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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

84144-6

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

NO. 27969-3-III

ELIZABETH D. KALTREIDER,

Appellant

v.

LAKE CHELAN COMMUNITY HOSPITAL

Respondent

BRIEF OF RESPONDENT

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I. INTRODUCTION

Elizabeth Kaltreider ("Kaltreider") failed to present admissible factual evidence in opposition to the Lake Chelan Community Hospital ("Hospital") motion for summary judgment, and there is no new evidence presented on appeal. This appeal only addresses the dismissed "duty of protection" cause of action. On appeal, Kaltreider essentially argues she was "vulnerable" because she was a patient at an alcohol treatment facility, and the Hospital employee's sexual misconduct was foreseeable because such conduct is "not unforeseeable."

Beyond the assertions, Kaltreider presents no evidentiary proof supporting the cause of action's necessary elements: (1) vulnerability giving rise to the protection duty; (2) the Hospital's notice of a the employee's potential for sexual misconduct; and (3) causation.

Kaltreider was physically and mentally competent, was self-directed and capable of making her own decision, and was

consensually and secretively involved in sexual encounters with a male nurse, George Menard ("Menard" or "employee").

The Hospital did not know and could now reasonably foresee alleged sexual misconduct before Kaltreider left the hospital against medical advice ("AMA") without engaging in a presumption that all employees are predators. The defendant had no notice, actual or constructive, indicating that Menard was a risk for sexual misconduct with a patient.

Finally, Kaltreider provided no expert testimony on causation. The absence of evidence on these essential elements should lead to affirmation of the trial court's summary judgment order.

II. RESTATEMENT OF ISSUES

1. Was Kaltreider a "vulnerable" person when she had no cognitive or physical disabilities, when she was not entrusted to the exclusive custody or care of the Hospital, and when she claimed to be capable of making her own medical and relationship decisions?

2. Did Kaltreider present admissible evidence showing actual or constructive notice that sexualized communication or contact between Menard and Kaltreider was reasonably foreseeable?

3. Did Kaltreider establish causation between her claimed psychological damage and the purported breach of the duty of protection?

III. STATEMENT OF CASE

1. Procedural History

The Hospital moved for the dismissal of any and all claims brought by the plaintiff on January 12, 2009. CP 26. After briefing by both parties, the Honorable John Bridges entered the Order granting the Hospital's motion for summary judgment on March 9, 2009. CP 284-86.

On appeal, Kaltreider challenges only the dismissal of the "duty of protection" cause of action.

2. Facts

A. Menard

In 2001, Menard filed an application for employment at the Hospital. CP 29, 165. Consistent with Hospital practices, Menard was interviewed, his application was reviewed, and a background check was performed. Id. He was subsequently hired and given orientation and training over a series of months. CP 29, 165. He was given an employee handbook in 2001 with instructions to review the content and abide by the enclosed guidelines, policies and procedures. CP 29, 165. Hospital employees were encouraged to reference written materials, to consult nursing supervisors, and to submit to mandatory updates and seminars on various topics. CP 29, 165. In 2002, Menard, like other employees, underwent sexual harassment training. CP 29-30. The Hospital has a zero tolerance policy for sexual communications, innuendo, gestures, conduct or flirtatious behavior between staff or between staff and patients. CP 30, 166. No evidence

suggested past sexual misconduct by Menard during the first period of employment. CP 30, 166.

Upon leaving the Hospital in the Summer, 2002, to pursue other opportunities, Menard had received satisfactory job performance reviews. CP 30, 166.

Menard returned to the Hospital and applied for employment in March, 2007. Id. He submitted an application, denied any past criminal charges or convictions, passed a criminal background check, and employment references revealed no allegations of past inappropriate or sexual misconduct. CP 30, 166.

Upon his return to the Hospital in 2007, Menard was given an "Employee Reference" containing employment documentation, guidelines, and policies. Id. The sexual harassment policy continued to exist in 2007, and Menard was expected to again comport with the dictates of the policy. CP 31, 167.

Kaltreider was admitted to the Hospital on June 1, 2007, and prior to that date the Hospital had received no comments, criticisms

or complaints from any patient or employee suggesting that Menard engaged in communications or conduct of a sexual nature or constituting sexual misconduct. CP 31, 167. Hospital nursing staff are instructed and expected to refrain from flirtatious, romantic, or sexual communications and conduct with patients and they are expected to conduct themselves in a professional manner and avoid overly personal interactions and relationships with the patient population. CP 169. Menard was never identified as someone engaging in these sorts of behaviors before Kaltreider left AMA. CP 169, 177-78.

B. Kaltreider

Kaltreider's treating psychologist recommended that she go to the Hospital for in-patient treatment of her alcohol abuse, and Kaltreider acknowledged that she was free to accept or reject this recommendation. CP 170. At admission, Kaltreider understood that sexual conduct between staff and patients was prohibited. CP 170.

Kaltreider has specifically denied any physical or cognitive disabilities. CP 171. She describes herself as "independent minded" and "absolutely" able to make her own decisions. CP 171. She has never been deemed incompetent to care for herself or her son, and she admits that she was not involuntarily committed to the Hospital. CP 171. She voluntarily went to the Hospital in June, 2007, and she voluntarily left, despite recommendations to the contrary. CP 171.

The sexual interactions with Menard were described as "not unwelcome" and "consensual." CP 173. She never reported any of Menard's communications or their respective conduct while she was at the Hospital. CP 173. Even after her AMA departure, she made no complaints or communications to the Hospital about the Menard interactions.

During the expected 28 day recovery program, Kaltreider interacted with Dr. John Arnold, Dr. James Ethier, a chemical dependency counselor, and a variety of nurses and aides. CP 174-175. Because Kaltreider was not completing assignments and preparing for

her expected discharge on June 29, 2007, she was a high risk for relapse. CP 174. She was irritated by a recommendation for further in-patient treatment at a different facility, and Kaltreider independently decided to leave the Hospital AMA. CP 170-71. Even in this state of irritation at the Hospital, she made no complaints about Menard. Upon leaving the Hospital, Kaltreider still had plans to meet with Menard at Kaltreider's home on Bainbridge Island on July 2, 2007. CP 177. When Menard failed to show up for the rendezvous, Kaltreider did not notify anyone about the past sexual encounters. Eventually, she told her treating psychologist that she felt guilty about any reprimand or punishment of Menard because Kaltreider had been "an instigator" in the relationship. CP 177.

C. Menard's Personal Gratification

Menard rejected the first act of intimacy initiated by Kaltreider and he complained that he could "be fired for this type of activity." CP 171-72. He did not follow through on the planned rendezvous at Bainbridge Island because he thought it would be "inappropriate." CP

172. Even at the time of his initial employment with the Hospital, Menard recognized that any romantic or sexual interaction with a patient, including passing personal notes, meeting a patient in private, or fostering any romantic or sexualized interaction, was not part of his nursing duties and would be inappropriate. CP 172. Menard continued to understand these facts when he returned to Hospital employment in March, 2007. Id. Menard found Kaltreider's attention and flirtatiousness flattering, and he admits that he made bad judgments. CP 173. However, Menard concedes that his actions were not related to any of his job duties or function as a nurse; rather, he was engaged in personal actions for his own gratification. CP 173.

Ms. Roberta Ingram claims that Menard engaged in sexually inappropriate conduct with her at the Hospital in May, 2007. CP 216-17. However, this conduct was not reported until May, 2008, well after Menard was no longer employed and after Kaltreider had left the Hospital AMA. CP 217.

D. Causation

Kaltreider re-filed the Certificate of Merit signed by H. Berryman Edwards, M.D. in opposition to summary judgment. CP10-12. The Certificate makes no statement on causation or damage. Id. No other expert testimony was offered at summary judgment to establish a genuine issue as to a causal connection between Kaltreider's alleged damages and the purported breach of the asserted protection duty.

IV. ARGUMENTS & AUTHORITIES

1. Standard On Review and Summary Judgment.

The Court of Appeals reviews summary judgment decisions de novo. Seibold v. New, 105 Wn.App. 666, 675, 19 P.13d 1068 (2001).

At summary judgment, the moving party may challenge the party bearing the burden at trial, the plaintiff, to establish a genuine issue of material fact in support of every necessary element of the plaintiff's causes of action. Howell v. Spokane & Inland Empire Blood Bank, 117 Wn.2d 619, 625, 818 P.2d 1056 (1991). The

burden then shifts to the plaintiff to come forward with factually specific and admissible evidence in support of a genuine issue on the necessary elements. Young v. Key Pharmaceuticals, Inc. 112 Wn. 2d 216, 225, 770 P.2d 182 (1989).

2. Kaltreider was Not "Vulnerable."

A duty of protection may be owed to vulnerable individuals when there is a "special relationship" between the plaintiff and the defendant. See, Niece v. Elmview Group Home , 131 Wn. 2d 39, 45-47, 929 P.2d 420 (1997). The relationship of a hospital to a patient has been deemed a special relationship; however, the duty to protect someone from the conduct of a third person has seemingly been extended only to people who are truly vulnerable due to substantial incapacity or disability. Niece v. Elmview Group Home, 131 Wn. 2d 39, 42, 929 P. 2d 420 (1997)(plaintiff suffered from cerebral palsy and had profound developmental disabilities, including difficulties with mobility and communication while residing at residential care home); Shepard v. Mielke, 75 Wn.App. 201, 203, 877 P. 2d 220

(1994)(nursing home patient had been in a coma for 29 days, leaving her with significant brain damage); Caulfield v. Kitsap County, 108 Wn. App. 242, 253-54, 29 P. 3d 738 (2001)(plaintiff was profoundly disabled, and entrusted to the care of a government agency).

Vulnerability, as described in the published decisions, involves plaintiffs who are incompetent, unable to care for or protect themselves, or who, because of age or infirmity, are entrusted to the care of a defendant. Kaltreider has specifically denied incompetence, disability or impairment at any point in her life. Kaltreider engaged in consensual, secretive, and voluntary sexual encounters with Menard. No facts indicate she was impaired, incapacitated or unable to make her own decisions in June, 2007. Physically she was able, at all times, to remove herself from Menard's presence. She independently decided on Hospital admission and departure. She did not entrust her well-being to the Hospital like the profoundly injured and disabled plaintiffs in the above-cited cases.

Kaltreider's argument that she was vulnerable simply because she was an admitted patient is rebutted in Smith v. Sacred Heart Medical Center, 144 Wn.App. 537, 184 P.3d 646 (2008). There, two plaintiffs were admitted to the psychiatric unit at Sacred Heart Medical Center and they received inappropriate sexual advances from an employed nursing aide. The Smith Court recognized that the two plaintiffs, who had clearly been hospitalized on the psychiatric unit, did not exhibit mental and physical disabilities. Like the patients in Smith and unlike the profoundly disabled plaintiffs in the above-cited cases, Kaltreider was competent, independent, and self-directed.

Kaltreider's attempt to utilize WAC 246-840-740 as a guide or diagnostic formula for defining "vulnerability" is misguided. The WAC provision addresses nursing conduct and provides no diagnostic criteria or definition for incapacity, disability, or impairment as used in the "special relationship" cases. Similarly, Menard's nursing disciplinary proceedings never involved a psychological assessment of Kaltreider's cognitive and functional abilities to make her own

decisions. Based on Kaltreider's own self-assessment, her decision making capacity and her physical health, one can only conclude she was engaged in secretive and consensual sexual interactions with Menard.

By focusing on Menard's conduct, Kaltreider seeks to avoid the fact that she presented no meaningful evidence of the type of incompetence or incapacity which is necessary in the "duty of protection" cases.

3. The Hospital Had No Notice of Menard's Inappropriate Conduct Undertaken for Personal Gratification, and His Actions Were Not Reasonably Foreseeable.

The Hospital had no knowledge of any sexual misconduct or propensity for the same by Menard until a phone call on July 23, 2007, nearly one month after Kaltreider left the Hospital. CP 177. Menard's employment ended days after the call.

Menard had never been the subject of criminal charges for sexual misconduct, had never been previously fired for sexual

misconduct, and had never been the subject of past disciplinary actions by employers or the State of Washington. CP 177-78.

Kaltreider makes the global assertion that employee sexual misconduct is reasonably foreseeable but such an assertion, without supporting evidence, is mere assertion and unfounded by legal authority. In Smith, the court noted that sexual misconduct and resulting harm must be "reasonably foreseeable," and the foreseeability must be based on more than speculation or conjecture. Id at 546. The employer "generally does not have a duty to guard against the possibility that one of its employees may be an undisclosed sexual predator." Smith, 144 Wn.App. at 546 (2008), quoting Niece v. Elmview Group Home, 131 Wn.2d at 49.

There is no automatic presumption of sexual misconduct. The law does not impose a presumption of sexual misconduct by employees, and creating such an adversarial position between employer and employee is certainly not called for by statutes or caselaw. Instead, some direct evidence that the Hospital knew or

should have known of a potential for sexual misconduct by Menard is required as a predicate for the duty of protection claim.

Without evidence that Menard's sexualized conduct was known or reasonably foreseeable to the Hospital, the dismissal of the cause of action was warranted as a matter of law.

Kaltreider presented speculation and argument to the trial court, but she presented no employment, criminal or personal history of sexual misconduct by Menard prior to Kaltreider's AMA discharge. Moreover, the Hospital received no complaints or observations by others which could have suggested sexualized behavior by Menard. The mere fact that conduct can conceptually occur does not constitute sufficient notice to hold every employer liable when an employee acts outside of his or her scope of duty and engages in inappropriate conduct for personal gratification.

There was no admissible evidence suggesting that the Hospital should have reasonably foreseen that Menard would violate hospital

policies, state regulations, and engage in sexual interaction with a patient for his personal gratification.

4. No Proof of Causation With Expert Testimony.

Kaltreider put on no competent causation testimony in support of her cause of action. Testimony must be presented by a competent expert witness to causally relate the liability producing situation and the harm asserted by the plaintiff on a more probable than not basis. O'Donohue v. Riggs, 73 Wn.2d 814, 824, 440 P.2d. 823 (1968). In the present case, Dr. Ethier was asked hypothetical questions about Kaltreider's possible response to the sexual interactions with Menard. However, Dr. Ethier did not interact with or assess Kaltreider after she left AMA on June 26, 2007. CP 235-237. He had no occasion to evaluate, diagnose or treat Kaltreider after the sexual interactions, so Dr. Ethier's comments were clearly based upon a generalized statement of alcohol abuse patients and a generalized risk of relapse. CP 234-239. There was no foundation and no specific testimony

relating Menard's sexual interactions to Kaltreider's asserted, subsequent harm on a more probable than not basis.

Factually, Kaltreider did not have an alcohol relapse at the time of her AMA discharge or when Menard failed to arrive for the scheduled rendezvous with Kaltreider on July 2, 2007. CP 176-77. Instead, Kaltreider had a traumatic phone call with her former boyfriend, Mr. Nelson, on July 11, 2007, and that is when she began drinking alcohol again. CP 176-77, 100-102.

Without competent expert witness testimony, that Menard's interactions with Kaltreider resulted in her alleged harm or damage on a more probable than not basis. As a result, there was no genuine issue of material fact on the necessary element of causation.

IV. CONCLUSION

The Hospital provided a facility and an array of staff to address Ms. Kaltreider's long history of alcohol abuse in June, 2007. Unknown to any one at the Hospital, Ms. Kaltreider and Mr. Menard engaged in sexually inappropriate conduct. According to the plaintiff,

the conduct was done in secret and was consensual. Ms. Kaltreider had the cognitive and physical capacity to make her own decisions with respect to her care and her continued presence at the hospital. She left the Hospital against medical advice and was not involuntarily committed or detained at any point.

Kaltreider presented no evidence to the court indicating that she was physically or cognitively impaired to the extent that her care and protection was vested exclusively in the defendant hospital. In opposition to summary judgment, plaintiff put on absolutely no factual evidence to establish that the hospital knew or reasonably should have known of Menard's secretive and consensual acts relative to Ms. Kaltreider. Absent some scintilla of evidence that Menard was engaged in sexual misconduct with Kaltreider or past patients, plaintiff could not establish a genuine issue that the hospital reasonably could foresee that Menard would engage in this kind of conduct with Ms. Kaltreider. In the absence of any form of notice, dismissal was warranted as a matter of law.

Finally, Kaltreider put on no specific, sworn, admissible expert testimony causally connecting her claim of emotional and psychologic damages to the sexual encounters with Menard.

Based on all of the foregoing, the court should affirm the prior dismissal.

Respectfully submitted this 24th day of June,
2009.

EVANS, CRAVEN & LACKIE, P.S.

By 

ROBERT F. SESTERO, JR., #23274
Attorneys for Respondent

CERTIFICATE OF SERVICE

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 24 day of June, 2009, the foregoing was delivered to the following persons in the manner indicated:

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VIA REGULAR MAIL
VIA CERTIFIED MAIL
VIA FACSIMILE
HAND DELIVERED

7-24-09 / Spokane, WA
(Date/Place)

Shauna Wade