IN THE COURT OF APPEALS

STATE OF GEORGIA

WILLIAM HAYNES, JR.,

APPELLANT APPEAL NO. A04A1502

v.

FRANK Q. SMITH, M.D., SOUTHERN OB-GYN ASSOCIATES, P.C., and HOSPITAL AUTHORITY OF VALDOSTA AND LOWNDES COUNTY d/b/a SOUTH GEORGIA MEDICAL CENTER,

APPELLEES

BRIEF OF APPELLANT

PART ONE. STATEMENT OF PLEADINGS, FACTS, CITATION OF RECORD AND TRANSCRIPT, AND STATEMENT OF PRESERVATION OF ENUMERATION OF ERRORS

Appellant William Haynes, Jr. ("William") is the son of William Haynes, Sr. ("William Sr.") and Annie Haynes ("Annie"). He was born at The Hospital Authority of Valdosta and Lowndes County's South Georgia Medical Center on June 28, 1983[1]. Appellee Frank Q. Smith, M.D, attended his birth. ("Smith"). (Smith Ans. ¶ 7, R-157.)[2] Prior to William's birth

[1] Hereinafter the Appellee Hospital Authority is referred to as "SGMC".

[2] Hereinafter the following abbreviations are used: Deposition of William Haynes, Jr. - "WH, Jr. Dep"; Deposition of William Sr. - "WH, Sr. Dep"'; Deposition of Annie Haynes - "AH Dep"; Deposition of Frank Q. Smith - "Smith Dep"; Deposition of other Deponents - "[Last Name] Dep"; First Affidavit of

Smith had not discussed with William's parents their desires in regard to circumcision if they should have a boy. (AH Dep 25, R-533; WH, Sr. Dep 44, R-504.) After William's birth Smith by and through Mary Linda Miley, R.N., a SGMC employee acting as his and the hospital's authorized agent, merely sought permission to perform a circumcision. (Smith Dep 13-4; R-620-1; Miley Dep pp. 21-25; R-882-6.) Miley obtained Annie's signature on the consent form. (p. 18 of P. Ex. 1 to Smith's Dep, R-739) (Miley Dep 21-25; R-882-6.) She did not discuss circumcision with Annie, nor did she explain it even in a general manner. (Miley Dep 21-25, R-882-6.) Smith never discussed it at all with Annie. (AH Dep 25, 36, 42; R-533, 544, 550.)

His parents never discussed circumcising William until the evening of his birth when two men in green coats, possibly Emergency Medical Technicians in training, told William Sr., who did not want to have William circumcised, that only a half circumcision would be performed. (WH Dep 14-17, 26-35, 43-44; R-474-7, 486-95 503-4; Smith Dep 7-10; R-614-7.)

At the time Annie signed the consent form the only thing she knew about it was that it involved "just removing skin, perhaps, some excess skin or something." Annie does not know

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William Haynes, Jr.- "WH, Jr. Aff"; First Affidavit of Christopher J. Cold, M.D. - "Cold Aff"; First Affidavit of Robert S. Van Howe, M.D. - "Van Howe Aff"; Second Affidavit of David M. Gibbons, M.D. - "Gibbons 2d Aff"; First Amended Complaint for Medical Malpractice, Battery and Failure to Protect From Harm - "1st A. Compel."; Answer and Defenses of Defendant Frank Q. Smith, M.D. and Southern OB-GYN Associates, P.C. to William's First Amended Complaint for Medical Malpractice - "Smith Ans." [unless otherwise indicated the paragraph numbers refer to the numbered paragraphs of said defendants' Twelfth Defense].

what an uncircumcised man looks like. Before she signed neither Smith, nor anyone else, had described to her what circumcision was in general terms. (AH Dep 36-7; R-544-5.)

Smith circumcised William on June 29, 1983. (Smith Dep 11, R-618; and note on page 5 of Exhibit 1 thereto, R-838.) In doing so Smith negligently severed a part of William's glans penis and removed all of his frenulum. (Gibbons 2d Aff ¶ 11, R-431.)

During William's infancy and childhood Annie never noticed anything that was wrong with William's penis. She never saw any scar tissue on it, nor did she observe any problem with adhesions. (AH Dep 24, 19-21; R-532, 528-30.) William Sr. only saw William's penis when he was an infant. He never noticed anything wrong with it. (WH, Sr. Dep 11-12; R-471-2.) The parents first became aware of a problem when William informed them of it last year. (AH Dep 27-9; R-534-6; WH, SR. Dep 19-23, R-479-83.)

William did not know what circumcision was until he went to college. (WH, Jr. Dep 24-27, 29-31; R-948-51, 953-5.) During an anatomy course William discovered what circumcision was and that his was abnormal. He learned that he suffers abnormal sensations as a result of his injuries. Prior to his research William thought he had a normal functioning penis. Even though he had had physicals, no doctor had ever told him he had a problem. (WH, Jr. Dep 28, 30, 35-38, 49, 65-7, 87-8, 92-96, 101-106; R-952, 954, 959-62, 973, 989-91, 1011-2, 1016-20, 1025-30.) (See photos at R-905-15 and R-815-821.)

William is missing his frenulum and a significant portion of his ventral glans. One or two ventral skin bridges are present that formed as the defect healed. He does not have a normal

circumcised penis. His injury is a permanent one except that the skin bridge(s) can be separated surgically. (Gibbons 2d Aff ¶ 8, R-430; Cold Aff ¶ 33, R-358.)

The "cautery method" of circumcision used by Smith is not a standard technique. (Cold Aff ¶ 34, R. 358.) It involves separating the foreskin from the glans, applying a "Kocher" clamp to the foreskin just beyond the glans, and cutting off the foreskin with a hot cautery instrument. The physician then removes the clamp, pushes the foreskin remnant back behind the glans, and inspects the entire penis to make sure it is not bleeding. He then applies BFI powder and Vaseline gauze that is left on for 24 to 48 hours. (Smith Dep 21-7, 38; R-628-634, 645; cf. P. Ex. 2A, R-779). If the doctor is negligent he can draw the frenulum and part of the ventral glans into the jaws of the clamp and cut them away. Failure to prevent this falls below the applicable standard of care. (Gibbons 2d Aff ¶¶ 9-10, R-430-1; Cold Aff ¶¶ 34-5, R-358-9).

When Smith pushed back the foreskin remnant from William's glans and observed the entire penis he had to see and appreciate the defect he had caused. (Gibbons 2d Aff ¶ 12, R-431; Cold Aff ¶ 37, R-360.) The only way he could not have observed and appreciated the injury was if he had his eyes closed. (Gibbons 2d Aff ¶ 13, R-432; Cold Aff ¶ 37, R-360.) There is no evidence of that. (Gibbons 2d Aff ¶ 13, R-432; Smith Dep passim, R-608-721.)

William's parents could not have been expected to discover the damage to William's penis as it was wrapped in gauze. Parents are rarely knowledgeable about the newborn's penis and are often reluctant to handle and inspect it. After circumcision the penis is often obscured by the pubic fat pad, which is quite large on infants, thus making casual inspection difficult. Further the penis heals rapidly and injury that would have been readily apparent to the circumciser at the

time of the circumcision becomes significantly less so within a matter of days or weeks. (Gibbons 2d Aff ¶ 12, R-431-2; Van Howe Aff ¶ 23, R-401-2.)

In the U. S. neonatal circumcision became established in the late 19th century as a way to reduce the incidence of masturbation, which was believed to cause disease. However, by 1983 it was generally recognized in the medical community that circumcision had no therapeutic medical purpose and that it did not prevent any disease. (Cold Aff ¶¶ 10-11, R-349-50.)

Routine neonatal circumcision permanently disfigures and mutilates the normal penis by removing a normal, integral part of it, the foreskin. (Cold Aff ¶ 12, R-350.) Despite its common name the foreskin is not merely skin, but is a multi-layered structure of epidermis, dermis, Dartos fascia, lamina propria, and mucosal epithelium. The inner mucosal layer contains a Ridged Band that appears when the foreskin is drawn back behind the ridge of the glans. In its normal position the foreskin lies flat against the glans. It is attached to the glans on the ventral side of the penis by the frenulum. (Cold Aff ¶ 14, R-351.) The foreskin provides a covering for the penis upon erection. During sexual intercourse the foreskin is withdrawn behind the glans and the Ridged Band is held behind the glans by the coronal ridge or sulcus, thus exposing the Ridged Band and causing it to rub against the vaginal wall, which gives sexual pleasure to the male. (Cold Aff ¶¶ 15, 21; R-351-2, 354.)

The Ridged Band of the foreskin is highly innervated with fine touch mechanoreceptors, while the glans itself is innervated primarily with free nerve endings, which are sensitive to cruder, poorly localized feelings. The only portion of the body with less fine-touch discrimination than the glans penis is the heel of the foot. (Cold Aff ¶ 22, R-354-5.) The

frenulum also contains fine touch mechanoreceptors and is one of the most densely nerve-laden areas of the penis. Loss of the frenulum results in loss of sensation to the male. (Cold Aff ¶ 23, R-355.) If any portion of the glans is removed sensation in that area is lost or reduced. Numbness is expected where glanular tissue has been lost. (Cold Aff ¶ 26, R-356.)

After circumcision the mucosal surface of the glans begins a process of keratinization that continues for years and covers the free nerve endings, thus reducing glans' sensitivity and adversely affecting sexual pleasure. The loss of sensation caused by circumcision was generally acknowledged until the 1960's, when some began to deny it. Such denial has no basis in fact. (Cold Aff ¶¶ 27-8, R-356.)

When the foreskin is removed the glans loses its protective covering and is more susceptible to injury by burns, abrasions, etc. (Cold Aff ¶ 29, R-357.) Circumcision increases the likelihood of contracting certain venereal diseases in the event of exposure during sex. It does not eliminate the occurrence of any venereal disease, any type cancer, or urinary tract infections. (Cold Aff ¶¶ 30-1, R-357.)

Proponents have claimed a variety of health benefits including prevention of masturbation, cancer, penile inflammation, sexually transmitted diseases, HIV infection, premature ejaculation, urinary tract infections and poor hygiene. None of these has been adequately proven and many of them have been totally disproved. (Van Howe Aff ¶ 10, R-398.)

Circumcision carries with it considerable risks including hemorrhage, sometimes to the point of death; minor infections; life-threatening infections such as sepsis, meningitis, gangrene, staphylococcal scalded skin syndrome, and scrotal abscess; acute urinary retention leading to

renal failure; penile ischemia; necrosis, buried penis; partial or complete penile amputation; iatrogenic hypospadias; total denudation of the penis; abdominal distention; pneumothorax; urethral fistula; meatal ulceration, ruptured bladder; gastric rupture; tachycardia and heart failure; pulmonary embolism; and death. (Van Howe Aff ¶ 11, R-398; and exhibits thereto, R-415-23; Cold Aff ¶ 32, R-357.) Narrowing of the meatus (meatal stenosis) occurs virtually only in circumcised men. (Cold Aff ¶ 32, R-357.)

In 1983 the American Academy of Pediatrics' position in regard to neonatal circumcision was that there were no valid medical indications for circumcision in the neonatal period. (Van Howe Aff ¶ 12, R-399.)

Neonatal circumcision does not correct a deformity; it does not repair an injury; it does not cure any disease in the normal newborn; it does not relieve suffering; it does not prolong life. (Van Howe Aff ¶¶ 24-28, R-402.)

William had a normal foreskin at birth. Smith did not circumcise William as a result of a medical problem or disease or to prolong his life. Smith circumcised him merely because his mother signed a consent form. (Smith Dep 78-9, 81, 90-91; R-685-6, 688, 697-8.)

This action commenced with the filing of a Complaint for Medical Malpractice, Battery, and Failure to Protect against Smith, his medical group, SGMC, and certain XYZ corporations on June 26, 2003. (R-9-32). SGMC filed an Answer (R-39-51) as did Smith (R-54-64). A First Amended Complaint was filed (R-116-141) to which Answers were filed. (R-154-164 & 186-200). Depositions were taken. (R-461-904, 925-1034.) Smith and his medical group filed a Motion for Summary Judgment on all claims. (R-78-113). Smith raised the bar of the statutes of

limitation and repose, and denied that consent was invalid or that parents could not consent to circumcision. William opposed the motion in its entirety as to Smith but not as to his present medical group, Southern OB-GYN Associates, P.C., since discovery had revealed that Smith was not associated with that entity in 1983. (R-207-344, 437-460.) An oral hearing was held on that motion (MT 11/19/03), which the trial court granted by Order entered December 1, 2003. (R-1035A.) William timely filed his Notice of Appeal from that Order. (R-1-8.) SGMC filed a Motion for Summary Judgment on all claims. (R-1036-52.) SGMC likewise raised the bar of the statutes of limitation and repose, argued that the consent was valid, denied that parents cannot consent to circumcision, denied that any of its agents participated in the batteries alleged, and denied failing to protect William. William opposed that motion in its entirety. (R-1164-1208.) However, the trial court granted the same by Order entered January 23, 2004. (R-1209.) William timely filed his Notice of Appeal from this last grant of summary judgment, (R-1-8), and then timely filed an Amended Notice of Appeal (R-8A-8D) appealing both summary judgment Orders. The Orders were general and did not specify the grounds upon which summary judgment was granted, although part of the Transcript (MT-42-45, 11/19/03) reveals certain of the opinions of the trial court.

PART TWO. <u>ENUMERATION OF ERRORS AND JURISDICTIONAL STATEMENT</u>

1. The trial court erred in granting summary judgment to Smith because his fraudulent concealment of his negligent conduct tolled the statute of limitations and estopped him from asserting the bar of the statute of repose.

2. The trial court erred in granting summary judgment to Smith and SCMC because Annie's consent was invalid in that neither of those defendants disclosed to her in general terms the treatment in connection with which the consent was given and she did not otherwise have an appreciation of the same and therefore a claim for battery may lie.

3. The trial court erred in granting summary judgment to Smith and SCMC because Annie's consent was invalid in that circumcision is not a surgical or medical treatment or procedure as defined by Georgia law, but rather is a damaging genital cutting to which parents may not consent, and therefore a claim for battery may lie.

4. The trial court erred in granting summary judgment to the SCMC because it failed in its duty to protect William from the circumcision.

This Court, rather than the Supreme Court, has jurisdiction of this case on appeal for the reason that it is a case in which jurisdiction is not reserved to the Supreme Court.

PART THREE. ARGUMENT AND CITATION OF AUTHORITY

Standard of Review: On appeal of grants of summary judgment, the appellate court must determine whether the trial court erred in concluding that no genuine issue of material fact remains and that the party was entitled to judgment as a matter of law. Moore v. Food Assoc., 210 Ga. App. 780 (1993). This is a de novo review. Price v. Currie, 260 Ga. App. 526, 526-7 (2003). This statement applies to all of the errors enumerated.

1. The trial court erred in granting summary judgment to Smith because his fraudulent concealment of his negligent conduct tolled the statute of limitations and estopped him from asserting the bar of the statute of repose.

There was overwhelming evidence not only that Smith did violate the standard of care and that his violations proximately caused severe damage to William, but also that Smith had to know and appreciate what he had done and that he did not reveal his negligence and the damage caused thereby to William's parents as his fiduciary duties required him to do. Smith's fraud deterred William from discovering his injuries for eighteen years.

First, two qualified physicians testified in their Affidavits that Smith violated the standard of care in one of three ways when he circumcised William, as a direct and proximate result of which he excised William's frenulum and a significant portion of his ventral glans. (Gibbons 2d Aff ¶ 11, R-431; Cold Aff ¶. 36, R-359.)

Second both physicians have sworn that in their opinions when Smith pushed back the foreskin remnant from the glans and observed the entire penis, he saw and appreciated the defect that had been caused by his negligence, (Gibbons 2d Aff ¶ 12, R-431-2; Cold Aff ¶ 37, R-360), because the only way a physician could not have observed and appreciated the defect if he did what Smith swore he did in his deposition is if he had his eyes closed. (Gibbons 2d Aff ¶ 13, R-432; Cold Aff ¶ 37, R-360.) There is no evidence of such. (Gibbons 2d Aff ¶ 13, R-432; Smith Dep passim, R-608-721.) In short, Smith had to see, know, and appreciate the damage he had caused to William's penis immediately after it occurred. (Gibbons 2d Aff ¶ 12, R-431-2.)

Smith remained silent and did not inform William's parents of the facts. Both parents testified that they first became aware of any problem when William informed them last year of his independent discovery. (AH Dep pp. 27-9, R-535-7; WH, Sr. Dep pp. 19-23, R-479-83.) There was no reason for the parents to suspect that there was anything wrong with William. (See

p. 5 above.) Therefore, there was no reason for them to discuss his penis with any other physician.

The statute of limitation for medical malpractice is generally two years. O.C.G.A. § 9-3-71 (a). Usually statutes of limitation do not run against minors until they become of age. O.C.G.A. § 9-3-90 (a). But in medical malpractice cases where the damage occurs before the fifth birthday the statute of limitations runs on the seventh birthday, O.C.G.A. § 9-3-73 (b), and such claims are subject to a ten-year statute of repose. O.C.G.A. § 9-3-73 (c) (2) (A).

However, "a defendant's fraud which had debarred or deterred a plaintiff from bringing an action tolls the running of the statute of limitation until the fraud is discovered or reasonably should have been discovered. . . . . Where a relationship of trust and confidence such as a physician-patient relationship exists, there is a duty to disclose the cause of any injury and failure to do so acts as fraud, tolling the statute of limitation. [Citations omitted, emphasis supplied]." Esener v. Kinsey, 240 Ga. App. 21, 22 (1999). See also O.C.G.A. § 9-3-96, Shved v. Daly, 174 Ga. App. 209, 210 (1985). While the statute of repose is not tolled by fraud, "fraud, instead, gives rise to the doctrine of equitable estoppel, which prevents the defendant from asserting the defense of the statute of repose . . . " Esener at 23. Whether or not such fraud exists is generally a jury issue. Cf. Id. and Zechmann v. Thigpen, 210 Ga. App. 726, 730-731 (1993).

Here there was enough evidence of Smith's knowledge of his negligence and the damage caused by it to give rise to the duty to inform William's parents. There is evidence that Smith intentionally remained silent and that this silence debarred and deterred William's parents, and eventually William himself, from discovering the fraud. William acted promptly and diligently

upon discovering the fraud and brought this suit within two years of his eighteenth birthday and less than two years from the time he discovered the fraud. Therefore the suit was timely filed.

The trial court apparently agreed that there was sufficient evidence of fraud. (See MT-43, 11/19/03.) However, it orally ruled that the fact that William saw other physicians at various times precluded Smith's fraud from being the legal deterrent to discovery of the damage even if the other physicians had not treated William for the injuries of which he now complains. (See MT-43-44, 11/19/03.) This was error.

The fact that William's parents may have taken him to other physicians for other complaints and for regular physical examinations does not vitiate the fraud of Smith or its legal and equitable effects. William's parents never took William to be treated for the condition or symptoms of which he now complains. There is no evidence in the record that any physician ever examined or treated William for partial glanular loss or loss of his frenulum. Thus the case relied upon by Smith, Witherspoon v. Aranas, 254 Ga. App. 609 (2002), and similar cases (see e.g. Shved v. Daly, 174 Ga. App. 209 (1985), Cannon v. Smith, 187 Ga. App. 434 (1988), Padgett v. Klaus, 201 Ga. App. 399 (1991), Bryant v. Crider, 209 Ga. App. 623 (1993), Knight v. Sturm, 212 Ga. App. 391 (1994), Price v. Currie, 260 Ga. App. 526 (2003)) have no applicability here. In all those cases, the plaintiffs actually sought treatment from other doctors for the same complaints that underlay their claims. Here neither William nor his parents for him ever sought treatment or advice from any physician for loss of glanular material or the frenulum. Therefore, this case is controlled by cases such as Bynum v. Gregory, 215 Ga. App. 431 (1994) in which the fraud of the obstetrician in concealing the true cause of brain damage at birth was not vitiated by

the fact that child was thereafter seen by pediatricians and Beck v. Dennis, 215 Ga. App. 728 (1994) (*overruled in part on other grounds by* Abend v. Klaudt, 243 Ga. App. 271 (2000)), in which the patient's seeing other doctors for other problems did not vitiate the fraud of the treating doctor. Likewise in this case there are sufficient material facts from which a jury may find that Smith's concealment debarred and deterred William and his parents from bringing an action earlier.

For the foregoing reasons, the trial court erred in granting summary judgment to Smith based upon either the statute of limitation or the statute of repose.

2. The trial court erred in granting summary judgment to Smith and SCMC because Annie's consent was invalid in that neither of those defendants disclosed to her in general terms the treatment in connection with which the consent was given and she did not otherwise have an appreciation of the same and therefore a claim for battery may lie.

William claimed in his First Amended Complaint that Smith and SGMC were both liable to him for battery because his mother's consent to circumcision was invalid. (R-116-141.) Defendants contended and the trial court agreed (MT-44-5, 11/19/03) that because William's mother signed a consent form the consent was valid and an action for battery might not lie. This was error. The consent was not valid because William's mother did not have an appreciation for what circumcision was and neither Smith nor the nurse obtaining the consent on his behalf ever explained what circumcision was in general terms.

In 1983 Georgia law provided that a "physician must disclose in general terms the treatment or course of treatment in connection with which the consent is given." Young v. Yarn,

136 Ga. App. 737, 738 (1975), *overruled by* Ketchup v. Howard, 247 Ga. App. 54 (2000). Those were "the requisite disclosures necessary to render a consent valid." Id.[3] "Treatment" is "'a broad term covering all steps taken to effect a cure of an injury or disease; the word including examination and diagnosis as well as application of remedies.' Black's Law Dictionary, 4th Ed., p. 1673." Young, supra at 738. When a treatment is performed without basic consent, a cause of action for battery will lie. Kaplan v. Blank, 204 Ga. App. 378 (1992) citing Joiner v. Lee, 197 Ga. App. 754, 756 (1) (1990).

Here there was no disclosure of the proposed "treatment" except for the word "circumcision." (Page 18 of Pl. Ex. 1 to Smith Dep, R-739) This was hardly an explanation in general terms of the treatment for which consent was sought.

There is no evidence that any other explanation was offered, either by Smith or Miley. Smith never discussed circumcision at all with Annie. (AH Dep 25, 36, 42; R-533, 544, 550.) Miley did not explain what circumcision was or what it entailed even in a general manner. (Miley Dep 21-25; R-882-6.) When Annie signed the form the only thing she knew about circumcision was that it involved "just removing skin, perhaps, some excess skin or something." and that it was something that was done to baby boys. (AH Dep 36, 39; R-544, 547.) No one had described to her what circumcision was in general terms. (AH Dep 36-7, R-544-5.) Annie

[3] This holding dealt only with the principle of "basic" consent, i.e. that consent that avoids a claim for battery, not "informed consent," another principle altogether. Ketchup, supra at 55-8. Note that Young's overruling by Ketchup in no way destroyed the continuing necessity for a doctor to obtain "basic" consent.

does not know what an uncircumcised man looks like. (AH Dep 37, R-545.) These facts would allow a jury to conclude that Annie never gave basic consent because circumcision had never been described to her in general terms and she did not otherwise appreciate what it entailed. Therefore, the circumcision performed in reliance upon the consent form was in law a battery.

SGMC argued that because neither Miley nor any other employee touched William during the circumcision SGMC could not be liable. This is not true for two reasons. First, Smith testified that he always had a nurse assist him by holding the baby during the circumcision. (Smith Dep 19, 64; R-626, 671.) Therefore, since a nurse, an employee of the hospital, had to have assisted the nurse was a joint tortfeasor with Smith, and SGMC is liable for the tort in which its employee participated. Second, Miley, a SGMC employee, obtained the consent form for the circumcision. Therefore Miley procured the circumcision and was a joint tortfeasor with Smith.

"Every person shall be liable for torts committed by . . . his servant . . . in the prosecution and within the scope of his business,. . . ." O.C.G.A. § 51-1-2. SGMC is liable for the torts committed by its employees, including nurses, within the course and scope of their employment. "In all cases, a person who maliciously procures an injury to be done to another, whether an actionable wrong or a breach of contract, is a joint wrongdoer and may be subject to an action either alone or jointly with the person who actually committed the injury." O.C.G.A. § 51-12-30. "The term 'maliciously' means any unauthorized interference or any interference without legal justification or excuse, and ill will or animosity is not essential." Luke v. DuPree, 158 Ga. 590 (1) (1924). "The word 'procure,' as here used, does not require the lending of assistance in the

actual perpetration of the wrong 'done by another;' but if one, acting only through advice, counsel, persuasion, or command, succeeds in procuring any person to commit an actionable wrong, the procurer becomes liable for the injury, either singly or jointly with the actual perpetrator." Lambert v. Cook, 25 Ga. App. 712 (1920). See also Goddard v. Selman, 56 Ga. App. 116 (1937). "One who procures or assists in the commission of a trespass, or does an act which ordinarily and naturally induces its commission, is liable therefor as the actual perpetrator." Burns v. Horkan, 126 Ga. 161 (3) (1906). An action may be had against the person committing the tort as well as against anyone who directs or assists in its commission. Melton v. Helms, 83 Ga. App. 71, 73 (1950).

Here there is evidence that a SGMC nurse held William down during the circumcision, as Smith testified that that was how he performed all of his circumcisions. Indeed, Miley confirmed this by admitting that she had assisted in Smith's cautery circumcisions by holding the baby down. (Miley Dep 28, R-889.) Since restraining the baby is obviously a necessary part of the circumcision, a SGMC employee had to participate in it. To the extent the circumcision was done without valid consent (see supra and post) it was a battery and SGMC is liable for its employees' participation in it.

Further, Miley's obtaining of the consent form procured the commission of the circumcision. It was an act that ordinarily and naturally produced the performance of the circumcision. See Ketchum v. Price, 31 Ga. App. 49, 51 (1923), Burch v. King, 14 Ga. App. 153 (1913). Therefore, to the extent the circumcision was done without valid consent (see supra and post) it was a battery and SGMC is liable for its employee's having procured it.

SGMC also argued that the statutes of limitation and repose applicable to medical malpractice cases applied to the battery claim here. It cited Blackwell v. Goodwin, 236 Ga. App. 861 (1999) in support of its position, but this misapprehended the thrust of that case, which dealt with informed consent under . O.C.G.A. § 31-9-6.1 and not basic consent as here. However, it's holding is irrelevant here where no "basic" consent was given and where no parent legally could give valid consent, as argued below. In these particular circumstances the normal statute of limitation for personal injury, two years, appropriately tolled by the minority of the victim clearly applies. See O.C.G.A. §§ 9-3-33 and 9-3-90. Indeed, as argued below, circumcision does not even meet the definition of health or surgical service, diagnosis, prescription, treatment or care set forth in O.C.G.A. § 9-3-70. Therefore, even if Annie had given valid basic consent with knowledge of what circumcision entailed generally, the usual statute of limitation for battery would apply and the medical malpractice statute of repose would not.

For all of the foregoing reasons there were sufficient material facts in the record to sustain William's battery claims because basic consent was not obtained and the trial court erred in granting Smith and SGMC summary judgment on those claims.

3. The trial court erred in granting summary judgment to Smith and SCMC because Annie's consent was invalid in that circumcision is not a surgical or medical treatment or procedure as defined by Georgia law, but rather is a damaging genital cutting to which parents may not consent and therefore a claim for battery may lie.

Circumcision, although perhaps commonly supposed to be a surgical procedure, does not meet the legal definition of a surgical or medical treatment or procedure. As parents can only

consent to such, Annie's consent was invalid, even if she knew what circumcision was. Therefore, the jury might find that Smith's circumcising William was a battery for which Smith and SGMC are liable.

Foreskins occur normally in all newborn males. (Smith Dep 79, R-686.) Neonatal circumcision does not correct a deformity; it does not repair an injury, rather it always causes one; it does not cure any disease in the normal newborn; it does not relieve suffering, but rather always causes the baby to suffer some, if not a great deal of, pain; it does not prolong life. (Van Howe Aff ¶¶ 24-28, R-402.) Circumcision permanently disfigures and mutilates the normal penis by removing a normal, non-diseased structure, the foreskin. (Cold Aff ¶ 12, R-350.)

It is axiomatic that parents cannot do whatever they please to the body of their child, newborn or otherwise. In regard to modifications of the normal, non-diseased body, only medical or surgical procedures or treatments are allowed[4]. Thus it takes no citation of authority to state that removal from a child of normal earlobes or of a normal little finger would be a battery, even if consented to by a parent. Likewise the application of tribal scars to the cheeks of an infant born into an ethnic group that generally practices such and the removal of the clitoral prepuce or foreskin from an baby girl born into a Somali, Egyptian, or Ethiopian family would still be batteries if performed by a physician here in Georgia even at the parents' request. Georgia law

[4] There may exist an exception for religious circumcisions protected by the First Amendment to the U.S. Constitution but that issue is clearly not before the Court here, as the only reason for this circumcision was a request by Smith that he be allowed to perform it.

limits parental authorization of physical modification of a child's body or portion thereof to that entailing surgical and medical procedures as defined by law. Thus O.C.G.A. § 31-9-2 (a) (2) permits a parent for his or her minor child to consent "to any surgical or medical treatment or procedures not prohibited by law which may be suggested, recommended, prescribed, or directed by a duly licensed physician." Note, however, the limitation inherent in the Code section: only surgical or medical treatments are allowed.

In Georgia law "treatment" is defined as "'a broad term covering all steps taken to effect a cure of an injury or disease; the word including examination and diagnosis as well as application of remedies.' Black's Law Dictionary, 4th Ed., p. 1673." Young v. Yarn, 136 Ga. App. 737, 738 (1975), *overruled on other grounds by* Ketchup v. Howard, 247 Ga. App. 54 (2000). A "procedure" is "a series of steps by which a desired result is accomplished." Dorland's Illustrated Medical Dictionary, 25th Ed. (W. B. Saunders Co. 1965). "Surgery . . . is that branch of medical science concerned with the correction of deformities, repair of injuries, diagnosis and cure of disease, relief of suffering, and prolongation of life by manual and instrumental operations." Hartford Accident & Indemnity Co. v. Barfield, 89 Ga. App. 562, 564 (1954). "Medicine" is "the art and science of the diagnosis and treatment of disease and the maintenance of health" and "the treatment of disease by non-surgical means." Dorland's Illustrated Medical Dictionary, 25th Ed. (W. B. Saunders Co. 1965). Thus, it is apparent that parents under Georgia law can only consent to those treatments and procedures that are aimed at curing deformities or defects or at treating disease. Circumcision does none of those things.

Since circumcision is not a medical or surgical treatment or procedure, as defined by Georgia law, common parlance, and common sense, parents cannot consent to it. Any such attempted consent is invalid.[5] The performance of it by a physician for other than religious reasons is clearly a battery. Smith circumcised William merely because his mother signed a permit form. (Id.) This is a legally insufficient reason to remove a normal, non-diseased structure from the body of an un-consenting minor. Thus, there was more than sufficient

[5] This proposition is not as novel as may first appear. Recently numerous medical and legal commentators have suggested that the circumcision of normal neonates, at least when not performed for religious reasons, is a battery. Some have gone so far as to suggest that it is criminal assault. Seminal articles in this regard are: Chessler, A. J., "Justifying the Unjustifiable: rite v. Wrong," 45 Buffalo Law Review 555 (1997); Povenmire, R., "Do parents have the legal authority to consent to the surgical amputation of normal, healthy tissue from their infant children?: The practice of circumcision in the United States," 7 The American University Journal of Gender, Social Policy & the Law, 1:87 (1998-99); Van Howe, R. S., Svoboda, J. S., Dwyer, J.G., Price, C.P., "Involuntary circumcision: the legal issues," 83 BJU International [formerly British Journal of Urology] Suppl 1: 63 (1999); Boyle, G. J., Svoboda, J. S., Price, C. P., Turner, J. N., "Circumcision of Healthy Boys: Criminal Assault?," 7 Journal of Law and Medicine 301 (Feb. 2000); Somerville, M. A., "Altering Baby Boys' Bodies, The Ethics of Infant Male Circumcision," Chapter 8 in The Ethical Canary: Science, Society and the Human Spirit (Viking 2000). Copies of these articles were attached to William's Brief in Opposition to Smith's Motion for Summary Judgment. (See R-207-344.)

evidence that Smith and SGMC jointly committed a battery upon William and the trial court erred in granting summary judgment on this issue for this additional reason.[6]

4. The trial court erred in granting summary judgment to the SCMC because it failed in its duty to protect William from the circumcision.

William alleged and SGMC recognized that it has a duty to protect its patients from known or reasonably apprehended danger. Emory University v. Shadburn, 47 Ga. App. 643 (1933). While it argued to the contrary, and the trial court apparently agreed, there was sufficient evidence that SGMC failed in this duty to preclude summary judgment.

First, SGMC allowed William to be circumcised without assuring that basic consent had been obtained by anyone. It was the custom of the hospital to have its employees obtain the parent's signature on the circumcision consent forms. (Miley Dep 21, R-882.) SGMC obviously benefited financially from circumcisions done in its facility. While it may not have been the nurse's duty to answer questions and assure basic consent was obtained, it was obviously SGMC's duty to do so or at the very least to assure that someone else did so, since it undertook to get the consent signed. Therefore, SGMC itself had a duty to make sure basic consent had been obtained so as to fulfill its duty to protect its infant male patients from the battery of unconsented to circumcision. This it clearly failed to do.

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[6] There is no question but that William filed the case within the statute of limitation applicable to him on this battery claim since he filed suit within two years of his reaching the age of majority. See O.C.G.A. §§ 9-3-33 and 9-3-90.

SGMC argued below that Annie said she had no questions regarding circumcision, and therefore the consent was valid. This misses the point. One ignorant of a procedure may very well not have any questions to ask simply because of that ignorance. Further Annie never said she had no questions about circumcision in general, rather she answered "No" to the question "Do you remember having any questions of any doctor or person who appeared to work at the hospital about the circumcision or the signing of this permit?" (AH Dep 33, R-541.) That she does not remember having any questions at the time in no way suggests that she knew what circumcision was in general terms, which knowledge was necessary for her to give basic consent (assuming, arguendo, that she legally could give valid basic consent at all).

In short, it was not that Miley was in some fashion negligent. It was that SGMC failed to protect William from a circumcision performed without the obtaining of valid basic consent. Further, it was also that SGMC failed to protect William from the commission of a battery, circumcision itself, since such is neither a medical nor a surgical procedure. Indeed, SGMC actively participated in the battery by obtaining the consent form and by one of its nurses' holding William down while his penis was cut. Since SGMC failed in both regards, it may be held liable to William for its failure to protect him from the torts that were done to him.

Moreover, and perhaps more importantly, SGMC failed to protect Plaintiff from the erroneous at best, and false at worst, statements of the two men in green coats, apparently Emergency Medical Technicians in training, who William Sr. found in Annie's room when he came in the night before the circumcision. It was the false statement by these two men that only a half circumcision would be performed (WH, Sr. Dep 14-17, 26-35, 43-44; R-464-7, 486-95,

503-4; Smith Dep. 7-10, R-614-7) that led William Sr. to drop his intention to forbid the circumcision of William. While it was not William Sr. who in fact gave consent, there is evidence in the record that if these two unknown men had not interfered without any authority whatsoever then William Sr. would have forbidden the circumcision and it would not have happened. Such evidence is sufficient to raise a jury issue on SGMC's failure to protect Plaintiff from harm. Certainly SGMC had a duty to (1) make sure that any advice given by any of the personnel roaming the hallways was accurate, (2) not solicit circumcision by false statements, and (3) protect its infant patients, including William, from the erroneous and unsolicited advice of Emergency Medical Technicians in training, or even strangers, roaming the hallways in official-looking clothing. Since SGMC clearly and indisputably failed in this regard, it may be held liable to William even if the Court finds that the consent form signed by William's mother was valid and that circumcision is a medical or surgical procedure authorized by law. (William does not concede either point). Therefore, for this additional, but very important reason, the trial court erred in granting summary judgment to SGMC on the issue of its failure to protect William from harm.

CONCLUSION

This is a very important case. William was severely damaged when Smith circumcised him. Smith had to know that he had seriously harmed William. He intentionally concealed the damage from William's parents, and consequently from William, by his silence when he had a fiduciary duty to speak. William never received treatment or advice from any other doctor about the injuries to his glans and frenulum. He did not discover the damage until he was an adult.

Smith did not inform William's mother, who signed a consent form for the surgery, of the general terms of treatment, with which she was entirely unfamiliar. Thus her consent was invalid. Further Smith did not circumcise William for any medical reason. Neonatal circumcision does not meet the definition of medical or surgical treatment. Consequently, Smith could not obtain valid consent from William's mother to circumcise him. As her consent was invalid, Smith committed a battery upon William when he circumcised him and SGMC's employees participated in that battery for which SGMC is liable. Moreover, this battery damaged William well beyond the damage caused by a correctly performed circumcision.

For all of these reasons, as well as those expressed above, the trial court erred in granting Smith and SGMC summary judgment and this Court should reverse the Orders granting summary judgment to them and remand the case for a jury trial[7].

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[7] As before noted William does not object to the granting of summary judgment to Southern OB-GYN Associates, P.C., because discovery revealed that Dr. Smith was not associated with that entity in 1983. See Smith Dep 7, R-614.

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