SUPERIOR COURT OF NEW JERSEY
LAW DIVISION - MONMOUTH COUNTY
DOCKET NO. MON-L-483-12

BLAIR KIM, by and through his Guardian Ad Litem, John Kim,

Plaintiffs,

-vs-

MATAWAN ABERDEEN BOARD OF EDUCATION, MATAWAN REGIONAL HIGH SCHOOL, JOSEPH J. MARTUCCI, SUZANNE S. MERGNER, JESS MONZO, ANDREW LASKO, MICHELLE RUSCAVAGE, JOHNNY SHORT, ET AL,

Defendants.

CIVIL ACTION

DEPOSITION

OF:

DR. KEITH R. BENOFF

T R A N S C R I P T of the stenographic notes of the proceedings in the above-entitled matter, as taken by THOMAS J. McCAFFERY, a Certified Court Reporter (License No. 30X100034500) and Notary Public of the State of New Jersey, at the offices of Dr. Keith R. Benoff, 700 East Palisades Avenue, Englewood Cliffs, New Jersey, on Tuesday, the 23rd day of July, 2013, commencing at 1:50 p.m.

A P P E A R A N C E S

ANSELL, GRIMM & AARON, ESQS.
BY: BRIAN E. ANSELL, ESQ.
1500 Lawrence Avenue
Ocean, NJ 07712
For the Plaintiffs.

WOLFF, HELIES, DUGGAN, SPAETH & LUCAS, ESQS.,
BY: BRUCK E. HELIES, ESQ.,
Valley Park Professional Center
2517 Highway 35, Bldg. K
Manasquan, NJ 08736
For the Defendants Matawan Aberdeen Board of Education, Matawan Regional High School, Joseph J. Martucci, Suzanne S. Mergner, Jess Monzo, Andrew Lasko and Michelle Ruscavage.

CAMPBELL, FOLEY, DELANO & ADAMS, LLC,
BY: JACQUELINE FARRELL, ESQ.,
601 Bangs Avenue
Asbury Park, NJ 07712
For the Defendant Johnny Short.

I N D E X

D R. K E I T H R. B E N O F F, called as a witness, being first duly sworn, testified as follows:

MR. ANSELL: Good afternoon, Dr. Benoff. My name is Brian Ansell. I introduced myself earlier. I'm an attorney with the law firm of Ansell, Grimm & Aaron down in Monmouth County. And I represent a young man by the name of Blair Kim in connection with a lawsuit that's been brought against the Matawan Aberdeen Regional School district and some of their employees; and that lawsuit arises out of an incident that occurred on April 20 of 2010.

Do you understand that, sir?

THE WITNESS: Yes.

MR. ANSELL: I understand that you have become involved in this case, an examining neuropsychologist; is that correct?

THE WITNESS: Yes.

MR. ANSELL: And you're here on behalf of one of the defendants in the case, Mr. Helies' clients, the school district and their employees; is that correct?

THE WITNESS: Yes.

MR. ANSELL: Okay. And I understand that you have had your deposition taken before; is that

5

right?
THE WITNESS: Yes.
May I just turn my phone off?
MR. ANSELL: Absolutely.
(There was discussion off the record.)
MR. ANSELL: You don't need me to give you instructions; is that correct?
THE WITNESS: Yes.
MR. ANSELL: All right. I just want to remind you - of course you realize you're under oath; ad although we're sitting in your office in an informal setting, that oath is of course the same as if we were sitting in court before a judge and jury.
Do you understand that, sir?
THE WITNESS: Yes.
MR. ANSELL: Okay. How many times have you had your deposition taken?
THE WITNESS: I'd have to estimate.
My guess is approximately 20.

DIRECT EXAMINATION BY MR. ANSELL:
Q How old are you now?
A Forty-one.
Q How long have you been practicing as a neuropsychologist?

6

A I've been working on my own as a neuropsychologist since two thousand and four; and I had a pro -- provisional license starting - I forget when - probably 2001.
Q I understand you've had an opportunity to look over pertinent case materials involving this case; correct?
A Yes.
Q And you also had the opportunity to meet with Blair Kim and perform a battery of neuropsychological tests on him; is that correct?
A Yes. And a clinical interview.
Q Do you agree, Doctor, that Blair Kim sustained a traumatic brain as the result of the incident that happened on April 20th of 2010?
A I'd have to check my records.
From his description of the incident, it appears that by criteria he did have a mild traumatic brain injury, a concussion.
Q I didn't ask you the grade. I just asked you can we agree that he sustained a traumatic brain injury?
MR. HELIES: I object. He answered your question. If you don't like the answer, that's something else.

7

He answered your question.
MR. ANSELL: I understand.
A Traumatic brain injury is supposed to be considered according to severity; it's not supposed to be considered as an overall broad label.
Q Okay. So you have -- what are the various classifications --
A I --
Q -- of a brain injury?
A Sorry for rushing.
Typically they would be classified as either mild, moderate or severe.
Q Okay. And in your view, it was a mild traumatic brain injury.
A Yes.
Q And you're basing that on your review of the medical records that were supplied to you; correct?
A That is correct.
Q All right. But do you agree that he sustained at the very least a mild traumatic brain injury?
It was a mild traumatic brain injury.
Q Would you also agree, Doctor, that Blair Kim sustained a post-concussion syndrome following that mild traumatic brain injury?

8

A Actually, no, I wouldn't.
Q Why don't you agree with that?
A Because of the initial testing performed by Dr. Batlas.
Q So what is it about the initial testing performed by Dr. Batlas that leads you to believe that Mr. Kim didn't suffer from post-concussion -- post-concussion syndrome?
A A careful review of the data from Dr. Batlas' evaluation.
Q Okay. You're aware Mr. Kim's treating neurologist has diagnosed him with having sustained post-concussion syndrome.
MR. HELIES: Objection to form.
Q Are you aware of that?
A Which neurologist is it?
Q Dr. Pellmar.
A I'm aware of the fact that Dr. Pellmar has diagnosed it, yes.
Q As his treating physician; correct?
A Based upon the reports supplied to him by Dr. Batlas.
Q Well, he treated him directly himself; correct?
A I -- he's treated the post-concussion headaches,

9

to my knowledge. I don't know what other treatment he's provided him.
Q What in your mind constitutes a post-concussion syndrome?
A In addition to the post-concussive headaches, we would expect for a diagnosis of post-concussion syndrome there a might be a variety of symptoms, behavioral and most typically some cognitive deficit that would be present.
Q You were saying that in your opinion, Mr. Kim didn't sustain any post-concussive syndrome for any time period following his traumatic brain injury?
A I would not use the diagnostic label of post-concussive syndrome for Mr. Kim.
Q Did Mr. Kim sustain a vestibular disturbance following his traumatic brain injury of 4-20-10?
A He has been diagnosed with vestibular disturbance.
Q You take no issue with that diagnosis; correct?
A It's beyond the spectrum or neuropsychology; that would be more in the realm of a rehab type physician to comment on.
Q Meaning a neurologist.

10

A No. It could also be a physical medicine or rehabilitation specialist; could be -- any number of experts come comment on that. But I'm not a neurologist.
Q But certainly a neurologist can.
A Certainly.
Q Would you agree that he sustained post-traumatic headaches and migraines following the --
A Again that's really a comment for a neurologist, too, but there are reports from his treating neurologist that he has had headaches since the accident.
Q And based on your review of the records, you take no issue with that diagnosis; correct?
A Absolutely not.
Q And, again, do you consider the vertigo he sustained as vestibular disturbance or part of vestibular disturbance, or is that something separate?
A Again I'd like to classify that: It's beyond the spectrum of my expertise. But I am aware of the fact that it is classified in that general realm, yes.
Q And again do you agree that Mr. Kim had sustained vertigo subsequent to his traumatic brain injury of April 20 of 2010?
A Again that would be for his neurologist or a physical medicine or rehabilitation specialist to

11

comment on.
I'm not in a position to deny the existence of the symptoms.
Q You've seen that in the medical records, I believe.
A I'm sorry?
Q You take no issue with that diagnosis; correct?
A No.
Q That's correct, that you don't take any issue.
A Yes, I take no issue with it.
Q Now, you examined Mr. Kim on February 19 of 2013; correct?
A I just want to check the records to make sure I have the exact date.
Q It's on top of the report.
A I did examine him on February 19th of this year.
Q And would you agree with me that during your examination Mr. Kim was honest with you?
A There was -- there was no exaggeration of deficits on the symptoms to validate the tests that I administered.
That does not mean that I got his optimum effort at all; it just means that on that test, there was no

12

specific evidence of exaggeration.
Q Is there any indication that Mr. Kim was being dishonest with you?
A Certainly not in his testing, but there were certain inconsistencies that raised concern.
Q There was no evidence that you indicated of any symptom magnification or malingering on Mr. Kim's part; correct?
A There was no frankful malingering on his part.
Q So again do you have any reason to doubt or would you agree that Mr. Kim was in fact honest and truthful with you at the time of your evaluation?
A Again, what I did indicate before is that when I look at his performance across all of the tests that I administered, there were some inconsistencies in his performance; that while I would not classify it as frank malingering or intentional exaggeration of deficit, they were beyond the normal spectrum of variability when dealing with similar type situations.
Q You're talking about other factors.
A Certainly.
Q Again there was no indication to you of any dishonesty in your evaluation of Mr. Kim.
A Certainly nothing intentional.
Again, I cannot speak to motivation because I'm

13

not inside his head.
Q Well --
A There's no evidence of it.
Q There's things you do during your examination to try to determine if someone is being dishonest; is that right?
A Certainly if someone is trying to be dishonest, there are tests that are sensitive. And that was not the case.
Q Not the case with Mr. Kim.
A That's correct.
Q Now, you performed a battery of -- What would we call them? -- neuropsychological tests. Is that fair?
A Absolutely.
Q And I see you performed a total of ten tests; correct?
A Well, some of these tests --
Q Twelve. I'm sorry. Twelve tests.
A Some of the tests have multiple tests within them; they're referred to as sub-tests.
Q But you listed 12 different types --
A Twelve different ones.
But, for example, the first one, the Webster Intelligence Scale has actually ten different tests.

14

Q I think you classified in your report -- in your summary three different levels of findings, where there was intact performance, the test demonstrated low average performance, and demonstrated borderline or impaired performance; correct?
A Yes, that is.
Q So I'm a lawyer; I know nothing about what you do; that's actually true. And I'd like you to just please try to summarize or describe to me what you do as a neuropsychologist, what these tests are designed to do or elicit, and how Mr. Kim performed on these tests and what -- why some were intact, some were low average and some were, in the language you used, borderline or impaired.
A Okay. It's entirely possible I won't get everything within the --
Q Let's start with what you do.
A Okay. The way a neuropsychologist generally works is first we conduct an interview where we take a thorough history; we look at things such as medical history; we will consider things such as educational history; and in the event of an adult, we look at vocational history; we will look at developmental milestones, if they're available to us; we'll look at school history that we will ask about; ask about sleep

15

habits; about daily functioning, such as cooking, cleaning, driving; you look at the gamut of daily living activities; we'll ask a history of any psychiatric or psychological problems; and in a case such as this, we'll ask about precipitating factors, that being the accident in question.
So it's a thorough interview where we try to also open up the questions that we're getting a complete presentation.
We also ask about the symptoms and complaints that person is presenting with, as that should guide the evaluation.
Once we've completed the clinical interview, we then generally view the -- use the battery of tests; included in that battery is typically an intelligence test; we will use a test of memory, visual and verbal; we'll use, as in the case here of a younger individual, we'll use an achievement test; we use some language tests; we'll use some fine motor ability tests; we use some of what we refer as to executive function tests where we're testing sort of frontal lobe function within the brain - tell me if I'm going too fast - and we also will do -- a typical symbol validity test is done; and then we'll also evaluate personality or emotional state, if indicated.

16

Q And that's -- these are the various tests that you listed?
A Correct.
Q You talk about various tests showing intact performance, meaning, I assume, that that was in the range of normal; is that correct?
A What I refer to intact here is average. And then I also clarified in the next sentence that there were low average scores obtained on numerous tests, which in the case of Mr. Kim would be considered globally intact, because many -- generally speaking, people don't perform uniformly well across every test that we give to them; in fact, science has consistently shown that the more tests we throw at someone, the more we will get abnormally low and perhaps even abnormally high scores; in other words, humans are not machines; we don't perform equally well.
Q Could those type of test findings also be consistent with some finding of memory impairment or emotional problems?
MR. HELIES: Objection.
A Depending on the individual.
In Mr. Kim's case, I would actually -- I'd actually comment that that's not the case.
Q But it -- it could be; correct?

17

A It's possible, certainly, but not in the case of Mr. Kim.
Q Let's talk about what your -- what the intact performance -- what tests in your mind demonstrated intact performance?
A Tests that I would consider intact are tests that resulted in scores that were in the average or low average range; and they included tests that measure verbal abstract reasoning; expressive vocabulary; general knowledge; vocabulary of mental calculations; motoric and non-motoric visual construction; visual reasoning and abstraction; immediate storage of memory; storage of a word list; delayed recall of the word list; it included speeded visual scan; shifting between visual testing; and there was also a test of executive function, known as the Wisconsin card sorting, which measures frontal lobe cognitive flexibility.
Q Doctor, tell me about the low average performance test. What test demonstrated low performance?
A Some of them -- those that I mentioned fall within the low average, I would consider them to be intact; they included the digit repetition and sequencing; it included delayed story recall; delayed recall of a word list; and also the motoric, non-motoric

18

visual construction test.
Q Okay. So those tests you just mentioned to me, just explain to me what those tests -- how they're administered and why his -- he was below average performance.
A His performance was below average simply because that's the level of the test.
Q I understand. Explain the test.
A That's the point in terms of how they're administered. Most of those --
Q Tell us what they are and how they're administered.
A I'll take them one at a time.
The non-motoric visual construction test deals with we show a series of pictures; on each page there are shapes or forms; there's larger patterns up top; the objective is to identify three of the six shapes which will come together as if it were a jigsaw puzzle to recreate the large pattern; so it's constructing a pattern in your head; non-motoric sort of stimulus.
As to these, his score was low or his score was a lower average performance.
Q Because of why - the amount of time it took him or because he didn't complete the pattern properly? What was it that was lower than average?

19

A Because he was not able to reconstruct the pattern or he did not reconstruct it. I can't say as to whether he was able to, but he did not reconstruct the pattern.
Q Are those tests timed also?
A That particular test is timed - 30 seconds.
Q He wasn't able to do it within the 30 seconds.
A Correct.
Q Tell me about next test.
A The next one was a delayed story recall test; for that he had heard two stories about 25 to 30 minutes prior; and you're asked afterwards to tell as much of each story as you recall.
Q Okay. And why was he lower than average on those -- that test or those two tests?
A I can't say exactly why.
Q Why did you grade him that way?
A Because his score fell in the low average of performance.
Q How is that scored?
A His basic score was between the ninth through the 24th percentile; he couldn't recount the story properly; it was the number of story details that he was able to provide.

20

Q It's a written test?
A No. It's done verbally.
Q Okay. Please tell me about the third test.
A Next test was the delayed recall of a word list, where about 20 minutes prior, we had gone through a word list where I would read 16 words to him; he would tell me as many as he recalled; you go back and forth five times; then there's an immediate recall; then 20 minutes later there's a delayed recall where spontaneously you're asked to state as many of the words as you can recall; so after 20 minutes, he recalled -- I can check how many words, but his score was in the 64th percentile, which is in the low average range.
Q And the fourth test in this category?
A Also there was the digit span test, where for that there are three parts to it; on that test, he was -- his performance was the 16th percentile; the first part is repetition of a series of increasing lengths; for the second part it's reversal of a series of numbers and increases in length; for the third phase of the test, you're asked to order the numbers from lower to higher; and again the sequence starts; they grow in length.
Q Why did you score him or grade him as low performance?

21

A Because of the fact the score fell in the 16th percentile.
Q Sixteenth percentile of a hundred; right?
A Yes.
Q And was there any other tests you performed that would fall in the low average performance category that I missed?
A There was the symbol search.
Q Describe that test and why he was low average.
A That's a test where a person is presented several pages; they're asked to one at a time scan across a line and identify two symbols on the line that are identical; if there is -- if there are two that are identical, you mark one that's the same; if not, you mark the word "No" at the end of the line.
Q And that's all the tests that you graded low performance; correct?
A Yes. On those tests of performance, there was one thing I forgot: On a motor function test, he performed in the low average range with his left hand; it's a finger oscillation test where you're asked to tap down a tapper.
Q And nothing about borderline or impaired; that's average.

22

A Low average.
Q Again, these tests are designed to measure your cognitive performance?
A That's correct.
Q And what else are they designed to measure?
A Well, in the case of motoric, it would be motor initially.
Q If someone performed lower than average, there are various possible causes for that type of score; is that right?
A That is correct. But not everybody -- may I complete --
Q Yes.
A Not every score in the low average range is below where someone should be performing; that's an important point that should not be lost.
Q But it also can be lower performance.
A Yes.
Q I understand your opinion is that this has nothing to do with Mr. Kim's accident of 4-20-10; correct? That's your opinion.
A Yes.
Q But it could be -- these types of scores could be demonstrative of someone having poor cognitive performance in these types of circumstances, correct?

23

MR. HELIES: Objection to form.
You can answer.
A Yes.
Q In such -- just in your opinion, the etiology of this low performance is not the traumatic injury of 4-20-10; correct?
MR. HELIES: Objection to form.
A Yes. That's correct.
Q But let's talk about borderline or impaired performance tests. Can you just go through the same exercise we just did; take them one at a time; explain the test; explain why they were borderline or impaired.
A Sure. First is the coding, c-o-r-d-i-n-g, test. On this test you're asked to rate a symbol using a template up top as compared with a series of numbers; and again it's a speeded task where you're supposed to name as many as you can within 20 minutes; his performance was at the fifth percentile, which is in the borderline range.
The next task was the immediate recall of the word list after the distraction list; that was at roughly the sixth percentile, which is again borderline.
And on the delayed recall of the Rey, R-e-y, complex figure, his was in the borderline range; that was at the fourth percentile.

24

On the controlled oral word association test, his fluency was in the borderline range, the seventh percentile.
And the finger oscillation task performance with his right hand was at the fifth percentile; again the borderline range.
Q Just go through those tests again and just describe what it is you're asking for.
A With the letter fluency test, that's where you're given a letter; and over the course of 60 seconds, you're asked to generate as many words as you can think of beginning with that letter, aside from proper nouns.
Q Okay.
A The three letters typically are F, A and S that we use.
The Rey complex figure test is delayed recall, meaning first you're asked to copy a figure; then after a delay of a couple of moments, there would be immediate reproduction of memory where you're supposed to draw from memory; and then 30 minutes later there's delayed reproduction from memory.
Under the delayed reproduction, he was borderline -- also was in the borderline range.
And finally for the finger oscillation test, his finger oscillation with his right hand was in the

25

borderline range; there's where again you're tapping as quickly as you can.

Q Again I'll ask you the same question: These types of findings or test scores could be the result of someone having poor cognitive performance or cognitive difficulty; is that correct?

A Yes. They could be.

Q Now, you state at the end of your summary that reduced scores on select neurocognitive tests - those things we were just talking about - cannot be objectively associated with the incident of 4-20-10; correct?

A Correct.

Q Okay. And you -- what is the basis of that opinion?

A The basis for that opinion is very clear: Number one, overwhelmingly, individuals who have had traumatic brain injury, what's referred to more colloquially as a concussion, typically do return to baseline; overwhelmingly they return to baseline levels of cognitive function within six to nine months; certainly by a year we would expect them to be back to baseline level.

Second, as I --

Q Let's stop there a second.

26

A Well, but that's only part of the explanation.

Secondly, Mr. Kim performed significantly lower on a number of tests when I evaluated him during February of 2013 as compared to when Dr. Batlas evaluated him during November two thousand and eleven.

When someone is having cognitive problems as a result of a concussion, there is not a decline in function from some point long after the evaluation, after the accident, or sustaining the injury, to some later point even further down the road. If there is any decline, it would be at the same time; we don't get worsening performance, in the case of concussion, from one and a half years to roughly three years post-concussive. That not the course of events.

Q You say overwhelmingly and typically as to people who sustain a mild concussion of what you term mild traumatic brain injury, they return to baseline overwhelmingly and typically. That implies, does it not, that there are exceptions to that rule?

A Yes.

Q There are patients who can sustain permanent injuries and permanent cognitive problems from concussions; is that correct?

A There are those who have reduced performance upwards of years after a concussion.

27

Q And can have permanent problems resulting from concussions.

A Again I wouldn't necessarily say that it's resulting from a concussion specifically, but there are those who perform at lower levels following one, but I can't say specifically that it was the concussion or other factors that go into how one performs cognitively.

Q Again, there's exceptions to the rule; not every person is going to return to baseline; is that right.

A No, it's not every single person.

But, again, there are a variety of reasons as to why someone may not have returned to their baseline level of function.

Q All right. But here we have a potential reason in a traumatic brain injury, where the patient lost consciousness for up to five minutes, has had varying types of issues and problems at school.

Isn't it possible, Doctor, that that -- his traumatic brain injury of 4-20-10 has contributed to some of your findings in your examination?

MR. HELIES: Objection to form.

You can answer.

A My answer would be no, because the literature does not support that course of events; because, again,

28

in this case, a mild traumatic brain injury, known as a concussion, when someone performs the way he did with bad levels during November two thousand and eleven, and then when it's compared to how he performed here during February of 2013, you would not have a delay in function from one point after the brain injury, a year and a half roughly after the brain injury, to almost three years post; you would not get a drop-off in performance; that's not consistent with the long-term in neurocognitive deficits that can be seen in someone with a mild traumatic brain injury.

Q What about a person who can't afford to get treatment for the injury?

MR. HELIES: Objection to the question.

You can answer.

Q What if that person is untreated because of a lack of funds or any other reason?

A You would not expect the drop-off whether or not there's been any neurocognitive treatment.

Q Can you tell me -- you had the benefit of the earlier evaluation of Dr. Batlas I think from November of 2011; is that right?

A Yes, it is.

Q And can you tell me, this drop-off -- tell me there where there was a drop-off between the two

29

evaluations.
A Okay. I'd like to point out that many of the tests that Dr. Batlas administered are actually the same if not slightly different editions of the same tests that I administered, so it allows for a very good side by side comparison.
Q But they're not the same; correct?
A He gave the older edition of the third -- the third edition; I gave the current edition; that was his choice in terms of test administration.
We'll start with the IQ test for verbal abstract reasoning: When Dr. Batlas administered the test - and it was the adult version of the test, not the teenage version of the test, the younger version - Mr. Kim's performance was at the 36th percentile; for me it was at the 25th percentile; expressive vocabulary dropped from the 50th to the 37th percentile, which I consider a big drop-off; general knowledge went from the 37th to 25th; again a relatively small drop-off, not a clinically significant one.
Some of the sub-tests are not identical, so it's a little hard to draw a side to side comparison.
Let me continue with this -- oh, I actually stand corrected: He did give the same version of the IQ test. Just as to the memory test that goes along with it, he

30

gave the older version, but it's the same tests.
There were drop-offs from November two thousand and eleven to February 2013 - the same exact test, mind you.
For -- let's see other drop-offs of note: On that non-motoric visual construction test, he fell from the 50th percentile to the 16th percentile; for the digit span he fell from the 37th to the 16th; for the symbol search test he fell from the 37th to the ninth; for the coding sub-test, he fell from 25th to the fifth.
That's just the IQ test. We can move beyond the IQ test. Let me see.
Verbal fluency, he used the same three letters, F, A and S; he dropped from what he classified as 18th to 19th percentile to the seventh percentile.
Let's see if there are any other drop-offs.
The rey complex figure, he didn't put an actual percentile range; he didn't -- apparently he didn't administer the delayed 'cause it's not listed here on his summary sheet; but for the immediate, he only put below the tenth percentile; for me the test was at the first percentile. There's no sort of rescoring Dr. Batlas' data.
Let me see if there were any other drop-offs worth noting.

31

For the story memory, it's called the logical memory sub-test, for the immediate recall of the stories, he fell from the 50th to the 25th; and for the delayed recall, he fell from the 63rd to the ninth. And those are tests also that allow for direct comparison.
Q Okay. Those are the tests that allowed for direct comparison and ones you noted where there was some drop-off.
A Yes.
Q Go ahead, you can finish.
A Because there is significant drop-off across a smattering of tests covering a variety of different functions from roughly a year and a half after the concussion until my evaluation, that is not a pattern of performance that's consistent with the long-term neurocognitive fall-out from a brain injury of this sort.
Q In the 100 percentile of the neurological tests, what percentage of that was there these drop-off's that we're talking about?
A I don't think we can reduce to it a percentage; I think that's over-simplification.
The fact that -- what I have to focus on is the fact that it's across multiple areas of cognitive function; and it's the same test; it's not as if you can

32

argue that they're not comparable.
Q Okay. Are there more tests that there were consistencies?
A There were tests where there were consistencies.
Q Were there those tests that were consistent and in what way were there ones there were inconsistent?
A Again, I don't tally them up, but it's probably -- it's probably about 60-40, with 60 percent consistent, 40 percent not consistent; but, again, that's overly simplistic.
I don't means that as an insult, by the way.
A neuropsychologist would be evaluating --
Q I'm not insulted. I'm an over simplistic person.
A No, I would never imply that.
Q I would admit it.
I just want to clarify: What is it that you feel you're -- what is your field for where you feel that you're qualified to offer opinions and in what way you're not in terms of being a neuropsychologist and what you can do?
A The neurologist would be more classified to render opinions in terms of more physical -- physically based findings; they would be evaluating cranial nerve reflexes; they would be evaluating gate; stability;

33

they'd be evaluating headaches; mostly physical symptoms and complaints as what they'd be a little bit more focused on.

I'm looking more for the cognitive realm.

Q Okay. And --

A The complimentary.

Q And did Blair express to you how he perceived this injury affected his life?

A I'd have to look in my notes so I can verify.

Q Sure.

A He reported that he's had some headaches and some difficulty with balance; he said he had some rehabilitation for some neck problems; he reported that he had some problems with memory and concentration; that it's been harder for him to do things; and he said that he sometimes feels depressed about certain limitations that have placed upon his life.

Q Do you have any reason to doubt the veracity of any of his complaints?

A No.

Q And, in fact, they're caused by the injury?

MR. HELIES: Objection.

Q You don't doubt the veracity of his complaints.

A I can only speak to the cognitive side of things

34

- that it does not add up to the fact that they would be attributed to the injuries specifically.

Q Would you agree that the injury that Blair sustained could have had an adverse effect on his martial arts practice, for example?

MR. HELIES: Objection to form.

A That's beyond the scope of my practice; that's physical.

Q How about a deterioration in his academic performance?

MR. HELIES: Objection to form.

A In theory it's possible. I don't necessarily know that it has.

Q Okay. And that's because you looked at his school records and you're not sure any deterioration in performance is related --

A I looked over the school records that were provided to me -- I just want to make sure that I'm stating things correctly.

In the Matawan School District, for example, he was partially proficient in language as early as I think the third grade -- in the fourth grade; in sixth grade his academic record had grades spanning 63 through 89; academics in the 80's; he scores in the 70's for science; 63 for social studies; 80 for reading. And

35

this is all before the concussion that we were referencing.

So, again, there's a spread of performance, a large degree of variability long before the onset his symptoms.

In many individuals, once they get to high school, the nature of cognitive demands that academics place upon the person increases the burden, such that learning disabilities or learning difficulties that may not have between evident certainly will be evaluated and identified at an earlier stage of someone's education; do not -- it's not atypical for them to spontaneously come to the surface during the teenage years.

Q Do you know whether any accommodations were made for Blair after this accident?

A It's my understanding that he has a 504 accommodation.

Again, that's what I was stating just a minute ago - that it is entirely possible that independent of and unrelated to the concussion in question, he may have had those accommodations anyway. I have no way to know for sure how many people who are struggling as early as younger years, if they haven't been identified, sometimes things just come to the surface.

It's not at all unusual for a neuropsychologist

36

to have an adolescent referral, where there's no history of any sort of neurological insult and to have issues identified in the later teenage years.

Q Let's talk about your practice a little bit.

A Certainly.

Q You're in practice here.

A I'm an employee of the practice.

Q Who are the partners in the practice?

A Drs. Aaron Rabin, R-a-b-i-n, Eric Fremed, F-r-e-m-e-d, and David Masur.

Q Are they MD's? What type of doctors?

A They're -- they're neurolopsychologists.

Q And those are the three partners in the firm?

A That is correct.

Q And is Dr Masur also a neuropsychologist?

A Dr. Masur is your a neuropsychologist, who like me works as an employee.

Q And you are also employed, as you said. How long have you been here?

A I've been with the practice in some capacity since about 1999 or 2000. I forget the exact start date.

Q You have three office locations?

37

A That is correct.
Q Do you work in all three of the offices?
A As needed.
Q How often are you down in East Brunswick?
A Typically one or two times a week.
Q And how about here in Englewood Cliffs?
A Two or three times a week.
Q What about Parsippany?
A That office is used a little more sparingly; so sometimes as little as once or twice a month; but we rotate around, so it's not always me.
Q Of your overall practice, what percentage of your practice -- tell me about your practice. What does it consist of?
A Well, there are these medical-legal type evaluations and then there are also private patients that I see, people referred for a variety of reasons.
Q What percentage of your practice is dealing with medical-legal evaluations?
A It's probably about 40 percent. I don't keep a tally.
Q Your best estimate.
A About 40 percent.
Q Forty percent is consulting in litigation; correct?

38

A That's correct.
Q And of that 40 percent that you consult in litigation, what percentage is your consultation work on behalf of defendants?
A Almost exclusively.
Q Let's say a hundred percent.
A Technically it's like 99.8.
There have been a couple over the years where it's not been.
Q Since 1999, there have been a couple plaintiffs' cases; the rest have been defense cases; correct?
A I've only been doing the medical-legal cases for the last several years, but yes.
Q How many years have you been doing it?
A I think I started somewhere around 2008 or '9. I forget. I didn't keep track of the exact dates.
Q Let's take an estimate; 2008, 2009, you started doing legal evaluations; four or five years; correct?
A Yes.
Q Ninety-nine.eight percent of those have been on behalf of defendants in lawsuits?
A Of the medical-legal cases, yes; about 98, 99 percent on behalf of the defense.

39

Q In terms of consultation, do you have patients that you treat who are who are plaintiffs, cases that you offer opinions on behalf of?
A It's come up.
Q It's come up?
A Yes. Because I also work -- on Fridays, I'm a per diem employee at Kessler; and I have evaluated through private insurance referrals; and a number of those over the years have gone on to initiate a lawsuit against someone.
Q But have you ever testified on behalf of a plaintiff at trial?
A No, I haven't.
Q Have you ever given a deposition on behalf of the plaintiff?
A No, I haven't.
Q And for those lawyers who seek you out where you're not treating somebody already or through an insurance referral or a hospital or clinic contact setting, 99.8 percent of that is for the defense; is that right?
A That's accurate.
Q And the income you derive from doing consulting work, that 40 percent, does that go directly to you, or does that income go to the practice?

40

A The income goes to the practice, and then there's a profit sharing agreement over and above the base salary.
Q As to that 40 percent, that 40 percent of money that's coming from this legal work gets divied up between you and the practice at a different rate than you get paid as an employee?
A That's correct.
Q You get more money percentage-wise doing this medical-legal work than you do getting paid as an employee of this practice; is that right?
MR. HELIES: Objection to form.
You can answer.
A Um -- the possibility of being paid straight for everything as a salary has never been explored. I wouldn't know how to answer that.
Q How do you charge for your services?
A There's a fee.
Q You -- for this type work, medical-legal consultation.
A There's a fee for neuropsychological evaluation.
Q Which is?
A I believe starting at 2013, it was 3300; and then if there's any review of records on top of that, it would be a flat fee of 530 an hour.

41

Q Okay. Go ahead.
A That's it.
Q Do you charge for your deposition time?
A We charge the same rate of 530 an hour for a minimum of two hours for depositions.
Q And how about court time?
A It's divided up into half day units; I think it's 3500 per half day unit. I'd have to check.
Q How many times have you testified in court on behalf of a defendant in a lawsuit?
A I believe it's been six. I'm not sure, but I think six.
Q What counties?
A I've testified in Bergen, Middlesex, Hudson, and I think Essex. I think those four. It's possible I'm missing one because it's been over a number of years.
Q Of those six cases that you've testified in court, have you ever testified in court that a plaintiff had a residual cognitive deficit as a result of a head injury?
A I don't believe that I found there to be any residual cognitive deficits in those cases.
Q Okay. And what attorneys were those cases for?
A I'm sorry, I don't remember the names.

42

Q Any of them?
A I'm sorry. It's been a while since I've gone to court; I just don't remember.
Q You can't remember one attorney? The first time in court when you testified in front of a jury, you don't remember the name of the lawyer that questioned you?
A I'm not trying to be obstinate --
MR. HELIES: I object to the form of the question; you said -- the lawyer that questioned him is different from the lawyer --
Q Do you remember who paid you to come to court and testify? Do you remember the name of that lawyer?
A Again, I'm sorry, I'm not trying to be difficult.
Q I know you're not trying to be difficult. I'm just trying to understand -- get to your memory here.
Depositions you said you give about -- you did about 20 depositions?
A I believe so.
Q In those 20 depositions, have you ever testified under oath that a plaintiff had a residual cognitive difficulty or impairment as a result of a head injury?

43

A I can't say for sure. I genuinely don't remember. My response to all the questions in the depositions have been over the years; it's possible yes; it's possible no. I just can't say with any certainty.
Q How many active cases do you have right now in the medical-legal consultation?
A Active in what sense?
Q That are pending; you have an open file on; that haven't been closed because you may be called to testify at deposition; on-going, some day you're going to be doing an evaluation or you're waiting for a trial date.
A That's a good question. I actually don't know.
The secretarial and scheduling staff keeps track of things, but if I had to approximate, there might be -- just because some of these matters can take a while to wind there their way through the system, there might be 50 or 60 open cases.
Q These 50 or 60 open cases, can you tell me the name of one where you have issued a report where you have found that a plaintiff had sustained a cognitive deficit or impairment as a result of a head injury?
A I -- I don't know that I'm allowed to divulge the name of any individuals that I evaluated.
Q We'll see whether --

44

MR. HELIES: Nobody asked you the names.
Q Any case.
A I can think of a case, but I can't identify it by name.
Q Out of the 50 or 60, how many cases can you remember where you found a plaintiff had some residual cognitive deficiency?
A I don't sort things out in my head that way. I just -- I know that I have. I can't say percentage-wise. I don't divide up my cases that way. Every case is considered individually; we don't look at people as a collective.
Q Give me a ballpark.
A Especially when I factor in all the cases that I see.
Q Let's make sure you understand the question: You've told me you have 50 or 60 active files in your office, probably; and I asked you of those 50 or 60 active files, can you think of one case where you issued a report where you have found that a plaintiff had sustained a residual cognitive deficiency or deficit or impairment as a result of a head injury.
A My answer is yes.
Q Okay. And how many cases can you think of where you issued a report such as that?

45

A Off the top of my head, one recent case comes to mind. But I don't know how many I have, how many the office has over the last several months, or, quite frankly, at the moment, the last couple of years that are still open.

Q You can think of only one case as we sit here.

A Because when I -- when I evaluate someone, I focus on them; I write a report; I put it in the chart; and then I don't pay attention to it until it comes to the forefront again; this way I'm giving each individual case the attention it deserves at the moment; I'm not thinking globally across every case that I've had over the last several years.

Q That's wonderful, and I appreciate that. But what I'm asking you is as you sit here today, you can only think of one case where you said a plaintiff had residual problems as a result of a head injury?

A I said one recent case, which I would define as the last few weeks.

Again, I can't accurately go back to who I saw two months, three months, four months ago. I'm not comfortable --

Q What lawyer --

A Excuse me. May I answer the question?

46

Q Sure.

A I'm not comfortable putting on the record something that should I have the time to look into it more thoroughly would not reflect reality.

Q Well, I don't have the luxury of that today; I have the luxury to ask you questions today to see what you know and what you don't, and what you remember and what you don't, just like you did with my client, Mr. Kim.

A I also don't have the luxury of misstating the truth under oath simply because I'm not allowed to refer back to my records.

Q I want to know what you remember. You're telling me you can only remember one case over the last few weeks; is that right?

A Off the top of my head, I would classify as a legal-medical evaluation that I've done over the last several weeks, there's one noteworthy case that comes to mind. That's all I'm thinking of.

Q And who is the defense lawyer that sent you that case?

A That I don't remember offhand because I don't schedule the appointments.

MR. ANSELL: I'm going to ask you to produce that information to Mr. Helies. Okay?

47

MR. HELIES: You'll send me a letter.

MR. ANSELL: I will.

MR. HELIES: I'll consider it.

MR. ANSELL: I'm going to ask you to produce that, and if you don't produce it, I'll file a motion in court.

Q How many cases are you taking in -- did you take in so far in 2013? Can you estimate for me?

Medical-legal cases we're talking about.

A Probably about 20, 25.

Q Okay. And of those 20 to 25 cases, I just want to be clear: I'm talking 2013; we're in July of 2013; talking about the last couple months; only 20 to 25 cases we're talking about.

Of those 20 to 25 cases, not the 50 or 60 active cases, but of those 20 to 25 cases, how many of those cases can you remember sitting here today that you found a residual impairment in a plaintiff?

MR. HELIES: I just object to the form, because we don't know if he's done an examination or done a report yet, which the question assumes.

But with that statement on the record, if he can answer the question, by all means go ahead.

A Again I have to think about this, because I have to look back over the cases that I've seen over the last

48

seven, six and a half months.

Again off the top of my head, I'd say it's probably been about three or five of them that I found residual deficits in.

Q Can you remember the name of any of the defense lawyers that sent you those three to five cases?

A Again I don't keep track of the lawyers who send individual cases. The reports are processed by the staff and they're sent out; I just write the report; I don't write the report with the lawyer in mind.

Q When the case comes in to you, you know what lawyer is sending it to you; you see something in writing in the file.

A I could know it if I wanted to, but, again, that's not something I did.

When I look at an individual and I'm writing a report, I write it based on a clinical interview, the tests, test data and medical records; not the lawyer that sent the case.

Q I understand.

A But that --

Q When you see a case, you know who sent the case.

A I can access that information in the chart, but I don't keep track of it in my head per se; it's not --

49

Q I'm talking about -- now I'm talking about when you get case and you get the file, someone says to you, "Doctor, I'm sending you a letter, here's the information," and you dictate a letter to that lawyer; correct?
A Well, what happens is they made contact with the staff; I don't take the referral; I don't schedule the appointment; I don't process the report and send it back to them.
So when I'm dictating a report, I'm aware of who the lawyer is at the time, but I'm not actively taking the information from the lawyer; I'm not scheduling the appointment; I'm not sending the report to the lawyer; and I'm not discussing the results with the lawyer on the phone; I'm providing a report; I sent it to them and then life moves on.
Q In 2012, how many cases did you see in 2012, medical-legal cases?
A I'd be estimating -- probably 30, 35.
Q Okay. How about 2011?
A Probably 25, 30.
Q Ten?
A I don't even remember from that far back.
Q Okay.
A It's been somewhat steady from year to year.

50

Again, I don't keep track of the numbers, but it's increased steadily since 2008, 2009.
Q The instance of the defense lawyers sending you cases have been increasing since you started in 2008, 2009?
A That is correct.
Q This case is in Monmouth County. Do you know that?
A No off the top of my head.
Q You've never testified in Monmouth County; correct?
A Not to my knowledge.
Q We're up here in Englewood Cliffs.
Do you know how Mr. Helies found you in the cliffs of Englewood as opposed to someone in more close proximity to Monmouth?
A Mr. Kim was not evaluated in this office; he was evaluated in our East Brunswick office.
Q Do you know how Mr. Helies found you?
A I have no idea.
Q Is this the first case you've done for Mr. Helies or any other member of his firm?
A Again, I don't keep tract of exactly who I've done cases for over the years, but my speculation would be yes, but it would be only speculation.

51

Q You don't know as you sit here today whether or not this is the first case you've done for Mr. Helies of a member of his law firm?
A That is correct, because I don't keep track of exactly -- exactly which attorneys I'm seeing cases for or whichever firms I'm seeing cases for over the long haul.
Q Mr. Helies is sitting in front of you; he's very handsome, very gentlemanly.
Do you have any recollection of seeing him before?
MR. HELIES: Object to the form of the question.
A I've never had the pleasure.
Q Okay. You never testified in court for Mr. Helies?
A No.
Q Of any of his partners?
A Not to my knowledge.
Q Is there anything in your chart which would reflect how the business came into you?
A Only who called in the referral; according to the chart, the referral was called in by someone named Joette, J-o-e-t-t-e; and the firm was Mr. Helies'.
Q You don't know how he came to you, why he

52

came to you, of all the neuropsychologists in New Jersey, why he picked you?
MR. HELIES: Object to the form of the question.
A I have no idea. I have no idea how he came up with the information.
Q The income you derive from doing this kind of legal consulting work, is there some separate entity or LLC or corporation that you're running that income through?
A No. It comes through this practice.
Q It's part of your compensation.
A That's correct.
Q When's the last time you testified in court?
A Last time I testified -- it was two thousand and twelve. I don't know the specific time of year it was. It was sometime I belive during the middle of two thousand and twelve.
Q Okay. Do you remember which courthouse that was in?
A I believe my last one was in Newark.
Q Do you remember the name of that case, sir?
A Not off the top of my head.
Q Do you remember --

53

A We're going back about about a year.
Q Do you remember the defense lawyer in that case?
A Again, I'm sorry, I don't know the attorney specifically.
Q All right. Are you familiar with a fairly new law in New Jersey that protects kids from concussions in the athletic context in schools?
A I'm not aware of what you're referring to.
Q No? Are you aware of the law that was passed in 2011 that put certain requirements on school districts to develop policies to prevent concussions?
A I don't work for a school district or a law firm, so I don't keep track of laws that are placed upon school districts.
Q I didn't ask you if you did. But concussions -- you've been treating people with concussions; that's part of what you do; correct?
MR. HELIES: Objection to form.
He answered the question.
MR. ANSELL: The question I asked him was he's treating concussions; it's part of what he does.
MR. HELIES: You question suggests that because he's a doctor that he knows something about the law. I object to the form of the question.

54

MR. ANSELL: I didn't ask that. I'm asking him now if he's treating concussions; is treating concussions part of what you do?
MR. HELIES: I object to the form.
You can answer.
Anybody who hears the question or reads it will understand that.
That's exactly why I object to the form of the question, but he can answer.
A I do treat individuals who have been -- who have sustained concussions.
MR. ANSELL: All right. Thank you, Doctor.
I have no further question. I appreciate your time, Doctor.
MR. HELIES: Doctor, just one question.
THE WITNESS: Sure.

CROSS EXAMINATION BY MR. HELIES:
Q You expressed an opinion that in your analysis of the neuropsychological tests Dr. Batlas did of Mr. Kim and those results, that you gave similar tests, and Mr. Kim's results to your tests had some drop-off, as you described them, which you indicated to us is not demonstrative of any long-lasting manifestations of traumatic brain injury.

55

Is that your opinion or is that opinion that you gather from treatises, written medical records?
A That's an opinion supported by the body of literature and research.
Q Okay. And if you and I were to have a discussion about that, those bodies of literature and research, at some other point in time you could provide that information to me?
A Yes.

REDIRECT EXAMINATION BY MR. ANSELL:
Q Can you tell me what any of these -- this literature or research that you find to be reasonably relied upon by members of your profession?
A Oh, there's many -- there are numerous references; there is plenty of basic research that will support this.
Let's see - there are -- there's a variety of --
Q Tell me about texts and journals and things that you recognize, reasonably reliable in your profession.
A Absolutely. There are numerous articles that have come out in journals, such as the Journal of the International Neuropsychiatric -- Neurological Society; Archives of Clinical Neuropsychology; The Clinical

56

Neuropsychologist. Those are journals that come out obviously on a regular basis.
And consistently the literature will show that you don't get a -- the literatures that have done long-term outcome type research on mild brain injury slash concussions have shown that you don't get drop-offs in function.
Q You mentioned three journals that you would recognize as being reasonably relied upon.
A Certainly.
Q How any texts?
A Textbooks I cannot rely upon because they're not coming to you on a regular basis; they don't accurately reflect what is the most current information.
Q How about the Center for Disease Control - would you find their publications to be reasonably relied upon by members of your profession?
MR. HELIES: With regard to this issue?
MR. ANSELL: Any issue.
A I would find the Center for Disease Control to be less authoritative than the professional journals; the peer viewed -- reviewed professional journals where they're publishing the direct research of the experts in the field.
Q But I asked you is this something that you

would reasonably rely upon, members of your profession?
A Not in the same way.
Q In any way.
A I'm sure --
Q Is this reasonably relied upon --
A I recognize there's value in the -- what they collect, but I certainly wouldn't declare them to be the recognized authority.
Q How about the Brain Injury Association of New Jersey - are you familiar with that --
A I'm familiar with them.
Q Are you familiar with their publications?
A Some of them.
Q Are they reasonably relied upon by members of your profession?
A I think most of their publications are meant for the lay person than -- not so much for the professionals. I don't think that they typically state the research in a statistically evaluated manner.
I rely more upon the journals that are based on research, hard core research.
Q You're never been published in any articles relation to concussion; is that correct?
A That's correct.
Q Post-concussion syndrome?

A I -- I prefer to focus on clinical work, not research.
Q Right. You have been published on a couple occasions when you were going for your Ph.D., I saw; is that right?
A Some before, some after. But being focused on the clinical work now; I've done clinical work.
Q I understand. But what you were published in has nothing to go with residual --
A Basically brain function.
MR. ANSELL: All right. Thank you, Doctor.
MR. HELIES: Thank you, Doctor.
(There was a discussion off the record.)
(The witness was excused.)
(Whereupon the hearing of this deposition was concluded at 2:45 p.m. as of this date.)

CERTIFICATE

I, THOMAS J. McCAFFERY, a Certified Court Reporter and Notary Public of the State of New Jersey, hereby certify that the foregoing is a true and accurate transcript of the deposition or depositions of the witness or witnesses being first duly sworn in the within matter.

I FURTHER CERTIFY that I am neither attorney nor counsel for, or related to or employed by, any of the parties to the action in which the deposition was taken, and that I am not a relative or employee of any attorney or counsel employed in this case, nor am I financially interested in the action.

Thomas McCaffery

THOMAS J. McCAFFERY, C.S.R.
License No. 30X100034500
Dated: July 31, 2013