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IN THE SUPREME COURT OF THE STATE OF ALASKA
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JAMES AYULUK, as Conservator for
Ruth Ayuluk,

MAR 03 2009

Appellees/Cross-Appellants,

ATKINSON, CONWAY
& GAGNON, INC.
Supreme Court Nos.
S-11981
S-12502
S-12522

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;
and GARY W. AUSTIN, SR.,

Trial Court Case No.
3AN-01-09443 CI

Appellees/Cross-Appellants.

PETITION FOR REHEARING

Appellees and Cross-Appellants Red Oaks Assisted Living, Inc., Susan Reeves, and Richard Reeves (collectively "Red Oaks") move for a rehearing pursuant to Appellate Rule 506 on grounds that the Court's decision of February 20, 2009, misconceived a material proposition of law when it authorized the recovery of tort damages for sex to which the plaintiff both *had the capacity to consent and did in fact* consent; and when it overturned a compensatory damage award unrelated to the reversible errors it found in the conduct of the trial.

Confusingly, the Court first endorses the jury's role in deciding the issue of capacity to consent by ruling that the jury could properly have relied on evidence of Ruth's sexual history "to support its conclusion that Ruth had the [mental] capacity to consent" (Slip-Op. at 18-19); but it then rules that the jury was improperly instructed on Ruth's capacity to consent because the defense was irrelevant to her recovery in tort:

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“Even if Ruth was capable of consenting to sex and did consent to sex with Austin, tort damages . . . could have been assessed.” Slip Op. at 36. These two holdings – that the jury properly considered evidence of Ruth’s capacity to consent, but that the jury was erroneously instructed because capacity to consent was irrelevant – are irreconcilable.

The problem stems in part from the Court’s abrupt but unexplored departure from settled tort law by holding that whenever consensual sex violates a professional ethical standard, tort damages may be recovered for sex to which a plaintiff was fully capable of consenting and did in fact consent. Slip Op. at 36. This conclusion has huge ramifications, since such ethical standards apply to many relationships between fully capable adults: health-care providers and patients, lawyers and clients, college professors and students, clerics and parishioners. Professional ethical standards and workplace rules restricting sexual contact are ubiquitous but do not effectively prevent flirtations, romances, and marriages. Nor do they prevent breakups and heartache, which, following this Opinion, are now compensable in tort as long as one of the actors was violating the rules of his or her profession.

In support of its conclusion that tort damages are recoverable for consensual sex to which the plaintiff is fully capable of consenting, the Court gave a “*cf.*” citation¹ to two authorities: Restatement (Second) of Torts § 892(C)(2) (1979), dealing with “conduct made criminal in order to protect a certain class of persons irrespective of their

¹ “*Cf.*” means that the “[c]ited authority supports a proposition different from the main proposition but sufficiently analogous to lend support.” Harv.L.Rev.Ass’n, *The Bluebook: A Uniform System of Citation* (17th ed. 2000) at 23.

consent;” and *Joseph v. State*, 26 P.3d 459, 473-74 (Alaska 2001), recognizing a jailer’s duty to protect prisoners. See Slip Op. at 36 n. 49. The Court’s reliance upon loosely analogous authority was necessary because no direct support exists for the proposition that *consensual sex between adults who have the capacity to consent* – as the jury found to be the case here – gives rise to tort damages for breach of a professional duty.

Indeed, the law is to the contrary and, Red Oaks suggests, deserves to be explored.

“The relevant authorities . . . agree that a physician who induces a patient to enter into sexual relations is liable for professional negligence only if the physician engaged in the sexual conduct on the pretext that it was a necessary part of the treatment.”

Atienza v. Taub, 239 Cal.Rptr. 454, 457 (Cal.App. 1987). With very limited exceptions not applicable here, and ever since modern society’s rejection of the tort of seduction, tort law has not been concerned with consensual sex between capable adults; the professional licensing authorities may be, but tort law is not. This is true of the physician-patient² and attorney-client relationships³ and others as well. The capacity to

² See also *Korper v. Weinstein*, 783 N.e.2d 877, 879-80 (Mass.App.), *rev. denied*, 787 N.E.2d 1059 (Mass. 2003) (“Violations of medical ethics do not, . . . without more, establish legal liability for damages”); *Morrison v. McCann*, 301 F.Supp.2d 647, 654-55 (E.D.Mich. 2003) (applying Michigan law); *Darnaby v. Davis*, 57 P.3d 100, 104 (Okla.App. 2002); *Iwanski v. Gomes*, 611 N.W.2d 607, 614-15 (Neb. 2000); *Gunter v. Huddle*, 724 So.2d 544, 546 (Ala.App. 1998) (“The great weight of authority holds that a sexual relationship between a nonpsychiatric physician and a patient is outside the scope of the physician’s treatment, and is not actionable as malpractice, unless it is alleged that the sexual relations were instigated under the guise of providing therapy”); *Mindt v. Winchester*, 948 P.2d 334, 336 (Ore.App. 1997), *rev. denied*, 966 P.2d 222 (Oregon 1998); *Odegard v. Finne*, 500 N.W.2d 140, 143 (Minn.App. 1993) (“The general rule is that a medical malpractice claim cannot be based upon a sexual relationship between a physician and a patient”).

choose sex partners does not mean that the capacity will always be exercised with the “right” person, but that does not negate the plaintiff’s freedom to choose.

The two sources to which the Court analogized for support are not counter to these general rules. Restatement § 892C, “Consent to Crime,” is explicitly limited to criminal conduct: “This Section is concerned only with the effect of *consent to a crime* as barring recovery in a tort action *for the criminal conduct.*” *Id.*, cmt. a (emphasis added). Consensual sex, where both parties are lawfully capable of consenting, is not criminal. The Restatement rule very clearly applies to those persons, *unlike Ruth here*, whose willing consent the law refuses to recognize, *i.e.*, those whom the law holds to be *incapable of consenting*: for example, a child under the age of sixteen is deemed incapable of consenting to sex. *See id.*, illus. 7. The Restatement emphasizes: “The legislative purpose to protect the plaintiff irrespective of his consent must be clear and statutes will be relatively few in which it will be found.” *Id.*, cmt. 3.

The Court’s analogy to the jailer’s duties in *Joseph* (Slip Op. at 36 n. 49) is also imperfect. Suicide indisputably involves physical harm, whereas consensual sex between capable adults does not. By use of the analogy to *Joseph*, the Court intimates its view that consensual sex was harmful to Ruth (even though she did not think so), and

³ *Guiles v. Simser*, 804 N.Y.S.2d 904, 906-07 (Sup.Ct. 2005).

that Ruth needs the law of torts to protect her from the consequences of her own free decision-making, a view that the jury rejected on the basis of the evidence.⁴

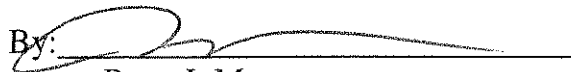
Finally, the Court should revisit its decision to vacate the compensatory damage award for nonconsensual sex acts, Slip Op. at 37-38. None of the jury instructions or evidentiary rulings that necessitate reversal relate to these damages. If further damages are to be allowed for the sex to which Ruth was capable of consenting and did in fact consent, that is a separate issue that can be separately addressed; it does not require vacating the jury's findings on nonconsensual sex.

CONCLUSION

The Court should reconsider that aspect of its February 20 decision that creates tort liability for consensual sex to which the plaintiff did in fact consent and that vacates the compensatory damages award.

DATED: March 2, 2009

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⁴ The jury heard substantial evidence on this issue, including testimony from the plaintiff's experts that persons such as Ruth could not consent to sex with a care provider. The jury rejected this testimony.

CERTIFICATE OF SERVICE

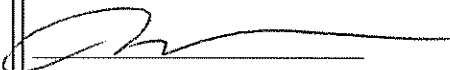
The undersigned hereby certifies that on 2d day of March, 2009, a copy of the foregoing was sent to the following via:

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