

**FILED**

JAN 29 2010

CLERK OF THE SUPREME COURT  
STATE OF WASHINGTON

RECEIVED  
SUPREME COURT  
STATE OF WASHINGTON

84144-6

10 JAN 15 AM 10:11

BY RONALD R. CARPENTER

NO. 27969-3

CLERK

**FILED**

JAN 19 2010

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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

ELIZABETH D. KALTREIDER,

Petitioner,

vs.

LAKE CHELAN COMMUNITY  
HOSPITAL,

Respondent.

GEORGE A. MENDARD,

Defendant.

---

PETITION FOR REVIEW

---

Danielle R. Marchant  
Amy S. Vira  
Johnson, Gaukroger, Woollett & Smith, P.S.  
P.O. Box 19  
Wenatchee, WA 98807-0019  
Phone: 509-663-0031  
Counsel for Petitioner

TABLE OF CONTENTS

<u>TABLE OF AUTHORITIES</u> .....	ii.
A. <u>IDENTITY OF PETITIONER</u> .....	1
B. <u>COURT OF APPEALS DECISION</u> .....	1
C. <u>ISSUES PRESENTED FOR REVIEW</u> .....	1
D. <u>STATEMENT OF THE CASE</u> .....	1
1. <u>Facts</u> .....	1
2. <u>Procedure</u> .....	5
E. <u>ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.</u>	6
1. <u>The decision of the Court of Appeals conflicts with a Supreme Court decision</u> .....	7
2. <u>This issue involves an issue of substantial public interest that should be determined by the Supreme Court</u> .....	8
F. <u>CONCLUSION</u> .....	9
G. <u>APPENDIX</u> .....	11

TABLE OF AUTHORITIES

**Washington State Supreme Court Cases**

*Niece v. Elmview Group Home*, 131 Wn.2d 39 (1997) ..... 7, 8

**Washington State Court of Appeals Cases**

*Shepard v. Mielke*, 75 Wn. App. 201 (1994) ..... 8

**Statutes and Rules**

WAC 246-840-740(4)..... 7, 9

A. IDENTITY OF PETITIONER

Petitioner Elizabeth D. Kaltreider asks this Court to accept review of the Court of Appeals decision terminating review designated in Part B of this petition.

B. COURT OF APPEALS DECISION

Ms. Kaltreider requests that this Court review in its entirety the Court of Appeals Decision affirming the Trial Court's order granting Defendant Lake Chelan Community Hospital's Motion for Summary Judgment filed on December 22, 2009. A copy of this Decision is in the Appendix at pages A1 – A15.

C. ISSUES PRESENTED FOR REVIEW

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?

D. STATEMENT OF THE CASE

1. Facts. Elizabeth D. Kaltreider was an inpatient 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 he had at no time 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 Mr. 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 D. 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. Mr. Menard, a 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, Mr. Menard, 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 D. Kaltreider filed a Complaint against Lake Chelan Community Hospital and the male nurse George Menard. CP 1-9. Ms. Kaltreider alleged that Mr. Menard 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 WAC 246-16-100(1)(b), (c), (d), (e), (i), (m), (o), (r), and (3), and that there was a further violation of WAC 246-840-740 as to the male nurse, George Menard, 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 D. 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.

Ms. Kaltreider appealed to the Washington Court of Appeals Division Three. In the decision indicated in Part B, the Court of Appeals affirmed the Trial Court decision granting Defendant Lake Chelan Community Hospital's Motion for Summary Judgment. Appendix at pgs. 5-6.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court should accept review of the Court of Appeals decision indicated in Part B because the decision is in conflict with a decision of the Supreme Court and because this is an issue of substantial public interest that should be determined by the Supreme Court.

1. The decision of the Court of Appeals conflicts with a Supreme Court decision.

The Court of Appeals decision indicated in Part B conflicts with the holding in *Niece v. Elmview Group Home*, 131 Wn.2d 39 (1997). In *Niece* the Court held that a special relationship exists between a group home for the developmentally disabled and its vulnerable residents which creates a duty of reasonable care, owed by the group home to its residents, to protect them from all foreseeable harms and that sexual assault by a staff member is not a legally unforeseeable harm. *Id.* at 51.

The majority opinion in the decision indicated in Part B interprets *Niece* to suggest that no such duty attaches in this case because Ms. Kaltreider is not profoundly disabled and thus completely unable to protect herself. Appendix at pg. 5. This is a misapplication of the holding in *Niece* which stands for the principle that the duty owed is directly related to the impairment. *Niece*, 131 Wn.2d at 46. As a result of her status as a chemical dependency patient Ms. Kaltreider was particularly vulnerable to sexual misconduct by hospital nursing staff. See WAC 246-840-740(4). Consequently, the hospital had a duty to protect Ms. Kaltreider from this particular vulnerability. As stated in Justice Schultheis's dissenting opinion of the decision indicated in Part B, "the degree of the claimant's impairment is in direct relation to the scope of the

duty of protection owed, which is limited by the foreseeability of the danger to which the protected party is vulnerable. In other words, the scope of the duty is to safeguard the resident from the foreseeable consequences of her impairment, which is known or should be known to the care provider.” Appendix at pg. 9 (citing *Shepard v. Mielke*, 75 Wn. App. 201, 205 (1994)).

Further, the majority holding that the hospital employee’s actions were not legally foreseeable is directly conflicting with the holding in *Niece* that sexual assault by a staff member is not a legally unforeseeable harm.

Given the conflicts between the decision indicated in Part B and the holding of *Niece v. Elmview Group Home*, this Court should accept review of this matter.

2. This issue involves an issue of substantial public interest that should be determined by the Supreme Court.

The issue of a hospital’s duty of reasonable care to vulnerable patients is an issue of substantial public interest. Under the holding of the majority in the decision indicated in Part B, a vulnerable but not completely incapacitated patient is owed no duty of protection by a hospital or care provider. It essentially becomes a black and white issue

where profoundly disabled persons are owed a very high duty of care and all others are owed none at all.

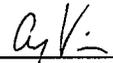
Washington Administrative Code 246-840-740 provides in part: “(4)... (a) Due to the unique vulnerability of ... chemical dependency clients, nurses ... are prohibited from engaging or attempting to engage in sexual or romantic conduct.” This provision of the code recognizes that chemical dependency patients are uniquely vulnerable to sexual advances. A chemical dependency treatment program is required to acknowledge this vulnerability and prohibit nurses and staff from engaging or attempting to engage in sexual or romantic conduct. It is of substantial public interest whether a hospital that is aware of this vulnerability has a special protective relationship with a patient insofar as that vulnerability is concerned. Petitioner respectfully requests the Court to accept review of the decision indicated in Part B.

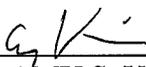
F. CONCLUSION

This Court should accept review for the reasons indicated in Part E and reverse the Court of Appeal’s decision upholding the Trial Court’s grant of summary judgment as to Lake Chelan Community Hospital and remand this case for trial.

Dated: January 14, 2010.

Respectfully submitted,

By:  #34197  
#612 DANIELLE R. MARCHANT  
Attorney for Petitioner  
WSBA #29260

By:   
AMY S. VIRA  
Attorney for Petitioner  
WSBA #34197

APPENDIX

**FILED**

DEC 22 2009

In the Office of the Clerk of Court  
WA State Court of Appeals, Division III

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

<b>ELIZABETH D. KALTREIDER,</b>	)	<b>No. 27969-3-III</b>
	)	
<b>Appellant,</b>	)	
	)	<b>Division Three</b>
<b>v.</b>	)	
	)	
<b>LAKE CHELAN COMMUNITY</b>	)	
<b>HOSPITAL,</b>	)	<b>PUBLISHED OPINION</b>
	)	
<b>Respondent.</b>	)	
	)	
<b>GEORGE A. MENARD,</b>	)	
	)	
<b>Defendant.</b>	)	

BROWN, J. — Elizabeth Kaltreider was a voluntary resident at Lake Chelan Community Hospital (LCCH) for inpatient treatment of alcohol dependency. Ms. Kaltreider and one of LCCH's nurses engaged in sexual acts while she was a resident. Ms. Kaltreider filed a complaint, alleging various causes of action against LCCH and the nurse. The trial court summarily dismissed her claims. Ms. Kaltreider appeals the court's dismissal of her duty of protection cause of action against the hospital. She contends she was a vulnerable victim and the nurse's actions were a foreseeable harm, triggering the hospital's duty to protect. We disagree and affirm.

## FACTS

On June 1, 2007, Ms. Kaltreider was admitted for inpatient treatment for alcohol dependency at LCCH. George Menard was a registered nurse employed by LCCH. Mr. Menard and Ms. Kaltreider began a flirtatious relationship. Mr. Menard would leave notes on Ms. Kaltreider's bed while she was away. Later, Ms. Kaltreider met Mr. Menard in a storage room, where they kissed and he fondled her. Also on more than one occasion, Mr. Menard got into Ms. Kaltreider's bed and placed his hands on her breasts and genitals and on one occasion digitally penetrated her vagina.

Mr. Menard made arrangements to spend the night with Ms. Kaltreider in a nearby motel following her discharge. The plan did not materialize. The pair, however, made plans to spend the Independence Day weekend at Ms. Kaltreider's home. Mr. Menard did not show up and ultimately told Ms. Kaltreider he would not be coming. The relationship then ended.

Ms. Kaltreider reported the relationship and on July 23, 2007, LCCH suspended Mr. Menard. This was LCCH's first knowledge of sexual misconduct by Mr. Menard. He ultimately resigned.

Ms. Kaltreider filed suit against the hospital and Mr. Menard in July 2008, contending, inter alia, LCCH owed a duty of protection from sexual misconduct.

LCCH successfully requested summary judgment dismissal of all claims. The court concluded Mr. Menard's conduct was not reasonably foreseeable as a matter of law. Ms. Kaltreider appealed.

### ANALYSIS

The issue on appeal is whether the trial court erred in summarily dismissing Ms. Kaltreider's duty to protect claim. She contends she was a vulnerable victim and the harm resulting from the sexual contact was foreseeable.

A motion for summary judgment may be granted when there is no genuine issue as to any material fact, and the moving party is entitled to a judgment as a matter of law. CR 56(c). All facts and reasonable inferences are viewed in the light most favorable to the nonmoving party. *Atherton Condo. Apartment-Owners Ass'n Bd. of Directors v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990). We review a trial court's summary judgment order de novo. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998).

It is well settled that an essential element in any negligence action is the existence of a legal duty which the defendant owes to the plaintiff. *Christensen v. Royal School Dist. No. 160*, 156 Wn.2d 62, 66, 124 P.3d 283 (2005). The existence of a legal duty is a question of law and "depends on mixed considerations of logic, common sense, justice, policy, and precedent." *Id.* at 67 (internal quotation marks omitted) (quoting *Snyder v. Med. Serv. Corp.*, 145 Wn.2d 233, 243, 35 P.3d 1158 (2001)).

As a general rule, a person has no legal duty to prevent a third party from intentionally harming another. *Niece v. Elmview Group Home*, 131 Wn.2d 39, 43, 929 P.2d 420 (1997). Courts have recognized two types of "special relationships" that are exceptions to this general rule. 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." *Id.*

Ms. Kaltreider relies on the first type of special relationship. Our Supreme Court found this type of special relationship in *Niece*. There, a developmentally disabled woman living in a private group home brought an action for damages against the home after she was sexually assaulted by a staff member. *Id.* at 41. The court held that the special relationship between a group home for developmentally disabled persons and its vulnerable residents "creates a duty of reasonable care, owed by the group home to its residents, to protect them from all foreseeable harms." *Id.* at 51. The court acknowledged that "[t]he duty to protect another person from the intentional or criminal actions of third parties arises where one party is 'entrusted with the well being of another.'" *Id.* at 50 (quoting *Lauritzen v. Lauritzen*, 74 Wn. App. 432, 440, 874 P.2d 861 (1994)). This duty, the court said, "is limited only by the concept of foreseeability." *Id.* at 50 (citing *Christen v. Lee*, 113 Wn.2d 479, 492, 780 P.2d 1307 (1989)).

"Profoundly disabled persons are totally unable to protect themselves and are thus completely dependent on their caregivers for their personal safety." *Id.* at 46. Because the plaintiff in *Niece* was unable to protect herself when she submitted to the care of the group home, she was completely vulnerable; thus the home owed her the duty of complete protection, which is limited by the foreseeability of the danger. *Id.*

No. 27969-3-III  
*Kaltreider v. Lake Chelan Cmty. Hosp.*

Here, unlike in *Niece*, Ms. Kaltreider was not completely impaired. She voluntarily admitted herself to LCCH and engaged in consensual sexual acts with Mr. Menard. Moreover, in *Smith v. Sacred Heart Medical Center*, 144 Wn. App. 537, 545-46, 184 P.3d 646 (2008), the court noted that the woman in *Niece* was totally helpless, which it distinguished from the patients who claimed no mental or physical disability in the case before it. Because Ms. Kaltreider was not a vulnerable adult, LCCH did not have a duty to protect against the actions of a third party.

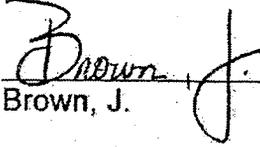
Moreover, Mr. Menard's actions were not foreseeable. In *Smith*, the court noted that sexual misconduct and resulting harm must be "reasonably foreseeable," and the foreseeability must be based on more than speculation or conjecture. *Smith*, 144 Wn. App. at 546. The employer "generally does not have a duty to guard against the possibility that one of its employees may be an [undisclosed] sexual predator." *Id.* (quoting *Niece*, 131 Wn.2d at 49). In determining whether sexual misconduct by a staff member is foreseeable, this court may look to whether there were prior sexual assaults at the facility or by the individual in question. *Niece*, 131 Wn.2d at 50. Here, LCCH did not have knowledge of prior misconduct at the hospital or by Mr. Menard. Further, Mr. Menard's actions were outside the scope of his duties. Without evidence that Mr. Menard's conduct was known or reasonably foreseeable to LCCH, there was no duty to protect.

We conclude that Ms. Kaltreider was not a vulnerable adult nor were Mr. Menard's actions legally foreseeable. Thus, LCCH did not have a duty to protect Ms.

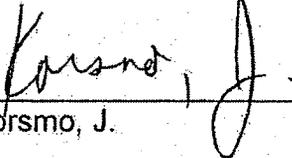
No. 27969-3-III  
*Kaltreider v. Lake Chelan Cmty. Hosp.*

Kaltreider from the actions of a third party. The court correctly concluded likewise and correctly dismissed Ms. Kaltreider's duty to protect claim.

Affirmed.

  
Brown, J.

I CONCUR:

  
Korsmo, J.

No. 27969-3-III

SCHULTHEIS, C.J. (dissenting) — Elizabeth Kaltreider contends that because she had a special relationship with Lake Chelan Community Hospital, it had a duty to protect her from sexual misconduct by a nurse at the hospital, which is a foreseeable harm. The majority holds that the hospital did not owe her a duty of protection because she was not totally helpless and the nurse's conduct was not foreseeable because the hospital had no knowledge of the nurse's abusive proclivities. I interpret the relevant special relationship authority to hold that the scope of the protected party's impairment establishes the scope of the duty of protection owed by the residential caregiver. Therefore, when the residential caregiver accepts a party into its care, the caregiver must protect the party from those dangers to which the party is vulnerable, which are known or should be known to the caregiver. Here, Ms. Kaltreider showed that she had a legislatively recognized vulnerability to sexual misconduct of which the hospital was aware or should have been aware. The special relationship that Ms. Kaltreider had with the hospital has no bearing on the hospital's knowledge of the particular nurse's proclivity for sexual misconduct. Therefore, I must respectfully dissent.

No. 27969-3-III – dissent  
*Kaltreider v. Lake Chelan Cmty. Hosp.*

Central to the issue in this case is *Niece v. Elmview Group Home*, 131 Wn.2d 39, 929 P.2d 420 (1997), where a developmentally disabled woman was sexually assaulted by a staff member at a group home and brought a negligence action against the group home for its failure to protect her. The Washington Supreme Court held that the group home had a duty to take reasonable precautions to protect the woman from the foreseeable consequences of her impairments, including possible sexual assaults by staff. *Id.* at 45-46.

The majority in this case suggests that the group home in *Niece* owed the woman a duty only because she was completely impaired, and no duty attaches here because Ms. Kaltreider was not similarly impaired. But the holding in *Niece* is still applicable—the hospital owed Ms. Kaltreider the duty to take reasonable precautions to protect her from the consequences of her impairments, which included a particular vulnerability to sexual misconduct by the hospital’s nursing staff.

The *Niece* court explained that passengers on common carrier transportation and hotel guests who are away from familiar surroundings may reasonably rely on their hosts to take those reasonable precautions that the passengers or guests would take at home. *Id.* at 46; see RESTATEMENT (SECOND) OF TORTS § 314A (1965). Similarly, “Profoundly disabled persons are totally unable to protect themselves and are thus completely dependent on their caregivers for their personal safety.” *Niece*, 131 Wn.2d at 46. Because the plaintiff in *Niece* was unable to protect herself when she submitted to the

care of the group home, she was completely vulnerable; thus the home owed her the duty of complete protection, which is limited by the foreseeability of the danger. *Id.*

*Niece* identifies the range of relative vulnerability found in a special relationship. It holds that the degree of the claimant's impairment is in direct relation to the scope of the duty of protection owed, which is limited by the foreseeability of the danger to which the protected party is vulnerable. In other words, the scope of the duty is to safeguard the resident from the foreseeable consequences of her impairment, which is known or should be known to the care provider. *Shepard v. Mielke*, 75 Wn. App. 201, 205, 877 P.2d 220 (1994).

The holding in *Smith v. Sacred Heart Medical Center*, 144 Wn. App. 537, 184 P.3d 646 (2008), does not require a different result. While the *Smith* court noted that the woman in *Niece* was totally helpless, which it distinguished from the patients who claimed no mental or physical disability in the case before it, that was not the basis for the court's conclusion that the hospital was not liable. 144 Wn. App. at 545-46. Instead, *Smith* was decided on foreseeability. *Id.* at 546.<sup>1</sup> In fact, *Smith* recognizes that the

---

<sup>1</sup> In *Smith* two hospital patients were sexually assaulted by a hospital employee after they were discharged from the hospital and after the employee was no longer working for the hospital. 144 Wn. App. at 546. The patients in *Smith* nonetheless argued that the hospital should be liable for their injuries arising from the assaults due to the special relationship that the patients had with the hospital because the hospital employee "laid the groundwork for these sexual encounters by his making comments to and hugging [one patient] and by his hugging and kissing [the other patient] while he was an employee." *Id.* The *Smith* court concluded that the facts were "legally insufficient to

relationship between a hospital and its vulnerable patients imposes upon the hospital a duty on the hospital to protect patients from the foreseeable intentional harm by third parties. *Id.* at 545.

Ms. Kaltreider's lack of complete impairment does not excuse the hospital from a duty to protect her. It is well established that persons in an inpatient treatment setting have a special relationship with the hospital. *Niece*, 131 Wn.2d at 46 n.2 (citing *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wn.2d 217, 228, 802 P.2d 1360 (1991)); see *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); *Hunt v. King County*, 4 Wn. App. 14, 481 P.2d 593 (1971) (hospital had a special relationship with a disturbed and suicidal patient). Thus, "special tort duties are based on the liable party's assumption of responsibility for the safety of another." *Niece*, 131 Wn.2d at 46 (citing *Lauritzen v. Lauritzen*, 74 Wn. App. 432, 440, 874 P.2d 861 (1994)). If the hospital knew that Ms. Kaltreider was particularly vulnerable to sexual misconduct by reason of her impairment, it owed her the duty to protect her from the consequences of that impairment, including her particular vulnerability.

---

predicate a cause of action against [the hospital] absent some showing that it knew or should have known of the potential for sexual abuse." *Id.* at 546-47. While the claimants in *Smith* did not make such a showing in that case, Ms. Kaltreider does here, as will be discussed, with an argument not made in *Smith*.

Ms. Kaltreider argues that the hospital knew or should have known of the potential for sexual misconduct visited upon its chemical dependency treatment patients, which are particularly vulnerable to misconduct. I agree.

According to state nursing regulations, the role of a nurse in a treatment setting places the nurse in a position of power that is abused when the nurse uses or benefits from his professional status and the vulnerability of the patient due to the patient's condition or status as a patient. WAC 246-840-740(1), (4). Not only is sexual contact between a nurse and a patient prohibited but the prohibition also extends to "behaviors or expressions of a sexual or intimately romantic nature" regardless of whether or not the patient consents to the conduct. WAC 246-840-740(2). Further, given the "unique vulnerability of . . . chemical dependency clients," nurses may not engage in sexual or romantic conduct with such a client for a period of at least two years even after the termination of the nursing services. WAC 246-840-740(4)(a). These regulations are a stark recognition of chemically dependent patients' vulnerability to the sexual misconduct of their treatment providers.

The regulations also recommend that the nurse "[c]onsult[] with supervisors regarding difficulties in establishing and maintaining professional boundaries with a given client." WAC 246-840-740(3)(b). Because the hospital is expected to give counsel to its nurses concerning appropriate conduct, it can be assumed that the hospital is aware of what constitutes misconduct.

The hospital argues that the regulations are not a guide or diagnostic formula for defining vulnerability. Nonetheless, the regulations do tend to show the treatment community's awareness of such a patient's vulnerability, which is a circumstance that the hospital knew or should have also known.<sup>2</sup>

Further, the legislature has recognized the vulnerability of chemically dependent inpatient treatment residents. RCW 9A.44.010(13); RCW 70.96A.020(4)(c). Any employee of a treatment facility who directly supervises such residents may be criminally liable for the crime of second degree rape if he engages in sexual intercourse with his patient, or for the crime of indecent liberties if he has sexual contact with his patient. RCW 9A.44.050(1)(e), .100(1)(e). These statutes not only recognize the vulnerability of persons in Ms. Kaltreider's position but also direct by implication that consent to sexual conduct is not a defense to her civil claim.

The criminal statutes and the WAC, together with the evidence in this case, easily establish that chemically dependent patients in an inpatient facility are vulnerable, and particularly so to inappropriate sexual or romantic liaisons. Therefore, the hospital owed

---

<sup>2</sup> See also WAC 246-324-035(1)(e) (requiring private chemical dependency hospitals to "develop and implement . . . written policies and procedures consistent with this chapter and services provided" regarding "[p]rotecting against abuse and neglect"; WAC 246-324-010(1)(c) (identifying a wide array of conduct as abuse: "an act by any individual which injures, exploits or in any way jeopardizes a patient's health, welfare, or safety, including . . . [s]exual use, exploitation and mistreatment through inappropriate touching [or] inappropriate remarks").

No. 27969-3-III – dissent  
*Kaltreider v. Lake Chelan Cmty. Hosp.*

Ms. Kaltreider a duty to protect her from sexual contact at the hands of its nurse if the nurse's conduct was foreseeable. *Niece*, 131 Wn.2d at 50.

“Ordinarily, foreseeability is a question of fact for the jury unless the circumstances of the injury ‘are so highly extraordinary or improbable as to be wholly beyond the range of expectability.’” *Seeberger v. Burlington N. R.R. Co.*, 138 Wn.2d 815, 823, 982 P.2d 1149 (1999) (quoting *McLeod v. Grant County Sch. Dist. No. 128*, 42 Wn.2d 316, 323, 255 P.2d 360 (1953)). Thus, the trial court's summary judgment can stand only if the sexual misconduct was “so highly extraordinary or improbable as to be wholly beyond the range of expectability.” *Niece*, 131 Wn.2d at 50 (quoting *Johnson v. State*, 77 Wn. App. 934, 942, 894 P.2d 1366 (1995)).

In *Niece*, the court held that a number of factors showed that “sexual abuse by staff at a group home for developmentally disabled persons may be a foreseeable hazard against which reasonable precautions must be taken.” *Id.* at 51. Those factors included “prior sexual assaults at [the group home], the [abandoned] earlier policy against unsupervised contact with residents, the opinion of [the disabled woman's] expert that such unsupervised contact is unwise, and Legislative recognition of the problem of sexual abuse in residential care facilities.” *Id.* at 50-51 (footnote omitted). Of particular relevance in this case is legislative recognition of the problem of exploitation of inpatient residents in alcohol treatment.

Legislative recognition is demonstrated by the regulations prohibiting nurses from engaging in sexual relations or romantic conduct with particularly vulnerable alcohol-dependent patients, the regulation requiring private treatment hospitals to create policies to prevent abuse, and the criminal statutes recognizing that inpatient alcohol treatment residents cannot consent to sexual intercourse or sexual contact. WAC 246-840-740(1) (nursing regulations); WAC 246-324-035(1)(e) (treatment hospital regulations); RCW 9A.44.050(1)(e) (second degree rape); RCW 9A.44.100(1)(e) (indecent liberties).

Applying the principles in *Niece*, a jury reasonably could conclude that the hospital knew or should have known that its nurses were prohibited from engaging in any sexual or romantic conduct with the hospital's patients. Indeed, nurses are instructed to seek counsel from the hospital with respect to maintaining appropriate professional boundaries. WAC 246-840-740(3)(b). Based on the applicable statutes and regulations, sexual misconduct is not a legally unforeseeable risk against which reasonable precautions must be taken. *Niece*, 131 Wn.2d at 50-51.

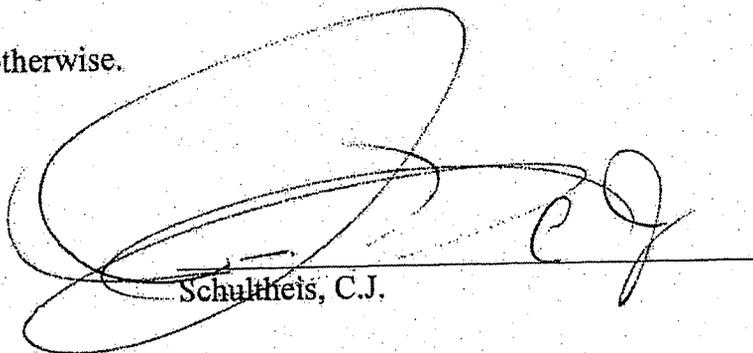
Other than sexual harassment training, which the nurse denied having participated in, the only evidence in the record of the preventative measure taken by the hospital was to place the burden on the patients, making them promise not to engage in sexual relations. A jury could reasonably find such preventative measures inadequate.

The hospital argues that it had no knowledge that this particular nurse might engage in relations with Ms. Kaltreider and the nurse's conduct was outside the scope of

No. 27969-3-III – dissent  
*Kaltreider v. Lake Chelan Cmty. Hosp.*

his duties. This argument is relevant only to the extent that *the hospital had a special relationship with its employee* in Ms. Kaltreider's claim for the hospital's negligent supervision of the nurse. *Id.* at 48-52; see RESTATEMENT, *supra*, § 317 (addressing the duty of a master to control the conduct of a servant to protect third persons). Ms. Kaltreider does not appeal the dismissal of that particular claim.

I would conclude that the injury to Ms. Kaltreider was not legally unforeseeable and the court erred by holding otherwise.



Schultheis, C.J.