IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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

Appellant,

v. Case No. 20030285

Sunita A. Kantak, M.D., MeritCare
Medical Center, and State of North Dakota,

Appellees.

IN THE DISTRICT COURT, EAST CENTRAL JUDICIAL DISTRICT, CASS COUNTY

Cass County Court File No. 99-3761

APPELLANT'S BRIEF

ZENAS BAER AND ASSOCIATES

By_____
Zenas Baer (#05460)
Attorney for Plaintiff/Appellant
331 6th St., Box 249
Hawley, MN 56549
(218) 483-3372

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ISSUES

1. Did the Trial Court err in preventing Plaintiff's experts, Dr. Christopher Cold and Dr. Robert S. Van Howe from testifying as to the standard of care for medical doctors in obtaining informed consent for an elective medical procedure on an infant?

2. The District Court erroneously excluded relevant, nonprejudicial evidence including a videotape showing the different circumcision procedures, circumcision tools, circumstraint, Gomco Clamp, photos of an intact penis, meeting minutes and billing statements, and denied cross-examination of expert witnesses which affected a substantial right of the Plaintiff.

3. The Jury Instructions as a whole were misleading and prejudicial to the Plaintiff when, amongst other things, the Court attempted to blend the "reasonable patient standard" and the "professional standard", which misled and confused the jury.

4. Even if any single error of law is not sufficient to grant a new trial, the cumulative effect of the multiple errors deprived the Plaintiff of the substance of a fair trial.

5. The District Court abused its discretion in taxing the costs when the proper procedure was not followed denying the Plaintiff the opportunity to contest the reasonableness of the expert witness fees.

6. The District Court erred as a matter of law in dismissing the equal protection constitutional claims challenging the constitutionality of N.D.C.C. 12.1-36-01 on the basis of lack of standing.

STATEMENT OF THE CASE

This case is on appeal from the Trial Court's Order denying a Motion for a new trial, and summary dismissal of the equal protection constitutional challenge to N.D.C.C. 12.1-36-01.

James and Anita Flatt are the parents of Josiah Flatt, born on March 6, 1997, at MeritCare Hospital, Fargo, North Dakota. Prior to birth, Flatts received no information about circumcision, and had no knowledge about the anatomy and structure of a normal, intact penis. On March 7, 1997, Josiah Flatt was circumcised by Sunita Kantak, a doctor neither of the Flatts knew or retained. Anita Flatt did not receive any information about circumcision prior to consenting. Following the circumcision, complications arose. Suit was filed alleging negligence in failing to obtain "informed consent" because inadequate information of the benefits and risks of the procedure was given to allow a parent to make an informed decision on whether to consent to circumcise their son.

The suit also challenged the constitutionality of N.D.C.C. 12.1-36-01 as being under-inclusive in protecting genitals of females but not male minors in violation of the Federal Equal Protection Clause. The District Court granted the State's Motion to Dismiss on the basis of standing on the constitutional grounds in May of 2000.

The underlying claim against Dr. Kantak and MeritCare Hospital went to trial in February 2003. The District Court made a number of pretrial evidentiary rulings

excluding relevant evidence, including photos of an intact penis, videotape of a circumcision procedure, surgical tools, surgical equipment, and a circumstraint. The District Court prevented Plaintiff's experts from testifying as to the standard of care for an elective procedure on an infant. The District Court gave a jury instruction that essentially perpetuated the "professional standard" as opposed to the "reasonable patient standard" in evaluating informed consent.

The District Court submitted the case to the jury on a special interrogatories which included an interrogatory comparing the fault between Dr. Kantak and Anita Flatt, even though there is no duty on the part of a patient to insure informed consent is given. The jury found no negligence on the part of Dr. Kantak and judgment of dismissal was entered with costs and expenses awarded to the Defendant. This appeal follows.

I. JURISDICTION

The Trial Court had jurisdiction under N.D. Const., art. VI, §8, and N.D.C.C. 27-05-06. A timely Notice of Appeal was filed pursuant to N.D.R.App.P. Rule 4(a). The Supreme Court has jurisdiction pursuant to N.D. Const.,art. VI, §2 and 6, and N.D.C.C. 28-27-01.

II. STANDARD OF REVIEW

A. NEW TRIAL

Denial of a Motion for a new trial is addressed to the sound discretion of the Trial Court and its decision will not be reversed on appeal unless the Trial Court has manifestly abused its discretion. *Benefiet v. Hoiby*, 370 N.W.2d 513, 515 (N.D. 1985); *Cook v. Stenslie*, 251 N.W.2d 393 (N.D. 1977). An abuse of discretion implies an unreasonable, arbitrary, or unconscionable attitude on the part of the Trial Court. *Zajac v. Old Republic Ins. Co.*, 372 N.W.2d 897 (N.D. 1985).

B. ERRONEOUS JURY INSTRUCTIONS

Jury Instructions must correctly and adequately inform the jury of the applicable law and must not mislead or confuse the jury. *State v. Olander*, 1998 N.D. 50, ¶18, 575 N.W. 2d 658. When considering the correctness of jury instructions, the Court reviews them as a whole. Instructions are allowed as a whole if they fairly advise the jury of the law on the essential issues of the case. In evaluating whether a District Court abused its discretion in instructing the jury, the Court must first determine whether the District Court committed an error in its instruction and then,

if so, whether the error was harmless. *Rittenour v. Gibson*, 2003 N.D. 14, 656 N.W.2d 691. A Trial Court has discretion , limited by the evidence and issues involved, over the nature and scope of written questions submitted to the jury. *Victory Park Apartments, Inc. v. Axelson*, 367 N.W.2d 155 (N.D. 1985).

C. ADMISSION/EXCLUSION OF EVIDENCE

The Appellate Court will review a District Court's admission or exclusion of evidence based on relevance grounds by applying an abuse of discretion standard. A District Court engages in "abuse of discretion" when it acts in an arbitrary, unreasonable, or unconscionable manner, or when it misinterprets or misapplies the law. *Peters-Riemers v. Riemers*, 2001 N.D. 62, 624 N.W.2d 83. Under N.D.R.Ev. Rule 103(a), error may not be predicated upon a ruling which excludes evidence unless a substantial right of the party is affected. *Langness v. Fencil Urethane Systems*, 2003 N.D. 132, 667 N.W.2d 596. Denial of the right to cross-examine with respect to material evidence is prejudicial error requiring a new trial. *Knoepfle v. Suko*, 108 N.W.2d 456, 463 (N.D. 1961).

D. STANDING TO CHALLENGE CONSTITUTIONALITY OF N.D.C.C. 12.1-36.01, ON CONSTITUTIONAL GROUNDS.

When a State statute regulating social or economic matters is challenged on federal equal protection grounds on an important substantive right such as gender, the intermediate standard of review applies and the statute must be substantially related to sufficiently important governmental interests. *B.H. v. K.D.*, 506 N.W.2d 368 (N.D.

1993). Classification based on sex is inherently suspect requiring strict judicial scrutiny. *State ex rel Olson v. Maxwell*, 259 N.W.2d 621 (N.D. 1977).

III. FACTS

Circumcision is an elective cosmetic procedure. (Dr. George Kaplan TT p. 694, App. p. 350; Dr. Shoemaker TT p. 1062, App. p. 376; Dr. Lunn TT p. 1496, App. p. 420; Dr. Cold TT p. 259 (Ex. 58), App. p. 298) There is no valid medical reason to do a routine circumcision on a neonate. (Dr. Cold TT p. 259, App. p. 298; Dr. Kaplan TT p. 637, App. p. 336)

Circumcision has been described as a very "emotional, engendering topic not unlike the topic of termination of life." (Dr. Shoemaker TT p. 1026, App. p. 368) Physicians are traditionally resistant to change. (Dr. Shoemaker TT p. 1028, App. p. 369; Dr. Kaplan TT p. 648-650, App. p. 339) Other western civilizations with an advanced medical community do not circumcise their children. (Dr. Shoemaker TT p. 1032-1036, App. p. 370-371) The Canadian and Australian societies recommend that no neonatal circumcision be done unless medically indicated. (Dr. Shoemaker TT p. 1029-1030, App. p. 369)

In the United States, the rate of circumcision peaked in the 1950s and 1960s at approximately 90%, and it is currently 40% on the west coast, 50% on the east coast, 70% in the south, and 85-95% in the Midwest. (Dr. Van Howe TT p. 367, App. p. 311) The high rate of infant circumcision in America is in stark contrast to the rest of the world. The prevalence of routine infant circumcision in the world is Australia 10.6%, New Zealand .35%, United Kingdom .41%, Canada 17%, South Korea less

than 10%, Finland less than 1%, Denmark 0%, Japan very low, Europe, China and Far East rarely perform, and in Africa rare. (Dr. Van Howe TT p. 364, App. p. 310; Tr. Ex. 50)

The Mayo Clinic, in 1959, reported that the foreskin of the penis, the clitoris and external genitalia are all primary erogenous tissue. (Dr. Cold TT p. 247, App. p. 295)

The foreskin is composed of primary erogenous tissue neurologically hardwired to the brain. It is primary sexual tissue. (Dr. Cold TT p. 152, 168, App. p. 275-279) The foreskin consists of specialized sensory tissue that is removed during circumcision. (Dr. Cold TT p. 217, App. p. 291) The specialized mucosa is important for sexual satisfaction. (Dr. Shoemaker TT p. 1069, App. p. 378) Mucosal tissue is similar to the tissue you find inside your lips or eyelids. (Dr. Cold TT p. 162, App. p. 277) The foreskin has five layers of tissue. (Dr. Cold TT p. 163-164, App. p. 278) Removal of the foreskin permanently removes up to 15 square inches of tissue (if allowed to grow to full term). (Dr. Cold TT p. 166, App. p. 278) The dorsal nerve is the primary nerve of the penis, which is severed on circumcision. (Dr. Cold TT p. 169-172, App. p. 279-280) The foreskin is richly endowed with fine touch nerve receptors like those in the fingertips. (Dr. Cold TT p. 189, App. p. 284; Dr. Shoemaker TT p. 1073, App. p. 379)

At birth, the foreskin is fused to the glans penis. One of the first tasks in the

circumcision procedure requires the fused mucosa be separated (torn, ripped) from the glans penis. When a circumcision is performed, the medical practitioner needs to tear the epithelial foreskin from the glans penis. (Dr. Kaplan TT p. 655, App. p. 341) Freeing and separating the adhesions of a foreskin to the glans penis has been described as amounting to "cruel and unusual punishment and is unfounded physiologically and medically". (Dr. Kaplan TT p. 654, App. p. 340) Circumcision with a Gomco Clamp requires the separation of the fused foreskin and glans like ripping a fingernail off a nail bed. (Dr. Cold TT p. 156, 172-175, 187, App. p. 276, 280-281, 284)

The function of the foreskin is to internalize an organ that is naturally externalized only on arousal. The circumcision of the glans penis denudes the glans which becomes keratonized, thickened and desensitized. (Dr. Cold TT p. 217, App. p. 291) The foreskin provides lubrication and protection of the glans. (Dr. Montgomery TT p. 771, App. p. 356)

Circumcision permanently alters a child's penis by removing healthy tissue. (Dr. Lunn TT p. 1535, App. p. 423) In Josiah Flatt's circumcision, there was a permanent loss of the foreskin and development of complications which included adhesions and asymmetry. (Dr. Lunn TT p. 1537-1538, App. p. 423-424) Circumcision results in a permanent scar. (Dr. Sawchuck TT p. 1432, App. p. 415)

There are at least three alternate techniques used for circumcision, i.e. Gomco

Clamp, Mogen Clamp, and Plastibell, each removing a different amount of tissue. (Dr. Cold TT p. 173, App. p. 280) The Gomco procedure removes the most amount of tissue. (Dr. Cold TT p. 214, App. p. 290)

Historically, circumcision has been touted as a means of deterring male sexual excess. "In 1194, Maimonides physician to the court of Sultan Saladin, suggested circumcision as a way to deter male "sexual excess". ("Should Your Infant Boy Be Circumcised?", Tr. Ex. 57, Dr. Cold TT p. 324-325, App. p. 303-304) In the modern medical world, circumcision became prevalent to prevent masturbation. The medical thinking was that any activity that drained a life force, i.e. sperm or semen, would decrease human health. This was the prevailing medical view prior to the germ-based theory of disease. (Dr. Van Howe TT p. 365-366, App. p. 311) The medical community theorized that by removing erogenous tissue it would reduce pleasure and thereby curb masturbation. (Dr. Van Howe TT p. 366, App. p. 311) The medical literature has, over the past 100 years, touted circumcision as a cure for masturbation, promiscuity, moral turpitude, epilepsy, club foot, mental illness, mental retardation, gout, alcoholism, asthma, hysteria, malnutrition, night terrors, eczema, and many others which have all been soundly rejected. (Dr. Kaplan TT p. 711-712, App. p. 354; Dr. Cold TT p. 230, App. p. 293)

The risks and complications of circumcision include bleeding, phimosis, concealed penis, skin bridges, insufficient skin removed, meatitis, chordee, inclusion

cysts, penile lymphedema, urethrocutaneous fistulas, loss of penile shaft, cyanosis, infections, pulmonary abscess, diphtheria, tuberculosis, tetanus, total loss of the penis and death. (Dr. Kaplan TT p. 663-673. 681-683, 686-691, App. p. 343-345, 347-350; Tr. Ex. 27) One hundred percent of boys who are circumcised will suffer from a permanent circumcision scar which desensitizes the penis. (Dr. Cold TT p. 218, App. p. 291) Further complications include infections, inflamation and irritation, meatal stenosis (narrowing of the urethral opening), alteration of sexual function because of removal of erogenous tissue and total or partial amputation of the penis. (Dr. Cold TT p. 245-248, App. p. 295)

The standard of care for disclosure of risks is that all known risks must be disclosed. There are no risks too small to go undisclosed. (Dr. Kantak TT p. 1204-1205, App. p. 385-386; Kantak Depo. p. 147 (Docket No. 191), App. p. 472) Dr. Shoemaker "I think known complications should be discussed." (Dr. Shoemaker Depo. p. 87, (Docket No. 186), App. p. 470) Dr. Lunn "[a]ll of the [risks] I know of" need to be disclosed. (Dr. Lunn Depo. p. 20, App. p. 474)

Parents should be "fully informed" of the possible benefits and potential risks of the newborn circumcision. (Dr. Lunn TT p. 1531, App. p. 422, referencing 1989 AAP Statement, Tr. Ex. 112, App. p. 237; Dr. Shoemaker TT p. 1045, App. p. 373, citing Tr. Ex. 31, App. p. 242) To meet the standard of care, a doctor should disclose those risks described by Dr. Kaplan in his treatise, "Complications of Circumcision".

(App. p. 226) (Dr. Shoemaker TT p. 1046-1047, App. p. 373-374)

A parent needs to know all of the potential risks in order to make an informed decision, a "complete explanation of the benefits and risks of any procedure" must be given. (Dr. Kaplan TT p. 705, App. p. 352, citing "Circumcision Debate" statement authored by Kaplan, Shoemaker and others, App. p. 257)

In practice, however, Kaplan indicates he will give parents "as much information as I think they want. I'll try to tell them the things that I think are major risks in my hands. And that to me fulfills the obligation of informed consent." (Dr. Kaplan TT p. 707, App. p. 353) Even though the 1989 AAP Statement indicated that parents should be "fully informed of the possible benefits and potential risks of a newborn circumcision", Dr. Lunn says that he does not believe anybody really does so. (Dr. Lunn TT p. 1531-1534, App. p. 415)

The standard of practice for obtaining informed consent for a medically indicated procedure is different than for an elective procedure. For an elective procedure, such as circumcision, the standard is to try to talk the parent out of the elective procedure. (Dr. Van Howe TT p. 351, App. p. 307) Dr. Shoemaker has successfully dissuaded every parent who has requested that he pierce their baby's ears after giving "informed consent". (Dr. Shoemaker Depo. p. 44, (Docket No. 186), App. p. 468) In situations where you have an incapacitated patient undergoing an elective procedure, the standard requires a full description of all of the risks. (Dr. Van

Howe TT p. 350-353, App. p. 307-308) When performing elective surgeries, all risks must be disclosed to meet the standard. (Dr. Cold TT p. 244-245, App. p. 294-295)

A medical provider has an ethical duty to their child patient to render competent medical care based on what the patient needs, not what someone else expresses. (Tr. Ex. 31, AAP Informed Consent Policy Statement, App. p. 242) In order to obtain informed consent, a doctor must describe the function of the foreskin intended to be removed.. (Dr. Van Howe TT p. 359, App. p. 309) The 1995 AAP Policy Statement "Informed Consent, Parental Permission and Assent in Pediatric Practice", gives the standard elements from a medical point of view of what a doctor must do in order to obtain informed consent. (Tr. Ex. 31, App. p. 242; Dr. Kaplan TT p. 640-644, App. p. 337-338) The doctor's duty is to the infant patient and the doctor must look out for the "best interests" of the patient irrespective of the parents' wishes. (Dr. Kaplan TT p. 644-645, App. p. 338) The concept of "best interest" applied in the pediatric context would prevent a doctor from piercing a child's ear, clitoris, or foreskin without a diagnosis. (Dr. Kaplan TT p. 645, App. p. 338; Dr. Shoemaker Depo. p. 44; App. p. 468, Docket No. 186)

James and Anita Flatt were first-time parents who declined to have an elective amniocentesis performed because the risks outweighed the benefits as described by their obstetrician, Dr. Bro. (Anita Flatt TT p. 429, App. p. 313) During prenatal visits and prenatal Lamaze classes, neither Anita nor Jim Flatt received any

information regarding circumcision. (Anita Flatt TT. p. 430, App. p. 313) James Flatt was circumcised, and Anita Flatt was only familiar with a circumcised penis. (Anita Flatt TT p. 432, App. p. 313) The thought processes leading to a decision to circumcise was that "since James was circumcised, his son would be circumcised". Anita Flatt had little knowledge of what a circumcision entailed when her son, Josiah Flatt, was born on March 6, 1997. (Anita Flatt TT p. 457, App. p. 319) James Flatt was given no information about circumcision, had no contact with Dr. Sunita Kantak, and was completely unaware of any of the risks associated with the procedure. (James Flatt Depo. p. 31-36, App. p. 477-478) James Flatt never met Dr. Kantak until the date of her deposition. (James Flatt Depo. p. 25, App. p. 476)

The only people with direct recollection of the events surrounding the birth of Josiah Flatt were James and Anita Flatt. They received no booklets on circumcision. (Anita Flatt TT p. 466-467, App. p. 322; James Flatt Depo. p. 29-30, App. p. 477) Neither James nor Anita Flatt received any information from Dr. Bro during prenatal visits about circumcision. Anita Flatt recalls a nurse coming in on the evening of March 6 requesting that she sign a circumcision consent form. (Anita Flatt TT p. 458, App. p. 320)

At the time of admission, Anita Flatt indicated to MeritCare staff that Dr. Pitts was the baby's physician. (Anita Flatt TT p. 452, App. p. 318; Tr. Ex. 7) Neither Anita nor James Flatt requested Dr. Kantak to take care of their son, Josiah. (Anita

Flatt TT p. 441, App. p. 316; Dr. Kantak TT p. 1154, App. p. 381) The first time Anita Flatt ever met Dr. Kantak was in the morning of March 7, 1997. (Anita Flatt TT p. 455, App. p. 319) Anita Flatt did not know, until Dr. Kantak introduced herself on March 7, 1997, that she would be circumcising Josiah Flatt. (Anita Flatt TT p. 462, App. p. 321) Anita Flatt found it difficult to understand Dr. Kantak because of an accent. Anita Flatt remembers Dr. Kantak coming into the room and announcing that she would be doing the circumcision. She stayed in the room for a minute or two, answered a question about pain, and left. (Anita Flatt TT p. 465, App. p. 321) Anita Flatt first saw the booklets on circumcision at her deposition in November 2000. (Anita Flatt TT p. 466-467, App. p. 321)

After seeing the result of the circumcision on Josiah, Anita and James Flatt broke into tears because it looked like a "bloody stump". (Anita Flatt TT p. 468, App. p. 321) James and Anita Flatt noticed that Josiah was in significant pain for approximately 10 days following the circumcision. (Anita Flatt TT p. 469, App. p. 321) In May 1997, Dr. Mastel diagnosed asymmetry and adhesions, both known complications of a circumcision. (Dr. Mastel TT p. 1378, App. p. 406) Dr. Mastel would only make note of adhesions if they were thick and dense. (Dr. Mastel TT p. 1388, App. p. 408)

Several days following the circumcision, James Flatt did some research on the internet and was astounded to find that death can result from circumcision. (James

Flatt Depo. p. 65, App. p. 481; Anita Flatt TT p. 510, App. p. 324) What was particularly disturbing was that the removal of the foreskin removed erogenous tissue which could diminish sexual pleasure. (Anita Flatt TT p. 510, App. p. 324; James Flatt Depo. p. 32, App. p. 477) After learning of the numerous complications associated with circumcision and the resultant loss of erogenous tissue, James and Anita Flatt would not have consented to the procedure if they had been adequately informed. (Anita Flatt TT p. 552-553, App. p. 326; James Flatt Depo. p. 31-34, App. p. 477-478; p. 48-49, App. p. 479-480)

Dr. Kantak did not disclose anything to Anita Flatt about the risks other than answering a question about pain. (Anita Flatt TT p. 554, App. p. 327) Neither Anita Flatt nor James Flatt would have consented to the circumcision if Dr. Kantak had discussed the risks of excessive bleeding, concealed penis, skin bridges, adhesions, asymmetry, major skin loss, necrotizing fascitis, severe permanent disability or death, meatitis, chordee, inclusion cysts, lymphedema, hypospadias, or epispadias. (Anita Flatt TT p. 1273-1276, App. p. 397-398) Anita Flatt wanted to know all of the risks associated with circumcision, wanted to know what the function was of the tissue removed, wanted to know how a baby is restrained during the circumcision procedure, and that death could have occurred. Parents would want to know that death is a potential complication of circumcision. (Dr. Kaplan TT p. 693, App. p. 350) Anita Flatt was completely unaware that the foreskin was naturally fused to the glans.

No defense witnesses contradicted the recollection of James and Anita Flatt. Dr. Kantak remembers nothing about March 6, 7 or 8. (Dr. Kantak TT p. 1153, App. p. 380) None of the nurses on duty in the nursery or on the floor remember the events of the birth of Josiah Flatt. Doreen Brass, the admitting nurse, has no recollection of the birth or postpartum care. (Brass TT p. 808-809, App. p. 358) Rita Frovarp, RN, on duty March 6, 1997, who would have done rounds with Dr. Kantak, has no recollection of any care or treatment of Anita Flatt or Josiah Flatt. (Frovarp TT p. 835-838, App. p. 360) Deborah Ludwig, LPN, has no recollection of the care or treatment given to Anita Flatt or Josiah Flatt, although the records reflect that she provided some care. (Ludwig TT p. 877-878, App. p. 362) Ruth Larson, the LPN who witnessed Anita Flatt's signature, has no recollection of the care and treatment given to Anita Flatt. She did recall that it was unusual for her to obtain a signed consent form and that she has only done it a half a dozen times in twenty years. (Larson TT p. 919-920, App. p. 364) Roberta Engquist has no recollection of the care and treatment given to Anita Flatt or Josiah Flatt. (Engquist TT p. 947, App. p. 366) Sherry Stoa, RN, has no recollection of care and treatment given to Anita or Josiah. Flo Dreiling has no recollection of the events, even though she was working on the date when Anita Flatt would have been admitted. (Dreiling TT p. 1344, App. p. 404) Amy Thilmony, RN, may have assisted in the circumcision, but does not recall the events of the day. (Thilmony TT p. 1444, App. p. 418) The record is devoid of any

recollection of the events that took place on March 6 and March 7 in the care and treatment of Anita Flatt and Josiah Flatt.

The only evidence contradicting Anita and James Flatt's recollection was evidence of a "routine". Dr. Kantak testified at length about her "routine", as did most of the nurses. The "routine" was aided by the 6 years between the birth of Josiah and trial. Dr. Kantak, by her own admission, does not describe risks to parents of phimosis, wound separation, concealed penis, unsatisfactory cosmesis, skin bridges, urinary retention, meatitis, inflamation of the prepucial opening, chordee, inclusion cysts, urethrofistula, amputation of a portion of the glans penis, trauma, or death. (Dr. Kantak TT p. 1208-1211, App. p. 387-390) Dr. Kantak did not disclose asymmetry or adhesions as risks because she did not consider them risks. (Dr. Kantak TT p. 1229, App. p. 394)

The nurses employed by MeritCare aid and assist in performing the circumcision. MeritCare Hospital provides the nurses, circumstraint, circumcision tray, sterile drape, mosquito forceps, the Gomco Clamp, and scissors. (Dr. Kantak TT p. 1232-1233, App. p. 395)

In August 1997, Dr. Sawchuck, a pediatric urologist at MeritCare Clinic, saw Josiah Flatt at the request of Dr. Montgomery, who was working in his position as Medical Director addressing the Flatts' complaint. Dr. Sawchuck diagnosed adhesions that can cause asymmetry, and if left untreated, can become a skin bridge.

(Dr. Sawchuck TT p. 1421-1427, App. p. 412-414)

The State of North Dakota enacted legislation in 1995, that criminalized surgical alteration of female genitalia. (Senate Bill No. 2454, which became law on August 1, 1995, codified at N.D.C.C. 12.1-36-01, App. p. 36) Some forms of female genital alteration are anatomically identical to circumcision. (Robert S. Van Howe Affd. 2-10-00, App. p. 89; Docket Entry No. 36)

IV. LEGAL ARGUMENT

A. Did the Trial Court err in preventing Plaintiff's experts, Dr. Christopher Cold and Dr. Robert S. Van Howe from testifying as to the standard of care for medical doctors in obtaining informed consent for an elective medical procedure on an infant?

1. Expert Testimony Required to Establish Standard of Care.

A Plaintiff must establish, through expert testimony, the degree of skill and care required of a physician, and whether specified acts fall below that standard of care. *Jaskoviak v. Gruver*, 2002 N.D. 1, 638 N.W.2d 1. Plaintiff called two experts to establish the standard of care. The District Court excluded their testimony on the informed consent issue, ruling as a matter of law that the "standard of care" is a legal issue. (TT p. 561, App. p. 328)

Dr. Christopher Cold is a Pathologist, sought to use slides to aid his testimony about the embryological development of the foreskin, and described how it is composed of primary erogenous tissue. The slides were for illustrative purposes only. (App. p. 435) The District Court sustained an objection and denied the ability of Dr. Cold to use slides to aid his testimony. (Dr. Cold TT p. 142-144, App. p. 272-273) As a result of the exclusion of slides, Dr. Cold had to use freehand drawings on a grease board to describe the five layers of tissue in an infant foreskin. (Dr. Cold TT p. 157, App. p. 276) Dr. Cold was limited by his inadequate artistic skills to show the interaction of the five layers of the foreskin. (Dr. Cold TT p. 164, App. p. 278) The slides excluded would have aided his ability to describe the anatomical structure of

the foreskin. (Dr. Cold TT p. 140-143, App. p. 272-273)

Dr. Cold was trained in the use of the various techniques for circumcision, including the Gomco Clamp, Mogen Clamp and Plastibell, and testified that different amounts of tissue are removed using each procedure. (Dr. Cold TT. p. 173, App. p. 280) Citing *Jaskoviak* at paragraph 17, the District Court excluded any evidence or testimony regarding the alternate methods of removing a foreskin, even though differing amounts of tissue are removed by each method. (Dr. Cold TT p. 176-183, App. p. 281-282)

It is important to understand that Josiah Flatt, a newborn infant, was the patient, and that the surgical procedure was not necessary to treat a medical condition. There was no medical reason to perform surgery on Josiah Flatt, who was a normal, healthy newborn boy. Dr. Cold was asked to describe the difference in approach of a medical doctor obtaining "proxy consent" as opposed to "express consent". Defense objected to the question arguing that it was a matter of law and not medical testimony. The Court sustained the objection. (TT p. 243-245, App. p. 294-295) This exchange took place:

Q: Are you familiar with the duty of a physician when obtaining proxy consent?

A: Yes I am.

Q: Could you describe that duty?

A: Proxy consent

Ms. Lord: Same objection your Honor.

The Court: Sustained. It's a matter of law. The Court will be instructing the jury on this. Please move on Mr. Baer.

Prevented from testifying as to the obligations of a medical doctor to describe the standard for disclosure, Plaintiff inquired about what risks needed to be disclosed:

Q: Now, when performing elective surgeries, what is the obligation of a medical doctor in disclosing risks? What type of risks need to be disclosed.

A: Basically all the risks.

Ms. Lord: I request that the answer be stricken from the record. It is – I object to the form of the question. Mr. Baer has been instructed not to request instructions on the law from this witness and that is a question that was inappropriate.

(Discussion at the bench.)

The Court: The objection is sustained.

(Dr. Cold TT p. 244, l. 4-17, App. p. 294)

Exclusion of Dr. Cold's testimony about what risks need to be disclosed in an elective procedure is an arbitrary, unreasonable and unconscionable restriction on the Plaintiff's ability to present its case. *Peters-Riemers v. Riemers*, 2001 N.D. 62, 624

N.W.2d 83.

The Court excluded Dr. Cold's testimony not on the basis of his qualifications, but because it was a "legal issue". The Trial Court misunderstood its role. The Court does not set the "standard of practice", it only sets the standard by which the conduct is measured, i.e. "reasonable patient" standard. *Jaskoviak* at ¶16 citing *Winkjers v. Herr*, 277 N.W.2d 579, 587-88 (N.D. 1979).

The defense repeatedly, in the presence of the jury, attempted to limit Dr. Cold and other expert witnesses' testimony on this crucial issue. The Court was misled by the Defendant to believe the role of the Court was to set the standard of practice. To illustrate the point Dr. Cold was commenting on the sufficiency of the "Infant Care Booklet" (Tr. Ex. 58) developed by MeritCare to meet the informed consent standard. He was asked:

Q: Okay, then the next paragraph deals with consent.

A: Right. "The written and verbal consent of one, or preferably both parents is required." I think that is crucial because both parents are involved in this decision. So I would agree with that.

Ms. Lord: Your Honor, I request that the answer be stricken. This witness is again being asked questions about the state of the law, which he's not qualified to answer, and only the Court can give the

jury instruction on the law.

The Court: Sustained, the jury is admonished that the last response is stricken. You are not to consider it as evidence.

(Dr. Cold TT p. 260, App. p. 298)

Concerned about the rulings made at the bench, (Dr. Cold TT p. 244, 260, App. p. 294-298), during the morning recess, out of the presence of the jury, Plaintiff sought the Court's clarification of its restrictive rulings. Plaintiff argued that under *Jaskoviak*, it was the Plaintiff's duty to show what a medical doctor must provide by way of information before performing an elective procedure. (TT p. 289-293, App. p. 300-301) The Court continued to limit the ability of Plaintiff's expert to describe the duty of a doctor to give information on an elective procedure. The Court continued to sustain the objections and ruled that

> "I am not going to argue with you [Mr. Baer]. That's what I understood you to ask. What is the duty, what must a physician--what's the duty of a physician. That goes to what is the duty that the law has to--the Court has to instruct on the law. You can ask about the risks, the benefits, those kinds of things, but the duty is something that is written in the law and that's for the Court. And that's my decision in that regard."

(Dr. Cold TT p. 292-293, App. p. 300-301)

By preventing Dr. Cold from testifying that all risks must be disclosed before doing an elective procedure, it gutted Plaintiff's case. On the basis of the rulings during Dr. Cold's testimony, the second expert witness, Dr. Robert Van Howe, was severely curtailed.

Dr. Robert Van Howe is a Board Certified Pediatrician. He is familiar with the accepted medical standard for obtaining "informed consent" and "informed permission". Informed consent is directly from the patient, informed permission from a proxy. The AAP has developed a position statement on informed consent which sets a nationwide standard for obtaining informed consent. (Tr. Ex. 31, App. p. 242) The Court prohibited Dr. Van Howe from discussing the national standard as contained in Exhibit 31. (Dr. Van Howe TT p. 345-346, App. p. 306) Dr. Van Howe was asked,

Q: When a medical doctor talks about informed consent and obtaining informed consent, are there certain things, if a medical doctor is meeting the standard of care, that they must obtain and assess of a patient or a surrogate before they can get informed consent?

A: There are basically three elements. And this document [Ex. 31] lists it as four, although I think of the second and third as being one. First, there has to be disclosure.

Voglewede: Your Honor, I am going to object to this again. It's attempting to have the witness state what the legal requirements are for the duties of informed consent.

The Court: Mr. Baer, we have discussed this before. I have ruled accordingly before. And this is a matter of law, and the law comes from the Court.

Witness: Actually I think it's ethical.

The Court: I'm sorry, don't argue with me.

Witness: I'm sorry.

The Court: So the objection is sustained.

(Van Howe TT p. 347, App. p. 306) This exchange took place in the presence of the jury.

Dr. Van Howe was prohibited from testifying as to the standard of care in obtaining informed consent and proxy informed consent. Dr. Van Howe was asked the different obligations of a doctor when dealing with an elective procedure on an infant.

Van Howe: The standard of practice is usually to try to talk the patient out of the elective procedure. And if they're still, after you're trying to talk them out of it, are willing to go through with it, you can be fairly sure that they're aware of the downside of performing

the procedure.

Q: Okay, and does that medical practice, or the accepted medical practice, is it altered if you're dealing with a proxy consent situation?

A: Well, with a proxy

Voglewede: Objection, same grounds. It gets into the legal issue.

The Court: Sustained.

(Van Howe TT p. 349, App. p. 307)

When asked to discuss inconsistencies in various statements developed by the AAP (compare exhibit 29 (Circumcision) and 31 (Informed Consent)), as it relates to informed consent from the parent of an infant, the defense objected on the grounds that it was "inquiring into the legal capacity of a parent to consent." After a bench conference, the Court instructed the jury "members of the jury, I want to caution you again, the law will come from the Court. At the end of the evidence, I will be instructing you on the law and that is the law you must use in deciding this case." (Van Howe TT p. 360-361, App. p. 298-299)

The Court's exclusion of expert testimony as to the standard of care for obtaining proxy consent for an elective procedure on a newborn infant for cosmetic purposes was an abuse of discretion which affected a substantial right of the Plaintiff. Based on this evidence alone, the Court acted unreasonably, arbitrarily and in an

unconscionable manner.

B. The District Court erroneously excluded relevant, nonprejudicial evidence including a videotape showing the different circumcision procedures, circumcision tools, circumstraint, photos of an intact penis, meeting minutes, and billing statements, and denied cross-examination of expert witnesses, which affected a substantial right of the Plaintiff.

1. Exhibits.

1(a). Relevant Evidence is Admissible.

Relevant evidence is any evidence having a tendency to make the existence of any fact that is of consequence more probable or less probable than it would be without the evidence. N.D.R.Ev. Rule 401. Relevant evidence is admissible except as otherwise provided by the Constitutions of the United States and the State of North Dakota. N.D.R.Ev. Rule 402. Videotapes are admissible to explain a technical procedure. *Williams Co. Social Service Board v. Falcon*, 367 N.W.2d 170 (N.D. 1985). Photographs or videotapes, even if they excite the emotions of the jury, are admissible. *State v. Miller*, 466 N.W.2d 128 (N.D. 1991).

A District Court abuses its discretion when it acts in an arbitrary, unconscionable or unreasonable manner, or when it misinterprets or misapplies the law. *Mellum v. Mellum*, 2000 N.D. 47, ¶21, 607 N.W.2d 580. Error may not be predicated upon the erroneous exclusion of evidence unless a substantial right of the party is affected. *State v. Hart*, 1997 N.D. 188, ¶21, 569 N.W.2d 451, N.D.R.Ev. Rule 103(a).

In its Pretrial Order (App. p. 138), the Court excluded a number of exhibits on relevancy basis. The issues which were of consequence in this trial were, at minimum, the elements of informed consent, which would include the extent of a available choices for treating the condition, disclosure of the relevant and material risks associated with each available choice, and most importantly, what information a reasonable person might want to know in determining whether to consent to a medical procedure. It is for the trier of fact to determine if a risk is the type of harm which a reasonable patient would consider in deciding on medical treatment. *Jaskoviak* at ¶18. All of the evidence excluded was relevant to determine if Anita Flatt would have consented to the procedure.

1(b). Videos.

Plaintiff offered videos to describe the actual circumcision procedure using the three different commonly used methods. A reasonable parent would want to know how their child is treated while performing this cosmetic elective surgery. A person who would see a video of a circumcision may be compelled to ask "why is this done? Why do they strap the child in with velcro straps? Why is the child crying? Is the foreskin actually grown together with the head of the penis?" The videotapes proffered would provide information a parent would want to know to make a decision on whether or not to circumcise their child, and give the jury a better understanding on what information a parent might want to make their decision.

The Court also found that it would be misleading to a jury to allow the videotapes to be shown because a jury could "incorrectly identify Josiah's experience with those of the babies in the videos." The fact is that none of the participants in the cutting of Josiah Flatt remember what his response was. The testimony is unanimous that the response varies greatly from baby to baby with anesthesia or without anesthesia. The videotapes were not confusing.

1(c). Surgical Instruments, Surgical Equipment and Surgical Technique.

Plaintiff sought to introduce a number of surgical instruments, surgical equipment and elicit testimony of surgical technique to allow the jury to understand that circumcision is more than just a "snip". Most parents do not know that circumcision requires the ripping of the foreskin from the glans penis before slicing it off. The surgical instruments would allow a parent to understand what the procedure entails and make a more informed decision as to whether or not they want to subject their child to the additional pain and agony when no medical diagnosis exists.

The specific element of informed consent that the surgical tools address is whether or not complete information was given and if a "reasonable patient" would have consented to the procedure had the full extent of the elective procedure been clarified. The District Court indicated "merely establishing that skin was cut and crushed in this surgery does not establish that there was any pain involved." Given

the undisputed testimony of Dr. Kantak that there is no way to determine how much pain a child suffers, nor that pain control measures are 100%, this is an absolute misstatement of the facts and common knowledge. (Dr. Kantak TT p. 1182-1184, App. p. 382-384)

1(d). Hospital Minutes of Meetings.

The District Court excluded minutes of hospital and clinic committees which dealt directly with the development of the booklet "Should Your Infant Child Be Circumcised?" Dr. Shoemaker testified that the booklet first came on-line for circulation in January 1997, just 5 to 8 weeks before Josiah Flatt's birth. The minutes of the meeting do not reflect authorization to distribute the booklet. The minutes of the meeting from December 1996, authorized the printing of brochures. There are no further minutes suggesting that the minutes from 1996 were approved, nor that the publication was ever authorized to be circulated. Given the heavy reliance by the Defendant on the development of the booklet "Should Your Infant Child Be Circumcised?", it was prejudicial error to exclude cross-examination of the development of the brochure.

1(e). Circumstraint and Photographs of Intact Penis.

Plaintiff had a right to present evidence touching on the issue of what a reasonable patient would want to know. A reasonable parent would want to know what type of surgical procedure their child is undergoing to sculpt and improve what

God intended. The photographs of the intact penis would allow a jury to understand what is lost and what a foreskin develops into if allowed to grow. The circumstraint would graphically illustrate for parents that their child will be held spreadeagle with velcro straps. The exclusion certainly negatively affected the substantial right of the Plaintiff to have a fair trial.

2. Denial of Cross-Examination.

After Plaintiff's experts were excused, Dr. Montgomery, a Board Certified Pediatrician, was called for cross-examination under the Rules. Dr. Robert Montgomery concluded that "good medicine was practiced by all those involved in your and your son's care." (Dr. Montgomery TT p. 563, App. p. 329; Tr. Ex. 15) In an effort to explore how he concluded that "good medicine" was practiced, he was asked:

Q: And would you agree, Dr. Montgomery, that the Physician Statements of the American Academy of Pediatrics essentially provide a standard of care for physicians who practice in pediatrics?

Voglewede: Objection your Honor. That goes to a legal issue.

Mr. Baer: It's a standard of care your Honor.

The Court: The standard of care that this jury needs to concern itself with is the legal standard that I will give them. And that's--you can ask

him what he feels is required in certain circumstances, but the legality as to what must be disclosed, I will give to the jury. So the objection is sustained as far as that goes.

(Dr. Montgomery TT p. 560, App. p. 328)

The Court prevented any cross-examination of Dr. Montgomery and essentially took the medical standard out of the jury's hands. The Court would be setting the standard. By the end of the first week of trial, defense had convinced the Court that the standard of care was a legal issue.

In another exchange in front of the jury, a defense objection was made to the AAP standard on elements for informed consent. Upon objection, the Plaintiff was asked why Dr. Montgomery was being called. Plaintiff stated:

Mr. Baer: For establishing the appropriate requirement for medical doctors at MeritCare to disclose information to parents of children undergoing procedures.

The Court: The standard of care is a legal issue in this case. The jury will be informed in the law by the Court.

(Dr. Montgomery TT p. 561, App. p. 328) All of this discussion took place in the presence of the jury. Dr. Montgomery TT p. 562-569, App. p. 329-330) The above exchange shows that the District Court prevented Plaintiff from cross-examining Dr. Montgomery on the conclusions he reached in this letter, already part of the evidence,

which stated "after a complete review, I feel good medicine was practiced by all those involved in your and your son's care." (Dr. Montgomery TT p. 564, App. p. 329) Without the ability to cross-examine Dr. Montgomery on his conclusion that "good medicine was practiced by all those involved in your and your son's care", it severely undermined Plaintiff's ability to expose the weaknesses and basis of his opinion, not to mention, referring to the jury that the Court would give them the "standard of care". More importantly, the Court had already ruled that the "standard of care" was a legal issue.

Cross-examination has been recognized as the greatest legal engine ever invented for the discovery of the truth. *Lily v. Virginia*, 527 U.S. 116, 114 (1999). The right to cross-examine is absolute and the denial of the right as to material evidence is prejudicial error requiring a new trial. *State v. Bartkowski*, 290 N.W.2d 218, 219 (N.D. 1980), see also *Peters-Riemers v. Riemers*, 2001 N.D. 62, ¶37 (dissent), 624 N.W.2d 83. Complete denial of cross-examination is a constitutional error. *State v. Bartkowski*, 290 N.W.2d 218 (N.D. 1980).

The denial of the right to cross-examine Dr. Montgomery was extremely prejudicial. He was a partner and associate of Dr. Kantak, a member of the AAP, he consulted with the family practitioner, Dr. Mastel, and Dr. Sawchuck, a specialist, and concluded that "good medical care was practiced by all concerned". The Court's misunderstanding of the case is illustrated by the following statement:

"You were asking him what is the-what is a pediatrician required to tell a patient to get informed consent, or something to that effect. You see, that's invading the province of the Court and the jury." (Dr. Montgomery TT p. 565, App. p. 329)

The denial of the right to cross-examine affected a substantial right of the Plaintiff to undermine the credibility of the defense that "good medicine" was practiced, and the Court's fundamental misunderstanding of the role of the expert prejudiced the Plaintiff.

3. Admission of Dr. Sawchuck Opinion Not Previously Disclosed was Prejudicial.

After restricting Plaintiff's ability to cross-examine Dr. Montgomery on the care and treatment given to Josiah Flatt, the Court inexplicably permitted Dr. Sawchuck to testify as to an opinion not previously disclosed, and prevented Plaintiff from cross-examining the basis of the surprise opinion.

Dr. Sawchuck treated Josiah Flatt for complications arising from the circumcision, i.e. adhesions and asymmetry. His report was part of the medical records and contained no opinions on whether the circumcision was properly performed. Nevertheless, Dr. Sawchuck was asked, and over objection, allowed to state his opinions about whether the circumcision had been properly performed. (Dr. Sawchuck TT p. 1404-1406, App. p. 410)

The bias of the District Court is clearly evident by the Court's willingness to

allow Dr. Sawchuck to testify in the form of an opinion not previously disclosed and preventing cross-examination of the opinion, (Dr. Sawchuck TT p. 1404-1406, App. p. 410), and the Court's restriction on cross-examination of Dr. Montgomery on a disclosed medical opinion. (Dr. Montgomery TT p. 567-568, App. p. 330)

C. The jury instructions as a whole were misleading and prejudicial to the Plaintiff, when, amongst other things, the Court attempted to blend the "reasonable patient standard" and the "professional standard", which misled and confused the jury.

1. "Reasonable Patient" v. "Professional Standard".

It is time that the Supreme Court clearly weigh in on the issue of whether informed consent is judged by the "professional standard" or the "reasonable patient" standard. Defendants argued to the District Court "we do not think that the North Dakota Supreme Court has been clear on what duty of disclosure should be applied; the professional standard, which looks to the custom in the community, or the patient standard, which talks about what a reasonable patient would want to know." (TT p. 1291, App. p. 400) The two standards conflict and cannot be reconciled in a single instruction. Plaintiff requested a special instruction on informed consent patterned after NDJI-Civil 14-20. The Court rejected Plaintiff's proposed instruction, instead, adopting Defendant's proposed instruction without change. The jury instruction given on the physician's duty to disclose is directly contrary to the reasonable patient standard. The reasonable patient standard requires "all risks potentially affecting the decision must be unmasked." *Jaskoviak v. Gruver*, 2001 N.D. 1, ¶16, 638 N.W.2d 1.

It is time this Court puts a fence around the medical community's ability to hide behind professional standards which are so at variance with the right of self-determination on the part of patients. Over objection, the instruction given was:

> "A physician has a duty to disclose to the patient, or in the case of a child, to his parent, the available alternatives and the material and known risks potentially involved in each alternative. A duty to disclose can arise only if the physician knew or should have known of the risk to be disclosed. A physician is not required to inform a patient of risks that are so remote as to be negligible, even where the consequences may be severe, and is not required to inform the patient of a very minor consequence, even though the probability is high. A physician has no duty to disclose all possible risks and dangers of the proposed procedure, but only those that are significant in terms of their seriousness and likelihood of occurrence. A doctor should not be required to give a patient a detailed, technical, medical explanation that in all probability the patient would not understand. There is no need to disclose risks of little consequence, those that are extremely remote, or those that are common knowledge as adherent in the treatment."

(underlining supplied) (TT p. 1589-1618, App. p. 426-434)

The instruction is particularly offensive to the law and testimony in this case

inasmuch as the Defendant herself testified that she would need to disclose all risks in order to obtain informed consent. (Dr. Kantak TT p. 1204-1205, App. p. 385-386) Dr. Shoemaker indicated that parents should be fully informed and that all risks should be identified. (Dr. Shoemaker TT p. 1045-1047, App. p. 373-374) Dr. Shoemaker wrote parents should receive a "complete explanation of the benefits and risks of any procedure". (Shoemaker Circumcision Debate, App. p. 257) Both Dr. Cold and Dr. Van Howe indicated that all risks need to be disclosed, particularly in an elective procedure. (Dr. Cold TT p. 253, App. p. 297) Statements of the AAP, considered to be general guidelines of the national standard of care, require "parents [to] be fully informed of the possible benefits and potential risks of newborn circumcision." (AAP 1989 Report of Circumcision, Tr. Ex. 112, App. p. 240)

The jury instruction so at variance with the undisputed medical testimony is prejudicial. When doctors are asked to perform an elective procedure, without medical benefit or diagnosis, on an infant, the standard of care requires a full recitation of the risks and benefits, not just those physicians might deem important. The law demands more than the medical custom which mouths the words of informed consent but does not apply the consent in practice. (Dr. Lunn TT p. 1531-1534, App. p. 422-423)

2. No Claim of Botched Procedure.

The jury instructions were deficient inasmuch as they instructed "there is no

claim for you to consider that the procedure was done wrong or that Dr. Kantak was negligent in performing the circumcision procedure." (App. p. 167) This is directly contrary to significant medical testimony indicating that undisclosed risks were the cause in fact of Anita Flatt's complaints. But for the adhesions and asymmetry, both known risks which were not disclosed, Anita Flatt would not have sought a second opinion or done research on the circumcision. This instruction prejudiced the jury in ruling as a matter of law that the circumcision was done properly.

3. Statutory Informed Consent.

The Court erred in refusing to give the statutory informed consent instruction patterned after N.D.C.C. 23-12-13. (See proposed instruction, App. p. 218) The medical standard of care can be modified by legislation. (Docket No. 186, Dr. Shoemaker Depo. p. 58-59, App. p. 469) N.D.C.C. 23-12-13 adopts a two-step process to determine when to authorize medical intervention. First, the parent must determine, if the child were able to make a decision would he consent to the proposed health care, and absent such a decision, the parent must make the decision based on a child's "best interest". Only the second element applies for a newborn.

A mom who has no understanding of circumcision or an intact penis is ill-equipped to make a decision on their son's "best interest" unless she has complete, full and unbiased information about the foreskin. First and foremost, you would expect that a mom would need to know the purpose, function and natural development

of a penis, of which the foreskin is one structure, before she is authorized to consent to its removal. Dr. Kantak did not disclose the function. (Anita Flatt TT p. 1276, App. p. 398) Further, you would expect that a mom would want to know what the procedure would entail, what restraints would be used and how the foreskin would be ripped from the glans penis.

If a parent took a one-day old child and ripped the foreskin from the glans penis, it would be defined as domestic violence by N.D.C.C. 14-07.1-01, and be a basis to deny custody to the parent. If one parent consented to unnecessary harm of an infant such as piercing an ear, tongue, nipple, navel, clitoris, or foreskin, this Court would deem the parent to be unfit and likely deny custody. A parent who, without adequate information, makes a decision to allow a medical doctor to surgically amputate the most erogenous tissue of the male body for no therapeutic reason, could be viewed to be acting contrary to the best interests of the child. North Dakota has weighed in on the issue of informed consent and the standard for determining informed consent. Informed consent to a non-therapeutic elective procedure on an infant can only be made after the best interests of the child have been considered. Any non-medically indicated surgery that permanently alters the penis is not in the child's best interest. It was error not to give this instruction. (See more fully developed argument at App. p. 121)

4. Special Verdict – Comparative Fault.

It was error to submit the Special Verdict form with a question about comparative fault for Anita Flatt. Clearly, there is no duty on the part of a parent to insure informed consent is obtained. There was no Jury Instruction on comparative fault. This was misleading and it prejudiced a substantial right of Plaintiff

D. Even if any single error of law is not sufficient to grant a new trial, the cumulative effect of the multiple errors deprived the Plaintiff of the substance of a fair trial.

The errors committed by the Trial Court were numerous. They began pretrial by excluding relevant evidence and continued throughout the course of trial. A summary of the errors follows:

- excluding any discussion about embryology, anatomy, circumcision procedures, tools of the trade. (TT p. 41, 43-44, App. p. 263-264)
- Objection and interruption of Plaintiff's opening statement with the admonishment that Court will instruct the jury as to the law. (TT p. 64-65, App. p. 266)
- Objection on opening statement about discussion of labor and delivery of Josiah Flatt as being not relevant. (TT p. 71-74, App. p. 268)
- Denied Dr. Cold's use of slides to aid his testimony to talk about embryology of the foreskin. (Dr. Cold TT p. 142-144, App. p. 272-273)
- Denial of the use of photos to aid in the understanding of the foreskin

and the five layers of tissue. (Dr. Cold TT p. 163-164, App. p. 278)

- Exclusion of testimony regarding three techniques of circumcision, each of which remove a different amount of tissue. (Dr. Cold TT p. 176-183, App. p. 281-283)
- Exclusion of relevant exhibits. (Dr. Cold TT p. 194-212, App. p. 285-290)
- Exclusion of Dr. Cold testifying on the standards for obtaining informed consent. (Dr. Cold TT p. 243-247, App. p. 294-295)
- Exclusion of Dr. Cold's ability to testify as to statements contained in the infant care booklet, Exhibit 58. (Dr. Cold TT p. 260, App. p. 298)
- Exclusion of Dr. Robert Van Howe's testimony on the difference between informed consent and informed permission. (Dr. Van Howe TT p. 346-352, App. P. 306-307)
- Exclusion of Dr. Van Howe's testimony on the AAP Statement regarding informed consent. (Dr. Van Howe TT p. 359-363, App. p. 309-310)
- Prohibiting cross-examination of Dr. Montgomery on his opinions that good medical care was practiced. (TT p. 556-568, App. p. 327-328)
- Taking defense witnesses out of order. (TT p. 568-575, App. p. 330-333)

- Denial of right to cross-examination of Dr. Shoemaker on the elements of informed consent. (Dr. Shoemaker TT p. 1038-1039, App. p. 371-372)
- Denial of the right to cross-examination of Dr. Sawchuck and allowance of his undisclosed opinion. (Dr. Sawchuck TT p. 1405-1406, App. p. 410)
- Denial of right to cross-examine Dr. Sawchuck on when he formed his opinion that the circumcision was performed properly. (Dr. Sawchuck TT p. 1437-1438, App. p. 416)
- Dismissal of MeritCare Hospital, even though they were agents of Dr. Kantak in obtaining consent. (TT p. 1313, App. p. 402)

In addition to the erroneous instructions previously discussed, the above errors prejudiced the Plaintiff and denied Plaintiff of the substance of a fair trial. A new trial is appropriate where, even though one error alone is not cause for a new trial, a cumulation of errors that demonstrates a denial of a fair trial, is grounds for such relief. *Kingdon v. Sybrant*, 158 N.W.2d 863 (N.D. 1968).

E. The District Court abused its discretion in taxing the costs when the proper procedure was not followed denying the Plaintiff the opportunity to contest the reasonableness of the expert witness fees.

After objection to costs were heard, the Court entered an Amended Judgment awarding costs to the Defendants in the sum of $58,506.20. The entry of costs was

deficient on procedural and substantive grounds. Procedurally, the Defendants did not follow the rule contained in N.D.C.C. 54(e). Defendants failed to accompany a copy of the Statement of Costs and Disbursements with the Notice of Entry of Judgment. Defendants admit they did not follow the proper procedure. All costs should be denied.

The Court further erred in arbitrarily adopting the amounts requested by Defendants without independently determining whether or not they were reasonable or necessary. The Court did not make independent findings of the reasonableness of costs and expenses. Although disbursements are permitted if reasonable, the Court must make findings that the fees are in fact reasonable. *Peterson v. Hart*, 278 N.W.2d 133 (N.D. 1979); N.D.C.C. 28-26-06. On the hearing for objection to taxation of costs, no evidence was presented to the Court. The Court erred in taking into consideration an Affidavit submitted after the fact. In order to determine if fees are reasonable, the Court needs to take oral testimony or allow some cross-examination. A Minnesota Court applying a statute almost identical to the North Dakota taxation statute has found that the Court must take oral testimony so a full record is available for review. *Quade & Sons Refrigeration, Inc. v. Minnesota Mining and Manufacturing*, 510 N.W.2d 256 (Minn. App. 1994), rev. denied. There is insufficient evidence to substantiate that the taxed costs were reasonable.

F. The District Court erred as a matter of law in dismissing the equal protection constitutional claims challenging the constitutionality of N.D.C.C. 12.1-36-01 on the basis of lack of standing.

North Dakota passed N.D.C.C. 12.1-36-01 which criminalizes surgical alteration of female genitalia, but does not provide any protection for boys. Josiah Flatt was born March 6, 1997, and circumcised on March 7, 1997. If the statute were gender neutral, his genitalia would be intact today. Gender-based states are "inherently suspect". *Tang v. Ping*, 209 N.W.2d 624 (N.D. 1973). Classification based on sex is inherently suspect requiring strict judicial scrutiny to determine if it is justified by a compelling state interest. *State ex rel Olson v. Maxwell,*, 259 N.W.2d 621 (N.D. 1977).

The District Court dismissed the constitutional challenge on the basis of standing. The State's argument is generally that the Plaintiff Josiah Flatt has not suffered an injury in fact. It is hard to fathom an injury more real that the severing of the most erogenous tissue simply because a statute was drafted gender specific. A party is entitled to have a Court decide the merits of a dispute. *State v. Tibor*, 373 N.W.2d 877 (N.D. 1985). Standing is a concept used "to determine if a party is sufficiently affected to as to insure that a justiciable controversy is presented to the Court." *Billey v. North Dakota Stockmen's Assn*, 579 N.W.2d 171 (N.D. 1998). Josiah Flatt would be intact today if N.D.C.C. 12.1-36-01 applied to him. Plaintiff contends that the statute is under-inclusive. Court's have regularly refused to

dismiss cases involving under-inclusiveness challenges to statutes on the standing rational. In *Orr v. Orr*, 440 U.S. 268 (1979), a husband challenged the constitutionality of a statutory scheme providing that husbands, but not wives, may be required to pay alimony. It was sufficient for standing that the plaintiff "bears a burden he would not bear were he female". *Orr* 440 U.S. at 273. Similarly, in *Arkansas Writers Project, Inc. v. Ragland*, 481 U.S. 221 (1987), a similar argument against standing was rejected because "it would effectively insulate under-inclusive statutes from constitutional challenge, a proposition . . . soundly rejected in *Orr*." Judge Posner, in a decent, *United States v. Marshall*, 909 F.2d 1312, 1336 (7th Cir. 1990), stated "in challenging a statute as a denial of equal protection, a Plaintiff will invariably be comparing his situation under the statute with those of persons not before the Court. (citations omitted). How could it be otherwise? If a tax statute exempts a class of taxpayers on grounds claimed to be irrational, no member of that class will attack the exemption as a denial of equal protection, yet the challenger must be able to point to the favored class in support of his constitutional challenge. He is permitted to do this without having to drag the members of that class into court."

It is difficult to understand a person who would have standing to challenge the constitutionality of N.D.C.C. 12.1-36-01 if not Josiah Flatt.

Further, if a case is capable of repetition, yet evading review, an exception to the classical standing argument exists. *Doe v. Charleston Area Medical Center, Inc.*,

529 F.2d 638, 644 (Ct. App. 4th Cir. 1975). More recently, the Supreme Court has ruled that injury in fact can be satisfied by a party who is "likely to suffer . . . injury as a result of [governmental action] that changes . . . conditions." *Clinton v. City of New York*, 524 U.S. 417 (1998). For a more complete argument on the entire equal protection argument, see Appendix p. 52)

The under-inclusiveness of the statute gives Josiah Flatt standing to bring the claim. The claim should be reinstated and remanded to develop a record for review on the merits.

CONCLUSION

The Trial Court's denial of Plaintiff's experts to testify about the standard of care was prejudicial to the Plaintiff's case, and on that basis alone, should be reversed. The exclusion of evidence relative to the material issues prejudiced Plaintiff. The cumulative effect of errors made by the Trial Court compel a new trial. The District Court abused its discretion when it acted in an arbitrary, unreasonable and unconscionable manner excluding evidence and misapplying the law. The Court should send the case back to the Trial Court for retrial on all issues, including the issue of constitutional challenge.

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Respectfully submitted,

ZENAS BAER AND ASSOCIATES

By_____
Zenas Baer (#05460)
Attorney for Appellant