

State of North Dakota
County of Cass

In District Court
East Central Judicial District

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

**PLAINTIFF'S MEMORANDUM IN
SUPPORT OF MOTION IN LIMINE
SEEKING INDIVIDUAL VOIR DIRE**

v.

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

Court File No. CV-99-03761

Defendants.

SUMMARY OF ARGUMENT

Plaintiff seeks individual voir dire of prospective jurors. This case involves circumcision and the effects circumcision has on the male anatomy. It is highly likely that many prospective jurors will find it uncomfortable to discuss their personal experiences regarding circumcision. Some prospective jurors may be offended and find it offensive to be asked questions about the status of their penis or the status of their husband's, father's or son's penises. Individual in-camera voir dire is required to encourage full disclosure by prospective jurors who may be too embarrassed to confess their true opinions before an audience. Individual voir dire is also appropriate to prevent jury pool contamination by inappropriate and prejudicial responses given to questions by prospective jurors. Plaintiff would also request a jury questionnaire be used to allow pre-screening of jury opinions and biases.

ARGUMENT

The State of North Dakota allows individual voir dire. In *State v. Helmenstein*, the Court permitted individual voir dire in a first degree murder case. 620 N.W.2d 581, 588 (N.D. 2000). Individual voir dire is permitted in order to insure both parties that the jury panel can be impartial and can render a verdict based exclusively on the evidence presented at trial as opposed to their personal beliefs. *State v. Gross*, 351 N.W.2d 428 (N.D. 1984).

Examination of jurors apart from the others is designed to prevent panel contamination resulting from inflammatory answers given by prospective jurors to questions posed to them on voir dire. *State v. Bible*, 858 P.2d 1152, *see generally* 47 Am.Jur.2d Sec. 198. It has been held that the preferred approach to voir dire in cases surrounded by extensive publicity is to conduct individual examination of the jurors. *Cummings v. Dugger*, 852 F.2d 1504 (C.A. 11), cert. denied 490 U.S. 1111 (1989).

To appreciate the need for individual voir dire, it is important to understand the psychological impact circumcision has had on the American culture which circumcises at a rate unheard of in other cultures for nonreligious purposes. Most of the world does not practice circumcision. Over 80% of the world's males are not circumcised. The longstanding psychological effects of male circumcision have rarely been studied. *The Psychological Impact of Circumcision*, BJU International, Vol. 83, Supp. 1, pp. 93-102, January 1, 1999, R. Goldman. (Exhibit A) As described by Goldman, the act of circumcision interferes with the infant maternal bonding. Citing *Schoene. Report on Task Force on Circumcision*, Pediatrics 1989, 84:389. Goldman describes long term psychological effects of circumcision. He describes that

individuals who have been circumcised or had their children circumcised may be reluctant to talk about circumcision or report how they truly feel because of various reasons, including

- (i) accepting beliefs and cultural assumptions about circumcision prevents men from recognizing and feeling their dissatisfaction; e.g. being told when young that it was necessary for health reasons and not questioning that;
- (ii) the emotions connected with circumcision that may surface are very painful; repressing them protects men from this pain. If the feelings become conscious, they can still be suppressed.
- (iii) those who have feelings about their circumcision are generally afraid to express them because their feelings may be dismissed or ridiculed.
- (iv) verbal expression of feelings requires conscious awareness. Because early traumas are generally unconscious, associated feelings are expressed nonverbally through behavioral, emotional and psychological forms.

(citations omitted) Goldman at p. 6.

Goldman goes on to state:

“Although men may be unaware of the effects of circumcision, the fear that their penis is somehow deficient is reported to be widespread in American culture.”

“Lack of awareness and understanding of circumcision, emotional repression, fear of disclosure, and nonverbal expression help keep circumcision feelings a secret.”

Id.

Given the literature substantiating the long term psychological effects of infant male circumcision, it is necessary to conduct individual voir dire to overcome the highly personal

feelings which may include “anger, sense of loss, shame, sense of having been victimized and violated, fear, distrust, grief, and jealousy of intact men.” *Id.* at p. 5

Goldman concludes

“the avoidance of guilt and the reluctance to acknowledge the mistake and all that that implies help to explain the tenacity with which the practice is defended.

Whatever affects us psychologically also affects us socially. If a trauma is acted out on the next generation, it can alter countless generations until it is recognized and stopped.

The potential social consequences of circumcision are profound. (citation omitted).

There has been no study of these issues perhaps because they are too disturbing to those in societies that do circumcise and of little interest in societies that do not. Close psychological and social examination could threaten personal, culture and religious beliefs of circumcising societies. Consequently, circumcision has become a political issue in which the feelings of the infants are unappreciated and secondary to the feelings of adults, who are emotionally invested in the practice.”

Goldman at 13.

This case has had extensive pretrial publicity. (Exhibit B) The nature of the topic framed by this litigation coupled with the pretrial publicity make it imperative to allow individual voir dire.

Upon information and belief, fellow Cass County District Court Judge Ralph Erickson allowed individual voir dire in the recent *Aipersbach* case. The *Aipersbach* case dealt with an assault on a minor child by a daycare provider. The *Aipersbach* case also had significant pretrial publicity.

The questions and areas of inquiry we would like to explore with the prospective jury pool are identified on the attached Exhibit C, which could also be used as a jury questionnaire.

Dated: January , 2003

Respectfully submitted,

ZENAS BAER AND ASSOCIATES

By _____

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Exhibit A - Psychological impact
Exhibit B - All copies of articles
Exhibit C - Jury Pool