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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2011

2090980

Joel Gunn and Donna Gunn

v.

KFC U.S. Properties, Inc., et al.

Appeal from Montgomery Circuit Court
(CV-09-900545)

On Application for Rehearing

BRYAN, Judge.

The opinion of April 8, 2011, is withdrawn, and the following is substituted therefor.

Joel Gunn ("Joel") and his wife Donna Gunn ("Donna") appeal from a summary judgment entered in favor of KFC U.S. Properties, Inc.; KFC Corporation; Yum! Brands, Inc.; and

Frank Schilleci, the owner of a KFC restaurant located in Montgomery (collectively "KFC"). We affirm.

Viewing the facts in the light most favorable to the Gunns, the nonmovants, as we are required to do on an appeal from a summary judgment, Hanners v. Balfour Guthrie, Inc., 564 So. 2d 412, 413 (Ala. 1990), we note the following facts. On May 6, 2007, Donna purchased some chicken at a KFC restaurant located in Montgomery, and she took the chicken home. Donna and Joel ate some of the chicken that night. Afterwards, Donna placed the remainder of the chicken in a plastic bag and placed it in a refrigerator. The next day, Joel took the chicken to work with him to eat as a snack. While at work, Joel removed a piece of chicken from the bag and discovered what he described as a human tooth embedded in the crust of the chicken. He did not take a bite of the piece of chicken that had a tooth in it. Shortly afterwards, Joel became dizzy, became "sick to his stomach," and vomited. He stated that, after vomiting, he "did not feel good" and felt "a little lightheaded." Joel informed his employer that he was sick, and he went home. At home, Donna, a nurse, gave Joel medication for an upset stomach and dizziness. Joel vomited

again that night.

The following day, Joel was treated by a doctor. The medical record from that visit states that Joel complained of nausea, vomiting, achiness, and dizziness or vertigo. The doctor prescribed Joel some medication, which he began taking. Joel testified that he vomited once more, but he could not remember which day he vomited. Joel testified that he missed three full days of work following the incident with the chicken. After returning to work, he continued to feel "a little weak to [his] stomach" for a few days. Joel testified that he suffered mental distress for several weeks due to the incident.

The Gunns sued KFC, alleging four claims. The first claim alleged that KFC had "warranted the merchantability of the food," that KFC had "warranted [that the food] was fit for human consumption and free from foreign items," and that KFC had breached that warranty. The first claim appears to be a claim of breach of implied warranty of merchantability. The second claim alleged breach of contract. The third claim alleged that KFC had "warranted that its items for public sale were fit for human consumption" and that KFC had breached that

warranty. The third claim appears to be a claim of breach of warranty of fitness for a particular purpose. The fourth claim is Donna's loss-of-consortium claim. The complaint does not allege a negligence claim. The Gunns sought compensatory and punitive damages.

KFC moved for a summary judgment, asserting (1) that KFC U.S. Properties, Inc., one of the named defendants, is the only proper defendant in this case; (2) that the alleged emotional distress suffered by Joel was trivial and that the Gunns had not provided sufficient evidence to sustain a negligence claim; and (3) that, with respect to the purported negligence claim, KFC is entitled to a summary judgment on the ground that the tooth in the piece of chicken did not cause any physical injury to Joel and that Joel was never in a "zone of danger." See AALAR, Ltd., Inc. v. Francis, 716 So. 2d 1141 (Ala. 1998) (articulating the "zone-of-danger" test to determine whether emotional-disturbance damages are recoverable in a negligence case). The summary-judgment motion stated that KFC was seeking a summary judgment on the Gunns' action "in its entirety." The Gunns filed a response to the summary-judgment motion, presenting arguments answering

each of the three assertions made by KFC in its motion. Following a hearing, the trial court granted KFC's summary-judgment motion, without specifying a reason. Following the trial court's denial of the Gunns' postjudgment motion, the Gunns appealed to this court. This court determined that it did not have appellate jurisdiction and, therefore, transferred the appeal to the supreme court. The supreme court then transferred the appeal to this court, pursuant to § 12-2-7(6), Ala. Code 1975.

> "In reviewing the disposition of a motion for summary judgment, 'we utilize the same standard as the trial court in determining whether the evidence before [it] made out a genuine issue of material fact,' Bussey v. John Deere Co., 531 So. 2d 860, 862 (Ala. 1988), and whether the movant was 'entitled to a judgment as a matter of law.' Wright v. Wright, 654 So. 2d 542 (Ala. 1995); Rule 56(c), Ala. R. Civ. P. When the movant makes a prima facie showing that there is no genuine issue of material fact, the burden shifts to the nonmovant to present substantial evidence creating such an issue. Bass v. SouthTrust Bank of Baldwin County, 538 So. 2d 794, 797-98 (Ala. 1989). Evidence is 'substantial' if it is of 'such weight and quality that fair-minded persons in the exercise of impartial judgment can reasonably infer the existence of the fact sought to be proved.' Wright, 654 So. 2d at 543 (quoting West v. Founders Life Assurance Co. of Florida, 547 So. 2d 870, 871 (Ala. 1989)). Our review is further subject to the caveat that this Court must review the record in a light most favorable to the nonmovant and must resolve all reasonable doubts against the movant. Wilma Corp. v. Fleming Foods of

> Alabama, Inc., 613 So. 2d 359 (Ala. 1993); Hanners v. Balfour Guthrie, Inc., 564 So. 2d 412, 413 (Ala. 1990)."

Hobson v. American Cast Iron Pipe Co., 690 So. 2d 341, 344 (Ala. 1997).

Procedurally, this is a peculiar case. The Gunns' complaint appears to have alleged claims of breach of implied warranty of merchantability, breach of contract, breach of warranty of fitness for a particular purpose, and loss of consortium. Although KFC's summary-judgment motion sought a summary judgment on the Gunns' action in its entirety, that motion focused on what KFC perceived to be a negligence claim alleged by the Gunns. However, the complaint does not appear to have alleged a negligence claim. Nevertheless, on appeal, the Gunns first argue that trial court erred in entering a summary judgment because, they say, "sufficient evidence existed as to the claim of negligence." Gunns' brief at 1 (emphasis and bold typeface omitted). In making that argument, the Gunns argue that they have submitted substantial evidence satisfying the current standard, first clearly articulated in AALAR, supra, concerning the recovery of damages for emotional distress on negligence claims. In

AALAR, our supreme court stated that, in negligence cases, recovery for emotional distress is limited "to those plaintiffs who sustain a physical injury as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." 716 So. 2d at 1147. This test is known as the "zone-of-danger" test. Id. In making arguments concerning the zone-of-danger test applied in negligence cases, the Gunns address a claim that their complaint does not appear to have actually alleged. Thus, their arguments concerning negligence do not appear to be relevant. Essentially, the Gunns ask us to reverse the trial court's judgment on the basis that they have established that they can successfully recover emotional-distress damages on a claim never actually alleged. "'[I]t is not the duty of the courts to create a claim which the plaintiff has not spelled out in the pleadings.' McCullough v. Alabama By-Prods. Corp., 343 So. 2d 508, 510 (Ala. 1977)." Ex parte Burr & Forman, LLP, 5 So. 3d 557, 566 (Ala. 2008) (declining to read a tort claim into a complaint when the language of the complaint concerned only an alleged breach of contract). Accordingly, we may not reverse on the basis of the Gunns' first argument.

The Gunns do not address any potential applicability of the zone-of-danger test regarding their actual claims. The zone-of-danger test does not control whether emotional-distress damages are recoverable in breach-of-contract and breach-of-warranty cases. See Morris Concrete, Inc. v. Warrick, 868 So. 2d 429, 438-40 (Ala. Civ. App. 2003) (stating that emotional-distress damages are generally not recoverable on a breach-of-contract claim and listing specific exceptions to that general rule); and Bowers v. Wal-Mart Stores, Inc., 827 So. 2d 63, 69, 70 (Ala. 2001) (stating that "it would violate the purpose for which the zone-of-danger rule [there specifically referring to the second part of the test articulated in AALAR] was created to apply that rule in a breach-of-contract case" and also stating that the rule does not apply to breach-of-warranty cases).

Next, the Gunns argue that the trial court erred because, they say, the trial court dismissed their "breach of standard of care" claim ex mero motu. Gunns' brief at 8. This argument is somewhat unclear. In attempting to win a reversal, the Gunns appear to have latched onto a statement made by KFC's attorney at the hearing on the summary-judgment motion. At

the hearing, KFC's attorney noted that KFC was not moving for a summary judgment on the issue of "breach of standard of care"; it appears that the attorney was simply referring to an element of the Gunns' supposed negligence claim. Significantly, the complaint does not purport to allege a "breach of standard of care" claim. In their brief, the Gunns argue that they alleged the "breach of standard of care" claim in paragraphs 12, 13, 17, 18, 21, 22, and 25 of the complaint. That is, the Gunns contend that they alleged the "breach of standard of care" claim in their claims of breach of implied warranty of merchantability, breach of contract, breach of warranty of fitness for a particular purpose, and loss of consortium. Their argument is somewhat confusing. At any rate, the Gunns' stated argument that the trial court ex mero motu entered a summary judgment on the "breach of standard of care" claim fails on its own terms because KFC moved the trial court to enter a summary judgment on the Gunns' action "in its entirety." Thus, the Gunns' second argument for reversal is unpersuasive.

In their reply brief, the Gunns attempt to argue issues that were not discussed in their principal brief. For

instance, the Gunns discuss a purported claim brought under the Alabama Extended Manufacturer's Liability Doctrine ("AEMLD"). The complaint did not allege an AEMLD claim. "We do not permit new matters to be raised for the first time in a reply brief." Birmingham Bd. of Educ. v. Boyd, 877 So. 2d 592, 594 (Ala. 2003).

In their two arguments properly presented to this court, the Gunns have failed to establish that the trial court erred. Of course, we consider only those arguments actually made by the Gunns. "An argument not made on appeal is abandoned or waived." Avis Rent A Car Sys., Inc. v. Heilman, 876 So. 2d 1111, 1124 n.8 (Ala. 2003). See also Galaxy Cable, Inc. v. Davis, 58 So. 3d 93, 99 (Ala. 2010) ("Failure by an appellant to argue an issue in its brief waives that issue and precludes it from consideration on appeal."). Considering the arguments actually presented, we affirm the trial court's summary judgment.

APPLICATION OVERRULED; OPINION OF APRIL 8, 2011, WITHDRAWN; OPINION SUBSTITUTED; AFFIRMED.

Pittman, J., concurs.

Thompson, P.J., concurs in the result, without writing.

Moore, J., dissents, with writing, in which Thomas, J., joins.

MOORE, Judge, dissenting.

Because I conclude that the main opinion fails to address the claims the parties agreed were to be considered by the trial court and because I believe the trial court erred in entering a summary judgment against Joel Gunn and Donna Gunn and in favor of KFC U.S. Properties, Inc.; KFC Corporation; Yum! Brands, Inc.; and Frank Schilleci (hereinafter referred to collectively as "the KFC defendants"), I respectfully dissent.

The main opinion correctly notes that, in their motion for a summary judgment, the KFC defendants asserted:

> "(1) that KFC U.S. Properties, Inc., one of the named defendants, is the only proper defendant in this case; (2) that the alleged emotional distress suffered by Joel was trivial and that the Gunns had not provided sufficient evidence to sustain a negligence claim; and (3) that, with respect to the purported negligence claim, [the KFC defendants are] entitled to a summary judgment on the ground that the tooth in the piece of chicken did not cause any physical injury to Joel and that Joel was never in a 'zone of danger.'"

___ So. 3d at ___ (citing AALAR, Ltd., Inc. v. Francis, 716 So. 2d 1141 (Ala. 1998)). The Gunns filed a brief in opposition to the KFC defendants' summary-judgment motion; in that brief, the Gunns responded only to the arguments presented by the KFC defendants; i.e., they asserted that

their complaint stated genuine issues of material fact as to their negligence claim and that Joel had been within the "zone of danger" sufficient to recover damages for negligent infliction of emotional distress.

The main opinion concludes that the summary judgment should not be reversed because the Gunns did not allege a negligence claim in their complaint. ___ So. 3d at ___. The Gunns specifically alleged that the KFC defendants had sold them food in an unmerchantable condition because it contained a foreign substance. Under Alabama law, a restaurant owes a duty to its customers to exercise reasonable care in the preparation and packaging of food, "i.e., ... a duty to sell [the customer] merchantable food or food that was not unreasonably dangerous." Flagstar Enters., Inc. v. Davis, 709 So. 2d 1132, 1139 (Ala. 1997). The assertion that the KFC defendants sold "unmerchantable" food could be construed as encompassing a negligence claim.

More importantly, after completing discovery, the KFC defendants did, in fact, understand that the Gunns were asserting a negligence claim. "Under [Rule 8, Ala. R. Civ. P.,] the prime purpose of pleadings is to give notice." Rule 8, Ala. R. Civ. P., Committee Comments on 1973 Adoption.

Under notice pleading, if a defendant, upon reviewing the wording of a complaint, deciphers it to incorporate a claim of negligence, which the plaintiff intended, then the complaint sufficiently states a negligence claim regardless of the exact terminology used. By responding to the summary-judgment motion as they did, the Gunns acknowledged their agreement with the KFC defendants' premise that they had alleged a negligence claim. Thus, the complaint cannot now be construed differently on appeal.[1]

In the summary-judgment motion, the KFC defendants asserted only that the Gunns' negligence claim failed because Joel had not suffered a physical injury and because he was not sufficiently within the "zone of danger" to sustain damages for negligent infliction of emotional distress. However, the

[1]To the extent that the complaint could be construed as alleging breach-of-warranty and breach-of-contract claims, the Gunns do not assert that the trial court committed any error in entering the summary judgment on those claims; therefore, those claims are consider waived. Boshell v. Keith, 418 So. 2d 89, 92 (Ala. 1982) ("When an appellant fails to argue an issue in its [initial] brief, that issue is waived."). The Gunns do belatedly assert in their reply brief that the trial court erred in entering a summary judgment on any claim based on the Alabama Extended Manufacturer's Liability Doctrine, but we cannot consider that argument. See McGough v. G & A, Inc., 999 So. 2d 898, 905 n.3 (Ala. Civ. App. 2007) ("Ordinarily, we do not consider issues raised for the first time in a reply brief.").

evidence, when viewed in a light most favorable to the Gunns, see Flagstar, 709 So. 2d at 1134, proves otherwise. The record shows that the Gunns had purchased and partially consumed a batch of chicken from the KFC defendants. Joel packed the remainder for consumption the next day at lunch. As he was about to eat, he noticed what appeared to be a human tooth in one of the pieces of chicken. Joel did not actually bite into that piece before becoming physically ill and emotionally upset.

I conclude that the facts of this case are sufficiently similar to those of Flagstar Enterprises, Inc. v. Davis, supra, to survive the KFC defendants' summary-judgment motion. In Flagstar, supra, the plaintiff ordered a biscuit and gravy from a Hardee's restaurant; Hardee's served the biscuit and gravy in a lidded styrofoam container. Id. at 1135. While distracted, the plaintiff began eating the biscuit and gravy without opening the container fully. Id. After taking a few bites, she opened the lidded container fully and saw blood on the top of the container. Id. at 135-36. The plaintiff, who became distraught at eating contaminated food, was subsequently tested for hepatitis and other infectious diseases; her tests were negative. Id. at 1136.

The plaintiff sued Flagstar, the owner of Hardee's, seeking damages under theories of negligence and under the Alabama Extended Manufacturer's Liability Doctrine ("AEMLD"). Id. at 1133-34. The trial court submitted the plaintiff's claims to the jury, and the jury awarded the plaintiff damages. Id. at 1133-34. Flagstar moved for a judgment as a matter of law on the plaintiff's negligence claim, asserting that the plaintiff had failed to present evidence indicating that it had breached a duty owed to the plaintiff in preparing and serving her food. The trial court denied that motion, and Flagstar appealed. Id. at 1139-40.

Our supreme court affirmed, recognizing that, from the evidence presented, the jury reasonably could have concluded that Flagstar had breached its duty by serving contaminated food and that the plaintiff had suffered emotional distress as a result. Id. at 1140. Addressing the issue of negligent infliction of emotional distress, the court recognized that

> "[d]amages for emotional distress may be awarded in a negligence case, even in the absence of physical injury. Taylor v. Baptist Medical Center, Inc., 400 So. 2d 369 (Ala. 1981). See also, Reserve National Ins. Co. v. Crowell, 614 So. 2d 1005, 1011 (Ala. 1993), cert. denied, 510 U.S. 824, 114 S.Ct. 84, 126 L.Ed.2d 52 (1993), wherein this Court recognized the difference between a claim alleging negligent infliction of emotional distress and a claim not based on infliction of emotional distress, but

> pursuant to which damages for emotional distress may nonetheless be awarded."

Flagstar, 709 So. 2d 1141 n.5. See also AALAR, 716 So. 2d at 1147 (discussing Flagstar, supra, and recognizing that it was reasonably foreseeable that the plaintiff in Flagstar would be placed at risk of physical injury as a result of Flagstar's serving her contaminated food and, thus, that she had been within the "zone of danger" and was entitled to recover for emotional distress on her negligence claim).

The similarities between Flagstar, supra, and the instant case are compelling. The Gunns allege that the KFC defendants served contaminated chicken for Joel's consumption, that Joel ate a portion of the chicken served to him, that, upon observing the contamination in the chicken, he became upset and vomited, and that he required medical treatment to deal with his symptoms. As recognized in AALAR, supra, Joel was within the zone of danger created by the KFC defendants' purported service of contaminated food.

For the above-stated reasons, I would reverse the summary judgment entered in favor of the KFC defendants and remand the cause for further proceedings. I, therefore, respectfully dissent.

Thomas, J., concurs.