

State of North Dakota  
County of Cass

In District Court  
East Central Judicial District

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

**MEMORANDUM IN SUPPORT  
OF INTRODUCING  
DEMONSTRATIVE VIDEOTAPE  
EVIDENCE**

v.

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

Court File No. CV-99-03761

Defendants.

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**SUMMARY OF ARGUMENT**

Plaintiff intends to introduce two videotapes. The first *Circumcision Video, Garrigus 1999*, 19 minutes (Garrigus Depo. Ex. 1, Deposition Transcript attached as Exhibit B), and the second circumcision video, *Barichello 1999*, 14:27 minutes. (Barichello Depo. Ex. 1, Deposition Transcript attached as Exhibit C) The Garrigus video shows three circumcisions using the most commonly used circumcision tools, to-wit: the Plastibel, Gomco clamp and Mogan clamp procedures. The Garrigus video uses and shows the administration of Lydocaine, to control pain. The Barichello video shows the circumcision of an infant from the beginning of the procedure to the end unedited. Dr. Christopher Cold has reviewed the videotapes and states they accurately portray the three most commonly used methods to perform circumcision. (Affidavit of Christopher Cold, dated 1-9-03, Exhibit A). The videos will be helpful to aid in the description of the available therapies.

These videos will demonstratively show how doctors perform circumcisions using the three most commonly prescribed instruments. More specifically, these videos will show the procedure using the Gomco clamp, which was used on Josiah Flatt. The videotape of the procedure is germane to the issue of circumcision and what information Sunita Kantak needed to give to Anita Flatt in order to make an informed decision. It is germane for the jury to understand the alternative methods of performing circumcision. It goes to the requirement of a medical doctor unmasking all of the risks, benefits and describing the available choices for the proposed therapy.

### **LEGAL ANALYSIS**

To determine if a videotape is admissible, the Court must first determine if they are relevant. N.D.R.Ev. Rule 401. Relevant evidence is defined as being “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” The underlying action is a medical malpractice action alleging that an assault and battery was committed on Josiah Flatt because the mother was given inadequate information to make an informed decision as to whether or not her son should be circumcised.

At issue is the circumcision procedure; the amount of foreskin removed in a typical procedure; the pain associated with the removal; the bleeding associated with the removal of the foreskin; and in general the procedure itself. At issue is what are the available choices with respect to the proposed therapy and of the material and known risks potentially involved in each. *Winkjer v. Herr*, 277 N.W.2d 579, 585 (N.D. 1979). The ultimate question of whether or not the physician disclosed the risks is an issue for the trier of fact, who must determine “whether a

reasonable person in the Plaintiff's position would attach significance to the specific risk.” *Jaskoviak v. Gruver*, 638 N.W.2d 1, 9 (N.D. 2002), citing *Guidry v. Neu*, 708 So.2d 740, 743 (La. Ct. App. 1997). The videotape will tend to prove that a reasonable person would attach significance to the specific risks associated with the procedure, or allow a reasonable person to decide they do not want their child exposed to the procedure given the disclosed risks.

The videotape showing the available methods of how a circumcision procedure is performed is indeed relevant to the finder of fact making a judgment as to whether or not Dr. Kantak met her duty of disclosure of “available choices with respect to the proposed therapy.” *Jaskoviak* at 7.

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.

Photographs and videotapes are admissible as competent evidence where they accurately portray anything which it is competent for a witness to describe in words or where they are helpful as an aid to a verbal description of objects and conditions, provided they are relevant to some material issue; and they are not rendered inadmissible merely because they vividly bring to jurors the details of a shocking crime or incidently tend to arouse passion or prejudice. *State v. DeZeler*, 230 Minn. 39, 41 N.W.2d 313 (1950).

The North Dakota Supreme Court has allowed a videotape to explain the procedure used when a blood test is processed in a blood bank. *Williams County Social Service Board v. Falcon*, 367 N.W.2d 170 (N.D. 1985). The use and admission of photographs or videotapes rests largely with the discretion of the Trial Court, even if the photographs or videotape have the additional effect of exciting the emotions of the jury. *State v. Miller*, 466 N.W.2d 128 (N.D. 1991). *State*

*v. Jobe*, 486 N.W.2d 407, 417 (Minn. 1992) (graphic crime scene photos and wounds to the victim). A photograph or videotape is not objectionable merely because they vividly bring to jurors the details of the procedure at issue and incidently may tend to arouse passion or prejudice. *State v. Lee*, 645 N.W.2d 459 (Minn. 2002) citing *DeZeler*, 230 Minn. at 46-47, 41 N.W.2d at 319.

The claims framed in this case involve substitute informed consent. North Dakota has adopted the objective or “material-risk” standard. *Jaskoviak v. Gruver*, 638 N.W.2d 1, 7 (2002). The objective or “material-risk” standard is also referred to as the “patient rule” which holds that the

“[T]he test is whether the physician disclosed all those facts, risks and alternatives that a reasonable person in the situation which the physician knew or should have known to be the plaintiffs would deem significant or material in making a decision to undergo the recommended treatment.”

*Jaskoviak* at 7. What material risks must be divulged is based on whether it would be material to the patient’s decision making process. “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 a specific risk. *Id.* at 9. In order for the trier of fact to understand the risks, it must fully comprehend the procedure itself. The jury must be afforded the opportunity to view a videotape which accurately depicts the circumcision procedure which was performed on Josiah Flatt. The videotapes are therefore relevant evidence and admissible to show the members of the jury what procedure was undertaken.

The depositions of both the producers of the videos were taken on January 2, 2003. The videographers both testified that the procedures accurately depicted the Gomco procedure, the Plastibel, and the Mogan clamp procedure.

David Garrigus testified by deposition on January 2, 2003, and testified that the video and audio was uncut and unedited except for a compression of the amount of time in performing the procedure. The audio is an accurate portrayal of the doctor's comments made throughout the course of the procedure. The video accurately reflects the various procedures intended to be shown. The *Garrigus* video was made for the purpose of parent education in the field of circumcision.

The *Barichello* video shows a circumcision procedure on an infant using the Gomco clamp from the first cut to the release of the Gomco clamp, without any compression of time. The total length of the video is 14 minutes and 27 seconds.

The videotapes should be admitted as substantive demonstrative evidence to allow the jury to understand what has so long been hidden from parents' views.

Dated: January , 2003

Respectfully submitted,

ZENAS BAER AND ASSOCIATES

By \_\_\_\_\_  
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Ex A - Cold Affidavit  
Ex. B - Garrigus Depo (condensed)  
Ex. C. - Barichello Depo (condensed)

attach copies of the condensed version of the depositions as exhibits, and we'll have to identify those as exhibits when they come up in the dictation;

so on this memo we will have the Garrigus video and the Barichello video to attach as exhibits, and also we will have the depositions of Garrigus and Barichello and also the affidavit of Christopher Cold.

so we'll have to be Cold - A; Garrigus Depo. Tr. Ex. B; and Barichello Depo. Tr. Ex. C