

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

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3 Josiah Flatt by and through)
4 His Natural Guardians)
5 Anita Flatt and James Flatt,)

6 Plaintiffs,) Civil No. 99-3761

7 vs.)

8 Sunita A. Kantak, M.D.,)
9 MeritCare Medical Center and)
10 State of North Dakota,)

11 Defendants.)
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TRANSCRIPT

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OF

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TRIAL

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Taken at
Cass County Courthouse
Fargo, North Dakota
February 7, 2003

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

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(Pages 443-575)

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A P P E A R A N C E S

MR. ZENAS BAER of
Zenas Baer and Associates
Attorneys at Law
331 Sixth Street
P. O. Box 249
Hawley, Minnesota 56549

FOR THE PLAINTIFFS.

- - - -

MS. JANE C. VOGLEWEDE and
MS. ANGELA E. LORD of
Vogel, Weir, Bye, Hunke
& McCormick, Ltd.
Attorneys at Law
502 First Avenue North
P. O. Box 1389
Fargo, North Dakota 58107

FOR THE DEFENDANTS
SUNITA A. KANTAK, M.D.,
AND MERITCARE MEDICAL
CENTER.

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1 (The trial herein was continued in open court, in
2 the presence of the jury, at 9:00 a.m., Friday, February 7,
3 2003, as follows:)

4 THE COURT: Let the record show that all parties,
5 counsel and jurors are present.

6 Mr. Baer.

7 MR. BAER: We would continue with plaintiff, Anita
8 Flatt.

9 THE COURT: You are still under oath, Ms. Flatt.
10 Please have a chair.

11 Q (Mr. Baer continuing) Mrs. Flatt, yesterday we
12 were talking with about the --

13 A Can I -- can I make two corrections from
14 yesterday?

15 Q Sure.

16 A My dad told me when we left the courtroom that I
17 said I was born at MeritCare. And he said I was actually
18 born at Dakota facility and -- but we doctored with
19 MeritCare when I was growing up, but for Cooperstown had a
20 hospital when we lived there. And then I believe -- and I
21 asked you this morning as well -- that I may have said my
22 mother and father-in-law's 40th wedding anniversary in June
23 of '96. It's 50th. They were married in 1946. I want to
24 correct that.

25 Q Okay. We were summarizing, Ms. Flatt, the time

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1 period immediately following the birth of your son Josiah on
2 March 6, 1997, when we broke yesterday afternoon. And we
3 got up to about the time of 7:00 o'clock. And I just want
4 to -- when you were at the facility, were you breast-feeding
5 Josiah?

6 A Yes.

7 Q Do you remember the times when you breast-fed
8 Josiah on the early morning hours right after his birth? Do
9 you remember breast-feeding him?

10 A Yeah. I believe we may have tried initially soon
11 after he was born. Then my recollection is, every two

12 hours, they wanted me to try to breast-feed him. But I
13 think it would be between two and three is probably between
14 everything that was going on in the hospital. I know it was
15 about every two hours they would come in and we would try
16 again.

17 Q Exhibit 6, which are Josiah Flatt's medical
18 records, identify on Bates stamp page No. 21 -- and I'm
19 sorry that this is not a very good -- if you look at the
20 line item where it says breast-feeding on 3-6, right there,
21 breast-feeding 3-6 at 4:20 a.m.?

22 A That's -- that would seem right.

23 Q Okay. And then the next -- it's on the next page
24 actually, breast-feeding at 6:10 a.m. Do you see that?
25 Right here?

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1 A Oh --

2 Q 6:10 a.m.?

3 A I can't read mine, but if that's what it says,
4 that would make sense.

5 Q Every two hours, so to speak?

6 A Yes.

7 Q Okay. Between the time that you were attempting
8 breast-feeding, would Josiah room with you in the room?

9 A Yes.

10 Q How did you feel after the delivery of Josiah?

11 A All sorts of feelings, elated, I had this baby,
12 just excited, and excited for Jim. He was -- it was a boy,
13 and it was, in his mind, a big boy. And they -- as far as
14 if you're talking about pain or anything else, I was very
15 swollen, I just -- they had me sit on ice for two days.

16 Q And the medical records indicate that ice was
17 administered to the perineum. Is that the vaginal area?

18 A My understanding, yeah, that's where it would have
19 ripped. Between the vagina and the anus.

20 Q Do you know whether you had sutures to repair
21 tears?

22 A I don't believe I ever had any stitches. If I
23 understood Dr. Lesteberg right, after he delivered my
24 placenta, it was -- he used the word abrasions, and the way
25 it must have tore or ripped, they didn't do -- is stitches

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1 sutures?

2 Q Yes.

3 A Yes.

4 Q Medical records of Exhibit 7, page 36, identify --
5 it perhaps is not -- right here it says iced. Do you see
6 that right on the bottom, ice?

7 A Yeah.

8 Q Ice. And the time period on that is identified up
9 on top. Ice is at 6:30, 8:30 a.m. Were you sitting on ice
10 at that time?

11 A The date of birth?

12 Q Yes.

13 A Yeah. I remember from the time I was at the
14 hospital I did.

15 Q So at approximately 7:00 o'clock, you indicated
16 yesterday that you were still awake and Jim made a phone
17 call to a friend; is that right?

18 A I think it was shortly before seven, because I
19 think Kyle leaves for work at seven.

20 Q Okay. Was Jim present throughout the entire
21 evening from the 5th to the 6th?

22 A Yes.

23 Q How long did he stay in the hospital with you on
24 March 6?

25 A March 6. He -- he would have left later that

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1 morning. He wanted to get a newspaper to keep. He was gone
2 for a couple -- and I'm not absolutely certain. It was late
3 morning when he was back, early afternoon.

4 Q Let's talk about the early morning hours still,

5 about at 8:00 o'clock. Were you aware prior to March 6,
6 1997, that you would be having Dr. Kantak as the
7 pediatrician for Josiah?

8 A No.

9 Q And when you were admitted to the hospital, did
10 somebody ask you who the baby's physician was?

11 A Yeah. They did an admission, and I would have
12 listed my OB-GYN. And I think they asked me about my family
13 doctor for possibilities for the baby. And I would have
14 said Dr. Pitts.

15 Q I'll just show you what is the Exhibit 7, page 5.
16 It says, "Baby's physician, Pitts." Would that have been
17 Bruce Pitts?

18 A That would have been that I responded that was
19 mine. I had not selected a family practitioner.

20 Q But when the question was asked, the records show
21 that the baby's physician would be Bruce Pitts?

22 A Yes.

23 Q Are you aware of any effort by MeritCare staff to
24 contact Dr. Bruce Pitts to see Josiah Flatt?

25 A No.

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1 Q Did Dr. Bruce Pitts ever contact you and say that

2 he was not willing to treat Josiah Flatt?

3 A No.

4 Q Tell the members of the jury then what you recall
5 happening between, say, 8:00 o'clock and the mid morning
6 time period.

7 A Dr. Bro came in, my OB-GYN, and Jim and I were in
8 the room. And I was still upset about the night before. I
9 expressed to him that Dr. Lesteberg left after he broke my
10 water, and Josiah came, and they lost his heart rate, and
11 the doctor there -- they wanted me to wait till the doctor
12 came back before I pushed any more. And he didn't say
13 anything. He just said I have a very big, healthy baby boy,
14 and he would see me in six weeks.

15 MS. VOGLEWEDE: Your Honor, I'm going to object to
16 this line of questioning on grounds of lack of relevance.

17 THE COURT: Mr. Baer, what's the relevance?

18 MR. BAER: It just identifies the frame of mind
19 and the ability to remember who was there and the sequence
20 of events that took place, Your Honor.

21 THE COURT: Objection is overruled. Please
22 continue.

23 MR. BAER: Thank you.

24 Q (Mr. Baer continuing) Prior to Dr. Bro coming to
25 visit with you, did you see Dr. Sunita Kantak at all?

1 A I did not see her on that day at all.

2 Q And during the course of your stay on the morning
3 of March 6, 1997, were you still regularly breast-feeding
4 Josiah?

5 A Every -- the nurses would chart -- I understood
6 them to be charting that, to make sure that every two hours
7 we were trying to breast-feed, because it wasn't going well,
8 and he was dropping a lot of weight.

9 Q And during this time period, by and large, Josiah
10 was in the room with you most of the time?

11 A Yes. And they promoted that, and that was great.

12 Q When Dr. Bro visited you in the morning of March
13 6, 1997, did you and Dr. Bro have any discussions about
14 circumcision?

15 A No.

16 Q What do you remember next about the visitors or
17 any type of contact with nursing personnel during the
18 morning hours of March 6, 1997?

19 A There was -- nurses were in and out a lot, and I
20 believe I had medication they had to give me for, I want to
21 say stool softener they gave me. They gave me pain
22 medication. I don't -- I don't recall the nurses' names. I
23 remember Kristi Burgard because she delivered Josiah. I
24 vaguely remember a Ruth Larson because of her dark hair. I
25 remember that. They were in and out.

1 Q Did you have any visitors, friends or relatives
2 that came in the morning hours of March 6?

3 A They were all there. My friend Stef, my friend
4 Lee, my friend Lori, my mother were all there for probably
5 half an hour to an hour after the delivery. And then Jim
6 and I tried to lay down. And then throughout the day, we
7 had visitors. And I want to say it was more in the
8 afternoon. And the video would reflect that.

9 Q Sure. Did you during the course of this time have
10 nurses instruct you on breast-feeding?

11 A Yes. And there was -- each one had different
12 ideas and techniques. And this didn't work, try this.
13 Yeah.

14 Q At some point did you come into possession of some
15 forms that needed to be filled out?

16 A There would have been -- at some point I remember
17 they -- asking when I could get discharged, if -- you know,
18 I was hoping Friday. They said I would be discharged on
19 Saturday. And then it was discussed that if he was going to
20 be circumcised, it was going to be that Friday morning. And
21 I believe that they dropped off a consent form.

22 Q Who would have dropped that off?

23 A The nurse. And I don't know which one.

24 Q Okay. Was the nurse accompanied by Dr. Sunita
25 Kantak?

1 A No, I did not see Dr. Kantak. The first time I
2 met Dr. Kantak was the morning -- Friday morning, the 7th of
3 March.

4 Q On the video, which the jury will see this --
5 later on, there is a statement or some conversation that
6 says, We need to fill out the hepatitis B form, and
7 circumcision day is tomorrow. Did the nurse drop off
8 multiple forms for you and Jim to review and sign?

9 MS. VOGLEWEDE: Objection, leading.

10 THE COURT: Sustained.

11 Q (Mr. Baer continuing) Did the nurse drop off
12 forms for you to sign?

13 MS. VOGLEWEDE: Same objection.

14 THE COURT: Overruled. Answer the question,
15 please.

16 A The nurses did. Yes.

17 Q (Mr. Baer continuing) And when the nurses dropped
18 off the forms, did they give you any information about
19 circumcision?

20 A No. I did not receive any information other than
21 my brief discussion when I signed it with the nurse that
22 evening.

23 Q Okay. Let's take this one step at a time.
24 A I know.
25 Q Now, we have the forms delivered to you. After

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1 the forms were delivered to your room, Ms. Flatt, did you
2 and your husband Jim have any conversations about
3 circumcision that you recall?

4 A Me and Jim?

5 Q Yes.

6 A It was our decision to circumcise Josiah. Our
7 discussions were, Jim is, therefore, we would.

8 Q Prior to that discussion, had you done any
9 research on what the purpose is or what the function is or
10 what is removed as a result of circumcision?

11 A No, I didn't.

12 Q What was your concept, if you can remember back
13 then, prior to doing research on it, what was your concept
14 of circumcision?

15 A That you cut around the -- before I saw a video of
16 one, I thought they put something on top and they just went
17 around, because when Joe had the problems with the
18 circumcision, I thought, how could they -- it must have just
19 flipped off and they didn't get the side. And I knew the
20 terminology meant to cut around.

21 Q Okay. Now, the evening hours, do you recall the
22 evening hours of March 6, 1997?

23 A Yes.

24 Q During the day, would you have -- or can you tell
25 the jury whether or not you slept or had good rest during

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1 the daylight hours.

2 A Rested in between probably in -- the most during
3 the day because it wasn't as active. And I think when Jim
4 left to -- I think he may have bought cigars, stopped and
5 told people at work, got a news -- I know he brought a
6 newspaper back, he got me chocolate, and I think that's when
7 I tried to rest.

8 Q Okay.

9 A But the evening is -- it was probably in the
10 afternoon when people started coming.

11 Q Okay. Now, sometime in the evening, did another
12 nurse come by, inquiring about the circumcision form?

13 A Yes.

14 Q What do you recall about that?

15 A It was in the evening, Jim was out in the hallway
16 with the Jasters, I was in the room, Josiah was in the
17 nursery, and they were looking at all the other babies that

18 were born. And a nurse came in and said we need to sign
19 this form for the circumcision tomorrow.

20 And the way my room was, my bed is here, and right
21 over here is a counter, and there's a door out to the
22 hallway. And she was standing at this counter with the form
23 that had been dropped off. So I got up out of bed. And I
24 just -- every time you get up after -- the gravity and I had
25 excessive bleeding, and I recall that filling and walking

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1 over there, and asking her, Can I -- can I be in the room
2 when he's circumcised the next day. And she said -- do you
3 want me to continue?

4 Q Yeah. Go ahead.

5 A She said, no, we just line up all the boys and
6 they do them and it's really quick. Parents aren't allowed
7 in the room. And then I remember, when I was signing the
8 form, I started to sign in the wrong spot. She said, No,
9 here by the X. Then I looked at the clock, because they
10 have a time on the form that you fill in. I filled in the
11 time, and it was 7:20 p.m. And she witnessed it.

12 And then I was -- when I was asking her about
13 the -- being there and the process, she did say that, no, I
14 couldn't, and they line up all the boys, and they do it,
15 that -- and if I had further questions, I would need to

16 address them to the doctor in the morning.

17 MR. BAER: Could I just ask, Your Honor, that she
18 be allowed to go to the grease board to draw a diagram of
19 the room?

20 THE COURT: Are the other drawings still there?

21 MR. BAER: Yes.

22 THE COURT: Okay. They need to be erased first.

23 MR. BAER: Sure.

24 Q (Mr. Baer continuing) Could you, Ms. Flatt, take
25 a grease pencil and draw a layout of the room that you are

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1 describing?

2 A The room -- and it's not going to be to scale.
3 This is -- like, my bed is here. There is a little table
4 here. They had a neat little chair thing here, where it
5 folds out to a bed, which Jim slept in. This is where they
6 have the machine -- it wasn't there the whole time, but this
7 is where they have the monitor. Then there was -- there's
8 like this countertop. And there's drawers, and like pantry,
9 and cupboards here. This is where I signed the form.

10 (Indicating.)

11 Q Where is the doorway to the hall?

12 A Right here. Well, this isn't going to be to scale

13 at all. The doorway is right there. Then you have a
14 bathroom, and we had another countertop here. I believe
15 that had a sink on it.

16 Q Okay. All right. And the nurse then came in.
17 The nurse who signed, witnessing the consent form,
18 apparently was Ruth Larson. Had you seen her before, to
19 your recollection?

20 A There were six of them when he was coming out.
21 There was --

22 Q Okay.

23 A I don't recall.

24 Q Okay. Did you have any questions about the
25 circumcision procedure of the nurse? You can take a seat

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1 again.

2 A Okay. Yes, as I told you.

3 Q What were the questions that you had?

4 A I wanted to know if I could be in the room when
5 they did it.

6 Q Any other questions?

7 A When it went on, it just said I had to address
8 those to the doctor in the morning.

9 Q As far as you remember, where was Jim at this
10 time?

11 A It's 7:20 at night, and he never left at night.
12 What I recall is that they had taken the baby to the
13 nursery, and he was talking to Kyle and Tina Jaster. And he
14 would have been out in the hallway.

15 Q Okay. Now, did you read the consent form before
16 you signed it, Ms. Flatt?

17 A Yes.

18 Q Did you have any specific questions about the
19 procedure that you asked Ruth Larson?

20 A Yes, what I had told you.

21 Q You mentioned that you wanted to watch. Was there
22 anything else that you asked?

23 A If I could -- if I could be there. I asked about
24 procedure. And I don't know -- I was trying to understand
25 how it was done. And she just said that I had to ask those

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1 of the doctor in the morning.

2 Q Did she tell you who the doctor was going to be?

3 A I did not know until the morning he was
4 circumcised that Dr. Kantak was doing it. In my mind, I
5 thought it was Dr. Bro because it would be during his hours.

6 Q Okay. So at 7:20 p.m., you still had no idea who
7 the doctor would be that would be attending to Josiah at the

8 circumcision in the next morning?

9 A No.

10 Q In the evening of March 6, did Jim stay overnight?

11 A Yes.

12 Q And did Josiah by and large stay in the room with
13 you throughout the course of that evening?

14 A Yes. The majority of time Josiah was with us.

15 Q The medical records seem to indicate a fairly
16 regular breast-feeding pattern. Had you become more
17 accustomed to breast-feeding at that time?

18 A I have to say, personally, no, it was very
19 difficult, and it was -- he was dropping weight. It wasn't
20 working very well.

21 Q Okay. Then on the morning of March 7, 1997, do
22 you remember that time period?

23 A Yes, Friday morning.

24 Q What do you recall?

25 A I recall Dr. Kantak coming in the room, mid

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1 morning.

2 Q And was Jim there at that time?

3 A No, he wasn't.

4 Q Where did he go? Do you know?

5 A I think he needed some clothes because we were

6 going to be staying another night. Just -- I know he -- I
7 think that's probably when he brought me back chocolate
8 peanut butter ice cream. He ran errands.

9 Q So what do you recall when Dr. Kantak came in?

10 A What I recall is our Lamaze instructor, Fran
11 Mosey, came in that morning before Dr. Kantak.

12 Q That's on the videotape, right?

13 A Yeah. She held Josiah.

14 Q Okay. And that was before Dr. Kantak came in?

15 A Yes, because Jim was there, he videotaped that.

16 Q Okay. So after Fran Mosey visited you and Jim,
17 Jim left shortly thereafter?

18 A Jim would have gotten ready and he would have left
19 to go do what he needed to do.

20 Q What do you remember about Dr. Kantak? First, can
21 you identify what conversation you had with her or where she
22 came into the room and what the conversation was?

23 A Up here?

24 Q Yes, please.

25 A I was in bed, I was kind of resting. Can you hear

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1 me?

2 Q Yes.

3 A Dr. Kantak came in the door, she stepped inside my
4 room, she seemed to be in a hurry. She -- that's when I
5 understood and I was thrown back -- she said, "I'm going to
6 be doing the circumcision on your son."

7 Q Prior to that time period that you're describing
8 right now, had you ever seen Dr. Sunita Kantak?

9 A No. I have never seen her, met her, no. I
10 remember having to pull myself up in the bed. And I had a
11 hard time understanding her. And I knew that there was pain
12 involved. In my mind, as you're cutting in that area,
13 there's pain. And I asked her about pain. She used her
14 hands, and it was hard to understand, but at the time I
15 understood her saying they used something to alleviate the
16 pain. And that was it.

17 Q Okay. How long a time period was Dr. Kantak in
18 your presence that morning, before the circumcision was
19 done?

20 A As long as it took to cover that. A minute, two
21 minutes.

22 Q Did you see anybody else with Dr. Kantak on the
23 morning of March 7?

24 A She was just in the doorway and there was -- there
25 was activity out in the hallway. But no one -- no one came

1 in my room.

2 Q Okay. Was Josiah in your room at that time or had
3 he already -- was he outside the room?

4 A No, I was resting, and I believe that was the time
5 he was outside the room.

6 Q Okay. You can take a seat then again. What do
7 you remember happening next or do you remember any other
8 visitors after Dr. Kantak came in and you had this brief
9 conversation?

10 A Yeah. Jim wasn't back yet, he was still running
11 errands. And my mom has a noon hour between eleven and
12 twelve. She worked at the Prairiewood post office at this
13 time. And she came over her noon hour. And I believe she
14 brought me -- I needed some -- a breast-feeding bra. And we
15 were standing -- I believe we were between the bed and the
16 counter, and Dr. Kantak came back in.

17 Q And what was the nature of that or what was the
18 extent of that conversation?

19 A The circumcision was done.

20 Q Did she make any other reports or anything like
21 that?

22 A I said, "How did it go?" And I don't know her
23 exact words, but it was, Everything was fine.

24 Q Did she mention anything about asymmetry?

25 A Not a word.

1 Q And after March -- or after that conversation with
2 Dr. Kantak, did you have any other contact with Dr. Sunita
3 Kantak during the time you were hospitalized for the birth
4 of Josiah?

5 A No, I didn't.

6 Q What do you recall about the afternoon hours then
7 of March 7, 1997?

8 A On Friday, the -- it would have been the same
9 routine of breast-feeding. Jim came back.

10 Q Did you have a number of other visitors, friends
11 and family?

12 A Yeah. Both days. Actually, what was -- Birch
13 Burdick and Tracy Gompf, who worked in the law office --
14 they did at the time -- stopped in after their noon -- or
15 during their noon hour. And that was right after Josiah was
16 circumcised. And that was -- they were going to come back.

17 Q Now, during the course of your stay at MeritCare
18 Hospital, did you receive any booklets on circumcision?

19 A No, I didn't.

20 Q Showing you what has been marked as Exhibit 57,
21 that has been represented as a booklet that would have been
22 available for distribution to the patient population in
23 March of 1997. Did you recall ever receiving that booklet?

24 A No. I didn't receive this.

25 Q Showing you what has been marked -- I'm sorry --

1 showing you Exhibit 58, "Infant Care" booklet, did you ever
2 receive the "Infant Care" booklet, Exhibit 58?

3 A No. This is -- is this the one that was disclosed
4 at the end of December?

5 Q Yes.

6 A No.

7 Q When did you first see those booklets, Ms. Flatt?

8 A At my deposition in November of 2000, I believe
9 MeritCare came up with that circumcision booklet, that first
10 one you gave me. Was it 57? And when you approached, it
11 was either the last week in December of 2002 or the first
12 week of January, you had more -- there was more than -- you
13 had books that you said MeritCare disclosed that would have
14 been available at that time period.

15 Q Did you receive any of those?

16 A No, I did not.

17 Q After Josiah was circumcised, did you have nurses
18 who would have taught you and Jim how to take care of a
19 circumcised penis?

20 A Yes. That was -- when he came back, one nurse had
21 said, You'll notice when he first urinates, and we did. He
22 squirmed and cried. And they wrap him really tight. So Jim
23 and I were at the bassinet in the room, and we were -- we

24 would get the urine off, you know, we unwrapped him to open
25 up the diaper, and we were both thrown back. I had never

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1 ever seen a newly circumcised infant male.

2 And we both looked at each other with tears in our
3 eyes, because they have, like, this pad of -- I call it
4 gauze, I don't know what the -- and jelly on the top or --
5 and when you remove that, it was -- Jim described it as a
6 bloody stump. And I get probably nauseated more and, being
7 a new mother, just kind of upset. And I joked with him,
8 saying, he's a boy, can you handle this? And he was taking
9 the diaper and getting -- trying to get the urine off.

10 And I believe the nurses went through with us that
11 you use these gauze -- they give you it. And you use -- I
12 say petroleum or Vaseline jelly. And you have to put it on
13 the penis, between the diaper and the penis. And I just
14 remember Jim, when he first urinated, he sat forever like he
15 was going to pull it off, but he just didn't want to touch
16 it. And I just remember being very nervous. But, yeah,
17 they went through that.

18 And at some point, and I don't recall when, they
19 went through the cord care of the alcohol. I remember Jim
20 asking a nurse, How do you get those babies so tight? So a
21 nurse came in and showed us how you do the wrapping, how

22 they wrap up the baby. A lot of breast-feeding information.

23 Q Did it appear as though Josiah suffered from pain
24 after the circumcision?

25 A Absolutely.

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1 Q How long did that persist?

2 A He slept a lot. That area, I'm going to -- we --
3 because of the way his circumcision was done, we thought he
4 remained swollen for a long period of time because it wasn't
5 till Dr. Mastel's appointment -- and I know I'm getting
6 ahead of it -- but we thought that that side was always
7 swollen, until Dr. Mastel explained that wasn't swelling,
8 that -- he called it an asymmetrical circumcision. But as
9 far as pain and discomfort, his bottom was sore, you could
10 tell, because when you changed him --

11 Q Let me just ask, as long as you brought that topic
12 up, when did you and Jim first notice that -- at least to
13 you it appeared as though there was something wrong with the
14 cut?

15 A It would have been pointed out by Dr. Mastel. We
16 kept thinking it was swelling. The blood and stuff getting
17 washed away, and he had blood around it when he had first
18 came back. And then they aren't -- you can get to the point

19 where you can be around the area and they're not squirming.
20 That was probably within 10 days.

21 But it's still on the one side. And everybody --
22 I think I had a nurse come to my home -- I asked for one --
23 shortly after -- they come the week after he's born.

24 Q Mm-hmm.

25 A And no one -- you know, they check him out. And

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1 no one reported anything. And then I believe I finally,
2 when I went -- it would have been his -- it would have been
3 his two-week -- or two-month checkup.

4 Q In May?

5 A Dr. Mastel -- I chose Dr. Mastel to be his doctor
6 and he was at North Broadway. And then I questioned, I
7 said, Why is he still swollen? And that's when Dr.
8 Mastel -- and he notes it, that he didn't get -- he has a
9 bulge of skin on the side. And he said that we always knew
10 it was a bulge of skin. He said he got an asymmetrical
11 circumcision.

12 Q Okay. But it was apparent to you very soon after
13 you brought Josiah home that there was something wrong with
14 the cut?

15 A We thought it was swelling.

16 Q Now, after you saw Dr. Mastel in May of 1997 and

17 were -- or he was diagnosed with an asymmetric cut, what did
18 you do then?

19 A I started making phone calls.

20 Q To who?

21 A MeritCare.

22 Q Why?

23 A Because it was done wrong.

24 Q Okay. Who did you call?

25 A I would have called the number in the phone book.

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1 I got transferred to the administration. There was -- just
2 to be clear, there's two issues going on. Right before that
3 I got a billing. And I called on two different issues,
4 because I know I have notes on when I made phone calls and
5 stuff. One was they billed me for Lesteberg.

6 MS. VOGLEWEDE: Objection, Your Honor, that has
7 been the subject of pretrial motions and has been excluded
8 by the Court.

9 THE COURT: Sustained.

10 A Okay. On this issue, I started calling doctor --
11 I ended up -- Jean Pladson.

12 Q (Mr. Baer continuing) Who do you remember talking
13 to at administration?

14 A Joyce Bloch, Jean Pladson, I believe there was
15 correspondence with a lady named Gail. What do they call
16 their support service? I can't remember the name. Risk
17 management. That's who I was transferred to.

18 Q When you made these phone calls, did you keep
19 notes of your conversations with representatives from
20 MeritCare?

21 A I did. I tried to the best I could. I did -- if
22 I had a sticky around, I wrote on it.

23 Q Did you retain those notes?

24 A Yes.

25 Q Showing you what has been marked for

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1 identification purposes as Exhibit 15, is this one of the
2 notes that you would have retained?

3 A It's been so long since I've seen it. Yes.

4 Q That is in your handwriting?

5 A Oh, yes, this is all my handwriting. There are
6 two different stickies, and they're dated. So do you want
7 me to go through them?

8 Q No. Do they -- are these notes that you took
9 during the time that you were conversing with MeritCare
10 about the circumcision issue?

11 A Yes.

12 MR. BAER: I would offer Exhibit 15.

13 MS. VOGLEWEDE: No objection.

14 THE COURT: Plaintiff's Exhibit 15 is received.

15 Q (Mr. Baer continuing) From Exhibit 15, can you
16 identify the earliest date, at least on that note, that you
17 would have talked to somebody from MeritCare?

18 A May 16, 1997 at 9:45 a.m., Joyce Bloch.

19 Q Had you ever met Joyce Bloch before?

20 A Only if it would have been the day that I went in
21 and talked to Dr. Montgomery. And I don't -- no, before
22 this, no.

23 Q Okay. And your concern at that time was what?

24 A I'm -- I informed her of Josiah's problem with his
25 circumcision. She was passing the information on to Jean

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1 Pladson, 234-5020, the risk manager, who will get back to
2 me.

3 Q Okay. Do you recall Jean Pladson getting back to
4 you?

5 A I -- let me -- she got back to me eleven days
6 later, but I called in between that twice.

7 Q Okay. Ms. Flatt, why would you keep stickies like
8 this?

9 A I do it all time.

10 Q Do you keep most everything you have or you write
11 on?

12 A It was -- I -- to be honest, I felt that Dr.
13 Kantak knew the minute that circumcision was performed, when
14 she took the device off, she knew something was wrong. We
15 were told everything was fine. It wasn't until my son was
16 two months old that, picking a doctor out in North Broadway
17 and trying to discuss the issue, we were told that it wasn't
18 symmetrical and that's what that bulge meant. And I felt it
19 was very serious. My husband described it as a
20 half-and-half at that time. So I kept notes because they
21 weren't returning my calls.

22 Q Showing you what has been marked as Exhibit 15-A,
23 do you recognize the handwriting on these messages?

24 A This is my handwriting. Jean Pladson's number.
25 Both of these -- this is -- everything on here is my

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1 handwriting.

2 MR. BAER: I would offer Exhibit 15-A.

3 MS. VOGLEWEDE: No objection.

4 THE COURT: Plaintiff's Exhibit 15-A is received.

5 Q (Mr. Baer continuing) Exhibit 15-A identifies an
6 appointment date with a medical provider. Who would that

7 have been with?

8 A Dr. Montgomery. I believe he was the medical
9 director at the time. I'm not sure what he does now. Or
10 you mean on the top one?

11 Q Yeah. Who was the appointment to be made with?

12 A Oh, to be -- Dr. Sawchuk is who Montgomery made an
13 appointment for me and Josiah to go to in August of '97.

14 Q When is that -- the bottom sheet of Exhibit 15-A,
15 when is that dated?

16 A The date of the appointment?

17 Q Yes.

18 A August 1, Friday, 2:40 p.m., First Floor, Desk 12,
19 Dr. Sawchuk.

20 Q When was the note of the conversation with Dr.
21 Montgomery?

22 A Okay. July 24, '97. It was a Thursday at 3:30.
23 I called MeritCare at 234-2119. I was transferred to Joyce
24 Bloch, 234-5876, left message. Friday the 25th, 2:45 p.m.,
25 Joyce Bloch called me back. Karen Dufty, Manager Patient

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1 Services, will come in Monday. 234-2392.

2 Then I left a message for Dr. Montgomery at 3:25
3 p.m. He was on vacation till the 13th. Then Monday the

4 28th, at 1:20 p.m., left a message for Karen Dufty. And all
5 I can tell you is, I'm not seeing a date -- this yellow is
6 when I got the appointment.

7 Q Okay.

8 A And all it says is, Wednesday, it's 11:08 a.m. in
9 the morning. And Jean Pladson, 234-5020. I would have
10 talked to her. And it's my understanding that Dr.
11 Montgomery had set it up for me to see Dr. Sawchuk after --
12 on the first of August.

13 Q Ms. Flatt, were you billed for the circumcision
14 procedure?

15 A Yes.

16 MS. VOGLEWEDE: Your Honor, I am going to ask to
17 have that stricken as a matter that was taken up with the
18 Court pretrial and excluded.

19 THE COURT: Mr. Baer.

20 MR. BAER: May we approach?

21 THE COURT: Yes.

22 (Discussion at the bench, out of the hearing of
23 the jury and the court reporter.)

24 THE COURT: The objection is sustained. I'll just
25 admonish counsel to please follow the previous order of the

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1 Court.

2 Q (Mr. Baer continuing) Now, Ms. Flatt, after --
3 did you see Dr. Sawchuk?

4 A Yes.

5 Q And describe for the members of the jury what your
6 appointment went like.

7 A It went well. Dr. Sawchuk, my understanding, was
8 a specialist in urology. My concerns was from a functioning
9 standpoint, is there going to be any problems with
10 urination, the urethra. At that point I didn't know what it
11 meant from a sexual function as well as he aged. And after
12 I received a letter in June from Dr. Montgomery, I
13 persisted, and he did -- then I did get appointment with a
14 specialist that was set up by MeritCare. We went in. It
15 was Josiah and I.

16 Q Let me just we stop you about that. The June
17 letter from Dr. Montgomery. Showing you what has been
18 marked as Exhibit 16, do you recognize Exhibit 16?

19 A This is the letter I got from Dr. Montgomery.

20 Q What's the date on it?

21 A June 18, 1997. I haven't reviewed this for --

22 Q Look at the envelope that is attached to that. Is
23 it addressed to you?

24 A Yes, Mrs. Anita Flatt at our address at this time
25 in Fargo. We had moved June 1 of '97 to a different

1 apartment.

2 Q And has it been in your possession all the time?
3 Was this letter in your possession?

4 A Four years ago I gave it to you. But it was in my
5 possession and then my attorneys.

6 MR. BAER: I would offer Exhibit 16.

7 MS. VOGLEWEDE: No objection.

8 THE COURT: Plaintiff's Exhibit 16 is received.

9 Q (Mr. Baer continuing) After you had had a number
10 of conversations with Dr. Montgomery and staff at the
11 MeritCare administration, were you still concerned about
12 your son's penis?

13 A Yes.

14 Q And when Dr. Montgomery sent you a letter on June
15 16, what was his conclusion about the state of your son's
16 penis?

17 A June 18, 1997 is the date of the letter. I
18 received it on the -- postmark is the 20th. After -- and
19 I'm just -- his letter says, "After a complete review, I do
20 feel good medicine was practiced by all of those involved in
21 your and your son's care. I do apologize for the error in
22 billing and this will be corrected and resubmitted."

23 He does express in this letter that he discussed
24 Josiah's circumcision issue, obstetrics department -- oh,
25 no -- with Dr. Mastel, who I had chosen for Josiah. And he

1 said -- all he says is with one of our urologists.

2 And then he says, "Asymmetry of the foreskin will
3 not cause any dysfunction sexually or otherwise in your
4 son's later life." He does say, "There is a good chance
5 that within one to two years the asymmetry should be barely
6 noticeable."

7 Q Were you satisfied with Dr. Montgomery's assurance
8 that everything is okay with your son?

9 A No.

10 Q What did you do after you got this letter?

11 A I called. That was the notes. I kept calling. I
12 wanted an expert to see my son and do an exam and make sure
13 nothing was damaged. I wanted -- I didn't want just someone
14 in administration saying, We have reviewed it, and it's
15 fine.

16 Q And this is when Dr. Sawchuk saw Josiah?

17 A Yeah. And they accommodated me when I met with
18 Dr. -- I actually went in, physically met with Dr.
19 Montgomery. There was another gentleman in that department
20 that I met with. And they were very kind. They scheduled
21 it, they see, We will do this for you. And they scheduled
22 it to get checked out by Dr. Sawchuk.

23 Q And when Dr. Sawchuk was examining Josiah, did he
24 show you what was wrong and describe what was wrong?

25 A Very much so.

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1 Q Could you describe that for the members of the
2 jury.

3 A Now, this is August, Josiah's five months.
4 Brought Josiah in just in the regular -- his regular clinic
5 room, we're not in the hospital. And he evaluated it. And
6 that's when they added to the asymmetry that there's
7 adhesions.

8 Q Tell the members of the jury where that was on the
9 penis, Josiah's penis.

10 A It would be Josiah's left. And what he did is,
11 when he undiapered him, he looked at it, he said that needed
12 to be tore down.

13 Q What did he do?

14 A He said there's -- I had two options. I could do
15 it on a type of outpatient basis or he could do it in the
16 office, because it's fairly new. And I did not trust Josiah
17 going anywhere where I couldn't be. And I said I would like
18 it done in the office. So I was -- everything is going to
19 go fine. He assured me, yes. And then he ripped.

20 Q What was the reaction of Josiah?

21 A Screamed and cried. And he did it on a table, and
22 he gave me the go when I could pick Joe up. And I -- he got

23 done with it. It seems like eternity as a mother. It was
24 quickly. And I remember I put him up in the nape of my neck
25 and I -- Josiah calmed down. He calmed down.

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1 Q Okay. How long was he crying? Any estimate?

2 A A minute. You know. And then he went into -- Jim
3 and I had already discussed about the look, the cosmetic --
4 the look. And we had discussed both functional and the --
5 that issue.

6 And then Dr. Sawchuk took a piece of paper and
7 drew me -- there's a difference if a man gets a circumcision
8 as an adult versus an infant. And he explained to me, as an
9 infant, you're dealing with such a smaller area, if they
10 tried to do anything now, the act of going back in and
11 cutting again, the scar tissue could make it worse.

12 And that -- he drew me a picture of -- that it
13 looks different when the -- that area where, if you fold the
14 skin out, is different if you're an adult. If they wait
15 till Josiah is an adult, it will be different, because of
16 what develops in the penis. And he drew two pictures.

17 And then he said -- I asked him for his expertise
18 on what we do for Josiah. And he says, I think you really
19 have to wait till he gets through adolescence and develops

20 and see what -- he did say that it may get better with age,
21 that was his prediction. And see what Josiah says. So he
22 wanted to wait until after the puberty time period and the
23 growth time period.

24 Q Is that what you and Jim decided to do?

25 A We soaked it in. I did get one other opinion.

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1 Yes, we -- we definitely didn't want anything further done.
2 And it made sense to us.

3 Q After you saw Dr. Sawchuk, did you have further
4 communication with Robert Montgomery?

5 A I believe after -- if I recall correctly, after
6 the appointment, I would have got another letter.

7 Q Showing you had a has been marked as Exhibit 17,
8 do you recognize Exhibit 17?

9 A Yeah. Oh, yes. This --

10 Q What's the letter dated?

11 A He actually addresses this one to Mr. and Mrs.
12 James Flatt. It's dated September 24, 1997.

13 Q And is -- is the letter a letter that was sent to
14 your address and received by you?

15 A Yes.

16 Q And has it been in your possession the entire time
17 except when you turned it over to your attorney?

18 A Yes.

19 MR. BAER: I would offer Exhibit 17.

20 MS. VOGLEWEDE: No objection.

21 THE COURT: Plaintiff's Exhibit 17 is received.

22 Q (Mr. Baer continuing) Looking at Exhibit 17, does
23 Dr. Montgomery describe problems that are associated with
24 the use of a Gomco clamp?

25 A He says that they're usually performed with the

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1 use of a Gomco clamp and bell. "When this bell is used,
2 there's frequently a small amount of excess tissue or a
3 small amount of asymmetry" -- if I'm saying that right --
4 "asymmetry present initially. As the child grows, this
5 tissue, or asymmetry, fade into the rest of the tissue on
6 the penis and become unnoticeable. We therefore feel good
7 medicine was practiced and would recommend that nothing
8 further be done to Josiah's circumcision now or in the
9 future." But that contradicted Sawchuk.

10 Q Did Dr. Kantak describe asymmetry to you before
11 she did the circumcision?

12 A No.

13 Q Did Dr. Kantak describe any risks of circumcision
14 before she did the procedure?

15 A The only thing we talked about was pain.

16 Q After September of 1997, did you do anything else
17 to pursue the issue with your son's circumcision?

18 A I had been contacting attorneys, yes.

19 Q Who had you contacted? Do you recall the names?

20 A I went to the yellow pages. I do not recall the
21 names. And this was before September as well. And it
22 continued throughout working with MeritCare and trying to
23 get a check on Josiah, because at one point an attorney -- I
24 would get him on the phone, and one attorney said, I want to
25 see Al Baker but --

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1 MS. VOGLEWEDE: Objection, Your Honor, hearsay.

2 THE COURT: Sustained.

3 Q (Mr. Baer continuing) Did you contact attorneys?

4 A Yes. And I understood I needed to request medical
5 records.

6 Q And did you request medical records?

7 A Yes, I did.

8 Q Showing you what has been marked as Exhibit 7-A,
9 do you recognize Exhibit 7-A, Ms. Flatt?

10 A Handwritten request September 22, 1997. That's my
11 writing. And I am requesting a complete copy of the medical
12 records. And this is actually their -- mine had an

13 original. This was a little diary type of paper that I had
14 at home. This is out of MeritCare's -- I don't believe I
15 made a -- kept a copy. And this would be their response to
16 me. This is what they sent me.

17 Q What's the postmark on that letter?

18 A October 3, 1997. It's to Anita Flatt. That's all
19 I got.

20 Q Okay. And your request was for complete medical
21 records?

22 A Yes. For Josiah's complete medical records.

23 MR. BAER: Okay. I would offer Exhibit 7-A.

24 MS. VOGLEWEDE: No objection.

25 THE COURT: Plaintiff's Exhibit 7-A is received.

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1 Q (Mr. Baer continuing) So when you were checking
2 out and seeking legal counsel, you requested medical records
3 and you got what has been marked as Exhibit 7-A; is that
4 right?

5 A Correct.

6 Q Do you remember whether or not you took Exhibit
7 7-A to any lawyers to review the case?

8 A I took it to you.

9 Q Prior to coming to me to look at the case, had you

10 talked to other lawyers about reviewing the case?

11 A I talked to other lawyers, and I don't recall
12 taking -- I made several calls over the phone, very
13 uncomfortable issue, heard the general theme of just being
14 the area and all these conflicts.

15 Q Would it be fair to say that through your calling
16 of attorneys, nobody was willing to take that case?

17 A That was the impression I was left off on the
18 phone calls, because of utilization of MeritCare and
19 personal injury suits, and everything else, and experts they
20 utilize. I got a lot of calls that it would be a conflict
21 for this office, it would be a conflict.

22 Q When did you contact me about this case, Ms.
23 Flatt?

24 A My best recollection is right after the holidays
25 of '97. I know you did and I did request -- do you want me

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1 to stop? I'll stop talking.

2 Q Okay. You indicated that you collect or save
3 notes and scraps of paper. Did you save other things from
4 the prenatal visits with Dr. Bro about ultrasound records,
5 and so forth?

6 A Yes.

7 Q Showing you what has been marked for

8 identification purposes as Exhibit 9, can you identify
9 Exhibit 9?

10 A This is Josiah's ultrasound.

11 Q And that would have been something you kept in
12 your papers for Josiah?

13 A I thought it -- it was -- there's the other one.
14 Okay. Yes.

15 Q 9-A is the manila envelope and photocopies of that
16 ultrasound?

17 A Mm-hmm.

18 Q Showing you both 9 and 9-A, are those documents
19 that you kept in your records documenting the prenatal care
20 that you received for the pregnancy of Josiah Flatt?

21 A Yes.

22 MR. BAER: I would offer Exhibits 9 -- first I
23 will offer Exhibit 9.

24 MS. VOGLEWEDE: No objection.

25 THE COURT: Plaintiff's Exhibit 9 is received.

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1 MR. BAER: And 9-A.

2 MS. VOGLEWEDE: No objection.

3 THE COURT: Plaintiff's Exhibit 9-A is received.

4 Q (Mr. Baer continuing) Upon your discharge from

5 the hospital, were you given a prescription for some pain
6 medication?

7 A Yes. My understanding is Dr. Bro wrote me a
8 prescription for ibuprofen.

9 Q Showing you what has been marked for
10 identification purposes as Exhibit 10, do you recognize
11 Exhibit 10?

12 A Yeah, this is the -- this is the prescription
13 because it's a discharge date of March 8.

14 Q And has that -- you saved that in your records; is
15 that right?

16 A Yes.

17 MR. BAER: I would offer Exhibit 10.

18 MS. VOGLEWEDE: No objection.

19 THE COURT: Plaintiff's Exhibit 10 is received.

20 Q (Mr. Baer continuing) Still has some ibuprofen in
21 it. Is it still from that original prescription?

22 A I -- yeah. I don't know how many are in there. I
23 know. But it would be, yes.

24 Q Did you also keep other mementos and items of
25 personal items to save for Josiah?

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1 A Absolutely.

2 Q Showing you what has been marked for

3 identification purposes as Exhibit 11, can you identify
4 Exhibit 11?

5 A It -- it's his baby book. My friends gave this to
6 me before he was born. And it has things that I kept --

7 Q Okay.

8 A -- throughout the -- do you want me to go through
9 this?

10 Q Yes.

11 A His wrist and ankle band, my band, the paper.

12 Q Before we go any further, I want to offer it
13 before you testify from it. Does it appear to be your son's
14 baby book?

15 A Yes, this is my son's baby book.

16 MR. BAER: I would offer Exhibit 11.

17 MS. VOGLEWEDE: No objection.

18 THE COURT: Plaintiff's Exhibit 11 is received.

19 Q (Mr. Baer continuing) 11-A was contained in there
20 also. Is this your wristband, Ms. Flatt?

21 A Yes. Let me -- yes.

22 Q Who does it identify your doctor to be?

23 A Dr. Bro.

24 MR. BAER: I would offer Exhibit 11-A.

25 MS. VOGLEWEDE: No objection.

1 THE COURT: Plaintiff's Exhibit 11-A is received.

2 Q (Mr. Baer continuing) Showing you what's been
3 marked as 11-B, can you identify 11-B for the members of the
4 jury?

5 A This is Josiah's immunization record. And I
6 believe, with the formula samples you get, I got this card,
7 and there's also one in the baby book. And it's probably
8 not up to date.

9 MR. BAER: Okay. I would offer Exhibit 11-B.

10 MS. VOGLEWEDE: No objection.

11 THE COURT: Plaintiff's Exhibit 11-B is received.

12 Q (Mr. Baer continuing) Showing you what have been
13 marked for identification purposes, Ms. Flatt, as Exhibits
14 11-C and 11-D, could you identify for the members of the
15 jury what those are.

16 A Okay. 11-C, this would be something that I would
17 have got from MeritCare. I don't know what you -- you call
18 it, but that's --

19 Q Is this the document you got from MeritCare? It's
20 a card indicating congratulations on the birth of your son?

21 A Yes. Yes.

22 Q 11-D, the blue one.

23 A That's the same thing. I am -- those are those
24 formula cards.

25 MR. BAER: And I would offer Exhibits 11-C and D.

1 MS. VOGLEWEDE: No objection.

2 THE COURT: Plaintiff's Exhibits 11-C and 11-D are
3 received.

4 Q (Mr. Baer continuing) Now, on 11-C and 11-D,
5 there are names of the doctor for your son Josiah. And then
6 that name is scratched out. Whose name was on there
7 originally?

8 A They put Dr. Kantak.

9 Q Okay. And who scratched it out?

10 A I did.

11 Q When did you do that?

12 A It would have been after I picked Dr. Mastel,
13 which would have been within two weeks of birth.

14 Q Okay. And on here it says that the delivery
15 doctor is Dr. Bro and Dr. Lesteberg, doesn't it?

16 A Yep.

17 Q Was Dr. Bro there when you delivered?

18 A No.

19 Q Was Dr. Lesteberg there when you delivered?

20 A No, not when I delivered. Afterwards and before.

21 Q And on the white one, Exhibit 11-C, it identifies
22 mother's doctor as being Dr. Bro. He was your OB-GYN
23 doctor, wasn't he?

24 A Yes.

25 Q Then it also has Dr. Lesteberg. Have you ever had

1 a doctor/patient relationship Dr. Lesteberg?

2 A No.

3 Q Showing you what has been marked for
4 identification purposes as 11 -- as Exhibit 11-E, can you
5 identify Exhibit 11-E for the members of the jury?

6 A This is all one?

7 Q That's all 11-E.

8 A Okay. First part -- these are all stuff I put in
9 his baby book -- is the card I got when I started going to
10 Dr. Bro, recording the times of appointments and when I went
11 in. Then when I moved to Hawley, a Dr. Aileen Luz would
12 have saw Josiah. And at one point she would have saw him
13 and I wrote down -- had her write down his height and weight
14 so I could record it in the baby book. And the
15 immunization. And the Social Security card of Josiah that I
16 had to order. And is this his -- yeah, Department of
17 Health, Division of Vital Records, ordering his birth
18 certificate or requesting one.

19 Q These documents would have been kept for Josiah's
20 memories, I take it?

21 A These were all -- my recollection is, they're all
22 in his baby book.

23 MR. BAER: I would offer Exhibit 11-E.

24 MS. VOGLEWEDE: No objection.

25 THE COURT: Plaintiff's Exhibit 11-E is received.

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1 Q (Mr. Baer continuing) Showing you what has been
2 marked as Exhibit 11-F, Ms. Flatt, can you identify Exhibit
3 11-F for the members of the jury?

4 A This is a certificate of his birth, and a copy.
5 You need it to get a Social Security number.

6 Q And was this kept in his baby book?

7 A Yes.

8 MR. BAER: I would offer Exhibit 11-F.

9 MS. VOGLEWEDE: No objection.

10 THE COURT: Plaintiff's Exhibit 11-F is received.

11 Q (Mr. Baer continuing) Showing you what has been
12 marked for identification purposes as Exhibit 11-G, could
13 you identify for the members of the jury what these
14 documents are.

15 A These are handouts I would have received at some
16 point during Josiah's doctoring. Is this a copy in the
17 back? The last --

18 Q The last one appears to be a copy.

19 A I don't recall if this would have been done by
20 someone else or not.

21 Q Do you know when you would have received those?

22 A It would have had -- they were in his baby book
23 when I gave it to you. It would have had to have been in
24 that first year.

25 Q Do you know when he received his polio vaccine?

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1 A It's in the baby book.

2 MR. BAER: I would offer Exhibit 11-G.

3 MS. VOGLEWEDE: No objection.

4 THE COURT: Plaintiff's Exhibit 11-G is received.

5 Q (Mr. Baer continuing) Showing you what has been
6 marked for identification as Exhibit 11-H, can you identify
7 this for the members of the jury?

8 A Yes.

9 Q What is it?

10 A My Grandma Lucy died and had sent Josiah a card
11 for his birthday. And this was his first birthday. And I
12 was trying to see -- she died seven days after it was sent.
13 They found her in her home.

14 Q Okay.

15 A I kept it for him with her gift.

16 Q Okay. And that gift is inside there?

17 A Yeah. The money. Yep.

18 MR. BAER: I would offer Exhibit 11-H.

19 MS. VOGLEWEDE: No objection.

20 THE COURT: Plaintiff's Exhibit 11-H is received.

21 Q (Mr. Baer continuing) Showing you what has been
22 marked for identification purposes as Exhibit 12 -- and
23 there's some subparts to Exhibit 12 -- do you recall putting
24 keepsakes into a manila envelope?

25 A Yes. It's been a long time, though.

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1 Q Is Exhibit 12 -- the writing on the top of Exhibit
2 12 in your handwriting?

3 A Yes. That's my handwriting.

4 Q And each of the items inside are marked as
5 exhibits. And perhaps we can just identify what those
6 exhibits are at this time. Exhibit 11-A is what?

7 A This is 12-A.

8 Q 12-A.

9 A It's a little figurine. Probably from his baptism
10 from the cake.

11 Q Okay. 12-B.

12 A 12-B. Another little figurine that he would have
13 got.

14 Q These are keepsakes that you would have put away
15 for Josiah when he is old enough to take care of those or

16 appreciate them?

17 A Yes.

18 Q There's also some Forums from the springtime. Are
19 those newspapers you kept for him?

20 A Yes. We -- Jim -- records -- the record snow, he
21 would take parts of the newspaper that we'd get to put along
22 with his baby book and stuff. This is the one he went and
23 got the day Josiah was born.

24 Q Okay. That is Exhibit 12-J?

25 A Yeah. And 12-K was, I believe, that first winter

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1 we had all that snow. And Jim would have put that in there.

2 12-L is that -- the fire in Grand Forks.

3 Q Okay. 12-J is what? the day of his birth?

4 A The day of his birth, where his name is in the
5 paper.

6 Q Okay. 12-F is what?

7 A I'm assuming it's his baptism. This is the
8 Presbyterian church printout from when he was baptized.

9 Q And 12-I is what?

10 A Certificate of live -- this is Jim's -- this is
11 the copy of Jim and I's signature to the request for the
12 birth certificate.

13 Q Okay. 12-H. What is 12-H?

14 A His feet.

15 Q Would that have been something you received from
16 MeritCare after he was born?

17 A Yes. It was put in his baby book at the hospital.

18 Q That would have been received upon your leaving
19 the hospital?

20 A I believe they did that the day he was born.

21 Q Okay. But then you put it in your baby book right
22 away?

23 A The baby book came in our bag with us to the
24 hospital.

25 Q And then 12-G is what?

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1 A This is the Doctor -- same thing. It's the card
2 they give you. Doctor Gilbertson up here, he signed it, and
3 it's his feet.

4 Q The certificate of birth with his footprints?

5 A Yes.

6 Q Okay. 12-E is a card?

7 A This is when I selected Dr. Bro. They have them
8 at the clinic, you can take them. And it gives us his
9 background. And I kept that for Josiah's doctor.

10 Q Okay. Then 12-D is what?

11 A Oh, that's his certificate of baptism.

12 Q When was he baptized?

13 A Pastor Tilly baptized him August 17, '97. We
14 waited for Jim's sister to be able to come to North Dakota.

15 Q And then 12-C is what?

16 A Oh. This is -- this is his grandma and grandpa's
17 card from -- from my husband's folks. It's Josiah's Grandpa
18 and Grandma Flatt. And she just notes in there that she
19 bought his baptism outfit and he got -- grandpa gave him
20 coins and a two dollar bill.

21 Q And all of these are mementos that you would have
22 collected during the early months of your son's life?

23 A Yes. There is more. I know you returned the
24 bonds.

25 Q The savings bonds that were gifts?

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1 A Yes.

2 MR. BAER:

3 Q (Mr. Baer continuing) I would offer Exhibits 12
4 and 12-A through 12-L.

5 MS. VOGLEWEDE: No objection.

6 THE COURT: Exhibits 12 and 12-A through 12-L are
7 received.

8 We need to take a break, Mr. Baer. Would this be

9 a good time?

10 MR. BAER: It would be fine, Your Honor.

11 THE COURT: You may step down. Members of the
12 jury, we're going to recess until 10:45. We ask you to
13 please remember the admonition. Jurors, you're excused.
14 Court is in recess.

15 (Recessed at 10:24 a.m. until 10:46 a.m., the same
16 day, at which time the following proceedings were continued
17 in open court, in the presence of the jury:)

18 THE COURT: Let the record show we are reconvened
19 with all parties, counsel and all jurors.

20 Mr. Baer.

21 Q (Mr. Baer continuing) Ms. Flatt, showing you what
22 has been marked as Exhibit 13, do you recognize Exhibit 13?

23 A This is a photo album of -- regarding Josiah, his
24 birth, and just the first months with Josiah.

25 Q Okay. Do some of those photos depict the bassinet

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1 that Josiah stayed in at the hospital?

2 A Yes. They're right after -- some of these are
3 right after birth.

4 Q Okay. And are these -- were these part of the
5 baby memorabilia that you had been collecting?

6 A Yes.

7 MR. BAER: I would offer Exhibit 13.

8 MS. VOGLEWEDE: No objection.

9 THE COURT: Plaintiff's Exhibit 13 is received.

10 Q (Mr. Baer continuing) Ms. Flatt, did you at any
11 time seek a second opinion regarding the evaluation
12 completed by Dr. Sawchuk?

13 A Yes, that's what the defense put in the other day.
14 You said you would -- you knew a doctor that was not in the
15 area affiliated with MeritCare to review what Dr. Sawchuk's
16 medical record reflected with regard to Josiah's adhesions
17 and asymmetrical circumcision.

18 Q Now, during the course of the trial that you were
19 in the hospital, did Jim and others videotape some of the
20 events?

21 A Yes.

22 Q I show you what has been marked as Exhibit 14.
23 Does this appear to be a copy of the videotape?

24 A Yeah. And that's Jim's writing.

25 MR. BAER: Your Honor, at this time I would offer

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1 Exhibit 14, which is a videotape. I would like to play it
2 for the jurors at this time.

3 MS. VOGLEWEDE: No objection.

4 THE COURT: Plaintiff's Exhibit 14 is received.

5 Go ahead, Mr. Baer.

6 MR. BAER: Thank you.

7 THE WITNESS: Does it project through here?

8 THE COURT: I don't know. Does it?

9 MR. BAER: I don't know either.

10 THE COURT: We'll have to try and see.

11 THE WITNESS: Okay.

12 (Videotape shown.)

13 Q (Mr. Baer continuing) Could you identify, Ms.
14 Flatt, what this is showing?

15 A This is the night we went in when I was in labor.

16 Q (Mr. Baer continuing) Let me --

17 MR. BAER, Perhaps, Your Honor, when I ask a
18 question, I should just pause the video?

19 THE COURT: I think that would work.

20 Q (Mr. Baer continuing) Okay. You were saying, Ms.
21 Flatt, the opening frames of this video are what time
22 period?

23 A The evening of March 5, 1997. That's my arm right
24 now, where I'm in the bed.

25 MR. BAER: So can the jurors hear it okay? Is it

1 hearing okay? All right.

2 (Resumed showing videotape.)

3 Q (Mr. Baer continuing) Now, Ms. Flatt, those
4 opening frames were the evening before Josiah was born,
5 right?

6 A When I was in labor. And that shows, as I said,
7 my brother Marlo, his wife Brenda, his two kids, Brady and
8 Bryce were there, my mother, my friend Lori's there, my
9 friend Lee's there, my friend Stef is there. Jim is the one
10 videotaping. That shows them. And that's when they have me
11 hooked up where you can tell a contraction.

12 And in the beginning, you can hear my brother
13 saying, Just breathe through it. This skips to -- when it
14 got into heavy labor, the camcorder was put away, and this
15 is videotaping right after Josiah was born.

16 Q Would this have been in your room or would this
17 have been in the nursery?

18 A This would be they took him in the nursery.

19 Q Okay. And are you aware or can you tell from
20 reviewing the video who was operating the video camera
21 during this segment we are now going to see?

22 A This switches between Jim and my friend Lori. I
23 want to say it's Jim right now because Jim gets the camera
24 that took the photos that was in the photo book. And
25 Lori -- my friend Lori then is videotaping.

1 Q Okay. We'll continue now with the video.

2 (Resumed showing videotape.)

3 Q (Mr. Baer continuing) I want to ask, the
4 gentleman standing there in the red sweatshirt, is that Jim?

5 A That's Jim.

6 Q Could you describe for the members of the jury
7 approximately what time this would have been in relationship
8 to the birth of Josiah Flatt?

9 A He was born at 3:41 a.m. This is just right
10 after.

11 Q So after the new baby exam, he would have been
12 brought back to your room. And then this segment would
13 go --

14 A Oh, this next one?

15 Q Yes.

16 A I would have to -- I'm not sure of this next one.
17 All of that that you saw --

18 Q Right.

19 A -- was right after he was born. And they -- that
20 would have been when Dr. Lesteberg showed up and I was in
21 the room, delivering the placenta.

22 Q You're saying good-byes to your mother; is that
23 right?

24 A This is the morning of his birth. This is when
25 everybody is getting ready to leave.

1 Q Now, do you know when this would have been taken?

2 A Starting now?

3 Q Yes.

4 A Doesn't it have the time on the bottom corner?

5 Q I don't know. Just hold on a second. The blue
6 card that you see in this bassinet, is that Exhibit 11-D?

7 A Yep. Yes, it is.

8 Q Before you crossed out the name Dr. Kantak?

9 A Yes.

10 Q There. You see the time at this point?

11 A Yep.

12 Q 12:25:21 p.m. on March 6?

13 A Jim would have probably started taping when he
14 came back. And this is in the room.

15 Q Right. The videotape, is it in chronological
16 order from March 5 through the end of your hospital stay?

17 A Yes.

18 Q Do you know who this nurse is?

19 A No, I'm not sure. I just noticed that you can
20 also see in the video that counter.

21 Q That's the counter that you were drawing up on the
22 drawing this morning?

23 A Yes. The door may have been a little bit closer.
24 The door -- she's taking him out.

25 Q Okay.

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1 A I just noticed that. Then you can see the pantry
2 and the cabinets. I don't know who that nurse is. I don't
3 know her name.

4 Q At this point, March 6, 1997 --

5 A Did it say 3:30 there?

6 Q Hold on just a second. I'll try to -- 3:37:44?

7 A Yeah.

8 Q Okay. How would you have been made aware that he
9 would be circumcised the following day?

10 A The nurse. The nurses would have told me.

11 Q Okay. Prior to this time period, had Jim ever met
12 Dr. Sunita Kantak, to your knowledge?

13 A Jim never met Dr. Kantak till the day of his
14 deposition. He had never seen her.

15 Q The day of her deposition?

16 A Yeah. Her -- Dr. Kantak's deposition.

17 Q Okay. I want to go back because I think there was
18 a phrase -- did you talk about hepatitis B? You have to
19 fill out the hepatitis B form?

20 A Yeah.

21 Q And that was right before you talked about the

22 circumcision day?

23 A Yes. We would have been informed from the staff
24 what was going to be taking place when we inquired as to
25 when we were discharged and everything else.

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1 Q We'll hear that again.

2 (Resumed showing videotape.)

3 Q (Mr. Baer continuing) And who were you talking to
4 at that time?

5 A Jim. Jim's videotaping that. I said that they
6 left the consent sheet for the circumcision.

7 Q Okay. You mentioned to -- who is that blonde
8 women?

9 A Brenda, my -- at the time my sister-in-law.

10 Q Okay. You were just talking to her about talking
11 to a medical doctor. Who was that? Let's hear it again.

12 (Resumed showing videotape.)

13 Q Who are you referring to?

14 A I said, "I told Dr. Bro this morning," referencing
15 that Lesteberg left.

16 Q Okay.

17 A That I was upset.

18 (Resumed showing videotape.)

19 Q (Mr. Baer continuing) Who is this gentleman?

20 A That's my brother Marlo.

21 Q Okay. Was that his wife that was holding the
22 baby?

23 A Yeah. And their two kids. You will see Brady,
24 who would hold Josiah next, and the little girl is Bryce.
25 That's their two kids.

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1 (Resumed showing videotape.)

2 Q (Mr. Baer continuing) Now, this is at 6:57:49
3 p.m. on March 6, 1997. The consent that you signed is dated
4 -- the time is 7:20. Do you remember what happened between
5 7:00 o'clock and 7:40?

6 Let's just play the --

7 (Resumed showing videotape.)

8 Q (Mr. Baer continuing) Now, this is at 7:40. You
9 would have signed the consent form 20 minutes before this
10 time period?

11 A Sure. Yes.

12 Q Did Dr. Kantak come into the room at any time
13 between 7:00 o'clock and 7:40?

14 A No, she didn't.

15 Q Did any nurse other than Ruth Larson come into the
16 room to explain anything about the procedure of

17 circumcision?

18 A No. I mean, there was nurses in and out, but not
19 to talk to me about circumcision.

20 (Resumed showing videotape.)

21 Q (Mr. Baer continuing) The last shot there was
22 7:54 p.m. After 7:54 p.m. and midnight, did Dr. Kantak ever
23 come in to see you?

24 A No, she did not.

25 Q This is March 7, the next day, right? Do you know

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1 approximately what time it was?

2 A This is early in the morning. Probably -- I think
3 it says on here.

4 (Resumed showing videotape.)

5 Q (Mr. Baer continuing) It's 6:55:28 a.m.?

6 A Yeah. I believe just -- we checked that clock on
7 the video camcorder. At one point when we go over to the
8 wall, there's a clock in my room. There was two or three
9 minutes apart.

10 (Resumed showing videotape.)

11 Q (Mr. Baer continuing) Who is this?

12 A That's Fran Mosey. And that's March 7, 9:51 a.m.

13 Q Okay. And at 9:51 a.m., on March 7, have you seen
14 Dr. Kantak yet?

15 A No.

16 (Resumed showing videotape.)

17 Q (Mr. Baer continuing) Who is that talking for the
18 camera?

19 A That's Jim, his dad. This is the day of
20 circumcision at six at night.

21 (Resumed showing videotape.)

22 Q (Mr. Baer continuing) Is this -- who is this
23 talking in the video?

24 A I'm videotaping.

25 Q Where is Jim at that time?

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1 A I'm -- I don't know where he is at at this time.
2 But that's my brother, one of my twin brothers, Terry. And
3 his wife.

4 (Resumed showing videotape.)

5 Q (Mr. Baer continuing) Who is this holding your
6 son?

7 A It's my father, Anneus.

8 (Resumed showing videotape.)

9 Q (Mr. Baer continuing) You make a comment there
10 about somebody coming to visit you.

11 A Jeff Bredahl is the gentleman. He is one of the

12 attorneys that I worked for at the time. Partner with Tim
13 Hill. With the blue U.S.A. top. And he's -- I'm talking to
14 him, and said Tracy and Birch came up the noon hour, right
15 after the circumcision. Tracy Gompf is an attorney that
16 practices law, Birch Burdick is the state's attorney.

17 Q Okay.

18 A He wasn't at the time.

19 (Resumed showing videotape.)

20 Q (Mr. Baer continuing) Sorry. Hold on just a
21 minute. This is at 8:17 a.m. on what day?

22 A March 8, Saturday, when we were going to get
23 discharged that day.

24 Q Okay. So was it fair to say that Jim stayed there
25 each of the nights that you were there?

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1 A Yes, he did.

2 (Resumed showing videotape.)

3 Q (Mr. Baer continuing) Now, before you were
4 discharged from the hospital, were you made to -- or were
5 you given any more instructions?

6 A We were -- I was anxious to get home, and so was
7 Jim. We were anxious to get home. And they -- that car
8 seat is provided by MeritCare at the time. My understanding
9 is they don't do it any more, but at the time -- and they

10 required us to watch a video before we got Josiah ready and
11 took him home. So we would have watched the video before
12 this. And I think right after this, we left.

13 Q What was the video about?

14 A Car seat safety. How you install them in your
15 car, how you put -- my -- I think my mother had boughten
16 that head thing and how -- it was just the car seat safety,
17 just lean back -- they are supposed to be in the back seat
18 of the car and everything. We just watched the video in our
19 room.

20 Q Did somebody from MeritCare say that you must
21 watch it before you leave?

22 A Yeah. Yes.

23 (Resumed showing videotape.)

24 Q (Mr. Baer continuing) The medical records
25 indicate on Exhibit No. 7 that Josiah was discharged at what

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1 time, Ms. Flatt?

2 A 1510. That would be 3:10.

3 Q 3:10 p.m.?

4 A Yep.

5 Q The time on the video is 3:06:34?

6 A Correct.

7 Q The next shots that we'll see are from what
8 vantage point?

9 A I believe he stops recording and puts the recorder
10 in the bag, we go home, and then he would have done some
11 recording of our apartment.

12 (Resumed showing videotape.)

13 Q (Mr. Baer continuing) When is this from, Ms.
14 Flatt?

15 A The day after Dr. Sawchuk tore it.

16 Q Okay. And the date on here is August 2, 1997.

17 A Well, actually -- I think the record said Dr.
18 Sawchuk saw him August 1st. Wasn't it supposed to be August
19 2nd? I don't know.

20 Q Let's look at the records to see what the records
21 reflect.

22 If you look at Exhibit No. 6, there's an
23 appointment sheet indicating urology. What's the date on
24 that appointment sheet for Dr. Sawchuk?

25 A There is a Bates stamp of August 1, 1997, patient

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1 here with mother for evaluation, per request of Dr.
2 Montgomery.

3 Q Okay. And that's August 1st?

4 A That's what that says.

5 Q And what does the note of Dr. Sawchuk identify the
6 date to be?

7 A August 2. August 2 of 1997.

8 Q So the --

9 A And it even looks like that would be the -- Jim is
10 -- this is Jim and this was probably the very night that --
11 of the appointment, in the evening hours.

12 Q Okay. I take it, it was the -- those red surfaces
13 that you see were adhered together prior to your appointment
14 with Dr. Sawchuk?

15 A Yes. That extra skin there was attached up there
16 so it looked -- before Dr. Sawchuk did that, you had a ridge
17 around part, and you couldn't see it because the skin had
18 came up -- you can see the red line -- how far it came up,
19 so you couldn't see any of that raw material there before
20 this was done. This was what Dr. Sawchuk needed to be done
21 and this is what he explained was the adhesion area. Then
22 the asymmetry is right down there.

23 (Resumed showing videotape.)

24 Q (Mr. Baer continuing) I think that's the
25 conclusion of it.

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1 A That's at Jim's parents.

2 Q Now, Ms. Flatt, after you brought Josiah home and
3 noticed that there was some problem with his penis, did you
4 or Jim do any independent research on the issue of
5 circumcision?

6 A Yes. We didn't have Internet access at home, but
7 Jim on his breaks at work started looking on the Internet
8 and reading information about it.

9 Q And what did he find?

10 A The first thing I remember is that I had no clue
11 that babies still died from circumcision, even today. I
12 know the big thing in the course of time -- and I can't tell
13 you times and dates of exactly everything. And we would
14 have given you all the information, and we received more
15 information from you.

16 Jim was very disturbed by the fact that this
17 tissue was erogenous. We both walked into it thinking it
18 was extra tissue that they standardly remove and it doesn't
19 have a purpose, and that that could take away sexual
20 pleasure. My big thing was the death was very stand back.
21 And we were mad when we started finding out death from
22 bleeding, infection, didn't know about the adhesions. I
23 didn't even know they gave them a sugar pacifier. I didn't
24 know they swaddled him.

25 We also found out how they restrain them in a

1 little plastic mold. And they actually strap the baby's all
2 fours. Now, my understanding MeritCare saying that they
3 don't and that they would let the baby swaddle on the upper
4 half and just strap the lower half.

5 Q If you would have known that at the time or before
6 you consented to the circumcision or before you signed that
7 piece of paper, would you have consented to the procedure?

8 A Absolutely not. Neither Jim nor I would have
9 consented. There's no reason.

10 MR. BAER: Thank you. I have nothing further.

11 THE COURT: Cross-examination.

12 MS. VOGLEWEDE: Thank you, Your Honor.

13 CROSS-EXAMINATION

14 BY MS. VOGLEWEDE:

15 Q Now, Ms. Flatt, as you recall, there were two
16 separate visits that you had from Dr. Kantak, correct?

17 A Correct.

18 Q One was before the circumcision?

19 A Correct.

20 Q And one was after?

21 A Correct.

22 Q And you believe that the first visit occurred on
23 March 7, 1997, correct?

24 A That's true, correct.

25 Q In fact, you are certain that it occurred on March

1 7, in your own mind?

2 A Yes.

3 Q And according to your memory, a nurse brought in a
4 consent form the evening of March 6, 1997 for the
5 circumcision, true?

6 A The form was brought in before the signing was the
7 evening.

8 Q And what --

9 A And I called it a sheet. It was -- it's in the
10 medical records.

11 Q You're talking about the consent form that you
12 signed?

13 A Yes.

14 Q So someone brought that in sometime on March 6,
15 1997 in your memory?

16 A Yes.

17 Q And do you know who brought it in?

18 A No, I don't. The records don't reflect.

19 Q Was it one nurse or several nurses?

20 A I don't know.

21 Q Was a hepatitis B form brought in to you on March
22 6?

23 A I believe so, yes.

24 Q Was it brought in by the same nurse who brought in
25 the consent form for the circumcision?

1 A I don't know.

2 Q Was it brought in at the same time as the consent
3 form for the circumcision?

4 A If I recall -- if I rely on the video, I believe I
5 stated in there that they were brought in -- I don't know.

6 Q You don't remember?

7 A I don't remember signing a hep- -- what did you
8 call it?

9 Q Hepatitis B form?

10 A Yes. Correct.

11 Q So you don't remember who brought that or when,
12 correct?

13 A Correct.

14 Q Or whether it came in with the consent form for
15 the circumcision, correct?

16 A Correct.

17 Q And you don't remember what time those came to you
18 on March 6?

19 A It would have been sometime in the afternoon.

20 Q Okay. And you would agree, Ms. Flatt, that your
21 memory of the date of March 6 is not entirely clear?

22 A Correct. I don't remember everything.

23 Q You don't remember for sure all the times that
24 different people were there, both family and friends, and
25 nursing staff, correct?

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1 A No, I didn't keep a record of every time someone
2 came and went.

3 Q And whatever day it was that Dr. Kantak first saw
4 you, it was in the morning that she saw you, correct?

5 A Yes.

6 Q It was before about 11:00 a.m., true?

7 A Before 11:00 a.m., true.

8 Q Okay. And what happened in the first visit that
9 Dr. Kantak made to you was that she did introduce herself,
10 true?

11 A True.

12 Q And the subject of circumcision did come up?

13 A True.

14 Q Do you recall her talking about the newborn
15 examination of Josiah?

16 A No, I do not recall her talking about a newborn
17 examination of Josiah. Dr. Bro came in the day he was born.
18 And from what he said about, you have a very big, healthy
19 baby boy, and he had a chart and there were some helper with
20 him, I assumed he had just examined Josiah. That was March

21 6.

22 Q When Dr. Kantak came in, do you recall whether or
23 not she said anything about the fact that Josiah was a
24 healthy baby?

25 A I don't recall -- I recall her saying she was

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1 going to go do the circumcision. No.

2 Q Do you recall whether or not she said anything
3 about his condition, that he was normal and healthy?

4 A Before the circumcision?

5 Q Yes.

6 A No, I don't recall anything about that.

7 Q Do you recall her talking about a hepatitis
8 vaccine?

9 A No, I don't recall her talking about that.

10 Q Are you saying she didn't or that you don't recall
11 one way or the other?

12 A I have no recollection. I have the recollection
13 of when she came in and said, as I testified, I am going to
14 be performing the circumcision, because that stood me back.

15 Q Okay. And when the topic of circumcision came up,
16 you did ask her some questions, correct?

17 A Yes.

18 Q You asked her about pain?

19 A Yes, I did.

20 Q And you asked her all the questions that you had
21 at that time, true?

22 A At that time, I asked the questions I had, yes.

23 Q And at that time you felt all the questions that
24 you had then were answered, true?

25 A At that time, yes, I did.

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1 Q You didn't tell Dr. Kantak you wanted to wait and
2 postpone a decision about circumcision, true?

3 A True.

4 Q You didn't tell her that you didn't want her to be
5 the one to do a circumcision on your son, true?

6 A No, I didn't say anything like that to her.

7 Q And when she left the room, it was your
8 understanding that a circumcision would in fact be performed
9 on Josiah?

10 A Yes.

11 Q Now, when that first visit occurred with Dr.
12 Kantak, you were the only one in the room, true?

13 A Yes. Josiah -- I don't even think Josiah was in
14 the room.

15 Q Your best memory is that Josiah was back in the

16 nursery, true?

17 A Correct.

18 Q And your mom had left, correct?

19 A This is March 7. My mom hadn't come yet. Even
20 when you're talking about the first time Kantak came in was
21 shortly before my mom got there on her noon hour, because my
22 mother was there when she came back to report that he had
23 been circumcised.

24 Q Whenever this first visit occurred, you were the
25 only person in the room when Dr. Kantak came, true?

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1 A Yes. Correct. I'm almost positive that Josiah
2 wasn't even in there.

3 Q Jim was not there?

4 A No, Jim had never met Dr. Kantak.

5 Q On March 6, after the delivery, within the next
6 hour or two, the friends who had been there and your mom all
7 left, correct?

8 A The day of the delivery, that is correct.

9 Q And at some point Jim left, too, true?

10 A Yes. And that would have been later morning. His
11 deposition is going to be read in the record. I can't
12 remember if he says 10:00 o'clock.

13 Q But you recall that he did leave on March 6 in the
14 morning?

15 A Correct. He wanted to get papers, cigars. Yes,
16 correct.

17 Q Okay. And then you recall a second visit from Dr.
18 Kantak, true?

19 A On the 7th because -- you're going back and forth.
20 I don't want to get confused.

21 Q This is on March 7?

22 A Yes.

23 Q The second visit? And she came to tell you about
24 the circumcision that had been performed, true?

25 A Correct.

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1 Q She told you that everything went fine --

2 A Yes.

3 Q -- right?

4 A Yep.

5 Q Your mother was with you for that visit, true?

6 A Yeah, my mom and I were standing next to my bed.

7 Q Okay. You and your husband had talked about
8 circumcision before Josiah was born, correct?

9 A Yes.

10 Q And you had probably talked about it a couple of

11 times before you went into the hospital, true?

12 A I agree with that, yes.

13 Q You may have talked about it in the hospital as
14 well, true?

15 A Yeah. Yes, we did.

16 Q And your feeling about it was, it's a man's issue,
17 I don't have that anatomy, and you wanted to know what his
18 feelings were about it, true?

19 A When we talked about -- that was the discussion.
20 I felt it was something that I would lean more to what he
21 thought.

22 Q And his view was that he was circumcised, so he
23 would want his son circumcised, true?

24 A Correct.

25 Q And you supported him in that decision?

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1 A Correct.

2 Q And you agreed with him?

3 A Correct.

4 Q You told the jury earlier that you only knew of
5 circumcised penises, true?

6 A Correct.

7 Q And it had been the tradition in your family that

8 people were circumcised?

9 A At the time of my deposition, that's what I
10 understood. I did not -- I -- I'm not -- see my family
11 members. And since then it has come to being that -- I know
12 I testified in my deposition that I believed everybody was
13 circumcised. I believed that. It's not true.

14 Q Okay. Your understanding then at the time of your
15 deposition was that your brothers were all circumcised?

16 A That was my understanding.

17 Q And it was your understanding that one had been
18 circumcised at a later age than the newborn age, correct?

19 A Yes, that's what I was -- that's what I thought I
20 understood.

21 THE COURT: This is the time we need to recess.
22 You may step down.

23 Ladies and gentlemen of the jury, I am going to
24 remind you again of your admonition. Don't discuss the case
25 or let anybody talk with you about it. We're going to

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1 recess until 1:30 p.m. Court is in recess. Jurors are
2 excused.

3 (Recessed at 11:59 a.m. until 1:29 p.m., the same
4 day, at which time the following proceedings were continued
5 in open court, in the presence of the jury:)

6 THE COURT: Let the record show that all parties,
7 counsel and jurors are present.

8 Ms. Voglewede, you may continue.

9 MS. VOGLEWEDE: Thank you, Your Honor.

10 Q (Ms. Voglewede continuing) Ms. Flatt, before we
11 broke for lunch, we were talking a little bit about your
12 family history of whether circumcisions were done. Do you
13 recall that?

14 A Yes.

15 Q And at the time of your deposition, it was your
16 understanding that all of your brothers were circumcised,
17 correct?

18 A That was my understanding.

19 Q And, Ms. Flatt, you don't need to give your
20 brothers' names, I'm not interested in who was who, but it
21 was your understanding at that time that one brother was
22 unable to be circumcised at birth because he was ill; is
23 that correct?

24 A That was my understanding.

25 Q And that he asked to be circumcised at a later

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1 age, you think, around seven, because he was being teased;
2 is that correct?

3 A I believe, on the age, I didn't know when I said
4 -- I don't know what he said. At one point it could have
5 been seven, he could be 10.

6 Q At some time while he was a child?

7 A Yes. At that time, yes.

8 Q Okay. You've since learned that's not the case or
9 that your understanding about your family's history was not
10 accurate?

11 A I have not seen -- I did not know -- I assumed
12 this information came out after this litigation started
13 after '98. I was testifying to what you guys wanted to know
14 what I thought.

15 Q That was what you understood at the time?

16 A At the time.

17 Q Okay. Now, there's just a couple of things I
18 would like to clarify, Ms. Flatt, about the events leading
19 up to Josiah's birth and his circumcision. You have told
20 the jury that when Dr. Lesteberg arrived at the hospital,
21 you were mad and you voiced it, correct?

22 A When he returned after Josiah was born and walked
23 in the room, I was delivering my placenta. Yes, I was upset
24 he wasn't there.

25 Q And you told him so, correct?

1 A I told him -- he could tell. I just went on with
2 the fact -- I was going on about, Where were you, we lost
3 his heart rate, why weren't you here, why did you go to -- I
4 was just going on like that. Certainly, because of my tone,
5 he should have known.

6 Q And you consider yourself to be a very direct
7 person, correct?

8 A I have been told that a lot, yes. I am direct.

9 Q And I believe you told the jury that when Dr. Bro
10 came that morning, you also told him that you were upset,
11 correct?

12 A Yes, I did. I told Dr. Bro what had happened. I
13 wished he would -- I wished it would have happened at a time
14 when Dr. Bro could have done it.

15 Q Now, the jury's heard some testimony about the
16 fact that you were unaware, you say, that Dr. Kantak would
17 be the pediatrician caring for your son in the nursery,
18 true?

19 A Correct.

20 Q And isn't it true that you -- that was not the
21 only assignment of doctors that you were not happy about?
22 You were unhappy that Dr. Bro, who was your obstetrician,
23 told you that if you delivered when he was not on call, that
24 the obstetrician on call would be the one to deliver your
25 baby, true?

1 A During the prenatals I did, Dr. Bro voiced that to
2 me. And I felt that I went through all this energy picking
3 Dr. Bro. But I also understood and it was just -- you just
4 hope you go into labor when your doctor's on duty. And I
5 didn't. But I voiced -- I disagreed with that, I
6 believed -- I chose him as my doctor, I wanted him as my
7 doctor. I also understand doctors need sleep, they have
8 their own schedules, and I understood what the policy was.

9 Q But you were unhappy about that, and you told Dr.
10 Bro so, correct?

11 A I told him, yes -- yes, I disagreed, I wanted him
12 as my doctor.

13 Q Now, Ms. Flatt, you do not have any claims in this
14 case concerning what happened with your labor and delivery;
15 isn't that true?

16 A Jim and I -- Jim and I do not have any claims.
17 That was the way this case was brought forward. The only
18 claim is Josiah.

19 Q And you do not have any claims in this case about
20 what happened during the labor and delivery; is that true?

21 A That is true of -- I -- yes, that's true. I won't
22 expand.

23 Q Thank you. Now, Dr. Kantak did not say to you
24 when she saw you before the circumcision, "I recommend that
25 you circumcise your son," did she?

1 A I don't recall her saying anything like that.

2 Q And she didn't push you to have it done, did she?

3 A I don't recall her pushing me, no.

4 Q And you've described that at some point a nurse
5 brought in a consent form for the circumcision, correct?

6 A Yes, as well as that one shot. Yes.

7 Q And both of those came to you at the same time?

8 A I don't know that, but I know that's my
9 recollection of there was two forms. And I don't know if
10 Jim signed -- well, the medical records would show.

11 Q You don't recall when you received them, true?

12 A That it would have been the day he was born. I
13 believe it was in the afternoon. That's the best I can do.

14 Q And you don't know who brought them?

15 A It would have been a nurse and I do -- I not
16 know -- the only nurse I really remember is Kristi Burgard.
17 And we always had a picture of her for Joe because she
18 delivered him. And then I remember the name Ruth Larson,
19 but there was, like, 15, probably 20 -- was there? -- during
20 my stay. I don't remember. No.

21 Q Ms. Flatt, was the first that you learned about
22 circumcision or the first that the topic came up when a form
23 was brought into your room by a nurse; is that your

24 testimony?

25 A When -- when MeritCare brought it to our

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1 attention?

2 Q Was the first that you learned about circumcision
3 in the hospital when a nurse came in to bring a form?

4 A Yes, it would have been -- well, I don't know if
5 it was when she got a form. We asked at some point, When do
6 I get to leave, what do we have to do, what goes on, and it
7 was -- circumcision would be Friday morning, you wouldn't
8 get to leave till Saturday.

9 Q So did you raise the topic of circumcision with
10 the nurse?

11 A I -- I would have raised the topic on what was
12 done when.

13 Q Meaning for the circumcision, what was done when?

14 A That's -- possibly, I would have -- I know I
15 wanted to know and initiated conversation about discharge
16 and what needed to be done. And I believe all those issues
17 came up. He has shots, when his circumcision would take
18 place, and that I wouldn't be able to leave till Saturday.
19 And neither would Joe -- Josiah.

20 Q So it may have been you that initiated the first
21 discussion of circumcision in the hospital?

22 A To the nurse, it could have been, yeah.

23 Q And the form that was brought in you believe at
24 some time on the afternoon of March 6, 1997, was the consent
25 form that you ultimately signed?

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1 A Yes. And it helped with the video, because I say
2 "consent sheet was dropped off." And I'm not going to be
3 able to recall the time now that that's on the video. I
4 don't recall.

5 THE CLERK: Defendant's Exhibit No. 134 has been
6 marked.

7 MS. VOGLEWEDE: May I approach, Your Honor?

8 THE COURT: Yes.

9 Q (Ms. Voglewede continuing) Ms. Flatt let me show
10 you Exhibit 6, Josiah Flatt's records, looking at page 10.
11 Is that the consent form that was brought to you on March 6?

12 A Yep.

13 Q And does this appear to be an accurate enlargement
14 of that form?

15 A Yeah, it does.

16 Q As does this Exhibit 134?

17 A That's what it's marked, yes.

18 MS. VOGLEWEDE: Your Honor, we would offer Exhibit

19 134 for illustrative purposes.

20 MR. BAER: So long as it's just for illustrative
21 purposes, no objection, Your Honor.

22 THE COURT: Defendant's Exhibit 134 is received
23 for illustrative purposes only.

24 Q (Ms. Voglewede continuing) Now, Ms. Flatt, before
25 you signed this form, you read it, correct?

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1 A Correct.

2 Q And you read the whole thing?

3 A Yes, but -- and I believe I -- I stated this in my
4 deposition as well. I do not know that it was filled in
5 because Baby Boy Flatt, it doesn't have his name. And the
6 only writing on the form is when it's the first date line
7 that says March 6, '97, 7:20 p.m., that's my writing. And
8 then when you see the X, the nurse had it -- to give an X
9 because I started to sign at the wrong spot, that's my
10 writing. The rest is not my writing.

11 Q Okay. Just so we're clear, you're saying the date
12 about halfway down the page is your writing?

13 A That is me putting the date of my signature.

14 Q And the time is your writing?

15 A That's me, yes.

16 Q And that X was made by the nurse, you say?

17 A Yes, because I started to sign in the wrong spot.

18 Q Where it says "signature of patient"?

19 A Yes. And she put an X and said, "Sign here."

20 Q Then after the X, that's your signature?

21 A That is my signature.

22 Q Are you saying that the top may not have been
23 filled out?

24 A I do not recall. I just do not recall when -- my
25 understanding is two different nurses are writing on here.

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1 Q Is it your testimony, Ms. Flatt, that you may have
2 signed a consent form that had nothing filled in on top as
3 to what procedure you were consenting to?

4 A My testimony is I do not know what all was filled
5 in when I signed it. I do not know. I did know and
6 understand this was a consent to circumcise Josiah.

7 Q Okay. So you did know that --

8 A Yes.

9 Q -- when the consent form came to you?

10 A Yes.

11 Q And you read the entire form, true?

12 A Yep. Yes.

13 Q And you understood it, correct?

14 A Yes.

15 Q And you were mentally clear at the time, true?

16 A I believe I was.

17 Q So you signed it, and you did so voluntarily,

18 correct?

19 A Correct.

20 Q And you recall signing it?

21 A Correct.

22 Q And you don't dispute that that's your signature,

23 true?

24 A True.

25 Q There was no one else in the room when you signed

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1 it except the nurse, true?

2 A True.

3 Q And you and Jim were aware that Josiah was going

4 to be circumcised the next day, true?

5 A Yes, we were.

6 Q In fact, you said to Jim, "They're going to

7 circumcise Joe tomorrow"?

8 A Yes, he did.

9 Q And you signed the form in order to get Josiah

10 circumcised, true?

11 A Yes. They bought me a form -- the sheet, yeah.

12 Q You and your husband had agreed before you signed
13 that your son would be circumcised, true?

14 A Yes, our personal belief was we were going to
15 circumcise him.

16 Q You say you aren't sure how much of the top was
17 filled in, but that you knew it was for his circumcision,
18 correct?

19 A Yes.

20 Q And it says, "I authorize Dr. Kantak and those
21 designated as assistants to perform upon my son the
22 following surgical operations or procedures: Circumcision,"
23 true?

24 A That's what it says. True.

25 Q And then it says, "If any unforeseen conditions

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1 arise during the surgery which call for procedures in
2 addition to or different from those now planned, I request
3 and authorize this doctor to do whatever is judged necessary
4 or advisable," true?

5 A That -- that's paragraph No. 2, true.

6 Q No. 3 says, "My doctor, dentist, or podiatrist has
7 explained the nature and purpose of the surgery or
8 procedures, other methods of treatment, risks involved and

9 the possibility of complications; I understand these risks
10 and options available to me. I understand there's no
11 guarantee or assurance as to the results that may be
12 obtained." That's what the form says?

13 A That's what the form says.

14 Q Then it says, "I consent to receive the anesthesia
15 considered necessary by the surgeon or doctor," true?

16 A That's what the form says, true.

17 Q "I consent to any pictures taken during surgery in
18 the interest of medical knowledge," correct?

19 A That's what it says, true.

20 Q "I consent to the admittance of observers, as
21 deemed qualified by MeritCare Hospital for the purpose of
22 education," correct?

23 A That's what it says, correct.

24 Q "I consent to the disposal of body tissue parts
25 which are necessary to remove," correct?

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1 A That's what it says, yes. Correct.

2 Q And "I consent to receive blood transfusions or
3 other transfusions advised by my surgeon or doctor,"
4 correct?

5 A That's what it says, correct.

6 Q And you read all of that before you signed it,

7 true?

8 A True.

9 Q Now, when Ruth Larson came to witness your
10 signature, you had some questions about the procedure for
11 her, correct?

12 A Correct.

13 Q And she answered some of them?

14 A Yep. Yes.

15 Q And she said that if you had additional questions,
16 you should talk to the doctor?

17 A In the morning. Yes.

18 Q And even though you say you had questions, you did
19 sign the consent form that night, true?

20 A Yes, I did.

21 Q You felt that you were going to go ahead and have
22 the procedure done?

23 A Yes.

24 Q And after signing the form and before the
25 circumcision was done on March 7, 1997, you did not tell

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1 anyone at MeritCare that you didn't want the circumcision to
2 be done, true?

3 A No, I didn't. True.

4 Q The jury has heard some testimony about the
5 teaching that's done by the nurses and about various
6 booklets. You do recall getting some teaching from the
7 nurses on various aspects of being a new mom, true?

8 A Absolutely, yes. The nurses, yes.

9 Q You recall getting some information on
10 breast-feeding, for example?

11 A Almost every nurse, because they brought Josiah,
12 if he wasn't in the room, but they -- they must have been on
13 a time. Every two hours we had to start. And whatever
14 nurse was on duty, they each gave me information on a
15 technique, what they thought would help, until we could get
16 it so he was eating.

17 Q But as to any documents or booklets that MeritCare
18 gives to new moms, you say that you did not receive any of
19 those, correct?

20 A No one gave me a booklet.

21 Q I assume, Ms. Flatt, that you have checked
22 thoroughly through all of the things that you have at home
23 that you saved from Josiah's hospitalization?

24 A Yes, I have.

25 Q And in the materials that you have checked at

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1 home, you say that you do not have a booklet called "Should

2 Your Infant Boy Be Circumcised?" true?

3 A True. I don't.

4 Q You also do not have a booklet called "Infant
5 Care," true?

6 A True. I'm not -- you're saying titles, and I know
7 these were disclosed a month ago. If you're going to go
8 through those, all of those, no, looked, don't have them,
9 didn't get them.

10 Q Let's go through those. You did not find any
11 booklet in what you have at home called "Infant Care," true?

12 A True.

13 Q You did not find any booklet called "Postpartum:
14 After Delivery," true?

15 A True.

16 Q You did not find a booklet called "Breastfeeding
17 Your Baby," true?

18 A True.

19 Q And you did not find a booklet called "Feeding
20 Your Baby," true?

21 A True.

22 Q And you did not find the original sheet of a
23 record called the Family Birth Center Patient Teaching and
24 Discharge Record, true?

25 A True. Is that the one where they --

1 Q Directing your attention in Exhibit 6 to pages 7
2 and 7-A, which is actually the back side of the same sheet,
3 you've checked what you have at home and you don't have
4 that?

5 A No, I don't have a copy of this.

6 Q You don't have the original either, do you?

7 A I don't think I -- no.

8 Q And in what you reviewed at home, you also do not
9 have a hepatitis B vaccination information sheet, do you?

10 A Is it in the medical records somewhere? I don't
11 believe it's anywhere. I have never seen one, no.

12 Q So you don't have one of those either?

13 A Nope.

14 Q And it is your testimony that the nurses and
15 doctors at the Family Birth Center failed to give you each
16 and every one of those documents; is that correct?

17 A That is -- that they did not give them to me?
18 That is correct.

19 Q Now, Josiah was your first baby, true?

20 A Yes. True.

21 Q And you were nervous and you were scared about
22 being a new mom, correct?

23 A I suppose so. That's a fair statement.

24 Q And after Josiah was circumcised, one of the
25 nurses told you ahead of time that when he pees, you'll know

1 it, meaning it's going to be uncomfortable for him, right?

2 A Yes.

3 Q So that's something they did teach you about in
4 the hospital?

5 A And I'm not saying -- I could go through each day,
6 it was different, the nurses came in, bathing, cord care. I
7 remember them teaching Jim how to wrap the baby tight. The
8 circumcision, how we had to use the jelly and gauze pads,
9 because they gave us that stuff to use. And, yes, the
10 nurses did that. They did.

11 Q And you knew ahead of time before the circumcision
12 was done that it would involve cutting of tissue, correct?

13 A I thought of it as a snip in the penis, yes.

14 Q You knew it would involve cutting the tissue,
15 true?

16 A I knew that it would be cutting at -- yes.

17 Q Now, sometime after you took Josiah home, you
18 noticed what you've described as a bulge or a lump on the
19 side of the penis?

20 A What it -- the best way that I can describe it is
21 what I saw. We noticed it, thought it was swelling. It
22 wasn't until Dr. Mastel pointed out what it was, and it
23 was -- it's extra skin on one side. Then it grew up. What
24 happened is, that's -- that was the adhesion, and one

25 side -- they took up more one side. The bulge was tissue.

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1 Q But that's the thing that you noticed about the
2 circumcision some time after you took Josiah home? That was
3 upsetting to you, true?

4 A As well as the first time he wet himself. I have
5 never seen a newborn circumcision. My concept was not that
6 it would look like it looked. So the blood, yes, I didn't
7 realize that there was blood. I mean I guess I realized,
8 yes, they're cutting, but I just didn't think it would come
9 back and look like that.

10 Q Okay.

11 A So that's the first time that Jim and I -- and
12 then we -- we would talk about it. And we were waiting for
13 the swelling to go down. Well, it wasn't swelling, but what
14 we believed was swelling.

15 Q But it was this extra skin on the side that was of
16 some concern to you after the circumcision healed, true?

17 A Yes. And the way it looked, until they had to
18 retear it, is it -- it looked like they circumcised one side
19 and not the other, so it was to us the bulge of skin and
20 then there was no ridge on one side.

21 Q That was something that you wanted corrected, you
22 wanted to see if something should be done, true?

23 A I wanted to know what happened.
24 Q You wanted to correct it, true?
25 A I wanted him -- him treated, yes, for whatever was

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1 wrong with him.

2 Q And you also wondered if it would affect his
3 functioning, true?

4 A True.

5 Q For example, you wondered if it would affect the
6 way that he urinated, true?

7 A Yep, if it would be painful, if it would affect
8 any of that, yes.

9 MR. BAER: Your Honor, can I just request that
10 this exhibit be moved? It's distracting to me.

11 THE COURT: Yes.

12 Q (Ms. Voglewede continuing) When you made your
13 contacts, Ms. Flatt, to MeritCare about concerns that you
14 had about your son's circumcision, it was about that extra
15 skin on the side; isn't that true?

16 A And I want to respect the Court's order, but I
17 don't want to be dishonest. There was times that a
18 telephone call would have involved more than one issue, but
19 yes, yes. Yes to your question, but I just want that it

20 wasn't just -- there was telephone calls that I had to get
21 transferred to two different areas.

22 MS. VOGLEWEDE: May we approach the bench, Your
23 Honor?

24 THE COURT: Yes.

25 (Discussion at the bench, out of the hearing of

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1 the jury and the court reporter.)

2 Q (Ms. Voglewede continuing) Ms. Flatt, just so --
3 just so the jury is aware of what we were talking about
4 here, you did have another concern about the care not
5 related to the circumcision, correct?

6 THE COURT: You may answer.

7 A Yes.

8 Q (Ms. Voglewede continuing) And that related to
9 being charged for Dr. Lesteberg's services when he was
10 unable to be at the hospital as quickly as you delivered,
11 correct?

12 A Well, I -- as quickly as I delivered, the way
13 you're saying it, I would say, what happened is I got -- I
14 got my first bill in April of '97.

15 Q Ms. Flatt, let's -- in order to comply with the
16 Court's direction here, I want to try to stick with the
17 question and answer here. You had a concern related to Dr.

18 Lesteberg and him not being present at the delivery,
19 correct?

20 A Absolutely. Yes.

21 Q And you took that up with MeritCare in addition to
22 concerns about Josiah's circumcision, correct?

23 A Yes, because there was a line item bill for his
24 delivery only, and they did correct it.

25 Q Then when Dr. Montgomery checked into that for

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1 you, he wrote off that charge or MeritCare wrote off that
2 charged and removed it, true?

3 A Yes. I believe it was 1,400 --

4 THE COURT: I'm sorry, but that's what is not
5 going to be part of the record. There are no figures about
6 charges. That's a prior ruling of the Court. That is not
7 an issue in this case.

8 Jurors, you are not to concern yourself with that.
9 That is stricken from the record. You're not to consider
10 that at all.

11 Okay. Just answer the specific question, please.

12 Ms. Voglewede.

13 Q (Ms. Voglewede continuing) The concern that you
14 raised about that issue to Dr. Montgomery was addressed and

15 resolved, true?

16 A Yes. They finalized it in December of '97.

17 Q The concern that you expressed to MeritCare about
18 Josiah had to do with this extra skin from the circumcision,
19 true?

20 A Yes. And more.

21 Q And what was "the more?"

22 A Well, I -- I don't want to -- there's adhesions
23 and there's -- if we're just talking about his
24 circumcision --

25 Q You didn't --

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1 A -- there's two issues; what they define as
2 asymmetrical, and that bulge that was -- there was adhesions
3 under it.

4 Q You didn't know anything about adhesions then, did
5 you, when you first went to MeritCare?

6 A No. Dr. Sawchuk and the second opinion would have
7 informed me of that.

8 Q Okay. The reason you went to MeritCare is you
9 thought he had some extra skin on one side, true?

10 A He did. Yes. He did.

11 Q But that was the concern that took you to
12 MeritCare, true?

13 A Yes. That -- yes. Correct.

14 Q And you met with two men, you said, in
15 administration?

16 A After my phone calls, there was an appointment
17 made with Dr. Montgomery. And there was another tall
18 gentleman that was involved. I don't know if that was
19 Gilbertson. That's what's coming to my head. And I --
20 introduced both of them, but I actually just met in Dr.
21 Montgomery's office with Josiah and talked privately for
22 most of that.

23 Q Okay. And Dr. Montgomery was very nice to you,
24 correct?

25 A Absolutely, yes, he was.

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1 Q And he arranged at some point for you to see Dr.
2 Sawchuk, true?

3 A Yes, he did. At my request, he did.

4 Q And part of that arrangement was for Dr. Sawchuk
5 to have the opportunity to examine Josiah, true?

6 A As Dr. Montgomery said, the specialist you would
7 have to go to is called a urologist for functioning, so,
8 yes. That's who he recommended.

9 Q And you were aware that a urologist specializes in

10 the genital urinary system?

11 A To check his urethra, I knew that.

12 Q And one of the big concerns that you had for Dr.
13 Sawchuk was whether this would affect Josiah's functioning,
14 true?

15 A That was one of the concerns Jim and I had.

16 Q And you were concerned whether it would affect his
17 urination, true?

18 A That's true.

19 Q And whether it would affect his fertility, true?

20 A Yeah, that's -- that -- yes.

21 Q You wondered if it would affect whether he could
22 have children --

23 A Yes.

24 Q -- true?

25 A And his sexual functioning.

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1 Q And Dr. Sawchuk was reassuring to you on those
2 issues of function, correct?

3 A After the exam, he reassured me, from his
4 expertise, that functioning should not be a problem, even as
5 he ages.

6 Q So he said his functioning is fine now, true?

7 A Yes. We knew he was urinating. I didn't know

8 what it meant in the future.

9 Q And he said he didn't expect any problems in the
10 future with that, true?

11 A That's true.

12 Q Then the other concern you had was about the
13 appearance of the penis, true?

14 A Yep. Jim and I had discussed and we were
15 concerned. I don't know how we -- Jim always said, It's
16 half and half.

17 Q And Dr. Sawchuk spent a lot of time talking with
18 you about that, correct?

19 A Yes. After he examined Josiah, he said it needed
20 to be ripped down.

21 Q It needed to be?

22 A Torn, torn down, that what it -- what that process
23 was doing is, there was adhesions and tissue was growing
24 back together.

25 Q You said this morning that he drew some diagrams

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1 for you?

2 A Yeah, he had -- where Josiah laid when he did the
3 little procedure in the office, he had taken out paper, he
4 was -- he drew -- because the issue was what procedures are

5 available to Josiah when he is a man because of this issue.
6 And he was explaining to me, when they do cuts, after
7 adolescence, the cut -- and I don't -- I'm not going to
8 remember the medical terms of that area of the penis. It is
9 a different permanent scar on the penis than a newborn has.
10 You can definitely tell if it's been done at newborn or
11 adult. And so he was trying to -- it's smoother -- he says
12 the scarring is different.

13 Q And was it your understanding from that that if
14 something was done at a later age, it would leave more
15 scarring than it does at the newborn stage?

16 A No. My understanding is, he explained both
17 scenarios, newborn versus adult. That generally it -- the
18 part -- the underneath -- they removed the foreskin over --
19 what you call that, underneath that, is more smoother they
20 do it at adult.

21 But he said, with Josiah, you have already got a
22 cut; if you go and cut again, there's going to be issues
23 potentially of more scar tissue, so you would be even worse
24 off. But he just suggested nothing be done till after
25 puberty, because you don't know the size, you don't know

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1 what you're dealing with.

2 Q Did you happen to save those diagrams that he

3 drew?

4 A He didn't give them to me. He drew them. I would
5 assume they're part of those medical records.

6 Q And his recommendation to you was to wait and see,
7 correct?

8 A Yeah, until after puberty and see -- my
9 discussions with him is what I felt, as a parent, wait and
10 see if Josiah brings it up to me.

11 Q Did he tell you that it should become less
12 noticeable as Josiah grew?

13 A He felt with increasing size and development, that
14 hopefully that extra part would just kind of stretch out and
15 it would be less noticeable.

16 Q Dr. Sawchuk didn't tell you that the circumcision
17 had been done wrong, did he?

18 A He never, never said those words, no.

19 Q And with regard to the adhesions, he gave you the
20 option of having them taken down in the office, correct?

21 A Yes, he did.

22 Q And you selected that option, you said you wanted
23 to have him do it that day in the office, true?

24 A Where I could be present, I did.

25 Q And your son cried when he did that, but then he

1 quieted down, true?

2 A Yep. When I comforted him, he did, he quit
3 crying.

4 Q And after you had seen Dr. Sawchuk, you were
5 reassured about the function issues that you -- function
6 questions that you had, correct?

7 A Yes. He felt that there would be no functioning
8 problems on either the urethra, sexual, all level.

9 Q And with regard to the appearance, you were simply
10 going to wait and see, true?

11 A True.

12 Q Now, Ms. Flatt, you have a been a lawyer since
13 1996, correct?

14 A Yes. I was admitted to practice for the State of
15 North Dakota in September of 1996.

16 Q And at the time you had Josiah, you were in
17 private practice of law, true?

18 A I was -- I assisted Bredahl Hill. It was like --
19 it wasn't -- it was an independent contractor, I got an
20 hourly wage, didn't have benefits. I guess you would -- it
21 would be doing -- I was able and qualified to do private
22 practice. A lot of my work was research appellate briefs.
23 That's how they accommodated me working nights after Josiah
24 was born.

25 Q So you were not in the private practice of law

1 then?

2 A That's practicing law, but different people have
3 different meanings, that if you're in private practice, I
4 have my own little shingle out on the roof and I'm coming to
5 court.

6 Q You were in practice -- in private practice with
7 the Bredahl Hill firm, true?

8 A Yes, I -- yes.

9 Q And among the kinds of work you were doing were
10 employment law, federal law cases, partnership dissolution
11 and family law, true?

12 A That was, yeah. True.

13 Q And you stayed with that firm until early 1998,
14 correct?

15 A And thereafter, correct.

16 Q And before you went to law school, I think you
17 told the jury that you had an undergraduate degree in
18 sociology, true?

19 A Yep. Four-year degree in sociology, with an
20 emphasize in criminal justice.

21 Q And you also had some graduate degree credits,
22 true?

23 A I chose to work the North Dakota 1993
24 legislative -- they call it an internship, but I got
25 political science graduate credit for doing that. So you --

1 you're an intern and you work out in Bismarck for the
2 session of the legislature.

3 Q And do you remember when you joined Mr. Baer's law
4 firm?

5 A It would have been February 2, 1998.

6 Q That was not quite a year after Josiah was born?

7 A That's correct.

8 Q And three days after you started working for him,
9 you called MeritCare to get a copy of the consent form that
10 you signed for the circumcision, correct?

11 A I don't -- I requested the records way before
12 that, but they didn't give me them all.

13 Q Turning your attention to Exhibit 6, page 33, do
14 you see a release of information phone request, indicating a
15 phone call from Anita?

16 A Yes, that -- and I believe, after consulting Zenas
17 and reviewing what they did send, it wasn't there, so he
18 said, We need that form.

19 Q And the request was for the consent for
20 circumcision, true?

21 A Yeah. They have a question mark, yes, mail.

22 Q They were to mail it to you, true?

23 A Yes. Well, that's what this says, and that looks

24 like the MeritCare -- that they would have done the --
25 pursuant to me calling them.

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1 MS. VOGLEWEDE: That's all I have. Thank you.

2 THE WITNESS: You're welcome.

3 THE COURT: Redirect, Mr. Baer.

4 MR. BAER: Yes, briefly, Your Honor.

5 REDIRECT EXAMINATION

6 BY MR. BAER:

7 Q Ms. Voglewede was asking you about teaching
8 materials that were allegedly given -- allegedly given to
9 you. I want to make sure that we're clear on the exhibit
10 we're talking about is Exhibit 6, page 7. And on Exhibit 6,
11 page 7, it's the document that is the teaching and discharge
12 record. Do you see that?

13 A Yes, I do.

14 Q And I want to put this up on the ELMO. I will try
15 to zoom this in, Ms. Flatt, so the jury can see this.

16 A You're referring to where it says,
17 "Booklets/Teaching Sheet Explained"?

18 Q Yes. Up on top here, the "Booklets/Teaching Sheet
19 Explained." Were you given the "Postpartum: After Delivery"
20 booklet, to your knowledge?

21 A No. I would've put it in his baby book, and I
22 don't have it.

23 Q How about "Breastfeeding Your Baby"?

24 A Same answer.

25 Q How about "Feeding Your Baby"?

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1 A Same answer.

2 Q Is there anything on here that talks about should
3 your infant child be circumcised?

4 A No. But am I understanding correctly that --
5 what's that -- you can't see -- is that a print -- imprint
6 from a carbon copy that's kind of over --

7 Q Yes.

8 A Okay.

9 Q Now, on the left-hand side of this document, where
10 it has on the top, patient initials, do your initials show
11 up anyplace in this teaching sheet?

12 A No, they don't. And I know Ms. Voglewede said in
13 her opening, those are my X's. Those aren't my X's. The
14 nurse did that. And I'm not disputing they told me about
15 blood clotting when I left, and when I have to call the
16 doctor if -- if they get over golf size. They told me about
17 the baby blues, the postpartum. The nurses did this.

18 The things she has checked -- and I agree, on the

19 sixth, they did that, because I started breast-feeding on
20 the sixth. On the eighth, I talked about when I need to
21 call the doctor if I'm having problems. I don't know who
22 this nurse is and --

23 Q How about on the sixth? Down here there are a
24 number of things that were presumably done on the sixth.

25 A Yeah. They show you how they fold the diaper

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1 back, how you put the diaper -- Joe was fairly big, so we
2 didn't -- you just have to get it around the belly button.

3 Q How about the -- goes all the way down to cord
4 care. Do you remember getting taught about cord care?

5 A Yep, because they had -- the Q-tips worked better
6 than the swabs they gave you. Jim and I were both -- they
7 showed both of us, yes.

8 Q And the circumcision care isn't checked or it
9 isn't identified over here as having been done until 3-7-97.
10 Do you remember --

11 A Well, that's because --

12 Q -- the nurse giving you circumcision care
13 instructions?

14 A Yes, because that's when she would have said,
15 You'll know when he first urinates.

16 Q Under the last one, they have "Car Seat: Own/
17 MeritCare/Video." Was it MeritCare's car seat?

18 A Yes. I think it's somehow included in your
19 billing. And they make sure you have them when you leave.
20 But I don't know why they don't have video circled because
21 we had to watch it before we left with that car seat.

22 Q That was all done on 3-8?

23 A Yeah, because we were ready to go. Then, like,
24 Wait, you have to watch the video.

25 Q Do you recall at any time during your stay at

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1 MeritCare having a nurse bring this form to you and having
2 you check off on the left-hand side what you want taught?

3 A No, no. I remember signing this form and agreeing
4 to all that.

5 Q That you had been taught that?

6 A Yeah. But this was before we were leaving on the
7 8th.

8 Q Right. Your signature appears on the bottom,
9 3-8-97?

10 A That's Anita Flatt. That's my signature.

11 Q Okay. So on the 8th of March, the nurse would
12 have brought this form to you and asked you to sign it for
13 purposes of identifying what you had been taught?

14 A You're saying that's what the nurse -- yes, I
15 signed that and agreed with that.

16 Q During the cross-examination, Ms. Voglewede was
17 inquiring about information you received from nursing staff
18 at MeritCare. When -- you used the term information. Did
19 you receive any paper documents that involved circumcision
20 care?

21 A When I handed Josiah's baby book over for this
22 litigation, everything they would have gave us at the
23 hospital, they would have handed to, me, and I believe it
24 was Jim that put the footprint ones in because he had to
25 come and get the baby book, and we also put some in the

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1 baby -- baby book -- would be in there. So other than that
2 information, they did not hand me physical paper. I'm not
3 saying they didn't. I agree that they instructed me on
4 diapering and stuff.

5 Q Ms. Voglewede spent some time on the informed
6 consent form and was asking you whether or not the informed
7 consent form contained certain specific language. And what
8 I -- would you remind the members of the jury whether or not
9 this form, to your recollection, was filled out when you
10 signed it.

11 A I don't recall what part of it was formed out. I
12 do know they left a form. It must have been forgotten about
13 because the nurse came in and said that we needed to get
14 that consent signed. And I remember reading --

15 Q And where it says, under paragraph No. 3, "My
16 doctor, dentist, or podiatrist has explained the nature and
17 purpose of the surgery or procedures, other methods of
18 treatment, risks involved and the possibility of
19 complications; I understand these risks and options
20 available to me. I understand there's no guarantee or
21 assurance as to the results that may be obtained," was that
22 true when you signed that document, that your doctor had in
23 fact talked about those things?

24 A No. But the nurse assured me that I could talk to
25 the doctor in the morning. I looked at it as a formality.

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1 I didn't look at it as anything strange. I knew a doctor
2 was going to be available to me in the morning to speak
3 about. I mean, it says in there unnecessary surgery.
4 Circumcision isn't necessary.

5 Q And at this time when you signed the document of
6 7 -- at 7:20 on March 6, 1997, you had limited knowledge
7 about what circumcision was?

8 A I knew that they cut around -- my personal

9 knowledge of what I believed?

10 Q Yes.

11 A That's what I knew. I knew they cut around the
12 penis.

13 Q Ms. Voglewede also asked you about your contact
14 with Dr. Kantak on that day. And did Dr. Kantak describe to
15 you risk of urethritis?

16 A When you say "that day," you're talking about when
17 she first -- when I first met her on the 7th --

18 Q Yes.

19 A -- the Friday? No, she did not.

20 Q Did she talk to you about urethritis any time
21 during the stay at the hospital?

22 A Absolutely not.

23 Q Did she talk to you about urethral stricture?

24 A No.

25 Q Did she talk to you and describe to you that it

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1 was a cosmetic procedure?

2 A No.

3 Q Did she describe to you that some cultures do it
4 for religious reasons?

5 A No, but I think I knew that.

6 Q Did she describe to you that some people reported
7 loss of sensation and a loss of sexual pleasure?

8 A No.

9 Q Did she describe to you that some doctors say that
10 the benefits -- the more clean -- or cleanliness?

11 A No, she didn't.

12 Q Did she describe to you that some doctors contend
13 there is less risk of urinary tract infections?

14 A No, she did not.

15 Q Did she describe to you that it was a very minor
16 procedure?

17 A No, she did not.

18 Q When you talked to her about the anesthesia that
19 would be used, what type of -- or what response did you get
20 from her?

21 A The only -- the only question I presented when she
22 said she was going to do the circumcision was, all I could
23 think is they're cutting down there, there's got to be pain.
24 I wanted to know -- that was my concept in my knowledge at
25 the time. I wanted to know what she did for pain.

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1 And she used her hands, and she was hard to
2 understand, and I leaned forward to understand her. She
3 seemed in a hurry. She just stood by my door, and she used

4 her hands and her head and explained that they use something
5 to alleviate that pain. And I shook my head in that, oh,
6 okay. And I couldn't think of any other questions for her
7 at that time.

8 Q Ms. Voglewede asked you about the circumcision
9 tradition in your family. And I would like you to explain
10 to the jury what you have learned about whether or not your
11 family members are circumcised, without identifying your
12 brothers or anybody.

13 A Three nights ago, I learned that some aren't. And
14 I don't -- and, I guess, when I think about it and I was
15 quizzed on it on deposition, I didn't -- I don't see my
16 brothers, I don't see my dad, I don't see my uncles, I don't
17 see that. And that was -- I just thought everybody was.

18 MR. BAER: Thank you. Nothing further.

19 THE COURT: Recross, Ms. Voglewede.

20 MS. VOGLEWEDE: Just one moment, Your Honor.

21 Nothing further.

22 THE COURT: You may step down.

23 MR. BAER: Your Honor, we would call James Flatt
24 by deposition. I would ask permission to allow my parallel,
25 Tim Heier, to read the deposition.

1 THE COURT: Is it dated November 15, 2000?

2 MR. BAER: Yes, it is, Your Honor.

3 THE COURT: Okay.

4 MR. BAER: I'm not sure how to do this. Are you
5 going to do the swearing in or just identify --

6 THE COURT: What I think -- what I think you can
7 do is that you can --

8 MR. BAER: Excuse me, Your Honor.

9 THE COURT: Yes. Go ahead.

10 MR. BAER: We're having a little sidebar.

11 THE COURT: Go ahead. Apparently they don't need
12 me.

13 MR. BAER: We might need you, Judge.

14 THE COURT: Let me explain a little bit to the
15 jury what we're going to do here. At this time as part of
16 plaintiff's case, Mr. Baer is going to read and have his
17 assistant read Mr. Flatt's responses or answers to questions
18 that were asked of James Flatt at a deposition which took
19 place on November 15, 2000. And at that time Mr. Flatt was
20 under oath and these are the questions. The questions were
21 asked by Ms. Lord, but the offer today is from the
22 plaintiff. So Mr. Baer is going to read the questions and
23 his assistant will be reading what Mr. Flatt's answers were.

24 You will be reading from the witness chair when we
25 get ready to do that.

1 MR. BAER: Okay.

2 THE COURT: Come forward, please.

3 Go ahead, Mr. Baer.

4 MR. BAER: This is by Ms. Lord.

5 (The deposition of JAMES FLATT, taken November 15,
6 2000, was read; questions by Mr. Baer, answers by Mr. Tim
7 Heier, Pages 4 through 27, line 2.)

8 THE COURT: I am going to interrupt because we
9 need to take a recess. And for the record, we're at
10 Mr. Flatt's deposition, page 27, we just finished through
11 line 2. We'll start at line 3. Have I got that right?

12 MR. BAER: Yes, you do, Your Honor.

13 THE COURT: Thank you. You may step down.

14 Jurors, remember my admonition not to discuss the
15 case.

16 We're going to be in recess until 20 minutes past
17 3:00. Jurors, you are excused.

18 (Recessed at 2:58 p.m. until 3:19 p.m., the same
19 day, at which time the following proceedings were continued
20 in open court, in the presence of the jury:)

21 THE COURT: Let the record show we are reconvened
22 with all parties, counsel and jurors.

23 And we'll continue with reading James Flatt's
24 deposition. Please proceed.

25 MR. BAER: Thank you.

1 (Continued reading of the deposition of JAMES
2 FLATT, taken November 15, 2000; questions by Mr. Baer,
3 answers by Mr. Tim Heier, commencing at page 27, line 3.)

4 MR. BAER: Your Honor, I want this part of the
5 record. I would offer that at this time.

6 THE COURT: Could I just suggest, there are three
7 of them, that you do them at the end, after we're done
8 reading?

9 MR. BAER: Sure.

10 THE COURT: Would that be okay?

11 MR. BAER: Yes, that's fine.

12 (Continued reading of the deposition of JAMES
13 FLATT, taken November 15, 2000.)

14 MR. BAER: At this time, Your Honor, I would offer
15 Deposition Exhibits 1,2 and 3. And I will mark them as
16 Trial Exhibits 60, 61 and 62.

17 MS. LORD: No objection, Your Honor.

18 THE COURT: Plaintiff's Exhibits 60, 61 and 62 are
19 received.

20 MR. BAER: Plaintiff would call Dr. Montgomery for
21 cross-examination.

22 MS. VOGLEWEDE: Can we approach the bench for just
23 a moment, Your Honor?

24 THE COURT: Yes.

1 the jury and the court reporter.)

2 THE COURT: You may proceed, Mr. Baer.

3 MR. BAER: Thank you. We would call Dr. Robert
4 Montgomery for cross-examination under the rules.

5 ROBERT MONTGOMERY, M.D.,
6 being first duly sworn, was examined and testified on his
7 oath as follows:

8 CROSS-EXAMINATION

9 BY MR. BAER:

10 Q Good afternoon, Dr. Montgomery.

11 A Good afternoon.

12 Q You are a physician at MeritCare?

13 A Yes, I am.

14 Q Do you work in the administrative side?

15 A Half time, I do, yes.

16 Q The other half time you're a pediatrician; is that
17 correct?

18 A That's right.

19 Q And your position as an administrator side is
20 medical director; is that correct?

21 A That's correct.

22 Q What does a medical director do?

23 A Well, in various places, he does many things. I
24 do mostly, oh, listen to patients if they're concerned about
25 the care received from the physician or if the -- if they

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1 felt the care didn't go well or if the procedure didn't go
2 well. Then I look into those and review them.

3 Q Okay. And as a pediatrician, are you a member of
4 the American Academy of Pediatrics?

5 A I am.

6 Q So you're familiar with standards that apply and
7 statements that are -- that have been released by the
8 American Academy of Pediatrics?

9 A Yes.

10 Q And would you agree, Dr. Montgomery, that the
11 position statements of the American Academy of Pediatrics
12 essentially provide a standard of care for physicians who
13 practice in pediatrics?

14 MS. VOGLEWEDE: Objection Your Honor, that goes to
15 a legal issue.

16 MR. BAER: It's a standard of care, Your Honor.

17 THE COURT: The standard of care that this jury
18 needs to concern itself with is the legal standard that I
19 will give them. And that's -- you can ask him what he feels

20 is required in a certain circumstance, but the legality as
21 to what must be disclosed I will give to the jury. So the
22 objection is sustained as far as that goes.

23 Q (Mr. Baer continuing) Dr. Montgomery, you are
24 familiar, are you not, with what must be disclosed in order
25 to obtain informed consent to a procedure on a pediatric

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1 patient, right?

2 A Right.

3 Q And the American Academy of Pediatrics has
4 published a statement on what elements are necessary for
5 obtaining informed consent; isn't that true?

6 A Well, I'm not sure about that.

7 MS. VOGLEWEDE: Your Honor, this witness is here
8 as a fact witness. That's my understanding in this case.
9 These questions seem clearly outside the scope of his
10 involvement as a fact witness in Anita Flatt's complaints to
11 MeritCare.

12 THE COURT: Mr. Baer, where are you going?

13 MR. BAER: He is called as a witness for
14 cross-examination purposes under the rules.

15 THE COURT: Yes, but for what purpose?

16 MR. BAER: For establishing the appropriate

17 requirement for medical doctors at MeritCare to disclose
18 information to parents of children undergoing procedures.

19 THE COURT: The standard of care is a legal issue
20 in this case. The jury will be informed on the law by the
21 Court.

22 MR. BAER: May we approach, Judge?

23 THE COURT: Yes.

24 (Discussion at the bench, out of the hearing of
25 the jury and the court reporter.)

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1 THE COURT: Members of the jury, we have obviously
2 got some issues here that we need to work on, the attorneys
3 and I, and so I am going to excuse you at this time because
4 it's going to takes us a while to do. And so I'm going to
5 again advice you -- you know, I have lost my little page
6 with the admonition on it, but I just wanted to tell you
7 again, especially now since it's going to be over the
8 weekend, you are not to read any news accounts, not to watch
9 anything on television or you're not to listen to any radio
10 accounts of this trial or anything to do with the trial.
11 You're not to discuss it with anyone else, you're not to
12 allow anyone else to talk with you about it.

13 That's pretty much it in a nutshell, right? Okay.
14 Everybody has got that in mind. So would you please

15 remember that. We're going to recess until 9:00 o'clock on
16 Monday morning. Have a good weekend. We'll see you then.

17 Jurors, you are excused.

18 (Continued in open court, out of the presence of
19 the jury:)

20 THE COURT: Please be seated. The jury has been
21 excused.

22 Ms. Voglewede, you had an objection to a question
23 that Mr. Baer asked. And we had a discussion that was not
24 on the record, and I think we need to make that on the
25 record at this time. So what was your objection?

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1 MS. VOGLEWEDE: Mr. Baer's initial questions to
2 Dr. Montgomery concern standards of care for disclosure of
3 risks and benefits and informed consent. I objected to that
4 as clearly beyond the scope of this fact witness's
5 involvement in this case. Dr. Montgomery was never
6 disclosed by plaintiffs as an expert witness in this case.
7 He was listed by defendants and, I believe, plaintiffs as
8 well as simply one of many witnesses from MeritCare who
9 would be called.

10 His involvement in this case was to respond as a
11 medical director to some concerns that Anita Flatt brought

12 to MeritCare. That's the scope of his testimony here. And
13 it appeared to me that Mr. Baer was clearly going beyond the
14 scope of that, into expert testimony.

15 THE COURT: Mr. Baer.

16 MR. BAER: Your Honor, I think it's important
17 to -- what Dr. Montgomery's role in this matter in the
18 context -- and I just -- I would like to refer to Exhibit
19 16, which has been admitted as evidence in this case. It's
20 a letter written by Dr. Montgomery.

21 And he concludes that he has reviewed the chart on
22 your son's -- or "I have reviewed your chart and your son's
23 chart completely. I have also discussed your case with our
24 obstetrics department and the individuals doing the coding
25 and billing for the obstetrics department. An error was

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1 made."

2 Then he says, "With regard to your son's
3 circumcision, I have discussed his case with Dr. Glen Mastel
4 who your son saw for his two week checkup. I've also
5 discussed your son's case with one of our urologists.
6 Asymmetry of the foreskin will not cause any dysfunction
7 sexually or otherwise in your son's later life. In fact,
8 there is a good chance that within one or two years this
9 asymmetry should be barely noticeable.

10 "After a complete review, I do feel good medicine
11 was practiced by all those involved in your and your son's
12 care. I do apologize for the error in billing."

13 What this letter is saying, Judge, is that Dr.
14 Montgomery completely reviewed the care and treatment given
15 to Josiah Flatt in March of 1997 and subsequently and
16 concluded that everything was good care. I need to be able
17 to at least examine him or cross-examine him on what he
18 reviewed, what standards he used to come to the conclusion
19 that it was good care, and how he arrived at the ultimate
20 conclusion that good medicine was practiced.

21 Otherwise, Doctor Montgomery, with this letterhead
22 as an exhibit, will be passed off as having reviewed it.
23 It's almost like sandbagging an extra expert witness by the
24 defendants in this case.

25 THE COURT: But those aren't the questions you

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1 were asking, Mr. Baer.

2 MR. BAER: Your Honor, in order to determine
3 whether or not good care was given, I have to establish that
4 he understands the standards of practice for pediatrics.

5 THE COURT: You weren't -- to my mind, you weren't
6 asking him those questions, Mr. Baer.

7 MR. BAER: Maybe I was going at it in the wrong
8 manner. I can certainly rephrase the questions if -- and I
9 will do so.

10 THE COURT: What I'm trying to convey -- and
11 perhaps I'm not very clear -- that the elements of a claim
12 for failure to obtain informed consent are legal elements,
13 they're in the law, and those are the elements that the
14 Court gives to the jury. That comes from me and not anybody
15 else.

16 If you want to have someone testify about those
17 elements and what it means to give informed consent, what it
18 means -- what you should disclose in a case such as this,
19 then you have to have expert testimony to do that. If you
20 want to inquire of Dr. Montgomery how he reached those
21 conclusions in the letter, then you can do that. But that's
22 not what you were doing. You were asking him what is the --
23 what is a pediatrician required to tell a patient to get
24 informed consent, or something to that effect. You see,
25 that's invading the province of the Court and the jury.

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1 MR. BAER: I would like to explore that and --

2 THE COURT: I'm not going to change my ruling. I
3 have ruled this -- I have ruled this way many times.

4 MR. BAER: Judge, I don't mean to even imply that

5 you should change your ruling. I just want to understand
6 where my limitations are. And as I understand the law under
7 Jaskoviak and Winkjer v. Herr, in order for the plaintiff to
8 even come into court to sustain a claim of lack of informed
9 consent, I need to have expert witness testimony to
10 establish what that standard of care is that's required. So
11 I have the burden of proving what the standard of care is
12 from the medical side of it.

13 I'm not trying to invade the Court's province of
14 giving the elements from a legal basis of an informed
15 consent claim. All I'm trying to do is establish through my
16 witnesses what that standard of conduct is for physicians in
17 the pediatric practice. And we have had testimony that --
18 and I think Dr. Kantak in her deposition even says that the
19 AAP policy statements do provide essentially the standard of
20 care.

21 And so I just want to make sure that the record is
22 clear that what I am trying to do is to meet my burden; and,
23 that is, to prove what the standard of care is for
24 physicians, AAP members, in the care and treatment of
25 infants. And that may be something totally different than

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1 the legal requirement for an informed consent case, but

2 that's the Court's province.

3 But from a plaintiff's standpoint, I need to be
4 able to prove what that standard of care is, because one of
5 the instructions that the Court is going to have for the
6 jury at the end is, Did the plaintiff prove the standard of
7 care, No. 1, and, No. 2, was it breached? So that is my
8 burden. And I'm not meaning to invade the province of the
9 Court at all, nor get into the law aspect of it. I'm simply
10 trying to establish what that standard of care is.

11 THE COURT: Ms. Voglewede.

12 MS. VOGLEWEDE: Your Honor, that is the role of
13 expert testimony, and Mr. Baer had the opportunity to
14 disclose experts to address those issues. Dr. Montgomery
15 was not one of those people. Furthermore, there's no
16 indication in this case that Dr. Montgomery was even asked
17 to address that concern or that that was a concern that
18 Anita Flatt had was about informed consent. So it's clearly
19 beyond his role in this case.

20 THE COURT: Well, what I will allow you to do, Mr.
21 Baer, is to cross-examine Dr. Montgomery on those -- is it
22 one or two letters? Two letters?

23 MR. BAER: Two letters.

24 THE COURT: Okay. And to get into that because
25 they are in evidence. But you have not disclosed him as an

1 expert witness. So my objections to your asking him about
2 the standard of care with informed consent with a pediatric
3 patient are sustained. I am not going to change that
4 ruling.

5 MR. BAER: Okay.

6 THE COURT: So do you want to take this up then on
7 Monday with Dr. Montgomery as your witness?

8 MR. BAER: Sure.

9 THE COURT: So can we excuse him then at this
10 time?

11 MR. BAER: Yep. That's fine. Thank you.

12 THE COURT: Ms. Voglewede, you also brought up to
13 me the fact that you had filed two motions, one of which
14 relates to Dr. Kaplan's testimony, which you are asking to
15 have on Monday. Mr. Baer, you said you had not had a chance
16 to review that?

17 MR. BAER: I received this. It was on my table
18 here when we came back from after noon break, so I've only
19 had the briefest time to review this memorandum.

20 THE COURT: And you need to know this today, Ms.
21 Voglewede?

22 MS. VOGLEWEDE: I do because he is coming in on
23 Sunday.

24 THE COURT: Okay. We'll take a 10-minute recess
25 and then I will address that motion. Court is in recess.

1 (Recessed at 4:26 p.m. until 4:39 p.m., the same
2 day, at which time the following proceedings were continued
3 in open court, out of the presence of the jury:)

4 THE COURT: Please be seated. The defendant has
5 made a motion regarding the order of appearance of
6 witnesses, referring to Dr. Kaplan, and there's also a
7 reference to Dr. Shoemaker. And I've reviewed the motion
8 and affidavit.

9 Mr. Baer, are you opposed to the motion?

10 MR. BAER: I am at this time, Your Honor, yes.

11 THE COURT: Would you like to give me your --

12 MR. BAER: Sure. No. 1, I appreciate obtaining a
13 written motion and memorandum, albeit late. I want the
14 record to reflect that I only received a copy of this after
15 our afternoon break, which was I believe at 3:20 this
16 afternoon. It is now 4:40. I believe that the motion is
17 improper and should be denied for various reasons.

18 First, it is a motion brought to the Court under
19 the Rules of Civil Procedure. Motions under Rule 6 must be
20 served to allow at least 18 days before hearing of a motion.
21 Second, under the Rules of Court, motions under Rule 3.2
22 allow motions to be filed 10 days before being heard.
23 Neither of those are met in this case.

24 Lastly, I would refer the Court to North Dakota
25 Century Code 28-14-10, where it talks about the order of

1 trial for civil trials in North Dakota. And it says, "When
2 the jurors have been sworn, the trial must proceed in the
3 following order, unless the judge for special reasons
4 directs otherwise." And the order is that the plaintiff
5 shall produce the evidence on the plaintiff's part. The
6 second one is the defendant may open defendant's defense and
7 offer defendant's evidence.

8 In this case, we have had expert witnesses that
9 have been delayed by days in their anticipated testimony.
10 Now, I am the first to admit that perhaps that is because of
11 my bad estimate as to when those experts could testify. And
12 they were also from out of state. So I don't think that it
13 is a special reason just because the defendants have an
14 expert coming from out of state and wants to get on and off
15 in a hurry.

16 I would certainly like to accommodate the
17 defendants, but in this case, we were delayed at the
18 beginning because of some concerns about opening statements,
19 we were extensively delayed by Dr. Cold's testimony since he
20 could not use photographs objected to by the defendants, and
21 it created the need for multiple hours of testimony, when it
22 could have been done in half an hour or 45 minutes.

23 We do not think it would be appropriate in this
24 case to accommodate the defendants in their schedule to
25 allow Dr. Kaplan or Dr. Shoemaker to be taken out of order.

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1 Thank you.

2 THE COURT: Yes. Ms. Voglewede.

3 MS. VOGLEWEDE: Your Honor, usually motions are
4 not even required in the circumstances like these. Counsel
5 are usually able to reach some agreement. We did try
6 reaching some agreement with Mr. Baer, discussed it
7 yesterday. He indicated he would not agree.

8 We did advise the Court and counsel back in
9 December of this concern because we had to schedule both Dr.
10 Kaplan and Dr. Shoemaker several months in advance. I
11 realize that trials can be unpredictable, but defendants had
12 even less control over that than plaintiffs do. Plaintiffs
13 at least can control the order of their witnesses during
14 their first week of trial.

15 At this point Mr. Baer has had the opportunity to
16 put in at least a substantial part of his case. The cases
17 that I cited to the Court indicate that it clearly is within
18 the discretion of the Court to control the order of
19 testimony, particularly where, for example, medical
20 witnesses are concerned.

21 For example, in the Amador case, the Court
22 states -- with the exception of a nurse, this involves six
23 witnesses who were called by the defense during the
24 plaintiff's case. With the exception of a nurse, all such
25 witnesses were practicing physicians. And as the trial

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1 court noted, it is customary to accommodate the schedules of
2 medical witnesses. Plaintiff was allowed to explain to the
3 jury that the witnesses were testifying out of order and
4 that she had not completed the presentation of her evidence.

5 Then likewise in the Braxton v. Faber case, the
6 Court said, As a practical matter, great latitude is often
7 accorded professionals, including medical experts who have
8 been summoned to testify. It is not uncommon as a courtesy
9 to these professionals for a court to structure the order of
10 testimony around their schedules. We cannot say that in
11 doing so the trial court abused its discretion.

12 There are some witnesses that we have tried to
13 accommodate as much as we can. We have had people kind of
14 waiting on call to see if Mr. Baer wants to call them. But
15 with these two witnesses, Your Honor, we simply don't have
16 that flexibility. And with Dr. Kaplan, he will need to
17 complete his testimony by the end of the day on Monday in

18 order to return for scheduled surgeries later in the week.
19 So we would ask for the Court's accommodation to be able to
20 do that.

21 THE COURT: The Court agrees that the normal
22 course is that the plaintiff puts her case on first, to be
23 followed by the defendant's case. The Court is also aware
24 that it is not always easy to accommodate witnesses,
25 particularly those that are far away, and those that are

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1 expert witnesses. And it is not unusual for the Court to
2 allow witnesses to be called out of order.

3 In this particular case, because Dr. Kaplan has
4 previously arranged to appear in this trial on Monday, which
5 is February 10, that he is unable to be here on other later
6 days of the week, the Court is going to, in its discretion,
7 grant the defendant's motion to have Dr. George Kaplan
8 testify out of order on Monday February 10, commencing at
9 9:00 a.m.

10 I will explain that to the jury, that that is the
11 ruling of the Court, that we are interrupting the
12 plaintiff's case, and they will have to keep that in mind as
13 they listen to the evidence.

14 Do you have a specific request as to Dr.
15 Shoemaker?

16 MS. VOGLEWEDE: I do not at this time, Your Honor,
17 because I -- I will do what I tried to do this week, which
18 is to wait and see how we progress. I don't want to come to
19 the Court before it's necessary. He is scheduled to -- I
20 will tell the Court, he is scheduled to appear on Tuesday.
21 I don't know what Mr. Baer estimates the remainder of his
22 case will take.

23 THE COURT: Do you have any estimate you can give
24 me, Mr. Baer?

25 MR. BAER: Could I just address the issue of the

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1 timing of Dr. Kaplan's testimony? I would certainly like to
2 get through Dr. Montgomery first because he's on the stand,
3 the jury sees him on the stand. And I would like to get
4 through Dr. Montgomery first. And then if the Court wants
5 to grant the motion, which it already has, to take Kaplan
6 after Dr. Montgomery, I would just as soon get through Dr.
7 Montgomery, he's on the witness stand, so that there's
8 continuity in their receiving of the evidence.

9 THE COURT: Ms. Voglewede.

10 MS. VOGLEWEDE: I have no objection to that, so
11 long as Dr. Montgomery doesn't go longer than into the
12 afternoon, which I assume will not happen. At the very

13 latest, Your Honor, it's my expectation that I would have to
14 call Dr. Kaplan immediately after lunch in order to complete
15 his testimony by the end of the day.

16 MR. BAER: Your Honor, I certainly do not want to
17 be limited or I want to have the right to completely
18 cross-examine Dr. Kaplan as a defense witness.

19 THE COURT: Just hold it. I've heard enough. Dr.
20 Kaplan will testify at 9:00 a.m. on Monday. I will explain
21 it to the jury. Okay.

22 Anything else?

23 MS. VOGLEWEDE: Nothing further.

24 THE COURT: Thank you. We're recessed until 9:00
25 o'clock Monday. I would like to talk to counsel only,

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1 please.

2 (Recessed at 4:49 p.m. the same day.)

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