Rel: October 18, 2019

ALABAMA COURT OF CIVIL APPEALS

OCTOBER TERM, 2019-2020

2180399

Kevin Forbes and Maria Rosa Forbes

v.

Glen L. Brawley

Appeal from Shelby Circuit Court
(CV-18-900017)

PER CURIAM.

Kevin Forbes ("Kevin") and his wife, Maria Rosa Forbes ("Maria Rosa"), appeal from a judgment of the Shelby Circuit Court dismissing their complaint against Dr. Glen L. Brawley,

an orthodontist, alleging claims of breach of contract, misrepresentation, and fraudulent inducement.

The record indicates the following. On January 8, 2018, Kevin filed a civil action alleging a claim of breach of contract against Dr. Brawley. In the complaint, Kevin averred that he was to pay Dr. Brawley $5,150 pursuant to what he said were "specified payment options" for braces for Maria Rosa. Kevin made clear in the complaint that he was not Dr. Brawley's patient. Maria Rosa was not originally a party in the action.

As an exhibit to the complaint, Kevin attached a form indicating that, on April 21, 2014, Dr. Brawley agreed to provide orthodontic treatment to Maria Rosa for a total of $5,150. At that time, Dr. Brawley offered three payment options for the treatment: (1) no down payment and extended payment plans of 24 to 60 months; (2) an initial down payment of $1,150 and 20 interest-fee payments of $200 each for the remaining $4,000; and (3) payment in full, for which Dr. Brawley gave a discount of 4% or $206. The payment-options form stated: "Treatment times differ from patient to patient.

These payment options do not correspond to the estimated treatment time but are merely provided for your convenience."

As a second exhibit to the complaint, Kevin included an e-mail he received on October 6, 2015, from April Floyd, Dr. Brawley's financial coordinator. The e-mail, sent a year and a half after Maria Rosa became Dr. Brawley's patient, informed Kevin that Maria Rosa was "a couple of visits" away from the appointment at which she could expect to have her braces removed. However, Maria Rosa's account balance was $3,995. That amount would need to be paid in full before the "removal appointment" could be scheduled, Floyd said. That same day, Kevin sent an e-mail to Dr. Brawley, stating:

> "Good evening Glen!
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> "You may or may not be aware but I spoke to April early last month and made a payment of $1,000. I informed her then that I will be paying you at least $1,000 a month until the balance is paid or if a large payment comes to me, then the balance would be paid in full. At least another $1,000 will be paid this coming Monday.
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> "We appreciate your patience and kindness. However, with the e-mail below [the October 6, 2015, e-mail from Floyd], to say your office is not going to remove Maria Rosa's braces unless payment is paid in full shows an extreme lack of communication between the staff and you."

In the complaint, Kevin asserted that he was "working on contract ... and he was being paid in sporadic lump sum amounts." Kevin stated that, when Dr. Brawley "threatened" to leave Maria Rosa's braces on even after they were ready to come off, Kevin and Dr. Brawley "agreed on an alternate payment arrangement." Kevin alleged that, after Dr. Brawley had been paid $4,450 of the total $5,150 owed "under the alternative payment arrangement that [Dr. Brawley] had agreed to," Dr. Brawley "abruptly took off" Maria Rosa's braces approximately six months early. Kevin alleged that the reason Dr. Brawley gave him for removing Maria Rosa's braces was that Kevin had not paid Dr. Brawley "pursuant to one of the payment options." Kevin alleged that Dr. Brawley's conduct breached the "financial arrangement" he had reached with Dr. Brawley. As a result, Kevin said, he was going to have to pay for Maria Rosa to have braces put on again. Kevin requested damages in the amount of $14,500 for breach of contract, plus an additional $29,000 for mental anguish.

On February 20, 2018, Dr. Brawley filed a motion to dismiss Kevin's complaint. As grounds for his motion, Dr. Brawley asserted that, because Kevin was not a patient of his,

Kevin lacked what Dr. Brawley characterized as "standing" to bring the action and that only Maria Rosa would have "standing" to sue him for any unsatisfactory result if the braces had been removed prematurely. Maria Rosa was not asserting the claim of breach of contract, however.

Dr. Brawley contended that, in the complaint, Kevin had asserted the breach-of-contract claim as he did in an attempt to avoid the application of the Alabama Medical Liability Act ("the AMLA"), § 6-5-480 et seq. and § 6-5-540 et seq., Ala. Code 1975, which governs all actions that sound in contract or in tort based on an alleged "medical injury." Dr. Brawley argued that the complaint failed to meet the pleading requirements of the AMLA and was barred by the statute of limitations applicable under the AMLA.

Additionally, Dr. Brawley asserted that Kevin could not prove the existence of a contract with Dr. Brawley, that any alleged oral agreement regarding payment options was not a "contract" between Kevin and Dr. Brawley, and that, even if any such agreement existed and could be deemed an oral contract, it would violate the Statute of Frauds because the orthodontic services Dr. Brawley was to provide Maria Rosa

could not have been performed within one year. Any subsequent oral promise Kevin might have made to assume Maria Rosa's debt or to modify the payment plan was unilateral, Dr. Brawley said, and not an agreement made with him. Dr. Brawley further asserted that Kevin had failed to pay the $5,150 pursuant to any of the payment plans and that, therefore, based on the details and exhibits of his own complaint, Kevin had demonstrated that, if the payment-options form constituted a contract, Kevin had violated its terms such that he could not prevail on a breach-of-contract claim against Dr. Brawley. Finally, Dr. Brawley asserted that Kevin had failed to articulate that he had been damaged in any way.

A hearing was set to consider the motion to dismiss. Kevin then filed his first amended complaint alleging the same count of breach of contract, but removing the language contained in the first complaint asserting that Maria Rosa's braces had been removed before "her teeth were properly fixed." Kevin also responded to the motion to dismiss, arguing that he had not made a claim for a medical injury, so the AMLA was not applicable. Kevin attached to his response the comprehensive financial history for Maria Rosa with Dr.

Brawley. Kevin's name does not appear on that document, which is in Maria Rosa's name. The document indicates that, from September 8, 2014, when treatment began and the initial fee and installment payments were set to begin, the Forbeses had failed to make almost all of their monthly payments and, from September 8, 2014, to September 1, 2015, they had paid a total of $450. Between September 1, 2015, and January 11, 2016, the Forbeses made four payments to Dr. Brawley, bringing the total amount of the payments to $4,450 and leaving a balance of $995.

Dr. Brawley responded with a motion to dismiss the first amended complaint, reasserting the same grounds as reasons why the breach-of-contract claim was due to be dismissed.

A hearing was held April 4, 2018, on Dr. Brawley's motions to dismiss. At the hearing, the trial court questioned Kevin's ability to assert a breach-of-contract action on behalf of Maria Rosa, pointing out that Kevin did not have braces and that he had not been damaged. Kevin's attorney replied that Kevin was "out the money he paid Dr. Brawley and now he's going to have to pay somebody else to fix his wife's teeth from the premature removal of the braces by

Dr. Brawley." On April 4, 2018, the trial court entered an order dismissing Kevin's complaint, as amended. Other than stating that Dr. Brawley's motions to dismiss were well taken, the trial court did not specify its reasons for dismissing Kevin's action.

On April 6, 2018, Kevin filed a second amended complaint pursuant to Rule 78, Ala. R. Civ. P.[1] In the second amended complaint, Kevin alleged that he had been damaged "in that he did not receive the benefit of his bargain." Kevin also added a count alleging misrepresentation. Specifically, Kevin alleged that Dr. Brawley had represented that he would leave Maria Rosa's braces on until May 2016 but had actually removed them in February 2016.

On April 16, 2018, Kevin filed a third amended complaint. For the first time, Maria Rosa was named as a plaintiff in the action regarding a new count--fraudulent inducement--based on new alleged facts. She still was not included as a plaintiff regarding the claims alleging breach of contract and

[1]Rule 78, Ala. R. Civ. P., provides, in part, that, "[u]nless the court orders otherwise, an order granting a motion to dismiss shall be deemed to permit an automatic right of amendment to the pleading to which the motion is directed within ten (10) days." There is no dispute that Kevin amended his complaint within the 10-day period.

misrepresentation. In the claim alleging fraudulent inducement, Kevin and Maria Rosa asserted that Dr. Brawley had held himself out as a qualified orthodontist when, in fact, the Forbeses said, he was suffering from a disability. In support of that claim, the Forbeses attached as an exhibit to the complaint a copy of the lawsuit that Dr. Brawley had filed against his insurance carrier on September 6, 2017--approximately 19 months after Maria Rosa's braces had been removed--seeking disability benefits based on an injury he had suffered to his right arm in a 2013 "brush saw" accident.

Dr. Brawley filed motions to dismiss both the second and the third amended complaints. In addition to incorporating the previously asserted grounds for dismissal of the claims of breach of contract and misrepresentation, Dr. Brawley argued that Maria Rosa could not be added as a new party in an amended complaint after the dismissal of the previous complaints. Specifically, Dr. Brawley argued that, because she had not been a party when the action was originally dismissed on April 4, 2018, Maria Rosa could not avail herself of Rule 78. He also argued that the claim of fraudulent inducement did not relate back to the complaints that had been

dismissed and, therefore, that the claim alleging fraudulent inducement was time-barred. Dr. Brawley also maintained that the claim of fraudulent inducement must fail because he had no duty to inform the Forbeses of a previous injury.

On September 19, 2018, the trial court held a hearing on Dr. Brawley's motions to dismiss the second and third amended complaints. A transcript of that hearing is not included in the record on appeal. On September 28, 2018, the trial court entered a judgment dismissing both the second and the third amended complaints, again stating only that Dr. Brawley's motions were well taken. The Forbeses filed a motion to alter, amend, or vacate the judgment on October 10, 2018. The postjudgment motion was denied by operation of law on January 8, 2019. The Forbeses filed a timely notice of appeal to the Alabama Supreme Court on February 5, 2019. On June 25, 2019, our supreme court transferred the appeal to this court pursuant to § 12-2-7(6), Ala. Code 1975.

On appeal, the Forbeses raise three issues. Specifically, they argue (1) that the breach-of-contract and misrepresentation claims are not governed by the AMLA and should proceed on their own merits; (2) that the alleged oral

contract, or what Kevin called a "side financial contract," between Dr. Brawley and him did not violate the Statute of Frauds; and (3) that the "mere existence" of Dr. Brawley's civil action in federal court did "not trigger the start of the 'savings clause' two-year extension of the statute of limitations for a fraud claim." The gist of the Forbeses' first two issues appears to be that the trial court erred in dismissing the action because, they contend, Kevin demonstrated that he had stated two claims--breach of contract and misrepresentation--for which relief could be granted.

As mentioned, in his various motions to dismiss the complaint and the amended complaints, Dr. Brawley presented the trial court with a host of reasons why each of the three counts the Forbeses had alleged against him was due to be dismissed. Regarding Kevin's claim alleging breach of contract, Dr. Brawley contended (1) that Kevin lacked "standing" and, therefore, he said, the trial court lacked subject-matter jurisdiction; (2) that Dr. Brawley had no doctor-patient relationship with Kevin and thus owed him no duty; (3) that the claim was barred by the statute of limitations; (4) that, despite Kevin's assertion to the

contrary, the action was governed by the AMLA and the complaint failed to meet the pleading-specificity requirements of the AMLA; (5) that the complaint failed to establish the existence of a contract between Dr. Brawley and Kevin; (6) that the alleged oral contract was void based on the Statute of Frauds; (7) that the complaint and its attachments "affirmatively" established that no breach occurred; (8) that Kevin failed to perform his own obligations under the alleged contract; and (9) that Kevin failed to articulate his damages.

Dr. Brawley challenged the viability of Kevin's misrepresentation claim on the ground that Kevin had failed to state a claim for which relief could be granted. Specifically, Dr. Brawley said, Kevin had failed to allege that Dr. Brawley had made a false representation of a material existing fact, with knowledge of falsity or recklessness, which was reasonably or justifiably relied upon by Kevin. Dr. Brawley also argued that the misrepresentation claim was due to be dismissed because, he said, Kevin failed to state how he was damaged by any purported misrepresentation.

Finally, Dr. Brawley argued to the trial court that the Forbeses' claim of fraudulent inducement, which was not

alleged until the third amended complaint, was due to be dismissed because it addressed an entirely separate wrongful act, and, therefore, Dr. Brawley contended, the third amended complaint did not relate back to the original complaint under Rule 15(c)(2), Ala. R. Civ. P. Dr. Brawley also contended that the claim was due to be dismissed because, he said, (1) it was barred by the applicable statute of limitations; (2) the tolling period set forth in § 6-5-482(a), Ala. Code 1975, was not applicable under the facts of this case; (3) the claim was barred by the four-year statute of repose set forth in the AMLA; and (4) the complaint failed to state a claim of fraudulent inducement because the Forbeses failed to articulate how Dr. Brawley's hand injury harmed them or that they relied on any alleged misrepresentation to their detriment.

As mentioned, the trial court did not state the reasons for dismissing the three claims alleged by Kevin and Maria Rosa. In their appellate brief, the Forbeses did not address most of the grounds Dr. Brawley asserted for the dismissal of the action. Therefore, these circumstances trigger the

application of Fogarty v. Southworth, 953 So. 2d 1225 (Ala. 2006). In Fogarty, our supreme court stated:

> "When an appellant confronts an issue below that the appellee contends warrants a judgment in its favor and the trial court's order does not specify a basis for its ruling, the omission of any argument on appeal as to that issue in the appellant's principal brief constitutes a waiver with respect to the issue."

953 So. 2d at 1232 (footnote omitted)(emphasis added).

> "'This waiver, namely, the failure of the appellant to discuss in the opening brief an issue on which the trial court might have relied as a basis for its judgment, results in an affirmance of that judgment. [Fogarty, 953 So. 2d at 1232]. That is so, because "this court will not presume such error on the part of the trial court." Roberson v. C.P. Allen Constr. Co., 50 So. 3d 471, 478 (Ala. Civ. App. 2010) (emphasis added). See also Young v. Southern Life & Health Ins. Co., 495 So. 2d 601 (Ala. 1986).'"

Scrushy v. Tucker, 70 So. 3d 289, 307 (Ala. 2011)(quoting Soutullo v. Mobile Cty., 58 So. 3d 733, 739 (Ala. 2010))(first emphasis added).

Although Fogarty and its progeny appear to have been applied primarily to appeals involving summary judgments, see, e.g., Fogarty, Norvell v. Norvell, 275 So. 3d 497 (Ala. 2018), Drake v. Alabama Republican Party, 209 So. 3d 1118 (Ala. Civ. App. 2016), Soutullo v. Mobile County, 58 So. 3d 733 (Ala. 2010), and Ramson v. Brittin, 62 So. 3d 1035 (Ala.

Civ App. 2010), our supreme court has also applied the Fogarty line of cases to reviews of dismissals. In Facebook, Inc. v. K.G.S., [Ms. 1170244, June 28, 2019] ___ So. 3d ___, ___ (Ala. 2019), our supreme court discussed Fogarty in the context of the denial of a motion to dismiss, stating:

> "In its order denying Gelin's motion to dismiss, the trial court did not indicate the basis for its conclusion that 'it has jurisdiction over [Gelin].' In other words, the order does not indicate whether the trial court believed it had jurisdiction over Gelin because she had not timely raised the personal-jurisdiction defense or because Gelin had sufficient minimum contacts with Alabama. Under these circumstances, where the trial court did not specify a basis for its ruling, Gelin was required to present an argument in her principal brief on appeal, in compliance with Rule 28(a)(10), Ala. R. App. P., stating why neither ground was a valid basis for asserting personal jurisdiction over her. See Fogarty v. Southworth, 953 So. 2d 1225, 1232 (Ala. 2006). However, in her principal brief on appeal, Gelin argues only that she does not have sufficient minimum contacts with Alabama; she does not address the other potential basis for the trial court's order--that her assertion of the personal-jurisdiction defense was untimely. Gelin's failure to do so results in a waiver of this issue on appeal."

(Footnote omitted.)

In Belle v. Goldasich, [Ms. 1171001, Sept. 13, 2019] ___ So. 3d ___ (Ala. 2019), a plurality opinion in which four justices concurred and five justices concurred in the result,

our supreme court applied Fogarty to affirm the dismissal of a count Belle had asserted against defendants in that legal-malpractice action. The court stated:

> "Belle's notice of appeal did not expressly indicate that she was appealing only the judgments entered against her on the second count, but she has now effectively conceded that the claim asserted in her first count--based on the alleged negligent drafting of the April 2011 medical-malpractice complaint--is time-barred by the statute of repose in § 6-5-574(a).
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> "....
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> "... The attorney defendants asked the trial court to enter judgments in their favor on count one of Belle's amended complaint based on, among other things, the statute of repose. The trial court granted their motions without explaining its rationale, and Belle has failed to address in her brief to this Court what effect the statute of repose has on count one of her amended complaint. Accordingly, we conclude that she has waived any arguments on this issue and has effectively abandoned count one. See also Freeman v. Holyfield, 179 So. 3d 101, 105 (Ala. 2015) (holding that the appellant waived any argument that the trial court erred by holding one of his claims to be time-barred because he presented no argument on that issue)."

Belle, ___ So. 3d at ___.

In this case, the Forbeses addressed only three of the numerous bases upon which Dr. Brawley sought to dismiss the three claims against him, i.e., that the breach-of-contract and misrepresentation claims were not governed by the AMLA,

that the alleged contract was not void based on the Statute of Frauds, and that the tolling provision of § 6-5-482 applied so that the fraudulent-inducement claim was not barred by the statute of limitations. Their failure even to mention the other grounds that Dr. Brawley raised and upon which the trial court might have relied in dismissing the action constitutes a waiver of those issues and results in the affirmance of the judgment. Fogarty, supra.

For the reason set forth above, the judgment is affirmed.

AFFIRMED.

Thompson, P.J., and Moore, Donaldson, and Hanson, JJ., concur.

Edwards, J., dissents, without writing.