State of North Dakota | In District Court

County of Cass | East Central Judicial District

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

Plaintiffs,

v.

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

Defendants.

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND MOTION IN LIMINE TO EXCLUDE TESTIMONY OF PLAINTIFFS' WITNESSES

Civil No. 99-3761

I. FRIVOLOUS PLEADING

The filing by Defendants of this Motion for Summary Judgment is wholly without merit, frivolous, and presented for an improper purpose such as to harass Plaintiff or needlessly increase the cost of litigation. Plaintiff will seek assessment of reasonable costs, expenses and attorney's fees pursuant to N.D.R.Civ.P. Rule 11(b), N.D.C.C. §28-26-31, and N.D.C.C. §28-26-01. The basis of the motion for sanctions will be set out more fully in a Rule 11 Motion.

II. INTRODUCTION

Before responding to the substance of Defendants' Motion for Summary Judgment, Plaintiff is compelled to comment on the footnote on page 1 of Defendants' Brief in Support of Motion for Summary Judgment (hereinafter referred to as Defendants' Memorandum). Defendants purport to put this claim into context by suggesting that the case originally involved

claims against the State of North Dakota challenging the constitutionality of N.D.C.C. §12.1-36-01 as a violation of the Equal Protection Clause of the United States and State Constitutions. This Court dismissed the constitutional claims. In spite of the request by Plaintiffs to enter final judgment on the constitutional issues, this Court declined to do so preventing final judgment from being entered so an immediate appeal could be taken. N.D.R.App.Pro. Rule 4(A). An appeal will be taken following entry of final judgment.

The disturbing allegation in Defendants' Memorandum is "Plaintiffs' counsel's similar crusade in Federal Court to overturn the same State statute had been rejected for lack of standing." (Defendants' Memorandum, p. 1, footnote 1) As an officer of the Supreme Court of the State of North Dakota, the Supreme Court of the State of Minnesota, the Eighth Circuit Court of Appeals, and the United States Supreme Court, I took a solemn oath to support and defend the Constitution of the United States in pursuing my legal career. If defense of the Equal Protection Clause of the United States Constitution and the Constitution of the great State of North Dakota to insure that baby boys are granted equal protection of their genitalia under the laws of the State is a crusade, I plead guilty. Defendants' counsel is on no less a "crusade" in defending the primitive, barbaric practice carried on by the medical community in violation of their bedrock principle "first do no harm". The medical community perpetuates the mutilation of baby boys without benefit of medical diagnosis purely and simply to satisfy the whims of the parents. The "crusade" argument advanced by Defendants is solely intended to deflect attention from the real issues in this case, i.e. the continuance at the hands of medical doctors of a barbaric procedure which is not "medical treatment" and is universally condemned in civilized societies throughout the world. The jury should decide the issue and judge the medical doctors' continuing complicity

in this serious affront to human rights of infant boys.

III. STANDARD OF REVIEW

Summary judgment should be granted only if it appears that there are no genuine issues of material fact or any conflicting inferences which may be drawn from those facts. N.D.R.Civ.P. Rule 56(C), *Production Credit Assn. of Minot v. Klein*, 385 N.W.2d 485 (N.D. 1986). The party moving for summary judgment has the burden to demonstrate clearly that there are no genuine issues of material fact. *Binstock v. Tschider*, 374 N.W.2d 81 (N.D. 1985). In considering a motion for summary judgment, the Court may examine the pleadings, depositions, admissions, affidavits, interrogatories, and inferences to be drawn therefrom to determine whether summary judgment is appropriate. *Everett Drill Vent. v. Knutson Flying Serv.*, 338 N.W.2d 662 (N.D. 1983). In so doing, the Court must view the evidence in a light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the evidence. *Id*. The resisting party must present competent, admissible evidence by affidavit or other comparable means which raises an issue of material fact and must, if appropriate, draw the Court's attention to relevant evidence in the record by setting out the page and line in depositions or other comparable documents containing testimony or evidence raising an issue of material fact. *Industrial Commission of North Dakota v. Wilbur*, 453 N.W.2d 824 (N.D. 1990). A genuine issue of fact is material if it might affect the outcome of the suit under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

IV. INFORMED CONSENT POST *JASKOVIAK*

A. OBJECTIVE STANDARD IS "BEST INTEREST" OF CHILD.

Defendants mischaracterize Plaintiffs' claim. The Defendants recognize there are disputed issues of material fact, which in and of itself is sufficient to deny summary judgment unless the issues remaining are purely a question of law. Defendants assert "summary judgment should be granted in this case because the Plaintiffs' advocated position that parents should not be permitted to consent to the circumcision of infant males absent a medical necessity or abnormality is *not* the law in North Dakota. Furthermore, Plaintiffs have failed to produce testimony from qualified experts as required to put an informed consent claim before a jury." (Defendants' Memorandum, p. 2) This position is wholly without merit and frivolous.

The Complaint against Defendants is that Dr. Sunita A. Kantak failed to obtain "informed consent" before performing the circumcision procedure on Josiah Flatt. (Complaint, ¶ 28) The Complaint alleges a causal relationship between the failure to obtain informed consent and the resulting circumcision of Josiah Flatt causing severe and permanent injuries. (Complaint, ¶¶ 29 and 30)

A plaintiff in an informed consent case must establish breach of a physician's duty of disclosure, causation, and injury. *Jaskoviak v. Gruver*, 638 N.W.2d 1, 6 (N.D. 2002) A causal connection exists when adequate disclosure would have caused the patient to withhold consent to the particular course of treatment or procedure. *Buzzell v. Libi*, 340 N.W.2d 36, 40 (N.D. 1983). A patient can establish a causal connection between an injury and the physician's failure to disclose by showing that had there been a proper disclosure, the patient would not have consented to the treatment. *Jaskoviak* at 7, citing To J.D. Lee and Barry A. Lindahl*, Modern Tort Law*, ¶ 25:48.

According to *Jaskoviak*, *Id.* p. 9, North Dakota has adopted a rule that a Plaintiff's cause

of action is not limited to the existence and nonperformance of a relevant "professional tradition". The standard to be followed is that in deference to the patient's right of self-determination in particular therapy demands, a standard "set by law for physicians must be developed rather than one which physicians may or may not impose upon themselves". *Jaskoviak*, 638 N.W.2d 8 citing *Canterbury v. Spence*, 150 U.S.App.D.C. 263, 464 F.2d 772 (1972), cert. den. 409 U.S. 1064. *Jaskoviak* went on to hold that the standard for measuring the performance of a physician's duty as it relates to informed consent is conduct which is reasonable under the circumstances. The test, therefore, for determining whether a particular peril must be divulged is its materiality to the patient's decision. All risks potentially affecting the decision must be unmasked. *Id*. at 8. Ultimately, the trier of fact must determine whether a reasonable person in the Plaintiff's position would attach significance to the specific risk. *Jaskoviak* at 9.

Defendants' argument beginning at page 11 of Defendants' Memorandum entitled "Under North Dakota Law a Parent Can Consent to Circumcision of an Infant Son Whether or Not There is a Medical Indication or Abnormality" may be a proper statement of law, but it is totally irrelevant to the issue of informed consent as framed in the pleadings. There is no claim in the Complaint arguing that parents do not have the authority to consent to medically indicated treatments. It is true Plaintiffs' experts believe the consent for non-medical removal of otherwise healthy tissue is not a valid consent. The real issue is, however, what information Dr. Kantak gave to Anita Flatt in order to inform her of the risks and benefits of the procedure to meet the informed consent standard to remove healthy genital tissue for non-medical reasons.

B. STATUTORY STANDARD OF INFORMED CONSENT.

Although cited in passing, Defendants do not analyze the North Dakota Century Code

dealing with "informed consent". N.D.C.C. §23-12-13 sets forth the standard for obtaining informed consent in the State of North Dakota. The standard for obtaining informed consent applies to any healthcare decisions for a minor patient. N.D.C.C. §23-12-13(1). There is no disagreement that Josiah Flatt was a minor patient when he was circumcised on March 7, 1997. The statute sets out specific limits on the exercise of authority to consent to healthcare of a minor. Before a parent is authorized to give informed consent, the parent must:

> "first determine in good faith that the patient, if not incapacitated, would consent to the proposed healthcare. If such a determination cannot be made, the decision to consent to the proposed healthcare may be made only after determining that the proposed healthcare is in the patient's best interest."

N.D.C.C. §23-12-13(3).

Accordingly, under North Dakota statutory law, the standard for obtaining informed consent for a minor involves two inquiries. First, if the patient (infant) were able to communicate his desires, would he consent to the procedure? The obvious answer is no given the shrieks and cries of babies undergoing the procedure who, in their rudimentary way, are attempting to communicate their displeasure to medical providers who apparently are oblivious to its meaning. And second, absent a determination that the infant would want the procedure done, a healthcare provider may only do the circumcision after determining that the circumcision is in the infant's best interests. The infant's best interests would be to leave the foreskin intact. Thus, the analysis of "informed consent" must begin with the "best interest" of Josiah Flatt.

Defendants devote considerable effort to the argument that the entire premise for the Plaintiffs' informed consent claim is a mistaken view of fundamental North Dakota law.

(Defendants' Memorandum, p. 12) This is a misstatement of the pleadings and totally unsupported by the claims advanced.

To the contrary, the Defendants want this Court to ignore statutory positive law directly applicable to this case. The plain language of the consent statute (which was not analyzed by the Defendant) requires a determination to be made before a circumcision can be performed that the baby, if not incapacitated, would consent to the healthcare, or, absent such divine knowledge, the person giving consent would need to determine that the circumcision was in the baby's "best interest". In order to determine whether or not circumcision was in the baby's "best interest", a parent must be given all available information on the benefits and risks of the procedure in an unbiased manner. A description of the benefits and risks must be provided by the medical doctor.

The AAP Circumcision Policy Statement (Kantak Depo. Ex. 10, Z. Baer Affd. Ex. 5) concluded that there is not sufficient data to recommend routine neonatal circumcision. The AAP found that circumcision is not essential to the child's current well being, and in order to make informed choices, parents of male infants should be given accurate and unbiased information and be provided the opportunity to discuss the decision. (Kantak Depo. Ex. 10, Z. Baer Affd. Ex. 5) If there is no medical benefit to a procedure, the prophylactic removal of healthy tissue is not in the child's best interest and could be considered criminal assault. Imagine if the medical doctor removed a finger, earlobe, or other body part at the request of the parent.

Clearly, there is a legal basis for the informed consent claim and Plaintiffs are not attempting to attack the fundamental right of a parent to consent to "medical care of an infant child". Routine circumcision, however, does not fall under the rubric of "medical care"

inasmuch as there is no medical condition being treated by the routine surgery. (VanHowe Depo. p. 36, Z. Baer Affd. Ex. 7)

The structure of the informed consent statute in North Dakota recognizes the autonomy of the child and that limitations on parents are embedded in the statute making parents and medical doctors accountable for decisions touching on medical care of infants unable to communicate their needs. There are only two circumstances under which informed consent can be obtained for circumcision, i.e. if the baby were not incapacitated would he consent? If that determination cannot be made, the procedure can be done only if it is in the child's best interest. N.D.C.C. §23-12-13(3). "Best interests" can only be determined by the finder of fact. A compelling argument could be made that "best interests" could never involve the amputation of highly erogenous, sensitive tissue from the penis of a newborn for purely cosmetic reasons.

Applying N.D.C.C. §23-12-13(3) to the facts of this case, Dr. Kantak's duty was to disclose to Anita Flatt all of the risks and benefits known when performing a circumcision. *Jaskoviak* at 8. In other words, would a reasonable parent attach significance to risks associated with the circumcision procedure so as to effect the parent's decision on allowing the assault and battery on their infant son's genitalia? Defendants deliberately omit any reference to the "best interest" standard in an attempt to mislead the Court.

C. MATERIAL FACTUAL DISPUTE.

1. He Said/She Said.

Overlooked by Defendants in their zealous attempt to deflect the Court's attention to an irrelevant issue, is the fundamental material factual dispute as it relates to what was said by Dr. Kantak to Anita Flatt to meet her duty to convey complete information of the risks and benefits

of circumcision. Dr. Kantak does not recall any aspect of the discussions she had with Anita Flatt about the risks or benefits of circumcision, nor ever met James Flatt. (Kantak Depo. pp.59, 64, 66, 128, Z. Baer Affd. Ex. 5; Answer to Interrogatory No. 27, subp. (b), Z. Baer Affd. Ex.10) Dr. Kantak has no recollection of ever meeting James Flatt and only had brief encounters with Anita Flatt, the nature of which are subject to dispute. There is nothing in the medical records

describing the risks or benefits. (Kantak Depo. Ex. 4, Z. Baer Affd. Ex. 5) (Only the printed form suggesting risks and benefits were discussed.)

On the other hand, Anita Flatt specifically recalls a nurse approaching her in the late evening of March 6, 1997, with a consent form to sign. (Kantak Depo. Ex. 5, Z. Baer Affd. Ex. 5) She had a number of questions about the consent form and the circumcision process. The nurse indicated she would need to talk with the doctor in the morning. Anita Flatt was told she could not be present during the circumcision procedure. (A. Flatt Depo. p. 33, Z. Baer Affd. Ex. 3)

> Anita Flatt recalls the first meeting with Dr. Kantak being March 7, 1997, as follows:
>
> "and she didn't even come in my room. And - she was just in the doorway. . . and I remember saying-asking about pain. Is there pain? . . . She was using her hands. And something about for the pain. It's nothing. And I remember her using her hands and her head. And all of a sudden she was gone."

(A. Flatt Depo. p. 34, Z. Baer Affd. Ex. 3) In addition, in response to deposition inquiry about what Plaintiff asked Dr. Kantak at the initial meeting, she responded:

> "I know I was concerned about pain. I know she brushed it off as nothing. They use something. I cannot tell you what she called it. She said something that was used. She was using her hands. I remember I was asking about pain. And that I think I said I understood-confirmed that she does all the boys, they line up all the boys and they do them. And that I couldn't be in the room. But that was it. I talked about pain. I remember I asked a lot about pain."

(A. Flatt Depo. p. 46, Z. Baer Affd. Ex. 3) Specifically to the point Anita Flatt indicates:

"Sunita Kantak did not let me make an informed choice that is for my son. And I am a believer, after going through all this, that that is my son's choice. Someone cut a piece of his body and caused injury to him and I have a lot of guilt. My son-my husband was in tears. He described his penis as a bloody stump. I mean it's a very private issue. Then as time goes on, we see that there is this lump of skin on the side of the penis. That doesn't help. I wish I was more informed. God, I wish I would have read about it, I wish my family would have talked about it. I wish I would have been informed."

(A. Flatt Depo. p. 49, Z. Baer Affd. Ex. 3) Anita Flatt goes on to say:

". . . I'm guilty of being ignorant and not knowing that. I relied on [Kantak] to give me the medical knowledge about it. I didn't get it. I didn't–you know, maybe it comes down to this. Did I drill her and say use medical terms. No. I was ignorant. I didn't know. And I didn't get them from her."

(A. Flatt Depo. pp. 49-50, Z. Baer Affd. Ex. 3) Anita Flatt further states:

"I remember the biggest shock to me was little boys still die from being circumcised. And that one to Jim and I was the one–I mean, even like .1 percent chance that Josiah could have died, I needed to know that. I didn't know that. No one told me that. Bleeding. Excessive bleeding. Infection. That's all like stuff that it's not like skin that doesn't feel. It's stuff that feels. It's the sensation. All that is gone.

(A. Flatt Depo. pp. 52-53, Z. Baer Affd. Ex. 3) Anita Flatt further testified:

"I should have been told all the risks that the medical trained professionals know. I mean, from a medical standpoint they're the experts. I needed to rely upon

them. I am not a medical expert. I needed to be told about the bleeding. I needed to be told about any, any percentage chance of a death. I needed to be told about infection issues. I needed to be told about what is this you are taking away from him. It's full of nerves, it's full of sensation. I mean, it has an impact on his sexual life. I need to be told that. Those issues are for him to decide when he's older. The fact that the complications. I think I needed to be told that–you know, I went in there thinking every guy looks the same circumcised. That sometimes they don't get circumcised right. And I felt I needed to be told the risk that my son has a bulge of skin on the side of his penis. I needed to know that it wasn't just something so routine and just we do it routinely, we line them up, we go through, it's nothing big.

The pain is a big one for me. I needed to be told that it is painful. My understanding from Dr. Kantak is, oh, nothing. She uses something. Nothing. My son was in pain. That was pain."

(A. Flatt Depo. pp. 53-54, Z. Baer Affd. Ex. 3)

James Flatt testified that he did not get any information from Dr. Kantak and recalls seeing nothing on circumcision. (J. Flatt Depo. pp. 25, 29, Z. Baer Affd. Ex.4) James Flatt testified that he should have been told that Josiah

"could die from the–that he could die from it. That he would be in extreme pain. That it's–I don't know how to say it. When I seen–when he was circumcised, after I seen it, it was pretty graphic to me of the, I mean, the nature of the cut. I mean, if I look at it I was never told that he could die, he could get infection, he could–I mean, that it's going to

take away sexual pleasures from him later on in life. Everything. I mean, nothing was expressed to me in that."

(J. Flatt Depo. p. 32, Z. Baer Affd. Ex. 4)

James Flatt unequivocally stated he would not have had his son circumcised if he had been aware of the risks. (J. Flatt Depo. pp. 32, 33, 38 and 45, Z. Baer Affd. Ex. 4)

Based on these fundamental material disputed facts, summary judgment is not appropriate. It is for a jury to decide the believability and credibility of witnesses describing these facts. There is no basis for awarding summary judgment on an informed consent case when the entire case revolves around a "he said/she said" argument. Dr. Kantak has no recollection of what she said, only a recollection of what her normal practice is. Anita Flatt and James Flatt have vivid recollections of what was described to them. Taking the evidence most favorable to Plaintiffs, and drawing all inferences from that testimony in their favor, summary judgment is not warranted.

In fact, even if Plaintiffs had no expert witness testimony, a compelling argument could be made that given the standard of "best interest" of Josiah Flatt as described in *Jaskoviak*, summary judgment would be inappropriate. According to the teaching of *Jaskoviak*, a standard set by law for physicians has been established. That standard is a "best interest" standard as defined in N.D.C.C. §23-12-13(1)(3). Even lay people understand it is not in the "best interest" of a child to be subjected to needless, painful surgery that amputates the most erogenous tissue of the human body.

V. EXPERT WITNESSES

A. GENERALLY.

Having established a material factual dispute as to what, if anything, was described to Anita Flatt regarding the risks and benefits of a circumcision, the next analysis must be a fleshing out of the medical standards on what the risks and benefits of the procedure are. Under settled North Dakota law, expert medical testimony is generally necessary to identify the risks of treatment, the gravity, likelihood of occurrence, and reasonable alternatives. *Jaskoviak*, 638 N.W.2d at 9, citing *Winkjer v. Herr*, 277 N.W.2d 579, 588 (N.D. 1979). Plaintiffs have disclosed three expert witnesses prepared to describe the risks and benefits of circumcision and the elements of informed consent.

B. QUALIFICATIONS/PLAINTIFF EXPERTS.

Let me first address the issue about qualification for expert witnesses. Trial Court's should be extremely cautious in entering summary judgment in medical malpractice cases because of a lack of expert testimony, in view of reluctance of members of the medical profession to testify against fellow physicians. *Winkjer v. Herr*, 277 N.W.2d 579, 589 (N.D. 1979). N.D.R.Civ.P. Rule 702 envisions generous allowance of the use of expert testimony if the witnesses are shown to have some degree of expertise in the field in which they are to testify. *Meyer v. Rygg*, 630 N.W.2d 62, 66 (N.D. 2001). A physician can testify about another field of medicine within his experience, even though it is not his specialty. *Collom v. Pierson*, 411 N.W.2d 92, 96 (N.D. 1987), cited with approval in *Blessum v. Shelver*, 567 N.W.2d 844 (N.D. 1997). An objection about the extent of the expert's experience affects the weight of the testimony and not its admissibility. *Id*. It is not necessary that a physician testifying as an expert witness about the care and treatment rendered by a defendant physician be commensurate or consistent with the same school of medicine, same field of medicine, and same general line of

practice as defendant physician. *Collom Id.* at 96.

Defendants do not challenge the need for expert testimony to establish the standard of care, but argue that Dr. Robert VanHowe, a board certified pediatrician who has done primary research on the issue of circumcision, is not sufficiently qualified to testify as to the standard of care because he has never performed a circumcision. Defendants argue that in spite of the fact that Dr. VanHowe was invited to present his findings of research of 4,500 medical articles on the issue of circumcision to the American Academy of Pediatrics Committee studying circumcision, he is unqualified to give an opinion as to the standard of care.

Additionally, Defendants content that Dr. Christopher Cold, a Pathologist who has extensively researched the subject of male infant circumcision and done primary research on the anatomy, histology, and development and function of the foreskin is insufficiently qualified. (Christopher Cold Affidavit February 28 2002, Z. Baer. Affd. Ex. 11)

Finally, Defendants contend that Dr. Eileen Wayne, a surgeon specializing in opthomology who is regularly required to obtain "informed consent" for procedures is not sufficiently qualified to help the finder of fact. Dr. Wayne is a member of the American College of Legal Medicine, and identified as an expert on informed consent. (Z. Baer Affd. Ex. 12) Dr. Wayne is the author of "Informed Consent for Medically Necessary Circumcision", which is a partial list of the risks and benefits associated with the circumcision procedure affirmed by defense experts Dr. Kaplan and Dr. Shoemaker. (Wayne Depo. Ex. 3, Z. Baer Affd. Ex. 6) Dr. Wayne is the author of draft legislation concerning informed consent and medical accountability submitted to Congress in 1994. (Wayne Depo. Ex. 7, Z. Baer Affd. Ex. 6)

The attack by Defendants on the qualifications of Drs. VanHowe, Cold and Wayne, to

testify on the standard of care for physicians who circumcise, suggests a standard of care rejected by *Jaskovick* in that a Plaintiffs' cause of action is not limited to the "existence and nonperformance of a relevant professional tradition" and that enlightened societies demand a standard set by law for physicians. *Id*. at 8. After all, no less authority than defense expert Dr. Kaplan wrote that circumcision is traditionally done by "inexperienced operators who are neither urologists nor surgeons".

There is no Board who reviews qualifications to perform a circumcision. Physicians present nothing to the hospital to show they are skilled and qualified to perform circumcisions. (Wayne Depo. p. 13, Z. Baer Affd. Ex. 6)

Defense expert Dr. Shoemaker agrees with Dr. Wayne that unnecessary surgery is called fraud and abuse. (Shoemaker Depo. p. 122, Z. Baer Affd. Ex. 9; Wayne Depo. p. 37, Z. Baer Affd. Ex. 6) In a broader sense, Dr. Wayne is of the opinion that performing unnecessary and nonmedically indicated procedures on nonconsenting patients is fraud and abuse. (Wayne Depo. pp. 38-39, Z. Baer Affd. Ex. 6) She further indicates that the standard of care in medical practice is that a parent's consent for unnecessary surgery on a minor infant is invalid. (Wayne Depo. p. 36, Z. Baer Affd. Ex. 6) Dr. Wayne is of the opinion that circumcision should not have been offered to the parents because it was not medically indicated. (Wayne Depo. p. 62, Z. Baer Affd. Ex. 6) All of the Plaintiffs' witnesses possess an abundance of knowledge through experience, research and medical practice touching on the issues of circumcision and informed consent.

1. Dr. Robert VanHowe, Board Certified Pediatrician.

Dr. VanHowe is a Board certified pediatrician, a colleague of Defendant Dr. Kantak and defense expert witnesses Drs. Lunn and Shoemaker. Although Dr. VanHowe does not perform

circumcisions for philosophical reasons, he has extensively researched, written and published on the issue. Dr. VanHowe has reviewed at least 4,500 articles on the issue of genital alteration. (VanHowe Depo. pp. 1, 3-4, 65-66, Z. Baer Affd. Ex. 7) Dr. VanHowe has been retained and acted as an expert witness in a number of cases involving circumcision. (VanHowe Depo. pp. 16-17, Z. Baer Affd. Ex. 7) Dr. VanHowe was invited by the American Academy of Pediatrics Task Force on Circumcision to give a presentation on his findings of the literature research, which presentation lasted 2 ½ to 3 hours. (VanHowe Depo. p. 69, Z. Baer Affd. Ex. 7) Dr. VanHowe is a peer reviewer for a number of publications. (VanHowe Depo. p. 75, Z. Baer Affd. Ex. 7)

Based on Dr. Van Howe's experience, expertise, education and training, Dr. VanHowe would be prepared to testify that surgical amputation of the foreskin from the male penis results in damage; surgical amputation of the foreskin from the infant male penis is extremely painful; surgical amputation of the foreskin from the infant male penis has early complications such as hemorrhage, infection, amputation of glans penis, amputation of the entire penis and death; surgical amputation of the foreskin from infant male penis has been linked to an increased rate of hospitalization in the first years of life; surgical amputation of the foreskin from the infant male penis has delayed complications, including miatal stenosis, hidden or buried penis; surgical amputation of the foreskin results in psychological complications; surgical amputation of the foreskin alters sexual practices. (VanHowe Affd. February 10, 2000, Z. Baer Affd. Ex. 7)

In addition, based on his experience as a medical doctor and his research on genital alteration, he is prepared to testify there are no clear medical benefits to male genital alteration. *Id*. at p. 3. He is further prepared to testify that based on his experience as a medical doctor and

research on genital alteration that overall male genital alteration impairs health and costs more money than it saves. *Id.* at p. 6. He is further prepared to testify that based on his experience as a medical doctor and research on genital alteration that some forms of female genital alteration which are illegal are anatomically identical to removal of the prepuce from the male penis. *Id*. at p. 7. He is further prepared to testify that the American Academy of Pediatrics recommends that where a parent requests an intervention that is not in the child's best interest, that the physician has a duty to tell the parents no and to protect their patient who is the child. (VanHowe Depo. p. 83, Z. Baer Affd. Ex. 7)

He is further prepared to testify that parents making a decision for infants must meet two criteria in order to have valid consent. First, a substitute judgment where you determine what would the child choose for themselves if they could express a choice, or, you look to the child's best interest. The complications and side effects and downside of circumcision far outweigh any potential benefits that may exist. (VanHowe Depo. pp. 81-82, Z. Baer Affd. Ex. 7)

VanHowe is further prepared to testify that there are certain elements of consent which include disclosure of all known complications from the procedure, that once full disclosure has been given, the medical doctor must determine that the consent giver fully understands what has been disclosed to them, and third, that you have to have a lack of coercion. In his opinion, based on the record, Dr. Kantak did not meet the standard of care for informed consent for the procedure of circumcision. (VanHowe Depo. pp. 89-90, Z. Baer Affd. Ex. 7)

2. Dr. Christopher Cold, Board Certified Pathologist.

Dr. Christopher Cold has extensively researched the foreskin and glans penis. Dr. Christopher Cold is prepared to testify that based on review of the medical records, the

deposition of Dr. Sunita Kantak, that she was unfamiliar with the normal anatomy, histology and development of the penis. She also exhibited very poor knowledge of how the Gomco clamp works, and there was no evidence that she had a thorough understanding of the surgical procedure. She had no knowledge of the erogenous nature of the foreskin, the normal maturation of the penis, the indications for circumcisions, nor a full understanding of the complications of newborn circumcision. Dr. Cold is prepared to testify that the injury of the foreskin includes the loss of complete coverage of the glans penis, loss of mobile skin and mucosa to cover the penis during erection, loss of erogenous penile mucocutaneous tissue, and a permanent scar on the penis. He is prepared to testify that Josiah Flatt was harmed as a result of the substandard medical care provided by Dr. Kantak and MeritCare. (See Answers to Interrogatories and Request for Production of Documents to Plaintiff Set II, Z. Baer Affd. Ex. 14; see also Affidavit of Dr. Christopher Cold February 28, 2000, Z. Baer Affd. Ex. 11)

Dr. Cold is further prepared to testify "I have reviewed the medical records of Josiah Flatt, and find serious deficiencies in his care. The informed consent does not list a true list of complications. The operative note gives no information about the amount of anesthesia given, or the manner of administration. The operative note does not describe what volume of tissue was removed, and does not mention that the tissue was submitted to pathology for histo-logic examination or used for any experiments. There is no mention of any abnormality of the foreskin, and therefore, it must assume that the penis of Josiah Flatt was entirely normal before the surgeon amputated a portion of the penis." *Id.* at ¶ 17.

It is a physician's duty to protect patient's from unnecessary surgery. Vulnerable patients such as infants and children must be vigorously protected from unnecessary surgery.

Circumcision takes away a man's opportunity to choose whether he has a complete penis or a scar on his penis. To take away this choice and replace it with a scar violates the physician's oath to first do no harm. (Affidavit of Chris Cold, para. 17, 18, Z. Baer Affd. Ex. 11)

3. Dr. Eileen Wayne, Board Certified Opthomologist and Informed Consent Expert.

Dr. Eileen Wayne is prepared to testify as to the standard of care that applies to pediatrician Dr. Kantak and to MeritCare as it relates to the obtaining of informed consent. Dr. Wayne would testify as to the standard of care applying to any physician or surgeon obtaining consent from a proxy would require

- determining and meeting the child's needs
- protecting the child from exploitation
- protecting the child from noxious stimuli, pain, suffering and risk
- protecting the rights of the child to autonomy
- protecting the right of the child to physical integrity
- protecting the child from sexual abuse
- empowering the parent/child relationship and emotional bonding.

She would further testify that Dr. Kantak departed from the standard of care in that she

- Perpetrated unnecessary surgery upon a nonconsenting, protesting child.
- Subjected the child to noxious pain and suffering, and unnecessary surgical risk.
- Waited only one minute, rather than the usual 15 minutes, for lidocaine to take effect.
- Failed to test whether the lidocaine had taken effect.

- Intentionally inflicted the pain of both the needle sticks and an unanesthetised circumcision.
- Failed to provide postoperative pain control.
- Violated the child's right to future autonomy.
- Destroyed the physical, sexual and erogenous integrity of the child's penis.
- Did not remember what she was taught in medical school about the immunologic, erogenous and mechanical gliding functions of the foreskin.
- Could not therefore disclose that information to the mother.
- Failed to disclose the fact that men are attempting to restore a quasi-foreskin and why they need to do so.

- Failed to disclose that her son, as an adult, may be angry with her for altering his sex organ.
- Failed to dictate an operative report. Cannot name the nurse assistant or witness. Cannot tell us if the child bled, requiring damaging cautery or sutures causing circulatory compromise. Cannot tell us the millimeters of foreskin amputated. Cannot tell us whether the foreskin was sold or disposed of in an appropriate manner.

Further, she is prepared to testify that Josiah's injuries include:

- Loss of the foreskin.
- Loss of the pleasurable erogenous sex nerves that were in the amputated foreskin.
- Loss of the lubricating mucus membranes

- Loss of the immunologic lysozyme produced by the mucus membranes.
- Loss of the frictionless gliding mechanism and sheath.
- Loss of sensitivity of the remaining glans with keratinization and drying of what should be a moist sexually sensitive glans.
- Loss of the sex appeal and beauty of a red moist glans slipping in and out of its sheath to an exposed dry, pink, keratinized one.
- Being doomed, as an adult, to dry sex without mucus lubrication and without the protective, frictionless, gliding sheath of the foreskin.
- Being doomed to never know the fullness and ecstacy of sexual orgasm with a whole penis.
- Decreased desirability as a future mate and sex partner.

- Loss of self esteem, knowing that his pediatrician amputated a sexual part of him and tossed it in the trash.
- Lifelong increased risk of meatal stenosis.
- Lifelong increased risk of early sexual decline in performance.
- Imprinting the limbic system with penis pain instead of penis pleasure.
- Imprinting the association of pain, violence, and sex.
- Imprinting suffering, anxiety, and victim mentality.
- Imprinting "learned helplessness."
- Weakening the ability of the child to trust.
- Weakening of the pleasurable emotional bond between parent and child.

(Plaintiffs' Answers to Interrogatories Set II, Z. Baer Affd. Ex. 14)

Elements of informed consent are not circumcision specific. (Kantak Depo. Ex. 12, Z. Baer Affd. Ex. 5) The extensive experience of the Plaintiffs' expert witnesses more than meets the standard required under N.D.R.Ev. Rule 702, particularly in light of the new standard articulated by the North Dakota Supreme Court that the test for determining whether a particular peril must be divulged is its materiality to the patient's decision. All risks potentially affecting the decision must be unmasked. *Jaskoviak v. Gruver*, 638 N.W.2d 1, 8 (N.D. 2002). In light of *Jaskoviak*, and in light of Anita Flatt's testimony that had she been informed of the risks, she would not have consented, and James Flatt's positive testimony that if he had known of the risks, he would not have consented to the procedure. Plaintiff has provided more than adequate expert testimony, the weight of which can be judged by the jury. (A. Flatt Depo. p. 53, Z. Baer Affd. Ex. 3; J. Flatt Depo. p. 45, Z. Baer Affd. Ex. 4)

C. DEFENSE EXPERTS CONCUR WITH PLAINTIFF'S EXPERTS.

Not only do Plaintiffs' experts establish the standard of care, Defendants and Defendants' experts agree. For example, Defendant Dr. Kantak agrees that the AMA Policy E-8.08 addressing informed consent accurately reflects the standard of practice. (Kantak Depo. p. 105, Kantak Ex. 8, Z. Baer Affd. Ex. 5) The AMA Policy on informed consent establishes an ethical obligation to help the patient make choices from therapeutic alternatives. Informed consent is defined as a "basic social policy" for which only two exceptions apply. Those exceptions are when a patient is "incapable of consenting and harm from failure to treat is imminent" or where disclosure would cause a threat of psychological harm to the patient.

In addition, Dr. Kantak believes that the AAP Policy on informed consent dated February 1995, sets the standard of practice for informed consent amongst pediatricians. The AAP Policy indicates that a medical doctor has a legal and ethical duty to his/her child patient based on patient needs, not on what someone else expresses. (Kantak Depo. pp. 109-110; Kantak Depo. Ex. 12, Z. Baer Affd. Ex. 5) Dr. Kaplan, one of the defense experts, agrees that complications of circumcision include bleeding, phimosis, concealed penis, skin bridges, infections, urinary retention, infection, maetitis, chordee, inclusion cysts, lymph edema, fistula, necrosis, hypospadeas and epispadeas, complications of plastibel, impotence, psycho social issues, and pain and anesthesia. (Kaplan Depo. pp. 41-42, Z. Baer Affd. Ex. 5; *Complications of Circumcision*, George W. Kaplan, M.D., Urologic Clinics of North America, Vol. 10, No. 3, pp. 543-549, August 1983, Z. Baer Affd. Ex. 15; *Common Problems in Pediatric Urology, Neonatal Circumcision*, Niku, Stock, Kaplan, Vol. 22, No. 1, February 1995, Z. Baer Affd. Ex. 16) Most complications of surgery occur at the hands of inexperienced operators who are neither urologists

nor surgeons. (Kaplan Depo. p. 43; Z. Baer Affd. Ex. 5) The Doctrine of Informed Consent, according to Dr. Kaplan, includes a complete explanation of the benefits and risks of any procedure. (Kaplan Depo. p. 137, Z. Baer Affd. Ex. 5) In order to make a determination of whether circumcision is proper, a parent must look to the child's best interest. (Kaplan Depo. p. 139, Z. Baer Affd. Ex. 5) The standard of practice on obtaining informed consent would require a medical doctor to make a determination that the procedure was in the best interests of the child or life saving. (Shoemaker Depo. p. 31, Z. Baer Affd. Ex. 9) A child is born and endowed with all the rights and privileges of a human being and a medical doctor has a duty to respect that person. (Shoemaker Depo. p. 32, Z. Baer Affd. Ex. 9)

In order to do a circumcision, a doctor must first tear the connective tissue between the foreskin and the glans penis with a forceps. The doctor then uses a blunt instrument to tear the epithelium. The doctor then places a clamp on the foreskin and tightens the clamp to crush the vascular system and then amputates the foreskin with a scalpel. All medical complications known to medical doctors should be discussed with the patient to obtain informed consent. (Shoemaker Depo. p. 87, Z. Baer Affd. Ex. 9)

Babies subjected to circumcision, even with analgesia, have been known to suffer elevated blood pressure, elevated pulse, elevated cortisol levels, high pitch crying, all of which are indications of stress in the baby while undergoing circumcision. Other symptoms are breath holding, total body rigidity, vomiting, passing out, respiratory or cardiac arrest which would all be responses to pain or stress. (Shoemaker Depo. pp. 97-100, Z. Baer Affd. Ex. 9) When prepared for circumcision, babies, in their rudimentary way, communicate their objection to the procedure by crying, drawing their legs up, vomiting and passing out. (Shoemaker Depo. pp.

101-102, Z. Baer Affd. Ex. 9)

The standard of care for obtaining informed consent can be altered by the State legislature which would trump medical practice. (Shoemaker Depo. p. 53, Z. Baer Affd. Ex. 9) Dr. Shoemaker is not aware of a law in the State of North Dakota dealing with informed consent. (Shoemaker Depo. p. 59, Z. Baer Affd. Ex. 9; Kantak Depo. Ex. 11, Z. Baer Affd. Ex. 5). N.D.C.C. §23-12-13.

From review of the medical records and depositions, Dr. Shoemaker believes that when born, Josiah Flatt exhibited no indication for surgery, was in no immediate distress, and there would be no harm in waiting until Josiah reached age 18. The medical records indicated no complaint about the child's penis, and no physical finding suggested a need for surgery. The surgical note of Dr. Kantak does not meet JCHO standards. (Shoemaker Depo. pp. 116-117, Z. Baer Affd. Ex. 9) Performing unnecessary surgery and billing for it is fraud. (Shoemaker Depo. p. 122, Z. Baer Affd. Ex. 9) In medical practice, it is frequently taught that "if it is not documented, it was not done". (Shoemaker Depo. pp. 122-123, Z. Baer Affd. Ex. 9)

VI. CONCLUSION

The Motion for Summary Judgment is so deficient on the merits to warrant sanctions. There is an abundance of material issues of fact even without expert testimony to warrant trial. The Defendants zealous attempt to mislead the Court as to the issue has burdened and harassed the Plaintiff. The Motion should be denied in all respects.

Dated: March 29, 2002

ZENAS BAER AND ASSOCIATES

By_____
Zenas Baer (#05460)
Attorney for Plaintiffs
331 6th St., Box 249

Hawley, MN 56549
(218) 483-3372