIVISION III

ELIZABETH D. KALTREIDER,

Plaintiff/Appellant

vs.

LAKE CHELAN COMMUNITY  
HOSPITAL (Respondent);  
GEORGE A. MENDARD,

Defendants.

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APPEAL FROM THE SUPERIOR COURT FOR CHELAN COUNTY  
THE HONORABLE JOHN E. BRIDGES

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APPELLANT'S REPLY BRIEF

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**1. Ms. Kaltreider was a “vulnerable” patient.**

Washington Administrative Code 246-840-740(1), (2), and (4) states that due to the “unique vulnerability” of chemical dependency clients, nurses are prohibited from engaging in sexual or romantic conduct. The conduct is prohibited whether or not the client consents. Therefore, alleged consent is not an affirmative defense on which to base summary judgment.

The unique vulnerability was a basis for the Washington State Department of Health summarily suspending the male nurse's license. CP 213-215.

The State of Washington Department of Health Nursing Care Quality Assurance Commission as to Ms. Kaltreider expressly found:

“Patient A (Elizabeth Kaltreider) was susceptible to exploitation and psychological harm by virtue of her innate vulnerability as an individual actively struggling with acute alcoholism.” CP 214.

The Medical Director of the Lake Chelan Community Hospital Addiction Recovery Center, James W. Ethier, M.D., testified in deposition:

“Q. What was your title at Lake Chelan Community Hospital?

A. I was . . . Medical Director of the Addiction Recovery Center.” CP 226.

“Q. . . . Is it unprofessional conduct for a health care provider such as a registered nurse to have sexual conduct with a patient?

A. Yes. CP 227.

Q. Is romantic conduct with a patient prohibited for a registered nurse in the State of Washington?

A. Yes.” CP 227.

“Q. . . . What makes that behavior unprofessional as far as consequences to a patient?

A. Firstly, it places treatment of the patient at risk in the sense that it would be considered . . . contaminated treatment. CP 230.

Also, the damaging part is a relationship between a patient is considered, especially in an inpatient setting, a certain level of helplessness or inability to perceive things that may be harmful to them, and that a healthcare provider essentially sits in a relationship of power over that patient. . . .” CP 230.

“Q. So that sort of prohibited sexual or romantic misconduct then has the potential to both interfere with the treatment that would otherwise be going on and damaging the patient?

A. . . . Yes . . .” CP 231.

“Q. Doctor, I would like you to assume that Patient A in this Ex Parte Order of Summary Suspension, Exhibit 2, is Elizabeth Kaltreider. Referring you to page 2, paragraph 1.3, the third sentence, which reads “Patient A,” Elizabeth Kaltreider, “was susceptible to exploitation and psychological harm by virtue of her innate vulnerability as an individual actively struggling with acute alcoholism.”

With respect to that sentence, do you agree with that?

A. Yes.” CP 232.

“Q. Based on your experience and training and based on your role as the Medical Director at the Lake Chelan Community Hospital, so with that experience, training and foundation and role, is there anything in this Ex Parte Order of Summary Suspension that you disagree with?

Mr. Sestero: Object to the form. It's compound.

Q. (By Mr. Janisch) You can answer.

A. I don't disagree with anything in that document." CP 233.

"Q. If you would assume that the alleged acts in the Statement of Charges and Summary Suspension Exhibits 1 and 2, and those alleged violations occurred by George Menard to inpatient Elizabeth Kaltreider, do you have any opinion as to the effect on Elizabeth Kaltreider after she left Lake Chelan Community Hospital?

Mr. Sestero: Same objection.

A. Sexualized relationships with patients are disorganizing, generally, and they cause emotional upheaval. I would expect, having known Elizabeth and her responses, emotional responses, that she would be at great risk for relapse." CP 235-236.

Dr. Ethier testified that Elizabeth Kaltreider has very significant other psychiatric problems. CP 237 (line 7-8).

Dr. Ethier further testified as to the risk:

"A. . . . So the contact with George Menard in this way exacerbates and greatly increases her risk to relapse to alcohol because that, I believe, affected her emotional state." CP 238 (lines 23-25), CP 239 (line 1).

Consistent with the Washington State Administrative Code, the Washington State Department of Health findings, and the testimony of the

Lake Chelan Community Hospital Medical Director, Ms. Kaltreider in deposition by the hospital's counsel poignantly stated her vulnerability:

"A. . . . When I went into treatment, I was extremely tired. I was exhausted. . . . I was very tired. . . . I was very confused. I would not say my decision-making was rationale at all times. . . . A lot is being thrown at you in treatment." CP 271 (lines 18-24).

**2. Mr. Menard's sexual misconduct is not unforeseeable as a matter of law.**

Factual questions exist as to Mr. Menard's training and supervision at Lake Chelan Community Hospital.

In deposition Mr. Menard testified:

"Q. Do you recall, independent of any documents, being instructed on sexual harassment policies and procedures at Lake Chelan?

A. No, I don't recall." CP 140.

"Q. With respect to the issue of sexual or romantic conduct with a patient, at any time have you had any training on that issue?

A. No. CP 221.

Q. Are you are of any training on the issue of sexual or romantic contact with patients that was offered through Lake Chelan Community Hospital?

A. No. CP 221.

Q. At any time before or during your employment with Lake Chelan Community Hospital, did any of your supervisors at Lake Chelan Community Hospital discuss with you any issues with respect to sexual or romantic conduct with a patient?

A. No.” CP 221.

Mr. Menard, while an employee of Lake Chelan Community Hospital, engaged in prohibited sexual misconduct with another patient shortly prior to victimizing Ms. Kaltreider. Mr. Menard went so far as to rub up against another female patient to feel her breasts and went so far as to while giving medications to gyrate his hips in a sexual way and ask “Do you want it now?” This unrelated patient was also subject to sexualized conduct by the male nurse employee of the hospital. CP 216-217.

Mr. Menard was the only nurse on duty at night where Elizabeth Kaltreider was. In his deposition he stated:

“Q. During your shifts while Elizabeth Kaltreider was there, how many other nurses were working in the area where you were working?

A. On the night shift, I was the only nurse on duty. CP 224.

Q. How about during the day shift?

A. On the day shift, there was generally other nurses, maybe one to two other nurses, and one or two alcohol counselors or psychiatric techs. CP 224.

Q. So night shift you were the only nurse there?

A. I was the only nurse on night shift.” CP 224.

Mr. Menard, while working in his capacity as a registered nurse at Lake Chelan Community Hospital, on two (2) separate occasions at night came into Ms. Kaltreider’s room and got into bed with her. He sexually fondled her. CP 202.

**3. There is expert testimony.**

H. Berryman Edwards, M.D., certified that it is his expert opinion that there is a reasonable probability that Defendant’s conduct did not follow the accepted standard of care required to be exercised by the male nurse George Menard as to be provided and safeguarded by the Lake Chelan Community Hospital while Elizabeth Kaltreider was in treatment. CP 10-19.

The Lake Chelan Community Hospital’s Medical Director offered sworn testimony in deposition as to Ms. Kaltreider’s unique vulnerability and the likelihood of damages as a result of her unique vulnerability. CP 232; 235-236.

**CONCLUSION**

The special relationship between Lake Chelan Community Hospital and Elizabeth Kaltreider as a vulnerable patient gives rise to a

duty of reasonable care, owed by the hospital to Elizabeth Kaltreider, to protect her from foreseeable harm. The prohibited sexual misconduct by the male nurse to the female patient is not legally unforeseeable harm. The foreseeability of Mr. Menard's sexual and romantic misconduct remains a question of fact.

It is respectfully requested that the Court of Appeals reverse the Summary Judgment Order.

DATED this 20 day of July, 2009.

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& SMITH, P.S.

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