Affirmed and Memorandum Opinion filed September 16, 2010.

In The

Fourteenth Court of Appeals

NO. 14-09-00339-CV

MICHELLE MCCLURE, Appellant

V.

KINGWOOD PINES HOSPITAL, L.L.C. AND HORIZON HEALTH CORPORATION, Appellees

On Appeal from the 127th Judicial District Court
Harris County, Texas
Trial Court Cause No. 2008-07494

MEMORANDUM OPINION

This is an appeal from an order granting a traditional summary judgment in favor of appellees, Kingwood Pines Hospital, L.L.C.[1] (hereinafter "Kingwood Pines") and Horizon

[1] Both parties refer to "Kingwood Pines Hospital, L.L.P." on the cover of their briefs. The summary judgment order identifies this entity as "Kingwood Pines Hospital, L.L.C."

Health Corporation (hereinafter "Horizon Health"), on appellant Michelle McClure's negligent hiring and negligent supervision claims.[2] We affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

McClure checked into Kingwood Pines for treatment on August 28, 2006. When McClure's husband arrived the next day to pick up McClure's personal belongings, her wallet, cell phone, and prescription eyeglasses were missing. McClure's husband attempted to use a credit card to purchase gasoline, but the credit card was declined; he called the credit card company and the company advised him that there was "suspicious activity" on the card. McClure checked out of the facility on August 31. A Kingwood Pines employee eventually was arrested in connection with the theft of McClure's possessions while she was a patient at Kingwood Pines.

McClure filed an original petition against Kingwood Pines on July 23, 2007, in the 393rd District Court of Denton County. On August 17, 2007, Kingwood Pines filed a motion to transfer venue from Denton County to Harris County. McClure filed a first amended petition adding Horizon Health as a defendant, and later filed a second amended petition.[3] In her second amended petition, McClure asserted a negligent hiring claim against Kingwood Pines and Horizon Health; a negligent supervision claim only against Kingwood Pines;[4] a request for punitive damages only against Kingwood Pines; and a

[2] The second amended petition, which is the live pleading, contained a request for attorney's fees. The motion for summary judgment filed by Kingwood Pines and Horizon Health did not specifically address the request for attorney's fees, and the summary judgment order signed on February 10, 2009 did not otherwise dispose of the claim for attorney's fees. *See McNally v. Guevara*, 52 S.W.3d 195, 196 (Tex. 2001) (per curiam) (judgment not final when counterclaim for attorney's fees was not addressed in motion for summary judgment or in trial court's judgment). After this court asked the parties to address whether a final and appealable judgment exists, McClure filed with the trial court a notice of nonsuit as to her attorney's fees claim only. An order of nonsuit on the attorney's fees claim was signed by the trial court on August 27, 2010, and this court received a supplemental clerk's record containing the order. Therefore, appellate jurisdiction exists.

[3] In her second amended petition, McClure stated that Horizon Health owned and operated Kingwood Pines at the relevant time.

[4] McClure also includes, under a separate heading, a discussion about foreseeability in relation to Kingwood Pines and Horizon Health. The questions of duty and proximate cause both hinge on a

request for attorney's fees. She contends she was injured by identity theft that she attributes to the theft of her possessions by a Kingwood Pines employee. On January 28, 2008, the trial court in Denton County granted a motion to transfer venue and ordered that the entire case be transferred to Harris County.[5] The case was transferred to the 127th District Court of Harris County.

Kingwood Pines and Horizon Health filed a hybrid traditional and no-evidence motion for summary judgment on McClure's negligent hiring and negligent supervision claims. Under the traditional summary judgment heading, Kingwood Pines and Horizon Health argued that McClure had no cause of action for negligent hiring or supervision because she did not sustain physical harm. *See Verinakis v. Med. Profiles, Inc.*, 987 S.W.2d 90, 97-98 (Tex. App.—Houston [14th Dist.] 1998, pet. denied) ("[T]he duty of the employer or contractee extends only to prevent the employee or independent contractor from causing physical harm to a third party."). The trial court signed an order on February 10, 2009, granting a traditional summary judgment in favor of Kingwood Pines and Horizon Health on McClure's negligent hiring and negligent supervision claims.[6] The

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determination of foreseeability of harm. *Mellon Mortgage Co. v. Holder*, 5 S.W.3d 654, 659 (Tex. 1999). It is unclear from the pleading whether this foreseeability discussion is directed at McClure's negligent hiring claim, her negligent supervision claim, or both.

[5] The trial court's order states that it is granting Horizon Health's motion to transfer venue. The only motion to transfer venue in the record on appeal was filed by Kingwood Pines. The trial court's docket sheet indicates that a motion to transfer venue was filed by Horizon Health.

[6] McClure filed a "Motion to Establish Date" on April 1, 2009, pursuant to Texas Rule of Appellate Procedure 4.2(b) and Texas Rule of Civil Procedure 306a(5). On May 22, 2009, the trial court held a hearing on McClure's motion and signed an order establishing the date on which McClure or her attorney received notice of the February 10, 2009 summary judgment order. However, the February 10, 2009 summary judgment order was interlocutory because it did not dispose of the claim for attorney's fees in McClure's second amended petition. *See McNally*, 52 S.W.3d at 196. The February 10, 2009 summary judgment order became final on August 27, 2010, when the trial court signed an order of nonsuit as to McClure's attorney's fees claim. *See Farmer v. Ben E. Keith Co.*, 907 S.W.2d 495, 496 (Tex. 1995) (per curiam). McClure's notice of appeal filed on April 1, 2009, was timely. *See* Tex. R. App. P. 27.1(a) ("In a civil case, a prematurely filed notice of appeal is effective and deemed filed on the day of, but after, the event that begins the period for perfecting the appeal.").

trial court granted the traditional motion for summary judgment only and expressly based its decision on *Verinakis*.

II. ANALYSIS

We review the trial court's summary judgment *de novo*. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). To be entitled to traditional summary judgment, a defendant must conclusively negate at least one essential element of each of the plaintiff's causes of action or conclusively establish each element of an affirmative defense. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997). In reviewing a traditional summary judgment, we examine the entire record in the light most favorable to the non-movant, indulging every reasonable inference and resolving any doubts against the motion. *Yancy v. United Surgical Partners Int'l, Inc.*, 236 S.W.3d 778, 782 (Tex. 2007).

The Texas Supreme Court has not "ruled definitively on the existence, elements, and scope" of negligent retention, supervision, training, and hiring claims. *Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 804 n.27 (Tex. 2010). This court has held that a claim for negligent hiring and supervision is based on an employer's direct negligence rather than the employer's vicarious liability for the torts of its employees. *Zarzana v. Ashley*, 218 S.W.3d 152, 157-58 (Tex. App.—Houston [14th Dist.] 2007, pet. struck). The elements of a negligence action are (1) a legal duty owed to the plaintiff, (2) a breach of that duty by the defendant, and (3) damages proximately caused by the breach. *Id*. at 158 (applying elements to negligent supervision claim). An employer's duty extends only to prevent the employee from causing ***physical*** harm to a third party. *Verinakis*, 987 S.W.2d at 97-98.

McClure concedes that she suffered no physical harm. Therefore, she does not have a viable claim under *Verinakis* and the trial court correctly granted summary judgment on that basis. *See id*.; *see also Sibley v. Kaiser Found. Health Plan of Tex.*, 998 S.W.2d 399, 403-04 (Tex. App.—Texarkana 1999, no pet.) (negligent hiring and supervision claim failed in absence of allegation of physical harm).

Contrary to *Verinakis*, McClure argues that recovery for negligent hiring and supervision should be permitted in the absence of physical harm for damages resulting from identity theft. This court is bound by and follows its own precedent. *See, e.g., Chase Home Fin., L.L.C. v. Cal W. Reconveyance Corp.*, 309 S.W.3d 619, 630 (Tex. App.—Houston [14th Dist.] 2010, no pet. h.) ("Absent a decision from a higher court or this court sitting en banc that is on point and contrary to the prior panel decision or an intervening and material change in the statutory law, this court is bound by the prior holding of another panel of this court."); *see also Beluga Chartering B.V. v. Timber S.A.*, 294 S.W.3d 300, 304 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (adherence to precedent gives "due consideration to the settled expectations of litigants"); *Grimes County Bail Bond Bd. v. Ellen*, 267 S.W.3d 310, 315-16 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (same). McClure has identified no intervening decision from the supreme court, no intervening decision from this court sitting en banc, and no intervening statutory change that would justify a decision contrary to *Verinakis*'s physical harm requirement.[7]

The trial court correctly granted summary judgment on McClure's negligent hiring and supervision claims in the absence of a physical harm.

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[7] Other courts have indicated that a negligent hiring or supervision claim may be permissible if the employee commits an actionable tort causing a "legally compensable injury." *See Gonzales v. Willis*, 995 S.W.2d 729, 739-40 (Tex. App.—San Antonio 1999, no pet.) (evidence insufficient to establish severe emotional distress, and sexual harassment could not provide basis for negligent hiring claim because sexual harassment is not a common law tort) *overruled in part on other grounds by Hoffmann-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 447-48 (Tex. 2004); *see also Brown v. Swett & Crawford of Tex., Inc.*, 178 S.W.3d 373, 384 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (plaintiff could not prove actionable tort of defamation, and therefore, negligent hiring and supervision claims failed); *Garcia v. Allen*, 28 S.W.3d 587, 593 (Tex. App.—Corpus Christi 2000, pet. denied) (failing to investigate ability of employee to perform job duties before terminating him is not an actionable tort, and therefore, negligence claim failed). McClure contends that the Kingwood Pines employee violated section 32.51 of the Texas Penal Code by using the contents of her wallet to steal her identity. *See* Tex. Penal Code Ann. § 32.51 (Vernon 2003 & Supp. 2009). McClure has identified no legal authority establishing that identity theft under the Texas Penal Code is "an actionable tort" for purposes of a negligent hiring or supervision claim, and we have located no such authority.

McClure also argues that she had a special relationship with Kingwood Pines, allowing her to recover mental anguish damages. Because McClure did not make this argument in her response to the motion for summary judgment, we do not consider this argument on appeal. *See* Tex. R. Civ. P. 166a(c) ("Issues not expressly presented to the trial court by written motion, answer or other response shall not be considered on appeal as grounds for reversal.").

McClure's issue is overruled. Because of our disposition, we need not address appellees' cross-point.

III. CONCLUSION

The trial court's judgment is affirmed.

/s/ William J. Boyce
Justice

Panel consists of Justices Frost, Boyce, and Sullivan.