UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PABLA MARTINEZ, individually and as a parent, guardian and next friend of K.M., a minor child,

Plaintiff,

v.

WAFFLE HOUSE, INC.,

Defendant.

CIVIL ACTION NO.
1:19-CV-00593-JPB

ORDER

This matter comes before the Court on Waffle House, Inc.'s ("Defendant") Motion for Summary Judgment [Doc. 45]. This Court finds as follows:

FACTS AND PROCEDURAL HISTORY

On February 5, 2017, Pabla Martinez ("Plaintiff"), her minor daughter and Oscar Herrera visited the Waffle House restaurant on Buford Highway, just north of I-285 in Doraville, Georgia. [Doc. 58-1, p. 14]. After only five minutes, Plaintiff and her family placed their order with a server. Id. at 14-15. Plaintiff ordered a Texas Chicken Melt and told the server that she did not want onions on her food because she was allergic to onions. [Doc. 45-4, p. 19; Doc. 67-3, pp. 7, 22, 41]. Plaintiff also ordered a Chocolate Chip Waffle for her daughter. [Doc. 67-3, p. 8].

As Plaintiff was ordering the food, Clayton Griffith, the grill-cook employed by Defendant, allegedly stated that he did not "want to serve those fucking beaners, fucking Mexicans." [Doc. 58-1, p. 16; Doc. 45-4, p. 22]. The grill-cook additionally called Plaintiff and her family "fucking wetbacks" and "dirty beaners."[1] [Doc. 58-1, p. 16]. When Plaintiff questioned the grill-cook as to what he was saying, he replied with "no hablo ingles." [Doc. 45-4, p. 23]. As a result of the grill-cook's comments, Plaintiff elected to change her order from dine-in to carry-out. [Doc. 58-1, p. 15].

The grill-cook's comments continued even as Plaintiff paid for the meal. When Plaintiff paid for the meal with a $100 bill, the grill-cook stated that the bill was "probably a fake hundred[-]dollar bill" and that Plaintiff "should have gone to Taco Bell with that." Id. at 16. The grill-cook even stated that Plaintiff "should have been deported." Id.

After Plaintiff and her family arrived home and opened their food, Plaintiff realized that her food was cooked with onions. [Doc. 45-4, pp. 38-39]. Furthermore, the waffle did not contain chocolate chips. [Doc. 67-3, p. 16]. Instead, it also contained onions. Id. Additionally, a straw wrapper and an opened

[1] Defendant denies that the grill-cook ever used any racially offensive language towards Plaintiff. Defendant, however, concedes for the purposes of this motion only, that Plaintiff's testimony on this point must be considered true.

condiment package were on top of the food. [Doc. 45-4, pp. 39, 67]. Neither Plaintiff nor her daughter ate any of the food. [Doc. 58-1, p. 16].

As a result of the incident, on February 4, 2019, Plaintiff filed her Complaint against Defendant. [Doc. 1]. The Complaint was amended as a matter of right on February 14, 2019, and again on July 1, 2019. [Docs. 4 and 24]. The Second Amended Complaint contains the following causes of action: (1) discrimination in contractual relations in violation of 42 U.S.C. § 1981; (2) intentional infliction of emotional distress; (3) tortious misconduct; (4) negligence; (5) punitive damages; and (6) attorney's fees under O.C.G.A. § 13-6-11. [Doc. 24]. Defendant moved for summary judgment on October 11, 2019. [Doc. 45].

ANALYSIS

"Summary judgment is appropriate when the record evidence, including depositions, sworn declarations, and other materials, shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Feliciano v. City of Miami Beach, 707 F.3d 1244, 1247 (11th Cir. 2013) (quoting Fed. R. Civ. P. 56) (quotation marks omitted). A material fact is any fact that "is a legal element of the claim under the applicable substantive law which might affect the outcome of the case." Allen v. Tyson Foods, Inc., 121 F.3d 642, 646 (11th Cir. 1997). A genuine dispute exists when "the evidence is such that a

reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Ultimately, "[t]he basic issue before the court … is 'whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law.'" Allen, 121 F.3d at 646 (citation omitted).

1. Race Discrimination under 42 U.S.C. § 1981

42 U.S.C. § 1981 provides that:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

The elements of a cause of action under § 1981 are as follows: "(1) that the plaintiff is a member of a racial minority; (2) that the defendant intended to discriminate on the basis of race; and (3) that the discrimination concerned one or more of the activities enumerated in the statute." Kinnon v. Arcoub, Gopman & Assocs., Inc., 490 F.3d 886, 890 (11th Cir. 2007).

In this case, the second and third elements are at issue. Defendant argues that it is entitled to summary judgment because the alleged discrimination was based on Plaintiff's national origin—not her race. Defendant also argues that

Plaintiff was not denied a contractual right because Plaintiff paid for and received her food. [Doc. 45-1, pp. 3-7].

a. Distinguishing Between Race and National Origin Discrimination

Defendant is correct that § 1981 only applies to racial discrimination claims and not discrimination claims based on national origin. "Although § 1981 does not itself use the word 'race,' the Court has construed the section to forbid all 'racial' discrimination in the making of private as well as public contracts." Saint Francis Coll. v. Al-Khazraji, 481 U.S. 604, 606 (1987). As previously stated, Defendant argues that the grill-cook's comments (like "beaner" and "wetback") only relate to Plaintiff's national origin. This Court disagrees.

Courts, including the Supreme Court of the United States, have held that the concept of race discrimination under § 1981 is quite broad. For example, in Saint Francis College, where the Supreme Court was analyzing a discrimination claim of a United States citizen born in Iraq, the Supreme Court determined that "[b]ased on the history of § 1981, we have little trouble in concluding that Congress intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics. Such discrimination is racial discrimination that Congress intended § 1981 to forbid." Id. at 613. The Court elaborated that, at a minimum, § 1981 reaches

"discrimination against an individual 'because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of *homo sapiens*.'" Id.

Courts in the Eleventh Circuit have recognized that the "line between discrimination based on ancestry or ethnic characteristics, and discrimination based on place or nation of origin, is not a bright one." Bailey v. DAS N. Am., Inc., No. 2:17-cv-732-RAH-WC, 2020 WL 4039193, at *6 (M.D. Ala. Jul. 17, 2020). In fact, "[i]n some contexts, 'national origin' discrimination is so closely related to racial discrimination as to be indistinguishable." Id. See also Bullard v. OMI Ga., Inc., 640 F.2d 632, 634 (5th Cir. 1981) (noting that in some contexts national origin discrimination is so closely related to racial discrimination as to be indistinguishable and recognizing that in those cases, the granting of summary judgment is "especially questionable").

> National origin claims encompass scenarios where an individual has been discriminated against based upon that person's *nation or place of origin*. However, racial/ethnic discrimination claims encompass scenarios where an individual has been discriminated against because they are a member of a specific *ethnic or racial* group which is not necessarily associated with or limited to that person's nation or place of origin.

Joseph v. Fla. Quality Truss Indus., Inc., No. 05-61045-CIV, 2006 WL 3519095, at *3 (S.D. Fla. Dec. 6, 2006).

This Court finds that at least some of the grill-cook's comments ("beaners," "wetbacks" and "dirty beaners"[2]) fall within the Supreme Court's broad definition of race which includes "identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." See Saint Francis College, 481 U.S. at 613. Moreover, when the evidence is viewed in the light most favorable to Plaintiff, this Court finds that the grill-cook's alleged comments encompass discrimination based on ethnicity and ancestry. Certainly, an issue of material fact exists as to whether the grill-cook knew Plaintiff was from Mexico and whether the discrimination was based solely on Plaintiff's place of birth or on Plaintiff's ethnic background as well. Because a factual issue exists as to whether the grill-cook's alleged comments were related to Plaintiff's ancestry or ethnic characteristics, and not simply the place of her birth, Defendant is not entitled to summary judgment on this ground.

b. Interference with the Right to Contract

Defendant additionally argues that it is entitled to summary judgment as to Plaintiff's § 1981 claim because Plaintiff was not denied the right to contract with Defendant for food. [Doc. 45-1, pp. 3-7]. Generally speaking, in § 1981 claims

[2] See Alvarado v. Shipley Donut Flour & Supply Co., 526 F. Supp. 2d 746, 754-55 (S.D. Tex. 2007) (holding that slurs like wetback or taco-eater are not specific to Mexicans, but Hispanics generally).

involving retail establishments, "the plaintiff must demonstrate the loss of an actual contract interest." Lester v. "B"ing the Best, Inc., No. 09-81525-CIV, 2010 WL 4942835, at *5 (S.D. Fla. Nov. 30, 2010). Courts within the Eleventh Circuit have held that where the plaintiff completes his or her transaction and receives his or her entire order, the plaintiff's right to contract is not abridged and no claim exists under § 1981. Id. Here, Defendant contends that Plaintiff was able to complete her transaction with Defendant because she ordered, paid for and received her food. Defendant, however, ignores that Plaintiff did not receive what she paid for.

In Lester, the plaintiff ordered a two-cheeseburger combo meal without any onions or pickles. Id. After the plaintiff received her food, she returned her french fries because they were cold. Id. While the employee was replacing the plaintiff's french fries, the employee's manager made derogatory racial comments towards the plaintiff. Id. Applying the rule above, the court determined that the plaintiff's § 1981 claim was subject to summary adjudication because the plaintiff "ultimately received her entire purchase, exactly as ordered." Id. The court concluded by noting that "[e]gregious as the comments alleged . . . may have been, they did not prevent the formation of a contract, alter the substantive terms on which the contract was made, nor thwart the completion of the transaction." Id.

Unlike the plaintiff in Lester, Plaintiff did not receive what she ordered. Instead, she received a meal that was cooked with onions despite her clear order to the contrary. Although the grill-cook's comments did not prevent the formation of the contract, the substantive terms on which the contract was made were altered when Plaintiff received food that she was unable to eat. Defendant ignores that § 1981(b) defines the making and enforcement of contracts as including performance of the contract and the "enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship." While this Court recognizes that "mere poor service is not a violation of § 1981," Akins v. McDonald's Rests. of Fla., Inc., No. 6:08-cv-1243-Orl-22GJK, 2010 WL 11623679, at *6 (M.D. Fla. Feb. 19, 2010), Plaintiff does not simply allege poor service in this case. She alleges more. Ultimately, this Court finds that the substantive terms on which the contract was made were altered when the grill cook used onions to prepare Plaintiff's food.

The cases relied on by Defendant are distinguishable and do not change the result. In Lopez v. Target Corp., the plaintiff alleged that a store cashier refused to wait on him and process his transaction because of his race. 676 F.3d 1230, 1231 (11th Cir. 2012). After about five minutes and waiting in another line, the cashier's supervisor apologized profusely to the plaintiff, allowed him to complete his purchase and gave him store coupons. Id. at 1232. In analyzing whether the

cashier's refusal to serve the plaintiff amounted to a violation of § 1981, the Eleventh Circuit Court of Appeals recognized that "scant authority" exists in the Eleventh Circuit applying § 1981 to claims brought by customers against commercial establishments. Id. at 1233. The court determined that, despite the delay, the plaintiff could not state a § 1981 claim because he completed his transaction and bought his desired goods at the same price using the same payment methods as any other customers. Id. at 1234. Lopez is distinguishable because the Lopez plaintiff was able to complete his transaction and purchase his desired goods. The purchase was merely delayed. Here, however, Plaintiff was not able to purchase her desired goods despite paying for them. Plaintiff attempted to purchase edible food without onions, which she did not receive. As such, Lopez is not applicable to this case.

Kinnon is similarly distinguishable. 490 F.3d at 888. There, the plaintiff, an African American female, ordered pizza to be delivered to her office for a staff meeting. Id. Two hours later, when the defendant finally attempted to deliver the pizza, the plaintiff refused to pay the delivery driver and returned the pizza because the delivery was so late. Id. In attempting to collect payment for the pizza, the defendant left numerous racially derogatory messages on the plaintiff's voicemail. Id. at 889. In analyzing the plaintiff's § 1981 claim, the court determined that the

plaintiff failed to introduce evidence that she was actually denied the ability to make, perform, enforce, modify or terminate a contract because the plaintiff successfully entered into the contract for the delivery of the pizza and successfully terminated the contract. Id. at 892. The court further noted that the defendant did not begin her campaign of discriminatory telephone calls until after the contract at issue was terminated. Id. at 893. In the instant case, the discriminatory statements occurred during the contracting process, and thus Kinnon is distinguishable. Furthermore, unlike the plaintiff in Kinnon, Plaintiff actually paid for the purchase.

Ultimately, after considering the record and applicable case law, this Court finds that Defendant's argument that Plaintiff's contractual rights were satisfied the moment she left with her food order to be unavailing. Because Plaintiff did not receive what she ordered, Defendant is not entitled to summary judgment on this ground.

2. Respondeat Superior

Defendant argues that the doctrine of respondeat superior bars Plaintiff's § 1981 claim and other tort claims because the grill-cook was acting outside of the scope of his employment when he made the statements. In determining whether Defendant can be liable for the grill-cook's conduct, this Court must turn to the common law of agency. Solomon v. Waffle House, Inc., 365 F. Supp. 2d 1312,

1329 (N.D. Ga. 2004). In Georgia, "[a] master is liable for the torts of its servant if they are committed in the prosecution and within the scope of the master's business." Middlebrooks v. Hillcrest Foods, Inc., 256 F.3d 1241, 1246 (11th Cir. 2001). More specifically,

> Two elements must be present to render a master liable for his servant's actions under respondeat superior: first, the servant must be in furtherance of the master's business; and, second, he must be acting within the scope of his master's business. If a tort is committed by an employee not by reason of the employment, but because of matters disconnected therewith, the employer is not liable. Furthermore, if a tortious act is committed not in furtherance of the employer's business, but rather for purely personal reasons disconnected from the authorized business of the master, the master is not liable. Summary judgment for the master is appropriate where the evidence shows that the servant was not engaged in furtherance of his master's business but was on a private enterprise of his own.

Leo v. Waffle House, Inc., 681 S.E.2d 258, 262–63 (Ga. Ct. App. 2009). Importantly, "the determination of whether an employee was acting within the scope of his employment is a question for the jury; however, in plain and indisputable cases, the court may decide the issue as a matter of law." Middlebrooks, 256 F. 3d at 1246.

This Court finds that this is not a case that falls within the "plain and indisputable" exception. Here, a reasonable jury could conclude that the grill-cook was acting within the scope of his employment because he was working at the grill

and preparing food for patrons, including Plaintiff, when he began using racial slurs. See id. at 1246-47. See also Slocumb v. Waffle House, Inc., 365 F. Supp. 2d 1332, 1341 (N.D. Ga. 2005) (determining that a reasonable jury could find that servers working within a restaurant were acting within the scope of their employment because the alleged misconduct involved their function as servers). Ultimately, because a reasonable jury could conclude that the grill-cook was acting within the scope of his employment and within his function as the grill-cook when he made the racial comments and cooked onions into Plaintiff's food, summary judgment is not appropriate on this ground.

3. Intentional Infliction of Emotional Distress

To recover on an intentional infliction of emotional distress claim under Georgia law, a plaintiff must show evidence that: (1) the defendant's conduct was intentional or reckless; (2) the defendant's conduct was extreme and outrageous; (3) a causal connection exists between the wrongful conduct and the emotional distress; and (4) the emotional harm was severe. Abdul-Malik v. AirTran Airways, Inc., 678 S.E.2d 555, 558-59 (Ga. Ct. App. 2009). In this case, Defendant argues that it is entitled to summary judgment because the grill-cook's conduct was not extreme and outrageous as a matter of law, and Plaintiff failed to show that both she and her child suffered severe emotional distress. [Doc. 45-1, pp. 7-9].

Extreme and outrageous conduct, which is the second element, is that which is "so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Abdul-Malik, 678 S.E.2d at 559. Ordinarily, whether actions rise to the level of extreme and outrageous conduct necessary to support a claim of intentional infliction of emotional distress is a question of law. Id. In analyzing the fourth element, whether the emotional harm was severe, this Court must consider that

> emotional distress includes all highly unpleasant mental reactions such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea. It is only where it is *extreme* that liability arises. The law intervenes only where the distress inflicted is so severe that no reasonable [person] could be expected to endure it.

Id. at 560.

Assuming without deciding that the grill-cook's actions were extreme and outrageous, this Court agrees with Defendant that Plaintiff failed to show that either her or her daughter suffered severe emotional distress. In response to Defendant's Motion for Summary Judgment, Plaintiff never argues that she suffered severe emotional distress, and Plaintiff's argument is limited exclusively to the distress allegedly suffered by her daughter. More specifically, Plaintiff alleges that the grill-cook's comments were "jarring" and "hurtful" and resulted in

"multiple visits to a psychiatrist" where "other family dynamics were discussed." These allegations are not enough. See Pierce v. Wise, 639 S.E.2d 348, 351-52 (Ga. Ct. App. 2006) (finding that the plaintiff could not show severe emotional distress because he only visited the psychologist once and no evidence existed that he was unable or unmotivated to work). See also Ghodrati v. Stearnes, 723 S.E.2d 721, 723 (Ga. Ct. App. 2012) (finding that the plaintiff's allegations of anxiety, sleeplessness, embarrassment and loss of confidence were not so severe that a reasonable person could not endure it). Here, Plaintiff never argues that her daughter suffered from nightmares or had continuing issues in school as a result of the incident. Plaintiff also never argues that either she or her daughter suffered from any ailment which the reasonable person would not be expected to endure. Ultimately, this Court finds that attending counseling, without more, is insufficient to support a claim for intentional infliction of emotional distress. As a result, Defendant is entitled to summary judgment as to this claim.

4. Negligence

Defendant argues that Plaintiff's negligence claim cannot survive summary judgment because of Georgia's economic loss rule. [Doc. 45-1, p. 12]. In response, Plaintiff failed to present any opposition to this argument or address her negligence claim in any way.

"Failure to respond to the opposing party's summary judgment arguments regarding a claim constitutes an abandonment of that claim and warrants the entry of summary judgment for the opposing party." Burnette v. Northside Hosp., 342 F. Supp. 2d 1128, 1140 (N.D. Ga. 2004). Because Plaintiff abandoned her negligence claim, Defendant is entitled to summary judgment on this ground.

5. Tortious Misconduct

Tortious misconduct is based on the principle that one who owns an establishment and sells goods

> owes a duty to a customer [who is] lawfully in his store by his implied invitation for the purpose of transacting business, to protect the customer against the use of any unprovoked and unjustifiable opprobrious and insulting and abusive words by a clerk employed by him to deal with customers, tending to humiliate, mortify, and wound the feelings of the customer.

Wolter v. Wal-Mart Stores, Inc., 559 S.E.2d 483, 485 (Ga. Ct. App. 2002). In Georgia, a claim for tortious misconduct arises "when a customer-invitee on the premises of the [inviter] for the purpose of transacting business is subjected to abusive, opprobrious, insulting or slanderous language by an agent of the [inviter.]" Kirkland v. Earth Fare, Inc., 658 S.E.2d 433, 437 (Ga. Ct. App. 2008). "This theory of liability rests not upon slander 'but on the theory that a business inviter owes a public duty to protect its invitees from abusive language and conduct.'" Wolter, 559 S.E.2d at 485. "The concept of 'tortious misconduct' thus

denotes a limited exception to the applicability of the rule that a corporation may not be held liable for unauthorized, unratified slander by one of its agents." Carter v. Willowrun Condo. Ass'n, Inc., 345 S.E.2d 924, 926 (Ga. Ct. App. 1986).

As an initial matter, neither party submitted to the Court a case involving abusive language in the form of racial slurs directed towards a customer, nor was this Court able to locate an analogous case. With no authority to the contrary, this Court finds that Plaintiff has presented evidence of the sort of insulting or abusive behavior this tort was intended to redress. The evidence in the record shows that the grill-cook used profanity ridden language when speaking to Plaintiff and her young child. The grill-cook also called Plaintiff names like "dirty beaner" and "wetback" and told Plaintiff that she should be deported. The evidence further shows that when Plaintiff received her food, it was cooked with onions. Simply put, this case involves opprobrious or disrespectful language, and a reasonable jury could find that it rises to the level of tortious misconduct. Cf. Davis v. Rich's Dep't Stores, Inc., 545 S.E.2d 661, 664 (Ga. Ct. App. 2001) (finding that the plaintiff did not show tortious misconduct because the plaintiff described no harassment or abuse when he was physically present in the store). Accordingly, for the reasons stated above, Defendant is not entitled to summary judgment on Plaintiff's tortious misconduct claim.

6. Punitive Damages

Defendant contends that Plaintiff is not entitled to punitive damages under 42 U.S.C. § 1981 or Georgia law. [Doc. 45-1, pp. 20-23]. This Court agrees that summary adjudication on this claim is appropriate.

In § 1981 discrimination cases, punitive damages are available where the plaintiff puts forth "substantial evidence" that she was intentionally discriminated against with malice or with reckless indifference to her federally protected rights. Spriggs v. Mercedes-Benz USA, LLC, No. CV 213-51, 2016 WL 1690677, at *15 (S.D. Ga. Apr. 26, 2016). As conceded by the parties, the state law standard is virtually identical. Malice or reckless indifference is established by showing that the discrimination occurred in the face of the knowledge that it was in violation of federal law, which includes: (1) a pattern of discrimination; (2) spite or malevolence; or (3) a blatant disregard for civil obligations. Id. Significantly, punitive damages are "an extraordinary remedy" and a plaintiff must demonstrate some form of reckless or egregious conduct or otherwise every discrimination claim could include a punitive damage award because every discrimination plaintiff must demonstrate an intentional unlawful discrimination. Dudley v. Wal-Mart Stores, Inc., 166 F.3d 1317, 1322 (11th Cir. 1999).

Moreover, in part because of the egregious-conduct requirement, punitive damages will ordinarily not be assessed against a defendant with only constructive knowledge of a violation of federal law. Id. Although the defendant "may be liable in compensatory damages for the discriminating act of its agent, [the defendant] might not be liable for punitive damages for the same act." Id. Because the purpose of punitive damages is to punish, a plaintiff must show that the discriminating employee was "high up" in the corporate hierarchy or that higher management approved of the behavior. Id. at 1322-23.

Applying the legal framework explained above, this Court finds that Plaintiff cannot meet her burden or create a genuine issue of material fact showing that punitive damages are appropriate in this case. Here, it is undisputed that the grill-cook was not "high up" in the corporate hierarchy of Defendant. Plaintiff also cannot put forth evidence that higher management approved the grill-cook's behavior. In fact, the undisputed record in this case reflects that Defendant had policies in place to ensure its employees did not discriminate against its patrons. The record further reveals that after Plaintiff complained about the grill-cook, Defendant investigated Plaintiff's allegation, disciplined the grill-cook and reminded the grill-cook of the non-discrimination policies. Even though Plaintiff does not think Defendant did enough in response to Plaintiff's complaint, these

undisputed actions are sufficient to show that Defendant did not act with reckless indifference to Plaintiff's federally protected rights. As such, summary judgment is appropriate as to Plaintiff's request for punitive damages under both federal and state law.

7. Attorney's Fees

Defendant moved for summary judgment on Plaintiff's claim for attorney's fees. Attorney's fees and expenses of litigation may be awarded pursuant to O.C.G.A. § 13-6-11 if "the fact-finder determines the defendant has acted in bad faith, has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense." Atlanta Emergency Servs., LLC v. Clark, 761 S.E.2d 437, 441 (Ga. Ct. App. 2014). Importantly, questions concerning bad faith, stubborn litigiousness and unnecessary trouble and expense are "generally questions for the jury to decide." Id.

Defendant asserts that summary judgment is appropriate as to Plaintiff's claim for attorney's fees because Plaintiff can prove neither bad faith nor unnecessary trouble and expense. In response, Plaintiff only argues that the bad faith prong applies, and thus any argument that she is entitled to fees under the unnecessary trouble and expense prong is deemed abandoned.

"Bad faith warranting an award of attorney fees must arise out of the transaction on which the cause of action is predicated, and it may be found in how the defendant acted in his dealing with the plaintiff." Bo Phillips Co. v. R.L. King Props., LLC, 783 S.E.2d 445, 452 (Ga. Ct. App. 2016). Significantly, "every intentional tort invokes a species of bad faith and entitles a person so wronged to recover the expenses of litigation including attorney fees." Id. Because Plaintiff's tortious interference and discrimination claims remain for the jury to consider, Plaintiff's claim for attorney's fees rooted in bad faith likewise remains.

Defendant's argument that Plaintiff is unable to recover bad faith attorney's fees because a bona fide controversy exists between the parties is without merit. This exception does not apply to bad faith attorney's fees. The Georgia Court of Appeals has made clear that the bona fide controversy exception "pertains solely to the issue of stubborn litigiousness or causing the plaintiff unnecessary trouble and expense." Atlanta Emergency Services, 761 S.E.2d at 442. Ultimately, Defendant is not entitled to summary judgment as to Plaintiff's claim for fees under O.C.G.A. § 13-6-11 because Plaintiff's claims involve intentional torts.

CONCLUSION

For the reasons stated above, Defendant's Motion for Summary Judgment [Doc. 45] is **GRANTED IN PART AND DENIED IN PART**. The following

claims shall proceed to trial: (1) discrimination under 42 U.S.C. § 1981; (2) tortious misconduct; and (3) attorney's fees under O.C.G.A. § 13-6-11.

The parties are **HEREBY ORDERED** to file the Consolidated Pretrial Order required by Local Rule 16.4 within thirty days of entry of this Order. The parties are notified that a failure to comply with this Order may result in sanctions, including dismissal of the case or entry of default judgment.

SO ORDERED this 17th day of September, 2020.

J. P. BOULEE
United States District Judge