

In The Matter Of:

Nereyda Benitez v.

BrettA. Andeson and HB Architectural Lighting, Inc.

Chirag Shah

December 4, 2024

Michelle Cox - Senior Court Reporter

851 Grand Concourse - Room 804

Bronx Civil Supreme

Bronx, NY 10451

macox@nycourts.gov

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF BRONX: CIVIL TERM: PART IA-30

3 NEREYDA BENITEZ,

4 Plaintiff,

Index No.
BRETT A.

- against -

5 ANDERSON and HB ARCHITECTURAL LIGHTING,
6 INC.,

7 Defendants.

8 851 Grand Concourse
9 Bronx, New York 10451
December 4, 2024

10 B E F O R E:

11 HONORABLE ERIK L. GRAY,
12 Justice of the Supreme Court

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

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24 Michelle Cox
25 Official Court Reporter

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1 THE COURT: Good morning, Counselors.

2 MR. RYBAK: Good morning, Your Honor.

3 MR. LEITER: Good morning.

4 THE COURT: Before we bring the jury in, we have
5 the issue of the defendants' last pending motion in limine
6 regarding precluding certain testimony from Dr. Shah, who's
7 plaintiff's life care planner.

8 MR. RYBAK: Your Honor, if I may say something.

9 I mean, the defendants have been filing motions
10 in limine like the day before a witness is heard, the night
11 before at 2:00 a.m. I mean, our witness list has been
12 known, except for Dr. Benatar, which was last second
13 because of Dr. Lerman.

14 I mean, these motions should have been made
15 before trial, after jury selection. The defense were well
16 aware that Dr. Shah was one of our expert witness because
17 we exchanged the 3101(d).

18 The motions that are being made at this late
19 stage, I mean, I don't think these motions should even be
20 entertained by the Court because they're made at such late
21 stage where we have to scramble to majardigo [phonetic] out
22 this motion at 4:00 a.m. this morning, because we were up
23 against the wall.

24 THE COURT: I understand. A better practice
25 would have been to file all motions in limine before we

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1 began the trial. Be that as it may, I am going to
2 entertain the motion.

3 Mr. Leiter, if you'd like to make your argument,
4 please proceed.

5 MR. LEITER: Thank you, Your Honor.

6 So this motion in limine is the last one we have
7 pending before Your Honor. It in part asks the Court to
8 revisit, or allow us to renew a portion of our motion in
9 limine that was made before trial. The motion in limine
10 that was made before trial that pertains to Dr. Shah and
11 what he intended to testify to and what other doctors were
12 going to testify to, because we were told at that time, the
13 Court was told at that time that Dr. Kosharsky would be
14 one of the witnesses here, and we only learned last week
15 that he would not be.

16 And so when the information we had changed, we
17 then needed to address that, those new facts, and
18 Dr. Lerman wasn't here. And we made the motion even before
19 we heard Dr. Benatar's testimony yesterday, though I would
20 submit that much of the testimony he gave yesterday
21 furthers the motion that we already made regarding
22 Dr. Shah.

23 And the issue is Dr. Shah put together a life
24 care plan that is premised upon an assumption of certain
25 facts being in evidence through testimony through

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1 Dr. Kosharskyy, through Dr. Lerman that simply is not here
2 and is not going to be here. And if he doesn't have the
3 foundation that he was assuming would be here, for him to
4 then, later, on top of that, the testimony he would give
5 solely as an expert witness regarding a life care plan,
6 then that can't still be put before this jury. The
7 underlying foundation is no longer there.

8 And the case, I saw that they did file opposition
9 this morning. There's only one case they cite to there.
10 The case that's more directly on point is actually
11 Hotaling, H-o-t-a-l-i-n-g, versus CSX Transportation. It's
12 5 A.D. 3d 764, Third Department 2004, and it's Pages 969
13 through 970. They are addressing specifically a life care
14 planner and reliance on material not in evidence.

15 And what they detail there, beyond just what
16 could be found even in the case they cited about how a life
17 care planner may consider certain materials that are not in
18 evidence, as part of his evaluation, it cannot be the sole
19 basis or principle basis. And here they go through that in
20 more detail in Hotaling.

21 And there they say that where the material that
22 was not in evidence was merely, you know, a second opinion,
23 confirming what was already in evidence, where three of the
24 treating physicians had already testified, and all of the
25 medical records were in evidence, that the opinion was not

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1 going to be disqualified because he had also reviewed
2 material that was not in evidence.

3 The situation that we have here is very
4 distinguishable from that. What we have is in evidence at
5 this time, only the possible records from where she went
6 the day of the accident, which do not indicate any injury
7 to the spine, to the neck, to the back. And then we have
8 the reports from Total Orthopedics and Dr. Lerman, which do
9 not give any direction of what her future care would be,
10 what the cost would be, all of that that Dr. Shah would be
11 relying on, would be from narrative reports that are not in
12 evidence.

13 And he acknowledges as much in his life care
14 plan. He said specifically in the footnotes that he's
15 taking the care, the frequency of it and the cost directly
16 from Dr. Lerman, from Dr. Kosharsky, and Dr. Persich.

17 THE COURT: Why is that improper?

18 MR. LEITER: Because it's not in evidence and we
19 can't cross-examine Dr. Lerman about the need, the
20 frequency or the cost if he's not here, and no report that
21 he's written that states the cost, the frequency or the
22 need is in evidence.

23 THE COURT: You would agree, but for defendants'
24 request for an adjournment --

25 MR. RYBAK: Dr. Persich.

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1 THE COURT: -- regarding Dr. Persich's testimony,
2 which I believe was on November 27th, he would have
3 testified already?

4 MR. LEITER: We have no objection at all to any
5 testimony that Dr. Shah intends to give premised on
6 Dr. Persich's testimony.

7 As we indicated previously, it can all be
8 introduced subject to connection, and then Dr. Persich
9 comes in. If Dr. Persich gives the testimony that Dr. Shah
10 was expecting and assuming to be there, it's delivered,
11 there's no issue at all.

12 The issue is with doctors who we know are not
13 testifying and records that are not in evidence and are not
14 going to be in evidence.

15 THE COURT: But you said yourself that the case
16 law that you cited states that the doctor can review
17 hearsay evidence as long as it's not the only evidence.

18 MR. LEITER: Yes. So we have to go sort of item
19 by item, because Dr. Persich is only a podiatrist. By
20 virtue of being a podiatrist, he can only testify about
21 injuries and conditions below the knee.

22 THE COURT: Dr. Shah is a medical doctor who
23 performed a physical examination of patient himself.

24 MR. RYBAK: Yes.

25 MR. LEITER: He did. And but he's only a pain

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1 management -- he's a physiatrist. And a physiatrist can't
2 perform a surgery. A physiatrist can't determine that
3 someone needs surgery. The only thing a physiatrist can do
4 is refer a patient to see an orthopedic surgeon. The
5 orthopedic surgeon is the one who has to make the
6 determination as to whether or not surgery is warranted or
7 not, and that would be the person who would perform the
8 surgery.

9 THE COURT: Well, it sounds like part of your
10 argument is Dr. Shah is not qualified to give testimony
11 outside his practice area.

12 MR. LEITER: That is part of our argument, that's
13 certainly the case law that holds that. Just as a
14 physiatrist can't talk about the spine, a pain management
15 doctor -- he can -- and there are parts, just to be clear.
16 There are parts of his life care plan he can talk about
17 when his life care plan includes the plaintiff going to see
18 a pain management doctor. That's certainly in his
19 wheelhouse. He's a pain management doctor, he can say,
20 I've assessed this patient and I determined she should be
21 seeing a pain management doctor and this is how often she
22 should be going to see that doctor.

23 THE COURT: But doesn't the information that's
24 outside Dr. Shah's specialty area just go to the weight
25 that the jury gives that evidence rather than to its

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1 admissibility?

2 MR. LEITER: It doesn't because he -- he's, first
3 of all, acknowledged in his report -- this is maybe one of
4 the reasons.

5 Just to start, if he had said in his report, as a
6 pain management doctor I believe she needs this item at
7 this frequency and I've independently determined this is
8 what it costs. If that's what the life care plan had for a
9 particular item -- let's suppose it's fusion surgery --
10 that would be one thing. But that's not what this life
11 care plan is.

12 This life care plan is saying, the only basis
13 which I'm including this item in this life care plan, and
14 the only reason I'm putting this cost to it, and the only
15 reason I'm putting this frequency is because this is what
16 Dr. Lerman said in a narrative report, this is what
17 Dr. Kosharsky said in a narrative report.

18 So once he's identified himself that the
19 principle basis is out-of-court material, that's where the
20 case law is clear that's not permissible. He's not saying
21 I looked at five things together, three or four being in
22 evidence, one of them not, and my opinion is unchanged by
23 the thing that's not in evidence.

24 THE COURT: But Dr. Shah comes up with an entire
25 life care plan, and that life care plan is based, in part,

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1 on his review of other doctors' records, and his personal
2 physical examination of the plaintiff and other items.

3 So it doesn't sound like here we have only his
4 information being based upon hearsay.

5 MR. LEITER: So I think the issue is you're
6 asking the question as if we look at the life care plan in
7 its totality. But the issue as the case law holds, and the
8 way the courts address it there is, if you imagine if the
9 witnesses is on the stand and he wants to testify to a
10 specific item in the life care plan, and that's when the
11 objection is made. The determination has to be on that
12 item-by-item basis. It can't be -- he doesn't get to --
13 it's not just deciding whether he gets to testify at all or
14 not; we're agreeing he gets to testify.

15 But when he wants to testify specifically, let's
16 say a future lumbar surgery, the question is, does he have
17 a foundation and evidence upon which to give that
18 testimony. And if he doesn't, then the objection would
19 have to be sustained.

20 When he then moves on, when that objection is
21 sustained and he says, we're now going to talk about an
22 ankle fusion, and we say, well, sure, subject to
23 connection, Dr. Persich will talk about that, that's
24 allowed. If he then tries to come back and say, as to this
25 neck condition, but again we don't have that foundation

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1 evidence, that objection would be sustained. If he then
2 returns to pain management, how many times did she see a
3 pain management doctor like himself, that's allowed.

4 So we can't have just one ruling on the entirety
5 of a life care plan when he's identified in his plan that
6 he does not have the same source for everything, and he's
7 not using the same source collectively for everything.

8 So he's not using Dr. Kosharskyy at all when
9 thinking about the ankle and putting the ankle plan, that's
10 entirely Dr. Persich. And by the same token he's relying
11 entirely on Dr. Kosharskyy and Dr. Lerman when it comes to
12 the spine for the items that he identifies he's relying.
13 And those are the items that we say cannot come in.

14 And related to that, all of the testimony that
15 he's given for it to have any probative value or relevance
16 in this trial, has to pertain to what the jury is being
17 asked to consider, which is what is it that's reasonably
18 certain to be received by the plaintiff as future care, and
19 what is reasonably certain to be the cost of that care.

20 THE COURT: Your papers seem to indicate that you
21 believe there are two different standards of burden of
22 proof in this case, one for future medical expenses and one
23 for the general trial.

24 MR. LEITER: So --

25 THE COURT: Which I respectfully disagree with.

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1 MR. LEITER: So and I think what you're going to
2 tell me is you read the case law. I'm going to agree that
3 that's what the case law is, which is that the jury is
4 instructed by the PJI about the preponderance of the
5 evidence being the standard.

6 THE COURT: Correct.

7 MR. LEITER: At the same time, all of the case
8 law from the appellate division is clear that, when they
9 review the award, the award that a jury makes, they vacate
10 or sustain it based on whether or not it was established
11 with reasonable certainty. And that's where I agree with
12 you. That's a disconnect there.

13 THE COURT: I agree with you inasmuch as the
14 appellate papers seem to indicate that reasonable certainty
15 is the standard when dealing with past or future medical
16 expenses.

17 But in doing a lot of research on this last
18 night, I note that the words, "reasonable certainty," comes
19 from CPLR 4545, which is the admissibility of collateral
20 source of payment. So it's the collateral source statute.

21 And if you look closer at what the appellate
22 divisions have said, when they're talking about reasonable
23 certainty being synonymous with clear and convincing proof,
24 and most of the case law really refer to CPLR 4545, not the
25 standard of proof in the trial.

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1 MR. LEITER: I would say -- so reasonable
2 certainty is certainly the standard incorporated into CPLR
3 4545. But I don't think it could be said that the
4 reference to reasonable certainty is because 4545 has a
5 reasonable certainty standard. Because when the Court is
6 discussing most of -- almost all of the cases, in fact,
7 that appellate courts are looking at the award, they're not
8 saying it's an issue that the Court should have reduced it
9 out of collateral source here. Often there was no
10 collateral source here.

11 THE COURT: You cite as one of your examples,
12 Kihl, K-i-h-l v. Pfeffer, P-f-e-f-f-e-r, which is the
13 Second Department case from 2007 before it went up to the
14 Court of Appeals. And they talk about the standard of
15 proof of the collateral source herein being reasonable
16 certainty. So that was one of the cases that you cited.
17 It's specifically talking about CPLR 4545 and the standard
18 at a collateral source hearing.

19 MR. LEITER: Sure. Again, that definitely is the
20 standard at a collateral source hearing. But what I'm just
21 trying to emphasize is, when you also look at cases where
22 appellate courts are making reductions to the jury's award
23 of future medicals or future lost earnings claims, and they
24 make the reduction, and they say it's because it wasn't
25 established with reasonable certainty.

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1 THE COURT: I agree with you on that, although I
2 think the origination of that term comes from discussions
3 regarding collateral source hearings in CPLR 4545. I don't
4 think the appellate division intended, and I don't read it
5 that way, as requiring two different standards during a
6 trial, one for the general trial and one for past and
7 future medical expenses.

8 MR. LEITER: Just take that for a moment. Let's
9 assume that the standard is just preponderance of the
10 evidence, that's all they would need to show for any kind
11 of economic loss. And putting aside the cases I talk
12 about, let's say for loss of earnings, how you actually
13 have to have your tax records or other equivalent documents
14 in evidence to support loss earning claims. You just can't
15 get on the stand and say, these are my losses, this is what
16 I used to earn. Even though the jury might say, I
17 credit -- after hearing the judge's charges, I credit that
18 testimony, I think it's credible, I think it's
19 preponderance of the evidence, and I'm making the award, we
20 all know that award would be vacated.

21 So even if we assume, though, for the moment,
22 that the preponderance of the evidence standard is the only
23 standard we're going to consider when we're looking at this
24 life care plan and what Dr. Shah as testified to, we still
25 have the fact that he acknowledges in his life care plan

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1 that he's including items that he's not saying are more
2 likely than not to be received by the plaintiff. And that
3 he's not even claiming on the broader items, the ones that
4 I think they would they try to argue are most likely to be
5 admissible, that he's saying she's going to actually
6 receive them. Because, again, the key issue here is not
7 what does a doctor think would be helpful, what would a
8 doctor recommend. It's for them to determine what issue --
9 let's just go with preponderance of the evidence. What is
10 she more likely than not actually going to receive, and
11 what is she more likely than not going to -- is he going to
12 do the actual cost of that.

13 THE COURT: Was this a jury question?

14 MR. LEITER: At this point I would say it's not a
15 jury question because we had Dr. Benatar acknowledge that
16 there's no item that he's identified or that he believes or
17 that he said with a reasonable degree of medical certainty,
18 or by any other standard, that she's actually going to
19 receive.

20 So if Dr. Shah is going to testify to any item,
21 there has to be a basis to believe she's going to receive
22 it. And we know she's gone four years without receiving
23 any of the care. We have Dr. Shah's plan including -- his
24 plan was issued in March of 2024. He first has a plan that
25 carries her from ages 39.9 to 40, so March to April.

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1 THE COURT: May I ask if you have a life care
2 planner coming to testify?

3 MR. LEITER: We do have a life care planner.
4 He's been retained. And that life care planner's opinion
5 is that none of the medical care is necessary, and so it's
6 a zero.

7 THE COURT: And if that wasn't his opinion, we
8 wouldn't be at trial, right?

9 MR. LEITER: I think there's a disagreement.

10 THE COURT: Yes.

11 MR. RYBAK: That's the whole point.

12 THE COURT: The point being that Dr. Shah has
13 certain opinions, and your life care planner has certain
14 opinions. They are diametrically opposed in their
15 opinions, and isn't it a jury question for a jury to decide
16 during deliberations, who, if any one of the two they
17 believe?

18 MR. LEITER: It isn't until Dr. Shah has a
19 foundation for what he wants to testify to. Because
20 Provder is not coming in to testify to anything that Shah
21 doesn't first have a basis to put in for him to address.

22 THE COURT: Right.

23 But isn't the foundation going to be laid or not
24 laid, as the case may be, by plaintiff's attorney on direct
25 examination?

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1 MR. LEITER: Well, the issue here is his report
2 already shows that he doesn't have that foundation. When
3 he says this is an item that's possible, or let's take as
4 one of the examples the notion of a spinal stimulator. So
5 a spinal stimulator permanently implanted would only be
6 done after the person has first had a trial of spinal
7 stimulator. And they don't because the frequency with
8 witnesses has proven not to be effective. So they don't
9 put a permanent one in at that cost until they first find
10 out how the first one would be effective. They don't even
11 do the trial spinal stimulator until they first determine
12 that medications aren't working that's to treat pain that
13 can't be resolved by medication.

14 And here we know she's on no medications, and we
15 know that Dr. Shah's plan had her taking a trial of various
16 medications from March to April of this year, this
17 three-month trial. And then only after it's determined
18 whether or not it works, would they even consider doing the
19 trial of spinal stimulator.

20 So we know that that didn't happen. We know
21 she's not even taking any sort of ordinary prescription
22 pain medication, that no doctor has prescribed any to her,
23 that it has been more than four years, that she would have
24 all of the care that Dr. Shah has put in his life care plan
25 in terms of surgeries, medications, all of it, available to

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1 her at no out-of-pocket cost because of her health
2 insurance, and it has no deductibles, it has co-insurance
3 requirements. So all of that when it's available to her
4 for free, she's not getting any of it. She's choosing to
5 get none of it. And she didn't testify that she has any
6 intention of receiving any of this. There's not even a
7 representation by Dr. Shah that he's ever even told her
8 about this plan.

9 So if there's no indication whatsoever that this
10 plaintiff has any intention of receiving even, let's pull
11 up the Tier 1 level of treatment, then speaking about what
12 the costs and care would be at Tiers 2, 3 and 4 if one
13 fails and then two fails is just speculative.

14 And he's acknowledging that this is not something
15 he's claiming is more likely than not. He's not claiming
16 that there's a high degree of probability. He's not saying
17 there's a preponderance. He's not even saying it's a
18 50 percent chance.

19 And if we know from the beginning before he's
20 even testified that, by his own report, these are
21 speculative -- and the case that I cited where he
22 previously testified in the case in the Court of Claims,
23 and the judge recognized these are all speculative -- to
24 think that we're going to talk about implanting a permanent
25 spinal stimulator when we're not even at a trial stimulator