IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

FELIX ABEL BORUNDA and MARTHA DOLORES BELTRAN,
Plaintiffs/Appellants,

v.

EVERARDO FLANDES RICO, *Defendant/Appellee*.

No. 1 CA-CV 12-0859

FILED 12-5-2013

Appeal from the Superior Court in Maricopa County
No. CV2010-019991
The Honorable George H. Foster, Judge

AFFIRMED

COUNSEL

Law Office of Jimmy Borunda, Phoenix
By Jimmy Borunda

Counsel for Plaintiffs/Appellants

Thomas Thomas & Markson PC, Phoenix
By Neal B. Thomas and Brian D. Rubin

Counsel for Defendant/Appellee

MEMORANDUM DECISION

Judge Donn Kessler delivered the decision of the Court, in which Presiding Judge Andrew W. Gould and Judge Michael J. Brown joined.

K E S S L E R, Judge:

¶1 Plaintiffs/Appellants Felix Abel Borunda and Martha Dolores Beltran appeal from the superior court's decision granting two partial summary judgments in favor of Defendant/Appellee Everardo Flandes Rico. Appellants argue that the court wrongly found that Rico, who had negligently driven his vehicle into their home, was not liable to them for negligent infliction of emotional distress or for loss of consortium between themselves and Beltran's children. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL HISTORY

¶2 At approximately 11:00 p.m. on June 21, 2008, Rico drove his vehicle into the home of Borunda and Beltran, who were married at the time. Also in the home were Beltran's two minor children, Rene and Martha Sophia, and one of Martha Sophia's friends.

¶3 Rene, age eleven, was seated at his desk in his room when he heard a noise, the vehicle came through the wall into his room towards him and struck the desk he was seated behind. Broken wood scratched his legs and his face, drawing blood. The vehicle stopped partially in his room and partially in his sister's room. He picked up debris that had fallen on him and tried to open his sister's door but could not.

¶4 Martha Sofia, fourteen years old, was in her room with her friend watching television when she heard a noise and realized that a car was in her room. Neither child was hit by the vehicle or struck by any furniture or debris. She could not see much because dust was everywhere. The furniture had been pushed against the door, so they could not open it.

¶5 Borunda and Beltran were in a room that was not struck by the vehicle, and they did not see the vehicle strike the house. Borunda heard a bang. Beltran was asleep and did not realize a vehicle had struck the house until after the impact, when she heard her son screaming.

Eventually, they were able to open the door to Martha Sofia's room to let the girls out.

¶6 Paramedics examined Rene at the scene and bandaged the wounds on his legs. Rene did not require stitches, and he did not go to the hospital.

¶7 Rene had pain in his foot and his head; he saw a doctor about ten days after the accident, and the pain resolved. Rene had nightmares and difficulty sleeping for several weeks, became easy to anger, and was frequently afraid. He saw a psychologist four or five times while he was in the sixth grade, after which his nightmares stopped. Rene was left with small, barely visible and fading marks on his legs.

¶8 Martha Sofia did not see a medical doctor after the accident, but her parents took her once to see a psychologist. She worried that another car would strike the house, but had no trouble sleeping. She reported no problems in school after the incident.

¶9 Beltran would comfort her son at night when he had nightmares, which put a strain on her marriage. She also feared that another car would hit the house and was afraid to continue to live at the residence. She had difficulty sleeping. Eventually, she and Borunda divorced.

¶10 Borunda and Beltran filed suit against Rico, alleging severe emotional distress.[1] Rico filed separate motions for partial summary judgment on their claims for negligent infliction of emotional distress and loss of consortium.[2]

¶11 Rico argued that Borunda and Beltran could not prove negligent infliction of emotional distress because neither was in the "zone of danger," and any emotional anguish they experienced was not manifested as a physical injury. Rico argued they could not maintain a claim for loss of a child's consortium because none of the children sustained any type of severe injury, and nothing indicated that the injuries

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[1] Beltran also filed suit on behalf of Rene and Martha Sophia, and Juanita and Fernando Bejarano filed suit on behalf of Martha Sofia's friend. Those claims were settled.

[2] The complaint did not identify the nature of the claims being alleged. Rico explained that his motions were based on his understanding of the claims after having taken discovery.

incurred interfered with the children's capacity to have a relationship with their parents.

¶12 In responding to the summary judgment motion on the emotional distress claim, Borunda and Beltran argued generally that summary judgment was not appropriate and questioned whether summary judgment was even possible on "specific items of damages as in the instant motion." They argued that they had presented evidence on each of the elements of a negligent infliction of emotional distress claim, but did not identify the relevant evidence. They argued that the entire house should be viewed as the zone of danger. They requested that they be given leave under Arizona Rule of Civil Procedure 56(f) ("Rule 56(f)") to submit affidavits from psychologists to rebut the motion, if the court believed that they had not presented enough evidence to withstand summary judgment. In response to Rico's motion regarding the loss of consortium claim, Borunda and Beltran again questioned whether granting summary judgment was even permitted on their claim by Rule 56 and the Arizona Constitution. They further argued that attached affidavits presented at least a "minimally-triable issue" for a jury.

¶13 Simultaneously submitted were affidavits from each of the plaintiffs in which they avowed that their "love and companionship with [Rene] has been compromised and affected because of the horrible scar on his right leg" and that their "close, loving relationship and bond has been severely affected" by Rico's actions. Also attached were two two-page unsigned documents purported to be reports of psychological evaluations of Borunda and Beltran by psychologist Wayne H. Holtzman. The reports stated it was "reasonable to conclude" that the event was a "significant factor" in causing the divorce and in "creating much psychological and economic stress for the whole family."

¶14 Rico objected to Beltran's affidavit on the grounds that she had previously testified at deposition that the accident affected her emotional state only regarding her safety and marriage, and had testified that Rene's scars were not visible. Rico further objected to the psychologist's reports as hearsay and asserted that, even if not hearsay, they did not establish any physical manifestation of any emotional disorder and did not raise any issue of material fact.

¶15 The court granted both motions for partial summary judgment. The court found that Borunda and Beltran had failed to show any evidence to support a claim for negligent infliction of emotional distress. Specifically, the parents were not in the zone of danger, Beltran

was sleeping at the time, neither Borunda nor Beltran saw an injury occur, and neither of them manifested a physical injury as a result of mental anguish. The court rejected plaintiffs' argument that their divorce resulted from the distress, noting that they divorced because Beltran no longer wanted to live in the home and that they were already having marital difficulties.[3] The court noted that divorce was not a physical injury. Further, the court found that Borunda and Beltran had not presented evidence showing a genuine issue of fact to withstand summary judgment on Rico's motion regarding loss of consortium. Specifically, the court found no evidence of a "serious, permanent and disabling injury to the children."

¶16 Borunda and Beltran filed a motion for reconsideration, arguing, among other things, that the court exceeded its jurisdiction in awarding partial summary judgment on "particular items of damage claims" and that the court wrongly failed to grant them time to provide supplemental affidavits under Rule 56(f). Attached to the motion was an affidavit from Dr. Holtzman swearing that the reports provided by Borunda and Beltran were his findings and conclusions, and offering his own opinion that Borunda and Beltran were within the zone of danger.

¶17 The court denied the motion to reconsider, noting that it did not recall a Rule 56(f) motion being filed and that the docket did not reflect the filing of such a motion.

¶18 The court entered judgment in favor of Rico on the loss of consortium and negligent infliction of emotional distress claims, determined that no other claims remained requiring a trial, and entered final judgment. The court noted that it granted summary judgment to Rico on the claim for negligent infliction of emotional distress with respect to both the children and the parents. Borunda and Beltran timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (Supp. 2013).

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[3] Beltran had testified at deposition that she and Borunda married in January 2008, that she moved out to live with friends in March 2008 because of cultural differences, that she moved back with Borunda in May, and the incident occurred three weeks later.

DISCUSSION

¶19 Summary judgment may be granted when "there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Ariz. R. Civ. P. 56(a). Summary judgment should be granted "if the facts produced in support of the claim or defense have so little probative value, given the quantum of evidence required, that reasonable people could not agree with the conclusion advanced by the proponent of the claim or defense." *Orme Sch. v. Reeves*, 166 Ariz. 301, 309, 802 P.2d 1000, 1008 (1990). In reviewing a motion for summary judgment, we determine de novo whether any genuine issues of material fact exist and whether the trial court properly applied the law. *Eller Media Co. v. City of Tucson*, 198 Ariz. 127, 130, ¶ 4, 7 P.3d 136, 139 (App. 2000). We view the facts and the inferences to be drawn from those facts in the light most favorable to the party against whom judgment was entered. *Scalia v. Green*, 229 Ariz. 100, 102, ¶ 6, 271 P.3d 479, 481 (App. 2011).

I. Appropriateness of Summary Judgment

¶20 Appellants argue that summary judgment cannot be granted to resolve factual issues or to take damages issues away from the jury. They further argue that taking damages issues from the jury violates the Arizona Constitution, Article 6, Section 27, which precludes a judge from commenting to or charging a jury on factual matters, and Article 18, Sections 5 and 6, which reserve to the jury the defenses of contributory negligence and assumption of the risk, and which preclude the abrogation of the right to recover damages for injuries, respectively.

¶21 The superior court here did not use summary judgment to resolve factual issues. Rather, the court found that Borunda and Beltran had failed to produce evidence showing a genuine issue for trial, a circumstance for which summary judgment is appropriate and intended. *See Orme Sch.*, 166 Ariz. at 310, 802 P.2d at 1009. Further, the court did not take from the jury the issue of damages. The question before the court was whether Borunda and Beltran had produced sufficient evidence to create an issue of fact as to the elements of the claimed causes of action and, as such, the question related to liability, not damages. None of the cited constitutional provisions apply. The court was not commenting to a jury on factual matters, the defenses of contributory negligence and assumption of the risk were not at issue, and the plaintiffs' right to recover damages was not abrogated.

II. Denial of Relief Under Rule 56(f)

¶22 Appellants argue that the superior court wrongly concluded that they failed to file a motion for relief pursuant to Rule 56(f) and that the court should have granted their request for additional time to allow for further discovery before ruling on the motions for summary judgment. We will not disturb the trial court's decision on a Rule 56(f) request absent an abuse of discretion. *Birth Hope Adoption Agency, Inc. v. Doe*, 190 Ariz. 285, 287, 947 P.2d 859, 861 (App. 1997).

¶23 A party moving for relief pursuant to Rule 56(f) must submit a sworn statement specifically describing the reason justifying the delay. *Simon v. Safeway, Inc.*, 217 Ariz. 330, 333, ¶ 6, 173 P.3d 1031, 1034 (App. 2007). The affidavit must inform the court of "(1) the particular evidence beyond the party's control; (2) the location of the evidence; (3) what the party believes the evidence will reveal; (4) the methods to be used to obtain it; and (5) an estimate of the amount of time the additional discovery will require." *Lewis v. Oliver*, 178 Ariz. 330, 338, 873 P.2d 668, 676 (App. 1993).

¶24 Borunda and Beltran's only request for additional time under Rule 56(f) appears in their response to Rico's motion for partial summary judgment on the intentional infliction of emotional distress claim. Borunda and Beltran merely asked for "leave . . . to submit affidavits from psychologists etc." if the court found the evidence already presented was insufficient. No affidavit including the required information accompanied the request. Because Borunda and Beltran did not make an appropriate motion pursuant to Rule 56(f), we can find no abuse of discretion in the trial court's decision not to allow additional time for discovery.

III. Negligent Infliction of Emotional Distress

¶25 Appellants argue that the court wrongly granted summary judgment to Rico on their claim for negligent infliction of emotional distress. They contend the court erred in concluding that they had to have suffered a direct impact or physical injury to maintain the claim and in finding that they were not within the zone of danger.

¶26 A plaintiff may recover damages for mental anguish or emotional distress precipitated by fright, shock or other mental disturbance resulting from conduct by the defendant that placed the plaintiff in fear for his own safety or security. *Quinn v. Turner*, 155 Ariz. 225, 227-28, 745 P.2d 972, 974-75 (App. 1987); Restatement (Second) of

Torts § 313 cmt. d (1965) (hereafter "Restatement"). A plaintiff may not recover on a claim for negligent infliction of emotional distress, however, unless the mental anguish resulting from the defendant's conduct is accompanied by, manifests as, or develops into bodily harm. *Keck v. Jackson*, 122 Ariz. 114, 115-16, 593 P.2d 668, 669-70 (1979); *Monaco v. HealthPartners of S. Ariz.*, 196 Ariz. 299, 302, ¶ 7, 995 P.2d 735, 738 (App. 1999); *Gau v. Smitty's Super Valu, Inc.*, 183 Ariz. 107, 109, 901 P.2d 455, 457 (App. 1995); *DeStories v. City of Phoenix*, 154 Ariz. 604, 608, 744 P.2d 705, 709 (App. 1987). Transitory physical phenomena, such as crying, nightmares, insomnia, and headaches, that are themselves inconsequential and do not result in substantial bodily harm, cannot support a claim for negligent infliction of emotional distress. *Monaco*, 196 Ariz. at 302, ¶ 8, 995 P.2d at 738; *Gau*, 183 Ariz. at 109, 901 P.2d at 457; *Burns v. Jaquays Mining Corp.*, 156 Ariz. 375, 378-79, 752 P.2d 28, 31-32 (App. 1987); *see also* Restatement § 436A cmt. c. However, a claim may be sustained where such symptoms persist so as to result in a long-term physical illness or mental disturbance. *Monaco*, 196 Ariz. at 302-03, ¶ 8, 995 P.2d at 738-39; Restatement § 436A cmt. c. When a plaintiff seeks recovery for emotional distress caused by an injury to a third person, the plaintiff must not only suffer a physical manifestation of that mental distress, but must also have witnessed an injury to a closely related person and must have been within the zone of danger so as to have been subjected to an unreasonable risk of bodily harm created by the defendant. *Pierce v. Casas Adobes Baptist Church*, 162 Ariz. 269, 272, 782 P.2d 1162, 1165 (1989).

¶27 Appellants appear to assert their claim both as individuals who themselves suffered a traumatic experience and as parents who witnessed an injury to their child. Both theories required Appellants to show they suffered physical manifestations of their mental distress that were not transitory, temporary, or inconsequential. *See Monaco*, 196 Ariz. at 303, ¶ 12, 995 P.2d at 739; *Gau*, 183 Ariz. at 109, 901 P.2d at 457; Restatement § 436A cmt. c. The record before us does not contain evidence of any physical manifestation of mental distress sufficient to present an issue of fact as to either claim.

¶28 In *Monaco*, plaintiff brought a medical malpractice suit after he was erroneously injected with a substance that increased his risk of developing leukemia. 196 Ariz. at 300, ¶¶ 2-3, 995 P.2d at 736. Plaintiff testified that he believed he would develop cancer, that he had trouble sleeping and when he did sleep he frequently dreamed about getting leukemia, that he sometimes walked around the house all night, that he had lost patience with his children and that he did not enjoy visits with his grandchildren. *Id*. at 303, ¶ 9, 995 P.2d at 739. His wife corroborated his

testimony, recounting that plaintiff would jump all over the bed at night, that he would grind his teeth, that she would wake and he would not be there, or if he was there, he would be soaking. *Id*. at ¶ 10. A psychologist testified that after treating the plaintiff for six months, the psychologist diagnosed plaintiff's condition as post-traumatic stress disorder and explained that this was a medical condition, and declared that plaintiff would never be cured. *Id*. at ¶ 11. This court found that, based on the record, plaintiff's emotional distress was not transitory or inconsequential, but that plaintiff had sustained substantial, long-term emotional disturbances sufficient to support a claim for negligent infliction of emotional distress. *Id*. at ¶ 12.

¶29 Here, Borunda testified that he and Beltran experienced marital problems because Beltran would sleep with her son to comfort him when he had nightmares, and because she was afraid another car would crash into the house and so wanted him either to move or put up a fence. He testified that he coped with the stress after the accident by going to church and talking to the pastor. He also testified that he saw a psychologist once in December 2010 because he was under a lot of stress at the house and was living by himself, which he attributed to the accident. Appellants provided what purported to be the psychologist's evaluation,[4] which reported that Borunda said the accident ruined his marriage, caused him to lose work, and required that the house be repaired. Borunda reported that he often became depressed over "everything that has happened since the crash."[5]

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[4] The unsworn document and the second one for Beltran were on the letterhead of Wayne H. Holtzman, Ph.D. Although Rico asserted that the documents were hearsay, the court does not appear to have excluded them. Because our review is limited to evidence before the court at the time the court rules on the motion, we do not consider the affidavit by Dr. Holtzman submitted by Borunda and Beltran with their motion for reconsideration. *See Cella Barr Assocs., Inc. v. Cohen,* 177 Ariz. 480, 487 n.1, 868 P.2d 1063, 1070 n.1 (App. 1994) (precluding consideration of transcripts attached to a motion for reconsideration because they were not presented to the court when it ruled on the motion).

[5] Dr. Holtzman's report also indicates that Borunda feared that he developed psoriasis as a result of the stress from the crash. In his deposition, however, Borunda testified that he had had the psoriasis for about twenty years.

¶30 Beltran testified that the accident affected "her safety and . . . matrimony." She testified that she could not sleep, and that she did not want to live in that house any longer. She also testified that she went to see the psychologist more than two years after the accident because she was depressed because of the accident, because her marriage had ended, and because she had no money. Dr. Holtzman's evaluation of Beltran recounted that Beltran indicated that having to move out of the house after the accident was disruptive and caused marital difficulty. She slept with Rene for several weeks after the incident because he was having nightmares, and once they moved back into the house she and the children feared that another car would crash into the house, but Borunda would not build a railing around the house for protection. She and her husband went for counseling at their church, but did not go to follow-up sessions. She noted that they had financial difficulties, that she started working, which made her feel good because it kept her occupied, and that she and her children moved out in January 2009. She told Dr. Holtzman that she and her husband had marital difficulties before, but that it had become worse after the accident. She also told him she was having a very difficult time, and was getting financial assistance from friends. She reported being depressed less often than before but sometimes felt bad, lonely, trapped, and desperate.

¶31 Both evaluations found it reasonable to conclude that the crash "was a significant factor in causing the dissolution of [their] marriage, and in creating much psychological and economic stress for the whole family."

¶32 Appellants' deposition testimony and the psychologist's reports do not present sufficient evidence showing that either Borunda or Beltran suffered any substantial long-term physical illness or mental disturbance arising from mental anguish caused by the accident. Although both claimed to suffer from periodic depression and blamed their financial and marital difficulties on the accident, neither complained of recurring debilitating physical symptoms, such as those described in *Monaco*. In addition, unlike in *Monaco*, Dr. Holtzman did not diagnose any permanent medical condition, but found instead that the accident contributed to their "stress." Their evidence suggests that any emotional distress arose from the aftermath of the incident, such as from the disruption caused by having to move out of the home during repairs and the need to comfort Rene, and did not arise from fear for their own safety or that of their child during the actual experience of the crash. Damages for negligent infliction of emotional distress must arise from the emotional

disturbance that occurred at the time of the incident, not after. *See Keck*, 122 Ariz. at 116, 593 P.2d at 670; Restatement § 436 cmt. c.

¶33 Because Appellants have not shown evidence of a physical manifestation of emotional distress arising from the incident, they cannot maintain a claim for negligent infliction of emotional distress based either on their direct experience from the crash or as the parents of an injured child.

¶34 In addition, to maintain a claim for negligent infliction of emotional distress resulting from an injury to a third person, a plaintiff must witness an injury to a closely related person. *Pierce*, 162 Ariz. at 272, 782 P.2d at 1165. Rene, the only person who suffered any kind of injury as a result of the collision, suffered only minor abrasions that did not even require stitches or a visit to the hospital. Although the circumstances of the event were undoubtedly traumatic, no reasonable person could conclude that Appellants had suffered emotional distress based on witnessing such minor injuries.

¶35 Because Appellants' claims fail on this element, and because Appellants have not shown evidence of a physical manifestation of emotional distress arising from the incident, we do not address whether they were within the zone of danger.

IV. Loss of Consortium

¶36 Borunda and Beltran also argue that the court wrongly granted summary judgment to Rico on their claim of loss of consortium with the children. [6]

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[6] On appeal, Appellants also assert that they pursued a claim for loss of consortium between themselves. Our review of the record, however, does not show that this claim was presented in superior court. The complaint failed to articulate any specific claims. It presented Appellants' version of the facts and generally asserted that they had suffered severe emotional distress, property damage, a divorce, expenses, lost wages, and inconvenience. Rico's motion for partial summary judgment on the loss of consortium claim was limited to a loss of consortium between the parents and the children, as was the Appellants' response. After the children plaintiffs had settled, the court determined that no issues remained to go to trial. Nothing in the record indicates that Borunda and Beltran ever advised the court at that time that a claim for loss of consortium between

¶37 Loss of consortium is defined as "a loss of capacity to exchange love, affection, society, companionship, comfort, care and moral support." *Pierce*, 162 Ariz. at 272, 782 P.2d at 1165. Parents may maintain a cause of action for the loss of consortium of a child "when the child suffers a severe, permanent, and disabling injury that substantially interferes with the child's capacity to interact with his parents in a normally gratifying way." *Id*. The injury can be psychological or emotional, and need not be catastrophic. *Barnes v. Outlaw*, 192 Ariz. 283, 286, ¶ 10, 964 P.2d 484, 487 (1998); *Pierce*, 162 Ariz. at 272, 782 P.2d at 1165. Whether the injury substantially interferes with the child's capacity to have a normal relationship with his parents is a question of law for the court to decide. *Pierce*, 162 Ariz. at 272, 782 P.2d at 1165.

¶38 Appellants provided no evidence that any of the children suffered any severe, permanent, and disabling injury, whether physical or psychological, that significantly interfered with their capacity for a normal relationship with their parents. Rene, the most seriously injured, received only minor physical injuries. Although he also suffered some emotional trauma in the form of nightmares and behavioral problems, the record contains no evidence that these injuries were severe, permanent, or disabling, such that he was rendered incapable of exchanging love, affection, society, companionship, comfort, care, or moral support with his

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themselves was still pending. Because this theory of Appellants' claim was not presented to the trial court, we do not address it. *CDT, Inc. v. Addison, Roberts & Ludwig, CPA, P.C.*, 198 Ariz. 173, 178, ¶ 19, 7 P.3d 979, 984 (App. 2000) (stating we consider only those arguments, theories, and facts properly presented in superior court).

parents. The superior court's ruling granting summary judgment to Rico on the claim for loss of consortium is affirmed.

CONCLUSION

¶39 The judgment of the superior court is affirmed.