IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

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| BROOKE LUJAN | : | CIVIL ACTION |
| v. | : | |
| PATRICIA MANSMANN, PATRICIA NEUHAUSEL, and GENESIS ASSOCIATES | : | NO. 96-5098 |

**M E M O R A N D U M**

**Padova, J.** September , 1997

This is the second opinion in this case which Plaintiff, Brooke Lujan, brings against her former psychologist, Patricia A. Mansmann, her former addiction counselor, social worker Patricia A. Neuhausel, and Genesis Associates, the corporation that employs Mansmann and Neuhausel (hereinafter referred to collectively as "Defendants"). In the first, Lujan v. Mansmann, 956 F. Supp. 1218 (E.D. Pa. 1997), the Court granted in part and denied in part Defendants' Motions to Dismiss. Now Defendants move for summary judgment pursuant to Federal Rule of Civil Procedure 56. For reasons that follow, the Court will deny Defendants' Motion and dismiss Plaintiff's breach of contract claim.

## I. BACKGROUND

The alleged facts that gave rise to this law suit, as they appeared in the Amended Complaint, appear at length in the

prior opinion, and the reader is referred to that opinion. The summary of Plaintiff's allegations is reproduced here.

> Sometime in July, 1990, Lujan sought treatment from Defendants for perceived emotional problems, including bulimia. Lujan's parents agreed to pay for Lujan's treatment, and Lujan began receiving such care from Defendants. Lujan's parents ultimately paid $8,000 for Lujan's therapy. Nonetheless, Defendants breached their duty to provide Lujan with psychological counseling that was within the standard of care of licensed therapists practicing in the Philadelphia area. This breach occurred when Defendants provided advice and counseling that harmed Lujan; was "cult-like in nature;" encouraged Lujan "to believe in certain memories, including memories of satanic abuse, satanic murders, and deviant sexual assaults;" convinced "Lujan to believe she was being stalked by a cult and that her life was in danger;" induced Lujan to undergo plastic surgery "to alter her features so the 'cult' would have a more difficult time finding her;" informed Lujan that she would have to detach herself from her parents and eliminate all communication with them for approximately two years and retain contact only for financial matters; encouraged her to travel away from Pennsylvania [to escape the cult]; and otherwise fell below the appropriate standard of care. (Am. Compl. ¶¶ 11, 15-19, 30-31). Defendants' actions prevented Lujan from completing her course of study at Lebanon College. Defendants also conducted "rage therapy," and, even though as a consequence of such therapy Lujan fell into a catatonic state, Defendants waited several hours before summoning professional medical attention to assist her.
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> At a July, 1992 meeting, Defendants provided Lujan with a termination letter advising Lujan that Defendants were discontinuing her therapy for two years, until the danger from the cult subsided. (See Am. Compl. ¶¶ 20-25).
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> On December 15, 1995, Lujan received information concerning the lawsuit her parents filed against Defendants. See Tuman v. Genesis Assocs., 935 F. Supp. 1375 (E.D. Pa. 1996). As a result of this information, Lujan discovered the techniques and unethical practices employed by Defendants and, for the first time, understood that Defendants' mind control techniques had harmed her. The news of the lawsuit caused Lujan to

> question both her memories and the propriety of the treatment Defendants afforded.

Id. at 1121-22. The first count of the Amended Complaint, which contains the facts quoted above, alleges negligence. The remaining counts allege breach of contract, gross negligence, intentional infliction of emotional distress, negligent infliction of emotional distress, breach of confidentiality, and conduct justifying punitive damages.[1] Plaintiff filed this action on July 17, 1996, approximately four years after the termination of her therapy, and two years beyond the 2-year statute of limitations for tort actions under Pennsylvania law. 42 Pa. Cons. Stat. Ann. § 5524 (West Supp. 1997).

## II. LEGAL STANDARD

Rule 56 of the Federal Rules of Civil Procedure provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c).

An issue is "genuine" only if there is sufficient evidence for a reasonable jury to find for the non-moving party.

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[1]Two other claims were dropped from the Amended Complaint: fraudulent misrepresentation and violation of the Racketeer Influenced and Corrupt Organization Act. 18 U.S.C.A. §§ 1961-1968 (West 1984 & Supp. 1997).

See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S.Ct. 2505, 2510 (1986). A factual dispute is "material" only if it might affect the outcome of the case. Id. In determining whether there are such issues, all uncertainties are to be resolved in favor of the non-moving party. Id. at 255, 106 S.Ct. at 2513.

A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the record that it believes demonstrate the absence of a genuine issue of material fact. See Cheilitis Corp. v. Citrate, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552 (1986). Where the non-moving party bears the burden of proof on a particular issue at trial, the movant's initial burden can be met simply by "pointing out to the district court that there is an absence of evidence to support the non-moving party's case." Id. at 325, 106 S.Ct. at 2554. After the moving party has met its initial burden, summary judgment is appropriate if the non-moving party fails to rebut by making a factual showing "sufficient to establish an element essential to that party's case, and on which that party will bear the burden of proof at trial." Id. at 322, 106 S.Ct. at 2552.

## III. DISCUSSION

### A. STATUTE OF LIMITATIONS

Pennsylvania’s two year statute of limitations allows a plaintiff two years within which to commence an action for

"injuries to the person." 42 Pa. Cons. Stat. Ann. § 5524(2). In addition, it applies the two year limitations period to:

> Any other action or proceeding to recover damages for injury to persons or property which is founded on negligent, intentional, or otherwise tortious conduct or any other action or proceeding sounding in trespass including deceit or fraud, except an action or proceeding subject to another limitation specified in this subchapter.

42 Pa. Cons. Stat. Ann. § 5524(7). The statute of limitations issue was raised in Defendants' Motions to Dismiss. As this Court stated then, the statute of limitations encourages the "filing of claims promptly by giving no more than a reasonable time within which to make a claim. By limiting the period in which a claim may be made, the statute protects defendants from having to defend actions where the truth-finding process is impaired by the passage of time." Lujan v. Mansmann, 956 F. Supp. at 1224 (quoting Brunea v. Gustin, 775 F. Supp. 844, 846 (W.D. Pa. 1991) (citations omitted)).

In this case, which is based on diversity of citizenship, the law of the forum state, Pennsylvania, applies. This includes Pennsylvania's statute of limitations. Baily v. Lewis, 763 F. Supp. 802, 804 (E.D. Pa.), aff'd, 950 F.2d 721, 733 (3d Cir. 1991). Pennsylvania law imposes a duty on the complainant to "use all reasonable diligence to properly inform himself of the facts and circumstances upon which the right of recovery is based and to institute suit within the prescribed period." E.J.M. v. Archdiocese of Philadelphia, 622 A.2d 1388, 1391 (Pa. Super. Ct. 1993) (citing Schaffer v. Larzelere, 189

A.2d 267, 269 (Pa. 1963). The statute of limitations 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." McD. v. Rosen, 621 A.2d 128, 130 (Pa. Super. Ct. 1993) (citation omitted).

**1. The Discovery Rule**

In some cases, regardless of the exercise of all reasonable diligence, the complainant is unaware that she has suffered an injury, or unaware of its cause, or both, during the limitations period. Then, a judicially created doctrine, "the discovery rule," may become applicable. As the Pennsylvania Supreme Court recently stated in Dalrymple v. Brown, No. 55 E.D. 1996, 1997 WL 499945 (Pa. Aug. 25, 1997), the discovery rule "is an exception to the requirement that a complaining party must file suit within the statutory period. The discovery rule provides that where the existence of the injury is not known to the complaining party and such knowledge cannot reasonably be ascertained within the prescribed statutory period, the limitations period does not begin to run until the discovery of the injury is reasonably possible." Id. at *2. Although the purpose of this rule is "to mitigate, in worthy cases, the harshness of an absolute and rigid period of limitations, it is also true that the rule cannot be applied so loosely as to nullify the purpose for which a statute of limitations exists." Id. (citations and internal quotations omitted).

The party seeking to invoke the discovery rule is under "a heavy burden of inquiry." Brunea, 775 F. Supp. at 846. He must establish his "inability to know of the injury despite the exercise of reasonable diligence." Dalrymple, 1997 WL 499945, at *3 (citing Pocono Int'l. Raceway v. Pocono Produce, 468 A.2d 468, 471 (Pa. 1983)). "The standard of reasonable diligence is objective, not subjective. It is not a standard of reasonable diligence unique to a particular plaintiff, but instead, a standard of reasonable diligence as applied to a reasonable person." Dalrymple, 1997 WL 499945, at *3 (quoting Redenz by Redenz v. Rosenberg, 520 A.2d 883, 886 (Pa. Super. Ct.) (internal quotations omitted), appeal denied, 544 A.2d 1343 (Pa. 1987)). "This objective standard allows for equity in protecting those parties who could not, through the exercise of reasonable diligence, know they were injured." Dalrymple. 1997 WL 499945, at *6. "[T]he statute is tolled only if a reasonable person in the plaintiff's position would have been unaware of the salient facts." Brunea, 775 F. Supp. at 846 (citation omitted). Under the discovery rule, the statute of limitations begins to run "when the injured party possesses sufficient critical facts to put him on notice that a wrong has been committed and that he need investigate to determine whether he is entitled to redress." McD. v. Rosen, 621 A.2d at 130 (citation omitted). More specifically, the discovery rule tolls the statute of limitations until "the plaintiff knows or reasonably should know (1) that he has been injured, and (2) that his injury has been caused by

another party's conduct." Baily, 763 F. Supp. at 805 (citation omitted).

The nature of the alleged injury plays a considerable role in determining whether to apply the discovery rule. "Since the standard of knowledge is objective, the nature of the injury will typically determine whether the discovery rule has application. Only where the injury is not readily discernible can the rule apply." McD v. Rosen, 621 A.2d at 131 (citation omitted). The Dalrymple court stated that jurisdictions that follow the objective approach, like Pennsylvania, apply the discovery rule "by focusing on the nature of the injury rather than the particularities of the specific plaintiff." Dalrymple, 1997 W 499945, at *7.

The Pennsylvania courts, following their legislature, have been unwilling to allow the incapacity of a plaintiff to toll the statute of limitations. Baily, 763 F. Supp. at 808. The Pennsylvania judicial code provides, "Except as otherwise provided by statute, insanity or imprisonment does not extend the time limited by this subchapter for the commencement of a matter." 42 Pa. Cons. Stat. Ann. § 5533(a)(Supp. 1997). The Baily court points out that the existence of an insanity tolling provision has been pivotal to courts in those jurisdictions that have allowed the discovery rule to apply to plaintiffs alleging that childhood sexual abuse was so traumatic as to cause them to

repress its memory. Baily, 763 F. Supp. at 808.[2] By contrast, "courts applying Pennsylvania law have consistently stated that a statute of limitations runs against a person under a disability, including one who is incompetent." Baily, 763 F. Supp. at 808 (citations omitted). That is true even where plaintiff's incapacity was allegedly caused by the injury. Id.

In Dalrymple, the Pennsylvania Supreme Court declined to apply the discovery rule in the case of a plaintiff in her mid-thirties who alleged that she had, in August of 1990, recovered memories of childhood sexual assault upon her that had occurred in 1968 and 1969. Dalrymple, 1997 WL 499945, at *1. Focusing on the nature of the injury as it is experienced by a reasonable person, the court stated with respect to the plaintiff:

> [s]he cannot escape the fact that the original injury was a battery which is commonly defined at law as a harmful or offensive contact. In a typical battery all the elements of the offensive touching will be present and ascertainable by the plaintiff at the time of the touching itself. Under application of the objective standard, it would be absurd to argue that a reasonable person, even assuming for the sake of argument, a reasonable six year old, would repress the memory of a touching so that no amount of diligence would enable that person to know of the injury. Appellant's argument, though admittedly quite ingenious, is still an assertion of an incapacity particular to this

[2] Baily cites cases from courts in Michigan and New Jersey emphasizing that plaintiffs who had repressed memories of childhood sexual abuse, or who were otherwise so traumatized by the experience that they were unable to institute legal action, could come under the insanity tolling provisions of the respective statutes of limitations. Baily, 763 F. Supp. at 808 n.4.

> plaintiff's ability to know that she suffered a battery.

Id. at *6 (citations omitted). The Dalrymple court, in dealing with a case of repressed memory of childhood abuse, was concerned not only with the nature of the injury, but also with the nature of the evidence. It stated:

> Here, we have only the "memories" of the plaintiff to rely upon in determining that an actual injury occurred. There is no objective evidence of an injury. To require an alleged tortfeasor, no matter now heinous the allegations, to respond to claims of an injury many years after the fact where the only "evidence" of the actual injury is held in the "memory" of the accuser, would allow the exception known as the discovery rule, to swallow the rule of law embodied within the statute of limitations itself.

Id., at *7.[3]

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[3]At one point in Dalrymple, the Pennsylvania Supreme Court uses language that seems like it might be heralding a stricter standard than its "reasonable diligence" standard of the past. It states, "The very essence of the discovery rule is that no amount of vigilance will enable the plaintiff to detect an injury." Dalrymple, 1997 WL 499945, at *6. For that language, the court cites its opinion in Pocono, which, in turn, quotes a 19th century Pennsylvania Supreme Court case, Lewey v. H.C. Fricke Coke Co., 31 A. 261 (Pa. 1895). In Lewey, the court tolled the statute of limitations, "for no amount of vigilance will enable [a plaintiff] to detect the approach of a trespasser who may be working his way through the coal seams underlying adjoining lands." Id. at 263 (applying discovery rule where defendant removed coal from another's land via access from his land).

I conclude, however, that the Dalrymple court has not changed its standard from the "reasonable diligence" one of the past. It repeatedly refers approvingly to past applications of the discovery rule in Pennsylvania, and nowhere indicates that it is changing the standard. Dalrymple, 1997 WL 499945, passim. By contrast with the "no amount of vigilance" language quoted above, everywhere else in the Dalrymple opinion, when discussing the standard, the court uses more qualified language. Id. at *2-3, 6 ("such knowledge cannot reasonably be ascertained within the prescribed statutory period;" when the plaintiff is "reasonably

**2. Application of the Discovery Rule**

"In applying the discovery rule, whether a plaintiff should have made a timely discovery of his or her injury is generally an issue for the jury unless the undisputed facts lead unerringly to the conclusion that the time it took to discover an injury was unreasonable as a matter of law." McD. v. Rosen, 621 A.2d at 130. The point at which the complainant should reasonably be aware that an injury has been suffered remains a jury question, and "only where the facts are so clear that reasonable minds cannot differ may the commencement of the limitations period be determined as a matter of law." E.J.M., 622 A.2d at 1391 (citation omitted).

There are two questions as to the application of the discovery rule with respect to Defendant's Motion for Summary Judgment. The first is whether, under Pennsylvania law, the discovery rule can apply to this sort of case at all. Would the Pennsylvania Supreme Court conclude that this case is akin to Dalrymple, where the injury is such that the plaintiff cannot benefit from the discovery rule because the injury is readily discernible, or would it allow such a case to proceed to trial? If the case is allowed to go forward, then the second question is

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unaware that an injury has been sustained;" "despite the exercise of reasonable diligence;" "a standard of reasonable diligence;" "no amount of reasonable diligence;" "through the exercise of reasonable diligence;" "where the injury is not readily discernible").

whether the Court can conclude from the Rule 56 submissions that reasonable jurors could not disagree on whether Plaintiff was in possession of "the salient facts" that would have led a reasonable person to know or to investigate further whether she had a cause of action.

**a. The Implications of Dalrymple**

After the initial briefing of Defendants' Motion for Summary Judgment, the Pennsylvania Supreme Court issued its opinion in Dalrymple. In their Reply Brief, Defendants raised the issue of Dalrymple's application to this case, and Plaintiff filed a Sur-Response addressing the question. Oral argument was held on the issue on September 15, 1997. In terms of the facts, Dalrymple is readily distinguishable from this case. Dalrymple deals with the repression of childhood sexual abuse. This case deals with the implantation of false memories. In Dalrymple, the allegation was of concrete physical injury (battery), indeed, of criminal injury, and the court held the victim must have been aware of it at the time it occurred. This case deals with allegations of subtler and more complicated injuries that are primarily psychological and very insidious.

The importance of Dalrymple for this case is not in the similarity of facts but in its lengthy discussion of Pennsylvania's discovery rule and the circumstances under which it will and will not be applied. The court states, "The very essence of the discovery rule in Pennsylvania is that it applies

only to those situations where the nature of the injury itself is such that no amount of vigilance will enable the plaintiff to detect an injury." Dalrymple, 1997 WL 499945, at *6. The court concluded that, where, as in the case before it, the injury was a battery, its nature was such that it was knowable. The plaintiff's argument that she repressed the memories was therefore "an assertion of an incapacity particular to this plaintiff's ability to know that she suffered a battery." Id. Accordingly, the court held that the discovery rule did not apply.

The Dalrymple court discussed at length and with approval this court's opinion in Baily, which "recognized that Pennsylvania permits utilization of the discovery rule in cases where the injury is not readily discernible as opposed to cases where it is the incapacity of the plaintiff which causes the delay in bringing suit." Id. at *3. Baily was a repressed memory case in which a family friend had allegedly sexually molested the plaintiff on a regular basis from the time he was twelve years old until he was seventeen. Baily claimed he first became consciously aware of the alleged abuse some fourteen years after it ended, during the course of psychotherapy for various emotional problems which he then attributed to the conduct of his abuser. Baily conceded that he was aware of the actions when they occurred, that they were "frightening" and painful, both physically and emotionally. He testified that at the time the abuse occurred, he "knew it was horrifying," but he claimed that

he could not bring his action earlier because he had repressed memories of the events. Id. at 807-08.

Dalrymple quoted the Baily court's statement that "[i]t was . . . plaintiff's own incapacity, albeit, one allegedly caused by the injury, and not the nature of the injury itself that resulted in his inability to pursue his claim." Dalrymple, 1997 WL 499945, at *3 (citing Baily, 753 F. Supp. at 808). Focusing on Pennsylvania's objective standard for reasonable diligence, the Baily court held that repressed memory was an incapacity unique to the plaintiff, and such claims would not supply sufficient justification under Pennsylvania law to toll the statute of limitations. Dalrymple at *3 (citing Baily, 763 F. Supp. at 810-11). Baily stressed the reluctance of the Pennsylvania courts to toll the statute of limitations due to a disability on the part of the plaintiff that affected his ability to assert his claim within the statutory period.[4] Id. at 809.

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[4]Baily cited a case from the United States Court of Appeals for the Third Circuit, which, while dealing with federal rather than Pennsylvania law, explained the connection between the emphasis on an objective standard of reasonable diligence and the refusal to toll the statute based on disability of a plaintiff. In Barren by Barren v. United States, 839 F.2d 987 (3d Cir.), cert. denied, 488 U.S. 827, 109 S.Ct. 79 (1988), the court, applying the Federal Tort Claims Act, 28 U.S.C.A. § 2671 et seq., held that, while medical malpractice as to his psychiatric problems was a substantial factor in the plaintiff's inability to recognize that very malpractice, the limitations period would not be extended. In so ruling, the court stated, "Allowing [the plaintiff] to file later than an objectively reasonable person would be tantamount to ruling that a plaintiff's mental infirmity can extend the statute of limitations. Such extensions have uniformly been rejected by this and other courts of appeals. . . . We recognize that our holding in this case visits a harsh result on the plaintiff. However, limitations periods must be

As the Dalrymple court noted, "Pennsylvania courts have consistently applied the discovery rule in only the most limited circumstances, where the plaintiff, despite the exercise of reasonable diligence, was unable to discover his or her injury or its cause." Dalrymple, 1997 WL 499945, at *7 (citation omitted).

Under Pennsylvania's objective standard to determine whether an injury was discoverable, as set out in Dalrymple, one must focus on the nature of the injury, rather than the particular characteristics or incapacities of the individual plaintiff. Is there something about the nature of the injury itself, that renders it unascertainable by a reasonable plaintiff exercising reasonable diligence? The Pennsylvania cases applying the discovery rule frequently involve physical injuries, often hidden within the plaintiff's body. In such cases, the courts have concluded no amount of vigilance would have enabled the plaintiff to discover the injuries within the period of limitations. See, e.g., Ayers v. Morgan, 154 A.2d 788 (Pa. 1959) (surgical sponge left in patient's abdomen during operation performed nine years earlier); Trieschock v. Owens Corning Fiberglas Co., 521 A.2d 933 (1987) (asbestosis appearing many years after exposure to asbestos); cf. Walls v. Scheckler, 1997 WL 570581 (Pa. Super. Ct., Sept. 16, 1997) (holding statute was tolled where plaintiff who was in an automobile accident and suffered bruises could not know until later symptoms appeared

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strictly construed." Baily, 763 F. Supp. at 809 (citing Barren, 839 F.2d at 992).

that she had a "serious injury" so as to trigger her insurance under the limited tort option of the Motor Vehicle Financial Responsibility Law). On the other hand, where courts have concluded that the injury was ascertainable by a reasonable person within the limitations period, the discovery rule was not applied, as in Dalrymple, Baily, and McD. v. Rosen, 621 A.2d at 131-32 (holding plaintiff who alleged sexual misconduct by her psychiatrist possessed salient facts regarding her alleged mistreatment and who was responsible for it shortly after it occurred, when her friends told her that something "[i]s wrong here," and she withdrew from therapy because of mistrust of the psychiatrist).

**b. The Nature of the Injury**

In the case sub judice, in order to determine whether the nature of Plaintiff's alleged injuries were such that they were undiscoverable, one must look at what the injuries are alleged to be. This task is complicated by an uncertainty in Pennsylvania law as to what constitutes an "injury" for purposes of the discovery rule.[5] The uncertainty was mirrored at oral

[5] In 1984, in Cathcart v. Keene Indus. Insulation, 471 A.2d. 493, the Pennsylvania Superior Court stated:

> It should be noted that we are not attempting at this time to define "injury." The importance of the definition should be readily apparent. A narrow definition will greatly enlarge the right of the plaintiffs, as the statute of limitations will begin to run at a later time. Adoption of a loose definition of "injury" will mean that the statute of limitations

argument on the Motion by Plaintiff's statements as to what injury or injuries she was claiming. Plaintiff's counsel initially stated:

> The injurious events were . . . the totality of the circumstances of the therapy that was provided by Genesis Associates between the years of 1990 and 1992. It was a culmination of everything that was done in those two years that caused Ms. Lujan to suffer from false memories and from the psychological sequela that have flowed from the implantation of those false memories.

(Tr. at 35.) Later in the argument, Plaintiff's counsel seemed to be departing from this view that the injurious events, which were the totality of the therapy, culminated in the implantation of false memories. Instead, he stated that he believed all the symptoms for which Plaintiff claimed damages in this law suit

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> could begin running with the discovery of a trivial harm, with the likely consequence that inconsequential lawsuits will be filed in order to avoid statue of limitation problems. In the case before us, according to deposition testimony, [the plaintiff] was permanently disabled more than two years prior to the time that he filed his complaint. This was unquestionably sufficient "injury" for statute of limitations purposes. Rather than attempt to formulate a definition at this time, we will await a case in which the issue has been raised in the lower court and properly briefed on appeal.

Id., 471 A.2d at 500 n.10. That was in 1984. Seven years later, in Manzi v. H.K. Porter Co., 587 A.2d 778 (1991), the Superior Court noted that the question still had not been resolved, and addressed it only to the extent of concluding that "no appellate court in this Commonwealth has treated a non-compensable condition as an injury precluding subsequent actions by the plaintiff, should he develop an injury in the future." Id. at 781. See also Giffear v. Johns-Manville Corp., 632 A.2d 880 (Pa. Super. Ct. 1993) (discussing the difference between "harm" and "injury" in context of exposure to asbestos), aff'd sur nom Simmons v. Pacor, Inc., 674 A.2d 232 (Pa. 1996).

stemmed from the implantation of the false memories. (Tr. at 56-57.)

In her Sur-Response to Defendants' Reply, where Plaintiff also characterized her injury as the implantation of false memories, she analogized the injury to the implantation of the sponge in Ayers. She argued that, by its very nature, the implantation of false memories cannot be recognized by a reasonable person using reasonable diligence. (Pl.'s Sur-Resp. at 1.) Plaintiff pointed out that, unlike in Dalrymple and Baily, where the courts determined that the underlying injury was a battery which was readily discernible at the time, in her case, there was no such immediately ascertainable physical injury, the memory of which she repressed. Instead,

> plaintiff's injury is that false memories of abuse and other horrors were implanted by the defendants. The implantation of false memories is not an ascertainable injury. The injury itself is damage to how a reasonable person perceives their past and their memories. Actual memories are replaced with false ones which are indistinguishable from true memories. No amount of vigilance could discover the injury, because a reasonable person would have absolutely no reason to know that the memories were false. Rather, the reasonable person relies on their memories in determining whether someone's conduct has harmed them, or whether they have suffered an injury.

Id. at 7-8 (emphases and footnote omitted).

At oral argument, Defendants maintained that Plaintiff's characterization of the case in her Sur-Response as one in which the sole injury was the psychological injury of implantation of false memories was inaccurate. Defendants argued that Plaintiff had alleged, and her experts had testified to,

> a constellation of injuries and symptoms all of which are alleged to result [from] the course of treatment in this case. And those injuries include not only injuries that are physical and ascertainable, those injuries include injuries described in the expert reports as intensely physical and intensely distressing to plaintiff at the time.

(Tr. of 9/15/97 (hereinafter "Tr.") at 5-6.) Defense counsel went on to detail the "physical injuries," including extreme headaches, symptoms characterized as post traumatic stress disorder, recurrent nightmares, occasional flashbacks, and injuries relating to a catatonic state requiring hospitalization, all of which caused intense distress.

Defense counsel relied on the Pennsylvania Superior Court case, Shadle v. Pearce, 430 A.2d 683 (Pa. Super. Ct. 1981), in which the plaintiff brought a personal injury action against his dentist after the two year limitations period had expired. The dentist had negligently treated the plaintiff for an abscessed tooth in September of 1972. Thereafter, the plaintiff developed bacterial endocarditis, which necessitated an aortic valve transplant. In February of 1973, at about the time of the transplant surgery, the plaintiff learned that his condition had resulted from his dentist's negligence. He was covered by medical and wage loss insurance, made an excellent recovery, returned to work with few limits on his activities, and decided not to sue the dentist. Several years later, in January of 1976, the plaintiff developed an aortic aneurysm, which was secondary to the valve transplant. The aneurysm allegedly affected the plaintiff's life drastically; he was incapacitated, his

activities were severely restricted, and his life expectancy was significantly shortened. The plaintiff contended that the aneurysm should be considered a new injury, separate and distinct from the aortic valve transplant, and that the statute of limitations did not begin to run on the aneurysm until it had occurred. The court disagreed. It held that the statute began to run in February, 1973, when the plaintiff learned that his heart problem had resulted from his dentist's negligence. It stated:

> If we were to hold otherwise under the facts presented here, we would create a concept in the law which would permit an injured plaintiff to have a new limitations period commence for the initiation of an action for personal injuries as of the date when each complication or change in condition arises, despite the fact that no "new" negligence has occurred which is attributable to the defendant. Such a concept would be contrary to the legislative intent inherent in the creation of periods of limitations in our law. Such statutory limitations periods make it clear that one who knows he has suffered from malpractice may not unduly postpone an action until the full extent of his damage is ascertained.

Shadle, 430 A.2d at 685-86.

Defendants read Shadle to say that, if the injuries are not separate and distinct, then "the existence of one ascertainable injury suffice[s] to bar all." (Tr. at 8, 17.) Once the allegedly tortious acts inflicts any damage that is physical and ascertainable, the statute begins to run. See Orozco v. Children's Hosp. Of Phila., 638 F. Supp. 280, 282 ("once the statute of limitations begins to run on an injury claim it also runs with respect to related injuries arising from

the same negligent conduct, even if the related injuries are not immediately ascertainable"). Defendants note that, according to Plaintiff's expert's report, what made the implantation of false memories possible was the "mass contagion of the intense group work." (Tr. at 27.) Defendants state this allegedly included brow beating, shunning, withdrawal of approval, creation of flashbacks, intense headaches, and deterioration into a catatonic state as a result of the allegedly bizarre nature of the therapy. They argue that a constellation of intensely physical and distressing symptoms accompanied the alleged implantation of false memories, that Plaintiff knew at the time that they were distressing and she knew that they were caused by the therapy. Therefore, under Shadle, once she was aware of some distressing physical consequences from Defendants' alleged wrongful actions, the statute began to run.

In Shadle, when the plaintiff had his heart valve transplant, he knew not only that he suffered distressing physical symptoms, but that the surgery was required because of his dentist's malpractice. The court held his knowledge of malpractice triggered the statute of limitations. It stated that "one who knows he has suffered from malpractice may not unduly postpone an action until the full extent of his damage is ascertained." Shadle, 430 A.2d at 686. Shadle knew both "(1)that he [had] been injured, and (2) that his injury [had] been caused by another party's conduct." Baily, 763 F. Supp. at 805. Defendants appear to be claiming that Plaintiff knew from

her physical symptoms that she had suffered an injury. Plaintiff claims that, although she suffered distressing physical symptoms, she had no reason to know that she had suffered an injury; she thought she was receiving helpful therapy.

Many medical treatments, including most surgeries, are physically or mentally distressing or both. That does not make them compensable injuries. A plaintiff has to have reason to believe that he has suffered an injury rather than simply the inevitable discomfort of legitimate treatment. The Pennsylvania Supreme Court made this distinction in Hayward v. Med. Center of Beaver County, 608 A.2d 1040 (Pa. 1992). In that case, a portion of the plaintiff's left lung was removed unnecessarily because his physicians had misdiagnosed a blood clot as cancer. After the surgery, one of the physicians told the plaintiff that his pain had been caused by a blood clot, rather than the suspected cancer, but assured him that the surgery had still been necessary. Following surgery, Plaintiff experienced shortness of breath, and his condition deteriorated. Both his physicians and a lung specialist he consulted told him that his symptoms were due to his decreased lung capacity that resulted from the surgery; however, it was not until 2½ years after the surgery that Plaintiff learned from a doctor examining him in connection with his Workman's Compensation claim that the surgery had been unnecessary. Defendants argued that the plaintiff knew of his breathing difficulty and that the surgery had caused it within the limitations period and his suit was therefore time-barred.

Plaintiff maintained that he had no reason to know he had suffered an injury until he learned that, contrary to what his doctors had told him, the surgery was unnecessary. He

> suggest[ed] that, given the nature of the medical field and its complexity, he could not be expected to know, until informed otherwise by Dr. Wald, that the ill effects he suffered were a result of wrongdoing and not merely the unexpected, inevitable or unforeseeable consequences of the medical treatment . . . .

Hayward, 608 A.2d 1043. The Pennsylvania Supreme Court decided that reasonable minds could differ as to when the injury (as opposed to the symptoms) was reasonably ascertainable, and the question was one for the jury.

In her Amended Complaint, Plaintiff states:

> Due to the cult-like nature of the therapy, Plaintiff did not have sufficient knowledge to recognize techniques of mind control and unethical practices, and techniques which were harmful to plaintiff's psychological well being utilized during therapy until some time after plaintiff first began receiving information relating to a lawsuit filed by her parents against Genesis Associates.
>
> As a result of receiving information about her parents' lawsuit, Plaintiff began to question the veracity of her memories, and the appropriateness of the treatment she received from Defendants.

(Am. Compl. ¶¶ 27-28). As in Hayward, a genuine issue of material fact exists as to when a reasonable person in Plaintiff’s position, suffering her distressing symptoms, and using reasonable diligence, would have ascertained that she was probably a victim of malpractice rather than a client in a course of legitimate therapy.

In order for me to accept Defendants' position, I would have to conclude, in the face of submissions to the contrary,[6] that Plaintiff was unable to distinguish between true and false memories because of the nature of Plaintiff rather than because of the nature of the injury. This is where I depart from Defendants' position. With respect to "cause," Defendants' position would require me to conclude as a matter of law that a person in Plaintiff's position would regard her distressing symptoms as being imposed by an injury caused by another party's

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[6]Plaintiff's expert, Dr. Linda Jayne Dubrow, submitted a supplemental report which stated:

> When a person has an experience involving influence that results in the inducement and reinforcement of distorted memories, the individual has no overt cause to question these memories or to perceive them as any different from real memories. The person assumes that the person or people influencing them are well-intentioned and sincere, have their best interests at heart, and that therefore these memories are "real."
> . . .
> In Brook Lujan's case, Ms. Lujan was strongly influenced and even directly encouraged by Genesis therapists to produce memories of trauma and abuse as the only way of getting better. She was further influenced by the mass contagion of the intense group work in which all the clients were influenced by Genesis therapists to produce similar memories. Any doubts she may have had about the veracity of these memories were actively squelched by the Genesis therapists when they did not allow her to contact her family to verify her emerging thoughts and feelings. Her doubts, like those of other Genesis clients who were being influenced to produce distorted memories, were labeled as "resistance" to treatment and interpreted as a sign that she (and others) were not working hard enough and would not be able to make a full recovery.

(Pl.'s Sur-Resp. Ex. A.)

wrongful conduct rather than being part of her underlying condition and legitimate therapy. This I refuse to do on this record.

My reading of Dalrymple and other Pennsylvania case law with respect to the discovery rule is that it neither clearly excludes nor clearly includes the type of injuries Plaintiff allegedly suffered. Whether she allegedly suffered one injury or a group of related injuries, the outcome of this case will depend on what Plaintiff knew or should have known at what time and whether a reasonable person in her position would have investigated further on the basis of what she knew or should have known. At this stage, I find that question is one on which reasonable minds can differ. As this court has stated, "where the injury and cause thereof are subtler and more complicated than in the normal malpractice case, it seems particularly inappropriate to determine as a matter of law what the plaintiff should have known." Greenberg v. McCabe, 453 F. Supp. 765, 772 (E.D. Pa. 1978), aff'd without op., 594 F.2d 854 (3d Cir.), cert. denied, 444 U.S. 849, 100 S.Ct. 78 (1979). At present, we have only Rule 56 submissions, untested and unclarified by cross-examination. We will have to await the evidence as it is presented at trial to determine which questions should ultimately be submitted to the jury.

**c. Plaintiff's Knowledge**

In their memorandum of law in support of their Motion for Summary Judgment, Defendants argue that all of Plaintiff's claims are time barred and that the discovery rule does not apply because, during the limitations period, Plaintiff repeatedly questioned Defendants' therapy, knew that others disapproved of it, and was on notice to investigate further. (Defts' Mem. in Supp. at 1.) For example, Defendants state:

> "Plaintiff admits that, in February 1993, she was beginning to ask her therapist if the treatment she had undergone at Genesis was not "so good". Further, plaintiff discussed Genesis's therapy with Lara Berezin, a former Genesis patient, and plaintiff admits that they both were questioning Genesis's therapy, that there was certain Genesis treatment practices that they did not agree with and that she and Ms. Berezin believed that Genesis Associates "went a little bit over on some areas." Moreover, plaintiff acknowledged she was told by Roxanne Thompson, her current therapist, that her therapy at Genesis was "very unethical, . . ."

(Id. at 7-8 and Ex. E at 485.) Plaintiff's deposition can also be read to show that Plaintiff thought Defendants' therapy "wasn't inappropriate," although she came to think they might not be "as perfect and wonderful and caring as I thought they were." (Pl.'s Resp. Ex. D. at 484.) Plaintiff was initially critical of Thompson's therapy techniques because they were different from those used by Defendants. (Id. Ex. D at 206-08.) As to the alleged statements by Plaintiff that her therapist, Roxanne Thompson, told her Defendants' treatment methods were unethical, Thompson testified that she did not tell Plaintiff that the therapy she received from Genesis was improper. She stated, "I'm not going to trash another therapist. It's not ethical." (Id.,

Ex. G. at 201.) Defendants present passages from Thompson's treatment notes and some from Plaintiff's journal that might seem to support their position that Plaintiff was on notice, but Plaintiff presents alternative interpretations of the same passages and other passages to the contrary.[7]

Defendants further claim Plaintiff was put on notice by an article about Genesis she had read, as indicated by Thompson's treatment notes. (Defts' Mem. in Supp. at 11 , Ex. Z (Treatment Notes of Apr. 25, 1994.)) Defendants' append an article from the Philadelphia Inquirer of February 27, 1994, (Ex. AA), which refers to lawsuits having been filed against Genesis, but there is no indication that this was the article Plaintiff saw.

With respect to the Plaintiff's allegation that Defendants implanted in her mind false memories of abuse by a cult and by her parents, Defendants assert that the claim is contradicted by Plaintiff's deposition testimony that she still believes she <u>was</u> the victim of ritualistic abuse by a cult and that she was sexually molested by her parents. It is hard to know where Defendants want to go with this argument. It does not appear that they are arguing, as a response to the charge of implanting false memories, that the memories are true. Rather, they seem to be suggesting that because Plaintiff is inconsistent

[7]In their Reply Brief, Defendants reiterate their argument and cite additional evidence, but the Court still finds it cannot conclude that there were no genuine issues of material fact as to the state of Plaintiff's knowledge and whether she had sufficient critical facts to put her on notice.

in her claims of the falsity of the memories, she has no viable claim. Plaintiff's counsel argues that Plaintiff's residual uncertainty is evidence of the tenacity of the harmful false memories implanted by Defendants' improper therapy techniques. Given the nature of Plaintiff's claim of implanted false memories, I find that some uncertainty and inconsistency with respect to the veracity of the memories does not invalidate her claim as a matter of law.

Reading the evidence concerning the information available to Plaintiff during the limitations period in the light most favorable to Plaintiff, I find that the evidence is subject to more than one interpretation. There are disputed questions of material fact as to what Plaintiff knew and suspected at what time and whether, during the limitations period, a reasonable person in her position had sufficient information to put her on notice that a wrong may have been committed, so that she would have investigated further.

**3. Equitable Estoppel**

In addition to asserting that the discovery rule applies, Plaintiff argues that Defendants should be estopped from asserting the defense of the statute of limitations under the doctrine of fraudulent concealment. Under Pennsylvania law,

> a party may be estopped from asserting the statute of limitations "[w]here through fraud or concealment, the defendant causes the plaintiff to relax his vigilance or deviate from his right of inquiry." The defendant's conduct "need not rise to fraud or concealment in the

> strictest sense, that is with an intent to deceive; unintentional fraud or concealment is sufficient." However, the plaintiff bears "the burden of proving such fraud or concealment, by evidence which is clear, precise and convincing[,]" and the plaintiff's reliance upon the claimed fraudulent concealment must be reasonable.

Baily, 763 F. Supp. at 811 (quoting Molineux v. Reed, 532 A.2d 792, 794 (Pa. 1987)); Citsay v. Reich, 551 A.2d 1096, 1099 (Pa. Super Ct. 1988).

Defendants claim that, because Plaintiffs have agreed to dismiss their fraudulent misrepresentation claim, the doctrine of equitable estoppel does not apply. Defendants cite no law stating that the fraudulent misrepresentation and fraudulent concealment are necessarily thus linked, and the Court declines to dismiss the claim.[8]

**B. BREACH OF CONTRACT CLAIM**

[8] It should be noted that the doctrine of equitable estoppel can apply only if the plaintiff's reliance on the defendant's representations was reasonable. That means that, in this case, Plaintiff's ability to recover under this theory will therefore be subject to essentially the same standard as the one governing the discovery rule. In the cases cited by Plaintiff, there were apparently no other clues that would have put a reasonable person on notice, and the plaintiffs' reliance on the defendants' representations were therefore reasonable. See Schaffer v. Larzelere, 189 A.2d 267 (Pa. 1963) (statute of limitations not applied where doctor intentionally concealed that the cause of patient's death was his premature and negligent release of her from hospital); Nesbitt v. Erie Coach Co., 204 A.2d 473 (Pa. 1964) (statute of limitations not applied where adjuster induced plaintiff to delay filing suit until the end of the limitations period). If Plaintiff was put on notice by other facts, or should have been, as Defendants claims, then it would not be equitable to toll the statute, even in the presence of fraudulent concealment.

Defendants maintain that Lujan's breach of contract claim is governed by a two year statute of limitations period for torts instead of the four year period prescribed in 42 Pa. Cons. Stat. Ann. § 5525(3) (West 1981 & Supp. 1996) (establishing a four year limitations period for "an action upon an express contract not founded upon an instrument in writing").[9] Defendants raised this question in their Motion to Dismiss, but the Court did not resolve it then. The opinion stated:

> The court need not resolve this issue in light of its prior decision regarding the discovery rule. Whether a two or four year statute of limitations applies is of no moment because the Court has concluded, for purposes of resolving Defendants' Motion to Dismiss only, that the statute may have begun to run on December 15, 1995.

Lujan v. Mansmann, 956 F. Supp. at 1227. Now that the case is about to go to trial, the question needs to be resolved.

Defendants assert that, because Lujan's breach of contract claim actually sounds in tort and resembles a tort claim for personal injury damages, a two year statute of limitations applies. See e.g., Tuman v. Genesis Assocs., 935 F. Supp. 1375, 1390 (E.D. Pa. 1996) (noting "to prevent malpractice plaintiffs from sidestepping the two-year limitation in tort suits, Pennsylvania law requires a plaintiff to make out a distinct contract claim, separate and apart from a tort claim based on the defendants' alleged violation of a professional duty of care")

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[9]9. Other kinds of contracts may be subject to limitations periods of five or six years. See 42 Pa. Cons. Stat. Ann. §§ 5526, 5527 (West 1981 & 1997 Supp.)

(citing Sherman Indus., Inc. v. Goldhammer, 683 F. Supp. 502 (E.D. Pa. 1988)). In Murray v. University of Pennsylvania Hosp., 490 A.2d 839 (Pa. Super. Ct. 1985) the Superior Court stated:

> It has been held . . . that the two year statute application to causes of action for personal injuries cannot be avoided by the expedient of pleading in contract. In determining which statute will control, it is necessary to determine the nature of the damages sought to be recovered. If recovery is sought for the cost of completing performance of the contract or remedying defects in performance, the applicable statute of limitations is six years. If, however, the damages sought to be recovered are for personal injuries, the two year statute of limitations is clearly applicable.

Murray, 490 A.2d at 841-42 (citations omitted); see also Spack v. Apostolidis, 510 A.3d 352 (Pa Super Ct. 1986).

In this case, in her breach of contract claim in the Amended Complaint, the damages Plaintiff seeks are those typical in personal injury cases: emotional and mental pain, loss of life's pleasures, loss of future earnings, etc. Indeed, they are the same damages she seeks for her torts claims. Plaintiff does not seek money to pay for psychotherapy to complete the work that was undertaken by the contract or to correct the damage that Defendants' treatment has allegedly done her, money that would allow her to achieve the benefits of the contract from someone else. Therefore, under this standard, Plaintiff's breach of contract claim is properly considered a torts claim, and the court will dismiss it. See Sherman,683 F. Supp. at 506, 508 (dismissing plaintiff's breach of contract count on motion for summary judgment because "a malpractice plaintiff may not

sidestep the two-year limitation on tort actions by pleading tort claims as breaches of contract").

**C. PUNITIVE DAMAGES**

In their Motion, Defendants move, in the alternative, for dismissal of Plaintiff's punitive damages claim. The Pennsylvania Supreme Court has held that "[a]ssessment of punitive damages are proper when a person's actions are of such an outrageous nature as to demonstrate intentional, willful, wanton or reckless conduct." SHV Coal, Inc. v. Continental Grain Co., 587 A.2d 702, 704 (Pa. 1991) (citations omitted). Plaintiff's claim for punitive damages is based on allegations of wrongful therapy, yielding false memories, and the abrupt termination of a mentally unstable and dependant young adult without referral or a support network, among other things. Defendants contend that Plaintiff has failed to present evidence of misconduct on the part of Defendants that is so outrageous as to justify a claim of punitive damages. For example, with respect to the alleged harmful effects of Defendants' abrupt termination of therapy, Defendants state the following:

> As to the claim that plaintiff was abandoned in therapy by defendants, and cast adrift, isolated and without friends, the evidence is that within days of therapy ending with defendants, plaintiff went into a women's abuse shelter (that also provided therapy) and continued in contact with Ms. Neuhausel.

(Deft.'s Mem. in Supp. at 29.) (citations omitted). Plaintiff's expert describes the termination as follows:

> The conduct of psychotherapy was perhaps at its most bizarre at the time of Brook's abrupt termination from Genesis, which took place at a Burger King Restaurant. This termination violated the standard of care. Brook was unduly influenced to sign a paper agreeing to her termination, without even being referred to another therapist. Brook was pressured to leave so as to protect herself and the Genesis therapists from unproven Satanic cult threats. Brook was persuaded to change her name and her physical appearance, even to the point of having plastic surgery. Brook was persuaded to move far away, and essentially disavow any knowledge of her previous life or identity. With Brook's dependence on the therapists firmly established and in a hysterical, disorienting, and paranoia and panic producing atmosphere, Brook complied with these demands. Brook's college education also had to be abruptly terminated by this move.

(Pl.'s Resp. Ex. B at 17-18.) According to Plaintiff's deposition testimony, which Defendants cite, they did not steer Plaintiff to the shelter. She found that on her own, and her "contact" with Neuhausel was a plea for help that yielded nothing. Plaintiff testified,

> I remember telling her about basically what had happened and wanting to get some help in terms of wanting to talk to her about some of it. Even though I knew we were terminated, I was just in such bad shape, and she said she couldn't really talk, so I eventually wound up talking more to the people at the Domestic Violence Shelter.

Defts' Mem. Ex. MM at 163-65.) I find the submissions create genuine issues of material fact regarding behavior that could constitute outrageous conduct. Therefore, the punitive damages claim will go forward.

## IV. CONCLUSIONS

For reasons that appear in the foregoing, Defendants' Motion for Summary Judgment will be denied and Plaintiff's claim for breach of contract will be dismissed.

An appropriate Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

| | | |
|---|---|---|
| BROOKE LUJAN | : | CIVIL ACTION |
| v. | : | |
| PATRICIA MANSMANN, PATRICIA NEUHAUSEL, and GENESIS ASSOCIATES | : | NO. 96-5098 |

**O R D E R**

**AND NOW**, this day of September, 1997, upon consideration of Defendants' Motion for Summary Judgment (Doc. No. 65), Plaintiff's Response (Doc. No. 71), Defendants' Reply (Doc. No. 74), and Plaintiff's Sur-Response (Doc. No. 80), and following oral argument on the Motion on September 15, 1997, **IT IS HEREBY ORDERED THAT**:

1. The Motion is **DENIED**; and

2. Plaintiff's breach of contract claim is **DISMISSED**.

BY THE COURT:

_____
John R. Padova, J.