No. 90844-3

Court of Appeals Cause No. 45123-9-II

SUPREME COURT
OF THE STATE OF WASHINGTON

KELSEY BREITUNG,

Petitioner,

vs.

STATE OF WASHINGTON and
COMMUNITY COUNSELING INSTITUTE,

Respondents.

ANSWER OF RESPONDENT COMMUNITY COUNSELING INSTITUTE TO PETITION FOR REVIEW

Emmelyn Hart, WSBA #28820
Gregory S. Worden, WSBA #24262
LEWIS BRISBOIS BISGAARD & SMITH LLP
2101 Fourth Ave., Suite 700
Seattle, WA 98121
206-436-2020

Attorneys for Respondent Community Counseling Institute

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I. INTRODUCTION

Respondent Community Counseling Institute ("CCI") is a non-profit organization offering walk-in drug assessments, outpatient education, and treatment services for individuals with substance abuse problems. Andrew Phillips, a certified mental health counselor, was a substance abuse counselor at CCI when he met then 16-year old petitioner Kelsey Breitung. Breitung reported to CCI for court-ordered early intervention education services following a misdemeanor assault while intoxicated charge. Phillips was Breitung's counselor.

Unbeknownst to CCI, Phillips began an inappropriate sexual relationship with Breitung six weeks after Breitung was discharged from treatment at CCI and placed, at her request, in court-approved foster care with Phillips and his wife. CCI suspended and ultimately terminated Phillips' employment when it learned of the relationship.

Breitung sued the Washington Department of Social & Health Services ("Department") alleging it negligently placed her in the Phillips' home and negligently investigated the child abuse and

neglect referrals reported to it. She also sued CCI for negligent hiring, training, or supervision of Phillips and for corporate negligence.[1]

CCI moved to summarily dismiss the claims Breitung brought against it. The trial court granted the motion and dismissed those claims with prejudice.[2] Breitung appealed. The Court of Appeals, Division II affirmed the trial court in an unpublished opinion. *Breitung v. Dep't of Soc. & Health Servs.*, 2014 Wash. App. LEXIS 2190.

Breitung petitions for review, but spends the bulk of her petition revisiting the arguments she made in the Court of Appeals rather than addressing the requirements necessary to secure this Court's review. Her attempt to concoct an argument that satisfies any of the requirements of RAP 13.4(b) justifying review falls far short. In the end, Breitung offers little real analysis to support the proposition that the Court of Appeals incorrectly decided the questions posed below. This Court should deny review.

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[1] Although Breitung attributed most, if not all, of her alleged injuries to her sexual relationship with Phillips, she did not name Phillips or his wife in her lawsuit.

[2] The trial court also granted the Department's motion for partial summary judgment, dismissing all of Breitung's claims arising from her placement in the Phillips' home.

II. RESTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

CCI acknowledges the issues that Breitung presents for review as to the appropriateness of CCI's dismissal, but believes they are more appropriately formulated as follows:

> (1) Should this Court deny discretionary review of a decision by the Court of Appeals to affirm a trial court order summarily dismissing the petitioner's complaint where the petitioner fails to identify any conflict between decisions of this Court or another Court of Appeals addressing the role of foreseeability in a sexual abuse case?
>
> (2) Should this Court deny discretionary review of a decision by the Court of Appeals to affirm a trial court order summarily dismissing the petitioner's complaint where the decision is fact-specific and the petitioner fails to identify an issue of substantial public interest meriting further review by this Court?

III. COUNTERSTATEMENT OF THE CASE

The Court of Appeals' decision provides the proper factual overview of this case, which CCI incorporates by reference. It offers the following additional facts to offset the misleading factual contentions Breitung provides in her statement of the case.

Breitung maintains that Phillips sexually abused her while he was employed at CCI. Pet. at 3. While true, her insinuation that he did so while she was under the care and supervision of CCI is spurious. In fact, CCI discharged Breitung from treatment more than

six weeks *before* Phillips began to abuse her. CP 5. The abuse occurred in Phillips' home following Breitung's court-ordered placement there for foster care. CP 540. It did not occur while Breitung was in treatment with Phillips at CCI.

Breitung then self-servingly characterizes Phillips' abuse as "highly foreseeable." Pet. at 3. She confuses what she wishes for with what is. There is simply no evidence CCI had any knowledge of Phillips' sexual proclivities when it hired him as a mental health counselor. The record instead discloses that CCI ran a criminal history and background check of Phillips that revealed only a 1995 misdemeanor conviction for attempted possession of stolen property. CP 484-86. Phillips did not have a history of violent or sexual crimes. *Id.*

Breitung also deceptively states "CCI had knowledge of Phillips' improper relationship with [Breitung] prior to discharging her from its care." Pet. at 3. Simply stated, CCI did not know of Phillips' improper relationship with Breitung until Phillips informed the organization that he had engaged in a sexual relationship with her after her discharge from CCI and despite being specifically instructed not to have any contact with her following that discharge. CP 516, 520. The concerns Breitung's former temporary guardian, Rose Beitler, raised with CCI

about the relationship between Breitung and Phillips before Breitung was discharged from CCI were about *Breitung's sexual interest* in Phillips and Phillips' breach of confidentiality during counseling. CP 947, 950, 955-56.

Finally, Breitung falsely states that CCI discharged her from treatment because of its "concerns of an inappropriate sexual relationship between [her] and Phillips[.]" Pet. at 3. On the contrary, CCI discharged Breitung from counseling because Phillips inappropriately shared confidential information about her with his wife. CP 956, 963, 965.

This Court should rely on the facts as the Court of Appeals and CCI have objectively presented them rather than on the self-serving summary Breitung presents in her petition.

IV. ARGUMENT WHY REVIEW MUST BE DENIED

This Court's review of an intermediate appellate court's decision terminating review is discretionary. RAP 13.3(a)(1). The Court will grant a petition for review only in certain circumscribed cases. RAP 13.4(b). None of those circumstances exist here; consequently, this Court must deny review.

Breitung pays no attention to the criteria of RAP 13.4(b) and fails to identify a proper basis for her petition. Pet. at 2, 13. Based on

the few clues she provides,[3] CCI presumes for purposes of this answer that her challenge is based on: (1) an indiscernible decisional conflict among the appellate courts; or (2) a misguided belief that the issue is one of substantial public interest that should be determined by this Court. RAP 13.4(b)(1-2), (4).

Breitung's attempt to create a conflict where none exists is unavailing. Far from being in conflict with prior decisions addressing the role of foreseeability in sexual abuse cases, the Court of Appeals' decision is consistent with them. Breitung's effort to create an issue of substantial public importance likewise falls far short. This is a fact-specific case inapplicable to the general citizenry of Washington. Breitung's tortured interpretation of the concept of foreseeability does not merit further review.

A. The Court of Appeals' decision does not conflict with other appellate decisions addressing the role of foreseeability in sexual abuse cases

Breitung appears to suggest, with little analysis, that review is warranted because the Court of Appeals' decision is inconsistent with other appellate decisions addressing foreseeability in sexual abuse

[3] For example, Breitung asks the Court to accept review of the order granting CCI's summary judgment motion to "provide guidance and clarification of the special relationship duty to child abuse victims[.]" Pet. at 2, 13. Her plea for review falls outside the narrow confines of RAP 13.4(b) and should be ignored.

cases. Pet. at 2, 14. According to Breitung, the Court of Appeals improperly usurped the jury's role in determining foreseeability. *Id.* She manufactures a conflict where none exists. The Court of Appeals' decision is consistent with well-established precedent summarily addressing the role of foreseeability in cases such as this one.

An individual or entity generally has no legal duty to prevent a third party from intentionally harming another unless a special relationship exists between the defendant and either the third party or the foreseeable victim of the third party's conduct. *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 43, 929 P.2d 420 (1997); *Petersen v. State*, 100 Wn.2d 421, 426, 671 P.2d 230 (1983). A duty arising from a protective relationship is limited by the concept of foreseeability. *Christen v. Lee*, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989). *See also, Schooley v. Pinch's Deli Market, Inc.*, 80 Wn. App. 862, 869, 912 P.2d 1044 (1996), *aff'd*, 134 Wn.2d 468, 951 P.2d 749 (1998) ("[F]oreseeability means foreseeability from the point of view of a reasonable person who knows what the defendant's conduct will be, but who does not know the specific sequence of events that ultimately will ensue therefrom."). A plaintiff alleging sexual misconduct must show that such conduct was "reasonably foreseeable," and such foreseeability must be based on more than speculation or mere

conjecture. *Kaltreider v. Lake Chelan Cmty. Hosp.*, 153 Wn. App. 762, 766-67, 224 P.3d 808 (2009). In general, foreseeability is a question for the jury unless the circumstances of the inquiry are "'so highly extraordinary or improbable as to be wholly beyond the range of expectability.'" *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 323, 255 P.2d 360 (1953). *See also, Sitarek v. Montgomery*, 32 Wn.2d 794, 203 P.2d 1062 (1949) (holding as a matter of law that the intervening act of a neighbor in shooting a baby-sitter was not reasonably foreseeable by the employer of the baby-sitter because the injury was the result of a succession of "most unusual and unforeseen events" which, "by no flight of the imagination," could have been anticipated).

The Court of Appeals' decision here is in keeping with a long line of Washington cases consistently holding that where the defendant had no knowledge of an abuser's sexual proclivity, his later sexual abuse was unforeseeable as a matter of law. For example, in *Peck v. Siau*, 65 Wn. App. 285, 827 P.2d 1108 (1992) a teacher had two sexual encounters with a student on school grounds. The student and his parents sued the school district for negligent hiring, supervision, and retention. *Id.* at 288. The trial court granted the district's summary judgment motion. The Court of Appeals affirmed,

holding there was no evidence the district knew about the teacher's conduct or any previous misconduct at the school. *Id.* at 293. In particular, Division II noted the district had checked the teacher's certification and his background when it hired him. Nothing the district uncovered during its investigation suggested the teacher was unfit for employment as a school librarian.

In *Kaltrieder*, 153 Wn. App. 762 (2009), a patient voluntarily admitted for inpatient alcohol treatment at the defendant hospital reported having a sexual relationship with a registered nurse employed by the hospital. This was the first time the hospital learned of the nurse's sexual misconduct. The nurse later resigned. The patient sued the hospital, alleging it owed her a duty to protect her from the sexual advances of its employee. The trial court granted the hospital's summary judgment motion, concluding the nurse's conduct was not reasonably foreseeable as a matter of law. The Court of Appeals affirmed, holding both that the hospital did not have a duty to protect the patient from the actions of the nurse because she was not a vulnerable adult and that the nurse's actions were not foreseeable. The hospital had no knowledge of prior misconduct by the nurse and his actions were outside the scope of his duties. Without evidence that the nurse's conduct was known or reasonably foreseeable to the

hospital, it had no duty to protect the patient from an undisclosed sexual predator.

Smith v. Sacred Heart Med. Center, 144 Wn. App. 537, 184 P.3d 646 (2008) is particularly instructive in that it involved sexual misconduct that occurred off hospital property. There, the plaintiffs were admitted to the hospital's psychiatric unit. While there, a nursing assistant hugged and kissed one plaintiff and hugged another, and suggested they have sex. After the plaintiffs had been discharged, and after the nursing assistant had left his job, the plaintiffs went to the nursing assistant's home and had sex. The plaintiffs later sued, alleging a special relationship existed while they were at the hospital and the hospital failed to protect them while the abuser laid the groundwork for later sexual encounters. The Court of Appeals disagreed, affirming dismissal of the claims on summary judgment. According to Division III, the plaintiffs made no showing that the hospital knew or should have known that the nursing assistant was a danger to patients or that the sexual relationship was foreseeable. Foreseeability must be shown by "something more than just speculation and a possibility." *Id.* at 546. Division III held that the plaintiffs' claims were "legally insufficient . . . absent some showing

that [the hospital] knew or should have known of the potential for sexual abuse." *Id.* at 546-47.

All of these cases stand for the proposition affirmed by the Court of Appeals that a plaintiff must present something more than speculation and conjecture before an employer will be held responsible for failing to protect the plaintiff from an employee's sexual misconduct. As the Court of Appeals noted in its *de novo* review of the record, Breitung presented no evidence that anyone knew or had reason to suspect that Phillips posed any risk of harm, sexual or otherwise, to her or to anyone else. Any proclivity he had to molest was unknown. To accept Breitung's arguments would wrongly make CCI an insurer against the unforeseeable, something Washington courts have *never* condoned.

Despite Breitung's best efforts to create a conflict justifying further review under RAP 13.4(b)(1) and (2), none exists. The Court of Appeals' analyzed a number of controlling decisions addressing foreseeability and issued an opinion consistent with those decisions. Accordingly, the Court should deny Breitung's petition for review.

C. The Court of Appeals' decision does not threaten the public interest

Breitung also seems to suggest, again without analysis, that a substantial public interest will be served if this Court accepts review.

Pet. at 14. She is mistaken. The Court of Appeals' decision does not implicate a substantial public interest meriting further review under RAP 13.4(b)(4).

The criteria generally considered to determine if an issue is of substantial public interest "are the public or private nature of the question presented, the desirability of an authoritative determination for the future guidance of public officers, and the likelihood of future recurrence of the question." *Sorenson v. City of Bellingham*, 80 Wn.2d 547, 558, 496 P.2d 512 (1972). Rather than address these factors, however, Breitung squanders her time duplicating the arguments raised in her briefing on the merits. Pet. at 14-17. The Court of Appeals properly rejected those arguments.

The real merits of this controversy are well-settled; namely, whether Breitung presented sufficient evidence to establish a genuine issue of material fact as to the foreseeability of Phillips' sexual abuse to overcome summary dismissal of her claims. This is not a continuing question of great public importance which is likely to reoccur in the future. It is a fact-specific inquiry inapplicable to the general citizenry of Washington.

Breitung's pleas for review under RAP 13.4(b)(4) should fall on deaf ears. The Court of Appeals' decision does not involve an issue of

substantial public interest; accordingly, the Court should reject Breitung's request to review CCI's summary dismissal.

V. CONCLUSION

Breitung fails to offer any basis under RAP 13.4(b) for review by this Court. Accordingly, this Court should deny the petition for review.

DATED this 22nd day of December, 2014.

Respectfully submitted,

/s/ Emmelyn Hart
Emmelyn Hart, WSBA #28820
Gregory S. Worden, WSBA #24262
Attorneys for Respondent
Community Counseling Institute

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on December 22, 2014 I caused service of the foregoing **Answer of Respondent** via the methods listed below:

Steve Puz
Amanda Bley
Assistant Attorney General
7141 Cleanwater Dr. SW
P.O. Box 40126
Olympia, WA 98504-0126
SteveP@atg.wa.gov

x via U.S. Mail, first class, postage prepaid,
☐ via Legal Messenger Hand Delivery
☐ via Facsimile
x via E-mail (Courtesy copy)

Rebecca J. Roe
M. Lorena Gonzalez
Schroeter, Goldmark & Bender
810 Third Avenue, Suite 500
Seattle, WA 98104
roe@sgb-law.com

x via U.S. Mail, first class, postage prepaid
☐ via Legal Messenger Hand Delivery
☐ via Facsimile
x via E-mail (Courtesy copy)

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/s/ Marlisa Lochrie
Marlisa Lochrie

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Subject: RE: Kelsey Breitung v. State of Washington and Community Counseling Institute - Case No. 90844-3

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Good morning,

Attached for filing in the above referenced case, please find Respondent Community Counseling Institute's Answer to Petition for Review.

Attorneys for Respondent Community Counseling Institute:

Emmelyn Hart, WSBA #28820
Gregory S. Worden, WSBA #24262
LEWIS BRISBOIS BISGAARD & SMITH LLP
2101 Fourth Ave., Suite 700
Seattle, WA 98121
206-436-2020
Emmelyn.hart@lewisbrisbois.com
Gregory.worden@lewisbrisbois.com

Declaration of Service is attached to the Answer.

Please let me know if you have any questions.

Thank you,

LEWIS BRISBOIS BISGAARD & SMITH LLP

Marlisa Lochrie
Legal Secretary
Marlisa.Lochrie@lewisbrisbois.com
2101 4th Avenue, Suite 700
Seattle, WA 98121
T: 206.455.7405 F: 206.436.2030

LewisBrisbois.com

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