SUPREME COURT OF THE STATE OF NEW YORK.

COUNTY OF BRONX : CIVIL TERM : IA-4

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VICTOR GONELL, Index: 305966/2009

Plaintiff.

-against-

FAIRWAY MARKET and CARLOS TAVAREZ,

Defendants.

----------x

October 1, 2014
851 Grand Concourse
Bronx, New York 10451

B E F O R E:

HONORABLE HOWARD H. SHERMAN
Justice of the Supreme Court

A P P E A R A N C E S:

REPRESENTING THE PLAINTIFF
BLOCK, O'TOOLE & MURPHY, LLP.
One Penn Plaza - Suite 5315
New York, New York 10119
BY: SCOTT OCCHIOGROSSO & FREDERICK C. ARANKI, ESQS.

REPRESENTING THE DEFENDANTS
FAIRWAY MARKET and CARLOS TAVAREZ
LEWIS, BRISBOIS, BISGAARD & SMITH, LLP.
77 Water Street - 21st Floor
New York, New York 10005
BY: DARRELL J. WHITELEY & JOSHUA M. JEMAL, ESQ.

Monica A. Martinez
Senior Court Reporter

(Whereupon, the jury enters the courtroom.)

THE COURT: Welcome back. Have a seat.

Sorry for the delay. Part of it was there are eight new exhibits we had to admit into evidence, eight. Exhibits 14 through 21 for Plaintiff, which are various medical records. You will hear about them as we go along.

Your next witness is?

MR. ARANKI: Thank you, your Honor. Plaintiff, Victor Gonell, calls Dr. Edwin Richter.

THE COURT: He is outside?

MR. ARANKI: Yes.

THE COURT OFFICER: I got it.

(Whereupon, the witness enters the courtroom and takes the witness stand.)

THE COURT OFFICER: Stand here. Raise your right hand.

Do you solemnly swear or affirm the testimony you give will be the truth, the whole truth and nothing but the truth under the possibility penalty of perjury?

THE WITNESS: I do.

D R. E D W I N R I C H T E R,

called by the Plaintiff, after being duly sworn, testified as follows:

THE COURT OFFICER: Have a seat. In a loud, clear voice, state your name, title, and business address.

THE WITNESS: Dr. Edwin Richter. 166 West Broad Street, Stamford, Connecticut.

THE COURT: Good afternoon, Doctor. Keep your voice up, the acoustics are terrible.

THE WITNESS: I will try, your Honor.

THE COURT: Okay.

MR. ARANKI: May I?

DIRECT EXAMINATION

BY MR. ARANKI:

Q. Good afternoon, Dr. Richter?

A. Good afternoon.

Q. Dr. Richter, are you licensed to practice medicine?

A. Yes, I am.

Q. In what state?

A. In New York and Connecticut.

Q. When did you become licensed to practice in New York?

A. 1989.

Q. And when did you become licensed to practice medicine in the State of Connecticut?

A. 2005.

Q. Can you please tell the jury your educational background?

A. Yes. Starting with college, I went to Harvard University, graduated from there in 1983 with honors with a degree in biology. After that I went to New York University

medical school, graduated from there in 1987. After that I started my internship and residency in the field of physical medicine, rehabilitation. This was also at NYU. This involved an internship with rotations in internal medicine, orthopedics, neurology, and neurosurgery. That was done at Tisch Hospital and Bellevue Hospital. I then went onto do my residency, training in my actual specialty of rehabilitation medicine. That was done primarily at the Rusk Institute, which is the rehabilitation center of NYU Medical Center, but also rotated through Bellevue, Manhattan V.A., Hospital for Joint Disease, and Goldwater Hospital.

Q. Do you currently practice medicine?

A. Yes, I do.

Q. What type?

A. I'm a physiatrist which is another word for doctor of physical medicine and rehabilitation. It is a specialty that takes care of people with disabling conditions, conditions that prevent them from functioning as they normally would. Most typically or most commonly are patients with musculoskeletal problems, problems with the bones, the joints, the muscles, or neurological problems, problems with the brain, spinal cord, or the peripheral nerves, although I do take care of other types of patients such as people with amputations or other medical conditions or accidents that may have caused them to have significant disability.

Q. Do you have an office?

A. Yes, I do.

Q. Where is your office?

A. That is in Stamford, Connecticut, in what is called the professional office building which is physically attached to Stamford Hospital.

Q. Dr. Richter, are you board certified?

A. Yes, I am.

Q. What does it mean to be board certified?

A. Well, in my specialty you have to complete a residency, and then usually during the last year of the residency you take a written exam. If you pass it, as I did, you then have to practice for a year in the specialty and get a recommendation from two other doctors who themselves are board certified, then you take an oral exam.

In my field we go up to the Mayo Clinic. The exam is put on once a year. If you pass that, which I did as well, you are then considered to be board certified or a diplomate in your specialty. It means that in addition to being competent to practice, that you have also achieved a level of expertise.

Q. Do you have any hospital affiliations and privileges?

A. Yes, I do.

Q. Where is that?

A. My in-patient privileges are at Stamford Hospital, which is Stamford, Connecticut. I also have teaching privileges

at New York University.

Q. What teaching responsibilities do you have in New York University?

A. Currently associate professor of rehabilitation medicine. I give lectures at NYU; I lecture in their annual review course, specifically on management of patients with amputations, but I also do a lot of teaching at other institutions around the greater New York area, including my own hospital at Stamford Hospital. I also supervise, mentor some medical students, residents periodically.

Q. And have you ever been published in any medical literature?

A. Yes, I have.

Q. What areas, generally?

A. In the field of rehabilitation medicine which would bring several categories within that. So fair amount about orthopedic problems, fair amount about brain injury or stroke, and then amputation and several other aspects of rehabilitation medicine. I have also written a total of seven textbook chapters, and also edited medical textbook called Medical Aspects of Disability.

Q. When was the last time you participated in the treatment of your patients?

A. Yesterday.

Q. When are you next scheduled to treatment of patients?

A. Tomorrow.

Q. If you weren't here today, what would you be doing?

A. Covering inpatient unit at Stamford Hospital which is a 17 bed inpatient unit where we admit our acute rehab patients.

Q. Now, have you had occasion during the course of your career to testify in court?

A. Yes.

Q. Approximately, how many times?

A. About 80 times.

Q. And is that primarily on cases that you, that involve litigation?

A. Yes.

Q. Have you ever been qualified as an expert in court proceedings in the area of physical medicine and rehabilitation?

A. Yes.

Q. Have you ever been not qualified when you came to court to testify in that area?

A. Not that I recall, no.

MR. ARANKI: Your Honor, at this time, I would like to offer Dr. Richter as an expert in the field of physical medicine, rehabilitation.

THE COURT: Any objection?

MR. WHITELEY: No objection.

THE COURT: Okay.

MR. ARANKI: Thank you.

Q. Have you been called to testify in court for both plaintiffs and defendants?

A. Yes, I have.

Q. Approximately, how many times have you testified for defendants?

A. About 20 times.

Q. And have you been retained by defendants to consult on cases, but you didn't actually end up having to testify in court?

A. Yes.

Q. Approximately, how many times has that?

A. Oh, I would say over a hundred times.

Q. And have you testified in court for plaintiffs, as well?

A. Yes.

Q. Have you ever testified for an individual represented by our firm Block, O'Toole & Murphy?

A. Yes.

Q. Do you know how many times that is?

A. That would be about 12 times, I believe.

Q. And have you also examined and prepared reports for individuals represented by Block, O'Toole & Murphy on cases that didn't go to trial?

A. Yes.

Q. And do you know how many times that you've done that?

A. Um, probably about 50 or 60.

Q. Have you ever testified in a case in which I was the attorney who was questioning?

A. Yes.

Q. And do you recall when the last time was?

A. I believe it was last summer.

Q. How many times other than that?

A. One more time before that.

Q. Are you being -- strike that.

Were you compensated for your examination of Mr. Gonell, your examination of Mr. Gonell in preparation of reports with regard to Mr. Gonell?

A. Yes.

Q. How much were you compensated?

A. In total, $1,750.

Q. And are you being compensated for your time here today away from your practice?

A. Yes.

Q. How much are you being compensated?

A. $3,500.

Q. Dr. Richter, did there come a time when my office asked you to conduct an examination of the plaintiff, Victor Gonell, regarding an accident he had in July 1, 2009?

A. Yes.

Q. Do you recall when the first time it was you examined

Mr. Gonell?

Let me ask you before you answer that question, have you prepared reports with regard to your examination of Mr. Gonell and review of medical records?

A. Yes, I have.

Q. Do you have those reports with you in addition to a file which you are holding right now?

A. Yes, I do.

Q. Would it aid you in testifying today to be able to consult that, your reports and file from time to time?

A. Yes, please.

MR. ARANKI: Your Honor, with the Court's permission?

THE COURT: As needed, if he has to refresh his memory, he can refer to it.

MR. ARANKI: Thank you, your Honor.

Q. So, Doctor, let's go back to my initial question, when did you first examine Mr. Gonell?

A. April 12, 2011.

Q. Did you prepare a report regarding that exam?

A. Yes, I did.

Q. And did you, prior to examining Mr. Gonell for the first time, did your office provide you with medical records with regard to his treatment related to this accident?

A. Yes.

Q. And what records did you review?

A. St. Luke's Roosevelt Hospital, Dr. Jessica Gallina, Dr. Jason Gallina, Dr. Schottenstein, Central Park Physical Medicine Rehabilitation, Behavioral Medicine Associates, Duane Reade and CVS.

Q. CVS Pharmacy?

A. CVS Pharmacy.

Q. And the records that you reviewed with regard to Mr. Gonell, you are looking at your report to refresh your recollection, correct?

A. Yes.

Q. Did you also form a physical examination of Mr. Gonell on April 12, 2011?

A. Yes, I did.

Q. Can you tell the jury what that physical examination consisted of?

A. It consisted of first observing him, noting how he moved, for example. I noticed that he appeared to be in evident discomfort. I looked at how he transfers, which is what we describe, how we describe someone getting on and off a chair, on and off an exam table, and that was very guarded, moving very carefully. He had some difficulty taking clothing off, putting it back on. Complaining that that hurt his back. The way he walked --

MR. WHITELEY: Taking what on, and taking what

off?

THE WITNESS: Taking clothing off.

MR. WHITELEY: Clothing.

A. For purposes of the examination, I looked at how he walked, described his gait as antalgic, meaning he was limping, painful type of gait. I looked at his cane. He had a cane with him, examined that for types of wear. Had significant wear on the cane. I looked at his ankle, saw well-healed scars there, and noticed atrophy, shrinkage of the muscles of the left calf. I measured both sides, both of his legs. At the left calf, the circumference was 32.5 centimeters versus 35 centimeters on the right; about a one inch difference in the measurement around his calf. I measured his range of motion.

At the left ankle I checked the dorsiflexions, bringing your foot off the gas motion, and he lacked five degrees; couldn't get it up to the formal 90 degree position that most of us rest in. He could only plantar flex, which is the step on the gas motion to about 20 degrees; most of us can do about 30 degrees of that plantar flexion, and most of us can do 10 to 20 degrees above neutral of the dorsiflexion. He couldn't get to the neutral position. He had -- his pulses were okay. I looked at his shoes. There was less wear of his left sneaker versus on the right, and less callus on the left foot than the right.

Q. Doctor, can I stop you a second.

What in your opinion is the significance of less wear on the left sneaker versus the right?

A. Putting less of his body weight onto the left side, favoring -- putting more weight on the right side, therefore that puts more wear and tear on the shoe, and the way the skin reacts on the foot, the more work it does or more weight that it bears, the more callus it develops.

Q. Is that consistent with your finding of antalgic gait?

A. Yes, it is consistent with putting less weight by limping. I also looked at his back. I felt the muscles of his back, the lumbar paraspinal muscles were tight and tender; meaning painful to a pressure that would normally not hurt. He had spasm bilaterally, which is a tight contraction of the muscle with abnormal muscle tone. I checked his range of motion, seeing how he could bend forward, lean back flexion. Bending forward was 40 degrees. Normal healthy person should be able to do 80 to 90 degrees. Extension, leaning back, he could only do 10 degrees. Again, a normal person should be able to do 25 to 30 degrees. He reported those were painful, and normally those motions would not be painful. Checked a test called straight leg raising. It didn't do anything on the right. On the left side caused some increased local pain in his lower back.

Q. What is the significance, if any, of a passive straight leg raise test?

A. Straight leg raise can indicate you have compression of

a nerve route or radiculopathy as we call it.

Q. And that is with regard to which body part?

A. In the lumbar spine, low back.

Q. Doctor, during your evaluation of Mr. Gonell, did you also take a history?

A. Yes, I did.

Q. What does that mean to take a history of somebody?

A. Taking a history is when a medical professional asks a series of directed questions of a patient to find out what has happened to them, what is wrong with them, what have they been doing about it in terms of treatment.

Q. What medical history have you provided by Mr. Gonell?

A. He described an accident. He was working as a driver's helper, and he was struck by a forklift, injuring his left lower leg and hurting his lower back. He told me he had still left ankle pain, increased if it, he puts weight on it, even using the cane. Reports he could walk one block, at which point his back pain is aggravated. Pains also aggravated by exposure to cold or weather changes. Told me limited to sitting less than 30 minutes, standing less than 15 minutes before the pain would become severe.

In terms of pain medicine, he was taking Vicodin which is a combination of hydrocodone which is an opioid or narcotic type of medicine, combined with the small does of Tylenol, taking that two to three times a day and Cymbalta, a medicine used both

for depression and also for nerve pain, and taking 30 milligrams of that at bedtime.

Q. Let me just stop you for a second.

A. Sure.

Q. At that time, did he also tell you about any treatment that he was undergoing?

A. Yes.

Q. What did he tell you?

A. He was seeing Dr. Schottenstein, who I understand to be a pain management specialist. He was doing a home exercise regimen that he had been previously instructed in physical therapy.

Q. Did he indicate to you whether he was able to work or not?

A. Yes.

Q. What did he tell you?

A. He had been unable to work.

Q. Did you also take a history with regard to, little bit about his background?

A. Yes. I took an educational and vocational history. He had an eleventh grade education in the Dominican Republic. He had taken a couple of months of English classes after coming to the U S. He had been working doing the delivery job about six years, and before that doing a cleaning job.

Q. Did he relay to you that he had any accidents before

the July 1, 2009 accident?

A. Yes.

Q. What did he tell you?

A. He said he had a remote history, going way back, of a motor vehicle accident for which he had a couple months of physical therapy, and then he made a full recovery from that accident, and was back to work on full duty.

Q. Just to go back a minute, Doctor, you indicated that when you examined Mr. Gonell, April 12, 2011, that you found a positive sign of lumbar spasm; is that correct?

A. Yes.

Q. And what is the significance of a finding of spasm?

A. Spasm is thought to be a defensive reaction that when people are having pain in certain areas that the muscles in that area will tighten up as if trying to protect the person from pain, but it becomes counterproductive because the muscle's very contracted, thought they are not getting proper blood supply or oxygen, so the muscles become very painful in addition to whatever was originally driving that pain.

Q. And the -- you also -- sorry. Strike that.

Is a finding of spasm an objective or subjective finding?

A. Objective.

Q. Can you explain what that means?

A. Sure. Subjective means someone giving an opinion,

saying how they feel, whether they like something or don't like something, whereas objective is something that can be measured; it can be detected without resorting to asking someone their opinion.

Q. Do you also find atrophy --

A. Yes.

Q. -- in his leg, correct?

A. Yes.

Q. And what is the significance of the finding of atrophy?

A. Well, muscles atrophy for one of two reasons. One can be if they loose their nerve supply. So if, for example, the nerve to a muscle gets cut, then the muscle will shrink because it is not getting to work, doesn't get to exercise.

The other reason a muscle will shrink, and in this case we're talking about a leg, so we have the other leg to compare it to, so shrinkage of the left leg when compared to his asymptomatic right leg means he's not exercising those muscles as much, all consistent with the idea he doesn't put as much weight on that side and relying more on the right leg.

Q. So the finding of atrophy was consistent with the other findings you found with regard to the lower extremity?

A. Yes, it is.

Q. After performing this examination of Mr. Gonell, April 12, 2011, and reviewing all the records you indicated you

reviewed, did you form an overall impression of his current, of his, at that time, his state of health and well-being?

A. Yes.

Q. And what were those impressions?

A. He was status post an accident. He had severe Pilon fracture, meaning a fracture that involves weight-bearing surface of the left tibia and fibula; meaning the major bone of the shin, as well as the smaller bone that runs next to it. That was expected to cause posttraumatic arthritis; meaning when you have an injury to a joint, particularly if you have a fracture to part of the bony surface of the joint, it is expected that the person will develop an arthritis there that is not like a rheumatoid arthritis, which is a disease, a medical problem, and not like the normal osteoarthritis that most of us get if we live long enough from wear and tear of everyday life, but post a traumatic arthritis from that particular injury.

He also had lumbar internal derangement; meaning a problem with the discs, causing radiculopathy. Radiculopathy means an irritation of the nerve route because the nerves exit the spine before they go down, in this case into the leg, and he had chronic back pain, left -- chronic left ankle pain, and depression as a result of these injuries.

Q. Now, did you also form an opinion, within a reasonable degree of medical certainty, as to whether Mr. Gonell would need any future medical treatment going forward, based on the injuries

he sustained in the accident?

A. Yes.

Q. What was that opinion?

A. There are several types of medical treatment he's expected to need. He will need follow-up medical care in general across his life span as a result of the accident. This would include seeing pain management specialist monthly, spine specialist six to eight times a year, and an orthopedist six to eight times a year. You need future courses of physical therapy, 36 to 48 sessions per year, and psychotherapy, therapy with a psychologist, 26 sessions per year.

He would need a follow-up MRI of his lumbar spine every two to three years. Follow-up x-rays of the lumbar spine every two to three years, and follow-up lower extremity EMG. EMG is short for electromyogram. It is an electrical test done to test the nerves and muscles, in this case of the lower back and legs, every two to three years.

In terms of the ankle, you need a total follow-up x-rays every two to three years. He was expected to need ankle surgery. This could be left ankle fusion where the surgeon goes ahead and fixes some of the bones so that there is no longer motion-part of the ankle, or total ankle replacement by the age of 50. This would be due to the posttraumatic arthritis I mentioned before. I did give an opinion that the fusion increases the stress on other joints of the leg and also the

back, so the replacement would be preferable for him. If he had the replacement it would be likely needing revision in ten to 15 years, thereafter.

He will continue to need pain medicine, at least consistent with the Vicodin and Cymbalta he was taking, at that time, and he would also need to limit his activities.

Q. Let me stop you.

A. Sure.

Q. I'm going to go back and ask about the different modalities you said he will need. You indicated he's going to need follow up with pain management specialist monthly for the rest of his life expectancy, correct?

A. Yes.

Q. Why is it your opinion that he needs that treatment?

A. Well, number one, he has chronic pain. He has had it for a long time. It is not going to go away on it's own, at this point. He has been getting, at times, some injections as part of this treatment protocol. He is taking a controlled substance, the Vicodin that I mentioned before. It was actually moved to a different schedule by the FDA. It cannot be called in. It has to be a prescription written for a one month supply only. The pharmacy is not allowed to fill a prescription for a bigger amount. So he would need it at least to be going back to see the pain management doctor to get his pain medicine renewed.

Q. And on average, what is the current cost per visit for pain management specialist?

A. $150 per visit.

Q. Where did you get that figure?

A. I get that from a database I use to set my own practice fees, as well as some of the information we have at the hospital.

Q. And the figures that you, that you are going to give the opinion for with regard to all of the medical treatment that you say he -- that you give the opinion he needs going forward, did you get the figures all from the same database?

A. Yes. In terms of the physician fees, yes. In terms of other costs, those are obtained through the hospital.

Q. Okay. You also indicated that he needs visits with a spine specialist six to eight times a year.

Why do you say he needs that treatment?

A. Well, he has an ongoing active problem with his spine. He is having ongoing back pain, and he has a significant risk for progression of his back pain, needs to be monitored, and have therapy supervised at times, such as physical therapy or other devices.

Q. What is the cost per visit for that treatment?

A. $150 per visit.

Q. You also opined he needs visits with an orthopedist six to eight times a year?

A. Yes.

Q. Why do you give that opinion?

A. Because at the left ankle he has the problem with the posttraumatic arthritis and he will need monitoring, and again, periodic courses of physical therapy, or perhaps prescription of other devices. So he needs to be checked up for that.

Q. Cost per visit for that treatment?

A. $150 per visit.

Q. And it is your opinion also that he needs physical therapy treatments going into the future, correct?

A. Yes.

Q. And on average, what is the current cost of each physical therapy session?

A. $125 per session.

Q. And why is it that you feel he needs physical therapy?

A. Well, he has these two problems. He has the one problem with his lower back where he has lumbar radiculopathy, chronic low back pain, and risk for progression of that, and has the left ankle problem which in it's own right is painful and is making it difficult for him to walk; and because that is affecting the way he walks, that is also actually putting increased stress on his lower back.

Q. And how much are physical therapy treatments?

A. $125 per session.

Q. That is current?

A. Current, yes.

Q. You also indicated that he needed psychotherapy visits 26 times a year, correct?

A. Yes.

Q. Why do you feel that?

A. Because he has what we call a reactive depression. His reaction to what happened to him caused him to be depressed. The psychotherapy would be there to treat that.

Q. Average cost per visit?

A. $125 per session.

Q. And why did you give the opinion that he needs an MRI of his lumbar spine every two to three years?

A. He has had significant injury to his lumbar spine. He has, at this point now also had surgery, fusion surgery to his lumbar spine, and he is at risk for progression of his lumbar spine disease as he goes forward. So he needs this to checkup on.

Q. And you gave the opinion that he needs x-rays of his lumbar spine every two to three years as well?

A. Yes.

Q. Why do you feel that?

A. To monitor the status of his fusion. The MRI is much better for looking at the discs and nerves. X-ray gives additional information about the status of the bones.

Q. Dr. Richter, to go back a minute, what is the current

cost of MRI of the lumbar spine?

A. $1,500.

Q. What is the current cost of x-rays to the lumbar spine?

A. $250 to $300.

Q. And you also gave the opinion that he needs a lower extremity EMG every two to three years. Why do you feel that way?

A. That monitors the progression of his radiculopathy, the problem that he has with the nerves coming out of the low back.

Q. What is the average cost of a current EMG?

A. $1,500. That would include the EMG and also a test called nerve conduction done at the same time.

Q. And with regard to the ankle, you indicated that he would need x-rays of his left ankle every two to three years. Why do you say that?

A. Because again, he has had significant bony injury and he will need monitoring. He has, at this point, had removal of hardware, but there is still, I believe, some hardware still in there, and as I mentioned before he's at risk for this progressive posttraumatic arthritis.

Q. What is the current cost of ankle x-ray?

A. $250 to $300.

Q. And the left ankle fusion that you indicate he's

expected to need in the future, by age 50, what is the cost of that surgery?

A. Fifteen to $20,000.

Q. What does that cost include?

A. That is an all-inclusive charge. In other words, that includes the doctors' fees, the surgeon, anesthesiologist, presurgical clearance by a medical doctor. Includes the charges for the surgical hardware, includes charges for the operating room, hospital stay, and the post-op rehab.

Q. And the total ankle replacement that you indicated he may need, what is the current cost of that?

A. That would be forty to $60,000, and again, just as described with the fusion, that would include all the related costs, all of the labor costs of the different doctors, therapists, nurses, as well as the cost of the device itself and the hospital charges.

Q. And the revision of the ankle replacement of 10 to 15 years, what is the current cost of that surgery?

A. Fifty to $70,000. It is somewhat more involved surgery in the initial replacement.

Q. Dr. Richter, you are not a surgeon, correct?

A. No.

Q. You never performed an ankle surgery?

A. Nope.

Q. What is it from what you've reviewed and from your

medical experience and background that allows you to give the opinion that he's going to need these future surgeries to his ankle?

A. Because I have treated many patients who either have had these operations or went on to have these operations after I started treating them, so I have a large amount of experience seeing the patients within this case, a Pilon fracture of the tibia and fibula with disruption of the articular surface, the surface of the bone that bears weight, and in this particular case I've also, not at the time of this initial visit, but I've also reviewed an operative report where doctor directly visualized him having arthritis in the ankle.

Q. And the medications that you indicated that Mr. Gonell is going to need, the Vicodin, what is the current cost of that medication?

A. The cost of his regimen per month would be $40 to $60 per month.

Q. What would be the current cost of the Cymbalta that he was taking, at the time?

A. $180 per month.

Q. Now, did you also form an opinion as to Mr. Gonell's physical limitations?

A. Yes.

Q. What were those limitations?

A. He should be limited to sitting no more than 30 minutes

at a time, standing no more than 15 minutes at a time, walking no more than one block at a time. He should avoid bending or twisting of his lumbar spine. He should avoid any heavy or repetitive lifting, and he would not be able to return to any type of work for which he is qualified.

(Transcript continues on the next page.)

Q. Now, after you examined him in April of 2011, did you then receive additional medical records from my office with regard to additional treatment that Mr. Gonell had after you saw him?

A. Yes.

Q. And what did you review?

A. I reviewed an operative report by Dr. Brisson from December 18, 2012. I also reviewed a post-operative consultation report by the same doctor, dated January 2, 2013.

Q. And are you referring to -- what document are you referring to right now?

A. That's Dr. Brisson.

Q. Did you also prepare a supplemental report with regard to review of those records?

A. Yes, I did.

Q. What was the date of that report?

A. The date is January 30, 2013.

Q. Now, based on the additional records that you reviewed, did you form any additional impressions?

A. Yes, I did. This did not change my impressions regarding the ankle, but it did make a change in my impressions regarding the lower back. The change was that since he's had this lumbar fusion surgery in 2012, there is potential need for additional lumbar spine fusion surgery within 15 years.

Q. And what is the current cost of that surgery?

A. That surgery would cost, again this is all inclusive, $75,000 to $85,000.

Q. And why is it your opinion that Mr. Gonell is going to need that additional lumbar fusion surgery?

A. Well, he had fusion done at two levels of his lumbar spine. He had a third level, which is involved from this accident, and he has some symptoms that relate to it and findings that relate to it, but that level was not fused during this particular surgery. So, that is one reason why he might need this surgery. Also, because he has two levels that are fused, he will have to put more work, more wear and tear on the levels that are not fused. They have to pickup the slack. And that is another reason that can propel him towards repeat surgery. And then, finally, there is always finally the risk of the fusion itself might fail at some point. And that's a third reason why people sometimes go onto revision surgery. Since he has all of these things going on, and he has active symptoms even now, he's at high risk for that revision surgery.

Q. Again, Dr. Richter, you've never performed a spinal fusion surgery before, correct?

A. Correct.

Q. What is your opinion that he's going to need this additional surgery?

A. Because I have treated many patients who had spinal fusion surgery. Some of them I've treated before they had

surgery, I have some patients in my practice right now who are scheduling that type of surgery with a surgeon, and I've treated many hundreds of patients who have had this type of surgery, and I've actually treated many patients who had the revision surgery. So, again, from that amount of experience, I can see the pattern that develops typically. Combine that with my continuing medical education, my reading and attending lectures to stay current in the field, and that's how I put together my opinion.

Q. Did any of your impressions from the report of October of 2011, the report that's dated October 2011, change other than the additional need for lumbar surgery?

A. No.

Q. Did you examine Mr. Gonell a second time?

A. Yes, I did.

Q. When was that?

A. That was April 29, 2014.

Q. And you also prepared a report with regard to his examination that you're referring to right now?

A. Yes.

Q. What is the date on that report?

A. That date is August 26, 2014.

Q. At the time that you examined Mr. Gonell in April of this year, did you also review additional medical records that were provided to you by my office?

A. Yes, I did.

Q. What else did you review?

A. Most notably I reviewed the report by Dr. Gallina, I believe that's Dr. Jessica Gallina. Operative report dated July 27, 2012 regarding removal of painful hardware and arthroscopy. I also reviewed again the operative report of Dr. Brisson.

Q. Did you also take a history of Mr. Gonell again?

A. Yes, I did.

Q. And can you tell me what you found out?

A. He still had pain, the same types of pain. He still gets aggravated by the sitting, standing or walking or weather changes or attempted lifting, just as he had been before. He had the removal of hardware of the ankle, but it was still hurting. His medicines were different at this point. He was taking Tramadol combined with Tylenol. Tramadol is another painkiller medicine. Technically, it's not a narcotic or opioid medicine. However, that's only a technicality, because it really treats the same type of receptors in the brain. So, this is taking the place of his Vicodin. As well as Bupropion, which is an antidepressant, 150 milligrams twice a day. And Clonopin, which is a drug that can be used as a muscle relaxant or anxiety reliever by taking that at bedtime. He was continuing under treatment.

At that point, he was seeing his psychologist every two weeks. His neurologist, who was also doing pain management

for him every eight weeks and spine doctor periodically, and he had not returned to work.

Q. At that time, did you conduct another physical examination of Mr. Gonell?

A. Yes, I did.

Q. What did you find?

A. Again, I observed him to have the guarded transverse limping gait. New finding of his surgical scars related to the back surgery. He had a seven-centimeter scar that's almost three inches on his back, in the low back. And then, in the front on his abdomen, eight centimeters. So, just over three-centimeter scar as well. Those scars were healing well.

I checked his range of motion. He could only flex forward about 35 degrees and extend back 10 degrees. He again had that tightness, tenderness and spasm of the muscles of his lower back. His left ankle range of motion remained very limited. He still couldn't get up to the neutral position. He lacked five degrees from that. And he could only go down about 15 degrees in plantar flexion. Like he was stepping on the gas. Again, that same finding of decreased wear of the sneaker on the left and decreased callus on the left foot when compared to the right.

Q. What was his lumbar spine range of motion like when you saw him in 2014 as compared to when you saw him in 2011?

A. It's a little bit worse. He could flex 40 degrees back

in 2011, and he could only flex about 35 degrees. The extension was about the same, about 10 degrees. Basically, very consistent and still significantly less than a normal person.

Q. Is this restriction or limitation of the lumbar range of motion consistent with someone who has had a fusion surgery in their back?

A. Yes, it is.

Q. Now, did you again form an impression after you examined Mr. Gonell in April of 2014?

A. Yes.

Q. And what were those impressions?

A. Well, at that point, again, he's status post the injuries I mentioned. Pilon fracture, expected to cause post-traumatic arthritis; and the lumbar disc derangement with the radiculopathy; still had the chronic pain, back and ankle; and depression. Continued to need the medical care. Opined that he would continue to need the similar services of the pain management doctor, the specialist orthopedist.

At this point, my research indicated that the E-cost would be $155 per visit. We still need the same physical therapy. The cost to that would be about $130 per visit now. And the psychotherapy, again, the same number of sessions, now costing $130.

In terms of follow-up on the lumbar spine, he still needed the same testing regimen as I mentioned before. He still

needs the same testing regimen I mentioned before on the left ankle and still is looking towards either the fusion or the ankle replacement by age 50. And then, with the replacement, if that's one that is chosen to be revised, in 10 to 15 years. Those costs are still about the same.

He'll continue to need pain medicine with the revised regimen that he's now on, the Tramadol would cost about $70 a month. Bupropion, about $150 a month. Clonopin, $52 a month.

And I indicate the same restrictions on his activity and the same inability to return to any work for which he is qualified.

Q. So, a couple of things from what you just said. So, three years, about three years after you examined him the first time, the cost for certain treatment had gone up, correct?

A. Yes.

Q. And you indicated that in your report?

A. Yes.

Q. And the limitations that you indicated he had three years ago, he still has now, correct?

A. Yes.

Q. Now, I just want to direct your attention to the second to last paragraph of your 2014 report. Do you see where I am?

A. Yes, I do.

Q. In that report, you indicated that, "opinions expressed in my previous reports" and you date -- you indicate a date of

5/26/11 of your first report. Is that a typo?

A. Yes, it is.

Q. Your first report is actually dated what?

A. First report is dated 10/18/11.

Q. And then, the next date listed is correct, 1/30/13, correct?

A. Yes.

Q. And then, the date that's after that, 4/22/14. Do you know what that date is corresponding to?

A. Yes, it corresponds to a short letter of clarification that was clarifying the 1/30/13 report to indicate that, as I've just testified a few minutes ago, the opinions that I came forth with in the 10/18/11 report had not changed, that I had merely added on additional impressions based on the 1/30/13 report.

Q. Okay. Now, I believe you had said -- I'll just ask. Have you ever treated in your practice and at the hospital patients with ankle injuries similar or to the one that Mr. Gonell had in this accident?

A. Yes, I have.

Q. And how often have you had to do that?

A. Oh, probably about a hundred or so.

Q. Have you ever referred patients with injuries, such as the ankle injuries that are the type that Mr. Gonell had, to other specialists?

A. Frequently.

Q. What type of specialists?

A. Other types of specialists, orthopedists, most commonly. Sometimes pain management doctor or a neurologist if he might have some associated nerve problems. Those would be the most typical ones. Maybe occasionally a rheumatologist.

Q. How about a psychologist?

A. Yes. Certainly if we're talking about non-physician, psychologists, physical therapists, sometimes an occupational therapist, those would all be common.

Q. Would you say the same for patients that you've treated that have had back injuries and surgeries similar to what Mr. Gonell had?

MR. WHITELEY: Objection.

THE COURT: Sustained.

Q. What would be the reason that you would refer a patient with injuries similar to what Mr. Gonell had to a psychologist or psychiatrist?

A. This is something that I've done actually on many occasions, both at Rusk Institute and now at Stanford Hospital. Because patients who suffer injuries that caused them chronic pain and/or injuries that limit their function, that keep them from performing the way they used to, often get what we call a reactive depression. I use that term reactive to distinguish from the people who seem to get a depression because of some genetic problem or a chemical imbalance in their brain. But this

this case, it's reacting to the injury, the pain, and the related disability.

Q. Doctor, I'm going to ask you to assume that there was testimony in this court that on July 1, 2009, Mr. Gonell was standing, and was struck in the back and buttocks by a forklift travelling at a speed of eight to ten miles an hour.

MR. WHITELEY: Objection.

THE COURT: Sustained as to the speed.

Q. Everything but the speed. You got that? Okay?

A. Yes.

Q. Also, assume there was testimony that the impact was severe. Assume that there was testimony that Mr. Gonell was knocked to the ground and that the forklift ran over his left ankle. I want you to also assume that he was taken to the hospital by ambulance. The hospital's records with regards to Mr. Gonell's initial hospitalization are in evidence. Also assume that Mr. Gonell was diagnosed with a Grade III Pilon open left ankle fracture, underwent three surgical procedures as per the records in evidence. Also assume that Mr. Gonell testified that he never suffered an ankle injury prior to this injury, or ever had any treatment related to his left ankle. Now, based on all those assumptions, your review of the medical records, your examination of Mr. Gonell, do you have an opinion within a reasonable degree of medical certainty that whether Mr. Gonell's left ankle injuries and treatment were related to the accident of

July 1st, 2009 or before?

A. Yes, I do.

Q. What is your opinion?

A. They're all related to that accident.

Q. And would that include the post-traumatic arthritis that you mentioned in your initial report?

A. Absolutely.

Q. Why do you give that opinion?

A. Well, Mr. Gonell had an accident involving, I mentioned about of the pilon fracture. This refers to the fact that he has the weightbearing surface of the main bone of his lower leg that was damaged in this fracture. He had surgery to try to put it back together, but it is well-known and accepted in literature that patients with this type of fracture are at very high risk for going on to develop post-traumatic arthritis. We also have the benefit of Dr. Gallina's report, her arthroscopy, where she actually looked inside his ankle and saw arthritis. It's not a question of whether he's going to develop it in the future, it's he has it now. And it is my opinion, based on my experience and knowledge of the literature, that this will progress and get worse over time. Because even though he's trying to favor it and limp on it and put less wear on his shoe, he still has to put some wear and tear on it. So, that's going to be piled on top from the damage from the fracture itself.

Q. Now, Doctor, I want you to assume that after the

accident of July 1st, 2009, Mr. Gonell testified that he was on pain medication and was non-weight bearing for several weeks after the accident.

Also, please assume that Mr. Gonell testified that ones he was on his feet and using crutches, he became aware of lower back pain that radiated to his lower extremities. Assume based on the records that are in evidence that he underwent physical therapy, lumbar injection therapy, took pain medication, and that none of these modalities resolved his ongoing radiating back pain, lower back pain. Also assume in 2011, Dr. Gallina, Dr. Jason Gallina, whose records are in evidence, diagnosed him with tearing in his disc. And assume that as a result of his back injuries, he came under the care of Dr. Paul Brisson, spinal surgeon whose records are also in evidence. And he had a lumbar fusion surgery during which Dr. Brisson found an annular tear in his lumbar spine.

Based on these assumptions, the medical history that you took, and your examinations of Mr. Gonell, and review of all the medical records, do you have an opinion within a reasonable degree of medical certainty as to whether Mr. Gonell's lumbar spine injuries are related to the subject accident of July 1st, 2009?

A. Yes, I do.

Q. What is that opinion?

A. They are related.

Q. Why do you say that?

A. Well, Mr. Gonell was, at the time of this accident, about 38 or 39 years old. And he was functioning as a person doing physical work. He did have a remote history of a back injury, where he had that couple months of P.T., but he made a full recovery from that and was acting, working, not having problems with his back. He then has this accident and once he's allowed to get back up on his feet, as he starts to recover from the most acute part of his ankle injury, he's getting back symptoms. He gets treatment for that, what we call conservative treatment, pills, shots, therapy, which don't make you get better. And he eventually winds up having this surgery by Dr. Brisson in which Dr. Brisson sees what he describes as annular tears, tears of the lining of the disc. And that's a very good explanation for why his back is painful. And that is something that can be caused by this type of accident.

So, he went from functioning well, not having back problems, to having these back problems and with a finding at surgery. It's all consistent with that.

Q. Now, do you also have an opinion within a reasonable degree of medical certainty as to whether the future treatment that you testified he's going to need going forward has a causal relationship with the forklift accident of 2009?

A. Yes, I do.

Q. What's your opinion?

A. All of those treatments and tests that I described are related.

Q. Now, you indicated that he had told you he had a remote history of a prior accident, correct?

A. Yes.

Q. I want you to assume that Mr. Gonell had a motor vehicle accident in 2002. Assume that he underwent conservative treatment for about three and a half months, and that he had no treatment from early 2003 and for the ensuing six years after that, until the date of our accident, July 1st, 2009, for his left ankle or his lower back. And that there has been testimony by Mr. Gonell, please assume that there has been testimony by Mr. Gonell that during those six years, he worked as a driver's helper on a delivery truck with no restrictions or limitations. And you were also provided copies of medical records from 2002 to review, correct?

A. Yes.

Q. And you reviewed those records?

A. Yes, I did.

Q. Based on your review of the records and the assumptions that I just gave you --

MR. WHITELEY: Objection. When was he given these records?

MR. ARANKI: Your Honor, who is conducting the examination, me or Mr. Whiteley?

THE COURT: Overruled.

MR. WHITELEY: The reports.

MR. OCCHIOGROSSO: Subject --

THE COURT: When we get to cross, if that comes out, I'll deal with it then.

Go ahead.

Q. Dr. Richter, when did you review the medical records from 2002?

A. That was within the last few days.

Q. Okay. Now, based on the assumptions, the review of the medical records and everything else that you've been testifying about today, does that change your opinion as to whether Mr. Gonell's left ankle injuries and the treatment he needs for those injuries going forward are related to the accident of July 1st, 2009?

A. It does not change my opinion.

Q. Based on the assumptions and your testimony and your review of the medical records from the 2002 accident and the 2009 accident, does that change your opinion as to Mr. Gonell's back injuries, the surgery, the lumbar fusion surgery and the treatment you opine that he needs going forward are all related to the subject accident of 2009? Is it still your opinion that it was --

A. Yes.

Q. Okay. And why do you feel that way?

A. Well, I had the opportunity to review those records. I noticed that he had very minimal radiologic findings on his MRI. Just some mild disc bulges. He had conservative therapy, but no surgery. And he was found by a number of doctors and other practitioners to be able to go back to work, which he did. And the proof is in the pudding, in terms of the functions. That he was able to go back and work for several years.

Q. Doctor Richter, do you have an opinion within a reasonable degree of medical certainty as to the permanency of Mr. Gonell's ankle injuries?

A. Yes, I do.

Q. What is your opinion?

A. Those are permanent.

Q. Why do you feel that way?

A. He has evidence from the operative report of arthritis within his ankle. He has decreased range of motion that was very consistent across the two times I examined him. And he has atrophy, decreased muscle bulk there. These were all long term things that have persisted now for several years since the accident.

Q. And Dr. Richter, did you have an opinion within a reasonable degree of medical certain as to the permanency of Mr. Gonell's back injuries?

A. Yes, I do.

Q. What is that opinion?

A. That is also permanent. He did have these tears in the lining of the disc. He had to have fusion surgery. So, that's a permanent change of his spine. He is affected with this for the rest of his life. So, it is permanent.

Q. Doctor, do you have an opinion within a reasonable degree of medical certainty as to Mr. Gonell's ability to return to work for any type of job for which he's qualified?

A. Yes, I do.

Q. What is your opinion?

A. He is not able to return to work for any such job.

Q. On what do you base that?

A. I mean, first of all, I factor in his abilities, such as his education and his work background. So, he doesn't have the type of background for an office job. He's been doing physical types of work his whole life. He has limited education. He has limited ability to tolerate sitting, standing or walking. So, again, in addition to not being able to do the physical work that he can't do because of his back and ankle, he's again a poor candidate for an office or clerical type job as well.

Q. Thank you.

MR. ARANKI: Your Honor, subject to any redirect, I have no further questions.

THE COURT: We'll take a five-minute break before we begin cross. Please don't discuss the case.

COURT OFFICER: All rise. Jury exiting.

(Whereupon, the sworn jurors exited the courtroom.)

THE COURT: You can step down. I think he probably wants to look at your paperwork.

THE WITNESS: Sure.

(Whereupon, the witness was escorted out of the courtroom.)

COURT OFFICER: Jury entering.

(Whereupon, the sworn jurors enter the courtroom and take their respective seats.)

THE COURT: You don't have to sit down. You know it's getting late. Rather than start and stop in the middle, the doctor's schedule is such that he'll be able to come back tomorrow morning. It benefits all of us, so we'll stop now. Counsel will do his whole cross tomorrow morning, then we have one other witness. Just in terms of witnesses, a bit of an update.

I told you there is a possibility of another day, tomorrow afternoon, because of one juror's medical appointment. I'm not sure, but one of you has a medical appointment. We'll stop at lunchtime. Maybe go a little into the lunch hour, but by 1:30 stop for the day. So, you'll have tomorrow afternoon off, except who has a doctor's appointment. I wasn't going to give you up.

Then, Monday, another one of you members has

another doctor's appointment that will take all day. So, we won't meet Monday. That is the last schedule of not working full days. Subject to emergencies, witnesses, but after that, we'll go everyday. So, to accommodate your schedules, half a day tomorrow, off Monday. And Friday, looks like it's going to end by lunchtime, too, even if we work a little into the lunchtime to get out early for the weekend on Friday.

So, tomorrow morning we'll do a couple of witnesses. Friday morning we have a witness. Tuesday, we go back to sort of like today, morning and afternoon. So, I'm going to ask you to be here at 9:30 tomorrow morning, just like today. I appreciate your coming here on time. The doctor will be back at 9:30, we'll finish him, and then hear the next witness. Other than that, and we'll still on -- those of you who have limited days to do this, we are still on schedule to finish this trial in the time you have and that they sort of warned you about when we started.

Have a good night. Don't discuss the case.

COURT OFFICER: All rise. Jury exiting.

(Whereupon, the sworn jurors exited the courtroom.)

(Whereupon, the Court stands in recess, and the case is continued to Thursday, October 2, 2014, at 9:30 a.m.)

SUPREME COURT OF THE STATE OF NEW YORK.

COUNTY OF BRONX : CIVIL TERM : IA-4

----------x

VICTOR GONELL, Index: 305966/2009

Plaintiff.

-against-

FAIRWAY MARKET and CARLOS TAVAREZ,

Defendants.

----------x

October 2, 2014
851 Grand Concourse
Bronx, New York 10451

B E F O R E:

HONORABLE HOWARD H. SHERMAN
Justice of the Supreme Court

A P P E A R A N C E S:

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Monica A. Martinez
Senior Court Reporter

THE COURT: Ready.

MR. WHITELEY: All set.

THE COURT: Okay.

THE COURT OFFICER: All rise. Jury entering.

(Whereupon, the jury enters the courtroom.)

THE COURT: Good morning. Welcome back. Have a seat.

Whenever you are ready.

MR. WHITELEY: Good morning, your Honor.

CROSS-EXAMINATION

BY MR. WHITELEY:

Q. Hi, Doctor. How are you?

A. Fine, thanks.

Q. Dr. Richter, can you tell me, you are a treating doctor, that is what you talked about yesterday a little bit?

A. Yes.

Q. You actually treat real patients and do work for them and prescribe them -- refer them out to other doctors an things like that?

A. Yes.

Q. And you treat all types of injuries, very serious injuries to more modest injuries?

A. Yes.

Q. And Doctor, in terms of your background a little bit, you said that you went to Harvard College and NYU, correct?

A. That is right.

Q. And you went to prep school, or did you say that, or from the resume?

A. That is probably from the resume, it is true.

Q. Debating club, as well?

A. Yes.

Q. Okay. And Doctor, you treat patients what percentage of the time in your practice today?

A. Percentage of time, it is about 90 percent or so.

Q. So this is something that is different than that, correct?

A. That is right.

Q. And this is, you are hired for a specific purpose and the purpose was not to treat a patient, correct?

A. Correct.

Q. You never treated Mr. Gonell for anything, correct?

A. Correct.

Q. You were in fact hired by the law firm who represents the plaintiff for a specific purpose, correct?

A. Yes.

Q. And that specific purpose was to prepare a life care plan, correct?

A. Yes.

Q. What is the purpose of preparing a life care plan?

A. To layout the future needs of that patient, what they

will need in terms of future treatment.

Q. Wouldn't it be fair to say, Doctor, that the purpose of preparing a life care plan, the purpose for which you were retained is to try to maximize the amount of recovery for the plaintiff?

A. That is not my purpose.

Q. Sir, this isn't the first time you've testified for the Block O'Toole law firm, is it?

A. No.

Q. You said yesterday you testified at least 11, 12 times for them?

A. Something like that, yeah.

Q. In addition to the times you've testified for them in court, you've been retained over, I think you said 50 times to do work for, just like you are doing today, to prepare a life care plan, right?

A. Yes.

Q. And you did get to court on those occasions, correct?

A. Correct.

Q. It is as many as 60 times you've been retained to look at one of the clients they are representing, correct?

A. Yes.

Q. And in each of those occasions, purpose is to prepare a life care plan; you are saying it is not your purpose to try to maximize the value of the recovery?

MR. ARANKI: Objection. Asked and answered.

THE COURT: Overruled. Is that what you are saying?

THE WITNESS: That is what I'm saying, yes, it is not my purpose.

Q. You remember the case you were in, don't you, it was also with the Block O'Toole firm, it was the Jacobs case, correct?

A. I don't independently recall that.

Q. Just last year, September of last year, you don't have any memory of it at all?

A. Not specifically. I don't know any of the details.

Q. But you went to court on that case didn't you, sir?

A. Sure.

Q. You do remember going to court?

A. Yes.

Q. And when you go to court, you swear to tell the truth, you take an oath, correct?

A. Yes.

Q. And you testify just like you do in here to this jury, right?

A. Yes.

Q. Sir, do you remember being asked the following question and giving the following answer in the Jacobs trial under oath, Page 66, Line 4:

"QUESTION: So when you were retained by them and the other plaintiff's counsel, when they call you as a witness, you know you have to draft a life care plan and that maybe discussed in court, correct?

"ANSWER: Yes.

"QUESTION: And you know when you retained in these situations, the life care plan is to maximize the person's, client's recovery, correct?

"Yes."

Do you remember being asked those questions and giving those answers?

A. Yes, I do. I remember that very well.

Q. So the purpose of being retained to do a life care plan is to try to maximize the plaintiff's recovery, that is what you testified to under oath, right, sir?

A. Yes, but I misunderstood the question.

Q. I see. So you didn't want to maximize the person's recovery in that case?

A. I was interpreting the word recovery in the sense of a medical recovery. The person's improvement of care. I didn't realize until some of the follow-up questions that he meant it as recovery of money.

Q. Sir, a life care plan is about money, isn't it; it is a life care plan.

What you've done on your direct testimony in every

single instance you said how much something costs, right?

A. That is correct.

Q. And you told this jury about all the type of treatment that you think that Mr. Gonell is going to need in the future, and you went and added what the cost of all that treatment would be, right?

A. That is right.

Q. And you put down the cost of $150 for certain treatments, $155 for certain treatments, $1,500 for MRI's, you said how many times that this person in your opinion might need those treatments for the rest of his life, and the purpose is to get the dollar value times the number of treatments, right?

A. That's right.

Q. And that is to maximize the value of the recovery of the plaintiff, correct?

A. My perspective is that I'm trying to make it the most accurate recovery if you want to use that term.

Q. Okay. Let's talk a little about the accuracy of that, sir.

Sir, the first thing that you testified about was that the plaintiff would need future psychotherapy visits, correct?

A. Yes.

Q. And you said he would need 26 visits across his entire life span, correct?

A. Yes.

Q. That is your official testimony from yesterday, right?

A. Yes.

Q. And if you multiply 26 times 32 years, let's just take average life expectancy, do you realize that is 832 psychotherapy treatments that you are recommending as your testimony, sir?

A. Yes.

Q. 832 times, and you are saying each one of those is going to cost $130; is that correct?

A. Yes.

Q. Now, sir, you were shown certain records, you were given records by the plaintiff's attorneys, right, in preparation for this?

A. Yes.

Q. You prepared reports, three different reports, right?

A. Yes.

Q. The earliest in each of those reports you put the dollar value; how many types of treatment you recommended this guy would need to have, right?

A. Yes.

MR. WHITELEY: Excuse me.

(A brief pause.)

Q. And, sir, the records you were given, were you given for instance the billing records for the treatment the plaintiff already incurred from the time of the accident up until now?

A. Not that I recall, no.

Q. So you had put all these billing suggestions, but never really looked at the actual medical bills, is that your testimony here today?

A. Yes.

Q. So the real cost of what actually has taken place, you wouldn't realize he had psychotherapy treatment, right?

A. Yes.

Q. And presumably those things had a certain cost, didn't they?

A. Yes.

Q. You never looked at those costs?

A. Correct.

Q. They are not in your file, are they?

A. No.

Q. And you realize he has had MRI tests, correct?

A. Yes.

Q. But you never looked at what the MRIs have cost Mr. Gonell?

A. Correct.

Q. So instead, yesterday I think you said you were looking at some kind of database, right, some database of yours?

A. Yes.

Q. That is where you got all the costs, right?

A. That is right.

Q. Don't you think it would have been a little bit more accurate, sir, to look at the actual costs being incurred by Mr. Gonell for the same tests that you are recommending he have across his whole life time?

A. Not in terms of future. Different providers may charge different amounts. These are going to be averages. I don't know where he will go for his various tested treatment in the future.

MR. WHITELEY: Let's mark this for I.D. Not sure what we are up to.

THE COURT: We are up to GG.

(Whereupon, the item referred to is received and marked Defendant's Exhibit GG for Identification.)

MR. ARANKI: Your Honor, can we see a copy?

MR. WHITELEY: It is in evidence.

MR. ARANKI: Can I know what it is, please.

THE COURT: What is it?

(Shown to counsel.)

THE COURT: It is in evidence already?

MR. JEMAL: No, it is not. Not yet. There is a certification, copy here.

THE COURT: Okay.

MR. JEMAL: From the subpoenaed records.

THE COURT: I'm only asking because if it is in evidence, we don't have to --

MR. WHITELEY: No, it is I.D.

MR. ARANKI: Can we approach?

MR. OCCHIOGROSSO: Can we approach?

THE COURT: Okay.

(Whereupon, the following discussion takes place on the record, in the robing room, in the presence of the Court and counsel, and out of the hearing of the jury.)

THE COURT: It is a Workers' Comp billing.

MR. OCCHIOGROSSO: Claims register and before the reporter was here, Mr. Whiteley's representation was he doesn't plan on offering it.

THE COURT: Just show it to him regarding costs and --

MR. WHITELEY: Yes, at this time.

MR. OCCHIOGROSSO: Yes, but my --

MR. WHITELEY: Where it offered --

MR. OCCHIOGROSSO: Hold on.

MR. WHITELEY: The issue on the Workers' Compensation would be redacted.

MR. OCCHIOGROSSO: He just said that the numbers that he uses in his report are averages, and that it can differ from provider to provider. So I don't know what the basis is to show him a Workers' Compensation register.

MR. WHITELEY: These are the actual costs he incurred, Judge.

MR. OCCHIOGROSSO: He already said he uses an average.

THE COURT: To the extent he's not offering, use it, we're not going to talk. Only concern is that if the witness mentions Workers' Compensation.

MR. WHITELEY: I'm not going to mention Workers' Compensation.

THE COURT: I don't want him --

MR. WHITELEY: These are the records for actual payment of treatment I will say.

THE COURT: And let him look at it, you can ask him about --

MR. WHITELEY: Specific.

THE COURT: -- how cheap it was or why $150 for you.

MR. JEMAL: Sixty percent, or 50, 40 percent the estimates are.

MR. ARANKI: The reason why it is improper at the end of the case, we are planning on putting in the actual billing records. If Comp paid less than what was actually --

MR. OCCHIOGROSSO: Billed, that is different.

MR. ARANKI: That is a collateral source issue -- let me finish. For him to start asking questions about, well, didn't he actually only pay $64 for Dr. Brisson, it is

going to get backdoored is what I'm afraid of.

THE COURT: Okay.

MR. ARANKI: No offense, this isn't the first time it was tried to be done.

MR. WHITELEY: The medical costs are listed and amount paid are listed. They are the same numbers. There is no list versus deducted price. Here hospital receive values 812, I'm out. Non-reimbursed 812, I'm out, 812. Every one of these numbers is the same as everyone of these numbers. These are the actual treatments. It is absolutely critical in establishing a future life care plan to know what the history of payment is. Every single case I've ever had we put this right into evidence or been able to cross-examine on these costs. These are the costs, this is the actual history.

THE COURT: All right.

MR. WHITELEY: I'm not going to say Workers' Compensation, and I'm going to ask him not to read -- I don't have --

THE COURT: To the extent, I don't want to bring up Workers' Compensation, I don't want to talk about what was billed, what was paid, although in this case it may very well be --

MR. WHITELEY: I will tell him this is -- the actual billing, is this a history of the actual billing

records that are incurred by Mr. Gonell.

MR. OCCHIOGROSSO: How can he authenticate that?

MR. WHITELEY: He will look at the different surgeries.

MR. OCCHIOGROSSO: He's not qualified.

MR. WHITELEY: He's qualified.

MR. OCCHIOGROSSO: He said --

THE COURT: I'm not putting it in evidence. I'm not going to let him read from it, talk about Workers' Compensation.

MR. OCCHIOGROSSO: Or try to put it in from the witness.

MR. WHITELEY: He's familiar with the doctors.

MR. OCCHIOGROSSO: Doesn't mean --

MR. WHITELEY: He read the records, put all the records in evidence, Judge.

THE COURT: Are you offering on his testimony?

MR. WHITELEY: Um, I don't believe I will, but I would like to, you know, have that option.

MR. OCCHIOGROSSO: No. My point is that --

MR. WHITELEY: I will stop, approach if I do.

MR. OCCHIOGROSSO: That is not an option.

THE COURT: I will let you question him about the billing numbers for these services by these doctors. No mention of Workers' Compensation insurance, reimbursement,

just what was billed.

MR. WHITELEY: The actual billing.

THE COURT: If you start to get to a point where you think you want to offer this, let me know, we'll --

MR. OCCHIOGROSSO: Even to characterize it and give it to him and say this is the actual bills.

MR. WHITELEY: That is what it is.

MR. OCCHIOGROSSO: No, we're not going anywhere yet. And it is already been said in front of the jury it is in evidence when it is not in evidence. He said --

THE COURT: I will tell them it is not in evidence. It is not a problem.

MR. ARANKI: There is no guarantee in the future he will go to the same doctors he went to before.

THE COURT: Doesn't make it improper cross-examination. If this is what he has been paying or someone has been paying on his behalf, up until now for these services --

MR. OCCHIOGROSSO: But what he can be asked -- this is why I'm making the point.

THE COURT: Go ahead.

MR. OCCHIOGROSSO: What he said already about the source of his information is that it is not the actual bills, and that he's taking an average in the future.

THE COURT: From database.

MR. WHITELEY: From a database.

MR. OCCHIOGROSSO: He says the database reflects the average of cost and differs from provider to provider. What is it showing, to do --

MR. JEMAL: To show the average is two-thirds higher.

THE COURT: The providers used so far has been billing at this rate.

MR. OCCHIOGROSSO: Understood. The way to do it now, having looked at that, would you agree --

MR. WHITELEY: You can do that on your --

MR. OCCHIOGROSSO: We will be back here in two minutes.

THE COURT: Okay. Play it by ear.

(Whereupon, the following takes place on the record, in open Court, in the hearing and presence of the jury:)

THE COURT: Okay. The objection is overruled. For the jury's edification, you heard somebody, maybe you heard me say or somebody they believed it was already in evidence. This document is not in evidence. I was mistaken -- maybe I will talk to everybody. Did you all want a quick break. Okay.

(Whereupon, a short recess is taken.)

THE COURT: You okay?

THE SWORN JUROR: Yes.

THE COURT: We'll get you out of here this morning. All right.

MR. WHITELEY: Thank you.

THE COURT: I'm sorry. Juror No. 1, what I said before, believe it or not I was looking there and didn't notice the empty seat. I told your fellow jurors that you heard mentioned by maybe an attorney and by me about this being in evidence already. This -- this document is not in evidence. Okay.

CONT'G CROSS-EXAMINATION

BY MR. WHITELEY:

Q. Doctor, just to recap a second, you are retained here for the purpose, by the plaintiff's attorneys in a civil litigation, correct?

A. Yes.

Q. The purpose of a civil litigation is for money, correct?

A. Yes.

Q. And you are not here as a treating doctor, you are not here to assist or aid Mr. Gonell in terms of any treatment advice, correct?

A. That is right.

Q. Not here to refer him to any of your other doctors that you know, correct?

A. Correct.

Q. You've never done that?

A. That is right.

Q. You've never offered him any medical treatment of any kind, correct?

A. Correct.

Q. Your only purpose was to prepare a life care plan for this law firm for Mr. Gonell, correct?

A. Yes.

Q. And you were paid something like, I think you said $5,250 for your testimony here, and report, and so forth, correct?

A. Yes.

Q. It is only ten percent of what you do; the rest of your job, 90 percent of your time you're actually treating patients, correct?

A. That is right.

Q. But not here. Now, the life care plan that you prepared, you had several categories, and you had several categories, you did the report three different times, right, in 2011, 2013, again in 2014, correct?

A. Yes.

Q. We'll take the 2014 report. That is the most recent one. It is August 26, 2014.

Can you tell me, sir, what you said it would cost,

let's stick to, let's take the first one here with physical therapy. You recommended that the, Mr. Gonell get 36 to 48 visits every single year, physical therapy, for the rest of his life, right, another 30 plus years?

A. Yes.

Q. Have you ever prescribed physical therapy to one of your patients, sir, for 32 years; have you ever said, sir, you will need 32 years of physical therapy to one of your patients?

A. Well, I haven't practiced that long but --

Q. Right. You never do that, that far out into the future?

MR. ARANKI: Objection. That is not what he said.

THE COURT: Well, to the extent that is sort of a separate question, overruled.

Is it true, you never do it that far out into the future?

THE WITNESS: To tell them, no.

Q. But for a life care plan it is the purpose of maximizing the recovery, you do it a whole life time, right, that is what you said in the report here?

A. Yes.

Q. And 36 to 48 visits, what did you say each visit would cost in your report?

A. $130.

Q. Now, I'm going to show you a document marked, not sure

what is on it?

MR. JEMAL: GG.

Q. GG for identification, sir.

(Shown to the witness.)

Q. That is a record of the history of actual payments that Mr. Gonell has incurred, correct?

A. Yes.

Q. Sir, I will ask you to turn to Page 6 of that report. See the number on the upper right?

Who is the physical therapist that Mr. Gonell is treating with?

A. I will try to pronounce it correctly, Joel Dinglisan.

Q. He's the physical therapy?

A. Yes.

Q. The guy that is providing physical therapy to him now, correct?

A. Yes.

Q. And if you go down about, little bit more than halfway down the page, you will see that on a particular date, 12/3/09 there was a billing charge and a billing not paid for a physical therapy treatment, correct?

A. I'm just looking for the dates.

Q. It is underneath the doctor's name where you see Joel Dinglisan. If you go under that SVC for service date, take anyone of them 12/3/09, 12/9/09, pick one, what is the price?

A. $61.60.

Q. So you said to this jury, from your database -- by the way, is your database in your file; I didn't see it?

A. No, it is not.

Q. Where is the database?

A. That is information I've collected from various sources. It is in my office.

Q. Why wouldn't you have it in the file if you are telling the jury they should rely upon your word that you looked at some database; we don't have the paperwork on it?

A. I don't have it with me, no.

Q. Why wouldn't you put it in the file if you are subpoenaed -- we subpoenaed your file to come to court, why wouldn't you bring the database with you?

A. I don't consider that to be part of the file. It is a resource I use.

Q. It is a place where you get all the numbers, right?

A. Yes.

Q. Instead of looking at the actual billing records that Mr. Gonell actually incurred, you went to the database you chose not to bring with you?

A. Yes.

Q. The actual billing record shows that a physical therapy visit cost $61, not $130, correct?

A. On that particular date, yes.

Q. Well, let's go to other dates. How many do you want to see? Look at every time you see Mr. Dinglisan's name in the report.

Tell me if you see anything different than $61?

A. Yes, I do. I see $123,20.

Q. What day?

A. That is --

Q. What page?

A. Same page, 11/19, 11/20/09.

Q. Hold on. Okay. I see one visit for $123?

A. I see three visits for $246.40. The three above that one. The one below I see is $88.55. A bunch of other $61.60.

Q. Would you say the majority of them are, sir, for the average daily treatment is $61.60?

MR. ARANKI: Objection.

Q. Look at all of them, Page 5 --

MR. OCCHIOGROSSO: What is the majority of average daily treatment -- you want him to calculate?

THE COURT: I will sustain as to the form of the question.

You want to ask if the majority of the physical therapy visits on those pages were $61, you can ask that.

Q. I'll adopt that question.

A. I would say $61.60 is the most common amount.

Q. Okay. Let's take the next category.

You said that Mr. Gonell is going to need 12 visits of pain management, isn't that correct?

A. Yes.

Q. Every single year, for the whole, rest of his life, right; again, you've gone out and recommended something for a person's whole life, right, for 30 years or more, correct?

A. Yes.

Q. Even though you would never do that in an actual practice, correct?

A. Correct.

Q. Now, what did you say in your -- in your last report that would -- pain management specialist report visit could cost?

A. $155.

Q. And who is the pain management specialist in this case that Mr. Gonell is actually seeing?

A. For some of -- it is West Side Anesthesiology and some Dr. Schottenstein.

Q. Dr. Schottenstein worked for pain and neuro; pain management guy, right?

A. Yes.

Q. So let's go to Page 6 again of this report. And you said it was $155 for a visit, what is Dr. Schottenstein actually charging for his visit, bottom of the page?

A. Yep, this is $49.26.

Q. And do you see any other Dr. Schottenstein anywhere

else?

A. On this page, no. On the next page I see a visit with him for $139.34.

Q. And on Page 8 you see another one for $49.26, correct?

A. Yep. I see one for $551.81.

Q. Do you have any idea from these records what that actual treatment was that he had, that exceptional number was that perhaps an x-ray, something like that?

MR. OCCHIOGROSSO: He's asking to speculate? Objection.

Q. Do you have any idea, sir?

A. I don't know what that was.

Q. The average visit, if you look at most of Dr. Schottenstein's visits, the average visit costs $49.26, would you say that is correct?

A. That is the most common, yes.

Q. Let's go to the spine specialist.

Who is the spine specialist that Mr. Gonell is actually treating with?

A. Dr. Brisson.

Q. And Dr. Brisson -- first of all, what did you say a spine specialist would cost Mr. Gonell each and every time he had to go to one?

A. On average, $155 per visit.

Q. You said he needed to go six or eight times a year

again for the rest of his life, right?

A. Yes.

Q. Who is the treating doctor, spine specialist here; isn't it Dr. Jason Gallina?

A. On these bills it might be, yes.

Q. Page 11?

A. Okay.

Q. Right at the top of the page, what is Dr. Gallina charging for office visit --

MR. ARANKI: Objection. That is Jessica, not Jason.

Q. Sorry about that. Sorry. Page -- be right with you.

(A brief pause.)

Q. Page 16, sir, Jason Gallina. About three quarters of the way down the page, what does Jason Gallina charge for a visit for the spine specialist treatment?

A. $64.07.

Q. As opposed to $155 from your database?

A. Yes.

Q. You talked about MRI's. You said that somehow you knew that Mr. Gonell would need MRI's, two or three times a year, all the way for the rest of his life, correct?

A. No, every two to three years, not --

Q. Didn't you say each of the MRI's were going to cost him --

A. $1,500.

Q. He has had MRI's in this treatment, right, he actually had MRI's, right?

A. Yes.

Q. Can you tell us, sir, how much they've actually cost him; rather than $1,500, there is a couple here -- I will show you to save time, you can turn to Page 4?

A. Okay.

Q. At the bottom of the page, MRI from East River Medical?

A. Okay. $912.

Q. So not $1,500, but $912?

A. That's correct.

Q. Now -- then there were some big ticket items you listed out in terms of trying to maximize the recovery. You talked about some surgeries that you thought that Mr. Gonell might need at some point, correct?

A. Yes.

Q. And one of those surgeries -- it was a little confusing to me. In your earlier report in 2013 you said he needed another lumbar fusion surgery, right?

A. Yes.

Q. But in your most recent report, in August of 2014, there is no lumbar surgery required, correct?

A. That is an omission on my part.

Q. Because I thought you said you included the report of

12/18 showing he had the lumbar fusion surgery, I thought that was the reason he didn't need a fusion surgery?

A. No. That is an omission that I do now see on my part in terms of my 2014 report. What I was --

Q. Sorry. In your 2013 report you didn't have any reference to the 12/18/12 surgical procedure that Mr. Gonell actually underwent, right?

A. No. In my 2013 report I do reference the surgery, I reviewed his operative report, and post-operative note, and that is where I offered the opinion about the potential need for the additional lumbar spine fusion surgery, and it is an omission or error on my part not to have included that again in 2014.

Q. So -- but the 2014 report you say you are reviewing the operative report, correct?

A. Yes, and I also say that in 2013 as well.

Q. To be clear, Mr. Gonell, according to your review here had discectomy and fusion at L3/4, L4/5 levels, correct?

A. Yes.

Q. And you said that in terms of -- first of all, you didn't say anything about him needing future surgery in your most recent report, correct?

A. That is correct.

Q. Mistake on your part you are saying?

A. Yes.

Q. You did in the last report, opined he needed one and

it would cost 75 or 85. How much did you say it would cost him for the surgery?

A. Yes, 75 to $85,000.

Q. And you are aware now as -- that he actually had the surgery to the same levels, right, L3/L4 fusion and discectomy?

A. Yes.

Q. And there is a charge for that surgery that took place, right?

A. Yes.

Q. What is that charge, Doctor, and you can turn to Page 26?

A. Okay.

Q. Surgery took place on December 18, 2012, right, that is what your notes say?

A. Yes, indeed.

Q. And there is a charge, surgeon was Dr. Brisson, correct?

A. Yes.

Q. Charge from Dr. Brisson was $17,800, not 75 or $80,000, do you see where it says that, sir?

A. I do, indeed.

Q. Funny. And then --

MR. ARANKI: Objection.

THE COURT: Stricken.

Q. There are some additional charges as surgical would

have; some neuro charges, another three grand, then you turn to the next page, there is a couple of costs of $7 that he had on that same date, do you see that, Page 27?

A. Yes.

Q. And did he -- go all the way over to Page 28. You see there is another $1,100 being charged by North American Partners. I don't know who that is. It is the same date, 12/18, let's throw that all in on the surgery.

A. Yes.

Q. Is there anything else you can see, take whatever time you need, that would have been a cost for that surgery?

MR. OCCHIOGROSSO: Your Honor, I ask the court take judicial notice the fact that is a 34 page document, containing 34 pages of billing records for medical treatment Mr. Gonell has received from the date of the accident to the present, and he is now asking the witness to go through it.

MR. WHITELEY: It is all in chronological order, more or less.

THE COURT: To the extent it is chronological and asking about one date, I will take judicial notice it is 34 pages.

MR. OCCHIOGROSSO: Thank you, your Honor.

MR. WHITELEY: In chronological order by date.

Q. Any other charges for the December 18, 2012 surgery,

sir?

A. I'm looking for the hospital charge, but I don't see it.

Q. Sir, the total charge for the surgery, according to the records of payment was just a little bit over $20,000, isn't that correct?

A. From what I've seen, yes.

Q. Not 75 or $80,000, correct?

A. Correct.

Q. Now, you also said, just so I'm clear and the jury is clear, that he needed either an ankle fusion or an ankle replacement, but not both, correct?

A. Correct.

Q. And you are saying he needs one which cost 15 to 20, another which would cost 40 to 60, correct?

A. Yes.

Q. Do you have any indication of what the original ankle surgery cost?

A. No.

Q. Isn't that something that would be in the, in this payment history as well?

A. Should be. I see a bill from Dr. Gallina for $5,211.

Q. What is the date of that?

A. That is 7/1.

Q. The date of the accident, right?

A. 7/8. I see a $75 charge from St. Luke's Roosevelt which is obviously not the total hospital bill. I see another one from St. Luke's for $87.87 from 7/1 to 7/9 -- 7/1, rather. There is a Weinberger, not sure who that is.

Q. What is the date?

A. I'm sorry. Those are later dates.

Q. Let's take all the days, all the treatment on July 1st, July 2nd, July 3rd, anything you see more than a couple thousand dollars?

A. Yeah, there is a radiology bill for $213.

Q. You have that in a separate category, right; you have x-rays, MRI's, EEG's -- we'll get to those. Talking about the surgery?

A. Yeah, I assume that was related to the surgery since it was the same date. There is a bill for E-B-I-D-B-A Bio -- the date is 8/14 for $3,300 item.

Q. Okay. That is a month after the surgery?

A. But that might be a bill for surgical hardware. I'm not sure what that is.

MR. WHITELEY: I will move to strike that.

THE COURT: Stricken. And let's just -- do you have a question, because otherwise it is becoming like a conversation.

Q. Yeah. The point is, sir, the surgery that Mr. Gonell had for his actual ankle, the surgery he actually did have that

we know about, because of his injury to his ankle, cost somewhere between five and $7,000 according to the records, correct, sir?

A. Yes.

Q. Not 40 or $60,000, correct?

A. No, certainly not.

Q. And that is by his actual treating surgeon, Dr. Jessica Gallina, correct?

A. Yes.

Q. The practicing doctor who actually was treating the patient, correct?

A. Yes.

Q. Now, let's talk about the meds for a bit, because meds cost a lot of money. I notice in the three reports you've done over the last two, three years, the meds have changed?

A. Yes.

Q. Pretty dramatically, right?

A. Yes.

Q. In fact, the meds he was taking only a year ago in 2013, he's not taking any of those meds today, right?

A. Correct.

Q. He's taking totally different meds today than last year?

A. Yes.

Q. But you can come in here for some reason and tell the jury that you know what medicine he needs for every single year

for the rest of his life, correct?

A. I know that he needs something comparable to which I believe is the wording of my report, the medicine he's taking today, consistent with.

Q. You think he needs specific medicine since, and you say that in your report dated August 26, 2014, correct, sir; you want me to read it?

A. Sure.

Q. Will continue to need analgesic medications at least consistent with the current regimen of Tramadol, $70 a month, Bupropion, $150 a month, and Klonopin, $52 a month, correct, sir?

A. Yes.

Q. That is what you said that adds up to about $272 every single month, since you have to do it -- since you say it is across his whole life, you have to multiply that by 32 years, right?

A. That is right.

Q. Even though he's just taking totally different medicine from this year to last year?

A. Yes.

Q. Doesn't seem to make sense, does it?

A. By indication, is that it is something consistent with what he is taking.

Q. Quite a prediction, isn't it, sir?

A. Quite a what?

Q. Quite a prediction?

A. It is a projection.

Q. Let's talk about the prediction you made about the cost of these meds of $272 a month for his whole life time. Let's talk about that.

A. Yes.

Q. You have some records in your file, don't you, sir -- you said on your direct you had records from Duane Reade and CVS. Can you find those for us?

A. Sure. Okay.

Q. Is that where you found out about the cost of the Bupropion and Klonopin and Tramadol?

A. No, it is not.

Q. None of those meds are even in those records?

A. They are not in the CVS records which do contain prices, and those meds are not in the Duane Reade which doesn't contain prices anyway.

Q. But the old meds aren't there, right --

A. The old meds are there, not the current ones.

Q. You made a prediction for 30 years plus, based upon what, what Mr. Gonell told you?

A. Yes.

Q. Because there is no medical record in your file that says anything about what, the meds he's actually taking, are

there?

A. No, I believe he actually brought his medicine to the exam --

Q. Okay.

A. -- so I could write them down.

Q. So a lot of your testimony, sir, is based upon the history that Mr. Gonell gives you, correct?

A. Yes.

Q. And you assume that Mr. Gonell is coming in, telling you the truth, right?

A. Yes.

Q. That is what most of your patients would do if they are actually being treated by you, right?

A. Yes.

Q. Now, Mr. Gonell is not a patient being treated by you, he's here for a different purpose, correct?

A. Yes.

Q. But still think he's telling you the truth, right?

A. Yes.

Q. You said he needs these pain meds every single month, correct?

A. Yes.

Q. Are you aware of how he fills his prescriptions today?

A. Not specifically, no.

Q. You didn't ask him that?

A. My understanding is that he fills them regularly.

Q. Were you aware he uses Express Scripts; it is like mail order for pharmaceuticals?

A. No.

Q. Never told you that?

A. No.

Q. You never saw any records from them, right?

A. No.

Q. But the records are here in -- the same billing records, because this is the actual record of the billing for the meds that he's taking, same document; you want to take a look at it?

A. Sure.

Q. Let's go back a full year from the point of time when you changed to say he wanted those two meds in 2013, to the point in today where you are saying he needs three other ones?

A. Uh-huh.

Q. That whole year -- my records only go up to, I'm sorry, July 31, 2014. Are yours the same?

A. Let me check.

Q. Last page?

A. This one, June 30, 2014.

Q. Mine goes up to July 30th. I'm happy to show you mine. Let's take June 30th. Let's go back a year. Go back. I'm on Page 34. Do you see anything from Express Scripts on that page?

A. Page 34, no, I don't.

Q. Anything on the whole next page, 33, Page 33 going back to November of 2013, anything from Express Scripts?

A. No, I don't.

Q. Let's go back another page, Page 32, all the way back now to June of 2013. Do you see any -- any prescriptions that have been paid for, for Mr. Gonell?

A. No.

Q. And let's go back another page, 31, all the way back now to April of 2013, do you see that page?

A. Yes.

Q. Any Express Scripts meds there?

A. No.

Q. And there is nothing from CVS, Duane Reade either, right?

A. Correct.

Q. Let's go back another page, Page 30, and here we are, Express Scripts, you see it?

A. Yes.

Q. May 8, 2013 -- sorry. April 30, 2013 and April 25, 2013 he gets two prescriptions filled, correct?

A. Yes.

Q. And that is a year and three or four months ago, correct?

A. Yes.

Q. Not every month like you said. It is a year and three quarters, correct, about 16 months, 17 months, 15 months, something like that?

A. Yeah, something like that.

Q. And the total cost for medicine he got a year and a quarter ago was what?

A. About $115.

Q. One for $89, one for $25, correct?

A. Yeah.

Q. You can't tell exactly what the meds are here, right?

A. Right.

Q. Doesn't say, but you know the cost is $113 for a year and a quarter, right, sir?

A. Also $115, but.

Q. My math isn't that -- but that is $115 for a year and a quarter, you said $272 every single month, so something is off there, would you agree?

A. If that is the only source of his medicine then, yes. I don't know if he's getting his medicine some other way other than Express Scripts.

Q. Other then maybe something he may have told you, right?

A. Or that.

Q. Okay. You don't have any medical records, and you don't have anything else to support anything like $272 a month charge, do you, sir?

A. I don't know what Equion on is. There are a variety of charges of various amounts.

Q. There are plenty of medical charges, sir. We can go through all of them.

MR. OCCHIOGROSSO: Apparently, we are going to.

Q. We are talking about prescription meds. If you don't know what Equion is, neither do I. You don't know it to be a pharmaceutical payment?

A. No, I don't. Don't know at all.

MR. ARANKI: Don't know not to be either.

Q. So, sir, it seems as though every single medical cost you've given the jury is wildly greater than the actual costs, seems like that, would you agree?

A. If you are only looking at these billing records, yes.

Q. Well, the billing records are the actual history of billing of the plaintiff, correct?

A. That is the record of what was paid.

Q. Exactly.

A. By that company. It is not necessarily the record of the charges of all the treating providers.

Q. You see there is a charge other than what is being paid?

A. Yes.

Q. There is called, what is called list price and payment price, correct, sir?

A. Yes.

Q. And the payment price is what the actual payments are for those meds, correct?

A. Yes.

Q. So are you telling the jury you are giving them a different price than what is actually paid?

A. In terms of this situation, and I was thinking more of the other issues with the clinical providers, in terms of the medicine, yes. Also, if one doesn't have volume discounts --

Q. I see.

A. -- then one has to pay retail price.

Q. But you don't have any records of the retail price, sir, do you?

A. I have records of what the -- at the time of my report. What the current price would be, I don't know what --

Q. Do you have any records of the retail price that Mr. Gonell was ever asked to pay for any single treatment he ever had?

A. No.

Q. Because the only thing we have is what was actually paid, the truth, correct, sir?

A. That is the truth of what was paid.

Q. Exactly. Now, Doctor, you said that you worked a few times for the law firm of Block and O'Toole, and in the other cases that you worked on, isn't it a fact that you also weren't

told about a prior motor vehicle accident; let's take that Jacobs case?

MR. ARANKI: Objection, your Honor. There is no testimony that he wasn't told about a prior accident. It is in all of his reports from Mr. Gonell, and he has testified he has been given the records.

THE COURT: Sustained. I think that is assuming something not in or not yet in evidence.

Q. Let's go through that. In every one of your reports, sir, there isn't any reference to any medical records concerning his automobile accident, is there?

A. Medical records, no.

Q. Those medical records aren't in your original file, but were added just before the trial, correct, sir?

A. Yes.

Q. That is why the medical record review was never part of any of the three reports that you did for the Block and O'Toole firm, correct?

A. Yes.

Q. But just before you came in to testify, because they knew we were going to be asking about that?

MR. ARANKI: Objection.

THE COURT: Sustained, to the form of the question.

Q. Just before this testimony you were given a stack of

those records, right, from the subpoenaed files?

A. Yes.

Q. From State Farm and Allstate, correct?

MR. ARANKI: Objection.

THE COURT: Sustained. Just before you testify, just -- I think you testified a few days ago, you were given some records, medical records concerning this '02 accident; is that correct?

THE WITNESS: Yes, it is, your Honor.

THE COURT: Go ahead.

(Transcript continues on the next page.)

Q. It isn't reflected, then, in any of your reports, even in the most recent one of August 2014, because you didn't get it until after, correct?

A. Right.

Q. But you did come in here and you offered testimony about them, correct?

A. Yes.

Q. The plaintiff's attorney asked you, did you have a chance to review these records from the auto accident, correct?

A. Yes.

Q. And did you rely on them, in forming your opinions. He asked you that, right?

A. Yes.

Q. Then you went on to give a whole bunch of opinions. He kept asking you to assume all these things. Assume this, assume this, assume this. You offered an opinion. One of those opinions was based upon those medical records, right?

A. Yes.

Q. One of the medical records, sir, that you relied on was a medical record from Dr. Sosonkin, right?

A. Yes.

MR. WHITELEY: We'll mark that as Exhibit FF.

THE COURT: HH.

Q. Sir, are you aware that --

MR. OCCHIOGROSSO: Judge, can we approach before

the question comes out again.

THE COURT: Rather than approach, maybe this is a good time to take a five-minute break.

We'll take a short break and resume. Please don't discuss the case.

COURT OFFICER: All rise. Jury exiting.

(Whereupon, the sworn jurors exited the courtroom.)

THE COURT: You could step down.

THE WITNESS: Thank you.

(Whereupon, the witness exited the witness stand.)

MR. OCCHIOGROSSO: Judge, it seems like it's the same thing. It's reading records that aren't in evidence.

MR. WHITELEY: Judge, we're offering all of these because the attorney opened the door to them. He said he relied on them in his file.

MR. OCCHIOGROSSO: That doesn't make them admissible.

MR. WHITELEY: He was making the opposite --

THE COURT: Let him finish.

MR. OCCHIOGROSSO: Any time an expert relies on materials, you're allowed to question them about what materials they rely on in coming to their opinions. That doesn't make those materials admissible in evidence.

MR. WHITELEY: That's exactly the opposite of when

he was trying to get the x-rays into evidence when he relied upon them. Your Honor obviously admitted them. They've opened the door. They asked him the following types of questions: Were you provided with these records, yes; did you rely on those records in forming your opinions, yes.

Then, they went on to ask him a bunch of opinions, one of which is, my opinion is that it didn't cause any of his injuries today. It was all caused by the 2009 accident. It wasn't, but now they put it square and center in issue. We're absolutely entitled to cross-examine him on it.

The records go in. They're part of his file that he relied on. He's testified already to the jury about them.

MR. OCCHIOGROSSO: The records don't go in, because there is a distinction between a treating physician and an expert retained for litigation. An expert is retained for litigation relies on the file in coming to an expert opinion for litigation. It doesn't go into evidence. A treating physician and the things they rely on in treating a patient does go into evidence providing it clears the other hurdles.

MR. WHITELEY: Judge, if the attorney is actually trying to keep the records that his expert relied upon out of evidence, his entire testimony has to be stricken.

MR. OCCHIOGROSSO: No, it doesn't.

MR. WHITELEY: Yes, it does.

MR. OCCHIOGROSSO: Because an expert can rely on materials, explain what those materials are in arriving at an opinion, that doesn't make the materials themselves admissible.

THE COURT: Let me ask you a sort of practical sort of evidentiary question. If he testified I review these three, four days ago, then I formed new opinions or my opinions didn't change or whatever exactly it was, so, it is an issue as to him seeing these records and how they impact on his opinion. Apart from technically putting them in evidence or not putting them in evidence, that then gets into whether he can read from it or not, because it's not in evidence. How does he effectively cross-examine him about why his opinion wouldn't have changed or didn't change after reading whatever it is? And I have no idea what he's about to talk about. But if there is something in --

(Whereupon, the witness enters the courtroom.)

THE COURT: Doctor, why don't you wait outside.

(Whereupon, the witness exits the courtroom.)

THE COURT: If there is something in those records about the '02 back, depression or both, or whatever it is, that is somewhat significant, whether it was from the No-Fault file, wherever it's from, without mentioning where it's from, but something about an exam that a doctor did or

treated or whatever, and found something worse than has been portrayed in this trial, that this doctor says didn't change my opinion anyway, how does he effectively cross-examine him without talking about what's in that record, be it in evidence or just talk about what's in the record?

MR. OCCHIOGROSSO: First of all, as your Honor said, by not referencing the source in front the jury and on the record. He said the subpoenaed State Farm records. He knows he's not supposed to do that.

THE COURT: I sustained it. I'll clear that up, where these records came from. It's not important at this point. I know you want to introduce the whole No-Fault file. We're not talking about that now. I'm just dealing with how far you can go with this doctor on prior medical records from a prior accident.

MR. OCCHIOGROSSO: Secondly, Judge, he can say, based on those materials reviewed so and so, are you aware on such and such date he diagnosed X? Is it your testimony that doesn't change your opinion?

THE COURT: Okay.

MR. OCCHIOGROSSO: That, he can do. Beyond that, to read from the document verbatim, line by line, I mean, it is what it is.

MR. WHITELEY: Judge, he can't have it both ways. They can't sit here and argue that he relied upon the

records and use it to form the basis of the opinion and not allow us to question him entirely on those records and they go in evidence. They're part of his file.

THE COURT: We're almost splitting hairs, because my immediate concern is your ability to cross-examine him in detail about what's in those records.

MR. WHITELEY: Right.

THE COURT: Without talking about State Farm, No-Fault, whatever. Just cross-examine him. Do you know a doctor found a herniation or whatever is in there.

MR. WHITELEY: I'll say these are the records that the plaintiff's attorneys provided you, right?

THE COURT: Yeah. Yeah. And as far as going into evidence, I'm going to hold off on that for a little while, but I'm not going to preclude him, without talking about No-Fault, State Farm, mentioning any company, I'm not going to preclude him from questioning the doctor in detail on specifics about what another doctor found in 2002.

MR. OCCHIOGROSSO: I understand that.

MR. WHITELEY: Thank you, Judge.

MR. OCCHIOGROSSO: And I want to make one thing clear, your Honor, as far as admissibility of documents. We're not splitting hairs. The facilities that authenticate their records or have treaters that can come into court and talk about treatment is different from a place in 2002 that,

as far as I know, no witness has been on anybody's witness list that worked at that place, no one has indicated received certified records. That's the quality of that medical treatment, Judge. That's what's unfair about it. It's a characterization as if it's a legitimate medical facility that did legitimate treatment.

THE COURT: The idea of the treating, the facility, no certification, no one here to authenticate, etc., that is a concern. That's why I'm not ruling on the whole admissibility.

MR. OCCHIOGROSSO: It's not a technical distinction.

THE COURT: I understand that, but I'm not going to preclude him from questioning the doctor on the findings on those records, when the doctor already said whatever the findings were didn't change my mind. I'm not going to preclude him from going into detail on the findings. Whether I admit the whole record in or not, I'll decide separately. And we might talk about more.

MR. OCCHIOGROSSO: One more thing, on or off the record, scheduling-wise. We have an expert sitting in the hallway. I don't know why we have to leave early today or what time. He definitely has to be out of here.

THE COURT: A juror has a 3:00 doctor's appointment. So, we will go into the lunch hour to finish

today.

How much longer with this do you think you have?

MR. WHITELEY: Half an hour.

THE COURT: Okay. We'll get both of your experts out of here before we break.

MR. OCCHIOGROSSO: Thank you, your Honor.

THE COURT: Okay. No mention of State Farm, no No-Fault, no identifying. Just about the findings, impressions and diagnosis.

MR. OCCHIOGROSSO: And no proffer of it into evidence in front of the jury.

THE COURT: It's already being offered. I am reserving decision, so there is no reason to offer it again until we talk about it some more, as far as putting it in evidence.

MR. WHITELEY: Judge, you know what, I think I should be able to proffer it based upon everything we have talked about, and if he wants to object to it, he can. And this shouldn't be a show behind the curtain.

MR. OCCHIOGROSSO: It's a threshold determination by the Court as far as admissibility of a document.

MR. WHITELEY: And he said he's going to reserve his decision.

MR. OCCHIOGROSSO: And that's not going to change.

THE COURT: We're not doing that until we break.

It's already been offered.

Go ahead.

(Whereupon, the witness enters the courtroom and retakes the witness stand.)

COURT OFFICER: Jury entering.

(Whereupon, the sworn jurors enter the courtroom and take their respective seats.)

THE COURT: Welcome back. Have a seat. Okay.

Q. Now, Doctor, you reviewed, after you received the records we talked about before the break, you reviewed all those records that you received just before the trial, correct?

A. Yes.

Q. Concerning the treatment of the plaintiff from the prior car accident of 2002, correct?

A. Yes.

Q. You reviewed them before you testified here today to the jury?

A. Yes.

Q. Okay. And one of those records was the record of Dr. Sosonkin, correct?

A. Yes.

Q. And Dr. Sosonkin found post-traumatic lumbar radiculopathy and compression of the L1-S1 nerve root bilaterally, correct?

A. Yes.

Q. What's radiculopathy, Doctor?

A. That's an irritation of the nerve root.

Q. And what does it mean when there is compression of the nerve root?

A. That would mean that there is something, potentially a disc material, pressing on the nerve root.

Q. And compressing the nerve root causing what?

A. Compressing the nerve root can cause pain. It can sometimes cause numbness or weaknesses as well.

Q. If it's at the L1 to the S1 level, tell the jury what part of the spine that is?

A. That's the entire curve of the lower back.

Q. The whole lumbar spine, he had compression according to Dr. Sosonkin, correct?

A. Yes.

Q. And he had nerve roots bilaterally. So, that means it's on both sides of his back, correct?

A. That was his impression, yes.

Q. That means it radiates into his what, legs? Lower extremities?

A. In theory, it would.

Q. Dr. Sosonkin found that all of the above mentioned problems, and there are several others I won't get into, but that one in particular with regard to the lumbar spine, he says all of the above mentioned problems are causally related to the motor

vehicle accident on November 6, 2002; isn't that correct, sir?

A. Yes.

Q. And when Mr. Gonell came to see you, did he tell you about his lumbar radiculopathy and his compression and the fact that it was causally related to that accident?

A. Number one, I doubt that he knows the words lumbar radiculopathy, at least not before this trial.

Q. Fair enough. But did he tell you about --

MR. OCCHIOGROSSO: Judge, can he finish answering the question.

THE COURT: Finish your answer.

A. He did tell me that he had an accident, and that he had a couple of months of physical therapy, and his back got better.

Q. He said he had a couple of months --

MR. OCCHIOGROSSO: Judge, he's still not finished with the answer.

THE COURT: Go ahead.

A. So, he did not tell me any diagnosis, any technical professional diagnosis.

Q. And he didn't bring you those records, right?

A. No.

Q. Now, another part of the records that was provided to you by the plaintiff's attorneys was the record of Columbia Medical Services, specifically Dr. Alan Diaz. Do you have that record? And I can walk up an extra copy if you need it.

A. I have it.

Q. Okay. Dr. Diaz found that, "the possibility of this condition becoming permanent cannot be ruled out at this time. Prolonged sitting and standing have caused aching stiffness in the morning and acute pain with diffused radiation."

Sitting and standing, sir, that's a symptom that he's got today. He can't sit and he can't stand, right?

A. That's right.

Q. Same thing here, right?

A. Yes.

Q. "And because of the severity of the symptoms, the patient is somewhat limited in activities of daily living."

Do you see where it says that?

A. I'm not sure I'm on the same page.

Q. On the prognosis, the last page of Dr. Diaz's report.

A. Okay.

Q. Then, it says, "he has pain when sitting or standing for long periods of time."

Again, the sit and standing causing pain, right?

A. Yes.

Q. Then, he concludes in the last sentence, "it appears that these areas may be permanently weakened for an indefinite period of time resulting in significant and permanent restricted mobility."

Did you see where Dr. Diaz said that?

A. Yes, I do.

Q. Did Mr. Gonell tell you that he had had a prognosis that he might have significant and permanent restricted mobility and permanent weakness when he came to see you?

A. He did not tell me that.

Q. How many times did you see him, just the one time or did you see him each and every time you had the report?

A. Two times.

Q. Which two, the first and the second?

A. The first and the last.

Q. The first and the last. After that, they sent you the records, correct?

A. Yes.

Q. Did Mr. Gonell tell you that he had nerve conduction studies done?

A. No.

Q. Did he tell you that he had an MRI of the lumbar spine done?

A. No.

MR. WHITELEY: I'm just going to have this marked for identification, your Honor, the records of Dr. Diaz.

THE COURT: II for ID.

(Whereupon, the item referred to is marked Defendant's II for Identification.)

Q. Now, another one of the records that was provided you

by Block & O'Toole was the records of Dr. Mitchell Eisenstein, correct, sir?

A. Yes.

Q. And Dr. Mitchell Eisenstein found that the person, Mr. Gonell, had unremitting neck pain had periodic -- I'm sorry. Episodic non-radiating back spine. And with regard to his lumbar spine, he had ceaseless low back pain and tightness with extension to the bilateral gluteal muscles. What are the bilateral gluteal muscles and where with they?

A. Those would be the muscles. Buttocks on either side.

Q. So, the pain radiating down into his rear end on both sides, correct?

A. Yes.

Q. And Dr. Eisenstein, in his prognosis, said, "Due to the causal event," meaning the car accident, "patient's spine has received traumatic damage causing overstretching, tearing, inflammation of the natural muscular ligamentous structures of the spine and related soft tissue. There is a real possibility of permanent disability and weakness within these structures. At this time, the patient's prognosis is guarded."

Did Mr. Gonell tell you about the possibility that he had a permanent disability in the lumbar area, sir?

A. No.

MR. WHITELEY: This has already been marked as Defendant's Exhibit H. So, I just hand it up for continuity

sake.

THE COURT: Okay.

Q. There is another report, sir, from Dr. Leonard Slutski, correct?

A. Yes.

Q. And Dr. Slutski is what type of a doctor?

A. He's a neurologist.

Q. Neurologist that studies what?

A. Studies the nervous system.

Q. So, right, if you were to focus in on nerve root compression and that kind of thing, that's the kind of doctor that would do that, right?

A. Yes.

Q. Was one of the documents that you reviewed that the plaintiff's attorneys gave you before this case started, Dr. Slutski's report where he states, "I believe that all of the above-mentioned problems are causally related to the motor vehicle accident of November 6, 2002, and this neurological deficit can persist for an indefinite period of time, affecting patient's mobility and consequently the quality of his life."

Do you see where he says that?

A. Yes, I do.

Q. He's referring specifically to injuries to the lumbar spine, and he has injuries to the neck, right, C5 and C6?

A. Yes.

Q. But particularly the L5 nerve root, that's what he finds?

A. Yes.

Q. Right and left side, right?

A. Yes.

Q. The same place where he had his surgery just back in 2013, correct?

A. No.

Q. The L5 nerve root?

A. No, his surgery was L3 to L5.

Q. But it included the L5 level?

A. It included the L5 level, not the nerve root.

Q. The other doctor said he had lumbar radiculopathy and compression on every single level of his lumbar spine, right? We already went over that.

A. That's what Dr. Sosonkin said, yes.

Q. Correct.

MR. WHITELEY: I just ask for Dr. Slutski's records to be marked for ID.

THE COURT: JJ.

(Whereupon, the item referred to is marked Defendant's JJ for Identification.)

Q. Quickly. You also received the River Radiology Imaging reports as part of the prior accident medical treatment, sir? I have an extra, if you need it.

A. Yes.

Q. And there was a finding of L3-4, L4-5 and L5-S1 disc bulges by the MRI of the lumbosacral spine?

A. Yes.

Q. You just said the L3-L5 area is where he had the surgery?

A. Yes.

Q. He never told you he had an MRI from the first accident, did he?

A. No.

Q. This is already marked as F. Same thing with regards to x-rays, sir. You're aware of the x-rays that Mr. Gonell had as a result of his accident?

A. Yes.

Q. He never told you about the x-rays he had?

A. No.

Q. And did he ever tell you about the times that he had 50 or 45 or 55 acupuncture treatments?

A. No.

Q. Did he ever tell you about all the 40 or more chiropractic treatments he had?

A. No.

Q. The only thing he mentioned was a little bit of physical therapy, right?

A. A couple of months of physical therapy.

Q. He didn't tell you about any of the diagnostic testing or any of the involvement of a neurologist or MRIs or anything like that, correct?

A. No.

Q. Sir, are you aware that Mr. Gonell was also prescribed certain equipment as a result of that accident?

A. Yes.

Q. That's also in the records that you were handed, right?

A. Yes, it is.

Q. One of those pieces of equipment was a TENS unit, correct?

A. Yes.

Q. Can you tell the jury what a TENS unit is?

A. Yes. A TENS unit, it's a small box. It's an electrical device with some wires that attach to the patient's body. It gives a low level electrical stimulation and that can help to treat nerve pain.

Q. And how long does one typically use a TENS unit?

A. Oh, that depends.

MR. ARANKI: Objection.

Q. If you were to prescribe a TENS unit to one of your patients, how long -- first of all, have you ever done that?

A. Yes, I have.

Q. Prescribed a TENS unit?

A. Yes, I have.

Q. What kind of issue or patient would you give a TENS unit?

A. A patient with a radiculopathy, a disorder of the nerves would be the most common reason. Phantom pain from an amputation, another one I've done quite a bit of. I don't do very often for radiculopathy. I might do that once in a while.

Q. It's an expensive device, correct?

A. Yes, it is.

Q. It's not an easy thing to use, correct?

A. Correct.

Q. You wouldn't do it just for a run-of-the-mill person who says, oh, my back hurts?

A. I wouldn't.

Q. So, you're aware that he was prescribed, and he signed out a TENS unit from his treatment on the car accident, correct?

A. Yes.

Q. Along with lumbar supports, certain bedding equipment and so forth, correct?

A. Yes.

Q. Certain modifications to his house, things like that, correct?

A. I don't recall modifications to his house, but the rest of it I do recall.

Q. Sir, you also are aware that Mr. Gonell was treating for depression as a result of his prior accident, correct?

A. Yes.
Q. You weren't aware when you wrote the reports, right?
A. Yes.
Q. But you were aware because you got these records?
A. Yes.
Q. And the depression he had, one of the symptoms he had was that he felt like he could have died? Are you aware of that, sir?
A. I've seen that, yes.
Q. Okay. And he circled depression on every single one of his treatments with the psychotherapist for every day that he had treatment?

MR. ARANKI: Objection. There is no testimony that Mr. Gonell made that circle on the document, just that he signed it.

MR. WHITELEY: Well, they're all in evidence. We'll let the jury decide who circled them.

THE COURT: Okay.

A. I did see the circles, yes.
Q. Each time it's depression, correct?
A. I believe so, yes.
Q. And when he came to you, he just said he had back pain. He didn't say he had had prior treatment for depression, did he, sir?
A. I don't think so.

Q. But it's clear that he did, right?

A. It appears so.

Q. And, in fact, he was treated by a psychiatrist or a psychologist?

A. I believe psychologist. I'm sorry, it is a psychiatrist who did the treatment.

Q. And the psychiatrist was Dr. Meisher, correct?

A. Yes.

MR. WHITELEY: I'm almost done, your Honor. Let me just read this.

(Whereupon, a brief pause in the proceedings was held.)

Q. Are you aware, sir, that Dr. Meisher found that the plaintiff had feelings of excessive anxiety and worry, severe depression, poor sleep, dizziness and headaches, that was the summary of findings?

A. Yes.

Q. And that the doctor had recommended future consultation of psychologists and a consultation of a neurologist; isn't that correct?

A. Yes.

Q. And that he saw this psychiatrist on multiple occasions, each time filling out a chart listing all of his systems. Those are also in your record, correct?

A. Yes.

MR. WHITELEY: I think those are already in evidence as B. I'll just hand those up, but I'll have to mark Dr. Meisher's report separately because that wasn't put it.

THE COURT: That will be KK.

MR. WHITELEY: We have to pull that out.

(Whereupon, the item referred to is marked Defendant's KK for Identification.)

Q. Sir, I didn't notice in your file that there was any of the plaintiff's deposition transcripts; is that correct?

A. That's correct.

Q. So, did you ever read the plaintiff's deposition transcripts?

A. No.

Q. So, even though the plaintiff was deposed at length about his medical condition on three different occasions, you never sought fit to read any of those?

A. No.

Q. You wrote three reports?

A. Yes.

Q. And were you aware even that these depositions were conducted?

A. Not that I recall.

Q. Did the plaintiff or the plaintiff's attorneys ever tell you, yeah, there are three depositions that are a couple

hundred pages each of the plaintiff's questioning by the plaintiff's lawyer and the defense lawyer?

A. I don't think so.

Q. Specifically, two of those depositions were about his medical conditions. You never read them?

A. I didn't read them.

Q. You weren't given them?

MR. ARANKI: Objection. Asked and answered. It's been asked four times.

THE COURT: I think he said first he was --

Q. You never had any of them, right, sir?

A. Deposition transcripts, no.

THE COURT: I apologize.

MR. WHITELEY: It was Dr. Kincaid who got the first one and didn't get the other two.

THE COURT: My mistake.

MR. ARANKI: Same objection, your Honor.

MR. WHITELEY: Thank you very much, Doctor.

MR. ARANKI: I just have a few, your Honor.

REDIRECT EXAMINATION

BY MR. ARANKI:

Q. Dr. Richter, I just have some follow-up questions for you, based on the questions you were asked by Mr. Whiteley.

Do you need to review pass billing records to form the basis for your opinion as to future medical costs?

A. No, I do not.

Q. Why not?

A. First of all, when we're going forwards, we don't know for sure that he's going to get all of his care at the same places. We don't know that they are all still charging the same prices that they were at various points in the past. So, I'm more interested in current average prices as opposed to those at a specific place.

The other problems with billing records, number one, they're not always complete. That may be due to errors on the part of the provider, such as a hospital. It may be due to some sort of an error on the part of the insurance company. So, I don't know for sure that these are truly reflective of the care that was rendered. Looking briefly at this, I didn't find the hospital charge for the lumbar spine surgery, which would certainly be a major component of the total cost of that type of operation, as well as some things like presurgical testing that I didn't see in there. So, you can't go by just the billing records alone in terms of knowing what the future costs are going to be.

Q. So, do you have any reason to believe that this document that Mr. Whiteley questioned you about for a while, which is not in evidence, is complete?

A. I would think certainly.

MR. WHITELEY: Objection, Judge. I'd offer it.

THE COURT: I'm not sure how to rule on an objection and an offer.

MR. WHITELEY: Well, per your discussion, we were supposed to hold off on it.

THE COURT: I'm going to sustain the objection as to the doctor's understanding as to whether it's a complete document, and I'm not going to rule on the offer into evidence at this time.

Q. Doctor, what, if anything, did you say about the sheer amount of treatment reflected in this 34-page very small typed document?

A. That's a very substantial amount of treatment.

Q. And to a reasonable degree of medical certainty, was all the treatment that Mr. Gonell received subsequent to this accident of 2009 necessary and related to the forklift accident?

A. Yes.

Q. Now, you had testified yesterday that, and a little bit today, that you use the average for the future costs, correct?

A. Yes.

Q. And you get that from -- tell us again where you get that from?

A. Well, it depends upon which type of medical costs. In terms of things like doctors' fees, I have access to a database through my billing service to what typical fees are for various services. I also know from my own practice, since I use that to

set my own charges. I also know that in terms of my work as a hospital medical director over the years, both at Rusk and now at Stamford, in terms of knowing what costs are. And I'm able to obtain from hospitals or other providers the costs of various procedures, whether it's a test like an MRI or a procedure like an operation. And I use those to come up with an average for what the current cost would be.

Q. And I just want to go back to a question that was asked of you with regard to your August 2014 report. You had indicated that -- Mr. Whiteley had pointed out that the need for the lumbar fusion surgery was not included in this report, correct?

A. Yes, which was a mistake on my part.

Q. This was included in your January 2013 report, correct?

A. Yes, I did indicate near the bottom of this report that the opinions in my previous reports were unchanged, except for the change in my opinion about which medicines he would need.

Q. Okay. And he also pointed out that the cost of the ankle surgery that was reflected in the billing records that he was asking you about is not the same as what you opined in your August report. Is it true that the August report, your August report is talking about a ankle replacement surgery, not the ankle surgery he had?

A. Absolutely, he had what we call an open reduction and internal fixation of a fracture, which is a less expensive surgery. It is not involving the same types of hardware. It is

not nearly as extensive. It does not require, as a rule, nearly as much follow-up physical therapy or nursing care or other post-operative care.

Q. And that's different than the three surgeries he's had already, correct?

A. Yes.

Q. Now, the last thing I want to question you about is the records regarding the 2002 accident?

A. Yes.

Q. Doctor, does it make a difference when you got the records from the 2002 accident to form the basis for your opinion whether it was a few days ago or a year ago?

A. From my perspective, no.

Q. Why not?

A. Well, I have had the opportunity, before coming here to testify, to review all of those records, all of the ones that I was questioned about. And there may be a few others that might not be as important. I was able to look at all these predictions of gloom and doom by all of these different doctors and chiropractors that he was going to have all of these permanent -- possibly have all of these permanent disabilities and problems. And with the benefit of hindsight, I can say that they were obviously wrong. Because Mr. Gonell, in fact, returned to work.

There were reports from other doctors indicating that they believed he had made a full recovery and should be cleared

to go back to work. And in looking at how some of the doctors that we talked about this morning, how they drew their conclusions, looking at Dr. Sosonkin, he did help, which I talked about in my direct testimony. Feeling along the side of the spine, and he felt tightness, tenderness, spasm. He did a completely normal neurological exam. He went on very inappropriately, in my medical opinion, to opine that Mr. Gonell had L1 through S1 radiculopathies, which was not supported by his own physical exam. And what he was indeed feeling, no doubt, was he probably did have pain in the muscles of his low back after this car accident. And fortunately, it got better.

And so therefore, looking at that, looking at the other notes, it didn't really substantiate, the doctors did come up with the impressions that we heard this morning, but in my opinion, they were doing so without proper evidence to base it on. And, again, even that is more of an academic point. The reality is he got better and went back to work.

Q. Doctor, the doctors from the prior accident that examined Mr. Gonell, some of them had opinions that were different from each other?

A. Yes, sure. And that happens. We have multiple doctors evaluating a patient, they may have different opinions.

Q. Does some of those opinions contradict each other?

A. Yes.

Q. Now, Mr. Gonell, when you examined him, he told you

about the prior accident of 2002, correct?

A. Yes, he did.

Q. He didn't try to hide it or not tell you about it, right?

A. Not at all.

Q. He did tell you about the treatment that he had that he remembered having, correct?

A. Yes.

Q. Would you expect to be told about treatment that was so long ago and insignificant that he didn't even remember it?

A. No.

Q. And the treatment that, based on the records you reviewed, the treatment that he had went from when to when, if you know?

A. Well, it starts with an evaluation on November 7, 2002. And the physical therapy and the other follow-ups -- it's all a couple of months for the most part.

Q. So, the last treatment is around March of 2003?

A. Yes.

Q. And that's a full, if my math is right, six and a half years before the 2009 accident?

A. Yes.

Q. Thank you very much.

RECROSS-EXAMINATION

BY MR. WHITELEY:

Q. So, you say that Mr. Gonell didn't lie to you or try to hide it, correct, the fact that he had this accident?

A. That's right.

Q. But are you aware, sir, from the deposition that Mr. Gonell did lie about ever having depression before? He said he never had it. Were you aware of that?

MR. ARANKI: Objection. His treatment from depression, not depression.

THE COURT: Sustained as to the form of the question.

Q. Were you aware, sir, that the plaintiff did lie about ever having treatment for depression?

A. I'm not aware of that.

Q. So, that was a lie. He did lie, correct?

A. I don't know that he lied.

Q. He lied -- I'll ask you to assume he lied to the jury and he lied in the deposition, sir.

MR. OCCHIOGROSSO: Objection.

THE COURT: Sustained.

Q. Sir, you didn't get a chance to read the deposition, correct, because they weren't even given to you, correct?

A. That is correct.

Q. In the deposition, would you like me to read the point where it says, were you ever treated previously for depression, and he said never? Would you like me to read that?

A. No, I believe you that he said that.

Q. That was a lie, correct? It was false?

A. It was not correct. I don't know if he forgot.

Q. I see. And you are aware of those records from Dr. Meisher, where he went multiple, multiple times signing off on each one of them getting equipment and so forth and listing depression 20, 30 times? You're aware of that, right, sir?

A. Yes.

Q. Are you aware of the fact that he also lied about filing a claim for the auto accident?

A. No.

MR. ARANKI: Objection.

Q. Are you aware that he lied about the fact that he ever hired a lawyer?

THE COURT: If you want to refer to previous testimonies of anybody, including plaintiff, in which things that the doctor knew or didn't know were answered differently at that time, you can do that. But not to sort of categorize it yourself.

MR. WHITELEY: I'm just responding to the comment on redirect.

THE COURT: I understand why.

MR. WHITELEY: That he didn't hide it from anyone.

Q. Sir, you talked again on redirect about the cost thing. And again about your database and the averages and that kind of

thing?

A. Yes.

Q. And you don't have any of that with you, and you just want us to take your word on it, there is no paperwork or support that you can produce here today for this jury to see, any single cost, correct?

A. That is correct.

Q. That is just something you put on your --

A. Yes.

Q. And yet, when confronted with the actual cost, is it your position that that's not accurate?

A. It doesn't reflect the charges.

Q. Well, let's just talk briefly. Your charge was more than four times as much for the lumbar surgery than the actual charge, correct?

A. I disagree. I don't think that this reflects the true actual cost. It doesn't even have hospital charges.

Q. Do you have any records, sir, anywhere, of any payment for any surgery that Mr. Gonell underwent, for any other cost for that lumbar surgery for December anywhere?

A. Records, no.

Q. So, your cost of $75,000, $85,000 is more than four times the actual costs that were charged and paid for Mr. Gonell's lumbar surgery, correct, based on the records you've seen?

A. It is more than the amounts that are paid, according to the records that I've seen.

Q. More than four times as much, correct?

A. I'm not sure about that.

Q. Well, with respect to the ankle surgery, you said yours would be $40,000 and the actual ankle surgery was actually done by the real treating doctor in this case, Dr. Gallina, was only $5,000?

A. Completely surgery, remember.

Q. Are you relying on the surgery that he had for his left ankle right after the accident? Was that not a serious surgery, sir?

MR. OCCHIOGROSSO: Objection.

THE COURT: Sustained as to the form.

(Continued on the next page.)

Q. Sir, that surgery was, involved the placement of hardware, correct?

A. Yes, it did.

Q. It was a pretty severe fracture, correct?

A. Absolutely.

Q. Cost about $5,000 for Justin Gallina to do the surgery, correct?

A. Surgeon fee, yes.

Q. You say the surgery is going to cost $40,000 for another revision surgery down the road, correct?

A. Not a revision surgery, this would be a replacement.

Q. You said revision or replacement. I think there were two choices, correct?

A. Fusion. Fusion, which would cost considerable less than the replacement.

Q. The medical cost, your multiple was 12 times because you were saying to the jury it would cost $272 a month, but the records show it was more like $120 a year and a quarter?

A. The records show that is what Express Scripts paid presumably for a month supply of medicine at the time they paid for it, not a year and half supply.

Q. Presumably if he was taking the medicine every month, like you said, there would be some record somewhere of somebody paying for that, right?

A. Yes.

Q. If he wasn't taking the medicine then there wouldn't be a record, correct?

A. That's correct.

Q. And that is what we have here in the record before you which is the record of payment, we have one record going back to April of 2013 where he went to, and got two prescriptions filled for 120 bucks, right?

A. Right.

Q. In the next year and a quarter, excuse me, he never got anymore medicine filled?

A. That I can see from this report based on, assuming he only goes to Express Scripts.

Q. So your opinion then, based upon what he told you, he told you he needed these, told you he was going to get the stuff, right?

A. Yes.

MR. ARANKI: Objection, your Honor. It is the same thing.

THE COURT: Sustained. This is all going over.

MR. WHITELEY: Right, but he brought it up again.

THE COURT: I understand.

MR. OCCHIOGROSSO: Doesn't mean he asked the right question ten times.

MR. WHITELEY: Thank you, Doctor.

MR. ARANKI: Your Honor, couple more.

THE COURT: Go ahead. I will give him a couple. If it leads to something else, I will give you one, and we'll be here another three hours. Go ahead.

REDIRECT EXAMINATION

BY MR. ARANKI:

Q. Dr. Richter, in addition to -- as part of the 2002 records you reviewed, did you review a report of a Dr. Joseph Cole?

A. Yes.

Q. From February 16, 2003?

A. Yes.

MR. WHITELEY: Judge, this is not anything I've raised in --

THE COURT: Sustained.

MR. OCCHIOGROSSO: -- raised the prior treatment records, sat there and read from them.

MR. WHITELEY: First time.

THE COURT: I'm not going into a record that was never referred to before up until now or else we will be here a really long time.

MR. OCCHIOGROSSO: Can we discuss this quickly in the back?

THE COURT: No. Sustained. The idea of prior treatment we can go back and forth for days on prior treatment. I'm only allowing what was gone over already on

your direct and your redirect. I'm not going -- he didn't raise any new records.

MR. OCCHIOGROSSO: Your Honor, respectfully, I want to point out --

MR. WHITELEY: Objection, Judge. Speaking objection. If he wants to make a record in the back.

THE COURT: We'll make the record after. That is it.

Do you have any other questions other than that?

MR. ARANKI: No, your Honor.

THE COURT: Okay. You can step down.

THE WITNESS: Thank you, your Honor. I do have some records not part of my chart.

THE COURT: Just leave them.

THE WITNESS: Okay.

(Whereupon, the witness steps off the stand and exits the courtroom.)

THE COURT: While the doctor is stepping down, we'll take a short break, and then have one more witness, after who we'll break for the day.

Please don't discuss the case.

THE COURT OFFICER: All rise. Jury exiting.

(Whereupon, the jury exits the courtroom.)

THE COURT: Go ahead.

MR. OCCHIOGROSSO: My position is this, on both

the cross and the recross, Mr. Whiteley made specific reference to what he felt was favorable quotes from treaters we have no idea who they are, where they are, if they are licensed, if they are even in the State of New York, and read right from the reports what they found in 2002 to the jury. He knows full and well there are, in the same file there are independent medical exam reports in the same time period where doctors come up with completely different conclusions.

The whole point of questioning Dr. Richter about it is did it change your opinion. At least ostensively it was the purpose, when in reality it was to read it to the jury. The fact that the legitimate purpose, how it influenced his opinion, he should have had a right to say, you know what, I read four or five reports saying in two months he was fine. To me, on balance, I don't consider it significant.

THE COURT: You don't have to respond, because I'm not disagreeing with you, and at redirect I probably would have allowed him to come back on redirect and say he read you these reports, what about this. This was on re-redirect, after recross, when he didn't raise anymore reports, and I'm not going to let it go on adding because he would have raised another one and we would have been here for days.

MR. OCCHIOGROSSO: I understand. That speaks to the very reason why allowing to question about records no one knows who created them or authenticity is a problem. He did respectfully, your Honor, on recross mention Dr. Meisher by name, and talked specifically about his findings.

MR. WHITELEY: All right. Your Honor, it is now 11:40. I think we are breaking early today. If he wants to get his witness up and out, I suggest -- he can't be doing what he did yesterday, which was he waited 15 minutes and file review --

THE COURT: Well, he's out there. Do you want to start looking at the file now?

MR. WHITELEY: I will do whatever.

MR. OCCHIOGROSSO: Ready to call the next witness now.

THE COURT: We'll take the five minutes, let them stretch, bathroom. Juror gave me his signal anyway so.

MR. OCCHIOGROSSO: And I will get through my direct, then he can take a reasonable amount of time to review the records.

THE COURT: Okay. Number one looks like she is in bad shape too so.

(Whereupon, a short recess is taken.)

THE COURT: Okay.