TRIAL TRANSCRIPT OF DEBRA DWYER; 2013 Trial Trans. LEXIS 76

CIVIL COURT OF THE CITY OF NEW YORK, BRONX COUNTY, CIVIL TERM

Index No. 300107/2012

January 10, 2013

Reporter
2013 Trial Trans. LEXIS 76 *

MICHELE DALEY, Plaintiff, -against- SOLOMON AKERMAN, Defendant.

Expert Name: Dr. BIALSKY, D.C., M.A., C.R.C., C.L.C.P., C.B.I.S.-C.E.Debra Sabatini Dwyer, Ph.D., M.S.

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Counsel

[*1] SPAR & BERNSTEIN, PC, New York, New York, BY: ADAM HANDLER, ESQ.

COLLINS, FITZPATRICK & SCHOENE, LLP, WHITE PLAIN, NEW YORK, BY: RALPH R. SCHOENE, ESQ.

Judges

BEFORE HON. Mitchell Danziger, Judge, Civil Court

Proceedings

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[1]THE COURT: You had an application for submitting

[2]something into evidence.

[3]MR. HANDLER: I did. Judge, we marked this

[4]Plaintiff's Exhibit 39 for ID, the numerical data from

[5]Dr. Bialsky's life care plan. Dr. Bialsky testified as to

[6]the numerical data. We put it on the wall. We tried to

[7]have him write it out but it was taking too long. We have

[8]upon the Court's discretion upon defendant's application

[9]redacted certain portions of the data before the jury, the

[10]projected version of this data had things crossed out. I

[11]ask that this report be put into evidence subject to those

[12]same redactions.

[13]THE COURT: Counsel.

[14]MR. SCOENE: I object to it going into evidence,

[15]it was for demonstrative purposes. The doctor gave his

[16]testimony.

[17]MR. HANDLER: This is not a report, this is the

[18]hard numbers, it's the same thing as if he wrote it down.

[19]That was the whole point of it.

[20]THE COURT: I understand that. That wouldn't go

[21]into evidence. You can use it during your summations.

[22]It's not going into evidence for the jury to take that

[23]document **[*3]** into the jury room during deliberations. You can

[24]refer to that during your closing.

[25]MR. HANDLER: Okay. With respect to a very

[3]

[1]similar application, Dr. Dwyer is going to testify as to

[2]how Dr. Bialsky's numbers will project over the course of

[3]Mrs. Daley's lifetime within a reasonable degree of

[4]economic certainty. She provided an economic analysis

[5]which has been exchanged with the defendant. I have a copy

[6]for your Honor as well. And it's similarly two parts,

[7]there is a narrative section and a numerical data

[8]section --

[9]THE COURT: As part of her report.

[10]MR. HANDLER: I ask that in a similar fashion as

[11]Dr. Bialsky's, that the numerical portion be projected on

[12]the wall for the jury to read along and I would make an

[13]application for it to be put into evidence subject to the

[14]same ruling you just made.

[15]THE COURT: Any objection to putting those

[16]numbers on the wall for demonstrative purposes, Counsel.

[17]MR. SCOENE: No, I point out part of her analysis

[18]or calculations include Oxycodone --

[19]MR. HANDLER: We'll redact that. I will redact

[20]that right now.

[21]MR. SCOENE: **[*4]** Other than that, I have no

[22]objection.

[23]THE COURT: In terms of its admissibility --

[24]MR. HANDLER: On that note and I had Dr. Dwyer do

[25]the math, there is an adjustment because the power seat was

[4]

[1]left out as well so she's done an adjustment. I will

[2]redact what is inconsistent with what was shown to the

[3]jury.

[4]THE COURT: She is a PHD in economics.

[5](Whereupon, the jury entered the courtroom at

[6]2:30 p.m.)

[7]THE COURT: Welcome back. Hope you enjoyed your

[8]lunch. Again, I will not vouch for the quality when I say

[9]there are a lot of choices around here. Have a seat. Make

[10]yourself comfortable. Continuing with the case. How is

[11]the temperature in the room, is it good? We are getting

[12]cold weather. Continuing with the case. Counsel, call

[13]your next witness.

[14]MR. HANDLER: The plaintiff calls Debra Dwyer.

[15]Dr. Debra Dwyer to the stand.

[16](Whereupon, the Court Officer swears in the

[17]witness)

[18]COURT OFFICER: State your name and business

[19]address for the record.

[20]THE WITNESS: Debra, D-E-B-R-A, Dwyer, D-W-Y-E-R,

[21]17 Spring Briar Lane, Centereach, New York 11720.

[22] **[*5]** DIRECT EXAMINATION BY

[23]MR. HANDLER:

[24]Q. Good afternoon Dr. Dwyer. Have we ever met before

[25]today?

[5]

[1]A. No, we have not.

[2]Q. Have we worked on any other cases other than Michele

[3]Daley's case before today?

[4]A. We worked on one other case.

[5]Q. What are your credentials? Can explain to the Court

[6]who you are, what you study, and why you believe you're

[7]qualified to testify today?

[8]A. My interests have always been in the cross between

[9]labor and health, so work and disability. So I got my bachelors

[10]degree in economics from Queens College in Flushing. I went on

[11]to get my masters degree and PHD from Cornell University and I

[12]went to post-op at the Center For Policy Research in Syracuse,

[13]at Syracuse University. Primarily what do is -- as I said I got

[14]my fields in health and labor economics so what that means is I

[15]study health policy and labor laws and just understand the

[16]relationship between health and work.

[17]Q. Do you have a PHD?

[18]A. Yes, I do.

[19]Q. From where?

[20]A. From Cornell University.

[21]Q. And what is that PHD in?

[22]A. In health and economics. **[*6]**

[23]Q. You have a masters?

[24]A. Yes.

[25]Q. Same field?

[6]

[1]A. Yes.

[2]Q. Do you teach?

[3]A. Yes, so my work experience. After my post-op I spent

[4]a couple of years in Washington DC working for the Social

[5]Security Administration. Then I came to Stoney Brook University

[6]where I spent 8 years teaching general economics in the

[7]economics department. I was offered the position of chair in

[8]the health care policy and management department. That's what I

[9]do now, I teach health care policy and I teach health care

[10]economics while I am there and I do a lot of research in related

[11]areas.

[12]Q. Do you provide expert opinions for attorneys?

[13]A. I do.

[14]Q. And over the course of your career how many times were

[15]you in court to testify?

[16]A. About eight.

[17]Q. Are you being compensated for the work you performed

[18]on Mrs. Daley's case?

[19]A. Yes, I am.

[20]Q. And was your total compensation for the work on Mrs.

[21]Daley's case?

[22]A. $ 6,400.

[23]Q. An what does that $ 6,400 include?

[24]A. It includes time performing analysis to make research

[25]to understand **[*7]** within a reasonable degree of economic certainty

[7]

[1]the damages associated with this accident.

[2]Q. Does it also include your travel time to work?

[3]A. Yes.

[4]Q. And your time in court?

[5]A. Yes.

[6]Q. And your travel home from court?

[7]A. Yes.

[8]Q. I didn't mean to cut you off. Did you want to say

[9]something else?

[10]A. No.

[11]MR. HANDLER: I move to have Dr. Debra Dwyer

[12]admitted in as an expert in the field of economics.

[13]THE COURT: Any objection?

[14]MR. SCOENE: In terms of health care economics,

[15]that is what she said she is qualified in.

[16]MR. HANDLER: You're qualified in health care

[17]economics that is my application.

[18]THE COURT: So qualified.

[19]Q. Were you asked by my office to do a economic analysis

[20]with respect to Michele Daley's future medical care?

[21]A. Yes, I was.

[22]Q. And did you in fact perform that economic analysis?

[23]A. Yes, I did.

[24]Q. And just explain to the jury what an economic analysis

[25]is?

[8]

[1]A. So what we attempt to do when there is an injury or

[2]harm done is establish what the total economic value **[*8]** of the loss

[3]is. And so that means we want to put dollar values to the

[4]losses. I received the report of Dr. Bialsky who testified this

[5]morning and I took the data that he gave me and as an economist

[6]I predict what the value of those losses would be projected over

[7]the remainder of Mrs. Daley's life. So it's my job to figure

[8]out what the expectations of how long she would live, what the

[9]prices are going to be between now and the time of her death in

[10]2050 --

[11]Q. You don't know for a fact she is going live to 2050?

[12]A. We use federal statics to calculate the expected value

[13]of all of these things, that's what I do.

[14]Q. And your report, was it made within a reasonable

[15]degree of economic certainty?

[16]A. Yes, it was.

[17]Q. The economic loss analysis report was generated and

[18]given to my office, correct?

[19]A. Yes.

[20]MR. HANDLER: Can I mark this for identification

[21]purposes.

[22]THE COURT: You may.

[23](Whereupon, a document was marked as Plaintiff's

[24]Exhibit 40 for Identification as of this date.)

[25]Q. Dr. Dwyer, look what I marked is Plaintiff's Exhibit

[9]

[1]40 for **[*9]** identification, is that an accurate copy of the economic

[2]analysis that you conducted for the plaintiff Michele Daley?

[3]A. Yes, it is.

[4]MR. SCOENE: No, I seen it.

[5]Q. Can you just walk us through -- withdrawn.

[6]Are the figures that you calculated in your economic

[7]loss analysis different than the figures that were in

[8]Dr. Bialsky's life care plan?

[9]A. Slightly.

[10]Q. What's the reason why there are differences in what

[11]certain things cost in 2013, as opposed to 2020, 2025, 2040?

[12]A. As I said earlier, one of the things I do as an

[13]economist is try to figure out what the value of things are in

[14]the future. We are not only talking about the loss of today but

[15]in the future. As we know prices rise over time. The cost of

[16]riding the subway 20 years ago is not the same as the cost of

[17]riding the subway today. As so in medical care -- so as I was

[18]saying, even a slice of pizza 20 years ago cost fifty cents when

[19]I was a teenager, so now it cost $ 2 a slice. So in medical the

[20]price has been rising even faster than they have been in the

[21]general rate of inflation. So what I did was I looked **[*10]** through

[22]The Bureau Of Labor Statistics and what the inflation rates have

[23]been for the vary medical loss that Mrs. Daley has already

[24]experienced and will be experiencing in the future based on

[25]Dr. Bialsky's report. So it's slightly different in a number of

[10]

[1]ways. Dr. Bialsky is an expert in the -- a medical expert. He

[2]can tell us what the going rate is right now and he gives me a

[3]range because he knows that these pricings vary slightly. So

[4]what I do is I take the average of the range that he gives me.

[5]Q. Are there sometimes when life care planners don't give

[6]you a range and give you hard numbers?

[7]A. Yes.

[8]Q. Now, the part of your economic analysis which provides

[9]really what certain things are going to cost now into the

[10]future, that is a yearly breakdown of the cost of health care?

[11]A. Yes.

[12]Q. Would it assist the jury if you were able to explain

[13]to them what we projected on the wall and I can give you a laser

[14]pointer.

[15]A. Can I stand?

[16]THE COURT: Yes.

[17]Q. There are portions of your report that have been

[18]redacted and similar portions of Dr. Bialsky's report **[*11]** that were

[19]redacted. So I'd like to compare apples to apples. This is

[20]what the jury is seeing. Explain to us in relation to

[21]Dr. Bialsky's report what all of these numbers mean?

[22]A. Can we go to the first page of the report, this is

[23]page two. We will go in the same order. So the first item on

[24]the list that Dr. Bialsky recommended is, Mrs. Daley would need

[25]home care. So because of the injuries she has --

[11]

[1]MR. SCOENE: Objection. She is talking about

[2]numbers not injuries.

[3]THE COURT: Please limit your testimony to the

[4]number portion in this case.

[5]A. So that is $ 10,642. That you see is 2014 -- first of

[6]all, I began the losses for 2014 because when I was asked to do

[7]the analysis was back in 2012 and I was not sure when we would

[8]be here so I figured we would start in 2013.

[9]Q. If it was suggested to Dr. Bialsky that she didn't

[10]need home care for 2012 that portion should be redacted, you

[11]calculated that she has not had home care for 2012.

[12]A. That is correct. I began with 2013, which is somewhat

[13]conservative. That $ 10,642 comes from Dr. Bialsky's estimate of

[14]the cost of **[*12]** annual home care for Mrs. Daley of 10 to 12 hours a

[15]week between -- and I will read this, $ 6,840 and $ 11,824.80 --

[16]Q. How come neither of those numbers appear for year one?

[17]A. Because it's a little more complex than that. Because

[18]he gave me a range and I do like the range because he is

[19]acknowledging that these --

[20]MR. SCOENE: Objection to what she likes.

[21]THE COURT: Rephrase.

[22]Q. From an economic standpoint why is the range

[23]preferable?

[24]A. Because it's more realistic given that prices do vary

[25]from region to region and across practitioners.

[12]

[1]So $ 10,642 represents the average between $ 8,840 and

[2]$ 11,824. Okay. That is the year 2013. What I do for the year

[3]2014 you can see it goes up slightly from $ 10,600 to $ 10,962.

[4]The reason it's rising is I am increasing this at a rate of

[5]3 percent per year based on The Bureau Of Labor Statistics

[6]numbers on how home care has been rising over time. So that is

[7]pretty much in line with the general rate of inflation. It's

[8]raising at 3 percent per year. Each of these numbers go up

[9]slightly by 3 percent. And this continues until **[*13]** the year 2025

[10]and that's the year that Dr. Bialsky predicts that she will need

[11]a little more then 10 to 12 hours of home care, then she will

[12]need 12 to 14. So I estimate the mid point again, between 12

[13]and 14 hours, and in the year of 2025, that comes out -- it's
[14]between $ 10,608 and $ 13,796. When you increase that by
[15]3 percent in 2025 that number is $ 17,397. So each one of those
[16]numbers is what we expect she will pay for home care that year.
[17]So we continue again until the year 2038, we are
[18]stopping. Here again, Mrs. Daley is aging, and as she ages she
[19]needs a little more help so we estimate at the mid point of 15
[20]hours per week in the year 2038. That amount when you grow
[21]again by 3 percent and take the midpoint of the costs we get
[22]$ 29,462. If you continue in this way until the expected end of
[23]Mrs. Daley's life which is the year 2050 -- now, where do I get
[24]that from, from the life tables, the federal statistics, that's
[25]the National Center for Health Statistics put out --
[13]

[1]THE COURT: We spoke about that earlier, life
[2]expectancy.
[3]A. So you're aware that the life expectancy is 81.8 --
[4] **[*14]** THE COURT: We are aware this is what you found.
[5]I will charge them under the law what we accept. I am sure
[6]it will be close.
[7]A. So I use the life expectancy of 81.8 years, which
[8]brings her to the year of 2050 where the value of her home care
[9]is $ 33,605. The reason it's less than 2049 is she does not live
[10]the whole year, if I use the 81.8 as the age. For the grand
[11]total of $ 874,467.
[12]Q. So let me stop you. The first category -- we don't
[13]have to go through every one. It's your opinion within a
[14]reasonable degree of economic certainty that the total cost of
[15]home health care for Mrs. Daley over the course of her life,

[16]hopefully it's longer than 2050, in the future value, meaning

[17]the cost of inflation, the cost of increases in health care, the

[18]cost incurred for her reasonably can be $ 874,467?

[19]MR. SCOENE: Objection to form.

[20]A. Yes.

[21]Q. Thank you.

[22]A. So basically I use the same methodology for every

[23]category of health services that Mrs. Daley is expected to need.

[24]So the next categories is pain management. And

[25]Dr. Bialsky recommended 4 times per year at $ 75. So if you **[*15]** take

[14]

[1]4 times $ 75 you get 300 and again --

[2]THE COURT: So the record reflects, Dr. Bialsky

[3]didn't give a medical opinion, it's what he recommended.

[4]Dr. Bialsky testified that based on his records he believes

[5]that is what is needed. He was not making recommendations.

[6]He was reviewing what he believed what the records show

[7]based on records and testimony.

[8]A. So according to Dr. Bialsky's report the value of her

[9]pain management will be $ 312 in 2013 and this continues all the

[10]way through to 2050 increasing it at a rate of 4 percent. Here

[11]again I get the percentages from inflation rate from The Bureau

[12]of Labor Statistics. What I use is the average over the last 25

[13]years which has been 5.2 percent overall in general health care.

[14]Q. So the numbers are below what the statistical average

[15]has been?

[16]A. I looked a little closer, at a more narrowly defined

[17]health service. So it varies in these services. I did not take

[18]the inflation for health care, which we hear about in the news,

[19]I took what was relevant for each category for pain management.

[20]The price has been rising at an average rate **[*16]** of 4 percent

[21]according to The Bureau of Labor Statistics. $ 312 each year for

[22]the rest of her life until 2050 will be $ 1,065 in 2050. This

[23]tells you something about what you're going to be paying for

[24]things in --

[25]MR. SCOENE: Objection.

[15]

[1]THE COURT: Doctor, confine your testimony.

[2]Q. Rough estimate we're talking -- we're at $ 900,000

[3]between the home care and pain management. Let's keep a running

[4]total.

[5]A. So the total is $ 26,556 in pain management.

[6]So moving onto orthopedic surgery. Mrs. Daley should

[7]see the surgeon two times a year at $ 150, so that is $ 300. So

[8]you can see this column is identical to the pain management --

[9]Q. Let me stop you for a minute. Dr. Bialsky's report

[10]said one to four years, why does your report say two years --

[11]his report says one to four times a year, why does your report

[12]say two times?

[13]A. I kept it conservative.

[14]Q. You could have put in four times a year.

[15]MR. SCOENE: Objection. Leading.

[16]THE COURT: Sustained.

[17]A. We'll I written on my table --

[18]MR. SCOENE: There is no question pending.

[19] **[*17]** THE COURT: Sustained.

[20]Q. Explain orthopedic care.

[21]A. According to Dr. Bialsky's report Mrs. Daley will

[22]require between one and four per year. I calculated it at two
[23]per year to be conservative. So this column looks identical to
[24]pain management because inflation is the same and the cost per
[25]year is the average cost per year so we end up again with a
[16]

[1]grand total of $ 26,556 for a running total of about $ 930,000.
[2]If we move to x-rays. Mrs. Daley is going to require
[3]cervical and lumbar x-rays. I will do these two columns
[4]together. Once again they are identical. So we have -- there
[5]is one time per year she needs an x-ray of the cervical and the
[6]lumbar spine at a rate of $ 60. Rising at 4 percent. So both of
[7]them using the 4 percent inflation rate as well. So that is
[8]$ 62.00 by 2050 becomes $ 213 for a grant total of $ 5,311 in each
[9]category in x-rays over the remainder of her life.
[10]Q. What's the total at?
[11]A. We're at approximately $ 945,000. So MRI's. Mrs.
[12]Daley will also require an MRI of the cervical spine and the
[13]lumbar spine once every two years. So the way I did this, again
[14] **[*18]** there is a 4 percent inflation rate and I took the average cost
[15]of the MRI of $ 400 and I cut it into half because Dr. Bialsky
[16]said once every two years. So instead of $ 400 every year the
[17]average is $ 200 per year. The $ 200 rising at a rate of
[18]4 percent becomes $ 710 dollars by the end of her life in 2050.
[19]Adding an additional $ 17,704 in each category. So we're up to
[20]$ 940,000 and now we're up to $ 980,000.
[21]Q. This is the second page of your report.
[22]A. Yes, it is. For medication the inflation on medicine
[23]has gone up faster than other categories that we seen so far.
[24]So the inflation rate on medication is 4.5 percent. That's what

[25]I used for this analysis. The expected cost of Ibuprofen

[17]

[1]according to Dr. Bialsky's report is between $ 365 and $ 523. So

[2]I took the midpoint again which is $ 444.21 at a rate of

[3]4.5 percent and I grew it every year so that by 2050 the total

[4]cost of Ibuprofen medication is $ 1,893 for a total of $ 44,154.

[5]So we're up to 1 million 20 thousand.

[6]Physical therapy. It is expected that Mrs. Daley will

[7]need physical therapy. The average cost of the physical therapy

[8] **[*19]** according to Dr. Bialsky's report is between $ 720 and $ 2,880,

[9]the midpoint would be $ 1,800. Now physical therapy prices have

[10]grown slower than the general rate of inflation of 2.5 percent.

[11]Q. What's the basis of that testimony? Where do you get

[12]that?

[13]A. The same as every inflation rate, I took it from The

[14]Bureau Of Labor Statistics broken down by this category of

[15]health care services. So 2.5 percent, that's $ 1,800, by the

[16]year 1250, again accounting for the fact she is going to die

[17]before the year is up, is $ 3,680. For a total of $ 113,889 for

[18]physical therapy. So we're at $ 1,130,000.

[19]Q. You redacted all of the home equipment. There was

[20]some equipment that was included.

[21]A. The home equipment total comes out to $ 18,867.

[22]Q. That is the adjust amount from what was taken out of

[23]Dr. Bialsky's reports. What is the number?

[24]A. $ 18,867.

[25]THE COURT: The walker and the bed.

[18]

[1]A. So the home equipment includes the bed transfer

[2]equipment, which is required replacement every 5 years. The
[3]adjustable bed requires replacement between 7 and 10 years. I
[4]used 8 years. **[*20]** The walker which requires replacement every 5
[5]years. So if you spread that out annually over the course of
[6]her life the total is $ 18,867. And that was increased at a rate
[7]of only 2 percent. So the prices for medical equipment has gone
[8]up much slower than the other categories.
[9]Q. So based on your figures in the economic cost analysis
[10]rounded -- let's say rounded down, what's the total cost of her
[11]the health care, excluding surgery, within a reasonable degree
[12]of economic certainty?
[13]A. Including the case management which I have not gone
[14]through yet.
[15]Q. Excuse me.
[16]A. Okay. So the final category then -- I will give you
[17]the overall total. Case management. And according to
[18]Dr. Bialsky's report that would cost between $ 570 and $ 760 per
[19]year, so taken the midpoint at 7 hours per week, what that comes
[20]out to, and raising it at a rate of 4 percent again, so this one
[21]is at 4 percent inflation rate and we begin at 2013 with an
[22]annual expected cost of $ 692. The end of her life in 2050 it
[23]comes out to $ 2,361 for a total of $ 58,867. So the total cost
[24]without surgery -- I actually included **[*21]** the surgery for the
[25]adjusted --
[19]

[1]Q. We'll get to that in a second.
[2]A. We're talking about $ 1,188,500.
[3]Q. For a total health care excluding surgery from now
[4]until 2050?

[5]A. That's right.

[6]Q. Pursuant to the report of Dr. Bialsky?

[7]A. That's right.

[8]Q. Now, did you make a finding with respect to the life

[9]care plan and the future surgical intervention for Mrs. Daley?

[10]A. I did.

[11]Q. Could you -- I cannot show you on the computer for a

[12]couple of reasons but you can do it on here?

[13]A. Yes.

[14]Q. Write your name on the post-it note? What was the

[15]initial -- the first total of the nonsurgical total.

[16]A. The estimate?

[17]Q. Yes.

[18]A. The estimated non-surgical total was $ 1,188,500.

[19]Q. Okay. Now, can you explain to us the surgical

[20]intervention, how that factors in?

[21]A. So when I received Dr. Bialsky's report in 2012 what

[22]He had put in the appendix is her expected cost of future

[23]surgeries but it was not included in the life plan. So because

[24]it was not clear that she would need the cervical and lumbar

[25]surgeries --

[20]

[1] **[*22]** Q. Or indicated when she would need it --

[2]MR. SCOENE: Objection. Counsel, does not like

[3]the answer so he corrects it, that's not appropriate.

[4]MR. HANDLER: I will rephrase it.

[5]THE COURT: Strike that question and response.

[6]Rephrase your question.

[7]Q. Doctor, did Dr. Bialsky's report based on your

[8]observation give a date for when the cervical revision would be

[9]done?

[10]A. No, did he not.

[11]Q. Did his report give a date from when the initial

[12]lumbar fusion would be done?

[13]A. No.

[14]Q. How did you factor that into your economic cost

[15]analysis?

[16]A. Because I am an economist and not a medical expert.

[17]And Dr. Bialsky felt within a reasonable degree of medical

[18]certainty that surgeries -- there was a positive probability

[19]associated with the fact that she would need surgery in the

[20]future, what I did is I calculated what the cost would be but

[21]only at a 50 percent probability. So what I did, I said there

[22]is a 50/50 chance that she is going to need the surgeries. And

[23]I adjusted the numbers down based on that expectation. What he

[24]also did was again give me ranges. So **[*23]** for the cervical spine

[25]surgery the expected estimated cost that Dr. Bialsky gave me

[21]

[1]were between $ 107,323 and $ 108,090. What I did was I used the

[2]midpoints of that range which is $ 107,707. And then I took the

[3]midpoint of that to account for the fact there is a 50/50

[4]chance. When I do that the expected cost is $ 53,853.

[5]Now, as an economist what we do when we believe there

[6]is some uncertainty associated with whether or not it's going to

[7]happen, we just think and say, well, what we think the expected

[8]cost over her lifetime is between zero and $ 107,707.

[9]Now, I also had to think about the timing. Because we

[10]know that price changes over time. So this $ 53,853 is the

[11]amount it would be if she had the surgery today. I predicted

[12]she would have it halfway through to the rest of her life, that

[13]is 18 years out --

[14]Q. That does not mean she could not have it sooner?

[15]A. Correct.

[16]Q. And not after that?

[17]A. Yes.

[18]Q. You use the midpoint to be conservative?

[19]A. I have no other information to go on. When I do that

[20]18 years out the cost of the surgery would be $ 109,097 **[*24]** --

[21]THE COURT: Let's take a short break.

[22](Whereupon, a short recess was taken by all

[23]parties.)

[24]THE COURT: Welcome back. We corrected the

[25]technical difficulties. If you notice we merged -- we made

[22]

[1]the numbers a little smaller, there are a few more things

[2]added so we have more room. Have a seat. Make yourself

[3]comfortable. Continue counsel.

[4]Q. So the number is $ 109,097.

[5]A. So that's the expected total cost of a cervical spine

[6]surgery 18 years out, growing at a rate of 4 percent.

[7]Q. Where did you get the 4 percent?

[8]A. The Bureau of Labor Statistics provide us with those

[9]numbers. I do the same things for the lumbar surgery and I am

[10]not going to go through the whole thing again, it's very

[11]similar. There is a range that he provided for the surgical for

[12]the lumbar spine surgery. And I took the midpoint of that and

[13]the midpoint of that number for the 50 percent chance that she

[14]would need the surgery for a grand total also raised at

[15]4 percent. Estimated lumbar spine surgery at 4 percent, 18

[16]years out would be $ 121,672.

[17]So if you sum up all of these expected **[*25]** health care

[18]costs, the expected future health cost you get a grand total of

[19]1,440,156.

[20]Q. And these are based on the data that was provided to

[21]you by Dr. Bialsky?

[22]A. Correct.

[23]Q. It's fair to say that if another surgeon says instead

[24]of costing $ 107,000 the surgery cost $ 85,000 it could be

[25]adjusted --

[23]

[1]MR. SCOENE: Objection.

[2]Q. -- it can be adjusted, correct?

[3]A. Yes.

[4]Q. And based on a reasonable degree of economic certainty

[5]the adjustment for 20 or 40 thousands in your -- within a

[6]reasonable degree of economic certainty are the adjustments for

[7]the surgery give or take 20 thousand on each surgery so a total

[8]of 40 or 50 in the context of 1.4 million, does that change that

[9]figure that much over the cost of the projected life to 2050?

[10]A. Not significantly.

[11]Q. I think that is your whole report.

[12]MR. HANDLER: I have nothing further.

[13]THE COURT: We marked that last piece of paper

[14]for identification, is that correct?

[15]MR. SCOENE: Thank you.

[16]CROSS-EXAMINATION BY

[17]MR. SCHOENE:

[18]Q. Dr. Dwyer, we never met before, have **[*26]** we?

[19]A. No, we have not.

[20]Q. Are you affiliated at all with Dr. Lakin(sic)?

[21]A. Yes.

[22]Q. Who is Dr. Lakin?

[23]A. Dr. Lakin is a professor in the department I teach in,

[24]that I am chair of. He teaches and advises and we also have a

[25]partnership in this type of work.

[24]

[1]Q. This type of work, meaning being retained by

[2]plaintiff's attorneys to give economic analysis with future

[3]economic damages?

[4]A. Yes.

[5]Q. Dr. Lakin has been doing that for 20 or 30 years?

[6]A. Most likely.

[7]Q. He brought you on and now you're assuming some of

[8]those responsibilities?

[9]A. That is correct.

[10]Q. And so far you testified about eight times you said?

[11]A. Yes.

[12]Q. And I assume you expect to testify many more times in

[13]the future?

[14]A. I have a fill time job as chair person so probably not

[15]that -- not equivalent to what Dr. Lakin is doing, but more.

[16]Q. Dr. Lakin comes to court five or six times a month,

[17]doesn't he?

[18]A. I didn't know how often, probably about that.

[19]Q. Now, where do you -- what's the source of your --

[20]withdrawn. **[*27]**

[21]What's the basis for your belief that Dr. Bialsky

[22]holds the opinion that Mrs. Daley requires future surgery?

[23]A. From the report I received.

[24]Q. What kind of of doctor is Dr. Bialsky?

[25]A. I believe he is a chiropractor.

[25]

[1]Q. So based on him being a chiropractor, it's your

[2]understanding that he from a chiropractic point of view, he

[3]opined that Mrs. Daley required lower back surgery and cervical

[4]spine surgery?

[5]A. Yes.

[6]Q. To -- withdrawn. In some instance you have been asked

[7]to estimate the economic value of future lost earnings?

[8]A. In this case?

[9]Q. In some distance.

[10]A. Yes.

[11]Q. Lawyers ask you to do that in certain cases?

[12]A. Yes.

[13]Q. Were you asked to do that in this particular case?

[14]A. No.

[15]Q. Let's talk about the surgery component of your numbers

[16]for a moment, if we might. If using your 50 percent likelihood

[17]assumption -- that's an assumption on your part, correct?

[18]A. Yes.

[19]Q. You are taking a 50 percent assumption. If Mrs. Daley

[20]were to use that 50 percent assumption she has surgery in 5

[21]years **[*28]** the amount of money that it would cost to pay for the

[22]surgery would be significantly less than the 18 years out that

[23]you posture?

[24]A. That is correct.

[25]Q. In other words, the longer Mrs. Daley delays in doing

[26]

[1]the surgery the greater the cost down the road, correct?

[2]A. Give or take a few years the cost differential could

[3]be trivial but over a longer period of time it grows slower over

[4]time.

[5]Q. It would not be trivial between 5 years and 18 years?

[6]A. Not terribly trivial.

[7]Q. If we make an assumption that there is a 25 percent

[8]chance that Mrs. Daley was going to have cervical spine surgery

[9]than at 18 years your opinion about the amount of the cost for

[10]the surgery as far as an economic damage would be half of what

[11]you told us, correct?

[12]A. Not precisely half because of the growth rate over

[13]time which the difference would get smaller and smaller, but,

[14]yes, up front it would be half.

[15]Q. And of course if she never has the cervical spine

[16]surgery then there would be no economic damage associated with

[17]cervical spine surgery, correct?

[18]A. Correct. Just **[*29]** as if she does have it it would be

[19]twice that amount.

[20]Q. If she doesn't have lumbar surgery, yes or no, she

[21]then would have no economic component to that component of your

[22]analysis, correct, it wouldn't be there, she doesn't have it?

[23]A. Correct. That is correct.

[24]Q. Are you aware from Dr. Bialsky's report that it was

[25]his opinion that Mrs. Daley would require 12 to 48 times

[1]physical therapy for the year 2012?

[2]A. If that was in his report. I don't have it memorized.

[3]Let me look. Yes, 12 to 48 times a year. Sorry for the delay.

[4]Q. Do you know whether or not Mrs. Daley had any physical

[5]therapy during the year 2012?

[6]A. No, I did not.

[7]Q. You're opinions are based on assumptions that you are

[8]utilizing that were developed by Dr. Bialsky, correct?

[9]A. Expert opinion.

[10]Q. He's giving opinions or assumptions -- withdrawn.

[11]Your assuming the accuracy of his opinions, fair

[12]enough?

[13]A. Yes.

[14]Q. If the underlying -- if the underlying accuracy of his

[15]opinions are flawed then your conclusions would likely would be

[16]invalid?

[17]A. It would **[*30]** be likewise flawed.

[18]Q. Now, you are as an economist in the concept of present

[19]value?

[20]A. Yes.

[21]Q. Did you utilize the concept -- did you implement the

[22]concept of present value at all in your analysis as contained in

[23]the report?

[24]A. Yes, I did.

[25]Q. Did you implement the present value of let's say the
28

[1]$ 1,440,156 figure at all?

[2]A. It's my understanding I am not supposed to bring that

[3]to this courtroom. I am new at this so I don't know.

[4]Q. Did you do it?

[5]A. Yes.

[6]Q. Do you have that in your report anywhere?

[7]A. No.

[8]Q. Do you have that calculation anywhere with you?

[9]A. Not with me.

[10]Q. Where is it?

[11]A. It's at home on my computer.

[12]Q. You say on the computer?

[13]A. Yes.

[14]Q. Is there anything else on the computer that you did

[15]not bring with you today?

[16]MR. HANDLER: Objection.

[17]MR. SCOENE: Sustained.

[18]Q. The other case that you have with Mr. Handler, do you

[19]recall the name of that case?

[20]A. No, I don't, sorry.

[21]Q. If I mention the name of Wilson Dejesus does that ring

[22] **[*31]** a bell?

[23]A. Say that again.

[24]Q. Mr. Dejesus?

[25]A. I don't recall, sorry.

29

[1]MR. HANDLER: Again, Judge --

[2]THE COURT: Move on.

[3]MR. HANDLER: I have no idea who this guy is.

[4]Q. So to summarize, Dr. Dwyer, you take assumptions that

[5]are -- you accept as assumptions opinions that are contained in

[6]Dr. Bialsky's report, correct?

[7]A. Yes.

[8]Q. You then add those numbers up by increasing their

[9]value each year with a certain rate of inflation as you

[10]described?

[11]A. Yes.

[12]Q. Then you add up the numbers, that's what you did?

[13]A. Yes.

[14]THE COURT: Anything else?

[15]REDIRECT EXAMINATION BY

[16]MR. HANDLER:

[17]Q. A couple of questions. In the other case that we're

[18]working together on, do you remember we talked about a girl that

[19]can't walk --

[20]MR. SCOENE: Objection.

[21]THE COURT: Sustained.

[22]Q. The opinions you're giving here today you were asked

[23]about a Dr. Lakin?

[24]A. Lakin.

[25]Q. Are these your opinions or Dr. Lakin's opinions?
30

[1]A. These are my opinions.

[2]Q. You were asked about present value, **[*32]** explain to the

[3]jury what present value is?

[4]A. Present value means that amount, the $ 1,444,000, that

[5]I put up there, what would that be worth today. This the

[6]expected cost over the course of her lifetime. And just like

[7]the value of the dollar is going to be different in 2050 you

[8]need to account for that if she is going to get paid up front

[9]today. So the present value would adjust that number now

[10]downward to account for the fact if she getting a lump sum

[11]amount today, what would be equivalent $ 1,440,000, over the

[12]remainder of her life.

[13]Q. And finally, Doctor. You were asked about your

[14]opinion and it's potential of being flawed if Dr. Bialsky's

[15]opinions are flawed.

[16]A. Correct.

[17]Q. You agree that your findings are hinged on his

[18]opinions?

[19]A. Yes.

[20]Q. If his findings were made based on evidence of this

[21]case, testimony of the doctors, medical records, and in turn

[22]those medical records form the foundation of the testimony -- of

[23]his opinion and then his opinion is based on those foundations

[24]and yours is on top, like a pyramid, if the foundation on the

[25]bottom is strong **[*33]** and credible then would your opinion be

[31]

[1]credible as well?

[2]MR. SCOENE: Objection.

[3]THE COURT: Sustained.

[4]Q. Would your opinion change with respect to any of the

[5]figures if I told you that there was evidence that she would

[6]need future surgery?

[7]MR. SCOENE: Objection.

[8]THE COURT: Sustained.

[9]Q. How would your opinion change if I told you there was

[10]evidence of her needing future surgery?

[11]MR. SCOENE: Objection.

[12]THE COURT: Sustained.

[13]MR. HANDLER: I don't have anything further.

[14]THE COURT: Anything else?

[15]MR. SCOENE: No.

[16]THE COURT: You may step down, Doctor, thank you.

[17](Whereupon, the witness steps off the bench.)

[18]* * * * * *

[19]REPORTER'S CERTIFICATION

[20]The foregoing is hereby certified to be a true and correct

[21]transcript of the proceedings held in the above matter.

[22]

[23]----------
JEANNINE M. TARALLO-SOUZA

[24]Official Court Reporter

[25]

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