

COMMONWEALTH OF KENTUCKY
FRANKLIN CIRCUIT COURT
DIVISION 1

-----X
RALPH BAZE, :
 :
PLAINTIFF :
 :
 v. : CIVIL ACTION No. 04-CI-01094
 :
JOHN REES, :
 :
DEFENDANT. :
-----X

[Street Address]
[City, State]

May 10, 2005

The HEARING in this matter began/continued at
[time a.m./p.m.] pursuant to notice.

BEFORE:
ROGER CRITTENDEN
FRANKLIN COUNTY CIRCUIT JUDGE

APPEARANCES:

On behalf of Plaintiff:

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* * * * *

C O N T E N T S

WITNESS	DIRECT	CROSS	REDIRECT	RECROSS
DR. WATSON	8	[#]	[#]	[#]
[Name]	[#]	[#]	[#]	[#]
*[Comment]				

EXHIBITS

MARKED RECEIVED

[PARTY'S] EXHIBITS:

1	[Short Description]	[#]	[#]
2	[Short Description]	[#]	[#]
3	[Short Description]	[#]	[#]

[OPPOSING PARTY'S] EXHIBITS:

1	[Short Description]	[#]	[#]
2	[Short Description]	[#]	[#]
3	[Short Description]	[#]	[#]

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P R O C E E D I N G S

(##:## a.m./p.m.)

SPEAKER: -- which I'm going to refer to Dr.

Watson. I just want to get him out and get him in order.

THE JUDGE: Baze versus Rees, that's the number

04-CI-1094. And this is for the purpose of rebuttal of

Dr. Watson, is that correct?

SPEAKER: Yes, sir.

THE JUDGE: And you had -- you indicated you had

a couple of matters you wanted bring up.

SPEAKER: Just a couple of rule things, Judge.

When we were here last week, we talked about how --

THE JUDGE: You won't make the same motion on

the thing I have overruled twice.

SPEAKER: No, sir, I'm not.

THE JUDGE: Okay.

SPEAKER: No, sir. I inadvertently forgot to

enter Plaintiff's Exhibit 33. This time (inaudible) into

the record as an exhibit.

THE JUDGE: Okay.

SPEAKER: I don't believe they had any

objection. I brought that today with a sticker on it.

1 THE JUDGE: Okay. Did we admit that the last
2 time? I thought we did. But we'll -- we will admit it.

3 SPEAKER: We did, but we didn't have a copy,
4 somehow we didn't get a copy.

5 THE JUDGE: Okay.

6 MR. SHOUSE: Okay. And secondly Judge, I spoke
7 to Mr. Middendorf, who was kind enough to call me on the
8 phone yesterday and asked about faxing some things to Dr.
9 Watson for his cross examination.

10 THE JUDGE: Okay.

11 MR. SHOUSE: But one of them specifically is
12 this abstract of an article that he supplied to us this
13 morning. I'm going to object to faxing this to Dr. Watson
14 on two grounds. First of all, the question was asked the
15 last time we were here by the defense. I trust Dr.
16 Watson's testimony is going to be just rebuttal, just
17 rebuttal evidence. This abstract appears to me to go more
18 to the heart of Dr. Watson's testimony on direct
19 examination two weeks ago. And it's all about by
20 postponing redistribution, which is something that he
21 talked about. All Dr. Watson is going to do is rebuttal
22 evidence. The second ground I would object to, is that

1 this says that this is from the Journal of Analytical
2 Toxicology and is 11 pages long. It says it runs from
3 page 533 to 544, when all I have is a one-paragraph
4 abstract of an 11-page article, which Dr. Watson's not
5 going to have an opportunity to look at.

6 So I'm going to object to any questions on this
7 document here of Dr. Watson. This is rebuttal testimony.
8 It's not our case-in-chief. We're not putting case-in-
9 chief evidence into the record. Dr. Watson is here to
10 rebut their case-in-chief. They can ask him questions
11 about his rebuttal evidence, but under the rules that's
12 why we're here today.

13 THE JUDGE: Okay. Mr. Middendorf.

14 MR. MIDDENDORF: Judge, this was provided this
15 morning. That is what I received from Dr. Dershwitz to --
16 to be -- as PubMed is one of the leading areas that you
17 can look up articles along with MEDLINE. And it's just a
18 general characterization, if he can disagree with what it
19 says in there or he can agree with it. In fact, I believe
20 Dr. Watson has written similar things in the past, and it
21 does go -- I mean, this is proper rebuttal testimony that
22 we're going to ask him about.

1 SPEAKER: Your Honor, when --

2 MR. SHOUSE: Judge, again under the rules, what
3 we're faced with here is --

4 THE JUDGE: Well, he's -- I'm only going to let
5 you to cross exam as to what he testifies about today.

6 MR. SHOUSE: Thank you.

7 THE JUDGE: Now, if he gets into that, then he
8 can ask me about that article.

9 MR. SHOUSE: Thank you. Yes, sir.

10 THE JUDGE: Your questions, all right.

11 MR. SHOUSE: Okay. Thank you.

12 THE JUDGE: Okay. What's the number that I
13 called?

14 SPEAKER: Judge, Dr. Watson is available at 202-
15 363-7630.

16 THE WITNESS: This is Bill Watson.

17 THE JUDGE: Dr. Watson, this is Judge Crittenden
18 in Frankfort. How are you this morning?

19 THE WITNESS: Real good. How are you, Judge?

20 THE JUDGE: I'm fine. I understand you're ready
21 to testify on a rebuttal this morning.

22 THE WITNESS: Yes, I am, sir.

1 THE JUDGE: All right. We're present with all
2 the attorneys from both the plaintiffs and the defendants.
3 I will consider you're still under oath, Dr. Watson. And
4 Mr. Shouse is going to start asking you questions. Can
5 you hear fine?

6 THE WITNESS: I can hear real -- real good.
7 Thank you, sir.

8 THE JUDGE: Okay. Thank you. Go ahead, Mr.
9 Shouse.
10 Whereupon,

11 BILL WATSON
12 was recalled as a witness and, having been previously duly
13 sworn, was examined and testified further as follows:

14 DIRECT EXAMINATION

15 BY MR. SHOUSE:

16 Q Good morning, Dr. Watson. This is Ted Shouse.
17 How are you today?

18 A Good, thank you.

19 Q Good, okay. First of all, did you have some
20 documents there that I asked you to gather?

21 A Yes, I do.

22 Q Okay. And is one of those the curriculum vitae

1 of Dr. Mark Dershwitz, Defendant's Exhibit 5?

2 A Yes, it is. It was curriculum vitae prepared on
3 January 23rd of this year.

4 Q Okay. And is that 15 pages in length?

5 A Yes.

6 Q Okay, doctor. Is there anything in this
7 curriculum vita that leads you to believe that Dr.
8 Dershwitz is an expert in toxicokinetics?

9 A No, sir.

10 Q Okay. Thank you. What is necrokinetics?

11 A Necrokinetics is the term that we use
12 specifically to indicate the movement of drugs with the
13 changes in concentration --

14 MR. MIDDENDORF: Objection, Judge. I don't
15 think that he was -- objection.

16 THE JUDGE: Wait, wait, we've got -- hold on
17 doctor.

18 MR. MIDDENDORF: I don't recall this as part of
19 the cross examination of Dr. Dershwitz.

20 SPEAKER: Dr. Dershwitz testified that
21 necrokinetics was not in the dictionary and it was a made-
22 up word.

1 MR. SHOUSE: He did testify so --

2 MR. MIDDENDORF: Okay. I apologize.

3 THE JUDGE: Okay, go ahead, go ahead with --

4 MR. SHOUSE: I'm sorry, go ahead, doctor.

5 THE JUDGE: Go ahead with your answer.

6 THE WITNESS: Okay. It's a term that we use to
7 describe specifically the movement or changing
8 concentrations, movement over time in dead people or dead
9 animals.

10 MR. SHOUSE: Okay, thank you.

11 THE JUDGE: How do you spell necrokinetics?

12 THE WITNESS: N-e-c-r-o --

13 THE JUDGE: Okay, that's fine, I got "kinetics".

14 THE WITNESS: Okay.

15 BY MR. SHOUSE:

16 Q Okay. Referring you to two other documents that
17 I asked you to get today, do you have one that is an
18 article from the Canadian Journal of Anesthesiology
19 entitled "Technical Report: The Effect of Pancuronium on
20 the Solubility of Aqueous Thiopentone?"

21 A Yes, I do.

22 Q And is that three pages in length?

1 A Yes, it is.

2 Q Okay. And do you also have a xerox of the
3 bottle -- xerox of three bottles of Pentathol 500 mgs. It
4 has an "Exhibit B" sticker up in the corner?

5 A Yes.

6 Q Okay. The article -- is the buffering agent
7 that was used in the thiopentone in the article the same
8 as the buffering agent used in the xeroxes of the bottles
9 you've got before you?

10 A Yes, it is. It's sodium carbonate in both.

11 Q Okay. And just for ease since we are on the
12 telephone here, does it say, "sodium carbonate as a
13 buffer" on the xerox of the bottles?

14 A Yes, it does.

15 Q And it says, sodium carbonate is the same buffer
16 used in the Canadian article.

17 A That's correct.

18 Q So with regard to the precipitation, should the
19 two drugs mix, is the -- would the chemical reaction here
20 in Kentucky be the same as that reported in this article?

21 A If you're talking about thiopentone and
22 pancuronium, yes.

1 Q Thank you. Okay, is the next article or the
2 next document I asked you to have available for today, a
3 four page xerox including the title page of a book called
4 "Disposition of Toxic Drugs and Chemicals in Man".

5 A Yes, it's the seventh edition.

6 Q And then are there three pages after that that
7 appear to be the part of the book about a drug called
8 thiopental.

9 A Yes, this would be the monograph for a
10 thiopental.

11 Q Okay. And what is this book?

12 A Basil's textbook, Basil is the author. It is
13 the standard reference textbook for analytical
14 laboratories and forensic toxicologists.

15 Q Okay. Is it an authoritative text?

16 A I hesitate to call any text authoritative
17 completely. It is a reference text that would be the
18 first place that people would go for information.

19 Q Okay. Thank you. Are there different levels of
20 consciousness with regard to being under anesthesia?

21 A There are, when we talk about drugs that produce
22 anesthesia, different levels of effect that the drug

1 completes, so yes.

2 Q And if you were under the effect of an
3 anesthetic to the degree that you couldn't respond to a
4 verbal stimulus. Is that the same as being under an
5 anesthetic to the degree that a surgical procedure could
6 be performed on you?

7 A No. The published literature demonstrates that
8 you could suppress someone's consciousness so they didn't
9 respond to a verbal stimuli at a much smaller amount of
10 drug than would be needed to produce surgical anesthesia.

11 Q Okay. How many milligrams per liter of
12 thiopental would be required to make someone unable to
13 respond to a verbal stimulus?

14 A Between about 5 and 10 milligrams per liter
15 would produce the inability to do that.

16 Q Okay. How many milligrams of -- milligrams per
17 liter, excuse me -- of thiopental would be required to
18 perform a surgical procedure on someone?

19 A Somewhere between 40 and 80 milligrams per
20 liter, or higher.

21 Q Okay. Now does a study or studies, however in-
22 depth they might be, of opiates, does that allow you to

1 analogize in the study of opiates and what they do on the
2 body to what thiopental would do on the body?

3 A The drugs had some similar effects in that they
4 both decreased consciousness. They work at very different
5 places, different receptors in the body, and have
6 different pharmacokinetic properties till now.

7 Q Okay. How about experiments with morphine and
8 propofol? Do they allow you to analogize to what
9 thiopental will do?

10 A Morphine, no. Propofol comes a little bit
11 closer, in that it is -- has some similar actions.

12 Q Okay. Just one second, doctor. Okay, finally
13 doctor, did I ask you to get some charts together?

14 A Yes, you send me four graphs.

15 Q Okay. And these are the charts -- you
16 understand these to be the charts that Dr. Dershwitz
17 prepared for this litigation here in Kentucky. Is that
18 correct?

19 A Yes.

20 Q Okay. Now, what is your opinion of these
21 charts?

22 A One of them at least has arterial or venous

1 concentrations has time on the horizontal axis, thiopental
2 concentration on the vertical axis, but it has no units
3 for either of those. So this would really be a concept
4 and wouldn't provide specific information about versus
5 when or at what concentration something might occur.

6 Q Okay. Are graphs and charts or graphs -- let
7 limit it to graphs, charts are -- I know, are something
8 slightly different. Are graphs visual representations of
9 data?

10 A They're visual representations of data, either
11 actually measured data or the concept, for instance, of
12 how something would change. But --

13 Q Okay. With regard -- I'm sorry. With regard to
14 the chart you were just talking about, is that graph
15 understandable, able to be interpreted without supporting
16 testimony of the person or talking by the person who
17 prepared it?

18 A No, all you could say is that arterial and
19 venous concentrations are different and then become
20 similar.

21 Q Okay. Just one second, doctor. That's all I
22 have, doctor. I'm sure Mr. Middendorf has some.

1 THE JUDGE: Mr. Middendorf.

2 MR. MIDDENDORF: Thank you, Judge. Just a few
3 questions.

4 BY MR. MIDDENDORF:

5 Q You talked about Dr. Dershwitz's CV, is that
6 correct?

7 A Yes, sir.

8 Q Isn't it true that a Doctor of Pharmacy, which
9 you are, is that correct?

10 A Yes, I've a Doctor of Pharmacy degree.

11 Q After your two years of core requirements --

12 MR. SHOUSE: Judge, I'm going to object. I'm
13 going to object. All of this could've been asked on --

14 THE JUDGE: He's commenting on these -- I'm
15 going to let him. Go ahead.

16 MR. SHOUSE: Yes, sir. Yes, sir.

17 BY MR. MIDDENDORF:

18 Q So under -- after your two years of core
19 requirements and undergraduate studies, you only received
20 an additional four years after that, correct?

21 A I had five years of pharmacy school, one year of
22 a residency, two years of a doctor of pharmacy program,

1 and two years of a post-doctoral fellowship.

2 Q Okay. But Dr. Derschwitz certainly has more
3 studies according to his resume on first being an
4 anesthesiologist, and then also a doctor of pharmacology.

5 A He has a longer period of time, but in different
6 degrees.

7 Q Okay. Is it true that thiopental is an acid and
8 that sodium thiopental is a salt of that acid?

9 A I'd have to go back and look at that. To be in
10 solution, it has to be in a basic solution.

11 Q So you're not even sure.

12 A I'll have to go back and check that.

13 Q Yet, all of these -- the testimony that you've
14 given is as an expert on thiopental and you don't even
15 know that answer?

16 A I would have to go back and check that.

17 Q Okay. Do you consider yourself to be an expert
18 on pharmacokinetics and pharmodynamics of intravenous and
19 static medications?

20 A Of thiopental and the interpretation of
21 concentrations, yes.

22 Q Okay. Have you published in this area?

1 A I would have to go back and look. I know we at
2 least published some abstracts looking at thiopental
3 concentrations in specifically the metabolism of
4 thiopental.

5 Q Is what you are saying is you're not sure if you
6 published in this area?

7 A I know we published at least an abstract. I
8 don't know that whether we published a manuscript or not.

9 Q Have you received any grant support to study
10 this topic?

11 A No. I believe we did that unfunded work.

12 Q Okay. Are you aware of any published research
13 article on the process of postmortem redistribution for
14 thiopental?

15 MR. SHOUSE: I'm going to object. There was
16 nothing about postmortem redistribution in his direct
17 testimony today.

18 MR. MIDDENDORF: He said, "Arterial versus
19 venous postmortem redistribution," that was part of his
20 testimony when he was referring to the graphs.

21 MR. SHOUSE: Only with -- only with regard to
22 the chart.

1 MR. MIDDENDORF: And he also talked about
2 necrokinetics.

3 THE JUDGE: He can -- he can answer the
4 question, go ahead.

5 BY MR. MIDDENDORF:

6 Q Yes, sir. Are you aware of any published
7 research article on the process of postmortem
8 redistribution for thiopental?

9 A I published one case report demonstrating that,
10 yes.

11 Q Is it published on MEDLINE or PubMed?

12 A You can find the article through an electronic
13 search process, yes.

14 Q Okay. If I told you Dr. Dershwitz jumped on
15 MEDLINE and PubMed and couldn't find any article on
16 postmortem redistribution for thiopental, then he would be
17 wrong?

18 A He -- that would be correct. I know there is
19 one article published.

20 Q Okay. Do you disagree that Dr. Dershwitz is one
21 of the generally acknowledged experts in the area of
22 pharmacokinetics and pharmodynamics of intravenous

1 anesthetic medications?

2 A I don't know whether he is a generally
3 acknowledged expert. He certainly has, as I've said, the
4 degree and the background and he has done work with some
5 of the drugs, yes.

6 Q Okay. And Dr. Dershwitz testified there are
7 substantial differences in the arterial and venous
8 concentrations of intravenous anesthetic drugs.

9 MR. SHOUSE: Objection.

10 MR. MIDDENDORF: Do you disagree with this?

11 THE JUDGE: Well, wait a minute.

12 MR. SHOUSE: Wait a minute. I'm going to -- now
13 we're getting into the substance of Dr. Dershwitz's
14 testimony, which we didn't rebut.

15 MR. MIDDENDORF: They talked -- they talked
16 about the graphs --

17 MR. SHOUSE: We only talked about the
18 methodology.

19 MR. MIDDENDORF: And they said that they -- you
20 could not -- you could not distinguish from those even
21 though Dr. Dershwitz testified. He said during his
22 rebuttal testimony with Dr. Watson that you can't tell

1 from those. So I'm just asking a few questions to clean
2 that --

3 MR. SHOUSE: Judge, all I asked about was the
4 methodology of the graph. Is this graph an appropriate
5 graph? Does it meet what he thinks of as the standard for
6 a graph? Now, we're getting into the substance of --

7 MR. MIDDENDORF: Okay, sir.

8 THE WITNESS: Hello?

9 THE JUDGE: Yes, we're still here.

10 THE WITNESS: Just wanted to make sure.

11 MR. SHOUSE: Okay.

12 THE JUDGE: Okay.

13 BY MR. MIDDENDORF: Doctor, is it true that
14 virtually every published study on the pharmacokinetics or
15 pharmacodynamics of intravenous anesthetic drugs like
16 thiopental over the past 25 years has emphasized the
17 importance of arterial blood sampling?

18 MR. SHOUSE: Objection. There was nothing about
19 this on the same question.

20 THE JUDGE: -- same question.

21 BY MR. MIDDENDORF:

22 Q Doctor, you said that those graphs that were

1 given to you, you can't distinguish whether they are
2 conscious or not. Is that a fair statement?

3 A No.

4 Q Okay. Can you testify to a reasonable degree of
5 medical certainty that Eddie Lee Harper was conscious at
6 any point?

7 MR. SHOUSE: Objection, objection.

8 THE JUDGE: Objection sustained, he did --

9 MR. SHOUSE: That was two weeks ago.

10 THE JUDGE: We're still here, so.

11 MR. MIDDENDORF: Just a second, doctor. We
12 don't have anything further, Judge.

13 THE JUDGE: Do you, sir?

14 MR. SHOUSE: No, sir. No, sir.

15 THE JUDGE: Doctor, let me ask you one question.

16 THE WITNESS: Yes, sir.

17 THE JUDGE: This is Judge Crittenden. Do you
18 know in the past 25 years, let's say since 1980, have
19 there been any national studies done by any university or
20 any medical organization that made any suggestion to any
21 of the state government's, or any -- or the national
22 government regarding any other drugs to be used or that

1 should be used in lethal injection?

2 THE WITNESS: There is nothing that I'm aware of
3 that has been published, and I think with me -- well, how
4 I'm interpreting what you say when you say any kind of
5 national study, no.

6 THE JUDGE: Okay. All right. Thank you very
7 much.

8 MR. MIDDENDORF: Can I ask him one question
9 based on that, Judge?

10 THE JUDGE: You're going to cross examine him on
11 my question? Go ahead. Go ahead.

12 BY MR. MIDDENDORF:

13 Q Are you aware in Oklahoma, when the execution
14 protocol or the drug combination was originally, I guess,
15 adopted, Dr. Deutsche, the Chief Anesthesiologist at the
16 University of Oklahoma recommended these drugs?

17 A I've heard a story that it was -- that it came
18 out of Oklahoma. I never heard the names of anyone.

19 MR. MIDDENDORF: Okay. That's all the questions
20 I have.

21 MR. SHOUSE: No, sir.

22 THE JUDGE: All right. Dr. Watson, thank you

1 very much. I appreciate hearing from you again.

2 THE WITNESS: It's good talking to you, Judge.

3 THE JUDGE: Thank you, good bye.

4 THE WITNESS: Good bye.

5 MR. SHOUSE: Then that concludes our rebuttal
6 testimony.

7 THE JUDGE: I take it that you don't have any
8 reply or response to that.

9 MR. MIDDENDORF: The only thing that we asked, I
10 think when we were in here last, Judge, is that if we
11 could submit an affidavit from Dr. Dershwitz, which I
12 spoke with him and we could have that by Friday.

13 THE JUDGE: All right.

14 MR. SHOUSE: Judge, I'm going to object to that
15 again.

16 MR. MIDDENDORF: I don't believe this --

17 THE JUDGE: Let's -- let's look at the affidavit
18 and then see if you're going to object.

19 MR. SHOUSE: Well, I suspect it's going to have
20 all the things in it that he wasn't allowed to ask.

21 MR. MIDDENDORF: We'll limit it to what was
22 asked today.

1 MR. SHOUSE: But Judge, I can't cross examine
2 Dr. Dershwitz. I mean, he could have been in the phone
3 right now at 9:00. I mean, I said I could limit my
4 testimony to 10 minutes, I did it. We got eight minutes
5 to go before the 9:30 deadline. If Dr. Dershwitz has
6 something to say and serve rebuttal, he can do it right
7 now.

8 MR. MIDDENDORF: Judge, if I recall, when we
9 were in here when -- the last few days ago, when this was
10 brought up, there was no objection to it then.

11 MR. SHOUSE: I don't recall it being brought up,
12 Judge. And if I didn't object then, I'm objecting now.

13 THE JUDGE: I don't know. What I'm going to do
14 is, you can -- you can get your affidavit from Dr.
15 Dershwitz. Let Mr. Shouse see it, then present it, and
16 Mr. Shouse can state his objections, and I'll either admit
17 it or put it in by one of the other.

18 MR. SHOUSE: Yes, sir.

19 SPEAKER: I think that would also affect the
20 timing on the ten days to file a brief, because we've to
21 be able to look at that, write a brief and according to
22 your --

1 THE JUDGE: If you'll have it here by Friday,
2 you'll have 10 days from Friday.

3 SPEAKER: Thank you.

4 THE JUDGE: All right, okay. Thank you very
5 much.

6 MR. MIDDENDORF: So we're now -- we're now due
7 on the -- if I may borrow the Court's calendar --

8 THE JUDGE: Yes, you may.

9 MR. SHOUSE: Judge, this is -- I mean we think
10 May 20th is still fine, I mean that gives seven days to
11 write a brief. It's going to be limited simply to what's
12 --

13 THE JUDGE: Well, let's do it at the 20th. I
14 mean you -- that affidavit is not going to make that much
15 difference here. If you have any changes --

16 MR. SHOUSE: Yes, sir.

17 THE JUDGE: -- then you can add --

18 SPEAKER: There are three attorneys working on
19 this.

20 THE JUDGE: You will all be working out right
21 now.

22 MR. SHOUSE: Yes, sir.

1 THE JUDGE: Okay. Thank you.

2 MR. SHOUSE: Thank you, Judge.