NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

2010 CA 1464

RICHARD ATKINS, DENTISTRY, L.L.C., ET AL.

VERSUS

MARGARET MONTEIRO HOKE

Judgment Rendered: FEB 11 2011

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On Appeal from the 19th Judicial District Court
In and For the Parish of East Baton Rouge
Trial Court No. 546,354

Honorable Wilson Fields, Judge Presiding

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BEFORE: PARRO, GUIDRY, AND HUGHES, JJ.

HUGHES, J.

This is an appeal of a judgment that granted summary judgment in favor of plaintiffs/defendants-in-reconvention, Richard Atkins, DDS and Richard Atkins Dentistry, L.L.C. (Dr. Atkins), and also sustained the exception raising the objection of prescription filed by Dr. Atkins, dismissing all claims of the defendant/plaintiff-in-reconvention, Margaret Monteiro Hoke (Ms. Hoke.)[1] For the following reasons, we affirm the judgment of the district court in all respects.

FACTS AND PROCEDURAL HISTORY

In 2001, Ms. Hoke was involved in a domestic dispute with her ex-husband and suffered injury to her teeth, mouth, and jaw. Those injuries required her to seek out a dentist for extensive treatment and a full-mouth restoration. Although Ms. Hoke was a resident of Texas, she intended to stay with her parents in Houma, Louisiana for some amount of time and therefore chose to receive treatment from Dr. C. Richard Atkins, a Baton Rouge dentist that Ms. Hoke had known in the past.

The "Treatment Plan and Recommendations" prepared for Ms. Hoke by Dr. Atkins is dated February 7, 2006 and outlines the details and cost of the proposed restoration. The cost was set at $30,620. In summary, the treatment plan and recommendations proposed by Dr. Atkins included the taking of preliminary photos, a diagnostic wax-up, the preparation of the teeth, taking impressions, the insertion of temporary crowns for approximately three weeks, and finally the insertion and cementation of twelve permanent veneers, including any adjustments or re-fittings that might be necessary. Ms. Hoke accepted the treatment plan, paid the required $15,000 initial deposit, and began the treatment. Ultimately, nine of the twelve veneers that Dr. Atkins had placed into Ms. Hoke's mouth fell out and/or required re-bonding. Ms. Hoke did not pay the balance of the agreed upon

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[1] The judgment on the motion for summary judgment was certified as final and appealable by order of the court dated June 1, 2010.

price, and instead informed Dr. Atkins by letter that she was dissatisfied with his work and would therefore not pay any remaining balance. As Ms. Hoke had already moved back to Texas during her treatments with Dr. Atkins, she chose to receive the repair and replacement work from Dr. Larry Brunson, a Texas dentist.

On August 15, 2006 Richard Atkins Dentistry, L.L.C. filed a petition against Ms. Hoke for $15,893.35, the amount Dr. Atkins alleged was owed on Ms. Hoke's account. (R. pg. 7) On September 25, 2006 Ms. Hoke answered the suit and filed a reconventional demand against Dr. Atkins, denying that any amount was owed and further alleging that Dr. Atkins had performed substandard work that necessitated repair and replacement, thereby causing her damage.

Dr. Atkins answered the reconventional demand with an exception of prematurity, essentially arguing that Ms. Hoke's allegations amounted to a claim of malpractice against him and that Ms. Hoke was therefore first required to proceed under the Medical Malpractice Act, LSA-R.S. 40:1299.47, et seq. After a contradictory hearing, that exception was granted by judgment of the court signed on November 16, 2006. No review of that judgment was sought.

In December of 2006 Ms. Hoke filed a medical malpractice complaint against Dr. Atkins seeking review of her claims by a medical review panel. On March 16, 2007, while the medical review panel decision was still pending, Ms. Hoke filed a motion requesting leave of court to file a first amended reconventional demand, alleging breach of contract, breach of warranty, and abandonment, all stemming from her treatment with Dr. Atkins.[2] Dr. Atkins opposed the filing of the amended demand. The matter was set for a contradictory hearing, after which a judgment was signed on August 16, 2007, denying Ms. Hoke's request to file the amended demand.

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[2] The record also includes a "new" Petition for Damages filed by Ms. Hoke against Dr. Atkins on March 16, 2007 under docket no. 553340 in the 19th Judicial District Court.

In April of 2008 a Medical Review Panel rendered a unanimous opinion finding that Dr. Atkins complied with the applicable standard of care. Despite the panel's finding, Ms. Hoke filed a second amended reconventional demand on May 27, 2008, re-alleging that Dr. Atkins had provided a substandard service that caused her damages. In this demand, however, Ms. Hoke for the first time specifically alleged that Dr. Atkins had made inappropriate sexual advances towards her.

Dr. Atkins then filed a motion for summary judgment, alleging that there were no genuine issues of material fact and that he was entitled to judgment as a matter of law with regard to Ms. Hoke's demands. Noting the absence of evidence in the record that would indicate that he was negligent and/or committed malpractice in his treatment of Ms. Hoke, Dr. Atkins asserted that Ms. Hoke had failed to adequately support her claims by required expert medical testimony, and that summary judgment dismissing her claims was warranted. In regards to the alleged sexual tort claims, Dr. Atkins filed an exception raising the objection of prescription, noting that the alleged acts, according to Ms. Hoke's deposition, occurred in 1990 and 2006 and were therefore prescribed. The motion for summary judgment and the exception proceeded to hearing and the court granted summary judgment, dismissing with prejudice Ms. Hoke's reconventional demand. The court further granted Dr. Atkins's exception of prescription, also dismissing Ms. Hoke's allegations of sexual abuse by Dr. Atkins.

LAW AND ANALYSIS

I. Summary Judgment

The summary judgment procedure is designed to secure the just, speedy, and inexpensive determination of every action, except those disallowed by LSA-C.C.P. art. 969; the procedure is favored and shall be construed to accomplish these ends. LSA-C.C.P. art. 966(A)(2). Summary judgment shall be rendered in favor of the

mover 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 mover is entitled to judgment as a matter of law. LSA-C.C.P. art. 966(B).

Appellate courts review summary judgments *de novo* under the same criteria that govern a district court's consideration of whether summary judgment is appropriate. **Samaha v. Rau**, 2007-1726, pp. 3-4 (La. 2/26/08), 977 So.2d 880, 882; **Allen v. State ex rel. Ernest N. Morial-New Orleans Exhibition Hall Authority**, 2002-1072, p. 5 (La. 4/9/03), 842 So.2d 373, 377; **Boudreaux v. Vankerkhove**, 2007-2555, p. 5 (La. App. 1 Cir. 8/11/08), 993 So.2d 725, 729-30. In ruling on a motion for summary judgment, the judge's role is not to evaluate the weight of the evidence or to determine the truth of the matter, but instead to determine whether there is a genuine issue of triable fact. All doubts should be resolved in the non-moving party's favor. **Hines v. Garrett**, 2004-0806, p. 1 (La. 6/25/04), 876 So.2d 764, 765.

A fact is material if it potentially insures or precludes recovery, affects a litigant's ultimate success, or determines the outcome of the legal dispute. A genuine issue is one as to which reasonable persons could disagree; if reasonable persons could reach only one conclusion, there is no need for trial on that issue and summary judgment is appropriate. **Id.**, 2004-0806 at p. 1, 876 So.2d at 765-66. On motion for summary judgment, the burden of proof remains with the movant. However, if the moving party will not bear the burden of proof at trial on the issue before the court on the motion and points out that there is an absence of factual support for one or more elements essential to the adverse party's claim, action, or defense, then the non-moving party must produce factual support sufficient to establish that he will be able to satisfy his evidentiary burden of proof at trial. If

the opponent of the motion fails to do so, there is no genuine issue of material fact and summary judgment will be granted. See LSA-C.C.P. art. 966(C)(2).

When a motion for summary judgment is made and supported as provided in LSA-C.C.P. art. 967, an adverse party may not rest on the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in LSA-C.C.P. art. 967, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be rendered against him. LSA-C.C.P. art. 967(B). See also **Board of Supervisors of Louisiana State University v. Louisiana Agricultural Finance Authority**, 2007-0107, p. 9 (La. App. 1 Cir. 2/8/08), 984 So.2d 72, 79-80; **Cressionnie v. Intrepid, Inc.**, 2003-1714, p. 3 (La. App. 1 Cir. 5/14/04), 879 So.2d 736, 738. Because it is the applicable substantive law that determines materiality, whether a particular fact in dispute is material can be seen only in light of the substantive law applicable to the case. **Richard v. Hall**, 2003-1488, p. 5 (La. 4/23/04), 874 So.2d 131, 137; **Dyess v. American National Property and Casualty Company**, 2003-1971, p. 4 (La. App. 1 Cir. 6/25/04), 886 So.2d 448, 451, writ denied, 2004-1858 (La. 10/29/04), 885 So.2d 592; **Cressionnie v. Intrepid, Inc.**, 2003-1714 at p. 3, 879 So.2d at 738-39.

To succeed in a medical malpractice claim, LSA-R.S. 9:2794 sets forth the elements a plaintiff must prove. Those elements, in summary, are: 1) the plaintiff must establish the standard of care applicable to the doctor; 2) the plaintiff must show the doctor violated that standard of care; and 3) the plaintiff must show a causal connection between the doctor's alleged negligence and the plaintiff's injuries resulting therefrom. See **Pfiffner v. Correa**, 94-0924 (La. 10/17/94), 643 So.2d 1228.

To meet this burden of proof, a plaintiff is generally required to produce expert medical testimony. **Lefort v. Venable**, 95-2345, p. 4 (La. App. 1 Cir.

6/28/96), 676 So.2d 218, 220. Although the jurisprudence has recognized exceptions in instances of obvious negligence, these exceptions are limited to "instances in which the medical and factual issues are such that a lay jury can perceive negligence in the charged physician's conduct as well as any expert can." **Pfiffner**, 94-0924 at p. 9, 643 So.2d at 1234; see also **Coleman v. Deno**, 2001-1517, p. 20 (La. 1/25/02), 813 So.2d 303, 317. Some examples given by the supreme court of this type of injury are if a doctor fractures a patient's leg during an examination, amputates the wrong arm, drops a knife, scalpel, or acid on a patient, or leaves a sponge in a patient's body. **Pfiffner**, 94-0924 at p. 9, 643 So.2d at 1233. Otherwise, the jurisprudence has recognized that "an expert witness is generally necessary as a matter of law to prove a medical malpractice claim." **Fagan v. Leblanc**, 2004-2743 (La. App. 1 Cir. 2/10/06), 928 So.2d 571 (*citing* **Williams v. Metro Home Health Care Agency, Inc.**, 2002-0534, p. 5 (La. App. 4 Cir. 5/8/02), 817 So.2d 1224, 1228). Moreover, the jurisprudence has held that this requirement is especially necessary when the defendants have filed a motion for summary judgment and supported that motion with expert opinion evidence that the treatment did not fall below the standard of care. **Fagan v. Leblanc**, 928 So.2d at 575.

In support of his argument that this case was appropriate for disposal by summary judgment, Dr. Atkins pointed out Ms. Hoke's lack of ability to carry her burden of proof at trial, since she had produced no expert testimony. He also provided the opinion of the Medical Review Panel, which had unanimously concluded that Dr. Atkins did not breach the applicable standard of care in this case. In her defense, Ms. Hoke urged the court to consider the deposition testimony of Dr. Larry Brunson, the Texas dentist who treated her subsequent to Dr. Atkins. The trial court granted the motion for summary judgment without providing reasons.

On review, Dr. Brunson's testimony does not support Ms. Hoke's position that Dr. Atkins breached the standard of care in his treatment of Ms. Hoke. Dr. Brunson never states that he is of the opinion that Dr. Atkins breached the applicable standard of care. Moreover, when cross-examined, Dr. Brunson stated that he had never reviewed the records of Dr. Atkins, the deposition of Dr. Atkins, or the deposition of Ms. Hoke.

As such, based on the facts and circumstances of this case, we conclude that Dr. Atkins carried his burden of proof on the motion for summary judgment. In order to defeat the motion, Ms. Hoke was required to produce factual support sufficient to establish that she would be able to satisfy her evidentiary burden of proof at a trial on the merits, *i.e.*, that Dr. Atkins had breached the standard of care. There is no evidence in the record to support that claim. Accordingly, Ms. Hoke failed to meet her burden of proof. There remained no genuine issue of material fact remaining as to Dr. Atkins's liability under the Medical Malpractice Act, and summary judgment in his favor was appropriate.

II. Prescription

Dr. Atkins also raised the objection of prescription, claiming that any alleged claims of "inappropriate sexual advances" made towards Ms. Hoke had prescribed at the time of the filing of her second amended reconventional demand, which was the first notice of claims of that nature.

Normally, the exceptor bears the burden of proof regarding his exception; however, if the exception of prescription is raised and prescription is evident on the face of the pleadings, the burden shifts to the plaintiff to show suspension, interruption, or renunciation. **SS v. State ex rel. Dept. of Social Services**, 2002-0831 (La. 12/4/02), 831 So.2d 926, 931 (*citing* **Lima v. Schmidt**, 595 So.2d 624, 628 (La. 1992)). That proof must be clear, specific, and positive. **Unlimited**

Horizons, L.L.C. v. Parish of East Baton Rouge, 99-0889 (La. App. 1 Cir. 5/12/00), 761 So.2d 753.

A claim for sexual misconduct, while a delictual tort that would otherwise be subject to the one-year prescriptive period provided for in LSA-C.C. art. 3492, may also rise to a crime of violence, and therefore the prescriptive period could potentially be extended to two years.[3] This prescriptive period commences to run from the day injury or damage is sustained. See LSA-C.C. art. 3493.10.

In this case, while the dates of the alleged inappropriate sexual advances were not included in either of the demands, the relevant dates were contained in the deposition testimony of Ms. Hoke and other evidence submitted by Dr. Atkins in connection with the motion for summary judgment. As such, while it may not have been clear on the face of the pleadings that Ms. Hoke's claims were prescribed, the evidence submitted shifted the burden to Ms. Hoke to prove that prescription had been interrupted or suspended.

Ms. Hoke argues that the claims were not prescribed because the sexual tort claims raised in her May 27, 2008 amended demand relate back to her original reconventional demand, filed on September 25, 2006, pursuant to LSA-C.C.P. art. 1153. In the original demand, Ms. Hoke alleged that Dr. Atkins had contracted with her to provide dental services and had "failed to render those services in a professional manner, consistent with the standards for doctors of dentistry, dental professionals and standards set by state law and governing associations." Therefore, Ms. Hoke argues, because making sexual advances towards patients is unprofessional, sexual advances were included in the allegations made in her original reconventional demand and dated back to September 25, 2006, the date that demand was filed. We disagree.

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[3] It is unclear from the record the exact sexual crime that Ms. Hoke alleges Dr. Atkins committed. However, even allowing for the two-year time limitation to apply, the claims, as explained herein, were prescribed at the time of the filing of the second amended reconventional demand.

Louisiana Code of Civil Procedure article 1153 states that:

> When the action or defense asserted in the amended petition or answer arises out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of filing the original pleading.

Pursuant to this Article, if a comparison of the amended petition to the original petition shows that the original petition gave fair notice of the factual situation out of which the amended petition arises, the amended petition will relate back to the date of the filing of the original petition. **Reese v. State, Department of Public Safety and Corrections**, 2003-1615, p. 6. (La. 2/20/04), 866 So.2d 244, 248; **Giroir v. South Louisiana Medical Center**, 475 So.2d 1040 (La. 1985). However, if nothing in the original petition gives fair notice to the defendant of a completely separate cause of action the plaintiff may pursue, a newly pled cause of action cannot relate back. **Hennessey Const. Corp. v. Halpern**, 2003-1935 (La. App. 4 Cir. 6/23/04), 879 So.2d 340.

We have reviewed the original and amended reconventional demands in this case. Ms. Hoke's original reconventional demand against Dr. Atkins pled a cause of action for breach of contract due to negligent dental treatment. Nothing in that pleading gives "fair notice" to Dr. Atkins that Ms. Hoke sustained damages due to any alleged sexual misconduct of Dr. Atkins. Thus, we find that the delictual claims asserted by Ms. Hoke in her amended reconventional demand do not relate back to the filing of the original reconventional demand so as to interrupt the running of prescription on those claims. As such, we find no error in the trial court's sustaining of the exception of prescription filed by Dr. Atkins.

CONCLUSION

For the reasons assigned herein, the judgment of the district court dismissing all claims in the reconventional demands is affirmed. All costs of this appeal are

assessed to defendant/plaintiff-in-reconvention/appellant, Margaret Monteiro Hoke.

AFFIRMED.