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

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

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

Affirmed.

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Brown, J.

I CONCUR:

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Korsmo, J.