

FILED

MAY 28 2009

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

84144-6
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.

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

APPELLANT'S BRIEF

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I. INTRODUCTION

In June 2007 Elizabeth Kaltreider went to the Lake Chelan Community Hospital inpatient treatment program for rehabilitation and recovery from alcohol dependence.

While Ms. Kaltreider was a patient, a Lake Chelan Community Hospital registered nurse, George Menard, engaged in prohibited romantic and sexual conduct with Ms. Kaltreider. During evening shifts on two separate occasions, the male nurse got into bed with Ms. Kaltreider and inappropriately fondled her breasts and genitalia. During the course of Ms. Kaltreider's inpatient treatment, he engaged in other prohibited romantic and sexual conduct.

James W. Ethier, M.D., the Medical Director of the addiction recovery center at Lake Chelan Community Hospital in June 2007, testified in deposition that a registered nurse's sexual contact with a patient's genitals is serious misconduct and that it is unprofessional conduct for a registered nurse to have sexual contact with a patient. Dr. Ethier testified in deposition that the prohibited sexual or romantic misconduct has the potential to both interfere with the treatment and damage the patient and that the effect on Ms. Kaltreider was emotional upheaval and a great risk of relapse.

The special relationship between Lake Chelan Community Hospital while operating the inpatient treatment program and Ms. Kaltreider as a vulnerable patient, gives rise to a duty of reasonable care, owed by the Lake Chelan Community Hospital to Ms. Kaltreider, to protect her from foreseeable harm. The prohibited sexual misconduct by a male registered nurse to a female patient is not legally unforeseeable harm.

Foreseeability of the male nurse's sexual and romantic conduct at Lake Chelan Community Hospital to the patient Elizabeth Kaltreider is a question of fact.

Since the Trial Court granted summary judgment dismissal in favor of Lake Chelan Community Hospital, this appeal is brought to seek reversal of the summary judgment Order of Dismissal as to Lake Chelan Community Hospital.

II. ASSIGNMENT OF ERROR

1. The Trial Court erred in entering summary judgment dismissal of Plaintiff's Complaint against the Lake Chelan Community Hospital.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Does an inpatient alcohol treatment program at a hospital owe a vulnerable patient a duty of reasonable care to protect from foreseeable harm?

2. Is sexual misconduct by a hospital inpatient treatment facility registered nurse to a vulnerable patient legally unforeseeable harm?

IV. STATEMENT OF THE CASE

1. Facts. Elizabeth Kaltreider was an in-patient for alcohol dependency treatment at Lake Chelan Community Hospital while George Menard was employed by Lake Chelan Community Hospital as a registered nurse. CP 222. Ms. Kaltreider went to Lake Chelan Community Hospital for rehabilitation and recovery from alcohol dependence. CP 200-201. Ms. Kaltreider went into treatment on June 1, 2007 at the Lake Chelan Community Hospital. CP 200. She was promised wonderful counseling, individual care, appropriate programs and treatment for her disease of alcoholism. CP 200-201.

Prior to Ms. Kaltreider's admission on June 1, 2007, Lake Chelan Community Hospital Registered Nurse George Menard in May of 2007 engaged in prohibited sexualized conduct with another patient at Lake Chelan Community Hospital. CP 216-217.

Mr. Menard testified at his deposition that at no time he had any training with respect to the issue of sexual or romantic conduct with a patient. CP 221. Mr. Menard is not aware of any training on the issue of sexual or romantic conduct with patients that was offered through Lake

Chelan Community Hospital. CP 221. At no time before or during Mr. Menard's employment with Lake Chelan Community Hospital did any of his supervisors discuss with Mr. Menard any issues with respect to sexual or romantic conduct with a patient. CP 221. At no time did Mr. Menard ever consult with anyone at Lake Chelan Community Hospital regarding establishing or maintaining professional boundaries with a patient. CP 223. In Mr. Menard's deposition he did not recall being instructed on sexual harassment policies and procedures at Lake Chelan Community Hospital. CP 140.

While Ms. Kaltreider was a patient at Lake Chelan Community Hospital, Mr. Menard was the only nurse working in her area on the night shift. CP 224.

During the evening shift on two (2) separate occasions, Mr. Menard got into bed with Ms. Kaltreider. CP 202. Mr. Menard inappropriately fondled her breasts and genitalia. CP 202.

Based on the unprofessional conduct by registered nurse George Menard, the State of Washington Department of Health Nursing Care Quality Assurance Commission issued Statement of Charges and an Ex Parte Order of Summary Suspension of Mr. Menard's credential to practice as a registered nurse. CP 204-215; 219.

James W. Ethier, M.D., was the Medical Director of the addiction recovery center at Lake Chelan Community Hospital in June 2007. CP 226. Dr. Ethier followed Ms. Kaltreider through her treatment dates of June 1, 2007 to June 26, 2007. CP 240.

In deposition Dr. Ethier testified that he agrees:

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

CP 232; 204.

Dr. Ethier testified that it is unprofessional conduct for a registered nurse to have sexual contact with a patient and a registered nurse is also prohibited from having romantic contact with a patient. CP 227. Dr. Ethier further testified that a registered nurse’s sexual contact with a patient’s genitalia is serious misconduct. CP 228. The male nurse, while working at Lake Chelan Community Hospital, got into bed with Ms. Kaltreider and put his finger inside her vagina. CP 202.

Dr. Ethier testified in deposition that prohibited sexual or romantic misconduct has the potential to interfere with treatment and damage the patient. CP 230-231; 235-236; 238-239.

Dr. Ethier is of the opinion, assuming the facts alleged in the Statement of Charges and Ex Parte Order of Suspension (CP 208-215),

that the effect on Ms. Kaltreider was emotional upheaval and great risk of relapse. CP 232.

Dr. Ethier testified in deposition that Ms. Kaltreider has various significant psychiatric problems. CP 234, 237.

As a result of the prohibited sexual and romantic acts by the Lake Chelan Community Hospital male nurse to Ms. Kaltreider while she was an inpatient at Lake Chelan Community Hospital, there has been damage to her emotional well being. CP 203-204.

2. Procedure. Elizabeth Kaltreider filed a Complaint against Lake Chelan Community Hospital and the male nurse George Menard. CP 1-9. Ms. Kaltreider alleged that the male nurse while in the employment of Lake Chelan Community Hospital committed unprofessional conduct in violation of RCW 18.130.180(1)(7) and (24) and violated the provisions of Washington Administrative Code 246-16-100(1)(b), (c), (d), (e), (i), (m), (o), (r), and (3), and that there was a further violation of Washington Administrative Code 246-840-740 as to the male nurse engaging in prohibited sexual misconduct. Therefore, Ms. Kaltreider alleged that there was a special relationship between the Lake Chelan Community Hospital inpatient treatment program and her as a patient giving rise to a duty of reasonable care, owed by the Lake Chelan

Community Hospital, to its patient, to protect its patients from foreseeable harm such as the improper sexual or romantic conduct by the male nurse.

At the time of filing the Complaint, Ms. Kaltreider also filed a Certificate of Merit by H. Berryman Edwards, M.D. which states:

“Based on the alleged sexual or romantic conduct by male nurse George Menard with Elizabeth Kaltreider while she was an inpatient at the Lake Chelan Community Hospital Addiction Recovery Center, it is my 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.

Defendant Lake Chelan Community Hospital subsequently filed a Motion for Summary Judgment. CP 26-27. The Trial Court granted Defendant Lake Chelan Community Hospital’s Motion for Summary Judgment. CP 284-286.

Appellant respectfully submits that there are genuine material triable issues of fact as to breach of duty to the vulnerable patient; foreseeability of harm as to the unprofessional misconduct; and damages proximately caused.

V. ARGUMENT

1. De novo review. On appeal of summary judgment, the standard of review is de novo, and the appellate court performs the same inquiry as the trial court. *Nivens v. 7-11 Hoagy's Corner*, 133 Wash.2d 192, 197-98, 943 P.2d 286 (1997). When ruling on a summary judgment motion, the Court is to view all facts and reasonable inferences therefrom most favorably toward the nonmoving party. *Weyerhaeuser Co. vs. Aetna Cas. & Sur. Co.*, 123 Wash.2d 891, 897, 874 P.2d 142 (1994). A court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Ruff v. County of King*, 125 Wash.2d 697, 703, 887 P.2d 886 (1995); *see also* CR 56(c).

2. Sexual or romantic conduct by a registered nurse to alcohol treatment patients is serious misconduct by WAC provisions.

Washington Administrative Code 246-840-740 on sexual misconduct prohibited provides in part:

“(1) . . . Sexual or romantic conduct with a client . . .
. is serious misconduct . . .

(2) . . . Sexual or romantic conduct is prohibited
whether or not the client . . . initiates or consents to
the conduct

...

(4) . . .

(a) Due to the unique vulnerability of . . . chemical dependency clients, nurses . . . are prohibited from engaging or attempting to engage in sexual or romantic conduct.

. . .”

RCW 18.130.180 provides at subsection (24) that sexual contact with a patient is unprofessional conduct.

The Court may take judicial notice of the WAC provision. RCW 34.05.210(10).

The Declaration of Elizabeth Kaltreider sets forth genuine material triable issues of fact as to sexual misconduct by the Lake Chelan Community Hospital registered nurse violating sections of the Washington Administrative Code on standards of sexual misconduct. Section 246-840-740 specifically provides that sexual or romantic conduct is serious misconduct which is prohibited whether or not the patient initiates or consents to the conduct and that due to the unique vulnerability of chemical dependency clients, nurses are prohibited from engaging or attempting to engage in sexual or romantic conduct.

The Washington Administrative Code establishes the foundation for an inpatient treatment program patient vulnerable, giving rise to the

duty of the Lake Chelan Community Hospital to protect from foreseeable harm.

3. A protective special relationship exists.

In *Niece v. Elmview Group Home*, 131 Wn.2d 39 (1997), the Supreme Court held that (1) a special relationship between a group home and its vulnerable residents gives rise to a duty of reasonable care, owed by the group home to its residents, to protect the residents from all foreseeable harm, and (2) sexual assault by a staff member is not legally unforeseeable harm.

As to the protective special relationship, the *Niece v. Elmview Group Home* Court stated at 131 Wn.2d p. 43:

***“PROTECTIVE SPECIAL
RELATIONSHIP***

[1] As a general rule, there is no 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.” . . . (citations omitted). A duty arises where:

(a) a special relation exists between the [defendant] and the third person which imposes a duty upon the [defendant] to control the third person’s conduct, or

(b) a special relation exists between the [defendant] and the other which gives the other a right to protection.”

The Court in *Niece* recognized the relationship between a hospital and its **vulnerable** patients is a recognized special relationship. (Emphasis supplied). *Id.* at p. 46. Because of the special relationship, Elmview's duty to protect Niece from all foreseeable harms, including the harm of sexual assault by a staff, is much broader than its duty as an employer to control its employees. *Id.* at p. 52.

As applied to the case at bench, WAC 246-840-740(4) recognizes the unique vulnerability of chemical dependency patients. Registered nurses are specifically prohibited from engaging in sexual or romantic conduct with such a patient.

4. Whether the sexual misconduct by the Lake Chelan Community Hospital registered nurse is foreseeable is a question of fact.

In *Shepard v. Mielke*, 75 Wn. App. 201 (1994), a nursing home patient sexually assaulted by a visitor in her room brought action against a nursing home, alleging negligence. The Spokane County Superior Court entered summary judgment. The Court of Appeals, Division III, by Acting Chief Judge Sweeney, held that (1) the special relationship between a nursing home and patient was not prerequisite to imposing duty upon nursing home to protect patient from sexual assault by third party but, rather, duty of ordinary care would include duty of taking reasonable precautions to protect those who were unable to protect themselves, but

(2) question of whether sexual assault of patient was foreseeable was for the jury. The Court held that foreseeability is a question of fact for a jury unless the circumstances of the injury “are so highly extraordinary or improbable as to be wholly beyond the range of expectability” and that the question of foreseeability should go to the jury. *Id.* at p. 206.

In *Johnson vs. State*, 77 Wn. App. 934 (1995), a state university student, who was raped near her dormitory, brought a negligence action against the university, alleging that it breached a duty to exercise reasonable care for her safety. The university moved for summary judgment, arguing that the public duty doctrine barred the claim and that the criminal act of the rapist was an intervening cause. The King County Superior Court entered summary judgment. The Court of Appeals, Division I, held that: the student was entitled to invitee status, and the university thus had duty to exercise reasonable care for her safety, since she was attempting to gain access to her dormitory when attacked and that issues of material fact existed as to whether the university breached its duty to provide for her safety, precluding summary judgment, and that the rape was not unforeseeable as a matter of law, and thus question of whether the sexual assault was intervening cause exonerating university from liability was a question for the trier of fact.

In the case at bench, genuine material triable issues of fact exist as to the appropriateness of training and supervision. Another female patient was subject to improper sexual conduct by the same male nurse in the month before Ms. Kaltreider was at the Lake Chelan Community Hospital. CP 216-217.

There were a number of different romantic or sexual misconduct events during the time that Elizabeth Kaltreider was at the Lake Chelan Community Hospital. CP 200-215. It is a question of fact as to whether the misconduct was foreseeable.

Smith vs. Sacred Heart Medical Center, 144 Wn. App. 537 (2008), relied on by Lake Chelan Community Hospital for summary judgment in the Trial Court, is distinguishable in several respects. Sacred Heart did not have a “special relationship” because neither patient was vulnerable. *Id.* at 545. The patients in Sacred Heart apparently claimed no mental or physical disability at all. *Id.* at 546. In Sacred Heart no WAC or other regulatory provision as to unique vulnerability is cited. Further, significantly, the alleged sexual acts occurred outside of the hospital after the nursing assistant was terminated.

5. The breach of duty by Lake Chelan Community Hospital to protect its vulnerable patient proximately caused damages.

Genuine material triable issues of fact exist as to the nature and extent of damages proximately caused by the breach of a duty of reasonable care. Lake Chelan Community Hospital's medical director of the addiction recovery center acknowledged that the effect on Ms. Kaltreider was emotional upheaval and a great risk of relapse. CP 236. Ms. Kaltreider testified in her declaration that she had damage to her emotional well being and that she was emotionally damaged by the breach of trust by Lake Chelan Community Hospital. CP 203-204.

6. Plaintiff May Testify as to Sensory Perception and Subjective Symptoms.

A Plaintiff may testify as to subjective symptoms of pain and suffering. *Bitzan v. Parisi*, 88 Wn. 2d 116, 122 (1977). Further, laypersons may testify based on their sensory perceptions. *Parris v. Johnson*, 3 Wn. App. 853 (1970). Negligently inflicted mental distress is compensable and mental distress will usually be a fact question bearing on the reasonable reaction to the event. *Hunsley v. Giard*, 87 Wn.2d 424, 436 (1976).

VI. CONCLUSION

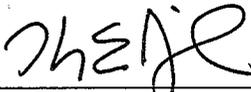
The special relationship between Lake Chelan Community Hospital and Elizabeth Kaltreider as a vulnerable patient gives rise to a duty of reasonable care, owed by Lake Chelan Community Hospital to Elizabeth

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

Therefore, it is respectfully requested that the Court of Appeals reverse the Trial Court's grant of summary judgment as to Lake Chelan Community Hospital and remand this case for trial.

DATED: May 27, 2009.

JOHNSON, GAUKROGER, DREWELOW
& WOOLETT, P.S.

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