

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60558
Summary Calendar

EDMUND JANUS and DONNA JANUS,

Plaintiffs-Appellants,

versus

BELLSOUTH TELECOMMUNICATIONS, INC.,

Defendant-Appellee.

Appeal from the United States District Court for the
Southern District of Mississippi
(1:93-CV-337-BrR)

(February 17, 1995)

Before KING, JOLLY, and DeMOSS, Circuit Judges.

PER CURIAM:*

I

The appellants, Edmund and Donna Janus (the "Januses"), received annoying telephone calls over a period of two and one-half years from approximately January 1990 until September 1992. In an effort to stop these annoying phone calls, the Januses purchased a call identifier to aid in determining the numbers of the unwanted

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

callers and then reported the calls to the appellee, BellSouth Telecommunications, Inc. ("BellSouth"). BellSouth assisted the Januses by changing their number to a private unlisted one, electronically testing the line for wire-tapping, and tracing the origin of the calls coming into the Januses' residence. BellSouth found no wire-tap on the phone line. As a result of the trace, BellSouth identified and contacted one repeat caller. The company placing these calls informed BellSouth that the 147 repeat calls were made mistakenly by a computer programmed to continue to call until receiving an answer.

Because of BellSouth's alleged failure to stop the annoying calls, the Januses filed suit against BellSouth in state court alleging various causes of action, including breach of contract, negligence, and breach of the implied warranty of suitability of BellSouth's personnel, equipment and system.¹ BellSouth removed the suit to the United States District Court for the Southern District of Mississippi. The district court granted BellSouth's motion for summary judgment finding no genuine issue of material fact. The district court held that BellSouth owed no duty to the Januses to stop the harassing calls. Even if BellSouth had a

¹The Januses additionally raised claims of both negligent and intentional infliction of emotional distress in their complaint, but failed to brief these claims on appeal. Consequently, these claims are abandoned. See FED. R. APP. P. 28(a)(5) ("The argument must contain the contentions of the appellant on the issues presented, and the reasons therefor"); Yohey v. Collins, 985 F.2d 222, 225 (5th Cir. 1993) (holding that appellant abandoned argument by failing to argue it in body of brief).

limited duty to use ordinary care to ensure that the Januses were not damaged while attempting to locate the source of the annoying calls, the court held that BellSouth did not breach this limited duty.

On appeal, the Januses argue that the district court erred in granting summary judgment in favor of BellSouth. They contend that BellSouth assumed a duty to eliminate the annoying calls "by virtue of [its] policy, procedure, equipment, facilities, and trained personnel." They argue that BellSouth breached this duty by failing to identify and stop these calls. This failure, they conclude, supports their claims of negligence, breach of contract, and breach of the implied warranty of suitability.

II

A

Because this is a case on appeal from the denial of a motion for summary judgment, we review the record de novo. Calpetco 1981 v. Marshall Exploration, Inc., 989 F.2d 1408, 1412 (5th Cir. 1993). Under Rule 56(c) of the Federal Rules of Civil Procedure, we examine evidence presented to determine that there is "no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). Once a properly supported motion for summary judgment is presented, the burden shifts to the non-moving party to set forth specific facts showing that there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S.Ct. 2505, 2511, 91

L.Ed.2d 202 (1986); Brothers v. Klevenhagen, 28 F.3d 452, 455 (5th Cir. 1994), cert. denied, 115 S.Ct. 639 (1994). We must review "the facts drawing all inferences most favorable to the party opposing the motion." Matagorda County v. Russell Law, 19 F.3d 215, 217 (5th Cir. 1994).

B

The Januses argue that BellSouth had a duty to eliminate the annoying phone calls made to them for two and one-half years. This duty, the Januses argue, was created by "BellSouth's policy, procedure, equipment, facilities, and trained personnel." The Januses conclude that BellSouth breached this duty by failing to take reasonable investigatory steps to locate and terminate these calls. This breach, they claim, gives rise to three causes of action--negligence, breach of contract, and breach of the implied warranty of suitability. BellSouth does not dispute the fact that the Januses received annoying calls. Rather, BellSouth argues that it had no duty to investigate or stop these annoying calls made by third parties.²

As both parties recognize, the Mississippi Supreme Court has not yet recognized the duty of a telephone service provider to investigate or prevent annoying telephone calls. In the absence of such a duty, BellSouth cannot be held liable for negligence. See

²The Januses contend that an employee of BellSouth assisted in placing the harassing calls. The Januses, however, produce no evidence in opposition to BellSouth's motion for summary judgment to support this contention.

Foster by Foster v. Bass, 575 So.2d 967, 972 (Miss. 1990)("actionable negligence cannot exist in the absence of a legal duty to an injured plaintiff"). Because we are sitting in diversity applying the law of Mississippi, we are unwilling to create such a duty, which is not yet recognized by the Mississippi Supreme Court, nor which is a rational extension of an already existing duty. Consequently, we affirm the district court's grant of summary judgment in favor of BellSouth on the Januses negligence claim.

The Januses assert two additional causes of action--breach of contract and breach of an implied warranty of suitability of BellSouth's personnel, equipment, and system. The Januses allege that BellSouth created a obligation in contract or extended an implied warranty of suitability to locate and prevent annoying calls made to their home by publishing Policy and Departmental Responsibilities in its Operating Guide and by informing subscribers in the telephone book of how to handle harassing calls. The policy section of BellSouth's Operating Guide states that "[w]here possible, every effort will be made to deter annoyance calling after the appropriate data has been obtained." Furthermore, the departmental responsibility of the Annoyance Call Center, according to the Operating Guide, is "for the overall handling of customers' annoyance call problems to a satisfactory conclusion." BellSouth advises subscribers in the telephone book merely to call the Annoyance Call Center for assistance with

persistent annoying calls. The Januses argue that these statements made in the Operating Guide and the telephone book express BellSouth's assumed duty to eliminate annoying calls. We disagree. The broad policy and procedure statements made in these two documents do not expressly nor impliedly state that BellSouth guarantees annoyance-free telephone service. Based on the evidence submitted against BellSouth's motion for summary judgment, we hold that BellSouth has agreed neither by contract nor by implied warranty to obligate themselves to identify and prevent annoying and harassing telephone calls.³ Accordingly, on the record before us, we hold that summary judgment in favor of BellSouth is appropriate on the claims of breach of contract and breach of the implied warranty of suitability.

III

For the foregoing reasons, the judgment of the district court is

A F F I R M E D.

³The Januses additionally argue that because BellSouth is the only company with which they could contract for residential telephone service, BellSouth had an obligation to eliminate annoying calls from coming into the Januses' home. Solely because BellSouth operates as a monopoly in providing telephone service does not impose a contractual obligation on BellSouth to prevent annoying calls to its customers. The Januses have failed to point to any other evidence, other than than discussed above, that establishes a contractual obligation on BellSouth to prevent these calls.