

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.

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 546.¹ In fact, *Smith* recognizes that the

¹ 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

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

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

[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 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*.

impairment, including her particular vulnerability.

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

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

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.²

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

² 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.

establish that chemically dependent patients in an inpatient facility are vulnerable, and particularly so to inappropriate sexual or romantic liaisons. Therefore, the hospital owed 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

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

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 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.