Affirmed and Memorandum Opinion filed January 20, 2011.

In The

Fourteenth Court of Appeals

NO. 14-09-00925-CV

JOSEPHINE LATIMER, Appellant

V.

MEMORIAL HERMANN HOSPITAL SYSTEM D/B/A MEMORIAL HERMANN HOSPITAL, Appellee

On Appeal from the 165th District Court
Harris County, Texas
Trial Court Cause No. 2009-12212

MEMORANDUM OPINION

Josephine Latimer appeals from a final summary judgment entered against her in favor of Memorial Hermann Hospital System D/B/A Memorial Hermann Hospital (the "hospital"). In a single issue, she argues that the trial court erred in granting summary judgment because either the hospital failed to negate an element of each of her four claims, or she raised a genuine issue of material fact. We affirm.

BACKGROUND

While visiting her brother in the hospital, Latimer had the urgent need to use a toilet, so one of the hospital's employees escorted her to a women's restroom. Outside

the restroom, Latimer observed a tall man in scrubs standing next to a cleaning cart. The man was later identified as Matthew Giadrosich, a housekeeping supervisor who worked at the hospital. Latimer entered the restroom and then entered one of the stalls, where she "started to have a messy bile [sic] movement." She did not hear a voice or knock at the door, but she heard someone enter the restroom and heard footsteps walking toward her stall. When she asked who was there, she heard a man say, "It's me." She then screamed, "I'm in here," and looked through the crack of the stall door. She saw Giadrosich coming towards her stall, and she again said, "I'm in here, please leave." Even though Giadrosich left the restroom, Latimer was startled. She had to "force stop [her] bile [sic] movement," and she got "feces and wet" in her pants when she pulled her pants up without wiping.

Latimer later explained that she "felt raped, icky, nasty, nervous, scared," and severely frightened. With the assistance of other hospital employees, she identified the man who entered the stall, and she filed a report to a security officer. According to the report, Giadrosich knew a woman was in the bathroom when he entered. Giadrosich explained in an affidavit that he did not see Latimer in the stall or make any attempt to look for her. Latimer was unable to admit or deny requests for admissions stating that (1) a man did not see her using the toilet and (2) a man did not touch the door of the stall she occupied.

Latimer sued the hospital for $4,000,000, alleging intrusion upon seclusion, assault, intentional infliction of emotional distress, and negligent supervision. The hospital moved for a traditional summary judgment on all claims, and the trial court granted the motion without specifying the grounds. This appeal followed.

STANDARD OF REVIEW

In a single issue, Latimer argues that the trial court erred in granting the hospital's motion for summary judgment. We review de novo the granting of summary judgment. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex.

2009). A movant is entitled to summary judgment on any of the nonmovant's claims if the movant conclusively negates at least one element of that claim. *See HIS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 798 (Tex. 2003). A movant fails to satisfy this burden if the nonmovant presents evidence that raises a genuine issue of material fact. *See Transcon. Ins. Co. v. Briggs Equip. Trust*, 321 S.W.3d 685, 691 (Tex. App.—Houston [14th Dist.] 2010, no pet.). We must view the evidence in the light most favorable to the nonmovant, crediting evidence favorable to her if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not. *See Mann Frankfort*, 289 S.W.3d at 848. Because the trial court's order did not specify the basis for granting summary judgment, we will affirm if any one of the theories advanced in the motion is meritorious. *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 380 (Tex. 1993).

INTRUSION UPON SECLUSION

The elements of a claim for intrusion upon seclusion are (1) an intentional intrusion, physical or otherwise, upon another's solitude, seclusion, or private affairs or concerns; (2) the intrusion would be highly offensive to a reasonable person; and (3) the claimant suffered an injury as a result of the intrusion. *Robinson v. Brannon*, 313 S.W.3d 860, 867 (Tex. App.—Houston [14th Dist.] 2010, no pet.) (citing *Valenzuela v. Aquino*, 853 S.W.2d 512, 513 (Tex. 1993)). The tort typically involves either physical invasion of a person's property, eavesdropping on a private conversation, or spying. *See GTE Mobilnet of S. Tex. Ltd. v. Pascouet*, 61 S.W.3d 599, 618 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

The hospital argues that there was either (1) no intentional intrusion or (2) no intrusion that would be highly offensive. We assume without deciding that there was an intentional intrusion into Latimer's seclusion.[1] We agree with the hospital that

[1] *But see Buchanan v. State*, 471 S.W.2d 401, 404 (Tex. Crim. App. 1971) (holding that the defendant did not have a reasonable expectation of privacy under the Fourth Amendment because he was in a public restroom, and there were no doors separating the toilet stall from the remainder of the general

Giadrosich's conduct would not be highly offensive to a reasonable person. The hospital met its burden on summary judgment by showing that the restroom was open to the public, Giadrosich was a housekeeping supervisor whose responsibilities included entering the hospital's restrooms to ensure tidiness, he did not see Latimer in the stall or attempt to see her, and he did not enter the stall. Latimer did not deny that Giadrosich did not see her using the toilet, and she did not deny that Giadrosich did not touch the door to the stall. Latimer admitted in a request for admission and stated in her affidavit that Giadrosich left the general restroom area after she informed him of her presence and told him to leave. Latimer presented no evidence that Giadrosich said anything other than "it's me" before leaving the restroom. Further, she knew that Giadrosich was wearing scrubs and had been standing next to a cleaning cart. Under these circumstances, the hospital conclusively established that Giadrosich's conduct would not be highly offensive to a reasonable person.

ASSAULT

The elements for a tort claim of assault are the same as for the crime of assault, *Johnson v. Davis*, 178 S.W.3d 230, 240 (Tex. App.—Houston [14th Dist.] 2005, pet. denied), and a defendant is guilty of criminal assault by threat when he or she "intentionally or knowingly threatens another with imminent bodily injury." Tex. Penal Code Ann. § 22.01(a)(2) (West Supp. 2009). A threat may be communicated by words, conduct, or a combination of both. *See McGowan v. State*, 664 S.W.2d 355, 357 (Tex. Crim. App. 1984). Conduct will amount to a threat of imminent bodily harm if a reasonable person would view the conduct as a threat under the circumstances. *See Olivas v. State*, 203 S.W.3d 341, 347 (Tex. Crim. App. 2006).

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restroom area); *Hamrick v. Wellman Prods. Group*, No. 03CA014-M, 2004 WL 2243168, at *1, *5 (Ohio App. Sept. 29, 2004) (affirming trial court's entry of directed verdict on intrusion upon seclusion claim because there was no evidence that cleaning ladies intended to invade on the appellant's seclusion when they opened the door to the bathroom stall in which he sat).

The hospital met its burden on summary judgment to conclusively establish that Giadrosich's words or conduct did not amount to a threat of imminent harm. Giadrosich said only "it's me" while he was in the restroom, and he left the restroom as soon as Latimer asked him to leave. He neither touched the stall, nor physically contacted Latimer. No reasonable person could view Giadrosich's conduct of walking toward the stall as a threat of imminent bodily harm.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

The elements of a claim for intentional infliction of emotional distress are (1) the defendant acted intentionally or with recklessness, (2) the defendant's conduct was extreme and outrageous, (3) the defendant's conduct caused the plaintiff emotional distress, and (4) the emotional distress was severe. *Hoffmann-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 445 (Tex. 2004). For the defendant's conduct to be extreme and outrageous, the conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.* (quotation omitted).

The hospital met its burden on summary judgment to conclusively establish that Giadrosich's conduct was not extreme and outrageous. Giadrosich, a housekeeping supervisor wearing hospital scrubs, entered the restroom and walked toward Latimer's stall. He said only "it's me," and he did not see her or touch the stall. He left the public restroom upon request. This conduct was not sufficient to even raise a fact issue regarding intentional infliction of emotional distress. *Cf. Aquino v. Sommer Maid Creamery, Inc.*, 657 F. Supp. 208, 211 (E.D. Pa. 1987) (dismissing emotional distress claim for failure to state a claim because the male supervisor's conduct was not outrageous or extreme when he, among other things, entered the women's restroom and banged on the door, asking what the female employee was doing inside); *Hamrick*, 2004 WL 2243168, at *1, *5 (affirming trial court's entry of directed verdict against male employee because conduct was not outrageous and extreme when cleaning ladies entered

a men's restroom and opened the door to his stall and the employer subsequently investigated the male employee for sexual harassment).

NEGLIGENT SUPERVISION

The elements of a claim for negligent supervision, like all negligence claims, are (1) the defendant owed a legal duty to the plaintiff, (2) the defendant breached that duty, (3) the plaintiff suffered damages, and (4) the damages were proximately caused by the defendant's breach. *Zarzana v. Ashley*, 218 S.W.3d 152, 158 (Tex. App.—Houston [14th Dist.] 2007, pet. struck). For a defendant's conduct to proximately cause a plaintiff's damages, the damages must have been foreseeable. *Id.* "Foreseeability requires that the injury be of such a general character as might reasonably have been anticipated." *Id.* (quotation omitted).

The hospital argues that Latimer's mental anguish damages[2] were not foreseeable. Generally, mental anguish damages have been held foreseeable in only a limited set of circumstances, including when (1) the defendant committed a tort intentionally or maliciously, (2) the defendant was in a particular special relationship with the plaintiff, (3) the plaintiff suffered serious bodily injury, or (4) the suit involved injuries of a shocking and disturbing nature, such as a suit for wrongful death or an action brought by a bystander for a close family member's serious injury. *See City of Tyler v. Likes*, 962 S.W.2d 489, 495–96 (Tex. 1997); *Lions Eye Bank of Tex. v. Perry*, 56 S.W.3d 872, 876 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). None of these circumstances is present in this case. Further, Latimer has not alleged that she suffered any physical harm. *See Verinakis v. Med. Profiles Inc.*, 987 S.W.2d 90, 97–98 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) (explaining, in a negligent supervision case, that the duty of an employer to a third party extends only to prevent an employee from causing physical harm). Finally, we have affirmed in this case summary judgment against Latimer on all

[2] Latimer claimed damages for "great mental anguish, shock, trauma, loss of independence and normal enjoyment of life[,] . . . grief, humiliation, anger, fear, anxiety, post traumatic stress and the possibility of inability to have normal relationships with men."

of the torts allegedly committed by Giadrosich, and thus, there is no separate actionable tort to support the negligent supervision claim. *See Brown v. Swett & Crawford of Tex., Inc.*, 178 S.W.3d 373, 384 (Tex. App.—Houston [1st Dist.] 2005, no pet.) (holding that to recover on negligent supervision claim, a plaintiff must prove that the employee committed an actionable tort against the plaintiff). Accordingly, the hospital conclusively established that Latimer's damages were not foreseeable under these circumstances.

CONCLUSION

We overrule Latimer's sole issue on appeal and hold that the hospital met its burden on summary judgment to conclusively negate an element of each of her claims. Accordingly, we affirm the trial court's judgment.

/s/ Adele Hedges
Chief Justice

Panel consists of Chief Justice Hedges, Justice Jamison, and Senior Justice Price.[*]

[*] Senior Justice Frank C. Price sitting by assignment.