AURIELLE BRIMMER	*	**NO. 2017-CA-0951**
VERSUS	*	**COURT OF APPEAL**
EAGLE FAMILY DENTAL INC.	*	**FOURTH CIRCUIT**
	*	**STATE OF LOUISIANA**

*** * * * * * ***

APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2016-02120, DIVISION "C"
Honorable Sidney H. Cates, Judge

* * * * * *

JUDGE SANDRA CABRINA JENKINS

* * * * * *

(Court composed of Judge Roland L. Belsome,
Judge Sandra Cabrina Jenkins, Judge Regina Bartholomew-Woods)

BELSOME, J., CONCURS IN THE RESULT

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AFFIRMED

AUGUST 8, 2018

This is a lawsuit alleging negligent dental treatment. Plaintiff, Aurielle Brimmer, appeals the trial court's August 24, 2017 judgment sustaining the Dilatory Exception of Prematurity filed by defendant/appellee, Eagle Family Dental, Inc. ("Eagle"). For the reasons that follow, we affirm.

FACTUAL AND PROCEDURAL HISTORY

On March 2, 2015, Ms. Brimmer sought dental treatment at Eagle. On that date, Dr. Brandon E. Hagler, DDS ("Dr. Hagler"), the owner of Eagle, performed a full mouth debridement and extracted several impacted teeth. Ms. Brimmer claims that she subsequently developed a severe periodontal infection, Ludwig's angina, and trismus, which required multiple surgeries, dental procedures, and long hospitalizations.

On February 29, 2016, Ms. Brimmer filed a request for a medical review panel with the Louisiana Patient's Compensation Fund ("PCF"). One day later, on March 1, 2016, Ms. Brimmer filed a Petition for Damages against Eagle, alleging that Eagle was vicariously liable for the actions and inactions of its employees,

agents, and persons "acting with apparent authority" in: (1) providing dental advice to Ms. Brimmer without having the requisite skill and knowledge; (2) failing to properly inform Dr. Hagler of all of Ms. Brimmer's symptoms and complaints following her dental treatment; (3) failing to ensure that all equipment was sterile; and (4) failing to properly advise Ms. Brimmer to go to the emergency room.

On June 7, 2016, Eagle filed an Exception of Prematurity, contending that Ms. Brimmer's lawsuit was premature because Eagle was a qualified health care provider under the Louisiana Medical Malpractice Act (the "MMA"), and Ms. Brimmer's claims had not first been presented to a medical review panel, as required by the MMA. In her opposition to the Exception, Ms. Brimmer argued that Eagle was not a qualified health care provider on the date that her claim was filed, and that the allegations in her Petition did not fall within the scope of the MMA.

After an evidentiary hearing on August 18, 2017, the trial court rendered a judgment on August 24, 2017 sustaining Eagle's Exception of Prematurity, and dismissing Ms. Brimmer's action, without prejudice. The trial court concluded that Eagle's "certificate of enrollment" from the PCF established a *prima facie* showing of coverage under the MMA. Ms. Brimmer filed a timely devolutive appeal.

DISCUSSION

Standard of Review

We must determine whether Ms. Brimmer was required to convene a medical review panel to review her claim against Eagle prior to filing suit. This is a question of law as well as of fact. We must, therefore, conduct a *de novo* review of this case to determine whether the trial court's ruling on the Exception of Prematurity was legally correct. *Duplessis v. Tulane Univ*., 07-0647, p. 3 (La. App. 4 Cir. 11/21/07), 972 So.2d 387, 389.

Assignments of Error

Ms. Brimmer lists two assignments of error:

(1) The trial court committed legal error in granting the Exception of Prematurity on the evidence presented in the record;

(2) The trial court abused its discretion in failing to address all of the issues raised in her Opposition to the Exception of Prematurity.

Assignment of Error No. 1

Ms. Brimmer's first assignment of error can be summarized as follows: (1) Eagle bore the burden of proof at the hearing on its Exception of Prematurity; (2) the merit of any exception of prematurity must be determined by the facts that exist on the date the Petition for Damages was filed; and (3) Eagle presented no evidence showing that it was a qualified health care provider at the time of the filing of the Petition on March 1, 2016.

We agree that the burden of proving prematurity is on the exceptor, who must show that it is entitled to a medical review panel because the allegations fall

within the scope of the MMA. *LaCoste v. Pendleton Methodist Hosp., L.L.C.*, 07-0008, p. 6 (La. 9/5/07), 966 So.2d 519, 523-24. We must examine the record to determine whether it shows by a preponderance of the evidence that Eagle was qualified under the MMA. *Goins v. Texas State Optical, Inc.*, 463 So.2d 743, 745 (La. App. 4th Cir. 1985). In general, the MMA establishes a framework for compensating persons who are injured as a result of medical malpractice committed by "qualified health care providers." *In re Med. Review Panel of Williams v. EMSA Louisiana, Inc.*, 15-1178, p. 9 (La. App. 4 Cir. 10/21/16), 203 So.3d 419, 426.

Ms. Brimmer does not dispute that Eagle is a health care provider, which includes a "corporation . . . licensed or certified by this state to provide health care or professional services . . . as a dentist." *See* La. R.S. 40:1231.1(A)(10). The MMA sets forth the method for becoming a qualified health care provider.

> (A) To be qualified under the provisions of this Part, a health care provider shall:
>
> (1) Cause to be filed with the board proof of financial responsibility as provided by Subsection E of this Section.
>
> (2) Pay the surcharge assessed by this Part on all health care providers according to R.S. 40:1131.4.

La. R.S. 40:1231.2(A). The health care provider's qualification becomes effective when proof of financial responsibility has been filed and the assessed surcharge is paid by the provider. La. R.S. 1231.2(A)(3).

Subsection E of La. R.S. 40:1231.2 describes the method by which a health care provider may establish "proof of financial responsibility":

> [B]y filing with the board proof that the provider is insured by a policy of malpractice liability insurance in the amount of at least one hundred thousand dollars per claim with qualification under this Section taking effect and following the same form as the policy of malpractice liability insurance of the health care provider.

In order to effectuate the provisions of the MMA, the board promulgated La. Admin. Code tit. 37, Pt. III, § 501, *et seq*., which governs the qualifications, conditions, and procedures required for PCF enrollment. The Administrative Code also addresses the required showing of "financial responsibility":

> A health care provider shall be deemed to have demonstrated the financial responsibility requisite to enrollment with the fund by submitting certification in the form of a certificate of insurance or policy declaration page that the health care provider is or will be insured on a specific date under a policy of insurance, insuring the health care provider against professional malpractice liability claims with indemnity limits of not less than $100,000, plus interest per claim, aggregate annual indemnity limits of not less than $300,000 plus interest for all claims arising or asserted within a 12-month policy period.

La. Admin. Code tit. 37, Pt. III, § 505.

The Administrative Code also provides for the issuance of a "certificate of enrollment" to a health care provider who was been qualified under the MMA:

> A. Upon receipt and approval of a completed application (including evidence of financial responsibility pursuant to § 505 . . . and payment of the applicable surcharge by or on behalf of the applicant health care provider), the executive director shall issue and deliver to the health care provider a certificate of enrollment with the fund, identifying the health care provider and specifying the effective date and term of such enrollment and the scope of the fund's coverage for that health care provider.

La. Admin. Code tit. 37, Pt. III, § 515(A).

These provisions demonstrate that a health care provider becomes enrolled in the PCF, and thus qualified, upon completion of the following:

- approval of an application;
- demonstration of financial responsibility to the satisfaction of the PCF; and
- payment of the applicable surcharge to the PCF.

Bickham v. LAMMICO, 11-0900, p. 6 (La. App. 4 Cir. 2/1/12), 90 So.3d 467, 472.

Ms. Brimmer argues that Eagle is not covered by the MMA because it was not qualified as a health care provider as of the date of the filing of the Petition. This is legally incorrect. "The MMA does not provide coverage to health care providers who fail to qualify **prior to the commission of the tortious conduct**." *Luther v. IOM Co.*, 13-0353, p. 9 (La. 10/15/13), 130 So.3d 817, 824 (emphasis added) (citing *Abate v. Healthcare Int'l, Inc*., 560 So.2d 812, 813 (La. 1990)).

Record Evidence of Qualification

We have carefully reviewed the evidence introduced at the hearing on the Exception, and conclude that Eagle has satisfied its burden of proving by a preponderance of the evidence that it was certified as a qualified health care provider on the date of the alleged malpractice.

The record contains a copy of a professional liability insurance policy from National Union Fire Insurance Company ("National Union"), with Dr. Hagler and Eagle as the named insureds, and with a policy period of January 23, 2015 to January 23, 2016.[1] The policy has the coverage limits required by La. R.S. 40:1231.2(E)(1) and La. Admin. Code tit. 37, Pt. III, § 505. The record also contains a copy of a check payable to the PCF on behalf of Dr. Hagler in the

[1] The record shows that Eagle renewed the policy for the period January 23, 2016 to January 23, 2017.

amount of $478.00 dated February 3, 2015, which is prior to the alleged tortious conduct.

The record does not include an application by Eagle to the PCF dated prior to the alleged malpractice.[2] The record also does not contain a certificate of enrollment issued to Eagle by the PCF prior to March 2, 2015.[3] We may, however, take judicial notice of governmental websites. *Mendoza v. Mendoza*, 17-0070, p.6 (La. App. 4 Cir. 6/6/18), -- So.3d --, 2018 WL 2716393 (citing *Felix v. Safeway Ins. Co.*, 15-0701, p. 7 (La. App. 4 Cir. 12/16/15), 183 So.3d 627, 632 & n.10). The public website of the PCF contains a copy of the signed certificate of enrollment for Eagle for the period January 23, 2015 through January 23, 2016. *See* http://204.196.210.34/certificates/certificates.aspx/certificates.aspx (last visited July 25, 2018).

The record also contains an April 18, 2016 certified letter from the PCF to Ms. Brimmer's attorney stating:

> [B]ased on the documents and information in possession of this office as of this date, [Eagle and National Union] are being reported as qualified for acts of medical malpractice under the provisions of R.S. 40:1231.8 et seq., for the above referenced claim [Ms. Brimmer's claim alleging malpractice on March 2, 2015]. The Oversight Board reserves the right to revise its qualification and coverage determination upon receipt of additional information.

A certificate of enrollment is "competent evidence to establish a *prima facie* case for the applicability of the medical malpractice law regarding claims against

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[2] The record does contain a "corporate application" dated April 13, 2016, with a date of enrollment of January 23, 2016 through January 23, 2017; and a "corporate application" dated July 21, 2017, with a date of enrollment of January 23, 2017 through January 23, 2018. These documents are irrelevant because the dates are after the alleged malpractice.

[3] The only certificates of enrollment in the record show that Eagle and Dr. Hagler were certified as enrollees for the period January 23, 2016 through January 23, 2017. Again, these certificates are irrelevant for purposes of this exception because they cover a period after the date of the alleged malpractice. *See Goins*, 463 So.2d at 745.

the party identified on the certificate." *Bickham*, 11-0900, p. 7, 90 So.3d at 472; *see also Remet v. Martin*, 98-2751, p. 9 (La. App. 4 Cir. 3/31/99), 737 So.2d 124, 129 (certificate of enrollment is "clear evidence" that health care provider is qualified).

In sum, the record contains the following documents that show Eagle's qualification by the PCF prior to the date of the alleged malpractice: (1) a copy of Eagle's professional liability policy for the period January 23, 2015 through January 23, 2016; (2) a copy of Dr. Hagler's February 3, 2015 check in payment of the PCF surcharge; and (3) a certified letter from the PCF confirming that, based on the documents and information in its possession as of April 18, 2016, Eagle was "qualified for acts of malpractice" on March 2, 2015. We take judicial notice of Eagle's certificate of enrollment for the period January 23, 2015 through January 23, 2016.

We conclude that, based on our *de novo* review of the record, Eagle has satisfied its burden of proving by a preponderance of the evidence that it was a qualified health care provider on the date of the alleged malpractice, and is thus covered by the MMA.

Assignment of Error No. 2

Ms. Brimmer also contends that the trial court abused its discretion in failing to address the argument in her Opposition to the Exception of Prematurity that her

action does not fall under the MMA because Eagle's "allied personnel" are not health care providers as defined in La. R.S. 40:1231.1(A)(10).[4]

The Petition alleges that Eagle is vicariously liable under the MMA, based on the theory of *respondeat superior*, for the actions/omissions of its employees that resulted in Ms. Brimmer's infection. This Court has held that a physician health care provider may be found liable under the MMA and the doctrine of *respondeat superior* for the failure of his assistant – not among the list of health care providers in La. R.S. 40:1231.1(A)(10) – to perform an adequate patient assessment. *Talbert v. Evans*, 11-1096, p.8 (La. App. 4 Cir. 3/7/12), 88 So.3d 673, 678-79. We, thus, reject Ms. Brimmer's contention that the allegations in her Petition do not fall within the "ambit" of the MMA.

We conclude that this action sounds in medical malpractice, and must proceed in accordance with the protocol set forth in the MMA.

CONCLUSION

For the foregoing reasons, we affirm the trial court's August 24, 2017 judgment sustaining Eagle's Exception of Prematurity, and dismissing Ms. Brimmer's action, without prejudice.

AFFIRMED

[4] Ms. Brimmer argues that she received "dental advice" from a "receptionist" who had no nursing, medical, and/or dental training. The Petition, however, refers to the alleged negligence of Eagle's "allied personnel." The record shows that Eagle had five employees – a dental hygienist, three dental assistants, and a front desk employee with a university degree.