TRIAL; 2012 Depo. Trans. LEXIS 852

SUPREME COURT OF NEW YORK, QUEENS COUNTY, CIVIL TERM, PART 6

INDEX NUMBER: 32450/09

June 7, 2012

Reporter
2012 Depo. Trans. LEXIS 852 *

HERMENEGILDO REYES, Plaintiff, - against - MARKETING WERKS, INC., and OSCAR LEE GARCIA, Defendants.

Expert Name: Dr. FRANK RICHTER, III, M.D.LEO JOHN SHEA, III, Ph.D.Debra Sabatini Dwyer, Ph.D., M.S.

Disclaimer

Certain information may have been removed or redacted. LexisNexis, its subsidiaries, affiliates and related entities bear no responsibility whatsoever for such content or any removal or redaction thereof.

Counsel

[*1] WITTENSTEIN & ASSOCIATES, P.C., Attorneys for the Plaintiff, Forest Hills, New York, BY: HARLAN WITTENSTEIN, ESQ.

TROMELLO, McDONNELL & KEHOE, ESQS., Attorneys for the Defendants, Melville, New York, BY: JAMES S. KEHOE, ESQ.

Judges

BEFORE HONORABLE HOWARD G. LANE, Justice of the Supreme Court, (And a Jury)

Proceedings

365

[1](Whereupon, Plaintiff's Exhibit 17, chart of

[2]future medical care, was marked for identification.)

[3]THE CLERK: Case on trial continues. This is

[4]index number 32450 of 2009, Hermenegildo Reyes versus

[5]Marketing Werks Incorporated and Oscar Lee Garcia.

[6]THE COURT: Parties ready to proceed?

[7]MR. WITTENSTEIN: Yes, your Honor.

[8]THE COURT: Ready for the jury.

[9](Whereupon, the jury entered the courtroom.)

[10]THE CLERK: Let the record reflect the presence

[11]and proper **[*2]** seating of the jury.

[12]THE COURT: Thank you, please be seated.

[13]Good morning, members of the jury. We welcome you

[14]back. We will be continuing the trial.

[15]At this time, plaintiff, you may call your next

[16]witness.

[17]MR. WITTENSTEIN: Thank you, your Honor. I call

[18]Dr. Edwin Richter.

[19]E D W I N F. R I C H T E R, calledasa

[20]witness by and on behalf of the Plaintiff having been first

[21]duly sworn, was examined and testified as follows:

[22]THE CLERK: In a loud, clear voice your name and

[23]address for the record.

[24]THE WITNESS: Dr. Edwin F Richter 166 West Broad

[25]Street Stamford, Connecticut 06902.
366

[1]THE COURT: You my inquire, counsel.

[2]MR. WITTENSTEIN: Thank you, your Honor.

[3]DIRECT EXAMINATION

[4]BY MR. WITTENSTEIN:

[5]Q Good morning, Dr. Richter.

[6]A Good morning.

[7]Q Did you bring your medical chart with you in order to

[8]refresh your recollection?

[9]A Yes, I did.

[10]Q Are you licensed to practice medicine in the State of

[11]New York?

[12]A Yes, I am.

[13]Q Are you licensed to practice medicine anywhere else?

[14]A Yes, state of Connecticut. **[*3]**

[15]Q When did you start practicing medicine?

[16]A In 1991.

[17]Q Where is your office located?

[18]A It is at 166 West Broad Street Stamford, Connecticut

[19]06902 in a building called the Physicians Office Building which

[20]is attached to Stamford Hospital.

[21]Q Please tell us about your practice?

[22]A My practice is in the specialty or field of physical

[23]medicine and rehabilitation also known as physiatry. That is a

[24]specialty of physicians that takes care of patients with

[25]disabling conditions.

367

[1]So on my inpatient unit I would typically take care of

[2]patients with strokes, brain injuries, spinal cord injuries,

[3]major fractures, major joint replacements, other neurological

[4]disorders and a few other general types of patients who've had

[5]something happen to them that prevents them from functioning.

[6]For my inpatients, these are people who couldn't go

[7]home from the hospital because of whatever condition they were

[8]treated for in the acute hospital, so they would come over to

[9]the rehab unit to get rehabilitation to try to get them home.

[10]In my office I sometimes see those patients **[*4]** after

[11]they've gone home for their followup care because many of them

[12]need outpatient rehabilitation.

[13]And I also see a different population of patients with

[14]disabling conditions, many of those are people with what we call

[15]musculoskeletal conditions, those would be things like neck

[16]pain, back pain, arthritis, some have neurological problems like

[17]a neuropathy and some of them are chronic pain patients. It's a

[18]variety of different types of patients, what they all have in

[19]common, they have some sort of condition that would tend to

[20]prevent them from functioning normally.

[21]Q Doctor, are some of these people injured in motor

[22]vehicle accidents?

[23]A Yes, many of them.

[24]Q Over the years can you estimate for us the number of

[25]patients you've treated who have been involved in motor vehicle
368

[1]accidents?

[2]A That's several thousands, I would think.

[3]Q As part of your medical practice do you prepare life

[4]care plans?

[5]A Yes, I do.

[6]Q What is a life care plan?

[7]A A life care plan is a plan for a patient who's going to

[8]have continued needs, not somebody who just needs **[*5]** to see me for

[9]one or two visits, or a therapist for seven or eight visits, but

[10]someone who's going to need long term treatment across the span

[11]of their life. This could be physical therapy, it could be

[12]medical treatments, medications, medical tests.

[13]Q Please briefly share with us your educational

[14]background beginning when you went to college?

[15]A Starting at college, that was Harvard, I graduated in

[16]1983 with a bachelors degree in biology with honors.

[17]I then went on to New York University School of

[18]Medicine, I graduated from there in 1987.

[19]I then started my internship and residency, which are

[20]the postgraduate training doctors do before they practice; that

[21]was in my field of physical therapy and rehabilitation.

[22]But the internship was a rotating internship at NYU

[23]between Tisch Hospital and Bellevue Hospital with rotations in

[24]internal medicine, neurology, neurosurgery and orthopedics.

[25]After that one year internship, I did three years of
369

[1]residency training in my field of physical medicine and

[2]rehabilitation, most of which was at the Rusk Institute at NYU

[3]but also at Bellevue **[*6]** Hospital, the Manhattan VA Hospital, the

[4]Hospital for Joint Diseases and Goldwater Hospital. I completed

[5]that training in 1991.

[6]Q Doctor, while you were at the Rusk Institute did you

[7]ever cross paths with Dr. Leo Shea?

[8]A Yes, many times. After I completed my residency

[9]training I stayed on at NYU both as a teacher, now I am an

[10]associate clinical professor and for many years my practice was

[11]at NYU. I was director of the stroke program; director of an

[12]outpatient mild traumatic brain injury program; and also

[13]associate clinical director of the hospital. Dr. Shea was one

[14]of our senior neuropsychologists and we worked together on many

[15]projects and co-treated many patients together.

[16]Q Doctor, please tell us about your experience in

[17]treating people who've suffered either mild, moderate or severe

[18]traumatic brain injuries?

[19]A I've taken care of patients in all of those categories.

[20]On my inpatient service I've treated many patients with moderate

[21]to severe brain injuries; these are usually patients who has had

[22]prolonged loss of consciousness, often have significant

[23]abnormalities on their CAT **[*7]** scan or MRI, many of them have not

[24]only cognitive thinking problems but many of them also have

[25]damage to parts of their brain that control motions, they might
370

[1]have paralysis in certain parts of their body. In many ways

[2]those patients overlap with my stroke rehab patients, so I've

[3]treated many patients like that on an inpatient basis initially

[4]and then later on either in the nursing home or as an

[5]outpatient.

[6]Mild traumatic brain injury is actually a confusing

[7]term --

[8]MR. KEHOE: Can I ask you to keep your voice up a

[9]little bit, I am having trouble hearing you.

[10]THE WITNESS: Yes, I am sorry.

[11]A Mild traumatic brain injury is a somewhat confusing

[12]term. It refers to people who have had a head injury or a head

[13]trauma who then have either no loss of consciousness or only a

[14]brief loss of consciousness. When they go to an emergency room

[15]and the doctors evaluate them they use a standard scale called a

[16]Glasgow Coma Scale seeing if a person can open their eyes, if

[17]they can talk coherently versus being dazed and confused versus

[18]speaking gibberish or not able to speak. See if the person

[19] **[*8]** moves, or unable to move, or random movements, or movements when

[20]someone jabs them with a pin, all the way up to does the person

[21]have controlled movements so they can move in a manner like I am

[22]doing here, picking up this piece of paper where I know what I'm

[23]doing.

[24]With the mild traumatic brain injury patients their

[25]scores on the Glasgow Coma Scale are typically 13 to 15, at the
371

[1]higher end, because it's not a very sensitive -- it's not a very

[2]sophisticated test. But in the emergency room, assuming the

[3]person made it to the emergency room, they would score in that

higher range.

And if and when the person has a CAT scan or MRI of the

their brain it would typically be normal. However, those

patients, despite having a normal CAT scan or MRI, have problems

with thinking. They don't think at the level that they did

previously. They may have a different variety of problems, it

might be memory, it might be attention, it might be

concentration, it might be the speed at which they can do mental

work, but they have mental dysfunction and they may also have

other related symptoms, like headache **[*9]** or dizziness that persists

long after you would expect that those things might of gotten

better from a bump on the head.

So those patients need outpatient therapy and I have

treated many patients like that in combination with

psychologists which can include neuropsychologists who treat the

cognitive problems or psychotherapists who might treat the

associated emotional problems like anxiety or depression and

also various physical or occupational therapists or speech

therapists if the person needs those services too.

Q Doctor, since you mentioned the Glasgow Coma Scale, did

you have an opportunity when you began working on this case to

review the hospital records?

372

A Yes, I did.

Q Can you please explain what the findings were in the

hospital records regarding the Glasgow Coma Scale?

A Yes. Mr. Reyes scored a 14 out of 15. He was able to

open his eyes and he was able to talk, so he got the maximum

score for both of those categories.

As far as the cognitive piece, which is the third piece

of it, he was dazed and confused, so he scored one point less

than the maximum, **[*10]** so he got a 14 out of a 15.

Q Doctor, I am going to shift back to your background a

little bit again. Can you please tell us about some of the

presentations you've made to professional organizations either

in the field of traumatic brain injury or in physical medicine

and rehabilitation?

A I've given presentations in settings. I lectured

frequently at my own hospitals at NYU or at Stamford. I've also

given lectures on brain injury in the State University of New

York in New York City. I've gone to Hong Kong and to Montreal

and to London to speak to various international organizations

pertaining to brain injury. I've gone to Mexico City to give

presentations regarding orthopedic rehab. And I've lectured in

several city's around the United States at organizations such as

the American Academy of Physical Medicine And Rehabilitation,

which is our professional society.

Q Have you ever been a memory of the advisory board of
373

the Brain Injury Society?

A Yes, I have.

Q What were your responsibilities there?

A I was the chairman of the advisory board of the Brain

Injury **[*11]** Society, which was an organization that promoted

knowledge and information about brain injury. We used to put on

a number of seminars, had a website and also published some news

letters.

Q Doctor, in your medical career have you received any

awards or honors?

A Yes, I have. During the end of my residency I was

[12]awarded the award for outstanding performance by a resident at

[13]the Rusk Institute, and I have been named a Top Doctor in

[14]America in my specialty by Castle Connelly, which is a doctor

[15]rating organization and through that I've been named a top

[16]doctor in New York by New York magazine, and a top doctor in

[17]Fairfield County, Connecticut by Stamford magazine, Greenwich

[18]magazine and a couple of others.

[19]Q Doctor, very briefly, have you published any articles

[20]over the years in the area of traumatic brain injury?

[21]A Yes, I have.

[22]Q Tell us about that?

[23]A I've published a number of articles through my work at

[24]NYU regarding case reports and studies.

[25]I have also written textbook chapters in two different
374

[1]textbooks about traumatic brain injury.

[2]Q Doctor, did **[*12]** you ever have any internships in neurology,

[3]orthopedics or neurosurgery?

[4]A Yes.

[5]Q Please explain?

[6]A I did my rotations in orthopedics and neurosurgery at

[7]Tisch Hospital, which at the time was called University

[8]Hospital, part of NYU Medical Center.

[9]Neurology rotations were at Bellevue Hospital, also

[10]affiliated with NYU.

[11]Q You mentioned earlier that you have taught medical

[12]school, can you tell us a little bit more about that?

[13]A I give what I call grand rounds, which are formal

[14]lectures and informal bedside teaching or what we call clinical

[15]rounds. This would be in all different aspects of physical

[16]medicine and rehabilitation, which would include stroke, brain

[17]injury, orthopedic rehabilitation, amputee rehabilitation, among

[18]the more common topics.

[19]Q Are you board certified in any areas of medicine?

[20]A Yes.

[21]Q Please tell us about that?

[22]A I am board certified in physical medicine and

[23]rehabilitation. What that means is, at the end of my final year

[24]of residency I took and passed a written examination. That made

[25]me eligible one year later to go **[*13]** to the Mayo Clinic where my
375

[1]specialty has an oral examination once a year. Because I passed

[2]that examination, which would have been in 1992 and I was

[3]recommended by two doctors in my field who were already board

[4]certified themselves, my credentials were accepted by the board,

[5]which means that I am a Diplomate of the American Board of

[6]Physical Medicine And Rehabilitation.

[7]Q Doctor, what does the term hospital privileges mean?

[8]A Hospital privileges means that as a doctor you're

[9]allowed to admit patients to a hospital or to consult on other

[10]doctors' patients in that hospital.

[11]Q Where do you currently have hospital privileges?

[12]A At Stamford Hospital.

[13]MR. WITTENSTEIN: Your Honor, at this time I would

[14]like to offer Dr. Richter, an expert in the field of

[15]physical medicine and rehabilitation.

[16]THE COURT: Any objection?

[17]MR. KEHOE: No objection.

[18]Q Are you collecting a fee for being here in court today?

[19]A Yes, I am.

[20]Q How much is that fee?

[21]A $ 3,500

[22]Q Did my office refer Mr. Reyes to you?

[23]A Yes.

[24]Q Was this the second **[*14]** time that I ever asked you to

[25]evaluate somebody?
376

[1]A Yes.

[2]Q Last winter did you testify for one of my clients who

[3]was hit by a bus?

[4]A Yes.

[5]Q In this case, in the Reyes case, what were you engaged

[6]for?

[7]A I was engaged to review records, to conduct an

[8]examination and to project his future medical care needs.

[9]Q When did you perform the evaluation on Mr. Reyes?

[10]A February 15, 2012.

[11]MR. KEHOE: I didn't hear the date.

[12]THE WITNESS: February 15, 2012.

[13]Q Before you prepared Mr. Reyes's life care plan did you

[14]review any medical records or documents?

[15]A Yes, I did.

[16]Q Without giving us a laundry list of what you reviewed,

[17]would it be fair to say you reviewed approximately 15 different

[18]items?

[19]A Yes.

[20]Q In the United States what are the two most common

[21]causes of traumatic brain injury?

[22]A Across United States, motor vehicle accidents and

[23]falls.

[24]Q And in this case do we have both those elements

[25]present?
377

[1]A Yes, we do.

[2]Q In the motor vehicle collision context, are certain

[3]type of **[*15]** injuries more likely to occur in the pedestrian scenario

[4]as opposed to being a passenger in a car?

[5]A Yes.

[6]Q Please explain?

[7]A For the pedestrian, first of all, they are much more

[8]likely to sustain fractures. Typically if someone is hit by a

[9]car they are hit by the bumper and they are struck on the leg

[10]near the knee so they are likely to get leg fractures.

[11]MR. KEHOE: I will object. Can I have a sidebar?

[12]THE COURT: Yes.

[13](Whereupon, discussion held off the record.)

[14]THE COURT: The objection is withdrawn?

[15]MR. KEHOE: Yes, based on counsel's statement.

[16]THE COURT: Thank you.

[17]Q Doctor, as I was saying, in the scenario of pedestrian

[18]collisions versus passengers in a car what types of injuries are

[19]you more likely to see in the pedestrian scenario?

[20]A Pedestrians? Fractures, fractures of long bones, and

[21]brain injuries are more likely for the pedestrian injuries

[22]versus the passenger or driver.

[23]Q Are brain injuries likely to occur in a pedestrian

[24]scenario?

[25]A In that type of injury the person may strike their head
378

[1]on the vehicle or be propelled **[*16]** through the air and strike their

[2]head on the ground.

[3]The person in the car, the driver or passenger,

[4]particularly if they have a seatbelt on, is much less likely to

[5]have their head come in direct contact with anything hard. It

[6]mostly might hit an air bag or padded back of the seat. The

[7]person in the car may get what in laymen's term is a whiplash

[8]area where the head goes back and forth that may cause a brain

[9]injury, but that typically is less likely or less severe than

[10]what happens to the pedestrian.

[11]Q Before you mentioned fractures of long bones in the

[12]pedestrian scenario, is a tibia considered to be a long bone?

[13]A Yes, it is.

[14]Q When you met Mr. Reyes did you take a medical history

[15]from him?

[16]A Yes, I did.

[17]Q Did Mr. Reyes tell you about the type of work that he

[18]did?

[19]A Yes.

[20]Q Did you perform a physical examination of Mr. Reyes?

[21]A Yes, I did.

[22]Q Can you please tell us about your findings on the

[23]physical examination?

[24]A Yes. On the physical exam I start by looking at the

[25]patient and observing them. He was normal in terms of the
379

[1] **[*17]** overall appearance of his body.

[2]He did not appear to be in distress while at rest,

[3]sitting. When he was walking however he had a notably antalgic

[4]gait. Antalgic gait means that he was limping, that he was

[5]walking unevenly.

[6]I then proceeded to perform certain physical

[7]examination maneuvers. And for some of the things that a

[8]physiatrist, a doctor like myself does, you have to ask the

[9]patient to do certain things, to move your arm a certain way, or

[10]to pull against me while I pull the other way; and I noted that

[11]while he appeared cooperative and friendly, he needed repeated

[12]explanations through an interpreter.

[13]I should mention that I am not fluent in Spanish, I

[14]know some words and phrases, but I was working with an

[15]interpreter who was bilingual to eliminate any problem with

[16]language barrier, however, even with the help of the interpreter

[17]we had to tell him how to do things more than once, or sometimes

[18]demonstrate visually with myself showing do this or something

[19]like that to get him to know what I wanted him to do.

[20]I checked range of motion --

[21]Q Doctor, can I interrupt you for **[*18]** a moment, please. You

[22]just talked about something, you mentioned the term visual cue?

[23]A Yes.

[24]Q Give us an example of a visual cue, please?

[25]A A visual cue would be if I say come over here and

380

[1]someone doesn't do that, I might go like this (indicating) to

[2]get someone to come towards me. When I say come over here, what

[3]I am doing is reaching a certain part of the brain, the part of

[4]the brain that processes sounds, interprets sounds as words,

[5]figures out what those words mean, then goes ahead and let's the

[6]person figure out if they want to do what I am telling them to

[7]do.

[8]If I do this (indicating) I am reaching out to a

[9]different part of the brain that interprets gestures, in that

[10]particular example, to show the person another way for me to

[11]show that person what I want them to do.

[12]Q Mr. Reyes's case, did you have to use some visual cues?

[13]A Yes, I did.

[14]Q Can you give us an example?

[15]A If I wanted him to -- for example, when I test

[16]strength, which we call manual muscle testing, and I will use my

[17]arm because it's easy for me to show the jury, if this was **[*19]** Mr.

[18]Reyes's arm and I wanted to see how strong his biceps was, how

[19]well he could flex, I would be telling him bend your elbow, and

[20]the translator would translate that into Spanish, and he

[21]wouldn't understand, he would sort of look at me with a puzzled

[22]look on his face, he didn't know what to do. If I went like

[23]this (indicating) he could figure out that's what I wanted him

[24]to do.

[25]Q You also told us when you gave Mr. Reyes instructions
381

[1]you had to tell him more than one time, is there any

[2]significance to that?

[3]A Yes, there is. And I was not asking him to do

[4]complicated things, these would be everyday simple things like

[5]take off your shoes so I could look at your foot or sit up on

[6]the exam table now. And I would say it to him in English, I

[7]didn't expect him to understand that, but then the interpreter

[8]would translate it into Spanish and he would again -- he sort of

[9]looked like he was in a fog, like he didn't understand what I

[10]wanted him to do, until I told him again, maybe rephrasing it a

[11]little bit or getting him up on the exam table, giving him a cue

[12]again like a pat on the table while **[*20]** the interpreter said what to

[13]do.

[14]Q Did you see any scars on Mr. Reyes's body?

[15]A Yes, I did.

[16]Q Where were the scars located?

[17]A Multiple scars on his left leg, which would be, I

[18]should say, I use the term left lower extremity in my report,

[19]but that's the lower leg.

[20]Q Doctor, did you perform any range of motion testing for

[21]the ankle or the knee?

[22]A Yes, I did.

[23]Q Please tell us what your findings were?

[24]A He did have the ability to do range of motion, he could

[25]move his ankle, for example, and I am going to use my wrists
382

[1]since it's easier than trying to raise my foot up, I asked the

[2]person to go up, like up off the gas, that's called

[3]dorsiflexion, or to push down like stepping on the gas, which we

[4]call plantarflexion and he had weakness in both of those

[5]directions. You normally grade the person on a one to five, or

[6]zero to five scale, with five being normal, his score was four,

[7]which was weak particularly for a man his age and size.

[8]Again, at the knee where the person can bend or

[9]straighten out the knee we call that flexion or extension, he

[10] **[*21]** was again limited to four out of five strength at the knee joint

[11]as well. So those were both limited.

[12]Q Doctor, did you make any observations regarding the

[13]left peroneal nerve?

[14]A Yes, the left peroneal nerve, it's a nerve in the lower

[15]leg, it starts out around the knee, around the outside of the

[16]knee, and it goes down into the foot and among other things,

[17]brings sensation, feeling to the top of the foot. And I use a

[18]device called a filament, it's a thin, somewhat flexible piece

[19]of plastic, so that when I touch the person with it, it has a

[20]handle, but I touch the person with the filament and when I

[21]touch their body with a filament it gives a standard amount of

[22]pressure, no matter how I maneuver it when it touches the person

[23]it's a standard amount of pressure that little plastic stick

[24]gives and he had a decrease in the territory, the area where the

[25]peroneal nerve supplies feeling.

383

[1]Q Did you take measurements of both of Mr. Reyes's legs?

[2]A Yes, I did.

[3]Q Please tell us what your findings were?

[4]A I measured the circumference of his calf on both sides,

[5]on the right it was **[*22]** 40.5 centimeters, on the left it was 39

[6]centimeters, so that's a difference of 1.5 centimeters. And for

[7]people who are more used to thinking in inches, 2.5 centimeters

[8]is approximately one inch, so that would be about 60 percent of

[9]an inch difference.

[10]Q Is there any significance to the difference?

[11]A Yes, there is. Normally the human body is symmetrical.

[12]There may be a difference of maybe a half a centimeter would not

[13]be remarkable but 1.5, one and-a-half centimeters, is

[14]significant as a measurement. And that's associated with muscle

[15]atrophy.

[16]The reason why he had a difference is because there was

[17]some atrophy, shrinkage of the muscles in the left calf. There

[18]are two reasons why we see muscle atrophy or muscle shrinkage in

[19]a particular area, one is if the nerve supply has been cut or

[20]reduced; and the other, which is more likely the factor with Mr.

[21]Reyes, is disuse, he is favoring the leg, in laymen's terms he

[22]is not using it as much, he is relying more on the right side so

[23]the muscles on the left side get weaker and smaller.

[24]Q What's the long term significance of that, sir?

[25] **[*23]** A That can progress, the person can get more weak on that
384

[1]left side, they are going to rely more on the right side so they

[2]may get overuse syndromes on the right side over time; but also

[3]as you have that weakening of the muscles on the injured side we

[4]rely on our muscle strength among other things to protect the

[5]joint.

[6]So when you have weak muscles, whether the muscles that

[7]move the knee or the ankle you're at more risk for injuring

[8]those joints, you're at more risk for accelerating the normal

[9]wear and tear of every day life that gives people

[10]osteoarthritis, and you also, by changing the way the person

[11]walks, put them at risk for problems elsewhere, such as the

[12]lower back.

[13]Q Doctor, after completing the physical examination and

[14]reviewing the medical documentation did you formulate any

[15]opinions within a reasonable degree of medical certainty about

[16]Mr. Reyes?

[17]A Yes.

[18]Q Please tell us about that?

[19]A I have several opinions about him, one is that he is

[20]status post pedestrian versus motor vehicle accident, that's the

[21]medical jargon we use to say somebody was hit by a car **[*24]** or a

[22]truck or a bus. He sustained some injuries from this, one was

[23]traumatic brain injury, another, the general category, is trauma

[24]to the left lower extremity specifically there he had the tibia

[25]and fibula fractures and the posttraumatic peroneal nerve injury
385

[1]with a peroneal neuropathy resulting from that.

[2]In terms of his brain injury, he has chronic cognitive

[3]dysfunction, meaning that his thinking processes are permanently

[4]not working right, posttraumatic headaches and he also has,

[5]going back to his left leg, pain, weakness, paraesthesias, which

[6]would be like pins and needles type of sensation, sensory loss,

[7]which is the decreased feeling and antalgic gait, which is the

[8]limping.

[9]Q Doctor, do you have any opinion with a reasonable

[10]degree of medical certainty regarding Mr. Reyes's prolonged

[11]walking or standing in everyday life?

[12]A Yes, he should avoid prolonged walking or standing,

[13]those are things that will significantly aggravate his symptoms.

[14]Q Doctor, in your opinion within a reasonable degree of

[15]medical certainty will Mr. Reyes need any future medical care?

[16]A Yes, **[*25]** he will.

[17]Q Please explain.

[18]A Sure. He needs first, starting with the doctors, he

[19]would need to see either a physiatrist or a neurologist managing

[20]his brain injury issues in particular, that I would recommend he

[21]needs four to six times a year and the doctor visits would

[22]average $ 150 per visit in today's dollars.

[23]With his orthopedic injuries he would also benefit from

[24]followup with an orthopedist or other musculoskeletal specialist

[25]three to four times a year for $ 150 per visit.

386

[1]He would need physical therapy on average per year he

[2]would need about 24 to 36 sessions per year and that would cost

[3]$ 125 per session in today's dollars.

[4]He would benefit from visits with a neuropsychologists

[5]like Dr. Shea weekly for six months, then twice a month for

[6]another six months. Those visits would also be averaging about

[7]$ 150 per advice.

[8]He would need pain medication, at a minimum he should

[9]be on a prescription strength nonsteroidal antiinflammatory drug

[10]that would be something like Celebrex or Voltaran, that would

[11]typically cost about 25 to $ 30 per month for the medication. **[*26]**

[12]And in terms of resting, he would also benefit from a

[13]followup electromyography or EMG and nerve conduction studies,

[14]that was a test that was done previously that showed the

[15]peroneal neuropathy on a test as opposed to the clinical exam

[16]that I did, in one to two years to followup on that injury to

[17]see what's going on with it and the cost for that testing would

[18]be about $ 1,500

[19]Q Doctor, these costs that you just told us about and the

[20]medical care that you recommend is that your opinion with a

[21]reasonable degree of medical certainty?

[22]A Yes.

[23]Q Doctor, I would like to you assume that a couple of

[24]days ago Dr. Baum was here and testified he was a treating

[25]orthopedist and surgeon and he told us that Mr. Reyes reached
387

[1]maximum medical improvement and would not need any more physical

[2]therapy. How come your opinion is different from his?

[3]A Because I think we're looking at two different aspects

[4]of the case. In terms of his fractures further physical therapy

[5]is not going to change anything about the fractured tibia and

[6]fibula so in that regard I would agree. He's reached his

[7]maximum **[*27]** medical improvement as far as the fractures go and that

[8]the therapy isn't needed for that. However, he does have the

[9]long term effects of the soft tissue injuries, he had an ankle

[10]dislocation in addition to the fractures, he had the nerve

[11]injury and he has chronic pain with resulting limp because of

[12]the combination of injuries that happened to his left lower leg.

[13]So he therefore is expected to have flare-ups of pain where his

[14]symptoms are worse than usual and that's where the physical

[15]therapy would come in.

[16]I would agree yes, he has reached maximum medical

[17]improvement in terms of the leg injuries, which is a fancy way

[18]for saying it's not going to get better but the therapy would be

[19]for dealing with some of the aftereffects, when his pain gets

[20]worse, if he overdoes it walking one day he has to get some

[21]therapy to address that. So that's where he would have the need

[22]for the physical therapy, even though he's not going to get

[23]better from it.

[24]Q I also want you to assume that Dr. Shea testified

[25]yesterday and he testified in his opinion that Mr. Reyes would
388

[1]need future neuropsychological care and **[*28]** he estimated it at two

[2]years, you just told us one year, why the difference?

[3]A Well, my recommendation is for one year, which is I

[4]think the basic regimen that you would give someone like this.

[5]I could certainly see if someone was continuing to show benefit

[6]at the end of the year you might want to continue it for perhaps

[7]another year, so it's not an unreasonable thought to do so, but

[8]I think he needs at least that one year and then at that point

[9]he could be reevaluated and potentially could have another year.

[10]Q Doctor, in your field do you sometimes deal with other

[11]well intentioned doctors that sometimes have different opinions

[12]about treatment plans?

[13]A Sure, it happens all the time.

[14]Q You mentioned I believe it was nonsteroidal

[15]medications?

[16]A Yes.

[17]Q What does that mean?

[18]A That's a category of drugs which do have

[19]antiinflammatory properties, that's where that part of the name

[20]comes from, they are not steroids, which is where another part

[21]of their name comes from. And these drugs are antiinflammatory

[22]drugs, they are not narcotics or opioid medicines, therefore

[23] **[*29]** they are sometimes preferred in a patient with a brain injury

[24]because they're not going to interfere with the person's

[25]thinking, they don't make them sleepy. So that would be
389

[1]typically a preferred kind of medicine to give someone who has

[2]an orthopedic injury and also a brain injury. And they are

[3]available, you can get over-the-counter versions of them.

[4]People might be familiar with Aleve is a brand that gets

[5]advertised a lot. That's a very small dose, not a prescription

[6]strength. What I am talking about is a prescription strength

[7]stronger drug, something like, for example, Celebrex or Voltaran

[8]or Relafen. There's dozens of drugs in this family.

[9]Q You mentioned earlier that Mr. Reyes would need a

[10]followup EMG in one to two years. Please explain the reason why

[11]he needs a followup EMG?

[12]A Because we like to know what's happening with this

[13]nerve. If he is having worsening of the condition it might even

[14]warrant orthopedic exploration of where the nerve passes around

[15]the knee on the outer side, it might warrant doing some bracing

[16]at some point, it might guide some variations in the physical

[17] **[*30]** therapy.

[18]MR. WITTENSTEIN: Thank you, I have nothing

[19]further at this time.

[20]MR. KEHOE: May I proceed, your Honor?

[21]THE COURT: You want to proceed or take a recess?

[22]MR. KEHOE: Whatever your Honor suggests.

[23]THE COURT: We'll take a five minute recess.

[24](Whereupon, the jury left the courtroom.)

[25]THE COURT: We'll take five minutes.
390

[1]MR. WITTENSTEIN: Doctor, I am not going to talk

[2]to you during the break because you are still on the stand.

[3]THE WITNESS: Yes.

[4](Recess taken.)

[5](Whereupon, the jury entered the courtroom.)

[6]THE CLERK: Let the record reflect the presence

[7]and proper seating of the jury.

[8]THE COURT: Thank you. Cross-examination.

[9]CROSS EXAMINATION

[10]BY MR. KEHOE:

[11]Q Good morning, doctor.

[12]A Good morning.

[13]Q My name is James Kehoe, I am an attorney representing

[14]the defendants who are being sued in this lawsuit. I will just

[15]ask you a few questions, okay?

[16]A Sure.

[17]Q Your first involvement with this case was February

[18]17th, 2012?

[19]A Actually, February 15th.

[20]Q 15th, okay.

[21]Then **[*31]** you generated the report on February 17th, 2012?

[22]A Yes.

[23]Q Correct?

[24]A Yes.

[25]Q And that -- those two days are -- other than coming
391

[1]here today are your only involvement with this case, correct?

[2]A Yes.

[3]Q Am I correct that your involvement with the case is not

[4]with the plaintiff himself, correct?

[5]A Yes.

[6]Q So in other words, the plan you told us about you have

[7]no expectation that the plaintiff would ever follow that plan,

[8]do you?

[9]MR. WITTENSTEIN: Objection as to the doctor's

[10]expectation.

[11]THE COURT: Sustained.

[12]Q You told us about your credentials, that in your real

[13]practice of medicine you work with real patients, correct?

[14]A Yes.

[15]Q And when you work with real patients, when you

[16]formulate a treatment plan, do you have an expectation between

[17]the communication between you and your patients that they may

[18]follow the plan that you put into effect?

[19]A Yes.

[20]Q And so the question here is, do you have any

[21]expectation that the plaintiff is going to follow your treatment

[22]plan?

[23]A I think that's what he needs. **[*32]**

[24]Q I didn't say that. Do you have any expectation that he

[25]would follow this plan you told us about?
392

[1]A I never know specifically what someone else is going to

[2]do in the future.

[3]Q Well doctor, that's correct, but do you have any

[4]expectation --

[5]MR. WITTENSTEIN: Objection, your Honor.

[6]Q Do you have an expectation that he would follow your

[7]plan?

[8]MR. WITTENSTEIN: Objection.

[9]THE COURT: Sustained. Asked and answered.

[10]Q In your real practice when you have somebody who is

[11]injured do you get the family involved with them?

[12]MR. WITTENSTEIN: Objection, your Honor.

[13]THE COURT: Overruled.

[14]A When possible, yes.

[15]Q In other words, you talked to us about you go to

[16]rehabs -- you work in rehab centers?

[17]A Yes.

[18]Q And you have family members that come?

[19]A Sure.

[20]Q Sometimes choices are made between the family about

[21]whether a patient should be treated at home or treated in a

[22]rehab center, correct?

[23]A Yes.

[24]Q You work with the patient's family?

[25]A When possible.

393

[1]Q Okay, in your real practice **[*33]** you do. Did you ever

[2]communicate with any of the patient's family members?

[3]A In my practice, sure.

[4]Q No, I am talking about relative to this case, did you

[5]communicate with them?

[6]A No.

[7]Q Did you have any expectation that your report was going

[8]to be sent to his parents --

[9]MR. WITTENSTEIN: Objection to what his

[10]expectations are, your Honor.

[11]THE COURT: Sustained.

[12]Q Did you send a report to any member of the patient's

[13]family, yes or no?

[14]A No.

[15]Q Did you send your report -- strike that.

[16]Were you aware that at a particular time that Dr. Baum

[17]was an orthopedist who treated the plaintiff?

[18]A Yes.

[19]Q You are aware that there was a period of time that he

[20]was the plaintiff's treating orthopedist, do you understand

[21]that?

[22]A Yes.

[23]Q And Dr. Baum considers himself still the treating

[24]orthopedist of the patient, do you understand that?

[25]A Yes.

394

[1]Q Did you send your report to Dr. Baum?

[2]A No.

[3]Q Did you review his testimony, the transcript, about

[4]his -- what he said about what his expectations **[*34]** for treatment of

[5]the plaintiff were?

[6]A Transcripts, no.

[7]Q You heard a hypothetical that he said he does not need

[8]any orthopedic treatment?

[9]A Yes.

[10]Q You disagree with him?

[11]A Correct.

[12]Q Are you aware that plaintiff was under the care for a

[13]period of time with a neurologist, Dr. Hausknecht?

[14]A Yes.

[15]Q Are you aware that he did not testify that the

[16]plaintiff needed any further treatment?

[17]MR. WITTENSTEIN: Objection, that's not so, your

[18]Honor.

[19]MR. KEHOE: That is so.

[20]THE COURT: Excuse me.

[21]MR. KEHOE: Sorry Judge, I apologize.

[22]THE COURT: Ladies of the jury, it's your

[23]recollection of the testimony that controls here,

[24]regardless of whatever statements are made by the attorneys

[25]in this case. It's your recollection of the testimony of
395

[1]the witness that controls.

[2]Overruled.

[3]A I am sorry, the question?

[4]Q The question is, are you aware that Dr. Hausknecht did

[5]not testify that the plaintiff needed any further neurological

[6]treatment?

[7]A Neurological, no. I don't know about that.

[8]Q Pardon **[*35]** me?

[9]A No, I don't know about that.

[10]Q Okay. So did you send your report to Dr. Hausknecht?

[11]A No.

[12]Q Did you review his records and his reports?

[13]A Yes.

[14]Q You reviewed Dr. Baum's records and reports, correct?

[15]A Yes.

[16]Q So you disagree with both of them as far as the

[17]plaintiff has no need for any treatment?

[18]MR. WITTENSTEIN: Objection, foundation to as to

[19]Hausknecht.

[20]THE COURT: Sustained, sustained as to form.

[21]Q Now, you quoted certain fees --

[22]A Yes.

[23]Q -- for various treatment. Have you ever followed a

[24]patient where the patient actually paid those fees?

[25]A Yes.

396

[1]Q Don't most of your patients have some type of either

[2]government or private insurance?

[3]A Most do, some don't.

[4]Q And you're telling us that people -- you've had people

[5]that had no insurance and pays all those fees that you just told

[6]us about?

[7]A Well, every person has different needs, they may not

[8]need the exact same plan that Mr. Reyes has, but just in general

[9]yes, I do have patients who pay cash for their medical care.

[10] **[*36]** Q All those fees you've just told us about, you've had

[11]patients --

[12]A Yes.

[13]Q Do you ever deal with patients that have health

[14]insurance and is that within your field?

[15]A Yes, most of my patients fortunately do have insurance.

[16]Q And you can buy health insurance, correct?

[17]A Sure.

[18]Q That would cover that type of treatment, correct?

[19]A It might, yeah.

[20]Q Can you tell the jury or us what --

[21]MR. WITTENSTEIN: Objection, collateral source.

[22]THE COURT: Sustained.

[23]Q Do you have any experience of what it would cost to

[24]get -- if someone wanted to buy insurance --

[25]MR. WITTENSTEIN: Objection.
397

[1]THE COURT: Sustained. Sustained.

[2]Q Were you asked to give an opinion as to what the cost

[3]of treatment that you feel in your report is appropriate to the

[4]plaintiff about going out and getting a policy --

[5]MR. WITTENSTEIN: Objection.

[6]THE COURT: Sustained.

[7]Q The report that you wrote, am I correct that you

[8]addressed it to Mr. Wittenstein's office, correct?

[9]A Yes.

[10]Q Your report and your work has nothing to do with **[*37]** the

[11]treatment of the plaintiff, just this case?

[12]A Yes.

[13]Q Are you aware that on the last visit with Dr. Baum he

[14]gave the plaintiff free medication, samples, and told him if he

[15]had any pain to call back and get further, are you aware of

[16]that?

[17]A I did see that he was giving samples, yes, yes.

[18]Q Are you aware that Dr. Baum never received any followup

[19]phone call from the plaintiff requesting any further pain

[20]medication?

[21]A Not that I know of.

[22]Q You still feel that he would need pain medication and

[23]medication every month, correct?

[24]A Yes.

[25]Q The cost and fees, is that up in Stamford, Connecticut?
398

[1]A No, that's nationwide.

[2]Q Are you aware that the plaintiff's family is in Mexico?

[3]MR. WITTENSTEIN: Objection.

[4]THE COURT: Sustained.

[5]Q Do you know what the cost of treatment, if the

[6]plaintiff went back to his family in Mexico, what that would be?

[7]MR. WITTENSTEIN: Objection.

[8]THE COURT: Sustained.

[9]Q Do you have an expectation that the plaintiff is going

[10]to stay in Stamford or New York and get that treatment?

[11] **[*38]** MR. WITTENSTEIN: Same objection.

[12]THE COURT: Sustained.

[13]Q Oh, now when you generally work with real patients

[14]don't you have like health care proxies and power of attorneys

[15]and things like that?

[16]MR. WITTENSTEIN: Objection, relevance.

[17]THE COURT: Sustained.

[18]Q If someone needs help in deciding their medical

[19]treatment is it part of your practice to make sure they have the

[20]appropriate health care proxies and Power of Attorney forms in

[21]place?

[22]MR. WITTENSTEIN: Objection.

[23]THE COURT: Sustained.

[24]Q Does the plaintiff have a health care proxy, do you

[25]know?
399

[1]MR. WITTENSTEIN: Objection, your Honor.

[2]THE COURT: Sustained.

[3]Q Did you ever prescribe the plaintiff medication?

[4]A No.

[5]Q I see you are wearing glasses?

[6]A Yes.

[7]Q Do you know if the plaintiff ever had his eyes

[8]examined?

[9]A No.

[10]Q If you have poor vision and you don't have your eyes

[11]examined --

[12]MR. WITTENSTEIN: Objection, beyond the scope.

[13]MR. KEHOE: Strike that.

[14]Q Do you have the history of the plaintiff reporting to

[15]you headaches? **[*39]**

[16]A Let me check. Yes.

[17]Q Do you know when the last time -- he gets it while he

[18]watches television, did you ever get that history?

[19]A No, he told me that they were made worse by riding in a

[20]car.

[21]Q By what?

[22]A Riding in a car, he mentioned, was something that makes

[23]them worse.

[24]Q Do you know if he's had any treatment for that

[25]condition?
400

[1]A No.

[2]Q Have you ever had a headache personally?

[3]A Personally, yes.

[4]MR. WITTENSTEIN: Objection.

[5]THE COURT: Sustained.

[6]Q Do you know if the plaintiff had taken so much as an

[7]aspirin or Tylenol for treatment of headache?

[8]A No.

[9]Q Did you do any neurological testing of the plaintiff

[10]other than the left nerve -- left lower leg?

[11]A I did a neurological physical exam, but no other tests.

[12]Q What did that consist of?

[13]A Manual muscle testing, testing his strength; and

[14]sensation testing, using the filament that I talked about

[15]before.

[16]Q Are there doctors, to your knowledge, in Queens County

[17]that have the same expertise as you, maybe not as good, the same

[18]qualifications? **[*40]**

[19]MR. WITTENSTEIN: Objection, your Honor.

[20]THE COURT: Sustained.

[21]Q You don't practice in New York now, do you?

[22]A No.

[23]Q So would I be correct if the plaintiff were to treat

[24]you he would have to go to Stamford, Connecticut?

[25]A He would have to see me to see in my office, as I do
401

[1]with many of my patients that live in New York give them a

[2]prescription, then he can go for therapy or get medication,

[3]prescriptions filled in New York.

[4]Q Has there been any followup between you and the

[5]plaintiff since February 17th, 2012?

[6]A No.

[7]Q Is there any indication that the plaintiff had any

[8]rehabilitation inpatient after he was discharged from Elmhurst

[9]Hospital shortly after this accident?

[10]A As an inpatient, no.

[11]Q When, to your understanding from your review of the

[12]plaintiff's record, was the first time ever the plaintiff made

[13]any complaints of head injury after he got out of the hospital?

[14]A After he got out of the hospital?

[15]Q Yes.

[16]A I believe as far as what's documented, it's when he

[17]went to see Dr. Shea or Dr. Hausknecht.

[18] **[*41]** Q Am I correct that that's at least a year and-a-half

[19]after the accident?

[20]A Yes.

[21]Q Is that significant, doctor, that the patient could

[22]be -- could have a year and-a-half of no complaints about any

[23]head injury or any headaches, then after he went to a doctor

[24]that his lawyers recommended that now he starts getting

[25]headaches?

402

[1]MR. WITTENSTEIN: Objection, your Honor.

[2]THE COURT: Sustained as to form.

[3]Q Is the timeframe significant, from the date of the

[4]accident to the first complaint of any headache, significant to

[5]you?

[6]MR. WITTENSTEIN: Objection to foundation, your

[7]Honor.

[8]THE COURT: You understand the question, doctor?

[9]THE WITNESS: I think I do, yes your Honor.

[10]THE COURT: Overruled.

[11]A I don't know that he didn't have any complaint of

[12]headache, all I know is what I am saying as far as what I can

[13]review from the records the first documented complaints in the

[14]records available to me were when he saw Dr. Hausknecht and Dr.

[15]Shea and their colleagues. What's significant to me is if he's

[16]still symptomatic over a year later this is not just a

[17] **[*42]** concussion which many people get then they get better and go

[18]back to themselves but an actual brain injury.

[19]Q You don't know what, if anything -- you understand the

[20]date of the accident that's the subject of this lawsuit is May

[21]of 2009 correct?

[22]A Yes.

[23]Q You have no reference of what, if anything, might of

[24]transpired in the plaintiff's life between the day of this

[25]accident and the first visit to Dr. Hausknecht or Dr. Shea about
403

[1]a year and-a-half later, do you?

[2]A Correct.

[3]Q Am I correct that you were not retained to render any

[4]opinion as to the mechanisms of the actual accident and the

[5]injuries?

[6]A That's right.

[7]Q Do you have any training in accident reconstruction?

[8]A No.

[9]Q Do you know what the plaintiff's intelligence level was

[10]prior to him -- prior to the accident?

[11]A His intelligence level, no.

[12]Q Do you know what his ability to follow instructions was

[13]prior to the accident?

[14]A I know that he was able to hold down a job so I can

[15]infer that he had better ability than what he has now but I

[16]don't know exactly what that was. **[*43]**

[17]Q Where did you get the information that he held down a

[18]job?

[19]A From him, he gave me a vocational history.

[20]Q If someone comes to you with headaches, complaints of

[21]headaches, you give them direction of how to initially treat it,

[22]see if they can do anything to it?

[23]A Yes, sure.

[24]Q What would be your initial treatment if I said I have

[25]headaches, for instance hypothetically, someone says I get a
404

[1]headache if I watch TV for too long a time?

[2]A If someone's related their headache to watching TV for

[3]too long a time, in generally I would have a concern about a

[4]visual problem. If someone has a history of traumatic brain

[5]injury, then I would definitely have a concern that they may

[6]have problems with the coordination of the two eyeballs not

[7]moving smoothly together, which is something we see quite a lot,

[8]particularly in mild traumatic brain injury.

[9]Q My question is not how it was caused but if somebody

[10]came up to you would you recommend initial preliminary treatment

[11]such as check your eyes, would that be something you may do?

[12]A I would not check someone's eyes the **[*44]** way that an

[13]ophthalmologist would do, I would look much in a similar way

[14]that a neurologist would typically do to ask them to follow my

[15]finger moving and some things like that, but I would not do an

[16]eye exam beyond that.

[17]Q In your experience if you needed glasses and you are

[18]straining watching TV --

[19]MR. WITTENSTEIN: Objection, well beyond the

[20]scope.

[21]Q -- could that be one of the initial problems?

[22]THE COURT: Overruled.

[23]A Could that cause headaches?

[24]Q Could that be one of the initial reasons you get

[25]headaches because you need glasses?

405

[1]A That's possible, sure.

[2]Q Couldn't the symptoms be relieved with something as

[3]simple as Tylenol or aspirin?

[4]A For some people, sure.

[5]Q Do you know if the plaintiff ever tried any of those

[6]simple solutions?

[7]A No, I don't.

[8]Q Did you recommend for him to try any of those simple

[9]solutions?

[10]A I did not make any recommendations to him.

[11]Q What is your experience or expertise with respect to

[12]orthopedics, and especially the lower extremities?

[13]A I treat a lot of patients with **[*45]** orthopedic injuries to

[14]the lower extremities.

[15]Q I know you see a lot of patients but do you consider

[16]yourself a lower extremity expert?

[17]A Sure.

[18]Q Are you familiar with Dr. Baum?

[19]A Not personally.

[20]Q Do you know his qualifications as an orthopedist?

[21]A Not specifically, no.

[22]Q Do you know, are you aware, that he is -- he has

[23]training and specialized courses and advanced training just in

[24]the lower extremities?

[25]A I don't know what his training is, I'm sure he did.
406

[1]Q Assuming that he testified to that, would you disagree,

[2]would you still feel your opinion is better than his?

[3]A When it comes to rehabilitation, yes. When it comes to

[4]operating, no.

[5]Q How about postoperation treatment?

[6]A When it comes to rehab, orthopedists frequently turn

[7]such patients over to physiatrists like myself, so I would say

[8]we have very comparable expertise in terms of postop

[9]rehabilitation.

[10]And in terms of the long term rehab, the stuff that

[11]goes on years later, those patients are much more likely to see

[12]someone like me, than someone like him. **[*46]**

[13]Q In other words, it's your opinion if the plaintiff went

[14]to someone like you he could be rehabilitated better than just

[15]staying with the orthopedist?

[16]A No, I am not saying that. I am saying in terms of the

[17]long term care, once orthopedists can no longer realistically

[18]offer someone further surgery they would routinely turn it over

[19]to someone like myself, a physiatrist.

[20]Q You understand that Dr. Baum testified under oath to

[21]this jury that in his opinion the plaintiff did not need any

[22]further or would not benefit from any further medical treatment

[23]with respect to his leg injury?

[24]A Yes, I understand.

[25]Q You accept that. And it's your opinion that you
407

[1]disagree with that?

[2]A Yes, I think that in the future, not necessarily right

[3]now, but in the future he is going to need more physical

[4]therapy.

[5]Q So when do you expect -- when in your opinion should

[6]plaintiff start having the physical therapy again?

[7]A Whenever he has a flare-up of his pain would be when he

[8]would need to have his next sessions.

[9]Q And you heard testimony from Dr. Baum -- or assume

[10] **[*47]** there was testimony that Dr. Baum did not get any post followup

[11]calls from the plaintiff that he was having any pain, so in your

[12]opinion based on that you would say he does not need physical

[13]therapy?

[14]A Not at this moment.

[15]Q Okay. So all of those opinions you gave us, and the

[16]amounts and things like that you talk about, may not figure in

[17]for some time in the future?

[18]A Perhaps.

[19]Q You don't know when he would need that treatment?

[20]A Not exactly when, no.

[21]Q So it's pure speculation what you're telling the jury

[22]about all this amount of therapy and treatment that you feel

[23]that the plaintiff needs?

[24]A No, it's not speculation, it's based on my experience

[25]with patients over the years with similar injuries back in the
408

[1]past.

[2]Q But you've said you can't give a definitive answer when

[3]the plaintiff would need to begin any of this stuff?

[4]A Not as to exactly when, but what he is going to need on

[5]average going forward.

[6]Q You don't know when that is going to begin, correct?

[7]A No.

[8]Q As a rehabilitation expert, do you have an expectation,

[9] **[*48]** if the plaintiff followed your instructions, that he would be

[10]able to rehabilitate himself?

[11]A I expect that that would help to give him a better

[12]quality of life, to help him be more functional in his

[13]activities of daily living, but it wouldn't bring him back to

[14]normal.

[15]Q You have no knowledge independently of what his

[16]pre-accident normal, quote unquote, normal condition was?

[17]A As far as I know he never had any fractures or injuries

[18]to his leg and he was walking around and working on that leg, so

[19]that's what I do know about his leg.

[20]MR. KEHOE: Thank you very much.

[21]THE COURT: Thank you. Redirect.

[22]MR. WITTENSTEIN: Thank you, your Honor.

[23]REDIRECT EXAMINATION

[24]BY MR. WITTENSTEIN:

[25]Q Doctor, I would like to you assume Mr. Reyes was here
409

[1]the other day and testified that it took him one hour to walk

[2]from his apartment to his brother's apartment, including rest

[3]breaks --

[4]MR. KEHOE: Objection.

[5]THE COURT: Overruled.

[6]Q -- is that normal?

[7]A No, it's not. In terms of walking city blocks, most

[8]people can walk about a block a minute, so in **[*49]** an hour they would

[9]walk about 60 blocks, I am talking about a healthy, normal sized

[10]person. So that's very slow.

[11]Q What if I also told that you Mr. Reyes testified just

[12]the other day he had to walk up the steps to the courthouse, the

[13]front entrance and he had pain, what does that tell you about

[14]his left leg?

[15]MR. KEHOE: Objection.

[16]THE COURT: Overruled.

[17]A That's also significant. I walked up the flight of

[18]steps myself this morning, so I know what you're talking about

[19]and that should not normally hurt a healthy person.

[20]Q Would having an IM rod in his left leg have anything to

[21]do with that, sir?

[22]MR. KEHOE: Objection.

[23]THE COURT: Overruled.

[24]A It very well may be. Sometimes after people have these

[25]orthopedic repairs with what we call hardware, sometimes the
410

[1]hardware itself can be a source of pain.

[2]Q I want you to also assume that Mr. Reyes testified that

[3]after walking a few blocks he had to stop and take a break

[4]before he resumes, what does that tell you about his left leg,

[5]sir?

[6]MR. KEHOE: Objection.

[7]THE COURT: Overruled.

[8] **[*50]** A Also abnormal. Walking a few blocks, someone's leg

[9]shouldn't hurt.

[10]Q Doctor, I want you to assume that Mr. Reyes testified

[11]that he's not on welfare and accepts no benefits from the United

[12]States government or the State of New York, did --

[13]MR. KEHOE: Judge, I object.

[14]THE COURT: Counsel approach.

[15](Whereupon, discussion held off the record.)

[16]THE COURT: Overruled.

[17]MR. WITTENSTEIN: Thank you, your Honor.

[18]Q As I was saying doctor, I want you to assume Mr. Reyes

[19]testified he's not on welfare, doesn't get food stamps, gets no

[20]benefits from the United States government, gets no benefits

[21]from the State of New York, he sleeps on a mattress on a

[22]floor --

[23]MR. KEHOE: Objection.

[24]THE COURT: Sustained as to form.

[25]MR. WITTENSTEIN: I will rephrase.

411

[1]Q I want you to assume that Mr. Reyes doesn't get

[2]welfare, doesn't get food stamps, gets no government benefits

[3]whatsoever and he has not worked since the day of the accident?

[4]A Okay.

[5]Q Do you have an opinion about Mr. Reyes's ability to pay

[6]for future health care needs?

[7]A Yes.

[8] **[*51]** Q Tell us?

[9]A He would not have the ability to pay for future health

[10]care needs, the costs are significant, they are what they are,

[11]if he doesn't have a source of income, if he doesn't have

[12]government benefits, even if he had the money to go out and buy

[13]a commercial insurance plan those would exclude his preexisting

[14]conditions so he couldn't pay for it.

[15]Q Doctor, if Mr. Reyes did not call Dr. Baum or Dr.

[16]Hausknecht to complain about headaches does that mean he wasn't

[17]having any?

[18]A No.

[19]Q Do you have any reason to believe that Mr. Reyes was

[20]able to pay any out of pocket expenses for any of his medical

[21]care as a result of this accident?

[22]A No.

[23]MR. WITTENSTEIN: I have nothing further.

[24]THE COURT: Thank you.

[25]Recross?
412

[1]MR. KEHOE: Yes.

[2]RECROSS EXAMINATION

[3]BY MR. KEHOE:

[4]Q Are you aware that the patient had -- Mr. Reyes had

[5]insurance that covered his medical treatment?

[6]MR. WITTENSTEIN: Objection.

[7]THE COURT: Sustained.

[8]MR. KEHOE: Pardon me?

[9]THE COURT: Sustained. There's an objection.

[10]Q Do you know how **[*52]** the patient's medical treatment that he

[11]had in the past was paid for?

[12]MR. WITTENSTEIN: Objection.

[13]THE COURT: Sustained.

[14]MR. KEHOE: I have no further questions then,

[15]Judge.

[16]THE COURT: Thank you doctor, you may step down.

[17]THE WITNESS: Thank you, your Honor.

[18]THE COURT: Counsel, approach.

[19](Whereupon, discussion held off the record.)

[20]THE COURT: We'll take a five minute recess.

[21](Whereupon, the jury left the courtroom.)

[22]MR. WITTENSTEIN: Before you took the bench we had

[23]an exhibit marked for identification. I want to bring it

[24]to your attention because I will be attempting to use it

[25]during my direct exam. This is Plaintiff's 17 for
413

[1]identification. Mr. Kehoe's already seen this. We have

[2]the economist and I expect to ask the economist to use this

[3]chart beginning from day one to the end to explain the

[4]different categories of costs and inflation rate and how

[5]the expenses change from on year to year basis.

[6]Your Honor, I also brought a proposed verdict

[7]sheet with me.

[8]THE COURT: Yes, I'll take it.

[9]MR. WITTENSTEIN: My request **[*53]** to charge I didn't

[10]finish because there was a lot of stuff.

[11]THE COURT: Okay.

[12]MR. WITTENSTEIN: I will give Mr. Kehoe a copy

[13]too.

[14]THE COURT: When can I expect yours, Mr. Kehoe?

[15]MR. KEHOE: Judge, I will e-mail it to your law

[16]secretary tomorrow and e-mail it to counsel at the same

[17]time.

[18]MR. WITTENSTEIN: This is for the judge.

[19](Handing.)

[20]THE COURT: We won't be here tomorrow but you can

[21]e-mail it at any time.

[22]My law secretary is on her honeymoon, that's why

[23]we gave you my e-mail address of my secretary Ms. Miller.

[24]MR. KEHOE: I have it, Judge.

[25](Recess taken.)
414

[1]MR. KEHOE: I object to this next witness being

[2]called because this witness's testimony is entirely based
[3]on the plaintiff's last witness as to future medical
[4]expenses and that witness very clearly on cross-examination
[5]says he has no idea when the plaintiff will begin or need
[6]to have any future medical attention so I don't see how an
[7]economist can set forth any opinion. He gave amounts that
[8]the jury is well able to give their opinion of, but I don't
[9]believe that a witness is qualified **[*54]** now to form any opinion
[10]that's beginning on day one, or day one after the verdict.
[11]And that's why -- I disagree with it, so I feel this
[12]witness is totally inappropriate to be called for her to
[13]give a number without any starting date and the doctor said
[14]it was pure speculation when the plaintiff would ever begin
[15]needing this treatment.
[16]THE COURT: Let me ask you this, if the doctor's
[17]opinion to a reasonable degree of medical certainty is that
[18]he cannot specify a specific date in the future in which
[19]the plaintiff may or will -- will need those services, that
[20]means that the plaintiff is not entitled to get medical
[21]expenses?
[22]MR. KEHOE: That's correct, Judge, because if he
[23]said, he was never asked, if he said I don't know when, in
[24]my opinion in all likelihood he will begin needing this
[25]five years from now and I would definitely say it could be
415
[1]five years to ten years, then there's some basis for the
[2]doctor to render an opinion. This doctor said he has no
[3]idea when if ever he will ever begin needing this. So
[4]you're asking the jury now to purely speculate now and have
[5]an economist tell them **[*55]** from day one this is what it will

[6]be.

[7]THE COURT: I guess my question is, if the doctor

[8]within a degree of medical certainty can't be specific,

[9]that's the extent of what the medical testimony or opinion

[10]can be, his testimony is I expect it to happen but I can't

[11]say a specific date, based upon all the other facts, so

[12]that in that particular case your argument is he is not

[13]entitled to future medical expenses? You understand my

[14]question?

[15]MR. KEHOE: And I agree with your Honor, only

[16]because if he -- knowing the day he would begin is not --

[17]but he could say no, I can't say if he's going to need it

[18]tomorrow, but in my opinion he will need it based on my

[19]experience I anticipate or I give opinion that he will

[20]begin to need it somewhere between one and three years in

[21]the future something like that, that line of questioning

[22]was never raised.

[23]THE COURT: So you're saying there is no evidence

[24]as to a date even though it's an indefinite date here in

[25]this case?

416

[1]MR. KEHOE: Yeah, he never gave that opinion.

[2]MR. WITTENSTEIN: Well your Honor --

[3]THE COURT: For the plaintiff. **[*56]**

[4]MR. WITTENSTEIN: I will be very brief, your

[5]Honor. Mr. Kehoe must of forgotten some of the testimony.

[6]Mr. Richter said when the pain flares up that's when he has

[7]to begin. There's been plenty of testimony from Mr. Reyes

[8]that he's had plenty of pain before today. In fact, Mr.

[9]Reyes obviously needed physical therapy before the day he

[10]testified in court. Mr. Reyes testified when he walked up

[11]those front steps of the courthouse he was in pain. He

[12]testified when he walks down the basement steps to his

[13]apartment he is in pain. So pain has been flaring up, so

[14]if we're talking about a starting point when therapy

[15]begins, the doctor testified when pain flares up. There's

[16]been plenty of testimony about pain flaring up, there's

[17]been plenty of testimony about constant pain. Mr. Reyes

[18]never said at any point he's in no pain.

[19]THE COURT: I think there is at least sufficient

[20]evidence in the record for the jury to determine, not for

[21]the court to determine, whether or not a point in time has

[22]been reached in which his suggested future medical expenses

[23]would be right for -- to be incurred. I take this

[24]testimony, **[*57]** and understand his testimony, he was not able to

[25]specify a date certain as to when that medical expense

417

[1]would be right to be incurred but I think there's

[2]sufficient evidence in the record for the jury to make a

[3]determination, that it's not based upon pure speculation.

[4]So the application to preclude the witness is denied.

[5]MR. KEHOE: Your Honor is distinguishing between

[6]pure speculation and mere speculation, isn't that the same

[7]thing?

[8]THE COURT: No -- yes it is but I am not -- but

[9]what I said is, I don't believe his testimony with regard

[10]to future medical expenses and the date in which -- a date

[11]specific in which those medical expenses would be right for

[12]the plaintiff, I don't believe should the jury decide that

[13]plaintiff is entitled to that it will be based on pure

[14]speculation.

[15]There is evidence from the expert witness that

[16]those expenses, to a reasonable degree of medical certainty

[17]will occur. As to the specific date, the witness was

[18]unable to say that but, and I agree with counsel for

[19]plaintiff that there was testimony about those medical

[20]expenses would be right at the **[*58]** time the plaintiff incurs

[21]pain, so that would be a date certain.

[22]So you take all the testimony together with the

[23]evidence and the jury would have a basis to determine when

[24]it would be right for the medical expenses. I don't find

[25]it to be speculative, taken in its totality.

418

[1]Parties ready to proceed?

[2]MR. WITTENSTEIN: Yes, your Honor.

[3]THE COURT: Just for my edification, the document

[4]that's marked as Plaintiff's Exhibit 17 for identification,

[5]are you going to be offering that into evidence?

[6]MR. WITTENSTEIN: I will be offering it into

[7]evidence. And if by some chance your Honor will not permit

[8]me to put it into evidence, I will be offering it for

[9]illustration purposes. It would probably be a good idea if

[10]we had an easel too. Thank you.

[11]THE COURT: Ready for the jury.

[12](Whereupon, the jury entered the courtroom.)

[13]THE CLERK: Let the record reflect that the jury

[14]is present and properly seated.

[15]THE COURT: Thank you, please be seated.

[16]Plaintiff, you may call your next witness.

[17]MR. WITTENSTEIN: Thank you, your Honor. I call

[18]Debra Dwyer. **[*59]**

[19]D E B R A D W Y E R, called as a witness by

[20]and on behalf of the Plaintiff having been first duly

[21]sworn, was examined and testified as follows:

[22]THE CLERK: In a loud, clear voice state your name

[23]and address for the record.

[24]THE WITNESS: My name is Debra Dwyer, D-E-B-R-A,

[25]D-W-Y-E-R.
419

[1]THE COURT: You may inquire, counsel.

[2]DIRECT EXAMINATION

[3]BY MR. WITTENSTEIN:

[4]Q Good afternoon, Ma'am.

[5]A Good afternoon.

[6]Q What is your occupation?

[7]A I am an economist.

[8]Q What is an economist?

[9]A That's a big question. An economist is somebody who

[10]studies how we allocate scarce resources and the market. So

[11]what that means is, we do a lot of mathematical modelling and

[12]statistics to understand why things are the way they are around

[13]us in terms of prices and all sorts -- our economic well-being.

[14]Q Can you please tell us about your current position?

[15]A Currently I am the Chairman of the Department of

[16]Healthcare Policy And Management at Stony Brook University.

[17]I've been there since 2006, so about six years.

[18]Before that I spent eight years **[*60]** in the economics

[19]department at Stony Brook University.

[20]Q Can you please tell us about some of your relevant past

[21]employment positions?

[22]A Sure. It started when I got my Ph. D. In 1996, I did a

[23]post doctorate at Syracuse University at the Center For Policy

[24]Research where I compared global health systems. So I compared

[25]the Netherlands health system to the United States.

420

[1]Then I went to Washington D.C., I worked for the Social

[2]Security Administration for two years in the Division For

[3]Economic Research, I was a senior economist there.

[4]Then I came to Stony Brook University.

[5]Q In your career and your educational background have you

[6]received any honors or awards?

[7]A I received a full fellowship and assistantship to study

[8]at Cornell University where I got my Masters and my Ph. D.

[9]I graduated from Queens college with honors and I

[10]received a Steven H. Bernheim award for economics, a student in

[11]economics, outstanding student.

[12]I was the president of the Economics Honor Society when

[13]I was undergraduate.

[14]Since then, since I became a professor, I received a

[15] **[*61]** number of grants to do research on Social Security disability

[16]related issues. Currently I am working on grants where I am

[17]working with the governor's office to try to survey public

[18]agencies to figure out what some of the barriers are to getting

[19]worker's compensation injured workers back to work.

[20]I also yesterday I found out that I was ranked top 19

[21]percent of economic researchers in terms of my researches

[22]impact.

[23]Q Thank you.

[24]MR. WITTENSTEIN: Your Honor, at this time I offer

[25]Dr. Dwyer as an expert in the field of economics.

421

[1]THE COURT: Other than the stated grounds off the

[2]record for objecting, any objection?

[3]MR. KEHOE: I don't object to her qualifications,

[4]I object to her testimony.

[5]THE COURT: Absolutely. Thank you.

[6]Q Were you engaged to calculate the future healthcare

[7]costs for Mr. Reyes?

[8]A Yes, I was.

[9]Q Did you prepare a chart regarding those healthcare

[10]costs?

[11]A Yes, I did.

[12]Q I am going to show you what's marked Plaintiff's Number

[13]17 for identification. Is this chart basically a blowup of a

[14]chart that you prepared?

[15] **[*62]** A Yes, it is.

[16]Q Will this chart assist you in explaining to the jury

[17]the nature of economic increases of costs of healthcare in the

[18]future?

[19]A Absolutely.

[20]Q Will this assist the jury in understanding the total

[21]cost of future healthcare for Mr. Reyes?

[22]A Yes.

[23]MR. WITTENSTEIN: Your Honor, at this point I

[24]would like to offer this into evidence.

[25]THE COURT: Any objection?

422

[1]MR. KEHOE: Yes I object, your Honor.

[2]THE COURT: Counsel approach.

[3](Whereupon, discussion held off the record.)

[4]THE COURT: Sustained. Insufficient foundation.

[5]Q Dr. Dwyer, before you prepared the chart did you review

[6]any type of written documents?

[7]A Yes, I did.

[8]Q What did you review?

[9]A I reviewed the report of Dr. Richter, I think his name

[10]was Dr. Richter.

[11]Q In Dr. Richter's report did he breakdown the different

[12]types of expenses, for example, physiatrist or neurologists?

[13]A Yes, he did.

[14]Q Did he breakdown orthopedic visits?

[15]A Yes, he did.

[16]Q Did he breakdown physical therapy visits?

[17]A Yes, he did.

[18]Q Did **[*63]** he breakdown neuropsychological treatment?

[19]A Yes.

[20]Q Did he breakdown medication?

[21]A Yes.

[22]Q And future EMG testing?

[23]A Yes.

[24]Q Did Dr. Richter give an opinion in his report about the

[25]amount of time that these expenses would be incurred?
423

[1]A Yes.

[2]MR. WITTENSTEIN: Your Honor, at this time I would

[3]like to offer this chart into evidence.

[4]THE COURT: Any objection?

[5]MR. KEHOE: I object.

[6]THE COURT: Same objection? Is it the same

[7]objection?

[8]MR. KEHOE: It is, but it's a little further.

[9]THE COURT: Sidebar.

[10](Whereupon, discussion held off the record.)

[11]THE COURT: Sustained.

[12]Q Dr. Dwyer, I would like you to assume that Dr. Richter

[13]testified in this case that Mr. Reyes needs four to six visits

[14]per year with a physiatrist or a neurologist, did you take that

[15]into account when you prepared your chart?

[16]A Yes, I did.

[17]Q I would like to you assume that Dr. Richter testified

[18]in this case that Mr. Reyes needs orthopedic visits of three to

[19]four times a year and he put a price of $ 150 per visit, did you

[20]account **[*64]** for that in your chart?

[21]A Yes, I did.

[22]Q Just going back to the previous question, I would like

[23]to you assume that Dr. Richter also testified it was o per visit

[24]in today's dollars for the physiatrist or the neurologist?

[25]A Yes.

424

[1]Q In terms of the cost of the orthopedist, Dr. Richter

[2]also testified it's $ 150 per visit in terms of today's dollars?

[3]A Yes, that's right.

[4]Q I would like you to also assume that Dr. Richter

[5]testified that Mr. Reyes would need future costs of physical

[6]therapy, at a cost of 24 to 36 sessions per year at $ 125 per

[7]session in today's dollars?

[8]A Yes.

[9]Q Did you account for that in your chart?

[10]A Yes.

[11]Q I would like you to assume that Dr. Richter also

[12]testified that Mr. Reyes would benefit from visits with a

[13]neuropsychologist weekly for six months, then twice a month for

[14]six months at $ 150 per visit in today's dollars?

[15]A Yes.

[16]Q Did you take that into account when you prepared the

[17]chart?

[18]A Yes.

[19]Q I would like you to assume that Dr. Richter testified

[20]that there's an anticipated need of **[*65]** analgesic medication, at

[21]least comparable to a prescription strength nonsteroidal

[22]medication costing 25 to $ 30 per month in today's dollars, did

[23]you take that into account when you prepared your chart?

[24]A Yes, I did.

[25]Q I would like to you assume when Dr. Richter testified
425

[1]that Mr. Reyes would need a future EMG of 1,500 in today's

[2]dollars one to two years in the future, did you take that into

[3]account when you prepared your chart?

[4]A Yes, I did.

[5]MR. WITTENSTEIN: Your Honor, it's my position I

[6]have laid a proper foundation. I am requesting that this

[7]document Plaintiff's 17 be permitted into evidence.

[8]MR. KEHOE: May I, I have two questions.

[9]VOIR DIRE EXAMINATION

[10]BY MR. KEHOE:

[11]Q Did you take into consideration when you prepared the

[12]chart that Dr. Richter testified he has no idea when --

[13]MR. WITTENSTEIN: Objection, your Honor.

[14]THE COURT: Sustained.

[15]MR. KEHOE: I didn't finish the question, Judge.

[16]THE COURT: I know what it is. Sustained. Thank

[17]you. Thank you. Thank you.

[18]MR. KEHOE: Can I just ask the question, Judge?

[19]THE COURT: **[*66]** You can ask the question on your

[20]cross-examination. It's not proper for voir dire.

[21]In any event, over objection Plaintiff's 17 for

[22]identification is admitted into evidence.

[23](Whereupon, Plaintiff's Exhibit 17, chart of future healthcare

[24]costs, was marked in evidence.)

[25]DIRECT EXAMINATION
426

[1]BY MR. WITTENSTEIN: (CONTINUED)

[2]Q Dr. Dwyer, did you perform an economic analysis of Mr.

[3]Reyes's future healthcare costs within a reasonable degree of

[4]economic certainty?

[5]A I did.

[6]Q Dr. Dwyer, if you would be so kind I will ask you

[7]please step down, we'll set up the chart on the easel, I will

[8]ask you some questions.

[9](Whereupon, the witness stepped down from the witness

[10]stand.)

[11]Q Dr. Dwyer, you are probably the only economist in the

[12]room, we'll work through the chart slowly. Beginning in the

[13]upper left where it says 2012 and working down to 2050 can you

[14]explain for us what each column represents?

[15]A Sure. The first column is the number of years from

[16]today starting from 2012 to the expected end of Mr. Reyes's

[17]life. So based on the National Health Statistics Mr. Reyes, **[*67]**

[18]who's currently 38, is expected to live another 38.1 years,

[19]which brings us to 76.1, which brings us to 2050.

[20]So starting in 2012 we calculate the expected medical

[21]expenses for the remainder of his life annually until 2050.

[22]Q Can you please explain as we go down that column why

[23]the numbers keep going up, why the numbers increase?

[24]A Okay, so for the medical expenses what I did was I took

[25]Dr. Richter's report, I am not a medical doctor, I have the
427

[1]title of doctor but I am not a medical doctor, so I don't have

[2]the expertise to be able to say what the future medical needs

[3]are going to be for Mr. Reyes given his injuries, so what I did

[4]was I took that report, and I took for the remaining six months

[5]of 2012, so for physiatrist or neurologist five visits per year

[6]at $ 150 per year, so I only did two for 2012, so we were on the

[7]conservative end all the way through, so for 2012 everything is

[8]calculated for six months and it's in current dollars.

[9]We also did current dollars for 2013, we were

[10]consistent -- I mean conservative. For 2013, the reason the

[11]numbers go up in 2013, is now we're **[*68]** calculating a full year for

[12]medical services needed, so it's five physiatrists needed, 3.5

[13]orthopedic visits, so when Dr. Richter said three to four visits

[14]what we did was take the midpoint.

[15]Q I want you to assume Dr. Richter testified it was 4 to

[16]6, why did you choose 5?

[17]A I take the midpoint or I take the lower end. So we try

[18]to be on the conservative side. So if there's uncertainty about

[19]the future medical needs and Dr. Richter says it's between five

[20]and six we're going to be conservative and go with the five. If

[21]it's between 3 and 4, in that case we went for 3.5 visits per

[22]year. We either do the midpoint or the lower end, so we chose

[23]5, we could have done 5.5 for this one. It does affect the

[24]numbers slightly so we underestimate in a lot of cases.

[25]So the 2012 and the 2013 numbers are in current
428

[1]dollars, but as we know inflation hits us and it affects our

[2]purchasing power, so the costs of a neurologist visit is today

[3]is not the same as a neurologist visit 20 years ago. Like the

[4]slice of pizza which runs $ 2 a slice --

[5]MR. KEHOE: Objection, Judge.

[6]THE COURT: Sustained. **[*69]**

[7]A Because of inflation the amount we can buy with the

[8]dollar changes every year, so the amount of medication we can

[9]buy this year is different than the amount of medication we're

[10]going to be able to buy next wear year and the year after that.

[11]So within a reasonable degree of economic certainty we are able

[12]to take projections based on the last 25 years of prices within

[13]each of these categories that we got from the Bureau of Labor

[14]Statistics, so we always use Federal statistics to project our

[15]numbers.

[16]So beginning with the year 2013, I will start with the

[17]neurologist, in 2013 it was 750; in 2014, even though it's still

[18]the same number of visits, the five visits for another year,

[19]it's now worth $ 780 because we're increasing it by four percent

[20]which is what we calculated for general medical expenses on

[21]average for the last 25 years, they've been rising by about 4

[22]percent, so we use overall for the last 25 years medical

[23]expenses have been rising by 5.2 percent for the last 25 years.

[24]We used 4 percent because for neurologists and

[25]physiatrists it was more like 4 percent as opposed to the
429

[1] **[*70]** overall medical inflation. So 750 we increase by 4 percent

[2]becomes 780 in 2014, 811 in 2015. We do this all the way

[3]through. And yes, by 2049 we're at 3,078. So that's how

[4]inflation affects us. It sounds like a lot, but again if you

[5]think about other commodities and how you have been spending

[6]over the last ten years, prices have changed.

[7]For the last year of his life, remember I said he will

[8]live to 76.1 years, so he will only live .1 of a year, and

[9]that's only $ 256 worth of neurologists visits.

[10]Q Doctor, if Mr. Reyes were to live longer than the life

[11]expectancy, would these numbers be even higher?

[12]A That's right.

[13]Q Please continue, doctor.

[14]A I did exactly the same thing for all of the other

[15]categories based on Dr. Richter's report. So for the

[16]orthopedist visit again I did one for 2012, then for 2013, I

[17]went on to 3.5 worth, $ 525 next year, the year after that if I

[18]increase it by four percent again it goes up to 546, and we get

[19]all the way down to $ 2,155 by 2049, and 179 in the remainder --

[20]the remaining year, for a total of $ 43,223 for orthopedists

[21]visits.

[22] **[*71]** So now physical therapy, the rate increase price was

[23]slightly slower than the others, so I used a rate of 3.5

[24]percent. Again these are based on the Bureau of Labor

[25]Statistics. So 30 visits per year, we only did 15 in 2012, 30

430

[1]in 2013 at $ 3,750, if you increase it by 3.5 percent in 2014

[2]it's $ 3,881, get all the way to the end it grows to $ 12,938 in

[3]2049, about an additional $ 1,071 in that last year of life, for

[4]a total of $ 278,413 for physical therapy.

[5]Now the neurologist -- neuropsychologist sorry --

[6]weekly for six months, then two per month for six months, so

[7]he's only predicting a year's worth, so we did the first six

[8]months in 2012 at 3,900, that's for half a year and for 2013 the

[9]remaining of that half a year was every other week at 1,800. We

[10]didn't need to grow this because he's not doing it beyond 2013,

[11]that was not what Dr. Richter prescribed, so 5,700 is the total

[12]for the neuropsychologists visits.

[13]Medications have been rising higher than the general

[14]inflation rates, so we use 4.5 percent for medications, drug

[15]costs, because patents are very high. So based on the

[16]recommendations **[*72]** of Dr. Richter of $ 30 per month we have 165 for

[17]half a year, 330 for the first full year in 2013, we grew it at

[18]4.5 percent every year, so that by the last full year of life

[19]2040 his drug costs are estimated to be $ 1,610, $ 135 add on for

[20]the last year of life, for a total of $ 30,343 worth of

[21]pharmaceuticals.

[22]Then the last one was a one time only EMG at 1,500,

[23]which didn't need to be grown since it's happening next year, so

[24]total of 1,500.

[25]For a grand total of future anticipated healthcare
431

[1]costs of $ 421,012.

[2]Q Doctor, I don't know if you mentioned the total of the

[3]physiatrist or neurologist visits, what was the total of column

[4]one?

[5]A That's right, I didn't say that one, it's not circled

[6]so I know you're right. The total for the neurologist is

[7]$ 61,833.

[8]MR. WITTENSTEIN: Thank you. I have nothing

[9]further, your Honor.

[10]THE COURT: Cross-examination.

[11]MR. KEHOE: Sure. Can I ask the witness go back

[12]on the stand?

[13]THE COURT: Sure.

[14](Whereupon, the witness resumed the witness

[15]stand.)

[16]CROSS EXAMINATION

[17]BY MR. KEHOE:

[18]Q I am **[*73]** the attorney who represents the defendants who are

[19]being sued in this lawsuit.

[20]We never met before, correct?

[21]A Correct.

[22]Q You work at Stony Brook in the office of Public Health

[23]Management?

[24]A No, it's the Department of Health Care Policy and

[25]Management.

432

[1]Q What's the general nature of that practice, of that

[2]field?

[3]A The field?

[4]Q Yes.

[5]A The field is about healthcare administration and

[6]management, so we train future leaders in the healthcare

[7]profession. They go on to be CEO's of hospitals or finance

[8]directors, continuous quality improvement. But we also train in

[9]policy where they go on to work for the government I teach a lot

[10]about how we translate what's going on with policy to

[11]management.

[12]Q So you're very familiar with the big healthcare debate

[13]in the country?

[14]A Absolutely.

[15]Q The present law in effect now?

[16]A Yes.

[17]Q Am I correct that under the present law a person with a

[18]preexisting condition can get -- that's no longer a bar to

[19]getting a policy of insurance?

[20]MR. WITTENSTEIN: Objection.

[21] **[*74]** THE COURT: Sustained.

[22]Q Are you familiar -- are you familiar with a party's

[23]ability, as to how the law is now in effect to purchase

[24]insurance, and how if at all it would be affected by preexisting

[25]conditions?

433

[1]MR. WITTENSTEIN: Objection.

[2]THE COURT: Sustained. Outside the scope of

[3]direct.

[4]Q Do you have any expectation that the numbers that you

[5]gave the jury are the actual expenses that the plaintiff himself

[6]will incur?

[7]MR. WITTENSTEIN: Objection to her expectations.

[8]THE COURT: Sustained.

[9]Q Your testimony, just so I understand it, you just

[10]followed what was written in a report by Dr. Richter and you put

[11]some percentages on that, correct?

[12]A Correct, based on national statistics.

[13]Q You based it on the 25 years past rate of inflation for

[14]each of those services, then you just took that and put it 25

[15]years in the future, or whatever years in the future you did,

[16]correct?

[17]A Yes.

[18]Q You have no -- so really you just put in the numbers as

[19]far as the math?

[20]A That's right.

[21]Q You're not here to offer any experience, any real

[22] **[*75]** expertise in healthcare management or healthcare policy?

[23]MR. WITTENSTEIN: Objection, beyond the scope.

[24]THE COURT: Overruled.

[25]A The numbers that I provided in my report are within a
434

[1]reasonable degree of economic certainty, so we have no certainty

[2]about what's going to happen in the future, and we have no

[3]reason to believe that things are going to be dramatically

[4]different over the next 25 years particularly since this month

[5]the Supreme Court is going to be deciding on what happens with

[6]healthcare reform. What I presented is what I believed to be

[7]reasonably true.

[8]Q But you're basing that not on a person's course to buy

[9]a policy of insurance --

[10]MR. WITTENSTEIN: Objection.

[11]Q You based it on what --

[12]MR. WITTENSTEIN: Objection.

[13]MR. KEHOE: She answered it's a Supreme Court

[14]ruling.

[15]THE COURT: Sustained.

[16]Q Let me ask you this, are you aware that earlier this

[17]morning before you testified that Dr. Richter told the jury he

[18]has no idea of when the plaintiff will really begin to need this

[19]treatment?

[20]MR. WITTENSTEIN: Objection, mischaracterization. **[*76]**

[21]THE COURT: Sustained as to form.

[22]Q Do you know what Dr. Richter testified this morning

[23]concerning when the plaintiff will actually, in his opinion,

[24]will begin to need any future medical attention?

[25]A No, I do not.
435

[1]Q So if he didn't begin for ten years what would be the

[2]difference of the price?

[3]A I could calculate the numbers if it -- you're saying if

[4]the treatment doesn't begin --

[5]Q Dr. Richter could not give an opinion when the

[6]plaintiff was going to start any of this treatment --

[7]MR. WITTENSTEIN: Objection, improper

[8]hypothetical.

[9]Q -- if he never has any future treatment --

[10]THE COURT: Excuse me, excuse me, you want me to

[11]rule on the objection?

[12]MR. KEHOE: Objection.

[13]THE COURT: Sustained.

[14]MR. KEHOE: Then I don't want you to rule on it.

[15]Q Let me ask you if agree with me, if the plaintiff

[16]doesn't have any future medical treatment his cost is zero,

[17]correct?

[18]MR. WITTENSTEIN: Objection.

[19]THE COURT: Overruled.

[20]A Yes, if he has no treatment it would be zero. But I

[21]was basing it on the medical expertise **[*77]** of Dr. Richter.

[22]Q That's all you're basing it on, correct?

[23]A Absolutely.

[24]Q How about in your healthcare -- I keep misquoting what

[25]your expertise is -- as a chair of the Department of Healthcare
436

[1]Policy And Management most of your work has to do with policy

[2]and healthcare management, and does that deal with patients

working with their own -- the actual teaching of physicians?

A What I do is I teach about health management and health

policy. What my expertise is in is more policy.

Q Is what?

A Policy.

Q Politics?

A Policy, not politics.

Q Generally when you teach you have an expectation that

the subjects you're teaching about deal with actual patients

going to their actual treating healthcare providers?

MR. WITTENSTEIN: Objection, improper.

Q Correct?

THE COURT: Sustained.

Q Would your opinion -- so your opinion is totally based,

all those facts, all those numbers, is totally 100 percent based

on Dr. Richter's report that you received, correct?

A Correct.

Q It doesn't take into consideration the opinions **[*78]** of the

plaintiff's treating physicians?

A I am not aware of who that is, so no.

Q You are aware that Dr. Richter is not a treating

physician of the plaintiff, are you aware of that?

A No.

437

Q You think he is a treating physician?

A I don't know.

MR. WITTENSTEIN: Objection.

THE COURT: Sustained.

Q You read his report?

A I read his report.

[7]Q Does his report say he is the treating physician?

[8]A No.

[9]MR. WITTENSTEIN: Objection.

[10]THE COURT: Sustained.

[11]Q I will ask it again then. After you read his report do

[12]you now have an opinion whether he is or is not a treating

[13]physician of the plaintiff?

[14]MR. WITTENSTEIN: Objection.

[15]THE COURT: Sustained.

[16]Q Can you tell us based on your formulas the reasonable

[17]cost if the plaintiff did not begin any treatment for 20 years?

[18]MR. WITTENSTEIN: Objection, based on reasonable

[19]cost.

[20]Q What's your opinion to the plaintiff's cost --

[21]THE COURT: Excuse me, overruled.

[22]A So the question is --

[23]Q In other words, if he didn't begin any treatment **[*79]** for 20

[24]years, what's his expenses?

[25]A So if he didn't begin treatment for 20 years it would
438

[1]be roughly in half of what I had done.

[2]Q That's just a ballpark figure?

[3]A Ballpark figure.

[4]Q We got the to point if he did it for about five years

[5]and stopped what would that mean?

[6]A You want me to give you a ballpark figure overall?

[7]Q Yes.

[8]A Probably about 25,000.

[9]Q If the only treatment that he went to was the visits to

[10]the neuropsychologist for the next year and-a-half how much

[11]would his reasonable cost of expenses be?

[12]A 5,700.

[13]Q That's 5,700?

[14]A Yes.

[15]Q That amount, that 5,700 is taking into account

[16]inflation?

[17]A No.

[18]Q You're not assuming there's going to be inflation

[19]because it will be something that's completed in a relatively

[20]short time, correct?

[21]A Yes, correct.

[22]Q So just to sum up, you based this on a hundred percent

[23]on what Dr. Richter's report stated and you did the math?

[24]A Yes.

[25]Q It had nothing to do with policy?
439

[1]A Right.

[2]Q Nothing to do with healthcare **[*80]** management?

[3]A It does in that I did the research on what the last 25

[4]years showed and what we can say -- what the experts from

[5]Federal statistics would say about what's to come in the next 20

[6]years.

[7]Q Is that based on healthcare costs in the United States

[8]or Mexico?

[9]A United States.

[10]Q Did you do -- were you asked to do any opinion as to

[11]what the costs would be in Mexico?

[12]MR. WITTENSTEIN: Objection.

[13]THE COURT: Sustained.

[14]Q Do you know the difference between -- of the amounts of

[15]the healthcare costs in the United States or Mexico?

[16]MR. WITTENSTEIN: Objection.

[17]THE COURT: Sustained.

[18]Q That's based on your opinion if the plaintiff lives and

[19]does all the treatments that's mentioned in Dr. Richter's

[20]reports and remains in the United States and lives for that

[21]period of time, correct?

[22]A Correct.

[23]MR. KEHOE: Thank you very much.

[24]MR. WITTENSTEIN: Very briefly, Judge.

[25]THE COURT: Redirect.
440

[1]REDIRECT EXAMINATION

[2]BY MR. WITTENSTEIN:

[3]Q Doctor, would it be fair to say that you were engaged

[4]solely for the purpose **[*81]** of performing economic analysis of Mr.

[5]Reyes's future healthcare costs within a reasonable degree of

[6]economic certainty?

[7]A Yes.

[8]Q God willing Mr. Reyes lives 20 years longer than what's

[9]in the chart, would the future medical care be more than a half

[10]a million dollars higher than what's currently shown on that

[11]chart?

[12]A If he lived 20 more years, yes.

[13]MR. WITTENSTEIN: Thank you. Nothing further.

[14]THE COURT: Recross?

[15]MR. KEHOE: I have nothing further, your Honor.

[16]Thank you.

[17]THE COURT: Thank you doctor, you may step down.

[18]THE WITNESS: Thank you.

[19]THE COURT: Counsel approach, please.

[20](Whereupon, discussion held off the record.)

[21]THE COURT: Members of the jury, we're going to

[22]recess until Monday. As I told you tomorrow -- we will not

[23]have any sessions tomorrow, you will be able to return to

[24]your normal every day lives and will not have any jury

[25]service for Friday. We will resume the trial on Monday.
441

[1]We'll have a later start, at ten o'clock, not 9:30, ten

[2]o'clock. So I will say to you now, have a good weekend,

[3]see you on Monday at ten **[*82]** o'clock.

[4](Whereupon, the jury left the courtroom.)

[5](Whereupon, the trial was adjourned to Monday, May

[6]11, 2012 at 10 o'clock a.m.)

[7]

[8]

[9]

[10]

[11]

[12]

[13]

[14]

[15]

[16]

[17]

[18]

[19]

[20]

[21]

[22]

[23]

[24]

[25]

End of Document