State of North Dakota

County of Cass

In District Court
East Central Judicial District

Josiah Flatt by and through his Natural Guardians Anita Flatt and James Flatt,

Plaintiffs,

v.

Sunita A. Kantak, M.D., MeritCare Medical Center,

Defendants.

PLAINTIFF'S REPLY MEMORANDUM TO DEFENDANTS' MOTION TO EXCLUDE VIDEOTAPES, SURGICAL INSTRUMENTS, MINUTES OF MEETINGS, AND OTHER "NON-INFORMED CONSENT RELATED EXHIBITS

Court File No. CV-99-03761

I. BIFURCATION

Plaintiff joins in Defendants' Memorandum seeking an Order denying bifurcation of liability and damages. Plaintiff believes that the issues are so intertwined, bifurcation would be prejudicial and not in furtherance of judicial economy. The Court should not bifurcate the issues of liability and damages, and rests on its previous Memorandum in support thereof.

II. EVIDENTIARY ISSUES

A. SUMMARY

Broadly speaking, the Defendants have brought Motions in Limine to exclude evidence including: videotape procedures of available alternative methods of circumcision (*Garrigus* and *Barichello* videos); a visual animation of a foreskin in action (Tr. Ex. 22, Z. Baer Affd. Ex. 9); minutes of meetings of the MeritCare Pediatrics Group, MeritCare Hospital (Tr. Ex. 18-20, Z. Baer Affd. Ex. 5-7), surgical instruments (Tr. Ex. 3, Z. Baer Affd. Ex. 2), 33 photographs of the

natural male penis (Tr. Ex. 21, Z. Baer Affd. Ex. 8), handwritten notes of Anita Flatt (Tr. Ex. 15, Z. Baer Affd. Ex. 4); and billing records (Tr. Ex. 8, Z. Baer Affd. Ex. 3)

The law on admissibility of evidence has been covered in the Memorandum in support of the introduction of the *Barichello* and *Garrigus* videos, which is incorporated herein by reference, and will only briefly be touched on here.

Relevant evidence is admissible. NDRE 402. "Relevant" evidence is any testimony, drawing, photograph, design or other testimonial or documentary evidence that will make an issue relevant to the proceeding more probable or less probable. NDRE 401. Relevant evidence can be excluded only if the Court finds the prejudice, confusion or waste of time outweighs the probative value. NDRE 403.

All of the exhibits are relevant to issues in dispute in this informed consent case. The videos are an accurate representation of the procedure performed on Josiah Flatt and the available alternative methods of performing circumcision. The tangible evidence aids in proving best interests of the patient, damages, pain, and aids in judging the credibility of the witnesses.

B. LEGAL ANALYSIS--STANDARD FOR INFORMED CONSENT

In an informed consent case, it is the duty of the doctor to disclose "the available choices with respect to the proposed therapy and of the material and known risks potentially involved in each". *Winkjer v. Herr*, 277 N.W.2d 579, 587 (N.D. 1979). In North Dakota, the Courts adopt an "objective" or "material risk" standard which is also referred to as the "patient rule". The test is whether the physician "disclosed all those facts, risks and alternatives that a reasonable person in the situation which the physician knew or should have known to be the plaintiffs would deem

significant or material in making a decision to undergo the recommended treatment . . ." *Jaskoviak v. Gruver*, 638 N.W.2d 1, 6, 7 (N.D. 2002).

"A patient's right of self-determination in [a] particular therapy demands a standard set by law for physicians rather than one which physicians may or may not impose upon themselves." *Jaskoviak* at 7, citing *Canterbury v. Spence*, 464 F.2d 772 (1972), cert. denied 409 U.S. 1064. The test for determining whether a "particular peril must be divulged is its materiality to the patient's decision: all risks potentially affecting the decision must be unmasked." *Jaskoviak* at 7.

In an informed consent case, a physician must disclose the general nature of the contemplated procedure, the material risk involved in the procedure, the probability of success associated with the procedure, the prognosis if the procedure is not carried out, and the existence and risks of any alternatives to the procedure. *Jaskoviak* at 7, citations omitted.

In determining what material risks need to be disclosed, the Courts apply a two prong test:

1. An examination of the existence and nature of the risk and the probability of its occurrence; and
2. A determination by the trier of fact [the jury] of whether the risk is the type of harm which a reasonable patient would consider in deciding on medical treatment.

Jaskoviak at 7, citing *Guidry v. Neu*, 708 So.2d 740 (L.A. Ct. App. 1997). Whether or not a risk is material to warrant disclosure is a function of the "severity of the potential injury and of the likelihood it will occur". *Jaskoviak* at 7. Ultimately a trier of fact must determine whether a

reasonable person in the Plaintiff's position would attach significance to the specific risk. *Jaskoviak* at 7.

C. APPLYING LAW TO EXHIBITS

Applying the law to the specific items of evidence offered, it is clear that they are all admissible.

1. VIDEOTAPES - SURGICAL EQUIPMENT

Defendants object to the introduction of the *Barichello* video and the *Garrigus* video largely based on Dr. Kantak's Affidavit indicating that she uses a different technique in doing the circumcision. Although it may be true that Dr. Kantak uses a different technique in performing circumcisions than is depicted in the video, the technique shown in the video does not deviate from the national standard of care. There is nothing in Dr. Kantak's Affidavit that suggests the physicians who are videotaped on either the *Barichello* video or the *Garrigus* video departed from the accepted national standard of care in performing a circumcision using alternative surgical techniques. Only if we had a video of Dr. Kantak performing a circumcision on Josiah Flatt would Plaintiff be able to meet the threshold argued by Defendant. Perhaps Dr. Kantak will invite Plaintiff to video her next circumcision, so we can have a more accurate depiction of the procedure.

(a) National Standard of Care.

Dr. Kantak has admitted the applicable standard of care for the obtaining of informed consent is set forth by the American Medical Association in its March 1981 Statement. (S. Kantak Depo. pp. 104-105, and Depo. Ex. 7 and 8, Z. Baer Affd. Ex. 10) The applicable standard for obtaining informed consent requires Dr. Kantak to allow the patient (in this case

Josiah Flatt) to make his own determination on treatment. The standard of care states that it is the physician's obligation

> "to present the medical facts accurately . . . to the individual responsible for the patient's care and to make recommendations for management in accordance with **good medical practice**. The physician has an ethical obligation to help the patient make choices from among the **therapeutic alternatives consistent with good medical practice**. Informed consent is a basic social policy for which exceptions are permitted: (1) where the patient is unconscious or otherwise incapable of consenting and harm from failure to treat is imminent; or (2) when risk-disclosure poses such a serious psychological threat of detriment to the patient as to be medically contraindicated. **Social policy does not accept the paternalistic view that the physician may remain silent because divulgence might prompt the patient to forego needed therapy.** Rational informed patients should not be expected to act uniformly, even under similar circumstances, in agreeing or to refusing treatment."

(AMA Policy Finder E-8.08 Informed Consent issued March 1981, (bold supplied), S. Kantak Ex. 7 and 8, Z. Baer Affd. Ex. 10).

More specifically and more to the point, Dr. Sunita Kantak, as a member of the American Academy of Pediatrics (AAP), follows the standard recommendations of bulletins issued by the AAP. (S. Kantak Depo. pp. 108-109, Z. Baer Affd. Ex. 10) The AAP has issued a policy statement on **Informed Consent, Parental Permission, and Assent in Pediatric Practice**. **RE9510**, Pediatrics Vol. 95, No. 2, February 1995. The AAP Statement on Informed Consent is

particularly applicable in the context of circumcision. The use of "proxy consent" according to the AAP Statement,

> "poses serious problems for pediatric health care providers. Such providers have **legal and ethical duties to their child patients to render competent medical care based on what the patient needs, not what someone else expresses**. Although impasses regarding the interests of minors and their expressed wishes of their parents or guardians are rare, the pediatrician's responsibilities to his or her patient exist independent of parental desires or proxy consent."

(Informed Consent, Parental Permission, and Assent in Pediatric Practice (RE 9510), S. Kantak Depo. Ex. 12, Z. Baer Affd. Ex. 10) The applicable standard in obtaining proxy consent requires an evaluation of whether or not the surgical removal of the foreskin was based on the patient's [Josiah Flatt's] need, not what their parent expresses.

Dr. Shoemaker, a defense expert, also admits that the AAP Statement (S. Kantak Depo. Ex. 12, Z. Baer Affd. Ex. 10), is an accurate statement of the standard of care as it pertains to informed consent. (Shoemaker Depo. pp. 29-32, Z. Baer Affd. Ex. 11) Dr. Shoemaker goes one step further and describes the various elements necessary for obtaining informed consent from a parent. If a patient is an infant, a medical doctor cannot do a procedure on the patient (the infant) "unless [Dr. Shoemaker] concluded it was in the best interest of the child to do the procedure". (Shoemaker Depo. p. 31, Z. Baer Affd. Ex. 11) The elements of informed consent would require the following:

1. Provision of information: Patient should have explanations, in understandable language, of the nature of the ailment or condition; the nature of proposed

diagnostic steps and/or treatment, and the probability of their success; the existence and nature of the risks involved; and the existence, potential benefits, and risk of recommended alternative treatment (including the choice of no treatment).

2. Assessment of the patient's understanding of the above information.

3. Assessment, if only tacit, of the capacity of the patient or surrogate, to make the necessary decision.

4. Assurance, insofar as possible, that the patient has the freedom to choose among the medical alternatives without coercion or manipulation."

(Informed Consent, Parental Permission and Assent in Pediatric Practice (RE 95-10), S. Kantak Depo. Ex. 12, p. 2, Z. Baer Affd. Ex. 10) (Shoemaker Depo. p. 33, Z. Baer Affd. Ex. 11)

Relevant to the Doctrine of Proxy Informed Consent is an assessment that the parent knows the nature of the "proposed diagnostic steps and/or treatments". A circumcision is a specific surgical procedure performed on healthy newborn infant males, not a procedure for therapeutic purposes--in short it is a cosmetic procedure. One cannot call it "elective" in the true sense because the baby does not elect to have his penis cut.

Dr. Shoemaker agrees that the standard of care in the medical practice can be modified by legislation. (Shoemaker Depo. pp. 58-59, Z. Baer Affd. Ex. 11) Dr. Shoemaker was, at the time of the deposition, February 27, 2002, unaware of any North Dakota law concerning informed consent.

(b) Statutory Informed Consent Standard-N.D.C.C. 23-12-13.

Remarkably, the Statements of the AAP and the AMA tract very closely the statutory law

entitled “Persons Authorized to Provide Informed Consent to Health Care for Incapacitated Persons--Priority” (N.D.C.C. 23-12-13). The informed consent law sets forth a system for medical professionals to obtain “informed consent”. Section 1 deals with the priority of individuals authorized to give “proxy consent” to an incapacitated individual which includes an infant. Subd. 3 provides that

> “before any person authorized to provide informed consent pursuant to this section exercises that authority, the person must first determine in good faith that the patient, if not incapacitated, would consent to the proposed health care. If such a determination cannot be made, the decision to consent to the proposed health care may be made only after determining that the proposed health care is in the patient’s best interest.”

N.D.C.C. 23-12-13.

Accordingly, under North Dakota statutory law, a material issue for the jury’s determination is whether or not Josiah Flatt, if not incapacitated, would consent to the circumcision, or, and perhaps more importantly, was the circumcision in the patient’s “best interests”. In order to determine whether or not the surgery would have been consented had Josiah Flatt been old enough to consent, the jury needs to understand the procedure, understand what surgical equipment is used, and determine whether or not a decision to circumcise, for no therapeutic reason, is in Josiah Flatt’s “best interests”. A video describing the procedure is the best teaching tool to be used.

The informed consent statute, N.D.C.C. 23-12-13, was amended during the same legislative session as the Female Genital Mutilation Law codified at 12.1-36-01, (August 1995),

was enacted. It is a felony for a medical doctor to surgically alter healthy female genital tissue.[1] The passage of the State law banning alteration of female genitalia is, according to Dr. Shoemaker, an example of the standard of medical practice being altered by legislative enactment. (Shoemaker Depo. p. 58, Z. Baer Affd. Ex. 11)

The informed consent statute provides a legislative standard for health care decisions to be made by an authorized person, typically the parent of the minor child. N.D.C.C. 23-12-13(1)(a)-(i). A person authorized to consent to health care on behalf of a minor child must first determine that the patient, if not incapacitated, would consent to the proposed health care. 1999 N.D. Opinion Attorney General 1, 1999 WL14712 (NDAG) at p. 3. (Z. Baer Affd. Ex. 24) In order to determine if Josiah Flatt would consent to the procedure, Anita Flatt must know what the procedure entails, the restraints used and the tools used to crush the foreskin. After viewing the procedure, Plaintiff is confident few people would consent.

(i) Best Interests of Child.

If a determination on whether the patient would have consented to the procedure, if not incapacitated, cannot be made, then the person consenting to the health care must make the decision based on the "best interest" of the patient.

Although not defined in the context of a health care decisions, "best interests" of a child is a fairly well developed concept in the State of North Dakota. "Best interests" of the child includes an analysis of a number of factors. N.D.C.C. 14-09-06.2. Relevant to the circumcision issue is a presumption of unfitness if any domestic violence is proven. The law presumes

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[1]The constitutionality of this statute has been challenged in the underlying litigation. An appeal following final judgment will be forthcoming.

unfitness to parent if a Court finds credible evidence that "domestic violence" has occurred, it creates a rebuttable presumption that a parent who has perpetrated the "domestic violence" may not be awarded sole or joint custody of the child. The rebuttable presumption can be overcome only by clear and convincing evidence that it is in the child's best interest to retain a custodial relationship. *Id*. Domestic violence is defined to be "physical harm, bodily injury, . . . or assault . . . on the complaining family or household members." by N.D.C.C. 14-07.1-01

In the context of circumcision, it is clear that the act of circumcision requires the use of restraining devices (circumstraint); the use of surgical tools including clamps capable of exerting between 8,000 and 40,000 foot pounds of pressure per square inch on the baby's newborn foreskin; scissors, knives and forceps. The result is the amputation of otherwise normal, healthy tissue, without a medical diagnosis. It causes injury, physical harm and a permanent scar. If such procedure were performed by a parent, the parent would be criminally charged and custody and care of the child would be denied. In short, circumcision causes physical harm, bodily harm, and is an assault on the infant for no therapeutic reason. Thinking, concerned and passionate people must ask why we as a society permit such an assault on the most vulnerable citizens by a medical community for no therapeutic reason. The medical community is merely carrying out the uninformed and ignorant wishes of parents.

In determining "best interests" in a custodial context, would the Court take into consideration the one parent's consent to unnecessary harm on an infant, such as allowing the piercing of an infant's ear? tongue? nipple? navel? clitoris? foreskin? If these forms of assault would be taken into consideration for custody determinations, "best interests" analysis would also include the amputation of the most erogenous tissue of the male body for no

therapeutic reason, by medical doctors who have an ethical duty to protect the baby from unnecessary surgery.

The performance of a circumcision and a video depiction of how circumcisions are performed would be relevant to a jury to determine if indeed the circumcision procedure was in the "best interests" of the child as required by N.D.C.C. 23-12-13.

(c) Myth–Circumcision-"Just a Little Snip".

The medical community has, for decades, perhaps centuries, continued the myth that circumcision was "just a little snip". "*Doctors Warned on Snip Risks by Honey Webb*" stated the headline of the *Sydney Morning Herald*, Sydney NSW, Australia, Saturday, October 4, 1997, warning doctors of their potential risks of negligence claims if they failed to inform parents of all possible side effects. The warning was issued by the Royal Melborne Institute of Technology. (Z. Baer Affd. Ex. 20)

The *British Journal of Urology*, 77, June 1996, p. 924, states that circumcision is not a "simple, minor snip", but rather a major surgery and needs careful thought and skill to perform. (Z. Baer Affd. Ex. 21) The *British Medical Journal*, Vol. 311, No. 7008 (September 23, 1995), pp. 816-817, reviewed a film produced by Jewish journalist, Victor Schoenfeld. The reviewer stated "the myth that circumcision is just a 'quick snip' and that newborns don't feel pain anyway were comprehensively demolished by the evidence in this generally well-balanced documentary." (Z. Baer Affd. Ex. 22).

Clearly, the medical profession has perpetuated the myth and convinced many, many parents that circumcision was simply a snip of minor import. The procedure is hidden from parents. The circumcision procedure itself must be in all its particulars "unmasked". Without

showing what surgical instruments are used to perform the circumcision, Plaintiff will be unable to counter the myth that it is just a snip. The jury will not be able to determine if a parent could reasonably believe the procedure was in the "best interests" of the infant incapable of providing consent, or determining whether or not the child would have made the decision to be circumcised had he not been incapacitated by his tender age.

In a series of articles in the *Maine Times*, January 2-8, 1997, Vol. 29, No. 9, Deputy Editor Sharon Bass addressed the issue entitled "Circumcision Persists Despite Doctors' Disapproval". In the article, she quotes individuals who express the opinion "it's not just a little snip of skin". The article concludes with the paragraph "risks and pain coupled with what most agree is an unnecessary operation drove Kenneth Baker years ago to require parents to watch a circumcision, either videotaped or live, before he would agree to perform one on their son. No one ever did." (Z. Baer Affd. Ex. 23)

Since the circumcisions depicted in the videotape accurately show physicians doing a circumcision applying the national standard using standard surgical equipment, it is immaterial that perhaps tiny nuances in differences in methods of performing the circumcision are prejudicial to the Defendant. Although Dr. Kantak may indeed do some of the procedures differently than depicted in the videotape, the result is the same, i.e. a severed foreskin for no therapeutic reason which violates her ethical obligation to her child patient, and violates State law inasmuch as the performance of unnecessary surgery cannot, under any circumstances, be deemed to be in the "best interests" of the patient, nor can there be any determination that Josiah Flatt would have wanted the procedure had he been able to consent.

(d) Babies Resist Circumcision.

Babies naturally resist circumcision, albeit in a nonverbal way, by crying, screaming and wiggling. All are indicia of the child's expression of his intent that he does not want the procedure done. Dr. Shoemaker testified that an infant who is strapped on a circumstraint shows a number of indicia of stress induced reactions, including, but not limited to, resisting the restraints; elevated blood pressure; elevated cortisone levels; high pitched crying; breath holding; body rigidity; vomiting; passing out; respiratory or cardiac arrest. (Shoemaker Depo. pp. 98-99, Z. Baer Affd. Ex. 11). In order for the jury to adequately determine whether or not the child would have consented to the procedure had he been able to consent, or determine the issue of "best interests" of the child, the jury must be able to visualize a circumcision procedure that does accurately show the alternate types of procedures available to the medical profession, and particularly show a circumcision procedure done with the Gomco clamp. Cold Affidavit, Z. Baer Affd. Ex. 19)

(e) Analgesia.

The Defendant raised the issue of lack of knowledge of how much analgesia was used in the circumcisions performed in the *Garrigus* and *Barichello* videos. According to the nurses who have attended circumcisions with Dr. Kantak regularly, it is difficult to predict how babies respond to circumcision with or without Lydocaine. Elizabeth Mattis, a 29-year employee of MeritCare Hospital, has observed circumcisions performed with anesthesia and without anesthesia, and states that at times it is difficult to predict what the reaction of the baby will be. She says "well some babies are gonna cry whether they receive anesthesia or not." (Mattis Depo. p. 11, Z. Baer Affd. Ex. 12) Mattis has observed physicians doing circumcisions without

anesthesia and indicates that she cannot tell the difference in the reaction of the babies with or without anesthesia. (Mattis Depo. pp. 10-11, 14, Z. Baer Affd. Ex. 12) Rita Frovarp, a Registered Nurse at MeritCare Medical Center since 1981, indicates that based on years of experience, that after the use of Lydocaine became standard, she could note that "there are times babies may not cry as frequent." She went on to state that even babies that did not receive Lydocaine would, from time to time, be very quiet. (Frovarp Depo. p. 39, Z. Baer Affd. Ex.13) Roberta Engquist, a Registered Nurse at MeritCare since 1985, indicates that Dr. Nyhus, a Family Practitioner who performs circumcisions without anesthesia (still today), does so "because he doesn't think it makes a difference" to use anesthesia. (Engquist Depo. p. 20, Z. Baer Affd. Ex. 14) Florence Dreiling, a Registered Nurse at MeritCare since 1981, indicates

> "Q: Do you notice a difference in the amount of discomfort in the baby when it is done without benefit of anesthesia as opposed to those who use anesthesia?
>
> A: It really varies. There are some babies that it's--it's a baby's temperament. A lot of babies will cry just when you're putting them on the board, you know, they're not wrapped up, they're laid on a diaper or blanket so it shouldn't be cold, and--but there's some that cry, some don't."

(Dreiling Depo. p. 31, Z. Baer Affd. Ex. 15)

None of the nurses who cared for Josiah Flatt or Anita Flatt, nor Dr. Sunita Kantak, remembers the labor, delivery or circumcision. Anita Flatt was deprived of the opportunity to observe. Since the reaction of babies is variable, some screaming, some not screaming, some resisting, some quiet, the jury should be allowed to observe videotapes showing four different children being circumcised with Lydocaine and through the use of different tools for cutting the

foreskin. The showing of a video will not prejudice the jury, but simply give a base line to determine damages. To deprive the jury of this evidence would allow the Defendant to secretly perform harmful procedures on patients who would then be precluded from showing the procedure when complaining about not getting sufficient information to get "informed consent". The whole concept of informed consent is to "unmask" the risks, benefits or alternative treatment modalities. In order to fully appreciate the risks, the procedure must be fully explained.

According to the nurses who have been identified as witnesses who know Dr. Sunita Kantak's routine about giving information on circumcision to a parent, Dr. Kantak never describes pain, just the method of controlling pain; never describes the Plastibel procedure; never describes the Mogan clamp procedure; does not describe embedded penis; severed penis; or urethra fistulas as risks. (Mary Johnson Depo. pp. 33-34, Z. Baer Affd. Ex. 16) Sherry Stoa, a Registered Nurse, in describing the habit of Dr. Kantak in informing parents about circumcision, indicates that Dr. Kantak distinguishes herself by going through more "thoroughly about the mutilation thing, why--if boys, why not girls, and the controversy of that." (Stoa Depo. p. 41, Z. Baer Affd. Ex. 17)

The Plaintiff would definitely agree that it would be most expeditious to have a videotape of the circumcision of Josiah Flatt. However, neither the nursing staff, nor Dr. Kantak, can remember any portion of the labor, delivery or circumcision. Anita Flatt was told she could not attend the circumcision. (A. Flatt Depo. pp. 33-34, Z. Baer Affd. Ex. 18) Perhaps a solution would be to obtain a Court Order allowing the videotaping of a circumcision by Sunita Kantak so that we have proof of the procedure and how she performs the procedure.

2. VIDEO AND SURGICAL INSTRUMENTS RELEVANT TO DAMAGES

Further relevance of the video and surgical instruments to the claims in this case are damages. Josiah Flatt suffered pain and the permanent loss of erogenous tissue from his body. In order to appreciate the element of pain, it is necessary for the jury to be able to touch, feel, and manipulate the instruments used by the medical doctors to summarily amputate non-diseased tissue for a non-therapeutic reason. By the nurses' own admissions, Lydocaine used as an analgesic is not 100% successful, even under the best of circumstances. There is no medical doctor willing to state that babies do not feel pain as a result of the circumcision. In order to be able to appreciate the pain, a jury should be able to look at the surgical equipment used to perform this procedure using Lydocaine that at best is a hit or miss proposition on controlling short-term pain.

Similarly, the 33 photos of the intact penis are relevant to the issue of what is lost if allowed to grow to full term. Similarly, the visual animation of the foreskin provides reference for jury members as to the tissue, its function and purpose, all of which is lost as a result of routine circumcision.

None of the exhibits are in any way inflammatory. The surgical instruments are not coated with blood but are in a sanitary sealed condition. The circumstraint has no evidence of gore, but is just a molded plastic circumstraint which holds the baby spreadeagle. The loud protestations of the Defendant suggests that the procedure is indeed barbaric and something that reasonable thinking people should be protected from. Why? So that the medical community can continue hiding the harm they are causing to babies? Is it to insulate parents from the reality of what goes on behind curtains when their child is held spreadeagle and his penis cut? Lasik

patients watch a video of the surgery as part of the information given so they can make an informed decision--why not circumcision?

3. MINUTES OF MEETINGS.

Defendants also object to the inclusion of minutes of the MeritCare Pediatric Group's development of the circumcision policy. These minutes are relevant to the issues of informed consent, credibility and damages. Part of the issue is the date on which a newly developed circumcision booklet was made available and prepared by the Pediatric Group. For instance, Exhibit 18 depicts minutes of the Maternal Newborn Joint Practice Council from December 15, 1996, which identifies as participants Dr. Shoemaker and Dr. Kantak, describing that Dr. Shoemaker had been selected to participate in a national committee on the task force of circumcision, and that he was writing a new document about circumcision, and after approval, would be distributed at "prenatal classes, family birth center, and the intensive care nursery." The subsequent minutes of the Maternal Newborn Joint Practice Council of July 14, 1997, identify Dr. Shoemaker as being present and the discussion on circumcision brochure identifying that the American Academy of Pediatrics was revising the current statement and a new statement will be published. The minutes suggest that the "MeritCare Brochure, written by Dr. Shoemaker, is available to parents." (Tr. Ex 18(a), Z. Baer Affd. Ex. 5) Finally, on October 3, 1997, Exhibit 18(b) depicts Maternal Newborn Joint Practice Council, of which Dr. Shoemaker is present indicating that there is discussion about the use of buffered Lydocaine for circumcision procedures because it causes less discomfort than using regular Lydocaine. The admission that buffered Lydocaine causes "less discomfort" suggests that there is and was discomfort with the use of non-buffered Lydocaine in March 1997, when Josiah Flatt was born. This is relevant to

the issue of pain control and the issue of damages resulting from the pain suffered by Josiah Flatt. (Tr. Ex. 18(b), Z. Baer Affd. Ex. 5)

The Defendant also objects to the introduction of the MeritCare Department of Pediatrics minutes. (Tr. Ex. 19, 19(a) through 19(j), Z. Baer Affd. Ex. 6) The minutes extend from April 25, 1996, through May 16, 2001. The minutes are relevant to the issues about what the Pediatric Group knew, when they knew it, and what information they needed to disclose to parents. The minutes also are relevant to prove issues of damages, including pain suffered by Josiah Flatt. They are further relevant to the issue of credibility of when the MeritCare brochure was made available to the patient population on a regular basis.

For instance, on April 21, 1996 (Tr. Ex.19, Z. Baer Affd. Ex. 6), the minutes of the Department of Pediatric meeting suggests that Dr. Miller raised concerns regarding circumcisions and the "need to develop a better handout to give patients regarding circumcisions."

Exhibit 19(a) depicts minutes from May 22, 1996, showing Sunita Kantak present where Dr. Miller discusses his concern regarding parents "wanting to watch circumcisions. It was decided that each physician will determine what he/she is comfortable with in regards to parents observing circumcisions." This testimony would tend to support Anita Flatt's recollection of the statements by the nurses that she was not allowed to watch the circumcision of her son. (Tr. Ex. 19(a), Z. Baer Affd. Ex. 6) Exhibit 19(b) are the minutes from the June 19, 1996 meeting showing the issue of circumcision being tabled. Sunita Kantak was present during that discussion. (Tr. Ex. 19(b), Z. Baer Affd. Ex. 6) Exhibit 19(c) depicts the minutes from the July 17, 1996 physician meetings at which, again, under old business, the discussion of circumcision was tabled. (Tr. Ex. 19(c), Z. Baer Affd. Ex. 6)

Exhibit 19(d) from August 21, 1996, identifies under new business that Dr. Miller shared his concerns with regard to circumcision preparation for parents. "Dr. Shoemaker will work on putting together a pamphlet discussing circumcisions and the payment plan involved with this procedure." Minutes of the meeting from August 21, 1996, would suggest that the physicians' own group, in the presence of Sunita Kantak, raised concerns regarding lack of preparation for parents before agreeing to circumcise their infant babies. (Tr. Ex. 19(d), Z. Baer Affd. Ex. 6)

Exhibit 19(e) are Department of Pediatrics minutes from September 11, 1996, at which Sunita Kantak was present. Under old business, the minutes suggest that Dr. Shoemaker is working on completing the circumcision pamphlet which would be sent around through the Department for approval before the next meeting. (Tr. Ex. 19(e), Z. Baer Affd. Ex. 6)

Exhibit 19(f) are the minutes from October 16, 1996, which discuss circumcision and the request by Dr. Shoemaker for their opinions on the circumcision handout he had written for parents of newborn boys. The minutes suggest that Dr. Shoemaker would make revisions and present it before the group again for input. (Tr. Ex. 19(f), Z. Baer Affd. Ex. 6)

Exhibit 19(g) reflect minutes of the physicians' meeting of November 6, 1996, where circumcision was discussed suggesting that Dr. Shoemaker had sent his letter in to be written in lay terms for patient use. (Tr. Ex. 19(g), Z. Baer Affd. Ex. 6)

Exhibit 19(h) are the Pediatric Department minutes from December 1996, at which Sunita Kantak was present indicating under old business that the circumcision brochure is ready to go to print, 1500 copies will be printed and distributed. It is written in a low reading level. (Tr. Ex. 19(h), Z. Baer Affd. Ex. 6)

Plaintiffs were not provided any meeting minutes of the Pediatric Department following December 18, 1996, until the next minutes dated November 15, 2000. There is nothing in the Department minutes suggesting that the minutes of December 18, 1996 were ever approved, or that the brochure was ever published.

MeritCare Clinic has produced a brochure which has as an initial publication date 12-96, and a revision date 1-97. (Kantak Depo. Ex. 2, Z. Baer Affd. Ex. 10) There is nothing in the minutes of the Pediatrics Department suggesting a review of the revision of the circumcision pamphlet.

Anita Flatt has testified that she did not receive literature from anyone at MeritCare about circumcision and denies ever receiving a copy of the pamphlet identified as "Should Your Child Be Circumcised?" (A. Flatt Depo. p. 47, Z. Baer Affd. Ex. 18) On the other hand, MeritCare nurses will testify that the common procedure used is to distribute the brochure when the pediatrician on call does rounds. Squarely at issue is the issue of whether or not Anita Flatt obtained a copy of the brochure. If the brochure had not been put into circulation, which we contend is a reasonable inference that could be drawn from the closeness in time from the development of the brochure to the birth of Josiah Flatt, the minutes of the meeting showing the development of the brochure is highly relevant. The documents also come in for impeachment purposes allowing the finder of fact to determine whether or not the brochure was in fact distributed to Anita Flatt. Nurse Sherry Stoa, who has been at MeritCare for 21 years, says as far back as she can remember, the pediatricians have handed out the circumcision booklet. (Stoa Depo. pp. 24-27, Z. Baer Affd. Ex. 17) The minutes of the Pediatric Group suggest otherwise

and no previous circumcision booklet has been produced by Dr. Kantak. The minutes are relevant to prove the credibility of the Defendant nurses.

The next minutes of the Pediatric Department meeting provided to Plaintiff was November 15, 2000, attended by Sunita Kantak where the discussion is concerning out-patient circumcisions. The conclusion portion of the minutes indicate "a parent's signature is required and the regular surgical consent form may be used. Lack of consent creates a problem." The discussion by the Pediatrics Group indicating that "lack of consent to perform a circumcision creates a problem" allows a reasonable inference that the medical community still was rather lax about obtaining consent, let alone informed consent, from parents who desire to have the physicians surgically alter their son's genitalia. The final minutes of the Pediatric Department meeting are from May 16, 2001. (Tr. Ex. 19(j), Z. Baer Affd. Ex. 6). Dr. Sunita Kantak is identified as having been absent from that meeting. Exhibit 19(j) shows further discussion about circumcisions, and how the hospital can save money by discharging newborns and parents as soon as they are well. The suggestion is to complete circumcisions by 10:00 a.m.

The final series of minutes are from MeritCare Hospital Department of Pediatrics. Beginning on January 24, 1996 (Tr. Ex. 20, Z. Baer Affd. Ex. 7), the MeritCare Hospital Department of Pediatrics discusses circumcision policy and received a report from Dr. Welle regarding Medicaid patients. The conclusion by the hospital is that performing circumcisions on Medicaid patients results in "no financial loss to the hospital for performance of circumcisions". The action of the Department of Pediatrics as identified in the minutes is "due to the minimal time commitment for performance of circumcision and lack of significant financial issues, no change will be made to in-patient circumcision policy at this time." These minutes were signed

by the Chairperson of the Department of Pediatrics, Craig T. Shoemaker, M.D. The minutes are relevant to the extent that they show the persistence of circumcision is perpetuated by positive economic import to the medical institution, not based on medical need or best interest of the baby.

In April 1996, the Department of Pediatrics MeritCare Hospital met again. (Tr. Ex. 20(a), Z. Baer Affd. Ex. 7). The minutes state that in April 1996, there was "the need for a circumcision policy statement." The action taken was "the FBC Joint Practice Council will be asked to develop a statement regarding the risks and benefits of circumcision." The minutes do not say develop a new statement regarding risks and benefits of circumcision. It says to develop a statement regarding risks and benefits of circumcision. Prior to April of 1996, an inference could be drawn that there was no brochure identifying the risks and benefits of circumcision.

The last minutes of the Department of Pediatrics addressing circumcision provided by Plaintiff was November 19, 1997. (Tr. Ex. 20(b), Z. Baer Affd. Ex. 7) The sole reference is "circumcision task force met in New Orleans". Nothing further was identified. All of these minutes are probative to the issue of judging the credibility of the doctors and nurses in their statement that the circumcision brochure developed by the hospital was given to Anita Flatt. Anita Flatt indicates she never received the brochure. A reasonable inference could be drawn by the timing of the development of the brochure that it in fact was not prepared for distribution until a later date.

4. HANDWRITTEN NOTES, BILLINGS, ETC.

In addition, the Defendants are seeking to exclude a series of documents identified as Exhibit 15, 15(a) through 15(i). (Z. Baer Affd. Ex. 4) These are handwritten notes by Anita

Flatt, post-it notes, scraps of paper or reimbursement forms, documenting conversations with hospital and medical personnel involving billing, complaints about asymmetry of the surgical procedure, and complaints about the doctor not being present during the delivery. One of the issues in this case is whether or not Anita Flatt was given a brochure or brochures at the time of her hospitalization. The hospital contends she was given the brochure. Anita Flatt contends she was not. Anita Flatt contends she saved all of the documents she received and even the notes upon which she wrote comments about conversations with the hospital administration regarding her concerns. The evidence identified in Exhibit 15 and its subparts would tend to show that Anita Flatt is indeed a packrat and collected and saved all of the documents that she received during her stay at MeritCare Hospital. Those documents are relevant to the issues of credibility and weight to be given to the testimony of the parties in this case.

CONCLUSION

For all the above reasons, the Court should allow the introduction of the videos, surgical equipment, department minutes, and photos of the natural penis to allow this jury to evaluate if the circumcision procedure was truly "unmasked" before the cutting took place.

Dated: January 15, 2003

Respectfully submitted,

ZENAS BAER AND ASSOCIATES

By_____

Zenas Baer (#120595)
Attorney for
331 6th St., Box 249
Hawley, MN 56549
(218) 483-3372

I think this will be about the end of the dictation, I just have to rework this and put it into some final form. I will need this prepared to submit to the Court tomorrow before closing, so it has to be done before 4:30 tomorrow, which will mean that we need to get it into virtually final form by noon so you have time to do the assembling of the exhibits