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

EDWARD PAPACODA, et al.	:	**CIVIL ACTION**
	:	
v.	:	**NO. 05-CV-3003**
	:	
THE A.I. DUPONT HOSPITAL FOR CHILDREN OF THE NEMOURS FOUNDATION, et al.	:	

MEMORANDUM AND ORDER

Kauffman, J. **October 24, 2006**

Plaintiffs Edward and Sarah Papacoda ("Plaintiffs") bring claims both as Administrators of the Estate of their deceased daughter, Kaitlyn Papacoda ("Kaitlyn"), and in their own right, alleging fraud, conspiracy and fraudulent concealment against The A.I. DuPont Hospital for Children of the Nemours Foundation ("DuPont Hospital"), The Nemours Foundation, William I. Norwood, M.D. ("Dr. Norwood"), Christian Pizarro, M.D. ("Dr. Pizarro"), John Murphy, M.D. ("Dr. Murphy"), Ellen Spurrier, M.D. ("Dr. Spurrier"), Deborah Davis, M.D. ("Dr. Davis"), and Russell Raphaely, M.D. ("Dr. Raphaely") (Count I); wrongful death, negligent supervision, monitoring and retention of health care providers against DuPont Hospital and The Nemours Foundation (Count II and VIII); negligence and wrongful death against Drs. Norwood and Pizarro (Count III and IX); negligent infliction of emotional distress against Drs. Norwood, Pizarro, Murphy, Davis, Raphaely and Spurrier (Count IV); negligence and wrongful death against Daniel Duncan and Paul Kerins (Count V and X); lack of informed consent against Drs. Norwood, Pizarro, Murphy, Davis, Raphaely and Spurrier (Count VI); and violations of the Rehabilitation Act, 29 U.S.C. § 701, et seq. against DuPont Hospital, The Nemours Foundation,

and Drs. Norwood, Pizarro, Murphy, Davis, Raphaely and Spurrier (Count VII).

In a Memorandum and Order dated June 26, 2006, the Court granted Defendants' Motions to Dismiss Plaintiffs' claims of fraud and conspiracy and Plaintiffs' claims regarding informed consent as to Drs. Davis, Raphaely, and Spurrier. The Court denied the Motions to Dismiss with respect to Plaintiffs' claims regarding negligent infliction of emotional distress, violations of the Rehabilitation Act, informed consent as to Drs. Murphy and Pizarro, and punitive damages. Now before the Court are Defendants' Motions for Partial Summary Judgment as to Plaintiffs' Rehabilitation Act claims.[1] For the reasons that follow, Defendants' Motions will be granted and all Rehabilitation Act claims against all Defendants will be dismissed.

I. BACKGROUND

Plaintiffs are the parents of Kaitlyn Papacoda, an infant born with serious congenital heart defects who passed away on August 12, 2003 following two surgeries at the Nemours Cardiac Center of the DuPont Hospital (the "Cardiac Center"). See Plaintiffs' Complaint ("Compl.") ¶¶ 3, 17, 21, 27. Kaitlyn's first surgery was performed on February 26, 2003, shortly after she was born.[2] Id. ¶17. The second surgery, a hemi-fontan procedure, was performed on June 26, 2003. Id. ¶ 21. Dr. Norwood, Director of the Cardiac Center, was the primary surgeon for Kaitlyn's

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[1] Defendants DuPont Hospital and The Nemours Foundation filed a joint motion for partial summary judgment on the Rehabilitation Act claims (hereinafter, "DuPont Motion" or "DuPont Mot."). Drs. Norwood, Pizarro, Murphy, Raphaely, Spurrier, and Davis filed a separate motion adopting the reasoning of the DuPont Motion.

[2] Although the Complaint states that Kaitlyn was born on March 12, 2003, it alleges that her first surgery was performed on February 26, 2003. Compl. ¶¶ 14, 17. The Court will assume that the allegation regarding her birthdate is a typographical error.

two surgeries and was to have been the primary surgeon for the third surgery needed to correct Kaitlyn's heart condition. Id. ¶¶ 6, 23. Kaitlyn passed away prior to undergoing the third surgery.

Plaintiffs filed suit on June 23, 2005, raising numerous state law claims, including fraud, conspiracy, wrongful death, and negligence. Plaintiffs also included a count alleging violations of the Rehabilitation Act by all named defendants except Paul Kerins and Daniel Duncan.[3] Plaintiffs allege that Defendants violated the Rehabilitation Act because they "did not take appropriate actions to protect and provide for the safety of the Cardiac Center patients as they did for children in other areas of the Hospital" and "the manner in which the cardiac center was set-up and operated (without oversight and accountability) directly resulted in the discrimination." Pl.'s Resp. at 3.

These allegations are identical to allegations made in 14 other related cases brought against Defendants in this District. See Pl.'s Resp. at 3, n.4. In at least seven of the related cases, motions for partial summary judgment identical to the instant motions have been granted.[4]

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[3] In Plaintiffs' Response to Defendants' Motions for Partial Summary Judgment ("Pl.s Resp."), Plaintiffs stipulate to dismissal of the Rehabilitation Act claims against all individual defendants except Dr. Norwood. See Pl.'s Resp. at 2.

[4] See Farell, et al. v. The A.I. DuPont Hospital for Children of the Nemours Foundation, et al., 2006 WL 1284947, at *1 (E.D. Pa. May 5, 2006) (granting motions for partial summary judgment in four cases: Farell, et al. v. The A.I. DuPont Hospital for Children of the Nemours Foundation, et al., Civ. No. 04-3877; Svindland, et al. v. The A.I. DuPont Hospital for Children of the Nemours Foundation, et al., Civ. No. 05-417; Daddio, et al. v. The A.I. DuPont Hospital for Children of the Nemours Foundation, et al., Civ. No. 05-441; and Reger, et al. v. The A.I. DuPont Hospital for Children of the Nemours Foundation, et al., Civ. No. 05-661); Rhoads, et al. v. The A.I. DuPont Hospital for Children of the Nemours Foundation, et al., 2006 WL 1409633, at *1 (E.D. Pa. May 22, 2006); Newkirk, et al. v. The A.I. DuPont Hospital for Children of the Nemours Foundation, et al., 2006 WL 1582318, at *2 (E.D. Pa. June 5, 2006); Kerr, et al. v. The A.I. DuPont Hospital for Children of the Nemours Foundation, et al., Civ. No.

Because Plaintiffs have not presented factual or legal allegations in this case that differ from those presented in the related cases and because the Court finds the reasoning of the courts in the related cases to be persuasive, the Court will grant Defendants' Motions.

II. LEGAL STANDARD

In deciding a motion for summary judgment pursuant to Fed. R. Civ. P. 56, the test is "whether there is a genuine issue of material fact and, if not, whether the moving party is entitled to judgment as a matter of law." Med. Protective Co. v. Watkins, 198 F.3d 100, 103 (3d Cir. 1999) (quoting Armbruster v. Unisys Corp., 32 F.3d 768, 777 (3d Cir. 1994)). "[S]ummary judgment will not lie if the dispute about a material fact is 'genuine,' that is, 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 (1986). The Court must examine the evidence in the light most favorable to the non-moving party and resolve all reasonable inferences in that party's favor. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986). However, "there can be 'no genuine issue as to any material fact' . . . [where the non-moving party's] complete failure of proof concerning an essential element of [its] case necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).

The party moving for summary judgment bears the initial burden of showing the basis for its motion. See Shields v. Zuccarini, 254 F.3d 476, 481 (3d Cir. 2001). If the movant meets that burden, the onus then "shifts to the non-moving party to set forth specific facts showing the existence of [a genuine issue of material fact] for trial." Id.

05-662, Order dated June 30, 2006.

III. DISCUSSION

Section 504 of the Rehabilitation Act of 1973 states that "[n]o otherwise qualified individual with a disability in the United States ... shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a) (2005). Therefore, to establish a claim under the Rehabilitation Act, a plaintiff must allege that: (1) she is a "handicapped individual" under the Act; (2) she is "otherwise qualified" for the program sought; (3) she was excluded from the program "solely by reason of [her] handicap;" and (4) the program at issue receives federal financial assistance. Wagner by Wagner v. Fair Acres Geriatric Center, 49 F.3d 1002, 1009 (3d Cir. 1995).

The parties do not dispute that Kaitlyn was a "handicapped individual" or that DuPont Hospital and the Nemours Foundation receive federal financial assistance. Therefore, the issues are whether Kaitlyn was "otherwise qualified" for a program she sought and whether Kaitlyn was excluded from this program "solely by reason of [her] handicap." Defendants argue that there is no genuine issue of material fact with respect to these issues because Plaintiffs have not provided any evidence that Kaitlyn was denied access to DuPont Hospital or excluded from a program for which she was "otherwise qualified." See DuPont Mot. at 4-6. Defendants also argue that the claim must fail because the Rehabilitation Act does not apply to medical treatment decisions. See id. at 7-10.

Plaintiffs contend that there are disputed issues of material fact because they have presented evidence that the Cardiac Center was subject to a "scheme of management and care" that did not exist elsewhere in the hospital. See Pl.'s Resp. at 3. Specifically, Plaintiffs allege

that the Cardiac Center's autonomy from the rest of the hospital resulted in improper oversight, control, and patient safety rules and regulations, and that these allegedly deficient standards resulted in discrimination against heart patients like Kaitlyn who were treated in the Cardiac Center. See id.

Plaintiffs' arguments, however, fail to raise a genuine issue of disputed material fact. Plaintiffs' allegations that the Cardiac Center was deficient or negligent in its treatment of Kaitlyn are irrelevant to a discrimination claim. As Judge Schiller pointed out in one of the related cases:

> Plaintiffs' children were not discriminated against based on their heart conditions; rather they were admitted to the Cardiac Center because of their need for specialized care. Plaintiffs have not put forward any alternative place of treatment and offer no possible explanation why treating children with serious heart issues at a cardiac center constitutes any type of denial, exclusion, or discrimination.

Farrell, 2006 WL 1284947, at *1 (E.D. Pa. May 5, 2006). Accordingly, since Plaintiffs have not established any discrimination against Kaitlyn, they have failed to allege a valid Rehabiliation Act claim.[5]

IV. CONCLUSION

For the foregoing reasons, the Court will grant Defendants' Motions for Partial Summary Judgment and dismiss the Rehabilitation Act claims as to all Defendants. An appropriate Order follows.

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[5] Because the Court finds that Plaintiffs have not offered any evidence that Kaitlyn was excluded from, denied access to, or discriminated under any program or activity, it need not address Defendants' other arguments regarding whether Kaitlyn was excluded from a program for which she was "otherwise qualified" and whether the Rehabilitation Act applies to medical treatment decisions.

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ORDER

AND NOW, this 24th day of October, 2006, upon consideration of Defendants' Motions for Partial Summary Judgment (docket nos. 21, 22), Plaintiffs' Response thereto (docket no. 24), Defendants A.I. duPont Hospital for Children and the Nemours Foundation's Reply (docket no. 26), Plaintiffs' Opposition (docket no. 30), and Defendants Drs. Norwood, Pizarro, Murphy, Spurrier, Davis, and Raphaely's Supplement to Motion (Docket no, 32), it is

ORDERED that:

1. Defendants' Motions for Partial Summary Judgment (docket nos. 21, 22) are **GRANTED**.

2. All Rehabilitation Act claims against all Defendants are **DISMISSED**.

BY THE COURT:

/s/ Bruce W. Kauffman
BRUCE W. KAUFFMAN, J.