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1 level in this case, not even at prescription medications,  
2 is too speculative.

3 And that's the reason that -- again, we're not  
4 saying he doesn't testify at all. But on items where he's  
5 labeled on himself as "possible," or "contingent," or  
6 "available," those are not items that he should be allowed  
7 to testify to. It serves no valid purpose since the jury  
8 clearly couldn't award them, even under a preponderance of  
9 the evidence standard.

10 The only purpose is to suggest to this jury that,  
11 hey, she may have only proved this number, but there might  
12 be this whole other world of cost, so why don' you give her  
13 a little extra just to cover them just in case. And that's  
14 defeating what the burden of proof is, what the legal  
15 standard is, and what the defendants are entitled to how  
16 this jury bases its decision on is prejudicial to us and it  
17 has no probative value.

18 THE COURT: All right. Is there anything else?

19 MR. LEITER: I think we've also noted that they  
20 never actually plugged the amounts that they're looking to  
21 have him testify to. And because -- you assume they would  
22 make that application here if they can't set forth why that  
23 should be allowed now that there's an actual basis to  
24 believe that a jury could conclude that by preponderance of  
25 the evidence that these are the items and these are the

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1 costs, it should not be allowed.

2 The number that they pled, around 350,000 -- and  
3 I get that by adding them from the first bill of  
4 particulars, first supplemental bill of particulars,  
5 cumulative, rather than assuming anything you have to  
6 substitute or replace.

7 THE COURT: The number that you used from your  
8 paper was \$367,000?

9 MR. LEITER: Yes.

10 THE COURT: That is correct that that is the  
11 number in the bill of particulars or any of the  
12 supplemental bill of particulars?

13 MR. RYBAK: More or less, but that includes  
14 future cost that hasn't been established yet. And that's  
15 the whole point of having a life care planner.

16 I mean, Mr. Leiter's argument, no life care  
17 planner would be able to testify because the whole point is  
18 the future is uncertain. It is speculation whether she's  
19 going to have these procedures, this treatment. And the  
20 whole point of a life care planner is that he's an expert  
21 in this field, and he reviewed 26 different documents in  
22 her file, her medical records, and he's basing his whole  
23 life care plan based on his exam of the plaintiff and his  
24 expertise in life care planning.

25 THE COURT: Let's say the jury returns a verdict

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1 of \$10 million for future medical care, and that's not  
2 supported by the evidence. You make a motion to reduce  
3 that. And if the jury doesn't award anything for future  
4 medical expenses because they didn't believe it was proven  
5 by a preponderance of the evidence, then nothing needs to  
6 be done.

7 MR. LEITER: I certainly would make a motion if  
8 there was a \$10 million award for future medical expenses,  
9 no question. And we would all recognize there's no way  
10 that would be supported.

11 THE COURT: Right. And it would be my job to  
12 reduce that award to what has actually been proven by a  
13 preponderance of the evidence during a trial.

14 Would you agree with that?

15 MR. LEITER: Yes.

16 But my primary concern today is that defendant is  
17 going to be prejudiced by testimony being presented by  
18 Dr. Shah that can't be the basis for an award, has no  
19 probative value, and would prompt the jury to make an award  
20 that's higher than it would otherwise be intentioned in a  
21 way that's not readily discernible when the jury returns a  
22 verdict.

23 If the jury believes -- if Dr. Shah could only  
24 properly testify to, let's suppose, \$320,000 of future  
25 medical expenses, and this jury makes an award of \$600,000,

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1 because they figure there is a lot of contingents, and  
2 let's just figure 10 percent of what we think that will  
3 cost, we'll kind of balance it out. And that's what they  
4 do. And when that number comes in at \$600,000, they're  
5 going to say, well, Dr. Shah had a total of over a million  
6 and a half, so that fits. And I'm not going to be able to  
7 say, this is how they came to 600,000. I'm not going to be  
8 able to say, well, this is the amount for actual -- for the  
9 physiatrist, that he was competent to testify to. This is  
10 the amount for the ankle that he was competent to testify  
11 to, but this other \$300,000 is just because he supposed  
12 there might be a million dollars of other costs that's not  
13 as certain, so they just said, let's throw in an extra  
14 \$300,000.

15 And that's the prejudice I'm going to have.

16 MS. KLAUM: And just if I may, Dr. Shah then is  
17 improperly trying to testify to the opinions of Dr. Lerman  
18 and Dr. Kosharsky who are not here, who are never going to  
19 be here. And their opinions are not part of the record in  
20 terms of future special damages.

21 And so that is --

22 THE COURT: I agree. I'm just not sure they need  
23 to be.

24 MR. LEITER: I guess, Your Honor, lastly, so from  
25 the case law as I've cited, since Dr. Shah has to be able

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1 to identify that the principle basis for each of the items  
2 in the testimony that he would give is something that is in  
3 evidence, I would suggest that the plaintiff, if they're  
4 contending that his testimony throughout this report is  
5 proper, identify what it is that they believe is in  
6 evidence for him to rely on so that it's not just that he  
7 had some other things that are tangentially being swept in  
8 with it, but that he has some item that he can identify as  
9 the principle basis for those numbers that's actually in  
10 evidence. Because the only things we have in evidence are  
11 the plaintiff's testimony, which I submit is not supported;  
12 Dr. Benatar's testimony, which I again submit is not  
13 supportive; the hospital records which has no support for  
14 this life care plan; and the few reports from Total  
15 Orthopedics that are in evidence that also don't support  
16 this plan or any of those costs.

17 And if they can't identify that there is a  
18 principle basis that's in evidence, I would reiterate,  
19 though, under the case law, you cannot testify to that. It  
20 doesn't come in as an exception to hearsay.

21 THE COURT: I'm not sure I agree with you.

22 You mentioned that the plaintiffs only cited to  
23 one case in their written opposition to your motion in  
24 limine, but it's a pretty persuasive case. It's Tornatore,  
25 T-o-r-n-a-t-o-r-e, v. Cullen. It's a Fourth Department

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1 case in 2018, and the cite is 162 A.D. 3d 1503. And I'm  
2 quoting: "It is well settled that opinion evidence must be  
3 based on facts in the record or personally known to the  
4 witness. It is equally well settled, however, that an  
5 expert is permitted to offer opinion testimony based upon  
6 facts not in evidence where the material is of a kind  
7 accepted in the profession as reliable in forming a  
8 professional opinion. A professional reliability exception  
9 to the hearsay rule enables an expert witness to provide  
10 opinions evidence based on otherwise inadmissible hearsay,  
11 provided it is demonstrated to be the type of material  
12 commonly relied on in the profession and provided that it  
13 does not constitute the sole or principle basis for the  
14 expert's opinion."

15 And this case cites the case of Wagman,  
16 W-a-g-m-a-n, v. Bradshaw, which is a Second Department case  
17 from 2002, and the cite on that is 292 A.D. 2d 84, which  
18 has been followed, as far as I can tell, by every  
19 department since then regarding what is now commonly called  
20 the professional reliability exception to the hearsay rule.

21 And we know that Dr. Shah's testimony cannot be  
22 based only on hearsay because he physically examined the  
23 plaintiff. So I'm not seeing how this case and the  
24 professional liability exception to the hearsay rule isn't  
25 applicable here.

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1 MR. LEITER: Sure. Maybe I can give you an  
2 example to illustrate it.

3 So as you quoted in the decision, that last part  
4 where it says, "provided it's not the sole or principle  
5 basis," and Dr. Shah identifies here that the sole, as well  
6 as the principle basis for particular items in his life  
7 care plan are the narrative reports from the doctors who  
8 are not here. And so that's Footnote 3, per  
9 Dr. Kosharsky.

10 And then he continues on from there where he  
11 says, "require annual injections to her cervical and lumbar  
12 spine as follows: Lumbar facet injections four times a  
13 year at \$1,200,000 per injection."

14 So he's not only clearly saying, when he puts in  
15 his report, lumbar facet injections, and then putting it at  
16 four times a year and listing the costs as \$1,200, he's  
17 clearly taking that entirely from an out-of-court report by  
18 Dr. Kosharsky that's not in evidence, and without  
19 Dr. Kosharsky coming here to say she needs lumbar facet  
20 injections, that she needs them four times a year and that  
21 they cost \$1200.

22 THE COURT: You want to pick apart the different  
23 opinions on the different body parts pursuant to hearsay,  
24 when I don't think it works like that. So I hear your  
25 argument. I don't think it works like that.

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1           The expert opinions that he's going to testify to  
2           are based on an entire life care plan, and part of those  
3           opinions are based on entirely hearsay, and part of those  
4           opinions are not based on hearsay. And I don't think we go  
5           into each answer to decide whether that particular answer  
6           is based on hearsay or based on his personal knowledge from  
7           the examination or from something else. I just don't think  
8           it works that way.

9           MR. LEITER: I understand that's your conclusion,  
10          Your Honor. Note my exception, for the record. But I  
11          think it's clear from the case law, and just as when  
12          plaintiffs asked their questions, they're not just going to  
13          ask, I'm expecting: What do you think the total cost of  
14          all care will be? They're going to ask him line by line.  
15          And when we get to a line that we know that he does not  
16          have an admissible foundation for, and an objection is  
17          made, I believe that objection is required to be  
18          sustained --

19          THE COURT: I know that you believe that.

20          MR. LEITER: -- because he doesn't have a  
21          foundation to answer that particular question. Just like  
22          for any other question, if a witness doesn't have personal  
23          knowledge to give an answer, they can't because they had  
24          personal knowledge to answer four questions earlier, answer  
25          the question that's being posed to him at that moment.

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1                   And so I would say in the same way, the fact that  
2                   he can give an answer about the ankle because it's subject  
3                   to connection with Persich, doesn't mean that when a  
4                   question now comes and says, how many times a year do you  
5                   suppose she's going to need lumbar facet injections, and he  
6                   says, per my plan it's going to be four times a year, and  
7                   it's based entirely not -- it's based entirely on what  
8                   Dr. Kosharsky said in a document that's not in evidence,  
9                   it's not that Dr. Shah has determined individually she  
10                  needs it four times a year, or even that he agrees with  
11                  Kosharsky.

12                  I think maybe that's a point I should have made  
13                  earlier. Dr. Shah's opinions are not even consistent with  
14                  the ones he's adopting from Kosharsky. The reason I know  
15                  that is because I have a prior report that he's prepared,  
16                  and he doesn't use the cost that he's adopting from  
17                  Dr. Kosharsky, and he doesn't use the cost that he's  
18                  adopting from Dr. Lerman or the frequency, and for somebody  
19                  with the same condition.

20                  So what he's done is thrown out his opinion,  
21                  honed in Kosharsky's opinion. Now Kosharsky's opinion is  
22                  not in evidence. It can't be the basis for the testimony.  
23                  And we're not going to hear Dr. Shah's own opinion, we're  
24                  just still going to hear Dr. Kosharsky's opinion, and  
25                  that's the hearsay problem that this presents.

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1 THE COURT: So in other words, everything is  
2 inadmissible if it doesn't have to do with the potential  
3 testimony of Dr. Persich?

4 MR. LEITER: No. Because as I said earlier,  
5 there are lots of items. Let's just take this supposition  
6 she's going to go to the gym at YMCA in Castle Hill and  
7 she's going to work out there and this is how much it cost  
8 to join that gym, and this is how much it cost to take the  
9 bus there, that's got nothing to do with Kosharsky or  
10 Lerman. So be it. He can testify to that as a physiatrist  
11 and he says I think she should be exercising, that's part  
12 of the plan.

13 THE COURT: And the plaintiff still has to prove  
14 that it's more likely than not that she will do that.

15 MR. LEITER: Right. The jury doesn't know. We  
16 know from the report that we had from Benatar yesterday  
17 that she belonged to a Planet Fitness. That Planet Fitness  
18 happened to be located right around the corner from her  
19 house. If she's not going there, I don't know how in the  
20 world the jury can conclude, by a preponderance of the  
21 evidence, that she's going to go to a YMCA in Castle Hill  
22 like Dr. Shah supposes, where he admits in his footnotes it  
23 would take an hour to travel there by bus and an hour back.

24 THE COURT: That's an argument you'll certainly  
25 make.

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1 MR. LEITER: Certainly.

2 But I'm not disputing that he gets to make that  
3 on the stand because that's just an issue on  
4 cross-examination and credibility.

5 But where there's -- there's no issue of him  
6 relying on Kosharskyy for how much does the YMCA cost or  
7 how much does the bus cost. But when you want to say, said  
8 injections costs \$1200 or \$1400 each, and you're putting  
9 that in your report only because Kosharskyy said it, that's  
10 where I say he's not permitted to testify about it.

11 THE COURT: So anything else you'd like to add?

12 MS. KLAUM: Your Honor, it's almost like a Frye  
13 argument in terms of Dr. Shah not being qualified to  
14 testify about future medical damage that were given by  
15 Lerman and Kosharskyy.

16 THE COURT: Well, that was my point earlier. It  
17 sounds like a weight-of-evidence argument rather than  
18 inadmissibility, to me.

19 MR. LEITER: Well, it would be Parker. Because  
20 Frye would be, is he really a life care planner. Parker  
21 is, did he apply life care planning principles and  
22 methodology to come up with his plan.

23 THE COURT: And aren't you going to cross-examine  
24 him about that?

25 MR. LEITER: The only thing in Parker is, he

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1 doesn't get to testify until he clears the Parker hearing  
2 and it's determined that he did apply the methodology. The  
3 methodology is certainly not take what some other doctor  
4 said, carry over into your report without scrutinizing it,  
5 even when you know that the numbers he gave you are not  
6 numbers that you agree with, not numbers you put in your  
7 own reports, just carry them over. There's no actual  
8 methodology being applied. He's simply adopting what  
9 somebody else said. That's hearsay.

10 THE COURT: I mean, some of this is speculative  
11 because we don't know what Dr. Shah is going to testify to.  
12 And whatever he testifies to, must be within the four  
13 corners of his expert witness disclosure. And I think some  
14 of this will be determined during his testimony.

15 MR. LEITER: We would ask for a Parker hearing.  
16 If he's going -- if he would come in here, and at the  
17 hearing, just the voir dire, acknowledge that he carried  
18 over numbers, carried over frequency, all of that directly  
19 from those reports without any alteration by hand, without  
20 any consideration of any other documents, without  
21 consideration of the examination -- and I don't even see  
22 how the examination can tell him it's \$1400 or it isn't.  
23 If that's what he would acknowledge that he did, I don't  
24 even see how there could be a question that he doesn't pass  
25 the Parker test.

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1 THE COURT: That application is denied. I've  
2 reviewed Dr. Shah's expert witness disclosure. And for the  
3 reasons previously discussed, the motion in limine is  
4 denied. And we'll see how the testimony goes, and you'll  
5 make your objections, and I'll make rulings on them during  
6 his testimony.

7 MR. LEITER: Thank you, Your Honor.

8 MR. RYBAK: Thank you, Your Honor.

9 THE COURT: Is there anything else plaintiff  
10 would like to add?

11 MR. RYBAK: No.

12 THE COURT: Let's bring in the jury and get  
13 started.

14 THE COURT OFFICER: All rise. Jury entering.  
15 (Whereupon, the jury enters the courtroom.)  
16 You may be seated.

17 THE COURT: Good morning, jurors.

18 THE JURY: Good morning.

19 THE COURT: Apologies again for keeping you  
20 waiting. There are many legal issues that are in a trial  
21 that the attorneys and I need to discuss outside of your  
22 presence. I apologize for keeping you waiting, but we are  
23 ready to begin.

24 Plaintiff, you may call your next witness.

25 MR. RYBAK: The plaintiff calls Dr. Shah to the

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1 stand.

2 THE COURT OFFICER: Remain standing.

3 Raise your right hand.

4 D A V I D S H A H M.D., a witness called on behalf  
5 of the plaintiff after having been first duly  
6 sworn and took the witness stand and testified  
7 as follows:

8 THE COURT OFFICER: In a loud clear voice, state  
9 your name and business address for the record.

10 THE WITNESS: It's Dr. Chirag Shah. Business  
11 address is 787 11th Avenue, Seventh floor, New York,  
12 New York 10069.

13 THE COURT OFFICER: You may be seated.

14 THE COURT: Counsel, you may inquire.

15 MR. RYBAK: Thank you, Your Honor.

16 DIRECT EXAMINATION

17 BY MR. RYBAK:

18 Q Good morning, Dr. Shah.

19 A Good morning.

20 Q Can you tell the jury your qualifications, meaning the  
21 schooling, what you do, things of that nature.

22 A Sure.

23 So originally I was accepted into a seven-year medical  
24 program at the University of Illinois. So I completed an  
25 undergraduate degree in biological sciences. After that I went

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1 on to actually go to law school, John Marshal Law School.

2 Completed that and got my master's in patent law.

3 Subsequently, I started my medical training at the  
4 University of Illinois as well. After completing my medical  
5 degree there, went on to complete a residency of physical  
6 medicine and rehabilitation, which was at Rush University in  
7 Chicago.

8 After completing that, I then went onto a fellowship  
9 at Mount Sinai Hospital here in New York in interventional spine  
10 and sports medicine.

11 Q Are you board certified?

12 A I am board certified in physical medicine and  
13 rehabilitation.

14 Q What does it mean to be board certified?

15 A Board certification means that you've gone through a  
16 residency program that's accepted by the ACGV, the governing  
17 board in New York State. And upon completing that, you take a  
18 two-part examination. Upon completing that or passing that  
19 test, you become board certified. And you have to maintain that  
20 certification over the course of ten years by maintaining the  
21 medical education.

22 Q Do you have any hospital affiliations?

23 A I currently work at the Mount Sinai Hospital, Mount  
24 Sinai West Hospital.

25 Q And can you explain to the jury your specialty?

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1           A     So my specialty is physical medicine and  
2     rehabilitation, with a focus on interventional spine sports  
3     medicine.

4           So psychiatry or physical medicine rehabilitation  
5     primarily focuses on restoring function for a patient who is  
6     experiencing a disability or an injury or have gone through an  
7     accident, trauma, et cetera, that -- you know, restoring that if  
8     function might include things that involve physical therapy,  
9     home exercising programs, medication management, injections or  
10    recommending surgical interventions if those things fit.

11          Q     Have you testified in court before?

12          A     I have.

13          Q     How many times?

14          A     Roughly six or seven times.

15          Q     And are you being paid for your testimony today?

16          A     I am.

17          Q     And what's your fee?

18          A     My trial testimony fee is \$10,000.

19          Q     And to be here today, did you have to cancel any  
20    appointment?

21          A     I did. I cancelled appointments.

22          Q     Usually what does your workday look like at work?

23          A     Wednesday, my initial part of the day is seeing  
24    patients in the office, in the clinic. And then the afternoon  
25    involves doing procedures on joints or the spine.

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1 Q Okay. Do you prepare life care plans for your  
2 patients?

3 A Yes, I do.

4 Q Can you explain to the jury what a life care plan is.

5 A Of course.

6 So I underwent a course in life care planning, and  
7 then certified as a life care planner. Essentially what it is  
8 is, it's an extension of kind of what I do on a regular basis in  
9 physiatry. What we do is we outline or identify the injury, the  
10 disability, and then outline what kind of -- the therapies,  
11 aids, procedures, surgeries, et cetera, that a patient would  
12 need throughout their lifetime from the disability to when they  
13 might pass away. And then we quantify that with a dollar figure  
14 based on current prices what those things cost.

15 Q Were you asked to prepare a life care plan for the  
16 plaintiff, Nereyda Benitez?

17 A Yes, sir.

18 Q And what did that entail?

19 Did you first meet with Ms. Benitez?

20 A So it involves several parts and then parts that  
21 include initially getting the medical records, and obtaining a  
22 medical history, based on what Ms. Benitez has already gone  
23 through. And then I have her come into the clinic. So she came  
24 into the clinic. I evaluate her by going through the history,  
25 all the history that she had from her accident, what she's gone

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1 through afterwards, as well as going through a physical  
2 examination.

3 And after that examination and a history, we compile  
4 all that information and I create a roadmap, if you will, for  
5 things that they made need going forward.

6 Q And did you bring notes in your life care plan with  
7 you?

8 A Yes, I did.

9 Q So if you need to refer to that, please do so.

10 When did you first meet with Ms. Benitez?

11 A March 2024.

12 Q And did you -- run us through the exam that you  
13 performed.

14 A Sure.

15 Just to clarify, the whole exam or just the physical?

16 Q The physical exam.

17 A After completing the history, I did a physical  
18 examination on the injured body parts, that includes her neck,  
19 her lower back and her ankle.

20 Essentially, we go through, you know, a multitude of  
21 different parts of it. So it will be -- there's palpation,  
22 which is touching the different parts to see if there's pain  
23 that gets aggravated when we touch it. We go through range of  
24 motion exercise, which is essentially going through what they  
25 are capable of doing in terms of bending forward, bending