STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2008 CA 1615

EVA JEANETTE CARRIER AND JACK CARRIER

VERSUS

ROBERT D. WESTERMAN, DDS, LTD. (A Professional Corporation), UNKNOWN DENTAL LABORATORY, XYZ INSURANCE CO. AND UVW INSURANCE CO.

On Appeal from the 19th Judicial District Court
Parish of East Baton Rouge, Louisiana
Docket No. 542,194, Division I(24)
Honorable R. Michael Caldwell, Judge Presiding

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Robert D. Westerman, DDS, Ltd.

BEFORE: PARRO, McCLENDON, AND WELCH, JJ.

Judgment rendered JUN 17 2009

PARRO, J.

Eva Jeanette Carrier and her husband (the Carriers) appeal a summary judgment in favor of Robert D. Westerman, DDS, Ltd. (Dr. Westerman), dismissing all of their claims against him. After a *de novo* review of the record and applicable statutes and jurisprudence, we affirm the judgment.

BACKGROUND

Dr. Westerman, Burbank Dental Laboratory, Inc. (Burbank), and their insurers were sued by the Carriers after Mrs. Carrier's dental bridge fractured and injured her mouth in the area of the bridge. The device was constructed by Burbank and was measured, fitted, and installed by Dr. Westerman. The Carriers alleged that Dr. Westerman was guilty of medical malpractice and that both Dr. Westerman and Burbank were guilty of fault under the Louisiana Products Liability Act (LPLA). A motion for summary judgment was filed by Dr. Westerman. The evidence submitted by Dr. Westerman showed that when he removed the bridge from Mrs. Carrier's mouth, it appeared that an internal joint had been poorly soldered during construction by Burbank, allowing the bridge to fracture at that weak point. The court noted in oral reasons that the Carriers had produced no expert testimony that Dr. Westerman's measuring and fitting of the device was defective, that there was a defect in his design of the bridge, or that he had breached the standard of care applicable to dentists in installing the device or in his follow-up care. A judgment dismissing the Carriers' claims against Dr. Westerman was signed May 14, 2008, and the Carriers filed this appeal.

APPLICABLE LAW

Summary Judgment

A motion for summary judgment is a procedural device used for all or part of the relief prayed for by a litigant when there is no genuine issue of material fact. Duncan v. U.S.A.A. Ins. Co., 06-0363 (La. 11/29/06), 950 So.2d 544, 546. Appellate courts review summary judgments *de novo,* using the same criteria that govern the trial court's consideration of whether summary judgment is appropriate. Costello v. Hardy, 03-1146 (La. 1/21/04), 864 So.2d 129, 137. A motion for summary judgment should only be

granted 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 material fact and that the movant is entitled to summary judgment as a matter of law. See LSA-C.C.P. art. 966(B).

The burden of proof remains with the movant. However, if the movant will not bear the burden of proof at trial on the matter that is before the court on the motion for summary judgment, the movant's burden on the motion does not require him to negate all essential elements of the adverse party's claim, action, or defense, but rather to point out to the court that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense. Thereafter, if the adverse party fails to produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial, there is no genuine issue of material fact. LSA-C.C.P. art. 966(C)(2). The burden on the moving party may be discharged by pointing out to the district court that there is an absence of evidence to support the nonmoving party's case. Samaha v. Rau, 07-1726 (La. 2/26/08), 977 So.2d 880, 886. Once the motion for summary judgment has been properly supported by the moving party, the failure of the non-moving party to produce evidence of a material factual dispute mandates the granting of the motion. Babin v. Winn-Dixie Louisiana, Inc., 00-0078 (La. 6/30/00), 764 So.2d 37, 40.

Medical Malpractice

> Medical malpractice is defined in LSA-R.S. 40:1299.41(A)(13), as:
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> any unintentional tort or any breach of contract based on health care or professional services rendered ... by a health care provider, to a patient, including ... all legal responsibility of a health care provider arising from ... defects in or failures of prosthetic devices implanted in or used on or in the person of a patient.

The elements of a medical malpractice action that a plaintiff is required to establish are statutorily defined as follows: (1) the degree of knowledge or skill possessed or the degree of care ordinarily exercised by physicians, dentists, optometrists, or chiropractic physicians licensed to practice in the state of Louisiana and actively practicing in a similar community or locale and under similar circumstances; (2) that the defendant

either lacked this degree of knowledge or skill or failed to use reasonable care and diligence, along with his best judgment in the application of that skill; and (3) that as a proximate result of this lack of knowledge or skill or the failure to exercise this degree of care the plaintiff suffered injuries that would not otherwise have been incurred. See LSA-R.S. 9:2794(A). Summarizing, the plaintiff must establish the standard of care applicable to the doctor, a violation by the doctor of that standard of care, and a causal connection between the doctor's alleged negligence and the plaintiff's injuries resulting from that negligence. Pfiffner v. Correa, 94-0924, 94-0963, and 94-0992 (La. 10/17/94), 643 So.2d 1228, 1233; Thomas v. Anderson, 08-0927 (La. App. 1st Cir. 11/3/08), 997 So.2d 729, 731, writ denied, 08-2807 (La. 1/30/09), 999 So.2d 761. Expert testimony is generally required to establish the applicable standard of care and whether or not that standard was breached, except where the negligence is so obvious that a lay person can infer negligence without the guidance of expert testimony. Samaha, 977 So.2d at 884; see also Fagan v. LeBlanc, 04-2743 (La. App. 1st Cir. 2/10/06), 928 So.2d 571, 575.

Louisiana Products Liability Act

The LPLA provides the authority for claims against manufacturers for damages allegedly caused by their products. Louisiana Revised Statute 9:2800.52 states that the LPLA is the exclusive basis of liability against manufacturers for damages from injuries caused by their products. The elements of a cause of action under the LPLA that must be proven by the claimant are: (1) the defendant is the manufacturer of the product; (2) the claimant's damage was proximately caused by a characteristic of the product; (3) this characteristic rendered the product unreasonably dangerous; and (4) the claimant's damage arose from a reasonably anticipated use of the product by the claimant or someone else. See LSA-R.S. 9:2800.54(A); Matherne v. Poutrait-Morin/Zefal-Christophe, Todson, Inc., 02-2136 (La. App. 1st Cir. 12/12/03), 868 So.2d 114, 119, writ denied, 04-0120 (La. 3/19/04), 869 So.2d 858.

The first element that must be proven by the claimant is that the defendant is the manufacturer of the product causing plaintiff's harm. Id. Under LSA-R.S.

9:2800.53(1), a manufacturer is:

> a person or entity who is in the business of manufacturing a product for placement into trade or commerce. "Manufacturing a product" means producing, making, fabricating, constructing, designing, remanufacturing, reconditioning or refurbishing a product."

Louisiana Revised Statute 9:2800.53(1)(b) further defines "manufacturer" as:

> A seller of a product who exercises control over or influences a characteristic of the design, construction or quality of the product that causes damage.

According to LSA-R.S. 9:2800.53(2), a "seller" is "a person or entity who is not a manufacturer and who is in the business of conveying title to or possession of a product to another person or entity in exchange for anything of value." The LPLA excludes from its provisions those who provide a professional service, "even if the service results in a product." See LSA-R.S. 9:2800.52(1). However, that exclusion is qualified, in that the statute further provides that the LPLA does apply to providers of professional services, if "they assume the status of a manufacturer as defined in R.S. 9:2800.53(1)."

ANALYSIS

The Carriers had the burden of proving that Dr. Westerman was liable to them under either medical malpractice or product liability causes of action. Therefore, in his motion for summary judgment, Dr. Westerman did not have to negate all essential elements of their claims, but was required to point out to the court an absence of factual support for one or more elements essential to their claims. Dr. Westerman supported his motion for summary judgment with his affidavit, Mrs. Carrier's deposition, and the Carriers' answers to interrogatories. His affidavit stated that from August 2004 through February 2005, he had been involved in the ordering and fitting of dental appliances for Mrs. Carrier. Those appliances were constructed by Burbank, a company with which he had been doing business for six years, during which period Burbank's services and products were of consistently high quality. All of the dental appliances constructed by Burbank for installation in Mrs. Carrier's mouth appeared to be of good quality when inspected by Dr. Westerman, and there were no obvious or patent defects in the dental bridge that is the subject of this lawsuit. If there was any defect in the

bridge when Dr. Westerman received it, the defect was latent and not readily discernable. Finally, Dr. Westerman averred that at all times while treating Mrs. Carrier, he adhered to the applicable standards of dentistry and neither did nor failed to do anything that caused the bridge work to fail. In Mrs. Carrier's deposition, she acknowledged that she still believed Dr. Westerman was a good dentist, that she had not sent Dr. Westerman's records to any dental expert for examination or evaluation, that no other dentist or expert had told her Dr. Westerman's work did not meet the standard of care, and that she believed the problem with her dental work was caused by the laboratory that made the dental bridge and not by Dr. Westerman.

The Carriers opposed the motion, supporting their opposition with copies of the orders written by Dr. Westerman to Burbank regarding the original and replacement dental bridges, Dr. Westerman's answers to interrogatories, a copy of an invoice from Burbank to Dr. Westerman showing the laboratory did not charge him for the replacement bridge, and Burbank's answers to interrogatories. On the morning of the hearing, the Carriers also filed a transcript of Dr. Westerman's deposition in opposition to the motion.[1] In that deposition, he described the design process for the bridge, which included determining the size of the bridge, the materials to be used, which teeth were to be involved, whether teeth needed to be removed, and modeling the configuration of the existing teeth so the bridge could be made to fit the patient. He then wrote a prescription for the bridge and sent it to a laboratory, where the laboratory technicians determined exactly how it was to be made and how it was to be constructed from start to finish.

Most of the Carriers' assignments of error are based on their allegation that Dr. Westerman was a manufacturer of the dental bridge and that the court erred in several particulars by failing to recognize that fact. The Carriers assert that, as a manufacturer, Dr. Westerman was presumed to have knowledge of the defective condition of the

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[1] The record indicates that, with the agreement of Dr. Westerman's counsel, the judge had delayed the hearing on the motion for summary judgment in order to allow the plaintiffs time to obtain this deposition.

dental bridge, such that the plaintiffs did not have to produce evidence of his knowledge of the defect, his fault or negligence, or his breach of the standard of care in the measurement, fitting, installation, and/or follow-up care provided to Mrs. Carrier. They also contend that the court erred in requiring them to produce evidence that there was a defect in the design of the dental bridge in order to impute liability to Dr. Westerman. They claim the court erred in failing to find that Dr. Westerman committed malpractice simply by virtue of implantation of a defective prosthetic device into Mrs. Carrier. Finally, they argue that a genuine issue of material fact exists as to whether Dr. Westerman knew or should have known of the defect in the dental bridge.

Concerning the product liability claims, the plaintiffs' case depends on classifying Dr. Westerman as a manufacturer, as that term is defined in the LPLA.[2] Having examined the statute in the light of the facts established by the evidence, we are convinced that Dr. Westerman does not fit that definition. First, he is not "in the business of manufacturing a product for placement into trade or commerce."[3] See LSA-R.S. 9:2800.53(1). Dr. Westerman is a dentist, whose business consists of providing professional dental services to patients. Second, he is not a "seller," because he is not "in the business of conveying title to or possession of a product to another person or entity in exchange for anything of value." See LSA-R.S. 9:2800.53(2). Although the dental work he provides for his patients sometimes may include the implantation or installation of dental devices manufactured and sold to him by others, such as the dental bridge involved in this case, he is not "in the business of" conveying title or possession to those patients in exchange for anything of value. He is "in the business of" providing for his patients' dental health, which includes repairing or replacing damaged teeth. He charges his patients for his professional services, not for the

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[2] Because of the interrelationship between the medical malpractice claims and the product liability claims in this case, this classification is crucial for both causes of action asserted by the Carriers.

[3] "Trade and commerce" is defined in Black's Law Dictionary as "[e]very business occupation carried on for subsistence or profit and involving the elements of bargain and sale, barter, exchange, or traffic." Black's Law Dictionary 1500 (7th ed. 1999). Dr. Westerman's practice clearly does not involve these elements, as his service is provided to individual patients and does not place a "product" into the stream of commerce.

transfer of title or possession of a product to them. Since he is not a "seller," he cannot be a "manufacturer," defined as a "**seller** of a product who exercises control over or influences a characteristic of the design, construction or quality of the product that causes damage." See LSA-R.S. 9:2800.53(1)(b)(emphasis added). Therefore, although Dr. Westerman admittedly influenced the design of the dental bridge, his "non-seller" status renders the above-cited portion of the statute irrelevant. Further, because he provides a professional service and did not "assume the status of a manufacturer as defined in R.S. 9:2800.53(1)," the provisions of the LPLA do not apply to him, even if his service might conceivably result in a product. See LSA-R.S. 9:2800.52(1).

The Carriers have not pointed out to this court, nor has our research revealed, any cases in which a health care provider who installed an allegedly defective medical or dental device in a patient has been classified as a manufacturer. In the only two cases in which such claims were made, the issue of whether the health care provider was a manufacturer was not resolved. Because the physician or hospital was a qualified health care provider, those claims had to be submitted to medical review panels before suits could be filed. See Huffaker v. ABC Ins. Co., 94-2345 (La. App. 4th Cir. 7/26/95), 659 So.2d 544, and Rogers v. Synthes, Ltd., 626 So.2d 775 (La. App. 2nd Cir. 1993).[4]

Since we find neither statutory nor jurisprudential support for the Carriers' argument, we reject their claim that Dr. Westerman is a manufacturer, as that term is defined by the LPLA. The Carriers have failed to establish that they will be able to satisfy their evidentiary burden of proof at trial on their product liability claim against Dr. Westerman. Therefore, the trial court's dismissal of this claim on summary judgment was appropriate.

Regarding the medical malpractice claim, the evidence shows that the Carriers did not have any other dentist review the medical records in this case in order to establish that some aspect of Dr. Westerman's treatment of Mrs. Carrier breached the standard of care ordinarily exercised by dentists. They have not produced any evidence

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[4] At oral arguments, Dr. Westerman's counsel explained that he is not a qualified health care provider, so he does not claim the protections of the Louisiana Medical Malpractice Act.

of fault or negligence in his evaluation of Mrs. Carrier's dental problems, his preparation of her mouth for the bridge, his design of the model of the bridge, his care of her after the original bridge was installed, his removal of that bridge when the problem was discovered, his installation of the replacement bridge, or his post-operative treatment of her. They argue that such proof is unnecessary in this case, because there is no dispute that the bridge failed and, as the manufacturer of that bridge, Dr. Westerman is presumed to have known that it was defective. Therefore, they contend, no expert testimony is needed to establish his fault. Because we have rejected the attempted classification of Dr. Westerman as a manufacturer, this argument has no merit.[5]

They also claim that any lay person could conclude from the failure of the bridge that there was something wrong with it. While that may be true, it is not possible for a lay person to conclude from that failure that Dr. Westerman's actions or inactions caused or contributed to the failure. He presented evidence that the break was due to a faulty solder of an internal joint over which he had no control. To show that they could carry their burden of proof at trial on this issue, the plaintiffs had to produce some evidence that his participation in the design or modeling or materials specifications caused the dental bridge to fail. No such evidence was presented.

The Carriers also contend that when Mrs. Carrier returned to Dr. Westerman several months after the original bridge was installed, and he discovered a very small chip in the porcelain on the part of the bridge where the fracture later appeared, he should have inferred from that chip that a more serious defect existed at that site. However, Dr. Westerman stated that such a chip is not unusual and could have been the result of many factors, including Mrs. Carriers' grinding of teeth, biting on something hard, being hit, or falling. In hindsight, he acknowledged that this chip may have been the first sign of the failure of the solder joint in the bridge, but said he could not have predicted this result based on an ordinary and minor chip in the porcelain.

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[5] The Carriers also contend that simply "by virtue of implantation of a defective prosthetic device" into Mrs. Carrier, Dr. Westerman committed malpractice. This suggests an absolute liability, regardless of any fault on his part in the measurement, design, or installation of the dental bridge. We find no legal support for this interpretation of LSA-R.S. 40:1299.41(A)(13).

Only another dentist could evaluate whether such a chip should have alerted Dr. Westerman to a more serious problem. However, the plaintiffs did not produce testimony from another dentist on this issue.

Ultimately, without expert testimony in this case, the plaintiffs cannot satisfy their burden of proof at trial as to the medical malpractice claims. Having evaluated the evidence, we conclude that this is not the type of case from which negligence on the part of the health care provider can be inferred from the facts. The plaintiffs have not shown that they will be able to carry their burden of proof at trial that Dr. Westerman breached the standard of care in his treatment of Mrs. Carrier. Therefore, the court correctly entered summary judgment dismissing the plaintiffs' medical malpractice claims against him.

CONCLUSION

Based on the foregoing, we affirm the judgment of May 14, 2008, dismissing all of the Carriers' claims against Robert D. Westerman, DDS, Ltd. All costs of this appeal are assessed to the Carriers.

AFFIRMED.