EVANS v. TACO BELL CORP.

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ORDER

Taco Bell Corp. has moved for summary judgment on theplaintiff's claims for injuries she allegedly suffered uponlearning that an employee of a Taco Bell restaurant she and herfamily patronized had been diagnosed with Hepatitis A. Theplaintiff, Wendy Evans ("Evans"), who brought the suit as aputative class action, objects to summary judgment in itsentirety. Taco Bell has filed a reply to Evans's objection.

Taco Bell has also moved to strike one of the declarationssubmitted in support of Evans's objection to summary judgment.Finally, Taco Bell has moved for sanctions against Evans and hercounsel on the ground that her previous objection to the summaryjudgment motion, which sought relief on the basis ofFed.R.Civ.P. 56(f) and which the court denied in an order of June 30, 2005,violated Fed.R.Civ.P. 11(b). Evans has filed an objection toboth the motion to strike and the motion for sanctions. Taco Bellhas made reply to the objection to the motion to strike. Background

Taco Bell argues in its reply that Evans's memorandumsupporting her objection to the summary judgment motion fails tocomply with Local Rule 7.2(b)(2), which provides: A memorandum in opposition to a motion for summary judgment shall incorporate a short and concise statement of material facts, supported by appropriate record citations, as to which the adverse party contends a genuine dispute exists so as to require a trial. All properly supported material facts set forth in the moving party's factual statement shall be deemed admitted unless properly opposed by the adverse party.Rather than incorporating the "short and concise statement"required by this rule, Evans's memorandum consists entirely ofargument as to the existence of what she views as genuine issuesof material fact precluding summary judgment on each of hertheories of recovery.

Although Evans supports each section of her argument withrecord citations, this court has previously ruled that summaryjudgment briefs that "go directly to arguing their positions,referring to certain facts as they pertain to each section ofargument, rather than following the more customary (and helpful)format of prefacing argument with a statement of all theunderlying facts of the case" fail to comply with Local Rule 7.2(b)(2)'s mandate for a "short and concise statement ofmaterial facts." Ulmann v. Anderson, 2004 DNH 73, 2004 WL883221, at *1 n. 2 (D.N.H. Apr. 26, 2004); see also Young v.Plymouth State Coll., 1999 WL 813887, at *1 n. 2 (D.N.H. Sept.21, 1999) (noting that factual statement which includes "argumentand legal characterizations" does not comply with rule). BecauseEvans's memorandum objecting to the summary judgment motion doesnot comply with L.R. 7(b)(2), all of the properly supportedmaterial facts set forth in Taco Bell's memorandum in support

ofthe motion are deemed admitted for purposes of thisorder.[1]

Evans, her husband, and their three minor daughters consumedfood that she had purchased from the Taco Bell restaurant inDerry, New Hampshire, for dinner on February 7, 2004. Withinhours, the entire Evans family fell ill, suffering variously fromnausea, stomach pains, diarrhea, fever, dehydration, andheadaches. These symptoms began to subside after four or fivedays but persisted in less severe form for about two weeks.

Aside from a call to a doctor, who opined that the family hadprobably been stricken by "one of those flu bugs that goes around," Evans Dep. at 17, the Evanses did not seek any medicalcare for these symptoms. Just over a week after consuming theTaco Bell food, however, two of Evans's daughters beganexperiencing a "scaly and bumpy rash" on their upper bodies.Id. at 26. Evans took her daughters to a doctor, who prescribeda cream and oral antibiotics during an initial visit and adifferent cream in a later visit. The rash lasted for about aweek. Recovered from their maladies, the Evans family consumedfood purchased from the Derry Taco Bell again on February 21,2004. After this meal, the Evanses felt "a bit sick" andunderwent "the regular diarrhea type of stuff" but did notexperience any other symptoms. Id. at 42. No physician has evertold Evans that the rash or any of the other symptoms she or anyof her family members experienced during this time were relatedto eating food from Taco Bell.

On February 25, 2004, an employee of the Taco Bell restaurantin Derry, New Hampshire, was diagnosed with Hepatitis A. Thatsame day, Taco Bell notified the New Hampshire Department ofHealth and Human Services, which immediately began aninvestigation. Following the investigation, Dr. Jesse F.Greenblatt, the chief of the Department's Bureau of DiseaseControl, recommended to the State Commissioner of Health andHuman Services that he "issue a Health Advisory through the Health Alert Network and issue a public alert through the media."Greenblatt Aff. ¶ 7. Greenblatt explains that these actions wereintended to "inform clinicians of a case of Hepatitis A in a foodhandler; advise of a public Hepatitis A . . . immunoglobulinclinic and to recommend additional vigilance regarding HepatitisA screening." Id. ¶ 8. The Department issued a notice to thiseffect on February 27, 2004, urging those who had patronized theDerry Taco Bell during a certain time period in February 2004, toreceive immunoglobulin injections.[2] At Taco Bell'sexpense, the Department set up a public clinic for this purposeat each of three different locations in southern New Hampshire.

Evans, her husband, and their three daughters all receivedimmunoglobulin injections at one of the public clinics on orabout February 29, 2004. None of the Evanses was feeling ill atthat time. The inoculation Evans received "hurt because [it] hadto go into a deep tissue muscle" in her arm, which continued tohurt for a few days. Evans Dep. at 46. She also recalls observingtwo of her daughters cry as a result of their inoculations andthat each of her children continued to feel pain in her arm for more than a week afterward. She does not recall,however, any other symptoms that she or her family experienced asa result of the injections.

The Evans family also underwent testing for Hepatitis A,although it is unclear whether this occurred before or aftertheir inoculations.[3] Evans explains that her family "gottested because we were all scared and wanted to know" and becauseher youngest daughter needed the testing to enroll in a newkindergarten program. Id. at 42. The testing, which involvedhaving blood drawn at the office of the Evans's family physician,cost almost $400 per person and was not covered by insurance.About a week after having the tests, the family received theresults, indicating that none of them had Hepatitis A.

In fact, during the 180-day period following the diagnosis ofHepatitis A in the Derry Taco Bell employee, no cases of thedisease arising from exposure to food from the restaurant werereported to the state Department of Health and Human Services.New Hampshire law at the time required any diagnosis of HepatitisA to be reported to the department within twenty-four hours. N.H.Code Admin. R. Ann. He-P 301.02(a)(1)(I) (2004). Given the passage of time since the employee's diagnosis, there will be nofuture occurrences of the disease arising from exposure to foodfrom the Derry Taco Bell. There is also no evidence that theinfected employee contracted the disease at the restaurant.

Evans filed a declaration and petition for classaction[4] in Rockingham County Superior Court against TacoBell on March 11, 2004.[5] At that point, Evans claimed tobe "in fear and experiencing emotional trauma associated with thepotential of contracting the disease" and from observing herchildren worry about contracting the disease. Compl. ¶¶ 23-24. Inaddition to the symptoms she experienced after eating food fromthe Derry Taco Bell on February 7, 2004, the complaint allegesthat Evans had been suffering from persistent nausea, headaches,and a darkening of her urine "[s]ince learning of her family'spossible exposure to Hepatitis A and receiving theinoculation. . . ." Id. ¶ 17. Evans therefore claims "damagesfor physical pain, physical symptoms, fear and emotionaldistress." Id. ¶ 24. Her complaint asserts seven separatecounts against Taco Bell: (I) negligence, (II) strict liability,(III), breach of fiduciary duty, (IV) breach of warranty, (V) violation of the New HampshireConsumer Protection Act, Revised Statutes Annotated ("RSA")358-A:2, (VI) vicarious liability, and (VII) enhancedcompensatory damages.

I. Taco Bell's Motion to Strike

Taco Bell has moved to strike the declaration of Sue A. Taylor,M.D., submitted by Evans in connection with her objection to themotion for summary judgment. Taylor is a physician in Dover, NewHampshire, specializing in endocrinological disorders, who hascounted among her patients one Joan Karakostas. Karakostas andher friend, Sherrie Daneau, ate at the Derry Taco Bell oncebetween February 7, 2004, and February 9, 2004, and again onFebruary 14, 2004. Both claim to have begun suffering "a varietyof symptoms" in the weeks that followed, including severe stomachpain, diarrhea, vomiting, aches and pains, and a darkening oftheir urine. Each submits a report of blood testing conducted inmid-September, 2004, showing a positive result for the presenceof the Hepatitis A antibody.

Based on this testing, together with two other blood testsKarakostas had previously undergone and the symptoms she claimsto have experienced starting in late February and early March,2004, Taylor opines that, during that period, "Karakostas could have been suffering from an acute case of Hepatitis A." TaylorAff. ¶ 13. Pursuant to Fed.R.Civ.P. 37(c)(1), Taco Bell movesto strike this opinion, and Taylor's affidavit in its entirety asundisclosed expert testimony. Evans protests that such a sanctionis inappropriate because, inter alia, the court has yet to setany deadline for the disclosure of experts.

The court need not resolve this issue, however, becauseTaylor's opinion, and indeed the entire issue of whetherKarakostas had Hepatitis A, is irrelevant. Karakostas is not aparty to this action — only Evans is. To be sure, Evans has filedthe case as a putative class action, seeking to representeveryone exposed to Hepatitis A as a result of patronizing theDerry Taco Bell in February, 2004. But unless and until the courtcertifies such a class, the potential claims of putative classmembers other than the named plaintiff are simply not before thecourt.[6] See generally 1 Alba Conte & Herbert B. Newberg, Newberg on Class Actions § 1.3, at 19-20 (4th ed.2002).

Whether someone other than Evans or the members of her familycontracted Hepatitis A from eating at the Derry Taco Bell, then,has no bearing on Taco Bell's motion for summary judgment, whichaddresses the only claims that comprise the action at this point— hers. See Massey v. Zema Sys. Corp., 1998 WL 708913, at *6n. 6 (N.D. Ill. Sept. 30, 1998) (deciding pre-certificationsummary judgment motion by examining claims as they related onlyto named plaintiffs rather than to other putative class members);accord Rutan v. Republican Party of Ill., 868 F.2d 943, 947(7th Cir. 1989) ("Because no class of plaintiffs . . . [was]certified, only the named plaintiffs . . . are before this court.Therefore, we treat plaintiffs' claims as being brought solely bythe named plaintiffs" in reviewing motion to dismiss for failureto state claim) (citation omitted), rev'd in part on othergrounds, 497 U.S. 62 (1990). The proferred evidence tending toshow that Karakostas (or Daneau) had Hepatitis A simply cannotcreate a genuine issue of material fact. Accordingly, Taco Bell'smotion to strike Taylor's affidavit is denied as moot, since thecourt has found it to be irrelevant. II. Taco Bell's Motion for Summary Judgment

A. Standard of Review

On a motion for summary judgment, the moving party has theburden of showing the absence of any genuine issue of materialfact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986).If the movant does so, the court must then determine whether thenon-moving party has demonstrated a triable issue. Anderson v.Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). In ruling on amotion for summary judgment, the court must view the facts in thelight most favorable to the non-moving party, drawing allreasonable inferences in that party's favor. E.g., J.G.M.C.J.Corp. v. Sears, Roebuck & Co., 391 F.3d 364, 368 (1st Cir.2004); Poulis-Minott v. Smith, 388 F.3d 354, 361 (1st Cir.2004).

B. Discussion

Taco Bell seeks summary judgment on Evans's claims on a numberof theories. First, Taco Bell argues that Evans cannot show thatit breached any duty to her in the ways alleged in the complaintand therefore cannot recover in negligence. Taco Bell also arguesthat, even if Evans did have some evidence of such a breach, shehas no proof that she suffered any compensable injury as aresult. Taco Bell contends that Evans's strict liability, breachof warranty, and Consumer Protection Act claims cannot succeed for lack of evidence that the food she purchased from theDerry Taco Bell was defective. Finally, Taco Bell argues that itdoes not owe any fiduciary duty to Evans as a matter of law.

1. The Negligence Claim

Evans's objection to Taco Bell's summary judgment motion setsforth a detailed recitation of evidence that she believesdemonstrates breaches of duty by Taco Bell. Specifically, Evansargues that, at the Derry restaurant, Taco Bell permittedemployees to handle food with bare hands, rather than requiringthem to wear gloves for that purpose; failed to implement orenforce appropriate hand-washing procedures; and inadequatelytrained the employee who contracted Hepatitis A about the perilsof the disease. Mem. Opp'n Mot. Summ. J. §§ II.B, D.[7]

The court will assume for purposes of this order that genuineissues of material fact exist as to whether Taco Bell breachedits duties in the ways Evans asserts. To survive summary judgmenton her negligence claim, however, Evans must also show a genuineissue of material fact as to whether any of those allegedbreaches proximately caused the injuries she complains of. See, e.g., Brookline Sch. Dist. v. Bird,Inc., 142 N.H. 352, 356 (1997); Doucette v. Town of Bristol,138 N.H. 205, 210 (1993). A defendant's negligent conduct is theproximate cause of the plaintiff's injury when the injury wouldnot have occurred but for the conduct, i.e., was itscause-in-fact, and the conduct was a substantial factor inbringing about the injury, i.e., was its legal cause. Carniganv. N.H. Int'l Speedway, Inc., 151 N.H. 409, 414 (2004); Estateof Joshua T. v. New Hampshire, 150 N.H. 405, 407-408 (2003).

Despite its considerable length, Evans's objection to thesummary judgment motion largely ignores Taco Bell's argumentsthat she has no proof linking its alleged negligence to herclaimed injuries. Indeed, the objection does not advance anyargument whatsoever as to how Taco Bell's allegedly derelicthandwashing practices or training of the Hepatitis A-strickenemployee contributed to Evans's claimed injuries. Mem. Opp'n Mot.Summ. J. §§ II.B.3. Evans does contend that Taco Bell's failureto require employees at its Derry location to wear gloves whenhandling food "increased the risk of transmission of theHepatitis A virus . . . to patrons [there] during February 2004thereby necessitating the inoculation and intervention on behalfof those patrons. . . ." Mem. Opp'n Mot. Summ. J. at 18-19.Because she and her family received inoculations at one of the clinics provided for that purpose, she suggests that Taco Bell'sbreach caused injury to her in the form of the accompanying pain.

As support for this theory, Evans relies solely on a February27, 2004, e-mail message which appears

to have been distributedto members of the Department's "outbreak team." This e-mailreported that employees of the Derry Taco Bell were not wearinggloves while preparing food or serving it to patrons and that theinfected worker had been performing these tasks while sufferingfrom symptoms of Hepatitis A.[8] The e-mail also noted that"hygiene techniques included the use of a hand sanitizer," butthat the federal Center for Disease Control (the "CDC") hadindicated that a sanitizer should not be used in place of gloves.Hutchins Aff. ¶ 2, Ex. 8 at 8. The e-mail goes on to state thatone "Dr. Talbot consulted with the CDC for this situation anddetermined that it was recommended that the intervention consistof immune globulin (IG) clinics to be implement [sic] forpotentially exposed patrons." Id. at 6.

Evans suggests that this e-mail creates a genuine issue ofmaterial fact as to whether the Department decided to recommendinoculations for those who had patronized the Derry Taco Bell during the relevant period based on the conclusion that therestaurant did not make its employees wear gloves while handlingfood. The court disagrees. Evans presents no developed argumentas to how the e-mail, either directly or inferentially, showsthat Taco Bell's alleged failure to require gloves at its Derrystore affected the Department's decision.[9] She also hasnot come forth with any other proof explaining the Department'sactions.[10]

Standing alone, the e-mail simply reflects the fact that theDepartment was aware, at the time it decided to recommendinoculations, that the Derry employees apparently had not been wearing gloves. There is nothing to suggest that, had Taco Bellmandated glove use at its Derry location, the Department wouldhave recommended an intervention short of inoculation for thosewho had eaten there and thus spared Evans the associated pain.She has therefore failed to adduce any proof tending to show thatTaco Bell's allegedly negligent conduct in this regard was thecause-in-fact of her claimed injuries. Cf. Bronson v.Hitchcock Clinic, 140 N.H. 798, 801 (1996).

Evans has also failed to adduce any proof tending to show thatTaco Bell's asserted breach was the legal cause of hercomplained-of injuries. This showing, also essential to recoveryin negligence, requires that the breach constitute "a substantialfactor, rather than a slight one" in producing the injury. N.Bay Council, Inc., Boy Scouts of Am. v. Bruckner, 131 N.H. 538,548 (1989) (citing Restatement (Second) of Torts § 431 cmt. a(1977)); see also Pillsbury-Flood v. Portsmouth Hosp.,128 N.H. 299, 304 (1986). Even if it could be inferred, from thee-mail's reference to the apparent non-use of gloves amongemployees at the Derry Taco Bell, that this practice played arole in the Department's decision — an inference which, for thereasons just discussed, is not reasonable — there is no evidenceto suggest that its role in the decision was substantial. Thee-mail therefore fails to create a genuine issue of material factas to whether Taco Bell's alleged negligence in permitting its Derryemployees to handle food with bare hands was the legal cause ofEvans's claimed injuries. See Island Shores Estates Condo.Ass'n v. City of Concord, 136 N.H. 300, 305 (1992) (affirmingdismissal of negligence claim where threat of injury to plaintiffwould have existed regardless of defendant's alleged breach).

Evans's only other theory attempting to link Taco Bell'salleged negligence with any harm to her proceeds from the factthat she and her family began suffering from gastrointestinal andrelated symptoms soon after eating dinner purchased from theDerry Taco Bell on February 7, 2004. She argues that the shortperiod of time between the consumption of the food and the onsetof the symptoms, together with the nature of the symptoms,creates a genuine issue of material fact as to whether the foodcaused the symptoms.[11] Generally, however, "merecorrelation between ingestion and illness is insufficient as amatter of law to establish causation." Wilson v. Circus CircusHotels, Inc., 710 P.2d 77, 79 (Nev. 1985); see also, e.g.,Minder v. Cielito Lindo Rest., 136 Cal. Rptr. 915, 918 (Cal.Ct. App. 1977); Mann v. D.L. Lee & Sons, Inc., 537 S.E.2d 683,684 (Ga.Ct.App. 2000); Griffin v. Schwegmann Bros. Giant Supermkts.,542 So. 2d 710, 712-13 (La.Ct.App. 1989); 4 Louis R. Frumer & Melvin I.Friedman, Products Liability § 48.21[2][a], at 48-123 (1960 &2002 supp.). As one court has remarked in reversing the denial ofsummary judgment for the defendant on a similar theory: The mere fact that the plaintiff became nauseous about one-half hour after consuming some of the [food obtained from the defendant] is insufficient to withstand the defendant's motion for summary judgment. There are many different causes of nausea, vomiting and stomach distress. The plaintiff's evidence of impurity leaves her proof in the realm of speculation and conjecture.Valenti v. Great Atl. & Pac. Tea Co., 615 N.Y.S.2d 84, 85 (N.Y.App. Div. 1994) (internal quotation marks and citations omitted).

Evans has not come forward with any authority or argumentsuggesting that New Hampshire would depart from thiswell-accepted rule.[12] Cf. Elliot v. Lachance,109 N.H. 481, 485-86 (1969) (overturning verdict awarding damages allegedly caused bydefective product in absence of evidence that defect causedclaimed injuries because "[t]he mere fact that the plaintiffsuffered injuries is not sufficient to justify such aconclusion") (internal quotation marks omitted). She also has notcome forward with any evidence linking Taco Bell's products toher symptoms apart from the temporal proximity between when sheconsumed the food and when she began suffering fromgastrointestinal distress. In fact, the only record evidencesuggesting the etiology of her symptoms at all consists of heraccount of her doctor's statement that the family probably hadthe flu. Evans has failed to show a genuine issue of materialfact as to whether Taco Bell's asserted negligence proximatelycaused her claimed symptoms.

Evans's objection to the summary judgment motion does notadvance any other theory connecting her other categories ofalleged damages to any misfeasance by Taco Bell. This shortcomingextends to her claim for fear and emotional distress over her family's possible exposure to Hepatitis A. Putting thatissue aside for the moment, however, the court notes that thenature of this claim itself presents a serious problem.

The New Hampshire Supreme Court has held, in a case rejecting aremarkably similar claim, that "regardless of physical impact, inorder to recover for emotional distress under a traditionalnegligence theory, the plaintiff must demonstrate physicalsymptoms of her distress." Palmer v. Nan King Rest.,147 N.H. 681, 684 (2002). Despite the physical symptoms enumerated in hercomplaint, Evans has not responded to the summary judgment motionwith evidence that her

claimed emotional distress had anyphysical effects.[13] Instead, she contends that she "isentitled to recover emotion [sic] distress damages with [sic]establishing proof of physical manifestation," notwithstandingPalmer. Mem. Opp'n Mot. Summ. J. at 34.

The plaintiff in Palmer bit into a used band-aid while eatingfood prepared by the defendant, causing her "physical and mental revulsion, as well as extreme anxiety that she might havecontracted an infectious disease." 147 N.H. at 682 (internalquotation marks omitted). After testing negative for both HIV andhepatitis, the plaintiff brought claims of negligence, strictproducts liability, and breach of warranty against the defendant.Id. She did not, however, claim to have suffered any physicalinjury. Id. The trial court granted summary judgment for thedefendants on the ground that "there was no evidence that theplaintiff had experienced any physical injury from her anxiety."Id. The supreme court expressly rejected the plaintiff'scontention on appeal that "because the `band-aid' in her mouthconstituted physical impact, an emotional distress claim need notbe predicated upon physical symptoms of her anxiety." Id. at698. In so holding, the court noted that it had refused the sameargument in Thorpe v. New Hampshire, 133 N.H. 299 (1990), wherethe plaintiff, like Palmer, had also suffered a physical impactbut had not alleged any physical injury. 147 N.H. at 684.

Evans seeks to distinguish Palmer and Thorpe in the firstinstance on the ground that, in addition to her alleged emotionaldistress, she does claim damages for the physical injury shesuffered in receiving the immunoglobulin injection.[14] AsTaco Bell points out in its reply brief, however, Evans does notassert that her claimed emotional distress resulted from herinoculation, but rather from her ingestion of food which shelater learned could have potentially been contaminated withHepatitis A. Because her alleged emotional distress did notfollow from any physical injury, Evans's negligence claim suffersfrom the same fatal defect as those of the plaintiffs in Palmerand Thorpe: it seeks damages for emotional distressunaccompanied by either physical injury or physical symptoms. Thefact that she also seeks damages for physical injury which didnot itself produce her claimed emotional distress does notentitle her to recover in spite of the rule laid down in thosecases.[15]

An examination of the genesis of the rule in New Hampshiremakes this point clear. In Chiuchiolo v. New England WholesaleTailors, 84 N.H. 329 (1930), the court scrutinized the rule insome jurisdictions "disallowing recovery for the consequences of fright caused by negligence when there is no physical impact."Id. at 332. Recognizing the rule as a departure from generalprinciples of tort damages, the court proceeded to considerwhether any sound policy rationale existed to justify such anexception. Id. at 333-34. The court identified "[t]he onlypossibly adequate reason" in this regard as "that in the long runjustice will be better promoted with . . . the exception, becauseotherwise this would open a wide door for unjust claims, whichcould not successfully be met." Id. at 334 (internal quotationmarks omitted).

After finding this rationale wanting, the court declined touphold the rule. Id. at 335. Nevertheless, the court held that If the rule is founded on policy, the argument for expediency, regarded as unsustained in cases of fright resulting in serious consequences, is maintained where there are no

such consequences. A rule of liability would impose undue burdens and go beyond the practical needs of recovery for another's negligence. When there are no consequences of fright, the fright can be regarded only as a momentary and transient disturbance, and as either too lacking in seriousness or as giving too great an extension of legally wrongful conduct to warrant the imposition of liability.Id. at 338. Many years later, the court explained the outcomein Chiuchiolo as reflecting the fact that it "was not persuadedthat abolishing the `impact rule' would cause a proliferation offraudulent claims and create liability disproportionate toculpability." Corso v. Merrill, 119 N.H. 647, 655 (1979). Instead, the Chiuchiolo court recognized that simply limitingrecovery to cases of emotional distress with "seriousconsequences" would serve to mitigate such undesirable effectswhile remaining "responsive to a fair sense of justice."84 N.H. at 335; see also Young v. Abalene Pest Control Servs., Inc.,122 N.H. 287, 290 (1982) (Douglas, J., dissenting).

The rule allowing recovery for emotional distress marked byphysical symptoms, then, rests on the assumption that thesymptoms "guarantee that the claim is not spurious" just as wellas physical impact does. William Lloyd Prosser & W. Page Keeton,Prosser & Keeton on the Law of Torts § 54, at 362 (5th ed.1984); see also Palmer, 147 N.H. at 683 (declining to revisitthis assumption). But physical injury can provide no suchguarantee when it has not itself caused the emotional distressfor which the plaintiff seeks recovery, but simply resulted fromthe same tortious conduct. As Prosser and Keeton have explained,"[w]ith a cause of action established by the physical harm . . .it is considered sufficient assurance that the mental injury isnot feigned." Prosser & Keeton, supra, § 54, at 363; see alsoid. at 361 (noting that recovery is generally disallowed for"mental disturbance, without accompanying physical injury,illness or other physical consequences . . .") (emphasis added).In the absence of such an assurance, whether in the form ofphysical injury or physical manifestation, New Hampshire law simply doesnot permit recovery for emotional distress.[16]

Furthermore, even if New Hampshire did allow damages foremotional distress unaccompanied by physical injury or symptoms,Evans has still failed to link her alleged emotional distress toany negligent act on the part of Taco Bell. To recover foremotional distress, like any other kind of damages, a plaintiffmust show that they were proximately caused by the defendant'snegligence. E.g., Corso, 119 N.H. at 656; Chiuchiolo,84 N.H. at 333. Again, Evans charges that Taco Bell deviated fromapplicable standards of care by failing to require its employeesat the Derry store to wear gloves, by failing to implement andenforce appropriate hand-washing policies, and by failing totrain the infected employee about the perils of Hepatitis A.There is no evidence, however, that any of these failurescontributed to Evans's anxiety over whether she or her family hadcontracted the disease by eating food from the Derry Taco Bell.

Indeed, there is no evidence that Evans even became aware ofthe allegedly derelict sanitation practices at the restaurant during the time she was living in fear of having been exposed toHepatitis A. Those practices therefore could not have caused orcontributed to cause her claimed emotional distress as a logicalmatter. Instead, as Evans herself suggests in her objection, herfear of having the disease arose "[s]ometime after learning thatan employee at the Taco Bell had contracted hepatitis. . .

."Mem. Opp'n Mot. Summ. J. at 38. But Evans does not argue thatTaco Bell breached any duty to her merely by having somebodyinfected with Hepatitis A work at one of its restaurants. She hastherefore failed to demonstrate a genuine issue of fact as towhether Taco Bell's asserted negligence caused her allegedemotional distress.[17] See Pichowicz v. Hoyt, 2000 DNH40, 2000 WL 1480445, at *3-*4 (D.N.H. Feb. 11, 2000) (denyingclaim for fear of contracting disease allegedly arising fromconsumption of water contaminated by defendant without proof thatfear "substantially caused or contributed to by thecontamination").

For the foregoing reasons, Evans has failed to demonstrate agenuine issue of fact as to whether Taco Bell's alleged breachesof duty, assuming that such breaches occurred, proximately causedher claimed damages. Taco Bell is therefore entitled to summary judgment on Evans's negligence claim.

2. The Strict Liability Claim

Evans acknowledges that, to recover on her strict liabilitytheory, she must prove that "the product was in a defectivecondition (when it left the defendant's hands), the defect madethe product unreasonably dangerous, and that the defect was theproximate cause of [her] injuries." Mem. Opp'n Mot. Summ. J. at38 (citing Buckingham v. R.J. Reynolds Tobacco Co.,142 N.H. 822, 825-26 (1998), McLaughlin v. Sears, Roebuck & Co.,111 N.H. 265, 267 (1971), and Buttrick v. Lessard, 110 N.H. 36,39 (1969)). She proceeds to argue that she has avoided summaryjudgment on this claim by coming forward with evidence that thefood she purchased from the Derry Taco Bell had been touched bythe bare hands of an employee infected with Hepatitis A.According to Evans, this alleged fact rendered the food bothdefective and unreasonably dangerous as required to hold TacoBell strictly liable under New Hampshire law. See id. §§III.a — III.b.

Evans's objection, however, does not address how this claimeddefect caused her any harm. As discussed at length in theanalysis of Evans's negligence claim, Part II.B.1, supra, therecord discloses no genuine issue of material fact linking TacoBell's alleged failure to require the employees at its Derry location to wear gloves with any of her claimed injuries. Thus,assuming, without deciding, that Evans has shown a genuine issueof material fact as to whether the food she purchased from TacoBell was both defective and unreasonably dangerous, her strictliability claim still cannot proceed given the absence ofevidence that the alleged defect caused her any injury. As Evanshas acknowledged, causation is an essential element of thisclaim. Taco Bell is therefore entitled to summary judgment onEvans's strict liability claim. See Willard v. Park Indus.,Inc., 69 F. Supp. 2d 268, 272-73 (D.N.H. 1999).

3. The Breach of Warranty Claim

Evans also acknowledges that, insofar as she seeks recovery forpersonal injury under her breach of warranty theory, she mustshow that such damages "proximately result[ed] from the breach."Mem. Opp'n Mot. Summ. J. at 47 (citing N.H. Rev. Stat. Ann. §§382-A:2-714-715 and Xerox Corp. v.

Hawkes, 124 N.H. 610,616 (1984)); see also Elliot, 109 N.H. at 485-86. Again,Evans argues that she has demonstrated a genuine issue ofmaterial fact as to whether Taco Bell breached implied warrantiesof merchantability and fitness for purpose by serving foodhandled by an employee infected by Hepatitis A while she was notwearing gloves, but offers nothing to connect this alleged breachto any of her claimed physical injuries. Like Evans's negligence andstrict liability claims, her breach of warranty claim cannotproceed in the absence of any such evidence. See Willard,69 F. Supp. 2d at 274; Elliot, 109 N.H. at 485-86.

Evans also argues that she can recover what she paid for theallegedly unmerchantable and unfit goods under her breach ofwarranty theory. N.H. Rev. Stat. Ann. § 382-A:2-714(2). Hercomplaint, however, does not claim the cost of the goodspurchased from Taco Bell as a category of loss sustained ordamages sought by Evans. In fact, the complaint expressly statesthat Evans "claims damages for physical pain, physical symptoms,fear and emotional distress." Compl. ¶ 24. Evans does not allegeto have suffered economic losses of any kind in the complaint,whether in setting forth her breach of warranty claim orotherwise. Cf. id. ¶ 25 (alleging that other class members"may have claims for medical bills, lost wages, lost time fromschool, and actual contraction of the Hepatitis A virus").Moreover, at her deposition in this matter, Evans was asked,"Other than what you paid for [the] blood tests, are there anyother out-of-pocket costs that you have occurred associated withthe allegations in this lawsuit?" Evans Dep. at 63. Her response was, "I don't remember."[18] Id.

The First Circuit has held that a plaintiff's failure to"implicate the relevant legal issues in his complaint" withregard to a theory of recovery may prevent him from raising thattheory in response to summary judgment. McLane, Graf, Raulerson& Middleton, P.A. v. Rechberger, 280 F.3d 26, 38 (1st Cir.2002); accord, e.g., Opals on Ice Lingerie v. Bodylines,Inc., 2002 WL 718850, at *4 (E.D.N.Y. Mar. 5, 2002) ("courtshave consistently ruled that it is inappropriate to raise newclaims for the first time in opposition to summary judgment")(quotation marks omitted). As another district court in thiscircuit has recognized, this rule is necessary because"[f]airness dictates that the defendant? be given a minimumdegree of forewarning as to the underlying basis of the reliefsought." Ocaso, S.A., Compania de Seguros y Reaseguros v. P.R.Mar. Shipping Auth., 915 F. Supp. 1244, 1253 (D.P.R. 1996).Accordingly, Evans's failure to mention, either in her complaintor in providing discovery as to her damages, that she was seekingto recover the cost of purchasing the allegedly unmerchantableand unfit goods prevents her from avoiding summary judgment by claiming those damages now.Taco Bell is therefore entitled to summary judgment on Evans'sbreach of warranty claim.

4. The Consumer Protection Act Claim

New Hampshire's Consumer Protection Act prohibits, in relevantpart, "any unfair or deceptive act or practice in the conduct ofany trade or commerce within this state." N.H. Rev. Stat. Ann. §358-A:2. Evans suggests that Taco Bell engaged in such behaviorthrough its "[l]ocal advertising," which gave her the"expect[ation] that the Derry restaurant operated in compliancewith state food handling and safety requirements." Mem. Opp'nMot. Summ. J. at 51. Although the discussion of the

ConsumerProtection Act claim in Evans's objection does not say how thisexpectation was defeated, the court assumes that, once again, shebelieves Taco Bell acted unfairly and deceptively by allowing theemployees at its Derry location to handle food with their barehands in spite of the statements in Taco Bell's advertising. TacoBell argues that these circumstances do not amount to a violationof RSA 358-A:2. The court agrees.

As Evans recognizes, "`[t]o be actionable [under RSA 358-A:2],the objectionable conduct must attain a level of rascality thatwould raise an eyebrow of someone inured to the rough and tumble of the world of commerce.'" Mem. Opp'n Mot. Summ. J. at 51(quoting Anheuser-Busch, Inc. v. Caught-on-Bleu, Inc., 2003 DNH127, 2003 WL 21715330, at *6 (D.N.H. Jul. 22, 2003), aff'd,105 Fed. Appx. 285 (1st Cir. 2004), cert. denied, 125 S. Ct. 1639(2005)) (further internal quotation marks omitted). The NewHampshire Supreme Court has held that the statute's prohibitionextends to misrepresentations made in the course of a businesstransaction. Snierson v. Scruton, 145 N.H. 73, 81 (2000)(applying RSA 358-A:2 to real estate agent's false statementsabout property on which plaintiffs reasonably relied in decidingto buy it). Evans also points out that RSA 358-A:2 itself definesdeceptive acts or practices to include "[r]epresenting that goodsor services have . . . characteristics, ingredients, uses, [or]benefits . . . that they do not have" and "[r]epresenting thatgoods . . . are of a particular standard, quality, or grade . . .if they are of another." N.H. Rev. Stat. Ann. §§ 358-A:2, V andVII.

Although Evans hints at a misrepresentation theory in heraffidavit submitted in response to the summary judgment motion,she does not relate any statement by Taco Bell that its foodmeets the rigors of "state food safety and handling requirements"or, for that matter, any particular standards. Instead, sheclaims to have developed an expectation to this effect "based, in large part, on representations made by Taco Bell in its national,regional and local advertising promoting the quality of Taco Bellrestaurants generally and their food in particular."[19]Evans Aff. ¶ 6. Such a vague account of the content of TacoBell's advertising simply cannot support a Consumer ProtectionAct claim based on Taco Bell's allegedly false statements. SeeKalik v. Abacus Exch., Inc., 2001 DNH 192, 2001 WL 1326581, at*8-*9 (D.N.H. Oct. 19, 2001) (granting summary judgment againstRSA 358-A:2 claim premised on misrepresentations in absence ofevidence of any material misstatements). Because Evans does notoffer any other theory supporting this claim, Taco Bell isentitled to summary judgment on it.

5. The Breach of Fiduciary Duty Claim Evans contends that a genuine issue of material fact exists asto whether Taco Bell owed her a fiduciary duty, based on herassertions that she placed "confidence in Taco Bell's assurancesof quality and safety" and that "[t]he preparation of the subjectfood was exclusively in the control of [Taco Bell] at the time itwas served in February 2004." Mem. Opp'n Mot. Summ. J. at 46. Thecourt agrees with Taco Bell that this argument is frivolous.

"`A fiduciary relationship . . . exists wherever influence hasbeen acquired and abused or confidence has been reposed andbetrayed.'" Lash v. Cheshire County Sav. Bank, Inc.,124 N.H. 435, 437 (1984) (quoting Cornwell v. Cornwell, 116 N.H. 205,209 (1976)). Contrary to Evans's sweeping construction,

however,the term "confidence" in this context does not equate with simplereliance on another to perform a bargained-for service, butdenotes "a special confidence reposed in one who, in equity andgood conscience, is bound to act in good faith and with dueregard to the interests of the one reposing the confidence."Id. at 439 (emphasis added; internal quotation marks omitted).

Thus, fiduciary duties have been recognized as running fromtrustee to beneficiary, from guardian to ward, from agent toprincipal, from attorney to client, and among partners.Restatement (Second) of Trusts § 2 cmt. b (1959). It is obviousthat the relationship between a fast food restaurant and its patrons is not of this character, even if the patrons have cometo depend on the restaurant for quality meals. Cf. Schneiderv. Plymouth State Coll., 144 N.H. 458, 462 (N.H. 1999)(recognizing college's fiduciary duty to student to preventsexual harassment by faculty because "[t]he relationship betweenstudents and those that teach them is built on a professionalrelationship of trust and deference, rarely seen outside theacademic community"). Evans does not provide any authority to thecontrary. Taco Bell is therefore entitled to summary judgment onher breach of fiduciary duty claim.

6. The Remaining Claims

Evans asserts claims entitled "vicarious liability" and"enhanced compensatory damages" as separate counts of hercomplaint. Given the absence of a genuine issue of material facttending to show any conduct on the part of Taco Bell's employeesfor which Evans can recover her claimed damages, see PartII.B.1, supra, the vicarious liability claim necessarily fails.Similarly, as Evans acknowledges, enhanced compensatory damagesare just that, i.e., "`simply the actual damages incurred,estimated by the more liberal rule that prevails in the case ofmalicious wrongs.'" Mem. Opp'n Mot. Summ. J. at 52 n. 11 (quotingNollet v. Palmer, 2002 DNH 136, 2002 WL 1674379, at *2 (D.N.H. July 18, 2002)) (further internal quotation marks omitted).Because Evans has not shown a genuine issue of material fact asto whether Taco Bell's allegedly wrongful actions caused herclaimed damages, she cannot recover enhanced compensatorydamages. Accordingly, summary judgment must enter on these claimsas well. Taco Bell's motion for summary judgment is thereforegranted in its entirety.

III. Taco Bell's Motion for Sanctions

Finally, Taco Bell seeks sanctions against Evans and hercounsel under Fed.R.Civ.P. 11(c)(1)(A) on the ground that her"Rule 56(f) Objection to Defendant's Motion for Summary Judgment"was presented in violation of Fed.R.Civ.P. 11(b)(1). Evansobjects to sanctions because, first, she was not provided theopportunity to withdraw or correct her motion afforded byFed.R.Civ.P. 11(c)(1)(A) and, second, the Rule 56(f) objection was notin fact presented "for an improper purpose, such as to harass orcause unnecessary delay or needless increase in the cost oflitigation" as prohibited by Fed.R.Civ.P. 11(b)(1).

Evans filed her 56(f) objection on April 22, 2005. Treating theobjection as a motion, Taco Bell filed its own objection to it,accompanied by a memorandum of law, on April 28, 2005. The memorandum

asked that Evans's "request for relief underRule 56(f) be denied, that plaintiff be ordered to file its[sic] opposition to defendant's motion [for summary judgment]by a date certain and all Court costs and attorney's [sic] feesbe taxed against the plaintiff." Mem. Obj. Mot. for Relief at 6.

More than two months later, the court issued an order denyingEvans's motion for 56(f) relief. 2005 DNH 104, 2005 WL 1592984(D.N.H. June 30, 2004). Noting that Taco Bell had requested feesand costs in its objection, the court stated: Insofar as Taco Bell seeks an order requiring Evans to pay its attorneys' fees incurred in connection with responding to the Rule 56(f) application, the request must be made through a separate motion. Fed.R.Civ.P. 11(c)(1)(A); L.R. 7.1(a)(1). Based on the foregoing analysis, however, it appears that Evans's Rule 56(f) request might have been presented "to cause unnecessary delay or needless increase in the cost of litigation" in violation of Rule 11(a)(b)(1). This gives the court particular concern in light of the history of this litigation and the prior admonitions to Evans's counsel by both the magistrate and the court itself. Accordingly, if Taco Bell wishes to pursue the issue of sanctions against Evans's counsel in connection with the Rule 56(f) objection, it shall do so by motion pursuant to Fed.R.Civ.P. 11(c)(1)(A). It is unfortunate that the resources of the court and the parties have had to expended on an issue that never should have been a problem in this case.Id. at *7. Taco Bell filed its motion for sanctions on July 13,2005, asking that the court order Evans to pay the $3,131 inattorneys' fees it claims to have expended in responding to therequest for Rule 56(f) relief. Rule 11(c)(1)(A) states, in relevant part, that a motion forsanctions "shall not be filed with or presented with the courtunless, within 21 days after service of the motion . . . thechallenged paper . . . is not withdrawn or appropriatelycorrected." This provision establishes "a type of `safe harbor'in that a party will not be subject to sanctions on the basis ofanother party's motion unless, after receiving the motion, itrefuses to withdraw that position." Fed.R.Civ.P. 11 advisorycommittee's note (1993). Evans argues that, because Taco Bell didnot serve her with its motion for sanctions before filing it, letalone twenty-one days in advance of that date, she has beendeprived of Rule 11(c)(1)(A)'s safe harbor and that, as a result,the motion must be denied outright. See, e.g., BrickwoodContractors, Inc. v. Datanet Eng'g, Inc., 369 F.3d 385, 389-90(4th Cir. 2004) (en banc); Elliot v. Tilton, 64 F.3d 213, 216(5th Cir. 1995); 2 James Wm. Moore et al., Moore's FederalPractice § 11.22[1][b], at 11-40 (3d ed. 1997 & 2002 supp.).

In response, Taco Bell acknowledges that Evans did not get thebenefit of the safe harbor provision, but rejoins that the FirstCircuit has not interpreted Rule 11(c)(1)(A) as stringently asother circuits have. See Nyer v. Winterthur Int'l,290 F.3d 456, 460 n. 6 (1st Cir. 2002) (noting that, while motion forsanctions in response to baseless motion to amend not served on plaintiff's counsel before filing, he "had approximately threemonths to reconsider and withdraw the motion to amend" before itwas denied as moot "but chose not to do so," and therefore "thepurposes of the safe harbor provision could no longer beeffectuated because [the attorney] had lost his opportunity toreverse course"); Silva v. Witschen, 19 F.3d 725, 729 n. 4 (1stCir. 1994) (treating defense attorney's comments to plaintiff'scounsel, in response to receiving copy of complaint beforefiling, that suit was unjustified and defendants intended to seekattorneys' fees, as "substantially equivalent warning" to safeharbor). Nyer, however, rejected the appellant's safe harborargument because he had failed to raise it in

response to themotion for sanctions in the district court, 290 F.3d at 460,while in Silva the sanction was imposed pursuant to the formerversion of Rule 11, which lacked any safe harborprovision.[20] 19 F.3d at 727-29. Thus, neither casesquarely addressed whether sanctions may be imposed on a motionthat was not served at least twenty-one days before filing, asoccurred here. In this court's view, the dicta from Nyer andSilva cannot overcome the weight of contrary authority and theclear language of Rule 11(c)(1)(A) itself. Because Evans did not get the benefit of the safe harborprovision, Taco Bell's motion for sanctions must be denied.

In the absence of this procedural problem, however, the courtwould not hesitate to impose the sanctions requested by TacoBell. Despite submitting an eleven-page affidavit in support ofEvans's request for Rule 56(f) relief, her counsel, PeterHutchins, offered virtually no explanation of how the discoveryoutstanding at the time would have affected the outcome of TacoBell's motion for summary judgment. 2005 WL 1592984, at *6-*7.Furthermore, the objection itself contained the assertions thattranscripts of depositions which had already been taken at thatpoint would not be available until twenty days later, and thatEvans's counsel should thereafter be entitled to an additionaltwo or three weeks to review and index the transcripts beforehaving to respond to Taco Bell's summary judgment motion. Thecourt has previously noted that these assertions strike the courtas disingenuous. Id. at *6 & n. 14. Because three of the fourdepositions forming the basis of the request for Rule 56(f)relief had already occurred before the request was filed, andbecause Hutchins could come up with no explanation as to therelevance of any of the other discovery outstanding at thatpoint, the apparent purpose of the request was to causeunnecessary delay in the resolution of the motion for summary judgment, or to cause Taco Bell to expend additionalattorneys' fees in responding, in violation of Rule 11(b)(1).

Furthermore, Evans's lawyers on a number of occasions duringthis litigation have engaged in conduct that included a chronicdisregard for the Local Rules and motion practice that themagistrate has deemed frivolous. See note 1, supra, andaccompanying text; 326 F. Supp. 2d 214, 219 (D.N.H. 2004)(recounting magistrate's rulings on Evans's first motion toremand and her objection to the pro hac vice admission of one ofTaco Bell's attorneys). In light of this history, and the natureof the Rule 11 violation itself, payment of Taco Bell'sattorneys' fees in responding to the request for Rule 56(f)relief would have been the appropriate sanction. As this courthas stated time and time again, all counsel who appear before itare expected to be familiar with the Local Rules and to conducttheir practice in conformity therewith. When counsel fail to doso, the result is often the unnecessary expenditure of time andresources by the court, opposing counsel, and the parties.

Conclusion

For the foregoing reasons, Taco Bell's motion for summaryjudgment (document no. 43) is GRANTED. Taco Bell's motion forsanctions (document no. 58) is DENIED. Taco Bell's motion to strike (document no. 63) is DENIED as moot. Evans's motion forclass certification (document no. 47) is also DENIED as moot. Theclerk shall enter judgment accordingly and close the case.

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2005 | Cited 0 times | D. New Hampshire | September 23, 2005

SO ORDERED.