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LORETTA G. WHYTE
CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KADLEC MEDICAL CENTER, ET AL.

CIVIL ACTION

versus

No. 04-997

LAKEVIEW ANESTHESIA ASSOCIATES, ET AL.

SECTION: I/3

ORDER AND REASONS

Before the Court is a motion filed on behalf of defendants, Lakeview Anesthesia Associates, Doctor Mark Dennis, Doctor William Preau, Doctor David Baldone, and Doctor Allan Parr, to dismiss plaintiffs' negligence and negligent misrepresentation claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.¹ For the following reasons, defendants' motion to dismiss is **DENIED**.

Background

On April 8, 2004, plaintiff Kadlec Medical Center ("Kadlec") and its insurer, plaintiff Western Professional Insurance Company

¹ Rec. Doc. No. 36. Plaintiffs' negligent misrepresentation claims are set forth in paragraphs 42-46 of their complaint and plaintiffs' negligence claims are set forth in paragraphs 50-56. See Rec. Doc. No. 1.

— Fee _____
— Process _____
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— CtRmDep _____
— Doc. No. _____

("Western"), filed this action against Lakeview Anesthesia Associates ("LAA"), Dr. Dennis, Dr. Preau, Dr. Baldone, Dr. Parr, and Lakeview Medical Center, LLC, asserting claims for intentional misrepresentation, negligent misrepresentation, strict responsibility misrepresentation, and negligence.² Plaintiffs' claims arise out of representations and/or omissions allegedly made or omitted by defendants in written employment references for Dr. Robert Lee Berry.

Dr. Berry was a member of an anesthesia practice group with Drs. Dennis, Preau, Baldone, and Parr in Louisiana.³ Dr. Berry had staff privileges at Lakeview Medical Center between 2000 and 2001. Plaintiffs assert that during those years, Dr. Berry became involved in a prescription drug diversion scheme where he would personally use narcotic drugs purportedly withdrawn for patient use.⁴ Plaintiffs further assert that defendants became aware of Dr. Berry's drug use and that defendants knew Dr. Berry was practicing medicine while impaired. On March 27, 2001, LAA

² Defendant LAA is the anesthesia practice group of which Dr. Berry was a shareholder with Drs. Dennis, Preau, DiLeo, Baldone, Levine, and Parr. Rec. Doc. No. 1, ¶11. LAA is the exclusive provider of anesthesiology services to LRMC. *Id.* at ¶12.

³ Rec. Doc. No. 1. Defendant Lakeview Medical Center, LLC, d/b/a Lakeview Regional Medical Center ("LRMC"), is not a party to this motion to dismiss. Plaintiffs have only asserted a negligence claim against Drs. Baldone and Parr. Plaintiffs assert all four claims against LAA, LRMC, and Drs. Dennis and Preau.

⁴ Rec. Doc. No. 1.

terminated Dr. Berry's employment "with cause."⁵

After Dr. Berry was fired, he sought employment through Staff Care, Inc., a temporary employment agency for medical professionals.⁶ In November, 2001, Dr. Berry ultimately found work as an anesthesiologist at Kadlec Medical Center in Washington State. Then, on November 12, 2002, during a routine tubal ligation surgery, Dr. Berry allegedly caused a patient, Kim Jones, to suffer extensive brain damage by practicing medicine while under the influence of drugs.⁷ The patient has remained in a non-responsive, vegetative state since November 12, 2002.⁸ Ms. Jones's family brought a medical malpractice lawsuit (the "Jones' lawsuit") in Washington against Dr. Berry and Kadlec, as Dr. Berry's employer, which Kadlec settled for 7.5 million dollars.

Plaintiffs allege that when defendants sent professional letters of reference on Dr. Berry's behalf, defendants intentionally and/or negligently misrepresented Dr. Berry's qualifications by failing to disclose information with respect to

⁵ Rec. Doc. No. 1, exhibit A, termination letter. The termination letter, dated March 27, 2001, represents that Dr. Berry's termination was effective March 13, 2001. The letter states: "As we have discussed on several occasions, you have reported to work in an impaired physical, mental, and emotional state. Your impaired condition has prevented you from properly performing your duties and puts our patients at significant risk." *Id.*

⁶ Rec. Doc. No. 1, ¶22.

⁷ Rec. Doc. No. 1, ¶¶28-32.

⁸ Rec. Doc. No. 1, ¶31.

his adverse employment history. Defendants, LAA as well as Drs. Dennis, Preau, Baldone, and Parr, seek dismissal of plaintiffs' negligence and negligent misrepresentation claims because defendants contend that plaintiffs' lawsuit is nothing more than a claim for contribution and/or tort indemnity, which defendants maintain is not recognized in Louisiana or Washington.⁹

Law and Analysis

A district court may not dismiss a complaint, or any part of it, for failure to state a claim upon which relief can be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed. 2d 80 (1957); *Blackburn v. City of Marshall*, 42 F.3d 925, 931 (5th Cir. 1995). This Court will not look beyond the factual allegations in the pleadings to determine whether relief should be granted. See *Spivey v. Robertson*, 197 F.3d 772, 774 (5th Cir. 1999); *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). In assessing the complaint, a court must accept all well-pleaded facts in the complaint as true and liberally construe all factual allegations in the light most favorable to the plaintiff.

⁹ Indemnity shifts an entire loss from a tortfeasor who is "only technically or constructively at fault" to the person primarily responsible, "while contribution apportions the loss among those jointly responsible." *Mayo v. Benson Chevrolet Co.*, 717 So. 2d 1247, 1249 (La. App. 5th Cir. 1998).

Spivey, 197 F.3d at 774; *Lowry v. Texas A&M University System*, 117 F.3d 242, 247 (5th Cir. 1997). "However, '[i]n order to avoid dismissal for failure to state a claim, a plaintiff must plead specific facts, not mere conclusory allegations'" *Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992) (quoting *Elliott v. Foufas*, 867 F.2d 877, 881 (5th Cir. 1989)) (alteration in original). "'[C]onclusory allegations and unwarranted deductions of fact are not admitted as true' by a motion to dismiss." *Id.* (quoting *Associated Builders, Inc. v Alabama Power Co.*, 505 F.2d 97, 100 (5th Cir. 1994)). Moreover, "'legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.'" *Blackburn*, 42 F.3d at 931 (quoting *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993)). "[T]he complaint must contain either direct allegations on every material point necessary to sustain a recovery . . . or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial." *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995) (internal quotation and citation omitted).

Defendants contend that Kadlec and Western are merely attempting to recover the monies paid to settle the Jones' lawsuit. Defendants characterize plaintiffs' action as a claim

for contribution and tort indemnity which they maintain has been abolished in Louisiana.¹⁰ Defendants submit that in 1996, the Louisiana legislature amended art. 2324 of the Louisiana Civil Code to abolish solidary liability among non-intentional tortfeasors and to place Louisiana in a pure comparative fault system. See La. Civ. Code arts. 2323, 2324.¹¹ Defendants detail

¹⁰ Defendants also argue that plaintiffs' negligence-based claims are barred under Washington law. Plaintiffs' claims have been pleaded under Louisiana law and neither party has provided any support for a determination that Washington law applies in this lawsuit. Accordingly, the Court examines plaintiffs' claims and defendants' motion under Louisiana law as pled.

¹¹ Article 2323 of the Louisiana Civil Code provides:

A. In any action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined, regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute, including but not limited to the provisions of R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable. If a person suffers injury, death, or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss.

B. The provisions of Paragraph A shall apply to any claim for recovery of damages for injury, death, or loss asserted under any law or legal doctrine or theory of liability, regardless of the basis of liability.

C. Notwithstanding the provisions of Paragraphs A and B, if a person suffers injury, death, or loss as a result partly of his own negligence and partly as a result of the fault of an intentional tortfeasor, his claim for recovery of damages shall not be reduced.

Article 2324 provides:

A. He who conspires with another person to commit an intentional or willful act is answerable, in solido, with that person, for the damage caused by such act.

B. If liability is not solidary pursuant to Paragraph A, then liability for damages caused by two or more persons shall be a joint and divisible obligation. A joint tortfeasor shall not be liable for more than his degree of fault and shall not be solidarily liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, death, or loss,

Louisiana's developments in tort liability, discussing the seminal Louisiana Supreme Court case on the 1996 amendments to the Louisiana Civil Code, *Dumas v. State*, 828 So. 2d 530 (La. 2002). Defendants, however, misunderstand the *Dumas* court's discussion of tort liability and solidary obligations.

In *Dumas*, the Louisiana Supreme Court decided a wrongful death and survival action brought by the family of a bicyclist who died after hitting a pothole in a Louisiana state park and striking his head on the pavement. 828 So. 2d at 531. The bicyclist died while being treated at the hospital when his head injuries were complicated due to malpractice. *Id.* Based on the 1996 amendments to Louisiana Civil Code arts. 2323 and 2324(B), the *Dumas* court held that an initial tortfeasor may present evidence of a subsequent tortfeasor's act, e.g. subsequent malpractice, as an affirmative defense to liability. *Id.* The *Dumas* court found that Louisiana's 1996 tort reform, which eliminated solidary liability for non-intentional tortfeasors, effected an additional change - a tortfeasor would no longer need to seek contribution or indemnity for another tortfeasor's portion of the plaintiff's damages because tortfeasors would only

regardless of such other person's insolvency, ability to pay, degree of fault, immunity by statute or otherwise, including but not limited to immunity as provided in R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable.

be held responsible for their percentage of fault even if other defendants were not parties to the lawsuit. *Id.* at 538. The *Dumas* court did not hold that Louisiana had entirely eliminated tort indemnity and contribution.¹²

As defendants recognize, Kadlec settled the Jones' lawsuit "for its own acts of negligence."¹³ Kadlec and its insurer now seek damages for *defendants'* alleged negligent misrepresentation and negligence in referring Dr. Berry to Kadlec without disclosing his prior adverse employment history. In order to find that plaintiffs' claims are barred by the effects of Louisiana's abolition of solidary liability, plaintiffs and defendants would have to be joint or concurrent tortfeasors with respect to Ms. Jones. That is, plaintiffs would have to be seeking contribution from defendants solely for defendants' fault with respect to the injuries sustained by Ms. Jones at Kadlec Medical Center. However, plaintiffs seek recovery not for the defendants' role as a tortfeasor in the Jones' lawsuit, but for

¹² The *Dumas* court did not address contractual contribution and indemnity. Likewise, "[t]he Louisiana Supreme Court did not hold that the right to seek indemnification among alleged co-tortfeasors disappeared, just the right of contribution." *Campo v. John Fayard Fast Freight, Inc.*, 02-3690, 2003 WL 22229300 (E.D. La. Sept. 26, 2003).

¹³ Rec. Doc. No. 36, memorandum in support of 12(b)(6) motion to dismiss for failure to state a claim upon which relief can be granted, p.3. Kadlec emphasizes that it actually responded to the Jones' lawsuit based on its legal responsibility under Washington law as Dr. Berry's employer. Rec. Doc. No. 1, ¶34.

the defendants' alleged breach of independent duties owed plaintiffs, e.g., the duty not to communicate misleading, incomplete, or incorrect information to plaintiffs.

Notwithstanding the fact that plaintiffs quantify their damages in a way which resembles the amount paid to settle the Jones' lawsuit plus costs, plaintiffs' damages are alleged to be the monetary losses to plaintiffs arising from defendants' acts of negligence and negligent misrepresentations. As plead, plaintiffs' negligence-based causes of action against defendants are based on the defendants' independent acts directed at plaintiffs.

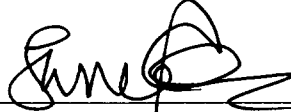
The Court cannot find as a matter of law that Kadlec's and Western's negligence-based claims are actually claims for reimbursement, contribution, or indemnity. Defendants have not provided the Court any legal authority for their theory that plaintiffs' allegations of negligent misrepresentation and negligence are contribution claims in disguise.

Plaintiffs allege that they suffered financial losses caused by the defendants' negligent misrepresentations and negligent acts. At this stage in the litigation, it cannot be said that plaintiffs' negligence-based claims against the defendants are actually and exclusively indemnity or contribution claims that have been abolished in Louisiana.

Accordingly,

IT IS ORDERED that defendants' motion to dismiss plaintiffs' negligence and negligent misrepresentation claims is **DENIED**.

New Orleans, Louisiana, May 9, 2005.



LANCE M. AFRICK
UNITED STATES DISTRICT JUDGE