

1 STATE OF NORTH DAKOTA IN DISTRICT COURT
2 COUNTY OF CASS EAST CENTRAL JUDICIAL DISTRICT

3

4 Josiah Flatt by and through : Cass Co. No. 99-C-03761
his Natural Guardians Anita : Supreme Co. No. 20030273
5 Flatt and James Flatt, :
: PRETRIAL MOTIONS
6 Plaintiffs, :
: vs. :
7 :
8 Sunita A. Kantak, M.D., :
MeritCare Medical Center, and :
9 State of North Dakota, :
: Defendants. :
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12 TRANSCRIPT OF PROCEEDINGS

13 BEFORE THE HONORABLE CYNTHIA ROTHE-SEEGER
14 -- DISTRICT JUDGE --

15 Cass County Courthouse
16 Fargo, North Dakota
January 22, 2003

17

18 A P P E A R A N C E S

19

FOR THE PLAINTIFFS:

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FOR THE DEFENDANTS:

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P R O C E E D I N G S

(The following proceedings were had at 9:30 a.m., as follows:)

THE COURT: Let the record show this is the time set for a continued pretrial and motion hearing. This is on civil file 99-03761. This case is entitled Josiah Flatt by and through his Natural Guardians Anita Flatt and James Flatt, Plaintiffs, versus Sunita A. Kantak, M.D., and MeritCare Medical Center, Defendants. The Plaintiffs are not here in person but their attorney, Mr. Zenas Baer is here. Dr. Kantak is not here. Dr. Kantak and MeritCare Medical Center appear through Counsel Jane Voglewede and Angie Lord.

I have sort of a chronology or a list here that I'd like to follow. So I am going to kind of work my way through that. The first thing is that at our initial pretrial I raised the issue of bifurcation and asked counsel for both parties to in writing tell me whether or not your client would be in favor of bifurcating the liability from the damages issues. And I have received your responses, and both parties agree that bifurcation would not serve the interests of judicial economy for enabling a realistic and steady flow of testimony.

I've reviewed your responses, but just for purposes of the record, Mr. Baer, do you want to speak

1 any further to that issue?

2 MR. BAER: Your Honor, I would rest on the
3 pleadings so far. I do not believe that it would serve
4 the interests of judicial economy and that the need to
5 call the witnesses for both liability and damages would
6 duplicate costs greatly for the Plaintiff. So we would
7 rest on our pleadings. Thank you.

8 THE COURT: Thank you. Defense? Ms. Lord?

9 MS. LORD: Just briefly, Your Honor. We
10 reiterate the Defense position that in order for the
11 Plaintiffs to prove liability in this case they must show
12 that a risk actually materialized into an injury.
13 Therefore, that's a critical aspect of the Plaintiff's
14 liability phase and that is why bifurcation would not be
15 feasible in this case. Thank you, Your Honor.

16 THE COURT: Thank you. And just for your
17 information, what I intend to do because there was so
18 many motions and so many documents, is that I intend to
19 issue a written opinion and I expect that that will be
20 available some time on Friday. So I am not going to be
21 issuing rulings today from the bench, but I am going to
22 go through the motions and give you an opportunity to
23 state your positions on the record and then I will ask
24 any questions that I might have. But just -- just for
25 your information on the issue of bifurcation, after

1 considering the memorandums by the parties which oppose
2 bifurcation, the Court is not going to bifurcate the
3 issues. But that will be part of the written order that
4 you'll receive.

5 There are next motions -- the Plaintiffs have
6 filed a motion to amend the complaint to clarify the
7 party Defendant. In other words, to amend MeritCare
8 Medical Center to MeritCare Hospital, and the Defendants
9 have a -- what I call a related motion which is the
10 motion to dismiss the MeritCare Medical Center. So I am
11 considering those together. So, Mr. Baer.

12 MR. BAER: Thank you, Your Honor. If I could
13 just get my -- I had these in a different order than
14 apparently the Court is going to do it, but just bear
15 with me just a moment. I will get to that very quickly.

16 What we're seeking, Your Honor, is an order
17 amending the complaint to clarify a misnomer. And in the
18 complaint that we filed in this case the Defendant is
19 identified as the MeritCare Medical Center, as doing a
20 business in a hospital located on North Broadway. That
21 is the location of the hospital. It is the location of
22 the medical center. It is the location of the facility
23 that provided the room and board for Josiah Flatt and
24 Anita Flatt during their hospitalization there.

25 Now the Defendant states that the MeritCare

1 Medical Center is a trade name alone. That it is not a
2 legal entity. And that may well be. But it still -- the
3 fact of the matter is is that the MeritCare Medical
4 Center is the facility containing the hospital itself.
5 The hospital may be the legal entity, but the medical
6 center is, in fact, the place where the proceedings took
7 place.

8 We contend, and I won't restate the law in our
9 memorandum, that there will be no prejudice at all to the
10 MeritCare Medical Center or MeritCare Hospital in
11 allowing the amendment of the complaint. The same
12 attorney represents both the Defendant Kantak and also
13 the MeritCare Medical Center. During the course of the
14 entire preparation of this case MeritCare Medical Center
15 has appeared through Jane Voglewede and Angie Lord. Even
16 in all the responses to the request for admissions --
17 responses to the discovery requests they are responded as
18 attorneys for the medical center.

19 Now, if the medical center is indeed just a
20 trade name or a -- some sort of a facility, they really
21 can't be represented. If it's not a legal entity, it
22 can't be represented. But yet throughout this entire
23 process it was represented that the MeritCare Medical
24 Center was indeed represented by the Defense Counsel and
25 indeed responded to interrogatory requests through

1 responses by Jean Pladson, the Risk Manager for MeritCare
2 Hospital. We believe that the same person is allowed to
3 accept service of process for the medical center, that
4 being Jean Pladson who we have supplied the Court with an
5 affidavit of service of process by the sheriff's
6 deputies.

7 The MeritCare Hospital employed the nurses who
8 provided in some way the -- and facilitated the informed
9 consent process. The testimony of the nurses who were
10 employed by the MeritCare Hospital are that they would
11 solicit parents as to whether or not they want
12 circumcision done. There is some dispute on that. Some
13 say yes; some say no. Some say that's only the doctors
14 who do that. But there are some nurses who say, yes, the
15 nurses do, in fact, approach the parents about whether or
16 not they want surgery -- or circumcision and that is
17 solicitation of surgery. So that MeritCare
18 Hospital facilitated obtaining this alleged informed
19 consent by having preprinted forms, by having a protocol
20 for nurses to follow, and it -- also the MeritCare
21 Hospital accepts circumcision apparently from the
22 requirement to do surgery in a surgical theater as
23 opposed to in an unsterile environment.

24 So what we ask the Court and would rest on the
25 cases cited in the memorandum that we be allowed to

1 change the name of the Defendant to MeritCare Hospital
2 instead of the MeritCare Medical Center. And one other
3 issue is the respondeat superior. MeritCare Hospital
4 granted privileges to Dr. Sunita Kantak. MeritCare
5 Hospital has the ability to revoke those privileges if
6 the doctor does not follow proper medical protocol. And
7 to that extent, MeritCare Hospital is potentially exposed
8 to the liability of Dr. Sunita Kantak in the obtaining or
9 the lack of obtaining informed consent for this surgery.
10 We would ask the Court to grant the motion to amend the
11 complaint. Thank you.

12 THE COURT: Ms. Lord.

13 MS. LORD: Thank you, Your Honor. We oppose
14 the motion. First of all, it is not a clarification of
15 the party. MeritCare Medical Center is a trade name.
16 MeritCare Hospital is a corporate entity. It's a
17 separate party. The Plaintiffs' suggestion that
18 MeritCare Medical Center would go unrepresented in this
19 action has no merit. Of course a Defendant being sued is
20 going to appear by an attorney. In this case MeritCare
21 Hospital is a separate corporate entity and is a separate
22 party. This is not just requesting a clarification.

23 Secondly, Your Honor, whether or not to grant
24 an amendment to the complaint is discretionary with the
25 Court. But when an amendment would be futile, that

1 discretion is appropriate in denying the motion. In this
2 case such an amendment would be futile. MeritCare
3 Hospital is not the party responsible for obtaining
4 informed consent from a patient. It's well-established
5 under North Dakota law in the Kershaw decision that a
6 hospital is not responsible for that, the physician is
7 and we recognize that and Dr. Kantak denies any
8 wrongdoing whatsoever in this case. But she's the only
9 properly named Defendant in this action. Going forward
10 with the informed consent claim which is undisputed is
11 the only claim at issue.

12 Thirdly, Your Honor, I need to respond to Mr.
13 Baer's assertion that the nurses are soliciting
14 circumcisions at the hospital. What the nurses are doing
15 is merely documenting the consent that the parent has
16 given and documenting consent which Anita Flatt gave in
17 this case is certainly not solicitation.

18 And finally, Your Honor, MeritCare Hospital
19 does not employ Dr. Kantak. The only claim alleged
20 against a corporate entity in this case is one of a
21 respondeat superior. Mr. Baer has been advised in the
22 answer that was issued as long ago as January of 2000
23 that Dr. Kantak was not employed by MeritCare Medical
24 Center. He's been advised in discovery that MeritCare
25 Hospital and MeritCare Medical Center do not employ Dr.

1 Kantak. Her employer is MeritCare Medical Group. So
2 there's no reason that this amendment should be granted,
3 it is futile and it should be denied.

4 THE COURT: Ms. Lord, who is Jean Pladson?

5 MS. LORD: She is the risk manager for
6 MeritCare Health System. And MeritCare Health System is
7 the parent corporation for MeritCare Hospital and
8 MeritCare Medical Group which was also explained in the
9 answer.

10 THE COURT: Is Ms. Pladson an agent authorized
11 to receive service on behalf of MeritCare Hospital?

12 MS. LORD: She is.

13 THE COURT: Is she also an agent authorized to
14 receive service on behalf of MeritCare Medical Group?

15 MS. LORD: She is.

16 THE COURT: But it's the position of the
17 Defense that Dr. Kantak should be the only named
18 Defendant in this case?

19 MS. LORD: That's correct, Your Honor, because
20 the only claim in this case is the informed consent claim
21 which is only viable against the physician.

22 THE COURT: Thank you. Anything else, Mr.
23 Baer?

24 MR. BAER: Just briefly. I think that that
25 simplifies matters a little bit more than what is

1 appropriate. MeritCare Hospital in this case is not an
2 innocent bystander. MeritCare Hospital provides the
3 room, the facilities, the circumstraints, the tools with
4 which to perform the circumcisions. It employes the
5 nurses. It has developed forms for obtaining what they
6 like to call "informed consent." It is merely a form
7 which nurses are required to complete, and in effect what
8 MeritCare Hospital does is employ the nursing staff who
9 are at that point agents of Dr. Sunita Kantak in insuring
10 that there is informed consent given.

11 The testimony would show that the nurses are
12 the ones who deliver and drop off the forms necessary for
13 the informed consent, and if there are any questions by
14 the parents the nurses answer those questions at least as
15 some of the nurses testified. And if they have
16 additional questions the nurses can't answer, they refer
17 them to talk to the doctor in the morning. So it is not
18 quite so simple to say that Dr. Sunita Kantak is sitting
19 here on an island because she uses as agents to insure
20 that informed consent is obtained the employees of
21 MeritCare Hospital.

22 The other issue about the soliciting of
23 circumcision is a real issue. If you look at the minutes
24 of the pediatric group, MeritCare Hospital now pediatric
25 group chaired by at that time Dr. Shoemaker, they talk

1 about circumcision policy and what the circumcision
2 policy should be at MeritCare Hospital. They're speaking
3 on behalf of the hospital at that point in time. I
4 believe it was sometime in January of 1996. The
5 MeritCare pediatric group who are also on this MeritCare
6 Hospital pediatric department are talking about
7 circumcision, circumcision forms, the need to change the
8 policy of circumcision. And in January of 1996, the
9 minutes reflect that after doing research because there
10 is no economic impact on the doing of the circumcision to
11 the hospital and because there's so minimal time the
12 MeritCare -- or the MeritCare Hospital pediatrics group
13 would not recommend hospital policy be changed with
14 regard to circumcisions.

15 So the hospital is not an innocent bystander in
16 this process of obtaining informed consent. They are
17 symbiotically related and Dr. Kantak certainly does not
18 stand alone in obtaining informed consent. All of these
19 other pieces are part of that informed consent and relied
20 on by Dr. Kantak to fit into place for obtaining informed
21 consent. So we believe that there is a claim to be made
22 against the MeritCare Hospital.

23 The other issue I think the Court addressed.
24 My only inquiry was whether or not MeritCare Medical
25 Center was a trade name of MeritCare Hospital or the

1 MeritCare Medical Group. I think it's one or the other.
2 I just want to know who is -- is the MeritCare Medical
3 Center a trade name of MeritCare Health Systems or
4 MeritCare Hospital? Thank you. That's all I have.

5 THE COURT: Ms. Lord.

6 MS. LORD: Yes, Your Honor. This is a simple
7 legal issue for the Court. Since Kershaw versus Reichert
8 in 1989, the Supreme Court has said very simply that
9 under North Dakota law a hospital has no duty to obtain
10 informed consent for medical procedure.

11 THE COURT: Can you give me the cite for that,
12 please?

13 MS. LORD: Yes, Your Honor. It is 445 N.W.2d
14 16, and that was a 1989 decision.

15 THE COURT: Thank you.

16 MS. LORD: So for more than ten years this has
17 been the law in North Dakota that the only one that has
18 the duty to obtain informed consent is the physician and
19 not the hospital.

20 THE COURT: Anything else?

21 MS. LORD: No, Your Honor.

22 THE COURT: Okay. Anything else, Mr. Baer?

23 MR. BAER: Just very briefly on that issue.
24 Even assuming Kershaw does hold for that proposition, if
25 you have agents of the hospital working in concert with

1 the person with a duty to obtain informed consent and
2 that person who has the duty to obtain informed consent
3 relies on agents of the hospital, that doesn't change the
4 state law of North Dakota that it is the hospital's duty.
5 But it is the doctor's duty, but that doctor is relying
6 on agents of the hospital to obtain that informed consent
7 and therefore it is not contrary to state law and this
8 theory would not require development of a duty of a
9 hospital to obtain informed consent. We're just saying
10 the doctor has that duty. The doctor used as its agents
11 to obtain and facilitate obtaining informed consent
12 employees of the hospital who have been -- basically are
13 agents of MeritCare Health Systems. Thank you.

14 THE COURT: Anything else?

15 MS. LORD: No, Your Honor, it's well stated in
16 North Dakota. There's no case law to support Mr. Baer's
17 theory and the Kershaw decision speaks for itself.

18 THE COURT: Okay. Thank you. Next I would
19 like to discuss the Defendants' motion to dismiss and
20 exclude any evidence of claims by Anita Flatt and James
21 Flatt in their individual capacities and to amend the
22 caption. Ms. Lord.

23 MS. LORD: Yes, Your Honor. I do not believe
24 it's been disputed by the Plaintiffs that there are no
25 individual claims on behalf of James Flatt or Anita

1 Flatt. Therefore, we would request that no claims that
2 would be brought on behalf of them or any evidence that
3 would be supportive of their claims as opposed to Josiah
4 Flatt's claims be allowed in this case. There's been
5 some discussion during depositions and discovery in this
6 case about Anita Flatt's dissatisfaction with some of the
7 services and billing services that she received at
8 MeritCare. That has nothing to do with Josiah Flatt's
9 claim in this case and we would request that any evidence
10 of that be excluded by the Court.

11 We would also request that any of the
12 handwritten notes regarding communications about the
13 billing issue be excluded by the Court. I believe the
14 Plaintiffs have opposed that, arguing that Anita Flatt is
15 a pack rat and it shows that she kept everything that
16 she's received in this case including documents from the
17 hospital. And our position regarding the handwritten
18 notes is that she did not receive those from the
19 hospital. It doesn't have anything to do with documents
20 that she received from the hospital and therefore the
21 fact that they're related to her claim as opposed to
22 Josiah Flatt's claim they should be excluded.

23 With respect to Josiah Flatt's claim it's
24 simply an informed consent claim, and so the evidence
25 should be limited to that claim. Anita Flatt's

1 involvement as a party is solely in her capacity as a
2 guardian for her child and since Mr. Flatt is deceased
3 there is no need to amend or substitute the estate of
4 James Flatt as a party in this case. And we request that
5 the party be -- or the caption be amended to include
6 Josiah Flatt by and through his natural guardian Anita
7 Flatt.

8 THE COURT: Thank you. And, Mr. Baer.

9 MR. BAER: Thank you. First off I think it is
10 correct that we are not seeking to amend the complaint to
11 add a personal claim of James or Anita Flatt. That issue
12 was addressed in 2000. And we don't intend, nor have we
13 ever contended, that we want to amend the complaint to
14 include that personal claim. That having been said,
15 however, it does not flow that all of the documents that
16 the Defendant seeks to exclude are irrelevant to the
17 proceedings at hand.

18 One of the broad brush issues is the
19 handwritten notes of Anita Flatt on post-it notes, on
20 billings, on other various scraps of paper, some from the
21 hospital, some from the insurance billing summaries. All
22 of these documents are relevant to the issue of
23 credibility. And the credibility of the witnesses and in
24 particular Anita Flatt is at issue.

25 THE COURT: Are you saying, Mr. Baer, that if I

1 recall what I had read Ms. Flatt is going to testify that
2 she did not receive the booklet and this goes to her
3 substantiating that. That if she had received it at the
4 hospital, it would be among her notes or documents; is
5 that what you're saying?

6 MR. BAER: These are the types of notes that
7 she kept. A post-it note, a pink -- with notes on it
8 from conversations with the doctors, appointment notes
9 for Dr. Sawchuck. And these are relevant not only to the
10 issue of her credibility that she kept all of the
11 documents that she received, but also to the issue of the
12 damages. These substantiate that on August 1st, 2:40
13 p.m., first floor, desk 12, she had an appointment with
14 Dr. Sawchuck to evaluate what she perceived to be a
15 problem with the circumcision.

16 THE COURT: Wouldn't that be reflected in
17 Josiah's medical records?

18 MR. BAER: It may well be, yes. I think that
19 -- I don't think that is -- it might not be the 1st, it
20 might be the 2nd. But the relevance of these documents,
21 Your Honor, go to the issue of Anita Flatt's credibility.
22 All of the nurses will say that none of them remember a
23 thing about Anita Flatt or Josiah Flatt with the
24 exception of perhaps one, Kristi Burgard, who actually
25 delivered Josiah Flatt. None of them describe how Josiah

1 Flatt responded to the circumcision.

2 They will testify that it is the normal process
3 for these nurses to go around in doing rounds to give
4 each and every one of the parents a circumcision booklet.
5 Anita says she did not receive it. The nurses and the
6 doctor want the jury or the finder of fact to conclude
7 that Anita is lying as result of that, is saying that she
8 must have thrown it away. The inference that the Defense
9 wants the finder of fact to draw from the testimony is
10 that we have this normal procedure, we used that normal
11 procedure on March 7, 1997, and therefore it must have
12 been done. And you'll have not one witness, but fifteen
13 nurses come forward to say that that is their process.

14 And what we have here is one parent with one
15 birth experience. On March 7th and the days following
16 she kept every scrap of paper, every written note, every
17 document that was relevant to her son's care and
18 treatment. And she made complaints about the
19 circumcision as early as May of '97 when she had an
20 appointment. She was concerned about the asymmetry, and
21 it's noted in the records that the asymmetry is there.
22 She saved all of these documents. And what we want to
23 show is that she did, in fact, save the documents because
24 she can say, yes, I saved everything. But unless she can
25 show the jury what it is that she saved, it is less

1 persuasive to a jury to see that she saved all of the
2 appointment notes that she had, the billing records with
3 notes on them and so forth. And as much as the Defendant
4 would like to have you believe that the billing records
5 are not relevant to this claim, I beg to differ.

6 One of the factors to evaluate whether or not
7 you want to undergo a procedure is what's the cost? What
8 is the cost of the procedure? There is no suggestion
9 that Dr. Kantak ever discussed cost of the procedure with
10 James Flatt or Anita Flatt to determine whether or not
11 they wanted to have that procedure. And so to that
12 extent even those billing records that do not have
13 handwritten notes on them are relevant from that
14 standpoint. So we would suggest that it is premature to
15 try to exclude these documents.

16 Now, if the Defendant would take the position
17 that and represent to the jury, well, we don't know if we
18 gave Anita Flatt the document, we don't know whether or
19 not we followed our proper procedure that day and we
20 can't say for certain that anything was given to her,
21 that might change the dynamics as to whether or not these
22 scraps and bits of paper are relevant. But I don't think
23 they're willing to do that. They want to stand on the
24 position that they have fifteen witnesses who will come
25 here and talk to the jury about their standard procedure

1 and that they followed it on March 7, 1997, and ask the
2 jury how can fifteen nurses be wrong. And all that we
3 would have is the mother saying, "No, I do not remember
4 receiving that, but I saved everything." And if I can't
5 show the jury what it is she saved, it is prejudicial to
6 her position to say that she saved these scraps of paper,
7 she saved all of the documents, she saved the brochures
8 on polio vaccine, on diphtheria, tetanus and pertussis,
9 measles, mumps, rubella, hemolipase type B. She saved
10 all of these documents as part of the baby book,
11 basically all of those documents.

12 So we think that those documents are highly
13 relevant to the credibility of Anita Flatt and to test
14 the credibility of the nurses who say they don't remember
15 anything about March 7th but our procedure was to give
16 this booklet.

17 One final issue on the amendment of the
18 pleading to delete James Flatt. The reason I struggled
19 with that is that James Flatt will not be entirely absent
20 from the trial. His deposition was taken during the
21 course of discovery and his deposition will be read into
22 the record. If James Flatt's name is deleted from the
23 pleading, we need to then have some sort of preliminary
24 statement to the jury as to why James Flatt -- so it
25 doesn't give the impression that Anita did this on her

1 own. That James Flatt, the father of this child,
2 actually also pursued this claim. So it doesn't appear
3 as though and so that the Defendants can't argue about
4 where is the father in this proceeding? Who is the
5 father? Why isn't he here?

6 THE COURT: But won't there be testimony that
7 Mr. Flatt was killed in an accident?

8 MR. BAER: There will.

9 THE COURT: So won't that explain it to the
10 jury?

11 MR. BAER: I don't think it does because the
12 jury probably isn't going to know when this pleading or
13 when this complaint was filed.

14 THE COURT: And won't there also be testimony
15 about Mr. Flatt being there during the birth and whether
16 or not he and Anita discussed circumcision? I mean,
17 don't you think that will be -- come out in the
18 testimony?

19 MR. BAER: I expect it will when you -- when
20 the jury reads James Flatt's deposition. I am just
21 concerned about the perception that we have a deceased
22 father who brought this claim on behalf of his son being
23 dismissed as a name on a pleading. Because the way the
24 jury is going to see this is in the jury room when they
25 get their special verdict form they will see only Anita

1 Flatt versus the Defendants if the Court grants that
2 motion. We're all done with our case. The only exposure
3 that the jury is going to have to the pleading, to the
4 headline of this case is in that special verdict form
5 which will only identify Anita. That's my only
6 consternation, Judge. Thank you.

7 THE COURT: Ms. Lord.

8 MS. LORD: Thank you, Your Honor. I would like
9 to respond to the amendment to the caption first. Again,
10 Your Honor, I am simply looking at the law and Mr. Baer
11 does not have any law to support his position. Under
12 Rule 25(a)(1) of the North Dakota Rules of Civil
13 Procedure the standard is clear if the claim does not
14 survive death it is extinguished. In this case the
15 guardianship by Mr. Flatt of his son extinguished upon
16 his death. Therefore, an amendment to the caption is
17 appropriate.

18 Secondly, Your Honor, with respect to the
19 handwritten notes, Your Honor was correct that this
20 argument that Mr. Baer is making is in response to the
21 Defense position that a booklet and other documents were
22 provided to Ms. Flatt at the hospital. The documents
23 that Mr. Baer wants to submit into evidence were
24 documents created by Ms. Flatt after her discharge from
25 the hospital. And other documents he's referring to were

1 provided after Ms. Flatt's discharge from the hospital.
2 They do not go to the credibility with respect to what
3 documents were distributed by the hospital. And if that
4 were the standard a Plaintiff could get any documents
5 into evidence simply by claiming they are a pack rat and
6 that's not the standard that this Court follows. We'd
7 request that the handwritten notes be excluded to the
8 extent that they contain any relevant information. A
9 large part of the information is not disputed with
10 respect to when Ms. Flatt had appointments with the
11 various doctors or conversations with various people.
12 And that information can be brought out through testimony
13 as far as when appointments were made.

14 Mr. Baer also addressed the cost of the
15 procedure and that has not been an issue in this case
16 regarding informed consent and it's not part of the
17 informed consent issue that's before the Court. The cost
18 of the procedure is also stipulated. There's no dispute
19 about what the cost was or how much the Flatt's had to
20 pay for the procedure. And as we said before in the
21 motion to dismiss the individual claims, there is no
22 claim for special damages in this case. Any claim for
23 medical expenses related to the circumcision procedure
24 would be part of the Flatt's individual claims as opposed
25 to Josiah Flatt's claims and they simply have no

1 relevance in this informed consent case being brought on
2 behalf of Josiah Flatt, the child.

3 Thank you, Your Honor.

4 THE COURT: Anything else, Mr. Baer?

5 MR. BAER: Just very briefly.

6 I think -- I realized how -- or that the
7 argument of the Defendant that if a claim dies with a
8 decedent, you have to -- basically it's a real party in
9 interest rule. But we have never claimed that there was
10 a claim on behalf of James Flatt or Anita Flatt. We have
11 never claimed there is a claim on their personal behalves.
12 All they are is guardians.

13 Ms. Lord cited to Rule 25 that if a decedent
14 dies and the claim does not survive, then you have to
15 drop the claim. We're not claiming that there's a claim
16 here and never have. We're just identifying him as being
17 a natural guardian at the time the claim was filed of a
18 minor individual asserting that minor's claim.

19 THE COURT: But if the jury is told whether
20 through testimony or stipulation or whatever that Mr.
21 Flatt died I think it was May 2000 --

22 MR. BAER: May 2, 2000, I believe, yeah.

23 THE COURT: -- in a car accident, won't they
24 understand that he is not at this particular point in
25 time a named party? I mean that's just -- you know,

1 that's just common sense, is it not?

2 MR. BAER: I can't tell you what a jury's going
3 to do once they get into the jury room.

4 THE COURT: I don't see that that's going to be
5 such a problem for the jury. I mean, you know, if the
6 dad died, well, that's why mom is the only one here. I
7 mean, they're going to figure that out. You know, we've
8 got a 5-year-old child and a mother and a dad died in an
9 accident. Otherwise he'd be here with us. I mean I
10 don't think it's that -- that big of a deal. I just
11 think that the jury will appreciate those circumstances.
12 That's just my common sense approach tells me they will.
13 They'll understand that.

14 MR. BAER: Having been involved in jury trials
15 for a number of years, I am always mystified as to what
16 jurors pick up on and what their diversions could be.
17 And I just don't want the absence of James' name to be
18 that potential diversion. And it makes no difference to
19 the Defendants. It certainly wouldn't prejudice the
20 Defendants at all to have his name on there. That's all
21 I have.

22 THE COURT: Ms. Lord.

23 MS. LORD: Your Honor, the Plaintiffs did
24 change the caption after the motion to amend the
25 complaint had been denied, and at the pretrial hearing

1 that we had the last time Mr. Baer would not concede that
2 there were no individual claims on behalf of Ms. Flatt
3 and James Flatt and that is why we brought the motion by
4 the Plaintiff sua sponte changing the caption. This
5 motion is appropriate and they do concede that there are
6 no individual claims. And we'd request that the evidence
7 being submitted to the jury be consistent with the fact
8 that the only claim in front of the jury is the informed
9 consent claim being brought on behalf on Josiah Flatt and
10 the handwritten notes do not go to that claim.

11 Thank you.

12 THE COURT: Anything else?

13 MR. BAER: May I just address that issue about
14 the sua sponte changing the caption. The buck stops here
15 in my office. I take full responsibility for that. It
16 was an oversight on the part of my word processing
17 standpoint and my editing that that former pleading
18 heading was placed on it. I take full responsibility of
19 it. I did not intend nor did I mean to amend any
20 personal claims on behalf of James or Anita Flatt.

21 THE COURT: Okay. Thank you.

22 Next, I would like to discuss what is termed as
23 the Plaintiffs' objection to certain of the Defendants'
24 exhibits. And, Mr. Baer, you have objected to -- you
25 have got seven different items listed starting with

1 medical records. I would like to discuss that motion at
2 this time.

3 MR. BAER: Sure. The Defendants have disclosed
4 as exhibits medical records of both Anita Flatt and
5 Josiah Flatt from 1997. Actually, from Anita from way
6 back perhaps to the 1960's and up to her current prenatal
7 visits. They have also disclosed the entire medical
8 record of Josiah Flatt from the time of his birth until
9 the present day. We contend that the medical records
10 with regard to mom are irrelevant except those that deal
11 with the birth of Josiah Flatt. They are not relevant in
12 any of the proceedings before the Court. They would
13 simply be confusing. They would be time consuming to go
14 through and explain when they have no relevance. So with
15 regard to the records of Anita Flatt, we would want only
16 the records from the time Anita -- perhaps the prenatal
17 records would be okay, and I don't deny that they may
18 have some relevance. But from the prenatal records to
19 the point of discharge of Anita Flatt, that should be the
20 only record that is relevant at least with regard to her
21 medical history. And I don't think we are going to have
22 a dispute at least if we can isolate where those records
23 are on the foundation of those records.

24 The other records are the records of Josiah
25 Flatt. Now, Josiah Flatt has an eye condition that

1 required considerable medical treatment at the MeritCare
2 Hospital. He had surgery, was seen in the Hawley Clinic,
3 Detroit Lakes Clinic for his eye condition. That's
4 totally irrelevant to the issue of his penis, his
5 foreskin or the removal thereof without his benefit. It
6 would only confuse and tend to distract the jury from the
7 issue in this case.

8 Now, I believe the Defendant said, Well, it
9 shows that there have been no further complaints about
10 his penis or his foreskin. That's true because of Dr.
11 Sawchuck's review. Dr. Sawchuck, the urologist, in
12 August of 1997 advised the Flatt's that they would not --
13 or he would not recommend any further surgical
14 intervention until he was an adolescent or a teenager.
15 And, so obviously, there is going to be the absence of
16 any mention of penile problems after August of 1997. And
17 those issues have no relevance to the informed consent
18 claim. I might say that it is analogous. What the
19 Defense wants to introduce this for is to say, Well,
20 Josiah, you can't have had any injury because there is
21 the absence of any complaints in the medical records.

22 Where did I hear that argument before this
23 morning? With the handwritten notes. Those records --
24 the medical records of Josiah Flatt are totally
25 irrelevant and should be redacted from the exhibits. And

1 I believe those are the records that I have identified
2 from the bate stamp numbers on their proposed exhibits.

3 Now, the exhibits have not been marked or
4 identified by numbers so I am just going from a stack of
5 exhibits that were provided to me by the Defendants in
6 identifying the location of those, and I don't know if
7 the Court has had or was given copies of those exhibits.

8 THE COURT: I don't believe I have copies of
9 those.

10 MR. BAER: But they are in two stacks of paper.
11 They're bate stamp numbered and I ask that the Court
12 delete those numbers that are identified on the records
13 of James Flatt -- or, I'm sorry, Josiah Flatt under items
14 No. 1 and 2.

15 The other three issues -- or the other three
16 documents are pamphlets that the Defendants allege were
17 given to Anita Flatt. They're fairly hefty booklet type
18 of exhibits. And I don't know that I have them here
19 today, Judge. But there are three pamphlets that they
20 contend were given.

21 THE COURT: You're talking about the postpartum
22 after delivery, feeding your baby and breast-feeding your
23 baby.

24 MR. BAER: Yeah, those are three different
25 pamphlets that they contend were given to the Plaintiff.

1 They did not supply me with originals of those documents,
2 just photocopies. I don't know the publication date on
3 them, and so I just object to their introduction. If
4 they can prove that they were, in fact, given to Anita
5 Flatt, I think that's discretionary with the Court. But
6 similarly if -- none of the witnesses testified that they
7 gave them these pamphlets. The medical records although
8 there are provisions in the medical records to identify
9 teaching materials given, it doesn't indicate that any
10 teaching materials were given.

11 So these booklets or pamphlets may well be
12 booklets or pamphlets developed by MeritCare Hospital and
13 these are hospital documents, Your Honor, not Kantak
14 documents which goes back again to that who's the
15 defendant in this case. These are documents developed by
16 the hospital which they contend form the basis of
17 informed consent. Otherwise, there would be no reason
18 the postpartum delivery, feeding your baby,
19 breast-feeding your baby, those are elements of the
20 Defendants' case that they want the jury to infer that
21 they do all this teaching, the hospital not the doctor,
22 about circumcision. There are, I believe, in some of
23 those pamphlets references to a circumcised or a
24 non-circumcised penis.

25 Item No. 6 is the "Circumcision litigation.

1 Can you protect yourself?" This is a document that
2 apparently was obtained by Dr. George Kaplan down in
3 Southern California, and the document allegedly -- not
4 allegedly, it does. It's entitled -- it's a tri-fold, I
5 think, or one, two, three, four, five, six panel
6 tri-fold. "Circumcision litigation. Can you protect
7 yourself?" It apparently is published by doctors
8 opposing circumcision, GCD at U, dot, Washington, dot,
9 EDU. And it has information on there about resources,
10 organizations that oppose circumcision. What men are
11 saying about their circumcisions. And then on the other
12 side there are -- it looks like it is a reprint of news
13 media reports. One is "Judge refuses to dismiss
14 circumcision cases from Suffolk County, New York.
15 Precedent set for ment to sue for being circumcised as
16 infants."

17 And the one I think that the Defendants are
18 concerned about is the one in the middle panel that says
19 "Precedent set for parents to sue for lack of informed
20 consent." Dateline is Fargo, North Dakota. "North
21 Dakota Judge Cynthia Rothe-Seeger denied the Defendants
22 motion for summary judgment in the Flatt vs. Kantak
23 circumcision case which will be -- which will proceed to
24 trial on February 3, 2003." And then it goes on and
25 there is an -- allegedly a quote by attorney Zenas Baer

1 in there. I can tell the Court that I don't recall ever
2 giving a quote to doctors opposing circumcision. I don't
3 know who that quote would have been from or whether or
4 not it even is a quote.

5 This pamphlet apparently -- it has a date on it
6 October 2002, has no relevance to the issue of whether or
7 not Dr. Kantak gave informed consent to Anita Flatt on
8 March 6th or 7th of 1997. It is offered as an exhibit
9 simply to try to paint Defense Counsel and perhaps those
10 doctors who are called to testify on behalf of the
11 anti-circumcision movement as kooks, fringe operators.
12 It has no relevance in this litigation at all. So we
13 would ask that that be rejected unless the Defendants can
14 show some relevance to that exhibit.

15 Lastly, Your Honor, I think the next issue is
16 the portions of videotape. And this involves a situation
17 where we have a videotape that was disclosed to the
18 Defendants through the course of discovery, and this is a
19 bit hard to read but this is a side-by-side analysis. We
20 believe that the evidence on this videotape offered by
21 the Defendants is intentionally altered, intentionally
22 trying to deceive or mislead the finder of fact.

23 First, it is shortened which if that was all
24 that was done to it I would not have any objection to the
25 shortening and the attempt by the Defendants to do it. I

1 may not agree that it should go in as such because
2 there's relevance to the other issues. But it's
3 shortened from 39 to 17 minutes. The sequence of the
4 tape is altered. They're deliberately trying to alter
5 the sequence to show the lamaze instructor coming in
6 after the circumcision when in the original tape it shows
7 that it is before the circumcision took place.

8 The most offensive alteration of this videotape
9 is that the original has only five mentions of the word
10 circumcision. Two prior to circumcision, three after
11 circumcision. The defense offered videotape which is
12 seventeen minutes long increases that number magically to
13 eight. They replay and repeat three of the segments that
14 identify the word circumcision to make it appear as
15 though all they're talking about in this postpartum
16 hospitalization is circumcision. It is intentionally
17 trying to mislead the jury.

18 The evidence of this videotape should not be
19 allowed. And, Your Honor, we intend to introduce the
20 entire videotape from beginning to end with Anita Flatt
21 commenting on it from time to time. The other issues and
22 other portions of the videotape that were deleted or not
23 contained were Anita Flatt describing, oh, when Dr. Bro
24 was here this morning I expressed some displeasure. That
25 was the morning of -- or morning after the birth of

1 Josiah Flatt. So we would ask that the Court exclude the
2 Defendants' altered videotape of the Plaintiffs' exhibit.

3 The other issue -- and I'm sort of at a loss to
4 address them in any detail is that the Defendants
5 disclosed as exhibits illustrative exhibits of the penis,
6 but have never given me any indication of what that might
7 be. They have also disclosed that they may provide
8 enlargements of portions of the medical records of Josiah
9 and Anita Flatt. Again, they have not disclosed what
10 those might be so I can't address whether or not I would
11 agree or disagree with that. And similarly, I don't know
12 if I am going to use any enlargements of certain portions
13 of the medical records. I have not concluded that I will
14 as of yet, but, you know, I can't address those issues at
15 this point.

16 I believe that that addresses those issues in
17 the -- raised in my memorandum objecting to the defense
18 exhibits.

19 Thank you, Your Honor.

20 THE COURT: Miss Voglewede.

21 MS. VOGLEWEDE: Thank you, Your Honor. Let me
22 first address the Plaintiffs' objections to portions of
23 medical records. First of all, with regard to Anita
24 Flatt's medical records, the Plaintiffs' motion objecting
25 to these exhibits had no reference in it whatsoever to

1 Anita Flatt's records. That is something new today.

2 Furthermore, the exhibit that we provided to
3 Plaintiff marked as Exhibit 101 for the mother's records
4 contains only her hospital records for this
5 hospitalization. That's all we plan to introduce.

6 Secondly, with regard to the baby's records,
7 subsequent to this hospitalization, one of the key issues
8 in this case is the Defense position that this child
9 suffered no injury. One of the issues that those
10 subsequent records address is examinations by different
11 physicians who saw Josiah Flatt subsequent to his
12 hospitalization for examinations for various purposes.
13 Some were routine checkups, some were for purposes of
14 other medial care. And it is relevant and material to
15 the issue of injury for Defendants to be able to
16 establish that, for example, other providers when they
17 have examined this child have noted genitalia normal or
18 they have noted no chronic medical conditions.

19 One of the issues people may wonder about in
20 this case is are the Plaintiffs claiming that something
21 was done wrong? That there was some bad result in the
22 circumcision, and perhaps Mr. Baer is willing to
23 stipulate that Josiah Flatt has a normal circumcised
24 penis and let us consider that and see whether these
25 subsequent records are relevant. That has not been his

1 position or at least I am uncertain what his position is
2 on that so far. So the Defendants are entitled to be
3 able to demonstrate to the jury that there is no injury
4 on this child's genitals and these records go to that
5 issue.

6 In addition, I think I pointed out to the Court
7 that there is, for example, in the hospital record for
8 his eye surgery a consent form very similar to the one
9 that Anita Flatt signed on Josiah's behalf for the
10 circumcision. Likewise, she signed a consent form on his
11 behalf for another kind of surgery as she is entitled to
12 do as a parent and we think it's relevant for that
13 purpose. If the Court wishes, for efficiency purposes,
14 we could certainly go through those records of the eye
15 surgery and whittle them down and select only the pages
16 we think are relevant. We thought it was more efficient
17 to simply mark that whole set to make sure it was
18 complete, and then simply refer to those few portions of
19 it that we think are relevant to the case.

20 Secondly, Your Honor, with regard to the
21 pamphlets on breast-feeding, postpartum care and feeding
22 your baby, it came up for the first time at the first
23 pretrial conference in December that Plaintiffs plan to
24 introduce a number of other exhibits to demonstrate that
25 Anita Flatt is a pack rat. These documents are in

1 response to that theory. They demonstrate that -- what
2 MeritCare is establishing is that it provides to parents
3 not only a brochure on circumcision and a brochure called
4 infant care, which was provided much earlier to
5 Plaintiffs' Counsel, but other documents -- educational
6 documents for parents which are referred to in the
7 medical records in this case. Copies of those were
8 provided to counsel. I think they include the date. If
9 they don't, we can certainly get that. But these are
10 relevant to the issue of what information MeritCare
11 believes was provided to this mother during her
12 hospitalization.

13 With regard to the circumcision brochure, one
14 of Mr. Baer's theories at least as apparent through
15 discovery in this case has been that doctors just blindly
16 continue to do circumcisions and they won't listen to the
17 opposition. Dr. Kaplan, one of our experts in this case,
18 a pediatric urologist from San Diego, received this
19 brochure at a medical meeting that he attended. And it
20 will be his testimony that often at these meetings
21 different anti-circumcision groups will pass out fliers
22 and brochures. They want to make sure the doctors get
23 them and that's how he got this brochure. In addition,
24 the brochure states -- it makes specific reference to
25 this case as Mr. Baer pointed out and seems to quote Mr.

1 Baer about this case. So it is admissable for that
2 reason alone because it's information that the expert
3 obtained about the case from a source other than me. And
4 the document notes the only sure protection against
5 litigation is refusal to perform nontherapeutic
6 circumcision of boys, which I think is certainly relevant
7 for the jury to hear in this case.

8 With regard to the video, we represented to the
9 Court at the pretrial in December that we would be -- we
10 planned on using portions of a videotape which was
11 provided to us by Plaintiffs. The whole videotape is
12 thirty some minutes long. I have no objection whatsoever
13 to Mr. Baer playing the entire videotape for the jury.
14 He is welcome to do that. There is lots on the videotape
15 that isn't relevant to this case, so all we did was
16 select the portions that we wanted to use and provided a
17 copy of those excerpts to the Court and to Mr. Baer.

18 I take strong exception, Your Honor, on my
19 behalf, on behalf of Angie Lord, and on behalf of any
20 member of my staff who prepared these excerpts that there
21 was a spoliation of evidence, any attempt to mislead the
22 Court or any unethical conduct and I want that to be on
23 record.

24 THE COURT: I did --

25 MS. VOGLEWEDE: I wrote a letter, Your Honor,

1 to Mr. Baer after receiving these exceptions and I said,
2 "We provided you with the excerpts of the videotape. Are
3 you claiming that something was altered in the
4 videotape?" And I got no response.

5 THE COURT: I did view the videotape and it was
6 my impression that at least two excerpts were shown
7 twice. That was --

8 MS. VOGLEWEDE: Here's what that is, Your
9 Honor. The first section is the clips that relate
10 specifically to circumcision, and we can change this any
11 way it suites Your Honor or Counsel. The clips that
12 related to conversation about circumcision were
13 excerpted. Then there's a second section which I believe
14 is the -- all of the taping that was done on the second
15 day of hospitalization which Defendants plan to introduce
16 for a different purpose and that is for the condition of
17 the baby following the circumcision. We left that one
18 whole and unedited, because the purpose there is to show
19 that this is all the tape that the Plaintiffs have of
20 Josiah during that whole day and we didn't want to excise
21 any of that out. The earlier ones were clipped out so
22 that, for example, if we're using the whole tape, if I
23 want to wind it back and make sure we can establish what
24 Anita Flatt said, what her husband said, we're going to
25 be spending an awful lot of time doing that. If there's

1 a way that we can have those clips isolated we can do
2 that much more quickly. That was the only reason for
3 doing it that way.

4 And I -- I simply want to go on record, Your
5 Honor, that I am very offended by Plaintiffs' Counsel
6 asserting that Defense Counsel have somehow tried to
7 mislead the Court in this case.

8 With regard to illustrative exhibits, there
9 were two exhibits that we had not yet selected, had not
10 provided those to Counsel. He may not have opened the
11 materials that we gave him this morning. They are
12 included there. I still -- I have gotten from
13 Plaintiffs' Counsel I believe -- for sure two and I
14 believe three different exhibit lists over the past week
15 and a half. Each one of which has additional exhibits
16 listed and I think there are about seven exhibits that
17 are listed that I have not received copies of. There is
18 one -- we are still looking, Your Honor, for illustration
19 that shows as much as we think should be shown about the
20 normal anatomy of the penis. We'll provide that if we
21 can find one that is suitable as soon as we can to
22 Plaintiffs' counsel, but that should not be a problem.

23 With regard to enlargements of the medical
24 records, it's my understanding that Counsel is willing to
25 stipulate to the medical records in this case. He has

1 had copies of those records for three years as have we.
2 If we're stipulating to those records themselves and the
3 enlargements are merely being made to assist the jury, I
4 don't see why that should be an issue.

5 Thank you, Your Honor.

6 THE COURT: I wanted to ask you, Mr. Baer, and
7 Ms. Voglewede said something about being willing to
8 stipulate that -- I believe you were referring to Josiah
9 Flatt has a normal circumcised penis. I think those are
10 the words she used or something to that effect. Do you
11 want to stipulate to that?

12 MR. BAER: No.

13 THE COURT: Okay. I just wanted to be sure I
14 gave you that opportunity. Do you want to stipulate to
15 foundation for medical records?

16 MR. BAER: As long as I know what amount are
17 going to be there, I don't have a problem knowing that
18 these are the medical records. But I don't want to
19 stipulate to all of those medical records that are
20 subsequent to the circumcision, and if I could address
21 that issue I will address that issue.

22 And I want to apologize if I misspoke and
23 perhaps insinuated that the Defendants offered more of
24 Anita Flatt's medical records than were originally
25 proposed. It seems to me that I have received during the

1 course of discovery and have used as an exhibit, records
2 that go way beyond the prenatal and hospitalization for
3 the birth of Josiah on Anita Flatt. And if I am at
4 error, I apologize for that.

5 Now, the Defendant alleges that they need the
6 subsequent medical records because other medical doctors
7 have evaluated and examined Josiah Flatt and not noted in
8 the records that there is a medical problem with his
9 genitalia. And I think what they're referring to is that
10 the medical records when you do a full physical exam they
11 would have genitalia and then it would say normal. That
12 illustrates the precise issue in this whole case. The
13 medical doctors have been so ingrained and so routinely
14 they do this that they consider a penis exhibiting a
15 permanent scar with permanent redaction of the foreskin
16 to be normal. When, in fact, a normal penis is something
17 that they very rarely see.

18 THE COURT: So why don't you want that record
19 in then? You're objecting to it.

20 MR. BAER: I am objecting to it because it is a
21 collateral issue. If what they want to do is say that
22 Anita Flatt signed these consents for eye surgery, then
23 Anita gets to describe whatever that medical doctor told
24 her, described to her, exhibited by way of brochures,
25 videotapes, it brings in that whole collateral issue,

1 Judge. And not only if there are two different consents
2 in there I'll defer to the Defendants' review of those
3 records. But if are those consents, if you open the door
4 and allow that consent in, I need to be able to examine
5 Anita Flatt and perhaps even call the doctors who gave
6 that consent about what information was given to Anita to
7 make that decision. The point is not that we are
8 contending that Anita Flatt received inadequate
9 information to consent to eye surgery. That's not the
10 contention. The contention is that on March 7th of 1997
11 she did not get adequate information to provide informed
12 consent to authorize that procedure done on her. So I
13 think it gets way into collateral issues. And certainly
14 I might like to point out didn't you describe normal
15 genitalia, but I won't have that doctor here who did that
16 examination. And in order to examine the doctor or get
17 that point across I need to have that doctor who did that
18 evaluation at a subsequent time and place here on the
19 witness stand.

20 The other issue that I heard the Defense talk
21 about was that their reason for getting it in is that
22 Josiah Flatt suffered no injury because he has a normal
23 circumcised penis. Again, it's confusing what normal is
24 from a surgically altered penis on the date of birth.
25 Now, one of the underlying issues raised by the

1 Defendants in this case and one of the issues that she
2 asked me to stipulate to is that he had a normal
3 circumcised penis. That's not the case. He has
4 asymmetry diagnosed in May of 1997 which caused Anita to
5 call Dr. Montgomery. Doctor -- several other doctors
6 about addressing that issue and then finally Dr.
7 Montgomery made an appointment with Dr. Sawchuck to
8 evaluate it and the last part of our videotape shows baby
9 boy Josiah Flatt after he had been to Dr. Sawchuck's
10 office where Dr. Sawchuck ripped the foreskin that had
11 adhered or grown together with the glans penis away from
12 the foreskin. So there is very good evidence in the
13 medical records to show asymmetry which is a known
14 complication of circumcision which was not described by
15 Dr. Kantak in doing her informed consent speech at least
16 as contended by the Defendants.

17 I understand that the Defendants now want to
18 introduce those exhibits, the postpartum, feeding your
19 baby and breast-feeding, for the purpose of undermining
20 the credibility of the Plaintiff saying she saved
21 everything. But yet there is not one nurse that I have
22 deposed and I have deposed about fifteen nurses who will
23 say they gave any literature to Anita Flatt. And this
24 whole case, Judge, is very difficult to put my finger on
25 because all of the information about what was given to

1 Anita Flatt is in the hands of MeritCare Hospital nurses,
2 is in the minds (sic) of Dr. Kantak, is in the
3 perceptions, the visual perception, the hearing of the
4 screams of the baby while he is being circumcised and
5 those are in the hands of the hospital personnel. Not
6 one of the them has come forward to say, "Yes, I
7 specifically remember this baby. Yes, I remember he
8 screamed. No, he was quiet. No, he had a good take on
9 the Lidocaine." We're dealing with a hospital, an
10 institution, that is going to come here and say this is
11 our normal practice. We could not have done it any other
12 than our normal practice and therefore you should accept
13 this as being the truth. And what -- the Defendant,
14 again, is seeking to introduce these booklets unless we
15 have some information to say, yes, that was given to
16 Anita Flatt on that day, we think it should be excluded.

17 Lastly, -- I'm sorry, the circumcision
18 brochure. How something that is published in 2002,
19 October, has any relevance to what happened in March of
20 1997, I don't know. I don't think that Dr. Kaplan can
21 testify as to the accuracy of the content of this alleged
22 quote. The statement which is in all bold, the only sure
23 protection against litigation is refusal to perform
24 nontherapeutic circumcision of boys, I think goes right
25 into what the Defense wants their mantra to be and that

1 is, you know, the medical profession has done it all the
2 time. These people who object to it are just kooks. Why
3 else would 90 percent of the babies who are born in
4 MeritCare Hospital be cut at one day of age?

5 THE COURT: May I see that brochure, please?

6 MR. BAER: Sure. And I haven't seen the
7 original. I don't know what the original looks like.

8 (The Court examined the brochure.)

9 THE COURT: Thank you, Mr. Baer.

10 MR. BAER: Lastly, I would just like to address
11 the videotape. At the time I received Ms. Voglewede's
12 response and a letter asking about whether or not I
13 contended there were any alterations, I had not had the
14 time to study the two side-by-side. I studied the two
15 side-by-side on Monday of this week. At five in the
16 morning I got up and did a diary of the videos
17 side-by-side, and as close as I could the five cuts that
18 are on the original tape are identified on this screen.
19 The counter on the left shows on the original tape where
20 that discussion took place. The Defense video counter is
21 on the right-hand side and it shows where in the counting
22 system that clip took place.

23 So the five events took place. And in the
24 event there is a visit from the lamaze teacher in the
25 left-hand side, and it's between -- the visit from the

1 lamaze teacher is between these two events. The 1800
2 hours on 36 and -- or the 18 counter and on 37. On the
3 Defense video the lamaze teacher comes after the
4 circumcision has been performed. On the original video
5 the lamaze teacher comes before the circumcision is
6 performed. Now, I can only speculate why the Defense
7 wanted to cut and play with when the lamaze teacher was
8 there. And the Defense replays cut No. 3, cut No. 4, and
9 cut No. 5 in their videotape.

10 And without close observation of doing the
11 side-by-side you can easily conclude that all they talked
12 about is circumcision. And the tape goes back and forth.
13 Sometimes it has a time on it; sometimes it's identified
14 by the date. But it's inconsistent. But the original
15 tape is the way it was taped and it shows consistently
16 the time period within which events occurred. And the
17 Defense video is altered to a point where it
18 misrepresents the events that took place upon that
19 videotape. But I understand -- that was just in
20 response, but I understand the Defense perhaps is not
21 going to want to offer that and they will rely on the
22 original videotape. Thank you.

23 THE COURT: Ms. Voglewede, is that what you
24 intend to do?

25 MS. VOGLEWEDE: Is use the original?

1 THE COURT: Yes.

2 MS. VOGLEWEDE: We're quite content to do that
3 as long as the Court doesn't mind us having to rewind if
4 we need to do so for witnesses to identify what they
5 said, we have no objection to that at all.

6 And, I believe, Your Honor, that the segment
7 that Mr. Baer is referring to on this lamaze teacher is
8 at the beginning of that long segment that I mentioned to
9 you at the end where we show day two uninterrupted for a
10 different purpose and then the clips that had to do with
11 the circumcision statements. But it's the Plaintiffs who
12 want to introduce this tape also and I have no problem at
13 all with using the original.

14 THE COURT: Okay. Anything else?

15 MS. VOGLEWEDE: Just a couple of comments.
16 With regard to the consent form that Anita Flatt signed
17 for his eye surgery, the only purpose for which we want
18 to introduce that, Your Honor, is to show her capacity to
19 sign for him as a parent. Again, if Mr. Baer is willing
20 to stipulate that Anita Flatt as a parent has the
21 capacity to consent to surgery on behalf of her son, we
22 may not need that. But that's an issue that Plaintiffs
23 have disputed in this case and that's -- we're not
24 introducing it to go to the underlying procedure or
25 anything about the procedure but simply to do with her

1 capacity to sign as a parent.

2 With regard to the condition of Josiah Flatt's
3 penis, the fact that our claim in this case is that he
4 has had no injury, this might be a matter, Your Honor,
5 that you could take care of as a matter of law. Because
6 as a matter of law there is no expert testimony in this
7 case to show that there is any injury to this penis, any
8 abnormality from the way the circumcision was done. If
9 Plaintiffs are willing -- well, even if Plaintiffs are
10 not willing to stipulate to that, that's a matter the
11 Court perhaps could instruct the jury on. Tell the jury
12 the only issue in this case is whether the physician
13 obtained informed consent from the parent. There is no
14 claim that the procedure itself was done improperly.

15 With regard to the booklets that were given to
16 Anita Flatt, that were -- the other ones, the
17 breast-feeding and so on, I simply want to respond to Mr.
18 Baer's remark about the fact that none of the nurses
19 remember specifically what they did in this case for this
20 mom. And the reason the nurses don't remember this mom
21 specifically is because this was such a normal,
22 uneventful hospitalization which is the reason the nurses
23 will be testifying about what their normal procedures are
24 and what Dr. Kantak's normal procedures are which were
25 followed in this case.

1 The brochure on circumcision litigation will
2 not be offered to show the proof of -- excuse me, will
3 not be offered to show the truth of the statements that
4 are made about this case. And, in fact, Dr. Kaplan will
5 testify that he has no idea whether the comments made
6 about this case are accurate. However, he received it,
7 as I said, from -- at a medical meeting as material that
8 was passed out in a meeting, and they indicate that one
9 of the techniques of these people is to essentially tell
10 doctors the only way you can protect yourself from
11 getting sued is not to do circumcisions, period.

12 Thank you.

13 THE COURT: Mr. Baer, did you want to comment
14 on the Defendants' suggestion that there is no issue that
15 this procedure was done improperly, instructing the jury
16 --

17 MR. BAER: I would like to comment on that.

18 THE COURT: Okay. Go ahead.

19 MR. BAER: I'm just at a loss to understand how
20 the Defense can take that position when their own doctors
21 diagnosed asymmetry and also adherent foreskin to the
22 penis that had to be ripped away again in August.
23 Their -- their -- certainly their recommendation is: Let
24 it go, leave it alone until the boy matures. But it's a
25 mystery to me how the Defendants can take the position

1 that this was a normal, uneventful circumcision when the
2 medical records from May until August are replete with
3 concerns raised about the circumcision, the asymmetry of
4 it, and that that is why the mom got into all of this
5 discussion with the powers that be at MeritCare. So it
6 is not true that this was a normal circumcision and it's
7 a normal circumcised penis.

8 Secondly, I would like to briefly address the
9 issue raised by Ms. Voglewede on the issue of informed
10 consent. And, as I understand her position and the
11 hospital's position, is that she wants to introduce the
12 informed consent or the sheets that Anita Flatt signed
13 authorizing eye surgery on Josiah Flatt for the purpose
14 of establishing that Anita believes she has the parental
15 patriae authority to authorize that surgery. The
16 implication is that if she had the authority to do so for
17 eye surgery, she also had the authority to do it for
18 circumcision. There is, however, a big distinction to be
19 drawn.

20 One is that he was diagnosed with a medical
21 condition requiring surgical intervention to correct an
22 eyesight problem. That's the eye surgery. With the
23 circumcision, the diagnosis by Dr. Kantak was normal,
24 healthy male. There was no medical diagnosis to warrant
25 circumcision. The circumcision was not done for

1 therapeutic reasons. The circumcision was not done to
2 correct an abnormality. That is the distinction to be
3 drawn, and I think the allowance of those consents just
4 gets us down that path where we have to call those eye
5 surgeons to talk about, well, what is the medical reason
6 for doing this? And why do you do it at this age instead
7 of waiting until they reach the age 18? All of those
8 issues are going to come into the mix. They are
9 collateral issues. They should not be permitted in this
10 litigation.

11 THE COURT: I'm sorry to tell you that I have a
12 number of other motions and we need to get to them, and I
13 need to take a break. So I am going to have to start
14 cutting you off because we are running out of time.

15 MR. BAER: Okay. I was finished with my
16 rebuttal on that one, Judge. Thank you.

17 THE COURT: At this time we are going to take a
18 ten-minute recess. We are going to recess until 11:20.

19 The Court's in recess.

20 (A recess was taken.)

21 THE COURT: We are reconvened with all of the
22 Counsel again present.

23 The Court would like to next ask Counsel to
24 address the Defendants' motions to exclude Plaintiffs'
25 evidence and there's reference to the videotaped

1 circumcision procedures, pictures or photographs,
2 MeritCare meeting minutes, surgical instruments and
3 testimony relating to the technique of the circumcision
4 procedure. I am sort of putting it all together. So I'd
5 like you to address that and you can go through each of
6 those subparts if you would like.

7 MS. VOGLEWEDE: Thank you, Your Honor.

8 I will start with the two videotapes which
9 Plaintiffs would like to introduce of other
10 circumcisions. And our position, Your Honor, is that
11 there are three separate grounds for excluding those, any
12 one of which would be sufficient for the Court to exclude
13 those.

14 One of the major problems with these videotapes
15 is that even if they were relevant to the claim that's
16 really at issue in this case, authentication cannot be
17 accomplished. They cannot be demonstrated to be
18 substantially similar to the way Dr. Kantak performs this
19 procedure so foundation is lacking.

20 The first problem with them, however, Your
21 Honor, is relevance. I would remind the Court that
22 negligence in performing the procedure is not an issue in
23 this case. It's an informed consent case. There is no
24 qualified expert testimony that anything about the way
25 the procedure was done was done improperly. Compare

1 this, Your Honor, if you will, to a case about heart
2 surgery -- informed consent about heart surgery.
3 Apparently, Plaintiffs believe that a patient can only
4 consent to heart surgery after watching a video showing
5 the sternum retracted and showing the cauterization of
6 blood vessels and showing the hemostats in place or a
7 cervical diagnostic procedure. That a patient would have
8 to watch the entire procedure or a hemorrhoid repair, for
9 example. None of Plaintiffs' experts have contended that
10 watching a procedure before consenting to it is a
11 requirement of an informed consent.

12 And, in fact, Your Honor, even medical students
13 and residents who see procedures performed for the first
14 time or the first few times have to become acclimated to
15 that. Viewing these procedures are not necessary for the
16 jury to understand what's at issue here which is the
17 information that was exchanged between Dr. Kantak and
18 Anita Flatt. In other words, Your Honor, what matters is
19 not what the procedure looks like when it's done. It's
20 what the risks and benefits are of the procedure.
21 Watching these videotapes will not tend to prove or
22 disprove anything about what Dr. Kantak told Anita Flatt
23 about the procedure.

24 Set that issue now, Your Honor, aside. They're
25 not relevant. Even if somehow they could be demonstrated

1 to be relevant, the foundation is absent and simply can't
2 be provided. The first tape, the Barichello tape, which
3 I refer to as the Canadian tape, the one that was made in
4 Toronto, the videographer is the executive director of
5 Intact, an organization devoted to ending nontherapeutic
6 infant male circumcision. They require to get credit for
7 this tape if it's shown in public. Presumably, that
8 would apply during this trial. They would want to have
9 credit for this tape. The videographer has no medical
10 training. He has no idea if this procedure is similar to
11 Dr. Kantak's. He searched for doctors who are willing to
12 be taped and found only one. And then after the taping
13 he turned the tape over to the Canadian authorities to
14 try to prosecute the doctor for sexual -- criminal sexual
15 assault, and those charges were never -- no wrongdoing on
16 behalf of that physician was ever found. The doctor who
17 does it on the tape, the procedure is not identified.
18 And most importantly, Your Honor, Dr. Kantak has
19 identified in the affidavit we submitted to the Court
20 substantial differences between that procedure and her
21 own. The child was six months old. There is a big
22 difference in the way procedures are performed on
23 newborns and on non-newborns, and this was a non-newborn
24 child. There was no dorsal penile nerve block given
25 which is what Dr. Kantak uses, and in fact it's uncertain

1 if any anesthesia was given. No glucose pacifier. No
2 swaddling of the upper extremities. The separation of
3 the adhesions was done differently. The timing of making
4 the dorsal slit was done differently. The application of
5 the clamps was different. The manner of bringing the
6 foreskin through the Gomco was different. The waiting
7 times were different. That simply can't be presented to
8 the jury as a procedure the way that Dr. Kantak does it.

9 The second video, the Garrigus video or what I
10 refer to as, I think, the Texas video. Again, the
11 producer had no medical training, doesn't know if any of
12 the doctors depicted in that tape do it similarly to Dr.
13 Kantak. Doesn't know the name, training, or experience
14 of the doctor who did the Gomco procedure. And, by the
15 way, Your Honor, it shows two procedures which Dr. Kantak
16 doesn't do and which none of her pediatric partners at
17 MeritCare do. It was edited and the producer doesn't
18 recall what was edited out. There are, again, substantial
19 differences between the Gomco procedure and the way Dr.
20 Kantak does it. No swaddling was done. The particular
21 anesthetic and dosage are unknown. The manner of
22 injection of the anesthesia was different. The waiting
23 times are unknown because the tape was edited. The
24 manner of the use of the probe was different. Bringing
25 the foreskin through the clamp was done differently. The

1 manner of separating the foreskin and making the dorsal
2 slit were different. And the way in which the scissors
3 was used was different.

4 In addition, in both of these tapes the
5 physicians are talking. Those physicians are
6 unidentified people who would, in essence, would be
7 testifying at the trial and that simply is not
8 admissable.

9 The third ground, Your Honor, and again any of
10 these grounds alone would be sufficient to exclude these
11 tapes. And the third one is the danger of unfair
12 prejudice, confusion of the issues and waste of time.
13 The jury's gonna wonder, Why are we watching these tapes
14 of these procedures? Are the Plaintiffs alleging in this
15 case that Dr. Kantak did it the wrong way? And I remind
16 the Court that there is no qualified expert testimony to
17 show that in this case. And so then the jury asks, Well,
18 if she did it right and the issue is informed consent,
19 why are we watching these? They are offered -- they are
20 going to be offered by Plaintiff apparently simply to try
21 to inflame the jury, to illicit some negative reaction to
22 the circumcision procedure itself. And, in fact, that is
23 the stated purpose of the Intact video on their web site
24 is to discourage people from choosing circumcision. And
25 the second video, the educational one, contains a warning

1 message that says this is a highly graphic tape of a
2 circumcision.

3 One of the cases that is cited in our brief,
4 Your Honor, I think is instructive that in which the
5 Court excluded photos, these were merely photos of a
6 lesion, when it was not disputed that the lesion was
7 malignant and it didn't support the plaintiff on any
8 disputed issue of fact. The only disputed issue here,
9 Your Honor, relate to informed consent. So there is
10 nothing that these videos will help resolve concerning
11 the issues in the case.

12 I want to just briefly speak to the 33 photos
13 of an intact male foreskin that Plaintiff plans to
14 introduce. There is no foundation. We have no idea what
15 the foundation is for those and no relevance that we can
16 see and those come from a web site called sexually
17 mutilated child, dot, org, which advocates suing
18 circumcisers and ending newborn circumcision. There is a
19 digital animation of the foreskin in action from another
20 web site dedicated to opposition to circumcision called
21 circumstitutions, dot, com. Again, there is no relevance
22 to this and no foundation.

23 We have also objected, Your Honor, to other
24 evidence which we believe is unrelated to informed
25 consent, and primarily that involves all the surgical

1 instruments, the circumcision board, and detailed
2 testimony which Mr. Baer may illicit from various
3 witnesses about how the procedure is done and what's the
4 next step and what do you do next. We object to those on
5 many of the same grounds that we enumerated for the Court
6 regarding the videos. The technique, the tools and the
7 manner of doing the procedure are simply not in issue in
8 this case. For example, the Gomco clamp is introduced.
9 Why? I mean, the jury wonders is there some claim that
10 the clamp was used wrong here? Well, no, there isn't.
11 And there's no expert testimony that's even been
12 proffered on that issue. It raises the danger of
13 confusion in the jury's mind about, well, are they
14 alleging that it was done wrong and no such claim has
15 been made.

16 We have, Your Honor, one of the illustrative
17 exhibits that we provided this morning to Plaintiffs'
18 Counsel is a -- and I'll just show it to the Court. This
19 is a drawing. This is marked as Exhibit 129 of a
20 circumcision using the Gomco clamp. I don't think, Your
21 Honor, even that should be necessary in this case because
22 it's an informed consent case. If you determine that
23 there's some relevance that the jury needs to know
24 something about the nature of the procedure, an exhibit
25 along these lines would address that without all of these

1 attendant problems with the other exhibits Plaintiff
2 plans to introduce.

3 The same goes for testimony from witnesses.
4 It's my guess, Your Honor, that if that kind of testimony
5 is allowed about all of the steps of the procedure and
6 how it's done, which isn't relevant to the case, it
7 probably will double the length of this trial. That's my
8 expectation. They do nothing to illuminate the issue of
9 informed consent.

10 With regard to the -- did you want to hear
11 about the minutes of the meetings, Your Honor, now?

12 THE COURT: I do. Go for it.

13 MS. VOGLEWEDE: Cover them all.

14 THE COURT: Yep.

15 MS. VOGLEWEDE: I am not sure what issue is
16 even disputed for which Plaintiff plans to offer those.
17 The way that those minutes came out was following the
18 deposition of Dr. Craig Shoemaker about their decision of
19 the department to prepare this circumcision booklet.
20 And, indeed, the minutes support the fact that he did
21 prepare this booklet and that it was presented to the
22 department and it was adopted. The booklet itself has
23 the date on which it was issued. And here Plaintiffs
24 plan to introduce some of the minutes as late as 2000 or
25 2001, long after the events took place in this case.

1 That has no relevance to this. Anything that has to do
2 with reimbursement or billing has no relevance. Again,
3 the parents have no claim here on their own behalf that
4 includes medical expenses. So that's not even an issue
5 in the case. So I'm not certain what relevance those
6 minutes even have, Your Honor.

7 I will say this, if those minutes are
8 introduced -- for example, I think Plaintiffs' Counsel
9 made a reference to some -- one of the minutes that said
10 Dr. Miller has concerns about circumcision. What that
11 will require is for me to call any doctor whose name is
12 mentioned in the minutes and perhaps all the rest of them
13 in the department who attended the meetings to address
14 what was discussed, what all of those matters are about,
15 which have nothing to do with the informed consent issue
16 in this case.

17 I might raise, Your Honor, if I can, one
18 additional issue kind of along those lines. There has
19 been testimony in this case concerning some of the
20 practices and procedures of physicians other than Dr.
21 Kantak. For example, there have been questions about
22 another physician who is not a member of the pediatric
23 department and the fact that he did not use anesthesia
24 for circumcisions. I would ask the Court to exclude that
25 evidence. It's clearly not relevant to Dr. Kantak and

1 how she does the procedure. She used anesthesia in this
2 case and that's undisputed, and that clearly would raise
3 collateral issues. It would be submitted only to try to
4 prejudice the jury in some global fashion since it
5 doesn't relate to Dr. Kantak.

6 There have also been questions about other
7 physicians and how they document certain things. Again,
8 if the Court allows Plaintiffs' Counsel to go into those,
9 we will be trying many cases involving these other
10 physicians, bringing them in to explain their procedure
11 and why they do it, all of which is collateral to the
12 issue of Dr. Kantak.

13 THE COURT: Mr. Baer.

14 MR. BAER: Thank you, Your Honor.

15 THE COURT: And you did -- you did put in a
16 memorandum --

17 MR. BAER: I did.

18 THE COURT: -- in support of the videotape
19 evidence.

20 MR. BAER: Yes.

21 THE COURT: And also a reply memorandum
22 regarding the other issues which I have reviewed.

23 MR. BAER: And I would just like to briefly
24 point out for the Court on some of these issues.

25 The Defendant takes the position that all of

1 these exhibits, the Gomco clamp, the surgical tray
2 including the tweezers, the circumstraint, is not
3 relevant to the issue of informed consent. We take issue
4 with that and look at the standard for informed consent.
5 There is no doubt that Dr. Kantak, Dr. Shoemaker, and Dr.
6 Kaplan, all agree that there is a national standard when
7 it comes to obtaining informed consent.

8 In fact, the AAP says that the doctors have a
9 legal and an ethical duty to their child patients to
10 render competent medical care based on what the patient
11 needs, not what somebody else expresses as their desire.
12 Take the state statute. The state statute is exactly on
13 point to what is the national standard of the AAP. The
14 state statute requires a two-part test. First, if the
15 patient is a minor, would the parent in conjunction with
16 the doctor come to the reasonable conclusion that the
17 minor would choose this surgery if he were an adult. If
18 you can't make that decision, then you have to do what's
19 in the child's best interests. And all of these
20 evidentiary issues regarding informed consent must be
21 compared against that standard. And you would first ask
22 if it's in the child's best interests, is there a medical
23 reason to do it? Is there a therapeutic reason to do it?
24 And we don't think in the case of a circumcision that
25 there is.

1 The evidentiary issues, the demonstrative
2 videotapes, the surgical tools, etcetera, are relevant
3 and admissable because circumcision is the issue. It is
4 true that if a person is undergoing heart surgery and
5 nothing untoward happened and the heart was repaired,
6 there was a medical reason for it. We don't contend that
7 every informed consent requires a videotape instruction.
8 We have never contended that. That's been something the
9 Defendants have pulled out of whole cloth. These
10 videotapes are not videotapes to suggest that they had to
11 be shown to the parent in order to obtain informed
12 consent. That's not the purpose of the videotapes.

13 We contend that the circumcision is the issue.
14 We contend that under Jaskoviak, a 2002 Supreme Court
15 decision, the obligation of the doctor, in this case Dr.
16 Kantak, is to describe the therapeutic alternatives in
17 performing the circumcision procedure. In this case Dr.
18 Kantak did not describe the Plastibell procedure, did not
19 describe the Mogan clamp procedure; therefore, only used
20 the Gomco clamp and didn't even describe what she would
21 -- or how she would perform the procedure. And the point
22 is that in a situation where the medical community has
23 essentially passed off circumcision as just a little
24 snip, the medical community has hidden this procedure and
25 does not describe to the general public and to parents in

1 particular what the procedure is and that there's no
2 medical reason to do it.

3 What the circumcision -- the pain and pain
4 control are issues that are involved here. You have
5 syringes where they insert Lidocaine and there's pain
6 associated with that. Now, MeritCare and Dr. Kantak have
7 no recollection about how this procedure was done. The
8 Plaintiff has to be able to describe to the jury what was
9 done. If we just describe it as a circumcision, they
10 will be left with the thought that the medical community
11 has fed our society for years that it's just a little
12 snip, what's the big deal. What we want to do is show
13 the videotapes. The Barichello and the Garrigus videos
14 both accurately depict circumcision procedures. They
15 accurately depict a circumcision procedure using the
16 Gomco clamp.

17 Now, I am not one to say that these are
18 precisely the same as Dr. Kantak would do the procedure.
19 And if Dr. Kantak would invite us to videotape a
20 procedure, we might be able to, you know, exhibit to the
21 jury what Dr. Kantak's procedure is. But the effect is
22 precisely the same. It is the traumatic separation of
23 the foreskin from the glans penis using blunt
24 instruments, the crushing of the foreskin, the cutting of
25 the foreskin, and the further crushing with a Gomco bell

1 and cutting of the foreskin and then throwing it into the
2 trash.

3 There has been no suggestion that the
4 videotapes are inaccurate in their depiction of the
5 various types of circumcision procedures. They might
6 quibble about, well, I do this differently, I do that
7 differently, but what does that go to judge? It goes to
8 whether or not it is the obligation of the Plaintiff to
9 mirror exactly what was done by Dr. Kantak and that is
10 not the position. We can't recreate exactly what was
11 done with Josiah Flatt. Even if we were granted
12 permission to videotape Dr. Kantak doing a circumcision
13 procedure, we could not duplicate Josiah Flatt's
14 circumcision because as the nurses so aptly put it, we
15 don't know how babies are going to react with or without
16 Lidocaine. Some scream, some don't, some cry, some are
17 restless, some are still. And so the point is, we don't
18 know how Josiah reacted.

19 The videotape shows four different reactions,
20 and one with the Mogan clamp procedure that baby almost
21 sleeps through the entire procedure or is quiet through
22 the entire procedure which is described by the nurses on
23 numbers of occasions in their video -- or in their
24 depositions that they do act very differently. And the
25 circumcision video would unmask the procedure and show it

1 for what it is. That it is not just a little snip. And
2 this would provide -- there's no prejudice at all to the
3 Defendant in this case. The Defendant agrees it was done
4 with a Gomco clamp. Babies act differently to those
5 assaults of their human body.

6 Now, one of the issues raised by the Defendant
7 is that they have no relevance. Now, if indeed pain was
8 not at issue or damage is not at issue, then I can
9 perhaps see that the Defendants may have a point. But
10 the point is in this case Josiah Flatt experienced pain
11 as a result of that procedure.

12 THE COURT: But isn't that something that's
13 disclosed as something that normally occurs?

14 MR. BAER: No, no.

15 THE COURT: Seems to me I read that in a
16 booklet or something that that's --

17 MR. BAER: The booklet wasn't given to at least
18 my client.

19 THE COURT: Well, let me just -- and I can't
20 recall because I've read so much lately. Is there not
21 some place where it is disclosed that pain may be felt by
22 the child and that --

23 MS. VOGLEWEDE: Your Honor, in this case we
24 have more than that. We have Anita Flatt's own testimony
25 saying that she did ask Dr. Kantak about the pain and

1 that was discussed. We know it was --

2 THE COURT: And how to control it? How to
3 control pain?

4 MS. VOGLEWEDE: Yes, what they use in the
5 procedure. So we know that issue was discussed.

6 THE COURT: Okay. Thank you. Go ahead, Mr.
7 Baer.

8 MR. BAER: Having discussed that pain is much
9 different than being able to look at a forceps and seeing
10 that this forceps would squeeze, crush the vascular
11 system and that the Gomco clamp would crush the vascular
12 system to a point where it caused hemostasis.

13 THE COURT: I did look at the videotapes. I
14 looked at both the Barichello and the Garrigus. I did
15 look at them.

16 MR. BAER: Okay. And what we're saying is,
17 Judge -- all we're asking to do is to show the video to
18 the jury so that they know what a circumcision
19 procedure is. And if there is no pain, that's an
20 argument the Defendants can make.

21 THE COURT: But how does that relate to what
22 Anita Flatt knew or was told or what materials she was
23 given before or at the time she signed the consent form.
24 How does that relate to that?

25 MR. BAER: There was no description of the use

1 of these crushing instruments. There was only -- I mean,
2 Anita Flatt will testify that what she thought the
3 procedure was was just a little snip around the side.
4 That's what she will testify to. That she had no idea
5 they had to first remove the connection between the
6 foreskin and the glans penis. That she had no idea that
7 there was a risk of death involved in the circumcision.
8 She would testify -- and I just want to on the issue of
9 pain, Judge. Even though Anita Flatt testified in her
10 deposition that she asked about pain and her testimony
11 was that Dr. Kantak sort of minimized it, said we use
12 Lidocaine and didn't describe the pain, only described
13 what they use to control the pain. And it would be not
14 unlike a situation where you have an industrial accident.
15 If an industrial accident happened where you had a hand
16 crushed by a machine, would that machine be relevant for
17 the jury's determination of what the damages should be?
18 I think absolutely. It would be reversible not to
19 include or to exclude that machine that caused that
20 crushing.

21 THE COURT: But isn't -- isn't the pain
22 experienced to various degrees by different babies. I
23 mean, how can you say by showing an instrument to a juror
24 that that's going to convey to the juror what a child or
25 and infant would feel when that procedure or that

1 instrument is used. I mean, how do you correlate that?

2 MR. BAER: I think the way it is, Judge, is
3 that -- and you're correct. At least from the nurses'
4 depositions that I have taken, they all say babies react
5 differently.

6 THE COURT: They all vary.

7 MR. BAER: They all vary.

8 THE COURT: It's an individual thing.

9 MR. BAER: And so what we have is four
10 different babies undergoing circumcision. The jury would
11 be given four different reactions. One's sleeping, the
12 other one --

13 THE COURT: But the problem is the procedure is
14 not the same except for one that was --

15 MR. BAER: Two.

16 THE COURT: -- or two that was used and there's
17 all these other variables: Age, time, the anesthesia,
18 the time period of waiting. There's all those variables
19 so it's difficult to correlate that and apply it to
20 Josiah.

21 MR. BAER: Let's go into those variables,
22 Judge. The variables that they talk about, how do we
23 know they are variables? All we have is Dr. Kantak
24 saying I do it differently. How do I know? How does the
25 Plaintiff know that she does it differently? We are

1 basically conceding in saying, oh, because you snip
2 differently, do you think that makes it different to the
3 baby on how much it hurts? Do you think it makes a
4 difference because she uses a safety pin to puncture that
5 foreskin in two spots to draw it through? That makes no
6 difference. In the end result you have a cut penis.
7 That the end result is the same. And the fact that she
8 may administer Lidocaine differently is irrelevant
9 because --

10 THE COURT: So if the end result is the same,
11 why go into the procedure? If the end result is the
12 same, why show the four circumcisions then?

13 MR. BAER: Well, number one is that she has a
14 duty and an obligation to describe the alternatives to
15 the procedure and alternative methods of doing it under
16 Jaskoviak.

17 THE COURT: Don't you have experts that are
18 going to do that? Don't you have your doctors that are
19 going to tell about the various --

20 MR. BAER: Certainly.

21 THE COURT: Can't you do it in that manner?

22 MR. BAER: But they will be testifying as to
23 how it is performed, but it certainly does not convey the
24 -- the -- graphically show what is actually done with the
25 babies in the nursery out of the sight of the parents and

1 it does not show the procedure itself. There is some
2 bleeding associated with these procedures. There is
3 evidence of that on the videos. And we think that by
4 fighting this it is -- only serves to keep the procedure
5 hidden from the general public and from parents. And
6 there has been no suggestion that the videotapes
7 inaccurately depict the circumcisions performed using
8 various different methods. There has been some
9 suggestion that there may be a few nuance differences,
10 but that has not in any way detracted from the conveyance
11 of what this procedure is.

12 You know, the point I think has to be drawn
13 again that this procedure has been kept out of parents'
14 hands for years and years. It has been overlooked. Even
15 the testimony of the Defense experts say it was a
16 procedure that was routinely done without ever asking
17 parents in the '50's and in the '60's. And unless it is
18 drawn out to show what is really done in this procedure,
19 it leaves the jury -- and if they are from Cass County
20 and were born in Cass County by the testimony of the
21 witnesses, 90 percent of them had it done to them. So it
22 leaves sort of a void about what this procedure actually
23 is. And the pain is caused by the circumstraint, the
24 Gomco clamp, the forceps, the scissors, the safety pin
25 and the syringe. All of those things are things that

1 cause the pain to this child.

2 I want to talk about the minutes of the meeting
3 before I run out of time, before the judge cuts me off.
4 Part of the defense in this case is that they provided a
5 booklet on circumcision to Anita Flatt. Anita claims she
6 never received a booklet on circumcision. The minutes of
7 the meeting are relevant to show the closeness in time to
8 the development of this brochure and the birth, leading
9 to the inference that it may not yet have gotten up to
10 circulating on the nursery room floor.

11 THE COURT: Doesn't the booklet have a publish
12 date?

13 MR. BAER: It has a date on the reverse side:
14 12-96, revised 1-97. But that -- that -- we have no idea
15 when it was put into publication -- or into circulation.
16 The minutes stop after December 1996 saying we authorize
17 1,500 to go to print. There are no further minutes
18 indicating that they reviewed the revision. There are no
19 minutes that indicate, okay, it is now in the stream of
20 distribution. And so the minutes are relevant to show
21 the history of the publication of this pamphlet, and they
22 are also admissable to show and to judge the credibility
23 of the nurses who will come to testify about what the
24 procedure -- the common procedure is. The nurses, some
25 of them testified that they have been passing out the

1 same circumcision booklet for 15 years. And the minutes
2 of the meeting suggest there never was a booklet on
3 circumcision before this one was developed in 1996 or
4 1997. And so it comes in to judge the credibility of
5 those witnesses in their statement that they have been
6 passing out this same information for 15 years.

7 The other relevance, I think, Your Honor, is
8 that the minutes show consciously that the pediatricians
9 discuss the issue of circumcision and made a conscious
10 choice not to change that circumcision policy because
11 there was no economic impact on the hospital. In January
12 of '96 they made that conscious choice, and the inference
13 could be that the hospital and the pediatrics department
14 of the hospital decided we're not going to make any
15 change because we make money doing it. Why change the
16 circumcision policy because we are not getting nicked by
17 medicare and medicaid.

18 The issue about the 33 -- I will just go with
19 the animated foreskin. This is the animated foreskin
20 that they're objecting to and it fits right in with the
21 33 photographs of the normal penis. We've already heard
22 the Defense refer to an amputated scar-coated penis as
23 being normal. This is necessary to describe for the jury
24 how the foreskin works. Mind you, 90 percent of those
25 babies born in MeritCare are cut. There may be no

1 experience with the foreskin, and how are they then to
2 determine damages if they have no clue of what a foreskin
3 is or what it does. And this animation identifies the
4 operation of the foreskin for purposes of the jury, and
5 we would have a medical doctor identify that this is a
6 fair representation of a circumcision.

7 The 33 photographs are 33 photographs of the
8 natural male penis. They show the penis covering -- the
9 foreskin covering the glans of the penis. Now, I admit
10 that 33 perhaps is overkill, but certainly there is a
11 series of five photographs towards the end that show the
12 male penis and the zones of the penis and how much is
13 removed as a result of circumcision. Over 50 percent of
14 the covering of the penile shaft is removed as a result
15 of circumcision. With 90 percent of the babies born in
16 Fargo being cut, if we just talk about what a foreskin is
17 they're not even going to know unless there is
18 documentary evidence to show what a foreskin is.

19 And we don't know what Josiah would have looked
20 like with a foreskin. All we can do is go by what a
21 foreskin does and what the function is. We are not
22 attempting to show that this is exactly what Josiah would
23 have been like. We are --

24 THE COURT: How does that go to the issue of
25 damages if you're saying that's what it's relevant to.

1 How does that go to damages?

2 MR. BAER: Because it is the loss of 50 percent
3 of the covering of the glans penis. And unless the jury
4 can appreciate what that means, we can talk all we want
5 but unless we have a photograph to show here's the line
6 on this penis and when you have an erection here's where
7 it -- here's where all of that skin would be cut off.
8 And so what we're suggesting is that it shows what amount
9 of the loss occurs as a result of the circumcised -- or
10 the circumcision being done. These photographs would
11 also show the anatomy of the penis.

12 And it's interesting that the Defendants object
13 to the introduction of the drawings of the clamps, of the
14 photographs. Doctors are not even taught in medical
15 school what the purpose is of the foreskin. Doctors --
16 Dr. Kantak was never taught in medical school what the
17 purpose of the foreskin is. She was just taught how to
18 remove the foreskin without even knowing what its
19 function is, and that's the issue that we have to
20 overcome in arguing damages in a case like this, Your
21 Honor. Because obviously the 90 percent of people who
22 are circumcised are going to say I haven't felt any
23 untoward consequences as a result of being circumcised.
24 But they don't know. And unless they can see what it is
25 that they would be missing and what the function is and

1 how it works, it would prejudice the Plaintiff in
2 presenting this case.

3 All of these issues go to the issue of damages
4 as does the testimony by the doctors of the technique
5 used, the Gomco clamp and so forth. If we are to present
6 this case and just say that Josiah Flatt was circumcised,
7 end of story, the jury cannot form any conclusion as to
8 what was lost.

9 THE COURT: But aren't you going to have your
10 experts testify about the results?

11 MR. BAER: Absolutely.

12 THE COURT: Aren't you going to have your
13 experts testify?

14 MR. BAER: Absolutely.

15 THE COURT: Okay.

16 MR. BAER: I will have the experts testify
17 about what is lost.

18 THE COURT: Okay.

19 MR. BAER: But I think to aide their
20 presentation, we need a visual like a picture is worth a
21 thousand words. So I believe that that is highly, highly
22 relevant.

23 And the other issue that was raised by the
24 Defense is that the Plaintiff should be somehow forbidden
25 from asking questions of nurses on the information given

1 by Sunita Kantak. Now, all the nurses that have been
2 called and those that have just recently been disclosed
3 have testified that Sunita Kantak is more thorough than
4 any of the other physicians when it comes to
5 circumcision. And I asked about the reaction of babies
6 that Sunita Kantak circumcised versus other babies.
7 There's no difference. The reaction is the same. So
8 Sunita Kantak's technique of doing the circumcision
9 doesn't make any difference on that baby. But the point
10 is that some of these physicians still perform
11 circumcision without benefit of anesthesia at all.

12 THE COURT: But that's not what happened here.
13 That's not what happened to Josiah, right?

14 MR. BAER: That is true.

15 THE COURT: So why -- you know, this is about
16 Josiah and what happened to him and what his mother knew
17 or was told or what information she got before she
18 consented. This is not about whether or not the people
19 in this county should be circumcising their male
20 children. That's not what this case is about.

21 MR. BAER: I agree.

22 THE COURT: Well, --

23 MR. BAER: I agree.

24 THE COURT: But you're going there.

25 MR. BAER: Where I'm going, Judge, is this:

1 That the nurses said they can't tell if a child sometimes
2 has anesthesia or doesn't have anesthesia. The nurses
3 can't tell because the reaction of the babies is so
4 varied.

5 We don't know if Josiah Flatt was one of those
6 who screamed even in spite of the fact that he had
7 Lidocaine, even in spite of the fact that he was done and
8 circumcised by Sunita Kantak using all these techniques
9 which I didn't see in her deposition or in her affidavit
10 suggested that there was less pain associated with it.
11 It was minor techniques. But the issue is two-fold.
12 What was Anita Flatt given to make an informed decision.
13 And in order to understand that, Judge, to determine
14 whether or not a reasonable parent would place
15 significance on a risk as is the standard in the state of
16 North Dakota, we think the jury needs to know what
17 procedure and what the procedure is. How it is done.
18 How it is performed.

19 THE COURT: Is that what the national standard
20 says?

21 MR. BAER: That's what the national standard
22 says, yes. Jaskoviak says that as well. And so we think
23 it's relevant for those purposes.

24 I believe that that addresses those issues,
25 Judge. If I have overlooked something, I believe I

1 covered it fairly thoroughly in my reply memorandum and I
2 will rest on my reply memorandum with regard to those
3 other evidentiary issues. Thank you.

4 THE COURT: Okay. Ms. Voglewede.

5 MS. VOGLEWEDE: Very briefly, Your Honor. With
6 regard to the closeness in time issue on these department
7 minutes, as Your Honor is already aware, the booklet
8 itself has its publication date and revision on it. So
9 if Plaintiffs wants to argue from that, that it was
10 produced too closely in time to be out and distributed to
11 patients, he can certainly make that argument. But this
12 addresses that issue.

13 With regard to credibility of nurses, the
14 department minutes don't even go to that issue or any
15 issue regarding the nurses at all. They're simply not
16 relevant. The only thing that is relevant is the -- one
17 of the documents that we provided long ago to Plaintiff,
18 another booklet called infant care booklet discusses for
19 more than a full page circumcision and that was given
20 out. It has a publication date that was given out from
21 at least '93 on in its revised form and contained
22 discussion of circumcision. So that's an issue that
23 Plaintiff can get at in a lot of other ways. The
24 department minutes are not relevant, and all they would
25 do, Your Honor, is open up a lot of collateral issues

1 requiring us to call other physicians to address issues
2 that aren't related to Anita Flatt's case.

3 Plaintiff contends that he needs to introduce
4 the department minutes to show that MeritCare continued
5 circumcisions because they make money doing it. We don't
6 think that's relevant, Your Honor, because the charges
7 for the procedure aren't an issue here. But if somehow
8 the Court feels it's relevant, we'll stipulate to the
9 charges MeritCare makes for a circumcision. We don't
10 need the department minutes to do that.

11 With regard to the photos and this digital
12 reenactment, there are situations, Your Honor, where the
13 Court's discretion really counts and I would say this is
14 one of them. The Plaintiffs plan to call a pathologist,
15 who as I understand it one of his primary purposes for
16 testifying is to talk to the jury about the anatomy of
17 the penis and the function of the foreskin at length
18 probably. And that addresses, I think, the issues that
19 Plaintiff is concerned about.

20 THE COURT: Okay. I am going to review again
21 the documents so I am kind of cutting you short on this,
22 but I think I have received enough information on those
23 particular motions.

24 I did want to also ask the Defense Counsel,
25 there was a motion by the Plaintiff for individual voir

1 dire and that also relates to the Plaintiffs' proposed
2 jury questionnaire. I haven't seen a response in writing
3 from Defense.

4 MS. VOGLEWEDE: I think, Your Honor, we
5 included within our -- I am wondering if it's in on
6 the -- is it in the bifurcation? We did file a brief
7 on -- yes, we did file one on voir dire and --

8 THE COURT: Okay. If you did, I either
9 misplaced it or I haven't had a chance to look at it. So
10 give me your short version.

11 MS. VOGLEWEDE: Just briefly, Your Honor, our
12 position is as far as voir dire we believe that a
13 procedure that's been adopted by some other courts which
14 would work well here would be to have general open voir
15 dire, but to let the jury know -- for the Court to let
16 the jury know that if issues come up which are of such
17 personal nature that they are not comfortable discussing
18 them in open court that the Court will then take voir
19 dire privately or in camera. We object to the proposed
20 questionnaire proposed by Plaintiffs, and I know we filed
21 a brief because I recall listing the specific -- oh, Your
22 Honor, ours is entitled Defendants response to Plaintiffs
23 motion in limine in seeking individual voir dire and jury
24 questionnaire.

25 There are many, many proposed questions on that

1 questionnaire that we think are objectionable for a
2 variety of reasons. Some of them I think are far too
3 personal. They require the jury to give information
4 nobody ought to have to give in a case like this. Some
5 of them are simply not relevant to the issues involved,
6 the informed consent issue, they get into the female
7 genital mutilation issue and lots of other things. I
8 don't want to be part of that kind of a questionnaire and
9 we will simply object to it. If the Court thinks the
10 questionnaire would be helpful, I would certainly take a
11 stab at drafting something I think is appropriate. But I
12 think a general voir dire with the opportunity for
13 individual voir dire should be sufficient.

14 THE COURT: Mr. Baer.

15 MR. BAER: Just briefly. The point that we
16 need to strive for is obtaining a fair and impartial
17 jury. And fairness and impartiality in this case is so
18 intertwined with deeply held personal and cultural
19 beliefs that unless the Court allows individual voir
20 dire, there -- you run the risk of poisoning the entire
21 panel by an offhand remark or an inappropriate response.

22 THE COURT: Are you saying that whether or not
23 a prospective male juror has been circumcised goes to his
24 qualifications as a juror?

25 MR. BAER: I think it goes to the issue of

1 fairness and impartiality or whether or not he has
2 preconceived notions about the procedure itself. And I
3 refer the Court to that Ron Goldman article, the
4 psychological affects of circumcision.

5 THE COURT: Well, -- you know, you'd have to
6 just give me a little leeway here, but if your statement
7 that 90 percent of the males in this area are circumcised
8 shortly after birth is true, if you're saying that
9 circumcision disqualifies a juror --

10 MR. BAER: No, no. I'm not saying that. I'm
11 not saying that at all, Judge. Not at all. What I'm
12 saying is that I have talked to a lot of people about
13 circumcision, and I get variably several types of
14 responses particularly from males. One of the responses
15 is a very defensive, "How dare you suggest that I have
16 been somehow harmed as a result of the circumcision. I
17 have always been able to satisfy a woman." It's the
18 defensive, "How dare you do that." The other response
19 is, "Oh, my God, I didn't know about the procedure. Why
20 do they do that? I wish I wouldn't have done it to my
21 sons." And I think it is the response that says, "I
22 cannot even think of it as -- you know, I can't imagine a
23 situation where I could view a circumcised -- a small bit
24 of tissue, a little snip, as being a claim of relief."
25 Look at the one letter to the editor where the person

1 said it is absolute fallacy for doing that, and we have
2 to be able to explore those.

3 THE COURT: But isn't a more appropriate type
4 of question in the vein of to a prospective juror, Have
5 you had the experience of consenting to a surgical
6 procedure for yourself or someone else in your family?
7 And I'm just doing this off the top of my head. And if
8 they say, you know, No, fine. If they say, yes, you can
9 go into that. You know, how -- Did you find that to be
10 distressful? You know, What information did you get?
11 What were your circumstances like? Did you get to talk
12 to the doctor? Those kinds of things. That goes
13 directly to our issues. But whether or not a prospective
14 juror, particularly a male, has any information about
15 what you say are the psychological affects of being
16 circumcised, you know I think that's really pushing the
17 envelope.

18 MR. BAER: Let me, again, go back to the issue
19 about have you consented to a medical procedure for
20 somebody else. Usually that's a medical procedure where
21 there's a diagnosis, there's options given for medical
22 treatment. With circumcision it is not a medical
23 procedure. It is not indicated. It is surgery at the
24 request of a parent. And which one of the parents wants
25 to sit here and admit, yes, I did consent to that

1 circumcision and admit that it may have done harm. I
2 think without allowing us the opportunity to explore that
3 aspect it leaves a potentially prejudice jury that could
4 never under any circumstances find for the Plaintiff in
5 this case, and that is not what voir dire is for. We are
6 trying to get a fair and impartial jury, and in a culture
7 where worldwide only 3 percent of babies are circumcised
8 and two-thirds of those 3 percent are here in America
9 where we're trying to look at this issue of informed
10 consent and what would a reasonable parent want to know,
11 we need to know if those jurors have made that decision
12 and whether or not they could rethink if they made that
13 decision and said, yes, go ahead and circumcise. We need
14 to know if they can be open-minded and accept perhaps a
15 different view.

16 So to that extent I agree that, you know, some
17 of the questions might be, you know, redundant. But I
18 certainly think it would be very beneficial for us as
19 practitioners to get an advanced look at who we are
20 dealing with and make the flow of individual voir dire go
21 much more expeditiously.

22 THE COURT: Don't you feel that you may be
23 offending potential jurors by asking these questions?

24 MR. BAER: I think absolutely. I think just by
25 talking about this some jurors are going to be offended.

1 THE COURT: Well, --

2 MR. BAER: But, Judge, I would rather know that
3 before they are in the box than after I try the case
4 knowing that all of those are offended by it. That's the
5 dilemma.

6 THE COURT: Well, you chose your forum. You
7 chose the forum. You chose where to bring the case.
8 What case to bring. And so you're stuck with this.

9 MR. BAER: I understand. All I'm trying to do
10 is get a fair and impartial panel.

11 THE COURT: I do not understand why you need to
12 know if a male juror has been circumcised or a female
13 juror knows of any males in her family that have been
14 circumcised. I mean, why, for instance, would I have any
15 knowledge as to whether or not my grandfather or my
16 father were circumcised? I mean that is outrageous; do
17 you not agree?

18 MR. BAER: I believe that there are many people
19 who know whether or not their fathers or grandfathers
20 were circumcised, and --

21 THE COURT: As a part of a religious belief?

22 MR. BAER: No, no. Those that are
23 uncircumcised -- I mean, I have talked to many people.
24 They say --

25 THE COURT: They share it with the members of

1 their family? They talk about it --

2 MR. BAER: Yeah.

3 THE COURT: -- indiscriminately?

4 MR. BAER: I don't know about indiscriminately,
5 Judge. But this is not an easy topic to talk about,
6 Judge. I grant you that. And because it is so personal,
7 we think that it is necessary to do individual voir dire
8 to ensure that there is a fair and impartial panel and
9 that perhaps responses -- and I'm sure there's going to
10 be very strong emotional responses to any inquiry about
11 the issue of circumcision. Just talking about the
12 circumcision gives people, you know, chills down their
13 back. And so I think that individual voir dire is
14 necessary. Thank you.

15 THE COURT: Ms. Voglewede.

16 MS. VOGLEWEDE: Your Honor, I have given this
17 some thought because it is a -- it's a sensitive issue
18 and it's a -- I'm sure it can be awkward. I think it is
19 perfectly fair as part of voir dire to inquire about the
20 attitudes and beliefs of prospective jurors. That to me
21 is the fair game part. You can ask them what their
22 attitudes and opinions are about the circumcision. Then
23 if you inquire further and ask why. You know, why is it
24 if they say I am in favor or I am against you can ask
25 why. Some people may well volunteer, Well, I'm

1 circumcised and that's fine with me or I'm not and that's
2 the way I like it. And if they feel comfortable
3 volunteering that in open court, that's fine. But some
4 clearly won't. And, for example, if someone was opposed
5 to circumcision because they had a complication occur in
6 their family, they might not want to talk about that in
7 open court.

8 That's why I suggested that the Court let the
9 jury know that if there's any issue that they prefer not
10 to discuss in open court they would have the option of
11 doing it in camera. People do, I think, feel quite --
12 there's quite a variety of responses. Some people are
13 willing to talk about it in public and it doesn't bother
14 them a bit. Others it's a very private matter. This
15 would account for both types of people.

16 THE COURT: Okay.

17 MR. BAER: I think the danger in doing that,
18 Judge, is that my experience with jury panels is that
19 they're very reluctant to offer any information and
20 they're quiet. They do not want to be seen making a
21 wrong answer in the presence of others, and with an issue
22 that is so volatile as circumcision it seems to me that
23 it would be prudent to allow individual voir dire for
24 beginning to end so that they are not in the situation to
25 say, Well, is this something I want to talk about or not

1 talk about and just allow them the privacy individually
2 to talk openly about that issue.

3 THE COURT: Okay. There's one remaining
4 inquiry that I would like to make and that is an expanded
5 media coverage request has been received from Julie
6 Holgate at KVLV.

7 Mr. Baer, did the Plaintiffs have a position on
8 that?

9 MR. BAER: Yes, we do, Your Honor. We have no
10 objection to the expanded media coverage and would
11 encourage the Court to allow expanded media coverage with
12 the exception, however, of voir dire. We do not think
13 that the media should be given access to the potential
14 jurors and their responses to voir dire questions. But,
15 otherwise, we think it would be highly appropriate. And
16 I would just like to say that expanded media coverage
17 would provide the opportunity to not only try this case
18 but also give an opportunity to educate the general
19 public about circumcision. And we think that it would be
20 inappropriate not to allow expanded media coverage for
21 something that has such significant impact on the public,
22 medical care and treatment. And we do not think there's
23 any danger of prejudice to the Defendants nor the
24 Plaintiffs in this case.

25 THE COURT: Ms. Voglewede.

1 MS. VOGLEWEDE: Your Honor, Mr. Baer's comment
2 is introduced as one of the reasons for our objection to
3 the media coverage.

4 THE COURT: Yes, you did file an objection.

5 MS. VOGLEWEDE: And that is educating the
6 general public about circumcision is not the proper forum
7 for this case. This case is not supposed to be a vehicle
8 for changing attitudes and educating the public of what
9 circumcision is about. This is an individual malpractice
10 claim against an individual physician involving one
11 patient.

12 In addition, Your Honor, just given the nature
13 of this case it strikes me that this is a case where a
14 little understatement might be very welcome. And the
15 media will have access to the entire trial unless the
16 Court excludes them, for example, from voir dire. And it
17 simply strikes me, Your Honor, as a case where expanded
18 media coverage is not appropriate.

19 THE COURT: Just -- in your -- I guess it was
20 Ms. -- yeah, your response -- your objection you refer to
21 North Dakota Administrative Rule 21, and one of the
22 grounds that the Court can deny expanded media coverage
23 is, I believe, it's No. 2 in Section 4. It says "A
24 witness or party has objected and shown good cause why
25 expanded media coverage should not be permitted." Now,

1 in my limited research I find no cases in North Dakota;
2 is that what you found also?

3 MS. VOGLEWEDE: I don't know of any, Your
4 Honor.

5 THE COURT: Okay. So give me your response,
6 your good cause definition for this particular case. Why
7 do you think there is good cause shown?

8 MS. VOGLEWEDE: In my opinion, Your Honor, the
9 good cause deals with the nature of the case. This is a
10 case in which Mr. Baer has just stated moments ago that
11 one of the things this case will allow him to do is to
12 educate the general public about circumcision. If that's
13 his purpose -- and we're talking here about a
14 five-year-old boy. If that's his purpose, this is a case
15 which could easily turn into a spectacle with media
16 coverage based on both the nature of the case and the
17 intention of Plaintiffs' Counsel. I think that's good
18 cause. I think that -- that the access that the media
19 will have to the case as they generally would is clearly
20 sufficient to cover the issues, and I think there is that
21 danger of this trial turning into a spectacle and that's
22 inappropriate.

23 THE COURT: Mr. Baer.

24 MR. BAER: Thank you, Your Honor. It is
25 precisely the Defendants' assertion that a little bit of

1 understatement in this case is appropriate which is
2 highly offensive to me. The medical community has hidden
3 the screams of these babies behind curtains for a hundred
4 years. They don't allow parents to watch. They don't
5 allow observation. They don't do it under sterile
6 conditions. It is a money-making business for them. If
7 the Aipperspach case which is a child burning case or a
8 child molestation case in West Fargo gets expanded media
9 coverage, there is no reason why this case should also
10 not get expanded coverage because it does have general
11 community interest.

12 THE COURT: That was a criminal case, am I not
13 correct? The Aipperspach? Where a daycare provider or a
14 care provider for a child was alleged to have burned a
15 child in her care or something and she was charged
16 criminally, right?

17 MR. BAER: I believe so. But I concede that in
18 this case we have the allegation that a medical doctor
19 under the guise of medical treatment amputates a foreskin
20 without medical benefit. Now, if I took that child home
21 and used these same instruments to cut that baby's penis
22 off, I would be charged criminally and be called before
23 the court and my parental rights terminated. The fact
24 that this is a civil case is not a distinguishing
25 characteristic of whether or not the media has a right to

1 broadcast it. It is -- looking at the issue of
2 circumcision, I ran across a quote from the Bible that I
3 think is quite appropriate. Titus 1:10-11. For there
4 are many rebellious people, mere talkers and deceivers,
5 especially those in the circumcision group, they must be
6 silenced because they are ruining whole households by
7 teaching things they ought not to teach and that for the
8 sake of dishonest gain.

9 Circumcision has come into a multi-million
10 perhaps billion dollar industry in America. And yet 97
11 out of a hundred babies born in the world are not
12 circumcised. We have a higher infant mortality rate than
13 a lot of the other western countries do. This procedure
14 has been mystified and hidden from the general public for
15 a hundred years and this trial in this climate with this
16 venue should have as much coverage as the law permits.
17 Thank you.

18 THE COURT: Anything else?

19 MS. VOGLEWEDE: Nothing further.

20 THE COURT: Have we covered everything? I'm
21 done with my list. So if I have forgotten something,
22 please let me know.

23 Ms. Voglewede.

24 MS. VOGLEWEDE: Your Honor, I have just a
25 couple of housekeeping questions.

1 THE COURT: Yes.

2 MS. VOGLEWEDE: One, can you advise us what the
3 Court's trial schedule will be in terms of hours and
4 breaks.

5 Secondly, I believe the testimony of James
6 Flatt will be offered by deposition and does the Court
7 want the parties to submit in advance any -- the segments
8 to be introduced and any objections thereto?

9 THE COURT: Yes. Would that -- would you agree
10 to do that, Mr. Baer?

11 MR. BAER: I want the entire deposition
12 introduced.

13 THE COURT: Okay. Are there objections that
14 need to be ruled upon?

15 MS. VOGLEWEDE: I am not certain yet, Your
16 Honor.

17 MR. BAER: I didn't ask any questions, Judge,
18 because it was their deposition and I didn't object to
19 anything that I am aware of.

20 MS. VOGLEWEDE: We'll review that. I simply
21 wanted to know if the Court wanted to have any objections
22 in advance.

23 THE COURT: Yes, I would appreciate that.
24 Okay.

25 MS. VOGLEWEDE: And in your order, Your Honor,

1 will you be addressing the issue of evidence that
2 Plaintiffs might seek to introduce concerning the
3 practices of other physicians so that we know of that in
4 advance of opening statements?

5 THE COURT: Yes, I will address that.

6 MS. VOGLEWEDE: Okay.

7 THE COURT: Okay.

8 MS. VOGLEWEDE: Oh, Your Honor, you did ask
9 today for us to bring our three copies of the exhibit
10 list, but did you also want the Court's copies of the
11 exhibits themselves today? We have an extra set. We
12 just didn't bring them here to the pretrial.

13 THE COURT: Unless they have to do with the
14 motions -- and I think --

15 MS. VOGLEWEDE: A few of them may. So maybe we
16 should just have our set delivered this afternoon if
17 that's okay.

18 THE COURT: We don't have the medical records
19 of either Anita Flatt or Josiah Flatt. We have maybe
20 some portions, but we don't have the whole body of them.

21 MS. VOGLEWEDE: We'll have our -- the Court's
22 set of all of the exhibits brought over this afternoon.

23 THE COURT: Okay. Okay. Mr. Baer, anything
24 else that we need to go over?

25 MR. BAER: I don't have anything further,

1 Judge.

2 THE COURT: Okay. And I -- and I believe --
3 excuse me for interrupting. I believe you were to bring
4 me your proposed jury instructions. We did get some from
5 Mr. Baer this morning.

6 MR. BAER: Yep.

7 MS. VOGLEWEDE: We have ours here, Your Honor.

8 THE COURT: Yes. Great. You can just give
9 those to my clerk. Thank you.

10 So I will try to address these additional --
11 the trial schedule, the issue on practices of other
12 physicians, and all of the motions that we have
13 discussed.

14 We are going to try to get the written order to
15 you on Friday of this week.

16 Mr. Baer, I know your office is in Hawley; do
17 you want it faxed to you and then with a copy mailed?

18 MR. BAER: Sure. That would be fine.

19 THE COURT: Okay. And what would you like? Do
20 you want us to do the same for you?

21 MS. VOGLEWEDE: Yes, please.

22 THE COURT: Okay. All right.

23 Anything else, Mr. Baer?

24 MR. BAER: No, Your Honor.

25 THE COURT: Okay. Ms. Voglewede or Ms. Lord?

1 MS. VOGLEWEDE: One procedural issue. Does the
2 Court normally give a portion of preliminary instructions
3 to the jury?

4 THE COURT: I do.

5 MS. VOGLEWEDE: We had submitted I think --
6 submitted some as such.

7 THE COURT: Yes, I do. They're pretty standard
8 preinstructions, direct and circumstantial evidence -- I
9 can't recall them offhand, but I'll get you a copy of
10 those ahead of time if you would like.

11 MR. BAER: Okay.

12 THE COURT: Okay. Anything else?

13 MS. VOGLEWEDE: Nothing further.

14 THE COURT: Okay. Thank you. The Court's
15 adjourned.

16 (The above proceedings concluded at 12:34 p.m.)

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1 STATE OF NORTH DAKOTA)
2 COUNTY OF CASS)

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4 CERTIFICATE OF COURT REPORTER

5 I, Catherine Jorgensen, a duly appointed
6 Official Court Reporter,

7 DO HEREBY CERTIFY that I recorded in shorthand
8 the foregoing proceedings had and made of record at the
9 time and place indicated.

10 I DO HEREBY FURTHER CERTIFY that the foregoing
11 and attached 97 typewritten pages contain an accurate
12 transcript of my shorthand notes then and there taken.

13 Dated at Fargo, North Dakota, this 28th day
14 of December, 2003.

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18 _____
Catherine Jorgensen
19 Official Court Reporter

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