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1. *TRIAL TRANSCRIPT OF STEVEN JOHN TOULIOPOULOS, M.D., 2008 Trial Trans. LEXIS 596*

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# *TRIAL TRANSCRIPT OF STEVEN JOHN TOULIOPOULOS, M.D.; 2008 Trial Trans. LEXIS 596*

Supreme Court of New York, New York County, Civil Term

Index No. 111750/06

September 22, 2008

**Reporter**
2008 Trial Trans. LEXIS 596 *

CHRISTOPHER MILLER, PLAINTIFF, -against- JETBLUE AIRWAYS CORPORATION and TURNER CONSTRUCTION CORP.

**Expert Name:** STEVEN JOHN TOULIOPOULOS, M.D.

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## Counsel

**[*1]** SACKS & SACKS, Attorneys for the Plaintiff, 150 Broadway, New York, New York 10038, BY: HOWARD R. BOROWICK, ESQ.

LEWIS BRISBOIS BISGAARD & SMITH, LLP, Attorneys for the Defendants, 199 Water Street 25th Floor, New York, New York 10038, BY: ALAN KAMINSKY, ESQ.

## Judges

BEFORE HONORABLE EILEEN RAKOWER, Justice

## Proceedings

2

[1]
[2]THE COURT: Counsel call your next

[3]witness.

[4]MR. BOROWICK: Yes, the Plaintiff calls

[5]Dr. Steven Toulipoulos.

[6]D O C T O R S T E V E N T O U L I P O U L O S,

[7]Witness, called on behalf of **[*2]** Plaintiff,

[8]having first been duly sworn, took the witness

[9]stand and testified as follows:

[10]THE COURT CLERK: State your name and

[11]spell your name.

[12]THE WITNESS: Steven Touliopoulos,

[13]T-O-U-L-I-O-P-O-U-L-O-S, first name Steven with a

[14]V.

[15]THE COURT CLERK: And what is your

[16]business address?

[17]THE WITNESS: 23-1831st Street, Astoria,

[18]New York 11005.

[19]MR. BOROWICK: May I, Judge?

[20]THE COURT: Yes, you may.

[21]DIRECT EXAMINATION

[22]BY MR. BOROWICK:

[23]Q Dr. Touliopoulos, I'm going to ask you to

[24]keep your voice up so we can keep the airconditioner

[25]on and direct your remarks to the jury.

[26]What is your occupation?

[3]
[1]
[2]A I'm an orthopedic surgeon.

[3]Q What does it mean to be an orthopedic

[4]surgeon?

[5]A It's a specialty in medicine that studies

[6]problems with bones and muscles and joints.

[7]Q It's a little hard to hear you back here,

[8]so as well, I'm projecting. If you could keep your

[9]voice up it will work well.

[10]A It's a specialty in medicine that

[11]specializes in disorders of bones, joints and muscles.

[12]Q And are you licensed **[*3]** to practice

[13]medicine?

[14]A Yes, I am.

[15]Q And where are you licensed?

[16]A I'm licensed in New York State and

[17]Connecticut, also.

[18]Q And what background education do you have

[19]that permits you to get a license to practice

[20]medicine?

[21]A Well, you have to finish an accredited

[22]medical school and take a three part examination.

[23]Q Okay, and what is your educational

[24]background?

[25]A I have a bachelor's degree in chemical

[26]engineering from Columbia University. I have a

[4]
[1]
[2]master's degree in bioengineering from Columbia, I

[3]went to medical school and SUNY Downstate and I stayed

[4]there to do my residency in orthopedics and I did a

[5]sport medicine fellowship at Lenox Hill Hospital in

[6]New York City.

[7]Q Doctor, are you board certified in your

[8]field?

[9]A Yes.

[10]Q And canyo u explain to the jury what it

[11]means to be board certified in orthopedic surgery?

[12]A You have to finish an accredited

[13]orthopedic residency program and then pass a two-part

[14]examination.

[15]Q Are you presently in private practice?

[16]A Yes, I am.

[17]Q Describe for **[*4]** the jury what your private

[18]practice includes.

[19]A I have a general practice in orthopedics.

[20]I treat, of course, sports injuries, but also

[21]traumatic injuries. I take calls at several emergency

[22]rooms.

[23]Q Do you have a particular specialty?

[24]A Again, I have a fellowship in sports

[25]medicine and athletic trauma.

[26]Q Do you do spine surgery?

[5]
[1]
[2]A I do not.

[3]Q Are there doctors in your practice that

[4]specialize in spine surgery?

[5]A Yes, there is.

[6]Q Now, have you ever operated on a knee?

[7]A Yes.

[8]Q Approximately how many times?

[9]A I would have to say --

[10]Q You don't have to give me an exact. Is

[11]it tens, hundreds or thousands?

[12]A Approximately a couple thousand.

[13]Q And what about feet?

[14]A Yes.

[15]Q How many?

[16]A Feet, probably several hundred.

[17]Q What about hands?

[18]A Probably also several hundred.

[19]Q Now, have you and I met before?

[20]A Yes.

[21]Q And have I called you as a witness when

[22]my client is also one of your patients?

[23]A Yes, I have.

[24]Q When you come to Court **[*5]** as a witness, when

[25]one of your patients has had a trauma injury and has

[26]gone to Court, do you charge a fee for your time?

[6]
[1]
[2]A Yes, I do.

[3]Q Are you charging a fee for your time,

[4]here, today?

[5]A Yes, I am.

[6]Q Tell the jury, when did you first become

[7]familiar with Chris Miller?

[8]A I became familiar with him while I was at

[9]St. Vincent's Hospital. He was transferred there from

[10]another institution.

[11]Q And do you know how he came to be

[12]transferred?

[13]A I don't know, I do not know the

[14]particulars, no.

[15]Q And was he someone who had a congenital

[16]condition, a traumatic condition or otherwise?

[17]A He had a traumatic condition.

[18]Q Do you treat both types?

[19]A Yes.

[20]Q Is there difference in the way in the way

[21]you treat congenital or traumatic condition?

[22]A Congenital is something that you are

[23]basically born with and traumatic is as a result of an

[24]accident.

[25]A traumatic injury is something that's

[26]treated more acutely.

[7]
[1]
[2]Q I want you to assume that he went to

[3]Jamaica Hospital from his accident scene and **[*6]** he -- I'm

[4]looking now at Exhibit 23 in evidence, and Jamaica

[5]Hospital, he reported or they reported that he was a

[6]twenty-nine year old male construction worker, that he

[7]fell and landed on his feet with an unknown loss of

[8]consciousness, that his complaints at the hospital

[9]included left wrist, bilateral ankles and low back

[10]pain. They did a lot of tests, films on him, exams on

[11]him and ultimately put him on morphine and planned to

[12]operate on him.

[13]At some point he or his family made a

[14]decision to transfer out of Jamaica Hospital and go to

[15]St. Vincent's.

[16]Do you know where St. Vincent's Medical

[17]Center is?

[18]A Yes.

[19]Q Are you affiliated with that Medical

[20]Center?

[21]A Yes, I am.

[22]Q What is your position at St. Vincent's?

[23]A I'm on staff, there.

[24]Q And for how long have you been on staff,

[25]there?

[26]A Since I believe, '97.

[8]
[1]
[2]Q Are your partners on staff, there?

[3]A The -- some of them are, yes.

[4]Q Do you know a Dr. Andrew Merola?

[5]A Yes, I do.

[6]Q What is his specialty?

[7]A Spine surgery.

[8]Q Do you **[*7]** know Dr. Papathomas?

[9]A Yes.

[10]Q How do you pronounce that?

[11]A Papathomas.

[12]Q Papathomas. And what does she do?

[13]A She's a podiatrist.

[14]Q Now, when you first met Chris Miller, the

[15]week of his accident, what was his condition when you

[16]first saw him?

[17]A You know, he had a significant trauma.

[18]He had multiple fractures, fractures of his right foot

[19]and also left foot. He had a dislocation of his left

[20]wrist. Soon thereafter we also discovered he had a

[21]fracture of his left knee and fracture of his lower

[22]back.

[23]Q Have you, since becoming his doctor, have

[24]you had an opportunity to review the Jamaica Hospital

[25]records and the films that were taken of him at

[26]Jamaica Hospital?

[9]
[1]
[2]A Yes, I have.

[3]Q And when you said --

[4]MR. BOROWICK: Strike that.

[5]Q When was the last time that you treated

[6]Chris Miller?

[7]A I don't have the exact date, but I think

[8]it was within the last month or two.

[9]Q So you're still his treating doctor?

[10]A Yes, I am.

[11]Q And over the two years that you have

[12]treated him, would you say that **[*8]** he was compliant or

[13]non-compliant?

[14]A He's been compliant.

[15]Q Cooperative or non-cooperative?

[16]A He's been cooperative.

[17]Q Have you ever found him to be a

[18]malingerer?

[19]A Never.

[20]Q What is a malingerer?

[21]A Somebody that doesn't really want to get

[22]better, somebody that maybe exaggerates their

[23]injuries.

[24]Q Has he ever been someone whose complaints

[25]were out of whack, much greater than what you found

[26]his objective findings to be?

[10]
[1]
[2]A No.

[3]Q Have they ever been less or understated

[4]from what his physical findings would be?

[5]A He is usually very stoic, not somebody

[6]who -- that likes to complain about pain, although you

[7]can tell he is in pain.

[8]I frequently see him grimace in pain when

[9]he's moving on and off the table.

[10]Q Now, during that first exam, after you

[11]examined him and had a chance to give him a physical,

[12]did you come to a conclusion about his injuries?

[13]A Yes.

[14]Q And did you do tests yourself, that even

[15]though there were films that were existent from

[16]Jamaica Hospital, did you do your own tests? **[*9]**
[17]A Yes, we did.

[18]Q And I'm going to ask you, with the

[19]Court's permission, I'm going to ask you to step down

[20]and give us a little bit of background using this

[21]exhibit, which is Exhibit 10.

[22]Would you describe for the jury --

[23]MR. BOROWICK: Actually, if we can put

[24]that off.

[25]Q Would you describe and explain to the

[26]jury the variety and extent of the injuries that you

[11]
[1]
[2]found?

[3]THE WITNESS: May I step down?

[4]THE COURT: Yes.

[5]THE WITNESS: Thank you.

[6](Witness steps down.)

[7]Q Okay, this is -- okay, do you have a

[8]pointer?

[9]A He sustained multiple injuries.

[10]Q I'm just going to ask you to shift it

[11]around a bit so everybody here can see.

[12]THE COURT: But it is important for the

[13]Reporter to be able to see the speaker, so do you

[14]need to reposition?

[15](Pause.)

[16]THE COURT: Can everyone see.

[17]THE JURORS: Yes.

[18]THE COURT: All right.

[19]A He sustained multiple injuries very

[20]frequently found with people that fall, especially

[21]when they land on their feet. There's kind of an axle

[22]force going up the **[*10]** body resulting in fractures of the

[23]heels.

[24]We call that bone the calcaneus, which is

[25]the heel bone.

[26]Q Let me just stop you for a second.

[12]
[1]
[2]We have some models, here, if it would

[3]help you to explain in three dimension as you're going

[4]through the charts, that would be great.

[5]A Again, this is the calcaneus. It's in

[6]the base of the heel area of the foot and on the right

[7]side, the base of the bone is shattered, it's cracked

[8]like an egg into dozens of pieces.

[9]On the left side, fortunately, it cracked

[10]but didn't really move, so we were able to treat that

[11]without surgery.

[12]Q How did you treat it?

[13]A We treated it with just a soft dressing,

[14]soft cast.

[15]Q Now, would you explain using the model,

[16]explain the dynamics, the mechanics of the foot?

[17]A Yes, the foot is, basically it's multiple

[18]bones in the foot. This is the ankle joint and right

[19]below is the foot and the subtalar joint is the joint

[20]that kind of combines the ankle and the foot joints

[21]together, and that was -- this joint here was affected

[22]by the fracture, because the fracture entered **[*11]** the

[23]joint.

[24]Q What's the significance of a fracture

[25]entering a joint?

[26]A Whenever there's a fracture that involves

[13]
[1]
[2]the joint there is damage to the cartilage and that

[3]predisposes people to get arthritis later on in life.

[4]Q You mentioned a subtalar joint.

[5]What is a subtalar joint and what is the

[6]importance in the mechanics?

[7]A Basically, the subtalar joint -- I'm just

[8]going to pull this apart --is the joint between the

[9]talus and the calcaneus, and this joint, this bone was

[10]fractured and the fracture went into, you can see

[11]here, into the joint.

[12]That's the joint that moves as you walk,

[13]so that injury to that joint will affect the way you

[14]walk.

[15]Q When a fracture like that occurs and

[16]splinters it into dozens of pieces, is it just bone

[17]that's affected?

[18]A Well, it's everything. This is a --this

[19]is significant trauma, so, the bone is affected, the

[20]cartilage is affected and everything surrounding the

[21]injured bone, whether it's the skin, soft tissues,

[22]tendon, ligament, muscles are also affected.

[23]Q How is bone --how is bone vascularized? **[*12]**
[24]In other words, how does blood supply the bone?

[25]A Well, there are blood vessels that enter

[26]the bone, there are holes in the bone where our

[14]
[1]
[2]branches of our arteris go into the bone and they feed

[3]the bone, and those can also be disrupted with trauma.

[4]Q What about nerves?

[5]A There are nerves, again, throughout the

[6]skin and the soft tissues and the covering of a bone

[7]and that's something that's also injured in this kind

[8]of trauma.

[9]Q All right, in his particular case, with

[10]his particular foot injury, were those affected?

[11]A Yes.

[12]Q Tell the jury, if you can, what is

[13]proprioception and how is it involved in weight

[14]bearing joints like the foot?

[15]A Proprioception is knowing where your

[16]joint is without actually looking at it.

[17]So, if someone were to move my finger

[18]with my eyes closed, Z would kind of know my finger is

[19]moving.

[20]Propioception kind of tells you what

[21]position your joints are in and it's very important

[22]during the lower extremities when walking.

[23]Q How is that affected in Chris' case?

[24]A Again, about the nerve injuries **[*13]** and

[25]associated muscle trauma and atrophy that affect

[26]proprioception.

[15]
[1]
[2]Q Now, getting back to the exhibit, you've

[3]told us about the foot injury on the right side, on

[4]the left side. Go up the line.

[5]A Yes, so, again, this is a diagram of the

[6]injuries.

[7]Coming up to the left knee, he had a

[8]fracture of the knee. We call that a plateau

[9]fracture, a tibial plateau is the upper part of the

[10]knee -- let me see if I can use this.

[11]This is a plastic model of the knee, it's

[12]the kneecap, shinbone, and thigh bone and he broke the

[13]upper part of the shinbone, the tibia and that was

[14]kind of crushed and pushed in from this accident.

[15]Q Did the fracture go into the joint?

[16]A Yes, it did.

[17]Q Again, now, with regard to the knee, tell

[18]us the significance of the fracture into his knee

[19]joint.

[20]A Well, it's also significant for the same

[21]reasons.

[22]You have, whenever there is cracks in the

[23]cartilage, it never heals, with normal cartilage it

[24]heals, with scar tissues so that it's predisposed to

[25]arthritis later on in life.

[26]Q All right, we'll get to **[*14]** it later but

[16]
[1]
[2]there's a little label on the right shin that says

[3]RSD.

[4]Tell us just as a preliminary -- we'll

[5]get into that a little later-- what is that?

[6]A RSD is short for reflex sympathetic

[7]distrophy and it's a condition where the nerves become

[8]hyperactive. So the nerves are the sympathetic nerves

[9]and there's kind of reflex arc where the pain causes

[10]more activity in the nerves and that causes more pain,

[11]and this becomes a cycle that's very hard to break.

[12]And the symptoms are extreme pain,

[13]swelling, redness, stiffness and so forth.

[14]Q And hypersensitivity, is there a

[15]connection between a fracture like he had in his heel

[16]and hypersensitivity and this RSD that you have

[17]described?

[18]A Well, the more significant the trauma the

[19]more likely one is to get RSD.

[20]Q Now, before we get past the right leg,

[21]was there any injury to the ankle itself on the right

[22]side?

[23]A He had ankle pain. There were no

[24]fractures in the ankle joint but we later found out

[25]his ankle was very loose, his ligaments were

[26]stretched out.

[17]
[1]
[2]Q How did you find out? **[*15]**
[3]A It's a clinical examination, we do it in

[4]the office by kind of pulling on the joints.

[5]Let me show it on the diagram. We

[6]perform a couple of tests, we pull the ankle forward

[7]and where we pull the ankle and kind of test the

[8]ligaments in the ankle.

[9]Q What did you find.

[10]A That the ankle joint was loose.

[11]Q Is that something that you operated on?

[12]A It's something that we have operated on,

[13]yes.

[14]Q Is that something that requires surgery?

[15]A It's something that would require

[16]surgery.

[17]The problems right now is the RSD and

[18]also, the fact that he still has problems with his

[19]left knee and his wrist.

[20]But, the operating on the RSD can have

[21]certain risks that they may aggravate the RSD so it's

[22]something that we want to wait it out and see.

[23]Q Okay, now going up and off the legs, the

[24]next thing seems to be indicated is the wrist.

[25]A Yes.

[26]Q The left wrist, tell us what happened to

[18]
[1]
[2]his left wrist?

[3]A He had a very complicated injury it's

[4]called perilunate dislocation.

[5]Q If you would just give us some **[*16]** basic

[6]anatomy of the wrist?

[7]A The wrist is made up of eight very small

[8]bones and whenever we move our wrists these little

[9]bones kind of grind over each other. It's a very fine

[10]machine, and what's holding the bones together are

[11]these very small ligaments.

[12]When he fell, the force caused the bones

[13]to kind of spread open and the ligaments to tear.

[14]Q And is that a painful injury?

[15]A It's very painful.

[16]Q The heel fracture on both sides are those

[17]painful injuries?

[18]A Very painful.

[19]Q The knee fracture into the joint, is that

[20]a painful injury?

[21]A It's also very painful.

[22]Q How was he medicated at St. Vincent's

[23]during the four weeks that he was there?

[24]A He was, I believe receiving narcotic

[25]medication. I believe morphine was some of the

[26]medications he was receiving.

[19]
[1]
[2]Q Was that enough to -- I mean can

[3]medication cure him?

[4]A No, it helps take the edge off the pain.

[5]Obviously, with these multiple injuries, even high

[6]doses of narcotic medication are not always successful

[7]in reducing pain.

[8]Q Now, the diagram **[*17]** indicates certain spinal

[9]injuries of the lumbar spine, the cervical spine, but

[10]there's a fracture at L-1, a complex fracture, is

[11]that -- that's not your specialty, is it.

[12]A That's not my specialty.

[13]Q So then we'll leave it for Dr. Merola.

[14]You can take that down and I ask you to

[15]replace it with this one.

[16](Witness complies.)

[17]MR. BOROWICK: I'm talking about now

[18]Exhibit 3 in evidence.

[19]Q Now, when you came to start treating

[20]Chris Miller, and you found these conditions to be

[21]present, was there a plan?

[22]In other words, what were you going to

[23]address first, what were you going to do?

[24]A There was a plan, obviously, we had

[25]Dr. Merola get involved with the spine injury right

[26]from the get go. And the issues with the extremities

[20]
[1]
[2]were addressed in the stage fashion.

[3]Q What factors and considerations were

[4]there for what to address first?

[5]A Usually swelling. He had significant

[6]swelling of his right foot and his ankle and if you

[7]operate too early on a swollen foot you would have

[8]trouble closing the skin afterwards. So you really

[9]have **[*18]** to wait for the swelling to go down and that can

[10]take sometimes, one, to two, even three weeks to

[11]happen.

[12]The left wrist was more amenable to

[13]surgical intervention at an early stage.

[14]Q Tell us what you did.

[15]A We made an incision to examine the small

[16]bones in the back of the wrist and we went through or

[17]between the tendons and through the capsule to expose

[18]the carpus.

[19]The carpus is the eight small bones of

[20]the wrist. And we found that the bones were split

[21]apart, that there was damage to the cartilage as we

[22]said in the knee and the foot, there was also damage

[23]to the cartilage in the wrist. That holds the same

[24]kind of prognosis.

[25]We removed the loose pieces of chip in

[26]the wrist, kind of put the bones back together again,

[21]
[1]
[2]put multiple pins in -- that diagram, that's a real

[3]x-ray of the case -- to hold the bones in place and

[4]then we, as best we could, we sutured the ligaments

[5]tears.

[6]Q Are those pins exiting the skin?

[7]A Yes, they are.

[8]Q And how does that resolve?

[9]A We pull them out, usually in the office.

[10]Q How long before **[*19]** you pull them out?

[11]A You know, around three months, plus or

[12]minus.

[13]Q And did that surgery remedy his wrist

[14]problems?

[15]A Well, the wrist, I guess the wrist is

[16]very fine machine, and once you rip it apart like this

[17]it's never going to work the same.

[18]With surgery, we hope it kind of restores

[19]anatomy to regain some motion and some strength, but,

[20]you never really regain your full motion, full

[21]strength. And considering that the extent of his

[22]injury with the bone chips, there's a high likelihood

[23]of the bone to develop arthritis.

[24]Q Now, what was his post-op care for the

[25]left wrist?

[26]A He was placed into a splint for a couple

[22]
[1]
[2]of months.

[3]Q Was there any medication or physical

[4]therapy while he waited for his knee surgery at

[5]St. Vincent's?

[6]A He -- there was minimal therapy that we

[7]could do because of his multiple injuries.

[8]For the hand, it's really immobilized for

[9]a prolonged period of time in the splint.

[10]Q Now, when you say immobilized, when he

[11]became-- when the pins were taken out and he would

[12]move his hand either up or down, **[*20]** what do they call it

[13]palmar?

[14]A Palmar flexion in the direction of the

[15]palm and dorsi flexion which is bringing the wrist

[16]back.

[17]Q And when he would do that, did he

[18]experience any pain?

[19]A Yes, he did.

[20]Q And what would be painful about that kind

[21]of movement after his bones have healed?

[22]A Well, because of scar tissue, because of

[23]the damage to the cartilage, because of residual

[24]swelling and stiffness, there's going to be pain for

[25]an extended period of time.

[26]Q And at some point -- let's move onto the

[23]
[1]
[2]foot.

[3]Did there come a time during that

[4]hospitalization when you addressed his foot fracture?

[5]A Yes.

[6]MR. BOROWICK: I'm now putting up

[7]Exhibit 4.

[8]Q I'm going to ask you to take us through

[9]his foot fracture and what you did.

[10]A We made an incision on the outside of his

[11]foot. We call this a hockey stick incision because it

[12]looks like a hockey stick.

[13]And we actually lift this skin up to

[14]expose the outside of the calcaneus, the heel bone and

[15]what we found was a very, very badly crushed bone, we

[16]call that comminutia **[*21]** when it's in many pieces and we

[17]piece them together the best we could.

[18]We couldn't get it back together the way

[19]it was before it broke because it was just kind of

[20]crushed, and there was a lot of damage to the area

[21]below the joint. We put the plate on, the multiple

[22]screws and filled in the holes with bone graft.

[23]Q Where did you get the bone graft from?

[24]A We got it from parts of his own foot but

[25]also from a cadaver.

[26]Q Is that surgery done under general

[24]
[1]
[2]anesthesia?

[3]A Yes.

[4]Q And was it successful?

[5]A Well, successful in that we were able to

[6]kind of restore the general anatomy of the foot.

[7]Before the surgery his foot was kind of blown out, it

[8]was very wide in which case it would be hard for him

[9]to put a shoe on.

[10]We were able to make it narrow -- this is

[11]a view from the bottom -- so that he could wear a shoe

[12]more comfortably. We were able to make it a little

[13]higher so he's not as short as he would have been

[14]without the surgery, but, as far as the joint goes,

[15]you know it was fairly crushed and we knew from the

[16]get go this was something **[*22]** that was going to give him

[17]problems in the future.

[18]Q While you were in there, wouldn't it have

[19]been easy enough to address the ankle?

[20]A No, no, because, you know, with all the

[21]swelling you really want to do as minimum amount of

[22]surgery as possible.

[23]Something like a ligament problem in an

[24]ankle is elective surgery that doesn't need to be done

[25]right away and there's no need to be increasing his

[26]surgical time, increasing the complication rate by

[25]
[1]
[2]doing everything at one time.

[3]Q Were you able to eyeball, actually see

[4]the damage to the cartilage?

[5]A Yes.

[6]Q And what did you see?

[7]A There was a lot of cracks in the

[8]cartilage and something-- some areas where we just

[9]couldn't piece it back together again.

[10]Q What is it called when you have cracks in

[11]the cartilage that are permanently damaged?

[12]A Again, multiple fractures, we call that

[13]comminutia. And the comminutia involves the articular

[14]cartilage and bone beneath the cartilage that helps.

[15]Q What is comminuted malacia?

[16]A That's when a cartilage start to wear.

[17]Q Now, when **[*23]** the crackled cartilage, when

[18]you remove pieces of that, when you observed the other

[19]pieces, was there any point at which it was while he

[20]was not weight bearing where there was bone on bone?

[21]A You mean initially after his accident?

[22]Q Initially after the accident.

[23]A Well, there's still cartilage on the

[24]other side on the talus, but there are parts on the

[25]calcaneus where there's no cartilage covering it.

[26]Q Now, what happens when there's bone on

[26]
[1]
[2]bone and it starts out with cartilage on cartilage and

[3]one side of that is stripped of its cartilage.

[4]A Well, its a progressive process.

[5]Cartilage is something that we walk on. It happens to

[6]lubricate the joint and reduces friction.

[7]So, without cartilage -- I said knee, but

[8]whatever joint it is, whether the it's a subtalar

[9]joint or any other part of the body will wear at an

[10]accelerated rate.

[11]Q All right, let me just ask you to assume

[12]that Mr. Miller never had any problem with his right

[13]or left foot, no fractures, no arthritis, no

[14]surgeries, is there anything in your analysis of his

[15]condition and treatment **[*24]** over the years that you have

[16]treated him that would suggest other than this fall

[17]was the cause of his foot problem?

[18]A There are no other conditions that would

[19]sway me from saying this was the cause of his

[20]condition.

[21]Q Same question with regard to the wrist.

[22]Do you have an opinion with a reasonable

[23]degree of medical certainty as to whether or not other

[24]than this fall, there's any other cause for his

[25]injury?

[26]A My opinion is that there's no other
27

[1]
[2]cause.

[3]Q Okay. Now, if I'm just going to ask you

[4]to describe, because I saw them in the hospital

[5]records, and I want to ask you what they mean.

[6]There was, with regard to the arm and the

[7]wrist injury, atrophy. What exactly is that and why

[8]did it happen?

[9]A Atrophy is when the muscles get thin and

[10]it's usually from disuse.

[11]So, you can imagine that once you're in a

[12]cast or you have a fracture and you're not moving the

[13]joint anymore, the muscles don't get used and start to

[14]get very weak.

[15]Atrophy can happen within a few days but

[16]can progress over weeks and months.

[17]Q Did he have **[*25]** it?

[18]A Yes.

[19]Q Osteopenia, what is that?

[20]A Osteopenia, like the way the muscle gets

[21]weakened and skinny when not being used, the bone also

[22]weakens and loses calcium when not being used, and I

[23]could tell that on the x-ray because it gets to be

[24]really washed out.

[25]Q Carpal instability and ruptured ligament?

[26]A That's what we found in the surgery as a
28

[1]
[2]result of his accident.

[3]Q Now, with regard to the left hand, in

[4]addition to the wrist injuries, there was something in

[5]the record about a crush injury and contracture, and I

[6]think it was about the fifth digit.

[7]What happened?

[8]A Well, after an accident, you can get

[9]swelling and stiffness and that's kind of the way your

[10]body wants to heal itself.

[11]The down side is you can get contracture

[12]where it just doesn't want to move anymore and that

[13]can significantly affect the function.

[14]Q With regard to his wrist, over the last

[15]two years since two years and three months, have you

[16]continued to treat his wrist, examine it, make

[17]findings?

[18]A Yes.

[19]Q How has his wrist been over the **[*26]** last two

[20]years?

[21]A His wrist has has progressed getting more

[22]pain and stiffness and which is not unexpected, and we

[23]discussed additional surgery for his wrist.

[24]Q Let's talk about the progression of the

[25]symptoms.

[26]Firstly pain; what have you noticed about
29

[1]
[2]his complaints of pain in the wrist when you examined

[3]him?

[4]A He's had more pain in the wrist and has

[5]had less function of the hand, and this concurs with

[6]the x-rays that we've taken that show that he's

[7]developing arthritis.

[8]Q Have you continued to take x-rays over

[9]time?

[10]A Yes.

[11]Q Of his wrist?

[12]A Yes.

[13]Q And you just mentioned, I had asked you

[14]about pain but you included something about function.

[15]Tell us about how you test function and

[16]what those tests of Mr. Miller have shown.

[17]A Function is basically how good you can

[18]use your body part, and to have good function you need

[19]good strength, good motion, and sensation.

[20]Q Okay, with regard to his wrist, how is

[21]his motion?

[22]A He has significant restriction of motion.

[23]Q And those other things you **[*27]** mentioned?

[24]A Also associated weakness.

[25]Q That accounts for the atrophy?

[26]A The atrophy and weakness go hand in hand

30

[1]
[2]together, yes.

[3]Q Hand in hand -- sorry.

[4]Okay, based on your surgery two years

[5]ago, the injury, what your findings have been over the

[6]last two years, did you have an opinion with a

[7]reasonable degree of medical certainty what his wrists

[8]future is going to look like?

[9]A He's getting more and more arthritis and

[10]that's resulting in more pain, stiffness and weakness.

[11]It's come to the point where he needs additional

[12]surgery.

[13]The surgery that we recommended was a

[14]wrist fusion, and what that is is we actually make

[15]those eight bones one bone and we fuse --

[16]Q Go ahead, I'm sorry.

[17]A I'll probably show it better on an x-ray

[18]but we fuse the bones together so the wrist no longer

[19]moves.

[20]The down side is, of course, the wrist

[21]doesn't move anymore. The upside is, without motion

[22]you have usually no pain.

[23]That's what we've recommended for his

[24]wrist.

[25]Q I'm pulling out two x-rays that you have

[26]provided, which **[*28]** is Exhibit 20 and Exhibit 19.

[31]
[1]
[2]If you don't mind, if he we can just

[3]figure out a way

[4]A This is one of the x-rays.

[5]Q Just try to step back so that you're not

[6]blocking the jurors.

[7]A This is one of the x-rays soon after the

[8]surgery showing the multiple pins, these are again,

[9]through the skin to be removed later in the office.

[10]This is the primary bones that are

[11]affected in this location although all the bones are

[12]to some degree, and showing that we've restored the

[13]anatomy.

[14]However, if you look at a more recent

[15]x-ray, he's developing what we call a slack wrist. So

[16]this is a well known complication of a perfect lunate

[17]dislocation where the bones are separating, getting

[18]arthritis in this joint, there is very little

[19]cartilage there and the cartilage is actually coming

[20]down because these bones are separating.

[21]So, this is leading to and this is a

[22]progressive problem, so this, over time is getting

[23]more and more symptoms and for these reasons we have

[24]recommended the additional surgery.

[25]Q I'm sorry if I missed it. What is the

[26]additional surgery? **[*29]**
[32]
[1]
[2]A It would be a fusion. So, we would

[3]basically open the back of the wrist, the incision

[4]would be from here to here and we would kind of scrape

[5]whatever cartilage is left off the bone surfaces so

[6]they would fuse.

[7]We pack all the areas between the bone

[8]with bone graft and put a plate on. It would span the

[9]radius to the metacarpal bone. It would hold the

[10]wrist still so the fusion will heal.

[11]Q Does that plate ever come out?

[12]A There is a good chance that it will come

[13]out because it's right at the skin, and will likely

[14]bother him in the future.

[15]Q When it comes out, how will that wrist be

[16]positioned?

[17]A Once the wrist actually fuses, the plate

[18]is no longer necessary, and it can be removed.

[19]The wrist, again, will not have any

[20]motion so he will not be able to flex or extend, or he

[21]will have very limited rotation, also.

[22]Hopefully he may be able to maintain his

[23]finger function.

[24]Q Isn't there something that goes through

[25]the wrist and carpal bone called carpal tunnel?

[26]A Yes.
33

[1]
[2]Q Explain that and whether or not it's

[3] **[*30]** involved in any of the considerations for his wrist

[4]treatment.

[5]A Yes, we diagnosed the patient with carpal

[6]tunnel syndrome.

[7]This is something that I'm sure many of

[8]you have heard about. It can be a condition that

[9]happens after repetitive use of the hand, however in

[10]this instance it's a result of trauma. It's a known

[11]complication of a bad wrist injury to develop carpal

[12]tunnel syndrome.

[13]Sometimes the symptoms are noticed right

[14]away, sometimes it occurs months and years later.

[15]Q While you're up there, so that you don't

[16]have to keep going up and back, I'll take the wrist

[17]ones and let's jump back to the foot.

[18]Show us what those x-rays depict.

[19]A This is an x-ray of the right foot, and

[20]again, this is soon after the surgery with the plate

[21]and screws in place.

[22]You can still see the amount of damage

[23]where he had the fracture, and again, this is a view

[24]from the bottom of the foot.

[25]You can see all the lines here where the

[26]fractures are going all the way. This is the joint

[34]
[1]
[2]here, the subtalar joint, this is the fracture going

[3]right into the **[*31]** joint.

[4]Then more recently was --

[5]Q Keep your voice up.

[6]A More recently, we are seeing the

[7]osteopenia, the bone is losing its calcium, he's

[8]getting arthritis in the subtalar joint.

[9]Q What's the impact of -- well, is the

[10]osteopenia, is it reversible --

[11]A Well --

[12]Q --in him?

[13]A The osteopenia, there is two reasons.

[14]One is disuse,with respect to his ankle and foot, one

[15]is disuse because he has pain whenever he puts his

[16]foot down and the other is RSD, and RSD is known to

[17]cause osteopenia.

[18]You know, if he has a fusion and he has

[19]some improvement in his pain and is able to walk a

[20]little bit more on the foot, his osteopenia may

[21]improve but never completely reverse.

[22]Q And has he regained any function in his

[23]foot as a result of the work that you did?

[24]A Well, he's able to put some weight down

[25]of very limited, and I would say that the goal of

[26]initial surgery was to prepare him for the fusion in
35

[1]
[2]the future, but if you don't restore his bone stock

[3]and create a normal looking foot, it's hard to fuse it

[4]later.

[5]So we didn't **[*32]** have great expectations with

[6]the first surgery, but we were able, in kind of

[7]restoring the bone and kind of the way it was before

[8]it broke and he's ready for a fusion.

[9]Q How much function has returned?

[10]A Again, you know he's got limited motion,

[11]swelling, stiffness.

[12]Q What's his pain level scale of one to

[13]ten?

[14]A It's pretty high. I don't recall off the

[15]top of my head. I would have to look at my records,

[16]but it's pretty high.

[17]Q Is there any correlation with the amount

[18]of use that he put his feet to, and the amount of

[19]pain?

[20]A Yeah, the more he stands or the more he

[21]walks, the more pain he's going to have and I recall

[22]he told me he has trouble walking within a few blocks.

[23]Also just sitting down is causing blood

[24]to rush to his foot which increases swelling and pain.

[25]Q So, if he can't walk for or stand long or

[26]sit long, what's the answer for him?
36

[1]
[2]A Well, unfortunately there's no good

[3]answer. This is what we try to resolve in surgery.

[4]We try to get things as best we can with what we have

[5]to work with.

[6]RSD is a chronic pain **[*33]** condition,

[7]therefore we expect him to have chronic pain.

[8]We're hoping that with a fusion some of

[9]his subtalar pain will get better and maybe make him

[10]walk a little bit better. I don't expect him to ever

[11]walk without a limp.

[12]Q Will he ever be able to squat?

[13]A No.

[14]Q Will he ever be able to walk stairs

[15]comfortably?

[16]A Not comfortably, no.

[17]Q It's his right foot; will he ever be able

[18]to drive like a normal person drives?

[19]A Like a normal person, no.

[20]Q Is the fusion that you're going to do on

[21]his foot, will that fuse his ankle as well or will it

[22]just fuse his lower foot?

[23]A It's just going to fuse the lower foot

[24]which is the subtalar joint. The joint --he will

[25]still have -- he will still have issues with the ankle

[26]rolling because of it's instability.
37

[1]
[2]Q How will this fusion affect his

[3]osteopenia?

[4]A Well, again, the -- if the pain improves

[5]and he's able to put a little more weight down it may

[6]help his osteopenia, again, although it will always be

[7]there to a certain degree. On the flip side, though,

[8]whenever you fuse **[*34]** a joint, no matter what part of the

[9]body it is, the joints that are not fused that are

[10]beside it get overworked.

[11]So, the joints in the midfoot are going

[12]to get overworked and will likely give him problems

[13]later on in life.

[14]Q What -- is there a correlation between

[15]the use of his foot and the development of arthritis?

[16]A Well, the more he walks on this foot, the

[17]more wear he will have and the more fast the arthritis

[18]will progress.

[19]Q Now he didn't have any other injuries to

[20]the other foot or knee, would the limp that you said

[21]he's going to have forever, would that affect his --

[22]the other joints in his body or in his spine?

[23]A It may, yes.

[24]Q And why is that?

[25]A Whenever you walk off kilter, that's

[26]going to-- it increases stress on other parts of the
38

[1]
[2]body.

[3]In other words, it's -- and in a

[4]situation like this, it's very common to see patients

[5]develop pain in the left knee and he already has

[6]issues in his left knee from the left hip, sometimes

[7]same side, increase back pain and again he already has

[8]issues in his back from the accident.

[9] **[*35]** Q All right, so, now, after the fusion of

[10]his foot and after the fusion of his wrist, let's talk

[11]about the other leg.

[12]How is his right -- how is his left foot?

[13]A His left foot fortunately, has healed

[14]fairly well. I don't think he has that many symptoms

[15]in his left heal at the present time.

[16]Q All right, let's talk about his left

[17]knee.

[18]You mentioned before that the tibial

[19]fracture -- before we get there, I want you to explain

[20]and take us through this RSD thing because ultimately

[21]I'm going to ask you whether or not it's going to be

[22]with him for the rest of his life. If you could just

[23]step down and maybe --

[24]By the way while you were treating him,

[25]did you notice anything in any of the MRI films that

[26]suggested or confirmed the existence of RSD?
39

[1]
[2]A Yes.

[3]Q And what did you notice?

[4]A The bone scan and MRI both confirmed.

[5]Q Well, with regard to the MRI, what about

[6]an MRI film was there, that confirmed the existence of

[7]RSD?

[8]A It revealed abnormal uptake in the joint

[9]around the injured area and foot, consistent with an

[10]RSD.

[11] **[*36]** Q Now, you said something about a bone

[12]scan.

[13]Did you cause a bone scan to be done?

[14]A Yes.

[15]Q Take that and approach the jury if you

[16]would and just explain what that shows --

[17]A This is the result of a bone scan and

[18]what a bone scan is, is that the body is injected with

[19]a technician 99, which is our radioactive ion, and

[20]that binds to the blood and then it goes to where the

[21]blood goes in the body.

[22]There are different phases of the bone

[23]scan, early and late, and there's a scanner that's

[24]used to scan the body to find out where the reactive

[25]ion end up going to.

[26]And here is a bone scan of his right foot
40

[1]
[2]and also his left foot. And you can see that the

[3]uptake there is in all the bones.

[4]So, when you have an RSD it doesn't

[5]affect just the bone that was injured, it affects all

[6]the bones in the area. So you can see that the small

[7]bones are affected, the ankle is affected, and of

[8]course, the area of the injury is affected and again

[9]this is just a different illustration of the same

[10]problem.

[11]You can see in the other foot where he

[12]had a calcaneus **[*37]** fracture, there's no uptake, there or

[13]minimal because it's healed and there's no RSD, there.

[14]Q Now, would you explain to us, using the

[15]exhibit, how the mechanism of pain from the regional

[16]complex occurs?

[17]A First thing is there's initial trauma to

[18]the area, whether it's the foot or elbow or shoulder

[19]or hand. It can happen in almost any part of the

[20]body.

[21]That triggers pain response from the

[22]brain which affects the spinal cord and the nerves of

[23]the spinal cord, especially the sympathetic nerves.

[24]Q Excuse me one second. Does RSD happen in

[25]every injury?

[26]A No, it does not.

[41]
[1]
[2]Q In this case, did he develop any RSD from

[3]his left foot?

[4]A No, he did not.

[5]Q Left knee?

[6]A No.

[7]Q Left wrist?

[8]A No.

[9]Q Spinal injuries?

[10]A No, he did not.

[11]Q Please, go on.

[12]A The sympathetic nerves are responsible

[13]for restriction of the blood vessels coolness and

[14]warmth of the foot and causes swelling and stiffness,

[15]again causes burning and swelling which triggers

[16]additional pain and that goes back around.

[17]So **[*38]** there's a cycle here; once created it

[18]can be very, very difficult to break.

[19]Q And in -- I mean, in different patients

[20]that have RSD, is it always the same level of pain?

[21]A There are, different patients have

[22]different clinical pictures. There is no cure for

[23]RSD.

[24]There is some treatments and he has

[25]received some of them, including medications and

[26]injection treatment to help kind of contain it but

[42]
[1]
[2]once you have it you can't cure it.

[3]Q What injection treatments has he gotten?

[4]A He received some foot injections.

[5]Q And did they give him any significant

[6]relief?

[7]A At best I think it was only for a couple

[8]of days.

[9]Q And with regard to the level of his pain

[10]from just from the RSD, forget the arthritic problems,

[11]et cetera, can you categorize or quantify that level

[12]of pain from the RSD?

[13]A Oh, it's severe, severe pain.

[14]Q Does the medication take the edge off

[15]that?

[16]A There are different medications: Pain

[17]medication, injection treatments, but, these are all

[18]palliative, they are not curative. And.

[19]The issue is that **[*39]** he needs additional

[20]surgery, and we're at the point now where there's a

[21]chance that he may worsen because surgery can

[22]sometimes trigger RSD, but we're at the point now

[23]where he has so much pain from arthritis, I think it's

[24]worth while to attempt any additional surgery.

[25]Q The RSD, you mentioned, you showed us on

[26]one of the foot x-rays that the bones were kind of
43

[1]
[2]mottled.

[3]What are the symptoms besides these

[4]objective tests that you have done the MRI and bone

[5]scan, what symptoms have you found clinically to

[6]support the diagnosis of RSD?

[7]A Again, he has significant pain. He has

[8]swelling, he has stiffness. At times, I believe the

[9]foot was warm. Again, it changes in temperature,

[10]results of another sign of RSD, and again the

[11]osteopenia is the radiographic center of RSD.

[12]Q Now, has the temperature of the foot --

[13]has it ever been discolored?

[14]A I believe I've seen some when I was

[15]reviewing the chart, yes.

[16]Q In addition to -- with regard to

[17]discoloration and temperature changes, cool or hot or

[18]whatever, do those -- are those always present in a

[19]patient **[*40]** that has RSD? Would they be consistently

[20]there, day after day, after day, or do they come and

[21]go?

[22]A There's no consistent picture. With some

[23]may cases, redness, coolness, some may have neither,

[24]some may have hair loss or overgrow hair and sometimes

[25]it may be present one day and other days may not be

[26]present.
44

[1]
[2]So these signs may not be present during

[3]the entire course or may vary from day to day.

[4]Q You can take that one down.

[5](Witness complies.)

[6]Q Dr. Toulipoulos, why did you wait on the

[7]knee surgery until this year?

[8]A Well, he had multiple injuries and this

[9]had to be thought out really well, and obviously, he

[10]had a back fracture, he needed back surgery for a

[11]disproblem and obviously we had to wait for his back

[12]to get better because it's hard to rehab if you have

[13]back pain and sciatica.

[14]Q If he had these back problems and

[15]sciatica rehab, how did he heal from the heel and knee

[16]fractures?

[17]A It's very restrictive, and part of the

[18]problem is that you treat one problem but the other

[19]problems are still there, and, you know, -- we can fix

[20] **[*41]** his foot with a fusion, but it will put more weight on

[21]his left knee. So it's like a circle, where one

[22]problem will aggravate the other problem. Especially

[23]with knee surgery, though, you need to be able to bend

[24]your knee and your hip and for those reasons, more so

[25]than the foot or the wrist, I think it was prudent to

[26]wait.

[45]
[1]
[2]Q Did you coordinate it with Dr. Merola as

[3]to who would get to operate again first, would it be

[4]the knee or the back?

[5]A Yes, we had --there were many occasions

[6]where we saw the patient together. We were in the

[7]same office the same day and saw him together and we

[8]kind of planned out the procedures.

[9]Q And ultimately after the back surgery,

[10]did you do the knee surgery?

[11]A Yes.

[12]Q And would you take us through the knee

[13]surgery that you did on Chris Miller?

[14]If you need a model, here it is.

[15]A What we found after the fractured heel,

[16]so basically he had a fracture that we said did not

[17]need surgery and that healed. But, very commonly with

[18]a fracture, you can tear up the soft tissues in the

[19]knee, meaning the meniscus, cartilage and **[*42]** the

[20]ligaments. And the patient had ongoing symptoms of

[21]his knee buckling and giving out. This actually

[22]resulted in falling several times because his knee

[23]kept giving out.

[24]That was one of the first clues that his

[25]ACL, his anterior crucial ligament was not working.

[26]That was confirmed on examination. He had positive
46

[1]
[2]tests in the office that showed that he had a loose

[3]ACL, when we did various testing the Lachman and pivot

[4]shift test.

[5]So, we again, we indicated him for

[6]surgery. We feared that if he kept falling down he

[7]would do further injury to his body and that's

[8]something that he really didn't need.

[9]So, we eventually performed a knee

[10]arthroscopy and reconstruction.

[11]What we found was that he did have some

[12]damage to the cartilage which was consistent with his

[13]injury.

[14]In other words he fractured his lateral

[15]plateau and this area he had damaged cartilage. I

[16]believe it was grade three.

[17]And zero is no damage and four is the

[18]worse, so he had pretty advanced damage when we went

[19]in there.

[20]He had a loose ACL that we cleaned and we

[21]reconstructed **[*43]** with a cadaver ligament.

[22]So, basically --

[23]Q Cadaver meaning a dead body?

[24]A Yes, it's a dead person, someone that's

[25]passed away that's donated their body parts and we

[26]used an Achilles tendon, this area here, from a dead
47

[1]
[2]person to reconstruct his ligament.

[3]To do that, we make an incision here, we

[4]make holes in the bones here and here with a drill and

[5]then we pass through the ligament in the knee and hold

[6]it with a couple of screws.

[7]Q Did you do that with open surgery or was

[8]that arthroscopic?

[9]A Arthroscopic assisted, meaning that most

[10]of the surgery is through the camera, however we have

[11]to make a small incision in order to pass the graft.

[12]Q How did that surgery work out?

[13]A Initially, he was improved, he had better

[14]stability.

[15]There was an additional injury to the

[16]knee, and now we believe there's a recurrent injury to

[17]his ligament.

[18]Q Over the course of -- by the way, in that

[19]joint are there proprioceptors, as well?

[20]A Yes.

[21]Q And given his, the buckling can you say

[22]with a reasonable degree of medical certainty **[*44]** as to

[23]whether or not those have been affected?

[24]A Propioceptor is affected, it's one of the

[25]things that we have that helps control buckling.

[26]Q Because of the damage that you saw, even
48

[1]
[2]though you reconstructed the ACL, the damage to the

[3]cartilage, is that permanent?

[4]A That's permanent.

[5]Q Is there any way to repair that?

[6]A No, there's not.

[7]Q What is the functional effect of the

[8]damaged cartilage in the knee?

[9]A The prognosis is that as time goes by,

[10]that cartilage will wear progressively over months and

[11]years.

[12]With an ACL that works, you can slow down

[13]this arthritic process, but you can't stop it.

[14]Without an ACL your knee will buckle and the bones

[15]will slip and every time that happens it just causes

[16]more grinding wear of the cartilage.

[17]Q Be you you gave him a new ACL with that

[18]graft, so, it should have been fine; right?

[19]A Like I said, initially it was, but then

[20]there was an incident.

[21]Q How do you explain the incident -- well,

[22]what was the incident, when was the incident and how

[23]do you explain the incident?

[24] **[*45]** A He was on steps, he was using a brace and

[25]I believe he also had a cane at the time and his knee

[26]gave out and he twisted it.
49

[1]
[2]Obviously, the causes are residual

[3]weakness of the knee, the problems that he has bearing

[4]weight with his right foot, it hurts, so he has to put

[5]his weight on his left side, and the difficulty using

[6]his hand to use a cane or handrail.

[7]Q Now, with regard to the knee, even after

[8]the ACL reconstruction, having these problems, can you

[9]give the jury a sense of what his prognosis is with

[10]regard to the knee?

[11]A His prognosis is it's guarded because

[12]we're looking at an additional surgery now.

[13]Because of his right foot problem and his

[14]back problem and the stresses that it's going to put

[15]on his knee, I'm not quite sure how successful

[16]additional surgery will be.

[17]I think it's worth one more time to help

[18]regain the stability and slow down the arthritis.

[19]But, because of his underlying damage to

[20]the cartilage, this is an injury as years go by will

[21]give him more symptoms.

[22]Q Now, have you done any recent films of

[23]the knee?

[24] **[*46]** A T believe I have.

[25]Q And would you show us what you did, when

[26]you did it and what it shows?
50

[1]
[2]A I believe this was July of this year.

[3]THE COURT: What film are we looking at?

[4]MR. BOROWICK: It may be on the other

[5]side.

[6]Exhibit 22.

[7]THE COURT: Thank you.

[8]Q First explain to us what an MRI is and

[9]what we're, looking at?

[10]A It's a machine that uses magnets to spin

[11]the kind of protons in the body and to give back a

[12]signal inside our body. So it does not use radiation

[13]or x-rays, like a regular x-ray does.

[14]Q Please, I'm missing half of what you

[15]said. Keep your voice up.

[16]A Okay, so this is an MRI of the left knee

[17]and you can see that all this white signal here is

[18]injury to his ACL we call that mesocoelia ligaments.

[19]And also on examination he also again had

[20]laxity of his ACL, ACL looseness is a clinical

[21]diagnosis, which means make the diagnosis based on

[22]physical examination.

[23]An MRI may not show it and therefore what

[24]the patient tells you, what you see when you examine

[25]the patient is sometimes more important than an MRI. **[*47]**
[26]Q Does that show any degenerative condition

[51]
[1]
[2]ongoing?

[3]A I do see some abnormal signal, again, in

[4]the lateral tibial plateau.

[5]Q Using Exhibit 8, would you show us using

[6]Exhibit 8 what you've described as the prognosis for

[7]his knee?

[8]A Arthritis has different symptoms and

[9]different signs and early on it's sometimes very hard

[10]to see on a regular x-ray.

[11]Q Could you just rotate that a little bit?

[12](Witness complies.)

[13]Q That's good.

[14]A Therefore, the arthroscopy in which

[15]you're looking at, the cartilage is the best test.

[16]As time goes by, patients have conditions

[17]like spurring of the bone, it kind of wears itself off

[18]and that sometimes one of the earlier signs of

[19]arthritis they can also develop spurs which are bumps

[20]on the bones that kind of develop because of the

[21]mechanics of the knee. And again, this all results

[22]from the loss of cartilage. As that wears out, the

[23]body responds by making the spurs and trying to kind

[24]of stabilize the knee on its own.

[25]Q Okay, you can put that down, and resume

[26]your seat.

[52]
[1]
[2](Witness **[*48]** complies.)

[3]MR. BOROWICK: Let me just take this down.

[4]Q Dr. Toulipoulos, in the last month or two

[5]months or as of the last visit that he made to your

[6]office, tell us what, bring us up-to-date, in how he's

[7]doing.

[8]A Again, he has --

[9]Q You have to keep your voice up.

[10]A He has recurrent left knee symptoms. His

[11]knee is buckling again; it's very painful, it's

[12]getting swollen and stiff. He has ongoing progressive

[13]pain in his foot, he's got an ankle that rolls.

[14]He's got increasing pain and stiffness in

[15]his left wrist.

[16]Q Now, over the course of the two plus

[17]years that you have been treating him, has he ever

[18]exhibited any type of emotional reaction to his

[19]multiple disabilities?

[20]A Yes, he has.

[21]Q Tell us about that.

[22]A Well, initially in the hospital, he was

[23]having nightmares. Whenever he would wake up at night

[24]he would feel that he was falling again and we

[25]actually called for a psychiatric consult while he was

[26]in the hospital.

53

[1]
[2]As time went by, I believe within a year

[3]or so later he was developing a depression that I had

[4] **[*49]** recommended that he follow up with a psychiatrist,

[5]again.

[6]Q Did you actually write him a script?

[7]A I believe I did, yes.

[8]Q Do you know whether or not he is or has

[9]seen a psychiatrist?

[10]A I believe he has.

[11]Q A few more questions.

[12]As part of your practice dealing with

[13]sports, the related injuries and other traumatic

[14]injuries, are you called upon on a regular basis to

[15]assess a person's ability, physical ability, medical

[16]condition to return to work either at their career, or

[17]at other work?

[18]A Yes.

[19]Q And over the course of time, have you had

[20]patients that could go back to work in doing what they

[21]were doing?

[22]A Yes.

[23]Q How about patients who couldn't go back

[24]to doing what they were doing, but could go back to

[25]doing other things?

[26]A Yes.
54

[1]
[2]Q Do you have an opinion, with a reasonable

[3]degree of medical certainty as to whether or not Chris

[4]Miller will ever return to any manual labor

[5]construction job?

[6]A It's my opinion that he will never be

[7]able to perform any sort of manual labor construction

[8]work.

[9] **[*50]** Q Do you have an opinion in the real world,

[10]as to whether or not Chris Miller will ever be able to

[11]compete for a full-time job at anything?

[12]MR. KAMINSKY: Objection.

[13]THE COURT: I'll allow it.

[14]Go ahead.

[15]A My opinion is that he will not be able

[16]to.

[17]Q Why?

[18]A He has chronic pain that's lasted for a

[19]couple of years, his conditions have worsened and not

[20]improving. He requires narcotic medications, those

[21]are medications that make people drowsy and sedate

[22]them. He has pain management control issues and I'm

[23]not even referring to his back problem, but I'm just

[24]referring to his extremity injuries.

[25]Q You've mentioned a number of procedures

[26]that he will require, at least with regard to his
55

[1]
[2]extremities. You said a wrist fusion, a foot fusion,

[3]ankle surgery, further knee reconstruction, and forget

[4]the spinal stuff.

[5]Those things cost money, don't they?

[6]A Yes.

[7]Q And let me ask you whether or not in

[8]connection with this litigation, I've asked you to

[9]confer with a life care planner who puts together a

[10]medical picture of costs in the future **[*51]** for litigation.

[11]Did you do that?

[12]A Yes, I did.

[13]Q Let me ask you, when is your best

[14]estimate that he will need the foot fusion?

[15]A Well, the goal right now is to address

[16]his knee, first. It's, I think, important to give him

[17]at least one good leg to stand on so that he can

[18]recuperate from his other injuries.

[19]Because the ankle injury is fairly

[20]complicated with RSD and arthritis, I believe that the

[21]knee should be carried out very soon and then once

[22]he's recovered from the knee, in six months to a year

[23]maybe the right foot fusion.

[24]Q When do you believe he will need the

[25]wrist fusion?

[26]A The wrist fusion, again, because he's

[56]
[1]
[2]going to need crutches after either his knee or foot

[3]surgery, I believe the wrist surgery is best deferred

[4]until after his knee and after his foot surgeries.

[5]Q How about his -- well, if you defer it to

[6]after the foot or knee surgery then when he does that

[7]rehab for his foot and his knee, get back up, weight

[8]bearing and uses the crutches, what's he going to do

[9]with that hand on a crutch?

[10]A It's going to be painful, **[*52]** it's going to

[11]be painful.

[12]The options are, you know, there's a risk

[13]of doing the wrist fusion and then having him use

[14]crutches and have the surgery fail, but like I said

[15]earlier, there's no good answer. No matter how you

[16]look at it it's what will give him less pain, not what

[17]will give him no pain.

[18]Q After you do the foot fusion and ankle

[19]and the wrist -- I'm sorry you do the foot, ankle and

[20]knee, then you do the wrist, what's his future look

[21]like after those surgeries?

[22]A Again, he's going to have a wrist that is

[23]going to be fused. We're hoping that that will help a

[24]lot with his pain. It all depends on the success of

[25]the surgery. He will have loss of motion of the

[26]wrist, residual motions of his hand including weakness
57

[1]
[2]and stiffness. He has the carpal tunnel that we may

[3]also address at the time of his wrist fusion.

[4]With his foot, again, we're hoping that

[5]at least in the subtalar joint it will be able to

[6]relieve some of the pain, but again, the RSD is still

[7]going to be there.

[8]We're hoping that it will not be

[9]aggregated by the surgery, although that's **[*53]** a chance

[10]that everyone will have to understand and be willing

[11]to take.

[12]He will still have the ankle that rolls

[13]and it's loose.

[14]Q He's thirty-one years old, now, with a

[15]life expectancy of something like forty-six or

[16]forty-seven years.

[17]Do you have an opinion with a reasonable

[18]degree of medical certainty of how self-sufficient he

[19]will be in thirty years?

[20]MR. KAMINSKY: Objection.

[21]THE COURT: Overruled.

[22]Answer, doctor.

[23]A Again, with respect to the knee, I

[24]believe thirty years from now he's going to have

[25]significant arthritis, that more than likely will

[26]require additional procedures. That will give him
58

[1]
[2]stiffness and weakness and difficulty walking.

[3]If his foot fusion is successful,

[4]hopefully that will alleviate some of his foot pain,

[5]but as I said earlier that will increase chance of

[6]getting arthritis in the adjoining joints, that will

[7]happen over thirty years and he will have arthritis in

[8]the small bones of his foot because of the way he

[9]walks.

[10]Again, his wrist, after fusion and after

[11]carpal tunnel surgery, hopefully, that **[*54]** will be

[12]something that will be successful in relieving his

[13]pain and hopefully, will be able to stabilize his

[14]symptoms.

[15]Q Do you have an opinion with a reasonable

[16]degree of medical certainty as to whether or not when

[17]he gets into his fifties, sixties and seventies, he

[18]will require a home health assistant?

[19]MR. KAMINSKY: Objection.

[20]THE COURT: Overruled.

[21]A Yeah, my opinion is that he will need

[22]one.

[23]Q Why?

[24]A Because he's going to have -- even at the

[25]present time he has difficulty walking five blocks,

[26]difficulty negotiating steps. You can imagine how he
59

[1]
[2]will be thirty years from now. Even the simplest

[3]activities of daily living are going to be restricted

[4]and he's going to need help to carry these out.

[5]Q I want you to assume that he's a father

[6]of five, he had been an active coach, coached three of

[7]his kids in different sports, he enjoyed sports

[8]himself, he was a responsible homeowner who took care

[9]of his house, helped with chores, took care of the

[10]outside and inside.

[11]Are those activities or are those

[12]activities that he will ever be **[*55]** able to participate in

[13]meaningfully, again?

[14]A Not in any meaningful way, no.

[15]Q I want you to assume that since the

[16]accident and during some of the rehab he's been able

[17]to go to one of his kid's games and keep score in the

[18]dug out.

[19]Is that something he can do?

[20]A Good bless him, that's something he can

[21]do. Obviously he's not going to be able to walk

[22]around the field and give instruction to the kids, but

[23]sitting for period of time is okay to do, yes.

[24]Q Do you encourage your patients to find

[25]things that they enjoy and do them?

[26]A Yes, I do.
60

[1]
[2]MR. BOROWICK: I have nothing further.

[3]THE COURT: Do you need a break?

[4]MR. KAMINSKY: May I proceed?

[5]THE COURT: Yes.

[6]CROSS EXAMINATION

[7]BY MR. KAMINSKY:

[8]Q Good morning, Doctor. My name is Alan

[9]Kaminsky I'm the attorney for the defendants, okay?

[10]A Good morning.

[11]Q You and I have obviously never met

[12]before; true?

[13]A I don't believe so.

[14]Q Just bear with me, I'm a little sad today

[15]because I was at the Yankee game last night and it was

[16]very emotional.

[17] **[*56]** I don't have a lot of questions for you

[18]and I'll tell you why: We don't dispute the

[19]orthopedic injuries that were suffered by Mr. Miller.

[20]There's no dispute about the ankle fracture, there's

[21]no dispute about the calcaneal fracture, there's no

[22]dispute about the wrist, there's no dispute about the

[23]knee, and in fact he has had surgery.

[24]MR. BOROWICK: I'm sorry, Judge I'm going

[25]to object.

[26]THE COURT: Please ask questions.

[61]
[1]
[2]Q He's had surgery for --

[3]THE COURT: Questions, please, not

[4]speeches.

[5]Q Is it true he's had surgery for all of

[6]those injuries?

[7]A He has had surgery for most of his

[8]injuries.

[9]Q And you've gone through that with the

[10]x-ray films and discussed that; correct?

[11]A Correct.

[12]Q So, let's put the orthopedic injuries

[13]aside.

[14]And that's your specialty; is that

[15]correct?

[16]A Yes.

[17]Q By the way, is it fair for me to say to

[18]the jury, we heard your credentials, we've heard how

[19]many times you've done surgeries, were those surgeries

[20]successful?

[21]A Again --

[22]Q Just if you can answer yes or no?

[23] **[*57]** A That's not a yes or no.

[24]Q Then I'll accept that, okay.

[25]He tolerated the surgical procedures

[26]well?
62

[1]
[2]A Yes, he did.

[3]Q Now, currently, he is at home, he's self

[4]sufficient; correct?

[5]A He's at home. He's living with his wife

[6]and children, yes.

[7]Q And he dresses himself?

[8]A (No response.)

[9]Q Yes?

[10]A I believe he does.

[11]Q And he takes care of his daily needs;

[12]correct?

[13]A Again, he has significant restrictions in

[14]terms of how far he can walk, but there are some

[15]activities he can do, yes.

[16]Q But he takes care of himself; he bathes

[17]himself, he feeds himself, he dresses himself, the

[18]day-to-day things that a person has to do, he's

[19]capable of doing them; true?

[20]A To the best of his ability.

[21]Q To-- anyone to the best of their ability.

[22]But my question is, he does them on his

[23]own; is that true?

[24]A Yes.

[25]Q And as far as driving is concerned, if a

[26]modification to accommodate his foot is needed he
63

[1]
[2]would be able to drive; correct?

[3]A If there was a modification, so there is

[4] **[*58]** no need to use his right foot, and modification for

[5]his loss of his wrist and hand use, I believe he may

[6]be able to drive again.

[7]You would have to ask Merola about his

[8]back issue, though.

[9]Q Okay, that's fine.

[10]Now, when he had this trauma, we can

[11]agree that these were fairly serious injuries;

[12]correct?

[13]A That is correct.

[14]Q Over the course of time, though,

[15]obviously, the condition of his heel is better today

[16]than it was when he fell; correct?

[17]A Better than day one, I would have to say,

[18]yes.

[19]Q And same thing for his wrist; true?

[20]A That is correct; yes.

[21]Q And the same thing for his knee?

[22]A That is correct.

[23]Q Okay, so, if you take him from where he

[24]was at the time of the occurrence and go over the past

[25]two years, and if you look at the hospital records and

[26]the treatment records, there has been improvement;
64

[1]
[2]true?

[3]A There are --

[4]Q If you can answer my question yes or no I

[5]would appreciate it. If you can't, just say you

[6]can't.

[7]A Initially I would say --

[8]Q Let me rephrase the question. **[*59]**
[9]If you can answer it yes or no, please

[10]do, if you can't, please say you can't.

[11]A I would have trouble answering that yes

[12]or no.

[13]Q Okay, that's fine.

[14]Do you have file material with you?

[15]A Um --

[16]Q Did you bring anything with you to Court,

[17]today.

[18]A I brought x-rays and copy of some of my

[19]office notes.

[20]Q May I see your office notes, please?

[21]THE COURT: Would you like to take a

[22]break?

[23]MR. KAMINSKY: You know, I'm going to try

[24]to finish the doctor before lunch.

[25]THE COURT: Great.

[26]Q By the way you told us you're being
65

[1]
[2]compensated. What is the amount of compensation

[3]Mr. Borowick is paying you?

[4]A Its five hundred dollars an hour.

[5]Q Is there a minimum?

[6]A No.

[7]Q What do you expect your compensation to

[8]be for your testifying in Court?

[9]A Again, dependses on how long I'm here,

[10]but approximately between six and eighth thousand.

[11]Q Six and eight thousand?

[12]A Yes.

[13]Q If I make you come back after lunch will

[14]it be eight to ten thousand?

[15]A It will be more --

[16] **[*60]** Q It's a joke.

[17]A Okay.

[18]MR. KAMINSKY: May I approach, Your Honor?

[19]THE COURT: Yes.

[20]Q How much does --how much did the knee

[21]surgery cost?

[22]MR. BOROWICK: Objection.

[23]THE COURT: Overruled.

[24]MR. BOROWICK: May we approach?

[25]THE COURT: Yes.

[26](Whereupon, an off the record discussion
66

[1]
[2]was held at the bench.)

[3]MR. KAMINSKY: I'll ask the question

[4]differently so we can avoid approaching.

[5]MR. BOROWICK: I don't mind approaching.

[6]MR. KAMINSKY: I'm trying to save time so

[7]I'll ask the question differently, so there's no

[8]need to object.

[9]If you want to approach, we will.

[10](Whereupon, an off the record discussion

[11]was held at the bench.)

[12](Record resumed.)

[13]Q The surgery that you did for his knee?

[14]A Yes.

[15]Q You said that that was modified

[16]arthroscopic surgery?

[17]A Assisted, yes.

[18]Q Arthroscopic assisted surgery is usually

[19]done on an outpatient basis; is that correct?

[20]A That's correct.

[21]Q So, this was done an an outpatient

[22]surgery?

[23]A Yes.

[24]Q He went in in the **[*61]** morning and left in the

[25]afternoon; is that correct?

[26]A I believe so, yes.

[67]
[1]
[2]Q That's the type of surgery, when we hear

[3]the term arthroscopic surgery, that's what the

[4]athletes get for their knee; correct?

[5]A Usually, yes.

[6]Q What is your charge for doing an

[7]arthroscopic surgery?

[8]A It depends on the procedures performed.

[9]Q What would be your charge for the type of

[10]surgery done to Mr. Miller?

[11]A I would have to give you an estimate

[12]because I don't know the exact numbers.

[13]Q Not a guess; I want an educated estimate.

[14]A It would probably be six thousand, five,

[15]six thousand dollars.

[16]Q So, it cost more for you to come to Court

[17]and testify than for you to do the surgery, roughly?

[18]A The --

[19]Q Just yes or no.

[20]A It's about the same numbers, yes.

[21]Q Okay, and let's see, he also had the

[22]wrist surgery?

[23]A That is correct.

[24]Q What was the --what would be the typical

[25]cost of the wrist surgery?

[26]A That would be more of a guess than an
68

[1]
[2]estimate.

[3]Q Okay, I don't want you to guess, okay. **[*62]**
[4]Now, a couple of things I want to go over

[5]briefly.

[6]I want to go over his stay at

[7]St. Vincent's, okay. I'm just going to read some

[8]comments from the St. Vincent's -- first of all he was

[9]in Jamaica before he made it over to St. Vincent's;

[10]correct?

[11]A That's correct.

[12]Q Let's just talk about his condition when

[13]he arrived at Jamaica Hospital.

[14]Do you know what an Assessment indicator

[15]is, in functional screen?

[16]A A functional assessment indicator?

[17]Q Yes.

[18]A There are different types, but every

[19]hospital has their own.

[20]Q Well, they gave him a score of twelve,

[21]which means that he was not in great shape, but he

[22]wasn't in dire straits.

[23]Can we agree with that?

[24]A It depends on the scale system.

[25]Are you talking about the Glass Glaucoma

[26]scale?
69

[1]
[2]Q No, I'm not talking about the Glass

[3]Glaucoma scale.

[4]I might as well show you.

[5]MR. KAMINSKY: May I?

[6]THE COURT: Yes.

[7](Handing.)

[8]Q On the bottom left.

[9](Witness looking at document)

[10]Q If you use that scale, and that's **[*63]** just a

[11]very brief cursory assessment of his condition, and

[12]using layman's term would basically a score of twelve

[13]means he has a serious injury but he's not in dire

[14]situation?

[15]A He's not critical, that's correct.

[16]Q Well, he checked himself out of Jamaica

[17]against the hospital's advice and he ended up at your

[18]hospital; correct?

[19]A Yes.

[20]Q Now, while he was at Jamaica, they did

[21]some CAT scans and they did a bunch of x-rays; is that

[22]true?

[23]A I believe so, yes.

[24]Q And the CAT scan that was done at Jamaica

[25]showed that he had an acute comminuted right calcaneal

[26]fracture; correct?
70

[1]
[2]A Correct.

[3]Q And they did a CAT scan of the left

[4]wrist, carpal instability; correct?

[5]A Correct.

[6]Q They did a CAT scan of the thoracic

[7]spine.

[8]Can you just show the jury on your body

[9]when the thoracic spine is?

[10]A It's not so easy. I can show on her

[11]body. Don't move.

[12]It's the area between the neck and spine,

[13]it's from here to down here.

[14]Q So, when he landed, it's fair to say he

[15]landed, as I properly described, he landed **[*64]** pretty much

[16]in a vertical position, that put force throughout his

[17]body; correct?

[18]A That's correct.

[19]Q Now, the CAT scan taken at Jamaica

[20]Hospital on the day of the occurrence in the emergency

[21]room of his thoracic spine there's no fracture or bone

[22]destruction, disc spaces are adequate and the

[23]impression was there's no significant abnormality of

[24]his thoracic spine; true?

[25]A I don't recall, but if that's what you're

[26]reading, I would have to agree with it, yes.

[71]
[1]
[2]Q So, we know there were no injuries to the

[3]thoracic area of the spine?

[4]A That's correct.

[5]Q The lumbar spine, it said that there's a

[6]mild depression which showed an L-1 complex deformity.

[7]And the lumbar, I'll use mine.

[8]MR. BOROWICK: Excuse me, Judge, this

[9]witness is not being offered with regard to the

[10]spine, at all. We'll bring in the spine surgeon.

[11]MR. KAMINSKY: I'll move on, okay. I'll

[12]move on.

[13]Q Now, the cervical spine, that's the neck;

[14]correct?

[15]A That's correct.

[16]Q They did a CAT scan of the cervical spine

[17]and that showed that there's no fracture **[*65]** of the

[18]cervical spine?

[19]A I believe so.

[20]Q They also, I guess to play it safe, took

[21]a CAT scan of his pelvic region; correct?

[22]A I believe so.

[23]Q And that was negative, everything was

[24]fine?

[25]A I believe so.

[26]Q They took a CAT scan of his right leg and
72

[1]
[2]that showed that there were no abnormalities; correct?

[3]A I have no recollection, but if you're

[4]reading that, I would have to agree with you, yes.

[5]Q They took a CAT scan of his chest and it

[6]showed know abnormalities; correct?

[7]A If --

[8]Q Do you want to see it?

[9]A If you're reading from the reports.

[10]Q I am.

[11]A Then I will agree with it.

[12]Q Would you accept my saying that I am

[13]reading from the records?

[14]A I would.

[15]Q Thank you. The Cat scan of the pelvis

[16]showed there's no abnormality and the fact that

[17]there's no abnormalities are all good things; true?

[18]A I would say yes.

[19]Q They did a CAT scan of the abdomen and

[20]there are no significant findings related to either

[21]lung base, compression, and when I say impression of

[22]the CAT scan, **[*66]** that's radiologist's impression of the

[23]reading of the films?

[24]A Correct.

[25]Q No offense, but you're not a radiologist;

[26]correct?
73

[1]
[2]A That's correct.

[3]Q Do you often rely on the findings of

[4]radiologists?

[5]A I do, especially when it's not an

[6]orthopedic report.

[7]Q As far as the CAT scan of the abdomen,

[8]the impression of the radiologist, Dr. Aieoli, whoever

[9]he is, no significant findings pertaining to the

[10]abdomen and the pelvis.

[11]Now, this is important, they also did a

[12]CAT scan of his head; true?

[13]A I believe so.

[14]Q And it showed that there's no

[15]intra-cranial hemorrhage, no mass, no extra axial

[16]collection is noted, no indication of acute or remote,

[17]non hematophagic infarction, if I'm saying that

[18]correctly?

[19]MR. BOROWICK: Judge, we're not claiming

[20]any brain injury.

[21]THE COURT: Thank you, Counsel.

[22]MR. KAMINSKY: I understand, but I want to

[23]point this out, if you don't mind.

[24]MR. BOROWICK: It's not part of this case.

[25]THE COURT: Thank you, Counsel.

[26]MR. KAMINSKY: May I continue, Judge?
74

[1]
[2] **[*67]** THE COURT: Please.

[3]Q The impression, normal CAT scan of the

[4]head, okay, you're aware of that; true?

[5]A If that's what you're reading, yes.

[6]Q Now, the CAT scan of the cervical spine,

[7]okay, "Overall cervical alignment is normal. More

[8]careful inspection suggests either that these are old

[9]or that the appearance is related to ligament

[10]calcification. No adjacent soft tissue abnormalities

[11]noted, also speaking against any acute injury."

[12]So, to the extent that there was any

[13]problem with the cervical spine, in layman's terms,

[14]they are suggesting that there may have been a

[15]pre-existing condition?

[16]A (No response.)

[17]Q Yes or no?

[18]A I'm not sure what they're suggesting,

[19]honestly.

[20]Q Okay.

[21]The thoracic spine, no significant

[22]abnormalities?

[23]A Again, that's what you said earlier, yes.

[24]Q "Left ankle, okay oblique and lateral

[25]projections show the bony structures to be

[26]unremarkable. No evidence of fracture or dislocation
75

[1]
[2]is seen. The joint spaces are well maintained and the

[3]surrounding soft tissue injuries are within normal

[4]limits. **[*68]** "

[5]So, those are good findings; is that

[6]correct?

[7]A That is correct.

[8]Q And the impression is no evidence of

[9]fracture or dislocation, so, as far as his left ankle,

[10]everything was normal; correct?

[11]A That's correct.

[12]Q Now, they did his wrists and they found

[13]no evidence of acute fracture and dislocation.

[14]They did find an acute right calcaneal

[15]fracture, as you discussed at length, the right leg

[16]was found to be normal and CAT scan of the left wrist,

[17]which you spoke about showed carpal instability.

[18]Do you remember speaking about that?

[19]A Yes.

[20]Q Okay, now, let's get to St. Vincent's

[21]Hospital and move this along.

[22]When he arrived at St. Vincent's Hospital

[23]they did an examination, they said he was a

[24]construction worker.

[25]Now, they asked him to review his

[26]symptoms and St. Vincent's has a system where if they

76

[1]
[2]write, "N C", that means non-contributory; is that

[3]correct.

[4]A Usually, yes.

[5]Q So, in general, pulmonary, ear nose and

[6]throat, cardiovascular, neurological, these were all

[7]non-contributing, meaning there **[*69]** were no issues

[8]concerning those aspects of his physical condition;

[9]true?

[10]A I don't have the chart in front of me,

[11]but if that's what you're reading, I would have to

[12]agree, yes.

[13]Q Now, they also take a social and family

[14]history and he said he smokes one pack of cigarettes a

[15]day for ten years.

[16]What are the effects on a person, as far

[17]as their lungs and potential life expectancy of

[18]smoking a pack of cigarettes a day for ten years?

[19]MR. BOROWICK: Objection.

[20]THE COURT: Overruled.

[21]A As an orthopedic surgeon, I think I would

[22]be least likely to answer that question.

[23]Q As a doctor, would you agree with me,

[24]smoking a pack of cigarettes a day for ten years is

[25]not something you advise him to do?

[26]A We advise them not to smoke.
77

[1]
[2]Q Why is that?

[3]A There are adverse effects.

[4]Q And those adverse effects demonstrate

[5]them, how?

[6]A From an orthopedic point of view it

[7]affects the circulation to the extremities.

[8]Q So, if he was twenty-nine when this

[9]happened and he said he smoked a pack of cigarettes a

[10]day for ten **[*70]** years, is it a good idea for a person at

[11]age nineteen to smoke a pack of cigarettes a day for

[12]ten years to age twenty-nine; just yes or no?

[13]A I would recommend not smoking, so I would

[14]say it's not healthy.

[15]Q Now, I'm going to take you through some

[16]more of the St. Vincent's medical records.

[17]When he arrived there they did a

[18]musculoskeletal examination and he was right upper

[19]extremities, painless from shoulder, elbow, wrist,

[20]fingers, no gross deformities. Left upper extremety,

[21]painless, full range of motion, painless, full range

[22]of motion. Shoulder, elbow, right lower extremity,

[23]painless, full range of motion. Hip, knee, leg, left

[24]lower extremety, full range of motion. Hip, knees,

[25]tender with an infusion. He had a black and blue, he

[26]had injuries to his heel, tenderness to his heel and

[78]
[1]
[2]he was alert A 0 times three.

[3]What does that mean when you see that in

[4]the medical records?

[5]A Alert and oriented times three.

[6]Q Basically means if you're talking to

[7]somebody he knows where they are?

[8]A Person, place and time, yeah.

[9]Q Okay. Now, let's go to **[*71]** the different --

[10]I just want to get a sense of, because -- would you

[11]agree with me that when he was in St. Vincent's,

[12]recovering from his injuries and undergoing surgery

[13]and things like that, he was in pain; correct?

[14]A That's correct.

[15]Q And you use, as most hospitals do, a pain

[16]scale and nurses or who ever is seeing the person at

[17]the time will say, describe your pain on a scale from

[18]one to ten, with ten being the worse; correct?

[19]A Correct.

[20]Q And have you had a chance to read the

[21]history of the progress notes from St. Vincent's

[22]Catholic Medical Center?

[23]A I have reviewed them.

[24]Q And there were times when he said his

[25]pain was a six out of ten; correct?

[26]A I believe so.
79

[1]
[2]Q And there were times when he said his

[3]pain was a one or a two out of ten; correct?

[4]A Again, you're reading that, I would trust

[5]you to read correctly but again --

[6]Q Most people don't trust lawyers, so I

[7]appreciate that very much, but I'm just reading from

[8]the records that are in evidence, okay.

[9]A Again, that wouldn't surprise me if he's

[10]on high narcotic **[*72]** medications.

[11]Q Absolutely, he's receiving OxyContin, so

[12]obviously, these injuries would cause significant

[13]pain; correct?

[14]A That is correct.

[15]Q But, these medications were masking the

[16]pain?

[17]A They were helping with the level of pain,

[18]yes.

[19]Q So, my question is, I'm trying to give

[20]the jury a sense of his condition and the pain that he

[21]was actually in, whether he was actually experiencing

[22]pain or the pain was masked by these medications.

[23]When he's asked to describe his pain, he

[24]often says two out of ten, it may be because he was on

[25]the medication, but that was also the level of pain he

[26]described himself in --
80

[1]
[2]MR. BOROWICK: Objection.

[3]Q --at various times?

[4]MR. BOROWICK: Objection, Counsel is

[5]talking about often.

[6]THE COURT: Let me just remind you,

[7]ladies and gentlemen, that Counsel is referring

[8]to a document that's in evidence, and that is

[9]anything that is in evidence will be available to

[10]you during deliberations.

[11]Q Now, also, one of the things the nurses

[12]do when they come in and check on a patient, they say

[13] **[*73]** what are your complaints, the patient will say I'm in

[14]pain, I want medication or whatever the complaints may

[15]be?

[16]A Yes.

[17]Q And if they have no complaints, they will

[18]say no complaints; right?

[19]A That may be an effect of the medication,

[20]but, yes.

[21]Q So, for instance, July 17th, '06, when

[22]the nurse comes in and says, "How do you feel?" He

[23]says, "I have no complaints this morning", okay, I'm

[24]just taking some things out of the medical records,

[25]I'm sure Mr. Borowick will take out other things.

[26]7/17, here, he says his pain is a four out of ten,

[81]
[1]
[2]okay.

[3]On 7/17 at 11:15 in the morning he says,

[4]P S, pain scale, right, he says three out of ten.

[5]On 7/18, in the morning he has no

[6]complaints.

[7]On 7/18, that evening, he has no

[8]complaints.

[9]On 7/19, at 11:30 a.m. patient reports

[10]pain scale zero to three.

[11]7/21, lower leg extremety, he's in a

[12]spling, he has good capillary refill, and sensation is

[13]intact.

[14]Just so the jury understands what that

[15]means, good capillary refill means that the blood is

[16]flowing properly throughout his body; **[*74]** is that correct?

[17]A We kind of pinch the toes, and we wait

[18]and see how long it takes to turn from white to pink.

[19]Q So, if I go like this with my finger, and

[20]the pressure is going to make it white, but if I have

[21]good capillary refill, it's going to come back to

[22]pink?

[23]A Usually within a couple of seconds it

[24]should turn pink again.

[25]Q And good capillary refill is an

[26]indication that the blood is flowing the way it's
82

[1]
[2]designed to flow?

[3]A Usually, yes.

[4]Q Again that's a good thing; is that

[5]correct?

[6]A That's correct.

[7]Q And, "Low extremety, all sensation is

[8]intact, meaning if you touch him, he's going to feel

[9]what he's supposed to feel?

[10]A Again, that's a good sign, yes.

[11]Q 7/21, another note at 10:00 a.m., no new

[12]complaints of pain, and it says progress noted toward

[13]S T Gs.

[14]Is it fair of me to say that the nurse or

[15]the doctor that made that notation say that the

[16]Plaintiff is progressing towards his short term goals?

[17]A It's making progress considering his

[18]injuries.

[19]Q Listen, I'm not asking you guys to do

[20] **[*75]** miracles.

[21]When a person comes into a hospital they

[22]set short term goals for him and long term goals for

[23]him, just like you've done?

[24]A That is correct, yes.

[25]Q So, here in the hospital, they set short

[26]term goals for him, they wanted to stabilize him, make
83

[1]
[2]him better and wanted to be able for him to go home.

[3]I would imagine were some of his short

[4]term goals?

[5]A That is correct.

[6]Q So, on 7/21, the note says, "Progress

[7]noted towards short term goals", so at this point I

[8]can't recall exactly what date he transferred to your

[9]hospital. Do you remember the date?

[10]A I don't remember the date.

[11]Q Let me see if I can find it.

[12](Pause.)

[13]Q Looks like 7/13, okay.

[14]So, by 7/21, they're writing down that

[15]he's making progress towards short term goals.

[16]Had he had any surgery by then?

[17]A I don't believe he has.

[18]Q Okay. Now, you mentioned, a question in

[19]response to question from Mr. Borowick that he had a

[20]psychiatric consultation while he was in the hospital.

[21]I want to read from that, if I may?

[22]A Sure.

[23] **[*76]** Q Because, as I pointed out, my clients

[24]don't dispute the orthopedic injuries, okay, we do

[25]dispute --

[26]MR. BOROWICK: Objection, Judge.
84

[1]
[2]MR. KAMINSKY: Withdrawn.

[3]Q I'm going to read from the psychiatric

[4]consultation: "He denies dreams of falling. He denies

[5]nightmares. "

[6]Now, if this says he denies nightmares,

[7]is that consistent or inconsistent with what you

[8]testified to?

[9]A I believe I testified that he had dreams

[10]of falling.

[11]Q Okay, well let me read from the --

[12]A But I'm not sure if that was in the

[13]hospital or afterwardses.

[14]Q Let's read from the psychiatric

[15]consultation, okay.

[16]"He denies actual dreams of falling, he

[17]denies nightmares, he denies flashbacks, he denies

[18]that he has been feeling anxious, generally. Overall

[19]mood has been good. He has had normal sleep. He

[20]denies --", I can't read that word. He denies --

[21]MR. KAMINSKY: May I approach?

[22]Q Can you help me with this symbol, here?

[23]A Sure, I'll try to.

[24](Witness reading document.)

[25]Q Is that --oh, history of?

[26]A Yes.
85

[1]
[2] **[*77]** Q "He denies history of recent auditory and

[3]halucinatory and suicidal illutation. He has a

[4]history of alcoholism as a teenager. He denies history

[5]of illegal drugs, except marijuana as teenager."

[6]And then the doctor says he recommends,

[7]"No psychotherapy is indicated at this time."

[8]Now, according to the psychiatric

[9]consultation, given his physical condition,

[10]especially, that's a pretty good psychiatric

[11]consultation; is it not?

[12]MR. BOROWICK: Objection.

[13]THE COURT: Overruled.

[14]MR. BOROWICK: Your Honor, this witness is

[15]not offered as a psychiatrist.

[16]THE COURT: This witness recommended the

[17]psychiatric consultation so he's perfectly

[18]capable of answering that question.

[19]Thank you.

[20]Q Just yes or no.

[21]A Can you ask that question again, please?

[22]Q I'll be happy to ask it again.

[23]Especially given his physical condition,

[24]okay, what I just read to you, that is a pretty

[25]favorable psychiatric evaluation; is it not?

[26]A From the parts you read to me, I would
86

[1]
[2]say yes.

[3]A Okay.

[4]Q Now, let's go to the next date, 7/21; **[*78]**
[5]"Reports a pain scale of three out of ten."

[6]Again, on 7/22, they write, "The right

[7]leg extremity capillary refill is brisk. Left

[8]extremity capillary refill is brisk."

[9]Again, those are good things?

[10]A Yes.

[11]Q 7/22 at night, He's resting comfortably

[12]at this time and his friends are visiting at bedside.

[13]7/24, patient reports pain of seven of

[14]ten before medication and the pain has, decreased to a

[15]four of ten by noon and continues to decrease because

[16]of his medication.

[17]Now, on 7/25, he's starting to be able to

[18]transfer himself out of his bed onto a chair; is that

[19]correct?

[20]A If that's what you're reading I would

[21]have to agree, yes.

[22]Q OOB means out of bed?

[23]A Yes.

[24]Q With an arrow pointing to a chair?

[25]A Onto a chair, yes.

[26]Q So, the first week he's there he's
87

[1]
[2]confined to bed rest and now he's making that progress

[3]to the short term goals, able to get out of bed and

[4]make it to a chair.

[5]Now, on 7/27 he's complaining of pain of

[6]a six out of ten and the nurses or whoever basically

[7]conclude it's because of **[*79]** the position he was lying, so

[8]they repositioned him and the pain is now a three out

[9]of ten, okay.

[10]Let's see, on 7/27 he reports pain

[11]decreased to four out of ten.

[12]On 7/28, pain is three out of ten.

[13]On 8/4, patient now reports relief. Pain

[14]is two out of ten, no other complaints.

[15]8/4, patient has no complaints.

[16]On 8/6, the patient says, "I'm ready to

[17]go home", and orders are obtained to send him home.

[18]And an orthopedic clearance is given on

[19]8/8.

[20]Now, on 7/21, they do a consultation and

[21]one of the things you do in a consultation, you ask a

[22]person about their past medical history; is that

[23]correct?

[24]A That's correct.

[25]Q Because when you're treating a person,

[26]you want to know his entire medical situation, because
88

[1]
[2]there may be things that would affect the way you

[3]treat him; true?

[4]A There may be, yes.

[5]Q So, for instance, if a person has

[6]pancreatitis, secondary to alcohol abuse, that's

[7]something you want to know about; true?

[8]A It could be, yes.

[9]Q And are you aware that Mr. Miller told

[10]the hospital that he **[*80]** "drank a lot in his teens", could

[11]not quantify the amount. He had pancreatitis ten

[12]years ago. He says he has stopped drinking a week

[13]before the accident because he felt that his

[14]pancreatitis was returning.

[15]Now, pancreatitides is painful; is it

[16]not?

[17]A You know, it can be.

[18]Q And pancreatitides is due to alcohol

[19]abuse; correct?

[20]A That's one cause of pancreatitides.

[21]Q Well, I want you to assume that

[22]Mr. Miller told his treating physicians-- and by the

[23]way often times when a person is talking to their

[24]physicians it's in their best interest to tell them

[25]the truth because they are the ones that are going to

[26]take care of them?

[89]
[1]
[2]A That is correct.

[3]Q And so, when he told his doctor that he

[4]had pancreatitis secondary to alcohol ten years ago

[5]because he was drinking a lot in his teens, when he

[6]was nineteen, and he kept drinking heavily up until

[7]allegedly, a week to be --

[8]MR. BOROWICK: Objection, objection.

[9]THE COURT: Sustained.

[10]MR. BOROWICK: This is outrageous.

[11]THE COURT: Thank you, Counsel. Just

[12]objection is enough. **[*81]**
[13]Sustained.

[14]Q I'll read to you from the hospital

[15]records. "Substance abuse--"

[16]MR. BOROWICK: Objection.

[17]It's already been read and Counsel knows

[18]what he's doing.

[19]THE COURT: Thanks, Counsel, you can sit

[20]down, too.

[21]Save the summation for summations and

[22]just ask him his questions.

[23]Q Okay. You said it could be attributable

[24]to drinking?

[25]MR. BOROWICK: Objection.

[26]THE COURT: Overruled.
90

[1]
[2]Q Does the patient himself attribute it to

[3]his drinking?

[4]MR. BOROWICK: Objection.

[5]THE COURT: Overruled.

[6]A From what you're reading it seems he is.

[7]Q Would you like -- have you seen this

[8]part?

[9]A I probably have, but I don't recall.

[10]Q All right, let me show it to you.

[11](Handing.)

[12]MR. BOROWICK: May we approach while he

[13]reads it?

[14]THE COURT: Yes.

[15](Whereupon, an off the record discussion

[16]was held at the bench.)

[17](Record resumed.)

[18]THE COURT: Can we take the jury out for

[19]a moment, please?

[20]THE COURT OFFICER: All rise, jury

[21]exiting.

[22](Whereupon, the jurors **[*82]** are exiting the

[23]Courtroom.)

[24]THE COURT: Doctor, you can step out.

[25]THE WITNESS: All right.

[26](Witness excused.)

[91]
[1]
[2]THE COURT: Feel free to make your

[3]record, Counsel.

[4]MR. BOROWICK: Judge, what Mr. Kaminsky is

[5]doing and not even subtly, he is injecting

[6]something into the case which has no relevance

[7]number one, pancreatitis, number one, but what

[8]he's doing is he's -- even in his last question

[9]he says, "And he continued to drink heavily up

[10]until a week before the accident", which isn't in

[11]any record.

[12]THE COURT: I have not read the record.

[13]To the extent that it does not say "heavily",

[14]that will be the only thing that I can see was

[15]objectionable about what Counsel was saying.

[16]MR. BOROWICK: What he's injecting is

[17]making this proximate cause of the accident.

[18]There's no indication of anything, that alcohol

[19]had anything to do with the accident.

[20]THE COURT: This jury is going to be

[21]called upon to determine a life expectancy and

[22]working life expectancy of Plaintiff and they are

[23]entitled to hear what is already going to be

[24]before them in the **[*83]** juryroom, which are records

[25]that are in evidence.

[26]MR. BOROWICK: And there is going to be no

[92]
[1]
[2]opinion given by any expert about life

[3]expectancy, period, not about smoking a pack a

[4]day, not about pancreatitis as a youngster, none

[5]of it.

[6]THE COURT: But the jury is permitted to

[7]use their own opinion about what they have heard

[8]about Plaintiff, what they have heard about

[9]Plaintiff's life, what they have heard about how

[10]the Plaintiff's health was in determining whether

[11]they accept a statistical life expectancy.

[12]MR. BOROWICK: That is true, but what is

[13]pancreatitis -- but he brought it up and I didn't

[14]object to it. But now what he's doing is he's

[15]bringing it close to the day of the accident,

[16]almost to the day of the accident, bringing it in

[17]so that there's some kind of attachment to maybe

[18]the accident happened as a result of alcohol.

[19]MR. KAMINSKY: Absolutely not.

[20]MR. BOROWICK: That is the connection by

[21]harping --

[22]MR. KAMINSKY: Absolutely not.

[23]MR. BOROWICK: If it's just as the Judge

[24]has suggested, that they should know that he had

[25]pancreatitis **[*84]** --

[26]THE COURT: All right, thanks, gentlemen.
93

[1]
[2]As I read the record, and you can show me

[3]if there's a different place for this, it says,

[4]"Pancreatitis ten years ago. Patient stopped

[5]drinking alcohol in early July, 2006, as he felt

[6]that his pancreatitis was returning."

[7]MR. KAMINSKY: Which is a week before the

[8]occurrence.

[9]MR. BOROWICK: Where does it say he was

[10]drinking heavily up until just before the

[11]accident?

[12]THE COURT: It says, "could not quantify."

[13]MR. KAMINSKY: Okay.

[14]THE COURT: Counsel is correct to object

[15]to places where you characterize what you are

[16]reading as opposed to simply reading, and I will

[17]sustain objections in that vein.

[18]MR. KAMINSKY: Okay.

[19]THE COURT: As I read the document that

[20]you were reading from, it does not say anything

[21]about heavy drinking. It does not qualify when

[22]he stopped drinking in terms of the accident.

[23]MR. KAMINSKY: There's a specific

[24]reference in the record.

[25]THE COURT: And therefore -- if you can

[26]show it to me, you can read it, if it's not in
94

[1]
[2]the records your characterizations **[*85]** will stop.

[3]MR. BOROWICK: How about the prejudice of

[4]him making some connection to the day of the

[5]accident that my client was in some way

[6]contributory to the accident without saying it,

[7]he's just bringing --

[8]THE COURT: There's no prejudice to the

[9]extent that liability is not before this jury.

[10]MR. BOROWICK: There is, though, because

[11]liability isn't before this jury and Counsel is

[12]making that suggestion to try to put off some

[13]kind of notion into that juryroom.

[14]THE COURT: I disagree.

[15]MR. KAMINSKY: Judge, on that page,

[16]somewhere, it does say a week before the

[17]accident.

[18]MR. KAMINSKY: What was the date of the --

[19]here we go, Judge: "Has a history of alcohol

[20]abuse as a teen. Last drink 7/6", a week before

[21]the accident.

[22]MR. BOROWICK: Last drank, oh, my God.

[23]Judge, it sounds like my client is a

[24]raving drunk a week before the accident.

[25]THE COURT: Counsel, there's notation in

[26]those documents that they should monitor for
95

[1]
[2]alcohol withdrawal during this stay in the

[3]hospital.

[4]MR. BOROWICK: Which means what? So

[5]they --

[6] **[*86]** THE COURT: Which means they thought

[7]something was connected to that.

[8]MR. BOROWICK: How do we know that's what

[9]they thought?

[10]THE COURT: We don't know and that's why

[11]I'm going to restrict Counsel simply to what's

[12]written and not characterize.

[13]MR. BOROWICK: I'm going to ask for a

[14]direction to the jury that alcohol had nothing to

[15]do with this accident.

[16]THE COURT: I'm happy to say that, not in

[17]those terms, but I'm happy to say that there's no

[18]indication that alcohol had anything to do with

[19]this accident, nor is the happening of the

[20]accident an issue before them.

[21]Liability has already been determined and

[22]they are only to determine the damages.

[23]MR. BOROWICK: Saying that there's no

[24]indication that alcohol had anything to do with

[25]this accident is kind of milk toast compared to

[26]what they need to hear.
96

[1]
[2]THE COURT: If you two can agree on

[3]different language I'm happy to say something

[4]other than that.

[5]MR. BOROWICK: I just said something and

[6]he said there's no objection to that.

[7]THE COURT: Write it out, Counsel.

[8]MR. BOROWICK: **[*87]** I said that you should

[9]understand that alcohol had nothing to do with

[10]this accident.

[11]MR. KAMINSKY: I agree.

[12]THE COURT: Okay.

[13]Bring them in.

[14]THE COURT: Counsel, you can stop as

[15]close to one o'clock as you want, and we'll stop

[16]at one o'clock.

[17]MR. KAMINSKY: Okay.

[18](Witness resumes the stand.)

[19]THE COURT OFFICER: All rise, the jury is

[20]entering the Courtroom.

[21](Whereupon, the jurors are entering the

[22]Courtroom.)

[23]THE COURT: All right, please sit down.

[24]Ladies and gentlemen, I instruct you,

[25]alcohol had nothing to do with the happening of

[26]this accident, and I remind you you are here to
97

[1]
[2]determine damages, only, not liability.

[3]Liability has already been determined.

[4]Please continue.

[5]MR. KAMINSKY: Thank you, Judge.

[6]Q Now, concerning the consultation notes

[7]that I was just in the middle of showing you,

[8]"Pancreatitis secondary to alcohol use and then it's

[9]asked about substance abuse and it says alcohol,

[10]'drank a lot in teens.' Could not quantify.

[11]Pancreatitis ten years ago. Patient stopped drinking

[12]alcohol **[*88]** in early July 2006 as he felt that his

[13]pancreatitis was returning."

[14]Now, does that suggest to you that his

[15]pancreatitis, you said one of the causes of the

[16]alcohol abuse, does that suggest to you that according

[17]to the Plaintiff himself, he suffered pancreatitis

[18]from alcohol abuse?

[19]A (No response.)

[20]Q Just if you can answer that question?

[21]A I can't answer that question.

[22]Q You can't or you don't want to?

[23]A I don't have the information to answer

[24]that question.

[25]Q What more information do you need to make

[26]that determination, other than the quotes from the
98

[1]
[2]Plaintiff himself, that he had pancreatitis and felt

[3]it coming back because of his alcohol abuse, what

[4]other information do you need?

[5]A You would need some sort of radiographic

[6]study; CAT scan or MRI to see if the inflammation is

[7]contained.

[8]Q If he says he feels it returning, could

[9]that be because he feels the pain and symptoms

[10]associated with it?

[11]A You can, but you can't make the

[12]determination without blood tests and radiographic

[13]study.

[14]Q Let's talk about the **[*89]** blood tests, then,

[15]that at your hospital, one of the things they were

[16]doing was monitoring for signs signs of alcohol

[17]withdrawal due to patient's history.

[18]Can I show you this?

[19]A Sure.

[20]Q Tell the jury if I read that correctly?

[21](Witness reading document.)

[22]A You read that correctly, yes.

[23]Q What does it mean to be monitoring the

[24]patient for signs of alcohol withdrawal?

[25]A Well, there are certain signs of alcohol

[26]withdrawal and a patient could get fidgety, anxious,

99

[1]
[2]they could have trouble resting and sleeping.

[3]Q So, there's another note here which I'm

[4]going to read to you: "Patient has a history of

[5]alcohol abuse as a teen. Last drink was 7/4/06."

[6]The accident happened 7/11/06, so,

[7]according to these notes the Plaintiff says his last

[8]drink of alcohol was exactly a week before; is that

[9]true?

[10]A Yes.

[11]Q Now, as far as the consultation that was

[12]done after the psychiatric examination that we

[13]discussed, psychiatry was called on 7/21/06.

[14]"Currently is not having flashbacks, is not having

[15]dreams of the event, he is not hypervigilant. **[*90]** He is

[16]not startled to response, he is not having any

[17]difficulty falling back asleep and no psychotropic

[18]medications are needed."

[19]Psychotropic medications would be

[20]medication for psychiatric disorders; correct?

[21]A That's correct.

[22]Q Now, they did an impression of the

[23]Plaintiff from a psychological standpoint and it says

[24]axis one.

[25]What is Axis one?

[26]A It's been a few years since I was in
100

[1]
[2]medical school.

[3]MR. BOROWICK: Excuse me, Judge, I'm going

[4]to object.

[5]This is psychiatric testimony, we both

[6]have a psychiatrist who is going to testify.

[7]He's not a psychiatrist.

[8]THE COURT: Thank you.

[9]You can answer the question.

[10]A It's -- I can't give you a definite

[11]answer, it's what the psychiatrist used to make the

[12]diagnosis.

[13]Q And their diagnosis was alcohol abuse

[14]versus dependence, did you see that in the record?

[15]A I reviewed the records, yes.

[16]Q Now, I asked you if you recommend to your

[17]patients that they smoke a pack of cigarettes a day.

[18]Do you recommend that your patients abuse

[19]alcohol?

[20] **[*91]** A No, I do not.

[21]Q That's because of adverse health effects;

[22]correct?

[23]A That's correct.

[24]Q Now, pancreatitis in addition to -- it's

[25]painful; right?

[26]A That's correct.
101

[1]
[2]Q How does the pain from pancreatitis

[3]manifest itself in a person?

[4]A Usually, it's flank pain, mostly, and

[5]it's a deep pain in the gut that you feel.

[6]Q Could it be debilitating?

[7]A Oh, at certain stages it can be very

[8]painful, yes.

[9]Q Can be very painful?

[10]A Yes.

[11]Q And could, yes or no, can you tell us

[12]smoking a pack of cigarettes a day, for ten years, is

[13]that something that can shorten a person's life

[14]expectancy; just yes or no?

[15]MR. BOROWICK: Objection.

[16]THE COURT: Overruled.

[17]Q Just yes or no?

[18]A I would say it can.

[19]Q Okay, thank you.

[20]And just again, yes or no, abusing

[21]alcohol from the age of nineteen to twenty-nine, to

[22]the point where you develop pancreatitis, to the point

[23]where you feel the pancreatitis returning within a

[24]week of this occurrence, is drinking that amount of

[25]alcohol, and I'm going to give you **[*92]** a quote. "Drank a

[26]lot in teens", could not quantify, okay.
102

[1]
[2]Is drinking to that extent that can

[3]cause -- what's the pancreas, by the way?

[4]A The pancreas is an organ that makes

[5]enzymes to help us digest what we eat and also makes

[6]insulin.

[7]Q Is it a vital organ?

[8]A Yes, it's vital, yes.

[9]Q And could a person developing

[10]pancreatitis because of alcohol abuse, is that

[11]something that could cause a shortened life

[12]expectancy?

[13]MR. BOROWICK: Objection.

[14]THE COURT: Overruled.

[15]A If --

[16]Q Just yes or no?

[17]A If he has --

[18]Q Sir, listen to my question.

[19]A I can't answer that question.

[20]Q You can't say whether or not -- you can't

[21]say whether or not abusing alcohol can have an adverse

[22]effect on a person's life expectancy?

[23]A You say --

[24]Q Can you answer that question?

[25]A If he --

[26]Q Yes or no?
103

[1]
[2]A If he abuses it chronically over a long

[3]period of time, it can, yes.

[4]Q Would ten years qualify as a long period

[5]of time considering he started at nineteen and was

[6]twenty-nine **[*93]** when he was still doing it?

[7]A You say he abused it as a teenager.

[8]Q Well, he was re-developing pancreatitis

[9]shortly before the occurrence.

[10]MR. BOROWICK: Objection:

[11]THE COURT: Sustained.

[12]Q Okay, let's move on.

[13]Can a diagnosis of alcohol abuse made by

[14]your hospital -- is alcohol abuse in and of itself

[15]something that can shorten a person's life expectancy,

[16]yes or no?

[17]MR. BOROWICK: Objection.

[18]THE COURT: Overruled.

[19]You can answer that question, please.

[20]A The chronic alcohol use abuse, chronic

[21]over a period of time can.

[22]Q In addition to shortening a person's life

[23]expectancy, can pancreatitis, alcohol abuse, smoking a

[24]pack of cigarettes a day for ten years, are those the

[25]type of things that can also shorten a person's work

[26]life expectancy?
104

[1]
[2]MR. BOROWICK: Objection.

[3]Q Yes or no?

[4]THE COURT: Overruled.

[5]You can answer that question.

[6]A Well --

[7]Q Sir, stop, stop.

[8]A If you --

[9]Q Where did you go to college, again?

[10]MR. BOROWICK: Judge, it's argumentative.

[11] **[*94]** THE COURT: Overruled.

[12]You can answer that.

[13]A Columbia.

[14]Q You know what yes or no means, I would

[15]imagine?

[16]A Yes, I do.

[17]Q So, my question to you is, can those

[18]things affect a person's work life expectancy; yes or

[19]no?

[20]A If you say can, I would say yes.

[21]Q Thank you.

[22]THE COURT: Counsel, it's a few minutes

[23]before one, shall we break?

[24]MR. KAMINSKY: Let's break.

[25]THE COURT: Very good.

[26]Don't talk about the case amongst
105

[1]
[2]yourselves or anybody else.

[3]See you back at 2:15. Please be back on

[4]time.

[5]THE COURT OFFICER: All rise.

[6](Whereupon, the jurors are exiting the

[7]Courtroom.)

[8](Witness excused.)

[9](Whereupon, the Court takes a luncheon

[10]recess.)

[11]* * *

[12](P. M. S E S S I O N).

[13](Witness resumes the stand.)

[14]THE COURT OFFICER: All rise, jury is

[15]entering.

[16](Whereupon, the jurors are entering the

[17]Courtroom.)

[18]THE COURT: All right, please sit down

[19]and let's continue.

[20]MR. KAMINSKY: Thank you, Judge.

[21]Q Welcome back, Doctor.

[22]I want to **[*95]** show you some pictures. I want

[23]you to assume that Plaintiff's Exhibit 14 and 15 are

[24]photographs that the Plaintiff exchanged during the

[25]course of discovery, okay?

[26]A Yes.
106

[1]
[2]Q And for the record, those are photographs

[3]of Mr. Miller when he was in the hospital; right?

[4]A This is a hospital picture. This I'm not

[5]sure where that is. There's a TV in the room.

[6]Q Okay, can we agree this picture was taken

[7]in the hospital?

[8]A Yes.

[9]Q It's in evidence, this is Plaintiff's

[10]Exhibit 14, all bandaged up, there.

[11]Do you know who took this picture?

[12]A No, I don't.

[13]Q Isn't it unusual to take a picture of a

[14]person a day or two after an accident while they're in

[15]the hospital?

[16]A Um --

[17]Q Just yes or no?

[18]A I wouldn't say it's unusual.

[19]Q Do you know if an attorney took this

[20]picture or why this picture was even taken?

[21]A I don't know who took it and why.

[22]Q Well, you didn't direct the photo to be

[23]taken, did you?

[24]A No, I did not.

[25]Q And these illustrated charts, I mean,

[26]this isn't pretty stuff to look **[*96]** at. I mean this is
107

[1]
[2]what surgery is; right?

[3]A I'm sorry, your question was?

[4]Q This is not pretty stuff, this is what

[5]surgery is?

[6]A It's an illustration of an operation,

[7]yes.

[8]Q And how many surgeries have you done?

[9]A Knee surgeries?

[10]Q Knee surgeries.

[11]A I would say over my career a couple of

[12]thousand.

[13]Q And that's what they look like; is that

[14]correct?

[15]A That's correct.

[16]Q I'm not going to go over all the other

[17]charts, but that's what surgery is, you open somebody

[18]up; right?

[19]A That's correct.

[20]Q And tell me, the thousands of people that

[21]you have done knee surgery on, how many of them

[22]returned to work in some capacity?

[23]MR. BOROWICK: Objection.

[24]THE COURT: Overruled.

[25]Q Do you have any way of knowing?

[26]A I don't know the exact number. Some do
108

[1]
[2]and some don't.

[3]Q And of the people that you do wrist

[4]surgery on, some return to work, some don't?

[5]A That's correct.

[6]Q People that you do foot surgery on, some

[7]return to work, some don't?

[8]A That's **[*97]** correct.

[9]Q Do you keep any sort of statistics as to

[10]the percentage who return to work that aren't in

[11]lawsuits compared to the percentage who return who

[12]don't return to work, who are in lawsuits?

[13]A I don't keep statistics on patients and

[14]lawsuits, so I wouldn't be able to answer that.

[15]Q You know what secondary gain is?

[16]A Yes.

[17]Q Tell the jury what secondary gain is?

[18]A It's when somebody can stand to gain from

[19]an injury, I guess.

[20]Q In other words, if someone can return to

[21]work in some capacity, but they don't because they're

[22]involved in a lawsuit and they have a claim for loss

[23]of earnings, that could be a form of secondary gain;

[24]true?

[25]A I believe so, yes.

[26]Q Now, and again, keeping in mind, I'm not
109

[1]
[2]disputing his --

[3]MR. BOROWICK: Objection, Judge.

[4]THE COURT: Save it for summations.

[5]Q From a neurological standpoint, there's

[6]no injury to his thought process or ability to

[7]communicate?

[8]MR. BOROWICK: Objection.

[9]THE COURT: Overruled.

[10]A Well, he's on narcotic medication which

[11]can alter your **[*98]** --

[12]Q I'll accept that, but he's had no injury

[13]that affects his ability to communicate or speak;

[14]correct?

[15]A When he's not on medication he will be

[16]able to speak.

[17]Q All the testing from the various doctors

[18]and all the records in, hospital records and

[19]everything else all show that he did not suffer any

[20]injuries to his head or to his cognitive abilities;

[21]true?

[22]A As far as I can see there was no injury

[23]to the head; that's correct.

[24]Q Okay. And are you aware that he uses a

[25]computer several hours a day?

[26]A I'm not aware of that.
110

[1]
[2]Q Well, would it surprise you if he's

[3]capable of sitting and using a computer several hours

[4]a day?

[5]A Well --

[6]Q Yes or no?

[7]A That wouldn't surprise me.

[8]Q And as far as this life care plan that

[9]you are a part of, let me see if I understand this.

[10]You're the treating doctor, and you meet

[11]with Mr. Borowick?

[12]A I met with him to discuss this case last

[13]week, yes.

[14]Q Where did that meeting take place?

[15]A In my office.

[16]Q And how long did that meeting take place?

[17] **[*99]** A An hour to two hours.

[18]Q One to two hours?

[19]A (No response.)

[20]Q Was that complimentary or did you charge

[21]him for that?

[22]A That's included in my hourly fee.

[23]Q That's part part of your hourly fee?

[24]A Yes.

[25]Q During that one to two hours, did he

[26]indicate to you the types of questions he would be
111

[1]
[2]asking you?

[3]A Um --

[4]Q Generally speaking?

[5]A He was more or less asking me medical

[6]questions. He had questions about the injuries and

[7]the prognosis and so forth.

[8]Q Did he show you the charts?

[9]A He showed me the charts and made sure

[10]that I was okay with them.

[11]Q He did show you the charts?

[12]A Yes.

[13]Q And is it then that you discussed this

[14]life care plan or was that a different time?

[15]A I believe it was at an earlier time.

[16]Q So you met with him prior to this?

[17]A I spoke with the life care planner about

[18]the involvement.

[19]Q Who was the life care planner that you

[20]spoke with?

[21]A I don't know if I can recall the name --

[22]Boyle, I believe.

[23]Q I'm sorry?

[24]A I can't recall **[*100]** the name exactly, I'm not

[25]sure.

[26]Q Barbara Scheffer?
112

[1]
[2]A No, I --

[3]Q Barry Root?

[4]A I'm sorry, I can't recall.

[5]Q Is it in your notes anywhere?

[6]A Probably not.

[7]Q Is it in a file that you kept somewhere?

[8]A Probably not.

[9]Q Did you have any other materials

[10]pertaining to this case other than what you brought to

[11]Court today?

[12]A I brought my office notes.

[13]Q Did do you have anything else?

[14]A No.

[15]Q Do you have anything else?

[16]A X-rays.

[17]Q Any correspondences, any handwritten

[18]notes, phone conversations written down?

[19]A No handwritten notes, and no phone

[20]conversations, no.

[21]Q Okay. And the life care plan, is it fair

[22]for me to say that by far, the single biggest

[23]component of that life care plan is the claim that he

[24]needs home health assistance?

[25]A I'm not sure if that's the --

[26]Q Yes or no?
113

[1]
[2]A I'm not sure if that's the biggest.

[3]Q Had you ever seen the plan that's been

[4]drawn up and provided to me?

[5]A I've seen it, yes.

[6]Q Would you agree **[*101]** with me that the biggest

[7]care of the life care plan is the cost of either his

[8]being admitted into a residence, assisted facility or

[9]someone coming to his house to provide home health

[10]care?

[11]A If you tell me it is I would tend to

[12]believe you. I don't remember the specifics.

[13]Q That's fine.

[14]And obviously, if he doesn't need that,

[15]that would be crossed off the cost of the plan?

[16]A If he would not need it, it would not be

[17]in the plan, yes.

[18]Q Has he had any home health care up until

[19]today.

[20]A I believe he did.

[21]Q You believe he did?

[22]A Yes.

[23]Q Who is the person that provided him the

[24]home health care?

[25]A Upon his discharge from the hospital.

[26]Q For how long?
114

[1]
[2]A The exact time of the duration, I'm not

[3]sure.

[4]Q Does he have home health assistance

[5]today?

[6]A I don't believe he does.

[7]Q And in your notes which you were good

[8]enough to let me look at at lunch time, when he first

[9]came to you-- I'm going to give you your file back.

[10]When he first came to you, he was

[11]confined to a wheelchair was **[*102]** he not?

[12]A I believe so, yes.

[13]Q For a couple of visits?

[14]A Yes.

[15]Q And then didn't he progress from a

[16]wheelchair to cane or crutches?

[17]A Yes.

[18]Q And then did he progress from crutches or

[19]cane to ambulating on his own?

[20]A Yes.

[21]Q And he continues to ambulate on his own?

[22]A I believe so.

[23]Q You believe so or you know?

[24]A I can look at my last records and let you

[25]know.

[26]Q Go ahead. When was the last time you saw
115

[1]
[2]him?

[3]A June 16, 2008. And I have that he had a

[4]significant limp, but was not using a brace or cane.

[5]Q So, in the beginning, is it fair for you

[6]to say that you would see him on a weekly basis?

[7]A It would have been more frequent, yes.

[8]Q And over the course of time it would be

[9]bi-weekly basis or monthly basis?

[10]A The visits would extend themselves, yes.

[11]Q You just told us now, that the last time

[12]you saw him was in June, three months ago?

[13]A I believe so.

[14]Q Do you have an appointment to see him in

[15]October or November, or is he going to call you as

[16]needed?

[17] **[*103]** A I'll look in my records.

[18]Q Sure.

[19](Witness looking in the records.)

[20]A The exact time of the next visit I don't

[21]have listed, but I do know that he is an ongoing

[22]patient in our office.

[23]Q He's a patient of your office but the

[24]last time you saw him was three months ago and you

[25]have no idea when you're going to see him again?

[26]A I would imagine in the near future, but I
116

[1]
[2]don't remember the exact date; that is correct.

[3]Q Now, if he were in any sort of the

[4]excruciating pain or had any emergency over the last

[5]three months or so, he could have called you; true?

[6]A He --

[7]Q Yes or no?

[8]A He could have called me or another

[9]doctor, yes.

[10]Q And there is nothing in your file to

[11]suggest that he did?

[12]A That's correct.

[13]Q Now, I just want to go back to this issue

[14]of pancreatitis and ask you if you would agree or

[15]disagree with the following statements:

[16]Pancreatitis is inflammation of the

[17]pancreas often due to gallstones or alcohol abuse?

[18]A I would say yes.

[19]Q And the most common symptom of

[20]pancreatitis is **[*104]** abdominal pain?

[21]A I believe so, yes.

[22]Q Pancreatitis can lead to a number of

[23]serious complications; they include infection.

[24]A When the pancreas is damaged it sometimes

[25]becomes infected with bacteria from the small

[26]intestine.
117

[1]
[2]Q Pancreatitis infections can be fatal. Do

[3]you agree with that?

[4]A I agree with that.

[5]Q Abscess, collection of pus that develops

[6]in or around the pancreas, treatment involves drainage

[7]by catheter or surgery.

[8]Do you agree with that?

[9]A Yes.

[10]Q Would you agree that pancreatitis can

[11]cause respiratory failures, chemical changes can occur

[12]as a result of pancreatitis, can impact lung function.

[13]This could result in hypoxia, a condition in which the

[14]level of oxygen in the blood becomes dangerously low.

[15]Would you agree with that?

[16]A I believe that is correct, also.

[17]Q Now, if a person has pancreatitis, is it

[18]helpful or --

[19]MR. KAMINSKY: Withdrawn.

[20]Q Is it an additional complicating factor

[21]to that person's lungs that they smoke a pack of

[22]cigarettes a day?

[23]A I --

[24]Q Or **[*105]** you can't answer?

[25]A If the person has acute active

[26]pancreatitis, I would say smoking is not a good idea.
118

[1]
[2]Q Do you agree that pancreatitis can also

[3]cause kidney failure?

[4]A In extreme cases, yes.

[5]Q And also shock that can be life

[6]threatening?

[7]A That is correct.

[8]Q Would you agree that excessive alcohol

[9]consumption causes seventy percent of chronic cases

[10]which often develop between the ages of thirty and

[11]forty.

[12]Do you believe that?

[13]A Unfortunately, I'm not well enough versed

[14]in pancreatitis to answer that question.

[15]Q All right. Would you agree or disagree

[16]with the following statement: Damage from alcohol

[17]abuse may not appear for many years, and then a person

[18]may have a sudden attack of pancreatitis. In up to

[19]sevent percent of adult patients, chronic pancreatitis

[20]appears to be caused by alcoholism.

[21]This form is more common in men than in

[22]women and often develops between the age of thirty and

[23]forty.

[24]A Again, I'm not well enough versed to

[25]answer that question.

[26]Q Okay, that's fine.
119

[1]
[2]Concerning **[*106]** the life care plan, inpatient

[3]rehabilitation -- no, I'm sorry that's not what I'm

[4]looking for.

[5](Pause.)

[6]Q Many home health aides and a driver,

[7]14,600 a year and then when he becomes sixty-one years

[8]old, that rises to $ 29,000 a year, then when he

[9]becomes seventy-one years old, that rises to $ 87,000 a

[10]year.

[11]Is that part of what you helped the life

[12]care planner to prepare?

[13]A If you're reading from that, I would say

[14]yes.

[15]Q Again, if he doesn't need that, we can

[16]cross that off?

[17]A Obviously, yes.

[18]Q Just like all the things that are on

[19]here: Total left knee replacement for $ 40,000.

[20]Is he scheduled to have a total knee

[21]replacement?

[22]A Scheduled for it at the present time, no.

[23]Q So if he doesn't have that we can cross

[24]off $ 40,000; right?

[25]A Hypothetically, if he doesn't have it,

[26]that's correct.
120

[1]
[2]Q What percentage of people that have

[3]arthroscopic surgery to their knee end up having a

[4]total knee replacement?

[5]MR. BOROWICK: Objection.

[6]THE COURT: Overruled.

[7]A This is not just an arthroscopy, **[*107]** he had a

[8]fracture. So if you look at this patient in

[9]particular and his young age --

[10]Q Just try and answer the question.

[11]MR. BOROWICK: The witness is in the

[12]middle of an answer.

[13]THE COURT: You will have an opportunity

[14]to redirect.

[15]If you can answer the question as it's

[16]posed, do it.

[17]A There's a high likelihood that he will be

[18]required --

[19]Q If you can't give us a percentage, don't

[20]give us a percentage.

[21]Do you know what the total cost of all

[22]the Plaintiff's surgeries and all the Plaintiff's

[23]physical therapy and all the Plaintiff's

[24]hospitalization and all the Plaintiff's medicines and

[25]all the Plaintiff's anesthesia, all the Plaintiff's

[26]visits to doctors such as yourself, do you know what
121

[1]
[2]the total cost of all those visits, all that medical

[3]treatment had been since the day of this accident up

[4]until today?

[5]A The exact number, I don't know.

[6]Q Can you give us --

[7]MR. BOROWICK: Objection.

[8]Q --an educated --

[9]MR. BOROWICK: The life care planner is

[10]going to be here tomorrow.

[11]THE COURT: But the witness **[*108]** did say that

[12]he spoke to the life care planner and helped in

[13]the report.

[14]MR. BOROWICK: For his specialty.

[15]THE COURT: So, to the extent-- I don't

[16]have the report in front of me and I don't know

[17]the extent of what his help was, this is proper

[18]questioning.

[19]MR. BOROWICK: He's not just asking about

[20]just him, he's asking about every doctor, every

[21]therapy and every item in that plan.

[22]THE COURT: You can answer the question.

[23]Q Doctor, do you know?

[24]A Can you repeat the question?

[25]I'd be happy to.

[26]Could you give the jury your

122

[1]
[2]understanding of what the total costs from the day of

[3]the accident up until today have been for all the

[4]surgeries?

[5]You saw the charts on for all the

[6]hospitals that we've seen the records on, for all the

[7]medications that we've heard about, physical therapy

[8]that's been discussed every possible bit of medical

[9]treatment that the Plaintiff has received from the

[10]date of occurrence up until today.

[11]Do you know how much that comes up to?

[12]A I don't know.

[13]Q You have no idea, at all?

[14]A I probably **[*109]** couldn't even guess. The

[15]reason is I don't know what the hospital budgets are.

[16]Q That's fine, if you don't know, you don't

[17]know.

[18]Now, when he was at St. Vincent's, they

[19]did radiological examinations just like they did at

[20]Jamaica; correct?

[21]A Many were similar, yes.

[22]Q I'm sorry?

[23]A Many of them were similar, yes.

[24]Q And what does it mean that during the

[25]course of a film, that there's mild degenerative

[26]disease involving L-1, S-1, as well as T-11, T-12?
123

[1]
[2]MR. BOROWICK: Objection.

[3]THE COURT: Overruled.

[4]While I know this is not the doctor's

[5]specialty, you can address it and redirect and

[6]with your other witnesseses.

[7]Q What is degenerative disease?

[8]A It's wear and tear on the disc.

[9]Q And degenerative, what does degenerative

[10]mean?

[11]Does it mean the fact it's the opposite

[12]of traumatic; correct?

[13]MR. BOROWICK: Objection.

[14]May we approach, Judge?

[15]THE COURT: I believe you went through

[16]congenital versus traumatic with this witness so

[17]I don't see why we want do that.

[18]MR. BOROWICK: As a general **[*110]** category, may

[19]I approach? I don't want to do this out loud,

[20]unless you want me to.

[21]Counsel will ask this witness about

[22]neurological, spinal surgery, about psychiatric

[23]and life care planning, then he'll ask the

[24]witness with the life care planning and

[25]psychiatrist.

[26]THE COURT: Thank you, Counsel. Please
124

[1]
[2]sit down.

[3]MR. BOROWICK: That's what is happening.

[4]Q Doctor, I want you to understand that

[5]under our rules of practice I'm allowed to cross

[6]examine you, okay?

[7]A Yes.

[8]Q Can you tell the jury degenerative means?

[9]A Degenerative is a process in life where

[10]things can wear a little bit.

[11]Q So, for instance, if somebody is a

[12]construction worker, lifting heavy objects over the

[13]course of years, bending and using his back and things

[14]like that, you could expect to see some degenerative

[15]changes; true?

[16]A I don't know if you would expect, but you

[17]could.

[18]Q And that's what we see on some of these

[19]films; correct?

[20]A On the report that you just read me, yes.

[21]Q Now, there's no question that the

[22]injuries that you operated **[*111]** on were because of trauma,

[23]because of the accident?

[24]A That's correct.

[25]Q But, the films show other things that

[26]aren't necessarily related to the accident; true?
125

[1]
[2]A I would say to a minor degree, yes.

[3]Q Okay. And now, if I told you that the

[4]total medical expenses that the Plaintiff has incurred

[5]today, for every drop of medical care, surgery -- I'm

[6]not going to go over the whole list -- as of today is

[7]$ 112,559.88, would that surprise you?

[8]A Again, if that's what it is, then that's

[9]what it is.

[10]Q So, all the surgeries we heard about,

[11]everything we've done all that comes up to $ 115,000?

[12]A I'm taking your word for that.

[13]Q Now, do you have any idea what the life

[14]care plan is projecting his total cost to be for the

[15]future?

[16]A I can review the records but I don't

[17]recall.

[18]Q Well, if I told you --

[19]MR. BOROWICK: Objection, objection,

[20]Judge.

[21]THE COURT: Come up.

[22](Whereupon, an off the record discussion

[23]was held at the bench.)

[24](Record resumed.)

[25]A You can answer the question, Doctor.

[26]A I **[*112]** don't recall what the number was.
126

[1]
[2]Q But you were a big part of it; right?

[3]A In my portion, yes.

[4]Q Who else was involved, if you know?

[5]A I don't know who the other treating

[6]doctors are.

[7]Q Concerning the person's ability to go

[8]back to work, have you ever seen patients go back to

[9]work that are confined to a wheelchair?

[10]A In my personal experience, I would say

[11]no, but it is possible.

[12]Q Have you ever seen people go back to work

[13]who are paralyzed?

[14]A Yes, there are patients that are, yes.

[15]Q Are there patients who go back to work

[16]who suffer from brain injuries?

[17]A That's correct.

[18]Q Are there patients who go back to work

[19]who are blind?

[20]A I believe so, yes.

[21]Q So, in this case, we're talking about a

[22]fracture to a person's heel, albeit a bad fracture.

[23]We're talking about a fracture to a person's wrist,

[24]we're talking about a fracture that you had to put

[25]pins in and those pins were taken out?

[26]A That is correct.
127

[1]
[2]Q By the way, I'm not going to go through

[3]all your notes, but all your notes, **[*113]** at no time

[4]whatsoever did he suffer from any infection or

[5]anything like that?

[6]A That's correct.

[7]Q And you were pleased with the surgery,

[8]were you not, that you performed on him?

[9]A Again, is he better than he was before,

[10]yes.

[11]Q And that's the point of your doing the

[12]surgery?

[13]A To make him as best as possible.

[14]Q Correct, and granted he's --no one is

[15]saying there's going to be climbing on top of Yankee

[16]stadium installing a roof, but that's the sole issue

[17]in the case.

[18]The issue is you have done what you can

[19]to make him better and you are satisfied with your

[20]work, are you not?

[21]A (No response.)

[22]Q I asked a convoluted question.

[23]Did you do good work?

[24]A I'm satisfied with my work but not with

[25]the outcome.

[26]Q And there's still room for improvement;
128

[1]
[2]correct.

[3]A He needs additional surgery, that's

[4]correct.

[5]Q And the purpose of that additional

[6]surgery would be to make him better or you wouldn't be

[7]doing that surgery?

[8]A That is correct.

[9]Q Okay, and are there people who go back **[*114]** to

[10]work that have fused wrists?

[11]A Some people do, yes.

[12]Q Are there people who go back to work who

[13]have fused ankles?

[14]A Depending on the job description, it's

[15]possible, yes.

[16]Q Would Mr. Miller be a candidate -- do you

[17]know what VESTED is?

[18]A I don't recall, no.

[19]Q Do you know if the State of New York

[20]provides free rehabilitation counseling for people to

[21]return them to the work force?

[22]A I know that there's consult for that,

[23]yes.

[24]Q Have any of your patients, to your

[25]knowledge, ever sought out that counsel?

[26]A I believe so.
129

[1]
[2]Q Have any of those patients that have

[3]sought out this one hundred percent free training and

[4]counseling offered by the State of New York to people

[5]who suffer different injuries, do you know if any of

[6]them have been satisfactorily retrained to return to

[7]the work force in some other capacity than what they

[8]previously did?

[9]A Some of them have been, yes.

[10]Q Okay, people that used to do physical

[11]labor have been retrained to do sedentary type work?

[12]A Some, yes.

[13]Q But in order **[*115]** for that to happen they have

[14]to be willing to go for the treatment, be able to go

[15]for the counseling, be able to perform it; correct?

[16]A You have to be capable of performing it.

[17]Q Do you know if any of the training is

[18]available at home?

[19]A That, I would not know.

[20]Q Do you know if any of the training -- for

[21]instance, do you know if you can get a GED by studying

[22]on the computer?

[23]A That I don't know, either.

[24]Q Do you know if all these services are

[25]provided free?

[26]A T would believe they would be.
130

[1]
[2]Q They are free.

[3]Do you know if Mr. Miller has ever made

[4]an attempt while this lawsuit is pending to pursue

[5]such counseling, do you know?

[6]A I do not know.

[7]Q Yes or no -- you do not know?

[8]A (No response.)

[9]Q You said you encourage your patients to

[10]do as much as they can?

[11]A That's correct.

[12]Q And that's with physical therapy. And

[13]you want them to resume as much of, for a lack of

[14]better word, as much of a normal life as they're

[15]capable of securing; is that correct?

[16]A That's correct.

[17]Q Would **[*116]** you encourage Mr. Miller to seek

[18]such counseling if such counseling were available to

[19]him and if he could do it; yes or no?

[20]A At this point he's not --

[21]Q My question is, if he could do it.

[22]A If he was a medical candidate, I would

[23]encourage him.

[24]Q You would.

[25]And he's now -- we're only two years after

[26]the accident; right?
131

[1]
[2]A It is two years, yes.

[3]Q So, from the date of the accident, from

[4]this and this and this, would you say he has, and as

[5]evidenced by your own office notes, would you agree

[6]with me that over the course of the last two years,

[7]his overall condition is better today than it was two

[8]years ago?

[9]A That is correct.

[10]MR. KAMINSKY: Nothing further. Thank

[11]you, Doctor.

[12]THE COURT: Redirect?

[13]RE DIRECT EXAMINATION

[14]BY MR. BOROWICK:

[15]Q Dr. Toulipoulos, I'm sorry, but I have to

[16]clear up some of the things that were raised.

[17]Counsel just brought up vocational and

[18]educational service offered free by the New York State

[19]Department of Education.

[20]What he said is they have been training

[21]for free and **[*117]** I want to ask you this question; if their

[22]prerequisite is that you must be physically able and

[23]medically cleared to go through a four day a week

[24]program and then accept a full-time job, would you

[25]say, given those criteria, would you say that my

[26]client is retrainable at the present time?
132

[1]
[2]A I would say no.

[3]Q Based on your treatment of the whole

[4]person, not just his foot, not just his ankle, not

[5]just his knee, not just his hand, but the whole

[6]person, including the medication that you give, would

[7]you say that in reasonable likelihood, within a

[8]reasonable degree of medical certainty, will he ever

[9]be able to participate in a program like that,

[10]forgetting even his educational status, to obtain a

[11]compete tive forty-hour a week job?

[12]A I would say no.

[13]Q Given what you told this jury about his

[14]prognosis, regarding each and every one of the

[15]injuries for which you've treated him; his foot, bad

[16]getting worse, better than the day of the accident as

[17]Mr. Kaminsky hilights, better than the day of the

[18]accident but getting worse, his ankle , bad, getting

[19]worse, his knee gotten **[*118]** better, gotten bad again, to

[20]worse --

[21]MR. KAMINSKY: Objection to the form.

[22]THE COURT: I'll allow that.

[23]Go ahead.

[24]Q -- heading toward arthritis at the knee

[25]and foot?

[26]A Correct.
133

[1]
[2]Q Wrist, better, now bad, getting worse,

[3]still on narcotic medication?

[4]A Yes.

[5]Q And over the course of the last two years

[6]sinking into a depression for which he's medicated, is

[7]this a person, within a reasonable degree of medical

[8]certainty, that is eves going to be ready to get out

[9]of the heUse and go to a job every day?

[10]A No.

[11]Q Well, Counsel pointed out that people in

[12]wheelchairs wheel out and go to a job. People who are

[13]paralyzed wheel out and go to a job, people with brain

[14]injuries get up and go get a job.

[15]Are those people necessarily in chronic

[16]pain, medicated with narcotics on a regular basis,

[17]waiting for surgeries on multiple limbs and spinal

[18]portions?

[19]A No, they are not.

[20]Q So, there are plenty of people with mild

[21]traumatic brain injuries who can physically go to work

[22]without pain; right?

[23]A That is correct. **[*119]**

[24]Q If we get past that, we scratched through

[25]the surface of those notions that it is just a guy who

[26]has a couple of orthopedic injuries, when you look at

134

[1]

[2]your patient as a whole person with all of these

[3]things, all of these problems affecting all of the

[4]other problems, is there any reason to believe that he

[5]will get better and be a whole person again?

[6]A No, if you --

[7]Q I'm sorry?

[8]A If you look at the entire person, the

[9]multiple injuries, the multiple extremities that are

[10]affected and also the fact that he hurt his back very

[11]significantly, and the need for ongoing pain

[12]medication on a chronic basis and the fact that he has

[13]RSD of his right lower extremety, these are chronic

[14]conditions, and I cannot foresee him ever returning to

[15]the work force.

[16]Q I want you to assume that somebody is

[17]going to suggest that he can be a clerical worker in

[18]an office or he can be an architect, just get a

[19]degree, go to college, get more training, go work in

[20]an office. But you said he can't squat?

[21]A That is correct.

[22]Q He can't bend, he can't lift. Could he

[23]do **[*120]** any of those jobs?

[24]A No.

[25]Q And in a competitive job market where

[26]lots of people are competing for those jobs, competing
135

[1]
[2]against people who are not under narcotic medication,

[3]do you think he would be competitive for any of those

[4]jobs?

[5]MR. KAMINSKY: Objection.

[6]THE COURT: I'll allow that.

[7]A No, he would not.

[8]Q Counsel asked you if your surgeries were

[9]successful and you were satisfied with your work and

[10]you just interjected before he stopped you, you said

[11]I'm satisfied with the work, but not with the result.

[12]How could you be satisfied with the work

[13]you're a doctor, board certified, orthopedic surgeon,

[14]how can you be satisfied with your own work but not

[15]with the result?

[16]A Well, with what we had to work with, I

[17]don't think anybody could have made it much better.

[18]You know, we're hoping that he would not

[19]need a fusion so soon in his wrist and ankle. The

[20]fact that he's progressed from arthritis so early in

[21]this course --

[22]Q So, hope, whatever hope is, is a

[23]wonderful thing but here is reality, Mr. Miller's

[24]reality means, at **[*121]** least insofar as these other

[25]surgeries are concerned and his overall condition,

[26]hope is a wonderful, thing but it ain't his reality?
136

[1]
[2]A That's correct.

[3]MR. KAMINSKY: Objection.

[4]THE COURT: The answer stands.

[5]Q Counsel kept asking you about this life

[6]care plan that you offered your own expertise into,

[7]with regard to the orthopedic injuries, and he said,

[8]well, if he doesn't need anymore surgeries, if all

[9]those surgeries don't happen, then that life care plan

[10]has too much money in it.

[11]If it's not needed, then he shouldn't

[12]have it, we can agree with that; right?

[13]A That is correct.

[14]Q Your expert opinion as his treating

[15]surgeon, whose been inside his foot, ankle, knee,

[16]wrist -- forget the spine -- is it your opinion that

[17]those surgeries, some of them are needed right now and

[18]others are going to happen in the future?

[19]A That is correct.

[20]Q And let me ask you about those surgeries.

[21]With regard to the knee jury and the

[22]second surgery that you want to do, now, is that

[23]second surgery, a reconstruction or a scope?

[24]A A scope with **[*122]** a reconstruction.

[25]Q With a reconstruction.

[26]And do you foresee whether or not he will
137

[1]
[2]ever need a TKR?

[3]A TKR is a total knee replacement. My

[4]opinion is that he will.

[5]The fact that he is only around

[6]thirty years of age, he's got grade three out of grade

[7]four cartilage damage on his knee that was fractured

[8]and that this is a progressive problem that over many

[9]years will develop into a more and more arthritis.

[10]Q When do you foresee -- he's now thirty,

[11]when do you foresee, if he continues to try his best

[12]to use his limbs, to get up, to get up and be mobile,

[13]when do you anticipate that he will need a total knee

[14]replacement?

[15]A I would say it would be in the next ten

[16]to twenty years.

[17]Q Let's average it, fifteen years. He's

[18]now forty -five, how long do the total knee

[19]replacements last?

[20]A About fifteen to twenty years.

[21]Q So if he's forty-five he goes to sixty

[22]and needs another one, at seventy-five and needs

[23]another one.

[24]Sir, would you tell us whether or not you

[25]hope he doesn't need them?

[26]A I hope he doesn't need them **[*123]** but the
138

[1]
[2]reality is that he will.

[3]Q Mr. Kaminsky pointed out that my client

[4]didn't have a brain injury, that he didn't have a

[5]pelvic jury.

[6]Well, I want to add to that; he didn't

[7]have a jaw injury, he didn't hurt his ear, he didn't

[8]hurt his shoulder, he didn't hurt his tailbone,

[9]anything else.

[10]So given all of those things, I'm going

[11]to ask you to consider all the injuries he had; the

[12]chronic pain, the RSD, the medications, the fact

[13]that's got discs -- you know what I'm going to leave

[14]that out, that's for tomorrow -- fractures in both

[15]legs, in the middle of his back, whether or not he has

[16]a brain injury, whether or not he has a pelvic injury,

[17]is that determinative as to whether or not a person

[18]can go back to work?

[19]A No, it is not.

[20]Q Counsel also brought up, and I think I

[21]was trying to time it, there was at least

[22]twenty-five minutes about pancreatitis, because there

[23]was a note in one of the hospital records that he had

[24]had pancreatitis as a youngster, as a nineteen year

[25]old and that he had some pain that he thought might be

[26]pancreatitis on the 4th **[*124]** of July, during a barbecue.
139

[1]
[2]I want you to assume that in the hospital

[3]records --

[4]MR. KAMINSKY: Mischaracterization, Your

[5]Honor, it's not --

[6]THE COURT: I don't remember anything

[7]about a barbecue.

[8]MR. BOROWICK: It's coming this afternoon,

[9]subject to connection, I promise.

[10]THE COURT: Okay, go ahead.

[11]Q I want you to assume that no where in the

[12]Jamaica Hospital record or St. Vincent's Hospital

[13]record, is there any indication of alcohol on breath,

[14]in blood.

[15]MR. KAMINSKY: Judge, we've agreed --

[16]objection.

[17]THE COURT: I'm going to let him ask his

[18]question.

[19]MR. KAMINSKY: Okay.

[20]Q No pancreatitis diagnosis, no films, no

[21]workup, no x-rays, no CAT scans, no MRIs. Looking at

[22]the pancreas, no diagnosis, no delirium, tremors from

[23]alcohol withdrawal, no treatment for alcohol

[24]withdrawal, no medication -- I think it's called an

[25]abuse?

[26]A Yes.
140

[1]
[2]Q No medication given by reason of the fact

[3]that my client said that he had had a drink a week

[4]after which happened to be July 4th.

[5]Does pancreatitis enter **[*125]** into this guy's

[6]medical picture?

[7]A No. In fact, I believe he read a CAT

[8]scan of the pelvis which was negative, so if he had

[9]pancreatitis, it would have shown up on the CAT scan

[10]of the abdomen.

[11]Q So, what about this smoking thing. Did

[12]anything about the smoking cause or contribute to any

[13]of his medical conditions for which you and the other

[14]doctors who are trying to treat him for?

[15]A No, there's no connection.

[16]Q Sometimes-- we know smoking is a bad

[17]thing and sometimes it shortens people's lives.

[18]Do you know any folks that are

[19]seventy-five and smoking?

[20]A I know a lot of Veterans that I have

[21]treated that are.

[22]Q So, can you say with a reasonable degree

[23]of certainty, can you say that my client, your

[24]patient, is going to have a shorter life because of

[25]his smoking habit?

[26]A No, I can't say that.
141

[1]
[2]Q Did you see anything in any of the

[3]records or during any of your examinations or

[4]interactions with Chris Miller that would indicate

[5]that he had any prior disability relating to work, at

[6]all?

[7]A No.

[8]Q I want you to **[*126]** assume that he had worked

[9]over 1700 hours a year, over 2000 hours in the year

[10]before the accident, he had no physical limitations he

[11]was a young foreman.

[12]MR. KAMINSKY: Objection.

[13]THE COURT: I'm going to allow it, I'm

[14]going to let Counsel do this.

[15]Go ahead.

[16]Q I want you to assume that was his real

[17]profile.

[18]Other than this accident, pancreatitis,

[19]smoking, any of that, have anything to do with his

[20]disability from employment?

[21]A No.

[22]Q Now Counsel picked through some of these

[23]records and said, well, look he was doing pretty well.

[24]He actually had no problem emotionally, no problem

[25]from a psychiatric point of view and he even went to

[26]something called Axis one, and I'm not going to ask
142

[1]
[2]you about psychiatric illness except to ask you

[3]whether or not your patient who you had been treating

[4]since the week after the accident, did he develop the

[5]depression that you diagnosed him with, and gave him a

[6]prescription to see a psychiatrist with, did he

[7]develop that immediately?

[8]A That was something that was progressive.

[9]Q And when a person **[*127]** has the kind of

[10]disabilities and injuries that require seriatim,

[11]surgery, rehab, surgery, rehab, progress, regression,

[12]how does that on a person's emotional health?

[13]A Oh, you can imagine it's very depressing,

[14]especially for a young construction worker who has

[15]been healthy his whole life.

[16]Q Counsel read from July 18th, I'm going to

[17]read from July 17th just for fun.

[18]Patient's complaint of pain, right lower

[19]extremity with pain scale seven to eight of ten,

[20]requesting pain medication almost every four hours

[21]with breakthrough pain.

[22]Does that sound like somebody who is

[23]comfortable?

[24]A No.

[25]Q Okay. Now, there were times when he was

[26]given significant medications, and the reaction was
143

[1]
[2]going from two of ten at his best, to ten of ten at

[3]it's worse.

[4]Ten of ten is pretty bad; right?

[5]A It's as bad as it gets.

[6]Q And the medications that he is given were

[7]Dilaudid, Oxycontin and at times morphine and

[8]Percocet.

[9]Is that something that would take ten of

[10]ten and make it two of ten?

[11]A Yes, if there was a very potent narcotic

[12] **[*128]** medication.

[13]Q And if you wanted to continue to take

[14]these potent medications, what do you sacrifice in

[15]clarity of thought?

[16]A It makes you dazed, it makes you

[17]lethargic, tired and sleepy.

[18]Q Now, I just read from the medical record

[19]of the hospital that you're associated with, for a

[20]patient that you were treating during the entirety of

[21]that admission.

[22]I read two pages out of it and I only

[23]pulled those two pages as a balance.

[24]If one wanted to get the whole picture of

[25]that month that you treated him or three weeks that

[26]you treated him, what would the whole picture be,
144

[1]
[2]without picking apart the record?

[3]A The whole picture or the big picture is

[4]that he had multiple fractures, severe pain at times

[5]that was not controllable and required extended

[6]hospitalization among procedures and still has

[7]significant issues of pain which require further

[8]treatment.

[9]MR. BOROWICK: I have nothing further.

[10]RECROSS EXAMINATION

[11]BY MR. KAMINSKY:

[12]Q There's no two ways about it, I mean

[13]Mr. Miller was a mess after this accident; right?

[14]A Yes, he was. **[*129]**
[15]Q And when he spent those three, four weeks

[16]in the hospital, that was not a pleasant experience?

[17]A No.

[18]Q True?

[19]A No, it was not.

[20]Q And the fact is he required medication to

[21]control his pain, but the medication largely did it's

[22]job and it controlled his pain while he was in the

[23]hospital; true?

[24]A I would say not always, because --

[25]Q Not always?

[26]A Because there was breakthrough pain that
145

[1]
[2]he just reported.

[3]Q I agree with you.

[4]The point I was making was just to try to

[5]show his condition in the hospital, that's all. I'm

[6]not negating what he went through, okay and I'm not

[7]suggesting --

[8]THE COURT: Question, please.

[9]MR. KAMINSKY: Yes.

[10]Q We can all agree, can we not, that his

[11]alcohol abuse and his smoking of cigarettes had

[12]nothing to do with his fractures; true?

[13]A That is correct.

[14]Q Counsel said he knows people that are

[15]seventy-five years old that smoke cigarettes.

[16]You can't say if his life is going to be

[17]shorter or longer because he smokes cigarettes, but if

[18]you were to bet, would **[*130]** you bet that the smoking

[19]cigarettes would lengthen his life or shorten his

[20]life?

[21]A Well, smoking is not a good thing, and if

[22]you smoke enough, it tends not to be good for your

[23]life span.

[24]Q So, you're not going to put your money

[25]down on Mr. Borowick suggesting that it might

[26]lenghthen his life?
146

[1]
[2]MR. BOROWICK: What? I didn't say that,

[3]Judge.

[4]THE COURT: Is that an objection?

[5]MR. BOROWICK: Yes.

[6]THE COURT: Sustained.

[7]MR. BOROWICK: I could barely hear it but

[8]it sounded objectionable.

[9]Q Let's talk about the pancreatitis, just

[10]another thirty seconds.

[11]MR. KAMINSKY: Did I use that much time?

[12]MR. BOROWICK: It was twenty-five minutes.

[13]Q Then we can go for another twenty-five

[14]seconds, okay.

[15]Pancreatitis can show up ten years down

[16]the road; can it not?

[17]A Well, again, I'm not an expert but I

[18]believe it can, yes.

[19]Q So, the fact that he had it and the fact

[20]that he may not be suffering from it today does not

[21]mean that ten years from now, he won't develop an

[22]acute case of it; true?

[23]A There's a **[*131]** small possibility, yes.

[24]Q And as far as his need for psychiatric

[25]consultation, who gave him the name of the

[26]psychiatrist to see, you or his lawyers?
147

[1]
[2]A I don't recall.

[3]Q What if I told you it was his lawyers,

[4]would that surprise you?

[5]A It wouldn't, because sometimes --

[6]Q It doesn't surprise you?

[7]A No.

[8]Q Do you generally like having your

[9]patients referred to medical providers by lawyers?

[10]Is that something you think is a good

[11]idea, bad idea, or you don't care?

[12]A As long as it's a competent physician,

[13]I'm happy that they get treatment.

[14]Q Do you know the extent of the so-called

[15]psychiatric treatment Plaintiff has received in this

[16]case?

[17]A I do not know the full extent.

[18]Q I'm sorry.

[19]A I do not know the full extent.

[20]Q What if I told you it was about two

[21]visits, would that surprise you?

[22]A I'm not sure if he's being treated and if

[23]the treatment is successful, it wouldn't surprise me.

[24]Q So it's been about two visits, okay to

[25]someone referred to by the attorneys.

[26]You said that his medications **[*132]** make him
148

[1]
[2]tired, sleepy, cloudy thought.

[3]Are you aware that he's been

[4]administered, during the course of this procedure, all

[5]sorts of psychiatric tests and he's never demonstrated

[6]any cloudiness of thought or any problems with his

[7]memories or problems with his cognitive abilities?

[8]Are you aware of that?

[9]MR. BOROWICK: Objection.

[10]MR. KAMINSKY: Sustained.

[11]MR. KAMINSKY: I have nothing further,

[12]thank you.

[13]THE COURT: Anything?

[14]MR. BOROWICK: No.

[15]THE COURT: You can step down, thank you,

[16]Doctor.

[17](Excused excused.)

[18]MR. KAMINSKY: Doctor, have a nice

[19]afternoon.

[20]THE WITNESS: You too, thank you.

[21]THE COURT: Mr. Borowick?

[22]MR. BOROWICK: Yes, Mrs. Miller.

[23]D E B O R A H M I L L E R, Witness, called on

[24]behalf of Plaintiff, having first been duly

[25]sworn, took the witness stand and testified as

[26]follows:

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