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

HOLLY FARRELL, *et al*,	:	
Plaintiffs,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
THE A.I. DUPONT HOSPITAL FOR CHILDREN OF THE NEMOURS FOUNDATION, *et al*,	:	**No. 04-3877**
Defendants.	:	

MEMORANDUM AND ORDER

Schiller, J. **July 19, 2006**

Plaintiff Holly Farrell brings this lawsuit, as parent and guardian and administrator of her daughter's estate as well as individually and in her own right, against the A.I. duPont Hospital for Children ("duPont"), the Nemours Foundation, and several medical professionals, including Dr. William Norwood. Norwood was the surgeon who performed heart surgery on Ms. Farrell's daughter, Ashley McArdle. The Second Amended Complaint includes, *inter alia*, medical malpractice claims and wrongful death and survival actions. Defendants have filed a motion for summary judgment, arguing that all claims are time-barred. Plaintiff contends that the doctrine of fraudulent concealment tolls the statute of limitations. For the following reasons, Defendants' motion is granted.

I. FACTUAL BACKGROUND

Ashley McArdle was born on May 22, 2001. (Second Am. Compl. ¶ 10.) She was born in Nanticoke Hospital in Seaford, Delaware. (Defs.' Mot. for Summ. J. Ex. B [hereinafter Farrell Dep.) at 58.) Ms. Farrell soon learned that Ashley was sick, and the baby was placed in an oxygen tank

at Nanticoke. (*Id*. at 57-58, 61.) Ms. Farrell allowed Ashley to be transferred to duPont, where it was determined that she required surgery because she was suffering from a congenital heart defect diagnosed as transposition of the great arteries and a malalignment-type ventricular septal defect. (Second Am. Compl. ¶¶ 11-12; Farrell Dep. at 63.) Ms. Farrell conducted research on Ashley's condition and on Dr. Norwood, the surgeon who would perform Ashley's operation. (Farrell Dep. at 73-76.) She was informed that Ashley would be anesthetized prior to the surgery and that an incision would be made into Ashley's chest to allow Dr. Norwood to perform heart surgery. (*Id*. at 88.) Prior to the surgery, the anesthesiologist, Dr. Deborah Davis, recorded information related to Ashley's vital signs and temperature and also communicated with Ashley's family. (Second Am. Compl. ¶ 15.) On May 25, 2001, Dr. Norwood performed heart surgery on Ashley to correct her heart defects. (*Id*. ¶¶ 12-13.) Ms. Farrell was told by a duPont employee that, with respect to Dr. Norwood, "if anybody can do the surgery, [ ] he could do it." (Farrell Dep. at 72.) Ms. Farrell was also told that, barring complications, she could take Ashley home in a week to ten days. (*Id*. at 73.) She was also informed that Ashley was "a very, very sick little girl." (*Id*. at 81.)

During Ashley's surgery, Ms. Farrell was told that it was going well; following the surgery, she was informed that Ashley was doing fine. (*Id*. at 96-97.) Ms. Farrell was also told that Ashley had a patch inserted between the two chambers of her heart and that she was on a heart-lung machine. (*Id*. at 99.) Ms. Farrell also testified that Dr. Norwood spoke with her after the surgery but that "I did not understand a word that man said to me."[1] (*Id*. at 98.) Throughout the process, Ms. Farrell was concerned about her daughter, but she relied on the doctors with respect to the medical

[1] According to Ms. Farrell, she spoke to Dr. Norwood at most two times. (Farrell Dep. at 123.)

particulars because "[t]hey knew what they were doing, I didn't." (*Id*. at 103.) After the surgery, Ashley was returned to the intensive care unit where her condition worsened. (Second Am. Compl. ¶¶ 17-19.)

Later in the day, someone at duPont asked Ms. Farrell to sign a consent form because Ashley required a second surgery due to a blockage at the patch site. (Farrell Dep. at 105.) Ms. Farrell signed the consent form, and Dr. Norwood performed the second surgery on the following day, May 26, 2001. (*Id*. at 106-107.) Ms. Farrell spent time with her daughter on that day and reported that she looked fine after the second surgery. (*Id*. at 110-11.) Approximately four days after the second surgery, Ms. Farrell noticed swelling that started in Ashley's fingers and hands and progressively spread and worsened. (*Id*. at 112-13.) According to Ms. Farrell's testimony, the swelling increased to the point that Ashley was not able to open her eye and her chest and her legs also exhibited extreme swelling. (*Id*.) Sometime after the second surgery, Ashley suffered seizures and required a third surgery to remove blood clots.[2] (*Id*. at 114; Second Am. Compl. ¶¶ 23-24.) Ashley's condition continued to deteriorate, and Ms. Farrell was asked if Ashley could be removed from the heart-lung machine because the doctors had "done everything they could." (Farrell Dep. at 119.) She agreed to allow Ashley to be taken off the heart-lung machine, and Ashley died on June 5, 2001, minutes after being removed from the heart-lung machine. (*Id*.)

After Ashley's death, Ms. Farrell allowed an autopsy to be performed to discover the cause of death because she wanted to help other babies with "the same complications" as Ashley. (*Id*. at 128-29.) Approximately three months after Ashley's death, Ms. Farrell received an autopsy report

[2] Ms. Farrell testified that she never saw Ashley experience a seizure nor was she informed by anyone at duPont that Ashley suffered seizures. (Farrell Dep. at 121-23.)

which concluded that Ashley died from multi-organ failure arising from complications with transposition of the great arteries. (*Id*. at 130.) According to the autopsy report, the final cause of death was "hypovolemic shock and coagulopathy in a 2 week old Caucasian infant with congenital transposition of great arteries."[3] (Defs.' Summ. J. Mot. Ex. C [hereinafter Autopsy Report].) The autopsy report also refers to a "Rastelli Operation" and states that the heart and lungs were to be turned over to a doctor at duPont for further evaluation. (Autopsy Report.) In 2004, years after Ashley's death, Ms. Farrell learned of Dr. Norwood's departure from duPont and contacted her attorney about Ashley's treatment. (Farrell Dep. at 134.) She then sought and received Ashley's medical records. (*Id*. at 131-32.) She did not, however, talk to any doctors regarding Ashley's treatment. (*Id*. at 134.)

According to the Second Amended Complaint, Defendants fraudulently concealed the true nature of Ashley's treatment at duPont. (Second Am. Compl. ¶ 40.) It was not until February 22, 2004, when Ms. Farrell learned through the press that Dr. Norwood was fired, that she could have realized that her daughter was the victim of medical malpractice while she was at duPont. (*Id*.) These reports of Dr. Norwood's firing led Ms. Farrell to request her daughter's medical records. (*Id*.) Plaintiff contends that after reviewing Ashley's medical chart, it became clear that certain information was omitted or incorrectly recorded, so as to deceive Ms. Farrell and lead her to believe that nothing improper occurred regarding Ashley's surgeries and treatment. (*See* Second Am. Compl. ¶¶ 41-84.) Furthermore, Ashley's doctors told Ms. Farrell that they were unaware of the reason for Ashley's deterioration, despite knowing that their improper techniques and care were

[3] Hypovolemic shock results from a sudden loss of a substantial amount of blood or the fluid constituent of the blood. ATTORNEYS' DICTIONARY OF MEDICINE 6062 (28th ed. 2005). Coagulopathy refers to any disorder or abnormality in the clotting of the blood. *Id*. at 3295.

responsible for her condition. (*Id*. ¶¶ 51-52.) According to the Complaint, "Ms. Farrell never questioned what happened to her daughter because Dr. Norwood, the Hospital, and the Foundation held Dr. Norwood out to be the best there is." (*Id*. ¶ 78.)

II. STANDARD OF REVIEW

Summary judgment is appropriate "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 a judgment as a matter of law." FED. R. CIV. P. 56(c). The moving party bears the initial burden of identifying those portions of the record that it believes illustrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). If the moving party makes such a demonstration, then the burden shifts to the nonmovant, who must offer evidence that establishes a genuine issue of material fact that should proceed to trial. *Id.* at 324; *see also Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586-87 (1986). "Such affirmative evidence – regardless of whether it is direct or circumstantial – must amount to more than a scintilla, but may amount to less (in the evaluation of the court) than a preponderance." *Williams v. Borough of West Chester*, 891 F.2d 458, 460-61 (3d Cir. 1989).

When evaluating a motion brought under Rule 56(c), a court must view the evidence in the light most favorable to the nonmovant and draw all reasonable inferences in the nonmovant's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986); *see also Pollock v. Am. Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3d Cir. 1986). A court must, however, avoid making credibility determinations or weighing the evidence. *Reeves v. Sanderson Plumbing Prods*., 530 U.S. 133, 150

(2000); *see also Goodman v. Pa. Tpk. Comm'n*, 293 F.3d 655, 665 (3d Cir. 2002).

III. DISCUSSION

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." *Everwine v. The Nemours Found.*, Civ. A. No. 05-3004, 2006 WL 891060, at *2 (E.D. Pa. Apr. 4, 2006) (*citing Guaranty Trust Co. v. York*, 326 U.S. 99, 110 (1945); *Bohus v. Beloff*, 950 F.2d 919, 924 (3d Cir. 1991)). Pennsylvania courts apply the relevant Pennsylvania statute of limitations unless Pennsylvania's "borrowing statute" is applicable. *Deleski v. Raymark Indus., Inc.*, 819 F.2d 377, 379 n.2 (3d Cir. 1987). Pennsylvania's "borrowing statute" states that "[t]he period of limitation applicable to a claim accruing outside this Commonwealth shall be either that provided or prescribed by the law of the place where the claim accrued or by the law of this Commonwealth, whichever first bars the claim." 42 PA. CONS. STAT. ANN. § 5521(b) (2004). Both Pennsylvania and Delaware courts apply a two-year statute of limitations in medical malpractice actions.[4] *See* 42 PA. CONS. STAT. ANN. § 5524(2); DEL. CODE ANN. tit. 18, § 6856 (2003). In a medical malpractice case, the statute of limitations normally begins to run once the plaintiff suffers the injury. *Bohus*, 950 F.2d at 924 (citations omitted). Lack of knowledge, mistake or misunderstanding do not toll the running of the statute of limitations. *See Pocono Int'l Raceway, Inc. v. Pocono Produce, Inc.*, 468 A.2d 468, 471 (Pa. 1983); *see also Fine v. Checcio*, 870 A.2d 850, 857 (Pa. 2005). This Court must also apply

[4] Delaware, where Ashley was treated and therefore where the claims accrued, has a three-year statute of limitations if the injury was unknowable within two years. *See* DEL. CODE ANN. tit. 18, § 6856(1). This injury was not unknowable, and regardless, this Court must apply Pennsylvania's "borrowing statute," which requires application of Pennsylvania's shorter two-year statute of limitations. *See* 42 PA. CONS. STAT. ANN. § 5521(b).

Pennsylvania law governing equitable tolling provisions. *See Everwine*, 2006 WL 891060, at *3 (*citing Bohus*, 950 F.2d at 924; *Wilson v. Transp. Ins. Co.*, 889 A.2d 563, 574-75 (Pa. Super. Ct. 2005)).

B. Fraudulent Concealment[5]

1. General Principles

The fraudulent concealment doctrine "tolls the statute of limitations where 'through fraud or concealment the defendant causes the plaintiff to relax his vigilance or deviate from the right of inquiry.'" *Bohus*, 950 F.2d at 925 (*quoting Ciccarelli v. Carey Can. Mines, Ltd.*, 757 F.2d 548, 556 (3d Cir. 1995)). The doctrine is premised on an estoppel theory and prevents a defendant from invoking a statute of limitations defense when the defendant's fraud or concealment caused the plaintiff to "deviate from his right of inquiry into the facts." *Fine*, 870 A.2d at 860. Should the doctrine apply, the statute of limitations is tolled until the injured party is aware, or should be aware, using reasonable diligence, of an injury and its cause. *Id*. at 861. Reasonable diligence may require that a plaintiff seek an additional medical examination and hire a lawyer. *Russo v. Cabot Corp*., Civ. A. No. 01-2613, 2002 WL 31163610, at *2 (E.D. Pa. May 24, 2002) (*citing Cochran v. GAF Corp.*, 666 A.2d 245, 249 (Pa. 1995)). Furthermore, "[w]here common sense would lead the plaintiff to question a misrepresentation, the plaintiff cannot reasonably rely on that misrepresentation." *Mest v. Cabot Corp.*, 449 F.3d 502, 516 (3d Cir. 2006).

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[5] Related to the doctrine of fraudulent concealment is the discovery rule. The discovery rule tolls the statute of limitations when a plaintiff, despite exercising reasonable diligence, is unable to discover the existence of an injury and its cause. *Bohus*, 950 F.2d at 924. The discovery rule does not apply to wrongful death and survival actions such as this one because Pennsylvania case law holds that death is an established event that places survivors on notice to use reasonable diligence to discover its cause. *Pastierik v. Duquesne Light Co.*, 526 A.2d 323 (Pa. 1987).

The doctrine of fraudulent concealment applies even if the deceptive conduct is unintentional. *Fine*, 870 A.2d at 860. However, there must be "an affirmative and independent act of concealment that would divert or mislead the plaintiff from discovering the injury." *Bohus*, 950 F.2d at 925. Courts recognize that most information can be discovered through reasonable diligence. *See Fine*, 870 A.2d at 858. Therefore, the question here is when Plaintiff "knew or [was] able to know, in the exercise of reasonable diligence, that [her daughter] was injured by another's conduct." *Everwine*, 2006 WL 891060, at *3. Although the issue of reasonable diligence is usually left to a jury, it may be decided as a matter of law if reasonable minds could not differ on the matter. *Debiec v. Cabot Corp.*, 352 F.3d 117, 129 (3d Cir. 2003). Although it is for a jury to decide whether alleged remarks were made, the court determines whether an estoppel results from established facts. *Fine*, 870 A.2d at 860. The plaintiff bears the burden of proving fraudulent concealment by clear, precise, and convincing evidence. *Id*. (*citing Molineux v. Reed*, 532 A.2d 792, 794 (Pa. 1987)). Despite potentially harsh results, the Pennsylvania Supreme Court has stated that the reasonable diligence standard "has some teeth." *Cochran*, 666 A.2d at 250.

2. The Parties' Contentions

Defendants contend that they did not conceal any material related to Ashley's treatment from Ms. Farrell. (Defs.' Mem. of Law in Supp. of Summ. J. Mot. at 10.) According to Defendants, although Plaintiff cites inconsistencies in the cooling temperatures recorded by Ashley's doctors, these numbers were never concealed from Ms. Farrell. (*Id*. at 11.) Furthermore, Ms. Farrell received all medical records and documents that she requested. (*Id*.) Ashley's doctors never hid her condition from Ms. Farrell; in fact, they informed her that they were unsure why Ashley died. (*Id*. at 12.) Defendants note that Ms. Farrell received Ashley's autopsy results within ninety days of her request,

providing her with all the documents necessary to bring a lawsuit. (*Id*.) Defendants also claim that Ms. Farrell failed to exercise reasonable diligence, arguing that she did nothing to pursue her claims until 2004, after the statute of limitations had expired. (*Id*. at 12, 14.) Furthermore, the reason cited by Ms. Farrell for eventually seeking information about her daughter's death – Dr. Norwood's departure from duPont – was unrelated to Ashley's treatment. (*Id*.)

Ms. Farrell argues that she had no reason to believe Defendants' negligence caused her daughter's death until she obtained her daughter's medical records in June of 2004. (Pl's. Resp. to Defs.' Mot. for Summ. J. at 3.) It was not until she learned that Dr. Norwood "had been fired from DuPont Hospital" that her suspicions became aroused, which led her to immediately attempt to discern the true cause of Ashley's death. (*Id*. at 5.) Ms. Farrell claims that Dr. Norwood misled her by falsely asserting that Ashley's first surgery went well. (*Id*.) She also claims that she was not informed that her daughter underwent a Rastelli procedure. (*Id*.) Furthermore, Dr. Norwood made false statements regarding Ashley's cooling during surgery and provided incorrect and misleading information on his operation notes. (*Id*. at 6-7.) Plaintiff was also never informed that her daughter suffered seizures at duPont although evidence of seizures was noted by nurses. (*Id*. at 7.) Additionally, Ashley's heart was not autopsied until 2005, and the heart autopsy revealed a structural defect that Dr. Norwood could not have overlooked but which was not noted on the autopsy report provided to Ms. Farrell. (*Id*. at 8.)

3. Analysis

The Court holds that as a matter of law Ms. Farrell may not properly invoke the fraudulent concealment doctrine, and therefore the statute of limitations on her claims have expired. The evidence is undisputed that Ms. Farrell took no steps to investigate her possible claims related to

Ashley's death until after the statute of limitations had expired. Ms. Farrell's claim that she relied on Dr. Norwood's statement that the surgery went fine cannot be reconciled with the fact that Ashley died shortly after surgery, particularly since Ashley required two additional surgeries. Furthermore, an autopsy was performed shortly after Ashley's death, and the results were provided to Ms. Farrell. Ms. Farrell testified that she wanted the autopsy "in case another baby had come in with the same complications my Ashley did, maybe if they found out what had happened to her, they could help another baby." (Farrell Dep. at 129.) Although an autopsy on the heart was not performed until 2005, the autopsy report Ms. Farrell received in 2001 confirmed that Ashley's "status deteriorated and she developed multiorgan failure." (Autopsy Report.) Thus, in 2001, Ms. Farrell was aware of her daughter's injury and its possible cause. She was not required to be aware of her potential cause of action for medical malpractice. *See Urland v. Merrell-Dow Pharms., Inc.*, 822 F.2d 1268, 1275 (3d Cir. 1987) ("[P]laintiffs need not know that they have a cause of action or that the injury was caused by another party's wrongful conduct. [O]nce [a plaintiff] possesses the salient facts concerning the occurrence of his injury and *who* or *what* caused it, he has the ability to investigate and pursue his claim.") (internal quotation omitted) (emphasis in original). Plaintiff's argument is flawed because the statute of limitation runs regardless of whether a plaintiff knows a legal cause of action, in this case a negligence claim, exists. *See Russo*, 2002 WL 31163610, at *2 ("The statute of limitations starts to run when a party is injured, not when he or she begins to investigate that injury or obtains a diagnosis of its cause.").

Plaintiff argues that Ashley's doctors had a duty to speak and disclose why Ashley was ill. (Pl's. Resp. to Defs.' Mot. for Summ. J. at 10.) But as Plaintiff acknowledges, Ashley was obviously very ill and Ashley's doctors did not conceal that fact, nor did they rule out any particular diagnosis.

In fact, Ms. Farrell was aware that Ashley's condition worsened and additional surgery was required. Any possibly conflicting information contained in Ashley's chart would not have been known to Ms. Farrell because she did not request Ashley's medical records until 2004. Furthermore, while Plaintiff claims that she was not informed that her daughter was to undergo a Rastelli procedure, that information is contained in the autopsy report. Therefore, as early as 2001, Ms. Farrell should have been aware of the operations that were performed on her daughter.

Plaintiff largely relies on *Hall v. St. Luke's Hospital*, a recent case from the Lehigh County Court of Common Pleas that Plaintiff describes as "strikingly similar" to her case. (Pl.'s Resp. to Defs.' Mot. for Summ. J. at 12.) Plaintiff's reliance on *Hall* is misplaced. In *Hall*, the court considered whether it was appropriate to toll the statute of limitations for plaintiffs who learned, after the statute of limitations had expired, that their family members were administered lethal doses of medication. The *Hall* plaintiffs alleged that although the hospital learned of the nurse's actions, it concealed the conduct and therefore the plaintiffs learned of the nurse's actions only through media reports and a criminal investigation. The court applied the doctrine of fraudulent concealment and tolled the statute of limitations. The *Hall* court held that a Pennsylvania statute created a duty in the hospital to inform the victims' families of the nurse's illegal conduct and the hospital failed to meet that duty. Furthermore, the court rejected the defendants' argument that the plaintiffs were not diligent because they did not pursue an autopsy.

There are significant factual differences between this case and *Hall*. First, the *Hall* case was decided on a motion for judgment on the pleadings; accordingly, the court was limited to the pleadings and was required to accept as true all well-pleaded facts in the complaint. Furthermore, this case is not akin to one involving a nurse charged with killing patients and a subsequent hospital

coverup designed to hide the hospital's awareness of the killings. Additionally, in the *Hall* case, the media reports revealed the nurse's conduct and hospital coverup and suggested that an injury took place. Here, although Plaintiff argues that it was not until Ms. Farrell learned that Dr. Norwood had been fired from duPont that she had reason to investigate her daughter's death, Plaintiff puts forth no evidence that Norwood's departure from duPont was related to Ashley's treatment. Therefore, news of his firing would not have raised suspicions like the media reports in *Hall*. Furthermore, unlike the *Hall* case, an autopsy was performed in this case and it determined the cause of Ashley's death to be hypovolemic shock and coagulopathy. Finally, the *Hall* court considered a Pennsylvania statute that required the defendants to inform the plaintiffs of information the hospital had, including the nurse's misconduct. No such statute applies here.[6]

This Court finds the Pennsylvania Superior Court's decision in *Kaskie v. Wright*, 589 A.2d 213 (Pa. Super. Ct. 1991), instructive in this matter. In *Kaskie*, the decedent was a minor struck by a drunk driver. 589 A.2d at 214. The child was operated on, but shortly thereafter his brain stopped functioning and he died. *Id*. The boy's parents brought a wrongful death and survival action outside the statute of limitations, alleging medical malpractice. *Id*. They also claimed that one of the doctors who operated on their son was an alcoholic and unlicensed to practice in Pennsylvania, a fact unknown to them until newspaper reports of an unrelated case were published. *Id*. The court upheld

[6] The Court is also unpersuaded by Plaintiff's reliance on *Half v. Metropolitan Life Insurance Co.*, 65 Pa. D. & C.4th 246 (Ct. Com. Pl. Allegheny County 2003). *Half* involved reliance based upon explicit falsehoods made regarding an insurance policy. The facts in *Half* are readily distinguishable from those now before this Court. Furthermore, Plaintiff's reference to two Third Circuit cases, *Debiec v. Cabot Corporation*, 325 F.3d 117 (3d Cir. 2003), and *Cowgill v. Raymark Industries*, 780 F.2d 324 (3d Cir. 1985), is unavailing. Both cases applied the discovery rule, not the doctrine of fraudulent concealment, to "latent diseases" such as chronic scarring lung disease and asbestosis.

the trial court's grant of summary judgment because the missing information was not related to the reason for bringing the claim outside the statute of limitations. *Id*. at 215. Additionally, the court stated that the precise extent of the injuries need not be known before the statute begins to run. *Id*. "Here appellants knew the child died. At that time medical negligence would have been apparent and/or could have been discovered. . . . Appellants' apparent confidence in [the operating surgeon] did not absolve them of the responsibility to be diligent concerning the treatment provided . . . ." *Id*. at 216.

Plaintiff argues that the objective standard of reasonable diligence should be flexible enough to protect those without skills equal to highly trained professionals. "Ms. Farrell is not a cardiothoracic surgeon. She is a woman of ordinary intelligence and less than ordinary sophistication." (Pls.' Resp. to Defs.' Mot. for Summ. J. at 15.) The Court agrees that the test of reasonable diligence takes into account "the differences between persons and their capacity to meet certain situations and the circumstances confronting them at the time in question." *Fine*, 870 A.2d at 858. Indeed, this Court's holding does not depend upon Ms. Farrell having any medical or legal knowledge that would have made her aware of precisely why Ashley died or what cause of action she may have been able to pursue. The law is clear, however, that a cause of action accrues when a plaintiff can first maintain a lawsuit to a successful completion, and in personal injury cases that prerequisite is generally met when the injury is sustained. *See Bohus*, 950 F.2d at 924; *see also Fine*, 870 A.2d at 857. At the latest, on the date Ms. Farrell received the results of the autopsy, she had all the information necessary to maintain a lawsuit. She knew that Ashley had died, and she knew the doctors who had operated on her. Yet no additional medical opinions were sought after the autopsy was conducted nor was a lawyer consulted.

Plaintiff's argument, that even if Ms. Farrell had requested her daughter's medical records she would not have learned of Defendants' negligence because the records contain material omissions and falsehoods, misses the point. Because she failed to seek the medical records until after the statute of limitations, Plaintiff may not now argue that the records would not have disclosed medical malpractice and therefore the records were futile to an investigation of a potential negligence claim. If the Court were to adopt Plaintiff's argument, it would eviscerate the concept of reasonable diligence and the purpose underlying the statute of limitations. Claims would never expire if an expired claim remained viable because exercising reasonable diligence would have been futile since the negligence would not have been discovered even with reasonable diligence.

Because Ms. Farrell failed to take any action from the time she received Ashley's autopsy results in 2001 until after the statute of limitations had already run, she was not reasonably diligent in pursuing her potential claims. Accordingly, this case is distinguishable from the facts of *Bohus*, which involved a plaintiff who was assured by the defendant doctor that her pain was normal and would subside, and who also sought additional medical opinions that confirmed the defendant doctor's prognosis. *Bohus*, 950 F.2d at 926. Finally, without an affirmative act of concealment on the part of Defendants, Plaintiff cannot toll the statute of limitations. Ms. Farrell's argument, that the statute of limitations was tolled because Ashley's doctors did not concede medical malpractice, would strip reasonable diligence of "the teeth"which it possess under Pennsylvania case law. *See Cochran*, 666 A.2d at 250; Pl.'s Resp. to Defs.' Summ. J. Mot. Ex. A (Farrell Aff.) ("I . . . did not learn that Ashley's death was caused by the manner in which the operation was performed until June of 2004.").

IV. CONCLUSION

The death of Ashley McCardle is a tragedy. However, this Court is bound to apply the law and "[u]nder the law of Pennsylvania, it is the duty of the one asserting a cause of action to use all reasonable diligence to inform himself or herself properly of the facts and circumstances upon which the right of recovery is based and to institute suit within the prescribed statutory period." *Ciccarelli*, 757 F.2d at 556. In light of this duty, the Court concludes that as a matter of law there exists no basis for tolling the statute of limitations in this case under the doctrine of fraudulent concealment.[7] An appropriate Order follows.

[7] Counsel for both parties have done a commendable job defending the interests of their respective clients. Counsel for Ms. Farrell, however, was faced with the difficult and unenviable position of prosecuting stale claims.

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

HOLLY FARRELL, *et al*,	:	
Plaintiffs,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
THE A.I. DUPONT HOSPITAL FOR CHILDREN OF THE NEMOURS FOUNDATION, *et al*,	:	**No. 04-3877**
Defendants.	:	

ORDER

AND NOW, this **19th** day of **July, 2006**, upon consideration of Defendants' Motion for Summary Judgment (on Statute of Limitations Grounds), Plaintiff's response thereto, Defendants' reply thereon, the parties' supplemental briefs, following oral argument on July 11, 2006, and for the foregoing reasons, it is hereby **ORDERED** that:

1. The motion (Document No. 89) is **GRANTED**.

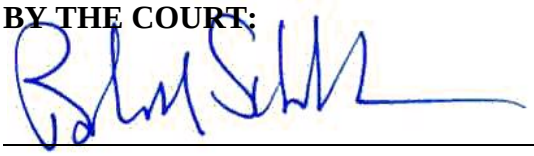
2. Defendants' Motion in Limine to Preclude Expert Testimony (Document No. 93) is **DENIED as moot**.

3. Defendants' Motion for Partial Summary Judgment on Plaintiff's Negligence, Medical Malpractice, Informed Consent and Corporate Negligence Claims Against Certain Defendants (Document No. 94) is **DENIED as moot**.

4. Defendants' Motion for Partial Summary Judgment to Dismiss Count I of Plaintiff's Second Amended Complaint is **DENIED as moot**.

5. The Clerk of Court is directed to close this case.

BY THE COURT:



Berle M. Schiller, J.