

1 IN DISTRICT COURT, COUNTY OF CASS, STATE OF NORTH DAKOTA

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3)
4 Josiah Flatt by and through)
5 His Natural Guardians)
6 Anita Flatt and James Flatt,)
7)
8 Plaintiffs,) Civil No. 99-3761
9)
10 vs.)
11)
12 Sunita A. Kantak, M.D.,)
13 MeritCare Medical Center and)
14 State of North Dakota,)
15)
16 Defendants.)
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TRANSCRIPT
OF
TRIAL

Taken at
Cass County Courthouse
Fargo, North Dakota
February 4, 2003

BEFORE THE HONORABLE CYNTHIA ROTHE-SEEGER - DISTRICT JUDGE -
-- AND A JURY --

VOLUME I
(Pages 1-55)

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1 (The trial herein was continued in open court, out
2 of the presence of the jury, at 1:29 p.m., Tuesday, February
3 4, 2003, as follows:)

4 THE COURT: Good afternoon. Please be seated.

5 Let the record show we are reconvened without the
6 jury, all parties and counsel are present.

7 Mr. Baer.

8 MR. BAER: Thank you, Your Honor. At this time I
9 would like to have the Court reconsider the motion on ruling
10 on evidence. The Court's ruling was dated January 24, 2003,
11 and it deals with evidentiary issues; specifically, the
12 issue of the videotapes, and surgical tools, and equipment
13 and some photographs. I would like to have the Court
14 reconsider those motions based on the memorandum that I
15 submitted to the Court and on the argument which will be
16 following. And I don't want to go into everything and
17 restate everything.

18 THE COURT: I am sorry to interrupt you. No
19 cameras during this portion. Just so you know. Only when

20 the jury is here are you allowed to take pictures. I needed
21 to interrupt you.

22 MR. BAER: Okay. I think the Court properly
23 analyzed in its memorandum the burden of proof on the
24 informed consent issue, but I think, in applying the burden
25 and the elements, that the facts that are in issue in the

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1 informed consent case -- and perhaps it was my error in not
2 arguing it properly at pretrial -- but I think the Court
3 overlooked a key component to the informed consent case.

4 And when you look at the standard for what it is,
5 the duty of the physician to disclose, Jaskoviak appears to
6 require all risks be unmasked. And the balancing test of
7 what risks should be or should not be unmasked is a function
8 of what a reasonable patient may think is appropriate, and
9 that reasonable patient -- what they think is appropriate to
10 be disclosed to evaluate the risks is a function of the
11 jury.

12 I think that language is directly out of
13 Jaskoviak, that the trier of fact must determine whether a
14 reasonable person in the plaintiff's position would attach
15 significance to the specific risk. That's Jaskoviak at
16 paragraph 17.

17 Having said that, and understanding that the risks
18 to be disclosed are risks that a reasonable person might
19 want to have disclosed, let's apply that standard to the
20 videotapings that the Court excluded. I understood from the
21 Court's memorandum that the Court excluded them basically on
22 two bases. The first would be that the Court found that
23 they did not address any of the factual issues which were in
24 dispute, and I think -- and perhaps I did not properly
25 advance this argument at pretrial -- the issue here is what

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1 would a reasonable person want to know about this procedure
2 in order to evaluate whether they want to subject their son
3 to that procedure.

4 I think the testimony and what the videotape would
5 show is the child being restrained by a Circumstraint, which
6 in and of itself is uncomfortable. The video would show the
7 use of the tools that are used to crush the foreskin. The
8 use of video would show the use of the knives that are used
9 to cut the foreskin. And it's the knife that does cause
10 from time to time and the tools that do cause from time to
11 time the injuries that are known risks of circumcision,
12 including amputation of the penile shaft. And so we think
13 that the videos would be relevant to the issue of whether or
14 not mom would want to know this information before

15 subjecting her son to that procedure.

16 One other thing the video would show is what a
17 natural penis looks like. These videos would show the penis
18 with a foreskin, then a penis without a foreskin after the
19 procedure is completed. And if the Court is concerned about
20 the different types of procedures or the sounds being
21 offensive, I don't have any problem as a compromise to
22 having the sound muted and just allow the procedure to be
23 shown.

24 The other basis upon which the Court ruled that
25 the videos would not be allowed was that they are -- there's

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1 a danger of confusion and misleading of the jury. I would
2 like to just point out that this case revolves around what
3 are the risks of a circumcision procedure. And showing the
4 video would merely show how a circumcision was indeed
5 performed so that the jury members could put into context
6 the expert testimony that will be elicited about what the
7 risks are, including amputation of the foreskin and
8 amputation of the entire penile shaft of a circumcision
9 procedure. And so we're not -- the confusion can only be
10 created by arguing that this is exactly what Josiah Flatt
11 went through.

12 And if the Court wants to admit it just for
13 illustrative purposes, I don't have any objection to the
14 Court issuing an instruction that this is for illustrative
15 purposes, it is not meant to describe what Josiah Flatt went
16 through, but it's illustrative of the procedure itself. And
17 if the Court doesn't want it to go back to the jury, that's
18 a fallback argument I make at the end, but I think it is
19 adequately representative of the procedures that were
20 performed, even given the nuance differences that Dr. Kantak
21 described in her affidavit, to aid and assist the jury in
22 evaluating whether or not a parent would concede or submit
23 their child to that procedure in the end.

24 I will move on then because I think it dovetails
25 into the surgical equipment and the Gomco clamp very well.

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1 And the Court ruled that the Gomco clamp and the surgical
2 equipment was not -- I want to make sure I don't misstate
3 the Court. The surgical implements do not reasonably and
4 actually tend to disprove or prove a fact at issue and,
5 therefore, they are not relevant.

6 I think the issue in this case and -- the real
7 issue in this case again is, what would a reasonable patient
8 want to know about the risks and alternatives to the
9 procedure in order to evaluate whether they wanted to submit

10 their son to this procedure. I think it is very relevant
11 what kind of tools are used. For instance, if they used
12 primitive tools, if they used, for instance, a dull kitchen
13 knife to perform the procedure, and something went awry,
14 certainly that would be something that would -- a parent
15 would want to know.

16 Similarly, if they use precision molded and formed
17 stainless steel tools to provide guidance on how far -- how
18 much of the foreskin to remove, those tools are known to
19 have defects, are known by the medical literature to be the
20 causes of injury and are the implements used to cause the
21 risks associated with the circumcision procedure.

22 So the tools themselves I think go directly to the
23 issue of whether or not a reasonable patient would submit
24 their newborn son to a procedure knowing that they used
25 clamping devices, and hemostats, blunt probes to separate

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1 the foreskin from the glans penis.

2 We think that the -- the surgical implements, the
3 Gomco clamp and the Mogen clamp, are those kind of tools
4 that certainly would prove or disprove a fact in issue; and,
5 that is, whether or not a reasonable person would consent,
6 knowing that these tools or implements were used.

7 The next issue is the photographs and animation.
8 It again goes to the issue of, what are the factual disputes
9 in this issue? What facts need to be proven by the
10 plaintiff in order to sustain a claim? One of the facts
11 that the plaintiff must prove or there's a directed verdict
12 awarded against the plaintiff is that of damages. And it's
13 hard to measure damages without having the ability to prove
14 what is lost, because the foreskin is a functioning body
15 part of the normal male anatomy, and that is lost as a
16 result of the procedure.

17 And as I read the ruling of the Court, the
18 photographs of the intact penis cannot be shown to the jury,
19 which we think is highly prejudicial to our ability to prove
20 what was lost. Similarly, there's photographs of -- or the
21 animation of the foreskin in action, it's a digital
22 animation, showing the foreskin sliding up and down the
23 shaft. That would be merely to prove a fact that is in
24 dispute; and, that is, what is lost, so that the jury can
25 adequately evaluate damages if they find that there's a

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1 failure to provide adequate information to consent to the
2 removal of that organ.

3 I believe that the Court's analysis of the -- in
4 the memorandum in excluding the surgical tools was that they

5 do not reasonably and actually tend to prove or disprove a
6 fact in issue and, therefore, are not relevant. I think the
7 relevance is the damages. And also the relevance is what in
8 fact was cut off, which goes back again to those videos,
9 which shows an intact infant male penis.

10 You have to appreciate the plaintiff's position
11 here. The plaintiff can't retrieve his foreskin and have it
12 as Exhibit A for the jury to observe. That foreskin was
13 disposed of, and unless we have the ability to illustrate to
14 the jury what a normal intact penis looks like in infancy,
15 the jury is not going to be able to appreciate the loss that
16 is caused by the removal of that otherwise healthy erogenous
17 tissue.

18 I just want to briefly address the issue. I don't
19 know this was part of my motion in pretrial. I think my
20 motion in pretrial sought introduction of all of these
21 exhibits as demonstrative evidence. I did not argue that if
22 the Court does not want to submit them to the jury, that the
23 Court should allow them as illustrative evidence. I want
24 to -- in my memorandum, I took a digital photo of the
25 Circumstraint board. And this is the Circumstraint board,

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1 where the child -- and it's been documented by depositions

2 and nurses, depositions of Dr. Kantak, that this is
3 illustrative of the restraints used to perform
4 circumcisions.

5 And this would simply give the jury a means to
6 understand the issue of, No. 1, would a reasonable parent
7 want to know that their child, a newborn child, one day old,
8 would be strapped down into a Circumstraint and have their
9 genitalia altered? We think that a reasonable parent would
10 want to know and consider what comfort -- what level of
11 comfort their child was being subjected to, and showing or
12 knowing that their child was going to be strapped down into
13 this, may raise a question in a parent to say, Well, why are
14 we doing it? What purpose does it -- does it serve, Doctor?

15 That may lead to the Gomco clamp. Well, what did
16 you do? Did you cut it off? How much do you cut off? The
17 Gomco clamp is reproduced in the memorandum that I
18 submitted. Just so that the Court understands how.

19 THE COURT: I did watch the videos. I have seen
20 all of the three methods.

21 MR. BAER: This is a separate issue. This is just
22 the Gomco clamp itself.

23 THE COURT: That was used in one of the --

24 MR. BAER: In one of the videos, right. All I
25 want to show is that this is the Gomco clamp. There's no

1 blood on it, there's no gore or anything to inflame the
2 jury. It is simply a surgical instrument that is used and
3 was used. It's representative of an instrument that was
4 used to circumcise Josiah Flatt. And so what we're asking
5 is that at least these instruments and the tools be allowed
6 to be used for, if not demonstrative evidence, at least
7 illustrative evidence for the jury's consideration.

8 I think I also in the memorandum, I reproduced
9 photos of the adult male penis. And there's a series of
10 five photographs that I would like to present that show an
11 adult male penis with the markings on it to demonstrate on a
12 grown adult the approximate amount of foreskin that is lost
13 as a result of a routine infant circumcision. We understand
14 that this is not Josiah's penis, nor is it his foreskin, nor
15 can we say with any certainty that Josiah would have grown
16 to the same size as these photographs depict.

17 It is an illustration of what is lost to the adult
18 by having that performed as an infant. One of the questions
19 in this case that the jury is going to be asked to answer is
20 future damages. And unless the plaintiff is allowed to
21 illustrate what an intact adult penis looks like, we cannot
22 illustrate the shape, the looks, the texture of a foreskin
23 when grown to adult size. We would have to have witnesses
24 describing what the appearance is, which is deficient when
25 it comes to describing something as complex as a penis and a

1 foreskin.

2 So I would ask the Court to reconsider the motion
3 on those issues. And one other issue I would like to
4 address is the hospital meeting minutes. The Court, as I
5 understand the Court's ruling, did not allow the meeting
6 minutes because they were subjective information about what
7 doctors at MeritCare knew about the risks, and that they
8 were cumulative evidence of when the pamphlet was published.

9 I think maybe I overlooked at the last argument,
10 Your Honor, the issue that is very critical; and, that is,
11 not the date that is printed on the circumcision booklet,
12 but when did that booklet get into circulation up on the
13 nursing floor. By excluding the minutes, it leaves the
14 impression that this booklet was around all the time, that
15 this booklet has been there since -- and some of the nurses
16 will say they have been handing out this same booklet since
17 1986, which couldn't be.

18 But the impression will be there, if we can't
19 refer to these hospital meeting minutes, that there was
20 indeed a booklet on circumcision before and this was a
21 revision, at least the way I understand the facts. And the
22 way the facts have developed in this case, this is the first
23 circumcision booklet that is devoted only to circumcision.
24 There may have been other booklets that had sections of --
25 with circumcision in them, but as I understand it, this is

1 the only one that dealt exclusively with circumcision.

2 So the development and the time line of the
3 development of that booklet is crucial to the understanding
4 and the plaintiff's claim that she never received a copy of
5 that booklet. And we think that it is very relevant to the
6 issue of when that booklet became available to not only Dr.
7 Kantak but the nursing staff for distribution on the
8 pediatrics ward or the nursery floor.

9 That is all I have at this time, Your Honor.

10 THE COURT: Thank you. Ms. Voglewede.

11 MS. VOGLEWEDE: Thank you, Your Honor. These
12 issues have been extensively briefed by both parties,
13 extensively argued at our final pretrial conference and, it
14 appears, extensively considered by the Court before issuing
15 the previous order.

16 We urge the Court to reject plaintiff's motion for
17 reconsideration as to those evidentiary issues which he has
18 raised today. This case does not allege -- plaintiffs do
19 not claim that this -- the circumcision was improperly
20 performed. The procedure itself is not in issue. That has
21 been clear to the Court since your ruling last July, when we
22 made our motion concerning plaintiff's experts.

23 Plaintiff's goal in trying to get in the
24 videotapes, the equipment, and so on, is to somehow suggest
25 that doing the procedure itself at all with these

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1 instruments is improper. And that is not a claim in this
2 case. The claim in this case is informed consent.

3 The Court permitted plaintiff's experts to
4 testify -- or denied our motion to exclude them on grounds
5 that this was an informed consent case. And all of the
6 reasons stated in the Court's memorandum opinion following
7 the pretrial conference recognize that. There's no claim
8 here that the clamping devices, the probes, the other
9 instruments, are improper tools to be used for a
10 circumcision. That is not the issue.

11 As to the damages issue, what is lost, as I
12 understand it, Mr. Baer wants you to reconsider the
13 photographs, the digital animation, to which we objected for
14 a number of other reasons, lack of foundation. They simply
15 won't help the issue that he claims is in dispute. By the
16 way, I do want to bring to the Court's attention, Mr. Baer
17 does have, as you can see here -- I mean, he has brought the
18 board, the tools, and so on, for purposes, I assume, of
19 making the motion. I would request that if he has any
20 further use for them, such as wanting to make an offer of

21 proof, in light of the Court's exclusion of that evidence,
22 he can certainly do that in chambers, but beyond that, they
23 should not be kept in the courtroom. The Court has already
24 ruled on those issues.

25 With regard to the plaintiff's interpretation of

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1 the law on informed consent, I simply want to point out to
2 the Court that the Gruver case did not hold clearly, did not
3 hold that all risks of a procedure had to be unmasked. The
4 case is full of language stating, for example, "A physician
5 is not required to inform a patient of risks that are so
6 remote as to be negligible even where the consequences may
7 be severe, and is not required to inform the patient of a
8 very minor consequence even though the probability is high."
9 The case continues along those lines at page 8.

10 With regard to the booklet, the MeritCare minutes,
11 again, counsel has not brought up anything new that
12 indicates something other than that's cumulative evidence
13 beyond what information is available from looking at the
14 booklet itself.

15 I would like to raise just one question about the
16 Court's ruling on the minutes, however. The Court did allow
17 one -- the minutes of one meeting to be introduced. This

18 may have been simply an oversight on the Court's part. But
19 the minutes that the Court allowed to be introduced were
20 from October -- October of 1997. That was on this buffered
21 lidocaine issue, if the Court will recall. There was
22 reference in the minutes to a discussion of possible
23 advantages to buffered versus unbuffered lidocaine. That
24 discussion occurred some seven months after the care took
25 place, and it would be our position that that's not relevant

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1 to the care that took place in March of 1997, so we would
2 ask the Court to exclude those minutes as well.

3 THE COURT: Mr. Baer.

4 MR. BAER: Thank you. Just briefly, I want to
5 clear up once and for all the apparent confusion about the
6 plaintiff's position. The defendant has just said that the
7 plaintiffs do not allege that the procedure was improperly
8 done. Dr. Sawchuk, who is subpoenaed as a witness in this
9 case, saw the patient in August of 1997, and diagnosed an
10 asymmetric circumcision. Dr. Mastel, who treated Josiah in
11 May of 1977, three months after his birth, two months after
12 his birth, and diagnosed an asymmetric circumcision, but for
13 the asymmetric circumcision, we perhaps would not be here
14 today, not because of Josiah not being injured, but because
15 mom did not take the time to go on the Internet to research

16 the issue of circumcision. So to allege that the asymmetry
17 has no part of this case is missing a very key ingredient;
18 and, that is, the damage.

19 Dr. Sawchuk, in his evaluation, says he may need
20 surgery, revision surgery, at some time in the future. They
21 don't recommend surgery right now, but they would wait until
22 the child reaches the age of puberty. Point 1.

23 The second point I would like to address on the
24 Gruver, Jaskoviak decision made by Ms. Voglewede and that
25 is, apparently, that Jaskoviak does not say that all risks

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1 must be disclosed. But the facts of this case are that Dr.
2 Kantak herself in her deposition, page 147, line 18 through
3 20 -- question: But my question now is whether or not there
4 are risks which are so small you would say, "I don't have to
5 disclose them"? Answer: -- Dr. Kantak -- No, I think you
6 need to tell them all.

7 So the standard in this case, although there may
8 be theoretical or hypothetical injuries, the standard in
9 this case, the circumcision case, according to the
10 defendant, Doctor Kantak, and also the experts, Dr. Kaplan
11 and Dr. Shoemaker, say that you should give them all the
12 risks, particularly when this is dealing with an elective

13 cosmetic procedure. It is not medically indicated. It's a
14 cosmetic elective procedure.

15 And just one brief comment, that it appears as
16 though both parties are coming to this Court today to ask
17 this Court to reconsider the rulings it made at the pretrial
18 hearing. What we are asking this Court for is a fair chance
19 at presenting a very, very sensitive topic that has been
20 taboo in our society to talk about or discuss for perhaps
21 centuries. We're just asking to get a fair shot at
22 presenting our evidence, presenting the anatomy of the male
23 penis, the foreskin, so forth. Thank you.

24 MS. VOGLEWEDE: Your Honor, there's no expert
25 testimony in this case that the asymmetry to which Mr. Baer

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1 referred was a result of negligence in how the procedure was
2 performed. Clearly, plaintiffs can present testimony about
3 the asymmetry and what the mom thought about it, but there's
4 no expert testimony that that was the result of negligence.

5 Secondly, as to what the law requires we disclose,
6 the Court determines that and instructs the jury what the
7 law requires a physician to disclose.

8 THE COURT: Okay. Anything else?

9 MR. BAER: I think that's a misstatement of
10 Jaskoviak. I think what is required to be disclosed is a

11 jury issue based on a two-pronged analysis. Basically, it
12 is, what is the risk, how great is that risk, and what is
13 the -- basically the patient's position or what is the need
14 for that procedure. I don't have a paragraph number of
15 Jaskoviak but --

16 THE COURT: I might comment that, as counsel
17 probably know, there's no such thing under the North Dakota
18 Rules of Civil Procedure as a motion for reconsideration.
19 None of the rules address that. So I have to tell you that
20 I don't find a rule that allows you to do what you're asking
21 for today. The closest rule would be North Dakota Rules of
22 Civil Procedure 60(b), which provides many different
23 situations for a court to vacate or amend an order.

24 And understanding that probably both of you may be
25 somewhat unhappy with some of the decisions that I made in

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1 this case, I have to tell you that they have been given much
2 consideration, much thought, much reading of the cases by
3 myself and my law clerk. And that's the job that I'm here
4 to do. So I have to tell you that even reading your
5 memorandum, Mr. Baer, and hearing the arguments today, I do
6 not find any of those reasons under Rule 60(b) to amend or
7 vacate the order on the motions in limine, which was dated

8 January 24, 2003. And so the motions for reconsideration
9 are denied at this time.

10 Mr. Baer, did you have anything else?

11 MR. BAER: Yes. I would move for sequestration of
12 witnesses under Rule 609 or something like that. 610, 612.
13 I will get the exact cite, Judge. Rule 615.

14 THE COURT: Ms. Voglewede.

15 MS. VOGLEWEDE: Are you requesting that as to all
16 witnesses called by either party?

17 MR. BAER: I am.

18 MS. VOGLEWEDE: Your Honor, virtually all
19 witnesses to be called in this case have already been
20 deposed. I am not certain of the reason for the request. I
21 am not certain that we can object to it once it's been
22 requested, but the rule may allow it or require it to be
23 imposed. If that's the case, we will certainly abide by
24 that.

25 THE COURT: Okay. Pursuant to Rule 615 of the

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1 North Dakota Rules of Evidence, the Court orders that all
2 witnesses other than the parties are excluded from the
3 courtroom, so they are not to hear the testimony of the
4 other witnesses. They are also ordered not to discuss their
5 testimony with any witness who has already testified or who

6 has or who will testify in the future. I will ask counsel
7 to please convey this order to your witnesses. That applies
8 to both plaintiff and defense.

9 Mr. Baer, anything further?

10 MR. BAER: There is one issue about the -- who is
11 going to be designated the person who represents MeritCare
12 Hospital. They're a party. I want to identify a corporate
13 representative to isolate -- that there's only one corporate
14 representative in the courtroom at any given time. I
15 believe there's a rule, I want to say rule 30-something.

16 THE COURT: Ms. Voglewede.

17 MS. VOGLEWEDE: Your Honor, I know of no basis for
18 such a restriction, except for the witnesses who are
19 planning to be called to testify, whom the Court has already
20 ordered be sequestered. There's no basis I know of
21 excluding other employees of MeritCare who may attend the
22 trial for various purposes.

23 THE COURT: Do you have a cite for me?

24 MR. BAER: I'm not asking for employees, I am
25 asking that they not -- I mean, that we don't have 12 of the

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1 board of directors here representing MeritCare at counsel
2 table.

3 THE COURT: Ms. Voglewede has already identified
4 Jean Pladson as the representative of MeritCare. She's
5 introduced her, she has identified her. If there are other
6 persons associated with MeritCare that want to attend a
7 public trial, they certainly may do so.

8 MR. BAER: I don't object to that. I guess I
9 don't want other members of MeritCare sitting up here as
10 clients, you know, like Jean Pladson, and her assistant and
11 three or more people sitting up here as MeritCare.

12 THE COURT: As long as there's only Ms. Pladson
13 that's been identified, she's the only one that the Court
14 considers here representing MeritCare. She's the only one
15 that the jury -- that has been identified to the jury as
16 representing MeritCare, so I guess I don't see your problem
17 with that. I don't think it is a problem is what I'm
18 telling you.

19 MR. BAER: I don't either as long as the only
20 person to be here on behalf of MeritCare is Jean Pladson.
21 For instance, day three of trial, I don't want Robert
22 Montgomery sitting here as a MeritCare representative; day
23 four, I don't want Roger Gilbertson sitting here as a
24 representative of MeritCare.

25 THE COURT: Well, Dr. Gilbertson and Dr.

1 Montgomery can come to the trial and sit here if they wish,
2 but the only person that is officially here representing
3 MeritCare is Ms. Pladson.

4 MR. BAER: I don't really care about them being
5 out in the audience. What my concern is being up here in
6 front of the bar or -- in front of the bar and having them
7 line up here as --

8 THE COURT: I don't anticipate that that's going
9 to be a problem, is it, Ms. Voglewede?

10 MS. VOGLEWEDE: The only person at counsel table,
11 Your Honor, is Dr. Kantak. Everybody else is back in the
12 audience.

13 MR. BAER: How about MeritCare? Is MeritCare
14 going to be here?

15 MS. VOGLEWEDE: Jean Pladson is here in the front
16 row of the audience.

17 MR. BAER: This isn't the audience, is it?

18 THE COURT: It is.

19 MR. BAER: This is audience right here, too?

20 THE COURT: It is.

21 MR. BAER: Oh my. Okay.

22 THE COURT: Anything else, Mr. Baer?

23 MR. BAER: No.

24 THE COURT: There was an inquiry regarding whether
25 or not you intended to use the board and the instruments or

1 are you going to be offering them for some purpose?

2 MR. BAER: Yes, Your Honor. As I understand the
3 rule and the state of the law in North Dakota, simply ruling
4 on a pretrial motion in limine does not necessarily preserve
5 the issue for appeal and so I need to have, you know, in the
6 context of the litigation, the ability to offer these pieces
7 of evidence, to get that into the trial record and have the
8 Court rule on those issues. Now, I don't want to --

9 THE COURT: What you need to do then is to put
10 them out of sight. When you get to that point, before you
11 bring them out, ask to approach the bench, and defense
12 counsel and I will confer with you, you can tell us how
13 you're going to proceed, we'll excuse the jury, we can --
14 you can have them marked, make your offer, and we'll proceed
15 from there. Will that work for you?

16 MR. BAER: I will do whatever the Court orders.

17 THE COURT: Ms. Voglewede, will that work for you?

18 MS. VOGLEWEDE: With one qualification, Your
19 Honor. I am not sure whether it's plaintiff's intent to
20 simply make an offer of proof to somehow have these pieces
21 of equipment videotaped or viewed by the Court or whether he
22 plans to make individual offers of proof of various
23 witnesses and break each time he wanted to that and take
24 testimony from them in camera. If that's going to be done,
25 that's -- we're going to end up spending a considerable

1 amount of time.

2 THE COURT: My interpretation of what Mr. Baer
3 said was that he wants them part of the record, and so in
4 order to do that, he is going to offer them so that they are
5 part of the record on appeal. And he will do that outside
6 of the sight and hearing of the jury. He will notify us
7 when he is going to be doing that, and we will excuse the
8 jury for that.

9 MS. VOGLEWEDE: That's a one-time offer to take
10 care of that information?

11 THE COURT: I hope so.

12 MR. BAER: I don't know whether I can do it in a
13 one-time offer because some of the evidence that I may be
14 offering is out of context, and unless there's testimony
15 from an expert that -- for instance, if an expert says that
16 a videotape would be helpful to describe that, then I want
17 to have a chance to offer those videotapes. And if the
18 expert is testifying about the procedure, I want the ability
19 to offer the surgical tools or the Gomco clamp, for
20 instance.

21 THE COURT: It is going to be several different
22 offers?

23 MR. BAER: I would expect so.

24 THE COURT: Well, we'll do it as quickly and as
25 efficiently as we can.

25

1 MR. BAER: On that issue, I do want to disclose
2 that when I visited with my expert, Chris Cold, who will be
3 testifying in this trial, he has a slide show that he uses
4 for purposes of instructing medical students and parents
5 about circumcision and the history of circumcision. And in
6 that slide show are photos or slides of penises and
7 foreskins. And I want to alert the Court to that fact that
8 I would intend to have him use his slide show to instruct
9 the jury on the history of circumcision and to describe the
10 anatomy of the foreskin.

11 THE COURT: You have not disclosed the slides to
12 defense counsel?

13 MR. BAER: I don't think they have seen the
14 slides. They have deposed him and they have his affidavit.

15 THE COURT: Do you have copies of the slides
16 available for their --

17 MR. BAER: I do not have them at this time, Your
18 Honor. I think I might be able to produce them.

19 MS. VOGLEWEDE: Your Honor, this is the first that
20 we have learned of a slide show at all or plaintiff's
21 intention to use it. Whatever that exhibit might be was not

22 disclosed earlier, we have had no knowledge of it, and we
23 would simply object to its use during this trial.

24 THE COURT: Mr. Baer, if you have a copy
25 available, you need to provide it to defense counsel as soon

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1 as possible. Ms. Voglewede, after you have had a chance to
2 view the slides, I'll allow you to give me a more
3 informative response. I know you haven't seen so it, so I
4 will let you have a chance to look at it, then you'll have a
5 chance to respond in detail. Okay.

6 MS. VOGLEWEDE: Thank you.

7 THE COURT: Okay. Mr. Baer, what else?

8 MR. BAER: I think that wraps up my pretrial
9 issues, Judge. I do have -- I do intend to use my laptop
10 computer with a slide show to basically project my outline
11 of my opening statement. It is only an outline. There's no
12 medical record produced, it is purely my words on the
13 computer screen that would be projected up on the board to
14 aid in opening statements.

15 THE COURT: Any photographs?

16 MR. BAER: No. I wish -- no. I wouldn't -- I
17 understand the Court's ruling. I am not going to do that.
18 I want to make sure that I'm not surprised by the defense

19 counsel's opening and I haven't -- I don't know if they are
20 intending to do it, but I don't want medical records showing
21 up in opening statements when they have not been offered as
22 exhibits in trial.

23 THE COURT: Ms. Voglewede.

24 MS. VOGLEWEDE: Your Honor, I would like to use
25 several enlargements of medical records in opening

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1 statement, which are from the records which counsel --
2 plaintiff's counsel and defense counsel have stipulated as
3 to foundation and which both parties will be using
4 extensively during the trial.

5 I would also like to use an enlargement of a very
6 brief chronology of events so that the jury can see what
7 days we're talking about, which date was -- that the baby
8 was born, which date the circumcision was done, so on.

9 THE COURT: Time line?

10 MS. VOGLEWEDE: Yes. And I believe those are the
11 only enlargements that I would plan to use.

12 THE COURT: If you have those here, would you
13 please show those to Mr. Baer?

14 MS. VOGLEWEDE: Sure. The records that I would
15 intend to use would be a sheet called the dictation and data
16 base from the baby's chart, the consent for circumcision

17 from the baby's chart, Dr. Kantak's operative note from the
18 baby's chart, the patient teaching and discharge record,
19 which is a two-page sheet from the chart, then the summary
20 that I mentioned earlier, the chronology, which counsel has
21 seen earlier.

22 MR. BAER: No, I have not. When did I get that?

23 MS. VOGLEWEDE: Sent that with our updated exhibit
24 list.

25 MR. BAER: When did it arrive?

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1 MS. VOGLEWEDE: Last week or week before.

2 MR. BAER: I have not seen that. Now that doesn't
3 mean it didn't get over to my office someplace. I have not
4 seen it. But I would object strenuously to the use in
5 opening statement of exhibits that have not yet been offered
6 in trial. The enlargements are portions of medical records.
7 Certainly, we have stipulated to foundation, but they have
8 not been admitted into evidence, it is argument in opening
9 statement, and would be prejudicial to the jury. It allows
10 essentially the defendant to make two closing arguments.
11 And this is a use of actual medical records in the opening
12 statement.

13 THE COURT: Any response?

14 MS. VOGLEWEDE: My response, Your Honor, is that
15 the purpose of opening statement is not to argue but to
16 present an overview of the facts. These records are not
17 argument, they are simply excerpts from records which both
18 parties plan to use during the case.

19 MR. BAER: If that were the case, what would
20 prevent me from having digitized all of the records, and
21 then I go through each one of the records showing the
22 omissions of notes by the nurses, showing the digital data
23 base of the nursing notes, showing no circ checks after the
24 circ policy was introduced. I could spend hours taking the
25 jury through every single omission by the nurses, and that

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1 would not be appropriate opening statement.

2 THE COURT: The Court is aware that both parties
3 have stipulated as to the foundation of the medical records,
4 they've -- you've had them for probably a couple of years.
5 I don't know. You know what's in them, you know them upside
6 and inside out -- upside down and inside out. The Court
7 believes that the medical records will be admitted, the
8 medical records of Josiah and also the records of Anita
9 Flatt regarding the birth of Josiah. And as long as those
10 enlargements are from only those portions that we have
11 discussed previously, the Court is going to allow the use of

12 those exhibits. This is just for an illustrative purpose,
13 it's not -- they will not be exhibits that will be going
14 into the jury at this point. Okay.

15 Anything else, Ms. Voglewede?

16 MS. VOGLEWEDE: Your Honor, how about the
17 chronology of events?

18 THE COURT: Are you objecting to that also?

19 MR. BAER: Yes.

20 THE COURT: The chronology I guess is something
21 that's a summary, which really hasn't been testified to.
22 There's no foundation at this point so I'm going to sustain
23 the objection as to that.

24 MS. VOGLEWEDE: Okay. May I, Your Honor, use a
25 blank calendar of the month of March 1997, nothing on it, no

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1 facts, simply shows the month, so I can point out the days
2 we're talking about?

3 THE COURT: Mr. Baer?

4 MR. BAER: I don't think I have an objection to
5 that.

6 THE COURT: Okay. Yes, you may.

7 MS. VOGLEWEDE: Thank you.

8 THE COURT: Okay. Anything else?

9 MS. VOGLEWEDE: Yes, Your Honor. Plaintiff's
10 counsel has made it clear that he plans to -- in light of
11 the Court's rulings excluding the videotapes of the
12 instruments, and so on, that he plans to go into very
13 detailed testimony during trial about the circumcision
14 procedure itself. That is an issue which the Court, we
15 believe, has already decided is not relevant to the case.

16 If his experts are permitted to testify about
17 the -- testify at all, they are limited to whatever aspect
18 of -- pain, for example. That one of the issues that
19 plaintiff's counsel has raised is that no pain is in issue,
20 then he should be able to demonstrate to the jury or that it
21 goes to the issue of damage. The only issue which these
22 experts ought be permitted to address by any description of
23 what circumcision is about should go only to what's directly
24 relevant to informed consent. The discussions with parents.

25 If it is plaintiff's counsel's intent to get into

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1 detailed descriptions of the circumcision itself and how
2 it's done and what the tools are used, et cetera, he will be
3 in effect circumventing the Court's previous rulings and
4 getting into evidence, all of those things which the Court
5 has already determined do not relate to an issue in dispute
6 in the case.

7 And because that may relate to what Mr. Baer plans
8 to cover in his opening statement, I did want to raise that
9 at this time, Your Honor, because we would object to those
10 kinds of -- that kind of detailed testimony on grounds that
11 the Court has already considered it and decided that that
12 has the potential to confuse and mislead the jury, that it
13 simply is not relevant to the case.

14 We will have some additional specific objections
15 to some of his experts which we'll raise at the appropriate
16 time. I did want to raise that issue with the Court now
17 because I think it may affect the content of opening.

18 THE COURT: Mr. Baer.

19 MR. BAER: Thank you. It seemed to me that in
20 your ruling, you indicated that I would be free to have the
21 expert witness testify as to what the procedure is and how
22 it is performed as it relates to what risks are to be
23 disclosed. For instance, one of the risks that I think
24 everybody agrees on is the amputation of the glans penis.
25 How can I talk and have the expert describe that risk

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1 without having him describing what causes the amputation?

2 THE COURT: Let me ask you -- I'm trying to
3 shorten this up. We've been here an hour and the jury is

4 waiting. Are you going to in your opening statement go into
5 a history of circumcision?

6 MR. BAER: I think I do address the issue that Dr.
7 Cold will be talking about the history of circumcision, yes.

8 THE COURT: If you can tell me what other areas
9 you're going to go into in your PowerPoint presentation.

10 MR. BAER: I have a copy right here. Does the
11 Court want a copy of it?

12 THE COURT: I would, please.

13 MR. BAER: Your Honor, I think I took it out of my
14 three-ring binder when I was looking at it at lunch. I
15 don't know that it got back into my three-ring binder.

16 THE COURT: How long would it take to look at
17 that, at your PowerPoint?

18 MR. BAER: Not very long. I could scroll forward
19 and get right to it.

20 THE COURT: I guess I probably need to look at
21 your PowerPoint because I can't really decide without seeing
22 it. Let me just tell you, other than for foundation, as I
23 have tried to explain before, this case is not a referendum
24 on the practice of circumcision. It is not. It is a case
25 about Josiah Flatt, his mother Anita Flatt, what happened on

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1 March 6, 1997. March 7. That's what the case is about.

2 And I am not going to allow historical perspectives, those
3 kinds of things.

4 If it relates and if you can get me foundation and
5 expert testimony relating to what happened in this case,
6 what the experts say are the risks, are the benefits, those
7 kinds of things, then it's more likely that that will get
8 in. But this is not going to be a class or an instruction
9 on what circumcision is. That's not what this is about.
10 Certainly not historical perspectives. So that's something
11 that I would sustain the objection to right off the top of
12 my head, I can tell you that.

13 MR. BAER: Maybe I should -- should ask for some
14 clarification because --

15 THE COURT: Well, I don't know what you have got
16 in your PowerPoint, for one thing. I don't want to be
17 surprised, I don't need defense counsel jumping up,
18 objecting. And probably you don't want that to happen.

19 MS. VOGLEWEDE: Nor do I.

20 THE COURT: How about -- apparently, there are
21 some other issues that you wanted to discuss before we go in
22 with the jury on the preinstructions; is that correct?

23 MS. VOGLEWEDE: Correct.

24 THE COURT: Well, I think that I need to deal with
25 these things, and I think that the jury is going to get

1 tired sitting in the jury room. So I'm wondering if it
2 would be better to bring them in, tell them that we have
3 some legal issues to discuss, and give them the admonition
4 and send them home until tomorrow morning, and then we can
5 go forward with our discussion this afternoon.

6 MR. BAER: That's fine.

7 THE COURT: Ms. Voglewede.

8 MS. VOGLEWEDE: I would prefer to keep this case
9 moving and get to the opening statements, if we can.

10 THE COURT: Believe me, so do I, but you folks
11 keep bringing up the same issues and new issues and you just
12 cannot get it decided between the two of you. You have
13 different versions, you have different ways of looking at
14 it. I'm the one that's supposed to give us the direction,
15 and you keep coming at me. How can we go forward when I'm
16 getting stopped all the time? It just doesn't work very
17 well.

18 And I am not blaming anybody. I am just saying
19 that's the way it is. And if I have to make rulings, then I
20 need to know what I'm making a ruling about. I'm not
21 interested in having a jury sitting around all afternoon.
22 That only makes them upset. And it's not -- it's just not
23 good, I don't think. I want the case to move forward too,
24 but you can't even agree on what we're going to allow on
25 opening statements. You're arguing about each other's and

1 you haven't even seen it. And then you want me to make a
2 decision. Well, I have to see what it is. You can
3 understand that.

4 MS. VOGLEWEDE: Yes, I can, Your Honor.

5 THE COURT: Okay. All right. Anything else? I
6 am going to have the bailiff come in so I can explain the
7 circumstances.

8 MS. VOGLEWEDE: I assume we will take up where we
9 left off?

10 THE COURT: Yes, we will. Okay. Mr. Carter,
11 would you bring the jury in, please.

12 (Continued in open court, in the presence of the
13 jury:)

14 THE COURT: Please be seated. Let the record show
15 that we are reconvened with all parties, counsel, and
16 members of the jury.

17 Jurors, I want to tell you that while you have
18 been waiting, and I hope patiently, the attorneys and I have
19 been going over some legal issues. We need to do some more
20 work before we can proceed with the trial. And so I'm going
21 to let you go for the rest of today. I'm going to ask you
22 to come back tomorrow morning and we'll start again at 9:00
23 o'clock. I see you have your buttons on. Right. Thank
24 you.

1 mentioned the word "patience." And it really is something
2 that you're going to have to have for the parties, their
3 attorneys and myself. And this doesn't work like a movie or
4 TV show, where everything gets done in 60 minutes or 48
5 minutes, or whatever it is, and everything is nice and
6 smooth.

7 Sometimes issues come up, sometimes questions come
8 up, and most of the time, it's a legal thing. And that's
9 where the attorneys and I need to take care of it. It does
10 not concern you, it's part of our job. And we can't always
11 know what's going to happen ahead of time, so I just want to
12 tell you that, tell you there are apt to be times when
13 you'll have to wait. So please understand that. We're
14 doing the best we can to keep things going. But we need to
15 do some more work before we're ready to proceed. Everybody
16 understand what I'm saying? I have got them nodding yes.
17 So you are going to get out early this afternoon, so make
18 use of it, because I don't know if that's going to happen
19 again.

20 Anyway, before you leave, I want to tell you that
21 you still are admonished -- I lost my sheet with the
22 admonition. Anyway, you are admonished not to discuss the

23 case or allow anyone to talk with you about the case, you're
24 not to watch any news reports or listen to any radio or
25 other media reports about the trial. And you are not to

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1 discuss it among yourselves either. So if you remember
2 that, please follow that order, it's very important. Okay.

3 Any questions from the jurors today? Okay. I'm
4 not seeing any hands. Okay. The parking should be better
5 tomorrow because there's less jurors around, so I hope that
6 things work a little bit better tomorrow. And we'll ask
7 that you come about five minutes to 9:00 so you can check in
8 with the bailiffs, get your buttons on, and hopefully we'll
9 be ready to start at that time. Okay. Thank you very much.
10 I appreciate your patience and your attendance.

11 Court is in recess. Jurors, you are excused.

12 (Continued in open court, out of the presence of
13 the jury:)

14 THE COURT: Close the door, please. We're going
15 to take a recess until 3:00 o'clock. Court's in recess.

16 (Recessed at 2:40 p.m. until 3:00 p.m., the same
17 day, at which time the following proceedings were continued
18 in open court, out of the presence of the jury:)

19 THE COURT: Mr. Baer, I will take you up on your

20 offer.

21 MR. BAER: This is what I was going to do on my
22 opening statement. Talking about embryology, function of
23 the foreskin, describe different methods of circumcision,
24 using the Gomco clamp, Mogen clamp, and Plastibell. It
25 describes what is lost as a result of the circumcision. And

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1 the pain associated with that. Then describe what the
2 complications are.

3 Now, on the history of circumcision, I think he
4 was prepared to talk more in detail from Egyptian times up
5 until current, but I can understand, if the Court does not
6 want to address those issues, but I think that it is
7 important for the --

8 THE COURT: I don't want more argument. I want to
9 see what your outline is.

10 MR. BAER: Let me see if there's another one on
11 Chris Cold. That was the only one on Chris Cold.

12 THE COURT: So you in your opening would have this
13 up on the board and then you would go through each of these
14 items?

15 MR. BAER: I'm talking about using this as an
16 outline for my -- basically to give my talk to the jurors as
17 to what I expect Chris Cold to testify to.

18 THE COURT: Can we take it frame by frame then?
19 MR. BAER: Sure.
20 THE COURT: Ms. Voglewede, can you see this?
21 MS. VOGLEWEDE: Yes.
22 THE COURT: Do you want to state any objections?
23 MR. BAER: I guess I would --
24 MS. VOGLEWEDE: I don't -- Your Honor, just to
25 make it clear, I don't want to be censoring or somehow

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1 interpreting Mr. Baer's opening statement. The only reason
2 I raised it is that I do not want to interrupt his opening
3 statement with an objection and don't want to have to do
4 that.

5 Here was the focus of my concern, was the lower
6 section of that slide that talks about the clamps, what is
7 lost, and the pain. I am assuming Mr. Baer means the pain
8 of the procedure, during which he would describe how the
9 procedure is done, the technique, et cetera.

10 The reason that I have objected to that -- and I
11 think the Court has in its previous rulings indicated that
12 that's not relevant -- but the reason I raise it also goes
13 to the qualification of these experts; as we raised in our
14 earlier motion, they don't do circumcisions. And if the

15 plaintiff's intent is to nevertheless have these experts get
16 into that testimony by describing the procedure, that Mr.
17 Baer is going to do that in his opening statement, then he
18 has essentially circumvented the Court's ruling, to say that
19 the procedure itself and how it's done isn't relevant. That
20 was the issue I was raising for the Court.

21 MR. BAER: I don't concede, Judge, that you have
22 made any ruling saying that the procedure is not relevant.
23 That's why we're here.

24 THE COURT: The procedure that was performed on
25 Josiah Flatt, not the procedure as it's been developed over

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1 the centuries, not the procedure as it may relate to
2 different methods, those kinds of things. The procedure
3 that was done on Josiah Flatt is relevant. This goes much
4 beyond that.

5 MR. BAER: Well, Judge, the reason for the
6 embryology is so that the jury can understand what is lost
7 as a result of the circumcision. And that goes to the issue
8 of damage. And so it seems to me that certainly damage is
9 an issue. It's just like if you cut your finger and leave a
10 little minor scrape, it may damage a few cells, it may leave
11 a scar, but that is something much different than if you
12 sever the fingertip or at the first joint.

13 THE COURT: I don't -- I don't want to quibble
14 with you, but I just do not see embryology as being relevant
15 in the opening statement as to what this case is about. If
16 you want to talk about informed consent, and you want to
17 talk about what happened to Josiah Flatt in March of 1997,
18 no problem. But this is -- this is not relevant to the
19 issue in this particular case. Informed consent.

20 MR. BAER: It's -- it's your courtroom, Judge, but
21 I just think that it's missing the point to say that a
22 parent wouldn't want to know what the embryologic structure
23 would be of that tissue that the doctor is requesting to
24 have removed or requesting consent to have removed. If the
25 parent --

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1 THE COURT: Well, you and I have different
2 opinions about that apparently. That's why -- that's all I
3 can say. I do not feel that is relevant. That's what my
4 ruling is. Okay. Can you show me the next slide, please?

5 MR. BAER: I guess I'm not sure that I want to
6 unless Jane is going to do the same thing for us this
7 afternoon, is go through her entire opening statement.

8 THE COURT: Okay. Can you tailor your opening
9 accordingly?

10 MR. BAER: I certainly am willing to live by --
11 this is -- I mean, this is just digital. I can manipulate
12 this, I can take it out, throw it away, put in a new one. I
13 can digitize medical records and I'll have those digitized
14 by morning, but, yeah, I can change it. But the -- I
15 appreciate the Court making these preliminary rulings so I'm
16 not caught making a statement of what I'm going to show,
17 then not being able to show it. So I would appreciate that,
18 although I may disagree with the Court.

19 Just so that I understand the limitations of the
20 Court's ruling, is the Court ruling that I cannot bring
21 forth any testimony as to the anatomic structure of the
22 foreskin and penis? Can I talk about anatomy? He is a
23 pathologist, anatomic pathologist.

24 THE COURT: You can talk about your experts and
25 what the -- what they -- why you're calling them, what --

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1 you know, what you expect that their testimony may say, but
2 it has to relate to the procedure on Josiah Flatt. It can't
3 be the whole history of circumcision.

4 MR. BAER: Can he talk about the anatomy of a
5 normal penis?

6 THE COURT: How does that relate to what happened
7 to Josiah Flatt?

8 MR. BAER: He had his normal penis amputated.

9 THE COURT: How does that relate --

10 MS. VOGLEWEDE: Your Honor, could I -- if it helps
11 at all, we don't object to that, to that discussion of the
12 anatomy, or at least to some extent. When it comes to the
13 embryology, and so on, I mean, obviously the Court has to
14 draw some relevance and limit it somewhat or it could get
15 far afield.

16 That's not the issue that I raised for the Court.
17 The issue that I raised is, as to Josiah Flatt, it is
18 improper for these experts to go into detail describing the
19 procedure itself, how it's done, the tools used in all of
20 that, because, A, they are not qualified to do so, and, B,
21 because the Court has determined that the procedure itself,
22 how it's done, is not relevant. That's the issue that I
23 raised for the Court.

24 That gets not so much to the history, the
25 embryology, the anatomy, but that gets to the description of

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1 the procedure, the tools, the pain, and all of that. That's
2 the issue that we would like the Court to determine in
3 advance of opening so that Mr. Baer knows, can he go into
4 that and can his experts go into it?

5 THE COURT: I have already ruled on that.

6 MS. VOGLEWEDE: That's what I thought.

7 MR. BAER: What is the -- is your ruling -- I
8 guess I --

9 MS. VOGLEWEDE: Your Honor, at page 5 of your
10 opinion of January 24, you state, "Introducing surgical
11 instruments, surgical equipment, and eliciting testimony
12 about how the procedure is performed is irrelevant since
13 they do not relate to any of the elements of informed
14 consent, and it would be a waste of time."

15 The reason I raised that for the Court is because
16 plaintiff's counsel has commented several times, including
17 to the media, that he plans to go into excruciating detail
18 about the procedure itself.

19 MR. BAER: Your Honor, this was a ruling on the
20 exclusion of those pieces of demonstrative evidence. It
21 certainly was not, at least interpreted by me, to be a
22 blanket ruling saying that none of the experts would be able
23 to testify as to how the procedure is performed. How can
24 you have a jury evaluate whether or not a reasonable patient
25 would have thought it important to consider a risk without

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1 knowing what the procedure is or how it is performed.

2 A procedure performed with -- that involves just a

3 stick of a needle and an injection is something quite
4 different than a procedure that excises and amputates a
5 functioning body part. And so in order to -- if you assume
6 it is correct -- I mean, if we take the defense position and
7 say, Okay, we're not going to talk about the procedure at
8 all, what are we left with? We're left with the plaintiff
9 not being able to describe how his foreskin was taken, how
10 or what was lost. And that is the issue in this case, is
11 what was taken from this otherwise normal, healthy baby boy
12 at one day of age. That is the damage component.

13 And so if the Court rules that the plaintiff can't
14 even describe the procedure itself, it asks the jury to make
15 a decision in a vacuum. How can the jury evaluate what
16 harms a parent might want to know, what harm would a parent
17 think is important.

18 We think that it would be extremely prejudicial to
19 exclude all testimony, and we don't read the Court's
20 decision to exclude that. It was essentially your ruling on
21 the exclusion of surgical instruments, not on the ruling of
22 whether or not we could describe the procedure. I might say
23 that if we're -- if we're going into dissecting each
24 sentence of your ruling, I would point the Court to page 3,
25 where you talk about -- I'm sorry, page 4, where you talk

1 about "If plaintiff has an expert who will testify that the
2 Mogan clamp and the Plastibel are alternatives, then that
3 testimony will be relevant evidence relating to the type of
4 information a doctor must disclose."

5 And so if we have a witness -- and I would make an
6 offer of proof that Dr. Cold would testify that he is
7 trained and was trained as a surgeon in the Navy to perform
8 Gomco procedures, Plastibell procedures, and Mogen clamp
9 procedures, and he is prepared to testify as to those
10 procedures.

11 THE COURT: But that has to be related to the duty
12 that a physician has to inform, it has to be related to any
13 risks and any benefits, it has to be related to what kind of
14 injury or damage can occur. It has to be related. And that
15 all ties into the informed consent. Only if it relates to
16 informed consent is it relevant.

17 MR. BAER: Certainly.

18 THE COURT: If you can relate those things in that
19 manner, that's fine, but it has to go back to the elements
20 of informed consent.

21 MR. BAER: All right.

22 THE COURT: Okay. Anything else?

23 MR. BAER: Do you need to see anything more up
24 here? I'm willing to modify it whichever way you want,
25 Judge.

1 THE COURT: Well, you know, I don't want to
2 foreclose you from doing what you think is proper, but I --
3 I don't want to have the jury being -- watching us do what
4 we're doing now, I guess, is what I'm saying. So, I guess,
5 is that enough clarity for you, Mr. Baer, what we've
6 discussed today?

7 MR. BAER: I believe that I can frame my opening
8 statement to talk about what I expect my experts to address
9 as it relates to the issue of informed consent, what a
10 doctor should disclose, what is his duty to disclose, and
11 what are the risks associated with it, and so forth.

12 THE COURT: Ms. Voglewede.

13 MS. VOGLEWEDE: That's helpful. And we will
14 reserve -- we may have additional objections on certain
15 aspects of the expert's testimony that go to the
16 qualification issue, and we'll make those at the appropriate
17 time.

18 THE COURT: Okay. We still need to talk about
19 another issue relating to the preinstructions. Is there
20 anything else before we move on to that?

21 MR. BAER: Oh, go ahead.

22 MS. VOGLEWEDE: One minor matter, Your Honor.
23 During discovery in this case, various questions were asked
24 of witness and comments made about the circumcision status
25 of various individuals. And I don't know if this would ever

1 even come up, but I would ask the Court to prohibit any
2 comments or questions by counsel about, for example, the
3 circumcision status of other MeritCare employees.

4 It's the type of issue that just asking the
5 question, it's kind of too late to object at that point. So
6 I would just ask the Court to prohibit counsel from
7 making -- asking questions or making comments in that
8 regard.

9 THE COURT: Mr. Baer.

10 MR. BAER: I don't have any current intention to
11 ask questions like that, but I certainly don't want to be
12 precluded from it if a witness certainly could be shown to
13 be biased one way or the other, depending on what they say.
14 I think it's highly relevant to those people who are
15 testifying as to whether or not they are circumcised or have
16 circumcised their own children, to find out what airspace
17 they're occupying and from what perspective do they give
18 their opinion. It goes to the issue of bias, it goes to the
19 issue of what framework they are coming from. It is no
20 different than the defense objecting to Dr. Cold speaking of
21 circumcisions because he's a pathologist. He comes from a
22 different discipline.

23 MS. VOGLEWEDE: Your Honor, this doesn't relate to

24 witnesses, it relates to a comment made about the MeritCare
25 employee who -- I don't think there is any intention of that

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1 person being a witness in this case. It was a comment made
2 during a deposition. I'm simply asking the Court to
3 prohibit counsel from raising that issue or commenting about
4 an individual who will not be a witness in the case.

5 MR. BAER: I want to make sure, Your Honor, that I
6 understand the defense counsel's objection. Are you talking
7 about Dr. Shoemaker's comments that Roger Gilbertson is not
8 circumcised?

9 MS. VOGLEWEDE: Your Honor, this is exactly why I
10 raised this issue. I think --

11 MR. BAER: I can't address it in the abstract,
12 counsel. I need to know who you're talking about.

13 MS. VOGLEWEDE: Your Honor, this is exactly the
14 reason I raised this and attempted to do so in a way to
15 prevent this kind of information from coming out in a
16 comment by counsel in open court.

17 I request the Court to admonish counsel, I think
18 that's highly inappropriate. If I cannot raise an issue
19 like this with the Court in advance of this trial starting
20 in order to avoid this type of comment, I do not know of any

21 other way to deal with it.

22 THE COURT: Although I'm not as familiar as you
23 are with the context and how this came about, it does not
24 appear from what I've been told thus far that this is in
25 that context something that the jury should know. And so in

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1 that context, as it's been explained, I would grant the
2 motion that no comment be made.

3 If it arises in a different context, then I would
4 ask counsel, if that's going to be brought up, please ask to
5 approach the bench, I can discuss it with you then. It may
6 depend on the circumstances as to how I would rule at that
7 point, but I could just say, those kinds of comments should
8 be brought to my attention first, before they're made before
9 the jury.

10 MR. BAER: I understand.

11 THE COURT: Anything else? Ms. Voglewede?

12 MS. VOGLEWEDE: No, Your Honor.

13 THE COURT: Okay. Mr. Baer.

14 MR. BAER: Yes, I do have comments on the summary
15 that I just saw today, and I trust that the defense counsel
16 sent them to me, but I only saw it for the first time today.
17 Now, I would object to this because it is not a summary of
18 the medical records. This is purely and simply argument.

19 The implication --

20 THE COURT: Now I did rule that she could not use
21 this in the opening.

22 MS. VOGLEWEDE: You did, Your Honor. That issue
23 is decided.

24 THE COURT: I wanted to be sure you understood
25 that.

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1 MR. BAER: I thought you said I had to look at it
2 first, then make a --

3 THE COURT: No, I ruled she could not use the
4 summary in the opening.

5 MS. VOGLEWEDE: It was provided to counsel by
6 letter of January 22. Just for the record.

7 THE COURT: That ruling is just for the opening.

8 MS. VOGLEWEDE: Your Honor, did you want to take
9 up the preinstruction issue?

10 THE COURT: I do. I just want to be sure we're
11 ready or done with the other arguments regarding the opening
12 tomorrow. Mr. Baer, did we cover all of your issues?

13 MR. BAER: I believe so.

14 THE COURT: Ms. Lord. Ms. Voglewede.

15 MS. VOGLEWEDE: I have nothing other than the

16 instruction issue.

17 THE COURT: Okay. Thank you, Mr. Baer.

18 Okay. Yesterday, Ms. Voglewede, you indicated
19 that along with the regular preinstructions -- and you did
20 get a copy on your desk or your table today?

21 MS. VOGLEWEDE: Yes.

22 THE COURT: And those are just the standard
23 preinstructions, plus I did add the note-taking instruction.
24 Ms., Voglewede, you had a request yesterday. Would you like
25 to state that again, please?

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1 MS. VOGLEWEDE: Yes, Your Honor. We were not on
2 the record, but it was my suggestion that we have a
3 preinstruction to the jury on informed consent, what the --
4 what the legal requirements are for informed consent, so
5 that the jury has a framework when they are listening to the
6 testimony as to the specifics of the instruction. If we get
7 into some discussion of that, I'll have Ms. Lord address
8 that.

9 But in my view, it would be helpful for the jury
10 to know at least briefly what that duty involves, so that
11 when they are listening to the testimony of both the factual
12 witnesses and the expert witnesses, they have somewhat of an
13 understanding as a background to that.

14 THE COURT: So you had suggested your requested
15 instructions No. 26 and 27?

16 MS. VOGLEWEDE: Correct.

17 THE COURT: Those are the two -- they're JIG's
18 C-14.00, which you've modified, and C-14.20, which you've
19 also modified.

20 MS. VOGLEWEDE: Correct.

21 THE COURT: Mr. Baer, am I correct that in your
22 requested instructions, you did include -- I can't remember
23 if you had both of them or just one of them. You had the
24 JIG. I'm sorry, I can't remember.

25 MR. BAER: I don't either. But I think it's

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1 highly inappropriate, Judge, to give the jury a statement of
2 the law before they hear the evidence. They are there to
3 listen to the evidence and listen to the facts. And only
4 upon completion of that are they given the law so they can
5 apply the law to the facts that they have obtained.
6 Otherwise, why wouldn't the Court just instruct the jury
7 before trial and let the jury make these determinations
8 throughout the course of the trial, and, every day, as the
9 trial goes on, Yeah, now I see the second element is
10 reached, the third element is reached.

11 It would be extremely prejudicial and be an
12 aversion of the jury process as it is known in North Dakota
13 to provide an instruction on the law prior to the taking of
14 testimony. Thank you.

15 THE COURT: Anything else? The rule is -- North
16 Dakota Rules of Civil Procedure 51 indicates that the --
17 51(a). "Immediately after the jury is sworn, the court may
18 instruct the jury concerning its duties, its conduct, the
19 order of proceedings, the elementary legal principles
20 governing the proceeding, and the procedure for submitting
21 written questions of witnesses if allowed by the court."

22 So it appears that it is a permissive kind of
23 thing. The -- I might say that I have not done this
24 routinely. The practice is to give those instructions at
25 the end. And my concern with doing it as you've requested

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1 is emphasizing a couple of instructions by giving them both
2 at the beginning and at the end. And I think that that's
3 something that I'm not prepared to do at this time. And I
4 also think that if I did that for the defense, the plaintiff
5 might come in and say, Well, we want these three
6 instructions. Then where do you stop?

7 MS. VOGLEWEDE: That's fine, Your Honor. It was a
8 suggestion. We're happy to use the traditional procedure of

9 waiting till the end.

10 THE COURT: Okay. I wanted to explain that to you
11 a little bit. That's where I'm coming from. So I'm going
12 to deny your request to give them as part of the
13 preinstructions.

14 Have you had a chance to look at the
15 preinstructions? I guess I want to know before --

16 MR. BAER: I have, Your Honor. I don't have a
17 problem with them.

18 THE COURT: No exceptions?

19 MR. BAER: I didn't see any exceptions to them.

20 THE COURT: Okay. How about defendant?

21 MS. VOGLEWEDE: Your Honor, are these the same as
22 the ones that were provided with your order?

23 THE COURT: As far as I know, they are.

24 MS. VOGLEWEDE: We have no objection.

25 THE COURT: Okay. When we commence tomorrow, I

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1 will be reading the preinstructions the first thing with the
2 jury. Then we'll go to the opening statements after that.
3 Okay?

4 MR. BAER: Okay.

5 THE COURT: Anything else?

6 MR. BAER: No, Your Honor.

7 MS. VOGLEWEDE: Nothing further.

8 THE COURT: Now, you both will have time to rework
9 your opening statements.

10 MR. BAER: Whoopee.

11 THE COURT: I can appreciate that. Thank you for
12 your time and your attention. I'll see you tomorrow at 9:00
13 o'clock. Court's in recess.

14 (Recessed at 3:29 p.m., the same day.)

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