

1 STATE OF MINNESOTA FOURTH JUDICIAL DISTRICT

2 COUNTY OF HENNEPIN CIVIL DIVISION

3

4 -----

5 D.N.N., individually and
6 on behalf of her minor
7 son, H.A.N.,

8 Plaintiff,
9 vs.

Court File No. MP-04-1585

10

11 Dr. Stephen Joseph Berestka,
12 Unity Hospital, Allina
13 Health System,

14

Defendants.

15

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18 Deposition of DR. STEPHEN JOSEPH BERESTKA,
19 taken pursuant to Notice and Agreement under the
20 Rules of Civil Procedure for the District Courts
21 of Minnesota, and taken at the law offices of
22 Burke & Thomas, located at 3900 Northwoods Drive,
23 Suite 200, in the City of St. Paul, State of
24 Minnesota, on the 7th day of October, 2004,
25 commencing at 8:00 a.m., before LISA M. LEUTHNER,
Registered Professional Reporter and Notary
Public.

26

27

1 A P P E A R A N C E S

2

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1 I N D E X

2

3 WITNESS: DR. STEPHEN BERESTKA PAGE NO.

4

5 EXAMINATION:

6 By Mr. Baer.....4

7 By Mr. Whitmore.....92

8

9 EXHIBITS: FIRST MARKED DISCUSSED

10 1 Curriculum Vitae of Dr. Stephen Berestka 7 7

11 2 Medical Records of H.A.N. from Allina Health Systems 21 21

12 3 Medical Records of D.N.N. from Unity Hospital 43 45

13 4 Summary Investigation Report of Unity Hospital dated 5/24/01 49 50

14 5 Mercy & Unity Hospitals Patient Care Policies and Procedures reviewed 3/99 71 71

15 DOCUMENT/INFORMATION REQUESTS:

16 None.

17 OBJECTIONS:

18 By Mr. Thomas.....5, 6, 11, 16, 17, 19, 26, 34, 35, 58, 65, 67, 69, 80, 83, 86, 90

19 By Mr. Whitmore.....11, 80

1 (WHEREUPON, on October 7, 2004, at
2 8:00 a.m., the following proceedings were
3 had:)

4 * * *

5
6 DR. STEPHEN BERESTKA, being first duly
7 sworn, was examined and testified under oath
8 as follows:

9
10 EXAMINATION

11 BY MR. BAER:

12 Q. Would you please identify yourself for
13 the record. Give us your name and your address,
14 please.

15 A. Stephen Berestka; 1910 Major Drive,
16 Golden Valley.

17 Q. And your last name is B -- how do you
18 spell it?

19 A. B-E-R-E-S-T-K-A.

20 Q. Thank you. What is your date of birth?

21 A. 8/7/34.

22 Q. And what is your -- are you married?

23 A. Yes.

24 Q. What is your spouse's name?

25 A. Alice.

1 Q. Does she live at the same address?

2 A. Yes.

3 Q. Do you have other relatives who live in
4 Hennepin County?

5 A. A distant cousin.

6 Q. Okay. How about children, do you have
7 children?

8 A. I have three.

9 Q. And what are their names and ages?

10 A. John is forty; Jean, girl, J-E-A-N, is
11 thirty-nine; and David is thirty-five.

12 Q. Do they live in Hennepin County?

13 A. The first two do.

14 Q. What is Jean's last name?

15 A. Larson, L-A-R-S-O-N.

16 Q. As a parent, did you make a decision to
17 circumcise?

18 MR. THOMAS: I object on relevancy, but
19 I'll let him answer.

20 Q. (Mr. Baer, continuing) Have you ever had
21 to make that decision on whether or not to
22 circumcise your children?

23 A. Yes.

24 Q. And did you make that decision?

25 A. Yes.

1 Q. And you made that decision to circumcise
2 your children?

3 MR. THOMAS: The same objection, but I'll
4 let him answer.

5 A. Yes.

6 Q. (Mr. Baer, continuing) Tell me about
7 your professional background. Give me the -- and
8 by the way, I did not have a copy of the CV, so
9 that might facilitate things, if you have a
10 current one.

11 MR. BAER: Just hold on. Let's go off
12 the record for a moment.

13 (WHEREUPON, Mr. Thomas exited the room
14 briefly.)

15 MR. THOMAS: We're looking to see if we
16 have one.

17 MR. BAER: The reason I ask is it says
18 it's attached to the Interrogatory Answers, and I
19 didn't see one in my file. It doesn't mean that
20 you didn't send it. It may have gotten lost.

21 MR. THOMAS: We're looking.

22 Q. (Mr. Baer, continuing) Okay. Let's just
23 get a brief background, then, of your educational
24 background, Dr. Berestka. Where did you go to
25 school, undergraduate and medical school, and

1 residency, those sorts of things?

2 A. University of Massachusetts. I graduated
3 in '55. University of Rochester, New York,
4 Medical School. I graduated in '59. And
5 residency, one year in -- well, internship and one
6 year at Highland Hospital in Rochester, New York.
7 And then one year here at the University of
8 Minnesota. And then I was drafted, so I spent two
9 years doing OB-GYN in the service in Germany. And
10 then I finished the third year, I think, here at
11 the University of Minnesota in '65.

12 Q. Let's just spend a moment. Are you
13 originally from the Massachusetts area?

14 A. Yes.

15 MR. THOMAS: Here you go.

16 (WHEREUPON, Mr. Thomas handed
17 Dr. Berestka's CV to Mr. Baer.)

18 MR. BAER: Could we have that marked as
19 an exhibit, please.

20 (WHEREUPON, Exhibit 1 was marked for
21 identification.)

22 Q. (Mr. Baer, continuing) You have before
23 you a copy of Exhibit 1. Just compare it to make
24 sure it is the same. Do you see that,
25 Dr. Berestka?

1 A. Is this the same?

2 Q. Yes.

3 A. Yes.

4 Q. All right. And is Exhibit 1 a current
5 Curriculum Vitae for you?

6 A. Yes.

7 Q. And it appears as though you were in
8 private practice. You were chief of staff of
9 Glenwood Hills Hospital. What did you do there?

10 A. Well, what a chief of staff does.

11 Q. What does he do?

12 A. Maintain the relationship between the
13 hospital and the medical staff.

14 Q. Was -- were you practicing in OB-GYN at
15 that time?

16 A. Yes.

17 Q. Did Glenwood Hills Hospital provide
18 OB-GYN services?

19 A. Yes.

20 Q. When did they stop?

21 A. I think two, three years later.

22 Q. Your CV indicates that you were
23 practicing at the Fridley Medical Center in
24 Fridley, Minnesota. What group were you with at
25 the Fridley Medical Center?

1 A. That's the name of the group.

2 Q. Well --

3 A. It's now called Multicare Associates, so
4 it's changed its name.

5 Q. And did it change its name before you
6 retired?

7 A. Yes.

8 Q. So when did it change its name from
9 Fridley Medical Center to Multicare?

10 A. I can't remember for sure. Sometime --
11 we kind of grew up with Fridley, so you get in
12 that habit. You know, that's why you think
13 there's a discrepancy, but it's the same group.

14 Q. Describe for me just briefly what your
15 patient base was when you were with the Fridley
16 Medical Group?

17 A. Primarily, general obstetric patients and
18 gynecology.

19 Q. How much would you say would be
20 obstetrics versus gynecology?

21 A. Sixty/forty, maybe.

22 Q. Sixty obstetrics?

23 A. Yes.

24 Q. And where did you typically deliver
25 children?

1 A. At Unity Hospital.

2 Q. And how long had you been affiliated with
3 Unity?

4 A. Twenty-five years.

5 Q. So that would be from '75 to 2001 or so?

6 A. Right.

7 Q. It appears as though that would be the
8 only place you had privileges, then, during that
9 span of time that you were with the Fridley
10 Medical Center?

11 A. Yes.

12 Q. Over those years, can you give any
13 estimate as to how many times you would have
14 delivered babies?

15 A. Two thousand. I don't know.

16 Q. And half of them would be boys?

17 A. I suppose.

18 Q. This case involves an allegation that
19 there was inadequate information given or no
20 information given to obtain consent for a
21 circumcision. Before I get into the details of
22 this case, Dr. Berestka, I would like to ask you
23 what you understand your duty is as a doctor in
24 informing a patient or the surrogate about the
25 risks and benefits to obtain what is known as

1 "informed consent"?

2 A. The -- whatever subject comes up, you
3 talk, you mention the risks and benefits. When
4 did we bring up the subject? I usually brought it
5 up in the prenatal visits. And we used to have a
6 box where we checked off circumcision, yes.

7 MR. THOMAS: I think you're going beyond
8 his question, Doctor. I think you're asking --
9 well, start again.

10 Q. (Mr. Baer, continuing) What I'm asking,
11 Doctor, is before we get into this specifically,
12 what do you understand your duty is as a medical
13 doctor by way of giving information to satisfy
14 yourself that you have given enough to obtain
15 informed consent?

16 MR. WHITMORE: Object to the form of the
17 question to the extent that it asks to define a
18 legal duty, and legal conclusion.

19 MR. THOMAS: I'll join that. You can
20 answer as to what you think you need to provide to
21 fulfill your informed consent obligations. That's
22 what you're asking?

23 MR. BAER: Yes.

24 A. To describe the risks and benefits of any
25 procedure.

1 Q. (Mr. Baer, continuing) And, obviously,
2 you can't do that for a one-day-old child,
3 correct?

4 A. Yes.

5 Q. And when you're doing a circumcision,
6 your patient is the one-day-old child, correct?

7 A. Yes.

8 Q. And typically during prenatal visits,
9 it's not always that you know what sex the child
10 is, correct?

11 A. Yes.

12 Q. And you did not provide prenatal services
13 to the mother of H.A.N., did you?

14 A. I saw her one time.

15 Q. In prenatal visits?

16 A. In prenatal visits.

17 Q. Okay. Now, without focussing on the
18 specifics of this case, could you describe for me
19 what you typically would tell a mother or a father
20 who has just given birth to -- or a family that
21 has just had a baby boy added to their family.
22 What would you tell them about the risks and
23 benefits of circumcision?

24 A. Most of the time, they didn't ask. They
25 had already made up their minds.

1 Q. And if they had already made up their
2 mind, I would take it, Dr. Berestka, that you
3 would see no need to identify what the risks or
4 benefits are, correct?

5 A. It's more likely that, yes.

6 Q. Would it be fair to say that if parents
7 have already expressed their opinion that they
8 want a circumcision, that you, as a doctor, would
9 no go through any of the risks or benefits of the
10 procedure?

11 A. Probably not.

12 Q. And in your mind, does that meet the
13 obligation of informed consent?

14 A. Unless I thought something was -- they
15 were missing something.

16 Q. How would you know that they are or they
17 aren't missing something without inquiring?

18 A. Well, some other procedure would have
19 perhaps more likely risks, but the risks are
20 minimum with a circ.

21 Q. So you're saying that because the risks
22 are so minimum, you would not even ask if they
23 have already expressed their opinion that they
24 want to have a circumcision done?

25 A. Right. Yes.

1 Q. Is that the way you have practiced over
2 the course of your professional career as an
3 obstetrician in dealing with parents of newborn
4 baby boys?

5 A. Pretty much so.

6 Q. Tell me, Doctor, has your practice or the
7 practice in general of obstetrics changed during
8 the time that you were at the Fridley Medical
9 Center, say, from 1975 to 2001 with regard to the
10 amount of information you would give to parents of
11 baby boys with regard to circumcision?

12 A. I don't recall any major change.

13 Q. Was there a time in your practice where
14 doctors would simply routinely perform the
15 circumcision, even without asking?

16 A. No.

17 Q. What do you know, Dr. Berestka, about the
18 anatomy of the foreskin?

19 A. Limited.

20 Q. Tell me what you know.

21 A. It's the covering for the glans penis.

22 Q. What function does it serve?

23 A. It sometimes protects. It sometimes
24 contributes to problems.

25 Q. Tell me what you mean by "sometimes

1 protects." What type of protection would it
2 provide?

3 A. Well, protection from direct trauma.

4 Q. Any other functions that you're aware of,
5 besides protection?

6 A. Not that I know of.

7 Q. And you said, "It sometimes contributes
8 to problems." Tell me what you mean by that.

9 A. In later life, there's often phimosis or
10 infection, balanitis, rarely penile cancer.

11 Q. Can you tell me what the incidence of,
12 let's say, phimosis is in intact adult males?

13 A. It's limited.

14 Q. How about balanitis in intact adult
15 males?

16 A. It's limited, but it's there.

17 Q. And balanitis is what?

18 A. Inflammation of the glans.

19 Q. And what is the treatment for balanitis?

20 A. Maybe cortisone or maybe antibiotic
21 cream.

22 Q. Would you agree, Doctor, that the --
23 strike that. Getting back to the anatomy of the
24 natural penis, when you were in medical school,
25 were you taught about the foreskin and what

1 function it serves?

2 A. Limited.

3 Q. When you say "limited," could you
4 describe what you were taught.

5 A. I can't remember. More than what I've
6 just mentioned.

7 Q. And I would take it, then, Doctor,
8 that -- do you view a circumcision to be a fairly
9 insignificant type of a procedure?

10 MR. THOMAS: I'm going to object on
11 vagueness grounds. What do you mean by that?

12 Q. (Mr. Baer, continuing) Do you understand
13 what I mean, Doctor?

14 A. No.

15 Q. Well, is there a classification of
16 procedures that you as a doctor would understand?
17 For instance, are some serious procedures, some
18 less serious? What adjective should we use for
19 those procedures that you think are less risky or
20 have less impact on the individual?

21 MR. THOMAS: Well, I'm going to object
22 again. It's just terribly vague. I don't know
23 what you're talking about.

24 MR. BAER: All right. I will get at it
25 from another angle.

1 Q. (Mr. Baer, continuing) Dr. Berestka,
2 would you agree that amputating the glans penis
3 would be a serious event?

4 A. I guess I have to say yes. I don't know
5 what you're leading up to.

6 Q. Okay. That would be more serious than
7 merely circumcising and removing the foreskin;
8 would you agree with that?

9 A. Most of the time, yes.

10 Q. What do you mean, "most of the time"?

11 A. Well, I don't know. You're going
12 somewhere with this, and I'm not sure where.

13 Q. I'm just trying --

14 A. You're trying to trap me.

15 Q. Really, I'm not, Dr. Berestka. I'm just
16 trying to understand how you, as a medical doctor,
17 would place procedures on a spectrum of those that
18 are risky and those that --

19 A. Some are more risky than others.

20 Q. Okay. How does circumcision fit on that
21 scope, on that spectrum?

22 MR. THOMAS: As compared to what? And
23 that's why it's so vague.

24 Q. (Mr. Baer, continuing) Why don't you
25 name some of the procedures that you would

1 normally do, Doctor, in your practice.

2 MR. THOMAS: Again, an OB does a
3 thousand, perhaps tens of thousands, of
4 procedures. What do you what, Zenas? What are
5 you trying to find out?

6 Q. (Mr. Baer, continuing) You do
7 episiotomies, right?

8 A. Um-hum.

9 Q. Is that a "yes"?

10 A. Yes.

11 Q. You do circumcisions?

12 A. Yes.

13 Q. You would do cesarean sections?

14 A. Yes.

15 Q. Tubal ligations?

16 A. Yes.

17 Q. Oophorectomies?

18 A. Yes.

19 MR. THOMAS: What's the relevance of any
20 of this? Are we going to get to some relevant
21 questions?

22 MR. BAER: I've always liked you, Rich.

23 MR. THOMAS: And I like you too, Zenas;
24 but, come on, we've got a meeting at 11:00.

25 Q. (Mr. Baer, continuing) Would you agree

1 that amongst those procedures that I just
2 described, that some carry more risks than others?

3 A. Yes.

4 Q. And would you agree, Dr. Berestka, that
5 the level of information that you give is somewhat
6 proportional to the risks associated with a
7 procedure?

8 A. Most of the time.

9 Q. So if you have a procedure that is low on
10 the risk category, you would give less information
11 about what the risks and benefits are?

12 A. Probably.

13 Q. And circumcision would be low on that
14 list, correct?

15 A. Probably.

16 Q. And so would it be fair to say that with
17 circumcision, you would give less information than
18 you would on, say, an oophorectomy?

19 MR. THOMAS: Well, I object to the form
20 of question, since they're different procedures
21 and they would have different risks and they would
22 have different things that you would have to
23 cover. You can answer, if you can.

24 A. Usually, the patient, the mother and
25 father, have made up their mind beforehand, so

1 they decide for me how much risk I need to tell
2 them about.

3 Q. (Mr. Baer, continuing) Okay. So is it
4 my understanding that if the mother or father has
5 made up their mind, you needn't even talk about
6 it?

7 A. Not specifically, unless they ask
8 further.

9 Q. And you feel your obligation of giving
10 information has been fulfilled if the parents say
11 they want it done?

12 A. Yes.

13 Q. Now, let's talk specifically about why
14 we're here today and the case of H.A.N. What did
15 you review before this deposition to prepare for
16 this testimony?

17 MR. THOMAS: He's just asking you about
18 what documents. He's not asking about what we
19 talked about.

20 Q. (Mr. Baer, continuing) Oh, you can talk
21 about that also. No, I'm not asking you for what
22 you talked to your attorney about. Just tell me
23 what documents you reviewed.

24 A. The hospital records, the prenatal
25 records.

1 Q. Anything else?

2 A. I don't remember.

3 MR. THOMAS: Just for the record, he did
4 look at some hospital bylaws briefly.

5 A. Oh, yes. Thank you.

6 Q. (Mr. Baer, continuing) Okay. Do you
7 remember the circumcision of H.A.N.?

8 A. Not specifically.

9 Q. And did review of the hospital records
10 or -- yeah, the hospital records of the birth of
11 H.A.N. refresh your recollection or jog your
12 memory about that specific day?

13 A. A little bit.

14 Q. In what way?

15 A. That this was done on, I believe, a
16 Saturday, on the weekend, and I was on call that
17 weekend.

18 Q. Anything else that came to mind when you
19 were reviewing that that jogged your memory?

20 A. No.

21 MR. BAER: Could I have this marked as an
22 exhibit, please.

23 (WHEREUPON, Exhibit 2 was marked for
24 identification.)

25 MR. WHITMORE: What is that?

1 MR. BAER: That is Exhibit 2, and it is
2 Bates stamp numbers 100001 through 100020.

3 MR. WHITMORE: Thank you.

4 Q. (Mr. Baer, continuing) I'll show you
5 what has been marked as Exhibit 2, Doctor, and
6 could I have you take a look at that, please.
7 I'll represent to you that this was supplied to me
8 as being the entire record of H.A.N. regarding his
9 birth. Have you seen those records before?

10 A. Parts of it.

11 Q. Take a moment to look at it and refresh
12 your recollection about those records.
13 Specifically, I'd like you to look to see whether
14 or not your notes or handwriting appears anyplace
15 in those records.

16 A. Yes, it says circumcision done.

17 Q. And what page is that on?

18 A. 12.

19 Q. Take a look at page 11, would you,
20 please, Doctor. Is that a form you're familiar
21 with?

22 A. Discharge?

23 Q. No, the form without -- I mean, assume no
24 writing is on there. Just the form of the page,
25 are you familiar with that?

1 A. The orders?

2 Q. Yes.

3 A. Yes.

4 Q. And is that part of the permanent
5 hospital chart?

6 A. I assume so.

7 Q. And that would be available when you --
8 or that would have been available when you were
9 treating H.A.N., correct?

10 A. Yes.

11 Q. And do you see the order dates on page 11
12 of Exhibit No. 2?

13 A. Yes.

14 Q. And the first order is from 1/24/00. Do
15 you know who would have written that?

16 A. The nurse practitioner did.

17 Q. What's the date on that one?

18 A. 1/24.

19 Q. Okay. Now, your note is all alone on one
20 page. Did you do it contemporaneously with the
21 procedure?

22 A. Yes.

23 Q. Are you certain about that?

24 A. Yes.

25 Q. You remember doing that?

1 A. Yes.

2 Q. And what does it say. That's on page 12,
3 correct?

4 A. "Circ done."

5 Q. What's the date?

6 A. 1/22.

7 Q. '00?

8 A. Yeah.

9 Q. And it says "circ done," and those are
10 your initials there?

11 A. Right.

12 Q. Is this what you would call an "operative
13 note"?

14 A. This was the note we did before and after
15 and always.

16 Q. I'm just asking you: Is this an
17 operative note?

18 A. This was, in the sense, an operative
19 note, yes.

20 Q. And in your mind, does it meet the
21 criteria for an operative note as described by the
22 federal regulations?

23 A. No one has said that it was inadequate.

24 Q. Does it meet the requirements of the
25 federal regulations, Dr. Berestka, if you're able

1 to answer that question?

2 A. I'm not able to.

3 Q. Does it have a start time of the
4 procedure?

5 A. No.

6 Q. Does it have a finish time?

7 A. No.

8 Q. Does it have the technique used?

9 A. No.

10 Q. Does it describe what instruments were
11 used?

12 A. No.

13 Q. Does it describe whether it was with a
14 Gomco clamp, a Plastibell, or a Mogen clamp?

15 A. No.

16 Q. Does it describe blood loss?

17 A. No.

18 Q. Does it describe anybody else being
19 present?

20 A. No.

21 Q. Does it describe the restraints that were
22 used?

23 A. No.

24 Q. In a true operative note, you would need
25 to describe most of those events or topics that I

1 just talked about, correct?

2 A. This seemed to be adequate for the
3 hospital's needs and my needs.

4 Q. So this is the type of operative note
5 that you always used at Unity?

6 A. Not only me, but many others.

7 Q. And as far as you know, that always
8 passed the peer review committee?

9 A. Yes.

10 Q. And you were never told that you needed
11 to do anything more than the "circ done" operative
12 note?

13 MR. THOMAS: Don't answer that question.

14 Q. (Mr. Baer, continuing) Were you ever
15 told?

16 MR. THOMAS: Wait, wait. No. Stop. Are
17 you going to ask him about peer review things?

18 MR. BAER: No.

19 MR. THOMAS: You just did. You're not
20 asking about peer review?

21 MR. BAER: No, I'm just asking him
22 whether or not the hospital ever told him that he
23 needed to do more than what the note -- the note
24 that was written here.

25 MR. THOMAS: Yes, and the hospital would

1 tell him that in the context of a peer review.

2 MR. BAER: I don't know that.

3 MR. THOMAS: Well, I don't know that
4 either. But you and I know that you can't ask
5 about peer review activities; and you and I know
6 that when you violate that, there are sanctions.

7 MR. BAER: I'm not asking about peer
8 review, Rich.

9 MR. THOMAS: All right.

10 Q. (Mr. Baer, continuing) I'm just asking
11 whether or not during the time that you practiced
12 at Unity Hospital, was there ever a change in
13 hospital policy that required more than "circ
14 done" as an operative note?

15 A. Not that I recall.

16 Q. Okay. Did you ever review hospital
17 bylaws with regard to operative notes?

18 A. I don't remember.

19 Q. Did you ever review hospital policies and
20 procedures with regard to operative notes?

21 A. Not that I remember.

22 Q. Other than on page 12, was there any
23 other reference or any other notation that you
24 made in the records of H.A.N. on Exhibit No. 2
25 before you?

1 A. On this exam sheet, I've again wrote
2 "circ done."

3 Q. Show me where that's at.

4 A. 13.

5 Q. Page 13?

6 A. In the middle of the page on the right
7 side.

8 Q. Okay.

9 A. The same note.

10 Q. And you would have done that when?

11 A. The same day.

12 Q. What time of day did you do it?

13 A. I assume morning.

14 Q. Do you remember when you did it?

15 A. No.

16 Q. How would you have been informed that
17 H.A.N. is to be circumcised?

18 MR. WHITMORE: Are you asking him if he
19 remembers how he was informed?

20 MR. BAER: Yes.

21 Q. (Mr. Baer, continuing) Do you remember?

22 A. Vaguely.

23 Q. How are you informed that H.A.N. was to
24 be circumcised?

25 A. When I come on the floor, the postpartum

1 floor, I ask, "Are there any circs?" and I was
2 told there was one.

3 Q. Who told you that there was one?

4 A. I don't remember. The nurse, I assume.

5 Q. It certainly wasn't in a conversation
6 with the mother?

7 A. No.

8 Q. It wasn't through a conversation with the
9 father?

10 A. No.

11 Q. In fact, you did the circumcision without
12 even talking to the mom or dad, correct?

13 A. Right.

14 Q. And do you remember which nurse it was
15 that told you there was one?

16 A. No.

17 Q. Describe for the record, if you will, if
18 you remember, what steps you took, then, to
19 complete that task.

20 MR. WHITMORE: To complete what task?

21 MR. BAER: The circumcision on January
22 22, 2000 of H.A.N.

23 A. So I said to the nurse, "Please set the
24 baby up for the circumcision," and then I did it
25 and wrote this note.

1 Q. (Mr. Baer, continuing) What type of
2 restraints did you use?

3 A. The usual restraints.

4 Q. What is "the usual restraints"?

5 A. They have some kind of straps on the arms
6 and legs, Velcro straps. Circumcision board, they
7 call it. It's not a board, but...

8 Q. Do they call it a "Circumstraint"?

9 A. I believe so.

10 Q. What color is it?

11 A. White.

12 Q. And how did you determine what procedure
13 to use, whether it's Gomco clamp, Mogen, or
14 Plastibell procedure?

15 A. I've always used the Plastibell, so
16 that's the one I used.

17 Q. Why do you use a Plastibell?

18 A. Because I'm most familiar with it.

19 Q. Were you trained in the other methods?

20 A. Yes.

21 Q. How long has it been since you've done a
22 Mogen procedure?

23 A. I never was trained in Mogen, just the
24 Gomco.

25 Q. When did you do the Gomco training?

1 A. Thirty years ago, thirty-five.

2 Q. How about the Plastibell?

3 A. Twenty-five years, thirty years.

4 Q. And before you did the circumcision on
5 H.A.N. on January 22, 2000, did you check the
6 records to ensure that there was informed consent
7 obtained?

8 A. No.

9 Q. Do you feel, Dr. Berestka, that that
10 failure to check to ensure informed consent was
11 obtained met the standard of care?

12 A. I assume that the nurse has got the
13 informed consent; otherwise, she wouldn't have
14 told me to go ahead.

15 Q. Okay. So the nurse sets up H.A.N. for a
16 circumcision. Describe for me what procedure you
17 would use.

18 A. I would use a Plastibell.

19 Q. How would you put the Plastibell over the
20 glans penis? What technique would you use? Would
21 you have to do a dorsal crush?

22 A. A dorsal slit, yes.

23 Q. Do you do a crush before the slit?

24 A. Yes.

25 Q. What do you use to do the dorsal crush?

1 A. Forceps.

2 Q. How do you separate the glans penis from
3 the foreskin?

4 A. With a blunt probe.

5 Q. What's that called?

6 A. Blunt probe.

7 Q. And how do you open the foreskin?

8 A. I cut along the dorsal slit, and that
9 opens it up.

10 Q. What anesthesia did you use?

11 A. None.

12 Q. Do you feel that that met the standard of
13 care, not using any anesthesia?

14 A. There have been recommendations to begin
15 using anesthesia, but no one has said that's a
16 standard.

17 Q. Why don't you use anesthesia?

18 A. It -- I've observed some situations. I
19 asked the nurses, "Did it make any difference?"
20 and they said that sometimes it does, sometimes it
21 doesn't; so I didn't feel that it was a big
22 advantage to doing it until I had more
23 information.

24 Q. Pardon?

25 A. Until I had more information that it was

1 a superior need.

2 Q. Have you always done that, when you do a
3 circumcision you don't use anesthesia?

4 A. It never was even considered years ago.
5 More recently, it has.

6 Q. You would certainly agree that babies
7 feel pain, wouldn't you?

8 A. Yes.

9 Q. And that doing a circumcision would be a
10 painful procedure?

11 A. Yes.

12 Q. The dorsal crush would be painful?

13 A. Yes.

14 Q. The blunt probe separation of the glans
15 penis from the foreskin would be painful?

16 A. Perhaps.

17 Q. The placement of the Plastibell would be
18 painful?

19 A. Not really.

20 Q. Tell me how you place the Plastibell.

21 A. It has a little handle on it, and you put
22 it over the glans inside the foreskin, and then
23 you tie a string there.

24 Q. Is the string seated into some sort of a
25 beveled edge?

1 A. A ridge.

2 Q. A ridge?

3 A. Yeah.

4 Q. What type of string do you use?

5 A. I believe it's catgut.

6 Q. And that is then supposed to fall off on
7 its own after a period of time?

8 A. Yes.

9 Q. So, I come from the farm, and we used to
10 do -- castrate sheep, little lambs, by putting a
11 real taut rubber band around the scrotum where it
12 would cut off the blood supply, it would cut off
13 all circulation, and eventually it would fall. Is
14 that a similar theory in using that Plastibell?

15 MR. THOMAS: Object to the form of the
16 question insofar as it's incorporating veterinary
17 procedures. But if you want to have an answer to
18 your question as to the concept of how the
19 Plastibell has the skin fall off, he can answer
20 that question.

21 A. Yeah, the skin dies underneath the
22 crushed tie and then falls off.

23 Q. (Mr. Baer, continuing) And the skin dies
24 because when you tie that tight, it cuts off all
25 vascularization of that foreskin?

1 A. And dies.

2 Q. And the reason it dies is because it is
3 no longer being nourished by blood?

4 A. Probably.

5 Q. What do you mean "probably"?

6 A. Yes.

7 Q. Do you know, Dr. Berestka, what the nerve
8 pathway is to the foreskin?

9 A. Not in detail.

10 Q. Do you know what nerves innervate the
11 foreskin?

12 A. I assume it's the preputial nerve, but I
13 don't know.

14 Q. Do you know anything about the anatomy of
15 the foreskin itself?

16 A. No.

17 MR. THOMAS: Object as repetitious.

18 Q. (Mr. Baer, continuing) Now, how long
19 does this procedure take?

20 A. Several minutes.

21 Q. Could you be more specific than "several
22 minutes"? Is it five minutes?

23 A. Five, eight minutes.

24 Q. What takes the time?

25 MR. THOMAS: Other than what he's

1 described?

2 MR. BAER: Well, he's described doing a
3 dorsal crush.

4 Q. (Mr. Baer, continuing) How long does
5 that take?

6 A. I've never timed it for each part of it.

7 Q. Well, let me ask you this. Do you do
8 anything before you do the dorsal crush? Do you
9 have to dilate the opening?

10 A. Well, I free the foreskin.

11 Q. Entirely before you do --

12 A. Crush.

13 Q. -- the crush. How do you dilate the
14 opening?

15 A. Dilate what opening?

16 Q. The foreskin opening.

17 A. It's usually already open. I try to
18 retract the foreskin a little bit to get the probe
19 in to free up the foreskin.

20 Q. So you have the baby strapped down on the
21 Circumstraint, and you would then retract the
22 foreskin, and then insert the blunt probe between
23 the foreskin and the glans?

24 A. Right.

25 Q. What is that tissue called that you are

1 severing or tearing away with that blunt probe?

2 A. It's like adhesions.

3 Q. It's a natural condition, right?

4 A. Right.

5 Q. Are you familiar with what the natural

6 separation time period -- I'll rephrase the

7 question. Are you familiar with how an intact

8 penis would have those adhesions separated?

9 A. I assume over time it just grows out of
10 it.

11 Q. Naturally?

12 A. I assume.

13 Q. Okay. You don't know?

14 A. Nothing a hundred percent, no.

15 Q. So you retract the foreskin so you can
16 insert the blunt probe, then you free all the
17 adhesions, which is separating the living tissue
18 that is connecting the foreskin from the glans?

19 A. Um-hum.

20 Q. Is that a "yes"?

21 A. Yes.

22 Q. After you do that, what do you do?

23 A. Then, I do the dorsal slit.

24 Q. Well, don't you do the crush first?

25 A. The crush first, yes.

1 Q. How long do you allow the forceps to stay
2 in place to accomplish the crush?

3 A. A few seconds.

4 Q. Okay. Then what do you do?

5 A. Then, I make the cut with a scissor along
6 where it's been crushed.

7 Q. Okay. Then what do you do?

8 A. Then it's already freed up, so I then put
9 the Plastibell on, and then I tie it.

10 Q. How do you determine how much foreskin to
11 remove?

12 A. Well, that's part of the advantage of the
13 Plastibell. It's designed to -- so you don't take
14 off too much or too little.

15 Q. So there's no variable? It's always the
16 same?

17 A. No, you have to determine the size. Some
18 glans are bigger and so forth, so there are
19 different sizes of Plastibells.

20 Q. What size did you use in this instance?

21 A. I assume it was a 1.3. That's the
22 standard size.

23 Q. There's nothing in the record that would
24 suggest what size?

25 A. No.

1 Q. Now, you place the Plastibell on there,
2 and then you tie it off?

3 A. Right.

4 Q. Is there bleeding involved?

5 A. Not usually.

6 Q. And that's because the dorsal crush would
7 have essentially crushed the vascular -- the blood
8 vessels that were there?

9 A. In that area, yes.

10 Q. And that's the only place you cut, right?

11 A. Yeah. You then trim the skin beyond the
12 tie. And sometimes if you don't tie it tight
13 enough or whatever, then it can bleed from
14 underneath.

15 (WHEREUPON, the court reporter asked for
16 a brief recess.)

17 Q. (Mr. Baer, continuing) You mentioned
18 that after you placed the string on there -- is
19 there a special type of knot that you use to
20 secure it, that string?

21 A. A square knot.

22 Q. Then you said you trim the excess skin.
23 Describe how you do that.

24 A. You take a scissor and go around 360
25 degrees.

1 Q. Now, at this point, are you aware of
2 whether or not there is nerve transmission to the
3 child?

4 A. I don't see how that pertains.

5 Q. I'm not asking you that, Doctor. I'm
6 asking you whether or not there is still -- the
7 nerves would still be intact at that point,
8 correct?

9 A. Well, they're crushed too.

10 Q. So the --

11 A. Or tied off.

12 Q. The string itself would tie off the
13 nerves so there is no more sensation?

14 A. I believe.

15 Q. But the sensation would be there of a
16 tied off nerve?

17 A. I guess. I don't know the physiology.

18 Q. Okay. So then you would take a scissors
19 and cut off the foreskin that was proximal to your
20 string -- or is it distal?

21 A. Distal.

22 Q. Distal to the string, right?

23 A. Right.

24 Q. Does the scissor mark then become the
25 edge?

1 A. Yes.

2 Q. Does the scissor mark then fall off?

3 A. The scissor doesn't leave a mark.

4 Q. Well, the skin that is being cut by the
5 scissors, does that ultimately fall off?

6 A. Yes.

7 Q. And so what you'd be left with after a
8 dorsal -- or a Plastibell, would be a small
9 plastic, cone-shaped device that is tied onto the
10 penis?

11 A. Right.

12 Q. And how long is it that that stays on?

13 A. Usually five to seven days.

14 Q. What are the risks associated with a
15 Plastibell?

16 A. Bleeding, infection.

17 Q. Any others?

18 MR. WHITMORE: I missed that. Bleeding
19 and what?

20 THE WITNESS: Infection.

21 Q. (Mr. Baer, continuing) Anything else?

22 A. There probably is, but those are the two
23 that are more common, if anything happens.

24 Q. Would you agree, Dr. Berestka, that there
25 is injury to the child by doing a circumcision?

- 1 A. I don't know what you mean by that.
- 2 Q. Well, do you know what an "injury" is?
- 3 A. Go ahead, tell me.
- 4 Q. No. Do you know?
- 5 A. Well, everybody has a different idea.
- 6 Q. I want to know what your idea of an
7 injury is.
- 8 A. Well, if you're saying a circumcision is
9 an injury, any cut is an injury.
- 10 Q. Well, then would it be true that a
11 circumcision involves a cut?
- 12 A. Yes.
- 13 Q. And a circumcision involves the permanent
14 amputation of tissue?
- 15 A. Yes.
- 16 Q. And do you know what volume of tissue it
17 was that you removed on this day?
- 18 A. No.
- 19 Q. Did you have the tissue sent to the lab?
- 20 A. No.
- 21 Q. Do you ever send foreskins that have been
22 removed to the lab?
- 23 A. No.
- 24 Q. What is done with them?
- 25 A. They're discarded.

1 Q. How?

2 A. I assume the nurses put it -- I don't
3 know where they put it.

4 MR. BAER: Could you mark that as an
5 exhibit, please.

6 (WHEREUPON, Exhibit 3 was marked for
7 identification.)

8 Q. (Mr. Baer, continuing) Before we go to
9 Exhibit 3, Doctor, on Exhibit 2, did we exhaust
10 all of the pages on which you had any notes made?

11 A. Yes.

12 Q. And how did you become the doctor for
13 H.A.N.? How did that doctor-patient relationship
14 arise?

15 A. Well, we had three OB-GYNs, and we
16 rotated being on call. So I was on call that
17 weekend.

18 Q. Did you ever have any discussion with
19 H.A.N.'s mother, D.N.N., about a doctor-patient
20 relationship?

21 A. I'm not sure what you mean.

22 Q. Well, did anybody ask you to circumcise
23 H.A.N.?

24 A. The nurse, as I stated before.

25 Q. Did Dawn Nelson ask you to circumcise her

1 son?

2 A. Not directly.

3 Q. Did David Nelson ask you to circumcise
4 his son?

5 A. Not directly.

6 Q. What information do you have that they
7 did it indirectly?

8 A. I assume the nurse asked them, and that's
9 why she told me to go ahead.

10 Q. And the nurse that you're talking about
11 is some unknown face?

12 A. Yes.

13 Q. As you were going through the records,
14 did you remember any faces or names of nurses that
15 may have been the one that told you this is the
16 child to be circumcised?

17 A. No.

18 Q. Who was Dawn Nelson's obstetrician?

19 A. Dr. Wust saw her mostly.

20 Q. And you said you had saw her once during
21 prenatal visits. When was that?

22 A. I believe it's November 10th. I don't
23 remember the date, but it's in the record.

24 Q. Okay. Did you know Dawn?

25 A. Only from that one visit.

1 Q. Prior to November 10 or after November
2 10, you had never seen her?

3 A. There's some note about I looked at some
4 lab records, but I don't remember seeing her,
5 unless it's in there somewhere.

6 Q. Okay. I'm showing you what has been
7 marked as Exhibit 3. And I'll represent to you
8 that those are Bates stamp numbers 500001 through
9 500082, and I'll represent to you that these are
10 records that I received from Unity Hospital
11 regarding the birth of H.A.N. in January of 2000.
12 Have you had an opportunity to look at these,
13 Doctor?

14 A. This is on the mother?

15 Q. I believe so.

16 A. The question is?

17 Q. Have you had a chance to look at those
18 records?

19 A. Parts of them. I'm not sure I've seen
20 all of them.

21 Q. All right. Do you know whether your
22 writing appears in any of those records?

23 A. Yes.

24 Q. Could you tell me where your writing
25 appears, Doctor? What's the page number?

1 A. 56.

2 Q. Okay. Tell me where.

3 A. The fourth line down. It's dated
4 11/10/99.

5 Q. And why don't you read what your
6 handwriting shows.

7 A. She apparently complained of sharp pain
8 in the vaginal area. No urine symptoms. Cervix
9 closed. Vaginal screen negative. I did a --
10 two-plus white cells in the urine showed, so we
11 awaited the urine culture. And I guess it was
12 positive the next day, so she was started on
13 medication.

14 Q. And this would have been a visit that
15 took place at the clinic?

16 A. Yes.

17 Q. How long would that visit have been?

18 A. You mean how long a time?

19 Q. Yes.

20 A. Ten, fifteen, twenty minutes. I don't
21 know.

22 Q. And she came in there with a specific
23 complaint?

24 A. Yes, apparently.

25 Q. To your knowledge, was there any

1 discussion about circumcision on that date?

2 A. Probably not.

3 Q. Well, your note doesn't indicate any
4 discussion, does it?

5 A. Right.

6 Q. And if she came in with a specific pain,
7 it wouldn't be your practice to talk about
8 circumcision, would it?

9 A. Not -- no, I would not.

10 Q. And do you know whether Dawn Nelson was
11 aware of the gender of her child in November of
12 1999?

13 A. I don't know.

14 Q. Where else does your handwriting appear,
15 Doctor?

16 A. I assume there's a hospital daily record,
17 but I haven't found it yet.

18 Q. Look at page 7.

19 A. Yes.

20 Q. Is that what you were looking for?

21 A. Yes.

22 Q. And are these doctors' orders?

23 A. No.

24 Q. What are they?

25 A. Progress notes.

1 Q. All right. And on 1/23/00, there is a
2 progress note there. Could you read that,
3 please. Is it in your handwriting, by the way?

4 A. Yes.

5 Q. And what does it say?

6 A. "Doing well. Upset about circ being done
7 without discussion beforehand, etc. I apologized
8 and discussed."

9 Q. Do you remember that conversation?

10 A. Vaguely.

11 Q. What do you remember about it?

12 A. I expressed my disappointment in having
13 been told that there was a circ to do and having
14 done it. And she, I'm not sure, didn't want it or
15 she wanted to talk about it before it was done.
16 But I'm not sure which of those situations it was,
17 probably both, but I don't know for sure. I don't
18 remember.

19 Q. Your note indicates, though, that she was
20 upset?

21 A. Yes.

22 Q. As you sit here today, do you remember
23 actually having that conversation with her?

24 A. I don't have a good memory.

25 Q. So whatever you recall is jogged by your

1 note?

2 A. Yes.

3 Q. Was there anybody else present when this
4 note was taken, to your knowledge, or when that
5 discussion took place?

6 A. I can't remember.

7 Q. Did you ever meet David Nelson, the
8 father of the child?

9 A. I don't think so.

10 Q. Now, is there any other place in the
11 medical records, to your knowledge, that your
12 handwriting appears?

13 A. Not that I remember.

14 Q. Would there be any way to tell,
15 Dr. Berestka, from reference to either Exhibit 2
16 or Exhibit 3, those being the medical records of
17 the child and the mother, what procedure you used
18 to perform the circumcision?

19 A. I just always use a Plastibell.

20 Q. But looking at the records, if somebody
21 were to look at the records, would they be able to
22 tell what procedure you used?

23 A. No.

24 (WHEREUPON, Exhibit 4 was marked for
25 identification.)

1 Q. (Mr. Baer, continuing) Showing you what
2 has been marked as Exhibit 4, and I'll represent
3 to you that this is a summary investigation report
4 completed by the Minnesota Department of Health,
5 have you seen that before?

6 A. No.

7 Q. Were you aware that the Minnesota
8 Department of Health was doing an investigation
9 regarding allegations of performing circumcisions
10 without consent?

11 A. No.

12 Q. Were you interviewed by anybody from the
13 Minnesota Department of Health?

14 A. Not that I remember.

15 Q. Are you saying you have never seen
16 Exhibit No. 4 before?

17 A. Have I seen this? No.

18 Q. Are you saying that you don't remember
19 talking to an investigator from the Department of
20 Health whose name is Christina Baltes?

21 A. I said my memory is not good. I don't
22 know. Did I? It's probably in here if I did.

23 Q. Look at page 600002. It's the first
24 page, Doctor, of Exhibit No. 4. And if you look
25 at the second page -- or the second paragraph

1 under "Nature of Visit," it says, "The allegation
2 is: On 1/22/00, physician #3 violated parental
3 rights to informed consent when he circumcised
4 patient (S) without parental knowledge and
5 consent. The physician did such a poor job that
6 patient (S) needed to have additional surgery."
7 That's the allegation. Were you aware that an
8 allegation had been made against you about the
9 circumcision of H.A.N.?

10 A. I don't remember.

11 Q. Were you aware that a complaint had been
12 filed with the Board of Medical Practice?

13 A. Somebody -- the Board of Medical
14 Practice, I did visit with them.

15 Q. With a Complaint Review Committee?

16 A. I believe so.

17 Q. But you don't remember any contact by the
18 Minnesota Department of Health in doing an
19 investigation?

20 A. I don't remember.

21 Q. I mean, you indicated that your memory
22 was poor. Is that because of some medical
23 problem?

24 A. No, it's just that my long-term memory is
25 not like other people's, perhaps.

1 Q. So as to the circumstances that
2 surrounded the events of the birth and
3 circumcision of H.A.N., your memory is poor?

4 A. Well, I wrote some notes down. If I
5 didn't write notes -- it's easier if you've
6 written something to recall.

7 Q. To your knowledge, have you ever been the
8 target of an investigation regarding patient care
9 in your earlier practice?

10 A. Yes.

11 MR. THOMAS: An investigation by whom?

12 MR. BAER: By the Department of Health.

13 A. No.

14 Q. (Mr. Baer, continuing) Have you ever
15 been sued for malpractice?

16 A. Yes.

17 Q. Describe those.

18 A. They were settled without...

19 Q. Sure. When and --

20 A. Well, I don't know the details.

21 Q. What were the circumstances of the
22 complaint or complaints? How many, first?

23 A. One lady had, after a laparoscopy, bowel
24 burns, and it was settled without verdict before.

25 Q. "Settled without verdict" can mean a lot

1 of things. Do you know how it was resolved?

2 A. It's the terminology for it. I don't
3 know what you call it. Nothing happened.

4 MR. THOMAS: I think it was dismissed
5 without payment.

6 Q. (Mr. Baer, continuing) Okay. When was
7 that?

8 A. I don't know. Years ago.

9 Q. In Hennepin County?

10 A. Yes.

11 Q. Which other event?

12 A. Some kind of an episiotomy problem thirty
13 years ago.

14 Q. Hennepin County?

15 A. Yes.

16 Q. Any others?

17 A. Those are the only two I remember.

18 Q. Are there others that you don't remember?

19 A. No. Sometimes things were investigated,
20 perhaps, but never went to where we talked about
21 you guys.

22 Q. Sure. Following the Minnesota Department
23 of Health investigation, did you participate in
24 any peer review? I'm just asking you whether you
25 participated, not what you did out of that. Did

1 you participate in any peer review of the
2 procedures of Unity Hospital for circumcision?

3 A. I don't remember any.

4 Q. By the way, were you credentialed to do
5 C-sections at Unity Hospital?

6 A. Yes.

7 Q. And did you do C-sections at Unity
8 Hospital?

9 A. Yes.

10 Q. And when you did C-sections, you would
11 need to dictate a note that was much more detailed
12 than the note you did for the circumcision,
13 correct?

14 A. Yes.

15 Q. And that was because of a policy in place
16 at Unity Hospital, correct?

17 A. Yes.

18 Q. And when you did the circumcision, there
19 was not a requirement for this to be in a surgical
20 theater, right?

21 A. Right.

22 Q. And did you ensure that there was a nurse
23 present when this circumcision was done?

24 A. They're usually present.

25 Q. Now, would you agree, Dr. Berestka, that

1 doing a circumcision is surgery?

2 A. Yes.

3 Q. If you'd look at page 3 of Exhibit
4 No. 4,, I believe, before you, 60003 on the
5 bottom, the report indicates that, "Interview with
6 physician #3 on 3/20/01 verified that informed
7 consent was not obtained prior to patient (S's)
8 circumcision."

9 A. Am I "physician #3"?

10 Q. Well, that's what I'm asking you. Do you
11 remember that conversation?

12 A. Not well, obviously.

13 Q. Well, not well and not remembering are
14 two different things. Which one is it? Do you
15 remember having any conversations with --

16 A. This is not a pleasant topic, so I may
17 have suppressed it, repressed it, whatever.

18 Q. I understand.

19 A. If I talked with her, I talked with her;
20 but I don't remember it.

21 Q. Well, do you remember an investigator
22 from the Department of Health coming to visit with
23 you about the circumcision of H.A.N.?

24 A. I don't remember.

25 Q. You have no recollection of it at all?

1 A. Where was it? At the hospital? At
2 home?

3 Q. You mean you're just blank on that?

4 A. Yeah.

5 MR. WHITMORE: Does that exhibit even
6 identify it as being the same patient?

7 MR. BAER: What's that?

8 MR. WHITMORE: Does that exhibit even
9 identify it being the Nelson baby?

10 MR. BAER: It alleges that on 1/22/00,
11 physician #3 violated parental rights to informed
12 consent when the circumcision was done. And this
13 report was sent to Dawn Nelson in response to the
14 complaint. Yeah.

15 MR. WHITMORE: Fair enough.

16 MR. THOMAS: There's no question
17 pending?

18 MR. BAER: I was just answering
19 Mr. Whitmore's.

20 MR. THOMAS: I know.

21 MR. BAER: He's reading intently, so I
22 thought I'd let him read.

23 MR. THOMAS: That's fine.

24 Q. (Mr. Baer, continuing) After having read
25 a little bit about the investigation, does that

1 jog your memory at all about visiting with an
2 investigator from the Minnesota Department of
3 Health?

4 A. I must have, but I don't remember.

5 Q. If you'd take a look at page 3 again,
6 600003. Dr. Berestka, are you on that page?

7 A. Yes.

8 Q. If you'd look at the third full
9 paragraph, it says, "The patient care policies and
10 procedures dated 3/99, on informed decision
11 making, indicate that, 'A verification of Informed
12 Consent form indicating the surgical, invasive, or
13 endoscopic procedure is to be completed by
14 hospital staff or the physician and reviewed with
15 the patient or legal representative prior to the
16 procedure.'" Do you see that?

17 A. Yes.

18 Q. And is that what your understanding was
19 of the existing policy that was in effect at the
20 time you did the circumcision?

21 A. I was told we did not need written
22 consent.

23 Q. By whom?

24 A. The nurses.

25 Q. When did that discussion take place?

1 A. Months before.

2 Q. Under -- in what context did it take
3 place?

4 A. This had changed; the policy had changed.

5 Q. When had it changed?

6 A. I don't remember the dates.

7 Q. And so the change was from what to what?

8 A. That written consent needs to be obtained
9 for circumcisions to not needing to be obtained.

10 Q. So are you saying, Dr. Berestka, that at
11 one point in your practice at Unity Hospital you
12 would have checked to see if written consent had
13 been obtained?

14 A. Prior to this change, yes. Usually there
15 was a form next to the baby or with the baby's
16 chart.

17 Q. And what would the written consent
18 describe for you?

19 A. It was just the patient consents to circ
20 or whatever.

21 Q. And the patient having signed a written
22 consent really doesn't give you consent, does it?

23 A. I assume that's what --

24 MR. THOMAS: Object to the form of the
25 question.

1 Q. (Mr. Baer, continuing) Well, isn't the
2 consent process, Dr. Berestka, a dynamic process
3 where the doctor is obligated to give a patient
4 sufficient information to make a reasonable
5 decision about what treatment they will or will
6 not consent to?

7 A. If it was signed, I assume she had
8 already been informed.

9 Q. But isn't it the doctor's obligation to
10 give that information?

11 A. I can't argue with that.

12 Q. So that's a yes, it is the doctor's
13 obligation?

14 A. If the patient asks, then you have to
15 answer yes -- or not answer yes, but give the
16 information that she wants. If she doesn't ask,
17 then --

18 Q. Then you don't have to give any
19 information?

20 A. Well, she's already made her decision.

21 Q. But are you saying that if she doesn't
22 ask, then you don't have to give any information?

23 A. Unless it's a major risk or something
24 perhaps more likely to be detrimental.

25 Q. In the context of a circumcision, who is

1 your patient?

2 A. The baby.

3 Q. And you certainly would agree that you
4 can't obtain consent from the baby, right?

5 A. Um-hum.

6 Q. Is that a "yes"?

7 A. Yes.

8 Q. And would you agree with the AAP's
9 statement, American Academy of Pediatrics
10 statement, on informed consent that has elements?

11 MR. THOMAS: Well, show it to him.

12 Q. (Mr. Baer, continuing) Are you familiar
13 with the American Academy of Pediatrics as it
14 deals with the policy on informed consent?

15 A. Not specifically.

16 Q. Have you read that?

17 A. Not specifically.

18 Q. Are you familiar with the article
19 "Informed Consent, Parental Permission, and Assent
20 in Pediatric Practice," published by the Committee
21 on Bioethics of the American Academy of
22 Pediatrics?

23 A. No.

24 Q. Would you agree that in order to meet
25 your obligations of informed consent, that there

1 is a different standard when dealing with proxy
2 consent as opposed to direct consent from a
3 patient?

4 A. I'm not sure what you mean.

5 Q. Well, when you're dealing with an adult
6 patient, you can talk to that patient and make
7 some observations about whether or not that
8 patient understands what you're talking to them
9 about, risks and benefits, correct?

10 A. Yes.

11 Q. With an infant, the infant is not making
12 the decision, correct?

13 A. Right.

14 Q. So when you're dealing with a proxy
15 consent, you really are obligated, are you not, to
16 give complete, unbiased information about the
17 risks and benefits associated with the procedure?

18 A. I assume she had made the decision
19 already, so...

20 Q. I'm just asking what your obligation is
21 in order to obtain informed consent. I appreciate
22 that you assume that she had made that decision
23 already. I'm more concerned with what your duty
24 is as a physician before embarking on a surgical
25 procedure on an infant. What is your obligation

1 when you are obtaining proxy consent for a
2 procedure?

3 A. If it's already been obtained, I don't go
4 any further.

5 (WHEREUPON, the court reporter requested
6 a brief recess.)

7 Q. (Mr. Baer, continuing) Doctor, during
8 the brief recess, you were looking again at the
9 Minnesota Department of Health Investigative
10 Report. After having had a little bit more time
11 to review that report, does it jog your
12 recollection about visiting with a representative
13 of the Department of Health?

14 A. Not really.

15 Q. Getting back, then, to the issue we were
16 talking about, and that is the proxy informed
17 consent or substitute informed consent, when you
18 obtain consent, would you agree that -- and I just
19 want to quote from the American Academy of
20 Pediatrics statement here -- that there are --

21 MR. THOMAS: Before you do, can you give
22 us the date on that.

23 MR. BAER: Yes, it's Volume 95, No. 2,
24 pages 314 to 317 of the Pediatrics Journal,
25 February, 1995.

1 Q. (Mr. Baer, continuing) It's a
2 publication dealing with the consent in the
3 pediatric context. It describes concepts that
4 informed consent includes four different aspects.
5 And the first -- and I just want to read it to you
6 and get your thoughts as to whether or not you
7 agree with the concepts, at least. First,
8 "Provision of information: Patients should have
9 explanations, in understandable language, of the
10 nature of the ailment or condition; the nature of
11 the proposed diagnostic steps and/or treatment(s)
12 and the probability of their success; the
13 existence and nature of the risks involved; and
14 the existence, potential benefits, and risks of
15 recommended alternative treatments (including the
16 choice of no treatment)." Number two, "Assessment
17 of the patient's understanding of the above
18 information." Number three, "Assessment, if only
19 tacit, of the capacity of the patient or surrogate
20 to make the necessary decision(s)." And number
21 four, "Assurance, insofar as is possible, that the
22 patient has the freedom to choose among the
23 medical alternatives without coercion or
24 manipulation." Would you agree with those
25 principles?

1 A. I can't disagree.

2 Q. All right. Then, let's talk about,
3 Doctor, what would be the diagnosis of a child --
4 for instance, what was the diagnosis of H.A.N.
5 before you did the circumcision?

6 A. A healthy newborn.

7 Q. Were you treating any medical condition
8 by doing the circumcision?

9 A. Not really.

10 Q. Were you treating any disease process?

11 A. Not really.

12 Q. Were there any anomalies that you noted
13 in the foreskin or penis?

14 A. No.

15 Q. Would it be fair to say, then, that
16 H.A.N. was circumcised for a nonmedical reason?

17 A. Probably.

18 Q. And I understood you to say that, at
19 least in this instance with H.A.N., you did not
20 even talk with the mom or dad; you took the word
21 of a nurse who said there was a circumcision to be
22 done?

23 A. Yes.

24 MR. THOMAS: This is maybe the fifth time
25 you've asked it, but I'll let the answer stand.

1 Q. (Mr. Baer, continuing) Would you agree,
2 Doctor, that as a doctor treating an infant, you
3 have an ethical duty to that child-patient in
4 treatment?

5 A. Yes.

6 Q. And would you also agree that in treating
7 that infant, you need to ensure that the treatment
8 you provide is in that child's best interests?

9 A. Yes.

10 Q. So that if a mother or a father would
11 want their daughter to have a clitoridectomy at
12 birth, you would not provide that?

13 MR. THOMAS: Don't answer that question.
14 That's not calculated to lead to admissible
15 evidence.

16 Q. (Mr. Baer, continuing) Correct?

17 MR. THOMAS: I instructed him not to
18 answer.

19 Q. (Mr. Baer, continuing) If a mother or
20 father asked you to take off a finger, would you
21 take off a finger?

22 MR. THOMAS: A normal finger?

23 MR. BAER: Yes, a non-diseased finger.

24 MR. THOMAS: I'm going to object to the
25 relevance, but I'm going to let you answer that

1 question.

2 Q. (Mr. Baer, continuing) Would you do it?

3 A. No.

4 Q. Pardon?

5 A. No.

6 Q. Why not?

7 A. I'm not trained to.

8 Q. Okay. That's the only reason? I mean,
9 if you were trained to do it, would you do it?

10 A. No, there are, obviously, other reasons.

11 Q. Why? Why?

12 A. We're talking about two different things
13 here. Circumcision is often done for social
14 reasons. Amputating a finger is not.

15 Q. What if the mom has a finger that's
16 removed and she wants her son or daughter to look
17 like her, you still wouldn't do it, would you?

18 A. No.

19 Q. And the reason you wouldn't do it is
20 because there's no medical indication, correct?

21 A. I'm not trained in it. We're off the
22 beaten path here.

23 Q. I understand you're not trained to take
24 off a finger; but it's revealing, Doctor, isn't
25 it, that you will cut off a normal part of the

1 anatomy of a boy as long as it's on the penis, but
2 not on the finger?

3 MR. THOMAS: And I'm going to instruct
4 you not to answer the question as it's, number
5 one, argumentative, not designed to produce any
6 information, and, number two, even though it's
7 argumentative, additionally, it's vague, since I
8 don't know what Mr. Baer means by "revealing."
9 So, it's a question we can't answer, and it's a
10 question not designed to illicit information in
11 the first instance. I'm going to instruct you not
12 to answer.

13 MR. BAER: I didn't even think there was
14 a question on the table, Rich.

15 MR. THOMAS: Oh, was it just a speech?
16 It was a soliloquy? In which case, I move to
17 strike.

18 Q. (Mr. Baer, continuing) Doctor, I want to
19 get back again to the reasons you would not remove
20 a finger if requested to do so by a parent.

21 MR. THOMAS: I think he's answered those
22 questions.

23 MR. BAER: I don't think he completely
24 answered. He said amongst other reasons he
25 wouldn't do it, but what are those other reasons?

1 MR. THOMAS: If you have something
2 additional to say other than what you've already
3 said.

4 A. I've said what I needed to say.

5 Q. (Mr. Baer, continuing) Refresh my
6 recollection of what you said, then, about why you
7 wouldn't remove a finger.

8 A. Because I'm not trained and because it's
9 not needed.

10 Q. Okay. It isn't needed to cut off a
11 foreskin, is it, for the health of the baby?

12 MR. THOMAS: Go ahead. You can answer.

13 A. Some people think it's needed for society
14 reasons.

15 Q. (Mr. Baer, continuing) Some parents
16 think it's needed for society reasons?

17 A. Right.

18 Q. So in your mind, a parent should be able
19 to decide, for society reasons, to cut off a
20 natural anatomy of their son's penis, and you, as
21 a medical doctor, accede to that request?

22 A. Yes.

23 Q. Without a medical reason for doing it?

24 A. There are distant medical reasons to do
25 it.

1 Q. But not immediate medical reasons?

2 A. No.

3 Q. Like a finger, you would never have an
4 ingrown fingernail, would you, if you had that
5 finger severed as a child, would you?

6 A. That's --

7 MR. THOMAS: How long are we going to go
8 with the finger? It's irrelevant.

9 Q. (Mr. Baer, continuing) Would you have an
10 ingrown fingernail, Doctor?

11 MR. THOMAS: These are argumentative
12 questions, Zenas. Now, I've been very, very
13 tolerant, but I'm sort of running out of
14 tolerance. Do you really want an answer to that
15 argument?

16 Q. (Mr. Baer, continuing) Doctor, you said
17 that there are distant reasons for cutting off a
18 foreskin, and what I'm trying to ask you is that,
19 likewise, there would be a reason to cut off a
20 finger, because you'd never have an infection of
21 that finger, would you?

22 MR. THOMAS: Wait, wait. I'm going to
23 object to the form of that question. You say
24 "likewise." Are you -- and by "likewise," that's
25 sort of a simile. Are you suggesting that an

1 ingrown fingernail is the same thing as balanitis
2 xerotica obliterans, phimosis, other things
3 associated, penile cancer, associated with the
4 retention of the foreskin? Is that what your
5 question is asking us to assume?

6 Q. (Mr. Baer, continuing) Doctor, I'm not
7 asking you to assume anything. You said that
8 there were distant medical reasons for
9 prophylactically removing a foreskin on an
10 infant. Describe those.

11 A. They were just mentioned.

12 Q. Doctor, I want you to describe them.

13 A. Balanitis, phimosis, penile cancer.

14 Q. Okay. All those are -- I mean, penile
15 cancer is very, very rare, isn't it?

16 A. I believe so.

17 Q. More children die from the process of
18 circumcision than adults die from penile cancer,
19 correct?

20 A. I don't know.

21 Q. Would you agree that if more children die
22 from circumcision than they do from adult penile
23 cancer that the risk benefit ratio would not
24 warrant circumcising?

25 A. If the mother wants it done, that's her

1 decision.

2 Q. No, Doctor, I'm asking you about the risk
3 benefit analysis. You would agree, wouldn't you,
4 that there is a risk benefit analysis that goes
5 into recommending certain procedures as a medical
6 doctor?

7 A. Often, but not always.

8 Q. So if the risk of getting penile cancer
9 is lower than the risk of a baby dying as a result
10 of a circumcision, it would be hard for you to
11 recommend circumcision, correct, if that were the
12 only reason?

13 A. Yeah, but there's others; balanitis and
14 phimosis.

15 Q. But if that was the only reason, you
16 wouldn't recommend it, would you?

17 A. Well, we'd have to discuss it.

18 MR. BAER: Could I have you mark that as
19 an exhibit, please.

20 (WHEREUPON, Exhibit 5 was marked for
21 identification.)

22 Q. (Mr. Baer, continuing) Showing you
23 Exhibit 5, Dr. Berestka, this is Bates stamped
24 numbers 800001 through 80004. I ask you to take a
25 look at that and tell me whether you recognize

1 that document.

2 A. Yes.

3 Q. Have you seen it before?

4 MR. THOMAS: Yes.

5 A. Yes.

6 Q. (Mr. Baer, continuing) I didn't ask your
7 attorney. I asked you.

8 MR. THOMAS: That's what we looked at
9 yesterday.

10 A. Yes.

11 Q. (Mr. Baer, continuing) Before you looked
12 at it yesterday, Dr. Berestka, had you ever seen
13 it before?

14 A. Not specifically.

15 Q. So you had never seen it before
16 yesterday?

17 A. The information that -- I knew about the
18 information regarding circumcisions without seeing
19 the document.

20 Q. Okay. But what I'm asking you,
21 Dr. Berestka, is that before you saw Exhibit No. 5
22 yesterday, which would have been October 6, 2004,
23 you had never seen this document before?

24 A. No.

25 Q. And what did you review about this

1 yesterday, Doctor? Or what provision are you
2 pointing to saying that you don't need to
3 obtain --

4 A. "Exception: Newborn circumcision," page
5 4.

6 Q. Page 4. That's under Roman numeral 4,
7 subparagraph C7; is that right?

8 A. No, A(1) and also C(7).

9 Q. Okay. And what does it say?

10 A. "Exception: Newborn circumcision."

11 Q. What is the exception from?

12 A. Required -- I don't know where it
13 starts. Informed consent form verification.

14 Q. But it doesn't say that circumcision is
15 excepted from the obligation to obtain informed
16 consent, does it?

17 A. It does not need -- you do not need
18 written consent.

19 Q. What I'm saying is that's something quite
20 different than whether or not you still have the
21 duty to obtain informed consent, correct?

22 A. I assume the nurse had gotten written
23 consent.

24 Q. Well, the nurse can't give information to
25 obtain informed consent.

1 A. I assume she did, in terms of should it
2 be done.

3 Q. Are you saying that the nurse would be in
4 a position, Doctor, to give information about the
5 risks and benefits in order to obtain informed
6 consent?

7 A. No, that she had gotten the okay to go
8 ahead.

9 Q. Who would have gotten --

10 A. The nurse.

11 Q. But how would the nurse get the okay to
12 go ahead?

13 A. Ask the mother.

14 Q. So if the mother asks and tells the
15 nurse, "I want a circumcision," that is in
16 compliance with informed consent, in your mind?

17 A. Yes.

18 Q. Have you ever sat on any of the hospital
19 committees regarding governance of the hospital?

20 A. Probably.

21 Q. Well, do you ever remember discussing
22 informed consent in the context of policies and
23 procedures, specifically circumcision?

24 A. No.

25 Q. Is your compensation -- or was your

1 compensation with Fridley Medical Center or the
2 Multicare Associates tied to production?

3 A. Probably.

4 Q. And that would include circumcisions,
5 correct?

6 A. Yes.

7 Q. So if you had a circumcision, if you'd
8 perform circumcisions, you would have whatever
9 revenues that generated as a base for your level
10 of compensation?

11 A. Yes.

12 Q. How much does your clinic receive for a
13 circumcision?

14 A. I don't know.

15 Q. Do you know what your clinic receives for
16 any hospital procedure that you do?

17 A. It's changed every day.

18 Q. So whatever it is, all of those
19 procedures and all the work you do, the revenue
20 stream comes in, and then your compensation is
21 based on your total revenues, at least in part?

22 A. In part.

23 Q. Which would then give, of course, the
24 practitioner motivation to bring in revenue,
25 right?

1 A. That's the nature of the practice.

2 Q. Right. And part of the practice in
3 bringing in the revenue would be doing
4 circumcisions?

5 A. If you're implying that's a reason to do
6 a circumcision, no.

7 Q. But it would be included? Whatever
8 revenue stream came in, that would be included?

9 A. That's just a by-product.

10 Q. Why do you say that it's "just a
11 by-product"?

12 A. Well, you're implying that we do
13 circumcisions to make money, and I resent that.

14 Q. Why do you do circumcisions?

15 A. The patient wants it.

16 Q. You mean -- well, it isn't the patient
17 that asks you, is it?

18 A. Who else? Well, I mean, the mother of
19 the patient. The mother of the patient, or the
20 father.

21 Q. Are there other procedures that you as a
22 medical doctor would do at the request of a parent
23 without medical diagnosis?

24 A. I don't know. Tying tubes. I don't
25 know.

1 Q. But that isn't on a baby, is it?

2 A. No, no.

3 MR. THOMAS: That wasn't your question.

4 Q. (Mr. Baer, continuing) Are there other
5 procedures that you would perform on an infant at
6 the request of a parent --

7 A. No.

8 Q. -- without medical diagnosis?

9 A. No.

10 Q. To your knowledge, did Unity Hospital
11 ever change their policy with regard to informed
12 consent as it relates to circumcisions during the
13 time you were there?

14 A. Well, this (pointing) at this time.

15 Q. Pardon?

16 A. This verifies that policy.

17 Q. Verifies what?

18 A. That it was changed.

19 Q. When was it changed?

20 A. Well, whatever date this is; 3/99.

21 Q. Well, that's when it was reviewed.

22 A. Well, apparently, it was -- that was the
23 impression I got, that it was changed at that
24 time.

25 Q. The impression you got was that it was

1 changed to exclude circumcisions from the
2 requirement to obtain verification of informed
3 consent in March of '99?

4 A. No, the written part.

5 Q. Right. How did you reach that
6 conclusion?

7 A. I was told that.

8 Q. By whom?

9 A. The nurses on the floor.

10 Q. So prior to 3/99, it's your understanding
11 that they required a written consent?

12 A. Yes.

13 Q. Do you remember that?

14 A. Requiring written consent?

15 Q. Yes.

16 A. Yes.

17 Q. During the time that you were at Unity
18 Hospital, was it ever changed from what you have
19 before you as Exhibit No. 5 to once again require
20 verification of written consent?

21 A. I'm not sure if that happened after. I
22 left January 1.

23 Q. Of 2001?

24 A. Yes.

25 Q. You left your practice?

- 1 A. I retired.
- 2 Q. In January of 2001?
- 3 A. I retired.
- 4 Q. Were you still practicing?
- 5 A. Up until then.
- 6 Q. But after that, were you practicing at
7 all?
- 8 A. No.
- 9 Q. So when the investigation report dated
10 May of 2001 and the investigation took place in
11 March of 2001, you were no longer employed at
12 Multicare Associates?
- 13 A. That's right.
- 14 Q. And no longer in active practice?
- 15 A. Right.
- 16 Q. Do you have an active license currently?
- 17 A. Yes.
- 18 Q. In what state?
- 19 A. Minnesota.
- 20 Q. Any other states?
- 21 A. No.
- 22 Q. Do you still carry on your board
23 certification?
- 24 A. I'm not sure what the rules are, if you
25 need to be recertified or not.

1 Q. It looks like your board certification
2 was in 1967, recertified in 1986. Are you still
3 board certified?

4 A. I believe so. I mean, they never rescind
5 it, so...

6 Q. If you were not employed at Multicare
7 Associates or Unity Hospital in March of 2001 when
8 the Department of Health did the investigation,
9 the report suggests that there was an interview
10 with you on 3/20/01, where would that have taken
11 place?

12 MR. WHITMORE: Objection, lack of
13 foundation.

14 MR. THOMAS: I join. He already told you
15 he doesn't remember. How's he going to answer
16 that question?

17 A. I don't remember. Maybe it was over the
18 phone.

19 Q. (Mr. Baer, continuing) The report
20 suggests, page 600003, "That physician #3 had
21 stated that the hospital had changed the informed
22 consent form requirement within the last year and
23 had dispensed with the informed consent form for
24 circumcisions." That's what you just testified
25 to, right?

1 A. The dates may not be right.

2 Q. Okay. Could you look at the informed
3 consent form on page 1, please, of Exhibit No. 5.
4 Would you agree with the definition of "informed
5 consent" as it is contained in the policy on
6 "Informed Consent and Decision Making," where it
7 says, "Informed consent is a legal process, and a
8 legal requirement of a physician which may not be
9 delegated"? Do you agree with that statement,
10 Doctor?

11 A. Probably.

12 Q. Okay. What do you mean "probably"?

13 A. I don't know. What is your question?

14 Q. My question is whether or not you agree
15 with the policy definition of "informed consent,"
16 that it "is a legal process and a legal
17 requirement of physicians which may not be
18 delegated"?

19 A. Probably, yes.

20 Q. Is that a "yes" or "probably"? I'm not
21 understanding what "probably" means.

22 A. Well, the circumstances are a little
23 different here.

24 Q. In what way?

25 A. Well, we often talked about circumcision

1 during pregnancy, prenatally. There's no
2 documentation of that; therefore, the informed
3 consent, when it says it's a "legal process," if
4 it's not documented, then that's not good. But we
5 assume that the patient had informed consent from
6 talking prenatally.

7 Q. So any patient that is giving birth to a
8 child of unknown gender at Unity Hospital would be
9 assumed to have already received informed consent?

10 A. Well, that we had talked about it prior.

11 MR. WHITMORE: I think his comments were
12 limited to his group. Your question was "any
13 patient."

14 Q. (Mr. Baer, continuing) Tell me about
15 your group practice.

16 A. Often times, we'd see the same patient
17 because that gave some continuity of care; but
18 obviously at delivery time, it could be somebody
19 else. So we tried to cover all bases during those
20 prenatal visits on potential things to do, do you
21 want a C-section if such and such, do you want a
22 circ --

23 Q. So if --

24 A. -- do you want an episiotomy.

25 Q. There's nothing in the records that would

1 suggest any discussion with Dawn Nelson about
2 circumcision?

3 A. No, but I didn't see her except once.

4 Q. I know. But there's nothing in those
5 records that would suggest any discussion --

6 A. I would assume my partner did, but
7 there's nothing to indicate that.

8 Q. Okay. Now my question again, then, to
9 this specific policy from Unity Hospital is
10 whether or not you agree with the precept that
11 informed consent is a legal process and a legal
12 requirement of physicians which may not be
13 delegated. Do you agree with that statement?

14 A. Yes.

15 Q. And then it goes on to say, "It
16 represents the patient's voluntary decision based
17 on an understanding of the proposed action and its
18 benefits, risks, and alternatives which have been
19 fully disclosed by the physician." Do you agree
20 with that?

21 A. Yes.

22 Q. But in the case of H.A.N., you didn't
23 impart any knowledge about circumcision to the
24 parents of H.A.N., did you?

25 MR. THOMAS: You know, this really is

1 repetitious. How many times do you want him to
2 answer that question?

3 A. I did not. You know that.

4 Q. (Mr. Baer, continuing) Okay. So would
5 it be fair to say that by your treatment of
6 H.A.N., by doing a circumcision without talking to
7 the parents, that that fell below the requirement
8 of this policy?

9 A. I didn't need to get a written consent
10 because it wasn't required.

11 Q. I understand the written consent
12 requirement, but the policy says it is the
13 physician's duty to obtain that consent. We were
14 going over it, and now the next sentence is, "The
15 information must be communicated to the patient in
16 a manner appropriate to the intellectual
17 capabilities, language, and emotional condition of
18 the patient." Did you do that?

19 A. No.

20 Q. The policy goes on to state, "The patient
21 will have the opportunity to ask questions,
22 request additional information, or consult with
23 others as desired." Was that patient given that
24 opportunity by your disclosure?

25 A. No.

1 Q. And then it says, "By Minnesota law, the
2 information communicated must be the information
3 which a reasonable patient in that patient's
4 position would expect to receive." Did you give
5 any information to the patient?

6 A. No.

7 Q. Now, my question is whether or not you
8 complied with this policy by the actions you took
9 to circumcise H.A.N. without speaking to mom or
10 dad?

11 A. I assume it had been discussed with her.

12 Q. I understand that that's the assumption
13 that you made, but I'm wondering whether or not by
14 assuming if that is sufficient to meet this
15 obligation on your part?

16 A. Well, this is so specific that there's no
17 way to answer, but I'd say no.

18 Q. So by assuming, you did not meet the
19 requirements of informed consent as stated in the
20 policy?

21 A. That's almost a discrepancy, because this
22 is almost different from page 4.

23 Q. Okay. Tell me why.

24 A. Well, here you don't need to verify
25 informed consent (pointing).

1 Q. But isn't there a difference, Doctor,
2 between written verification of inform consent and
3 the actual informed consent?

4 A. Yes.

5 Q. One is just a documentation that the
6 informed consent process took place, correct?

7 A. Yes.

8 Q. So how is there a difference between
9 saying you don't need to have the written
10 confirmation, how is that in any way contradictory
11 to the informed consent component of this policy?

12 A. I don't know.

13 Q. Would it be fair to say that if you read
14 the definition of "informed consent" contained in
15 the policy before you as Exhibit No. 5, that you
16 did not meet that standard when you performed the
17 circumcision on H.A.N. on the basis of an
18 assumption that informed consent was obtained?

19 MR. THOMAS: I'm going to object to the
20 form of the question as multiple. You can answer
21 if you can answer.

22 Q. (Mr. Baer, continuing) Do you understand
23 the question?

24 A. No.

25 Q. Would it be fair to say, Dr. Berestka,

1 that your actions in circumcising H.A.N., based on
2 the assumption that informed consent had been
3 obtained, does not meet the standard as set out in
4 the definition of "informed consent"?

5 A. It does not.

6 Q. Do you know who drafts the policies and
7 procedures on informed consent?

8 A. No.

9 Q. Who is Sandra Eliason? Do you know her?

10 A. I think she was chief of staff.

11 Q. To your knowledge, were any members of
12 your group ever consulted regarding verification
13 of informed consent on circumcisions while this
14 policy was being either changed or modified or
15 reviewed?

16 A. I assume they were, but I don't know for
17 sure.

18 Q. Do you ever remember being consulted?

19 A. No.

20 Q. How do you know this was a Saturday when
21 the circumcision of H.A.N. took place?

22 A. I looked it up on the calendar.

23 Q. Okay. And why would that make a
24 difference, that it was done on a Saturday?

25 A. Difference to what?

1 Q. About whether or not you got informed
2 consent or consent?

3 A. I don't think it made a difference.

4 Q. Okay. So when you did the circumcision
5 on H.A.N. on January 22, 2000, was that
6 circumcision in any way different than you would
7 have done any number of circumcisions before that?

8 A. No.

9 Q. The same process would have been used
10 about going to the nurses' station and saying,
11 "Are there any circs today?"; is that right?

12 A. Right.

13 Q. And then you would have done the
14 circumcisions?

15 A. Right.

16 Q. Without going to talk to the parents?

17 A. Right.

18 Q. And your group would have basically done
19 the same?

20 A. Yes.

21 Q. Anybody in your group that was on call
22 would have gone to the station, "Are there any
23 circs to do today?" and the nurses would have had
24 them prepared?

25 A. Right.

1 Q. Tell me, in your group, Dr. Berestka,
2 during the week, would one of you go do rounds at
3 the hospital for all patients of your group?

4 A. We often went and saw our quote/unquote
5 "own patients."

6 Q. Sure. Would there be times that one or
7 more of you would not be able to get over there so
8 that you would cover each other's --

9 A. Sure.

10 Q. -- patients at the clinic?

11 A. Sure.

12 Q. And that would include circumcisions as
13 well?

14 A. Yes.

15 Q. And the same policy would apply, even
16 during the week, --

17 A. Yes.

18 Q. -- "Are there any circs to be done?" and
19 if they say yes, you would go do them without
20 first going to the parents to describe the
21 procedure?

22 A. Yes.

23 Q. How long had you used that procedure?
24 All the time you were at Unity?

25 A. Yes.

1 Q. So would it be fair to say that the
2 practice or your common practice would not have
3 involved obtaining informed consent after the
4 child was born?

5 A. Yeah, we assumed it was obtained by the
6 nurse.

7 Q. Tell me what you'd do specifically with
8 your prenatal patients to inform them about
9 circumcision.

10 MR. THOMAS: This is repetitious of what
11 we've gone over an hour ago.

12 MR. BAER: No, it isn't, Rich.

13 MR. THOMAS: It really is. I'm going to
14 let him answer it, but it really is.

15 MR. BAER: We didn't talk at all about --

16 A. Yeah, I mentioned before that during
17 pregnancy, during prenatal visits, we asked about
18 various things, including circumcision.

19 Q. (Mr. Baer, continuing) But if the parent
20 says yes, they want the circumcision, it's the end
21 of the story?

22 A. Yes.

23 MR. THOMAS: Now do you remember going
24 over that several times?

25 Q. (Mr. Baer, continuing) And would that be

1 consistent with --

2 MR. BAER: I'll just conveniently ignore
3 that comment, Rich.

4 Q. (Mr. Baer, continuing) Would that be
5 consistent with the practice of your partners at
6 the Fridley Medical Center?

7 A. Yes.

8 Q. Just so that I'm clear on this, I don't
9 want to misunderstand you, during prenatal visits,
10 if a parent says, "Yes, I want a circumcision,"
11 then you feel that there is no need to describe
12 the risks or benefits of the procedure itself?

13 A. They've already made up their minds.

14 Q. So that's a yes, you do not feel as
15 though --

16 A. Right.

17 Q. -- there's any duty on your part to
18 describe that?

19 A. Right.

20 Q. And that's what you assumed occurred with
21 Dawn Nelson in this pregnancy?

22 A. Yes.

23 MR. THOMAS: What? What are we assuming
24 occurred?

25 MR. BAER: That she obtained --

1 A. That some discussion had occurred during
2 the pregnancy.

3 Q. (Mr. Baer, continuing) And that
4 discussion could have been, "Do you want a
5 circumcision?" and if she says yes, end of story?

6 A. Um-hum.

7 Q. Is that "yes"?

8 A. Yes.

9 Q. And to you, that would meet the standard
10 of care?

11 A. Yes.

12 MR. BAER: Thank you. I have nothing
13 further.

14 MR. THOMAS: Two real quick questions for
15 you, Dr. Berestka.

16

17 EXAMINATION

18 BY MR. WHITMORE:

19 Q. You didn't expect anybody from the
20 nursing staff to go explain the risks and benefits
21 of circumcision to Mr. or Mrs. Nelson, did you?

22 A. No.

23 Q. I have one other question. If you could
24 look at the document which was 500056, I just have
25 a question about that. I don't remember what

1 exhibit it is.

2 MR. BAER: It's, I think, Exhibit 3.

3 Q. (Mr. Whitmore, continuing) I can even
4 show you, Doctor.

5 A. It's the thick one.

6 Q. 56.

7 A. Okay.

8 Q. I'm going to point to a specific entry,
9 and I just want to -- it looks like there was a
10 visit on December 30 of '99.

11 A. Okay.

12 Q. Can you read that?

13 A. "Wants C-section."

14 Q. Okay. That's a C-section. I wasn't
15 certain about exactly what that was referring to?

16 MR. WHITMORE: That's all I have.

17 MR. THOMAS: Do you have any more
18 questions, Zenas?

19 MR. BAER: No.

20 MR. THOMAS: We'll read and sign.

21

22 (WHEREUPON, the proceedings were
23 concluded at 10:00 a.m.)

24

25

1 C O R R E C T I O N S

2

3 DR. STEPHEN BERESTKA 10/7/04

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1 I, DR. STEPHEN BERESTKA, have read the
2 foregoing pages 1 - 93 inclusive and have made any
3 and all corrections of errors which I feel the
4 court reporter has made in taking and transcribing
5 my testimony.

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Dr. Stephen Berestka

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15 Dated this _____ day of _____, 2004.

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Notary Public

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NOTARY REPORTER'S CERTIFICATE

STATE OF MINNESOTA
COUNTY OF OTTER TAIL

BE IT KNOWN THAT, I took the foregoing deposition of DR. STEPHEN BERESTKA, pursuant to Notice of Taking Deposition;

THAT, I was then and there a Notary Public in and for the County of Otter Tail, State of Minnesota, and exercised the power of that office in taking said deposition;

THAT, said witness, before testifying, was duly sworn to tell the truth, the whole truth, and nothing but the truth;

THAT, the reading and signing of the deposition by the witness was not waived;

THAT, I am not related to or employed by or contracting with any of the parties or attorneys to the action in which this deposition is taken and am not financially interested in the action;

THAT, the cost of the original has been charged to the attorney who noticed the deposition, and that all parties who ordered copies have been charged the same rate for such copies;

THAT, the testimony was taken down in Stenotype by me and reduced to 96 typewritten pages and is a true and correct transcript of the proceedings to the best of my ability.

WITNESS my hand and seal this 11th day of October, 2004.

Lisa M. Leuthner, Court Reporter
My notary commission expires
January 31, 2005.