

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

ANN BARRY, an incapacitated person, by :
and through her guardian, FRANCES :
CORNELL :
Plaintiff, :
: CIVIL ACTION
v. :
: No. 97-5883
MANOR CARE, INC., t/a LEADER :
NURSING AND REHABILITATION :
CENTER :
Defendant. :

MEMORANDUM-ORDER

GREEN, S.J.

April 29, 1999

Presently before the court is Defendant's Motion for Summary Judgment on all counts of Plaintiff's Second Amended Complaint and Plaintiff's Response thereto. For the following reasons, Defendant's Motion will be denied with respect to Counts I and II, and in accordance with Plaintiff's decision not to pursue Count III, this count will be dismissed with prejudice.

FACTUAL BACKGROUND

Plaintiff Ann Barry fractured her hip in August 1995. On October 3, 1995, Mrs. Barry was admitted as a resident at Defendant's facility in King of Prussia, Pennsylvania, for further rehabilitation. Mrs. Barry had an existing condition of senility and dementia and was no longer able to communicate verbally. Therefore, Mrs. Barry's lawsuit has been advanced by her daughter and guardian, Frances Cornell.

Ms. Cornell stated in her deposition that she visited her mother every day and did not see any bruises or any other injuries on her prior to the incident on October 26, 1995. (Pl.'s Ex. 21, Cornell Dep. at 23-24.) About a week before October 26, 1995, she heard Ronelle Custis, a nursing assistant and employee of Defendant, yelling and screaming in the hallway about another

patient, later identified as Helen Underhill, and exclaiming that she didn't have to "take it," that she didn't have to work there and that she wouldn't "take that from her own mother." (Cornell Dep. at 25-28.) On October 26, 1995, Ms. Cornell was visiting her mother. While the two women were watching television in Mrs. Barry's room, Ms. Custis entered the room. Ms. Cornell indicated that Mrs. Barry needed her diaper changed, and Ms. Custis transferred Mrs. Barry from her wheelchair to the bed in order to change the diaper. Ms. Cornell left the room, and while she was in the hallway, Ms. Cornell heard her mother scream. (Cornell Dep. at 41-42.) Ms. Cornell stated that although her mother would yell out sometimes, this was a "scream". (Cornell Dep. at 44.) About a minute later, Ms. Cornell re-entered the room. Ms. Cornell thought her mother looked funny and she noticed that her mother's glasses were lying as though they were upside down and one arm was sticking into a plastic cup that had been knocked over. (Cornell Dep. at 45-46.) Ms. Cornell noticed a bruised lump on the left temple area of Mrs. Barry and pushed the emergency button. Juanita Roseboro, an assistant director of nursing, responded and asked Ms. Custis what had happened, and Ms. Custis replied, "I don't know what happened to her. I don't know anything about it." (Cornell Dep. at 47-49.)

Two days later, on October 28, 1995, Ms. Custis gave a written statement wherein she stated that she took off Mrs. Barry's glasses and put them on the nightstand. She lifted Mrs. Barry up and put her on the bed. She took off the diaper and rolled Mrs. Barry toward the window. She noticed Mrs. Barry's hand was on the side rail, and changed her to the best of her ability. She stated that she did not know what happened. (Pl.'s Ex. 11, Custis stmt. dated October 28, 1995.) Thereafter, on October 30, 1995, Ms. Custis gave a statement to the police

wherein she stated that when she tried to roll Mrs. Barry over, “she was resisting and I couldn’t get her over and so I pushed her and the side rail shook and that’s when I proceeded to change her diaper. I realized she hit her head but I didn’t say anything to anyone because I was afraid!” (Pl.’s Ex. 11, Custis stmt. dated October 30, 1995.) Linda Harrington, a nurse employed by Defendant, states in her deposition that Mrs. Barry would often scream and yell especially with movement and transfers and that Mrs. Barry would resist transfers and hold onto whatever she could whether it be the wheelchair, the nurse, or the side rail, whatever she could reach for. (Def.’s Ex. D, Harrington Dep. at 9-10.)

An investigation by the Upper Merion Police Department revealed that Ms. Custis was previously arrested on March 11, 1993 by the West Goshen Township Police Department for a similar incident wherein she was charged with having assaulted an elderly patient at the West Chester Arms Nursing Home. Ms. Custis allegedly struck an elderly woman in the face, causing a bruise, while the woman was resisting being placed by Ms. Custis in a bed restraint. (Pl.’s Ex. 11, West Goshen Twp. Police Dept. Crime Report dated March 11, 1993.) The case went to trial, and the jury could not reach a verdict. The West Chester District Attorney’s Office decided not to retry the case.

Ms. Custis admits in her deposition that in filling out the application for employment with Defendant, she omitted prior work experience because she knew that she would not get good references from those employers. (Pl.’s Ex. 22, Custis Dep. at 21.) Ms. Custis left a 14-month gap in her employment data between August 1993 and October 1994. (Pl.’s Ex. 3, Custis Application with Manor Care.) During the 14-month gap, Ms. Custis was employed by Suburban Woods, and Ms. Custis stated that she was terminated after a resident complained that

she hit her. (Custis Dep. at 13-14.) Following that incident, Ms. Custis was employed as a Certified Nursing Assistant at Towne Manor where she was terminated for striking a person in the face on the premises. (Custis Dep. at 16; see also Pl.’s Ex. 14, Genesis Health Ventures Termination Report dated October 14, 1994.) Ms. Custis was charged for this incident by the East Norriton Township Police and paid a fine. (Custis Dep. at 17.) A few days after she was terminated by Towne Manor, Ms. Custis applied for employment with Defendant.

Once employed with Defendant and prior to the incident on October 26, 1995, Ms. Custis was written up for a “verbal dispute” on February 1, 1995. With respect to this dispute, the Employee Disciplinary Record states that “[i]t is a major offense to create an intimidating, hostile or offensive working environment. . . . another offense will result in discharge.” (Pl.’s Ex. 6.) The incident involving Helen Underhill which Ms. Cornell witnessed a week before the alleged assault on Mrs. Barry did not appear in Ms. Custis’s Disciplinary Record. Ms. Custis’s performance appraisal dated May 14, 1995 also stated that Defendant had “concern with her treatment of residents on the Arcadia Unit and the way in which she was speaking to them and therefore she had to be moved off the unit.” (Pl.’s. Ex. 5.)

DISCUSSION

Summary judgment shall be awarded “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the 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). A dispute regarding a material fact is genuine “if the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986). The evidence presented must be

viewed in the light most favorable to the non-moving party. Lang v. New York Life Ins. Co., 721 F.2d 118, 119 (3d Cir. 1983). This matter is before the court on the basis of diversity jurisdiction, and the parties do not dispute that the laws of Pennsylvania are applicable.

Defendant argues that Plaintiff has not produced any evidence that Ms. Custis intentionally assaulted Mrs. Barry. The Third Circuit has stated that “certain scenarios may arise where a material fact cannot be resolved without weighing the credibility of a particular witness or individual -- such as when the defendant’s liability turns on an individual’s state of mind and the plaintiff has provided circumstantial evidence probative of intent. In such a case, we have said that summary judgment is inappropriate because there is a sufficient quantum of evidence on either side for reasonable minds to differ and therefore the issue is ‘genuine’.” Schoonejongen v. Curtiss-Wright Corp., 143 F.3d 120, 130 (3d Cir. 1998)(citations omitted). Plaintiff has produced evidence that Ms. Custis changed her account of the incident in her statement to the police, the bruise on Mrs. Barry was not present before Ms. Custis entered the room, and Ms. Cornell heard Mrs. Barry scream. These facts are sufficient circumstantial evidence probative of intent to create a genuine issue of material fact on the question of whether Ms. Custis intentionally assaulted Mrs. Barry.

In Count I of Plaintiff’s complaint, Plaintiff claims that Defendant was negligent in hiring, training and retaining Ms. Custis as a nursing assistant. An employer may be liable in negligence if it knew, or should have known, that an employee had a propensity for violence and such employment might create a situation where the violence would harm a third person. Coath v. Jones, 419 A.2d 1249, 1250 (Pa. Super. 1980). Plaintiff has produced sufficient evidence to create a genuine issue of fact on the question of whether Defendant was negligent in the hiring

and retention of Ms. Custis and that such negligence caused the incident on October 26, 1995 based on the evidence related to Ms. Custis's prior work history, prior arrest and work performance while employed by Defendant. Therefore, Defendant's Motion for Summary Judgment on Count I of Plaintiff's Second Amended Complaint will be denied.

Plaintiff claims in Count II of the Complaint that Defendant is vicariously liable for the assault and battery. An employer is liable for the wrongs of an employee if the act was committed during the course of and within the scope of employment. Fitzgerald v. McCutcheon, 410 A.2d 1270, 1271 (Pa. Super. 1979). This liability of the employer may extend even to intentional or criminal acts committed by the employee. Id. Whether a person acted within the scope of employment is ordinarily a question for the jury. Id. If the act of assault, although a means of accomplishing an authorized result, is done for personal reasons or in an outrageous manner, it is not done within the scope of the employment. Lunn v. Boyd, 169 A.2d 103, 104 (Pa. 1961). Pennsylvania courts have applied the Restatement (Second) of Agency § 228, which reads in pertinent part:

(1) Conduct of a servant is within the scope of employment if, but only if: (a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; (c) it is actuated, at least in part, by a purpose to serve the master; and (d) if force is intentionally used by the servant against another, the use of the force is not unexpected by the master. (2) Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits or too little actuated by a purpose to serve the master.

See Fitzgerald, 410 A.2d at 1272.

In the present case, Ms. Custis was performing her duties as a nursing assistant in changing Mrs. Barry's diaper when the alleged assault took place. Thus, a genuine issue of

material fact exists on the question of whether Ms. Custis was acting within the scope of her employment when she allegedly assaulted Mrs. Barry. Whether the alleged assault was done for personal reasons, done in an outrageous manner or done for a purpose other than fulfilling her duties as a nursing assistant are all questions for the finder of fact. Thus, Defendant's Motion for Summary Judgment on Count II of the Plaintiff's Second Amended Complaint will be denied.

Plaintiff has claimed punitive damages in the present action under Counts I and II of the Second Amended Complaint. Punitive damages are appropriate where the conduct of the actor is reckless in that the "actor knows, or has reason to know, of facts which create a high degree of risk of physical harm to another and deliberately proceeds to act, or fail to act, in conscious disregard of, or indifference to, that risk." Martin v. Johns-Manville Corp., 494 A.2d 1088, 10-97 (1985); see also PolSELLI v. Nationwide Mutual Fire Ins. Co., 23 F.3d 747, 751 (3d Cir. 1994). Punitive damages may also be awarded on the basis of vicarious liability if the conduct of the agent is outrageous. Dean Witter Reynolds, Inc. v. Genteel, 499 A.2d 637, 643 (1985). Punitive damages must be based on conduct which is malicious, wanton, reckless, willful or oppressive, and only where the conduct complained of is especially egregious. Id. at 642-43. In the present case, for purposes of summary judgment, Plaintiff has produced sufficient evidence to create a genuine issue of fact on the question of whether the Plaintiff may be entitled to punitive damages based on her claims for negligent hiring and retention and vicarious liability for assault and battery. The court recognizes, however, that the trial record will determine the availability of punitive damages at trial. Defendant's Motion for Summary Judgment on the issue of punitive damages will be denied.

Finally, Plaintiff claims in Count III that Defendants were negligent in failing to assure adequate treatment after the October 26, 1995 incident. Plaintiff states that she will not be pursuing at trial the allegations in Count III of the Second Amended Complaint relating to Defendant's negligent failure to assure adequate treatment. Therefore, Plaintiff states that Count III may be considered to be withdrawn.

An appropriate Order follows.

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

ANN BARRY, an incapacitated person, by :
and through her guardian, FRANCES CORNELL :
Plaintiff, :
: CIVIL ACTION
v. :
: No. 97-5883
MANOR CARE, INC., t/a LEADER NURSING :
AND REHABILITATION CENTER :
Defendant. :

ORDER

AND NOW, this 29th day of April 1999, upon consideration of Defendant's Motion for Summary Judgment on all counts and Plaintiff's Response thereto, IT IS HEREBY ORDERED that:

- 1.) Defendant's Motion for Summary Judgment on Plaintiff's claim for Negligent Hiring and Retention in Count I of the Second Amended Complaint is DENIED;
- 2.) Defendant's Motion for Summary Judgment on Plaintiff's claim for Vicarious Liability for Assault and Battery in Count II of the Second Amended Complaint is DENIED;
- 3.) Defendant's Motion for Summary Judgment on Plaintiff's claim for Punitive Damages is DENIED; and
- 4.) Plaintiff's claim for Negligent Failure to Assure Adequate Medical Treatment in Count III of the Second Amended Complaint is DISMISSED WITH PREJUDICE.

The Deputy Clerk will contact the parties to arrange a date for trial.

BY THE COURT:

CLIFFORD SCOTT GREEN, S.J.