

U/S was performed, which revealed Rivera's left kidney had an irregular contour. (Complaint ¶ 9). A CAT scan was performed on Rivera on October 8, 2008 which revealed two punctuate stones. (Complaint ¶ 10). On December 9, 2008, a cystoscopy was performed, and a foreign body (a thread) was removed from Rivera. (Complaint ¶¶ 11-13).

Rivera commenced this action by filing her Complaint on October 27th, 2010, three (3) years after the surgery that is the subject of Plaintiff's claims. The Complaint contains four (4) counts: Count I is a negligence claim against Defendant Dandolu. Count II is a negligence/intentional conduct claim against Defendant Temple. Count III is a negligence/intentional conduct claim against Dandolu, and Count IV is a delay damages claim. (Complaint ¶¶ 20, 24, 47, 53).

Defendants filed Preliminary Objections on January 5, 2011, and Plaintiff filed an Answer in Opposition on January 21, 2011. (See Docket). The Court sustained Defendants' Preliminary Objections on February 3, 2011 holding that all claims of recklessness, vicarious liability, corporate negligence, and intentional infliction of emotional distress were stricken from the Complaint. (See Docket).

Defendants subsequently filed an Answer with New Matter on February 23, 2011 asserting that Plaintiff's claims may be barred by the applicable statute of limitations (Defendants' Answer with New Matter ¶ 57).

Plaintiff filed an Amended Complaint on February 25, 2011. (See Docket). Defendants filed Preliminary Objections to Plaintiff's Amended Complaint on March 17, 2011, and Plaintiff filed an Answer in Opposition to Preliminary Objections on April 4,

2011. (See Docket). The Amended Complaint was stricken by this Court on April 28, 2011, and the Court's February 3, 2011 Order was affirmed. (See Docket).

Defendants filed a Motion for Judgment on the Pleadings on July 19, 2011 on the basis that Plaintiff's claims were barred by the applicable statute of limitations because Plaintiff filed 12 months after the expiration of the limitations period. (See Defendants' Motion for Judgment ¶ 12). Defendants denied that the discovery rule was applicable because Plaintiff alleged that she discovered her injury on December 9, 2008, which is within the two year statutory period. *Id.* On July 27, 2011, Plaintiff filed an Answer in Opposition of the Motion for Judgment on the Pleadings. (See Docket). This Court granted Defendants' Motion for Judgment on August, 22, 2011. (See Docket).

Plaintiff then filed a Motion for Reconsideration on September 1, 2011, and Defendants responded to the Motion for Reconsideration on September 9, 2011. (See Docket). On October 3, 2011, this Court ordered that the August 22, 2011 Order was not reconsidered. (See Docket).

On September 21, 2011, Plaintiff appealed this Court's Order of August 22, 2011 to the Pennsylvania Superior Court. (See Docket). Plaintiff then filed a Statement of Matters Complained of on Appeal on December 6, 2011. (See Docket).

The issue to be addressed on appeal is: whether this Court erred in granting Defendants' Motion for Judgment on the Pleadings and dismissing Plaintiff's Complaint after Plaintiff allowed the Statute of Limitations to run before filing the Complaint.

LEGAL ANALYSIS

A motion for judgment on the pleadings is properly granted where the pleadings demonstrate that no genuine issue of fact exists, and the moving party is entitled to

judgment as a matter of law. *Gidding v. Tartler* 130 Pa. Commw. 175,178, 567 A.2d 766-67 (1989). “[T]he pleadings in an action are limited to a complaint, an answer hereto, a reply if the answer contains new matter or a counterclaim, a counter-reply if the reply to a counterclaim contains new matter, a preliminary objection and an answer hereto.” Pa. R.C.P. 1017.

In Pennsylvania, appellate review of an order granting a motion for judgment on the pleadings is plenary. *Lewis v. Erie Ins. Exch.*, 2000 Pa. Super. 160, P9, 753 A.2d 839,842 (2000). The reviewing court

must accept as true all well pleaded statements of fact, admissions, and any documents properly attached to the pleadings by the party against whom the motion is filed, considering only those facts which were specifically admitted. Further, the court may grant judgment on the pleadings only where the moving party’s right to succeed is certain and the case is so free from doubt that trial would be clearly a fruitless exercise.

Steiner v. Bell of Pennsylvania, 426 Pa. Super. 84, 88, 626 A.2d 584,586 (1993).

On appeal, Plaintiff claims that although the statutory period should have expired on October 17, 2009, a year before she filed her Complaint, the statute of limitations was tolled by virtue of the discovery rule, rendering Plaintiff’s Complaint timely filed.

The right to recover damages in a personal injury suit generally arises when the injury is inflicted. *Ayers v. Morgan*, 154 A.2d 788,791 (Pa. 1959). A personal injury action must be commenced within two (2) years. 42 Pa. C.S. § 5524. Once a cause of action has accrued, and the prescribed statutory period has run, the injured party is barred from bringing his cause of action. *Id.* Mistake, misunderstanding, and lack of knowledge do not generally toll the running of the statute. *Id.*

The discovery rule acts as a possible exception to the statute of limitations. The discovery rule provides that where the complaining party is reasonably unaware that his or her injury has been caused by another party's conduct, the statute of limitations is suspended or tolled. *Fine v. Checcio*, 870 A.2d 850, 858 (2005). The most salient issue in cases triggering the discovery rule is the inability of the injured, despite the exercise of reasonable diligence, to know that he is injured and by what cause. *Id.* Reasonable diligence is not an absolute standard but rather what is expected from a party who has been given reason to inform himself of the facts on which his right to recovery is premised. *Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc.*, 468 A.2d 468, 471 (Pa. 1983). The question the court must ask is: Not what the plaintiff knew of his injury, but what might he have known by using the information within his reach. *Fine*, 870 A.2d at 859.

When the court is presented with an assertion of the discovery rule, it must address the ability of the complaining party to exercise reasonable diligence in ascertaining the cause of his injuries. *Id.* Where reasonable minds could not differ in finding a party knew or should have known the cause of his injury through the exercise of reasonable diligence, the discovery rule does not apply as a matter of law. *Pocono Int'l Raceway*, 468 A.2d at 471.¹

¹ The Pennsylvania Supreme Court has been evenly divided as to whether there is a principle that further qualifies the discovery rule's application.

Some cases have indicated that the discovery rule requires that the court first determine if the injury was ascertainable at any point within the statutory period. *Fine*, 870 A.2d at 859. If yes, then the discovery rule does not apply and the statute of limitations is not tolled. See *Murphy v. Saavedra*, 746 A.2d 92 (Pa. 2000); *Baumgart v. Keene Buildings Products Corp.*, 666 A.2d238 (Pa. 1995).

In contrast, the *Fine* court held :
it is not relevant to the discovery rule's application whether or not the prescribed limitations period has expired; the discovery rule applies to toll the statute of limitations in any case where a

Pennsylvania's formulation of the discovery rule reflects a narrow approach “to determining accrual for limitations purposes” and places a greater burden upon Pennsylvania plaintiffs vis-à-vis the discovery rule than most other jurisdictions. *Gleason v. Borough of Moosic*, 15 A.3d 479, 485 (2011). The party asserting the application of the discovery rule bears the burden of proof, and Pennsylvania courts have not hesitated to find as a matter of law that a party has not used reasonable diligence in ascertaining his injury and its cause, thus barring the party from asserting his claim. *Id.* at 485-86.

In the instant case, reasonable minds could not differ in finding that, in the exercise of reasonable diligence, Plaintiff Rivera knew or should have known of her injury and its cause within the statutory period. Plaintiff’s failure to exercise reasonable diligence to discover the cause of the injury sooner prohibits her from using the discovery rule exception to the statute of limitations; therefore the limitations period should not be tolled.

In Plaintiff’s Complaint, she states that she experienced pain in her abdomen and uterus for almost a year following her surgery (from October 2007- June 2008). Plaintiff notified a doctor at Maria de los Santos Health Center in June 2008 that she had experienced blood in her urine *since* her surgery. While Plaintiff may have initially

party neither knows nor reasonably should have known of the injury and its cause at the time the suit arises.
Fine, 870 A.2d at 859.

The court in *Fine* used this standard instead of the bright line rule described above to avoid “unreasonable and arbitrary results” such as allowing an injured party to have the full advantage of the statutory period if the injury was discovered the day after the period expired while requiring a plaintiff who discovers his injury the day before the statutory period expires to file his complaint in 24 hours. *Id.* at 860.

In addition, the *Fine* court held that any Pennsylvania Supreme Court decision in which the discovery rule was applied *only* because the injury was discovered within the limitations period was overruled in that regard. *Id.* at 860 n.4 (emphasis added). Thus, the Court advocated a totality of the circumstances approach in lieu of the bright line rule to better effectuate the purpose of the discovery rule and avoid unreasonable and arbitrary outcomes.

believed that these ailments were side effects of surgery, their persistence for eight months should have indicated to Plaintiff that these were not mere side effects and that she sustained injury during her surgery.

The *Fine* court placed on the injured party the responsibility to be reasonably diligent in seeking out facts on which the recovery claim is based. Plaintiff did not seek medical attention until almost a year after she should have known of her injury. There is no evidence Plaintiff did anything to ascertain the cause of her injury until she went to a doctor almost a year later. Even if Plaintiff believed her pain to be a year-long side effect of the surgery, she had the responsibility to do more than just assume the pain was normal and to seek out the actual cause of the pain.

Unlike the doctor in *Fine* who assured the plaintiff that the numbness he was experiencing was a normal side effect resulting from the removal of his wisdom teeth, Defendant Dandolu never told Plaintiff her year-long pain and bloody urine were normal side effects. Plaintiff did nothing more than assume the pain was just a side effect. The plaintiff in *Fine* made several visits within weeks of his wisdom teeth removal to discover the cause of his pain.

Unlike the plaintiff in *Fine*, Plaintiff in the instant case did not attend any post-op check-ups and did not make reasonably necessary inquiries regarding the cause of her pain. By the time the Plaintiff did finally seek the assistance of a doctor, she had already been experiencing bloody urine and constant pain in her abdomen for more than a year. The plaintiff in *Fine* visited the doctor seven times in that same time span.

The doctor in *Fine* told the plaintiff several times the numbness he experienced was normal, and further options would only be explored if the numbness continued or

worsened. The court in *Fine* reasonably held the injured party had no reason to distrust the doctor's assurances, and the injured party was reasonably diligent by setting up multiple doctor appointments to determine the cause and extent of the injury. Therefore, the *Fine* court held the discovery rule was applicable, and the limitations period was tolled until plaintiff actually discovered the injury.

A similar result is not warranted in the instant case. Plaintiff did not have pain such as would be expected after surgery, nor did she receive any assurances from Defendant that her pain was simply a side effect. Fifteen (15) months had passed in between the date of the injury and Plaintiff's alleged discovery of her injury. While the Plaintiff is not expected to diagnose herself, it is unreasonable to wait almost a year to find the cause of her "constant pain". Bloody urine, constant year-long pain, and kidney stones are manifestations of an unexpected injury sustained during the surgery on Plaintiff's abdomen, unlike facial numbness common after wisdom teeth removal.

Furthermore, finding that the discovery rule does not apply will not lead to an unreasonable and arbitrary result. Here, Plaintiff reasonably would have known that "constant pain", kidney stones, and bloody urine persisting for a year after surgery indicated a serious injury rather than an expected side effect. Plaintiff was never misled about the nature of her injury. Plaintiff never made a reasonably diligent effort to find the root and cause of her pain until 15 months later. Even if the Court assumes Plaintiff was reasonable in assuming her injuries were just side effects in the beginning, it is not reasonable to wait 15 months for verification. Therefore, a holding that the discovery rule does not apply in this case will not lead to an unreasonable and arbitrary result because Plaintiff was not reasonably diligent and thus, cannot take advantage of the tolling of the

limitations period. There is no question Plaintiff's discovery occurred, *at the latest*, December 8, 2008, therefore the injury was discovered well within the statutory period. Plaintiff fails to carry the burden required under both the test set forth in *Pocono Int'l Raceway* and the totality of the circumstances approach set forth in *Fine*.

CONCLUSION

For the foregoing reasons, this Court respectfully requests its decision to grant Defendants Vani Dandolu and Temple University Hospital's Motion for Judgment on the Pleadings be **AFFIRMED**.

BY THE COURT:

7-3-12

DATE

ALLAN L. TERESHKO, J.

cc:

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