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U.S. DISTRICT COURT
EASTERN DISTRICT OF LA

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

KADLEC MEDICAL CENTER, *et al.* — CIVIL ACTION

VERSUS — No. 04-0997

LAKEVIEW ANESTHESIA ASSOCIATES, *et al.* — SECTION I/3

ORDER AND REASONS

Before the Court is a motion for summary judgment filed on behalf of defendant Lakeview Medical Center, L.L.C., d/b/a Lakeview Regional Medical Center ("LRMC").[1] LRMC argues that this case presents no genuine issue of material fact and that it cannot be held liable for negligence or any alleged misrepresentation in connection with credentialing letters regarding Dr. Robert Lee Berry which were mailed to Kadlec Medical Center and the Washington State Department of Health. LRMC also contends that plaintiffs' claims have prescribed. Plaintiffs, Kadlec Medical Center and Western Professional Insurance Company, oppose the motion.[2] For the following reasons, LRMC's motion for summary judgment is **DENIED**

[1] Rec. Doc. No. 88. LRMC initially filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. (Rec. Doc. No. 52.) However, because LRMC relies on the same arguments in the instant motion for summary judgment as it does in its motion to dismiss, the Court denies LRMC's motion to dismiss as moot.

[2] Rec. Doc. No. 110.

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IN PART and **GRANTED IN PART**.

Background

This lawsuit arises from statements or omissions made or omitted by defendants, LRMC, Louisiana Anesthesia Associates, L.L.C., and Doctors Dennis, Preau, Parr and Baldone, in professional reference letters or credentialing letters written on behalf of Dr. Robert Lee Berry. Dr. Berry practiced anesthesiology at LRMC in Covington, Louisiana from January, 1997, to March, 2001.[3] During that time, Dr. Berry was an employee of Lakeview Anesthesia Associates, L.L.C. ("LAA") and, ultimately, he became a shareholder of LAA with defendants Drs. Dennis, Preau, Baldone, and Parr.[4] Kadlec alleges that at some point during the year 2000, LRMC conducted an audit of Dr. Berry's narcotic medication records and discovered that he had failed to properly document withdrawals of the drug Demerol.

On March 13, 2001, Dr. Berry failed to respond to hospital pages during a 24-hour shift at LRMC. Kadlec alleges that hospital staff found Dr. Berry sleeping in a chair and that he "appeared to be sedated."[5] Apparently in response to this incident and based on

[3] Rec. Doc. No. 1. LRMC contends that Dr. Berry was actually employed by Lakeview Anesthesia Associates, L.L.C. ("LAA"), a co-defendant in this case. LAA provided anesthesia services to LRMC and Dr. Berry had staff privileges at LRMC.

[4] LAA is the anesthesia practice group of which 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.

[5] Rec. Doc. No. 1.

suspicions that Dr. Berry was diverting Demerol, LAA terminated Dr. Berry's employment effective that day.[6] Dr. Berry's staff privileges at LRMC subsequently expired.[7]

Following his termination from LAA, Dr. Berry sought employment through Staff Care, Inc., a temporary employment agency for medical professionals. Staff Care ultimately placed Dr. Berry at Kadlec Medical Center in Richland, Washington. Before Dr. Berry started practicing medicine in Washington, Kadlec sent a letter to LRMC requesting, among other things, (1) "evidence of current competence to perform the privileges requested" and (2) "a candid evaluation of [Dr. Berry's] training, continuing clinical performance, skill, and judgment, interpersonal skills and ability to perform the privileges requested."[8] Kadlec included an "Appointment Reference Questionnaire" with the request for information. The questionnaire provided a fill-in-the-blank form which asked specific questions that the medical center wanted answered.

On October 26, 2001, in response to Kadlec's inquiry, LRMC sent Kadlec a brief letter which stated that Dr. Berry was on the active medical staff in the field of anesthesiology at LRMC from

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[6] Rec. Doc. No. 1, exhibit A. LRMC emphasizes that it was not a signatory to the termination letter nor did it "employ or control Dr. Berry in any manner." Rec. Doc. No. 88.

[7] Rec. Doc. No. 88, exhibit 7, App-A-104.

[8] Rec. Doc. No. 88, exhibit B, declaration of Rose Anne McDow (internal exhibit 1). The Washington State Department of Health and Staff Care also sent questionnaires to LRMC requesting Dr. Berry's professional history.

March 4, 1997 to September 4, 2001.[9] The letter represented that such limited information was provided "due to the large volume of inquiries received in the office."[10] LRMC admits that it did not answer any of the questions on the enclosed questionnaire, but says that this type of response was part of its standard business practice in responding to such inquiries.[11]

Based in part on the information contained in the letter from LRMC and two other letters of recommendation written by Drs. Dennis and Preau, Kadlec retained Dr. Berry's services through Staff Care in late 2001. About a year later, Dr. Berry was the anesthesiologist for a tubal ligation surgery performed at Kadlec. The patient, Ms. Jones, suffered extensive brain damage and has remained in a non-responsive state since the surgery, allegedly due to Dr. Berry's gross negligence and the fact that he was impaired by drugs during the surgery.[12]

The family of the injured patient sued Dr. Berry and Kadlec, as Dr. Berry's employer, in Washington for medical malpractice. Kadlec claims that during discovery in that case, it learned that

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[9] Rec Doc. No. 88, exhibit B (internal exhibit 2).

[10] *Id.* LRMC sent identical letters to the Washington State Department of Health and Staff Care.

[11] Rec. Doc. No. 88. LRMC also claims that neither the author of the letter nor the employee who signed the letter knew anything about Dr. Berry's alleged problems or his departure from LAA.

[12] Rec. Doc. No. 1.

LAA had terminated Dr. Berry "with cause" in 2001.[13] Kaldec ultimately settled the medical malpractice lawsuit for $7.5 million.[14] After the settlement, Kadlec filed this lawsuit against LRMC, LAA, and Drs. Dennis, Preau, Parr, and Baldone.

Law and Analysis

I. Summary Judgment Standard

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). The party seeking summary judgment always bears the initial responsibility of informing the court of the basis for its motion, and identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2553, 91 L. Ed.2d 265 (1986). The moving party need not produce evidence negating the existence of a material fact, but need only point out the absence of evidence supporting the nonmoving party's case. *Celotex,* 477 U.S. at 322-23, 106 S. Ct. at 2554; *Fontenot v. Upjohn Co.,* 780 F.2d 1190, 1195 (5th Cir. 1986).

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[13] Rec. Doc. No. 1.

[14] Rec. Doc. No. 1.

Once the moving party carries its burden pursuant to Rule 56(c), the nonmoving party must come forward with specific facts showing that there is a genuine issue for trial. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed.2d 538 (1986). That burden is not satisfied by creating merely some metaphysical doubt as to the material facts, by conclusory allegations, unsubstantiated assertions or by only a scintilla of evidence. *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994)(citations omitted). The nonmovant may not rest upon the pleadings, but must identify specific facts that establish a genuine issue exists for trial. *Id.* The materiality of facts is determined by "the substantive law's identification of which facts are critical and which facts are irrelevant." *Anderson v. Liberty Lobby, Inc.* 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L.Ed. 2d 202 (1986). Therefore, a fact is material if it "might affect the outcome of the suit under the governing law." *Id.* A dispute about a material fact is genuine if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no genuine issue for trial." *Matsushita*, 475 U.S. at 587, 106 S. Ct. at 1356.

In order to demonstrate that summary judgment should not lie, the nonmoving party must "go beyond the pleadings and by her own

affidavits, or by the 'depositions, answers to interrogatories, and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.'" *Celotex Corp.,* 477 U.S. at 324, 106 S. Ct. at 2553; *Auguster v. Vermillion Parish School Board,* 249 F.3d 400, 402 (5th Cir. 2001).

A court will resolve factual controversies in favor of the nonmoving party, "but only when there is an actual controversy, that is, when both parties have submitted evidence of contradictory facts." *Little*, 37 F.3d at 1075. The Court will not, however, in the absence of any proof, assume that the nonmoving party could or would prove the necessary facts. *See id.* (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888, 110 S. Ct. 3177, 3188, 111 L. Ed.2d 695 (1990)).

> [T]he plain language of Rule 56(c) "mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. In such a situation, there can be "no genuine issue as to any material fact," since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.

Celotex, 477 U.S. at 322-23, 106 S. Ct. at 2552; *see Munoz v. Orr*, 200 F.3d 291, 307 (5th Cir. 2000)("A complete failure of proof as to one element requires summary judgment against the entirety of the claim.")(citation omitted).

II. Plaintiffs' Claims

Plaintiffs, Kadlec Medical Center and Western Professional

Insurance Company, assert claims against LRMC for intentional misrepresentation, negligent misrepresentation, strict responsibility misrepresentation, and negligence based on LRMC's alleged omission of material facts in a letter representing Dr. Berry's term of service at LRMC. When a federal court exercises diversity jurisdiction pursuant to 28 U.S.C. § 1332, the court must apply the substantive law of the forum state. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S. Ct. 817, 822, 82 L. Ed. 1188 (1938).

Accordingly, under Louisiana law, in order to prevail on a claim for negligent misrepresentation, a plaintiff must establish the following elements: 1) the defendant, in the course of its business or other matters in which it had a pecuniary interest, supplied false information; 2) the defendant had a legal duty to supply correct information to the plaintiff; 3) the defendant breached its duty, which can be breached by omission as well as by affirmative misrepresentation;[15] and 4) the plaintiff suffered damages or pecuniary loss as a result of its justifiable reliance upon the omission or affirmative misrepresentation.[16] *See Hardy v.*

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[15] *See In re Ward*, 894 F.2d 771, 776 (5th Cir. 1990)("Naturally, if there is a duty to supply correct information it can be breached by omission as well as by affirmative misrepresentation.")

[16] In *Doucet v. LaFourche Parish Fire Protection*, a pecuniary interest in the transaction by the defendant disseminating the misleading information was recognized as a possible element of a negligent misrepresentation claim. 589 So. 2d 517, 520, n.1 (La. App. 1st Cir. 1991)(Gonzales, J., concurring). *See also Dousson v. South Central Bell*, 429 So. 2d 466, 468 (La. App. 4th 1983); *Hoffman v. Sabre Marine, Inc.*, 407 So. 2d 516, 517-18 (La. App. 4th Cir. 1981).

Hartford Ins. Co., 236 F.3d 287, 292 (5th Cir. 2001); *Brown v. Forest Oil Corp.*, 29 F.3d 966, 969 (5th Cir. 1994)(citing *Busby v. Parish Nat'l Bank*, 464 So. 2d 374 (La. App. 1st Cir. 1985). The elements of a claim for intentional misrepresentation are similar: 1) a misrepresentation of a material fact, 2) made with intent to deceive, and 3) causing justifiable reliance with resultant injury. *Guidry v. United States Tobacco*, 188 F.3d 619, 627 (5th Cir. 1999).

With respect to plaintiffs' negligence claim, under Louisiana law, the fundamental principle of tort liability is that "[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it." La. Civ. Code art. 2315. Therefore, in a negligence action under article 2315, the plaintiff bears the burden of proving duty, breach, causation and damages. *Wainwright v. Fontenot*, 774 So. 2d 70, 74 (La. 2000)(citing *Buckley v. Exxon Corp.,* 390 So. 2d 512, 514 (La. 1980)).[17]

A. The Duty Element

In Louisiana, intentional misrepresentation, negligent misrepresentation, and negligence claims that are based on an omission all include a duty element, i.e. whether the defendant

[17] "Under Louisiana jurisprudence, most negligence cases are resolved by employing a duty/risk analysis. The determination of liability under the duty/risk analysis usually requires proof of five separate elements: (1) proof that the defendant's substandard conduct was a cause-in-fact of the plaintiff's injuries (the cause-in-fact element); (2) proof that the defendant's conduct failed to conform to the appropriate standard (the breach element); (3) proof that the defendant had a duty to conform his conduct to a specific standard (the duty element); (4) proof that the defendant's substandard conduct was a legal cause of the plaintiff's injuries (the scope of liability or scope of protection element); and (5) proof of actual damages (the damages element)." *Perkins v. Entergy Corp.*, 782 So. 2d 606, 611 (La. 2001).

owed the plaintiff a duty to disclose the information in question.[18] Whether a duty exists is a question of law. *Barrie v. V.P. Exterminators, Inc.*, 625 So. 2d 1007, 1015 (La. 1993); *In re Ward*, 894 F.2d at 775 (citing *Harris v. Pizza Hut of Louisiana*, 455 So. 2d 1364, 1371 (La. 1984)).

The parties dispute whether LRMC owed plaintiffs a duty to disclose employment information related to Dr. Berry in connection with LRMC's response to Kadlec's inquiry. Both parties recognize that before a duty to disclose is imposed, Louisiana law requires both a pecuniary interest in the transaction and a special relationship between the parties.

1. LRMC's Duty vis-a-vis Kadlec's Misrepresentation Claims

With respect to Kadlec's claims for intentional and negligent misrepresentation, generally, a duty to disclose information will not exist absent some confidential, fiduciary, or other special relationship which, under the circumstances of the case, justifies the imposition of a duty to disclose information. *See Wilson v. Mobil Oil Corp.*, 940 F. Supp. 944, 955 (E.D. La. 1996); *Southern*

[18] *See Southern Serv. Corp. v. Tidy Bldg. Servs., Inc.*, No. 04-CV-1362, 2004 WL 2784909, at *4 (E.D. La. Dec. 1, 2004)(citing *Greene v. Gulf Coast Bank*, 593 So. 2d 630, 632 (La. 1992))(a duty to disclose is a required element of a claim of intentional misrepresentation by omission); *In re Ward*, 894 F.2d 771, 775 (5th Cir. 1990)(citing *Dohmann v. United Gas Pipeline*, 457 So. 2d 307, 309 (La. App. 3d Cir. 1984))(a duty to disclose is a required element of a claim of negligent misrepresentation by omission); *Bunge Corp. v. GATX Corp.*, 557 So. 2d 1376, 1382 (La. 1990)(a duty to disclose is a necessary element of a negligence claim based on an omission).

Serv. Corp., 2004 WL 2784909, at *5 (citing *Wilson*, 940 F. Supp. at 955); *see also Smolensky v. McDaniel*, 144 F. Supp. 2d 611, 620 (E.D. La. 2001).

In the present case, there is no dispute that LRMC knew that Kadlec would receive the information in question. Similarly, there is no dispute that LRMC sent the information at issue directly to Kadlec.[19] However, the parties dispute to what extent Louisiana law requires LRMC to have (1) a pecuniary interest in the transaction in question and (2) a contractual, fiduciary, or other special relationship with Kadlec before imposing a duty to disclose.

a. Pecuniary Interest

Both parties appear to agree that a duty to disclose does not arise in Louisiana absent the defendant having a "pecuniary interest" in the transaction.[20] *See Hardy*, 236 F.3d at 292. The parties cite the Restatement (Second) of Torts, section 552(1), which supports such a requirement.[21] However, the parties disagree as to the scope of a "pecuniary interest" requirement.

LRMC maintains that because it did not have any legal

[19] Rec. Doc. No. 88, exhibit 2, deposition of Donna Zulauf.

[20] *See* Rec. Doc. Nos. 88 and 110.

[21] Section 552(1) of the Restatement (Second) of Torts provides:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

obligation to respond to Kadlec's inquiry for information about Dr. Berry, whatever response LRMC did give was "entirely gratuitous."[22] LRMC argues that because LRMC's response was gratuitous, it did not have any pecuniary interest in the transaction. Kadlec, meanwhile, argues that the concept of a pecuniary interest is not as narrow as defendant claims. Specifically, Kadlec cites comment (d) of section 552 of the Restatement (Second) of Torts in arguing that a pecuniary interest is assumed if the defendant provided the information in the course of business.[23]

The Louisiana Supreme Court has not expressly adopted section 552 of the Restatement as part of its substantive law. *See Barrie*, 625 So. 2d at 1016 ("Adopting one of the common law standards as the sole method for determining liability for [negligent misrepresentation] is not necessary."); *see also Anderson v. Heck*,

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[22] Rec. Doc. No. 88.

[23] Section 552, cmt. d of the Restatement (Second) of Torts provides, in part:

> The defendant's pecuniary interest in supplying the information will normally lie in a consideration paid to him for it or paid in a transaction in the course of and as a part of which it is supplied. It may, however, be of a more indirect character. Thus the officers of a corporation, although they receive no personal consideration for giving information concerning its affairs, may have a pecuniary interest in its transactions, since they stand to profit indirectly from them, and an agent who expects to receive a commission on a sale may have such an interest in it although he sells nothing.
>
> The fact that the information is given in the course of the defendant's business, profession or employment is a sufficient indication that he has a pecuniary interest in it, even though he receives no consideration for it at the time. It is not, however, conclusive . . . .

554 So. 2d 695, 705 (La. App. 1st Cir. 1989)("Our courts have adopted the definition of negligent misrepresentation set forth in the Restatement (2nd) of Torts"). Louisiana courts look to the Restatement for guidance. *Nicholas v. Allstate Ins. Co.*, 765 So. 2d 1017, 1021 n.4 (La. 2000)("Although the Restatement is not binding on Louisiana courts, the restrictions and guidelines established therein for policy reasons do provide guidance.").

In *Barrie v. V.P. Exterminators*, the Louisiana Supreme Court suggested that the defendant's duty to disclose arose, in part, because of its pecuniary interest in the transaction. 625 So. 2d at 1017 ("due to V.P.'s pecuniary interest in supplying the information, the duty arose to exercise reasonable care . . ."); *see also Anderson v. Heck*, 554 So. 2d 695, 705 (La. App. 1st Cir. 1989)("it must first be established that the sellers owed a legal duty to him to provide correct information when he sought to purchase their business. Next it must be established that the sellers had a pecuniary interest in the transaction"). Therefore, in light of Louisiana caselaw and the fact that the parties do not dispute the issue, the Court finds in this particular case that Louisiana law requires a defendant to have a pecuniary interest in the transaction before imposing an affirmative duty of disclosure.

The comments to section 552 of the Restatement (Second) of Torts indicate that a party will not be considered to have a pecuniary interest in a transaction where the information is given

"purely gratuitously."[24] Restatement (Second) of Torts § 552 cmt. c.[25] The drafters distinguish a gratuitous situation from the situation where information is given "in the course of the defendant's business." *Id.* at cmt. d. In cases where information is given in the course of business, according to the Restatement, there "is a sufficient indication that [the business] has a pecuniary interest" in the transaction. *Id.*[26]

LRMC argues that because it "received no compensation, either direct or indirect, from sending the letter," the act was "entirely gratuitous."[27] LRMC fails to cite a case where any court concluded that compensation is required to find a pecuniary interest. The comments to the Restatement reject such a narrow definition of

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[24] The drafters of the Restatement included examples of "purely gratuitous" actions in the comments to section 552. One example involves an individual requesting a copy of another person's will from a trust company. Restatement (Second) of Torts § 552 cmt. c. The drafters explain that the trust company is not generally in the business of supplying copies of wills, but did it as a favor. In such situations, the drafters indicate that the trust company cannot be liable for supplying a copy of the wrong will because the information was given "as a favor." *Id.*

[25] Comment (c) to section 552 provides: "The rule stated in Subsection (1) applies only when the defendant has a pecuniary interest in the transaction in which the information is given. If he has no pecuniary interest and the information is given purely gratuitously, he is under no duty to exercise reasonable care and competence in giving it."

[26] Even if the information is supplied in the course of the defendant's business, the Restatement cautions that this fact alone is "not . . . conclusive" of a pecuniary interest. The drafters give an example of a situation where a person might give information in the course of his profession, yet not have any pecuniary interest in the transaction. The example involves an attorney giving what is commonly referred to as a "curbstone opinion." This situation arises where a person might ask an attorney for a legal opinion on the street, and the attorney gives a "casual and offhand opinion on a point of law." The drafters note that while this information might be given in the course of the attorney's profession, the attorney does not have any pecuniary interest in the transaction. Such a situation is not analogous to LRMC's letter to Kadlec.

[27] Rec. Doc. No. 88.

"pecuniary interest." Specifically, comment d to section 552 reads, in part: "The defendant's pecuniary interest in supplying the information *will normally lie* in a consideration paid to him for it or paid in a transaction in the course of and as a part of which it is supplied. *It may, however, be of a more indirect character.*" *Id.* (emphasis added); *see also Anderson*, 554 So. 2d at 705 ("This [pecuniary] interest need not be direct or immediate."). The drafters go on to indicate that a court need not find that a party received consideration in order to find that the party had a pecuniary interest in the transaction. Restatement (Second) Of Torts § 552 cmt. d.

This Court finds that LRMC had a sufficient pecuniary interest in releasing selective portions of Dr. Berry's employment history to Kadlec. *See Anderson*, 554 So. 2d at 705 (adopting course of business definition). Applying the reasoning of the Restatement to the present case, the Court concludes that LRMC supplied Kadlec information relating to Dr. Berry's employment in the course of LRMC's normal business. Far from being a "purely gratuitous" act, in this case, LRMC had a vested, pecuniary interest both in omitting the type of information at issue and answering inquiries of the type made by Kadlec. Indeed, LRMC recognizes that it omitted the information at issue because of a fear of liability to Dr. Berry for defamation and other causes of action based on

disclosure.[28] Further, LRMC has a generalized pecuniary interest in responding to credentialing inquiries. If LRMC chose not to respond to these sort of inquiries, it could have difficulty recruiting and retaining physicians. Doctors might want to avoid working at a medical facility which was unresponsive to requests for employment information, potentially foreclosing the possibility that those doctors could gain future employment elsewhere. Likewise, other health care providers could become unwilling to supply references to LRMC while their own inquiries went unanswered.

b. Relationship of the Parties

Both parties also agree that Louisiana law will not always impose a duty to disclose material information, even if a "pecuniary interest" exists. LRMC argues that a duty to disclose only arises in the context of a "contractual or fiduciary relationship." Kadlec responds that Louisiana courts have, even in the absence of a contractual or fiduciary relationship, also imposed a duty to disclose in certain "confidential relationships." This Court agrees that Louisiana law would recognize Kadlec's relationship with LRMC as a "special relationship" that gives rise to a duty of disclosure.

LRMC relies on the Louisiana Supreme Court's decision in *Daye*

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[28] See Rec. Doc. No. 88, p. 8. In addition, LRMC may have a pecuniary interest in avoiding public disclosure of information that Dr. Berry had been practicing medicine while impaired as such disclosure could have presented a risk of lawsuits by Dr. Berry's surgical patients.

v. General Motors Corp., 720 So. 2d 654, 659 (La. 1998), for the proposition that in misrepresentation cases a duty to disclose is limited to those situations where the parties have either a contractual or a fiduciary relationship. In *Daye*, the court stated, "[O]ur jurisprudence has also limited negligent misrepresentation tort theory to cases wherein contract or fiduciary relationship exists." *Id.* While LRMC accurately quotes the language of the *Daye* court, a careful examination of Louisiana jurisprudence and federal cases applying Louisiana law does not support such a narrow view.

For example, in *Commerce and Industry Insurance Co. v. Grinnell Corp.*, the court, citing *Barrie*, noted that a duty to supply information "exists when there is privity of contract, or a fiduciary relationship, *and in a few cases when third parties relied on misinformation supplied by the defendant.*" *Commerce and Indus. Ins. Co.*, 1999 WL 508357, at *2 (emphasis added); *see also Southern Serv. Corp.*, 2004 WL 2784909, at *5 ("A duty to disclose information will not exist absent some confidential, fiduciary, or other special relationship which, under the circumstances of the case, justif[ies] the imposition of a duty to disclose information."); *Wilson*, 940 F. Supp. at 955 ("A duty to disclose does not arise absent special circumstances, such as a fiduciary or confidential relationship between the parties."); *Smolensky*, 144 F. Supp. 2d at 620; *Bunge Corp. v. GATX Corp.*, 557 So. 2d 1376, 1384

n.4 (La. 1990)("The confidential relationship is not restricted to any specific association of the parties").

In *Barrie v. V.P. Exterminators, Inc.*, the Louisiana Supreme Court recognized that "Louisiana is a jurisdiction which allows recovery in tort for purely economic loss caused by negligent misrepresentation where privity of contract is absent." 625 So.2d 1007, 1014 (La. 1993)(citing *Pastor v. Lafayette Bldg. Ass'n,* 567 So. 2d 793 (La. App. 3d Cir. 1990); *Payne v. O'Quinn,* 565 So. 2d 1049 (La. App. 3d Cir. 1990); *Cypress Oilfield Contractors, Inc. v. McGoldrick Oil Co., Inc.,* 525 So. 2d 1157 (La. App. 3d Cir. 1988)). The *Barrie* court further noted that negligent misrepresentation tort theory has developed on a case by case basis. *Id.*

Reading these cases together, in Louisiana a duty to disclose is not limited to cases wherein a contractual and fiduciary relationship exists. Courts have found a duty to disclose in cases where third parties relied on misinformation supplied by the defendant, even without a contractual or fiduciary relationship, when "there is communication of the misinformation by the tortfeasor *directly* to the user or the user's agent." *See Commerce Indus. and Ins. Co.*, 1999 WL 508357, at *2 (emphasis in original).

The *Commerce Industry* court found that the defendant owed no duty to the plaintiff because there was no evidence that the plaintiff insurance company had any "direct or indirect contact" with the defendants. *Commerce Indus. and Ins. Co.*, 1999 WL 508357,

at *3. In the present case, however, it is undisputed that LRMC had *direct* contact with Kadlec. While LRMC might not have had any contractual or fiduciary relationship with Kadlec, LRMC directly supplied Kadlec with a partial answer to its questionnaire. The Court finds that this case falls into the third category of cases wherein a duty to disclose exists absent a contractual or fiduciary relationship.

Furthermore, when evaluating negligent misrepresentation cases, the Louisiana Supreme Court has held that courts should conduct a duty/risk analysis. *Daye*, 720 So. 2d at 659. The duty/risk analysis involves balancing competing policy considerations on a case-by-case basis. *Id.; see also Commerce Indus. and Ins. Co.*, 1999 WL 508357, at *3 (citing *Hill v. Lundin & Assoc.*, 256 So. 2d 620, 623 (La. 1972)). Pursuant to the duty/risk analysis, "[p]laintff[s] must prove that the conduct in question was a cause-in-fact of the resulting harm, the defendant owed a duty of care to the plaintiff, the requisite duty was breached by the defendant and the risk of harm was within the scope of protection afforded by the duty breached." *Daye*, 720 So. 2d at 659. As part of the duty analysis, the Louisiana Supreme Court has recognized that "courts have tended to impose a duty when the circumstances are such that the failure to disclose would violate a standard requiring conformity to what the ordinary ethical person would have disclosed." *Bunge*, 557 So. 2d at 1384.

In this case, the Court concludes that under Louisiana law, the duty to disclose with respect to misrepresentation claims is broad enough to encompass the facts of this case. Notwithstanding the economic damage issues presented in this case, the Court also finds that policy considerations weigh heavily in favor of imposing a duty to disclose information related to a doctor's adverse employment history that risks death or bodily injury to future patients.[29] Kadlec and LRMC have a unique "special relationship" which existed in part to further communication between health care providers so that future patients could be protected. Notwithstanding LRMC's contention that "public policy militates against creating a boundless duty to disclose," this Court finds that if and when a hospital chooses to respond to an employment referral questionnaire, public policy should encourage a hospital to disclose the sort of information at issue.[30]

2. LRMC's Duty vis-a-vis Kadlec's Negligence Claim

In its fourth claim for relief, Kadlec asserts a claim against LRMC for negligence. In deciding whether a duty exists in a negligence action, Louisiana courts are "required to make a policy

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[29] LRMC contends that Kadlec is performing a doctrinal bait-and-switch by arguing that the harm to consider as part of a duty/risk inquiry is the potential harm to patients when in fact the harm is only economic. While Kadlec's damages are economic, LRMC fails to comprehend that those economic damages do in fact arise from the injury caused an innocent patient.

[30] LRMC's argument that this Court should not "create a new cause of action" by imposing a duty on LRMC to disclose this information is unpersuasive. Simply put, this Court is not creating a new cause of action in finding, as a matter of law, that LRMC had a legal duty to disclose certain information to Kadlec. Rather, the Court has determined that under Louisiana law a duty exists.

decision based on various moral, social, and economic factors." *Bursztajn v. United States*, 367 F.3d 485, 489 (5th Cir. 2004)(citing *Posecai v. Wal-Mart Stores, Inc.*, 752 So. 2d 762, 766 (La. 1999)). "Under Louisiana law, the existence of a duty presents a question of law that 'varies depending on the facts, circumstances, and context of each case and is limited by the particular risk, harm, and plaintiff involved.'". *Id.* (quoting *Dupre v. Chevron U.S.A., Inc.*, 20 F.3d 154 (5th Cir. 1994)). In *Posecai*, the Louisiana Supreme Court explained that:

> The court may consider various moral, social, and economic factors, including the fairness of imposing liability; the economic impact on the defendant and on similarly situated parties; the need for an incentive to prevent future harm; the nature of defendant's activity; the potential for an unmanageable flow of litigation; the historical development of precedent; and the direction in which society and its institutions are evolving.

Posecai, 752 So. 2d at 766.

Considering all of the above factors and the factors discussed as to plaintiffs' misrepresentation claims, the Court concludes that under the circumstances of this case, a duty existed to disclose information to plaintiff.

Kadlec's request for information communicated in detail the type of information sought and the purpose for which that information would be used. Kadlec's request made clear that any response would be relied upon in order to credential Dr. Berry. Accordingly, LRMC's direct response omitted relevant and material

information about his tenure at LRMC which may have been exceedingly useful in preventing the harm caused Kadlec among others. Any additional expense that LRMC would incur as a result of its communication of the reasons behind Dr. Berry's termination is clearly outweighed by the benefits of a hospital not knowingly passing on an impaired doctor to another unsuspecting health care provider. If LRMC omitted such information negligently or intentionally, LRMC may have breached its duty of care to Kadlec, which is a question of fact for the jury.[31] *See Bursztajn v. United States*, 367 F.3d at 489.

B. The Other Elements of Plaintiffs' Claims

LRMC also contends that Kadlec has failed to produce evidence to support each element of its intentional misrepresentation, negligent misrepresentation, and negligence claims.

1. Materiality

In order to maintain a successful claim for misrepresentation, intentional or negligent, a plaintiff must show that the defendant misrepresented, or omitted, a material fact. *See Guidry v. United States Tobacco Co.*, 188 F.3d 619, 627 (5th Cir. 1999)(intentional misrepresentation claim); *Johnson v. First Nat'l Bank of Shreveport*, 792 So. 2d 33, 49 (La. App. 3d Cir. 2001)(negligent

[31] Because the Court finds that Louisiana law supports imposing a duty to disclose on LRMC, there is no need to determine whether the Health Care Quality Improvement Act ("HCQIA"), 42 U.S.C. § 11133, or the Louisiana Regulation, Diversion of Medications Regulation, La. Admin. Code, Title 46, part XLV, subchapter G, § 6557, imposes a similar duty.

misrepresentation claim). Applying Louisiana law, the Fifth Circuit has explained that "materiality expresses the notion that the deceived party would have acted differently had he known the truth about the fact misrepresented." *Mamco, Inc. v. American Employers Ins. Co.*, 736 F.2d 187, 190 n.6 (5th Cir. 1984).[32]

LRMC argues that, as a matter of law, even if a duty to disclose exists, its omissions cannot be found to be material. However, whether LRMC's omission constituted a "material misrepresentation" cannot be resolved on summary judgment.

The United States Supreme Court has emphasized that the determination of materiality "requires delicate assessments of the inferences" an individual would draw from a given set of facts and "the significance of those inferences to him." *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 450, 96 S. Ct. 2126, 2132-33, 48 L. Ed. 2d 757 (1976)(addressing materiality in a securities context). These "delicate assessments" said the Court, "are peculiarly ones for the trier of fact." *Id.*

The Court finds that Kadlec has established a genuine issue of material fact with respect to the materiality of the alleged omissions in question. Kadlec points to evidence that on or about the same time period that LRMC responded to Kadlec's request for

[32] Although the Fifth Circuit has acknowledged that the definition of "material" can differ slightly from one area of the law to another, it explained that *Mamco* "accurately describes the essential contours of the ordinary legal meaning of 'materiality.'" *Godchaux v. Conveying Techniques, Inc.*, 846 F.2d 306, 316-17 (5th Cir. 1988).

information about Dr. Berry, LRMC responded to several other inquiries about other doctors and that LRMC provided more information about those doctors than it provided about Dr. Berry.[33]

2. Reliance

A plaintiff requesting damages for intentional or negligent misrepresentation must also show actual and reasonable reliance on the misstatements or omissions made by the defendant. *Guidry*, 188 F.3d at 627 (intentional misrepresentation claim); *Busby v. Parish Nat. Bank*, 464 So. 2d 374, 377 (La. App. 1st Cir. 1985)(negligent misrepresentation claim).

LRMC argues that Kadlec has failed to produce any evidence that it actually relied on LRMC's letter and, further, that any reliance Kadlec placed on the omissions would be, as a matter of law, unjustifiable. Kadlec has submitted evidence of actual reliance on the omissions. For example, Kadlec has submitted evidence that hospitals expect any adverse information to be included in responses to questionnaires such as the one provided to LRMC.[34] Furthermore, Kadlec has submitted evidence that it actually relied on the letter supplied by LRMC as part of its credentialing of Dr. Berry.[35] This evidence creates a genuine issue of material fact with regard to the issue of actual and justifiable reliance on

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[33] Rec. Doc. No. 110, exhibit K (App 235-240) and exhibit L (App 243-247). In each of the letters, LRMC represented that it had reviewed the doctor's file.

[34] Rec. Doc. No. 110, exhibit F, deposition of Rose Anne McDow.

[35] *Id.*

LRMC's omissions.

However, LRMC argues that, pursuant to Louisiana law, there can be no justifiable reliance when an inference is based on an "unexpressed assumption."[36] LRMC cites the Louisiana Supreme Court's decision in *Daye v. General Motors Corp., supra*. In *Daye*, the Louisiana Supreme Court reviewed a jury's conclusion that the plaintiff's reliance on certain automobile promotional materials was the cause-in-fact of his auto accident and subsequent injury. The *Daye* court overturned the jury's verdict, finding it clearly erroneous. *Id.* at 659. However, the *Daye* decision is inapplicable to the present case.

In *Daye*, the Louisiana Supreme Court did not find that there was no genuine issue of material fact with regard to the issue of reliance. Rather, after reviewing the trial court record, the court came to the conclusion that the jury's verdict as to causation was clearly erroneous. Only after considering the plaintiff's trial testimony did the court reach the conclusion that the plaintiff's interpretation of a car manufacturer's promotional materials was unreasonable. *Id.* The court did not suggest that the plaintiff had failed to raise a genuine issue of fact with respect to reliance. *Id.*

LRMC also relies on *Anderson v. Heck*, 554 So. 2d 695, 705-06 (La. App. 1st Cir. 1989), and it argues that Kadlec's reliance on

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[36] Rec. Doc. No. 88.

LRMC's omissions was unjustifiable as a matter of law because its reliance was based on an unexpressed assumption. *Anderson* is also distinguishable from the present case.

In *Anderson*, the court simply held that the trial court did not err when it found that the plaintiff had not carried his burden of proof on the issue of reasonable reliance on the defendant's misrepresentation. *Anderson*, 554 So. 2d at 705-06. Importantly, the court based its conclusion, in part, on the fact that the plaintiff had only relied on one aspect of a financial statement even though the sellers had provided a complete statement which accurately represented the transactions in question. *Id.* In the instant case, LRMC does not suggest that it actually provided Kadlec with all of the relevant information or that Kadlec chose to selectively ignore certain parts of LRMC's disclosure. Rather, Kadlec claims that it did not have any access to the unfavorable details of Dr. Berry's employment history because LRMC did not provide any such information.

3. Causation

Finally, LRMC argues that Kadlec has not raised a genuine issue of material fact with respect to causation. LRMC relies on *Louviere v. Louviere*, 839 So. 2d 57, 65 (La. App. 1st Cir. 2002), in claiming that too much "time, space, people, and bizarreness" has intervened so as to preclude Kadlec, as a matter of law, from raising any genuine issue with respect to proximate causation.

In *Louviere*, the Terrebonne Parish Sheriff's Office ("TPSO") sued the Thibodeaux Police Department ("TPD") for negligent referral of a deputy after the deputy went on a crime spree.[37] The TPSO never requested specific information from the TPD and the TPD did not send only select information; instead, TPD sent TPSO a "To Whom it May Concern" letter suggesting that the deputy would be "an asset as an employee." *Id.* at 63. Perhaps and most importantly, TPSO only alleged that TPD had omitted one piece of negative information regarding Louviere's employment at TPD, i.e., a formal complaint and accompanying civil lawsuit alleging excessive force. The appellate court noted that the trial record indicated that the deputy had in fact disclosed this lawsuit on his application to TPSO and that TPSO likely knew of the lawsuit. *Id.* Other than the one complaint of excessive force, the deputy had satisfactory job performance evaluations while with TPD. Furthermore, the deputy was not terminated from TPD; he voluntarily resigned to take a job with a flooring company.

In this case, by contrast, Kadlec has submitted evidence showing that it sent a letter requesting specific information relating to Dr. Berry's employment, including information regarding termination. LRMC ignored Kadlec's attached questionnaire, instead opting to respond with a prefatory phrase which indicated that they

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[37] *Louviere* involved a claim of negligent referral, not intentional or negligent misrepresentation. *Louviere*, 839 So. 2d at 61.

were inundated with such requests and that they could only provide the physician's dates of service. In addition, Kadlec has submitted evidence indicating that, because of LRMC's omissions, it had no way of knowing that Dr. Berry allegedly had problems with drug abuse before being employed by Kadlec. By contrast, in *Louviere*, the appellate court found that the subsequent employer had, or should have had, actual knowledge of the only relevant omission alleged.

For these reasons, this court finds LRMC's argument that Kadlec cannot prove proximate causation as a matter of law to be unpersuasive. Furthermore, the Court finds that Kadlec has successfully raised a genuine issue of material fact regarding the issue of causation.

4. Intent

With respect to its intentional misrepresentation claim, Kadlec must prove that LRMC had an "intent to deceive." *See Guidry*, 188 F.3d at 627. That element must be proved in addition to those elements shared with a negligent misrepresentation claim, i.e. materiality, justifiable reliance, and causation. *Id.*

The United States Supreme Court has stated that the issue of intent is not generally amenable for summary judgment disposition because it "frequently turn[s] on credibility assessments." *Crawford-El v. Britton*, 523 U.S. 574, 599, 118 S. Ct. 1584, 1597, 140 L. Ed. 2d 759 (1998). Louisiana courts have also noted that

summary judgment is not generally appropriate for disposition of cases requiring a judicial determination of subjective facts such as intent. *Coates v. Anco Insulations, Inc.*, 786 So. 2d 749, 754 (La. App. 4th Cir. 2001)(citing *Jefferson Parish School Bd. v. Rowley Co., Inc.*, 305 So. 2d 658, 663 (La. App. 4th Cir. 1974); *Butler v. Travelers Ins. Co.*, 233 So. 2d 271 (La. App. 1st Cir. 1970)).

While LRMC contends that Kadlec has produced no evidence that LRMC's letter was intended to deceive Kadlec, the Court finds that Kadlec has presented sufficient evidence of an intent to deceive to create a genuine issue of material fact. Specifically, Kadlec has submitted evidence that LRMC's response to its inquiry and questionnaire was substantially different from responses sent by LRMC to other hospitals requesting similar information about other doctors around the same time.[38] Kadlec submits evidence that in contrast to the generic response it received, LRMC responded to other inquiries about doctors who had no adverse employment information with responses such as "[t]here is no information of a derogatory nature contained in Dr. [X]'s file."[39] The Court finds that this evidence is sufficient to raise a genuine issue of material fact regarding LRMC's intent to deceive Kadlec.

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[38] Rec. Doc. No. 110, exhibits K and L. *See* Rec. Doc. No. 1, exhibit D.

[39] Rec. Doc. No. 110, exhibits K and L, LRMC letters regarding other doctors.

C. Strict Responsibility Misrepresentation

With respect to Kadlec's strict responsibility misrepresentation claim, the Court finds that Kadlec cannot sustain such a claim. Kadlec concedes that no Louisiana court has ever recognized a tort for strict responsibility misrepresentation.[40] Futhermore, contrary to Kadlec's statement that "other jurisdictions have adopted a cause of action for strict responsibility misrepresentation," it only cites a Wisconsin Supreme Court case from 1959 which merely discussed the claim. *See Stevenson v. Barwineck*, 99 N.W.2d 690, 693 (Wis. 1959). While a court in Wisconsin has addressed such a cause of action, no Louisiana court has endorsed a claim for strict responsibility misrepresentation.

Fifth Circuit law requires courts, sitting in diversity cases, to apply the law of Louisiana as it currently exists rather than to "adopt innovative theories of recovery." *See Mitchell v. Random House, Inc.*, 865 F.2d 664, 672 (5th Cir. 1989). In view of the fact that Louisiana has never recognized a strict responsibility misrepresentation tort, the Court declines plaintiffs' invitation to graft any common law strict responsibility or strict liability misrepresentation claim onto Louisiana's tort law. Furthermore, the Court recognizes that it is doubtful that Louisiana would adopt

[40] Rec. Doc. No. 51. In its opposition memorandum to the summary judgment motion, Kadlec expressly states that it wishes to "rely on its response to the [motion to dismiss]."

such a claim when Louisiana has largely eliminated or refined "strict liability" through tort reform. *See e.g.*, Joseph S. Piacun, *The Abolition of Strict Liability in Louisiana: A Return to a Fairer Standard or an Impossible Burden for Plaintiffs?*, 43 Loy. L. Rev. 215, 237 (1997)(discussing the limited existence of strict liability in Louisiana).

III. Prescription

Under Louisiana law, negligence, intentional misrepresentation, and negligent misrepresentation claims are delictual, i.e. tort, actions. *See Copeland v. Wasserstein, Perella & Co., Inc.*, 278 F.3d 472, 478, 480 (5th Cir. 2002); La. Civ. Code art. 2315. Delictual actions are subject to a one-year prescriptive period in Louisiana. La. Civ. Code art. 3492. Ordinarily, the party pleading prescription bears the burden of proving that the plaintiff's claims have prescribed. *Terrebonne Parish Sch. Bd. v. Mobil Oil Corp.*, 310 F.3d 870, 877 (5th Cir. 2002).

The prescriptive period begins to run once a plaintiff "has actual or constructive notice of the tortious act, the resulting damage, and the causal connection between the two." *Doucet v. LaFourche Parish Fire Protection*, 589 So. 2d 517, 519 (La. App. 1st Cir. 1991). "Therefore, prescription does not run against one who is ignorant of the facts upon which his cause of action is based, as long as such ignorance is not willful, negligent, or

unreasonable. *Id.* (citing *Zumo v. R.T. Vanderbilt Co.*, 527 So. 2d 1074 (La. App. 1st Cir. 1988)).

Generally, knowledge is imputed only when the plaintiff has information sufficient to excite attention and to prompt further inquiry. *Terrebonne Parish Sch. Bd. v. Columbia Gulf Transmission Co.*, 290 F.3d 303, 321 (5th Cir. 2002)(internal quotations omitted). Louisiana courts use a "reasonable person" standard with respect to constructive knowledge. *Id.* Thus, the crux of the inquiry is the reasonableness of the plaintiffs' alleged inaction. *See id.* (emphasis in original) (internal quotations omitted).

In making a determination of reasonableness, Louisiana courts look to the specific facts of a particular case, requiring a case-by-case analysis. *Id.* at 322. Prescription will not begin to run at the earliest possible indication that a plaintiff may have suffered some wrong. *See Knaps v. B & B Chem. Co.*, 828 F.2d 1138, 1140 (5th Cir. 1987)(citing *Jones v. Employee Transfer Corp.*, 509 So. 2d 420, 423 (La. 1987)). Prescription should not be used to force a person who believes he may have been damaged in some way to rush to file a lawsuit against all parties who might have caused that damage. *Id.*

Plaintiffs filed their lawsuit on April 8, 2004.[41] LRMC argues that Kadlec had actual or constructive notice of its injury more than one year before it filed its lawsuit and, therefore, Kadlec's

[41] Rec. Doc. No. 1.

claims are prescribed.[42] Specifically, LRMC argues that Kadlec had actual knowledge of LRMC's omissions by January, 2003, "[a]t the very latest," when the Jones family sued Kadlec in connection with Ms. Jones's personal injury. Kadlec counters that it did not have actual or constructive knowledge of LRMC's omissions until April 14, 2004, when it first became aware of the fact that LAA terminated Dr. Berry with cause.[43]

After considering all of the evidence submitted by the parties, the Court finds LRMC's argument that prescription has run on plaintiffs' claims to be without merit. Kadlec has submitted evidence that demonstrates its lack of actual knowledge. Kadlec submits the affidavit of its Risk Manager, Patricia Lacey, who averred that Kadlec "was not aware, and had no indication that Dr. Berry had a drug diversion or impairment issue prior to his tenure at Kadlec until . . . April 22, 2003."[44] LRMC does not submit any evidence to refute this statement.

LRMC largely rests its claim that Kadlec had constructive

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[42] LRMC suggests that Kadlec bears the burden of proving that its claims have not prescribed because it has invoked the civil law doctrine of *contra non valentum*. The doctrine of *contra non valentum* is an equitable doctrine where prescription does not run against a party that is unable to act. *Terrebone Parish Sch. Bd. v. Mobil Oil Corp.*, 310 F.3d 870, 884 n.36 (5th Cir. 2002). Plaintiffs may invoke the doctrine to defeat prescription on a claim where more time has passed than the prescriptive period allows. The Court finds that plaintiff need not invoke *contra non valentum* to defeat LRMC's prescription argument because the evidence supports Kadlec's claim that it did not have actual or constructive knowledge of its action more than one year before filing its complaint.

[43] Rec. Doc. No. 110.

[44] Rec. Doc. No. 110, exhibit Q, affidavit of Patricia Lacey.

knowledge on the statement of Ms. Lacey, who during her deposition said that she had "connected Dr. Berry to the Jones case" by November 22, 2002.[45] However, Ms. Lacey's statement merely indicates that she knew, as of November, 2002, that Dr. Berry had "confessed to diverting drugs."[46] The relevant inquiry is when Kadlec, through Ms. Lacey or any other agent, had constructive knowledge of LRMC's omissions, i.e., whether Ms. Lacey had sufficient information that would prompt a reasonable person to conduct further inquiry into whether LRMC omitted material information from its letter. To that end, LRMC has not directed the Court to any evidence that Ms. Lacey or any other employee or agent of Kadlec had any reason to suspect that LRMC had omitted information from its credentialing letter prior to April 8, 2003, i.e., one year prior to the date this lawsuit was filed.[47] Accordingly, the Court concludes that Kadlec's claims have not prescribed.

Conclusion

Upon review of the motions and memoranda, the undisputed

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[45] Rec. Doc. No. 88, exhibit 5, deposition of Pat Lacey. The United States Supreme Court has noted that "notice of facts to an agent is constructive notice thereof to the principal himself, where it arises from or is at the time connected with the subject-matter of his agency; for, upon general principles of public policy, it is presumed that the agent has communicated such facts to the principal." *Am. Sur. Co. of New York v. Pauly*, 170 U.S. 133, 155, 18 S. Ct. 552, 561, 42 L. Ed 977 (1898).

[46] Rec. Doc. No. 88, exhibit 5, deposition of Pat Lacey. *See* Rec. Doc. No. 88, exhibit 4, deposition of Anjen Sen, M.D. (internal exhibit no. 44).

[47] *See* Rec. Doc. No. 110, exhibit Q, affidavit of Rose Anne McDow.

facts, the exhibits, and the law, the Court finds that plaintiffs have submitted evidence that raises genuine issues of material fact and that defendant has not carried its burden of demonstrating that it is entitled to a judgment as a matter of law with respect to plaintiffs' claims of intentional misrepresentation, negligent misrepresentation, and negligence. Accordingly,

IT IS ORDERED that with respect to plaintiffs' intentional misrepresentation, negligent misrepresentation, and negligence claims, defendant's motion for summary judgment is **DENIED.**

IT IS FURTHER ORDERED that LRMC's motion for summary judgment with respect to plaintiffs' claim for strict responsibility misrepresentation is **GRANTED.**

IT IS FURTHER ORDERED that LRMC's motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure is **DENIED AS MOOT.**

New Orleans, Louisiana, May 19, 2005

LANCE M. AFRICK
UNITED STATES DISTRICT JUDGE