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 for summary judgment, filed on behalf of defendants, Lakeview Anesthesia Associates, Doctor Mark Dennis, Doctor William Preau, Doctor David Baldone, and Doctor Allan Parr, seeking summary judgment as a matter of law on plaintiffs' claims for intentional misrepresentation, negligent misrepresentation, and strict responsibility misrepresentation.[1] Defendants argue that there is no genuine issue of material fact with respect to plaintiffs' reliance and that defendants are entitled to judgment as a matter of law with respect to all of plaintiffs' misrepresentation claims. For the following reasons, defendants' motion is **DENIED IN PART** and **GRANTED IN PART.**

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[1] Rec. Doc. No. 94. Defendant Lakeview Medical Center, L.L.C. (d/b/a Lakeview Regional Medical Center) is not a party to this motion for summary judgment.

Plaintiffs' case against these defendants arises out of two letters of reference written by defendants Dr. Preau and Dr. Dennis, as employees and shareholders of Lakeview Anesthesia Associates ("LAA"), on behalf of Dr. Robert Berry ("Berry"). Berry was an anesthesiologist who practiced medicine at Lakeview Regional Medical Center through LAA. From January, 1997, to March, 2001, Berry was an employee of LAA and, ultimately, a shareholder with Drs. Dennis, Preau, Baldone, and Parr.[2]

Plaintiffs, Kadlec Medical Center and Western Professional Insurance Company, Kadlec's insurer, allege that Berry became involved in a prescription drug diversion scheme where he would personally use narcotic drugs, i.e., Demerol, that he had purportedly withdrawn for patient use.[3] Plaintiffs further assert that defendants became aware of Berry's drug use and that defendants knew that Berry was practicing medicine while impaired. Plaintiffs also allege that LAA terminated Berry's employment "with cause" on March 27, 2001.[4]

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[2] Defendant 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.

[3] Rec. Doc. No. 1, ¶¶13-17.

[4] Rec. Doc. No. 1, exhibit A, termination letter. The termination letter, dated March 27, 2001, and signed by Drs. Dennis, Preau, Parr, and Baldone, represents that Berry's termination was effective March 13, 2001.

The termination letter provided:

> 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.

After Berry was fired, he sought employment through Staff Care, Inc., a temporary employment agency for medical professionals.[5] Drs. Dennis and Preau provided letters of reference to Staff Care which stated that Berry was an "excellent" physician, but failed to mention his drug diversion, his impairment while practicing medicine, or that he was terminated for cause. In late 2001, through Staff Care, Berry found work as an anesthesiologist at Kadlec Medical Center in Washington State.[6]

On November 12, 2002, during a routine tubal ligation surgery, Berry allegedly caused extensive brain damage to Kim Jones when he committed malpractice while allegedly impaired by narcotics.[7] Ms. Jones has remained in a non-responsive, vegetative state since the surgery.[8] Ms. Jones's family brought a medical malpractice lawsuit (the "Jones' lawsuit") against Berry and Kadlec, as Berry's employer, which Kadlec settled for 7.5 million dollars.

Plaintiffs allege that when defendants sent professional letters of reference on Berry's behalf, defendants intentionally and/or negligently misrepresented Berry's qualifications and competency as an anesthesiologist by failing to disclose information with respect to his adverse employment history.

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[5] Rec. Doc. No. 1, ¶22.

[6] Berry was placed as a temporary or "locum tenes" physician at Kadlec by Staff Care.

[7] Rec. Doc. No. 1, ¶¶28-32.

[8] Rec. Doc. No. 1, ¶31.

Plaintiffs also assert a claim for strict responsibility misrepresentation and a claim for negligence.

Pursuant to Rule 56(c) 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).

In Louisiana, the elements of an intentional misrepresentation claim are: 1) a misrepresentation of material fact; 2) made with intent to deceive; and 3) causing justifiable reliance with resultant injury. *Guidry v. United States Tobacco Co.*, 188 F.3d 619, 627 (5th Cir. 1999). Similarly, the elements of a claim for negligent misrepresentation are: 1) a duty on the part of the defendant to supply correct information to the plaintiff; 2) a breach of said duty; and 3) justifiable reliance upon the misrepresentation with resulting damage. *New Birth Temple Church v. Delta Claims Service, Inc.*, 738 So. 2d 1210, 1212 (La. App. 2d Cir. 1999). Justifiable reliance is a necessary element of plaintiffs' claims for intentional and negligent misrepresentation, and plaintiffs' failure to establish reliance would entitle defendants to summary judgment.

Defendants argue that the record evidence establishes that

plaintiffs did not and could not rely on the letters submitted by Drs. Dennis and Preau. Specifically, defendants indicate that Kadlec labeled the letters written by Dr. Preau and Dr. Dennis as "can't use" because the letters were either undated or too remote in time.[9]

Although some of defendants' evidence supports a finding that the letters could not be used as "primary source" letters, plaintiffs have submitted evidence which suggests that Kadlec actually relied on defendants' letters notwithstanding the fact that Kadlec labeled the letter "can't use." For example, Donna Zulauf, a Kadlec employee, testified that the letters written by doctors Dennis and Preau were in fact taken into consideration, even though they were not counted toward the required three "primary source" letters.[10]

Upon review of the motion, the undisputed facts, plaintiffs' opposition, the exhibits submitted by both parties and the law, the Court finds that plaintiffs have submitted evidence that raises genuine issues of material fact with respect to plaintiffs' actual reliance on defendants' representations and that defendants have not carried their burden of demonstrating that they are entitled to a judgment as a matter of law with respect to plaintiffs' intentional and negligent misrepresentation claims. Although

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[9] Rec. Doc. No. 94, defendants' statements of uncontested material fact in support of their motion for summary judgment, ¶¶8-11.

[10] Rec. Doc. No. 113, exhibit E.

defendants highlight evidence which suggests that Berry would have been employed by Kadlec despite defendants alleged misrepresentations, this Court must resolve any factual controversy in favor of the non-moving party when the non-moving party has brought forth evidence sufficient to enable a rational trier of fact to find for the non-moving party.[11] *See Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994).

Defendants also contend that plaintiffs' strict responsibility misrepresentation claim should be dismissed. A claim for "strict responsibility" misrepresentation has never been expressly or impliedly adopted in Louisiana. In *Barrie v. V.P. Exterminators, Inc.*, 625 So. 2d 1007 (La. 1993), the Louisiana Supreme Court mentioned that the common law tort of misrepresentation is generally separated into three categories: intentional, negligent, and strict liability. *Id.* at 1011 (citing Prosser & Keeton, The Law of Torts, § 107). However, the *Barrie* court did not address a strict liability misrepresentation claim. *See id.*

Citing *Imperial Enterprises, Inc. v. Fireman's Fund Ins. Co.*, 535 F.2d 287 (5th Cir. 1976), plaintiffs contend that in the

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[11] Defendants further contend that Berry's own material dishonesty on his initial application "trumps and supercedes" any possible reliance on Kadlec's part. However, defendants have failed to explain how any misrepresentations by Berry would legally immunize defendants from liability for their own alleged misrepresentations. If anything, it can be argued that Berry's deceit bolsters plaintiffs' claim that they reasonably and justifiably relied on the professional references submitted by defendants. As defendants recognize, if Berry had answered honestly with respect to his prior adverse employment action, the application process would have stopped. Instead, Berry was not forthcoming on his application and defendants were asked to submit professional referrals on his behalf.

absence of substantive law in Louisiana with respect to strict responsibility misrepresentation, this Court is required to determine how a state court would decide the issue.[12] Plaintiffs also direct the Court to a Wisconsin Supreme Court case from 1959, *Stevenson v. Barwineck*, 99 N.W.2d 690, 693 (Wisc. 1959), in support of this Court finding a strict responsibility misrepresentation cause of action to exist in Louisiana. Defendants, however, note that 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). Accordingly, Fifth Circuit precedent instructs that a court sitting in diversity should determine how the forum state would decide unresolved *issues* of law pursuant to *Erie Railroad* while unrecognized *claims* should be left for the state courts to determine.

In view of the fact that Louisiana has never recognized a strict responsibility or strict liability misrepresentation tort, the Court declines plaintiffs' invitation to graft any common law

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[12] In support of the proposition that this Court should determine whether Louisiana would recognize a cause of action for strict responsibility misrepresentation, plaintiffs cite *Imperial Enterprises, Inc. v. Fireman's Fund Ins. Co.*, 535 F.2d 287, 290 (5th Cir. 1976). This Court finds *Imperial Enterprises* inapposite.

In *Imperial Enterprises*, the Fifth Circuit, faced with an absence of Georgia law on the narrow issue of a no-assignment clause in a fire insurance contract, found that it was bound to apply the substantive law of Georgia under *Erie R.R. Co. v. Thompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938). *Imperial Enter.*, 535 F.2d at 290. The *Imperial Enterprises* court resolved the issue as a Georgia court would by analyzing that state's general principles of insurance law. The court was not faced with a cause of action unrecognized in Georgia.

strict liability misrepresentation claim onto Louisiana's tort law. Furthermore, the Court recognizes that it is doubtful that Louisiana would adopt 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).

Because there are genuine issues of material fact in dispute with respect to plaintiffs' intentional misrepresentation and negligent misrepresentation claims, **IT IS ORDERED** that defendants' motion is **DENIED** with respect to those claims.

IT IS FURTHER ORDERED that with respect to plaintiffs' strict responsibility misrepresentation claim, defendants' motion is **GRANTED.**

New Orleans, Louisiana May 6, 2005.

LANCE M. AFRICK
UNITED STATES DISTRICT JUDGE