

IN THE CIRCUIT COURT OF SALINE COUNTY, ARKANSAS

NATIONAL BANK OF COMMHRCE
(Of El Dorado, Arkansas), GUARDIAN
OF THE ESTATE (Only) OF JAMES TALLEY,
a minor, and SHIRLEY TALLEY AND
GEORGE TALLEY, PARENTS,

PLAINTIFFS

vs.

NO. CIV 84-160

HCA HEALTH SERVICES OF MIDWEST,
INC., d/b/a DOCTORS HOSPITAL,
BLAINE WILLIAMS, FRANCES TULLY,
AND BRENDA SWAYZE,

DEFENDANTS

CROSS EXAMINATION
OF DOCTOR KLIAS GBORGR CHALHUB

BE IT REMEMBRD that on this 23rd day of
September, 1986, the above styled cause came on for
trial before the Honorable John W. Cole, Circuit Judge
of the Seventh Judicial Circuit of the State of Arkansas,
at Benton, Saline County, Arkansas; the plaintiffs being
represented by the Honorable Bernard Whetstone, the
Honorable Bud Whetstone, the Honorable Lamar Porter and
the Honorable Hugh Crisp, and the defendants being
represented by the Honorable Alston Jennings, Jr.;
THEREUPON, the following proceedings were had and done,
to-wit:

LOIS GREEN
OFFICIAL COURT REPORTER
P. O. BOX 545
MALVERN, AR 72104
(501) 337-7118

P R O C E E D I N G S

DOCTOR ELIAS GEORCB CHALHUB,

called as a witness by the defense, being first duly sworn,
was examined and testified as follows:

CROSS EXAMINATION

BY MR. BUD WHETSTONE:

Q Doctor, you talked quite a little while about your
Leaching and you talked to us about your doctoring and you
told us about all the work that you do at the Child Study
Center and all of your experience. You recall that?

A Yes.

Q There's a little something I think you left out that I
want to ask you about and that is testifying. That's part of
your business to testify in courtrooms for money, am I right
or am I wrong?

A That's not part of my business, Mr. Whetstone. I think
it's part of the obligation of physicians to do that.

Q You do it out of a sense of obligation, is that what
you're telling us?

A Yes.

Q Okay. Well, Doctor, tell us how much are you charging
in this very case at this very time out of your sense of
obligation to come up here to Little Rock and inform this

Jury about James Talley?

A As I told you in my deposition, we have to charge the time that it takes us to be out of our office. That's a Hundred Twenty-five Dollars (\$125.00) an hour to review charts, to meet in conference with the attorneys and Two Hundred Dollars (\$200.00) an hour to testify.

Q You've made Three Hundred Dollars (\$300.00) since this jury's been watching you, haven't you?

A If that's the time, you're correct-

Q That's the time right up there on the wall. It's an hour and a half and it's Three Hundred Dollars (\$300.00), you can figure that out.

A That's correct.

Q Three Hundred Dollars (\$300.00), right?

A Absolutely.

4 And when I took your deposition, we went Four hours. We were in a room and we were sitting back and you were drinking a Coke or whatever kind of diet drink you were drinking and everything was very relaxed, we were at Doctors' Hospital and I was asking you questions, do you recall that?

A I wasn't very relaxed, Mr. Whetstone, but you may have been. Yes, we did do that.

Q And that was August the 27th, I believe. Does that sound about right?

A I don't remember the exact date but it was in the latter

1 part of August, yes,

2 Q And we talked for four hours and I asked you questions
3 and took your deposition and the bill was Bight Hundred
4 Dollars (\$800.00)?

5 A That's correct.

6 Q That's your usual charge?

7 A Yes.

8 4 And you flew in on the airplane to Little Rock,
9 Arkansas, didn't you?

10 A Pes, I did.

11 Q And you told re in that deposition that when you got on
12 that airplane that you at that point started charging Mr.
13 Jennings a Hundred and Twenty-five Dollars an hour, didn't
14 you?

15 A Yes.

16 Q And you said that when the depoaition cost started that
17 your rate went up to Two Hundred Dollars (\$200.00) an hour?

18 A That's correct,

19 Q And ell of these charta and all of these books and all
20 these things that you brought here today with you, you did
21 not bring those with you on the airplane, did you?

22 A No.

23 Q And so as you were flying from Mobile to Little Rock and
24 you were sitting in your chair and you push the little button
25 and you push your chair back like ao, the lady brings a

little cart down the aisle and says, "Do you want coffee, Coke, or whatever," you were raking a Hundred Twenty-five (\$125.00) bucks an hour, right?

A Well, I don't think it's quite that situation, Mr. Whetstone. It's a deposition under oath in a stressful situation.

Q Excuse me, I didn't ask you about a deposition. I asked you about being on an airplane, pushing the button and--

A Oh, I'm sorry.

Q --and the seat going back and whether or not you were making a Hundred Twenty-five Dollars (\$125.00) an hour while that was going on?

A Yes, I was. But I was preparing for the deposition by being ready and going over that. But the important thing is that you have to be out of your office at that time, Mr. Whetstone.

(Mr. Whetstone, interposing) Wait a minute--

A You have to compensate yourself for the time that you would have to be seeing patients--

(Mr. Whetstone, interposing) Doctor--

--to be able to do that.

Q --can I make a deal with you?

Sure.

Because we could be here a long, long time and this jury wants to go and I want to go. Would you answer the question

1 that I ask you and do not answer a question I do not ask you,
2 would you do that for re?

3 A If I could ask the judge a question.

4 MR. JINNINGS: I think that the witness has a right
5 to explain his answer.

6 MR. WHETSTONE: Your Honor, I have no quarrel with
7 him explaining any answer he wants to explain, but I'r
8 talking about speeches and talking about things that I'm not
9 asking him anything about and trying to make that bargain
10 with him.

11 THE COURT: Well, the witness as well as the
12 attorneys need to refrain from extraneous comments. The
13 witness is entitled to give an answer and he's entitled to
14 explain his answer.

15 Q (Mr. Whetstone, continuing) Now, Doctor, we're talking
16 airplanes right now. Are you with me?

17 A I'm with you. I understand.

18 Q You're on the airplane on your way to Little Rock. You
19 didn't bring a book with you or any file with you because I
20 asked you for that file at the deposition and you said you
21 didn't have one.

22 A That's correct.

23 Q So you weren't studying anything for this trial when you
24 were on that airplane, were you?

25 A No. I was, Mr. Whetstone.

1 Q Oh, you were!

2 A Yes, I was.

3 Q What was it you were studying?

4 A I was going over in my mind the case, the testimony that
5 I was going to give and anticipating the examination.

6 Q Do you recall the case of Roland Lewis versus Thomas
7 Holden?

8 A Yes, I do.

9 Q That was a case that ended in 1986?

10 A That's correct.

11 Q You did not testify in that case, did you, Doctor?

12 A No. I had to go and be present in Jackson, Mississippi
13 for two days and I was not called.

14 Q Excuse me, I asked you--I think you can answer that yes
15 or no. And you did not testify in that case, did you?

16 A No, But let me explain. I had to go to Jackson,
17 Mississippi at the request of the attorney and be present
18 there two days being in anticipation of being called.
19 However, they did not call me to testify.

20 Q And your bill was Ninety-six Hundred Dollars, wasn't it?

21 A That was for four years' work, Mr. Whetstone. That case
22 had been going on since 1978. It required many trips to
23 Jackson, required many visits with attorneys, it required a
24 tremendous amount of time. This was a major lawsuit in the
25 State of Mississippi that took over two and a half weeks to

1 try. It required a tremendous amount of time.

2 Q Okay, well, let me ask you a question and I've already
3 asked you since you told us about the tremendous amount of
4 time you spent dealing with lawsuits and the Ninety-six
5 Hundred and the Two Hundred Dollars an hour and the One
6 Twenty-five when you're on the plane, is that not part of
9 your business testifying legal, and testifying and getting
8 money for it part of your business?

9 A I get compensated for the time that I'm out of my
10 office, but I have a full time practice. I do most of this
11 type of work on the weekend and in the evenings when I have
12 time. People and physicians that are competent and are in
13 the area have got to be responsible and it's their obligation
14 to be able to unbiasedly explain facts so that people can
15 understand them.

16 a (Mr. Whetstone, interposing) Sort of like--

17 A I'm not an advocate for anybody. I was asked to look at
18 these facts, give an opinion as to causation.

19 a It's sort of like charity work for you, isn't it?

20 A No. It's not charity work. Let's make no mistake about
21 that. I get paid, I get paid well. I don't get paid as much
22 as I would if I sat in my office or went to the hospital and
23 saw patients.

24 a Well, let me ask you this. Do you normally testify for
25 the injured party or do you normally testify for the

1 defendant?

2 A When I'm asked to review a set of charts concerning
3 their situation in both plaintiff's attorneys and defense
4 attorneys ask re to do that because there are a very few
5 people that have the areaa of specialization that I have.
6 The moat recent one was in Norrilton, Arkansas in which I
7 testified for a plaintiff-

8 MR. WHPTSTONB: Bxcuse me, excuse me, Your Honor.
9 I believe--

10 MR. JBNINGS: Be's answering the question.

11 MR. WHETSTONE: I believe he can say that he
12 testifies for the plaintiff or defendant. That's all I want
13 to know and I'm not interested in anything in Morrilton.

14 THE COURT: The question was, does he normally
15 testify for the plaintiff or the defendant--

16 MR. WHETSTONE: Yes, sir.

17 THE COURT: And that can be answered very simply.

18 4 I am asked rostly by defendants.

19 a You're asked mostly by defendanta?

20 A That's correct.

21 a Okay. In this very case you told me in your deposition
22 that you agreed to testify in Saline County after you looked
23 at the hospital records and a few other records and before
24 you ever saw James Talley, right or wrong?

25 4 That's correct.

1 Q And before you ever saw a mattress, right or wrong?

A That's correct.

3 Now, at the time we took your deposition, I noticed
4 probably three, four or five times you kept saying, "I saw
5 the mattress," and "I saw the mattress," we went on and on and
6 on and finally I said, "Doctor, you saw a mattress," correct?

7 A That's correct.

8 Q Doctor Uhaley saw the mattress, did he not?

9 4 Well, I don't know. Doctor Whaley testified that he
10 had. So let me explain that. All I can do is to tell you
11 that Mr. Jennings and the hospital showed me the mattress
12 which they said was the mattress that James Talley was on.
13 Now, if they're not telling the truth and that's not the
14 mattress, then you know, I can't help that. But that's what
15 I was shown. I was told that was the mattress. I assume
16 they're honest and reliable people.

17 Q But before you even saw the mattress that they told you
18 was the mattress, you said you were going to come up here and
19 testify about how this thing happened and you said you were
20 going to testify about the extent of his injuries. You
21 committed yourself to that before you ever saw James Talley
22 on the mattress, right or wrong?

23 A That's wrong. Let me explain that. Okay. I told Mr.
24 Jennings that I would come up and testify in terms of
25 causation because as I have already explained to you, in my

1 fifteen years' experience, my review of the literature, I've
2 never heard of any baby suffocating on his own power that was
3 normal with the deficits that were described by the other
4 neurologists who are competent neurologists and I had no
5 problem with saying that that was a process which is not
6 supported in the literature. It's not to my knowledge ever.
7 The reason for examining James Talley and for doing it on the
8 same day as the deposition was to save you time and to save
9 Mr. Jennings time so that I could corroborate the previous
10 examinations and the evidence was already there that he had
11 problems due to the brain stem and the cerebellum. My
12 examination confirmed that and that's what I told you in the
13 deposition.

14 Q Do you know Doctor Whaley?

15 A Yes, I do.

16 Q As a matter of fact, you have worked with him and you
17 knew him sort of on a daily basis over a period of years,
18 have you not?

19 A He was a resident of mine in 1977 and 78.

20 Q In your dealings with him, was he a straightforward,
21 sincere, honest, reliable individual?

22 A Yes.

23 Q Is he a good pediatrician?

24 A Yes, he is.

25 A I asked you in your deposition whether you were familiar



1 with Doctor John Menkes. You know who Doctor John Menkes is?

A I said I knew who he was.

3 4 Excuse me, I asked you in your deposition whether you
4 knew who he was?

5 h That's correct.

6 4 And do you now know who he is?

7 A Yea.

8 Q Do you agree that he is one of the authorities in the
9 world on the subject matter that we're talking about here
10 today?

11 A No, I don't.

12 4 Do you agree he has written a book on it that's a best
13 seller?

14 A Be's written a book on child neurology but let re
15 explain. And the reason I have to tell you that is in his
16 deposition he said that he's only been aware of babies that
17 this occurred has occurred in breach deliveries. He was eent
18 the National Institute of Health's book last March like I
19 was, who is a teaching physician, There's been articles in
20 the litereture over the years and I would expect somebody
21 that would write a textbook to at least discuss this basic
22 mechanism which we know occurs in children. Now, the problem
23 with one person writing a textbook is you can't know
24 everything. He is a good neurologist, a competent
25 neurologist, but we all don't know everything. So what you

1 do in that situation is you say, "Look, I don't know anything
2 about that. It may exist. But because I don't know
3 anything about it doesn't mean that it doesn't occur."

4 Q He doesn't know about it but you do, is that what you're
5 telling us?

6 A Well, yes. Because I've been able to tell you where
7 it's found. We know that it occurs. I've got the
8 information. We know the mechanism.

9 Q Hemiparesis, what is that?

10 A That's a weakness or paralysis of the arm and the leg.

11 Q Did you find that on James Talley?

12 A No, I didn't,

13 Q Is that something that comes and goes?

14 A No. It comes in various degrees.

15 Q But if you've got it, you've got it and if you don't,
16 you don't?

17 A Well, you know, you have to describe the severity of the
18 beripareais. Now, in people that we normally talk about
19 having hemiparesis is they can't use the arm and they can't
20 use the leg. They're flail, they go by their side. Now, in
21 children or adults that have lesser involvement, then they
22 may be weak, but it's different from the other side. You
23 don't--your arm doesn't move as well. Your leg doesn't move
24 as well. In my examination, I can not detect a hemiparesis.
25 He has clumsiness, and he was a little bit more clumsy on the

1 right side than he was on the left aide, but there was no
2 spasticity and with the hemiparesis, you see spasticity.

3 Q Please try to answer this yes or no- Did he have
4 heriparesis when you examined him?

5 A No. And let me again explain the reason why, okay. The
6 reason why is you have to understand, again, it comes in
7 various degrees and in his exariaation at that tire, he's
8 left handed, he obviously does more things with his left hand
9 than the right hand and he's going to appear to use the left
10 hand better, but his right hand was not heriparetic. His
11 left--his right leg was not heriparetie. He walked equally.
12 Be used both arms equally.

13 Q Did he have it, Doctor, or did he not have it. I'm
14 trying to find out, yes or no. In any degree, did he have
15 it? Did he have a little bit of it, none of it, what did he
16 have?

17 UR. JBNNINGS: He's answering your question, Mr.
18 Whetstone.

19 MR. WHBTSTONE: He's making speeches.

20 Q I want to know, did you find it?

21 MR. JBNNINGS: I object to Mr. Whetstone's
22 badgering and yelling at the witness.

23 THE COURT: I think we can go a little smoother
24 than this. Doctor, please try to answer the question as
25 shortly and succinctly as possible.

1 A (Witness answering) I've tried to answer that, Mr.
2 Whetstone, that in my examination, he did not have
3 hemiparesis.

4 Q Okay.

5 A And I tried to give you the reasons why because those
6 are important.

7 Q I know. I didn't ask you the reasons, but I understand
8 you told me even though I didn't ask you. He didn't have it.
9 Did you know that Doctor Whalcy testified in this very
10 courtroom in the chair that you're sitting in that he
11 examined the little boy the next day and that he did have it?

12 A Well, if he did, that's Doctor Whaley. He's not a
13 neurologist. He's not an observed trainer in neurology. He
14 admits that he does not have the experience in that area.

15 Q Is he not competent to know whether the little boy's got
16 hemiparesis?

17 A Well, by my examination, if he finds a hemiparesis,
18 something would have changed from one day to the next day
19 because he didn't have it the time that I saw it.

20 Q Doctor Bornhofen, I believe, is going to testify that
21 he's got it.

22 A I don't know what Doctor Bornhofen is going to testify
23 eo.

24 Q I believe you do but we'll go into that later.

25 A That's fine.



1 Q Doctor Menkes says he found it, right?

2 A Doctor Menkes described a mild circumduction of the
3 right lower extremity. That's not a hemiparesis as far as
4 I'm concerned.

5 Q His deposition says that he found it, did it not?

6 A If you look at what he describes, it's not a hemiparesis
7 as we understand hemiparesis.

8 Q Well, that's what he called it, right?

9 A Well, what I'm trying to tell you is what a hemiparesis
10 is. Now if you call mild circumduction hemiparesis, then
11 he's entitled to call that heriparesis. By definition,
12 that's not what we term hemiparesis. That's not what I term
13 hemiparesis.

14 Q You understand you're the only doctor, only medical
15 doctor who's testified so far that you can't find
16 hemiparesis, do you understand that?

17 A That's fine. I don't have any problem with that.

18 Q Okay. You did the exam on August 27th of this year?

19 A Yes.

20 Q And you were in a room, an examining room?

21 A Yes.

22 Q And I was there, Mr. Jennings was there, the mother was
23 there, you were there, James was there?

24 A Correct.

25 MR. BERNARD WHETSTONE: Mr. Jennings yes there.

MR. BUD WHETSTONE: Did I not say Hr. Jennings was there?

HR. JENNINGS: Yes, you did, and I was.

MR. BUD WHETSTONE: I did say it and he was.

Q And we were there for almost exactly thirty minutes?

A That's correct.

Q And that's all you've ever seen this young man, ever, period?

A That's correct.

Q Thirty minutes?

A Yes.

Q And during that period of time, I took some notes too.

You went through your notes, and you did a lot of the exams

that you do on a youngster like look up into the nose, look a

little flashlight in the eyes and do all the, or the eyes,

nose and ears, throat, the whole thing, that was part of your

exam, just the normal exam, right?

A Certainly.

Q And you asked him some questions, didn't you?

A Yes.

Q And you said that he was very good at responding?

A Yes.

Q And you could understand him easily, right?

A Yea.

Q And one of your questions was, "Does Whaley still have a

mustache?" And his answer was, "Haven't saw one." And your answer was, "Haven't seen him?" You remember that?

A No, I don't. But I mean, if you wrote it down, I have no problem with it.

Q Well, I mean you didn't know you didn't understand him, did you?

A I don't think that was misunderstanding him, Mr. Whetstone. I mean, many children at age three years eleven months interchange verbs for saw and Been.

Q I'm not talking about his interchange of verbs. I'm talking about your inability to understand what he was saying.

A I don't think I had any problem understanding what he was saying. He followed all of my commands, he responded to the examination in a very mature way.

Q And the way that you knew and the way that you know that he's a very intellectual little boy is because you pulled out a little flashlight and put it up like that and then you told him to do something and then you turned the flashlight off and he knew what you were doing, and from that you decided that he's got pretty good intellect, right?

A No. I've read the psychological reports, Mr. Whetstone, that your psychologist provided me. They state--

Q Wait--

A Can I finish my answer? They state in their



1 psychological report that his I.Q. is a hundred twenty, in
2 the low superior range. I rely on that. That's, you know,
3 psychometric testing, that's objective **testing**.

4 Q My psychologist, **is** that what **you** said?

5 A Well, the psychologist that you had your reports **done by**
6 and that I have copies of.

7 4 But you understand they're not, **don't you?**

8 A Well, I understand that you were the **one** that asked for
9 the report. If that's not correct, then I'll **stand** correct.

10 Q Well, you understand that Doctor Johnson **was** called in
11 by Doctor Whaley, do you understand that?

12 A If you say **so**, that's fine. I have **no** problem with
13 that.

14 Q Well, I wouldn't want you to get confused about whose
15 psychologist **she** might be.

16 A I'm not confused.

17 Q Okay, thank you. You read from her report of August 15,
18 1986 which you said gave you great comfort? Right?

19 A **No**. I don't think I used the word "great **comfort**." I
20 **said** that it **showed** he had made significant **progrese**.

21 Q Made significant **progress**. Okay, **do** you have that
22 report with you?

23 A Yes.

24 O Let's go **over** it just a rinute. You said over and **over**
25 again that **he** has an I.Q. of a hundred twenty. You said that

1 probably six tinea.

2 A I've said that because that's in the report.

3 Q I understand that. Are you ready?

6 A Yes.

5 Q On page three. This is Doctor Judy White Johnson's
6 report. "On the 1986 Stanford-Binet, James obtained an I.Q.
7 of a hundred twenty, the lower limits of the superior range
8 of intellectual functioning compared with other children his
9 age." That's what you're talking about?

10 A That's correct.

11 Q "For an age equivalent or mental, age of three years
12 seven months," right?

13 A That's correct.

14 Q Now, she's referring to the second testing, you
15 understand, the most recent testing.

16 A I understand.

17 Q "On this testing, he obtained an I.Q. equivalent of a
18 hundred thirteen for a mental age of four years six months.
19 Thus, in the thirteen months between testing, James has
20 gained only eleven months in his mental development. While
21 this two months may not seem like much in adult time, it is a
22 highly significant amount of child time, especially for a
23 child with his intellectual potential." Right.

24 A That's what she says, but that's not a correct
25 interpretation. The Stanford-Binet, obviously you don't

1 understand the test either, has a great deal of scatter.

2 Q Excuse me, do you think she doesn't understand how to
3 give a Stanford-Binet?

4 A No. She does. I was talking about the interpretation.
5 The interpretation of the Stanford-Binet has a great deal of
6 scatter. A seven point difference is not significant in a
7 three year eleven month old child.

8 Q Well, I mean, while you've been telling this jury five
9 or six times he has a hundred and twenty, you could have been
10 using a hundred thirteen, couldn't you?

11 A Fine. If you want to use a hundred thirteen, I have no
12 problem with that. That's in the above average range.

13 Q And it's dropping, isn't it, Doctor?

14 A No. If you understand the test and the way the test is
15 done, Mr. Whetstone, in the interpretation of the test, that
16 is within the standard deviation of what you would get if you
17 tested a child on various occasions.

18 4 Doctor, we've had three psychologists come into this
19 courtroom that know about this testing, that do the testing.
20 Some of them are neuropsychologists that deal with brain
21 damage and so forth, and all three of them, I believe the
22 jury will recall, said that the recent tests show that his
23 I.Q. is dropping, okay. I'm not asking you to agree with
24 that, but do you understand that, that I'm saying that?

25 A Yes.

1 Q And are you saying that they're wrong?

4 A No. There is a definite difference of one twenty to
one thirteen, but you have to understand the mechanism of the
4 testing and that you're going to get variation. If you
tested him in another year, you have to wait a year because
6 there's a practice effect. You may see the I.Q. at one
7 eighteen. It may be one twenty-two. You have to have more
8 than two comparisons on a Stanford-Binet. A Stanford Binet
9 is a test which has a great deal of scatter. As I've tried
10 to tell you before, when the child becomes age six, you do
11 what we call the Wechsler Intelligence Scale Revised for
12 Children, which is a much better test, it's a much more
13 reliable test. It has less scatter. This goes on and then
14 there's the Wechsler Intelligence Scale for Adults which is
15 also used.

16 Q Do you have Doctor Stevens report also, one of the
17 psychologists?

18 A No, I don't.

19 Q Well, I'll read along with you here and if you want a
20 copy, if your attorney wants to give you a copy, if you want
21 to look at this, feel free to ask me for it, This is August
22 25th, 1986.

23 A Okay.

24 MR. JENNINGS: This is what, Stevens?

25 MR. WHETSTONE: Doctor Stevens.

1 MR. JKNNINCS: August 25?

2 MR. WHETSTONK: I have given the doctor a copy of
3 it.

4 Q Okay, second paragraph. "James has shown some progress
5 since last seen. Though his rate of progress is far below
6 that of a normal child, he is now demonstrating what I had
7 predicted in the past, that is, due to his slower rate of
8 development, he is progressively falling further behind his
9 peers and the scores indicating his performance relative to
10 his peers are dropping. If the present rate of development
11 continues, he will eventually end up being measured in a
12 markedly deficient range in a number of areas. These most
13 recent scores are significantly more valid than the earlier
14 scores, as with increasing age, the reliability of
15 measurement increases markedly," Okay? Do you understand
16 that what he's saying is that you're getting a more accurate
17 score on tests the older he gets? Do you understand that
18 part?

19 A Yes, I do,

20 Q Do you understand that it started off at a hundred
21 twenty and it is now at one thirteen? Do you understand
22 that's what the man is saying?

23 A Okay. I do understand, but you have to understand that
24 that's within the range of variability. And you have to
25 understand that. I can't answer that question without being

1 able to explain why you have that variability, Mr. Whetstone.
2 Otherwise, I think you get some misinformation. And the
3 misinformation is that the testing is going to vary with
4 examiner, with tire and with the type of test. The type of
5 tests that were administered have a great deal of scatter.
6 If it--and again, understand, that he has had one insult that
7 occurred on the first day of his life. That's not going to
8 get any worse, okay. That's not going to change. The damage
9 has already been done. All you're going to do is improve
10 over time.

11 a All you're going to do is improve over tire?

12 a That's correct.

13 a Doctor, now we understand that James is going to be
14 doing a little better when he's five than when he's four.
15 He's going to be doing a little better when he's six than
16 when he's five, right?

17 a That's correct.

18 a What we're talking about is what James is going to be
19 doing when he's five compared to somebody else his own age
20 that's five, do you understand that's what we're talking
21 about?

22 a Yes. That's what these tests are compared to, Mr.
23 Whetstone.

24 That's right. They're compared to other people?

25 a That's correct.

1 Q And they're dropping?

2 A Well, I can't explain it to you any other way than I've
3 already done, is in terms of variability. You have to
4 understand that there's a standard deviation. The standard
5 deviations are within an acceptable range for variability
6 which is not statistically significant.

7 Q I understand that I don't understand it, Doctor, and I
8 understand that I don't have any training in it, but we've
9 had three people come in here that have got PhD's in
10 psychology, Are you telling this jury that they don't
11 understand it?

12 A I don't know those people, Mr. Whetstone. I can tell
13 you based on my experience and the psychologists that I deal
14 with and I've been doing that for fifteen years and have been
15 in charge of two Child Study Centers, was in charge of the
16 Child Study Center for the State of Arkansas and for the
17 Children's Colony--

18 Q What was my question?

19 A Uh,--

20 P What was my question?

21 A I have the ability to make my own interpretation.

22 Q What was my question, Doctor?

23 A You asked me if I believed these three psychologists. I
24 don't know them.

25 Q I said are they qualified to understand this?

1 A I don't know them, so I--

2 Q Well, that's the answer I want. If you don't know, say
3 I don't know, would you do that?

4 A Okay.

5 Q Were you taught in medical school about psychologists?

6 A Yes.

7 Q Do you believe that they've got a place in the world?

8 A Oh, yes. Absolutely.

9 Q Do you believe that they can help an individual even
10 such as yourself understand things about brain damage?

11 A They help me and they help most neurologists in terms of
12 psychometric testing and educational testing, yes, I do. I
13 use them all the time. I rely on PhD psychologists to give
14 me that information. We do that in our staffings and I do
15 that in my daily practice.

16 Q You do it in staffings?

17 A Yes.

18 Q Is that where you get a group of people together and you
19 have like a psychologist and you have all different kinds of
20 doctors and they kind of sit around, maybe not in a circle,
21 but that's kind of the way I picture it and you talk about an
22 individual and you decide what is best for that individual?

23 A Yes.

24 Q Do you understand, Doctor, that in this very case that
25 we have such a team and such a group to help little James

Talley to decide what to do with him in the future and what to do with him right now?

A Yes.

Q Do you understand that he is in gaster Seals right now?

A Yes.

Q And you told re in your deposition that you don't know much about Easter Seals?

A Yes.

Q You've also told me that you don't think he probably ought to be at gaster Seals, he ought to be in regular kindergarten?

A Yes.

Q So when you get together with your group in Mobile and you make these decisions for what's going to be done for a little boy that's brain damaged, you think that's okay, but you think when they do it here in Little Rock that it's not okay, that you want to come in here from Mobile and tell them that they're wrong?

A No. That's absolutely wrong. Let me explain to you why that's absolutely wrong, and I tried to explain to you that in my deposition and I'll be glad to pull it out and read it to you. Our focus, our importance and what our goal is as an advocate for children is to place them in the most normal situation. Children with normal intelligence need to be around other children with normal intelligence. If they have

motor disability, that is no hindrance. They may have difficulty competing in competitive sports, but with normal intelligence, we try to encourage them to use that intelligence to gain confidence and gain self-esteem in the areas in which they are good. You don't accentuate their problems. That's why you design their program in the public school system, in the private school system so that we can take advantage of their strengths and not their weaknesses.

And that's why we have the team is to decide whether they need to go to public school or they need to go someplace else. That's the team concept in medicine, isn't it?

Yes.

The team has met and the team has tested him and the team has spent time with him and the team has gone to physical therapy and looked at him and spent all this time and you spent thirty minutes with him and you say the team is wrong?

I would have to say that based on my experience and based on all of his testing and his examination, Mr. Hetstone, it would be a different recommendation that we could make and I tried to give you and the jury the reasons why I disagree with those recommendations.

You had thirty minutes with him and they've had all this other time with him?

But I've been spending six weeks reading all of the test

results which they have provided me with and based on the reports that they get, it doesn't make sense to come to the conclusions to put this child in a special school and institutionalize a child with normal intelligence and a mild to moderate motor deficit. I just have a hard time with that.

Q Do you Understand that the doctors are trying to tell you that through these reports that through these things that you've read and all these hours of reading that you've told us that you've done, do you understand that they're trying to tell you that he doesn't have just mild motor deficits. He's got brain damage that affects other parte of his brain, such as his ability to think and sequence things. Do you understand that they're saying that?

A Sure.

Q Well, then he's not just clumsy and that's all there is to it, is it?

A I've already told you that he **has** learning disabilities but that does not necessitate putting somebody in a school with retarded children and putting somebody in an institution depriving **him** of adequate socialization, depriving **him** of friends, depriving **him** of being around normal children. That doesn't conetitute that.

4 What institution do you think they're going to stick him in?

1 A Doctor Menkes mentioned institutionalizing him. I don't
2 know what he had in mind and they may do that in California,
3 but we certainly don't do that in Alabama and we don't do
4 that in Florida and don't do that in Georgia.

5 Q You're going to say that Doctor Menkes said that he
6 needs to be institutionalized?

7 A That's what he said in his deposition.

8 Q Well, I wish we had time for you to show us where he
9 said that. That's not the way I recall it. The jury's heard
10 it, so I won't plow that ground. Do we agree, Doctor, can
11 you and I just agree on this such? Does James Talley have
12 brain damage?

13 A Yes, he does,

14 Q And did he get the brain damage when he was nine hours
15 old at Baptist Hospital when he was laying on that mattress?

16 A Yes, he did.

17 Q I've talked with you in your deposition about what you
18 think about having a nurse in the room?

19 A Yes, you have.

20 Q And you told me as I recall in your deposition that you
21 thought it was perfectly satisfactory for a nurse to leave a
22 newborn baby, if the baby was otherwise healthy, been checked
23 out healthy, to leave the baby alone for as long as ten
24 minutes unobserved, right?

25 A Yea. That's correct.

1 Q How long do you think little James Talley was without a
2 heartbeat?

3 A Well, as I tried to give you the evidence baaed on the
4 PE, based on his lack of cardiac involvement, based on his
5 lack of renal involvement, based on a C.T. Scan, based on his
6 clinical examination, based on the type of brain damage and
7 neurological deficit he has at this tire, that the best
8 estimate would be sometime between two and a half to four or
9 five minutes.

10 4 In your deposition it was two to eight minutes.

11 A That was based on the PH, not based on everything else.

12 Q Well, have you changed it from two to eight to two to
13 four?

14 A No, I haven't changed. I told you those studies were
15 from animals and dogs and you can't necessarily take that
16 data and translate it. You have to take everything into
17 constellation. You can't take one value. You have to take
18 the type of brain damage that he has, the type of deficit
19 that he has, all of the studies that--

20 Q I'll take your word for it.

21 A Judge, could I finish? Judge, could I finish my answer?

22 THE COURT: You may go ahead and finish. But the
23 attorney and the witness both are going to have to try to be
26 a little more brief and succinct in your answers and
25 your questions.

1 A (Witness, answering) The bottom line is, Mr. Whetstone,
2 that you practice medicine with all of the data. You don't
3 select out one test. You don't select out one individual's
4 situation. You have to put it all together and come to the
5 most reasonable conclusion.

6 Q Okay, the answer though is four minutes, two and a half
7 to four minutes is how long you think that his heart had
8 stopped?

9 A Is the best I could estimate, yes.

10 Q And you realize that the way that they found the little
11 boy in the first place, the way that they ever found out his
12 heart was stopped that there was a nurse in the room that saw
13 him, you understand that?

14 A I'm sorry. I don't understand what you're saying.

15 Q You understand the way they figured out his heart had
16 stopped in the first place, there was a nurse there?

17 A Yea.

18 Q And she saw him?

19 A Yes.

20 Q And she saw him, you said that his heart had stopped for
21 perhaps as long as four minutes, right?

22 A Yes.

23 Q Would he be worse off today if she had been out of the
24 room an extra six minutes that you told the jury that it's
25 okay for her to be out of the room?

1 A No. And let me tell you why. Because when this type of
2 event occurs, damage to the brain stem occurs at that moment.
3 Now, let me also correct one other thing. The **heart** may not
4 stop completely when **you** have **a** brain stem **stroke** until
5 things taper on down. In other words, **you** can have **stoppage**
6 of respiration **and** as soon as the tissues becomes not having
7 oxygen, then the heart may atop because the heart becomes
8 ischemic, but it couldn't have occurred for any great length
9 of time. Babies that have **significant** heart **stoppage** and
10 significant lack of oxygen and blood flow going **to** the heart
11 and the kidneys go into renal failure. They go into
12 congestive heart failure. That's what we see in babies that
13 have those type of problems. James Talley didn't have those
14 problems.

15 Q I guess I'm not asking **good** questions. Because what I'm
16 trying to find out **is** you said that his heart had stopped
17 four minutes and then the nurse found **him** and he was in an
18 emergency situation and she found him and grabbed him and
19 then whatever damage he **has**, **he** has **as** a result **from** that four
20 **minutes** of stoppage, are we right **so** far?

21 A No. The result of his damage is from the occlusion of
22 the blood vessel.

23 **a** But his heart had stopped for four minutes?

24 A Well, **we** don't know that. At the time she found him, it
25 **had** just stopped. Okay, could have--respirations which are

1 affected by the brain stem could have decreased. When that
2 decreases, you're not exchanging oxygen and when you're not
3 exchanging oxygen then the heart rate **starts** to **go** down.
4 Now, it may have only been **ten** seconds that it stopped.
5 Nobody knows that. All we know **is** that the oxygen
6 concentration which **is** what lowers the **PH** **was** affected. That
7 could be affected by not breathing, it could be affected by
8 the heart stopping and **so** we just don't know.

9 Q Well, let me **go** at it a different way. Suppose the
10 nurse had waited the ten minutes that you have told the jury
11 it's okay for her to be out of the room? Suppose she had
12 waited an extra ten **minutes**, what would have happened? Would
13 he have been any worse?

14 A He would have probably died.

15 Q Probably killed him, wouldn't it?

16 A Yea.

17 Q Doctor Menkes said in his deposition and I think Doctor
18 Whaley has testified that **an** individual can have suffocation
19 and have brain damage from suffocation without having **all**
20 these holes in their brain and all this other business that
21 you've shown **us**. Did you read that in Doctor Meokes
22 deposition?

23 A I don't recall. If you could **show** it to me, I'd like to
24 look at it. I don't think that's **the** way it **was** exactly
25 stated.

1 Q Well, are you telling us that if a person has brain
2 damage from euffocation that they've got to have these holes
3 that you've showed us on the CAT Scan?

4 A Yes. That's one part of it. You've got to have
5 something, okay? The brain has to show some atrophy or some
6 shrinkage. The skull doesn't grow. The head doesn't grow.
7 You have significant seizure disorders, you have mental
8 retardation. When that occurs, something else has got to
9 show up. You just don't have damage to this back of the
10 brain and this back of the brain. You've got to have
11 demonstrated damage by some objective test to the top of the
12 brain or the cortex. And that's not here. I can't make it
13 here. And the reason that it's not here is because the
14 damage occurred back here, not up here.

15 Q You don't understand that Doctor Menkes and Doctor
16 Whaley disagree with you on that point?

17 A Well, Doctor Whaley in his deposition said that he would
18 defer to the neurologist because he didn't understand this
19 part of anatomy, psychology and the mechanism.

20 Q He's testified in this courtroom and I shouldn't ask you
21 what he said in the courtroom because you weren't here but
22 you have read Doctor Menkes deposition. Did you understand
23 that all this stuff about the neurological, or the heart and
24 the kidney and brain swelling and the seizures and all of
25 that business, he said that you could have suffocation in a

1 boy like James Talley without having all these findings that
4 you've told the jury that he would have to have? Do you
understand that y'all are like that on this issue?

4 A I don't think so. I think that you're talking about
6 extent of damage. It's always conceivable that anybody who
6 has a brain stem stroke or has lack of oxygen for even a
7 short period of time can have mild involvement. But the
8 predominant involvement, and let's make no mistake about
9 that, is not here. It's back here. Now Doctor Whaley and
10 I'll be glad to look through his deposition and show you
11 where he told in his deposition, now if he changed his mind
12 in court, I didn't hear his testimony, but he doesn't know
13 about anatomy and physiology of the brain. He doesn't even
14 know about this type of mechanism.

15 Q Who doesn't?

16 A Doctor Whaley. And he stated clearly that he would defer
17 to the neurologist. Now Doctor Menkes and I may differ. I
18 have to give you my opinion. I've tried to give you based on
19 sound anatomy, based on sound physiology, based on x-rays,
20 based on laboratory data, based on clinical observations. I
21 don't know any other way to do it, Mr. Whetstone, but to
22 tell you the way it is based on the chart, the child and the
23 studies.

24 MR. WHETSTONE: Judge, this may be a good time to
25 take a break.

1 THE COURT: Yes, I believe it is. Let's break,
2 ladies and gentlemen, for fifteen minutes. You're under the
3 usual admonitions.

4 (THBRBUPON, court was in brief recess, then the
5 Court and Counsel for Plaintiff and Defense returned to the
6 courtroom and proceedings occurred as follows:)

7 THE COURT: Proceed.

8) (Mr. Bud Whetstone, continuing Cross Examination:)
9 Doctor, you have given us your theory about this vertebral
10 basilar insufficiency, explained it to the jury, so I want to
11 ask you something about that. You told about all the studies
12 that have been done on it. You know of any studies or any
13 reports where a child ever got a brain injury or any damage
14 in the first forty eight hours of his life the way you have
15 explained to us that you think James Talley did?

16 Yes.

17) You do know of it?

18 Yes.

19) How many times?

20 I've had two in my experience.

21) While they were in the hospital?

22 Yes.

23) And I asked you on your deposition about that and you
24 said there just weren't any statistics and you'd never heard
25 of it?

1 A You're talking about smothering.

2 a No, sir. I'm not talking about smothering. I'm talking
3 about your vertebral basilar, this theory that you've got
4 about what happened to James Talley, you got out all your
5 little charts and everything and went through all of this and
6 you got your books out and went through that and talked about
7 the statistics of what all Menkes doesn't know and so forth,
8 and I'm asking you, do you know what the studies are of how
9 many times a child forty-eight hours old has ever gotten any
10 damage whatsoever from this way that you say James got his
11 damage?

12 A Well, I told you that--I've given you the references
13 that I have to quote in the articles, and my experiences that
14 I feel that I've had two children exactly like this that have
15 the same problem.

16 Q Do you know of any studies that show that?

17 A I've given you the studies, the papers and the
18 references, the recent book from--

19 Q Doctor, the question is not whether you gave me a book.
20 The question is do you know anything in your studies that
21 show that--

22 A These are the studies. That's what I was trying to tell
23 you. These are the articles that talk about the studies that
24 were done.

25 Q And you said--are you saying yes or no?

A Yes. That's what this deals with, prenatal, perinatal events.

3 You recall during the first break when **you** had these **books** and **you** were sitting in that chair and Mr. Lamar Porter walked over and asked could we be looking at those **books** and you wouldn't give them to you, would you?

A No. He didn't ask me, Mr. Whetstone. I didn't go over and look at his things. I don't mind showing him anything but it's just the way he did it that bothered me.

10 Q Okay.

11 A I mean, I think that was discourteous, I don't go through his things and I'm more than happy to share these because if you haven't seen them, you need to and maybe perhaps we could understand what was going on.

15 Q Read to us in that book where it says how many babies that are forty-eight hours old have had vertebral basilar insufficiency and have had an injury or died? Read that to us.

19 It doesn't have numbers, okay. It talks about mechanisms, okay. It talks about people's experiences.

21 We understand the mechanism, Doctor. You went through that in detail this morning. I'm talking about when, within the first forty-eight hours is there any literature on that or not?

25 It's right here. It says, "In the neonatal period,"

which is from birth to one month of age.

2 From birth to one month of age. I'm talking about in
the first forty-eight hours, is there or is there not any
material on that?

4 I don't know how to answer it any better, Mr. Whetstone.
It says in the neonatal period.

6 You're not going to show us anything in that book or any
book that says that a child in a hospital, while he was in
the hospital right after he was born got injured the way you
10 said James got injured? You're not going to show us that in
11 that book or any book on the face of this earth, are you?

12 It says that right in this book, Mr. Whetstone.

13 In the neonatal, that's the first month. I'm talking
14 about the first-- while they're in the hospital.

15 Well, that's what this says. I don't understand what
16 the difference is. I'm having a hard time understanding--

17 Well, they don't stay in the hospital for a month, do
18 they?

19 No. But it includes the period from birth to the
20 neonatal period. I mean, that's day one, two, three, four,
21 five, six, up to thirty days.

22 Okay, let me ask you this. Can you envision that for
23 some reason there would be something pushing into a baby's
24 face, such as a mattress and the more that it pushed into the
25 baby's face, for whatever reason, the more the baby would

ull its head back, and the more it would pull its head back,
he more it would crimp the arteries in the back of the neck
causing vertebral basilar insufficiency, **can you envision**
hat?

5 A Not on a one inch mattress, no.

6 Q Well, on a mattress that Dr. Whaley would characterize
s being unreasonably dangerous, could you picture it on that
ind of mattress?

9 Well, I've examined the same mattress. Doctor Whaley
10 as his own opinion about the mattress but--

11 You have not examined the same mattress. Doctor Whaley
12 id not identify **this** mattress as being the mattress and he
13 sid this mattress was not unreasonably dangerous and the one
14 e **saw** that night **was** unreaaonably dangerous. **Now**, can you
15 vision that the same scenario that you've gone through
16 ere, can you imagine that if you did have a mattress that
17 as thicker and softer and unreasonably dangerous and was up
18 r a baby's face that the baby may do just exactly what you
19 aid this little boy did and pull his head back and get the
20 rteries crimped in his neck the **way** you told us you think
21 nes did?

22 No. Simply because those type of mattresses are not
23 ke Sealy Posturepedic. They don't **go** up and down in
24 ertain places. The weight of the baby's body **is** far greater
25 an the weight of the head **so** it'a all going to go down to

the ~~same~~ extent. The mechanism that people think that this occurs when babies are in cribs **is** by moving and getting their head against ~~the~~ crib and when they get their head against the crib, well, **lifts it** up, they do that. It's not **by** just oinking down into **a** mattress.

3 Let me **ask** you this if I didn't ask you this when I **took** your deposition and if you didn't **give** this answer. Page 51. I understand we're not talking about mattresses **now** but we're just talking about this general proposition. Page 51, line

3. Question: "But if for ~~some~~ reason there was something pushing against the baby's face, the more it pushed against the baby's **face** for whatever reason, the more the baby would be likely to pull the head back which would result in just what you're talking about, vertebral basilar insufficiency?

Answer: I don't have any disagreement. That's a possibility."

Let's get the rest of that and let's read the bit before **because** what we were talking about **is** a five or ~~six~~ inch mattress, **as** I recall, and if you would give ~~me~~ the deposition, I would be glad to show you that. ~~We~~ indicated in **my** deposition of the mattress that we talked about and the ~~same~~ mechanism we're talking about here is **you** picture a baby sitting on this mattress. Okay, the body is here which weighs heavier than the head. It's **all** going to go down the ~~same~~. The mechanism that this **occurs** when that baby's head

goes against the side of the crib and the baby's pushing up and that's when the mechanism occurs, not just lying on a mattress. The baby's going to turn his head from side to side, but not this way.

Q Do you understand, Doctor, that there were eighteen babies in that--seventeen or eighteen, depending on the way you look at it, but there were eighteen babies in that nursery that night?

A Yes.

Q You understand that one baby got hurt that night?

A Yes.

Q You understand that Doctor Whaley has testified that there was one mattress that was unreasonably dangerous in his opinion that night?

A Yes. Did he examine the other mattresses?

A I believe he did. Let's talk about what the future holds for James Talley in terms with his peers. Been some indication from the psychologists that it's going to be pretty bleak for him mentally and the things that he's not going to be able to do and the way he's going to be accepted. take it you disagree with that in general?

A In general I do, because I don't know how to totally predict that.

Q Do you agree that at the present time he has problems like throwing a ball, catching a ball?

1 A Yes.

2 Q Do you agree that he has problems dressing and
undressing himself?

4 A Yea.

5 Q You understand that he wears blue jeans because he
6 doesn't like to wear shorts because he falls all the time?

7 A No. I didn't understand that, but I have no
8 disagreement with that.

9 4 Do you understand that if he keeps falling, you said
10 there was no way he would be injured and you said something
11 in your testimony about him not being injured again, that
12 this was a one time situation. Do you understand that he may
13 at sometime between now and whenever the rest of his live
14 that he may fall again because of this irbalance that you've
15 told us about and reinjure himself again?

16 A Reinjure himself in what way? Not with another stroke.

17 Q However you injure yourself falling, like burping your
18 head?

19 A Well, I think all children, you know, between the ages
20 of three and ten fall a great deal, but they don't
21 significantly injure themselves. You know, I'm sure he's
22 going to fall. He's going to fall as any other child would.
23 He's probably going to fall more because he's clumsy. But
24 you scrape your knees and you scrape your arms, you don't get
25 concussions and subdural heratomas.

Q He's going to fall more than the average individual the rest of his life, isn't he?

A No. I don't know that. Because as I've already told you, you're going to get better with time. He's got normal intelligence to above normal intelligence. He's going to accommodate for his deficit. He's going to be able to know what he can do and what he cannot do. People that have handicaps work around those handicaps. They don't do things that get them in trouble.

Q Should he work on a ladder, upon a ladder?

A Surely not now.

Q Ever?

A I don't know that. I don't know what his coordination will be at age sixteen.

Q Well, do you think his coordination is gonna get pretty relatively normal as time goes on?

A I told you it was going to improve. I don't know where it will level off. He's going to be clumsy, okay? The amount of clumsiness as I've tried to explain to you, the brain of the child is like an expansile, a plastic mold. It changes. Parts of the brain do other things. We've all heard about the frontal lobes of the brain. He doesn't even see that portion. We don't even understand all the functions. We do know that it takes over certain other functions. Now, we understand from our previous studies of

1 children with cerebral palsy, that have insults at birth
2 that over time, while they may be delayed in their
3 development, some of them eventually catch up. Some of them
4 have permanent deficits. The extent cannot be estimated
5 until that time. But we know he's not going to get any
6 worse.

7 4 Do you think he's going to be terribly frustrated and
8 upset as time goes on?

9 A That's up to James Talley. That's up to how his mother
10 handles the problem who I think understands and is extremely
11 supportive. That's how the school system handles his
12 deficit. That's how they design his program so that they can
13 take advantage of his strengths and not maximize his
14 weaknesses.

15 Q And you said one of the things that should happen in
16 public school, that if he's got a test that takes thirty
17 minutes--takes a normal child thirty minutes and he's a
18 little slow because of this damage that he has, that he just
19 simply needs to take an hour to take the test?

20 A Yes.

21 Q And then you said that's probably what they're going to
22 do for him in public school, right?

23 A Well, that's what we would recommend if we had an
26 individual that had difficulty completing a set of tests in
23 "x" amount of time, if he could understand it and had no



1 problem understanding it, why should you penalize a child
2 that has the knowledge, that has the intelligence to be able
3 to complete the test. You simply give them **more** time.

4 **a** You do?

5 **A** I do.

6 **Q** In public school?

7 **a** Well, that's what I said, Mr. Whetstone. I'm not making
8 it up.

9 **Q** I understand you're not making it up and I'm not going
10 to be making this up either. What if it's the end of the day
11 and he's taking the test the last thirty minutes of the day
12 and he's going to catch a bus home. Do you think the bus is
13 going to wait for him while he has an extra thirty minutes
14 that you said that he needs and that they're going to give
15 him? You think the bus driver and the rest of the **kids** are
16 going to wait on him?

17 **A** I would hope they'd design his program so that if he's
18 taking tests, they're going to be done at a certain time that
19 will allow him to catch his bus. **Now**, I think one has to be
20 reasonable. The school system has to be flexible. They have
21 to understand his problem. If he misses his bus, then he
22 misses his bus. Something else would have to be done. But I
23 don't think the people intentionally do that if they
24 understand his problem, they design the situation so that
25 you can avoid that as much as possible.

□

2 a Our school system simply, Doctor, is not set UP to have
3 an individual take a thirty minute test and add an extra
4 thirty minutes just to accommodate him.. I mean, we move from
5 one class to the next class, to the next class and it's over
6 and then they get on the bus and you go home. Isn't that the
7 way it's designed?

8 Not in kindergarten and in the first grade, Mr.
9 Whetstone.

10 Well, I'm talking about the second grade, the third
11 grade. That's the way public schools are designed, aren't
12 they?

13 Nor in the second grade or the third grade. You don't
14 change classes until the sixth grade and sometimes in middle
15 school.

16 You go home at the end of the day at every age, don't
17 you?

18 Right. But you're in one class. You have a teacher
19 that can individualize your program, you have a teacher that
20 can allow you to take a test longer than another child. That
21 happens all the time. That's why we alter the programs for
22 children. That's why we try to keep them in a normal
23 situation.

24 Do you think that teachers in Saline County, I'm not
25 talking about their intent, I mean, I used to teach school
and I think it's one of the greatest things you can ever do.

1 o you think that the teachers with twenty-five children or
2 o in a room can take a little boy like James and go read all
3 hese depsoitions and all these things that you've read that
4 ou said took hours to read and have an understanding of his
5 rain and what he needs and then take a program and build it
6 round him in public schools? Do you think that's realistic,
7 n this world?

8 No. But let me explain what they do and you've already
9 old us what they do. They have that staffing with all those
10 ntelligent people that have been seeing James, they, they
11 esign a program, they Beet with the school system. They
12 ay, "Look, James can't attend. He's not going to be able to
13 omplete his algebra test or his mathematics test in thirty
14 inutes, He needs forty minutes to do that. Let's design
15 hat program for him." Now within the public school system,
16 ou have special clasees, you have tutors, children can go
17 ut for a hour if they're having particular problems in
18 eading or a particular problem in math. They come back into
19 he regular situation. You design that program so that they
20 an maximize their time in a normal environment with normal
21 hildren and be able to feel proud and have their own self
22 steen.

23 And does it take specialists in order to do this or is
24 ust any teacher qualified to do it?

25 No. They have to have teachers that are trained in

1 special education.

2 Q And if James has a disability that was caused at
3 Doctor's Hospital we just let the taxpayers pay for it,
4 that's what you're saying?

5 A No. That's not what I'm saying, Mr. Whetstone. I don't
6 know, you know, it's up to you to decide who's at blame for
7 James Talley's problem.

8 Q No. That's not up to me to decide. It's up to the jury
9 to decide.

10 A It's up to the jury to decide. My--you asked me the
11 question as to how do you teach them. Regardless of what the
12 problem is, the school system has to teach him. The Public
13 Law 94-142 which was instituted some thirteen years ago was
14 done for a special reason. It was put in there to insure
15 that every child would have an advocate and that the public
16 school system had an obligation to provide that child with
17 the program that was best suited for them.

18 Q Is that the law you think he ought to go under, is that
19 law you just told us about?

20 A That's the law of the land.

21 Q That's right. And it was passed by the Legislature?

22 A Yes.

23 Q And if it's repealed tomorrow by the Legislature, like
24 on a budget cut back, if we're trying to reduce the Federal
25 deficit or something like that, do you have an opinion then

1 about what ought to happen to James in public school?

2 A I would think the public school system has the
3 obligation to the taxpayer which are paying their salaries to
4 provide those opportunities to those children.

5 Q Doctor, I'm talking about the real world, not
6 Obligations. Do you think the public school can take an
7 individual with the problems that he's got and take care of
8 him? If the answer is yes, just say yes.

9 A Yes, it is. I do sincerely believe in the public school
10 system.

11 Q I do too. What do you see the future holding for him
12 mentally with his peers?

13 A In terms of what?

14 Q **When** I asked you this question in your deposition on
15 page 109?

16 A I can't remember--

17 Q Question, Line 5: Bringing all this philosophy down to
18 James Talley, how do you see James Talley in the future
19 mentally dealing with his peers and with all the things that
20 you've told us that he cannot do? Answer: Well, mentally, I
21 think he's going to do quite well. Now, he's going to have
22 some physical problems with his coordination and he will not
23 **be** able to compete athletically in competitive sports as
24 other children his age. I don't think there's any question
25 about that but that again depends on the child. It depends

1 on his parents. It depends on the environment they're placed
2 in as to how much emphasis that is done. You're obviously
3 not gonna put him into a competitive basketball game at the
4 age of six because he's not going to be able to do it, but
5 he's going to get terribly frustrated and upset, right?

6 A If you put him into a competitive situation, yes. I
7 agree.

8 a But he can engage in swimming activities?

9 A Yes.

10 a He can engage in soccer?

11 A Yes.

12 Q You think soccer is a good sport for James Talley?

13 A If he wants to play it, I think he can. The position
14 known as halfbacks which don't have to move very much, All
15 they've got to do at his age in the YMCA programs is stand
16 there and stop the ball. He doesn't have to run up and down
17 the field. There's also a goalie, same type of thing. We're
18 talking about a program geared for him with children like
19 him. The YMCA programs do that. That instills the type of
20 confidence and the practice and the ability to be able to do
21 things. That's what our system is. It's for everybody, not
22 for just stars.

23 Q I'm all for sports. I'm all for being even on the
24 second and third team, but you're telling this jury with the
25 imbalance that he has, the problems that he has falling down,

1 the problems that he has catching himself when he does fall
2 down, stumbling over his feet, the whole thing, you're saying
3 that sport you pick out, one that would be a good sport would
4 be soccer?

5 MR. JENNINGS: If it please the Court, I think it's
6 appropriate in this situation for the remainder of the
7 doctor's answer to be read. There's only a few sentences
8 left in that answer, page 109.

9 MR. BUD WHETSTONE: You want me to read the rest of
10 it?

11 THE COURT: I think that would be appropriate, yes.

12 MR. BUD WHETSTONE: Okay.

13 a (Mr. Whetstone, continuing) I'll start at the paragraph
14 on line 16. You're obviously not going to put him into a
15 competitive baseball game at age six because he's not going
16 to be able to do it. He's going to get terribly frustrated
17 sad upset but he can't engage in swimming activities. He can
18 engage in soccer. He can engage in things that will allow
19 him to use the ability that he has and that he can enjoy.
20 He's going to find out what he can do and what he cannot do,
21 but what he can't do, he's not gonna want to do, but the
22 things that we don't do well, none of us like to do because
23 it's not very rewarding and it's hard.

24 MR. JENNINGS: Thank you.

25 MR. BUD WHETSTONE: Excuse me, one second.



1 Q Doctor, you only saw him for thirty minutes, you've
2 already told us, and there were no people his age there and
3 no four year **olds** his age there, right?

4 A Correct.

5 Q Do you know how he interacts with children his own age?

6 A Just on the reports that I've read.

7 a And what is your understanding?

8 A I really can't recall **all** of the reports right **now** so I
9 don't know. I **just** can't tell **you** that I can recall that
10 right now.

11 Q If his mother says that he has a terrific amount of
12 **problems** and gets frustrated and cries end that type thing,
13 would you think that would be something that you would
14 expect, taking into consideration his condition?

15 A Yes.

16 Q You think he does have a certain amount of emotional
17 **problems** even at **this** very tire?

18 A Well, I don't know what you mean by emotional problems.
19 I think he's probably frustrated because he has some motor
20 **problems**. There's no question about that. In terms of
21 **reports** that were produced by the psychologiats and by Doctor
22 Jenkes that he appears to **be** mature, he appeera to **be**
23 idjusting well at his age, what his relationships with other
24 **children**, there's a lot of variables in that. It's not
25 **just** because he has clumsiness. He has a deficit. He's

receiving a lot of care and attention and demands a lot of attention.

Q But the care and attention he's receiving **has** been, is with people like physical therapists, he's been to physical therapy over three hundred times, you know that?

A Yea, I do.

Q His mother has driven almost twenty thousand miles driving to physical therapy. He's had a lot of love and attention.

A Absolutely.

Q What I'm talking about is when you take him out of that love **and** attention and these professionals that have been working with him up until this time and just throw him out with other four year olds in a competitive situation, in your opinion emotionally, is that not going to be devastating to him?

A Oh, it's going to be difficult, but that's not what I'm advocating. You're not going to do that. You're going to design a program for him **so** that he will be successful. You're going to design his school program. You're going to design his sport program so that you don't frustrate him and maximize his potential.

A We agree on this, don't we, that we've got to design a program for James Talley of some type?

A Yes.

1 2 Now, Doctor, I asked you earlier about, the different
2 doctors involved and the depositions that you've read and you
3 understand that there's a team of doctors, there's Doctor
4 Whaley, and there's Doctor Johnson and there's Doctor Stevens
5 and there's Doctor Blackerby, who I think probably is not on
6 the team, and then there's Doctor Menkes who is probably not
7 on the team, but you understand that from reading their
8 reports that they're kind of on one side over here and that
9 there are two doctors that are going to testify for the
10 defense that are kind of taking a different point of view or
11 may take--I know you have, but there's yet another one,
12 Doctor Bornhofen to come on, is that the way you see it?

13 4 Yes.

14 2 I asked you earlier if you knew what Doctor Bornhofen's
15 testimony was going to be and you said what?

16 4 No. I don't know what his testimony is going to be.

17 2 Doctor, where did you spend the night last night?

18 4 I spent the night with Doctor Bornhofen, He's my
19 partner and longtime friend and every time I come to Little
20 Rock, I spend the night with him, but I specifically told him
21 that Mr. Whetstone was going to ask me in front of this jury
22 whether I discussed this case with him and discussed his
23 testimony and I said I didn't want to do that because I
24 didn't want to affect what he said, I didn't want him to
25 affect what I said. He agreed with that. He's an honorable

1 nan and you're going to get an honest answer just like you
2 have from me.

3 a Regardless of all that, you spent the night last night
4 at his house?

5 A Oh, absolutely, and he's my close friend.

6 a His wife and your wife are very close friends, aren't
7 they?

8 A Yes.

9 A They're very close socially, aren't they.

10 A Well, we don't see them but once a year, but yes.

11 A Well, I mean, he's in Little Rock and you're in Mobile?

12 That's correct.

13 A Very close socially?

14 They're nice people. We like them,

15 MR. WHETSTONR: Pass the witness.

16 CROSS EXAMINATION

17 Y MR. JBNNIHGS:

18 I have just a very few, Doctor. The first thing I'd
19 like you to discuss in a little bit more detail is what
20 catter means on the Stanford-Binet Intelligence Test?

21 Well, in any psychological test at any time, there are a
22 whole host of factors. It depends on the child, how he feels
23 that day, the examiner and there's variability in the
24 examiner and there is a range of testing scores which they
25 all standard deviation. And the reason for that is that on

□
1 a given date, somebody might not feel good, they may not try
2 as hard and you have to account for that within a broad range
3 of everybody. So you're going to see what we call scatter.
4 Now, it also depends on the test. The Stanford-Binet Test is
5 known for tremendous scatter in both directions.

6 Q Does the age of the child affect the amount of the
7 scatter on the Stanford-Binet?

8 A Yes. The younger the child, the more the scatter and as
9 the child becomes older, you're going to be able to get a
10 more finite evaluation of not overall intelligence, the I.Q.
11 is about right. It's where the differences are in certain
12 specific learning disabilities, which he has. Nobody's
13 questioning that.

14 Q What are they, by the way? We've talked about learning
15 disabilities in great detail. Are you able to tell exactly
16 what kind of problems, if any, he would have in school,
17 public, private or any other kind of school?

18 A Well, I don't think we know that yet because he's
19 obviously not there but he has attention problems, he has
20 problems with visual motor perception--

21 Q That again means what? I'm sorry to interrupt you.

22 A That's visual spacial things, looking at things on the
23 blackboard, being able to put them down on a piece of paper,
24 drawing figures and reversing letters, that sort of thing.
25 That's common at this particular age whether you have

1 problems or not. It's just the degree and there's little
2 question that he has that difficulty. That improves with
3 remediation and by remediation, with practice.

4 Q Anything else as far as learning disabilities that
5 you've gleaned from the reports?

6 A I can't remember all of the details but, I think that's
7 essentially it.

8 Q There's been a suggestion that all of us level off in
9 our general abilities at some point and that that will be
10 true of James but that he's going to start going downhill
11 sooner than the rest of us. Does that make any sense to you?

12 A Absolutely not. There's no factual evidence to
13 demonstrate that somebody that has an insult on day one of
14 this type, of a one time insult goes down unless something
15 else happens to him, if he has another type of brain injury,
16 he has an accident or something intervenes. The trend and
17 the data and the knowledge of following children over time is
18 that they did better. Okay, and eventually they'll level
19 off, but that usually comes in adolescence.

20 MR. JENNINGS: I believe that's all I have, Doctor.

21 Thank you.

22 THE COURT: Doctor you may step down. Thank you
23 very much.

24 (WITNESS EXCUSED)

25