IN THE
TENTH COURT OF APPEALS

No. 10-19-00255-CV

GEORGE REYNOLDS,

Appellant

v.

LOUISA HARGRAVE AND SENIOR LIVING PROPERTIES, LLC,

Appellees

From the 369th District Court
Leon County, Texas
Trial Court No. 17-0013CV

MEMORANDUM OPINION

This dispute arises from the termination of appellant George Reynolds's employment at Senior Living Properties, LLC ("Senior Living") for purportedly engaging in inappropriate sexual conduct with a resident and Reynolds's subsequent lawsuit for defamation per se, slander, intentional infliction of emotional distress ("IIED"), and exemplary damages. In two issues, Reynolds complains about the trial court granting

no-evidence and traditional summary judgments in favor of appellees, Louisa Hargrave and Senior Living, as well as the trial court's denial of his motion for new trial. We affirm.

I. Background

Prior to this dispute, Reynolds served as a maintenance supervisor at Senior Living's nursing-home facility in Centerville, Texas. Hargrave, a certified nurse assistant, also worked at the Senior Living nursing home in Centerville. On November 18, 2016, Hargrave asked her immediate supervisor, charge nurse Samantha Guidry, who she needed to notify about an incident between an employee and a resident. Guidry directed Hargrave to an administrator.

While speaking to administrator Donna Williford, Hargrave reported what she believed to be inappropriate sexual conduct between Reynolds and a resident. Hargrave recounted that she walked to the resident's room to ask her about her shower. Upon entering the resident's room, Hargrave stated that Reynolds was in the doorway of the resident's bathroom with his pants unzipped and his genitals exposed. Apparently, the resident was in her wheelchair facing Reynolds, and when they realized that Hargrave had entered the room, Reynolds and the resident went in different directions.

Based on Hargrave's report, Williford initiated an investigation and reported the incident to the Texas Department of Aging and Disability Services ("DADS"). On November 22, 2016, Reynolds was terminated from his employment with Senior Living.

The following day, DADS conducted an investigation into the incident at the facility and substantiated the allegation of resident abuse.

Thereafter, Reynolds filed his original petition, asserting claims for defamation per se, slander, and IIED related to Hargrave's report and for Senior Living's acceptance of Hargrave's report. Reynolds claimed that Hargrave filed a false report. Hargrave and Senior Living filed original answers denying Reynolds's claims and asserted numerous affirmative defenses, including substantial truth and privilege.

Later, Hargrave and Senior Living each filed a traditional summary-judgment motion, contending that they cannot be held liable for truthful statements substantiated by investigations by Senior Living and DADS and that the alleged statements of defamation are protected by a qualified privilege, and also a no-evidence summary-judgment motion arguing that there is no evidence to support the essential elements of Reynolds's claims. Reynolds filed a response to the summary-judgment motions of Hargrave and Senior Living. In the response, Reynolds included an unsworn, partially-typed, and handwritten statement by his niece, Autumn Rose Johnson, who alleged that she heard statements about Reynolds from: an unknown, middle-aged woman; her manager at Dairy Queen, who heard her niece Alisha make statements about Reynolds; and from a lady that came into the Dairy Queen. Reynolds also alleged in his response that Oscar, a cook at the nursing home, heard Hargrave mention on the day of the incident that Reynolds should be fired.

Reynolds, Hargrave, and Senior Living each filed objections and special exceptions to the summary-judgment evidence presented by the opposing party. The trial court signed an order sustaining Hargrave and Senior Living's objections to Reynolds's summary-judgment evidence. Specifically, the trial court struck Johnson's statement and the statement made by Oscar, as set forth in Reynolds's affidavit. The record does not reflect that the trial court ruled on Reynolds's objections to Hargrave and Senior Living's summary-judgment evidence.

Additionally, the trial court entered a final judgment granting each of Hargrave's and Senior Living's summary-judgment motions. The trial court ordered that Reynolds take nothing from Hargrave and Senior Living and stated that the order disposed of all parties and claims and is appealable.

Subsequently, Reynolds filed a motion for new trial, alleging that his sworn testimony contradicted the evidence of Hargrave and Senior Living and showed that Hargrave did not follow the proper procedures when making the report. Reynolds argued that this raised a material question of fact and law as to the issue of qualified privilege, among other things.

The trial court denied Reynolds's motion for new trial. This appeal followed.

II. SUMMARY JUDGMENT

In his first issue, Reynolds argues that the trial court erred in granting summary judgment in favor of Hargrave and Senior Living. The focus of this issue appears to be

on Reynolds's defamation claim. Furthermore, within this issue, Reynolds apparently complains that: (1) Hargrave's conclusory affidavit cannot be used to show she acted in good faith to establish a qualified privilege; (2) a trial should follow to demonstrate that this incident could not have happened due to Reynolds's erectile dysfunction; and (3) Reynolds created a fact issue with his affidavit.

A. Standard of Review

Different standards of review apply to summary judgments granted on no-evidence and traditional grounds. *See* TEX. R. CIV. P. 166a(c), (i). A no-evidence summary judgment is the equivalent to a pre-trial directed verdict, and we apply the same legal sufficiency standard on review. *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). Once an appropriate no-evidence motion for summary judgment is filed, the non-movant must produce summary-judgment evidence raising a genuine issue of material fact to defeat the summary judgment. *See* TEX. R. CIV. P. 166a(i). "A genuine issue of material facts exists if more than a scintilla of evidence establishing the existence of the challenged element is produced." *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). We do not consider any evidence presented by the movant unless if creates a fact question. *Binur v. Jacobo*, 135 S.W.3d 646, 651 (Tex. 2004).

More than a scintilla of evidence exists if the evidence would enable reasonable and fair-minded jurors to differ in their conclusions. *Hamilton v. Wilson*, 249 S.W.3d 425, 426 (Tex. 2008) (per curiam); *see Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 25 (Tex. 1994).

Evidence that is "so weak as to do no more than create a mere surmise or suspicion of fact" is no evidence and, thus, does not create a fact issue. *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983); *see Ortega v. City Nat'l Bank*, 97 S.W.3d 765, 772 (Tex. App.—Corpus Christi 2003, no pet.) (op. on reh'g). In determining whether the non-movant has met his burden, we review the evidence in the light most favorable to the non-movant, crediting such evidence if reasonable jurors could and disregarding contrary evidence unless reasonable jurors could not. *Tamez*, 206 S.W.3d at 582; *see City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005).

The party moving for traditional summary judgment bears the burden of showing that no genuine issue of material fact exists and that he is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *see also Sw. Elec. Power Co. v. Grant*, 73 S.W.3d 211, 215 (Tex. 2002). The burden of proof is on the movant, and we resolve all doubts about the existence of a genuine issue of material fact against the movant. *Sw. Elec. Power Co.*, 73 S.W.3d at 215. The non-movant has no burden to respond to a traditional motion for summary judgment unless the movant conclusively establishes its cause of action or defense. *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000) (per curiam). A moving party who conclusively negates a single essential element of a cause of action or conclusively establishes an affirmative defense is entitled to summary judgment on that claim. *Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508-09 (Tex. 2010). Once the movant produces sufficient evidence conclusively establishing its right to

summary judgment, the burden shifts to the non-movant to present evidence sufficient to raise a fact issue. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). In reviewing a traditional summary judgment, we review the evidence in the light most favorable to the non-movant, crediting favorable evidence if reasonable jurors could do so, and disregarding contrary evidence unless reasonable jurors could not. *See Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009) (citing *Wilson*, 168 S.W.3d at 827).

B. Discussion

As noted above, Reynolds asserted claims for defamation per se and slander, as well as IIED and for exemplary damages. Slander is a defamatory statement that is orally communicated to a third party without legal excuse. *Randall's Food Mkts., Inc. v. Johnson*, 891 S.W.2d 640, 646 (Tex. 1995). Thus, what Reynolds really alleged was a claim for slander per se, which does not require independent proof of damage to the plaintiff's reputation or of mental anguish, as the slander itself gives rise to a presumption of these damages. *See Moore v. Waldrop*, 166 S.W.3d 380, 384 (Tex. App.—Waco 2005, no pet.). To be considered slander per se, the statements must: (1) impute the commission of a crime; (2) impute contraction of a loathsome disease; (3) cause injury to a person's office, business, profession, or calling; or (4) impute sexual misconduct. *Id.*

In a suit brought by a private individual against an employer, truth is an affirmative defense to slander. *Randall's Food Mkts.*, 891 S.W.2d at 646. Moreover, an

employer has a conditional or qualified privilege that attaches to communications made during an investigation following a report of employee wrongdoing. *Id.*; *see Dixon v. Sw. Bell Tel. Co.*, 607 S.W.2d 240, 242 (Tex. 1980); *see also Leatherman v. Rangel*, 986 S.W.2d 759, 762 (Tex. App.—Texarkana 1999, pet. denied) (noting that a qualified privilege extends to statements made in good faith on a subject in which the maker has an interest or duty to another person having a corresponding interest or duty). This privilege remains intact if the communications pass only to persons having an interest or duty in the matter to which the communications relate. *Randall's Food Mkts.*, 891 S.W.2d at 646. To defeat this privilege, the employee must show that the statement was motivated by actual malice existing at the time of the publication. *Id.* "In the defamation context, a statement is made with actual malice when the statement is made with knowledge of its falsity or with reckless disregard as to its truth." *Id.*

In this issue, the parties focus their arguments on the validity of the affirmative defense of qualified privilege raised by Hargrave and Senior Living in the trial court in response to Reynolds's claims for slander per se (defamation) and IIED.[1] Attached to

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[1] As mentioned above, Hargrave and Senior Living filed no-evidence and traditional summary-judgment motions. The trial court granted both motions. Ordinarily, when a party moves for summary judgment under both rules 166a(c) and 166a(i), "[we] first review the trial court's summary judgment under the standards of rule 166a(i)." *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). However, because the parties focus on the validity of Hargrave's and Senior Living's affirmative defense of qualified privilege, and because it is within the context of a traditional motion for summary judgment that we determine whether a moving party conclusively established the affirmative defense so as to be entitled to summary judgment on that claim, we analyze Hargrave's and Senior Living's traditional motion for summary judgment in this issue. *See Frost Nat'l Bank v. Fernandez*, 315 S.W.3d 494, 508-09 (Tex. 2010).

Hargrave's and Senior Living's summary-judgment motions was an affidavit executed by Hargrave, a provider investigation report, and an investigation report from DADS.[2] In her affidavit, Hargrave stated that she is a certified nurse assistant employed at Centerville Healthcare Center in Centerville, Texas. She then described the incident in question as follows:

> On November 18, 2016, I walked down to resident . . . room to ask her about taking a shower. When I walked into [the resident's] room, I saw George Reynolds standing in the doorway of [the resident's] bathroom with his pants unzipped and his genitals out. [The resident] was in her wheelchair facing Mr. Reynolds. They both went in different directions when they heard me come in.

Regarding her reporting of the incident, which is the basis for most of Reynolds's complaints, Hargrave noted:

> I asked my immediate supervisor, charge nurse Samantha Guidry, who I needed to notify about an incident and she told me to talk to the administrator. I then went straight to the administrator of the facility, Donna Williford, to report the incident.
>
> My reporting of allegations concerning Mr. Reynolds' acts with [the resident] was done in good faith and based on my observations. My reporting of the incident was done pursuant to Senior Living Properties,

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[2] Hargrave and Senior Living acknowledge that Reynolds filed objections to the form of Hargrave's affidavit regarding her reporting of the incident and her statements concerning good faith and the authenticity of the Texas Department of Aging and Disabilities report. On appeal, Reynolds asserts that these objections were overruled by the trial court. However, the record does not reflect any ruling by the trial court on Reynolds's objections. The failure to secure a trial court ruling on objections to summary-judgment evidence waives any complaint about the summary-judgment evidence on appeal. *See Vice v. Kasprzak*, 318 S.W.3d 1, 11 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) ("Failure to secure the trial court's ruling on the objections to the summary judgment evidence also waives the complaint for appeal." (citing *Roberts v. Friendswood Development Co.*, 886 S.W.2d 363, 365 (Tex. App.—Houston [1st Dist.] 1994, writ denied)).

> LLC's policy and based upon my understanding that state law required that the allegations be reported to appropriate persons.
>
> At no time did I have any malice, ill will or spite toward Mr. Reynolds, and none of my actions were motivated by any kind of malice or improper motive.

The provider investigation report, completed by Williford, recounted Hargrave's allegations and indicated that:

> Resident was safe. Staff immediately reported to administrator. Administrator talked with resident, called [Reynolds] to office and placed on suspension until investigation is completed, local law enforcement notified, starting interviewing resident rewarding [sic] any inappropriated [sic] behavior by [Reynolds] towards them.

Williford also spoke to other staff to see if they knew of Reynolds engaging in other inappropriate conduct. Also included with the provider investigation report was written statements from staff at the Centerville Healthcare Center noting that they had not seen any inappropriate conduct of staff towards residents.

Additionally, Hargrave and Senior Living attached the investigation report from DADS substantiating Hargrave's allegation of resident abuse to their summary-judgment motion, thus conclusively establishing the affirmative defense of qualified privilege.

In his response to the summary-judgment motions, Reynolds included an affidavit he executed, as well as the resident's medical records. In his affidavit, Reynolds denied engaging in sexual conduct or other exposure with the resident. Rather, he stated that, when Hargrave entered the room, he was standing at the side of the resident's toilet repairing a clogged toilet, which was a part of his custodial responsibilities. Regarding

malice and qualified privilege, Reynolds complained that Hargrave did not follow the proper procedures for reporting alleged workplace misconduct. *See Vice v. Kasprzak*, 318 S.W.3d 1, 11 n.5 (Tex. App.—Houston [1st Dist.] 2009, pet. denied) ("[C]onclusory and self-serving affidavits submitted as summary judgment evidence by either the movant or the non-movant are not counted as summary judgment evidence."); *see also Chhim v. Univ. of Houston*, 76 S.W.3d 210, 218-19 (Tex. App.—Texarkana 2002, pet. denied) ("[Employee's] assertions amount to nothing more than conclusory allegations and unsupported speculation. The nonmovant must come forward with more than merely conclusory allegations, improbable inferences, and unsupported speculation to survive summary judgment."). He further relied upon unsworn out-of-court statements made by Johnson, his niece, and an unsworn out-of-court statement allegedly made by a cook, Oscar, at the nursing home where Hargrave worked at the time. Hargrave and Senior Living objected to the statements made by Johnson and Oscar. The trial court sustained the objections and struck the statements from Johnson and Oscar from the record. Reynolds does not complain about this ruling on appeal.

As shown above, there is no evidence in the record indicating that Hargrave's allegation was made with malice. *See Dixon*, 607 S.W.2d at 242; *see also Leatherman*, 986 S.W.2d at 762. Indeed, her allegations were made to another employee who also had a duty to report elder abuse in the nursing home and were in furtherance of the investigation into elder abuse at the nursing home. *See Randall's Food Mkts.*, 891 S.W.2d

at 646; *Dixon*, 607 S.W.2d at 242; *Leatherman*, 986 S.W.2d at 762. Furthermore, in their investigations, neither Williford nor DADS found Hargrave's allegations to be false or malicious. Moreover, the evidence that Reynolds relied upon to show malice and bad faith was struck from the record by the trial court, and the striking of this evidence was not asserted as an issue in this appeal. Therefore, even taking the evidence favorable to Reynolds as true and indulging every reasonable inference in his favor, we cannot conclude that the trial court erred in granting summary judgment in favor of Hargrave and Senior Living as to Reynolds's slander per se claim on the basis of qualified privilege, as Hargrave and Senior Living conclusively established their affirmative defense of qualified privilege and Reynolds failed to present more than a scintilla of admissible summary-judgment evidence to raise a material fact issue that Hargrave was malicious or acted in bad faith at the time she published the allegations and, thus, was not entitled to a qualified privilege. *See Randall's Food Mkts.*, 891 S.W.2d at 646; *Dixon*, 607 S.W.2d at 242; *Leatherman*, 986 S.W.2d at 762; *see also Fernandez*, 315 S.W.3d at 508; *Tex. Mun. Power Agency*, 253 S.W.3d at 192; *Little*, 148 S.W.3d at 381; *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 157 (Tex. 2004) ("We affirm the summary judgment if any of the theories presented to the trial court and preserved for appellate review are meritorious" (internal citations omitted)). We overrule Reynolds's first issue.[3]

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[3] On appeal, Reynolds does not challenge the trial court's order granting summary judgment as to his claims for IIED or exemplary damages. Thus, we affirm the trial court's summary judgment as to these claims. *See Oliphant Fin., L.L.C. v. Hill*, 310 S.W.3d 76, 77-78 (Tex. App.—El Paso 2010, pet. denied) ("As a

III. MOTION FOR NEW TRIAL

In his second issue, Reynolds contends that the trial court abused its discretion by denying his motion for new trial because the record contained fact issues that should have been resolved at trial. This issue is premised on a finding in Reynolds's first issue that the trial court erred in granting summary judgment in favor of Hargrave and Senior Living. Because we have concluded that the trial court did not err in granting summary judgment in favor of Hargrave and Senior Living, we cannot conclude that the trial court abused its discretion by denying Reynolds's motion for new trial. *See Waffle House, Inc. v. Williams*, 313 S.W.3d 796, 813 (Tex. 2010) (noting that we review a denial of a motion for new trial under an abuse-of-discretion standard); *see also Cire v. Cummings*, 134 S.W.3d 835, 838-39 (Tex. 2004) (stating that, in applying the abuse-of-discretion standard, we must decide whether the trial court acted without reference to any guiding rules or principles; in other words, we must decide whether the act was arbitrary or unreasonable). Accordingly, we overrule Reynolds's second issue.

IV. CONCLUSION

Having overruled both of Reynolds's issues, we affirm the orders of the trial court.

JOHN E. NEILL
Justice

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general proposition, an appellant must attack all independent bases or grounds that fully support a complained-of ruling or judgment. If an appellant fails to do so, then we must affirm the ruling on appeal or judgment.").

Before Chief Justice Gray
Justice Davis, and
Justice Neill
Affirmed
Opinion delivered and filed August 26, 2020
[CV06]