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

PAUL SVINDLAND, et al.,	:	
Plaintiffs,	:	**CIVIL ACTION**
	:	
v.	:	
	:	
THE A.I. DUPONT HOSPITAL FOR CHILDREN OF THE NEMOURS FOUNDATION, et al.,	:	**No. 05-0417**
Defendants.	:	

MEMORANDUM AND ORDER

Schiller, J. **November 3, 2006**

Plaintiffs Paul and Allison Svindland filed this action against Defendants Dr. William Norwood and the Nemours Foundation, alleging that Defendants' negligence caused the death of their infant son Ian. Presently before the Court is the Nemours Foundation's motion for summary judgment on Plaintiffs' negligent credentialing claim. For the reasons that follow, the motion is granted.

I. BACKGROUND

Ian Svindland was born to parents Paul and Allison on May 13, 2003. Both prenatally and at birth Ian was diagnosed with multiple congenital heart defects, including a ventricular septal defect ("VSD").[1] (Am. Compl. ¶¶ 16-17.) On June 24, 2003, Ian was admitted to the Nemours Cardiac Center for surgery to repair his VSD, and the following day the procedure was performed by Dr. Norwood. (*Id.* ¶¶ 19-20.) To safely stop Ian's heart during surgery, Dr. Norwood cooled

[1] A VSD is an opening in the septum or the muscular wall that separates the left and right ventricles of the heart, allowing blood to flow between them. ATTORNEYS' DICTIONARY OF MEDICINE 1449 (28th ed. 2005).

Ian's body to induce deep hypothermic circulatory arrest. (*Id.*) This cooling procedure included cardiopulmonary bypass, whereby blood was removed from Ian's body, cooled, and recirculated to lower Ian's body and brain temperatures so that he could withstand circulatory arrest. (*See* Expert Report of Dr. Hannan, Aug. 17, 2006 [hereinafter Hannan Expert Report] at 2.) The following day, Ian was placed on Extracorporeal Membrane Oxygenation ("ECMO") to provide cardiac support.[2] (Am. Compl. ¶ 25.)

On June 30, 2006, Ian underwent a second surgical procedure to correct a patent ductus arteriosus ("PDA"), a separate heart condition. The ductus arteriosus is a channel in unborn infants that allows blood to bypass the lungs when going from the right side of the heart into the aorta. ATTORNEYS' DICTIONARY OF MEDICINE 2369 (28th ed. 2005). It normally closes naturally after birth. *Id.* If the ductus remains open, a portion of the infant's blood is deprived of oxygen. *Id.*

Despite the hospital's efforts, Ian's condition continued to deteriorate and on July 14, 2003, at two months old, Ian passed away. (Am. Compl. ¶ 31.) In their Amended Complaint, Plaintiffs allege that: (1) Dr. Norwood was negligent because he used unsafe cooling procedures and failed to ligate (or medically close) Ian's PDA during the June 25th surgery; (2) they were given insufficient information to form the basis of informed consent as to the June 25th surgery; and (3) the Nemours Foundation was negligent in their "[s]upervision, [m]onitoring, and [r]etention of Dr. Norwood." (*Id.* ¶¶ 9-22.) The Nemours Foundation filed for summary judgment on the third claim.

[2] ECMO is a non-conventional mode of ventilator support that helps the body exchange carbon dioxide and oxygen. HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 1530 (15th ed. 2001).

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 (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 under Rule 56(c), a court views the evidence in the light most favorable to the nonmovant and draws 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., Inc.*, 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

As the forum state, Pennsylvania choice of law rules govern this action.[3] *Fleet Nat'l Bank v. Boyle*, Civ. A. No. 04-1277, 2005 WL 2455673, at *6 n.10 (E.D. Pa. Sept. 12, 2005) (Federal courts exercising supplemental jurisdiction apply the choice of law principles of the forum state.); *see also Klaxon Co. v. Stenor Electric Mfg. Co.*, 313 U.S. 487, 496 (1941). Pennsylvania employs the "interests analysis" approach to choice of law. *Griffith v. United Airlines, Inc.*, 203 A.2d 796, 805 (Pa. 1964). This rule "permits analysis of the policies and interests underlying the particular issue before the court." *Id.* Priority of interest is awarded to the state which has the greatest qualitative interest in the outcome of the litigation. *Myers v. Commercial Union Assur. Cos.*, 485 A.2d 1113, 1116 (Pa. 1984); *see also Lacey v. Cessna Aircraft Co*, 932 F.2d 170 (3d Cir. 1991). Delaware unquestionably has the greatest interest in this case. All parties to this action are citizens of Delaware and the medical treatment giving rise to these claims was rendered in Delaware. Pennsylvania's only interest is as the host forum. Therefore, the Court applies Delaware's substantive rules of decision.[4]

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[3] In their initial Complaint, Plaintiffs alleged violations of the Rehabilitation Act, 29 U.S.C. § 794 (2006). (Compl. ¶¶ 141-68.) Although the Court dismissed Plaintiffs' sole federal claim under the Rehabilitation Act on May 5, 2006, the Court retained supplemental jurisdiction over Plaintiffs' state law claims. *See Farrell v. A.I. DuPont Hosp.*, Civ. A. No. 04-3877, 2006 WL 1284947, at *8 n.6 (E.D. Pa. May 5, 2006).

[4] Plaintiffs assert that there is no difference between Pennsylvania law and Delaware law as to corporate negligence, and therefore the laws of each state may be referred to interchangeably. (Pls.' Supplement to Joint Pretrial Stip. at 3); *see also Everwine v. Nemours Foundation*, Civ. A. No. 05-3004, 2005 WL 3150275, at *1 (E.D. Pa. Nov. 22, 2005) (Where there is no conflict between potentially interested jurisdictions, the court may refer interchangeably to the laws of each state.). Plaintiffs' assertion is not accurate. Delaware has not adopted as comprehensive and well-delineated a policy of institutional liability as has

B. Negligent Credentialing

Plaintiffs assert a claim of negligent credentialing against Defendant Nemours Foundation.[5] As discussed below, this claim is precluded both by Delaware's peer review privilege and lack of sufficient evidence of causation.

The Delaware Supreme Court has stated that "a hospital, as an employer of health care personnel, is required to make available . . . employees who possess the skill and training necessary to comply with the [requisite standard of care]." *Register*, 377 A.2d at 10. Although *Register* involved negligent supervision, the Delaware Supreme Court stated more broadly: "A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless . . . in the employment of improper persons or instrumentalities in work involving risk of harm to others . . . ." *Id.* (*quoting* RESTATEMENT (SECOND) OF AGENCY § 213 (1953)). "[T]he hospital [must] make available employees that possess

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Pennsylvania. *Compare Thompson v. Nason*, 591 A.2d 703 (Pa. 1991) (corporate negligence) *with Register v. Wilmington Med. Ctr., Inc.*, 377 A.2d 8 (Del. 1977) (negligent supervision) *and Riggs Nat'l Bank v. Boyd*, Civ. A. No. 96-5122, 2000 WL 303308 (Del. Super. Ct. Feb. 23, 2000) (negligent credentialing). Moreover, Plaintiffs have not cited one Pennsylvania case in their response to Defendant's summary judgment motion, and therefore their choice of law argument is moot.

[5] Defendant also moved for summary judgment on Plaintiffs' claims for negligent supervision and corporate negligence. Plaintiffs concede that they are not asserting a claim for negligent supervision. (Resp. to Def.'s Mot. for Summ. J. [hereinafter Pls.' Resp.] at 3.) Defendant's objection to corporate negligence stems from the fact that the claim only exists under Pennsylvania law. (Def.'s Mot. for Summ. J. at 6-8); *see also Thompson*, 591 A.2d at 708. Corporate negligence is a doctrine of institutional liability under which a hospital can be found liable independent of its doctors and staff. *See Thompson*, 591 A.2d at 707. To the extent that Plaintiffs' claims against the Nemours Foundation arise under Pennsylvania law, Defendant's motion for summary judgment is granted in accordance with the choice of law analysis above. However, to the extent that "corporate negligence" is simply a moniker for independent hospital liability, Plaintiffs' claim for negligent credentialing under Delaware law is discussed below.

a reasonable average ability to carry out their professional work and . . . exercise reasonable care, skill and judgment in performing their duty in an effort to accomplish the purposes for which they are employed." *Id.* (internal citations omitted).

Beyond this language in *Register*, very little caselaw exists in Delaware addressing negligent credentialing. The two most exhaustive discussions by Delaware courts both resulted in dismissals at the summary judgment stage. *See Davis v. St. Francis Hosp.*, Civ. A. No. 00-06-045, 2002 WL 31357894, at *4 (Del. Super. Ct. Oct. 17, 2002) (granting defendant's motion for summary judgment on negligent credentialing claim for failure to produce expert testimony on causation); *Riggs Nat'l Bank*, 2000 WL 303308, at *8 (granting defendant's motion for summary judgment on negligent credentialing claim because of statutory peer review privilege).

1. Delaware's peer review privilege precludes Plaintiffs' negligent credentialing claim

Defendant contends that no negligent credentialing claim exists in Delaware in light of Delaware's peer review statute. Plaintiffs counter that the statute only creates a judicial privilege and is not a complete bar to recovery. State privileges apply in federal court where state law supplies the rule of decision. *Pearson v. Miller*, 211 F.3d 57, 66 (3d Cir. 2000).

Delaware's Medical Practice Act confers immunity on medical peer review boards and creates a privilege for the materials reviewed by such boards. DEL. CODE ANN. tit. 24 § 1768 (2006). Section 1768(a) confers immunity from suit to members of "organizations whose function is the review of medical records, medical care, and physicians' work, with a view to the quality of care and utilization of hospital or nursing home facilities . . . so long as the person acted in good faith and without gross or wanton negligence . . . ." *Id.* Section 1768(b) states that "[t]he records and proceedings [of such organizations] are not public records and are not available for court subpoena, nor are they subject

to discovery." *Id.*

The purpose of Delaware's peer review statute is to create "an environment for the establishment and enforcement of professional standards" by insulating the decisions of peer review groups from judicial scrutiny. *Dworkin v. St. Francis Hosp.*, 517 A.2d 302, 304 (Del. Super. Ct. 1986); *see also Hagadorn v. Davidson*, Civ. A. No. 88C-MY-0116, 1990 WL 18274, at *2 (Del. Super. Ct. Feb. 12, 1990). The privilege created by Section 1768(b) has been robustly interpreted by Delaware courts. *See, e.g., Shaw v. Metzger*, Civ. A. No. 77-0101, 1982 WL 172853, at *1 (Del. Super. Ct. Nov. 22. 1982) ("The statutorily conferred confidentiality is plenary and extends to all documentation which implements that process."); *Danklef v. Wilmington Med. Ctr.*, 429 A.2d 509, 513 (Del. Sup. Ct. Mar. 26, 1981) ("[T]his statute establishes a policy . . . that the confidentiality of medical committee proceedings be preserved without exception."). Moreover, courts have cautioned against second guessing the decisions of individuals charged with setting the standards of professional care in medical centers. *See, e.g., Dworkin*, 517 A.2d at 305-306 (*citing Gerrero v. Burlington County Mem'l Hosp.*, 360 A.2d 334, 360 (N.J. 1976)).

The privilege established in Section 1768(b) privilege applies to "records prepared for the exclusive use of the committee, transcripts of committee meetings, and testimony actually received by the committee." *Id.* at 307; *see also Connolly v. Labowitz*, Civ. A. No. 83-0001, 1984 WL 14132, at *1 (Del. Sup. Ct. Dec. 17, 1984) ("[T]he privilege attaches [to:] (1) records, (2) proceedings and (3) testimony before the [credentials] committee."). Credentialing committees are considered "peer review organizations" within the auspices of Section 1768(a), and, therefore, the records of such are privileged under Section 1768(b). *Riggs*, 2000 WL 303308, at *6 ("[T]here does not seem to be any doubt that the 'records and proceedings' of hospital credentialing committees are 'not available for

court subpoena or subject to discovery.'" (*citing* DEL. CODE ANN. tit. 24 § 1768 and *Shaw*, 1982 WL 172853, at *1)).

Despite the unwavering protection Delaware courts have provided for committee materials, the peer review privilege is not unlimited. *Id.* The privilege does not completely "insulat[e] the decisions of such committees from outside scrutiny." *Dworkin*, 517 A.2d at 307. Moreover, information used by such committees that is obtained from independent sources is discoverable. *Riggs*, 2000 WL 303308, at *6.

Nevertheless, in *Riggs*, the Delaware Superior Court ruminated that the peer review statute de facto eliminated of the claim of negligent credentialing.

> [I]n some cases, what ends up being insulated [by the statute] is not just the evidence, but the testing of the credentialing decision itself. Maybe such normal implications could also constitute a subsidiary State policy. To state it colloquially: "we don't want courts mucking around and second guessing and interfering with professional credentialing." *Barring gross fault amounting to bad faith or malice, negligent credentialing may be prevented from being an independent basis for traditional malpractice suits.* "We're going to limit liability to negligent performance on the particular patient."

Riggs, 2000 WL 303308 *7 (emphasis added); *see also Robinson v. LeRoy*, Civ. A. No. 84-121, 1984 WL 14129, at *1 (D. Del. Nov. 16, 1984) ("It may well be . . . that the practical effect of [Section 1768] is to make suits against hospitals for negligently admitting incompetent physicians or maintaining them on their staffs virtually impossible.").

This court agrees that Delaware's peer review statute has made it nearly impossible to assert negligent credentialing claims. Here, Plaintiffs do not claim malice or bad faith by Defendant, and therefore the records of the Nemours Foundation's credentialing body are fully protected by Section 1768. Accordingly, Defendant's motion for summary judgment on Plaintiffs' negligent credentialing

claim is granted.

2. Plaintiffs fail to provide sufficient evidence of causation to support negligent credentialing claim

In the alternative, assuming that a claim for negligent credentialing could co-exist with the peer review statute, summary judgment for Defendant is also appropriate because Plaintiffs fail to provide sufficient expert testimony on causation. Defendant argues that Plaintiffs have not shown that "but for" the Nemours Foundation's negligent credentialing, Ian would not have died. Plaintiffs argue that their expert in hospital administration, Dr. Hyde, has presented sufficient evidence in his report to carry their burden on summary judgment. (Pls.' Resp. at 2-4.) In support of this assertion, Plaintiffs highlight the following conclusions reached by Dr. Hyde: (1) the credentialing body failed to adequately investigate an internal complaint about Dr. Norwood's procedures; (2) the body failed to secure accurate mortality data and instead relied on Dr. Norwood's self-reported statistics; (3) the committee negligently relied on a report issued by Dr. Jacobs about Dr. Norwood's competence even though the two men were old friends and both had testified as to the other's surgical competence in court. (*Id.* at 4.)

In medical malpractice actions, expert medical testimony is required as to "the causation of the alleged personal injury or death." DEL. CODE ANN. tit. 18 § 6853(e) (2006); *Davis*, 2002 WL 31357894, at *3 ("The law is clear that in a medical malpractice action an expert medical opinion must be provided . . . for causation."). Under Delaware's "but for" causation doctrine, "the defendant's conduct is a cause of the event if the event would not have occurred but for that conduct; the defendant's conduct is not a but for cause of the event if the event would have occurred without it." *Culver v. Bennett*, 588 A.2d 1094, 1098 (Del. 1991). Moreover, to establish proximate cause

for a negligent credentialing claim such as this, expert testimony must show that the physician was medically *unqualified* to perform the procedure in question and therefore should not have been credentialed. *Davis*, 2002 WL 31357894, at *2-*3.

Nowhere in his report does Dr. Hyde state thatDr. Norwood was unqualified to perform surgery on Ian. Dr. Hyde makes only two arguably relevant statements as to causation. First, "[p]roper medical staff credentialing would have disallowed Dr. Norwood's credentials to be accepted as presented." (Pls.' Resp. Ex. B [hereinafter Hyde Expert Report] at 3.) This is inadequate to support "but for" causation.[6] Dr. Hyde does not state that had the credentialing committee availed itself of accurate mortality data, it would not have credentialed Dr. Norwood because he was unqualified. *See Davis*, 2002 WL 31357894, at *2-*3. As presented, this leaves open the possibility that Dr. Norwood would have been credentialed even if the committee had employed adequate procedures. *See Id.* Therefore, this statement fails to establish that Defendant's credentialing of Dr. Norwood was a 'but for" cause of Ian's death.

At the very end of his report, Dr. Hyde adds a second statement on causation. He concludes: "Had Nemours done a proper job of oversight, Dr. Norwood would not have had his credentials renewed and Ian would not have had surgery performed by Dr. Norwood, and would likely have had surgery performed elsewhere." (Hyde Expert Report at 5.) While this statement appears to state proximate cause, it is a conclusory statement without factual support. Dr. Hyde's discussion of "hospital oversight," does not once mention Dr. Norwood. The hospital's general oversight is

[6] For the purpose of evaluating Dr. Hyde's testimony, as part of this motion only, the Court assumes arguendo that other medical experts can adequately testify that but for *Dr. Norwood's* medical negligence, Ian would not have died. Plaintiffs rely on Dr. Hyde's testimony to link the *Nemours Foundation* to Ian's death.

irrelevant unless it can be linked to the credentialing decision and Ian's death. Moreover, Dr. Hyde's statement fails to articulate that Dr. Norwood was unqualified to have his credentials renewed.

Plaintiffs fail to state that but for the hospital's insufficient oversight, Dr. Norwood would not have been credentialed and would not have negligently performed Ian's surgery. *See Davis*, 2002 WL 31357894, at *2-*3 (granting defendant's motion for summary judgment on credentialing issue where plaintiff failed to establish causation); *see also Riggs*, 2000 WL 303308, at *5 (The broad theory of causation required by a credentialing claim – that a physician should not have been allowed into the operating room – runs a risk of prejudice on an issue of local and administrative discretion.). Accordingly, the Court grants summary judgment to Defendant Nemours Foundation on the negligent credentialing claim based on Plaintiffs' failure to establish causation.[7]

IV. CONCLUSION

For the foregoing reasons, the Court dismisses Plaintiffs' claim of negligent credentialing against Defendant Nemours Foundation. Plaintiffs' expert, Dr. Hyde, is precluded from testifying with respect to these matters. An appropriate Order follows.

[7] Defendants filed a second motion for summary judgment on the corporate liability/negligent credentialing issues after Dr. Hyde was deposed. The gravamen of Defendant's second motion is that Dr. Hyde's opinion lacks adequate foundation and therefore is insufficient to support a claim of negligent credentialing. In light of the above analysis, the Court denies this second motion as moot.

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ORDER

AND NOW, this **3rd** day of **November**, **2006**, upon consideration of Defendant Nemours Foundation's motion for summary judgment on Plaintiffs' negligent credentialing and/or corporate liability claims, Plaintiffs' response thereto, and for the foregoing reasons, it is hereby **ORDERED** that:

1. Defendant's Motion for Summary Judgment on Corporate Negligence Claims (Document No. 45) is **GRANTED**.[1]

2. Defendant's Motion for Summary Judgment on Plaintiffs' Corporate Liability Claim (Document No. 68) is **DENIED as moot.**

BY THE COURT:

Berle M. Schiller, J.

[1] As part of this motion, Defendant sought to preclude the expert testimony of Dr. Hyde on informed consent. The court also grants this portion of Defendant's motion. Additionally, in light of the Court's ruling on credentialing, Defendant's motion to trifurcate the trial is moot.