IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR KENT COUNTY

GABRIEL G. ATAMIAN,	:	
	:	**C.A. NO: 03C-12-038(RBY)**
Plaintiff,	:	
	:	
v.	:	
	:	
MICHAEL J. RYAN, DDS and BECDEN DENTAL LABORATORY,	:	
	:	
Defendants.	:	

Submitted: March 3, 2006
Decided: June 9, 2006

Gabriel G. Atamian, *pro se.*

Matthew P. Donelson, Esq., Elzufon, Austin, Reardon, Tarlov & Mondell, Wilmington, Delaware for Defendant Ryan.

Thomas Gerard, Esq., Marshall, Dennehey, Warner, Coleman & Goggin, Wilmington, Delaware for Defendant Becden.

OPINION

UPON CROSS MOTIONS FOR SUMMARY JUDGMENT
PLAINTIFF'S - DENIED
DEFENDANTS' - GRANTED

Young, J.

OPINION

On December 15, 2003, Plaintiff, Gabriel G. Atamian, M.D., M.S.E.E, J.D., filed a Complaint against Defendants, Michael J. Ryan, D.D.S. ("Dr. Ryan") and Becden Dental Laboratory ("Becden"), alleging 1) Assault and Battery; 2) Misrepresentation and Deceit; 3) Common Law Conspiracy; 4) Products Liability; 5) Negligent Infliction of Emotional Distress; and 6) Neglecting to Prevent Conspiratorial Wrongs related to the fabrication and installation of a dental crown.[1]

Presently before the Court are the separate Motions for Summary Judgment filed by Plaintiff and by Defendants Dr. Ryan and Becden. This Court heard oral arguments on the parties' motions on March 3, 2006. During the course of the hearing, Plaintiff threatened to leave the hearing, while it was in progress. The Court warned Plaintiff that, if he abandoned the hearing, Plaintiff would forfeit his right to be heard in oral argument, and Plaintiff's motion would be decided on the written submissions. Despite this admonition, Plaintiff left the hearing. For the following reasons, Plaintiff's Motion for Summary Judgment is **DENIED,** and the Motions for Summary Judgment of Defendants Dr. Ryan and Becden are **GRANTED**.

STANDARD OF REVIEW

Summary judgment should be rendered if the record shows that there is no genuine issue as to any material fact, and the moving party is entitled to judgment as

[1] The Complaint includes two different counts numbered "Count IV."

a matter of law.[2] The facts must be viewed in the light most favorable to the non-moving party.[3] Summary judgment may not be granted if the record indicates that a material fact is in dispute, or if it seems desirable to inquire more thoroughly into the facts in order to clarify the application of the law to the circumstances.[4] However, when the facts permit a reasonable person to draw but one inference, the question becomes one for decision as a matter of law.[5]

DISCUSSION

Count I - "Assault and Battery"

A *prima facie* case for assault requires the plaintiff to show that a defendant's conduct placed the plaintiff in apprehension of imminent harmful or offensive physical contact.[6] A *prima facie* case for battery requires that the plaintiff show an intentional and unpermitted contact to which the plaintiff did not consent.[7] While a patient may legitimately bring a cause of action for battery against a dentist, such claims are limited to circumstances where the dentist performed a procedure to which

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[2] Super. Ct. Civ. R. 56(c).

[3] *Guy v. Judicial Nominating Comm'n*, 659 A.2d 777, 780 (Del. Super. Ct. 1995).

[4] *Ebersole v. Lowengrub*, 180 A.2d 467, 468-69 (Del. 1962).

[5] *Wootten v. Kiger*, 226 A.2d 238, 239 (Del. 1967).

[6] *Atamian v. Arezoo A. Bahar, DDS, et. al.*, 2005 Del. Super. LEXIS 156 (quoting *Atamian v. Gorkin*, 1999 Del. Super. LEXIS 666, at *4).

[7] *Brzoska v. Olsen*, 668 A.2d 1355, 1366 (Del. 1995).

the patient has not consented, or where the procedure administered is of a substantially different nature and character than that to which the patient consented.[8]

Plaintiff alleges that Dr. Ryan and Becden Dental Laboratory committed assault against him. At his deposition, however, Plaintiff admitted that he did not realize what Dr. Ryan had done until after leaving Dr. Ryan's office.[9] Because Plaintiff was unaware of what Dr. Ryan had done until after Plaintiff left the office, there could have been no fear of harm until after the treatment was completed. By definition, requiring apprehension, Plaintiff's allegation of assault against Dr. Ryan fails.

Neither has Plaintiff established sufficient evidence to support his claims of battery by Dr. Ryan. Plaintiff does not assert that he did not consent to the treatment by Dr. Ryan. Rather, in his Complaint, Plaintiff repeatedly alleges that Dr. Ryan did not properly perform the procedures. These claims are more accurately allegations of negligence, rather than battery. Neither does Plaintiff allege that the treatment performed by Dr. Ryan was substantially different in nature or character from the procedure to which Plaintiff consented. Without any allegations of unpermitted contact, the plaintiff's claims of battery fail.

Plaintiff does not present any facts to indicate that any member of Becden's personnel came into contact with him in any fashion. Plaintiff's counts of assault and battery against Defendant Becden fail.

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[8] *Id.*

[9] *See* Atamian Dep. at 12-13.

Summary judgment in favor of the defendants is **GRANTED** as to the plaintiff's claims for assault and battery.

Count II - "Misrepresentation and Deceit"

Plaintiff asserts that Dr. Ryan committed Misrepresentation and Deceit by cementing in a crown which Dr. Ryan allegedly knew contained the same defects as the provisional crown. A claim for misrepresentation and deceit must consist of "a representation material to the transaction, made falsely, with knowledge of its falsity or recklessness as to whether it is true or false, with the intent to mislead another who justifiably relies on the misrepresentation."[10]

Based on the facts as asserted in Plaintiff's Complaint, it cannot be reasonably inferred that Dr. Ryan had any intent to deceive the plaintiff or to induce the plaintiff to act. Neither can it be inferred that Plaintiff relied on any statements made by the defendants to his detriment. Plaintiff's claims are actually couched in terms suggesting a breach of the dental standard of care rather than misrepresentation or deceit.

Neither has Plaintiff established any facts that could appropriately lead a jury to believe that Defendant Becden committed any misrepresentation against Plaintiff. Plaintiff has not presented any facts to indicate that anyone from Becden had contact at all with Plaintiff. Therefore, Plaintiff has failed to plead facts sufficient to establish a claim for deceit or fraud. Summary Judgment is **GRANTED** in favor of the defendants on Count II.

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[10] *Atamian v. Nemours Health Clinic*, 2001 Del. Super. LEXIS 438, at *3.

Count III - "Common Law Conspiracy"

To prevail on a claim for civil conspiracy, a plaintiff must allege "(1) a confederation or combination of two or more persons; (2) an unlawful act done in furtherance of the conspiracy; and (3) actual damage."[11] In his Complaint, Plaintiff describes in great detail the alleged "New York Jewish Physician Conspiracy" against him, but never alleges any facts to indicate how either Dr. Ryan or Becden might have any involvement in this vague, alleged conspiracy.

Plaintiff alleges that Dr. Ryan and Becden made an agreement for Becden to "fabricate Plaintiff's crown #14 to have no interdental space." As proof of this conspiracy, Plaintiff asserts that he overheard Dr. Ryan say to a co-worker that he was "trying very hard to enlarge the interdental space of Plaintiff's crown #14, in order that flossing be possible and thus to keep it clean." Plaintiff maintains that this statement shows a "meeting of mind [sic] to do an unlawful act on Plaintiff."

These bald assertions are insufficient to establish any of the elements necessary for a claim of civil conspiracy. Plaintiff does not present any evidence that Dr. Ryan or Becden committed any unlawful act in confederation or combination. If anything, Dr. Ryan's alleged statement indicated that he was attempting to enlarge the interdental space in order to benefit Plaintiff. Plaintiff's claim for civil conspiracy, therefore, fails. Summary Judgment is **GRANTED** in favor of the defendants as to Count III of the Complaint.

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[11] *Bahar*, 2005 Del. Super. LEXIS 156, at *8 (citing *Manley v. Assocs. in Obstetrics & Gynecology, P.A.*, 2001 Del. Super. LEXIS 314, at *28).

Count IV - "Product Liability - Implied Warranty of Fitness and Merchantability"

Count IV of Plaintiff's Complaint asserts that both Defendant Becden Dental Laboratory and Defendant Dr. Ryan are liable under theories of breach of the implied warranties of fitness and merchantability. Specifically, Plaintiff alleges that Dr. Ryan "has not taken the full arch impression of the Plaintiff's mouth for the fabrication of crown #14." Plaintiff further alleges that Becden Dental Laboratory "has fabricated through the instructions and prescription of defendant, 'Dr. Ryan', a defective and dangerous crown #14 without interdental space between teeth #14 and 15." Plaintiff alleges that these actions have injured him and caused him to "suffer pain and mental anguish."

Dr. Ryan contends that, because he is not in the business of selling goods there can be no viable claim against him for a breach of the implied warranty of merchantability or implied warranty of fitness based on a defective crown. The Delaware Superior Court recently addressed this issue in the case of *Atamian v. Bahar, et. al.*[12] The Superior Court held that an action for breach of warranties under Article 2 of the Uniform Commercial Code could not be sustained against a dentist because the dentist provided primarily services, not products.[13] The Superior Court held that "the primary purpose of the dental office and the dentist was to provide dental services."[14] The Court held that, therefore, because the dentist was "not in the

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[12] 2005 Del. Super. LEXIS 156.

[13] *Id*. at *11-12. Accord *Flowers v. Huang*, 1997 Del. Super. LEXIS 387; *Lamb v. Newark Emergency Room, Inc.*, 1983 Del. Super. LEXIS 753.

[14] *Bahar*, 2005 Del. Super. LEXIS 156, at *11.

business of selling goods . . . there can be no viable claim against [him] for breach of the implied warranty of merchantability or implied warranty of fitness."[15]

Dr. Ryan, as a dentist, provided services to Plaintiff and not products. The crown he delivered to Plaintiff was merely incidental to the services he rendered to Plaintiff. It did not constitute a "sale" under the UCC.[16] Therefore, Plaintiff has no viable claim against Dr. Ryan for breach of the implied warranty merchantability or the implied warranty of fitness. Summary Judgment is **GRANTED** to Dr. Ryan as to Count IV.

Defendant Becden, however, is in the business of manufacturing dental products. The Superior Court also dealt with this issue in *Atamian v. Bahar.* The Court held that, in order to "survive summary judgment for breach of the implied warranty of merchantability, the plaintiff must have expert testimony to prove defect and causation."[17] Such expert testimony is not necessarily required where the issues are within a lay person's scope of knowledge.[18] As the Court held in *Bahar*, however, the "fabrication of dental prostheses is not . . . a matter commonly within the knowledge of a layperson."[19]

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[15] *Id.*

[16] *See Lamb*, 1983 Del. Super. LEXIS 753.

[17] *Atamian v. Bahar*, 2005 Del. Super. LEXIS 156, at *12 (citing *Reybold v. Chemprobe Technologies*, 721 A.2d 1267 (Del. Super. Ct. 1998)).

[18] *Id.*

[19] *Bahar*, 2005 Del. Super. LEXIS 156, at *13.

Plaintiff's sole expert witness is William G. Christensen, D.D.S., M.S., a prosthodontist from Utah, who provided an affidavit regarding Dr. Ryan's treatment and Becden's repair of Plaintiff's crown. Shortly after Plaintiff submitted Dr. Christensen's affidavit, Becden served Plaintiff with Expert Interrogatories and Request for Production. Plaintiff responded to Becden's expert discovery, but did not answer the request substantively. Instead, Plaintiff referred Becden to Plaintiff's Pretrial Stipulation, which indicated that Plaintiff does not anticipate calling Dr. Christensen to appear as a witness at trial. To that end, Plaintiff maintained that he had "no obligation to answer defendant's interrogatories and production of documents pertaining to Dr. Christensen."[20]

Plaintiff also attempts to counter Becden's argument by suggesting that Becden depose Dr. Christensen. However, Plaintiff, not Becden, bears the burden of proffering an expert at trial to support his claims. Without an expert to testify at trial that Becden's fabrication of the crown was defective, and caused Plaintiff's damages, Becden's Motion for Summary Judgment on Plaintiff's claims that Becden breached the implied warranty of merchantability is **GRANTED.**

In order to prevail on a claim for breach of the implied warranty of fitness against Defendant Becden, Plaintiff must show: (1) he had a special purpose for the goods; (2) Becden knew or had reason to know of that purpose; (3) Becden knew or had reason to know that the buyer was relying on the seller's superior skill to select goods that fulfilled that purpose; and (4) the plaintiff in fact relied on Becden's

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[20] Pl. Resp. to Def. Becden's Expert Interrog.

superior skill.[21] No recovery is available, however, where a product is used for its ordinary purpose.[22]

Plaintiff does not allege in his Complaint that he had any particular special purpose beyond the normal usage for the crown. Nor does he present any facts to indicate that Becden was aware of any special purpose for the crown. Because Plaintiff's Complaint fails to establish any of the elements necessary for a claim of breach of an implied warranty of fitness, Summary Judgment is **GRANTED** to Defendant Becden on this count.

Count V [although labeled Count IV] - *"Negligent Infliction of Emotional Distress"*

The elements of a cause of action for negligent infliction of emotional distress are: "outrage, resulting from the negligence of another, suffered by a person within the immediate zone of danger of the negligent act.[23] In order to recover under a theory of negligent infliction of emotional distress, the plaintiff is required to demonstrate some bodily injury or sickness as well as mental illness as a result of the defendant's actions.[24]

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[21] *Atamian v. Bahar*, 2005 Del. Super. LEXIS 156, at *14 (citing *McDermott v. Matric Essentials, Inc.*, 1991 Del. Super. LEXIS 438).

[22] *Dilenno v. Libbey Glass Div.*, 668 F. Supp. 373, 376 (D. Del. 1987).

[23] *Allison v. J.C. Bennington Co.*, 1996 Del. Super. LEXIS 418, at *6 (citing *Robb v. Pennsylvania Railroad Co.*, 210 A.2d 709 (1965)).

[24] *Id.*

Plaintiff has alleged no specific negligent acts that have caused him any emotional distress. Plaintiff merely incorporates his prior allegations and asserts that through "the above acts and omissions of the defendants, Plaintiff was injured and damaged; and [sic] been caused to suffer extreme emotional distress and will continue to suffer in the future of [sic] extreme emotional distress . . . ." The allegations which Plaintiff incorporates in this count are for intentional torts, not negligence. Moreover, Plaintiff has not identified any bodily injury or mental illness which would permit him to recover under a theory of negligent infliction of emotional distress. Instead, the plaintiff only alleges that he has generally suffered "emotional distress."

Therefore, because there is no evidence in the record that defendants committed any negligent act causing Plaintiff to suffer physical harm and mental illness, summary judgment is **GRANTED** to the defendants as to Count V of Plaintiff's Complaint.

Count VI [although labeled Count V] - *"Neglecting to Prevent Conspiratorial Wrongs*"

Plaintiff also alleges that Dr. Ryan failed to fulfill his fiduciary duty to Plaintiff by failing to respond to Plaintiff's dental complaints and conditions, specifically by failing to correct the defects in the crown on tooth number 14. This allegation fails to mention any type of conspiracy or failure to prevent any conspiracy. As such, Count VI fails to present sufficient facts to permit a reasonable inference that Dr. Ryan or Becden knew of or failed to prevent a conspiracy. The facts, as pled, do not

establish a valid claim for failure to prevent a conspiracy.[25] Summary Judgment is **GRANTED** in favor of the defendants on Count VI.

CONCLUSION

For the reasons stated above, the Motions for Summary Judgment of Defendants, Michael J. Ryan, D.D.S. and Becden Dental Laboratory, are **GRANTED.** Accordingly, the Motion for Summary Judgment of Plaintiff, Gabriel G. Atamian, M.D., M.S.E.E., J.D., is **DENIED.**

/S/ ROBERT B. YOUNG
J.

oc: Prothonotary
cc: Opinion Distribution

[25] The Court notes that, although Plaintiff failed to mention the specific code section in his Complaint, the Court analyzed this particular count under the standard of 42 U.S.C. § 1986 (2001) titled "Action for neglect to prevent conspiracy."