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

MICHELLE EVERWINE and CHRISTOPHER EVERWINE, as parents and natural guardians of JOSHUA EVERWINE, a minor, and MICHELLE EVERWINE and CHRISTOPHER EVERWINE, individually and in their own right,	:	**CIVIL ACTION**
v.	:	
THE NEMOURS FOUNDATION, WILLIAM I. NORWOOD, M.D., Ph.D, JOHN MURPHY, M.D., KENNETH MURDISON, M.D., and PRISCILLA HILLYER	:	**NO. 05-3004**

MEMORANDUM AND ORDER

Norma L. Shapiro, S.J. **April 4, 2006**

Plaintiffs Michelle and Christopher Everwine ("the Everwines") brought this action against the Nemours Foundation, the A.I. duPont Hospital for Children (a subsidiary of the Nemours Foundation), and several medical doctors and other medical personnel, as parents and natural guardians of their minor son Joshua, and individually and in their own right. They allege a number of violations of state and federal law arising from their son's medical treatment at the A.I. duPont Hospital for Children ("duPont Hospital") and from the medical personnel's conduct toward them. After defendants' motion to dismiss was granted in part, the Everwines filed an Amended Complaint against the Nemours Foundation, Dr. William I. Norwood, Dr. John

Murphy, Dr. Kenneth Murdison, and Priscilla Hillyer. The Amended Complaint alleges negligence, failure to secure informed consent, negligent hiring and supervision, intentional infliction of emotional distress (to the Everwines), and violations of the Rehabilitation Act, 29 U.S.C. §701 *et seq.*. The defendants, moving for partial summary judgment on the Everwines' claims on their own behalf for medical negligence and intentional infliction of emotional distress, argue these claims are barred by the applicable statutes of limitations. The motion will be granted.

I. FACTUAL AND PROCEDURAL BACKGROUND

Joshua Everwine was treated for Hypoplastic Left Heart Syndrome, a congenital heart defect, at duPont Hospital in Wilmington, Delaware, shortly after birth. Defendant Dr. William Norwood, then a surgeon at duPont Hospital, performed three surgical procedures on Joshua to correct the defect. The first was performed on April 29, 1999; the second on November 9, 1999; and the third on July 12, 2000. Joshua experienced seizures and neurological problems after the second surgery; the Everwines claim Drs. Norwood, Murphy and Murdison told them nothing had gone wrong during the procedure. The Everwines allege the negligent performance of the second surgery caused Joshua serious neurological, developmental, and other disabilities. They also claim Dr. Norwood, the duPont Hospital, and the Nemours Foundation misrepresented the quality of Dr. Norwood's pediatric cardiac care and the risks involved in the three surgical procedures Joshua would undergo.

The Everwines allege that some time after Joshua's third surgery they attempted to obtain

Joshua's medical records, but encountered difficulties.[1] They hired an attorney who wrote duPont Hospital on their behalf to request the records. They claim that on February 14, 2002, Drs. Murphy and Murdison told the Everwines they would stop treating Joshua because of their attorney's letter. They also allege that about the same time, Dr. Murdison told Mrs. Everwine the only available technique for a scheduled catheterization procedure would involve piercing Joshua's heart; Mrs. Everwine later learned that there were other techniques available but Dr. Murdison favored the one he mentioned because he wanted to write a scientific paper on it. Following the meeting with Drs. Murphy and Murdison, the Everwines dismissed their attorney. Shortly thereafter, they chose to have the procedure performed elsewhere with a different technique. It is not clear whether they continued to request the records.[2]

On June 23, 2005, the Everwines brought this action against duPont Hospital, the Nemours Foundation, Drs. Norwood, Murdison and Murphy, perfusionist Hillyer[3], and others. After this court granted in part defendants' motion to dismiss, plaintiffs filed an Amended Complaint on behalf of their minor son and on their own behalf. They allege: (Count I) the negligence of Dr. Norwood, formerly a surgeon at duPont Hospital, in performing the second surgical procedure on Joshua Everwine caused significant harm to Joshua and substantial expenditures to the Everwines; (Count II) the negligence of Ms. Hillyer, the perfusionist

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[1] The record is not clear on the timing of the Everwines' requests for and receipt of Joshua's medical records.

[2] See Deposition of Christopher Everwine at 133.

[3] A perfusionist is "a technologist who operates the heart-lung machine during cardiopulmonary bypass." Dorland's Illustrated Medical Dictionary 1399 (30th ed. 2003).

attending Joshua Everwine's surgery, also caused damages to Joshua Everwine and the plaintiffs; (Count III) Dr. Norwood failed to secure the informed consent of the Everwines before performing three separate surgical procedures on Joshua Everwine; had he made full disclosure to the Everwines of the risks of the surgical procedures, the Everwines would not have consented; (Count IV) the negligence of the Nemours Foundation in hiring, supervising, and retaining Dr. Norwood and Dr. Murphy caused Joshua Everwine's injuries and the Everwines' expenses; (Count V) Dr. Norwood, Dr. Murphy, and Dr. Murdison intentionally inflicted emotional distress by lying to the Everwines about the success of Joshua's second surgery, and making other distressing statements; and (Count VI) the Nemours Foundation discriminated against Joshua Everwine on the basis of his disabling heart condition, in violation of the Rehabilitation Act, 29 U.S.C. §701 *et seq.*, by not making available in the Cardiac Center "the same protection and resources" as those available to other patients of the duPont Hospital.

After the Amended Complaint was filed, defendants moved for summary judgment on the Everwines' individual claims under Counts I, II, and III (the "medical malpractice claims"), and on Count V (intentional infliction of emotional distress on the Everwines) on the ground that these claims were barred by the statute of limitations. Plaintiffs, opposing the motion, argue the statute of limitations on all claims should be tolled because defendants fraudulently concealed the nature of Joshua's injuries.

II. DISCUSSION

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. Fed. R. Civ. P. 56(c). Only a factual dispute that might affect the outcome under governing law precludes the entry of summary

judgment. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). When reviewing a motion for summary judgment, a court must evaluate the facts in a light most favorable to the nonmoving party and drawing all reasonable inferences in that party's favor. Id. at 255.

a. Choice of law

A federal court sitting in Pennsylvania must apply the same statute of limitations and tolling principles on state law claims as would a Pennsylvania state court. See Guaranty Trust Co. v. York, 326 U.S. 99, 110 (1945); Bohus v. Beloff, 950 F.2d 919, 924 (3d Cir. 1991). In Pennsylvania, which statute of limitations applies is treated as a procedural matter not subject to choice of law analysis. Wilson v. Transp. Ins. Co., 889 A.2d 563, 571 (Pa. Super. 2005); Unysis Fin. Corp. v. U.S. Vision, Inc., 630 A.2d 55 (Pa. Super. 1993). Pennsylvania courts apply Pennsylvania's statute of limitations or the limitations period "provided or prescribed by the law of the place where the claim accrued . . . , whichever first bars the claim." 42 Pa. C.S.A. § 5521(b). The statute of limitations in Delaware (where the claim accrued) and Pennsylvania is the same: two years both for the medical malpractice claims and the claim of intentional infliction of emotional distress. See 42 Pa. C.S.A. § 5524(2); 18 Del.C. § 6856; 10 Del. C. § 8119.[4] Since the Delaware statute does not provide for a shorter period of limitations, the Pennsylvania statute applies.

Pennsylvania law governing the equitable tolling of the statute of limitations also applies. See Bohus, 950 F.2d at 924 (applying Pennsylvania tolling provisions); Wilson, 889 A.2d at 574-75 (applying Pennsylvania law to equitable tolling issue although the claim arose in New

[4] Both states have tolling provisions for actions by minors; defendants do not contend that Joshua Everwine's claims are time-barred.

Jersey and New Jersey law governed the claim).[5] Even if a choice of law analysis were necessary, the laws of the three potentially interested jurisdictions (Pennsylvania, the forum; New Jersey, plaintiffs' state of citizenship; and Delaware, where all events occurred) are the same in all respects material to this motion. All three states permit equitable tolling of the statute of limitations where the plaintiff did not and could not reasonably discover the fact and cause of his injury because he relied on misleading statements by the defendant; the statute of limitations is tolled until the plaintiff knew or should have known of his injury and its cause. Fine v. Checcio, 870 A.2d at 860 (Pa. 2005); Rothman v. Silber, 216 A.2d 18, 24 (N.J. Super. 1966);Shockley v. Dyer, 456 A.2d 798, 799 (Del. 1983). The court will cite to Pennsylvania law.

b. Medical Malpractice

The two-year statute of limitations on medical malpractice cases begins to run when the injury is sustained. Bohus, 924 F.2d at 924; Fine, 870 A.2d at 857. However,

> the defendant may not invoke the statute of limitations, if through fraud or concealment, he causes the plaintiff to relax his vigilance or deviate from his right of inquiry into the facts. . . . The plaintiff has the burden of proving fraudulent concealment by clear, precise, and convincing evidence. While it is for the court to determine whether an estoppel results from established facts, it is for the jury to say whether the remarks that

[5] Unlike New Jersey and Delaware, Pennsylvania does not require the plaintiff to show the defendant's intent to deceive. "The doctrine [of fraudulent concealment] does not require fraud in the strictest sense encompassing an intent to deceive, but rather, fraud in the broadest sense, which includes an unintentional deception." Fine, 870 A.2d at 860 (internal citations omitted). The issue before the court is not whether there was fraudulent concealment, but whether the Everwines knew of the existence of a potential cause of action more than two years from the filing of the complaint. There is no conflict on this issue.

There is a difference in the way Delaware law treats equitable tolling under the discovery rule if there was an "inherently unknowable injury," in the absence of any allegations of concealment. If the plaintiff "could not in the exercise of reasonable diligence" have discovered his injury, the statute of limitations is extended from two years to three. 18 Del. C. § 6856(1). Since plaintiffs do not invoke the discovery rule separately from their claim of fraudulent concealment, this difference does not affect the choice of law analysis.

are alleged to constitute the fraud or concealment were made.

Fine, 870 A.2d at 860 (internal citations omitted).

A party seeking to assert a cause of action against another has the "responsibility . . to be reasonably diligent in informing himself of the facts upon which his recovery may be based." Id. at 861. "[A] statute of limitations that is tolled by virtue of fraudulent concealment begins to run when the injured party knows or reasonably should know of his injury and its cause." Id. The question is when the plaintiffs "knew or [were] able to know, in the exercise of reasonable diligence, that [their son] was injured by another's conduct." Id.[6]

The Everwines allege Joshua's second surgery caused their son's injury. It occurred on November 9, 2000, and their Complaint was filed on June 23, 2005. The Everwines' individual claims are time-barred unless there is equitable tolling. The Everwines argue that the statute is tolled by fraudulent concealment because Dr. Norwood told the Everwines that "nothing" had gone wrong during the second surgery, and they justifiably relied on his statement. They claim Dr. Norwood should have told them the particular bypass and cooling techniques used during the procedure "were possible causes of the brain damage," so the statute should be tolled until February, 2004, when duPont Hospital terminated Dr. Norwood and subsequent press accounts made them suspect that he may have performed improper procedures. Pls.' Opp. to Defs' Mot. for Summ. J. at 9-10.

There is no genuine issue of material fact regarding when the Everwines knew or

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[6] In Fine, the Pennsylvania Supreme Court held that when the plaintiffs knew or had reason to know of their injury was an issue of fact for the jury. Fine, 870 A.2d at 854. In both cases the court was reviewing, there was an issue of fact: what the plaintiffs were told by the defendant dentists and their staffs. Id. at 862-3.

reasonably should have known about Joshua's injury and its cause. According to their own accounts, they both learned of the existence of the injury at the same time, on November 10, 1999. Mrs. Everwine was told immediately after Joshua's second surgery that he had seizures. Deposition of Michelle Everwine ["M. Everwine Dep."] at 133. As soon as she saw Joshua after surgery she knew he had had a stroke; shortly thereafter she saw Joshua have a seizure and asked hospital staff for help. Id. at 146-49. A day or two thereafter, a CT scan of Joshua's brain was performed; Dr. Bean, a neurologist at duPont Hospital, informed her Joshua had a brain injury from a stroke. Id. at 149-51. Joshua's father was also told a day or two after Joshua's second surgery on November 9, 1999 that Joshua had a stroke; he also saw Joshua having seizures. Deposition of Christopher Everwine ["C. Everwine Dep."] at 76-77. He also spoke to Dr. Bean a day or two later and was told Joshua had a brain injury. Id. at 81.

The Everwines knew or should have known at the latest by Joshua's third surgery in July, 2000, that the cooling and bypass techniques were possible causes of his injury. Some time between the second and third surgery, Dr. Murdison told Mrs. Everwine that "everything went wrong" during the second surgery. M. Everwine Dep. at 213. Mrs. Everwine testified Dr. Murdison told her "it could have been the cooling down, it could have been the air, an emboli got released, it could have been the cooling down. It could have been all of these things went wrong, emboli, cooling down, and then something released to his brain." Id. at 216. Mrs. Everwine also stated that after the second surgery she and her husband were told "there was something in the cooling procedure. . . . Joshua was warmed up, the aortic patch was ripped off . . . at that point, blood went everywhere, and he was cooled down extremely quick and that could have been the reason for the stroke." Id. at 86. Thus she "did [her] own research at that point"

and asked Dr. Norwood prior to the third surgery whether he would "cool Joshua down like [he] did the second time." Id. at 85.

Mr. Everwine testified that before the third surgery he asked Dr. Mainwaring, a physician present at Joshua's second surgery, what could have caused Joshua's stroke. C. Everwine Dep. at 85. According to Mr. Everwine, he was told "apparently . . . an aortic patch had [torn]. There was a nick or something that they were unaware of and air or some type of particle could have entered in during that incision or during that –when the patch was torn off. Or it could have been something in the cooling down or warming up process." Id. Mr. Everwine also testified that some time after the second surgery either Dr. Murdison or Dr. Mainwaring told him "that area of [the aortic] patch [tore off] when he was warmed up [and] there was bleeding, and they did not know that there was an actual tear until that point. And then they had to cool him back down and find the tear and repair that." Id. at 105.

The Everwines allege that they attempted to obtain Joshua's medical records but had difficulty doing so. See, e.g., M. Everwine Dep. at 275-77. It is unclear whether they were initially able to get only incomplete records or none at all. Id. at 249. They allege they engaged an attorney, but when he wrote the duPont Hospital to obtain the records, Dr. Murdison confronted the Everwines and told them he would not proceed with a scheduled catheterization procedure if the Everwines intended to sue him. Id. at 232-236. The Everwines then dismissed the attorney, although shortly after the conversation with Dr. Murdison they knew they would have the procedure done elsewhere. See id. at 244-245 (Joshua's catheterization was performed at Children's Hospital of Philadelphia on March 6, 2002, three weeks after the alleged conversation with Dr. Murdison); 248-249 (dismissal of the attorney). Although is unclear from

the record what parts of Joshua's medical chart were available to the Everwines at what time, the Everwines do not allege they could not know the existence and possible cause of Joshua's injury without the records; this issue is not material.

The Everwines state that Dr. Norwood fraudulently concealed Joshua's injury by insisting nothing had gone wrong during the second surgery (M. Everwine Dep. at 85). However, the Everwines clearly did not believe him; his denials did not prevent them from learning several possible causes, including tearing of the aortic patch and some problem with the cooling procedure, by July 2000.[7] At any rate, "reliance upon the word of one physician when the patient's own common sense should lead one to a different conclusion is unreasonable." Bohus, 950 F.2d at 925 (internal citation omitted). There is no genuine issue regarding any material fact that would justify tolling the statute of limitations until July, 2003 (two years before the filing of the complaint). Since the Everwines' action was not filed until 2005, their medical malpractice claims are time-barred.

c. Intentional Infliction of Emotional Distress

The two-year statute of limitations on this claim begins to run when the injury occurs.

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[7] There is no support for the plaintiffs' claim that they were "lured . . . into a sense of false security" by Dr. Norwood's and others' statements. Pl.'s Opposition to S.J. Motion at 8. They testified they believed at that point that Joshua could not be treated anywhere else, but they were clearly aware the second surgery had not gone according to plan. Mrs. Everwine gave this account of her meeting with Dr. Norwood prior to Joshua's third surgery:

> I asked Dr. Norwood if he was going to do anything differently. And he said, no. I said, what went wrong? He said, nothing. I said, my son had a stroke, something went wrong. He said, I'm not planning to do anything differently. And I said, was it the cooling down? He said, like I said, I'm not planning on doing anything differently. And I said that we were scared, we were scared to death. And he said, do you want me to save your son or not? And he walked out.

M. Everwine Dep. at 177.

Aquilino v. Philadelphia Catholic Archdiocese, 884 A.2d 1269, 1275 (Pa. Super. 2005).

The Everwines allege the defendants intentionally caused them emotional distress when: (1) prior to Joshua Everwine's third surgery on July 12, 2000, Dr. Norwood told them nothing had happened during the second surgery and he would do nothing different during the third; (2) also prior to the third surgery, Dr. Murphy and Dr. Murdison told them nothing in connection with the second surgery caused Joshua's injuries; (3) on February 14, 2002, Dr. Murphy and Dr. Murdison frightened Mrs. Everwine by telling her they would not perform any further procedures on Joshua because Mrs. Everwine requested his medical records; (4) around February, 2002, Dr. Murdison falsely told the Everwines that the only procedure available for her son was a catheterization procedure that involved piercing Joshua's heart; Dr. Murdison later admitted that other procedures were available but he favored this particular procedure because he was writing a research paper on it.

This action was filed on June 23, 2005. The Everwines admit all these acts occurred before June 23, 2003 and claims based on them are barred by the statute of limitations unless a tolling provision applies. They argue the court should toll the statute of limitations because the emotional distress was "repeated, upon the realization that the defendants' actions had been in furtherance of an attempt to keep them from knowing the truth" about Joshua's injury. Pls.' Opp. to Defs.' Summ. J. Mot. at 13-14. In each case, the Everwines allege they were distressed by a statement made to them at the time the statement was made; the fact that they may have been distressed by the memory of the same statement in a new context at some later time is immaterial. This claim will be dismissed as time-barred.

III. CONCLUSION

There is no genuine issue of material fact as to when Michelle and Christopher Everwine knew or had reason to know of their claims of medical malpractice and intentional infliction of emotional distress; defendants are entitled to judgment as a matter of law on the claims on the Everwines' own behalf because these claims are time-barred and will be dismissed.

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

MICHELLE EVERWINE and CHRISTOPHER EVERWINE, as parents and natural guardians of JOSHUA EVERWINE, a minor, and MICHELLE EVERWINE and CHRISTOPHER EVERWINE, individually and in their own right,	:	**CIVIL ACTION**
v.	:	
THE NEMOURS FOUNDATION, WILLIAM I. NORWOOD, M.D., Ph.D, JOHN MURPHY, M.D., KENNETH MURDISON, M.D., and PRISCILLA HILLYER	:	**NO. 05-3004**

ORDER

AND NOW, this 4th day of April, 2006, upon consideration of defendant's Motion for Partial Summary Judgment, plaintiff's response thereto, and defendant's reply, and for the reasons set forth in the foregoing MEMORANDUM, it is **ORDERED** that:

1. Defendant's Motion for Partial Summary Judgment (Paper # 26) is **GRANTED.**

2. The claims of Michelle and Christopher Everwine individually and in their own right as to Counts I, II, III, and V of the Amended Complaint are **DISMISSED** without prejudice to their claims of behalf of Joshua Everwine.

/s/ Norma L. Shapiro
S.J.