IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

CYNTHIA ANN KIRKWOOD,	:	**No. 99-00797**
	:	
Plaintiff	:	
	:	
vs.	:	**CIVIL ACTION - LAW**
	:	
FIRETREE LTD., a corporation,	:	
t/d/b/a CONEWAGO PLACE; and	:	
CONEWAGO PLACE, a corporation,	:	
Defendants	:	

OPINION AND ORDER

This matter came before the Court on the defendants' motion for summary judgment. Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Pa.R.Civ.P. 1035.2; Mosaica Acad. Charter Sch. V. Commonwealth, Dept. of Education, 572 Pa. 191, 199, 813 A.2d 813, 817 (Pa. 2002). When deciding a motion for summary judgment, the Court must examine the record in the light most favorable to the nonmoving party, resolving all doubts as to the existence of a genuine issue of material fact against the moving party. Atcovitz v. Gulph Mills Tennis Club, 571 Pa. 580, 586, 812 A.2d 1218, 1221 (Pa. 2002). With this standard in mind the relevant facts follow.

On May 4 and May 5, 1997 during the plaintiff's in-patient stay at Conewago Place, a group therapy center, the plaintiff was assaulted in an uninvited, sexually-charged manner by Tyrone Walters, an employee, agent and/or representative of the defendants, while Walters was performing

his duties for the defendants. On or about May 26, 1997, the plaintiff learned that the defendants previously terminated Walters from employment for similar conduct and that the defendants knew Walters was unfit for employment at the defendants' place of business, but re-hired Walters anyway.

The plaintiff filed a writ of summons on May 25, 1999. The plaintiff filed a complaint in 2000. The complaint contained two counts – one for assault and battery on the theory that Walters was the defendants' servant and one for negligence relating to the defendants' hiring Mr. Walters, their failure to properly supervise him and their failure to enforce their policy prohibiting male employees in female patient's living quarters. The defendants filed preliminary objections, arguing that the complaint was barred by the statute of limitations. On December 13, 2000, the Honorable Clinton W. Smith denied the defendant's preliminary objections.[1] On or about March 25, 2003, the defendants filed their motion for summary judgment, in which they again allege the plaintiff's complaint is barred by the statute of limitations. In response to the summary judgment motion, the plaintiff argued the defendants' motion should be denied under the "law of the case" doctrine and also asserted the statute of limitations had not expired due to the discovery rule.

1 In denying the preliminary objections, Judge Smith stated "the matter at issue should properly be decided by a jury and not as a matter of law."

The Court first will examine the plaintiff's "law of the case" argument. The coordinate jurisdiction rule, one of the rules contained within the "law of the case" doctrine, provides judges of coordinate jurisdiction sitting in the same case should not overrule each other's decisions. Riccio v. American Republic Insurance Company, 550 Pa. 254, 260, 705 A.2d 422, 425 (1997).[2] When determining whether the coordinate jurisdiction rule applies, the Court looks to where the rulings occurred in the context of the procedural posture of the case. Id. The Pennsylvania Supreme Court explained:

> Where the motions differ in kind, as preliminary objections differ from motions for judgment on the pleadings, which differ from motions for summary judgment, a judge ruling on a later motion is **not** precluded from granting relief although another judge has denied an earlier motion.

Id. at 261, 705 A.2d at 425 (emphasis added), quoting Goldey v. Trustees of the Univ. of Pennsylvania, 544 Pa. 150, 155-56, 675 A.2d 264, 267 (1996); see also Parker v. Freilich, 803 A.2d 738, 745-746 (Pa. Super. 2002). Therefore, the plaintiff's argument that the law of the case doctrine would bar a decision in favor of the defendants is without merit.[3]

The defendants claim the plaintiff's claims are

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2 In the brief in opposition to the defendants' motion for summary judgment, the plaintiff cites the Superior Court decision in Riccio v. Amercian Republic Insurance Company, 453 Pa. Super. 364, 683 A.2d 1226 (1996). Although the Supreme Court affirmed the Superior Court with respect to its ruling regarding the definition of the term 'spine' in an insurance policy exclusion provision, it held that the Superior Court erred in its ruling on the coordinate jurisdiction rule. Riccio v. American Republic Insurance Company, 550 Pa. at 262, 705 A.2d at 426.

3 The Court also notes the statute of limitations is an affirmative defense that generally cannot properly be raised through preliminary objections.

barred by the applicable statute of limitations. The plaintiff contends her claims are timely due to the discovery rule. After reviewing the case law cited by both sides and the plaintiff's own deposition testimony, the Court is constrained to agree with the defendants. The statute of limitations for a personal injury action such as this is two years. 42 Pa.C.S.A. §5524. This two year period begins to run "as soon as the right to institute and maintain a suit arises; lack of knowledge, mistake or misunderstanding do not toll the running of the statute of limitations." Pocono International Raceway v. Pocono Produce, Inc., 503 Pa. 80, 84, 468 A.2d 468, 471 (1983). In most cases, the statute of limitations begins to run on the date the injury is sustained. Haines v. Jones, 830 A.2d 579, 585 (Pa. Super. 2003); Murray v. Hamot Medical Center, 429 Pa. Super. 625, 628, 633 A.3d 196, 198 (1993). The discovery rule only applies where the plaintiff cannot reasonably be expected to be aware of her injury or its cause.[4] E.J.M. v. Archdiocese of Philadelphia, 622 A.2d 1388, 1393 (Pa. Super. 1993); A. McD v. Rosen, 621 A.2d 128, 130 (Pa. Super. 1993). The fact that the plaintiff is not

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Ramsay v. Pierre, 822 A.2d 85, 88 n.2 (Pa. Super. 2003); Blair v. Guthrie Development Corp., 451 A.2d 537, 539 (Pa. Super. 1980).

4 In fact, there is case law in Pennsylvania to the effect that the discovery rule only applies where the existence of the injury or its cause cannot reasonably be discovered **within the prescribed statutory period**. Dalrymple v. Brown, 549 Pa. 217, 223, 701 A.2d 164, 167 (1997); Hayward v. Medical Center, 530 Pa. 320, 325, 608 A.2d 1040, 1043 (1992). Here, not only did the plaintiff know both her injury and its cause well within the two-year limitations period, she also had reason to believe the defendants'

aware that the defendant's conduct is wrongful or legally actionable is irrelevant. E.J.M., at 1394; see also A. McD, at 131 ("where the plaintiff is aware of the 'facts concerning the occurrence of his injury' and the 'causative relationship' between the injury and the defendant's conduct, the fact that the plaintiff does not know that he has a cause of action will not prevent the statute from running."). Once the plaintiff knows that she has been injured and the cause of the injury, she must investigate to determine if the defendant's actions give rise to a legal remedy. Id.; see also A McD, at 131 ("once a plaintiff possesses the salient facts concerning the occurrence of his injury and who or what caused it, he has the ability to investigate and pursue his claim.").

Here, the plaintiff had sufficient information to trigger the statute of limitations on the date of each assault. The plaintiff knew Mr. Walters assaulted her on May 4 and 5, 1997. She knew what Mr. Walters did was wrong, and she knew she experienced emotional and psychological harm as a result of his actions. Plaintiff's deposition, pp. 54, 61-62. She knew Mr. Walters was the agent, servant or employee of the defendants. In fact, after the second incident the plaintiff had concerns about why this man was working the night shift, why he was in a position to be alone with

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actions were negligent within days of5the incidents.

women and why he didn't seem to have any supervision and could do whatever he wanted. Plaintiff's deposition, pp. 57, 62-64. Although the plaintiff did not know of Mr. Walter's history of assaultive behavior and the defendants' knowledge of the same until May 26, 1997, she did not need to know the defendants' hiring of Mr. Walters was negligent to trigger the statute of limitations. Bigansky v. Thomas Jefferson Univ. Hosp., 442 Pa. Super. 69, 78, 658 A.2d 423, 427 (Pa. Super. 1995); Brooks v. Sagovia, 431 Pa. Super. 508, 514-515, 636 A.3d 1201, 1204 (1993); Bickford v. Joson, 368 Pa. Super. 211, 218, 533 A.2d 1029, 1032-1033 (1987).

In summary, the plaintiff had sufficient information on May 4 and 5, 1997 to trigger the statute of limitations. Thereafter, she had two years within which to determine whether the defendants' actions regarding its hiring and supervision of Mr. Walters were actionable.

ORDER

AND NOW, this ___ day of December 2003, the Court GRANTS the defendants' motion for summary judgment.

By The Court,

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Kenneth D. Brown, Judge

cc: Peter D. Friday, Esquire
WOOMER & FRIDAY, LLP
1701 McFarland Rd
Pittsburgh, PA 15216
Cheryl L. Kovaly, Esquire
225 Market St, Suite 304
P.O. Box 1245
Harrisburg, PA 17108-1245