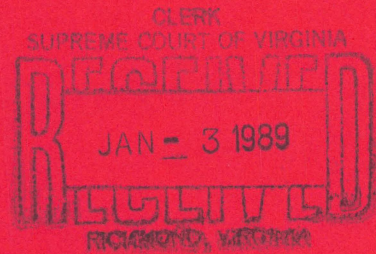


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IN THE
SUPREME COURT OF VIRGINIA
AT RICHMOND

Record No. 87-1358

SHAWN J. BANKS,
BY CAROLYN WALKER BANKS, HIS NEXT FRIEND

Plaintiff/Appellant,

v.

GALEN W. HARRIS,

Defendant/Appellee.

APPENDIX

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Q Can you describe for us generally Erich Road where the accident occurred?

A Erich Road is a -- the section of the accident where it occurred is a residential zone, runs north and south between Midlothian and Jahnke Road; hard top, black-topped surface.

Q Is the road flat on Erich Road where the accident happened?

A Yes.

Q And this part of Erich Road is in the City of Richmond?

A That is correct.

Q What were the road conditions on July 10, 1986, around 5:00 p.m.?

1 A At the time of this accident it was dry,
2 clear, the sun was out, there was no road defects,
3 no gravel.

4 Q Was there a school in the general
5 vicinity of Erich Road where the accident happened?

6 A I believe there is a school north of the
7 location of this accident, on Erich Road.

8 Q What time did you arrive at the scene on
9 July 10, 1986?

10 A Approximately 5:05 p.m.

11 Q And did the accident occur near the
12 intersection of Erich and another road?

13 A Yes, at the intersection of Erich and
14 Wainwright Drive.

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Q Mr. Blalock, can you tell us, based on
your investigation, the distance between the south
curb of Wainwright and the north edge of the
sidewalk at 5539?

A 49 feet 3 inches.

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Q What was the distance between the south

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curbing of Wainwright and the first break in the

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curbing south of this sidewalk at 5539?

15

A May I refer to my notes?

16

Q Yes.

17

A 61 feet 8 inches.

18

Q What was the distance from the south curb

19

of the intersection of Wainwright and the second

20

break in the curbing depicted in Exhibits 10 and 11?

21

A Approximately 71 feet 8 inches.

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Q What was the distance to the third break

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in the curbing in these photographs?

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A Approximately 10 feet more or 81 feet 8

Blalock-Direct

[79]

1 inches.

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Q On July 10, 1986, what were you and Shawn
doing and where were you before you were riding the
bike?

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A We were at my house.

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Q Where were you going to go?

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A We were going over to Shawn's house.

13

Q How were you going to get there?

14

A We were going to ride Shawn's bike.

15

Q Why were the two of you going to ride
Shawn's bike?

16

17

A Because mine was broken.

18

Q When you were riding the bike, who was
pedaling the bike?

19

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A I was.

21

Q Who was steering the bike?

22

A I was.

23

Q How was Shawn riding on the bike?

24

A Shawn was on the handlebars.

- 1 Q Which direction was he facing?
- 2 A He was facing away from me.
- 3 Q So, he was facing forward?
- 4 A Right.
- 5 Q Glenn, I notice that you are a tall
- 6 fellow. How tall were you last summer?
- 7 A About 6'2".
- 8 Q In July 1986?
- 9 A Yes.
- 10 Q About how much did you weigh?
- 11 A 155 pounds.
- 12 Q Did you have any problems operating the
- 13 bike with Shawn sitting on the handlebars?
- 14 A No, I didn't.
- 15 Q You didn't have any trouble steering the
- 16 bike?
- 17 A No.
- 18 Q You didn't have any trouble seeing?
- 19 A No.
- 20 Q When you left your house on the bike,
- 21 what direction did you go?
- 22 A What direction?
- 23 Q Yes.
- 24 A I came down Wainwright going towards his

- 1 house.
- 2 Q You left your house and you went west on
- 3 Wainwright towards Erich?
- 4 A Right.
- 5 Q And you turned left on Erich?
- 6 A Right.
- 7 Q And then you were headed in this
- 8 direction (indicating on the diagram)?
- 9 A Yes.
- 10 Q When you were on Erich Road, you were
- 11 headed towards Larrymore Road? Is that correct?
- 12 A Yes.
- 13 Q Can you estimate for the ladies and
- 14 gentlemen of the jury about how fast you were going?
- 15 A I was going a little faster than a walk.
- 16 Q A little faster than a walk?
- 17 A Right.
- 18 Q What side of the street were you on when
- 19 you were going on Erich south towards Larrymore?
- 20 A We were on the left side of the street.
- 21 Q Did you and Shawn have an accident with a
- 22 car?
- 23 A Yes, we did.
- 24 Q Tell the ladies and gentlemen of the jury

1 where you and Shawn were on the bike when you got
2 hit?

3 A Where we were?

4 Q Yes.

5 A We were on Erich Road. And we were
6 approaching a parked truck. And as we got to the
7 truck, we slowly came around the truck. And then
8 when we got around the truck, that is when the
9 accident occurred.

10 Q I am going to show you what has been
11 marked as Plaintiff's Exhibit 4. It is a picture
12 taken by the police officer. Is it your testimony
13 that you were hit by the car about when you came to
14 the truck shown in this picture?

15 A Yes.

16 Q The front of the truck?

17 A Right.

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Q When you left your house, wasn't it
Shawn's idea to ride on the handlebars?

A Yes.

Q And Shawn got on the handlebars, did he
not?

A Right.

Q And you began to pedal the bike, did you
not?

A Right.

Q And you left your home on Wainwright
heading towards the intersection of Wainwright and
Erich?

A Yes.

Q And you were on the left-hand side of the
street?

A Yes.

1 Q Did Shawn object to riding ont he left-
2 hand side of the street?

3 A No.

4 Q Did Shawn direct you to ride on the
5 left-hand side of the street?

6 A No.

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Q When you left your home, Shawn was on the handlebars?

A Yes.

Q He didn't protest riding on the handlebars?

A Right.

Q He didn't protest your riding on the left-hand side of the street?

A Right.

Q Did he protest when you were on the left-hand side of the street before the truck?

A No.

Q Did he protest when you came out from

1 behind the truck on the left-hand side of the
2 street?

3 A No.

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24 Q Did Shawn object when you came out from

1 around the truck?

2 A When I came out from around the truck?

3 Q Yes.

4 A When I came from behind the truck.

5 Q Did he object at that time?

6 A No.

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Q Glenn, as you were approaching the parked truck on Erich Road, did you make any abrupt or sudden maneuvers on the bike?

A No.

Q How would you describe the course of your bike as you were approaching the front of that truck?

A I was gradually coming out at a slant.

Q At a slant.

Q Sort of at an angle?

A Right.

Q This was a gradual movement on your part?

A Right.

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"QUESTION: Mr. Harris, is it your
testimony that the first time you saw the boys on
the bike was when the bicycle came out from
Wainwright towards the south curb of that
intersection?

"ANSWER: That's true. That was the

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"ANSWER: I was coming from the south, I was heading north. The other vehicle, this being a bicycle, came out, came out at me directly. I mean it was just directly, and to avoid -- there was no time for no pushing no horns, nothing like that, and it happened -- to answer your question correctly, the bicycle pulled right into my path. That's how it happened."

On page 18:

"ANSWER: Okay. I was heading --"

THE COURT: Where on 18?

MR. SCHAFFER: I am sorry. Line 1.

"Okay. I was heading north at the time, and the bicycle just shot out in front of me, so I would say that the bicycle struck me right in my course of travel, which I guess that would probably be --"

MS. RUSSELL: Excuse me. Did you read

1 the question to that answer?

2 MR. SCHAFER: "QUESTION: Where did your
3 vehicle strike the boys or the boy in relation to
4 the intersection of Erich and Wainwright?

5 "ANSWER: Okay. I was heading north at
6 the time, and the bicycle just shot out in front of
7 me, so I would say that the bicycle struck me right
8 in my course of travel, which I guess that would
9 probably be, you know, you have got a left side of
10 the road and right side of the road, so on the right
11 side of the road.

12 "QUESTION: Where did the bicycle come
13 from?

14 "ANSWER: Came from the east.

15 "QUESTION: So it is your testimony the
16 bicycle came out of Wainwright, and that's where you
17 hit him?

18 "ANSWER: Somewhat, that's correct.

19 "QUESTION: It was actually at the
20 intersection of Erich and Wainwright?

21 "ANSWER: No, the bicycle came out so
22 fast -- it came out fast, but it came out from the
23 east, is what I'm saying.

24 "QUESTION: When it came out in front of

1 you?

2 "ANSWER: Right.

3 "QUESTION: Did it come out from
4 Wainwright Road?

5 "ANSWER: It came out thereabouts,
- 6 somewhere 10 or 15 feet, thereabouts, very, very
7 close.

8 "QUESTION: Ten or 15 feet from the
9 intersection towards the south? In other words, you
10 hadn't quite gotten to the intersection yet?

11 "ANSWER: I don't actually recall right
12 now, but the bicycle came directly out into me. I
13 was heading north."

14 Let me go to page 23:

15 "QUESTION: Yeah, it was a big truck, a
16 U-Haul type truck. Something like, you know, a
17 moving type truck, but it was yellow. It was yellow
18 in color, it wasn't the color of a U-Haul, it was a
19 large truck.

20 "QUESTION: Was it a flatbed on the
21 truck?

22 "ANSWER: No, it's the kind that
23 overextends the cab, somewhat, you know."

24 MS. RUSSELL: Excuse me. Your Honor, I

1 would object to this reading on the grounds that it
2 goes beyond the scope of the direct examination.

3 MR. SCHAFFER: It does tie in later on.

4 THE COURT: Go ahead. I am going to
5 overrule the objection.

6 MR. SCHAFFER: "ANSWER: It's the vehicle --
7 it's a one-piece type truck, a kind that has a cab
8 and a body that's attached; not like a trailer
9 fashion.

10 "QUESTION: Can you see through the body
11 of the truck?

12 "ANSWER: It's enclosed.

13 "QUESTION: And where was the yellow
14 truck at the time of the accident?

15 "ANSWER: Ten or 15 feet from the
16 intersection, something like that, I would say.

17 "QUESTION: Was it parked?

18 "ANSWER: Yes, it was.

19 "QUESTION: And it was parked on the
20 right-hand side as you were heading north on Erich?

21 "ANSWER: Yes.

22 "QUESTION: And your testimony is the
23 yellow truck blocked part of your vision of the
24 intersection of Erich and Wainwright?

1 "ANSWER: I had clear vision when I was
2 driving. I didn't see nobody; okay?

3 "QUESTION: So when you were heading up
4 the road you could see the intersection of Erich and
5 Wainwright? In other words, you could see part of
6 Wainwright?

7 "ANSWER: I don't actually -- can't
8 actually see that.

9 MS. RUSSELL: Your Honor, I think he left
10 out something.

11 THE COURT: You missed something. Slow
12 it up a little bit. Read the entire question again.

13 MR. SCHAFER: "QUESTION: So, when you
14 were heading up the road you could see the
15 intersection of Erich and Wainwright? In other
16 words, you could see part of Wainwright coming into
17 Erich?

18 "ANSWER: I don't actually -- can't
19 actually see that. I could see -- I could see
20 directly in front of me and somewhat to the right
21 and to the left. The vision was somewhat obstructed
22 by the large truck.

23 "QUESTION: Did anything else obstruct
24 your vision of the intersection, other than that

1 truck?

2 "ANSWER: No, it didn't.

3 "QUESTION: Okay. In relation to that
4 truck, Mr. Harris, where did your car hit the boy on
5 the bike?

6 "ANSWER: Somewhere near thereabouts.

7 "QUESTION: Near the truck?

8 "ANSWER: Near thereabouts, yeah.

9 "QUESTION: Near the cab of the truck?

10 "ANSWER: It was towards the front, I
11 imagine."

12 Page 27.

13 "QUESTION: Tell me what you remember
14 about the impact with the bike.

15 "ANSWER: Okay. I'd say just a split
16 second before the actual impact the bicycle, the
17 wheel of the bicycle was pointing, in other words,
18 that way, in other words I was heading north, right,
19 and the wheel of the bicycle was heading this way,
20 which would be east.

21 "MR. SCHAFER: It would be heading east
22 coming from the west.

23 "ANSWER: It would be heading east coming
24 from the west. It was perpendicular to the street.

1 the first thing I saw, I tell you, was a boy. I
2 mean directly on me. I mean just right there. I
3 didn't even see the other little guy on the back of
4 it. I just saw the little small one, because he was
5 just about in my windshield. And I turned over -- I
6 turned my car.

7 "QUESTION: Wait a minute. Turned over?
8 What do you mean by turned over?

9 "ANSWER: I turned away. I turned away
10 from him.

11 "QUESTION: Your car didn't turn over on
12 him?

13 "ANSWER: Oh, no.

14 "QUESTION: So, you steered your car to
15 the left?

16 "ANSWER: I steered to the left, yeah.
17 Steered to your left."

18 MR. SCHAPPER: Judge, I would like to
19 read those in addition to that one that she read.

20 THE COURT: All right. Ms. Russell.

21 MS. RUSSELL: Reading from page 48 of
22 the deposition:

23 "QUESTION: Your testimony is that the
24 boys on the bike when you first saw them were coming

1 from Wainwright towards the south curb of
2 Wainwright."

3 "QUESTION: So, the boys were heading
4 this way, they were heading west on Wainwright on
5 the south side of Wainwright?

6 "ANSWER: I believe that's correct.

7 "QUESTION: And that's where they were
8 when you saw them the first time?

9 "ANSWER: It was there or very, very
10 close to there, thereabouts. Very close to there."

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Q And you were looking towards this intersection, weren't you?

A Yes. I was driving forward.

Q And you could see this intersection?
Correct?

A The intersection comes in from the right.

Q You could see that?

A Do you mean when I first approached the road?

Q Right. As you were approaching this intersection on Erich, could you see the intersection of Wainwright and Erich?

A No, I couldn't see the full intersection.

Q You could see in front of you?

A Yes, I could see in front of me.

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Q Mr. Harris, your car struck a bicycle carrying Shawn Banks and Glenn Gordon? Is that correct?

A Correct.

Q And the smaller child was actually on the handlebars? Is that correct?

A That is correct.

Q And the taller child was pedaling the bike?

A Yes.

Q And, Mr. Harris, it is your testimony that you first saw these two boys riding the bike when the bicycle headed west from the south curb of Wainwright?

A That is not direct.

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Q When the impact occurred, you recall the

1 boys on the bike coming out from the east to the
2 west, don't you?

3 A I recall when the impact occurred, that
4 was the first time I had even had vision of the
5 boys.

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Q Is it your testimony that you had passed the yellow truck parked on your right when you hit the boys on the bike?

A That is my testimony, yes.

Q You had passed it already?

A Yes.

Q Mr. Harris, you did not apply your brakes before the impact of the collision? Is that correct?

A That is correct.

Q And you did not slow down as you approached the intersection of Wainwright, did you?

A No.

Q You did not sound your horn, did you, before the impact?

1 A No.

2 Q And after you struck the bicycle, did you
3 see the child riding on the handlebars strike the
4 hood and windshield of your car?

5 A I saw it when the boy went up on the car.

6 Q And he actually hit the windshield of
7 your car? Is that correct?

8 A I didn't have time to see what part of
9 the car he hit.

10 Q But you saw his face in your windshield?
11 You remember that?

12 A I saw his torso, yes.

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1 Q What part of the child's torso did you
2 actually see?

3 A I am recalling from after the accident.
4 I recall seeing the upper part of his body.

5 Q So, from his chest up?

6 A Yes.

7 Q Did the child's body remain on the top of
8 your car as your car continued to move forward?

9 A I didn't actually move forward. I
10 swerved. I pulled over.

11 Q Did the child's body remain on your car
12 as it continued to move for some time?

13 A No.

14 Q It fell immediately off?

15 A I don't know how soon it fell. I don't
16 know how soon it was that he fell off. It was all
17 so fast.

18 Q But your car, after you hit the boys on
19 the bike, your car continued to go forward on Erich?

20 A That is correct.

21 Q When you struck the boys on the bike, you
22 steered to the left? Correct?

23 A It was almost as if the impact and my
24 steering was just about the same thing

1 simultaneously.

2 Q Did you apply your brakes and try to stop
3 your vehicle as soon as you could?

4 A Yes, I did.

5 Q And you stopped your vehicle north of the
6 intersection of Wainwright and Erich? Is that
7 correct?

8 A Correct. But that is not as soon as I
9 could.

10 Q Well, that is where your vehicle was
11 stopped? Right?

12 A Yes.

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Q Was there a truck or vehicles parked
along the right-hand side?

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A Yes, there was.

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Q Did that obstruct some of your vision as
you looked?

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A Yes, it did.

13

Q Did you see any children there at all or
anything in the neighborhood?

14

15

A No, I didn't.

16

Q And as you approached, what speed did you
get to?

17

18

A Twenty-five miles an hour.

19

Q As you got to the front of the truck,
between the truck and Wainwright or somewhere in
that area, is that where the accident occurred?

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A Yes, it is.

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13 Q Did it happen quickly?

14 A It happened quickly.

15 Q It happend like that (snapping fingers)?

16 A Just in a split second, yes.

17 Q You didn't have time to put on your

18 brakes? They just were there?

19 A They were just right there.

20 Q You tried to pull to your left?

21 A Yes, I pulled to the left immediately.

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12 Q Good afternoon, Dr. Cockrell. Would you
13 state for the ladies and gentlemen of the jury your
14 full name and your occupation?

15 A Janice L. Cockrell. I am the Director of
16 Physical Medicine and Rehabilitation at Children's
17 Hospital.

18 Q How long have you held that position?

19 A A year and a half.

20 Q Could you describe for the jury generally
21 your medical education and training?

22 A Yes. I was trained originally in
23 pediatrics. And I practiced pediatrics for about 10
24 years, five of which I was on the pediatric faculty

1 at MCV. And then I decided to further specialize
2 and went into physical medicine and rehabilitation.

3 I did my residency at MCV in
4 rehabilitation medicine.

5 Q So, you actually have done two medical
6 residencies: one in pediatrics and one in
7 rehabilitative medicine?

8 A That is correct.

9 Q How would you describe your subspecialty?

10 A My subspecialty is very unusual. It is
11 pediatric rehabilitation. And there are only
12 probably 30 of us in the country.

13 Q And you are a medical doctor?

14 A That is correct.

15 Q What does pediatric rehabilitative
16 medicine mean?

17 A Essentially, we specialize in treating
18 children with disability. About half of our
19 patients are children with congenital disabilities,
20 and the other half are children with acquired
21 disabilities. And these disabilities may be
22 acquired from trauma or illness.

23 Q So, your subspecialty in the practice of
24 medicine would include the treatment and evaluation

1 of children who have sustained head injuries from
2 trauma?

3 A That is actually my subspecialty. Of the
4 30 people who specialize in pediatric rehab, there
5 are only a few of us who actually do pediatric head
6 injuries.

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Q And in relation to Shawn's case, can you step down from the witness box and explain to us how mechanically a brain during head trauma suffers damage?

MR. SCHAFFER: It is how he suffered damage.

THE COURT: She said with regard to Shawn Banks.

MR. SCHAFFER: I am sorry. I missed that.

THE WITNESS: It doesn't really matter, because it was a very typical injury.

As you see, the brain is floating in fluid. And there are bony areas that protrude into the skull.

I think it may be better illustrated on this one. See all these bony ridges here.

BY MS. RUSSELL:

Q Is this sort of a cross-section of the brain?

A Yes. The brain is not in there at the moment. We are looking at the bottom of the skull,

1 the bottom of the cranial vault. We are looking
2 down on top of somebody's head. We have cut a slice
3 here. And this is the bottom of the cranial vault,
4 which is in this area approximately (indicating).

5 Brains are not firm, as we all know. And
6 a young child's brain is certainly quite jelloey.
7 but as they get to be Shawn's age, they are more
8 like an adult. And they jiggle. They jiggle around
9 in the cranial vault.

10 So, what happens in a head injury, in
11 Shawn's head injury, is there is an acceleration-
12 deceleration phase. That is to say, when you hit a
13 solid object, the brain sloshes against the cranial
14 vault.

15 Q By "cranial vault," you mean the skull
16 bone?

17 A Yes. The inside of the skull bone.

18 It sloshes against it and sloshes back.
19 So, you get two injuries? We call them coup and
20 contrecoup. And you generally will get injuries in
21 this area too where these bones are protruding.

22 In addition, though we can't see them
23 here, there are little cross-bridging arteries,
24 blood vessels that will often break. The other

1 thing that happens is there is just some shearing
2 forces. And it just gives you a lot of very focal
3 injuries. They are diffuse but they are little
4 focal injuries.

5 If you would look at it under a
6 microscope, you would see a great deal of injury
7 throughout the brain. In Shawn's case, it appears
8 that he had two impacts. He had the initial impact
9 when he hit the car, which produced one coup and
10 contrecoup, and then when he hit the pavement,
11 another coup and contrecoup. So, he had a total of
12 four injuries.

13 Q By "coup and contrecoup," you mean the
14 force going forward and then the force going
15 backwards?

16 A No. What I mean is the brain is moving
17 inside the skull, which is fixed. So, the brain
18 moves forward. The skull stops. The brain
19 continues to move forward, hits this part of the
20 skull, and then goes back and hits the back part of
21 the skull.

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Q You said that Shawn Banks had an injury
to the back of his skull. What was that injury?

A Well, he had a mild fracture to the back
part, the right side of his skull. It is called the
occipital bone.

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Q And what was the diagnosis of his

1 condition at the Medical College of Virginia?

2 A The diagnosis was what they called a
3 Grade II to III head injury and a left occipital
4 contusion. I believe that was all.

5 Q Was he in a coma at any time?

6 A Oh, yes.

7 Q Can you describe for the ladies and
8 gentlemen of the jury how long Shawn was in the coma
9 and what his physical state was during that time?

10 A Shawn was in a coma. He was unresponsive
11 to his environment for five days. The last day of
12 that, the fifth day, he started becoming a little
13 bit lighter. Recovery from coma isn't just in and
14 out of coma, however. And he did remain in an
15 agitated, very lethargic stage for several days. In
16 fact, even when he came to Children's Hospital on
17 the 21st, he was still agitated and confused.

18 Q Does the fact that Shawn was in a coma
19 for five days relate at all to the severity of his
20 head injury?

21 A Yes. The definition of severe head
22 injury is something that debate still rages about.
23 However, it is generally accepted that a Glasgow
24 Coma Scale rating of 8 or less signifies severe head

1 injury. And coma of greater than three days clearly
2 signifies head injury. Some people say coma greater
3 than 24 hours.

4 Q So, you would classify Shawn Banks' head
5 injury in a severe category?

6 A Yes.

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Q Did he lose his memory about the
9 accident?

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A Yes.

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Q Is that unusual?

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A It is normal, yes.

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Q Dr. Cockrell, I would ask you to assume

1 for the purpose of this question that Shawn was hit
2 by a car while riding on the handlebars of a bicycle
3 and that his body was thrown onto the top of the car
4 and then he fell off of the car onto the street,
5 which was a hard-surface pavement. And he was found
6 lying on his back. Assuming those facts, do you
7 have an opinion whether Shawn's severe head injury
8 which you have described today was caused by this
9 collision?

10 A Yes.

11 Q And your opinion is what?

12 A Yes, that it was.

13 Q Do you have an opinion how Shawn suffered
14 the skull fracture on the back of his head?

15 A In my opinion, it was when he hit the
16 street, the pavement.

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Q What type of force did it require to the back of Shawn's head to fracture the base of his skull? How would you describe that force?

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A It would have to be a very substantial force.

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Q Dr. Cockrell, can you describe for us your assessment of Shawn's recovery from the severe head injury?

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A I would say he has a very typical recovery in that motorically he looks excellent. And that is what we anticipated. He still has some difficulty with balance, which is not unusual. And then he has sustained some difficulties in learning, which again is very typical.

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Q Do you have an opinion whether Shawn suffers any permanent damage from this severe head injury?

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A Yes. I feel that the learning deficit is permanent.

22

23

Q By "learning deficit," what exactly do you mean by that?

24

A He has some difficulty with getting knew

1 knowledge out of his brain. It was much worse. And
2 the best recovery occurs during the first year after
3 the head injury. So, we have seen the best
4 recovery.

5 There will still be some modest recovery
6 over the next four to five years. But he does have
7 difficulty with retrieving information from storage.
8 He also seems to have some difficulty with
9 abstraction, pulling together abstraction.

10 Q Did you reevaluate Shawn in June of 1987?

11 A Yes, I did.

12 Q About a year after the accident?

13 A Yes.

14 Q Is your opinion about the permanent
15 damage based, in part, on your evaluation of Shawn
16 last month or two months ago?

17 A Yes.

18 Q With respect to these cognitive problems
19 and retrieving information, in your opinion, would
20 that affect Shawn's ability to learn?

21 A Yes, of course.

22 Q Have you made a recommendation about
23 continuing assistance to Shawn in the learning
24 field?

1 A Yes. It was made in 1986 and it was
2 repeated in 1987.

3 Q What was your recommendation?

4 A That he receive special education
5 services to allow him to use some strategy which
6 will help him to be more successful in school. He
7 is not a great student. But he can be successful.

8 Q You mentioned that Shawn has some balance
9 problems. Can you describe those for us in more
10 detail?

11 A Yes. I had a hard time defining them on
12 physical examination. And, yet, they seem to be
13 very real, as Shawn and his mother both described
14 something very consistent. So, fortunately, we now
15 have a test available at MCV, which has really only
16 been available for the last few months, called the
17 Equitest. It is a computerized test for balance.

18 Balance consists of our ears, our vision,
19 and our body, our feet, telling us where we are.
20 And we use all three of those senses. And what I
21 was trying to determine was which of these senses
22 was off.

23 Interestingly enough, it looks as if it
24 is two. It looks as if the inner ear and what we

1 call the proprioception are not functioning quite
2 right.

3 But Shawn is very good. Shawn is very
4 adaptable. And he adapted visually very well to
5 this. And that is why he occasionally falls into
6 things. Because it appears that his visual frame of
7 reference has changed. That is what he uses to keep
8 himself standing up straight.

9 Q In your opinion, are these problems with
10 balance related to the impact of the collision?

11 A Yes. Again, these are very typical
12 problems.

13 Q And in your opinion, are balance problems
14 also permanent injuries?

15 A Yes.

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Q And he was discharged to go home?

A Yes.

Q Since that time, are you aware that he
has football?

A Oh, I know he has. I asked him not to.

Q Basketball?

A Yes.

Q Runs track?

A Yes.

Q Would you agree he does pretty much
everything that other 13-year-old boys do?

A That is correct.

Q In fact, back on July 21, you said that
you felt "the child's prognosis is excellent,
although he will probably manifest some learning
difficulties in school." Was that your feeling at
that time?

A Yes.

Q Right now, if he walked in the courtroom

1 here, he looks normal and he talks normal? He is a
2 nice little boy, isn't he? Or I guess he is getting
3 to be a big boy.

4 A Yes.

5 Q Now, the learning difficulties, the
6 learning deficits that you mentioned, you feel are,
7 as you have testified, a residual from this
8 accident?

9 A yes.

10 Q Are you relying for that opinion on the
11 reports by Children's Hospital, the Psychiatry
12 Department of Dr. Cobb and Jeff Chase?

13 A Psychology.

14 Q Psychology. Excuse me. Is that correct?

15 A Yes. As well as the reports from
16 Occupational Therapy and Speech Therapy, yes.

17 Q As far as the educational defects and the
18 learning disabilities, that is coming from the
19 Psychology Department?

20 A Yes.

21 Q They gave tests?

22 A Yes. They gave tests that I ordered.

23 Q That you ordered?

24 A Yes.

1 Q You didn't select the tests?

2 A I had some say in which tests were
3 selected, yes. I requested tests to tease out
4 certain aspects of the problem.

5 Q Did you select the tests to be given to
6 Shawn Banks?

7 A I did not select which specific tests. I
8 requested what I wanted them to look at.

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Q Doctor, I show you the records from

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Thompson Middle School. Does that appear to be his

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school records for the year 1985-86, which would be

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the year right before this accident?

1 A Yes.

2 Q Would you read off his first semester?

3 And this would be the second time around. He had
4 already failed the sixth grade once. The second
5 time around, would you please read to the ladies and
6 gentlemen of the jury what his grades were?

7 A I am sorry. It is not clear to me what
8 you want me to read.

9 Q Just read his grades and the subjects,
10 please.

11 A Of the second time around or the first
12 time?

13 Q 1985-86.

14 A Okay. Career Orientation C, English F,
15 Reading D, Math F, Social Studies D, General Science
16 F. Some sort of art. I don't know what it is. But
17 it is a B. That is his first semester.

18 Q Read the second semester.

19 A Second semester: English D, Reading D,
20 Math D, Social Studies D, General Science D, Foreign
21 Language pass, Physical Education A, Industrial Arts
22 pass. I believe that is pass.

23 Q That is not a very good record?

24 A No.

1 Q Are you aware that since this accident,
2 he has started back to school in September of 1986,
3 Doctor?

4 A Yes.

5 Q Are you aware that his grades this year
6 are about the same as they were last year?

7 A Yes. I am aware of that.

8 Q They are not noticeably worse?

9 A I wouldn't expect them to be.

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1 BY MS. RUSSELL:

2 Q In other words, Dr. Cockrell, has Shawn
3 Banks lost some of his potential?

4 A Yes, I believe he has lost some academic
5 potential.

6 MR. SCHAFFER: I have another question.

7

8 RECROSS-EXAMINATION

9 BY MR. SCHAFFER:

10 Q Doctor, again are you relying on the
11 tests given by Jeff Chase to come to that
12 conclusion?

13 A Yes, of course.

14 Q So, you relied on what he says?

15 A I certainly do.

16 Q And if Mr. Chase says that some of these
17 deficits that you see now could preexist the
18 accident and may not be the caused from the
19 accident, you wouldn't disagree?

20 A I think I would disagree with him, yes.

21 MR. SCHAFFER: That is all I have.

22 THE COURT: May she be excused?

23 MS. RUSSELL: Yes, Your Honor.

24 THE COURT: Doctor, you are excused and

1 appreciate it.

2 THE COURT: Any redirect?

3 MS. RUSSELL: Just one question, Dr.
4 Cockrell.

5

6 REDIRECT EXAMINATION

7 BY MS. RUSSELL:

8 Q How would you compare Shawn's capability
9 or ability to learn before the accident as compared
10 to after the accident?

11 A All I can say is that we have seen what
12 we call a recovery pattern in the deficits. What
13 that means is as we have tested certain areas, we
14 have seen them slowly get better over the past year.
15 That indicates that both areas were damaged. So,
16 that is why we can make the assumption that those
17 are not the areas that were previously a problem.

18 Q So, in your opinion, the learning
19 problems he is having now did not preexist the
20 accident?

21 A I feel they did not preexist.

22 MR. SCHAFFER: I object to the form of
23 the question. But she has already answered.

24 THE COURT: All right.

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Q Dr. Chase, will you state your name and
your occupation for the record?

A Jeffrey Lake Chase. I am Staff
Psychologist at Children's Hospital.

Q How long have you been a Staff
Psychologist at Children's Hospital?

A Since July 1986.

Q And you participated in the treatment of
Shawn Banks at Children's Hospital? Right?

A Yes, I did.

Q I want to back up a little bit and get
you to describe for us generally your educational

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Q Can you tell us what your conclusions were based on this psychological testing of Shawn about his mental abilities?

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A Well, what I stated in my report regarding Shawn was that his overall performance on the IQ testing placed him in the low average range but that that was misleading because it takes so many subtests to give one score. The one score often doesn't indicate subtle problems in a specific area. And the areas that I pointed out that he had problems in continued to be in the area of verbal learning and verbal memory and somewhat also with mental control. But that had improved some. That would be his performance on Trails B.

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Q And how would the deficits in those areas of memory affect his cognitive ability to learn new material?

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A Without getting into the next evaluation, on balance, Shawn's here-and-now abilities had

1 improved. He could interact much better with you
2 just sitting down one to one. What he had
3 difficulty with is taking in the information that he
4 may have learned and retaining that and, therefore,
5 utilizing it in the future.

6 It is as if you have to relearn the same
7 task over and over again. Yes, there will be some
8 generalization, but much less so than for a normal
9 child.

10 Q So, every time he would be confronted
11 with a new situation, he had to --

12 A He, in essence, would have to relearn it
13 or approach it as if it were new again. That is a
14 bit strong. But he did not benefit from the
15 learning that most children would have had whereby
16 the second or third time, "I know what this is."

17 Q Let's go to the third evaluation, which
18 was done a year after the accident in June of 1987.
19 Were tests administered under your supervision of
20 Shawn to test cognitive functioning?

21 A Yes, they were.

22 Q Tell us what the tests were. And, again,
23 are they accepted tests in your field of expertise?

24 A The Wechsler Intelligence Scale for

1 children was readministered. The controlled oral
2 word association test, the selecting reminding test,
3 the Wisconsin card-sorting test, Trails A and Trails
4 B were again administered. The Wechsler Memory
5 Scale, the story recall component of that test and
6 the Benton Visual Retention Test and the Rey Complex
7 Figure were again administered.

8 Q Did Shawn continue to exhibit deficits in
9 memory based on that evaluation?

10 A Yes, he did.

11 Q Can you describe the memory deficits that
12 were picked up on that evaluation two months ago?

13 A Consistent with the earlier evaluations,
14 Shawn has the ability to take in information and
15 thus can carry on a conversation or interact in the
16 here and now quite well. What he has difficulty
17 with is effectively and efficiently retrieving that
18 information. It is as if you put it into a file but
19 you never label the file. So, you don't know where
20 to go to pull it out. That is the majority of his
21 memory deficits. People often talk about memory in
22 global terms. This is a specific type of memory
23 that will make his ability to freely recall
24 information difficult.

1 Q So, if Shawn was here today and you told
2 him a word, could he remember that word two seconds
3 later?

4 A He certainly could.

5 Q Sixty seconds later?

6 A Yes.

7 Q So, what you are talking about is
8 different from immediate memory?

9 A Yes, sir.

10 Q And how would the deficit and his ability
11 to retrieve information affect his ability to learn?

12 A Well, it penalizes him in school.
13 Because what you do is you build, especially in
14 certain subject areas, on previously learned
15 material. And he is not going to be able to, in
16 algebra, draw on the multiplication tables as
17 quickly as another child. While he is not studying
18 the multiplication tables in algebra, that is a
19 skill he will need to have.

20 So, he is going to always been a kind of
21 a step behind because of that. It will penalize him
22 on tests that require him to, for example, fill in
23 the blanks or essay as opposed to a multiple choice
24 test. Those sorts of tests tend to come as one

1 progresses and matriculates through school. In high
2 school, you are going to get that, and even more so
3 at the college level.

4 Q So, with Shawn's memory deficit, is it
5 going to become easier or more difficult for him as
6 he progresses through school?

7 A I would anticipate, because of the
8 complexity of the information and because of the
9 need to recall earlier learned material, that it
10 will become more difficult.

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Q Mr. Chase, what degrees do you hold?

A A Bachelor of Arts from St. Louis
University.

Q You do not have a Master's Degree?

A No, sir. The Ph.D. program at South
Carolina does not offer one.

Q And you don't have your doctorate?

A That is correct.

Q How long have you been studying for your
doctorate?

1 A I began graduate training in 1978.

2 Q Are you registered with the Virginia
3 Board of Psychiatrists?

4 A No.

5 Q Are you certified in the field of
6 psychiatry in anything?

7 A I am sorry. I didn't hear the question.

8 Q Are you registered or a member of any
9 psychiatric society?

10 A Not currently.

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7 Q Would you agree with me he wasn't doing
8 well in school prior to the accident?

9 A His grades did not reflect his
10 achievement.

11 Q Were you aware that he had failed the
12 sixth grade and taken it again and just completed it
13 prior to the accident in July of 1986?

14 A Yes, I was.

15 Q Were you aware of his grades the second
16 time around in the sixth grade?

17 A I believe so. I cannot say definitively.

18 Q What were they?

19 A I do not have his educational terms.

20 Q I show you the records that have been
21 summoned through the year 1984-85 and then next
22 1985-86.

23 A Yes.

24 Q Would you agree that these grades are not

1 very good?

2 A Yes, I would.

3 Q D's and F's?

4 A D's and F's in 1984-85. D's, C, P, and
5 one A and P.

6 Q But his IQ tested better than that,
7 didn't it?

8 A His IQ puts him on my testing --

9 Q Before you answer, I am talking now about
10 before the accident.

11 A I do not have a good assessment. A
12 screening IQ assessment was administered to him in
13 school. I believe it was the Otis.

14 Q Do you recall what that was?

15 A I believe it was in the high 70's.

16 Q That is pretty low, isn't it?

17 A That is in the borderline range.

18 Q Borderline between what?

19 A Well, the way that we classify IQ is
20 average, low average, borderline. And then you get
21 into the mentally retarded range. Or there are
22 different euphemisms. But that cutoff is
23 essentially at 70.

24 So, it is difficult to say exactly where

1 Shawn placed because of error variance associated
2 with any test. But clearly it was not a strong
3 performance.

4 Q Well, did you register or take his IQ
5 following the accident as part of the tests you
6 administered?

7 A Yes.

8 Q What was his IQ average at that time?

9 A At that time, it placed him in the low
10 average range of intelligence.

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Q Now, one of the reasons why his grades didn't reflect that is that he didn't have any motivation to make better grades? Would you agree with that?

A I really couldn't comment on how he was functioning premonstrably.

Q But is that a possibility?

A It is always a possibility.

Q And is it possible that he didn't know how to retrieve information from his mind; that he didn't know how, as you say, to put that label on his storage case and retrieve that information before the accident? Isn't that right?

A That would also be one of many possibilities that could account.

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19 Q Now, let me say this: You can't rule out
20 that he had these problems before the accident.

21 A It depends on to what degree of
22 probability you are saying that. I am reasonably
23 confident that it is a function of the injury. But
24 I can't absolutely rule out that it could have

1 preexisted.

2 Q You can't say he didn't have that before
3 this accident, can you?

4 A Not with 100 percent certainty.
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1 Q What is Shawn's full name?

2 A Shawn Jermaine Banks.

3 Q When was Shawn born?

4 A February 16, 1973.

5 Q What grade is he in in school?

6 A The eighth grade.

7 Q What school does he attend, Mrs. Banks?

8 A Thompson Middle School.

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Q How would you describe Shawn's

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performance in school before July 1986?

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A Good.

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Q Can you describe for us what schools he

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went to up until July 1986? Where did he go to

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elementary school?

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A He went to elementary school at Henrico.

- 1 Q Henrico Elementary?
- 2 A Henrico Elementary. He was on the honor
- 3 roll until we moved to the City.
- 4 Q When did you move from Henrico to the
- 5 City of Richmond?
- 6 A At the end of his fifth grade year.
- 7 Q So, he completed his fifth grade at
- 8 Henrico Elementary School and then began the sixth
- 9 grade in the City schools?
- 10 A No. He completed the fifth grade at Redd
- 11 School.
- 12 Q How would you describe Shawn's adjustment
- 13 from the fifth to the sixth grade?
- 14 A Not very well. He didn't want to move to
- 15 the City. So, he just fell down.
- 16 Q So, he was unhappy that year?
- 17 A Unhappy, yes.
- 18 Q About being in a new place and new
- 19 school?
- 20 MR. SCHAFFER: Your Honor, I object to
- 21 her leading.
- 22 MS. RUSSELL: I will rephrase the
- 23 question.
- 24 THE COURT: All right.

1 BY MS. RUSSELL:

2 Q Did Shawn have trouble in school in the
3 sixth grade?

4 A He had trouble because he chose to.

5 MR. SCHAFER: Your Honor, excuse me. I
6 think the answer is yes or no. As to why is up to
7 Shawn to testify to, not Mrs. Banks.

8 THE COURT: I think that is correct. I
9 will sustain the objection.

10 BY MS. RUSSELL:

11 Q Did Shawn fail the sixth grade?

12 A Yes.

13 Q Did he have to repeat the sixth grade?

14 A Yes.

15 Q Did he do better or worse when he
16 repeated the sixth grade?

17 A A little better.

18 Q How was he doing in the seventh grade?

19 A The seventh grade was after his accident.
20 And he did poor.

21 Q How would you describe Shawn's effort in
22 the seventh grade after the accident compared to his
23 effort in school in the sixth grade before the
24 accident?

1 A I saw a lot of effort after the accident.
2 He was just kind of cruising along before.

3 Q So, you saw more effort in the seventh
4 grade than in the sixth grade?

5 A Yes.

6 Q How would you describe his grades in the
7 seventh grade?

8 A Not average. A little below average.

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Q While Shawn was in the hospital for over
three weeks, did he have problems remembering
things?

A Yes.

Q Did that gradually seem to improve?

1 A It has improved, yes.

2 Q Did he remember why he was in the
3 hospital?

4 A If he did, he didn't tell me until after
5 he got out of the hospital.

6 Q And he doesn't remember the accident,
7 does he?

8 A No.

9 Q Shawn was able to go back to school in
10 the fall of 1986? Is that correct?

11 A Yes.

12 Q And he went back to Thompson Middle
13 School?

14 A Yes.

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Q Mrs. Banks, did you notice a difference
in Shawn's ability to remember after he came home
compared to his ability to remember before the
accident?

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A Yes, I did.

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Q Tell us about that. How did his ability
to remember differ?

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A He didn't remember things that happened
an hour before. Like I would say something to him
an hour before, and he wouldn't remember what I said
to him.

1 Q And did he continue to have problems with
2 his memory from after the accident in the summer of
3 1986 through this past summer?

4 A Yes.

5 Q Describe for us how you would observe his
6 problems with memory.

7 A Right now?

8 Q Well, during the last year.

9 A I haven't seen that much improvement this
10 year. For example, a couple of weeks ago, we had to
11 go to the doctor. And we went to Bremono Road, which
12 is off of Broad Street. When we broke for lunch,
13 Shawn asked me if we were on Midlothian. So, he is
14 still not remembering what happened before, right
15 before.

16 Q Everyday things?

17 A Everyday things, yes.

18 Q After the accident, did you notice a
19 difference in Shawn's physical abilities?

20 A Yes.

21 Q Tell us about what you observed.

22 A Like I say, he has always been outgoing.
23 I am thinking that Shawn was just a little afraid to
24 try to run track. He felt he couldn't run as fast.

1 And to be in gymnastics, he was unsure of that. And
2 he still is.

3 Q Before the accident, did Shawn ever run
4 track before?

5 A Two years straight, he came in first
6 place.

7 Q What about after the accident when he
8 went back to school in 1986-87, did he run track
9 that year?

10 A For the first six months, Dr. Cockrell
11 said he couldn't. But after that, he just wouldn't.

12 Q He decided not to go out for track?

13 A He decided not to try.

14 Q Before the accident, would Shawn do
15 gymnastics in school?

16 A Yes.

17 Q And what about after the accident, was he
18 able to do that?

19 A No.

20 Q How would you describe Shawn's balance
21 after the accident?

22 A He would run into me all the time,
23 because we were usually together. Or he would miss
24 a step or run into the wall.

1 Q Sort of lose his balance?

2 A Yes.

3 Q And did he ever have a problem with his
4 balance before the accident?

5 A No.

6 Q Mrs. Banks, did you observe a change in
7 Shawn's personality after the accident?

8 A Yes.

9 Q How would you describe that to us?

10 A Agitated all the time. He didn't like
11 anything loud. Depressed. Withdrawn.

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17 Q Mrs. Banks, is Shawn in school today?

18 A No, he is ot.

19 Q Where is he?

20 A Ms. Russell's office.

21 Q Ms. Russell's office?

22 A Yes, sir.

23 Q Do you know if he is going to testify?

24 A No, I don't.

1 Q Has he been down there the last two days?

2 A Yes, he has.

3 Q Mrs. Banks, did you ever give your son
4 Shawn instructions or warnings on riding bicycles?

5 A No, I haven't. I just always told him to
6 be mindful and always to be careful.

7 Q You have told him to be careful, haven't
8 you?

9 A Yes.

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20 Q Didn't you tell him to be careful and to
21 ride on the right side of the road and to watch out
22 for traffic?

23 A I always told him to be careful.

24 Q And why? What would happen if he wasn't

1 careful?

2 A He was intelligent enough to know what
3 would happen.

4 Q And what was that? That he might get hit
5 by a car?

6 A Anything could happen.

7 Q And one of which might be to be hit by a
8 car?

9 A I didn't say that to him. But he knew
10 that.

11 Q He knew that?

12 A I am hoping that he did.

13 Q Sure. And you felt certain, since he had
14 been riding a bike since he was five years old, that
15 by the time he was 13-1/2 years of age, he knew
16 that? And you wouldn't let him go out on a bike if
17 he didn't know that, would you?

18 A No, I wouldn't have.

19 Q Did you ever see him ride two on a bike?

20 A One time.

21 Q Was that the day before this accident?

22 A Yes, it was.

23 Q And that bothered you, didn't it?

24 A Yes, it did.

1 Q Did you say anything to him?

2 A I told him to be careful and to come
3 home.

4 Q Did you ever tell him that he shouldn't
5 ride two on a bike?

6 A No, I didn't.

7 Q You told him to be careful? And what did
8 you mean when you said "Be careful"?

9 A What I always mean. Be careful. Be
10 mindful of any situation.

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19 Q Shawn did start to school in September
20 following the accident, didn't he?

21 A Yes, he did.

22 Q And in December of that year, the
23 restrictions as to his physical limitations -- that
24 is, playing sports -- was lifted and, in fact, he

1 started playing football and basketball? Isn't that
2 true?

3 A Just with the neighborhood children.

4 Q With the neighborhood children?

5 A Yes.

6 Q But he was permitted to do that? He was
7 ridng his bike?

8 A Only when I allowed him to.

9 Q But he was permitted to?

10 A Maybe once a week.

11 Q And right now, he has no physical
12 limitations? He can play football, basketball, run,
13 or do whatever he wants to? Isn't that fair to say?

14 A He can. But I think he finds it a little
15 difficult.

16 Q His grades weren't good before the
17 accident, were they?

18 A No.

19 Q And, in fact, maybe not much, but they
20 were a little better the year following the
21 accident, weren't they?

22 A No.

23 Q Were they about the same?

24 A About the same.

1 Q And he passed from the seventh grade? He
2 completed it, and he is now in the eighth grade?

3 A Yes.

4 Q After you talked to him about riding, did
5 you know on the day of the accident that he was
6 riding two on a bike until after the accident?

7 A No, I didn't.

8 Q Would you have permitted him to do that
9 had you known it?

10 A No, I wouldn't.

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18 Q Dr. Peck, would you please state for the
19 record your full name and occupation, sir?

20 A Edward Arnold Peck, III. And I am a
21 clinical psychologist.

22 Q Where do you practice, Doctor?

23 A In Henrico County.

24 Q Doctor, can you tell us about your

1 education in your field?

2 A Yes. I was originally educated at Tufts
3 University, where I received my Master of Science
4 and Ph.D. Degrees. I followed that with a year of
5 clinical internship in child psychology at the
6 Children's Hospital Medical Center in Boston and
7 Harvard Medical School.

8 I had a year and a half of post-doctoral
9 training through a number of the Harvard Medical
10 School teaching hospitals, in particular the Peter
11 Bent Brigham Hospital, McLean Psychiatric Hospital,
12 Mass General Hospital, and again Children's Hospital
13 Medical Center.

14 Q Doctor, do you have any additional
15 degrees?

16 A Yes, I do. I am board-certified in two
17 areas. The first is the area of clinical
18 neuropsychology. The second is the area of medical
19 psychotherapy.

20 Q Have you told us where you have done your
21 internship?

22 A Yes, I have.

23 Q And your postgraduate work?

24 A Yes.

1 Q Do you hold any academic appointments?

2 A Yes. I am on the faculty of the
3 Department of Psychiatry at the Medical College of
4 Virginia, and I am on the teaching faculty at VCU in
5 the Department of Psychology. For a number of years
6 right after I first came to Richmond, I was
7 full-time at MCV, where I headed up the Rehab
8 Medicine Psychology Service. And I was also again
9 in the Department of Psychiatry and the Department
10 of Neurosurgery.

11 Q What hospitals do you have privileges at,
12 Doctor?

13 A I have consulting privileges at a large
14 number of local hospitals. St. Mary's, Henrico
15 Doctors Hospital, St. Luke's, I believe Richmond
16 Metropolitan Hospital, Johnston-Willis Hospital, and
17 Poplar Springs Hospital.

18 I am also on the consulting staff at the
19 Psychiatric Institute of Richmond where I have a
20 contract where we see every child from the maximum
21 age that they accept down to 13 or 14. We see every
22 child that comes in for admission for either a
23 psychological or a neuropsychological examination.

24 Q Doctor, have you ever had any articles

1 published?

2 A Yes. Somewhere over 90 to 100 articles,
3 book chapters, major presentations at conferences,
4 things like that.

5 Q Have you written any books on testing and
6 neuropsychology?

7 A Yes, I have. I currently have a book
8 chapter that deals exactly with psychological and
9 neuropsychological testing.

10 Q Have you been a guest on any TV show in
11 the area?

12 A Yes, I have, several times. Perhaps most
13 recently, after the air shuttle disaster, I was on
14 one of the local television shows during the news
15 hour as a consultant offering advice to the
16 community as to how to manage children's response to
17 that tragedy.

18 Q And are you a member of any professional
19 societies?

20 A A fairly large number. The American
21 Psychological Association, the International
22 Neuropsychological Society, the American Epilepsy
23 Society, the National Academy of Neuropsychology,
24 the Society of the Sigma Xi, and probably several

1 others that I can't remember at this point.

2 Q Are you on any committees, Doctor?

3 A Yes. I am on several committees. It is
4 not uncommon for me to be named as an oral examiner,
5 for example, with the Board of Psychology where
6 people are coming up for their psychology license.
7 I participate in giving these people examinations.

8 I am on a number of other types of
9 committees. For example, a couple of years ago,
10 there was a task force called by the Board of
11 Psychology to examine what should be the
12 credentialing and competency regulations for people
13 coming up as psychologists in the area of clinical
14 neuropsychology.

15 Q Doctor, I assume this is probably
16 superfluous. But are you licensed in the State of
17 Virginia in any field?

18 A Yes, I am.

19 Q What is that?

20 A I am licensed as a clinical psychologist
21 through the Board of Medicine. And I am licensed as
22 a psychologist with a direct provider of human
23 services through the Board of Psychology. I am also
24 licensed in the Commonwealth of Massachusetts, where

1 I originally did my training.

2 Q Doctor, you indicated you are a clinical
3 neuropsychologist. Could you tell thhe ladies and
4 gentlemen of the jury exactly what that field
5 encompasses and what it is?

6 A Yes. It is really a subarea of clinical
7 psychology that also looks at a number of other
8 areas that I won't go into. But, basically, it is
9 an area that looks at trying to first diagnose what
10 problems are that might be related to a change in
11 brain function such as after brain damage or what
12 changes might not be really that area but emotional
13 in nature.

14 For example, a psychiatrist might ask me
15 to evaluate a patient with a question of brain
16 damage but who is primarily showing evidence of
17 behavior problems. And again the question might be
18 how much of this is emotional and how much of this
19 is brain-related. A neurologist or a neurosurgeon
20 might ask me to do pretty much the same thing, but
21 they might already have other tests which indicate
22 the presence of brain damage and they want me to
23 qualify that in terms of the real world and to
24 address how much of this might have been there

1 before an injury, for example.

2 Q Doctor, at my request, did you see Shawn
3 Banks?

4 A Yes, sir, I did.

5 Q When was that, Doctor?

6 A I saw Shawn Banks on August 27th and
7 28th.

8 Q Of this year?

9 A Of 1987, yes.

10 Q Two to three weeks ago?

11 A That is correct.

12 Q What did yo do when you saw him, Doctor?

13 A Well, we essentially did what we would do
14 with anyone who is referred following an accident
15 involving a head injury. We carried out a
16 comprehensive evaluation of their neuropsychological
17 status. And we looked at how they are functioning
18 in the academic areas.

19 Q How long did your examination, including
20 testing, take? Did you talk to Shawn?

21 A Oh, yes. And his mother.

22 Q And his mother?

23 A Yes.

24 Q How long did these tests take and your

1 examination, so to speak, in the broad sense of the
2 word?

3 A The examination on the first day was
4 approximately seven hours and on the second day
5 approximately three hours. There were also other
6 things. For example, while the patient may have
7 been given some other tests, I was also sitting down
8 with the mother. So, an estimate of 10 hours, I
9 think, would be a conservative estimate of the total
10 amount of assessment time. That would not include,
11 for example, time to score the various tests or to
12 prepare the report.

13 Q Can you tell us briefly about how many
14 tests you gave Shawn?

15 A It is over 27 tests that were included as
16 part of this workup.

17 Q What was the purpose of these tests,
18 Doctor?

19 A To provide a sense as to what his current
20 status was with respect to his history of a
21 closed-head injury and to attempt to clarify whether
22 the problems and how many and to what extent his
23 problems that he might have at this time are the
24 direct result of that head injury.

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21 Q Doctor, what do we have here?

22 A We have a blowup of the second page of my
23 report. The total report is 13 pages long. I think
24 if I could just provide a little background.

1 You previously asked me how many tests.
2 And I said over 27. I think with due forbearance to
3 the Court, I won't try to answer what each test did
4 unless specifically requested.

5 What we do -- and it is a standard part
6 of our report -- is we prepare several pages of what
7 you might call a checklist where the tests
8 themselves might have examined for thinking or
9 language or memory or other areas. What we try to
10 do is, instead of saying this test indicated this
11 result and that test indicated that result, we try
12 to summarize it for the reader.

13 And this first page of three details
14 certain of the test results. We have also
15 color-coded it so that it is really easy to tell how
16 the ratings work. Any rating that is marked as
17 green is going to indicate average-range
18 performance.

19 Any area -- and, for example, there is
20 only one on this page -- that is marked yellow would
21 be what is called a borderline performance. That is
22 really a gray area. It is not quite good enough to
23 be fully normal but not bad enough to be impaired.
24 My area that is marked red shows evidence on the

1 tests of a problem.

2 So, what we are really seeing on this
3 page, first of all, is a large number of
4 normal-ranged findings. He had a normal level of
5 consciousness, which means that he was awake, with
6 us, aware of what was going on. He was
7 appropriately oriented in terms of who he was and
8 what was going on, and that sort of thing.

9 We did not find any problem at all with
10 attention and concentration over the 10 hours that
11 we saw him. He was able to pay attention, to
12 understand and monitor what was going on, and
13 respond appropriately. His motor activity level --
14 and by that, we are talking about can he move, can
15 he move normally -- was normal.

16 His speed of information processing was
17 also normal. Now, that is an important point,
18 because it is frequently impaired after even minor
19 closed-head injuries. And on our testing, we found
20 that his speed of information processing was within
21 normal limits.

22 For example, I am giving the jury and the
23 Court certain information out loud. And I am giving
24 it at a reasonably fast rate of speed. If you had

1 problems with speed of information processing, you
2 might get lost.

3 We would present information at a normal
4 rate of speed and at times somewhat faster and at
5 times somewhat slower to see how comfortable he was.
6 And he had a comfortable rate of following us in
7 terms of our presenting information to him. And
8 just to reinforce that, that is an important point,
9 because it is often impaired following head injury.

10 The next related to his sense of right
11 and left. He was able to identify right and left
12 upon himself. He was able to identify right and
13 left upon me when I was seated opposite him. For
14 example, I asked him to identify my right hand and
15 my left hand and things like that.

16 We also gave him a set of drawings of
17 hands and feet where it is just the drawing of the
18 hand and just the drawing of the foot. And he had
19 to identify whether it was a right or a left hand.
20 And there were 20 of these drawings. And, quite
21 frankly, they are difficult. He made only one
22 error. A normal-range performance is going to be at
23 least anywhere from two errors or less. So, he is
24 well within normal limits there.

1 He knows where his body is in space. And
2 by that, I am referring to the 5B body schema. He
3 knows when he is seated upright. He has a sense of
4 knowing where he is in the chair and walking across
5 the room. He is not totally confused. He knows up
6 from down.

7 His language ability, by and large, is
8 within normal limits. We did not find any problem
9 with comprehension of materials or his understanding
10 of what we were saying to him. There was no trouble
11 at all.

12 His oral expression in terms of how he
13 talks was accurate. It was appropriate. He used
14 reasonable fine grammar. His sentences were
15 reasonable in length. The only thing that we noted
16 was that his rate of speech was at times a little
17 hesitant. But unless you were listening for it, it
18 could easily go unnoticed.

19 His intonation -- that is, the tone that
20 he used if he was asking a question or stating a
21 fact -- was fully normal. We did not detect any
22 problems there.

23 His naming ability in terms of things
24 that were held up in front of him, could he name

1 them on command, no problem.

2 His ability to come up with lists of
3 words beginning with a particular letter -- "Tell me
4 all the words that you can think of beginning with
5 the letter P," for example, and he would have a
6 minute to do that, and then another letter, and then
7 another letter -- was within normal limits.

8 His ability to repeat items was also
9 within normal limits, both simple things and
10 relatively complicated things.

11 His auditory perceptual ability in terms
12 of listening on a prepared tape to basically
13 nonsense sounds and then making sense of them in
14 terms of how he could decipher them was within
15 normal limits.

16 We had another tape for him that had
17 melodies, kind of a taping sound.

18 NOTE: The witness indicated
19 by tapping.

20 "Was that the same or different?" And
21 then another sound that would come immediately after
22 that. And all he had to do was decide whether it
23 was the same or different. He was within normal
24 limits on that.

1 And that really covers page 2 of our
2 report.

3 On page 3, we are paying particular
4 attention to the memory and motor skills areas. And
5 again we find a number of, I think, important
6 findings. By and large, the majority of the memory
7 tests that we gave were within the normal range. We
8 did find on certain of the tests that he was showing
9 impairment.

10 When we looked particularly at his
11 memory-related weaknesses, it did not appear to be
12 so much a memory problem in terms of his forgetting
13 what was being said or shown to him as it appeared
14 to be what you might call an organizational problem.
15 He wasn't dealing with the information in a
16 systematic way. And, so, he was then having some
17 difficulty recalling it when you would say "Tell me
18 what we told you a little while ago."

19 However, if we gave him a multiple-
20 choice situation where we would say "Is this
21 something that you had seen before or not?", he was
22 well within normal limits on that sort of procedure.
23 Only one of the areas was in the borderline range.

24 It is obvious that information is getting

1 in and that it is being stored and that he can
2 actually recall this information if you give it to
3 him in the right context. But the organizational
4 part seems to be fairly weak.

5 I would like to have more to say about
6 the organizational skills, but I will delay that for
7 now. In the motor skills area, his strength of
8 grip, he is a very strong young man. Forty-seven
9 kilograms in terms of grip strength on the right.
10 That is a strong grip. And on the left, it was also
11 fine. And the difference between the right and left
12 grip strength is well within normal limits.

13 You normally look for a 10 percent
14 difference between the preferred and the non-
15 preferred hand. And that is a 10 percent difference
16 and not much more.

17 His motor speed in terms of tapping what
18 looks like a telegraph key that is hooked up to a
19 counter did show evidence of a fairly slow
20 performance. I would have liked to have seen him do
21 a little better on that. And that is in the
22 impaired range.

23 His ability to point to things or to do
24 things with his hands on command, which related to

1 the term "apraxia assessment," was within normal
2 limits. We asked him to carry out repetitive
3 movements with the hands. We asked him, for
4 example, to do what is called the palm-fist
5 procedure, which, by way of demonstration, is
6 something like this (demonstrating). One hand is
7 always in a fist or closed position and the other is
8 open. He showed a little bit of slowness on the
9 left. And that was the only finding that we noted
10 there.

11 And on the next one: The first section
12 up there deals with cognitive skills. And we have a
13 whole separate section that is not on one of these
14 exhibits that deals with his educational testing,
15 which I will get to. But his handwriting was fine
16 for his age.

17 On Section 10, his visual-based skills in
18 terms of looking at something and making sense out
19 of it was well within normal limits. His ability to
20 copy designs, some of them fairly simple and some of
21 them fairly complicated, was well within normal
22 limits.

23 His ability to carry out what are called
24 sequencing types of activities in the sense of what

1 goes first and then next and then third and fourth,
2 he was able to do that.

3 His higher-level problem-solving, by and
4 large, was well within normal limits. There was one
5 test that we gave that did show evidence of
6 difficulty. And that is marked there in red. But
7 when we looked at some of the other measures of the
8 same type of ability, we found that those were
9 within normal limits. And again I think that
10 organizational skills may have affected his
11 performance on that one test.

12 We found that with respect to his sense
13 of judgment, there were no problems in his overall
14 judgment. We did not think, for example, that he
15 was showing evidence of poor judgment on our
16 testing. He knew right and wrong.

17 His awareness of his deficits -- and I
18 think that this is another important point -- was
19 within normal limits. He tends to minimize his
20 problems. But when we asked him specifically, he
21 admitted to the fact, for example, that the memory
22 testing was hard for him and that that was not a
23 good area for him.

24 His intelligence testing was within the

1 average range on our workups. And we were able to
2 compare his results on our testing with some of the
3 results from prior testing. And we found some
4 changes that I, quite frankly, feel may be related
5 to differences in how the tests were administered
6 rather than his functional ability.

7

8 Q Doctor, you mentioned other tests. Did
9 you have as part of your background the tests or the
10 report submitted by Jeff Chase from Children's
11 Hospital that he ran, I believe, in August and July
12 and September of 1986 and June of 1987?

13 A Yes, I did.

14 Q Are these the tests that you are
15 referring to that you just mentioned that there may
16 be some differences. Would you explain that,
17 please?

18 A Yes. On the intelligence testing, there
19 is a whole cluster of parts to making up the whole.
20 There are a number of what are called subtests. And
21 each of them is supposed to be administered in a
22 particular way.

23 For example, one of the subtests is
24 called the coding subtest. And what that involves

1 is looking at a series of numbers that are printed
2 on a page. And above the rows is the same set of
3 numbers. It is basically the numbers 1 to 9.

4 And they are matched with a little
5 computer symbol like a cross or a circle or a plus
6 sign. And the person is supposed to have 120
7 seconds to copy as many of those little computer
8 symbols as they can, each one under the correct
9 number. What we found was that when we gave that
10 test, that it was within normal limits. And we
11 found that on one prior occasion with Mr. Chase,
12 that it had been somewhat lower, at least when he
13 was first seen.

14 But when he was seen only a short time
15 before ours, he was actually worse on that
16 particular test than when he was first seen. In
17 other words, after his head injury, he was doing
18 better than several months later. And, quite
19 frankly, that didn't make sense to me. And when I
20 went back and looked at it, what I believe has
21 happened was that --

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Q Go ahead, Doctor.

A Let me first say that I do a lot of supervision and training of students. And there are certain patterns that you look for in a test. And when you essentially see something that is unusual, there are certain reasons why things tend to look unusual or out of context. And I believe that what has happened here is that instead of 120 seconds for the person to be allowed to complete this -- in other words, having 120 seconds to do as many of

1 them as possible -- that only 90 seconds was allowed
2 to the patient.

3 So, what we have is a relatively low
4 score that is probably the result of a change in
5 procedure rather than it perhaps being a problem on
6 the part of the patient's behalf.

7 There was also one other subtest called
8 the block design subtest that involves having the
9 patient put together a series of blocks to match a
10 design or pattern that is shown to him. And I
11 believe that there are some difficulties there. I
12 am not really certain why, but I believe they are
13 related to other factors than, for example, a
14 question of brain injury. I would raise, for
15 example, a question of motivation on the part of the
16 patient or a question of fatigue on the part of the
17 patient.

18 Q That might influence or affect the score
19 they came up with?

20 A That is correct. It was very clear that
21 the first time the patient took that test shortly
22 after his head injury, that he actually performed
23 better on that test than when he was seen by Mr.
24 Chase shortly before us. And then when we saw the

1 patient, our score, which was also within normal
2 limits, was virtually identical to the first time
3 the patient had been given the test.

4 And you don't normally see good then bad
5 then good in a situation like this without raising
6 the question as to whether it was administered in a
7 different way or the patient's motivation or fatigue
8 may have been a factor.

9 I have not covered things that are not on
10 there such as the educational test results.

11 Q All right. Doctor, would you please go
12 into the educational results?

13 A I was able to review this young man's
14 educational history. And I was able to review
15 standardized tests that were administered through
16 the school system both before his accident and after
17 the accident. I was also able to administer a
18 number of tests that actually measure educational
19 potential and achievement.

20 And what we found, first of all, were a
21 number of risk factors for poor performance on some
22 of the neuropsychological tests as well as on the
23 educational tests.

24 This is a young man who repeated the

1 sixth grade. The second time he took the sixth
2 grade, his grades were still quite poor. And if you
3 like, I can cite the particular grades.

4 Q I think the jury has already had that.

5 A Okay. And his particular test results
6 indicate to me a pattern of preexisting poor
7 educational achievement. When we then saw him for
8 our educational testing, what we found was that when
9 we measured what is called potential -- that is, his
10 capability -- that his capability in most of these
11 areas was quite acceptable.

12 When we then compared that with his
13 educational achievement, we found that there was a
14 gap. In other words, he is not working up to his
15 potential. And that potential appeared to have been
16 there prior to the injury and is still there after
17 the injury.

18 Q Doctor, does the organizational aspect
19 that you talked about, does that come into play at
20 this point?

21 A Yes. There are certain ways that we all
22 try to learn to do things in a reasonably accurate
23 and straightforward manner so that it can be done
24 quickly and accurately and so that you can get the

1 job done. In this situation, if you have not
2 learned how to organize your work in school or if
3 you have not learned how to hold on to information --
4 and I am not talking about a course, but I am
5 talking about a natural learning of this sort of
6 thing -- when you are then given some of these
7 really difficult tests, you are going to show
8 problems in those areas primarily because of
9 organizational weaknesses and not, for example,
10 because your brain might have a specific type of
11 injury.

12 And that is an important issue in my
13 area. And that is that you don't make a mistake in
14 interpreting the data for anything other than what
15 it is.

16 Q Doctor, do you feel, then, that Shawn
17 Banks can complete high school?

18 A Yes, I do.

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5 Q Doctor, from your testing and your
6 observations and the review that you have had, do
7 you feel that he can complete a high school
8 education?

9 MS. RUSSELL: Same objection, Your Honor.
10 It calls for speculation.

11 THE COURT: Ms. Russell, I am not sure
12 that is the right objection. I think he can opine
13 his belief. But the question is not phrased
14 properly. What he feels is not too important to us,
15 Mr. Schaffer. It is whether he can state to a
16 reasonable degree of certainty.

17 BY MR. SCHAFFER:

18 Q Do you have an opinion based on a
19 reasonable degree of certainty in your field as to
20 whether or not he could complete high school? Do
21 you have an opinion based on a reasonable degree of
22 certainty?

23 A Yes, I have an opinion.

24 Q What is that opinion, Doctor?

1 A It is my opinion that this young man
2 possesses sufficient intellectual thinking and every
3 other kind of resource on my examination that
4 together says that he can complete high school if he
5 has the motivation to do so.

6 Q Doctor, how many head injuries have you,
7 in your field, observed or been a part of or been
8 involved in? Can you make any estimate?

9 MS. RUSSELL: Child head injuries?

10 MR. SCHAFFER: Any head injuries.

11 THE WITNESS: I would have to say it is
12 well over 800 at this time.

13 BY MR. SCHAFFER:

14 Q If you looked for a significant
15 closed-head injury, what would you normally expect
16 to find from your field, Doctor?

17 A We typically look in two areas. One is
18 in the thinking area, such as what might be
19 demonstrated by these tests. The other is going to
20 be in the behavioral or in the emotional areas.

21 In the thinking area, the most consistent
22 pattern of findings that the literature will
23 document are going to be problems, as I mentioned
24 earlier, with the speed of information processing

1 and something called word fluency, which we also had
2 on the first page, or coming up with a list of words
3 that is appropriate in length. We will also expect
4 to see problems with respect to memory ability and
5 also learning ability.

6 We might also see problems in a large
7 number of other areas of thinking that might depend
8 upon a particular type of brain trauma that was
9 actually sustained. One other area could be what is
10 called planning and judgment. There are a whole
11 host of secondary areas. But those are the primary
12 cluster.

13 The behavioral area tends to show
14 problems with respect to management of temper. A
15 person may have a major change in their capacity to
16 manage their temper. They usually have very little
17 control over their temper. Their patience may be
18 very short. And that may go along with the temper.
19 They may show a marked denial of any of their
20 problems.

21 I have had patients who were totally
22 paralyzed say that they have no problems at all;
23 that they could ride a motorcycle today; that they
24 just don't feel like it.

1 Problems with respect to depression,
2 problems with respect to what you might call just
3 getting along with people, socialization, are
4 frequently found after a closed-head injury. And
5 then there are going to be a whole second and third
6 kind of list. It depends on how long a list you
7 want to make it.

8 Q Let me stop you there. Using that, tell
9 us about Shawn in comparison to these other
10 closed-head injury cases.

11 A First of all, in the thinking end, with
12 respect to speed of information-processing, we found
13 that his data was within normal limits. With
14 respect to the word fluency or the word list
15 generation, we found that that was within normal
16 limits.

17 With respect to the memory area, we found
18 that the majority of those tests were within normal
19 limits. Or when we looked further at his difficulty
20 areas, we found that it wasn't so much a memory
21 problem as it was an organizational problem.

22 We found that his judgment was fine,
23 appropriate. We did find on one test some
24 difficulty with higher-level thinking. But when we

1 actually looked at that, it didn't appear to be so
2 much a deficit in that area as gain in
3 organizational ability. And when we looked at other
4 test results that measure the same thing, we found a
5 normal range of test results in those areas.

6 When we looked then at the emotional or
7 the behavioral area, we found that he, in fact, was
8 not demonstrating what is called anosognosia, which
9 is a long word meaning denial of illness, or denial.

10 He is a young man who, like many young
11 men and young women, are going to try to minimize
12 anything that is wrong with them or in any way that
13 they are different from their peers. That is a very
14 normal age-appropriate type of response. So, if you
15 ask him a very open question as to whether you have
16 any problems, you are not going to hear too many.
17 Buut if you ask him more specifically "Did you have
18 trouble with this sort of test?" or "Did you have
19 trouble with that?", the answer is "Yes, I had some
20 difficulty here and there."

21 When you ask him "Are you getting out?
22 Are you meeting people? Are you having any trouble
23 getting along with people?", his answer to me, first
24 of all, was that he is playing sports. He is

1 playing a lot of basketball, and that the girls are
2 calling him up. And he named one girl in
3 particular. And he was very appropriately somewhat
4 embarrassed by that, as many young men and women are
5 going to be at that age. But the point is that he
6 is telling me that he is not being rejected by his
7 peers in a way that I would expect if, in fact, he
8 was having the socialization problems that I have
9 already mentioned to you.

10 I saw no evidence of any problems with
11 his temper. I saw no problems with respect to his
12 management of frustration. And certainly 10 hours
13 of testing for anyone is going to be a frustrating
14 experience. He was no more frustrated than any
15 other patient that we might see who is capable of
16 managing his frustration and so forth.

17 Q Doctor, when you talked to him, did he
18 seem to be depressed or up?

19 A He just seemed very normal. He would
20 like to put the head injury behind him and go on and
21 live his life.

22 Q Doctor, this organizational problem --
23 and correct me if I am wrong -- is it your feeling
24 that this is the main difficulty for the memory

1 problems that he is having?

2 A That is correct.

3 Q Can one take special classes or can one
4 take special instruction as to how to organize
5 oneself?

6 A Yes. And that is a recommendation that
7 we included in our report. We see a lot of children
8 and adults in our practice with a variety of
9 problems. And those services are fairly widely
10 available both through special education services in
11 a school situation or through, for example, the
12 Medical College of Virginia, which has a cognitive
13 rehabilitation program. A number of private
14 practices, including ours, also provide very similar
15 types of services.

16 Q Are these successful?

17 A They are successful to the degree that
18 the patient is willing and able to work and again
19 depending upon the particular pattern of problems.

20 In this young man's situation, I note in
21 my report that I think he should have been referred
22 for special education at the time he was first
23 having trouble in the sixth grade, let alone when he
24 first began to repeat the sixth grade. And that was

1 prior to his head injury.

2 I think he should have been referred for
3 services before the head injury. And I note in my
4 report that after the head injury and when he went
5 back to the seventh grade, he should have been
6 referred for services. And those services should
7 have been provided at that time. I don't feel that
8 it is too late for those services to be brought in.

9 Q I think you have answered it, but my next
10 question would be: Is it your opinion that these
11 organizational problems he had preexisted the
12 accident and was not caused by the accident?

13 A That is correct.

14 MS. RUSSELL: Again I renew our objection
15 to this witness' qualification to make that opinion.
16 I would also object to the form of the question.

17 THE COURT: I sustain the objection as to
18 the form. But I overrule it as to his qualification
19 to give the opinion.

20 BY MR. SCHAFFER:

21 Q Doctor, do you have an opinion with a
22 degree of certainty in your field and can you
23 express an opinion based upon the test and the
24 reports that you have seen as to whether or not the

1 organizational problems that you have discussed and
2 described to us preexisted the accident of July
3 1986.

4 A Yes, I have an opinion.

5 Q What is your opinion?

6 A That they preexisted the accident. And
7 that is based on my professional training and
8 experience with patients and also the fact that I
9 have taught graduate-level courses in the
10 neuropsychology of learning disabilities.

11 Q Doctor, have we covered everything
12 concerning your examination and your
13 recommendations?

14 A Well, there are probably one or two
15 points.

16 Q Go ahead, Doctor.

17 A I think in terms of my recommendations, I
18 specifically state that he should be referred to the
19 school for special education assistance. And I
20 state that I am uncertain as to why the doctors at
21 Children's Hospital have not pushed for such a
22 referral in the past as it would have been an
23 obvious carryover and would have maximized the
24 patient's current potential.

1 I also state in my second recommendation
2 that this patient should have been involved a long
3 time ago in a consistent pattern of cognitive
4 rehabilitation. And at this time, I feel that the
5 patient remains an excellent candidate for this type
6 of remediation services.

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14 Dr. Peck, you would concede that Shawn
15 Banks suffered a severe head injury?

16 A That is what the records indicate, yes.

17 Q And you would agree with that
18 characterization that his head injury was severe?

19 A According to the criteria that are
20 established, he had a grade 3 head injury. That is
21 a severe head injury, yes.

22 Q And for a head injury which results in
23 somebody going into a coma for five days, that also
24 indicates that the head injury is severe?

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Q So, you would agree that from a severe head injury, Shawn Banks suffered some brain damage?

A I would concede that point, yes, on the basis of our testing.

Q So, your testimony today is not whether or not he had brain damage, it is just the extent of his brain damage?

A I believe that is correct.

1 Q In fact, you even mention in your report
2 that you believed his abilities were compromised by
3 the head injury?

4 A That is correct.

5 Q You would agree that the brain damage
6 which Shawn Banks suffered is permanent?

7 A I don't know if I would agree with that.
8 I don't mean to belabor the point. But are we
9 talking about how it is shown in the day-to-day
10 world? I don't think that is permanent. If we are
11 talking about putting it under a microscope, the
12 literature would probably say that it is permanent.

13 Q So, whatever brain damage he continues to
14 show one year after the accident, in your opinion,
15 that damage would like be permanent?

16 A No, no, no. Recovery following a brain
17 injury does not have an established cutoff point of
18 30 days or 90 days or a year. The literature is
19 full of people who continue to show evidence of
20 improvements on the standard medical tests such as
21 EEG and brain scan and other tests. And that may
22 continue beyond a year.

23 Q But the damage that you feel that Shawn
24 suffered to his brain as a result of his severe head

1 injury is permanent? It is never going to be
2 totally cured?

3 A I don't think that that sort of thing can
4 ever be totally cured, no.

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15 Q Dr. Peck, on page 3 of your chart, you
16 have documented for us that Shawn Banks has memory
17 deficits? Correct?

18 A I have documented that he performed
19 poorly on certain of the tests. However, I am
20 stating again that I don't feel that he has memory
21 deficits but that he has organizational skill
22 deficits so that he can't answer the questions the
23 way that would like to.

24 Q Well, Dr. Peck, you described and

1 categorized Shawn Banks' long-term memory as
2 moderately to severely impaired? Correct?

3 A On the basis of that particular test.

4 Q And you also describe Shawn Banks'
5 non-verbal short-term memory as being mildly to
6 moderately impaired? Correct?

7 A That is correct on the basis of that
8 test.

9 Q And you also claim or document for us
10 that Shawn Banks' immediate verbal memory is
11 impaired?

12 A Within the context of what you are
13 pointing to, yes.

14 Q Would you agree with me, Dr. Peck, that
15 Shawn Banks has difficulty retrieving information
16 stored in his brain?

17 A If you ask him a question that requires
18 an answer that he has to come up with totally on his
19 own, at times he does. But please note that many of
20 the other test results indicated that he doesn't
21 have trouble with it. And then if you give him any
22 kind of cueing or whatever, he is doing extremely
23 well.

24 Q Well, Dr. Peck, I understand that what

1 you are saying is that he is good in some things and
2 he is not so good in others. I want to ask you
3 about his ability not to get information into the
4 brain but to pull it out and to use it again. Do
5 you agree or do you disagree that Shawn Banks has a
6 problem in his ability to retrieve information from
7 his brain?

8 A Yes, with the proviso that it is not a
9 memory problem per se but an organizational problem.

10 Q It could be a memory deficit? Would you
11 agree with that?

12 A I don't believe that it is.

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Q My question is: It would not be surprising to see that type of memory deficit -- meaning inability to retrieve stored information -- in a child like Shawn who had a severe head injury?

A If it was a classic head injury, yes. but also the pattern of our test results would have been different than what we generated.

Q I don't think you quite answered my question, Dr. Peck?

A I am trying.

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Q Let me start back a ways before we got interrupted. This is an important point. Do you agree that Shawn Banks has a deficit in his ability to retrieve informationn from his brain?

A Yes, along the lines that I have qualified that, yes.

Q And you agree that the medical literature documents that that type of deficit is a consequence of a severe closed-head injury?

A Okay. I have to answer that question no because the classic literature is not also going to show the same kind of organizational problems that we are talking about here. And the test results would be different. The classic literature, yes, says that there are memory problems. But they are different than what we are seeing in this particular

1 situation.

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Q If he has that type of permanent memory deficit that he can't retrieve information out of his brain, that is going to cause him problems in everyday events of adult life?

A Yes.

Q Would you agree that that type of memory deficit would cause someone to be frustrated along the way in an academic setting?

A Emotionally frustrated or the other way to define "frustrated"?

Q Emotionally frustrated?

A Yes.

Q And if Shawn Banks has that type of memory deficit, would you agree that school is going to become increasingly more difficult for him?

A Yes.

Q And more frustrating?

A I would assume so, yes.

Q Dr. Peck, in your opinion, Shawn Banks should get special education and should have gotten it after the accident?

A Yes.

4 A No, I have not. What I have done is I
5 have pointed out that there appears to be some
6 errors in how certain of the tests were
7 administered. And it appears that they were
8 administered by an intern and not by Mr. Chase.

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22 A At times, yes, that is correct.

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1 Q Two to three weeks ago? You said you saw
2 him August 28th.

3 A But I saw some records as well. But I
4 first saw him on August 27th, that is correct.

5 Q And that is when you were hired by Mr.
6 Shawn's law firm for this case? Right?

7 A I don't know if the choice of words is
8 correct. But I was asked to carry out an
9 independent medical examination.

10 Q You were hired by a lawyer and you knew
11 that the purpose of your study was for litigation?
12 Correct?

13 A I knew that there may be a chance that
14 this would be used in a courtroom, yes.

15 Q Well, you knew that this case was coming
16 to trial, didn't you?

17 A Not at the time originally. I
18 subsequently found out about it.

19 Q How much have you been paid to date by
20 Mr. Schaffer for your work in this case?

21 MR. SCHAFFER: Excuse me. I don't think
22 that is relevant to this matter.

23 THE COURT: I am sorry?

24 MR. SCHAFFER: I don't see that that is

1 relevant to this matter.

2 MS. RUSSELL: Your Honor, it is classic
3 evidence of bias and credibility, how much he is
4 being paid to be here today to testify about Shawn
5 Banks.

6 THE COURT: I am going to overrule the
7 objection. Go ahead.

8 MR. SCHAFFER: You mean on his reporting
9 and reviewing of the records? I think you have got
10 to find out what he has done.

11 THE COURT: She has asked him the
12 question broad enough to cover all of that.

13 BY MS. RUSSELL:

14 Q Can you answer the question?

15 A Would you repeat the question?

16 Q How much have you been paid by Mr.
17 Schaffer or how much will you bill him for your
18 evaluation of Shawn Banks and your time to be here
19 to testify about that evaluation?

20 A The evaluation is billed at \$75 an hour.
21 So, at 10 hours, that would be \$750, plus I believe
22 about 2-1/2 hours of my time again at \$75 an hour to
23 prepare the report. In terms of my time here today,
24 where we are not able to do any testing in the

1 office when I am not in the office to supervise it,
2 I charge \$200 an hour.

3 Q What would you put the total fee that
4 being paid by Mr. Schaffer for the evaluation and
5 for your testimony today?

6 A I am not being paid for my testimony. I
7 am being paid for my time, first of all.

8 Q Can you give me a total figure, a
9 ballpark figure?

10 A I would have to say that it would be
11 around \$1,500 in terms of the time that I have spent
12 reviewing records and so forth.

13 Q Isn't it true that your bill before you
14 even set foot in the courtroom was over \$1,700?

15 A If you have got it, then I am happy to
16 stand corrected.

17 Q Is this a copy of your bill?

18 A Yes.

19 Q Does it show that as of three days after
20 your evaluation, your bill was \$1,775.63?

21 A Yes. But you are also bringing in
22 something which I didn't mention earlier, which was
23 time spent with the attorney going over the reports
24 and so forth with him.

1 Q Dr. Peck, you serve as a consultant to
2 lawyers frequently, wouldn't you say?

3 A I wouldn't say frequently, no.

4 Q It is not unusual for you to be retained
5 by a lawyer in this type of injury?

6 A It is about four times a year.

7 Q In fact, you have a professional
8 corporation that you have established for your
9 consulting services, don't you?

10 A I have a professional corporation that my
11 attorney told me to do; that when you open a private
12 practice, that you incorporate it.

13 Q And you are president of your private
14 corporation?

15 A That is correct.

16 Q And when you do consulting work for
17 lawyers, the money goes to your corporation? Is
18 that correct?

19 A Yes. The same way if I do a hospital
20 consultation or any other professional service. And
21 we also pay taxes to Henrico County.

22 MS. RUSSELL: No further questions.

23 Thank you.

24 MR. SCHAFFER: Doctor, I have just a few

1 questions on that last point.

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REDIRECT-EXAMINATION

4

BY MR. SCHAFFER:

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Q Has anyone from Ms. Russell's firm,

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McGuire, Woods & Battle -- are you assisting an

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attorney from her firm right now?

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A Yes.

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Q Doctor, when I called and asked if you

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would be kind enough to do this -- that is, would

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you look at Shawn -- what did you tell me at that

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time?

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A Probably one of the first things out of

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my mouth was that "I am going to call the shots the

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way I see them and I am going to write a report that

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is based on our data. And we let the chips fall

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where they may." And that is something that I say to

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anyone who is coming in for any kind of evaluation,

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whether they are an attorney or not.

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Q That you are going to call it the way you

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find it regardless of what happened? Isn't that

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what you told me?

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A Yes.

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Q And I said to go ahead? Isn't that true?

1 A That is correct.

2 Q Doctor, let's try to get back on track
3 here. Ms. Russell said if he had a memory deficit,
4 he couldn't finish high school. Is it your feeling
5 he has such a memory deficit that she described?

6 A No.

7 Q And have you explained why?

8 A I hope so I hope it hasn't gotten lost in
9 the shuffle.

10 Q Maybe one more time. Because it is
11 important. Do it one more time.

12 A The testing that we gave in the memory
13 area as well as a number of tests that look at
14 memory but are not obviously memory tests, such as
15 "I want you to listen. This is what we are going to
16 have you do," and then we have the person do it. Do
17 they remember what we have just told them to do? He
18 does not have a memory problem. He has an
19 organizational problem. The information gets in and
20 get stored. For example, it is stored up on a
21 little index card, as an example. The problem is he
22 doesn't know how to organize the little index card.
23 So, he has trouble getting the information out. If
24 you give him a choice of answers, he is very

1 accurate. So, the information can get in, get
2 stored, and get out. But it is not organized
3 properly so he can just pull it out when he wants
4 it. That is an organizational problem. And that is
5 a classic type of organizational problem that you
6 will see with someone with his history of very poor
7 academic performance versus a relatively normal and
8 high level of academic potential. It is not a
9 memory problem. It is an underlying learning
10 problem in terms of a learning disability.

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Q If you had a memory deficit, would you
find other things abnormal?

MS. RUSSELL: Your Honor, again I object
to Mr. Schaffer's leading.

MR. SCHAFFER: I am asking him would he.

THE COURT: I don't think that is a
leading question. Overruled.

BY MR. SCHAFFER:

Q Would you find other things abnormal?

A Yes.

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Q Doctor, by the fact that these areas that you would normally find to be abnormal if it were a memory deficit -- and in your tests, assume tha they were not abnormal but were, in fact, normal -- does that or does that not indicate one way or the other to you that it is not a memory deficit but an organizational deficit?

1 A That is correct. And, furthermore, on
2 one of the other tests that is not listed on that
3 chart but is part of what is called the
4 Woodcock-Johnson psychoeducational test battery,
5 which was in the educational area, there is one test
6 dealing with memory that is very closely normed on
7 the basis of age and grade. And he was totally
8 within normal limits on that test.

9 Q Doctor, I was going to get to that.

10 You mentioned on cross-examination by Ms.
11 Russell that since this accident, in fact -- well,
12 was it in March of 1987 that he took an SRA
13 Achievement Test for the Richmond School System?

14 A On March 16, 1987.

15 Q What did that test show? This was taken
16 just six months ago.

17 A That when you look at the results, the
18 results are within normal limits. The results are
19 very normal. His grade equivalent scores were
20 eighth grade second month for reading, eighth grade
21 fourth month for mathematics, seventh grade third
22 month for language arts, and so forth down the line.

23 Q And he was in the seventh grade at that
24 time?

1 A He was starting the seventh grade. Or he
2 was halfway through the seventh grade.

3 Q Does that support your conclusion or does
4 it contradict your conclusion?

5 A It supports it. I am trying to say that
6 he has the potential on tests like this for normal
7 achievement in school. But when you then look at
8 the achievement end of it, he is not working up to
9 his potential.

10 Q Doctor, I believe also on cross-
11 examination, Ms. Russell asked you whether there was
12 "brain damage." And you indicated "Do you mean on a
13 day-to-day world as opposed to microscopically?"
14 Would you please now explain what you meant by that?

15 A Well, each and every one of us has to try
16 to function as best we can in our lives, at our
17 jobs, and at whatever we do. And many of us have
18 some form of neurologic impairment that may be
19 related to brain damage.

20 Being brain-damaged, by itself, does not
21 mean that you are totally unable to function. It
22 does not mean that you have even significant
23 problems functioning. It depends upon what you are
24 asked to do, what you are trying to do, and so

1 forth. In this particular instance, whatever brain
2 injury or brain damage he might have at a
3 microscopic level at this point is not interfering
4 with his academic potential, on the basis of the
5 tests that he has taken more than a year after the
6 accident. So, it is not interfering with his
7 capacity.

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20 Q Dr. Peck, with respect to the SRA Test
21 that you just referred to, would you agree that SRA
22 tests do not quantify or determine memory function
23 as it relates to the inability to retrieve
24 information from the brain?

1 A Oh, I would strongly disagree.

2 Q Well, the tests that you have done more
3 accurately assess that ability than the SRA?

4 A Not necessarily. I mean I would
5 certainly have a preference for my tests. But if
6 part of the question is can he function in everyday
7 life and retrieve information, we are talking about
8 retrieval of information that he has supposedly
9 acquired either in the real world or in the school
10 situation. And these are normal.

11 Q Do the SRA tests, which show normal
12 performance, invalidate the results of your
13 neuropsychological tests that show that his
14 long-term memory is moderately or severely impaired?
15 Can you answer that yes or no?

16 A They don't invalidate it --

17 Q Can you answer that yes or no?

18 MR. SCHAFFER: Let him explain it.

19 THE COURT: Can you answer it yes or no?

20 THE WITNESS: No, I can't.

21 THE COURT: That is the only question she
22 has asked.

23 THE WITNESS: No, I can't answer the
24 question yes or no.

1 BY MS. RUSSELL:

2 Q It is not your testimony that just

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MR. SCHAFFER: Judge, I have got one more here.

This instruction is that if a party fails to testify, the presumption arises against them that the testimony would be adverse to them.

MS. RUSSELL: Your Honor, I think that instruction refers to an unexplained failure to produce an important witness. There are two things about this.

THE COURT: Is that the one you are talking about? I just want to make sure that is what he is talking about before you argue about it.

MR. SCHAFFER: Yes. I think that is it. It is similar to that anyway.

Oh, here it is.

MS. RUSSELL: Can we start arguing about

1 it?

2 THE COURT: Let me read it.

3 NOTE: The Court read the
4 document.

5 THE COURT: All right.

6 MS. RUSSELL: First of all, we have
7 undisputed medical testimony that Shawn Banks has no
8 memory of the accident. So, this failure to call
9 Shawn Banks is not unexplained at all. And that
10 instruction will relate to facts of which he has
11 knowledge. And if he doesn't have any memory, as
12 the undisputed medical testimony shows, he doesn't
13 have any knowledge.

14 And, finally, Mr. Schaffer had Shawn
15 Banks' deposition and could have read it to the jury
16 and decided not to. So, I think that it would be
17 very unfair to have the Court instruct the jury that
18 the failure to call Shawn Banks entitles them to an
19 assumption that his testimony would be unfavorable.

20 MR. SCHAFFER: Judge, obviously, his
21 materiality goes to much more than his knowledge of
22 that accident.

23 THE COURT: What does it go to?

24 MR. SCHAFFER: It goes to his knowledge

1 beforehand. It goes to his physical condition. It
2 goes to his injury. This is his case. This is the
3 first time in my twenty-some years of practice that
4 I have ever seen a plaintiff fail to appear in his
5 own case where it was a case like this. There is no
6 more material witness than the Plaintiff himself,
7 who is suing for hundreds of thousands of dollars
8 claiming personal injuries. I can't think of a more
9 material witness.

10 Now, I have no obligation to read his
11 deposition. I have the right to cross-examine. And
12 she has made this decision that she is not going to
13 call him. And we have shown that he was available.
14 He was sitting over there in her office. And if she
15 failed to call him -- and it is his case, with all
16 the aspects of materiality, all of his damages that
17 we could not cross-examine about how he is doing,
18 how he is doing in school, his injuries, his
19 thoughts, and let the jury look at him --

20 THE COURT: Mr. Schaffer, you could have
21 called him to do all of that.

22 MR. SCHAFFER: No, sir. It is her
23 client.

24 THE COURT: Why can't you call him?

1 MR. SCHAFFER: Because he is her client.
2 He is not present.

3 THE COURT: He is subject to subpoena
4 just like any other witness.

5 MR. SCHAFFER: But I don't think that is
6 the question. And we have researched that. Because
7 we could get him, we are not entitled to that
8 instruction?

9 THE COURT: That is what that instruction
10 says. It says you should rarely give that
11 instruction.

12 MR. SCHAFFER: I can't think of a more
13 appropriate case than when the Plaintiff doesn't
14 show up. I have never asked for this instruction
15 before, Judge. But here it is, the Plaintiff --

16 MS. RUSSELL: A plaintiff with amnesia.

17 THE COURT: He doesn't have any amnesia
18 concerning how he can't walk and how he has balance
19 problems and how he does badly in school and how he
20 cries at night and all of that.

21 MS. RUSSELL: That goes to when he was in
22 the hospital. And then there is certainly evidence
23 that his memory was poor then. But basically the
24 instruction is limited by "without explanation" and

1 "an available witness."

2 Shawn Banks lives in the City of
3 Richmond. Mr. Schaffer could have subpoenaed him.
4 He could have read his deposition. And I think that
5 if the Court gives this instruction, it would be
6 totally unfair. And all Mr. Schaffer has to do is
7 stand up and say, "Why didn't they call him?" He
8 doesn't need this instruction for an unfavorable
9 inference. I just don't think that there are facts
10 to support the giving of this instruction.

11 MR. SCHAFFER: Judge, if it is worth
12 anything in any case, it is worth it in this case.
13 I mean if it is going to be given in any case, it
14 has got to be given in this case. If the
15 instruction is valid at all in any situation, it has
16 got to be valid in this case.

17 THE COURT: What is the testimony that
18 could be presumed to be unfavorable.

19 MR. SCHAFFER: One is that he had great
20 knowledge of the rules of the road. Two is that his
21 memory is not bad; that he is recovering nicely.
22 Three is these scars we talked about.

23 THE COURT: She is not going to be able
24 to argue about the scars anyway. I took that away.

1 MR. SCHAFFER: He is sitting in the
2 courtroom now. And I am going to ask that he not be
3 permitted in the courtroom for closing arguments. I
4 understand he is in the courtroom. It is certainly
5 only for psychological purposes. And I am going to
6 ask that he not be permitted in the courtroom for
7 closing arguments.

8 MS. RUSSELL: Your Honor, the caveat
9 prepared by the committee of this instruction says
10 "The use of this instruction has been criticized and
11 may result in reversible error. Compulsory process
12 is available to all parties. So, full discovery of
13 a party's knowledge can be available through
14 process."

15 Here we have got a case where the
16 Defendant took the Plaintiff's deposition and had it
17 available to him to read. And he could have
18 subpoenaed my client. And I think the risk of this
19 type of instruction coming in and being misconstrued
20 by the jury is great and should not be given.

21 THE COURT: I am going to give it. I am
22 going to give that one over Plaintiff's objection.

23 MS. RUSSELL: Could you, at least, limit
24 it to areas of which he has knowledge or a memory?

1 THE COURT: It says "an available witness
2 who has knowledge of necessary and material facts."
3 I think that gives you enough to argue that he
4 didn't have anything he needed to be called about.

5 MS. RUSSELL: Well, I think if the
6 instruction is given, it needs to have some
7 reference to the fact that the undisputed medical
8 testimony is that he has no memory of the accident.

9 THE COURT: You can argue that certainly.
10 But I don't think that is part of the instruction.

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Ladies and gentlemen, think we have seen
in the testimony today what the real issue in this
case is. And that is how badly was Shawn Banks
injured in the accident and what is a proper amount
to compensate him for those injuries? But before I
get to what I think is the real issue in the case --

Plaintiff's Closing Statement

[474]

1 how badly was he hurt -- I want to spend a few
2 minutes this afternoon talking about the liability
3 issues and that Mr. Harris is liable for damages to
4 the Plaintiff for the injury.

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1 Ladies and gentlemen, I am at the point
2 now where I began. And that is the true issue in
3 this case. The real issue in this case and the
4 most difficult one is: How badly was Shawn
5 Banks hurt in that accident? You heard Dr. Peck
6 testify this morning that he didn't think he was
7 hurt that badly, although he has permanent brain
8 damage. But that is what is going to be the tough
9 issue -- how badly was he hurt.

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The major issue is what is the value of permanent brain injury? What is the value of having a memory problem that is going to affect you the rest of your life? What is the value of having to spend three terrifying weeks waking up from a coma and wondering whether you will ever walk again, having to learn how to walk again, talk again, think again, remember people. That is the difficult issue in this case.

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And we all know what a complicated world we live in and how modern life requires us to assimilate a lot of information just to live an everyday existence. And because of Shawn's memory problems, he is going to have a tough time in school. It is going to get tougher for him as the school progresses. And when he gets out and he is an adult, he is going to have a hard time every day of his life, because he can't remember and he can't learn quickly. And that is tough. He has got 57 more years to live. And he has got to figure out how to compensate for that.

Defendant's Closing Statement

[513]

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22 I want to call your attention to
23 Instruction Number 10. It tells you that if you
24 believe that a party, without explanation, failed to

1 call Shawn Banks, a valuable witness, who has
2 knowledge of necessary and material facts, you may
3 presume that if called, his testimony would have
4 been unfavorable to the party who failed to call
5 him. That is the Court's instruction to you.

6 Wouldn't you have liked to seen Shawn
7 testify? Wouldn't you have liked to have heard him
8 to make up your own mind.

9 I asked his mother, "Where is he?

10 "He is in Ms. Russell's office."

11 Here he sits now. Why wasn't he before
12 you? It is his case. What are they hiding. What
13 is it if he had gotten on the stand he would have
14 said? It is a strange situation. And, yet, they
15 are asking for damages against this gentleman.

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MS. RUSSELL: Ladies and gentlemen, I know it is late. Let me address straightup Mr. Schaffer's suggestion that we are hiding something by not having Shawn here. The undisputed testimony is that Shawn lost his memory about the accident. Dr. Cockrell said that is classic for a head injury.

Mr. Schaffer could have called Shawn to the stand. He could have read his deposition. He took his deposition just like I took Mr. Harris'.

MR. SCHAFFER: Your Honor, that is not evidence in this case. And I don't think that is an appropriate comment.

THE COURT: Well, the fact that he took

Closing Statements

[516]

1 or did not take a deposition is not evidence in the
2 case, Ms. Russell.

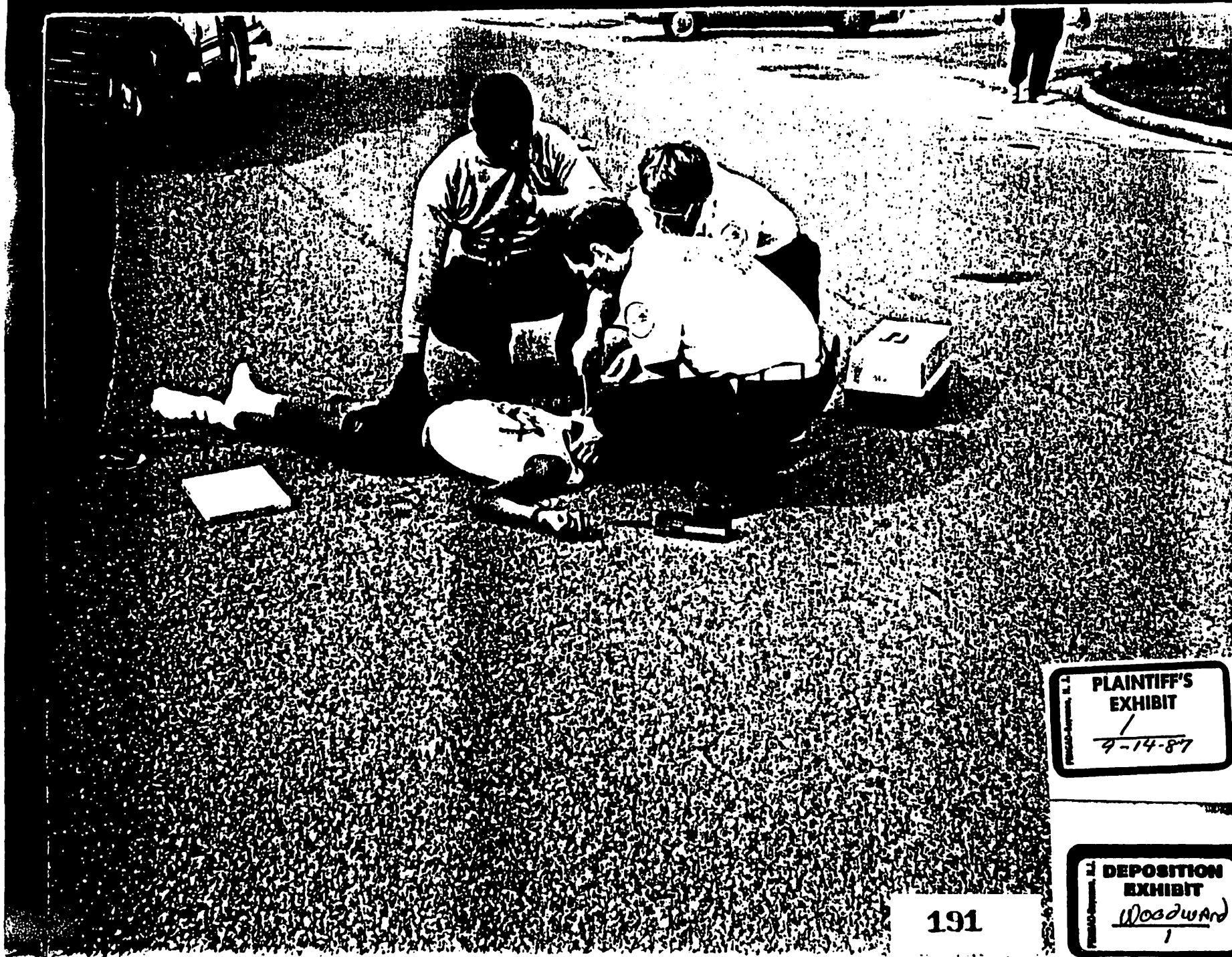
3 MS. RUSSELL: Mr. Scaffer could have
4 called Shawn to the witness stand. There is
5 absolutely no reason why he couldn't have. There is
6 nothing to hide. Shawn just doesn't have any memory
7 of the accident.

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INSTRUCTION NO. 10

INSTRUCTION NO. _____

If you believe that a party, without explanation, failed to call Shawn Banks, an available witness who has knowledge of necessary and material facts, you may presume that, if called, his testimony would have been unfavorable to the party who failed to call him.



PLAINTIFF'S
EXHIBIT

1
9-14-87

DEPOSITION
EXHIBIT

Woodward
1

191



PLAINTIFF'S
EXHIBIT
2
4-14-84

DEPOSITION
EXHIBIT
Woodward
6

PLAINTIFF'S
EXHIBIT

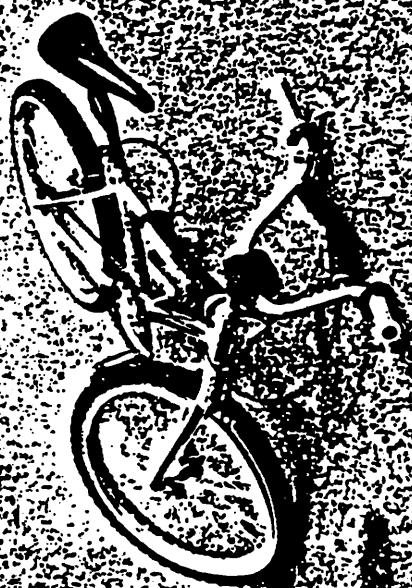
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DEPOSITION
EXHIBIT

Woodward
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193





PLAINTIFF'S
EXHIBIT

18-41-6
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DEPOSITION
EXHIBIT

Woodward
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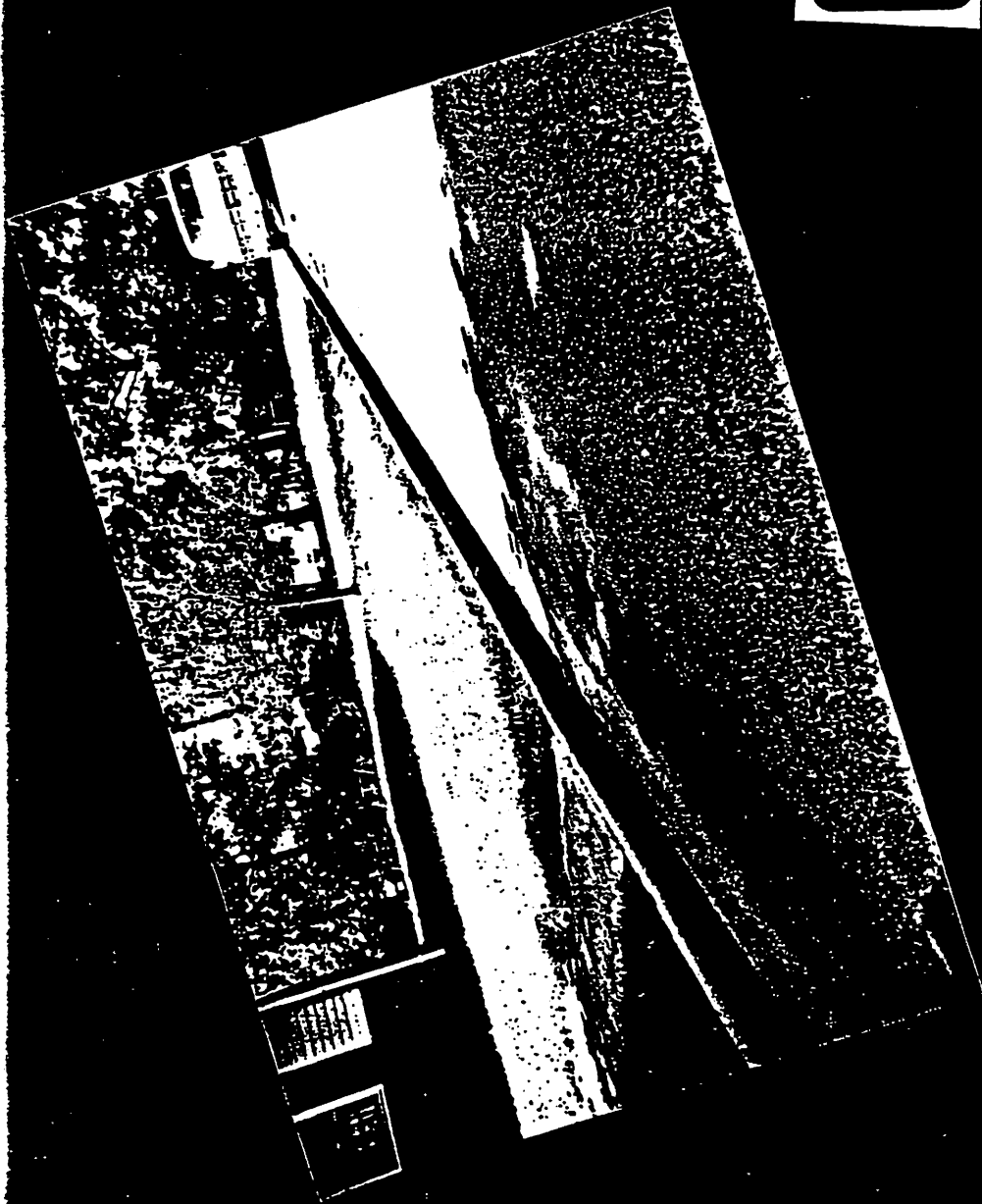
PLAINTIFF'S
EXHIBIT
18-41-6

DEPOSITION
EXHIBIT
Woodward
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PLAINTIFF'S
EXHIBIT
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9-14-87

DEPOSITION
EXHIBIT
Woodward
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PLAINTIFF'S
EXHIBIT
18-14-87
FENCAL-Argento, R. L.

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Ex-100

ASSIGNMENTS OF ERROR

1. It was error to instruct the jury that the failure of Banks to testify at trial gave rise to a presumption that his testimony would be unfavorable to his case when there was undisputed evidence that Banks had lost his memory of the accident as a result of his severe head injury, was available for defendant to call as a witness at trial and had previously testified by deposition taken by defendant. (Jury Instruction No. 10).

2. In the alternative, it was error to refuse to tailor this instruction that Banks' testimony was presumed to be unfavorable to his case to the specific material issues on which the presumption arguably applied. (Jury Instruction No. 10).