IN THE STATE COURT OF CLAYTON COUNTY
STATE OF GEORGIA

STACIE WILLIS, Individually and as the Natural Guardian, Parent and Next Friend of the Infant DEJUAN WILLIAMS,	)	
Plaintiff,	)	CIVIL ACTION
v.	)	FILE NO. 2014CV02070
MELISSA G. JONES, CNM; ANNE SIGOUIN; BRIAN REGISTER, MD; LIFE CYCLE PEDIATRICS, LLC; LIFE CYCLE OB/GYN, LLC; ABIGAIL KAMISHLIAN, MD FAAP; DAFFODIL PEDIATRIC AND FAMILY MEDICAL SERVICES, LLC,	)	
Defendants.	)	

PLAINTIFF'S BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SANCTIONS FOR SPOLIATION OF EVIDENCE

COMES NOW Plaintiff and files her Brief in Support of Plaintiff's Motion for Sanctions for Spoliation of Evidence.

I. INTRODUCTION

Subsequent to a botched Mogen clamp circumcision, critical evidence was in the possession, custody and control of Defendants Life Cycle Pediatrics, LLC, Life Cycle OB/GYN, LLC, the owner of said entities Anne Sigouin, and Life Cycle employees Melissa Jones, CNM, and Brian Register, MD (collectively referred to herein as the "Life Cycle Defendants"). The botched circumcision resulted in the amputation of a portion of the glans penis of Plaintiff's son DJ. **DJ's severed tissue was salvaged and preserved for months, then discarded, all without Plaintiffs' knowledge and consent.** Defendants, furthermore, did not isolate and preserve the

Mogen clamp used on DJ. Plaintiff, therefore, seeks sanctions against the Life Cycle Defendants for their spoliation of critical evidence in this case, that is, (1) the amputated portion of DJ's glans penis, and (2) the Mogen clamp used in the botched procedure (the "Mogen clamp").

II. MATERIAL FACTS

A. Spoliation of Amputated Portion of DJ's Glans Penis

On October 3, 2013 Plaintiff Stacie Willis (Ms. Willis) gave birth to her son DJ, who was delivered by cesarean section; his gestational age was less than 37 months at birth (considered premature in medical terms); and his birth weight was 2.466 kg, which is 5.44 pounds. [Ex. A] After clearance from the pediatrician, eighteen days later (October 21, 2013), DJ was taken to a Life Cycle clinic for Mogen clamp circumcision. Melissa Jones botched the circumcision; she severed glans tissue from the tip of DJ's penis. [Jones Dep. pp. 11, 16 (Ex. B)]

Ms. Jones summoned Dr. Brian Register (Dr. Register), a Life Cycle OB/GYN, for assistance. Dr. Register immediately came to the assistance of Ms. Jones, and his first concern was the "life-threatening issue" to "stop the child from bleeding to death." [Register Dep. pp. 74, 113 (Ex. C)] Ms. Jones initiated procedures to control the bleeding. Then she had the amputated portion of DJ's glans penis placed in a biohazard bag and secured in the Life Cycle refrigerator. [Jones Dep. pp. 13, 18 (Ex. B)] After Dr. Register confirmed the hemorrhaging was stopped, Dr. Register's next imperative was to promptly inform the owner/manager of Life Cycle Pediatrics, Defendant Anne Sigouin, of the urgency of having a pediatrician provide immediate care for DJ's injury, and to make a decision about urgent referral to a pediatric urologist. [Register Dep. pp. 44-49 (Ex. C).]

After Dr. Register had informed Life Cycle Pediatrics, through the owner/manager Ms. Sigouin, of the urgent need for pediatric care and after Life Cycle Pediatrics had provided no

care for DJ's injury, Ms. Jones called the referring pediatrician, Dr. Abigail Kamishlian, and reported the event. However, nothing was done urgently, and Ms. Jones scheduled an appointment for Ms. Willis to take DJ to Dr. Kamishlian the following day for examination. [Jones Dep. pp. 16, 17, 49 (Ex. B)] The Life Cycle Defendants did not inform Ms. Willis that a portion of DJ's glans penis had been amputated, no one with Life Cycle provided to Ms. Willis the amputated portion of DJ's glans penis, and no one with Life Cycle instructed Ms. Willis to take DJ for emergent care, with or without the amputated portion of his glans penis. In this regard, Ms. Willis testified:

> Q: When did you first learn that DeJuan had been injured?
> A: When I heard my child screaming and hollering.
> …
> Q: What did you see when you got there?
> A: When I walked into the room, I seen Melissa Jones standing over my son holding his penis, obviously trying to stop the bleeding with a whole bunch of gauze on the side of him. And I asked her what was going on. And she kept trying to tell me nothing was going on.
> …
> Q: Can you remember any details about what Ms. Jones said to you?
> A: Ms. Jones didn't say anything to me besides nothing was wrong. He just had a little extra bleeding.
> …
> Q: Do you know what he [Dr. Register] was trying to do by applying whatever it was?
> A: No. I – they didn't explain anything of what they were doing.
> …
> Q: Were you able to see the injury to DeJuan's penis? Did you ever go over and look and see closely at what was going on?
> A: It was covered with gauze. You couldn't see anything but blood.
> …
> Q: All right. While you were in the Life Cycle office, did you get a close look at DeJuan's injury?
> A: No.
> …
> Q: Okay. Did Dr. Register describe the injury to you on that day?
> A: No. No one told me anything. I didn't find out what was going on with my son until I reached the emergency room…He [Dr. Register] didn't tell me anything of what was going on. He said he reached out to the owner of the clinic [Anne Sigouin]. He told her to give me a call. And he said for

me to just wait for her call…Melissa [CNM Jones] walked up to me and said, "I called your pediatrician and I called – we called the owner." I told her…something is wrong with my son and I'm going to the emergency room.

…

Q: And you said that you asked Melissa and Dr. Register what happened; is that right?
A: That is not correct.
Q: Okay.
A: I asked Melissa what was going on, because she is the one that circumcised him. I kept asking her over and over what was going on. She kept telling me, "Oh, nothing. He just have a little extra bleeding."
Q: Okay. Did anybody at – while you were at Life Cycle tell you that a small piece of DeJuan's glans had been severed?
A: No.

…

Q: Okay. Is there anything that you remember Melissa Jones saying to you about the circumcision or the injury or Dr. Register saying to you about the circumcision or the injury that we have not already talked about?
A: They didn't tell me anything. Nothing at all.
Q: Okay.
A: Besides he had a little extra bleeding. And that came from Melissa Jones.

…

Q: You are very comfortable that there was nothing else that they said –
A: As far as his injuries?
Q: Yes, ma'am.
A: They didn't say anything about no injuries, no nothing, beside he was bleeding a little bit.
Q: Okay. And when you took DeJuan and left their office, his penis at that point was wrapped in gauze?
A: Correct.

[Willis 1st Dep. pp. 115-116, 118-119, 125, 129, 130-132, 134-135, 139-143 (Ex. D)]

Throughout the litigation, the Life Cycle Defendants, including their experts, have represented that the injury was very minor, or nothing at all, and that the severed tissue was negligible or nothing at all. Indeed, Plaintiff was only told that DJ had a little extra bleeding. [*Id.* p. 118], and Ms. Jones testified that the amputated portion of DJ's glans penis was a "very small piece of tissue"…"very, very small piece of tissue, it was no thicker than a credit card"…"the piece of tissue was so small you couldn't run a stitch through it"…"very, very, tiny piece of

mucosal tissue." [Jones Dep. pp. 11, 12, 15, 44 (Ex. B)] Significantly, Defendant Ms. Jones' said testimony provides the primary basis for Defendants' experts' opinions that Defendants were not negligent in failing to inform Ms. Willis about DJ's preserved glans tissue and failing to send DJ for an emergent consult with a qualified surgeon. Owner/Manager Anne Sigouin also seeks to diminish the injury. She testified:

> Q: Did you consider that to be an emergency situation when they [Dr. Register and Nurse Jones] called?
> A: No.
> Q: By the way, do you have any written procedures in place that explains what ought to be done if a glans or there's some severance of the glans or any part of the penis that should not be severed in a circumcision?
> A: No.
> Q: There's no written protocol to adjust for those types of emergencies?
> A: No. We've never had that type of emergency, so—and I'm not really quite sure this was one of those either.

[Sigouin 1st Dep. pp. 161 (Ex. E).]

The Life Cycle Defendants did nothing with the amputated portion of DJ's glans penis, except secretly keep it refrigerated for an undetermined number of months and then threw it away. That is, the Life Cycle Defendants did not examine, measure or photograph the amputated portion of DJ's glans penis before it was thrown away. [Jones Dep. p. 19 (Ex. B); Register Dep. pp. 59, 63 (Ex. C).] Nurse Assistant Debbie Person testified:

> Q: When did you notice it was no longer there?
> A: Months after.
> Q: Months?
> A: Yeah.
> Q: So it was sitting in the bag without any ice but in the refrigerator for months?
> A: Yes.
> Q: Did you ever tell Ms. Willis that that material was in the refrigerator?
> A: No, sir.
> Q: Do you know if anyone else did?
> A: No, sir.
> …
> Q: At some point, the material was no longer there, I take it?

A: Yes, sir.

[Person Dep. pp. 79, 81 (Ex. F).]

Questioned about Life Cycle's initial preservation of DJ's tissue, Dr. Sperry, the expert pediatrician retained by Defendant Kamishlian and adopted by Life Cycle, testified that there were two potential reasons to preserve the amputated portion of DJ's glans penis—the obvious reason was for reattachment, which would mitigate the consequences of the injury to the child; and the other reason was to preserve it as "evidence in a lawsuit." [Sperry Dep. pp. 29, 30 (Ex. G).]

Subsequent to the botched circumcision, the Life Cycle Defendants were immediately, directly aware that Ms. Willis was very upset about the incident and concerned for her child. [Person Dep. p. 64 (Ex. F) (Plaintiff was upset and trying to get an understanding of what happened.)] Consequently, Ms. Willis, being very upset and angry about her baby's penile injury, put Life Cycle on notice of potential legal action. Ms. Willis reveals that after a few days of calling for Ms. Sigouin at the Life Cycle Pediatrics office: "So finally I had got fed up. I said, 'Hey, tell Anne she does not have to call me back, I will have my attorney reach out to her and we will go from there.'" [Willis Dep. p. 267 (Ex. D)]. Also, **within about a week** of the incident, during a subsequent visit to see Anne Sigouin at the office of Life Cycle Pediatrics, Ms. Willis told Ms. Sigouin, "I can get a lawyer, I can get the Fox 5 News involved and have them investigate what is going on . . . ." [*Id.* p. 269.]

In less than a month after the subject incident, Ms. Willis retained legal counsel, and on November 12, 2013, her attorney sent a letter of representation by certified mail to the Life Cycle Defendants putting them on notice of her claim. [Ex. H.] Ten days later, by letter dated November 22, 2013, Defendants' liability insurance carrier responded to the letter from

Ms. Willis' attorney; the insurer acknowledged the claim and provided the requested insurance information. [Ex. I.] Less than two months thereafter, on January 15, 2014, Ms. Willis' legal counsel sent a letter notifying the Life Cycle Defendants of Ms. Willis "formal demand" for them to preserve evidence relevant to the botched circumcision. [Ex. J.] The letter of January 15, 2014 did not mention the amputated portion of DJ's glans penis because at that time it was still unknown to Ms. Willis and her attorney that DJ's severed glans tissue had been salvaged and was sitting in Life Cycle's refrigerator.

B. Spoliation of the subject Mogen clamp; it was immediately returned to circulation.

Life Cycle also failed to isolate and secure the Mogen clamp device used to perform DJ's circumcision, another item of critical evidence. Defendants admit that, after DJ's procedure, the clamp used on him was put in the mechanism for cleaning with other clamps and not labeled or marked in any way to show the clamp was used on DJ. *See* (Life Cycle owner) Sigouin 1st Dep., pp. 145, 198 (Ex. E) (notwithstanding her contemporaneous knowledge of DJ's circumcision injury, she did not ask anyone to retain or preserve the clamp used on DJ); and (medical assistant) Person Dep., p. 67 (Ex. F) (the instruments that were used on DJ were washed and put into a pack for later use.). Based thereon, Dr. Tomlinson (a Clinical Assistant Professor at Dept. of Family Medicine, Brown University, Providence, Rhode Island, and a Staff Physician, South County Hospital, Wakefield, Rhode Island, where he served on the Risk Management Committee from 2011-2016, and World Health Organization (WHO) Member of the Expert Review committee on Neonatal Circumcision, October 2009), testified that once (Ms. Jones) removed the clamp from DJ's penis and knew she had the complication, pursuant to the standard of care, "she should have identified the clamp and taken it out of service." [Tomlinson Dep. p. 66 (Ex. G).] Ms. Sigouin, likewise, should have taken the clamp out of service, after its use on

DJ. [*Id.* p. 75.] Dr. Tomlinson has taken clamps out of service after complications. [*Id.* pp. 78-79.] This is done because, "if there is a complication, normally you will do risk benefit analysis. There will be some procedure to identify how to make sure it didn't happen again. It's particularly such a catastrophic complication with known liability risks, etc." [*Id.* p. 81.] Defendants' expert Dr. Stovroff, who performs circumcisions, has a similar protocol and opinion as Dr. Tomlinson concerning segregating and evaluating a clamp used in a botched circumcision, to-wit:

> Q. If you were to use a Mogen or a Gomco device and an injury occurred, would you do anything with that device?
> A. I'd get rid of it [ ] I'd look at it, **evaluate it**, but then I would throw it away.
> Q. Would you under any circumstances put that device back into use without having evaluated it to make sure there was no mechanical issues with it?
> A. No, absolutely not.

Stovroff Dep. pp. 109-110 (Ex. L) (emphasis added).]

Unaware that Life Cycle had not isolated and preserved the device used on DJ, Plaintiff's counsel undertook significant efforts to identify that particular Mogen clamp in case Plaintiff had additional claims related to the clamp. To-wit: Plaintiff's counsel sent Life Cycle a litigation hold notice for all clamps in the fall of 2014 and noticed a videotape inspection of them. In response to that formal discovery request, Life Cycle, on January 23, 2015, provided photographs of three Mogen clamps, and at least two were marked as Teleflex KMedic clamps used at its Riverdale clinic where DJ was injured [Ex. M], and litigation against Teleflex ensued.

On September 11, 2015, attorneys for Teleflex went to Life Cycle's Riverdale Clinic and inspected and photographed at least two Teleflex KMedic clamps. [*See* Teleflex's discovery responses and clamp photographs at Ex. N.] Significantly, in preparation for the Life Cycle attorney's photography session on January 23, 2015, and at the Teleflex attorneys' photographs

sessions on September 11, 2015, Ms. Sigouin requested her staff to get all the Mogen clamps at the Riverdale location. [Sigouin 2nd Dep. pp. 12-14, 17-18 (Ex. O)] As a result, three clamps were produced on January 23, 2015, and two of the three were Teleflex KMedic clamps, and four clamps were produced on September 11, 2015 and two of the four were Teleflex KMedic clamps. [Ex. M and N.] Then, on December 6, 2016, Life Cycle produced thirteen Mogen clamps, and remarkably none of these were Teleflex KMedic clamps. Subsequently, Ms. Sigouin confirmed that a bio-hazard bag marked Exhibit 95 at her deposition contained three Mogen clamps, two of which were KMedic. [Sigouin 2nd Dep. pp. 34-35 (Ex. O)] Those appear to have been the original clamps first photographed at the Riverdale location where DJ was injured.

Additionally, although Life Cycle owner Ms. Sigouin's affidavit purports that Life Cycle's Mogen clamps are made by various manufacturers and are transferred from one clinic to another, her contradicting sworn testimony indicates that she only knows of Teleflex/KMedic brand Mogen clamps [*Id.*]; that the Mogen clamps do not typically move a lot between Life Cycle's locations [Sigouin 1st Dep. p. 92 (Ex. D)]; and she is unaware of the circumcision schedule at Riverdale because she is at the East Point location. [Sigouin 2nd Dep. pp. 14–15 (O)] Further, while her affidavit indicates that physicians bring and take circumcision clamps, in deposition Ms. Sigouin testified that "Dr. Edmonds might have brought a couple"; "Dr. Nasser brought stuff but I'm not sure if he had a Mogen"; and she indicated that she was not aware of any other doctors who had possibly brought additional Mogen clamps. [Sigouin 1st Dep. p. 61 (Ex. D) (Emphasis added.)] Moreover, she had no recollection of these doctors taking a clamp back [*Id. p.* 225], if they even brought any. Ms. Sigouin, contradicting her employee Ms. Jones [Ex. P, p. 4], also testified that no clamps have been thrown away or discarded [Sigouin 1st Dep.

p. 65 (Ex. D)], that all clamps existing on October 21, 2013 are still at the practice [*Id.*], and, per her affidavit [Sigouin Affidavit, ¶ 6 (Ex. Q)], "all clamps are still in use. . . ."

Due to Life Cycle's merry-go-round treatment of and testimony about their Mogen clamps, which obfuscated the subject clamp, Teleflex contended that DJ could have been exposed to other Mogen clamps. Plaintiff argued that Defendants' written discovery answers, combined with Life Cycle and Teleflex's photographs and Life Cycle's purchase of Teleflex KMedic Mogen clamps, constitute evidence upon which a jury could have reasonably concluded that a Teleflex KMedic clamp was, more likely than not, used on DJ. However, because of the failure of Life Cycle Defendants to isolate and preserve the specific clamp that was used on DJ, the Court granted summary judgment to the Teleflex defendants, finding that Plaintiff could not sufficiently identify the product used on DJ. Had Life Cycle acted appropriately, the product used on DJ would have been specifically identified and available for analysis, and supportive of additional claims.

III. ARGUMENT AND CITATION OF AUTHORITY

A. THE SUPREME COURT OF GEORGIA'S HOLDING IN PHILLIPS V. HARMON, 297 GA. 396 (2015) IS CONTROLLING AND WARRANTS SANCTIONS.

In *Phillips v. Harmon*, the Supreme Court of Georgia held that the duty to preserve evidence arises when litigation is reasonably foreseeable to the party in control of that evidence, even if the party is not on notice of a potential claim. 297 Ga. at 396. In *Phillips*, the plaintiffs alleged that the defendants acted negligently in monitoring and responding to heart decelerations and periods of bradycardia of an infant while at Henry Medical Center. Sometime after the incident, the defendant hospital destroyed or failed to preserve printed paper strips of the electronic monitoring of the decedent's fetal heart rate. At the time of the incident, medical records at the facility were maintained electronically, but nurses sometimes took notes on paper

fetal monitor strips during labor and delivery and nurses sometimes would refer back to their notes to complete the official record. Evidence in the case was that the facility would maintain the strips for 30 days post-delivery and then routinely destroy them and that the strips at issue were destroyed pursuant to this procedure. The plaintiffs in *Phillips* sought a jury charge on spoliation, which the trial court denied, and the jury subsequently returned a verdict for the defendants.

The plaintiffs appealed, contending that the trial court had erred in refusing to give the requested charge because the hospital's actions showed that it was contemplating litigation regarding the delivery in question when the monitoring strips were destroyed. The plaintiffs cited to the facts that hospital launched an internal investigation, as required under the hospital's policies and procedures, which involved questioning hospital personnel who were involved in the incident, the hospital's subsequent notification of its insurance carrier regarding the incident, and the hospital's decision to contact an attorney regarding the incident shortly thereafter. The plaintiffs argued that once the hospital undertook those activities, a duty arose for the hospital to obtain or preserve evidence and to protect the medical record and other potential evidence as needed in anticipation of possible litigation. The plaintiffs also presented evidence that the hospital's risk management would "sometimes" request that fetal monitor strips be preserved, although no such request was made in this case. The Court of Appeals held that the hospital did not have notice of "pending or contemplated" litigation when the paper fetal monitor strips were destroyed, and consequently, that the trial court did not abuse its discretion in declining to give a jury charge on spoliation as requested by the plaintiffs.

The Supreme Court of Georgia reversed, holding that the Court of Appeals and the trial court had applied an incorrect standard in determining whether litigation was "contemplated or

pending" when the monitoring strips were destroyed. The Supreme Court explained that "the duty to preserve relevant evidence must be viewed from the perspective of the party with control of the evidence and is triggered not only when litigation is pending but when it is reasonably foreseeable to that party." 297 Ga. at 396. As to potential defendants, the duty to preserve potential evidence "arises when it knows or reasonably should know that the injured party, the plaintiff, is in fact contemplating litigation, which the cases often refer to in terms of 'notice' to the defendant," which may be either "actual" or "constructive." *Id.* Notably, the Court held that a defendant's own actions may be relevant in determining whether the defendant had "constructive" knowledge of contemplated litigation.

The Supreme Court specifically disapproved numerous prior Court of Appeals cases which had based the analysis of potential spoliation on whether a party had received notice of a claim or suit and did not consider other relevant factors in making the determination. [*Id.* p. 398.] Essentially, after *Phillips*, it is clear that as long as a party itself contemplates potential litigation, that party is under a duty to preserve potential evidence regardless of whether it has received notice of a potential claim or suit.

The Supreme Court also for the first time specifically approved the Court of Appeals' prior holding that "in considering the giving of such an instruction, the trial court should consider both prejudice to the party seeking the charge and whether the party who destroyed the evidence acted in good or bad faith." [*Id*. p. 398], citing *Johnson v. Riverdale Anesthesia Assocs.*, 249 Ga. App. 152, 154 (2) (2001). The good or bad faith of the party is a relevant consideration because one of the rationales for the presumption is that it deters parties from pretrial spoliation of evidence and serves as a penalty, placing the risk of an erroneous judgment on the party that wrongfully created the risk. Importantly, however, although a party's good or bad faith in

destroying evidence is a factor in whether a party may be sanctioned, a party may be sanctioned even absent a showing of bad faith. [*Id*. pp. 398-399], citing *AMLI Res. Props. v. Ga. Power Co.*, 293 Ga. App. 358, 363 (1)(a)(iii) (2008) ("Exclusionary sanctions may be appropriate where the spoliator has not acted in bad faith.").[1]

(1) Spoliation Defined

"The term 'spoliation' is used to refer to 'the destruction or failure to preserve evidence that is relevant to 'contemplated or pending litigation.'" [*Phillips v. Harmon*, 297 Ga. at 393 (citations omitted).]

(2) Litigation was Contemplated by and Reasonably Foreseeable to Life Cycle.

(a) Plaintiff's Actions Evidenced Contemplated Litigation.

On October 21, 2013, Ms. Jones and others at Life Cycle observed how upset and angry Ms. Willis was before she left with her injured baby. [Person Dep. p. 64 (Ex. F)] Ms. Sigouin, who was not present that day, was nonetheless informed about Ms. Willis' stress and demeanor. Besides that, within a week of the subject incident, Ms. Sigouin had actual notice of Ms. Willis'

[1] *See also McKuhen v. Transform Health RX, Inc.*, 338 Ga. App. 354, 372 (2016) (the Georgia Court of Appeals reversed a trial court which denied a motion for spoliation sanctions where it appeared a defendant destroyed the original medication administration record of the plaintiff); *Bath v. International Paper*, 343 Ga. App. 324 (2017) (the Georgia Court of Appeals determined that the trial court erred in granting summary judgment where evidence relevant to the issues had been destroyed by the Defendant); *Sheats v. Kroger Co.*, 336 Ga. App. 307 (2016) (reversing trial court which denied motion for spoliation sanctions where Kroger failed to preserve package at issue in accident where plaintiff had testified that she did not intend to sue Kroger when the incident first occurred); *Loehle v. Ga Dep't of Public Safety*, 334 Ga. App. 836 (2015) (the Court of Appeals reversed the trial court's denial of a motion for spoliation sanctions where audio recordings were destroyed, confirming that neither actual or implied notice of litigation is required in order for a party to be on notice that evidence should be preserved); *Piedmont Newnan Hosp., Inc. v. Barbour*, 333 Ga. App. 620, 629-630 (2015) (after receiving a request for medical records, the hospital failed to preserve digital images of testing done on plaintiff's heart, which were lost when the hard drive was erased during a move. Affirming spoliation sanctions, the Court held that "the images themselves would have been important proof one way or the other because it would have shown whether the tracer was making its way to Mr. Barbour's heart").

intention to bring legal claims. [Sigouin 1st Dep. pp. 122-133 (Ex. E).] According to Ms. Sigouin, at their meeting within a week of the incident, Ms. Willis was very unhappy and upset, she felt there was something wrong with her son's penis and Ms. Sigouin assumed Ms. Willis came to ask her for money because of the circumcision incident. [*Id.* p.123.] Ms. Sigouin even responded, "we need to gather the facts," like the clearance letter from DJ's pediatrician and the urgent care medical records. Additionally, even before Ms. Sigouin's said meeting with Ms. Willis, Plaintiff had informed the Life Cycle Defendants via phone that her attorney would contact them. *See* Person Dep. pp. 117-118 (Ex. F) ([Ms. Willis] called and she was just saying she needed to know what to do) and Willis Dep., p. 269 (Ex. D) ("tell Anne [Sigouin] she does not have to call me back, I will have my attorney reach out to her . . .").

Twenty-two days later, Plaintiff's attorney's letter of representation dated November 12, 2013 was sent by certified mail to Life Cycle Defendants. The letter included the statement "This firm and the undersigned have been retained to assist in bringing forth claims for damage caused by the negligence of Melissa [Jones] and Life Cycle OB/GYN and Pediatrics." Ten days later, by letter dated November 22, 2013, the Claim Specialist for the liability insurance carrier representing the Life Cycle Defendants responded to the law firm's letter and acknowledged Plaintiff's claim. Further, within three months of the date of the subject incident, the law firm representing Plaintiff sent a letter by certified mail dated January 15, 2014 to the Life Cycle Defendants, which constituted a "formal demand" for them to preserve evidence related to the subject incident. The letter cautioned that "If you fail to preserve and maintain this evidence, we will seek any sanctions available under the law…The destruction, alteration or loss of any of the [evidence] constitutes a spoliation of evidence under Georgia law." A subsequent certified letter requesting preservation of all Mogen clamps which might have been used on the infant was sent

by certified mail to Defendants on July 28, 2014. The amputated portion of DJ's glans penis and the Mogen clamp used were not specifically mentioned in the first letter because, at that time, it was still unknown to Plaintiff and her attorney that the severed portion of her infant son's glans penis had been preserved by the Life Cycle Defendants. Nonetheless, between October 21, 2013 and even as late as January 15, 2014, DJ's severed tissue sat in Life Cycle's refrigerator; irrefutably DJ's severed tissue remained in Life Cycle's refrigerator "for months," before it was discarded. And, the Mogen clamp had been immediately put back into service.

(b) Defendants' Actions Evidenced Contemplated Litigation.

In *Phillips v. Harmon*, the Court stated, "*Baxley* correctly identified two concepts: that notice in the context of spoliation can be constructive, and that actual notice of contemplated litigation from the plaintiff to the defendant is not the only way that the defendant may reasonably foresee litigation, but rather, that the defendant's action may be relevant to that determination, that is, that such actions may demonstrate constructive notice." [*Id.* pp. 396-397.]

Defendants' expert acknowledges Defendants' constructive notice of potential claims. Dr. Sperry, the pediatrician retained as an expert witness by Defendant Dr. Kamishlian and adopted by Life Cycle, advised that a reason to preserve the tissue was for "evidence in a lawsuit." [Sperry Dep. pp. 29-30 (Ex. G)] Inasmuch as the Life Cycle Defendants did not provide the amputated portion of DJ's glans penis to a pediatric urologist (or to anyone else) for the purpose of reattachment, their actions point to the purpose for preserving it was as "evidence in a lawsuit." Life Cycle medical assistant Ms. Person seems to recognize this, as she testified "I don't know why [the tissue] was bagged, but I thought we just kept it because she might need it or -- I don't know, for, you know, for if she needed to take it to the hospital or the pediatrician

needed to examine it. But like I said I don't know. I just know we kept it." [Person Dep. p. 116 (Ex. F)] Further, Defendants' failure to provide the amputated portion of DJ's glans penis to an appropriate medical professional for attachment made it all the more critical that it be preserved for contemplated litigation that was reasonably foreseeable under the circumstances. Life Cycle's failure to isolate and maintain the device used on DJ also occurred even though Life Cycle was aware that the child was severely injured and that litigation about the injury was likely, especially given Ms. Willis' reaction to her son's injury immediately after the incident, including Ms. Willis' repeated requests to know what happened.

(c) Other Circumstances Evidenced Contemplated Litigation.

In *Phillips v. Harmon*, the Court also stated, "Notice that the plaintiff is contemplating litigation may also be derived from, i.e., litigation may be reasonably foreseeable to the defendant based on, other circumstances, such as the type and extent of the injury; the extent to which fault for the injury is clear; the potential financial exposure if faced with a finding of liability; the relationship and course of conduct between the parties, including past litigation or threatened litigation; and the frequency with which litigation occurs in similar circumstances." [*Id*. p. 397.]

Here, the immediate facts overwhelmingly pointed toward litigation, e.g., *the type and extent of the injury*—immediate unusual heavy bleeding from the tip of the penis; tip of the glans extended through the Mogen clamp; severed glans tissue adjacent to the pee hole; *the extent to which the fault for the injury is clear*—DJ was Life Cycle's infant patient and Ms. Jones admitted she severed DJ's glans penis ("tip of the glans extended through the Mogen clamp"); *the potential financial exposure if faced with a finding of liability*—this was recognized instantly by the nature of the injury—botched circumcision, resulting in permanent deformity and reinforced within days of the incident (*see* discussion in re: calls from Ms. Willis and meeting between Ms. Sigouin and

Ms. Willis, *supra*; and letters between Plaintiffs' counsel and Defendants' insurers, *supra*); *relationship between the parties*—healthcare providers/reliant patient; and *the frequency with which litigation occurs in similar circumstances*—Life Cycle/Ms. Sigouin is no stranger to allegations of medical negligence [Sigouin 1st Dep. pp. 218-219 (Ex. E) ("Do we have to go through all these [lawsuits] because we could be here another three hours)], and a similar case was litigated in Fulton Superior Court in 2006 (*D.P., Jr. v. Sonyika, et al..*, 2006 cv001125-J). Hence, before DJ's tissue was discarded and before the subject Mogen clamp was put back into service, Life Cycle Defendants should have reasonably expected that Ms. Willis would bring a claim related to her son's penile injury. Indeed, in the *Sonyika* case, Fulton State Court Judge Diane Bessen held that failure to preserve glans tissue severed during a botched circumcision could provide a basis for an award of punitive damages. (Court Order dated March 10, 2009, Ex. R).

B. Defendants Failed/Refused to Preserve the Amputated Portion of the Glans Penis, or to Document (Photograph) it Before it was Thrown Away and Failed to Identify and Hold the Mogen Clamp Used on the Infant.

DJ's glans tissue was in the Life Cycle refrigerator after Defendants were on notice of likely litigation involving that tissue, yet the tissue was discarded. Hence, the evidence is unequivocal that the Life Cycle Defendants failed or refused to fulfill their duty to preserve relevant evidence, i.e., the amputated portion of DJ's glans penis and the Mogen clamp used on DJ, pursuant to the legal requirements as set forth in *Phillips v. Harmon*; and they further failed or refused to document that evidence by examination, measurements, or video/photographs, before the actual evidence was thrown away or made unidentifiable. [Jones Dep. p. 19 (Ex. B)]

C. Five Factors Relevant to Deciding Sanctions for Spoliation of the Amputated Portion of the Glans Penis and Mogen Clamp.

In *Bridgestone/Firestone North American Tire, LLC v. Campbell*, 258 Ga. App. 767, 768-769 (2002), the Georgia Court of Appeals set forth five factors to use in deciding sanctions for

spoliation of evidence as follows: (1) whether the [party seeking sanctions] was prejudiced as a result of the destruction of the evidence; (2) whether the prejudice could be cured; (3) the practical importance of the evidence; (4) whether the [offending party] acted in good or bad faith; and (5) the potential for abuse if expert testimony about the evidence [was or] was not excluded. Accord, *Chapman v. Auto Owners Ins. Co.*, 220 Ga. App. 539, 542 (1996).

Each of the factors weighs heavily in favor of sanctions for Defendants' conduct:

(1) *Plaintiff has been extremely prejudiced as a result of the destruction of the evidence.* Plaintiff contends DJ and his severed tissue should have been emergently sent for reattachment surgery. Defendants counter that the tissue was too small to be reattached and therefore need not have been preserved. Defendants base their position on Ms. Jones' description of the salvaged tissue, which was discarded without examination by any experts in this case. Plaintiff, therefore, has been denied the very evidence that best demonstrates the extent of the amputation injury, and in the absence of the actual evidence the Life Cycle Defendants are free to claim, as they have, that the injury was minimal and the tissue was too small to reattach. In this regard, Plaintiff's cross-examination of Defendants' experts has been extremely compromised. The failure to preserve the tissue or inform the mother about it prior to destruction was found to be a basis for punitive damages award by Hon. Diane Bessen in the *Sonyika* case. Ex. R. Further, the Teleflex defendants obtained summary judgment based on the argument that Life Cycle could not identify the particular Mogen clamp used on the infant in the procedure in which he was injured.

(2) *The prejudice cannot be cured.* While Plaintiff's expert pediatric urologist has lawfully opined that had DJ and his glans tissue been sent to a pediatric urologist, the tissue could have been reattached, which would have mitigated DJ's injury (*see* Order denying Daffodil's

Motion for Summary Judgment), there is no way for Plaintiff to exactly and graphically show Ms. Jones' description of the tissue is wrong and that Defendants' experts reliance on Ms. Jones' description of the tissue is misplaced and unsupportive of Defendants' defense. Also, there is no alternative physical material to show the exact size, shape, and thickness, of the once preserved amputated tissue. With respect to the Mogen clamp, summary judgment was granted to the Teleflex defendants due to Life Cycle's failure to secure the subject clamp.

(3) *There was strong, practical importance of the evidence.* Key issues in this case are the extent of the injury/amputation and whether the amputated portion of DJ's glans penis could have been reattached which would have mitigated DJ's damages/problems. As noted in (2) above, Defendants destroyed the evidence that addresses these issues, which Plaintiff has the burden to demonstrate, and which will be the focus of much cross-examination of Defendants' experts, now hampered unjustly and grossly by DJ's glans tissue being destroyed before Plaintiffs could examine it. With respect to the Mogen clamp, identification of the Mogen clamp used was critically important to Plaintiff's ability to assert additional and alternative claims.

(4) *Defendants did not act in good faith.* Immediate preservation of the amputated portion of DJ's glans penis was the right thing to do. But, Life Cycle did not tell Ms. Willis about the tissue and Defendants destroyed the tissue without Plaintiff's consent. Furthermore, Defendants, during the months they had the tissue and while well aware of likely litigation, did not photograph it, or inform Plaintiff's counsel that it existed so that Plaintiff could obtain it for analysis and preservation. Moreover, Defendants destroyed DJ's glans tissue knowing litigation was contemplated and that the severed body part constituted evidence. Since litigation, Defendants have represented DJ's injury to be minimal, knowing they got rid of the critical evidence that could or would show otherwise. Further, the Mogen clamp used in the botched

procedure was not separated and preserved such that it could be analyzed, which is a violation of protocol common in the medical field. Given the foregoing, Defendants did not act in good faith and acted in bad faith by destroying DJ's tissue and recycling the subject device.

(5) *The potential for abuse of experts weighs against Defendants.* There is no comparable means of proof regarding the destroyed evidence, such that it allows for unjust and prejudicial abuse of Defendants' testimony by Defendants' experts in terms of opining about the size and viability of DJ's severed tissue. It is harmful to Plaintiff's case that her experts were not allowed to examine the severed tissue, yet Defendants' experts can opine the tissue was insignificant simply because Defendant Ms. Jones said the tissue was so small/thin. Achieving a fair and just result becomes impossible because Defendants destroyed the tissue evidence.

An analogous case is *Kitchens v. Brusman*, 303 Ga. App. 703 (2010), where the Court of Appeals reversed the trial court which failed to apply spoliation sanctions where the medical defendants failed to preserve a "tissue block" made from the surgical specimen taken from the patient, and relevant slides. The Court of Appeals held that the trial court abused its discretion by barring evidence of spoliation and refusing to fashion a remedy appropriate to the circumstances. The evidence went missing almost three months after defendants were aware of contemplated litigation. The trial court also erred by excluding the plaintiff's two expert witnesses because an inference could arise that the missing tissue block contained evidence harmful to defendants.

Similarly, in this case Life Cycle Defendants also failed to preserve critical evidence (DJ's glans penis tissue and the Mogen Clamp used to cause the injury) after they were on notice for months that litigation against them was contemplated and reasonably foreseeable. The glans penis tissue was preserved by the Life Cycle Defendants in saline and was preserved during the

time they became aware of contemplated litigation, and they subsequently disposed of it without notice to plaintiff or her counsel. Many of the defenses asserted in this case are now based upon Defendants' allegation that the glans penis tissue disposed of was not sufficiently large to re-attach. Their disposal of the glans penis tissue, which could have been examined and measured by the experts in this case, compel the imposition of sanctions by the Court. The remaining issue is—what sanctions are appropriate?

D. The Appropriate Sanctions Should be Imposed.

Georgia law abhors spoliation of evidence, and appropriate sanctions may include striking a Defendant's Answer,[2] or fact and issue preclusion, and/or a jury charge that the evidence would have been adverse to the spoliator. See *Chapman*, *supra* p. 541-542; *Campbell*, *supra* p. 768; R.A. *Siegel Co. v. Bowen*, 246 Ga. App. 177; and *Bouve & Mohr, LLC v. Banks*, 274 Ga. App. 758, 618 S.E.2d 650 (2005). Other appropriate sanctions are available and "the trial court has wide latitude to fashion sanctions on a case by case basis considering what is appropriate and fair under the circumstances. *Bouve*, 618 S.E.2d at 656.

Here, given Defendants' conduct, it would be appropriate to strike the Answer of the Life Cycle Defendants. Defendants, after they concealed the evidence from Plaintiff, concealed the spoliation of the evidence, which was only revealed through formal discovery during litigation.

[2] With regard to striking the Defendant's Answer, see *Delphi Communications, Inc. v. Advanced Computing Technologies, Inc.*, 336 Ga. App. 435 (2016) where Defendant's Answer was struck for spoliation where it failed to preserve a computer hard drive; and *Kroger Co. v. Walters*, 319 Ga. App. 52 (2012) where Defendant's Answer was struck for spoliation involving a videotape, and for concealing the spoliation.

In the event the Court determines to impose sanctions other than to strike the Answer of the Life Cycle Defendants, Plaintiff proposes the following sanction as an alternative:

A. That the Court instruct the jury at the beginning of the presentation of evidence that the Court has ruled and found:

(1) On October 21, 2013, after the circumcision incident, Defendant Ms. Jones had the amputated portion of DJ's glans penis placed in a container which was stored in refrigeration at the Life Cycle Defendants' facilities.

(2) Life Cycle Defendants did not inform Plaintiff Stacie Willis that a portion of DJ's glans penis had been amputated, or that it had been preserved. Life Cycle Defendants also failed to segregate the Mogen clamp used on DJ.

(3) Some months after the circumcision incident, an employee of Life Cycle Defendants threw away the amputated portion of DJ's glans penis that had been preserved. Defendants also failed to segregate and maintain the subject clamp or group of clamps which was used, or which most likely had been used on DJ. Life Cycle did not photograph, measure, or otherwise analyze DJ's severed tissue before they discarded it. Life Cycle did not photograph or analyze the Mogen Clamp used on DJ before they re-used it.

(4) Plaintiff Stacie Willis did not know that DJ's glans penis had been amputated, and that the amputated portion of his glans penis had been preserved and then thrown away, until September 20, 2016 when the deposition of Defendant Ms. Jones was taken.

(5) As a result of the Life Cycle Defendants destruction of the amputated portion of DJ's glans penis without informing Plaintiff Stacie Willis or her legal counsel, Plaintiff's medical expert witnesses were not afforded the opportunity to examine and photograph it. Further, Life

Cycle defendants prevented plaintiff's experts from identifying and examining the specific clamp used on DJ.

B. That at the trial, Plaintiff will be allowed to use, discuss, introduce evidence concerning, and cross-examine witnesses about, these findings. Defendants will be prohibited from challenging or disputing in any manner these findings, and will be prohibited from introducing any evidence, cross-examining anyone or arguing anything contrary to these findings. Further, other than properly introducing or referencing medical records, Defendants will be prohibited from introducing any evidence (including exhibits and demonstrative evidence), cross-examining anyone, or arguing anything related to the size, thickness, shape, color or viability of the amputated portion of DJ's glans penis. This includes a prohibition of any inquiry, testimony and argument that the amputated portion of DJ's glans penis was so traumatized, so thin or so small such that it need not have been preserved, or that it need not have been sent emergently to a competent medical professional, pediatric urologist or surgeon; or that Plaintiff need not have been informed of the amputation of a portion of DJ's glans penis; or that it was not viable for reattachment.

C. That the Court charge the jury consistent with these findings and the parties shall submit a proposed jury charge, including as part of the charge that any inferences about the severed tissue must be construed against Life Cycle, to the Court before the start of trial along with their other proposed jury charges.

IV. CONCLUSION

Due consideration of all the relevant facts and applicable law compel the conclusion that the Life Cycle Defendants committed wrongful spoliation of critical evidence in this case, and that they concealed the evidence and the subsequent spoliation of the evidence from Plaintiff.

WHEREFORE, for the reasons set forth, Plaintiff respectfully requests that the Court impose the sanction of striking the Answer of the Life Cycle Defendants; or in the alternative, that the Court impose the alternative sanction proposed by Plaintiff herein.

Respectfully submitted, this 23rd day of March 2018.

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **PLAINTIFF'S BRIEF IN SUPPORT OF PLAINTIFF'S MOTION FOR SANCTIONS FOR SPOLIATION OF EVIDENCE** was electronically filed with the Court using Odyssey eFileGA which will automatically send a copy to counsel of record, and that a copy was served upon counsel by depositing a true and correct copy in the U.S. Mail, first class postage prepaid, addressed as follows:

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This __23rd____ day of March 2018.

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