Affirmed and Opinion filed June 1, 2000.

In The

Fourteenth Court of Appeals

NO. 14-98-01400-CV

LEON EVANS, JR. AND HENRY DUDLEY, Appellants

V.

NMC DIALYSIS SERVICES DIVISION NATIONAL MEDICAL CARE, INC. D/B/A BIO-MEDICAL APPLICATIONS OF TEXAS CITY AND MAINLAND DIALYSIS CENTER, Appellees

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On Appeal from the 56th District Court
Galveston County, Texas
Trial Court Cause No. 95-CV-0143

O P I N I O N

Appellants, Leon Evans, Jr. and Henry Dudley, appeal from a summary judgment in favor of appellees, NMC Dialysis Services Division National Medical Care, Inc. d/b/a Bio-Medical Applications of Texas City and Mainland Dialysis Center. Appellants filed suit against appellees for intentional infliction of emotional distress arising out of dialysis treatments they received at appellees' facility. Because we find that the complained-of conduct was not extreme or outrageous as a matter of law, we affirm the summary judgment below.

FACTUAL BACKGROUND

Appellants were dialysis patients at the Mainland Dialysis Center (the Center), receiving dialysis treatments three times a week. During the course of their treatments, appellants attended a conference for dialysis patients where they gained extensive information about patient rights and responsibilities, and learned how to form dialysis patient support groups. After the conference, appellants organized a patient support group to help inform other patients of their rights and to provide information regarding their treatments at the Center.

Appellants complained that the Center took steps to actively discourage the patient support group by refusing to provide a meeting room for the group and by removing announcements of support group meetings. According to appellants, staff members were uncooperative with their efforts to make changes and enforce their rights at the Center, and began retaliating against appellants by (1) entering false information in their medical records; (2) projecting appellants in a negative manner to employees and other patients; (3) placing them under armed guard; (4) subjecting them to immediate removal by placing them on disciplinary probation; (5) forcing them to accept inadequate care givers; (6) denying them treatment sessions; and (7) shortening their treatment sessions.

Appellants contend that several of these allegations arose from a treatment session at the Center during which staff members overheard appellants discussing a rap song with violent lyrics and a shooting that had occurred at a restaurant in Killeen, Texas. As a result of overhearing this discussion, staff members made entries in appellants' medical records stating that they had threatened to kill everyone at the Center and take the staff hostage with an "AK." Afterwards, appellants were publicly informed that they were being placed on disciplinary probation, and armed guards were posted near them during their treatment sessions. While the Center maintained that these security steps were taken in response to a bomb threat and were not aimed specifically at appellants, appellants claimed the guards were present only during their own treatment sessions. All in all, appellants allege that these retaliatory actions – false record entries, public probation and armed guards – placed them in a negative light with employees and other patients at the Center.

Appellants further allege that the Center forced them to undergo treatment sessions with inadequate and unqualified care givers, including staff members who improperly inserted dialysis machine needles into their veins. These improper needle "sticks" caused them so much pain and discomfort that they learned to insert the needles themselves or, on at least one occasion, sought treatment elsewhere. They also claim that the Center shortened the duration of a few treatment sessions from the required four hours to only three and one-half hours, causing them to fear a potentially hazardous accumulation of excess fluid and toxins in their bodies.

Appellants lodged complaints with the Texas Department of Health (TDH), the United States Department of Health and Human Services (HHS), End-Stage Renal Disease Network of Texas, Inc. (ESRD) and others. Investigations by the TDH and ESRD substantiated some of appellants' complaints but failed to substantiate others. Appellants ultimately filed suit against the Center for intentional infliction of emotional distress. The Center moved for summary judgment on several grounds, including claims of "no evidence" and an allegation that, as a matter of law, the conduct complained of by appellants, even if true, did not rise to the level of "extreme and outrageous conduct" necessary to support an action for intentional infliction of emotional distress. The trial court granted summary judgment without specifying the ground or grounds upon which judgment was granted. On appeal, appellants challenge the summary judgment under three points of error. Only the second point of error, alleging that appellees' actions were extreme and outrageous, will be addressed, as it controls the disposition of this case on appeal.

STANDARD OF REVIEW

As the trial court's summary judgment did not specify the ground or grounds upon which it relied in granting appellees' motion, we will uphold the judgment if it was properly granted and supported by competent summary judgment evidence on any ground. *See Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1985).

The standard for reviewing a granting of summary judgment is well-established under TEX. R. CIV. P. 166a(c). Summary judgment is proper only when the movant meets his burden of establishing there are no genuine issues of material fact and proves he is entitled to judgment as a matter of law. *See Nixon v.*

Mr. Property Management Co., 690 S.W.2d 546, 548 (Tex. 1985). To be entitled to summary judgment, a defendant as movant must present evidence that either (1) conclusively negates at least one essential element of each of the plaintiff's causes of action, or (2) conclusively establishes each element of an affirmative defense to each claim. *See American Tobacco Co., Inc. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997). In deciding whether there exists a disputed fact issue precluding summary judgment, we must accept all proper summary judgment evidence favorable to the non-movant as true, indulge every reasonable inference in favor of the non-movant, and resolve all doubts in favor of the non-movant. *See Nixon*, 690 S.W.2d at 548-49. An appellate court may affirm a summary judgment on any of the movant's theories which has merit. *See Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 627 (Tex. 1996).

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

To recover for the tort of intentional infliction of emotional distress, a plaintiff must prove that (1) the defendant acted intentionally or recklessly; (2) the conduct was extreme and outrageous; (3) the defendant's actions caused emotional distress to plaintiff; and (4) the resulting emotional distress was severe. *See GTE Southwest Inc. v. Bruce*, 998 S.W.2d 605, 611 (Tex. 1999); *Twyman v. Twyman*, 855 S.W.2d 619, 621 (Tex. 1993).

We first address whether the facts presented below negate the second element of intentional infliction of emotional distress – that is, whether the Center's conduct was extreme and outrageous. To rise to the level of "extreme and outrageous," conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and thus be regarded as atrocious, and utterly intolerable in a civilized community." *Bruce*, 998 S.W.2d at 611. Generally, insensitive or rude behavior does not constitute extreme and outrageous conduct, nor do mere insults, indignities, threats, annoyances, petty oppressions or other trivialities rise to such level. *See id.* at 612. When repeated or ongoing harassment is alleged, the offensive conduct is evaluated as a whole. *See id.* at 615; *see also Household Credit Serv., Inc. v. Driscol*, 989 S.W.2d 72, 81-82 (Tex. App.—El Paso 1998, pet.

denied) (noting that while no single act as alleged by plaintiff arose to the level of intentional infliction of emotional distress, all of the acts taken together rose to an actionable level of conduct).

Whether a defendant's conduct may reasonably be regarded as so extreme and outrageous as to permit recovery is initially a question of law. *See Wornick Co. v. Casas*, 856 S.W.2d 732, 734 (Tex. 1993). Generally, liability for intentional infliction of emotional distress has only been found in those cases in which a recitation of the facts to an average member of the community would lead him to exclaim, "Outrageous!" *See* RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965); *Gearhart v. Eye Care Ctrs. of Am., Inc.*, 888 F. Supp. 814, 819 (S.D. Tex. 1995). Even conduct which may be illegal may not necessarily constitute conduct that rises to the level of extreme and outrageous. *See Gearhart*, 888 F. Supp. at 819.

In response to the motion for summary judgment, appellants set forth the following as allegations of extreme and outrageous conduct by appellees against appellants: refusing to allow them to eat or drink during treatment sessions; refusing to allow their support group to use the Center's meeting facilities, which forced them to meet in a noisy, mosquito-riddled parking lot; fraudulent, false and unacceptable entries made in their medical records, such as their "threat" to kill everyone at the Center, which could prevent them from receiving treatment elsewhere in the future; forcing them to endure pain and physical harm by inadequate patient care technicians who improperly inserted the dialysis machine needles into their veins; allowing appellants to "stick" themselves with the needles rather than granting their request for a competent technician; refusing to treat appellants, then reinstating their treatment sessions at times different from those of their friends; placing them on disciplinary probation, which violated their rights to privacy, subjected them to constant surveillance and required them to comply with staff demands or be expelled; refusing their request for disability stickers and interfering with their physician-patient right to privacy; cutting some of their scheduled treatment sessions short by a half-hour, causing them physical discomfort and fear of medical complications; instructing Center staff members to specifically "watch over" them and record their behavior in their medical records, and placing appellants under "armed guard" during their treatment sessions.

After reviewing these and other factual allegations presented below, we find that the Center's acts as complained of by appellants fall short of rising to the level of "extreme and outrageous" conduct as a matter of law. We do not find that appellees actions, taken as a whole, are so outrageous in character, or so extreme in degree, as to go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community. *See Bruce*, 998 S.W.2d at 611. At least one other court has reviewed similar allegations of conduct arising from a health care setting, and concluded that the evidence failed as a matter of law to support a claim for intentional infliction of emotional distress. *C.M. v. Tomball Reg'l Hosp.*, 961 S.W.2d 236 (Tex. App.—Houston [1st Dist.] 1997, no writ) (rude, insensitive and improper behavior by emergency room nurse to fifteen year-old rape victim held not to be extreme and outrageous as a matter of law, even though such conduct may have violated hospital protocols and statutory regulations). As appellees negated the "extreme and outrageous conduct" element of appellant's claim for intentional infliction of emotional distress, we overrule appellants' second point of error.

Having found that appellees negated at least one element of appellant's cause of action as a matter of law, we hold that summary judgment below was properly granted, and do not reach appellants' remaining points of error.

The judgment is affirmed.

/s/ Leslie Brock Yates
Justice

Judgment rendered and Opinion filed June 1, 2000.

Panel consists of Justices Yates, Hudson, and Fowler.

Do Not Publish — TEX. R. APP. P. 47.3(b).