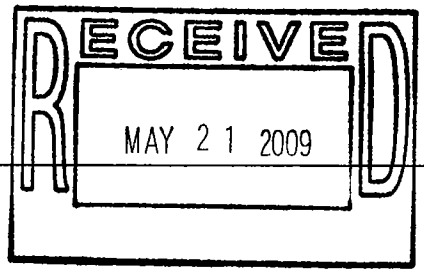
STATE OF MINNESOTA
COUNTY OF HENNEPIN



DISTRICT COURT
FOURTH JUDICIAL DISTRICT

M.G. L., a minor,

Plaintiff,

vs.

File No. 27CV08-13968

Dr. Natalie Zabezhinsky, M.D., et al,

Defendants.

MEMORANDUM GRANTING DEFENDANTS' MOTION TO DISMISS AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I. Appearances

Zenas Baer, Esq. appeared on behalf of Plaintiff. Mark Whitmore, Esq. appeared on behalf of Defendants.

II. Introduction

The above-captioned matter came on for hearing before the undersigned Judge of District Court on March 5, 2009 on Plaintiff's Motion for a Continuance, Defendant's Motion to Dismiss, and Defendant's Motion for Summary Judgment. On March 19, 2009, the Court issued a Minute Order granting the Motion for Continuance in part and denying it in part.

III. Factual and Procedural Background

M.G.L. was born to David and Kristen Lybeck ("the Parents") on April 27, 2001 at Mercy Hospital, a member of Allina Health System. The day after M.G.L.'s birth, Dr. Natalie Zabezhinsky ("Zabezhinsky") circumcised him.

Zabezhinsky wrote in M.G.L.'s chart: "Circ discussed [with] parents. Risks reviewed [no family history] of bleeding. Parents are willing to proceed. Circ performed in sterile manner using Mogan clamp. Anesth [with] 1% Xylocaine [no] complications." The Parents claim that they were asked only one question worded something like "are you going to circumcise him?",

and were not given any information on risks associated with circumcision. Although Zabezhinsky does not recall this particular circumcision, she testified in detail at her deposition as to how she would normally inform a parent of the risks and benefits of circumcision.

The Parents claim that M.G.L. regularly experienced infections in the area of his penis after the circumcision. M.G.L.'s pediatrician noted that M.G.L. had developed penile adhesions by the time he was ten months old. In the summer of 2006, M.G.L. went through a metoplasty, a surgery to remove excess skin and expand the penile opening. Since that time, M.G.L. has not received any medical care for his penis.

At some point before M.G.L. was circumcised, Mercy Hospital ("the Hospital") discontinued its policy of using informed consent forms for circumcisions.

On June 5, 2008, Plaintiffs filed a Summons and Complaint alleging false imprisonment, assault and battery, lack of informed consent, *respondeat superior*, negligence against Mercy Hospital, and consumer fraud.[1]

On July 2, 2008 Plaintiffs submitted the Affidavit of Robert S. Van Howe, M.D. ("Affidavit"). Zenas Baer, Esq., attorney for Plaintiff ("Baer"), failed to certify the July 2, 2008 Affidavit pursuant to Minnesota Statute §145.682, which requires that expert affidavits "must be signed by each expert listed in the affidavit and by the plaintiff's attorney." Minn. Stat. §145.682, subd. 4. (2005). On January 20, 2009, Defendants filed a motion to dismiss for failure to comply with Minnesota Statute §145.682, subd. 4, and a motion for summary judgment on the grounds of lack of evidence to support one or more elements of every count in the Complaint. On February 16, 2009, Baer submitted an Amended Affidavit of Expert Review ("Amended Affidavit"), which Baer did sign.

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[1] Except for the negligence claim, Plaintiffs did not specify which claims applied to which Defendants. The Court will assume that all claims are alleged against both Defendants, except negligence and respondeat superior, which are alleged against the Hospital.

IV. Legal Analysis

A. Motion to Dismiss

Minnesota Statute §145.682 (2005) provides in part:

Subd. 2. Requirement. In an action alleging malpractice, error, mistake, or failure to cure, whether based on contract or tort, against a health care provider which includes a cause of action as to which expert testimony is necessary to establish a prima facie case, the plaintiff must: (1) unless otherwise provided in subdivision 3, paragraph (b), serve upon defendant with the summons and complaint an affidavit as provided in subdivision 3; and (2) serve upon defendant within 180 days after commencement of the suit an affidavit as provided by subdivision 4.

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Subd. 4. Identification of experts to be called. (a) The affidavit required by subdivision 2, clause (2), must be signed by each expert listed in the affidavit and by the plaintiff's attorney and state the identity of each person whom plaintiff expects to call as an expert witness at trial to testify with respect to the issues of malpractice or causation, the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion.

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Subd. 6. Penalty for noncompliance…
(c) Failure to comply with subdivision 4 because of deficiencies in the affidavit or answers to interrogatories results, upon motion, in mandatory dismissal with prejudice of each action as to which expert testimony is necessary to establish a prima facie case, provided that:
(1) the motion to dismiss the action identifies the claimed deficiencies in the affidavit or answers to interrogatories;
(2) the time for hearing the motion is at least 45 days from the date of service of the motion; and
(3) before the hearing on the motion, the plaintiff does not serve upon the defendant an amended affidavit or answers to interrogatories that correct the claimed deficiencies.

When an expert affidavit fails to comply with the statutory requirements of Minnesota Statute §145.682, subdivision (6) requires "mandatory dismissal with prejudice of each cause of action as to which expert testimony is required to establish a *prima facie* case". *Teffeteller v. University of Minnesota*, 645 N.W.2d 420, 426 (Minn. 2002).

V. Discussion

A. Defendants' Motion to Dismiss

Defendants seek dismissal based on both procedural and substantive deficiencies in the Affidavit and Amended Affidavit submitted by Plaintiff pursuant to Minnesota Statute §145.682. That provision requires an affidavit signed by plaintiff's expert and plaintiff's attorney to be submitted within 180 days of commencement of the lawsuit. Defendants first argue that, while Plaintiff filed Van Howe's initial Affidavit within the requisite time, Baer did not sign it. Defendants seek dismissal of the Complaint for failure to comply with that portion of Minnesota Statute §145.682 that requires Plaintiff's counsel to sign the affidavit of expert review.

The Court need not decide whether the expert affidavits filed by Plaintiff were procedurally deficient, because both the Affidavit and the Amended Affidavit fail to meet the substantive requirements of an expert affidavit.

1. Elements of the Expert Affidavit

The affidavit in a medical malpractice action must include "the applicable standard of care, the acts or omissions that plaintiffs allege violated the standard of care and an outline of the chain of causation that allegedly resulted in damage to them." *Sorenson v. St. Paul Ramsey Medical Center*, 457 N.W.2d 188, 193 (Minn.,1990). *See also Teffeteller*, 645 N.W.2d at 428. The expert must, of course, have formal education, but that is not enough:

> [I]t is a practical knowledge of what is usually and customarily done by physicians under circumstances similar to those which confronted the defendant charged with malpractice that is of controlling importance in determining competency of the expert to testify to the degree of care against which the treatment given is to be measured.

Cornfeldt v. Tongen, 262 N.W.2d 684, 692-93 (Minn. 1977).

Van Howe has never performed a circumcision or engaged in the informed consent process for the procedure. *See* Affidavit of Mark Whitmore dated March 2, 2009, ¶2 and Ex. A (Testimony of Dr. Van Howe in *Josiah Flatt v. Sunita A. Kantak, M.D.* Civil No. 99037 61, District Court, Cass County, N.D.). Plaintiff has thus failed to establish that Van Howe has practical knowledge of circumcision or of the informed consent process that accompanies circumcision. The Affidavit attests only to his education in pediatrics, his work as a pediatrician, and the articles about circumcision that he has authored or reviewed.

Van Howe at no point addresses what physicians "usually and customarily" do. Instead he states:

> 5. I have personal knowledge of the standard of care and skill *required* of medical doctors and medical practitioners generally under the same conditions and like circumstances as those presented by M.G.L.'s case while he was under the care of Dr. Natalie Zabaezhinsky at Mercy Hospital in April 2001.

Affidavit, ¶5. (emphasis added). At no point does Van Howe state upon what authority he determined what was "required" or who "required" it. At no point does he state that medical doctors "usually and customarily" adhere to those requirements. He claims to have "a working knowledge of the requirements imposed on physicians by government agencies..." Affidavit, ¶4. However, the standard of care is not determined by government agency requirements.

The remaining paragraphs of the Affidavit consistently refer to the standard of care "required" rather than to the standard of care that is ordinarily and customarily practiced. In fact, at no point does the Affidavit address "what is usually and customarily done by physicians." Rather, the Affidavit addresses what Van Howe believes *should* be done—or not done—by physicians.

2. Standard of Care

Even if Van Howe had the requisite background and made the requisite comparison to

what physicians usually and customarily do, the Affidavit fails because the Court cannot determine what standard of care it advocates. Van Howe claims that Defendants were negligent in that they failed to do the following:

1) ascertain whether the Parents were competent to provide proxy consent;

2) ascertain whether the Parents had adequate information about the procedure;

3) adequately document the procedure;

4) ensure that the medical staff adhered to its Bylaws;

5) have nurses supervise the circumcisions;

6) require staff to obtain informed consent before a circumcision;

Affidavit, ¶¶8-12. Van Howe refers to these allegedly negligent acts or omissions only insofar as those procedures relate to Zabezhinsky's alleged failure to obtain informed consent. Indeed, at the hearing, Plaintiff's counsel unequivocally stated that, unlike most medical malpractice cases, which deal with improper administration of a drug or an improperly performed procedure, this case is "an informed consent case."

Portions of the Affidavit appear at first blush to support this informed consent claim. For example, paragraph 13 of the Affidavit states:

> 13. [I]t is my opinion that the failure of Mercy Hospital to follow the industry standards to insure that informed consent is obtained prior to an invasive procedure and surgery such as neonatal circumcision is a direct and proximate cause of the injuries suffered by M.G.L.

The Affidavit goes on to recite just what information would have been provided if informed consent had been given in accordance with Dr. Van Howe's claimed requirements:

> 14....[I]t is my opinion that if provided with complete disclosure M.G.L.'s parents would have chosen a different course of action, thus avoiding the injuries and damages inflicted by Natalie Zabezhinsky. Complete disclosure would have included a discussion of the function of the tissue removed; the details and technique of the procedure; the type of anesthetic used, their effectiveness and

their complications, the short-term impact of the procedure including pain, interference with breastfeeding, and requirements for aftercare; the long-term impact of the procedure including the behavioral changes and increased risk of subsequent hospitalization; the alternatives to circumcision such as forgoing the procedure; complications of the procedure including excessive bleeding, the need for transfusion, bacteremia, septicemia, meningitis, osteomyelitis, lung abscess, diphtheria, tuberculosis, staphylococcal scalded skin syndrome, gangrene of the penis and scrotum, scrotal abscess, impetigo, necrotizing fasciitis of the abdominal wall, tentanus, necrosis of the perineum, meatitis, meatal ulceration, meatal stenosis, penile adhesions, skin bridges, phimosis, buried penis, unwanted cosmetic outcomes, partial or complete amputation of the head of the penis, loss of the penis, excessive penile skin loss, urinary retention, urinary obstruction, acute obstructive uropathy (which can lead to kidney failure), bladder distention (swelling) to the point of bladder rupture, lymphedema, urethral fistula, scrotal trauma, pneumothorax, unilateral leg cyanosis, apnea, urine advancing in subcutaneous fascial planes, subcutaneous granuloma, pyogenic granuloma, penile tourniquet syndrome, problems with sexual function, nonspecific urethritis, gastric rupture, tachycardia, heart failure, heart injury, and death…

However, other portions of Van Howe's affidavit assert that physicians violate the standard of care by performing circumcisions at all:

19. …[I]t is my opinion that surgical amputation of the foreskin from the male penis results in damage.[2]

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20. [I]t is my opinion that there are no clear medical benefits to male genital alteration.[3]

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28. Medical ethical standards, which dictate "first do no harm", prohibit the medical community to [sic] perform a procedure knowing it is more likely to impair the health of the infant than to improve it…

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30. Neonatal circumcision cannot be justified on economic or medical grounds.

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43. There is no medical indication to perform infant circumcisions.

If the act of circumcision is *itself* a violation of the standard of care, informed consent would be impossible since consent would not suffice to bring the procedure within the standard of care. These portions of the Affidavit contradict Van Howe's earlier statements about informed consent. At this point, the Court must determine which version of Van Howe's "standard of

[2] The remainder of paragraph 19 contains 46 lines of written detail about the "damage" caused by *any* circumcision.
[3] This statement is followed by 88 lines of written detail.

care" should prevail: obtaining informed consent, or not performing circumcisions at all.

It gets worse. Even if the Court determines that Van Howe's "informed consent" portion of the Affidavit applies, Van Howe suggests that the Parents could not give informed consent:

> 36. ...When dealing with surgery on an infant, the best that can be obtained is "proxy consent", which poses serious problems. A provider of pediatric healthcare has a legal and ethical duty to their child patient to render competent medical care based on what the patient needs, not what someone else expresses. The pediatricians' responsibilities are to her patient and exist independent of parental desires or proxy consent.

Affidavit, ¶36.

Van Howe's Affidavit is—to put it charitably--confusing on this point. He has created a world in which any sort of informed consent would be insufficient to bring circumcision within the standard of care, and would in any case be impossible to obtain. He has created this world without considering at all what is "usually and customarily" done by physicians. He claims that the standard of care involves informed consent, and then provides inconsistent and self-contradictory information as to what informed consent is. In short, the opinions of Dr. Howe concerning "standard of care" leave the Court unable to determine anything at all.

3. Causation

The Affidavit fails to establish proximate causation, that is, "an outline of the chain of causation between the violation of the standard of care [here the alleged failure to obtain informed consent] and Plaintiff's damages." *Teffeteller* 645 N.W.2d at 428. *See also Cornfeldt*, 262 N.W.2d at 698. ("Lack of proximate causation prevents the exclusion of Dr. Wier's testimony against Ayerst Laboratories from being prejudicial error.").

Van Howe states that "[i]t is my opinion that if provided with complete disclosure M.G.L.'s parents would have chosen a different course of action..." Affidavit, ¶14. That, of course, is speculation. Van Howe does not articulate any basis for his "opinion" concerning

what the Parents "would have" done. In an effort to make up for this deficiency in Van Howe's expert opinion affidavit, Plaintiff submitted affidavits from the Parents stating that they would not have had M.G.L. circumcised if they had been provided with informed consent. However, the statute requires that the chain of causation be set forth in the expert's affidavit and a Plaintiff may not otherwise supply a missing link in the chain. *Tousignant v. St. Louis County*, 615 N.W.2d 53, 60-61 (Minn.2000) ("nonaffidavit materials may not be used to supplement an otherwise deficient affidavit").

It is not at all clear to the Court that the allegedly undisclosed risk resulted in harm. The Affidavit provides a long list of supposed risks, the vast majority of which M.G.L. never experienced. Although M.G.L. experienced meatal stenosis, Van Howe makes only conclusory statements about the alleged causal link between the circumcision performed and the meatal stenosis:

> 6...[I]t is my opinion that Dr. Natalie Zabezhinsky failed to exercise that degree of skill and care ordinarily required of medical doctors and medical practitioners generally under like conditions and similar circumstances in her care and treatment of M.G.L. and that as a direct and proximate result of her failure, M.G.L. suffered severe pain and suffering, the loss of his foreskin, and meatal stenosis...requiring a surgical procedure in the form of a meatotomy.

Affidavit, ¶6.

Van Howe does not claim that he ever reviewed the records pertaining to M.G.L.'s meatal stenosis, which occurred years after the circumcision. His review was limited to the medical records relating to the circumcision:

> 3. I make this Affidavit based upon my own personal knowledge as a skilled physician upon a review of the records provided to me in connection with the care and treatment rendered to M.G.L. by Dr. Natalie Zabezhinsky at Mercy Hospital in Coon Rapids, Minnesota, *in April 2001*.

Affidavit, ¶3 (emphasis added). Van Howe does not explain how he could determine a causal

relationship between a surgical procedure, the circumcision, and a condition that occurred several years later, the records concerning which he never reviewed. "The purpose of expert testimony is to interpret the facts and connect the facts to conduct which constitutes malpractice and causation." *Sorenson v. St. Paul Ramsey Medical Center,* 457 N.W.2d 188, 192 (Minn.,1990). Van Howe's conclusory statement here fails to provide an "outline of the chain of causation that allegedly resulted in damage." *Id.*

4. The Individual Counts

All six counts in this case allege torts arising out of the medical treatment received by Plaintiff. Thus, each of the counts is "a cause of action as to which expert testimony is required to establish a *prima facie* case" and must be dismissed. Minn. Stat. §142.682, subd. 6(c); *Teffeteller*, 645 N.W.2d at 426. "A majority of the jurisdictions that recognize a cause of action for negligent nondisclosure employs accepted medical practice in the circumstances as the standard of disclosure and requires expert testimony to establish that standard." *Cornfeldt v. Tongen*, 262 N.W. 684, 699 (Minn. 1977). As discussed at length above, the Court is unable to determine from the Affidavit *what* is the "accepted medical practice in the circumstances" from which Defendants allegedly deviated in this case. Since Plaintiff has failed to establish the standard of disclosure, it is impossible for the Court to determine whether it has been violated.

Plaintiff's failure to provide a valid and meaningful Affidavit causes all of Plaintiff's claims to fail. Each count is a "cause of action as to which expert testimony is necessary to establish a prima facie case". Minn. Stat. 145.682, subd. 6(a).

The Complaint alleges Count One: False Imprisonment; Count Two: Assault and Battery on M.G.L.; Count Three: Lack of Informed Consent; Count Four: *Respondeat Superior*; Count Five: Negligence—Mercy Hospital/Allina Health Systems; Count Six: Consumer Fraud Minn.

Stat. 325F.

Count One: False Imprisonment

To succeed on a claim of false imprisonment, plaintiff must show: 1) words or acts intended to confine; 2) actual confinement; and 3) plaintiff's awareness that he was confined. *Blaz v. Molin Concrete Products Co.*, 309 Minn. 382, 385, 244 N.W.2d 277, 279 (Minn. 1976)

Plaintiff claims that he was falsely imprisoned when he was strapped into a circumstraint for the circumcision to be performed. Plaintiff claims the confinement was wrongful because he did not give informed consent, but Plaintiff's informed consent claim has failed.

Count One fails.

Count Two: Assault and Battery

The Minnesota Supreme Court has dealt with claims of assault and battery in the context of medical malpractice:

> In the medical malpractice context, battery consists of an unpermitted touching, in the form of a medical procedure or treatment. The touching is permitted if the patient consents to it...Consent, however, is not rendered void when a patient is touched in exactly the way to which he or she has consented. To argue that consent that is inadequately informed is no consent at all, and hence a battery, is to ignore the practical differences underlying the distinction between battery and negligent nondisclosure.

Kohoutek v. Hafner, 383 N.W.2d 295, 299 (Minn.,1986).

Plaintiff claims that he suffered assault and battery when the circumcision was performed without valid informed consent. As discussed, Plaintiff has failed to establish a lack of informed consent.

Count Two fails.

Count Three: Lack of Informed Consent

The Court has addressed this count at some length above and it fails for the reasons

already stated.

Count Four: *Respondeat Superior*

Paragraph 79 of the Complaint alleges:

> 79. Allina Health System is liable for the injuries caused by the acts of Dr. Natalie Zabezhinsky and hospital staff on the basis of *respondeat superior*.

The Affidavit does not establish that the acts of Zabezhinsky or the hospital staff resulted in injury. Without an underlying cause of action against an employee acting in the course and scope of employment, there is no cause of action upon which the Hospital can be vicariously liable under the doctrine of *respondeat superior*.

Count Four fails.

Count Five: Negligence Against Mercy Hospital and Allina Health System

To establish a *prima facie* claim of medical negligence, plaintiff must introduce expert testimony "demonstrating (1) the standard of care recognized by the medical community as applicable to the particular defendant's conduct, (2) that the defendant in fact departed from that standard, and (3) that the defendant's departure from the standard was a direct cause of...injuries." *Plutshack v. University of Minnesota Hospitals*, 316 N.W.2d 1, 5 (Minn., 1982). Plaintiff has not provided expert testimony demonstrating the standard of care *recognized by the medical community*.

Count Five fails.

Count Six: Consumer Fraud—MN Stat. 325F [sic]

Plaintiff's consumer fraud count is presumably brought under Minnesota Statute §325F.69 (2009) (commonly known as the Minnesota consumer fraud act, or MCFA).[4] Subdivision 1 of the statute provides in part:

[4] The Complaint indicates only that the action is brought under Minnesota Statute §325F, without specifying the division of Minnesota Statute §325F.

> The act, use, or employment by any person of any fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice...is enjoinable...

To claim a violation of the MCFA, a plaintiff must prove an intentional misrepresentation, and damages caused by the misrepresentation. *Group Health Plan, Inc. v. Philip Morris, Inc.*, 621 N.W.2d 2, 12 (Minn. 2001).

Plaintiff has failed to identify any false, deceptive, or misleading statement. In the Complaint, Plaintiff pleads only:

> 94. That Allina Health Systems d/b/a Mercy Hospital and Dr. Natalie Zabezhinsky acted, used, or employed fraud, false pretense, false promise, misrepresentation, misleading statement or deceptive practice with the intent that others rely thereon in connection with the sale of services, to-wit: circumcisions.

Minnesota Rule of Civil Procedure 9.02 (2009) requires Plaintiff to plead allegations of fraud with particularity. Paragraph 94 falls far short of that standard.

Moreover, Minnesota Statute § 8.31 (the Private Attorney General Act) provides a private right of action to individual consumers under the MCFA. To assert an action for damages under the Private Attorney General statute, however, the plaintiff is required to demonstrate that the action benefits the public as a whole, rather than the plaintiff alone. *Ly v. Nystrom,* 615 N.W.2d 302, 312 (Minn. 2000). Plaintiff has failed to demonstrate that this action benefits the public as a whole.

Count Six fails.

C. Defendants' Motion for Summary Judgment

Defendants stated at the hearing that if the Court granted their motion to dismiss, it would be unnecessary to reach their motion for summary judgment. The Court agrees, but notes that had Defendants made only a motion for summary judgment, that motion would have been

granted. For the reasons set forth above, there is no genuine issue of material fact and Defendants are entitled to judgment as a matter of law.

D. Plaintiff's Motion for Continuance

Since Defendants' Motion to Dismiss is granted in its entirety, Plaintiff's Motion for Continuance is Moot.

ORDER

1. Defendants' Motion to Dismiss is GRANTED.

2. Defendants' Motion for Summary Judgment is MOOT.

3. Plaintiff's Motion for Continuance is MOOT.

4. Defendants are entitled to judgment dismissing the Complaint in its entirety with prejudice, and to their costs and disbursements herein.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: May 19, 2009

BY THE COURT:

George F. McGunnigle
Judge of District Court