

STATE OF MICHIGAN  
COURT OF APPEALS

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ELAINE CAWOOD and THOMAS J. CAWOOD,  
Co-Conservators of the Estate of Living Incapacitated  
Person, JENNIFER CAWOOD,

Plaintiffs-Appellants,

v

RAINBOW REHABILITATION CENTERS, INC.,

Defendant-Appellee,

and

HARRY ERKINS, Jr., SHERI McDANIEL,  
HAROLD WILSON, OWEN PERLMAN and LISHA  
CLEVINGER,

Defendants.

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FOR PUBLICATION  
December 1, 2005  
9:00 a.m.

No. 263146  
Washtenaw Circuit Court  
LC No. 03-001290-NO

Official Reported Version

Before: Smolenski, P.J., and Schuette and Borrello, JJ.

BORRELLO, J. (*dissenting*).

This case arises as a result of sexual contact perpetrated upon plaintiffs' daughter, Jennifer, by defendant's employee while Jennifer was a resident of one of defendant's long-term health care facilities for brain-injured individuals. It is not contested that plaintiffs placed their daughter in defendant's facility after she suffered a traumatic brain injury as a result of an automobile accident. Once plaintiffs discovered that the sexual contact had occurred, they filed suit against defendant, claiming direct and vicarious liability. Defendant moved for summary disposition, the trial court granted defendant's motion, and this Court has now affirmed. The majority's ruling therefore perpetuates the unacceptable practice of allowing long-term care facilities, such as defendant's, to escape liability and to avoid responsibility for torts committed by their employees against incapacitated patients whose health and safety has been entrusted to them. I dissent because plaintiffs should be entitled to recover against defendant on the basis of defendant's negligent failure to protect plaintiffs' daughter from being sexually assaulted by its employee when Jennifer was in defendant's sole care, custody, and control.

My brother jurists are correct in their assertion that, ignoring equity, the current status of the general law of intentional torts regarding vicarious liability is found in this Court's ruling in

*Salinas v Genesys Health Sys*, 263 Mich App 315; 688 NW2d 112 (2004). The holding in *Salinas* was predicated, at least in part, on my brother jurists' understanding of 1 Restatement Agency, 2d, § 219(2)(d), p 481. However, the principles set forth in the Restatement and this Court's opinion in *Salinas* fail to appropriately consider or address the nature and extent of the duty owed incapacitated persons who are patients in long-term health care facilities. Because such patients are wholly dependent on their caregivers to ensure their safety and to provide the most basic of services to sustain their very lives, there must be a heightened legal duty on the part of the caregiver to protect and guarantee the safety of its patients at all times.

When plaintiffs were forced to place their daughter into a long-term health care facility, they legitimately and reasonably expected that they were placing their daughter in an environment that was free from the threat of sexual molestation, and defendant owed Jennifer a duty to protect her from its employee's misconduct. The rationale for defendant's heightened duty to protect Jennifer is based on the nature of the relationship between patients like Jennifer and their caregivers. Incapacitated persons are at the mercy of their caregivers and are uniquely vulnerable to mistreatment in general and to sexual mistreatment in particular. Given the nature of the relationship between incapacitated persons and their caregivers, and given the extent to which such patients rely on their caregivers and are vulnerable to mistreatment, imposition of a heightened duty to protect such patients is justified. Moreover, given the high cost associated with residing in a long-term health care facility, individuals like plaintiffs are paying for such a heightened duty. Because the Restatement does not take into consideration the fact that incapacitated persons are uniquely vulnerable to any mistreatment by employees of a facility where they are patients, the Restatement is wholly inapplicable to the facts of this case and other similar cases. I would hold that once an individual is placed in a long-term care facility where that individual is wholly dependent on others for care, the long-term care facility must be held liable for any negligent act that causes a tort to be committed against that incapacitated person who is in the facility's care, custody, and control. Only then will facilities such as defendant's be held responsible to assure that patients are not sexually molested or harmed in any manner by facility employees.

Thus, the legal duty owed incapacitated persons in a full-time, long-term health care facility must be a simple one: to assure that no harm comes to an incapacitated person as a result of its employee's tort. If, as in this case, an incapacitated person has been sexually molested, then it is up to the trier of fact to determine whether defendant breached its duty to protect the patient. Therefore, in this case, I would allow the trier of fact to decide whether defendant was negligent by allowing a male to work alone on Jennifer's floor and by allowing a male to enter an incapacitated female patient's room at night.

As the population rapidly ages, and the time for many to enter long-term care facilities approaches, the citizenry of this state should have a reasonable expectation that the civil laws of this state will protect them from sexual exploitation at the hands of a health care worker. However, such protections cannot be attained by blind adherence to outdated legal doctrines, which in this case has allowed defendant to escape any liability for the harm that was inflicted on an incapacitated person who was entrusted to its sole care. Because such a result is unjust and unconscionable, I dissent.

/s/ Stephen L. Borrello