

SUPREME COURT OF ALASKA

Ayuluk v. Red Oaks Assisted Living, Inc.

201 P.3d 1183 (Alaska 2009) · No. Nos. S-11981, S-12502, S-12522 · Decided February 20, 2009

SUMMARY

The Supreme Court of Alaska reviewed a jury verdict arising from sexual contact between an assisted-living caregiver and a resident with impaired mental capacity. The court held that several evidentiary rulings excluding expert testimony and evidence relevant to notice and supervision were erroneous, requiring a new trial against Red Oaks and the Reeveses. It upheld the directed verdict for Leslee Orebaugh and ruled that the fee and cost award related to joining a third-party defendant must be recalculated on remand.

CASE DETAILS

COURT	Supreme Court of Alaska
WRITING FOR THE COURT	Matthews, Justice; Fabe, Chief Justice; Eastaugh, Justice; Carpeneti, Justice
JURISDICTION	Alaska
DECIDED	February 20, 2009
DOCKET	Nos. S-11981, S-12502, S-12522
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Plaintiff appealed after a jury trial in which Gary Austin was found liable for sexual battery on ten occasions but the other defendants were exonerated. Red Oaks and Orebaugh cross-appealed discovery and fee-and-cost orders.
STANDARD OF REVIEW	Expert-testimony and evidentiary rulings are reviewed for abuse of discretion, although legal questions concerning admissibility are reviewed independently. Directed-verdict rulings are reviewed by determining whether, viewing the evidence favorably to the nonmoving party, reasonable persons could differ. Jury instructions are reviewed de novo, with reversal for an incorrect or incomplete instruction only when substantial prejudice may have resulted. Discovery, continuance, and late-amendment decisions are reviewed for abuse of discretion.
PRECEDENTIAL VALUE	published precedential opinion

PARTIES

James Ayuluk, as Conservator for Ruth Ayuluk v. Red Oaks Assisted Living, Inc., Susan R. Reeves, Richard L. Reeves, Leslee K. Orebaugh, Parkside Assisted Living, Inc., d/b/a Rosewood Assisted Living, Gary W. Austin, Sr.

TOPICS

negligence standard of care vicarious liability evidence discovery dispute

PRACTICE AREAS

torts negligence evidence civil procedure appellate procedure

QUESTIONS PRESENTED

1. Whether the superior court improperly excluded expert testimony concerning the standards of care applicable to a certified nurse aide and an assisted living home.
2. Whether evidence of Austin's prior pornography-related conduct and bruising of another resident was admissible to show Red Oaks's knowledge of the risk Austin posed.
3. Whether evidence of Austin's sexual advances toward other residents was admissible to impeach his testimony that he loved Ruth.
4. Whether Ruth's prior sexual history was properly admitted as circumstantial evidence of her capacity to consent.
5. Whether the directed verdict for Orebaugh was proper.
6. Whether the jury should have received a separate aided-in-agency instruction for vicarious liability.
7. Whether the jury should have been instructed that Austin could be negligent per se if he was acting as a certified nurse aide and violated regulations prohibiting sexual contact with clients.
8. Whether damages were improperly limited to nonconsensual sexual contacts.
9. Whether discovery could encompass all medical records relevant to Ruth's health and whether a medical release could be required.
10. Whether the fee-and-cost award imposed as a condition of adding Friedman was properly calculated.

HOLDINGS

1. The superior court abused its discretion by excluding DeLapp's testimony concerning the standard of care applicable to certified nurse aides and Armstrong's testimony concerning the standard of care applicable to assisted living homes and caregiver supervision.
2. The superior court erred by excluding evidence concerning bruising of another Red Oaks resident shortly after Austin's shift and rumors that Austin viewed pornography at a prior workplace; the alcohol rumors and poor-job-performance evidence could properly be excluded.

3. Evidence that Austin made sexual advances toward other residents was admissible to impeach his testimony that he loved Ruth, although it was not shown to be admissible to establish Red Oaks's prior knowledge.
4. The superior court did not abuse its discretion by admitting evidence of Ruth's prior sexual history to the extent it bore on her mental capacity to consent.
5. The directed verdict for Orebaugh was proper because the evidence did not support liability based on her role as administrator designee or her alleged recommendation of Austin.
6. A separate aided-in-agency instruction should have been given because a caregiver with substantial power or authority over a vulnerable resident may create employer vicarious liability for tortious conduct outside the scope of employment.
7. The jury should have been instructed to determine whether Austin was employed as a certified nurse aide at Red Oaks and, if so, whether he violated regulations prohibiting sexual misconduct with clients.
8. The instruction limiting recovery to nonconsensual sexual contacts was erroneous; if the applicable standard of care prohibited sexual contact between staff and residents, damages could be assessed for all such contacts regardless of Ruth's consent.
9. Filing a personal-injury action waives the physician-patient privilege as to all information concerning the plaintiff's health and medical history relevant to the issues, and relevance for discovery includes information reasonably calculated to lead to admissible evidence. The superior court retained discretion over whether to require signed medical releases.
10. The \$74,416 fee-and-cost award was properly vacated because only fees and costs reasonably related to adding Friedman and the resulting continuance, incurred no later than three days before the April 3, 2006 trial date, were recoverable.

KEY QUOTATIONS

"We believe that a caregiver in an assisted living home who has supervisory power or authority over vulnerable residents is, for purposes of the aided-in-agency theory, in a position that is analogous to that of a supervisor of employees." (201 P.3d at 1200-01)

"Thus the jury could have found that every sexual act Austin committed, whether consented to by Ruth or not, could be the basis for an assessment of damages." (201 P.3d at 1202)

"On remand the court should award only costs and fees reasonably related to the addition of Friedman as a party, and the continuance required by her addition, incurred not later than three days before the rescheduled trial time of April 3, 2006." (201 P.3d at 1206)

FACTUAL BACKGROUND

Ruth Ayuluk suffered a disabling brain injury and lived at Red Oaks Assisted Living Home, where Gary Austin worked as a caregiver and sometimes alone with residents. Austin engaged in sexual relations with Ruth; the parties disputed whether the encounters were consensual and whether Ruth had the capacity to consent. Before hiring Austin, Red Oaks's owners knew of allegations that he had brought pornography to a prior workplace and had worked there under the influence of alcohol, and Red Oaks personnel later received reports of inappropriate

conduct and possible bruising involving residents. The conservator sued the facility and related defendants for negligent hiring, supervision, retention, failure to protect, battery, and vicarious liability.

PROCEDURAL HISTORY

Ruth Ayuluk's conservator sued Austin, Red Oaks, the Reeveses, Orebaugh, and Parkside for injuries arising from Austin's sexual relations with Ruth, asserting battery, negligent hiring, failure to protect, and vicarious-liability theories. The superior court excluded expert testimony and certain notice evidence, directed a verdict for Orebaugh, and entered discovery and fee-sharing orders. The jury found Austin liable for sexual battery, found Red Oaks not negligent, found Friedman negligent but not a legal cause, and awarded damages only against Austin. The Alaska Supreme Court affirmed dismissal of Orebaugh and Parkside, reversed as to Red Oaks and the Reeveses, vacated Austin's damages and the fee-and-cost award, and remanded.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

Affirm dismissal of Orebaugh and Parkside. Conduct a new trial against Red Oaks and the Reeveses with appropriate expert testimony, notice evidence, aided-in-agency and CNA-standard instructions, and damages instructions allowing recovery for qualifying consensual as well as nonconsensual contacts. Vacate and retry the compensatory and punitive damages awarded against Austin. On remand, permit discovery of relevant medical information subject to the superior court's discretion and award only fees and costs reasonably related to adding Friedman and the resulting continuance, incurred no later than three days before the April 3, 2006 trial date.

CASES CITED

- Marron v. Stromstad, 123 P.3d 992, 998 (Alaska 2005)
- Landers v. Municipality of Anchorage, 915 P.2d 614, 616 n. 1 (Alaska 1996)
- Estevez-Yalcin v. Children's Vill., 331 F. Supp. 2d 170, 174 (S.D.N.Y. 2004)
- Kenneth R. v. Roman Catholic Diocese of Brooklyn, 229 A.D.2d 159, 654 N.Y.S.2d 791, 793-94 (1997)
- State v. White, 549 N.W.2d 676, 682 (S.D. 1996)
- Jackson v. State, 890 P.2d 587, 591-92 (Alaska App. 1995)
- Alaska Marine Pilots v. Hendsch, 950 P.2d 98, 108 (Alaska 1997)
- Veco, Inc. v. Rosebrock, 970 P.2d 906, 914-15 (Alaska 1999)
- Meritor Savings Bank v. Vinson, 477 U.S. 57, 76-77, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986)
- Zsigo v. Hurley Medical Center, 475 Mich. 215, 716 N.W.2d 220, 226-27 (2006)
- Doe v. Forrest, 176 Vt. 476, 853 A.2d 48, 55-69 (2004)
- Doe v. Newbury Bible Church, 182 Vt. 174, 933 A.2d 196 (2007)
- Hardwicke v. Am. Boychoir Sch., 188 N.J. 69, 902 A.2d 900, 903-04, 918-20 (2006)
- Joseph v. State, 26 P.3d 459, 473-74 (Alaska 2001)

- Arctic Motor Freight, Inc. v. Stover, 571 P.2d 1006, 1008-09 (Alaska 1977)
- Langdon v. Champion, 745 P.2d 1371, 1373 (Alaska 1987)
- Luciano v. Moore, 45 Misc. 2d 335, 256 N.Y.S.2d 825, 826-27 (Sup. Ct. 1965)
- Neal & Co., Inc. v. City of Dillingham, 923 P.2d 89, 94 n. 6 (Alaska 1996)
- Miller v. Safeway, Inc., 102 P.3d 282, 294 (Alaska 2004)
- Hutka v. Sisters of Providence in Wash., 102 P.3d 947, 959 (Alaska 2004)
- Parnell v. Peak Oilfield Serv., 174 P.3d 757, 765 (Alaska 2007)

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