

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: 62

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PATRICK NAUGHTON, JR.,

Index No.:

Plaintiff(s)

104026/2005

-against-

PETROCELLI CONSTRUCTION, INC.,

Defendant(s).

Jury Trial

-----x
PETROCELLI CONSTRUCTION, INC.,

Third-Party Plaintiff,

-against-

W&W GLASS SYSTEMS, INC., and METAL SALES,

Third-Party Defendants.

-----x
80 Centre Street
New York, New York
March 12th, 2014,

B E F O R E:

HONORABLE FRANK NERVO,
Justice,

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

SACKS & SACKS, LLP
Attorney for Plaintiff
150 Broadway
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BY: JAMES J. McCORIE, ESQ.

Appearances continued on next page.

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Senior Court Reporter

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Kaminsky)

2 COURT OFFICER: Ready for the jury.

3 THE COURT: Yes, we are.

4 COURT OFFICER: All rise, jury entering.

5 (Whereupon, the jury entered the courtroom.)

6 THE COURT: Good morning. Please be seated.

7 As I recall, we're still on the cross-examination
8 of Dr. Touliopoulos by Mr. Kaminsky.

9 MR. KAMINSKY: Yes.

10 THE COURT: Doctor, you are reminded you are still
11 under oath.

12 THE WITNESS: Yes, your Honor.

13 MR. KAMINSKY: Good morning, everybody.

14 CROSS-EXAMINATION CONTINUED

15 BY MR. KAMINSKY:

16 Q Good morning, Doctor. Thank you for making the
17 necessary accommodations to come back today.

18 A No problem.

19 Q Doctor, we finished your office notes and we were going
20 over your life care plan.

21 You did different versions of your life care plan;
22 correct?

23 A I know that I think it was changed at some point, but
24 this is the final version that I have here.

25 Q Okay. And was one of the reasons it was changed is
26 because you made some errors as to what were one time costs as

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Kaminsky)
2 opposed to annual costs?

3 A There were errors in it. I don't recall the exact
4 errors, but there may have been an issue with the reoccurring
5 costs.

6 Q Would I be correct in saying that after you had an
7 opportunity to meet with Mr. Naughton's counsel and go over your
8 life care plan you made changes and revised them; correct?

9 A That is correct.

10 Q And then that revised plan was sent to my attention, as
11 were the earlier plans. If you know.

12 A I would imagine, yes.

13 Q And by the way, when you met with plaintiff's counsel
14 did you have an opportunity to discuss the nature of your
15 testimony?

16 A We discussed the history of the patient. We reviewed
17 mostly the x-rays, to pick out which x-rays I should be showing
18 during the trial.

19 Q Okay. Because obviously you have thousands and
20 thousands of patients. You don't remember everything about
21 everyone; correct?

22 A I have a lot of patients and I rely on my notes --

23 Q If you could speak up.

24 A I do have a lot of patients and I rely on my notes to
25 refresh my memory.

26 Q And just so we're clear, and there's nothing improper

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Kaminsky)
2 about it, but you did meet with counsel to discuss the nature of
3 your testimony before you took the stand yesterday.

4 A Well, I did meet with counsel to go over the x-rays, if
5 that's what you're referring to as the nature, but basically I
6 did meet with him to go over the x-rays, to pick which ones we
7 should pull, blowup for the Court.

8 Q And to discuss your notes and your life care plan.

9 A We did go over the life care plan, yes.

10 Q Do you know how it works in a trial with your life care
11 plan? In other words, do you understand that what happens next
12 is that an economist takes your life care plan and will come to
13 court and project those costs into the future?

14 A I believe so, yes.

15 Q And do you know Ronald Missun? Do you know the name
16 Ronald Missun?

17 A I never met him. The name sounds familiar.

18 Q Are you aware your life care plan, just like it will be
19 in this case, has been given to Dr. Ronald Missun, an economist,
20 who will be making projections as to the future costs of your
21 life care plan for the jurors' consideration?

22 A Well, it would be given to an economist. Yes, I
23 believe so.

24 Q And are you aware that one of the things that the jury
25 has to decide in this case is what is fair and reasonable
26 compensation for Mr. Naughton for his future medical expenses?

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Kaminsky)

2 A Yes.

3 Q And are you aware that, similarly, the jury has to
4 decide what his past medical expenses were?

5 A I believe so.

6 Q Do you know to date all of the past medical expenses
7 have been for surgery, the initial surgery, then the surgery
8 that you did, the hospitalizations, the anesthesiologist, the
9 pain management, the medications, everything, everything you can
10 think of, you know what the total has been from the day of the
11 accident up to today?

12 A I don't have the costs from the hospital or from the
13 other doctors, no.

14 Q If I told you it was approximately \$36,000, would that
15 refresh your recollection? Just yes or no.

16 A I don't think I've seen those numbers.

17 Q Okay. That's fine.

18 We went over some of your life care plan yesterday and
19 we mentioned that you projected, approximately, you don't have
20 to -- I have it right here. We'll take a look at it.

21 You said for the hospital stay for the left ankle
22 arthroscopic surgery, lateral ligament repair and the associated
23 facility and anesthesia costs would be approximately 21 to
24 \$22,000.

25 A That is correct.

26 Q And the attending follow-up physical therapy for that

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Kaminsky)
2 surgery would bring the total to roughly \$40,000.

3 A I believe so, yes.

4 Q Now, have you seen Dr. Missun's projections as to the
5 future medical costs?

6 A I have not seen those.

7 Q If I told you that he is going to project Mr.
8 Naughton's future medical costs for the rest of his life to be
9 \$446,580, would that surprise you?

10 MR. MCCRORIE: Objection.

11 THE COURT: Sustained.

12 Q So let's try and figure out where the rest of the costs
13 come from, okay?

14 Do you have your life care plan?

15 A Yes, I have it.

16 Q On page one you have medical care, you mention the need
17 for an orthopedist to see him two times a month for the first
18 month following his surgery. That comes to \$240; correct?

19 A That is correct.

20 Q Not that big of a number.

21 You mention subsequent to the ankle surgery he needs
22 one visit a month for the first year at \$120 a visit. That
23 comes to \$1400. That's not an annual cost. That's a one time
24 costs of \$1400; correct?

25 A That is correct.

26 Q Now on your sheet you list it as a annual cost but in

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Kaminsky)
2 reality it's not every year, it's just the first year; correct?

3 A That is correct.

4 Q So that would be a mistake.

5 A Well, it says for the first year after surgery.

6 Q Right, but you list it as a annual costs; correct?

7 A Well, yeah, but the annual costs for that year.

8 Q For that year.

9 A It's not a reoccurring cost.

10 Q It's not occurring every year. Just the first year.

11 A That is correct.

12 Q Same thing for an orthopedist to look at his ankle
13 three times a year, \$120 visit, \$360, that's an annual or
14 reoccurring?

15 A That's a recurrent annual cost.

16 Q So now you're differentiating. You're saying instead
17 of a one time cost for the first year, you're saying every year
18 for the rest of his life an orthopedist should look at his ankle
19 three times a year, \$360 a year, for however many years he
20 lived. Just so we understand the plan.

21 A That is correct.

22 Q And pain management, you're saying he needs to go see a
23 pain management person every six weeks, \$120 a visit, roughly
24 \$960 a year every year for the rest of his life; correct?

25 A Well, that cost would be every six weeks up until the
26 time of his fusion, which would be at ten to 12 years. And then

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Kaminsky)
2 I still believe he would require a pain management specialist.
3 The frequency would be a little hard to predict. Depends on the
4 results of the fusion. It may be every six weeks. It may be
5 every eight weeks or ten weeks, but it would be hard to say at
6 this point.

7 Q Okay. Because you have to understand that Dr. Missun's
8 projections are going to be based upon what you say.

9 So if you say he needs this every six weeks the cost
10 projection from Dr. Missun are going to be higher than if he
11 needs it every ten weeks, okay?

12 A That is correct.

13 Q So you are not sure if it's every six weeks or ten
14 weeks post ankle fusion; correct? Just tell me if you're sure
15 or not sure.

16 A I'm not sure. But I can give a approximation.

17 Q I don't want a approximation. I just want to know if.

18 MR. MCCRORIE: It's beyond a reasonable degree of
19 medical certainty. Not certainty.

20 THE COURT: Between six and ten weeks, would that
21 be reasonable?

22 THE WITNESS: I think that would be reasonable.

23 Q So let's round it off. We got \$960 a year. Let's say
24 \$1,000. If he lives another 40 years, you're saying he needs
25 \$40,000 of pain management and consultation.

26 A Yes.

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Kaminsky)

2 Q We mentioned the cost of the surgery. No argument on
3 that. But we still don't get anywhere close to \$400,000.

4 MR. McCORIE: Objection, Judge.

5 THE COURT: Sustained.

6 Q So let's look at what the other issue is.

7 This is something you're calling therapeutic
8 intervention. You're saying left ankle physical therapy, two
9 three times a month, \$4,000 a year for the rest of his life;
10 correct?

11 A That is correct.

12 Q Because you're saying he will need two to three times a
13 month, so anywhere between 24 and 36 sessions of physical
14 therapy a year for the rest of his life. A year for the rest of
15 his life.

16 A That is correct.

17 Q If he lives ten years he'll need 360 sessions of
18 physical therapy.

19 A Yes.

20 Q If he lives 20 years, he'll need -- What did I say?
21 How many?

22 THE COURT: 720.

23 Q Thank you. If he lives 40 years, he'll need \$1400, 20
24 session of physical therapy; correct?

25 A Yes.

26 Q So basically under this life care plan if the jury

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Kaminsky)
2 accepts it, my client is being asked to pay for upwards of
3 \$1,400 and 40 sessions of physical therapy for the plaintiff to
4 go to treat his ankle injury for the rest of his life; correct?

5 A Depends on longevity, yes.

6 Q If he lives 50 years we'll be paying for 1700 sessions
7 or whatever it comes to?

8 A Whatever it is, yes.

9 Q Doctor, over the last ten years, please tell the jury
10 since the day of the accident until today how many physical
11 therapy sessions the plaintiff has gone to.

12 A I don't know the exact number. I do know that he did
13 receive physical therapy, especially after his initial surgery
14 -- not initial surgery, but the subsequent surgery when after he
15 cleaned out his infection.

16 Q Would it surprise you if I told you that from the day
17 of the accident up until today Mr. Naughton has received a total
18 of seven sessions of physical therapy? Yes or no.

19 A That number is on the low end.

20 Q So let's rephrase it.

21 For the last ten years he's had seven sessions of
22 physical therapy, yet, you are saying that for the rest of his
23 life we should pay for upwards of \$1,400 and 40 sessions of
24 physical therapy that we both know he's never going to have;
25 true?

26 MR. McCORIE: Objection.

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Kaminsky)

2 THE COURT: Sustained. As I mentioned earlier,
3 when I sustain an objection to the question you must ignore
4 the question. There is no evidence before you with respect
5 to that.

6 Q So just like we discussed, if he doesn't have the
7 surgery we can cross that cost off the life care plan; correct?

8 A Correct.

9 Q If he doesn't have the physical therapy, we can cross
10 that off the life care plan; correct?

11 A If he elects not to do physical therapy, obviously,
12 yes.

13 Q And similarly, if he doesn't have the pain medication
14 we can cross that off the life care plan; correct?

15 A Yes.

16 Q Okay.

17 MR. McCORIE: Excuse me, the medication.

18 MR. KAMINSKY: My mistake.

19 Q Pain management is what I meant.

20 A Yes.

21 Q Now let's go on to the part of the case called loss of
22 earnings. You're aware of that component of the case as well;
23 correct?

24 A Yes.

25 Q Now, we've discussed the past and future medical
26 expenses, we discussed his injuries his pain and suffering, and

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Kaminsky)
2 there is no dispute he has a bimalleolar ankle fracture;
3 correct?

4 A Yes. Well, he had a bimalleolar fracture dislocation
5 to be more specific.

6 Q Okay, thank you.

7 Now the last component of his claim is his loss of
8 earnings.

9 Now you cleared him to go back to work within a
10 relatively short period of time after this accident; correct?

11 A That is correct.

12 Q And he was able to work for a significant period of
13 time post-accident with this hardware in his leg; correct?

14 A That is correct.

15 Q So even with whatever the demands are of the
16 ironworker, whatever they may be, Mr. Naughton was able to do it
17 before this accident and he was able to do it for a significant
18 period of time subsequent to the accident; correct?

19 A Yes.

20 Q With this hardware in his knee.

21 A Ankle.

22 Q I mean, in his ankle.

23 A In his ankle.

24 Q With your clearance.

25 A Yes.

26 Q And then there came a period of time in 2010, for

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Kaminsky)
2 whatever reason, whether it be because of pain discomfort,
3 changes in the economy, no work being available, for whatever
4 reason, there came a period of time when he stopped working;
5 correct?

6 A There came a period of time in 2010 where I recommended
7 that he doesn't work and he was not working because of his ankle
8 injury.

9 Q For whatever reason, if it was your recommendation,
10 which apparently he doesn't always follow, but for whatever
11 reason, whether your recommendation or other reasons, he stopped
12 working?

13 A He did stop.

14 Q Did you tell him he couldn't work in any capacity;
15 correct?

16 A That is correct.

17 Q So you would agree with me that he can work presently.
18 In his present condition he can work in some capacity.

19 A Absolutely.

20 Q And in fact, you would probably recommend that he do so
21 because it's better than sitting around home doing nothing;
22 correct?

23 A Well, I always recommend a patient find some sort of
24 gainful employment.

25 Q Now, you're recommending that he has this hardware
26 removed just to briefly summarize what you said yesterday.

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Kaminsky)

2 A Well, you're pointing out the medial malleolar screws
3 and if he goes alone but I would remove the fibula screws and
4 fibula plate.

5 Q Let's go over a timeline.

6 You mentioned that if he has those screws removed
7 because you believe their they're loss, causing him pain?

8 A Correct.

9 Q If he has those screws removed that would alleviate the
10 pain, assuming the 90 percent, assuming everything we said
11 yesterday, if the surgery is successful you believe he will
12 experience an improvement in a lessening in his pain and
13 discomfort.

14 A The pain from the plate and screws, but not the pain
15 from the loose ankle or the ankle arthritis.

16 Q Right. Which is something you said may require a
17 fusion, I think you said, 12 years down the road.

18 A I said it will within ten to 12 years, yeah.

19 Q So I want to take the period between now and ten to 12
20 years down the road because --

21 MR. McCORIE: Judge, can I ask Mr. Kaminsky direct
22 his questions over at the witness and not at the jury. He's
23 asking a question as he looks at the jury.

24 THE COURT: There's nothing wrong with that.

25 Q Okay. I want to take that ten to 12 year window
26 because his loss of earnings claim he is now -- Do you know how

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Kaminsky)
2 old he is now?

3 A He was 39 in 2004. He's probably 49 now.

4 Q Because his loss of earnings claim coincidentally
5 coincides with the next ten to 12 years, because the assumption
6 is he would retire roughly at age 60, 61, so here's what I want
7 to know:

8 If you do this surgery and get this hardware out, okay,
9 said it's going to take him from six months to a year to fully
10 recover; correct?

11 A Yes. Well, I would not say fully recover. I would say
12 to reach maximum recovery because he will not have a full
13 recovery after the surgery.

14 Q Okay. But I want you to assume that for a several year
15 period, for a multi year period Mr. Naughton was able to work
16 with this hardware in his ankle, okay?

17 I want you to assume that, as you have told us, the
18 hardware may be loosening, causing him pain and discomfort at
19 which point you suggested he no longer work as an ironworker.

20 Let's assume that Mr. Naughton follows your advice and
21 has the surgery at a total cost for surgery and hospital
22 follow-up treatment over the next six months to a year.

23 I want you to assume that he makes a successful
24 recovery from the removal of hardware and the pain in his ankle
25 lessens, discomfort lessens, he's able to walk further
26 distances, climb stairs, etc., etc.

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Kaminsky)

2 With those assumptions, isn't it true that a year from
3 now Mr. Naughton would be able to return to work as an
4 ironworker and work as an ironworker during that ten to 12 year
5 period up until the time you say he may need the ankle fusion
6 and he would be retiring from work anyway? Yes or no or you
7 can't answer.

8 A My opinion is that with the hardware removal surgery he
9 will still would not be able to return to work as a ironworker.

10 Q What about as an ironworker, member of the union in a
11 less strenuous capacity?

12 A My opinion is that any employment that requires him to
13 stand and walk most of the day would not be possible.

14 Q What are there union positions where people do
15 paperwork in a office?

16 MR. McCORIE: Objection. There are none and he's
17 a doctor.

18 THE COURT: It's kind of beyond his expertise.

19 A I am not familiar with that.

20 Q It is your position that Mr. Naughton can and should be
21 gainfully employed in some capacity; correct?

22 A It's my opinion that he is able to do sedentary work,
23 work where he does not have to stand, walk, go up and down
24 steps. I believe that's something he should be able to do in
25 the future.

26 Q Thank you, Doctor, very much.

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Lombardo)

2 THE COURT: All right, Mr. Lombardo.

3 MR. LOMBARDO: Yes, Judge.

4 CROSS-EXAMINATION

5 BY MR. LOMBARDO:

6 Q Good morning.

7 A Good morning.

8 Q Before yesterday you and I never met before.

9 A I don't believe so.

10 Q So you can't tell that I got my haircut on Saturday,
11 could you?

12 A No.

13 Q Now, Doctor, the file that you brought with you today,
14 that's not your entire file that you maintain in your office, is
15 it?

16 A This is a file -- We have electronic medical records in
17 my office, so everything is in the computer and this is the
18 printout of the medical records from my office.

19 Q Now when you see a patient do you write notes while
20 you're seeing him and transcribe them or in some form dictate
21 them into electronic notes?

22 A Yes. When I see a patient I sometimes -- Well, usually
23 I do not write notes but sometimes I do. And with those notes I
24 dictate a report and when the report comes back I check my
25 report with notes and if it's accurate I pull the handwritten
26 notes away.

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Lombardo)

2 Q Now, are there hard copies of the dictated reports kept
3 in your office?

4 A Well, these are all in the computer so whenever I need
5 the chart, it's printed up.

6 Q Okay. Do you keep a file jacket that has information
7 on it?

8 A I used to but no longer.

9 Q Okay. Well, that file jacket used to have information;
10 correct? It used to maintain certain information on that file
11 jacket.

12 A We used to have file jackets, yes.

13 Q And would the person who recommended the patient's name
14 or information, contact information be on that file jacket?

15 A The contact information, the patient's date of birth
16 and demographic information would be on that, yes.

17 Q Referral?

18 A It could be on that, yes.

19 Q Now, in the electronic file, do you still keep that
20 information on your electronic file?

21 A It sometimes is. This goes back a way to 2004. I'm
22 not sure. I don't think it is there any longer.

23 Q But would you have maintained the file jacket?

24 A No. Those are usually -- The reports are prior to us
25 becoming electronic, were scanned into the computer and the
26 paper charts were discarded.

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Lombardo)

2 Q What about the file jackets? Were they discarded as
3 well?

4 A Yes.

5 Q With all the information that was maintained on them?

6 A Well, I believe whatever information there is on the
7 file jacket should be scanned into the system.

8 Q And did you bring that with you here today or
9 yesterday?

10 A I brought in what my office printed out for me as far
11 as his medical records go.

12 Q But you knew there was another part of the file that
13 they didn't give you; correct?

14 A I'm assuming this is complete.

15 Q You're assuming?

16 A Yes.

17 Q You don't know for sure?

18 A I didn't personally check the computer. I left that up
19 to the office manager to print that up to me.

20 Q Now, are you aware that my office served your office
21 with a subpoena to bring the entire file with you, including the
22 file jacket and any information? Are you aware of that?

23 A I don't handle subpoenas. My office manager does. And
24 she is the one that printed out the file for me.

25 Q And she didn't printout the file jacket or the
26 information that would be maintained on that file jacket for

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Lombardo)
2 you, did she?

3 A Again, the file jacket is from 2004. And I'm not sure
4 if that was even available.

5 Q That information would have been somehow put into the
6 electronic file; correct?

7 A It is a very old chart. I'm not sure what was
8 preserved into the electronic medical record.

9 Q Would there have been a indication somewhere in those
10 documents that there is a information sheet that was taken from
11 the file jacket?

12 A I'm assuming if there was, it would have been printed
13 out.

14 Q And it's not printed out, is it?

15 A I don't have it.

16 Q You're assuming. It could be existing. Your personal
17 manager, office manager --

18 A I didn't personally check.

19 Q Did you check the computer to make sure all your
20 dictated notes and reports were included and nothing left out?
21 Did you check that?

22 MR. McCORIE: Objection. He said he didn't check
23 the computer.

24 THE COURT: Overruled.

25 A I didn't personally check the computer system.

26 Q So whatever your office manager gave you, you came to

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Lombardo)
2 court without ever checking it against the system to see if
3 there's anything missing, a date of an exam, anything like that?

4 A That is correct.

5 Q Doctor, how many patients do you currently have?

6 A I don't know the present patient load.

7 Q Approximately.

8 A Active patients, it's hard to say.

9 Q Hundred?

10 A I can tell you how many I see a week, if you'll like.

11 Q We'll start with a week. How many do you see a week?

12 A I would say roughly 120.

13 Q 120 a week. And you would say over a month period you
14 you'd see about 480?

15 A That's a very rough approximation.

16 Q Four hundred to 500?

17 A It could be lower also.

18 Q Now how many of those patients are construction
19 workers?

20 A A small percentage.

21 Q How much is a small percentage?

22 A I couldn't give you an estimate on that, because I
23 don't keep a log of that. I treat patients with all problems,
24 whether in construction, congenital, degenerative, we don't
25 discriminate.

26 Q I'm not saying you do. I just want to know how many

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Lombardo)
2 construction workers you treat.

3 A We treat anyone that would like to see us.

4 Q How many of those are construction workers?

5 THE COURT: Sustained. Next question. He said
6 small percentage three times.

7 Q Now, Doctor, when you saw -- Let's back up one more
8 second.

9 How many of your patients are clients of Sacks and
10 Sacks?

11 A I do not know.

12 Q Now, Doctor, let's go to the first time you saw Mr.
13 Naughton. I believe that's August 3rd, 2004; correct?

14 A Correct.

15 Q And that's approximately two weeks post-incident.
16 Accident happened on July 21st.

17 A That's correct.

18 Q So about two weeks.

19 A Almost two weeks.

20 Q And it's about almost two weeks since he had the
21 initial surgery to install the plates and the pins and screws;
22 correct?

23 A Yes. I believe the surgery was two days after the
24 accident.

25 Q And then you saw him within two weeks after that for
26 the first time.

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Lombardo)

2 A Yes.

3 Q And there was no infection at that time?

4 A That is correct.

5 Q I bet you did know this, I took some notes from
6 yesterday. Fracture blistering.

7 A We saw fracture blistering and we also saw sloughing of
8 the skin.

9 Q Sloughing? Is that how you pronounce it?

10 A Yes.

11 Q Granulation?

12 A Yes.

13 Q And are those early signs of possibility of infections?

14 A Those are not signs of infection, but those do
15 sometimes increase chance of infection.

16 Q When you saw those signs did you prescribe any
17 antibiotics to Mr. Naughton to prevent any type of infection?

18 A Absolutely not.

19 Q Did you advise him of the possibilities of infection
20 based on the symptoms you saw?

21 A Well, we spoke about ten years ago, but more than
22 likely that would have been something we would have discussed.

23 Q Are they in your notes for that day?

24 A It's not in my notes but we would have discussed this
25 prognosis.

26 Q Then he returned approximately two weeks later, less

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Lombardo)
2 than two weeks later where he had the infection; correct?

3 A That is correct.

4 Q And you went and did the wound irrigation and
5 debridement; correct?

6 A Correct.

7 Q After that you gave antibiotics. You started him on a
8 course of antibiotics for so many weeks; correct?

9 A Correct.

10 Q And the infection never returned.

11 A It took a while to clear up but it never came up, true.

12 Q And in practicing good medicine, you did what you
13 needed to do to fight off that infection; correct?

14 A That is correct.

15 Q And in the event he would have any subsequent surgery,
16 knowing his history of infection, you would take all steps
17 necessary to prevent any further infection and monitor it
18 closer, wouldn't you?

19 A Well, we would take the usual steps and that may
20 include taking cultures during the surgery to see if there is
21 any lingering infection.

22 Q Do you know what caused the original infection?

23 A It's related probably to the surgery.

24 Q How is it related to the surgery?

25 A Let me just finish this.

26 It's related to the combination of the surgery and the

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Lombardo)
2 accident. The accident caused soft tissue trauma. The trauma
3 reduces circulation to the body part which reduces your ability
4 to fight infection. The surgery allows a conduit for bacteria
5 to enter the body.

6 So it's a combination of the skin injury caused by the
7 fracture and the surgery.

8 Q But that would have been corrected during the surgery,
9 could it not, by fighting any type of antibiotics, taking any
10 cultures during that initial surgery; correct?

11 A I would say that for a closed fracture I usually do not
12 take cultures.

13 Q We're not dealing with a closed fracture here, right?

14 A I believe it was a closed fracture. And it was a
15 dislocated fracture. And custom is to give antibiotics during
16 the surgery, but that minimizes the chance of infection. It
17 does not prevent infection.

18 Q Now, after you did the surgery to do the wound
19 irrigation and debridement you next saw him on September 7th,
20 2004; correct?

21 A Yes.

22 Q And also saw him on September 21st; correct?

23 A That is correct.

24 Q What date was it that you recommended the physical
25 therapy, that he start undergoing physical therapy?

26 A I believe on September 21st a request was made for

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Lombardo)
2 physical therapy.

3 Q How about September 7th? At the bottom.

4 A Yes, yes. I'm sorry. September 7th, I notice physical
5 therapy was made and requested.

6 Q Do you know if he ever underwent that physical therapy?

7 A Knowing that he had received some therapy. I am not
8 sure of the dates of that.

9 Q Where was the physical therapy done?

10 A I'm not sure of that.

11 Q Was prescription prescribed to Mr. Naughton for the
12 physical therapy by you?

13 A Usually that is done.

14 Q Would you have a copy of that prescription?

15 A I do not have a copy.

16 Q Do you know what the modalities of the physical therapy
17 that Mr. Naughton participated in consisted of?

18 A Well, it would have been --

19 Q Do you know exactly, not it would have been, but do you
20 know what --

21 A I have not seen the physical therapy notes.

22 Q And if the physical therapy notes aren't around,
23 there's a good possibility he didn't undergo physical therapy;
24 is that correct?

25 MR. McCORIE: Objection.

26 THE COURT: Sustained.

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Lombardo)

2 Q So you don't know where he went for the physical
3 therapy, do you?

4 A I do not.

5 Q But as a treating physician would you want to monitor
6 the physical therapy to make sure he's doing the right
7 modalities to help increase his mobility; correct?

8 A As a treating physician, I would want to monitor the
9 patient. I am not really monitoring the physical therapist.

10 Q But you would want to monitor the type of physical
11 therapy he was undergoing; correct?

12 A It should be what's prescribed to the patient.

13 Q And you don't know what was prescribed, do you?

14 A I can tell you what I prescribed for this type of
15 injury.

16 Q You don't know what you prescribed in this particular
17 case?

18 A I don't have the prescription, but it would have been
19 for range of motion and strengthening. That's my usual custom
20 and practice to prescribe that.

21 Q Would you have referred him to a physical therapist?

22 A If he did not have a physical therapist or did not know
23 a physical therapist we do have referrals for therapists, yes.

24 Q In your office?

25 A In our Queens office we do have physical therapy, but
26 not in our Manhattan office.

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Lombardo)

2 Q Did he ask you for a therapist?

3 A I don't recall.

4 Q Let's go back to August 31st of 2004.

5 Now at that time about five, he's been about five, six
6 weeks post-injury.

7 A Yes.

8 Q And he came to you and he had no significant pain. He
9 denied any pain.

10 A That is correct.

11 Q And he wasn't taking any analgesic medications.

12 A That is correct.

13 Q And there were no signs of infection; correct?

14 A That is correct.

15 Q So within ten days following the St. Vincent's
16 Hospitalization where you did the debridement and the infection,
17 ten days later there was no sign of infection?

18 A There was no sign of active infection. He still had
19 open wounds at this time, but it was looking better after the
20 surgery.

21 Q And one month later, September 21st, he made a
22 significant improvement, did he not?

23 A He was improved, yes.

24 Q And there was an improvement in the function; correct?

25 A Yes.

26 Q And strength. There was an improvement in his strength

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Lombardo)
2 and improvement in the motion; correct?

3 A I'm just double-checking now.

4 (Pause in proceedings.)

5 Q About the middle of the first paragraph.

6 A Okay. Under my exam I still have his moderate
7 restriction of motion.

8 Q But I'm talking about his complaints in the first
9 paragraph.

10 A Okay.

11 Q He reported to you he had significant improvement in
12 ankle pain, as well as function with respect to strength and
13 motion; correct?

14 A That is correct.

15 Q And he complained of residual discomfort; correct?

16 A That is correct.

17 Q And, Doctor, can you agree that discomfort is different
18 from pain?

19 A Yes.

20 Q Now on October 19th, 2004, he reported no significant
21 pain again; correct?

22 A That is correct.

23 Q And he was ambulating without a cane and without a
24 brace.

25 A That is correct.

26 Q And again, still had a moderate restriction of motion

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Lombardo)
2 of the left ankle; correct?

3 A Yes.

4 Q And he had a normal gate, he walked normally.

5 A I have a near normal gate. I'm sorry. I wouldn't call
6 it normal but almost there.

7 Q Now, on October 19th, did you tell him that he was
8 likely required to have the lateral hardware removed in the near
9 future?

10 A Yes.

11 Q Ten years isn't the near future to you, is it?

12 A It's not, but --

13 Q Yes or no.

14 A There was a reason for this recommendation back then.

15 Q But you recommended it as early as October 19, 2004.
16 Within three months of the accident you're already telling him
17 that it's going to be recommended; correct?

18 A I stated that he may likely require because he did also
19 have recurrent redness when he stopped his antibiotics and that
20 concerned me. I thought I may have to go back in and remove the
21 hardware because if he developed a recurrent infection I would
22 have to remove the hardware to clear the infection. That was
23 the thought process back then.

24 Q But that was three months after the accident you're
25 recommending or at least telling him he's going to need the
26 surgery for whatever reason.

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Lombardo)

2 A Well, for different reason. Now it's because it's
3 loose.

4 Q Well, you're already putting the thought in his mind
5 that three months post-accident that he will need surgery to
6 have the hardware removed; correct?

7 A We did discuss that he would likely require it, yes.

8 Q Thank you, Doctor.

9 Now, you don't see him again for another four months;
10 correct?

11 A That is correct.

12 Q And was that by your design or his design?

13 A I'm looking at my report from October. I don't list a
14 follow-up on my October 2004 report.

15 Q So you don't know?

16 A Wait, wait. I did recommend follow-up in four weeks.

17 Q Four weeks is a lot different than four months.

18 A That is correct.

19 Q Now March 15, 2005, he comments to you that he's
20 pleased with the surgical result; correct?

21 A That is correct.

22 Q And he tells you that he has no significant pain,
23 there's no stiffness again; correct?

24 A No. He said there was some residual stiffness.

25 Q Residual stiffness.

26 He also says there's intermittent ankle discomfort.

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Lombardo)

2 Is that his term or yours, discomfort?

3 A I don't know if he used the word discomfort or it
4 bothers him. It's a terminology I used.

5 Q But if he said pain you would have noted pain, right?

6 A That is correct.

7 Q Also February 2005 the fracture was in excellent
8 alignment; correct?

9 A That is correct.

10 Q And the medial lateral fractures had healed; correct?

11 A They appear healed that's what I have in my report,
12 yes.

13 Q And at that time there would have been no need for the
14 hardware at the medial lateral malleolus.

15 A Well, I do recommend hardware after an ankle fracture
16 to remain in the body for about a year to year and a half
17 unfortunately.

18 Q But he's already got good alignment, good healing, he's
19 weight bearing and he's working and infection free.

20 A He is infection free and working, that is correct.

21 Q On May 4th, 2005, he's able to carry out his work
22 duties; correct?

23 A That is correct.

24 Q And his fracture has healed.

25 A They appear healed on the x-rays, yes.

26 Q And you notice there's loosening of the distal plates

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Lombardo)
2 screws; correct?

3 A That is correct.

4 Q So we're about ten months post-injury, post-accident,
5 and there's some loosening of the plates screws and you
6 recommended that he may require hardware removal; correct?

7 A That's correct.

8 Q So that's the second time in ten months you already
9 mentioned to him that the hardware's going to need to come out.

10 A Second time I mentioned for different reasons.

11 Q I'll give you that but second time you've mentioned to
12 him that there may be a need to the removal.

13 A That's correct, but I didn't recommend it.

14 Q Thank you, Doctor.

15 Now that was on May 4th, 2005; correct?

16 A That is correct.

17 Q Now you don't see him again for almost two years. You
18 don't see him until April 7th, 2007.

19 A That is correct.

20 Q In those two years there was no change in the range of
21 motion.

22 A Let me just double-check.

23 (Pause in proceedings.)

24 A I would say there's minimal changes from what I see.

25 Q You also note that due to the ongoing ankle symptoms,
26 the hardware removal and orthoscopic debridement of the left

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Lombardo)
2 ankle is recommended. So you're recommending it again for at
3 least the third time in three years.

4 A No. This is the first time I recommended it.

5 Q Third time.

6 A The first two times I mentioned he may require it, but
7 this is first time that I did recommend it be removed.

8 Q And since April of 2007, although you recommended it
9 back then as his treating orthopedic surgeon who he's relying on
10 he still hasn't had that surgery.

11 A He still has not had that.

12 Q Thank you, Doctor.

13 And how long did you ask to follow-up with him?

14 A About eight weeks.

15 Q And when was the next time you saw him?

16 A Next time was April 8, 2008.

17 Q So it was almost a year.

18 A That's correct.

19 Q That's not eight weeks, is it?

20 A No, it's not.

21 Q Again, did you recommend the removal of the hardware at
22 that time we're in April of 2008 now?

23 A Um, actually, I don't know -- I recommended new x-rays
24 and then to discuss surgery after the x-rays. I don't believe I
25 recommended it on this date.

26 Q But you did have the impression that he's presently

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Lombardo)
2 symptomatic with posttraumatic contractures of the left ankle
3 and symptomatic with hardware. You noted that when you examined
4 him, right?

5 A That is correct.

6 Q Now when was the next time after April 8th, 2008, that
7 you saw him again?

8 A February 17th, 2009.

9 Q So approximately ten months, is it? Nine months?

10 A That is correct.

11 Q And he tells you that he stopped working three or four
12 months before that; correct?

13 A That is correct.

14 Q And it's due to pain, stiffness and swelling he stopped
15 working. That's what he told you, right?

16 A That is correct.

17 Q Why did it take him three or four months to see you?

18 MR. MCCRORIE: Objection.

19 THE COURT: Sustained.

20 Q Did you ask him why he waited?

21 A I don't have that here. If I did ask him, I don't have
22 it reported.

23 Q Well, Doctor, I know you have a lot of patients. Would
24 it take three or four months to see you if I'm a patient
25 returning to with a bimalleolar fracture? Would it take that
26 long to see you if I called up?

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Lombardo)

2 A Usually it's not four months, but it could be a little
3 bit of --

4 Q But you don't know why he waited two or three months
5 because he stopped working with all these symptoms. You don't
6 know why he waited.

7 MR. McCORIE: Objection.

8 THE COURT: He didn't tell you?

9 THE WITNESS: I don't remember and I don't have it
10 recorded, so if he did tell me I don't know why.

11 Q What date were we on?

12 A February 17th, 2009.

13 Q And you asked for a follow-up on February 17th, 2009,
14 in four to six weeks; correct?

15 A That is correct.

16 Q And you didn't see him again until June 18th, 2009;
17 correct?

18 A Yes.

19 Q That's not four to six weeks, is it?

20 A That is correct.

21 Q And at that February 17th, 2009, you requested physical
22 therapy two times per week for eight weeks.

23 Although it's been requested did he ever do it for one
24 reason or another? Yes or no. If you can answer it yes or no.

25 A I don't know if it was authorized or when his therapy
26 was performed.

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Lombardo)

2 Q Now, on August 25th, 2009, he's now making complaints
3 of rolling and buckling.

4 A That is correct.

5 Q And he had no difficulty kneeling, right, or bending,
6 or squatting.

7 A That is correct.

8 Q And he still hasn't used a brace or a cane.

9 A That is correct.

10 Q And you noted that he has progressive left ankle
11 symptoms and symptomatic medial and lateral hardware in left
12 ankle instability.

13 A That is correct.

14 Q You said the left ankle instability can be corrected by
15 having the ligament reconstruction. I think you said that
16 yesterday.

17 A There is good chance it could be improved.

18 Q Good chance, 90 percent chance?

19 A Yes.

20 Q He hasn't had that done either, correct?

21 A That's correct.

22 Q That's going back 2009, that's about five years ago.

23 A That's correct.

24 Q And again you mentioned that he's a candidate for this
25 surgery in September 22nd, 2009.

26 A Yes.

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Lombardo)

2 Q And you mentioned it again in November 2009.

3 A Dr. DeMarco did.

4 Q But it's in your notes.

5 A Yes.

6 Q Now at this point he's undergoing injections into the
7 ankle; correct?

8 A I believe with Dr. Perper, yes.

9 Q How often was he having the injections?

10 A Fairly regularly. I don't know the exact frequency,
11 but at some point it may have been on a monthly basis.

12 Q He actually told you at one point they were only
13 lasting one or two days?

14 A If it's in my reports I'll take your word for it. I
15 don't recall that, but if it's in there. . .

16 Q But he continues to go for them.

17 A I have in my reports that it gave him partial and
18 temporary improvement. Meaning, that it didn't last that long
19 and it didn't help him completely, but it helped him enough to
20 make him feel better.

21 Q They would only last one or two days. He told you
22 that, right?

23 MR. McCORIE: Objection. He gave his answer. He
24 keeps trying to get him to say one or two days.

25 THE COURT: Sustained.

26 Q Did he tell you how long they were lasting, the relief

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Lombardo)
2 was lasting?

3 A I have partial and temporary. If you read what the two
4 days somewhere, please refer that to me because I don't recall
5 that.

6 Q September 22nd, 2009. He received left ankle
7 injections by Dr. Perper and felt better for approximately
8 one-two days.

9 A Yes.

10 Q So his injection is helping?

11 MR. McCORIE: That's one injection.

12 THE COURT: That's what he reported.

13 THE WITNESS: That's what he reported for that
14 particular injection.

15 Q He said injections. He didn't say, injection, did he?

16 A It was injection, singular.

17 Q Sorry. Left my glasses in my bag.

18 And on 9/28/10, my copy here I can't read it.

19 MR. LOMBARDO: Do you have a cleaner copy?

20 MR. McCORIE: Yes.

21 (Handing.)

22 Q Did tell you that the injections for the pain were not
23 working? Did he make that comment to you?

24 A Again, he said on this date the injections resulted in
25 temporary and partial improvement and symptoms for approximately
26 for two days.

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Lombardo)

2 Q Now, also on that visit September 28th, 2010, did you
3 advise him to maintain appropriate orthopedic follow-up?

4 A Yes.

5 Q Now, Doctor, when you asked to see him in four to six
6 weeks and then you don't see him until a few months that's not
7 appropriate orthopedic follow-up, is it?

8 A Well, on September 28th --

9 Q I'm just asking you when you mentioned to him to have
10 to maintain appropriate orthopedic follow-up and you tell him
11 you want to see him in four to six weeks and you don't see him
12 for three or four months, that's not appropriate orthopedic
13 follow-up, is it?

14 A I just want to clarify on September 28th, 2010, I did
15 not recommend follow-up in four to six weeks.

16 Q I'm not saying that you did. I'm just saying that you
17 maintain affordable --

18 A Appropriate orthopedic follow-up.

19 Q You told him to maintain it, correct?

20 A Yes.

21 Q If you want to see a patient in four to six weeks or
22 you don't see him for a year or six months, that's not
23 appropriate.

24 A As a general question?

25 Q As a general question.

26 A That is correct.

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Lombardo)

2 Q Now November 30th, 2010, you again mentioned the
3 hardware removal; correct?

4 A Yes, we did.

5 Q And you ask again for general follow-up for eight weeks
6 time, right?

7 A That is correct.

8 Q And yet you don't see him again until March 2012.

9 A That is correct.

10 Q How many months is that?

11 A It's over a -- I don't remember.

12 Q So that's not appropriate orthopedic follow-up, is it?

13 A Well, it's not what I recommended to the patient.

14 Q So he's not following your recommendations, is my
15 point, correct, as far as follow-up is concerned?

16 A As far as follow-up problem, that's correct.

17 Q I think that's obvious to all of us.

18 MR. MCCRORIE: Objection.

19 THE COURT: We don't need the editorial comments.

20 Sustained.

21 Q Now you saw him again on September 24, 2013?

22 A Yes, he was seen by Dr. DeMarco.

23 Q And Dr. DeMarco says, there's notes, there was good
24 overall joint space; correct?

25 A Dr. DeMarco --

26 Q No. Good overall --

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Lombardo)

2 A I'm reading the radiographs section and he says
3 degenerative arthritis of the tibiotalar joint, which is the --

4 Q But the he does say the ankle has good overall
5 preservation of joint space. He said that, doesn't he?
6 September 24, 2013.

7 A Which first paragraph?

8 Q Right under Plan, about midway through, one, two, three
9 four lines down. Right after he says patient.

10 A Yes. So --

11 Q Thank you.

12 And again, on December 24th, 2013, you note he's still
13 having, after all these years, he's still having significant
14 left ankle symptomatology due to the injuries in this accident,
15 right?

16 A Yes.

17 Q And to address that instability in the left ankle you
18 were recommending an arthroscopy with a lateral ligament
19 reconstruction; correct?

20 A That is correct.

21 Q And again, he still hasn't undergone that now, has he?

22 A That's correct.

23 Q Has he scheduled that with you?

24 A At the present time I do not believe it's scheduled.

25 Q In fact, he told you he's deferring surgical
26 intervention; correct?

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Lombardo)

2 A He has told me that.

3 Q Do you know for how long he's deferring the surgical
4 intervention?

5 A I don't know how long.

6 Q But yet you've planned for it in your life care plan.

7 A Correct.

8 Q All though he may never have it.

9 A He did express desire to have it done eventually.

10 Q You've been telling us five months after the accident
11 that he may need this.

12 MR. McCORIE: Objection.

13 THE COURT: Overruled. He still may need it.

14 THE WITNESS: I did not recommend lateral ligament
15 reconstruction for the ankle arthroscopy five months after
16 the accident.

17 Q But you did recommend that he undergo future procedure
18 to correct any symptoms he may suffer; correct?

19 A I said he may require it, but I did not recommend it
20 five months.

21 Q And within a year he actually did need it, didn't he?

22 A There was some signs of loosening that I did recommend
23 hardware removal for.

24 Q And he still hasn't had the hardware removal.

25 A Correct.

26 Q We call can agree on that.

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Tosca)

2 A That is correct.

3 MR. LOMBARDO: Nothing further.

4 MR. TOSCA: Just a couple of questions, if I may.

5 THE COURT: Absolutely.

6 CROSS-EXAMINATION

7 BY MR. TOSCA:

8 Q Doctor, just going back to the visit on May 4th, 2005,
9 that's when you made a finding of 45 percent loss of use; am I
10 correct?

11 A That is correct.

12 Q And even with that you opine at that point that
13 plaintiff return to his work as an ironworker; is that correct?

14 A That is correct.

15 Q And in fact he did return to work as an ironworker;
16 correct?

17 A That is correct.

18 Q And he doesn't see you again until two years later;
19 that is correct?

20 A That is correct.

21 Q At some point in the 2005 visit you mention that he may
22 need a hardware removal or that the hardware should be removed.

23 A That is correct. I said that he may require it in the
24 future.

25 Q I understand.

26 A If it bothered him.

1 S. Touliopoulos, M.D. - for Plaintiff - Redirect

2 Q But at some point later on you did recommend that he do
3 have it.

4 A Yes, I did.

5 Q And he never had it.

6 A That is correct.

7 MR. TOSCA: No further questions.

8 THE COURT: Any redirect?

9 MR. McCORIE: Yes, Judge.

10 REDIRECT EXAMINATION

11 BY MR. McCORIE:

12 Q Dr. Touliopoulos, as a first question did your opinions
13 that you gave under direct with reasonable medical certainty
14 change at all from the cross-examination of each of the three
15 defense attorneys?

16 A Not at all.

17 Q And only because in Mr. Kaminsky's hypothetical that he
18 gave you he said that you said assume you said that there may be
19 loosening of the hardware. You've already showed the jury in 3D
20 that there actually is, it's not a possibility, it is loose.

21 A Yeah. It's not a may. It's obvious. I think even to
22 a non-doctor that those screws are loose on those x-rays.

23 Q So, again, if a board certified hand surgeon were to
24 come in and say that there's no loosening, you would disagree
25 with that?

26 A Yes, I would.

1 S. Touliopoulos, M.D. - for Plaintiff - Redirect

2 Q Just to clarify, because there was some questions about
3 if he had the surgery would it relieve the pain, regardless of
4 whether or not Mr. Naughton gets the lateral ligament
5 reconstruction and the hardware removal, it is your testimony,
6 is it not, that he needs the future ankle fusion regardless
7 because of the arthritis?

8 A That is correct.

9 Q And just going to note that when Mr. Lombardo was just
10 questioning you, your September 24th, 2013, that note, and you
11 were trying to say something and Mr. Lombardo said, Thank you,
12 and cut you off, can you tell the jury again in the radiograph
13 section, can you tell them on review of the x-rays what it
14 revealed on that date?

15 A Yes. It revealed degenerative arthritis of the
16 tibiotalar joint.

17 Q And the tibiotalar joint is?

18 A The ankle joint. And the fact that we're not
19 recommending a fusion now is because he has preservation of
20 joint space. So the joint space is narrow to the point today
21 where I'm recommending a fusion. It still has preservation or
22 some narrowing that I noted earlier, but the preservation of
23 joint space doesn't mean that he does not have arthritis. He
24 does have arthritis.

25 Q Can you tell the jury if arthritis, with medical
26 certainty, is a progressive condition and what that means?

1 S. Touliopoulos, M.D. - for Plaintiff - Redirect

2 A It is progressive. As I stated earlier, once you have
3 arthritis it never gets better, it only worsens as the months
4 and years go by. So this is a condition that will become more
5 painful in the future.

6 Q And on Mr. Kaminsky's questioning and I believe Mr.
7 Lombardo's, too, they were pointing out that if the hardware
8 were to come out, Mr. Kaminsky said, well, that means he could
9 then go back to work.

10 Wasn't it your opinion that he still needed the lateral
11 ligament reconstruction surgery?

12 A That's correct.

13 Q And if the hardware came out and you didn't reconstruct
14 the ligaments, his leg would continue to roll; is that correct?

15 A Yeah, exactly.

16 Q Didn't you also testify that even after a lateral
17 ligament reconstruction, it will not fully take away the rolling
18 or fully tighten up the ligaments, he still would have that
19 condition?

20 A Yeah. In this particular instance I believe that his
21 looseness will improve so the amount the amount of the frequency
22 of the rolling, as far as the severity of the roll would get
23 better but not stop it completely and he'll still have the
24 arthritis and that will limit from him standing/walking for a
25 period of time.

26 Q Was that why even as a supervisor he can't go back and

1 S. Touliopoulos, M.D. - for Plaintiff - Redirect
2 work on a construction site with uneven surfaces, all the
3 climbing that would be required?

4 A Exactly. And it's primarily for the arthritis issues
5 but also the rolling presents a danger to patient.

6 Q You were asked so many questions about different things
7 that you saw.

8 Isn't it a fact that you also saw the opinion of their
9 vocational rehabilitation expert that said even as a supervisor
10 Mr. Naughton can't go back to work in 2011 when she saw him and
11 reviewed all the --

12 MR. KAMINSKY: Objection.

13 MR. LOMBARDO: Objection. Beyond the scope of
14 redirect.

15 THE COURT: Sustained.

16 Q On direct examination I pointed out everything that Mr.
17 Lombardo pointed out, that he hasn't good come back in two
18 years, he hasn't come back in one year, but just so the jury is
19 clear he didn't want the surgery then; correct?

20 A That is correct.

21 Q And if, as an orthopedic doctor, he wasn't going to do
22 the surgery, there would be nothing other than monitoring his
23 x-rays that you could have done for him during those years;
24 correct?

25 A That is correct. It would be -- As a orthopedic
26 surgeon my job is to perform surgery. If he did not desire

1 S. Touliopoulos, M.D. - for Plaintiff - Redirect
2 surgery there would not be a strong need for him to come back
3 and see me, although, to monitor him periodically I believe it
4 would be a good idea.

5 Q And during that time period, 2009, when they asked you,
6 September 2009, and then in 2010 to 2012, when he didn't come to
7 you, you already testified that you were aware that he was
8 seeing Dr. Perper on a monthly basis, pain management doctor,
9 another board certified physician getting injections; correct?

10 A That's correct.

11 Q And you were aware that during most of that period of
12 time he had stopped working because, in fact, you told him to
13 stop working September 2009?

14 A That is correct.

15 Q And all of these things that you're telling the jury
16 that even when he gets the lateral ligament reconstruction, that
17 he still would have some rolling and it won't fully heal him.
18 You told those things to Mr. Naughton as well; correct?

19 A That is correct.

20 Q It was just pointed out to you by Mr. Lombardo that
21 from May 2005 to April 2007 there was, and actually it was
22 pointed out by someone else, as well, that there was no change
23 in the range of motion, that it didn't change, it didn't get
24 worse.

25 A I believe I said there was no significant change.

26 Q But my point is, it was still 45 percent the loss of

1 S. Touliopoulos, M.D. - for Plaintiff - Redirect
2 use of his foot; it didn't get worse, but it didn't get better.

3 A That is correct.

4 Q And is 45 percent inability to use your foot medically
5 significant?

6 A Yes, it is.

7 Q When you said -- Withdrawn.

8 Do you expect loosening? When you stated that there
9 was some loosening, ten months postsurgery, did you expect
10 loosening to get worse of the hardware?

11 A Usually does get worse. Once screws start loosening it
12 sometimes backs up more over time and as it does it becomes more
13 symptomatic and bothersome for the patient.

14 Q If you could go to September 21st, 2009.

15 A Yes.

16 Q Just taking one of the dates you were asked questions
17 about.

18 Mr. Naughton will testify and his work record is in
19 there, but that's right after he saw Dr. Perper, sort of, August
20 2009 to September.

21 You stated there that he returned to work for
22 approximately two weeks following the injection that partially
23 relieved his symptoms; right?

24 A Yes.

25 Q Then you stated, However, he stopped working due to
26 significant pain. Correct?

1 S. Touliopoulos, M.D. - for Plaintiff - Redirect

2 A Correct.

3 Q And you actually know that he was on Vicodin at that
4 time.

5 A That is correct.

6 THE COURT: That was when?

7 MR. McCORIE: September 22nd, 2009.

8 Q Regardless of who referred Mr. Naughton to you, he
9 still had the bimalleolar ankle fracture; correct?

10 A Correct.

11 Q And you already stated that your practice sees a lot of
12 580 members at one time, correct, or construction workers?

13 A We do see a good number of construction workers. It's
14 still a overall small percentage of the practice and the
15 majority of them are referrals from former patients of mine.

16 Q And you told the jury that your office accepts
17 work-related accident and all of those rules and the
18 authorizations that are required; correct?

19 A That is correct.

20 Q And you put in for authorization for further therapy
21 for Mr. Naughton; correct?

22 A That is correct.

23 Q And as you know, sometimes authorization is granted and
24 sometimes it is denied; correct?

25 A That is correct.

26 Q You were also asked questions about the total amount of

1 S. Touliopoulos, M.D. - for Plaintiff - Redirect
2 billing to date. You see both work-related accident cases and
3 private pay patients; correct?

4 A That is correct.

5 Q Isn't it a fact when you're in the system of
6 work-related accidents, it's a significantly reduced fee that
7 you are mandated to take?

8 MR. LOMBARDO: Objection.

9 THE COURT: Overruled.

10 A That is correct.

11 Q And if the Court will instruct the jury if at the end
12 of the case the private pay rate that you put on your life care
13 plan is the rate, it might even be a little low for New York,
14 \$120 to see board certified orthopedic physician.

15 A Very conservative rates. Yes.

16 Q When you and I met for that first time we ever met and
17 we went over your life care plan, you were asked about the
18 change of the plan and, admittedly, the annual cost column on
19 the right was a little confusing, because in your notes some of
20 them you said, well, it's only going to be postoperatively;
21 right?

22 A That is correct.

23 Q Did you not tell me that for one of the areas it wasn't
24 once a month for life; that was only for the first year after
25 the accident and you corrected it?

26 A I made corrections, that's correct.

1 S. Touliopoulos, M.D. - for Plaintiff - Redirect

2 Q And so the period of time that Mr. Naughton will see
3 someone, board certified orthopedic doctor that you recommend
4 with reasonable certainty, is the two to three times a year or
5 three times a year; correct?

6 A Three times per year, yes.

7 Q Other than that change, were any other changes made
8 that you're aware of?

9 A There were some minor changes. I don't recall the
10 changes. But that may have been it.

11 Q Just so we're clear regardless of the -- Withdrawn.
12 Doctor -- Withdrawn.

13 Pain management. It's your opinion that up until the
14 time of the fusion, ten to 12 years from now, he needs to see
15 the pain management doctor as you've described in your plan;
16 correct?

17 A That's correct.

18 Q And the only difference that might possibly change
19 instead of the every six weeks it would go to every eight or ten
20 weeks so let's average it to nine weeks; is that correct?

21 A Yes. The issue here is the results of a fusion.
22 Again, it should help prevent the pain but it will not relieve
23 all his symptoms and he will still require to see a pain
24 specialist. I think at the outmost it would be ten. I think an
25 average, every eight weeks it would be good estimation.

26 Q And understanding no one has a crystal ball about how

1 S. Touliopoulos, M.D. - for Plaintiff - Redirect
2 it would go ten to 12 years from now, you did describe that
3 after a fusion he would be walking without the ability to go
4 heel to toe with a limp; correct?

5 A Correct.

6 Q For the rest of his life; correct?

7 A That is correct.

8 Q And that if it didn't cause the word pain, as someone
9 else pointed out, it would certainly cause discomfort to do that
10 with reasonable certainty, Doctor?

11 A It would cause discomfort and it would cause pain.

12 Q And so that limp would be there for life; correct?

13 A That is correct.

14 Q Would it be reasonable for him to see, instead of every
15 eight to ten weeks for him to continue seeing a pain management
16 physician every six weeks?

17 A That would be very reasonable.

18 Q I know it's ten years ago but does the facility Kessler
19 Physical Rehabilitation Physical Therapy, does that ring a bell
20 as someone you may have referred ten years?

21 A Yes.

22 Q Yesterday, when Mr. Kaminsky said, well, there's a ten
23 year synopsis of care, and you said that's of the negative
24 findings. In each of those notes and, in fact, in every note
25 from the day of the accident until today there are certainly
26 what we call positive findings, which means it's not good for

1 S. Touliopoulos, M.D. - for Plaintiff - Redirect
2 him.

3 A That is correct. He never had a normal examination
4 since I first met him.

5 Q And I want to specifically ask you a question about Mr.
6 Kaminsky pointing out that a trimalleolar would be worse, if you
7 just say that sentence, would be than a bimalleolar fracture.

8 Do you remember that?

9 A Yes.

10 Q What is worse a standard - if there is a one
11 trimalleolar fracture or a bimalleolar with a dislocation that
12 you've pointed out to the jury, the foot actually dislocating?

13 So what's worse? Trimalleolar without a dislocation or
14 bimalleolar with a location?

15 A Bimalleolar with a dislocation would be worse to have.

16 Q Tell the jury why.

17 A When there is a dislocation there is -- I believe I
18 mentioned this yesterday, that there's ruptures and tears of
19 ligaments. So not only are you dealing with bone breaking and
20 fractures, now you're also dealing with ruptured and torn
21 ligaments in the ankle which is the factor now because he has a
22 loose ankle.

23 Also, the ankle comes out of the socket. It scratches
24 the cartilage which can cause sort of a condition of arthritis.

25 So it's the worse injury to have than a trimalleolar
26 fracture.

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Kaminsky)

2 MR. McCORIE: Nothing further, Judge.

3 THE COURT: Any recross?

4 MR. KAMINSKY: Briefly, your Honor.

5 THE COURT: Approximately how long do you think
6 you'll be?

7 MR. KAMINSKY: Less than five minutes.

8 THE COURT: Can we hold off on the break?

9 MR. KAMINSKY: Now I'm under pressure. May I
10 approach the witness?

11 THE COURT: Sure.

12 (Approaching.)

13 RECROSS-EXAMINATION

14 BY MR. KAMINSKY:

15 Q Just take a look at that and let me know when you've
16 had a chance to look at it.

17 (Pause in proceedings.)

18 Q Tell the jury does that refresh your recollection as to
19 whether or not you referred Mr. Naughton to physical therapy and
20 to Kessler Physical and he was discharged after seven sessions
21 of physical therapy?

22 A My name is on it so --

23 MR. McCORIE: Objection. Beyond the scope.

24 THE COURT: No, it's not. Overruled.

25 A So I believe he was discharged at this point.

26 Q And he was being discharged after how many sessions?

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Kaminsky)

2 A Seven he sessions.

3 Q So given what we know about the plaintiff's follow-up
4 with his care and given what we know about the physical therapy,
5 seven sessions over ten years, and given what we know about how
6 often he came back to see you, do you really think he's going to
7 go --

8 MR. McCORIE: Objection.

9 Q -- for 1400 sessions of physical therapy?

10 THE COURT: Sustained. You're arguing with the
11 witness.

12 Q Do you have an opinion with a reasonable degree of
13 medical certainty as to whether or not a prudent patient with
14 all the exact same symptoms and conditions and injuries that Mr.
15 Naughton has, do you have an opinion as to whether or not that
16 patient should undergo the arthroscopic surgery and the ligament
17 repair?

18 MR. McCORIE: Objection.

19 THE COURT: Overruled.

20 A As I said earlier, I recommended it. It's up to the
21 patient to decide whether or not he wants to do it.

22 Q It's the patient's final call. We agree on that.

23 My question to you is do you have an opinion with a
24 reasonable degree of medical certainty as to whether or not a
25 prudent patient with those --

26 MR. McCORIE: Objection.

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Kaminsky)

2 THE COURT: Sustained. It's in the form of
3 argument.

4 Q Are you recommending that he did have that surgery?

5 MR. McCORIE: Objection, asked and answered.

6 THE COURT: It has been but overruled.

7 A I did recommend it, yes.

8 Q Do you continue to recommend it to this day?

9 A Yes, I do.

10 Q And is that because when you weigh the risks versus the
11 benefits, the benefits clearly, including the recovery that we
12 would expect, the improvement we would expect, is the reason
13 you're recommending that Mr. Naughton have that surgery because
14 the benefits of the surgery far outweigh any risks? Yes or no.

15 A Benefits outweigh the risks.

16 Q Thank you.

17 A I wouldn't use the word far, but they do outweigh the
18 risks.

19 Q And would a reasonable person --

20 MR. McCORIE: Objection.

21 THE COURT: Sustained.

22 MR. KAMINSKY: Can we approach on that, your Honor
23 off the record.

24 (Whereupon, discussions were held off the record
25 outside the hearing of the jury.)

26 Q Briefly, Doctor, you say he has a 45 percent

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Lombardo)
2 restriction motion.

3 A Loss of use.

4 Q Loss of use. And he had that since the accident
5 happened.

6 A He had that on the day I issued it to him. And I
7 reassessed it since the accident.

8 Q My point is he was able to walk with that limitation;
9 correct?

10 A That is correct.

11 Q And now I asked you if he has the surgery -- Withdrawn.

12 If he does have the surgery as far as your life care
13 plan is concerned, would that reduce the amount of times he
14 needs a management --

15 MR. McCORIE: Just to clarify the surgery.

16 Q The arthroscopy ligament repair surgery.

17 A No. The life care plan is based on him having surgery
18 as far as his pain management goes.

19 Q Thank you.

20 MR. KAMINSKY: Nothing further.

21 MR. LOMBARDO: Judge, very short.

22 RE-CROSS-EXAMINATION

23 BY MR. LOMBARDO:

24 Q On 9/24/2013, approximately nine years after the
25 incident, you noticed some degree of arthritis; correct?

26 A Let me pull it out.

1 S. Touliopoulos, M.D. - for Plaintiff - Cross (Mr. Lombardo)

2 (Pause in proceedings.)

3 Q Dr. DeMarco on 9/24.

4 A Yes.

5 Q It says, Some degree. It doesn't say, Significant
6 degree.

7 A That is correct.

8 Q And how long does it take for arthritis to increase in
9 a patient?

10 A It varies from patient to patient.

11 Q And it doesn't progress at a certain rate for every
12 patient; correct?

13 A Everyone is different.

14 Q And after nine years of this surgery he has some
15 degree; correct?

16 A Yes.

17 Q Do you know if he was seeing any orthopedic medical
18 care provider other than outside of University?

19 A Not that he reported to me.

20 Q That's all I have. Thank you.

21 MR. TOSCA: Nothing, Judge.

22 MR. MCCRORIE: Nothing further.

23 THE COURT: Thank you very much, Doctor, you are
24 excused.

25 At this point we'll take a ten or 15 minute recess.

26 Again, I have to remind you don't discuss the case

Proceedings

among yourselves as tempting as it might be. You haven't heard all the evidence.

COURT OFFICER: All rise. Jury exiting.

(Whereupon, the jury exited the courtroom.)

(Whereupon, a short recess was held.)

COURT OFFICER: Ready for the jury?

THE COURT: Yes.

COURT OFFICER: All rise, jury is entering.

(Whereupon the jury entered the courtroom.)

THE COURT: Please be seated. My apologies from the Court for the slight delay in getting started up again. We had a few legal issues to take care of. Also trying to mark some evidence to save some time.

Mr. McCrorie, next witness.

MR. MCCRORIE: Yes, your Honor.

Plaintiff calls Economist Missun, M-I-S-S-U-N, Ph.D.

THE CLERK: Raise your right hand.

R O N A L D M I S S U N,

called by and on behalf of the Plaintiff, having been first duly sworn, was examined and testified as follows:

THE CLERK: Be seated.

State your name and address for the record.

THE WITNESS: My name is Ronald Missun. Last name is M-I-S-S-U-N.

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 Business address is 325 West Main Street,
3 Louisville, Kentucky.

4 MR. McCRORIE: May I proceed?

5 THE COURT: Yes.

6

7 DIRECT EXAMINATION

8 BY MR. McCRORIE:

9 Q I'll call you Dr. Missun. Are you a medical doctor?

10 A No.

11 Q Can you tell the jury what your occupation is?

12 A I'm a labor economist.

13 Q If you can keep your voice up, they need to hear you
14 back here.

15 First tell the jury what an economist is and what a
16 labor economist is.

17 A Economist is somebody that studies wide variety of
18 things. Technical definition for economist is somebody who
19 studies the allocation of scarce resources. So an economist may
20 look into how people spend their time, how you choose between
21 work and leisure, how, you know, make decisions in terms of cost
22 benefit type of analysis.

23 A labor economist is someone who studies information
24 pertinent to labor markets that is of economic consequence. So
25 a labor economist would be familiar with earnings at different
26 stages of life. Younger people earn less than people, say, in

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 their 50s. Trends in the labor market. Earnings differentials
3 by education level, gender. Those types of things.

4 So anything pertaining to economic health outcomes in
5 the labor market.

6 Q Can you tell the jury your educational background
7 leading up to your current employment and highlight your Ph.D.
8 studies if you can.

9 A I have bachelor's degree from the University of
10 Wisconsin at Milwaukee. Double major in economics and
11 mathematics. Did my graduate work at the University of Illinois
12 where I received both my masters and Ph.D. in the field of
13 economics. And then my specialty area was labor market studies.
14 And that's the area I did my Ph.D. dissertation in.

15 I taught at Illinois Wesleyan University, as well as
16 teaching at the University of Illinois as a graduate student
17 doing teaching assistant position.

18 I was at Illinois Wesleyan for two academic years and
19 following that I joined the firm that I'm currently working for,
20 an employee of a firm Vocational Economics. I've been employed
21 with them since June of 1998. They're a forensic consulting
22 company.

23 By that I mean in cases, such as this, in a court
24 setting where there's an allegation of some type of quantified
25 damage, a forensic economist would be someone who comes in and
26 calculate what's the loss of the wages, the pension, you know,

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 how, if a person can't work any more or can't work in the
3 capacity they used to work in, what is the reduction in their
4 earnings over their lifetime, wages and benefits.

5 Also, in this case I was asked to quantify future
6 medical costs as well.

7 Q Dr. Missun, just for your knowledge, before you came in
8 stipulated into evidence were three of the charts you prepared,
9 but also stipulated were Plaintiff's 13, a complete Local 580
10 record of Mr. Naughton from 1995 through 2010, the complete wage
11 Collected Bargaining Agreement and wage sheets through June
12 2014, all of his pension information is complete work history.
13 Just so you know those are in evidence.

14 Without the aid of an economist to go through those
15 documents and the increases that can be expected over a period
16 of either a work life or a life expectancy, the jury would be
17 left to just figure it out themselves; correct?

18 A I mean, different occupations or different people have
19 different average work life expectancies. And by that I mean,
20 I'm sure you're all familiar with the concept of a life
21 expectancy. Some economist calculates work life expectancy, how
22 much someone works before they retire.

23 So someone who is highly educated with a sedentary they
24 may, on average, work longer than somebody else say the
25 construction trades.

26 In this case, I'm familiar with retirement data

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 specific to this union as well as studying data from the Siegel
3 Corporation, actuarial evaluation which gives information on
4 retirement age, average work hours in the union.

5 I have their wage and benefit scales from September
6 1973 to present, so I'm familiar with 40 years of their wage
7 benefits.

8 So I have a lot of information, how much it costs, the
9 COBRA costs for their health coverage. There's a lot of union
10 specific information, as well as obviously the plaintiff's
11 actually work record.

12 Q You just used the term again pointing out why
13 economists may be necessary, but the actuarial information is
14 also in evidence from 580 containing all of the actuarial
15 studies. Can you tell the jury what that word means -
16 actuarial?

17 A Well, in this context what the actuarial studies are
18 looking at are the pension fund. And a particular importance
19 there was a new law passed in 2006 called the Pension Protection
20 Act. And basically, as you may be aware, some pensions were
21 kind of shaky around 2003/2004 after the dot com bubble.

22 You heard about some pensions that were kind of having
23 some difficulty. Well, they setup rules in terms of funding.
24 And the actuaries go in and you have to show how strong your
25 pension funding system is.

26 So what percent of your liabilities have you accounted

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 for, and the larger that percentage the stronger your pension
3 plan is. And if you are considered to have at least 80 percent
4 of your pension liabilities funded, you're considered in the
5 green zone, which is the good zone to be in. And then you have
6 two other zones. I think they call it endangered and critical
7 categories if you have under eighty percent.

8 So I'm able to look at this particular union and as of
9 the last valuation of 2013, they're above the 80 percent
10 threshold. But as other unions experience, they had problems in
11 the past so they had to fund, throw money into the pension fund
12 without giving any additional benefits to workers. So there's a
13 significant increase to the contributions to the pension fund
14 since 2008. For instance, about 30 percent more today than
15 there was in 2008, but the benefit rate is identical to what it
16 was in 2008.

17 Q Dr. Missun, thank you for the answer. We were just
18 going on actuarial. I want to do some of your background.

19 A Sorry.

20 Q If that comes up during my question or defense
21 questions, anything you feel you need to explain to the jury you
22 can.

23 Let's just do this:

24 Have you testified in court before?

25 A Many times.

26 Q Can you tell the jury how many states in the United

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 States you testified as expert labor economist?

3 A Probably around 25.

4 Q Have you testified in New York before?

5 A Many times.

6 Q And have you testified on behalf of other construction
7 workers that our firm Sacks and Sacks has represented in the
8 last 15 years?

9 A Yes. I'd say probably close to 100 cases.

10 Q And you've even testified weeks ago between 75 and 100
11 cases you've testified.

12 A Yes.

13 Q And for how long have you been doing business, just
14 providing the wage analysis and medical cost analysis for any
15 clients of ours?

16 And when I say "you," I mean your company, not your
17 company but the company you work for.

18 A In terms of my personal consulting work, I think it
19 some time started in 1999 and I started with the firm in June of
20 '98. So probably within a year, year and a half or so. I think
21 I recall doing at least a couple of reports in 1999.

22 Q And if that firm is 40 years old but do you know how
23 long before you started 15 years or so ago, for how long your
24 company has been doing business?

25 A I don't know. I know there's a lady who used to be
26 with our firm who used to do work for Sacks and Sacks, but

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 beyond that I don't know.

3 Q Do you testify for both plaintiffs and defendants?

4 A Yes.

5 Q And it's not just plaintiffs that get to hire
6 economist, both sides do, correct? In New York at least.

7 A Yes. And anywhere.

8 Q In fact, the defendants have an economist here and you
9 reviewed her report, Posafina Aboud; correct?

10 A Yes.

11 Q Do you testify more for plaintiffs or defendants in the
12 whole country?

13 A I'd say about 90 percent of my case retentions are
14 matters where I'm retained by plaintiffs' counsel.

15 Defendants don't have to necessarily have to hire an
16 economist. They can just cross-examine an economist if they
17 want. A lot of times when I'm retained by defense counsel I may
18 not be named as an expert. So I may be doing consulting work
19 for them, but they have not identified me to the other side. In
20 which case I won't be called for testimony because I haven't
21 been designated as a witness, but I may review the reports, give
22 them my impressions and give them some idea that I might have.

23 Q In this case have you seen the legal designation of
24 Posafina Aboud on behalf of the defendants?

25 A Yes.

26 Q Have you reviewed it?

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct

2 A Well, yes.

3 Q Regardless of which side you testify for, when you
4 testify, as you're going to testify here today, you don't give
5 any opinions as to whether or not someone can work or can't
6 work. You just assume if they can or can't work based on the
7 question or based on what you're told; correct?

8 A Yeah. As a economist I have no qualifications to
9 determine if someone is disabled or, more importantly, how
10 severely disabled they are, even if they are disabled. So
11 that's really outside the realm of my expertise. So I would
12 rely on what other experts say to provide that where I or I may
13 be asked to make an assumption, but it's clearly stated to as an
14 assumption in my case.

15 Q Just so we're clear is that the same with medical? You
16 were given a life care plan, you don't have any opinion, ever,
17 including today whether or not someone needs medical care or
18 not, that's left to the jury, you're just assuming based on a
19 life care plan and questions presented to you?

20 A Absolutely correct. I have no medical training, so you
21 would have no way to judge that myself.

22 Q Just like you to assume that Mr. Kaminsky said he
23 cross-examined you month ago. That's where I was the attorney
24 for Sacks and Sacks and he was representing another construction
25 company where we have liability against him. It was damages
26 only trial; correct?

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct

2 A That's my recollection.

3 Q And they hired that same economist on that case
4 Josafina Aboud, remember?

5 A Yes.

6 Q And that's not atypical. Whatever economist you're
7 using, you would think you don't get a different one each time.

8 MR. KAMISKY: Objection.

9 THE COURT: Sustained.

10 Q In fact, in that case it was actually Mr. Lombardo that
11 hired the economist, but Mr. Kaminsky was trying the case. Do
12 you remember that, who the report was written to?

13 A That's my understanding.

14 Q Well, since you were just cross-examined a few weeks
15 ago Mr. Kaminsky told them that you testified that, not you but
16 your firm, over the 15 years plus, whatever you were with the
17 firm, has made more than \$1 million from the reports, and
18 testimony of all of the years that they've been in business; is
19 that correct?

20 A Yes. And I would say just from the consulting work
21 I've done, personally, I've testified that it reaches that
22 threshold without accounting anyone else.

23 Q Understood.

24 Again, that's gotten over the 15 years you've gotten
25 many assumptions. Again, you don't say whether people are
26 injured or not, you just assume what the loss would be based on

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 the work record you're given.

3 A Work record that I'm given and in some cases I'll have
4 a vocational rehabilitation person that will say this is what
5 this individual can still earn. They can't go back to what
6 they're doing what they're doing, but they can still earn
7 something and they can earn X. Then, in doing my calculations,
8 I take that into consideration, use that figure as an offset to
9 what the loss is.

10 Q When you say your firm has made that, you say you're a
11 salary employee. You work for Vocational, the name of your
12 firm; correct?

13 A Yes.

14 Q In this specific matter Patrick Naughton versus
15 Petrocelli Construction and then who brought the other parties
16 in, what elements of damages were you asked to analyze and
17 assess?

18 A Two things:

19 The loss of earning capacity, the loss of wages and
20 benefits considering work as an ironworker before the injury in
21 question; and then considering that he could still work, but not
22 at that particular job and earn less. So what's the difference
23 in terms of the wage and benefit loss? That's the first thing.

24 Second was quantifying the medical needs.

25 Q And when were you first called upon or retained to do
26 that? When was the first analysis that you did?

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct

2 A I this it was sometime in 2011. I want to say it's
3 October 2011, if I remember correctly.

4 Q So when we can get this out of the way, you're not here
5 for free; correct?

6 A Correct.

7 Q Is your firm going to be compensated for your time in
8 court to go over the analysis?

9 A Yes. They charge 2900 for a day rate. So no travel
10 charge time is charged, but actual expenses, whatever the flight
11 costs, hotel room, taxes, meals, that type of thing.

12 Q And you certainly charge for the analysis. Not you,
13 again, we'll clarify, but the company you work for.

14 A I think the initial earning assessment was at 3400.

15 Q As I assume defendants' economist charged them. No one
16 does this for free. That's what your job is, to do this.

17 A My firm hires me to perform work which obviously they
18 bill for.

19 Q Okay. What information was provided to you for, let's
20 make it for the wage loss analysis?

21 A Information I have includes the work history for Mr.
22 Naughton, his pension credit summary sheet, showing how many
23 hours he worked each year and pension credits he earned. I
24 mention earlier I have the wage and benefit scales from this
25 union from September of 1973 through June of 2014. I have the
26 COBRA rates for health coverage for Local 580 as of 2012.

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct

2 I have the pension booklet describing the formulas as
3 to how their pension system works, how do you determine what you
4 get per month in a benefit at retirement.

5 I have verified Bills of Particulars. The actuary
6 evaluation, which I mentioned earlier. The 2013 evaluation by
7 the Siegel Consulting Group, looking at the pension which also
8 gets into hours worked by union members and provides other
9 interesting information.

10 In addition to that, I was also provided with the
11 reports of defendants' vocational expert and economist.

12 Q And that's Sonia Markarsky, the defendant's
13 rehabilitation expert.

14 A Yes.

15 Q Holding up a brightly colored book. This is
16 Plaintiff's 13. This is what's known as the book, the CBA.
17 Tell the jury what jury CBA stands for?

18 A Collective Bargaining Agreement. And one of the things
19 in the CBA they bargain over is how much are we going to pay the
20 workers that do the work. It has other things in there, such as
21 work rules and other things, but in terms of things that would
22 pertain directly to me that would be of interest would be
23 primarily the wage and benefits scales, how much do you get paid
24 and when are those bumps paid and taken place and what are the
25 new rates.

26 Q When union worker says, I got my book, this is what

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 they're talking about, the little book that you carry in your
3 pocket, which is the Collective Bargaining Agreement.

4 A I've heard that phrase before.

5 Q So in addition to the book, the actual agreements are
6 in the documents as well as what you just referred to. The wage
7 and benefit sheets. Because the book is the agreement and the
8 wage and benefits sheet are the new agreements that come about
9 over the course of the new contracts; correct?

10 A Yes. So some times the Collective Bargaining Agreement
11 will spell out, for instance, over a four year time period,
12 well, when we get to the next year that there will be a two
13 dollar increase in the package, but they don't say how much is
14 going to go into wages.

15 They might not know how much the health coverage cost
16 will go up, they may not know how much money they have to
17 allocate to that fund, so they don't spell out all the gory
18 details until later on.

19 So I think I'm most interested in is what the bottom
20 line is in terms of how everything is divided out.

21 Q Just because the jury will have this whole document in
22 evidence, every six months there's a new wage sheet, at least in
23 Local 580, and this document that says on the top, Effective
24 January 1, I'm holding up January 1, 2014, to June 30th, 2014,
25 with the one before being from June 2013 to December 2013, going
26 all the way back. Is that your understanding, at least in this

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 union?

3 A Yes. The first six months of the year and second six
4 months of the year.

5 Q And it was also pointed out but I'm going to point it
6 out so we can do it on direct examination that there may have
7 been more than one report that's been issued.

8 A Yes.

9 Q Have you updated your report for the January 1, 2014?
10 You know, even if it's only by dollars or cents but different
11 categories, did you update your report so you can give the jury
12 now that we're actually at trial a final assessment of what the
13 loss may be?

14 A Yes. That's one of the things that changes over time
15 is additional information on the contract.

16 Q And from 2011, when you were first retained until now,
17 there have been many updates with the wage package; correct?

18 A Every six months.

19 Q I'll put it back in there but part of the documents
20 that are here are one of those old computer printouts with Mr.
21 Naughton's complete work history with the company he worked for
22 and dates he worked there, actually going all the way through
23 2010, in March of 2010.

24 That's another thing you reviewed; correct?

25 A Yes.

26 Q So before we get into the -- Let's bring up the life

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 care plan, that's the simplest thing.

3 With regard to the medical, the life care plan in the
4 medical analysis, what information were you provided and when
5 were you provided it for the first time?

6 A The case specific information of the care plan that I
7 was provided by Dr. Touliopoulos is dated February 19th, 2014.
8 My report is February 20th at 2014. So somewhere around the
9 time he finished the report the I received it.

10 Q And that was as the trial was approaching, that's Dr.
11 Touliopoulos's.

12 Were you also provided in the past from 2011 until now
13 a life care plan of someone else that had orthopedics in there,
14 as well as on behalf of the plaintiff, Mr. Carfi, and you also
15 had also some other components on there.

16 A Yes. I did three reports total that were pertaining to
17 life care plan. First one was based on Dr. Carfi's assessment
18 and Dr. Touliopoulos updated his assessment and then I updated
19 my report accordingly.

20 Q But the point is, just so we're clear, Dr. Touliopoulos
21 only deals with orthopedic. The other one may have something
22 else that jury heard about in questioning, other categories or
23 psychological.

24 A I didn't read that because I didn't think it was
25 pertinent. I understand he's not being called as a witness so I
26 don't recall the differences.

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct

2 Q In any event, so taking Dr. Touliopoulos life care
3 plan, did you ever become aware, I know you have the February
4 one, that sometime in January it was pointed out by Dr.
5 Touliopoulos that he didn't mean for one category, and one
6 category only, once a month for life with regard that he made a
7 mistake and that you redid the life care plan. So one time it
8 was 502,000 and now it was 400 something thousands?

9 A There was a care in the change plan and one that I'm
10 testifying to is based on his last assessment.

11 Q And just so we can make it quicker, change was instead
12 of \$1400 a year, it was \$360 per year, approximately \$1,000 per
13 year off with increases off for time.

14 A Yeah. I don't remember all the specifics, but I
15 remember there was a reduction.

16 Q And I don't want to rush you, I may be getting it, but
17 it was testified to before that there was another change, there
18 was a change in Dr. Touliopoulos's report. Therefore, you
19 issued another report analysis.

20 A Yes.

21 Q We're going to talk today about the only analysis that
22 is going to be before the jury.

23 MR. McCORIE: I don't know if your Honor wants me
24 to have him step down or do it after.

25 THE COURT: Go to one.

26 Q So if you can step down and bring the life care plane

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 with you. I'm going to put up before you and it's stipulated
3 into evidence, Plaintiff's 10. It's entitled the Life Care Plan
4 for Patrick Naughton. And the planner is Touliopoulos.

5 Can you first tell the jury, can you give them the
6 concept of whether or not medical care was the same cost years
7 ago and as it is today and what's that concept called?

8 A Well, costs go up over time. Medical costs like all
9 costs tend to go up on average over time. In this context it's
10 sometime referred to as a growth rate. So we're going to be
11 talking about growth rate for medical cost and growth rate for
12 wage and benefits and how they grow as well.

13 So what I've done is, in a nutshell, taking the life
14 care plan of Dr. Touliopoulos -- Again, I make no judgment as to
15 whether or not an item is needed or not. I don't do independent
16 verification of the cost that he's using. I take his cost, his
17 frequencies his timings as a given.

18 Q Can I stop you for one second, Doctor.

19 Can you do me a favor? Can you state all of the
20 opinions you give to this jury within a reasonable degree of
21 economic certainty?

22 A Yes.

23 Q If for whatever reason you can't, because that's the
24 standard you need to testify to, please tell us. We'll assume
25 it's under that standard but I may repeat it anyway out of
26 habit.

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct

2 So within a reasonable degree of economic certainty, if
3 a life care planner was needed and understanding if parts aren't
4 needed they can take it off the life care plan.

5 A Reasonable degree of economic certainty.

6 Q Thank you.

7 A So, again, I take the cost as a given if a care planner
8 gives me a cost and a range and says a doctor visit is between
9 150 and 200 a visit, I use the midpoint 175. If they say
10 surgery is needed, 10 to 12 years from now, I'll assume it's
11 needed 11 years from now. So any timing issues, any cost
12 issues, there's a range I use the midpoint on that.

13 So I take everything else as a given in terms of the
14 timing, cost, and then it's just a matter of applying a growth
15 rate to that. And that's for my report.

16 Q Without the aid of a economist, a jury would have to
17 know what growth rate is.

18 THE COURT: Please just state questions. Just ask
19 questions.

20 A So you're probably familiar with the Consumer Price
21 Index as at least in general way. So that measures the raise in
22 consume off the -- you what you may not know it's further
23 divided out into many subcategories. Portion of it is medical
24 so they have data on medical services, medical commodities,
25 professional services. Those types of things.

26 So what I do is I go through the life care plan and

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 identify what the need is and apply a growth rate depending on
3 the type.

4 Historically, growth and cost for medical cost has not
5 been uniform. The medical commodities have grown slower than
6 the services and costs over time. That's been true the last 10
7 years, 20 years, 30 years, 40 years, 50 years, 60 years. So as
8 a economist I can't use the same growth rate.

9 So in dividing out my different growth rate my chart
10 identifies next to the item in the second column the growth rate
11 type I'm using.

12 The first item was an immediate need, so I didn't
13 attach any growth rate with it at all. So this was needed as
14 soon as possible. Then I'm just gonna take the cost as today
15 and no growth on it. So if you need immediate growth that means
16 zero percent growth rate because it's needed immediately.

17 The orthopedist, that's a professional service so I'm
18 looking at the cost of that and the inflation. My general
19 methodology is if an item is needed within a ten-year window but
20 not beyond that ten-year window, then I'll look at inflation
21 rates on average over the last ten years and what that's been.

22 If it's longer and Mr. Naughton being 49 years old, 49
23 year old on male has another 32.2 years life expectancy.

24 Q Can you tell the jury where you get that from?

25 A U.S. life tables. That would be the average male in
26 the United States. It does say up here present age 48. He was

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct

2 48 when I did the assessment. But the life expectancy on here
3 is stated for a 49 year old, because I knew his birthday was
4 coming up.

5 So looking at some of these needs are needed over life
6 expectancy roughly 30 years out. If an item is needed long-term
7 then I'll look at over 60 years on average how much the costs
8 have gone up. So the reason I look long-term is that there can
9 be changes in the economy. If something is unique in the
10 short-term time period, it does not make economic sense, in my
11 opinion, to extrapolate from that especially for a long-term
12 life long need of 30 years.

13 When we get into the earnings, for instance, examples,
14 you know, why a five or six year average might not be
15 appropriate to extrapolate in the future.

16 If an item is needed pretty close to now in the life
17 care plan, I'll consider the shorter term rates but most items
18 tend to be long-term in nature. Usually the short-term items
19 are needed usually two to three years later from now. So in
20 that case, if it's a shorter duration, looking at the last ten
21 years, I think, is reasonable.

22 So my chart shows the growth rates that I used. If the
23 short-term rates, there's rates listed here, that's the general
24 consumer item MC for medical commodity. HS for hospital
25 service. MS for medical services. If it's a later intense
26 need, sometimes you use compensation, growth and professional

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 services.

3 Next each item I identified what the growth rate type
4 is and then I also, depending on if it's needed outside that
5 ten-year window, I'm either using the long-term or short-term
6 growth rate.

7 So that's kind of an overall introduction to
8 methodology.

9 Q Thank you. With the time allowed if we're going to
10 continue if you can just take us through the life care plan and
11 explain how you came to the future values.

12 A Sure.

13 THE COURT: Before we get to the specific of the
14 life care plan why don't we break for lunch. Apparently you
15 got an explanation of the various growth rates. So we'll
16 break for lunch at this point.

17 Ladies and gentlemen of the jury, please come back
18 at 2:15.

19 Again, don't discuss the case.

20 COURT OFFICER: All rise, jury exiting.

21 (Whereupon, the jury exited the courtroom.)

22 THE COURT: Have a good lunch. 2:15.

23 (Whereupon, lunch recess was held.)

24 COURT OFFICER: Ready for the jury?

25 THE COURT: Yes.

26 COURT OFFICER: All rise. Jury entering.

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct

2 (Whereupon, the jury entered the courtroom.)

3 THE COURT: Please be seated.

4 MR. McCORIE: With the Court's permission, can Dr.
5 Missun step back down?

6 THE COURT: Yes. Let me remind everybody that
7 we're competing with the noise from the fans from the
8 outside. As well as the logistics of this courtroom aren't
9 very good for the sound. So keep your voices up, please.

10 DIRECT EXAMINATION CONTINUED

11 BY MR. McCORIE:

12 Q Doctor, so we can get this done this afternoon, if you
13 can take one category and I'll take the largest category of
14 physical therapy and then we'll move on.

15 A Left ankle physical therapy. The therapy would be
16 professional service under the medical portion of the Consumer
17 Price Index needed over a life expectancy. There's a little
18 change for, like, one year where there would be more therapy
19 around surgery, but basically it's calculated for life.

20 So what I'm doing is taking the costs provided to me by
21 Dr. Touliopoulos and looking at the long-term rise in the costs
22 for professional services. So if you go to my chart for
23 long-term, go over to Professional Service, you'll see 4.9
24 percent. So over the long-term, the last 60 years, that's the
25 average growth rate for that.

26 So I'm simply taking Dr. Touliopoulos's figure for how

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 much it costs per year, increasing it by 4.9 percent per year,
3 adding it up for the whole life expectancy, and that comes to
4 the \$193,217 figure.

5 Q Just so we're clear, when it says "years," that would
6 be the number of years that the life care plan proposes?

7 A Yes. And again, in this case it's divided up because
8 there's the need and then there's surgery about 11 years out
9 where it needs more therapy, a different frequency during that
10 time period, and then it continues at the break. So there's one
11 little interruption.

12 Q So the thing that's left out on this is the number on
13 the life care plan that says two to three times per month?

14 A Yeah. If there's a raise of two to three, I'm using
15 two and a half.

16 Q Orthopedic care for three times a year for life. Okay.
17 Continue.

18 A Which item?

19 Q Orthopedic care, general follow-up, the three times a
20 year for life. So it would be orthopedist?

21 A So, again, with the exception of more intense therapy
22 around the time of the surgery, what we're looking at there is
23 taking the annual cost there of \$360 a year. It's a life long
24 need again. It's a professional service item. Same growth rate
25 4.9 percent.

26 Q So just for the orthopedic care, forgetting about just

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 the three times a year, that would be \$18,999?

3 A Well, if you add all the different time periods you'd
4 have to add each of those separately.

5 Q Okay, great, thank you.

6 Were all of the opinions that you put on to this board
7 and gave to the jury with a reasonable degree of economic
8 certainty?

9 A Yes.

10 Q Let's do the past loss wage analysis that you
11 performed. The final one that we got prepared for trial with
12 the jury.

13 You've already told us, I believe, in the morning that
14 the items that you were presented with to do the initial reports
15 and follow-up reports.

16 A Yes.

17 Q Can you please tell the jury there have been other
18 reports with a slightly different hourly, the average hours.
19 Can you please tell the jury, first, the concept of average
20 hours and where you got Mr. Naughton's average hours from? I'll
21 put the hours out.

22 A So, in a case where an individual has worked in a union
23 for fairly long time period, you typically want to look at what
24 they actually did in terms of how many hours a year they worked.
25 Some might work more or less than the average.

26 In this case Mr. Naughton had been in the union for a

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 while so what I did here -- This calculation is based on the
3 average from the day he joined the union, all the way up to date
4 of injury of July 21st, 2004. So I looked at the total amount
5 of time, including fractional years, added up all the hours and
6 divided by the amount of time when he joined the union. So over
7 that whole career he averaged 1959 hours per year.

8 Q So I hand you one of the documents which says 1995 to
9 2013. Let's go to 2008 or 2010.

10 First year he worked in the union partial year 623
11 hours?

12 A Yes. Started in September as it notes here.

13 Q 1996 and '97 it was 1570 and then 1300 hours.

14 A 1333.

15 Q From 2000 to 2003, those four years, there was 2400
16 plus hours, each of those were in excess of 2000 hours?

17 A Yes.

18 Q After the accident it went down from 2000 plus hours,
19 still above the lowest is the year of the accident, 1190 hours;
20 is that right?

21 A Yes.

22 Q And then after that back up to 1800. So what you did
23 was you averaged all those numbers to get an average number of
24 hours that he has worked over his career.

25 A Up to the time of the injury.

26 So it's my understanding that, although he returned to

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 work, he missed three months initially, after the initial
3 injury, where he was completely out and then he returned to work
4 fairly consistently for a number of years, although, he may have
5 missed some time here and there due to the injury, but he worked
6 pretty much full-time.

7 Q And understanding that sometimes either a medical
8 report or some other report can have an error as to the date of
9 accident, was there a mistake made early on and compounded in
10 subsequent reports as to the date of the accident that affected
11 the calculation of the number of hours averaged over the course
12 of his career?

13 A Yes. I accidentally have the date of entries as July
14 4th, 2004, instead of July 21st of 2004, which is the only small
15 time period. So it didn't impact the average hours much, but it
16 did have an impact.

17 Q But it did make the report technically incorrect.

18 A Sure.

19 Q By 11 hours a year.

20 A Yeah. So before I had a report that had 1790 or I'm
21 sorry 1719 --

22 Q He said 1790 but the report was actually 1970, 1970.

23 A Yes. I was trying to correct myself on that sorry.
24 The prior report I have 1970 hours. And the corrected amount is
25 11 hours less.

26 Q Again, not knowing where the information was, whether

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 it was an emergency room or somewhere, the defendant's economist
3 made the same exact mistake because she had 1970 hours as the
4 average over the course of time, right, according to the
5 exchange?

6 A Yes. She said that that was his average lifetime hours
7 that he had worked.

8 Q So, regardless, you do make mistakes sometimes in
9 calculations; is that correct?

10 MR. KAMINSKY: That's the first time I ever heard
11 him say that.

12 Q In fact, when you make a mistake and you learn of it
13 you correct the report; is that right?

14 A Yes.

15 Q The report that we have before us for the past lost
16 wages and the future lost wages is 1959, when you do the math,
17 average number of hours for Mr. Naughton.

18 A Yes. From the start of his career in September 1995 up
19 to the time of injury of July 21st, 2004, over that time period
20 that was his average rate on annual basis.

21 Q Most people think nine to five, what does 1959 hours
22 roughly work out to how many hours a week?

23 A Pretty much close to 40 a week. 40 hours a week
24 year-round would be 2,000 some odd hours - 52 weeks times 40.
25 Little bit less. Most ironworkers on average work less than
26 this amount, but his average over a prolonged time period was

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 this figure.

3 Q And you get that information that most ironworkers work
4 less because people have studied what the average ironworker,
5 maybe without a reputation or without a certain ability works;
6 is that right?

7 A Yes. The Siegel report that I mentioned earlier that
8 evaluates the pension gives average hours for the last five and
9 ten years, both around between 16 and 1700 for both of those
10 time periods, actually more for the last five years, than the
11 other.

12 Q Just so we're clear, because the five years leading up
13 to the accident it was in excess of 2000 hours, sometimes 2500
14 hours. You didn't take into account the fact that it went down
15 because of his disability. You just said until he stopped
16 working, even the '04, '05, '06, '07 and '08, you just averaged
17 all the hours, not accounting for any work less.

18 MR. KAMINSKY: Judge, I'm going to object to all
19 the leading. It's a little too much.

20 THE COURT: He can rephrase it. It's awfully
21 leading.

22 Q Did, in fact, Mr. Naughton's hours go down after the
23 accident based on his work history?

24 A His average hours were less than of the accident.

25 Q Regardless, you took those lower numbers and averaged
26 them in from the rest of 1995 to get 1959.

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct

2 A No. The 1959 average up to his time of injury in 2004.
3 If he did lose any time after that initial three months in '05,
4 '06, '07, and 2008, until he stopped working in 2008, in October
5 2008, past loss doesn't consider it, but I did not include those
6 hours in completing the average hours.

7 Q Understood. Tell the jury the basis you came about in
8 calculating the lost wages to date and all of the -- When I say
9 the basis, if you use a wage benefit chart, please, tell the
10 jury that you did, and can you state all of your opinions with a
11 reasonable degree of economic certainty.

12 To make it quicker, you do have an opinion and your
13 opinions are on this board; correct?

14 A Yes. Past loss is \$640,614. Time period includes
15 three months initially missed in 2004 due to the injury where he
16 was out immediately. And then also looking at the time he lost
17 from October 12th, 2008, up to February 2014, he did have a few
18 hours, I think about 300 hours in late '09, in 2010, which I
19 took into consideration and subtracted all four the
20 calculations, but basically with those caveats I'm taking 1959
21 hours looking at the wage and benefits scales.

22 So it says wage rate is X, I'm just applying this
23 number of hours to the wage rate to figure out how many wages he
24 would have. If there's a certain dollar value for the vacation
25 fund or annuity fund, those are also contributed on an hourly
26 basis. There's an hourly rate for those. I'm simply adding

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 those up over the past.

3 So the wage vacation and annuity are all calculated in
4 the same manner. I'm simply taking from the wage and benefit
5 sheets, what was the hourly contribution of those funds,
6 applying the hours and then acknowledging the increases over
7 time from 2004 up to present, scales change. And you take that
8 into consideration in doing all the calculations through.

9 Q Can you please take one wage and fringe benefit notice
10 and just go through the benefits a 580 ironworker is afforded
11 for each hour they work.

12 A Sure.

13 So based on the current contract started in January
14 2014 journeyman's wage rates is \$42.70. I understand he did
15 some work as a foreman as well. That actually is a higher pay
16 rate of \$43.98. If I use -- I use journeyman rates for all my
17 calculations. So maybe somewhat underestimated to the extent
18 that he would have been working as a foreman.

19 Hourly contribution to the vacation fund is \$9.05. So
20 each hour an ironworker works \$9.05 gets put into their fund and
21 that's money they can withdraw from themselves.

22 Q I know it may seem obvious but for the record that's in
23 addition to the \$43, everything starts at the \$43 and goes in
24 addition to that; correct?

25 A Yes.

26 Q Okay. Continue please.

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct

2 A There's an hourly contribution to the annuity fund of
3 \$11, as of the current contract. So each hour you work that
4 gets put into the fund.

5 By the way, the overtime benefits also apply to the
6 benefits as well as the wages. So if you work overtime you get
7 time and a half on these benefits as well.

8 So \$11 an hour for the annuity. Vacation was \$9.05.
9 Journeyman rate of \$42.77.

10 Other two major funds are the pension fund which
11 currently they're contributing \$10 an hour into per hour worked.
12 We'll talk about the pension in the future loss. And then
13 they're putting in \$12.50 per hour into the health and welfare
14 fund to cover health coverage for their members.

15 Those are future losses only, so those don't come into
16 play here.

17 The other thing that I have here is legally required
18 benefits. That's basically social security and unemployment
19 compensation. So most of that is social security.

20 So the more you earn, the larger your social security
21 check is when you retire and that's the way of capturing that.
22 This actually underestimates it, but I don't have his full
23 earnings history to be able to do a detailed analysis on his
24 social security, but from past experience I know this approach
25 actually underestimates the impact on social security.

26 Q So, now, if you can just tell the jury how you got to

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 the 640,614 number for past economic loss?

3 A That's simply adding up the wages, vacation, legal
4 required annuity contribution. Again, annuity contribution wage
5 and vacation are all based on the hourly pay scales. I'm just
6 applying 1959 hours per year to the scales that existed in the
7 past. Just adding it up. Legally required is about eight and a
8 half percent of wages and vacation pay and that is, most of its
9 6.2 social security.

10 Q There has been a consensus that Mr. Naughton can go
11 work in another capacity among the attorneys and among the
12 vocational experts. You read their reports.

13 You used a certain number for the future based on Mr.
14 Schuster's report and it's similar to the numbers in the other
15 report of the defendants' vocational.

16 Just tell the jury the number. We can tell them how we
17 got it, but what is the number we were using before we get off
18 path for the replacement job, value of a replacement job,
19 assuming, as Dr. Touliopoulos testified, Mr. Naughton cannot
20 return to ironwork even as a supervisor but certainly not as a
21 manual laborer to make that annual wage?

22 A It took Dr. Schuster's opinion and he provided a range
23 and I took the midpoint of that, which was 32,454, but the
24 report was back in 2011, so I bumped it up for wage growth and
25 the figure I'm using is \$34,055.

26 Q That took into account range between 29,000 and 44,000

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 that everyone agreed, not accounting for starting salary, median
3 salary, all of that?

4 A It was based on what was in Dr. Schuster's report, yes.

5 Q And so taking that number -- What was then number
6 again?

7 A \$34,055. And to that I'm adding an average benefit
8 package that's about 25 percent, 25.8 percent of wages. That's
9 what the average worker receives in benefits compared to their
10 wages.

11 Q Where we get to the future loss, as assuming as Dr.
12 Touliopoulos testified he cannot return, you have on the future
13 loss taking off that 34,000 and increased it into the future in
14 addition to other benefits that he might be able to get.

15 A Yes.

16 Q If the jury were to find that Mr. Naughton could have
17 worked in the last four years they can simply take \$35,000 times
18 four off the \$640,000.

19 A I'd say given the wage rates back then and including
20 benefits, about \$40,000.

21 Q So take \$160,000 off of that number if exactly in 2010
22 Mr. Naughton is found that he should have gone out and gotten
23 another job.

24 A Yes.

25 Q Okay. Thank you. I'm going to put up the future wage
26 analysis, with regard to Plaintiff's 12, with regard to Mr.

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 Naughton future of wage loss; is that correct?

3 A Yes.

4 Q The hypothetical is this and I want to just finish it
5 because we're trying to get down quickly so you can get
6 cross-examined.

7 For the prior question on past losses, I'd like you to
8 assume that Dr. Touliopoulos testified that because of the
9 accident that occurred on July 21st of 2004, Mr. Naughton had to
10 stop working as of September 2010 and that he was not able to
11 return to work due to the accident.

12 In addition to that, you had all of the documents that
13 you testified and that are here in evidence as Plaintiff's 13
14 and 14, is that the basis for your opinion that you gave before?

15 A Yes.

16 Q In the future I'd like you to assume that Dr.
17 Touliopoulos has testified that Mr. Naughton cannot return to
18 work as a ironworker, either in a manual labor capacity or as a
19 supervisor, or any job where you have to stand for long periods
20 of time.

21 I'd like you to assume that Mr. Naughton, subject to
22 connection, will testify that like his family members he would
23 work into his 60s. In fact, he'll say 65 but we use the lower
24 number. That was his intention. That's what he will be
25 testifying to, that it was his intention to work to that age.

26 I would like you to assume, you don't have to assume,

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 that based on all of the other documents that are in evidence
3 that you reviewed, do you have an opinion with a reasonable
4 degree of economic certainty, taking off the replacement costs
5 of future job that has been agreed to, as to what the future
6 loss would be?

7 A Yes.

8 Q And it's on the board but can you tell us, get to the
9 bottom line and then we'll go backwards, what would the future
10 loss be, accounting for another job we agree he can get, and
11 even giving him some benefits with that other job?

12 A Future loss will be \$2,275,759.

13 Q I just want to start with one thing, too.

14 You talked about before that you get from the U.S. life
15 tables his life expectancy.

16 Going to the work life. You picked to age 62. I know
17 we did reports on 60 and 65, but let's talk about where you got
18 62 from.

19 A The Siegel valuation, the pension valuation, it
20 provides average retirement age.

21 Q Of that number.

22 A Of 62. So I have some older data that I was provided
23 back in 2006 that provided some information on about 800
24 retirees for this union and done an analysis, but the newer
25 data, apparently the retirement age is a little bit longer than
26 it used to be.

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct

2 So this report here is based on the valuation and the
3 pension valuation by the Siegel Corporation of an average
4 retirement age of 62.

5 Q For an ironworker, not general public.

6 A For this particular union, for Local 580.

7 Q Understand. So before we get to your opinion, is it
8 not a fact each time we had you do reports we had you pick an
9 age of 60 or also an age of 65.

10 A Yes. Prior reports. I used statistical average. I
11 believe 60.8, around 61. And then understanding that it's data
12 intention to work to 65, I also done 65, but the figure here is
13 62.

14 Q I might still have you tell the jury what the 65 number
15 would be, but starting up at the top can you tell them how you
16 get to the 2,275,759 number?

17 A So, first we start with the current scales that I told
18 you what the rates were. So that's a starting point going into
19 the future. How far --

20 Q Just a little slower, Doctor.

21 A So one of the issues in doing the future projections is
22 how far out in the future do you go. As I stated, one of the
23 decisions here is to take the retirement age of 62 based on the
24 current pension valuation from the Siegel Corporation.

25 Another issue is how many hours would he work per year.
26 That also affects the loss. We talked about that. 1959 hours

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 is his average over, his career up to the time of injury.

3 The other issue that comes into play is what the rate
4 at which the wages and benefits would grow into the future. And
5 as I stated earlier, I have a 40 year history for this union
6 where I have this wage and benefits from September 1973 to
7 present.

8 What I've done is looked at the last 20 years, and at
9 the bottom of my chart I itemize and, say, from January 1994 to
10 January of 2014, over that 20 year time period, if you look at
11 the scales, the wages increase by 2.7 percent per year on
12 average. The vacation pay went up by 3.8 percent on average.
13 The annuity went up by 4.5 percent on average. The contribution
14 to the health fund went up by 5.2 percent on average. And
15 something called the pension accrual rate went up by 3.5
16 percent.

17 The pension accrual rate, the way they do the pension
18 is when you retire there's a dollar value that applies to all of
19 your pension credits. At present it's \$120. If you had someone
20 with a 30 year service, retires today, they'll get 30 times 120
21 or \$3,600 per month will be the monthly payment for the rest of
22 their life. Historically, that number has been different in
23 different years. It's actually not increased since 2008.

24 So since 2008 it's been flagged at 120.

25 Remember I mentioned the Pension Protection Act that
26 went into place?

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct

2 So this union had to boost the funding for the pension
3 before they can make improvements in the pension. And over that
4 time period the pension went up from \$7.70 to \$10 per hour.
5 It's a 30 percent increase over six year time difference from
6 2008 to 2014. With no benefit increase at all.

7 Now, it's highly unlikely that that would persist into
8 the future. You would expect all else equal if he had two
9 pensions one where union was getting five bucks into the
10 pension, one would be ten, you would expect the one with ten
11 bucks an hour to give you twice the benefit than putting in five
12 bucks an hour. You don't keep increasing the contribution of
13 the fund and get nothing for it.

14 In fact, the current Siegel report says they're in the
15 green zone. So now they would be able to, perhaps sometime very
16 soon, maybe even later this year, possibly increase that rate.

17 Q What does the green zone mean?

18 A Green zone means you have at least 80 percent funded.
19 I think the funding percent is around 84 percent for the union.

20 Q And understanding you study this union and unions, do
21 you have any knowledge as to whether or not this is an election
22 year where it would go up now that they're in the green zone or
23 could go up?

24 MR. KAMINSKY: Judge, objection.

25 MR. TOSCA: Objection.

26 MR. LOMBARDO: Objection.

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct

2 THE COURT: What was the question?

3 MR. McCORIE: My question is as someone who
4 studies the union, whether or not he has any knowledge as,
5 because this is an election year in 580, whether or not
6 they're in the green zone it could go up.

7 THE COURT: Reasonable degree of economic
8 certainty?

9 MR. McCORIE: Yes.

10 THE COURT: You can answer that.

11 A I can say that it can go up, that it's in the green
12 zone. I'll let the jury decide whether or not the election
13 process, whether or not how they want to appeal to members.

14 Q In any event since the Pension Protection Act, is it
15 your testimony, since only the pension hasn't gone up, it's
16 stagnant, that it's not your opinion as an economist that it's
17 going to stay stagnant forever.

18 A No. If you go back to 1973 the pension rate is the
19 \$12.60. So it's almost ten times what it was back then. But if
20 you look at the rate sheets that are in evidence the first six
21 years or so is flat at that \$12.60 rate. Then all of a sudden
22 it took off. So there could be time periods where it's stagnant
23 for various reasons.

24 In this case we know that pensions were hip at that
25 time. The funding was low and it wasn't that the money wasn't
26 going into the fund. They increased it by 30 percent, but

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 there's no benefit increase. And that doesn't stay true over
3 the long-term.

4 Q Just to highlight, so the pension accrual down here is
5 what is that? 3.5 percent?

6 A 3.5 percent. So looking at the last 20 years,
7 including that six year time period with zero percent increase
8 in that average, even with that in there the average growth was
9 three and a half percent.

10 Q Okay. What is a better way to do it economically?
11 Take a 4, 5 year period or take a 20 year period when you're
12 trying to find out wages, pension costs, anything to do with
13 wages?

14 A In general, when you're looking at doing a future
15 projection and you're looking at past, the first question you
16 asked is, is there anything unique in a short-term time period,
17 that I shouldn't rely just on that short time period to make a
18 future projection.

19 I just gave you an excellent example of a pension, why,
20 even though you're throwing 30 percent more money into the
21 pension fund and there's zero percent increase, if, technically,
22 you went by last six years in the pension and said what is the
23 accrual growth rate, I would have to say it was zero. But would
24 that be fair in terms of doing a future projection knowing that
25 they are now in the green zone and have the opportunity to
26 increase things and that they have made those contributions,

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 made those 30 percent improvement in the funding?

3 Q So continue doing the 20 year average and the analysis,
4 please.

5 A So the itemized growth rates I mentioned down here, the
6 wage, the vacation and the annuity are calculated exactly the
7 past loss was. You start with the current amount and you grow
8 it by the 20 year averages.

9 So if I take the current wage rate and each year
10 starting in 2015, ignoring the fact that there may be an
11 increase later this year, I start next year, 2.7 percent has
12 been the average increase over the last 20 years. I take the
13 current scale, increase it by two and a half percent each year
14 or 2.7 percent each year, carry that out to age 62 and tally it
15 up, you would go up with 1,247,186.

16 If I take the vacation current scale for vacation pay
17 and I increase it at its 20 year of 3.8 percent increase and add
18 that up to age 62, that gets 293,585.

19 Q Those top numbers are numbers that would be actual cash
20 money, that would be what the client, that Mr. Naughton would
21 make each year as opposed to benefits.

22 A Yes.

23 Q Please continue with the benefits that would be lost
24 under the analysis that you did.

25 A Legally required is eight and a half percent. That's
26 130,966. Annuity contribution calculate same way vacation is

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 fund. We start with the current rate per hour using, again,
3 1959 hours per year, and that rate of increase for the annuity
4 has been four and a half percent, increase that by four and a
5 half percent each year up to age 62. Add that together you get
6 374,535.

7 Now, the insurance and pension are calculated
8 differently. I have the COBRA rates as of 2012 what a single
9 coverage cost is in Local 580. It's \$470 a month, I believe.
10 So what I'm looking at that as the value of the health coverage.

11 Q While you're on that, Dr. Missun, in prior reports
12 where you provided information that Mr. Naughton was living with
13 someone, that there was a child, not his, her child, and that he
14 wanted to have a family.

15 Were you asked to calculate family rates at a different
16 time for the health insurance?

17 A Yes.

18 Q And that rate would be more than the \$470?

19 A Correct. So that's one of the changes from the current
20 report. This is just looking at the cost of single coverage,
21 this 470 a month.

22 Q Continue, please.

23 A So we're taking the 470 a month as the current rate and
24 then, again, the rate of increase and contributions to that fund
25 have been 5.2 percent over the ten 20 years. So I'm taking 5.2
26 percent increase each year up to age 62, starting with the cost

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 of 470 per month. And when you add that together that comes to
3 101,853.

4 The pension I talked briefly about earlier, the current
5 pension rate is 120 a credit. And over the last 20 years, even
6 though it was frozen the last six years, if you add in the other
7 14 before it, the average growth in the accrual rates was three
8 and a half percent.

9 So I'm assuming on average three and a half percent
10 increase each year starting next year in the \$120 per credit
11 accrual rate.

12 Q Just so the jury can be clear on that, if we can focus,
13 120 per credit means he gets a credit for each year of service;
14 is that correct?

15 A Any year he worked at least thousand hours he gets full
16 pension credit.

17 Q Which is every year except for the first part of the
18 first year; correct?

19 A Yes.

20 So that would be \$120 per month for each credit you
21 have when you retire at present. If you retired today. But the
22 accrual rate applies to all your credits. So when you last earn
23 a credit, they look up, say, what was the accrual rate that year
24 when you last earned a credit and that gets applied to every
25 credit you had. If you had 25 credits, 30 credits, however many
26 you have applies to all of them.

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct

2 So the way the pension works is at age 62 if he works
3 to that age I calculate the total number of pension credits he
4 would have had and I project the 120 per credit value to grow at
5 three and a half percent a year out to his retirement age,
6 figure out what that would be, and I multiply that by his number
7 of credits and that gives me his monthly pension for the rest of
8 his life expectancy.

9 So that amount comes to 1,228,420.

10 Q And you totaled them all together before we get into
11 any deductions it's on there but just for the record.

12 A Before the deductions it's 3,376,545.

13 Q Now, we know Mr. Naughton worked for approximately 14
14 years, I believe it is, in the union, maybe a little bit more.
15 So he's entitled to a pension; correct?

16 A Absolutely.

17 Q So tell the jury the deductions you made in addition to
18 that ways --

19 A So he will by the fact that he had five years of
20 vesting credit he's entitled to a pension still. So I need to
21 subtract off from this 1.2 million figure the pension he's still
22 entitled to.

23 So what I did was look at starting at age 62 what he
24 could get. I don't remember the exact amount, somewhere between
25 16, 1700 per month. So if you take that over his life
26 expectancy that comes to 333,720 pension payments that he still

1 Ronald, Missun, Ph.D. - for Plaintiff - Direct
2 will receive. And then the other two offsets are for the
3 replacement job of being about 30,000 a year with benefits.

4 Q So 34,000 for the 12 years with an increase, of course,
5 same increase you gave for the wages up top.

6 A Actually, I used large growth rate.

7 Q That's what you wanted to tell them. You used larger
8 than the 2.7 that the union was giving him.

9 A Yes. Various elements from the compensation package
10 grew from 2.7 to 5.2 percent. The package grew less though than
11 five percent over that 20 year time period. Over the long-term
12 in the U.S. economy, in fact, if you go back further with Local
13 580, you can find if you use a four year average you'll find
14 that growth rate was lower than the five percent. Looking
15 long-term it's about five percent, so I'm actually using the
16 larger growth rate of the offset job.

17 Q It was five percent, for the record?

18 A Yes.

19 Q So 34,000 increased by five percent each year
20 compounding it comes to the 609,750?

21 A Yes, up to the age of 62.

22 Then the benefits the average worker receives, benefits
23 equal to 25.8 percent of wages so I take that on as well. So,
24 including the pension, he still is going to be entitled to wages
25 and benefits from alternative employment. I can't estimate that
26 he will still receive. About 1,100,786. So I subtract that

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)
2 from a prior total and it gives the loss of 2,275,759.

3 Q Basic premise if you go to age 60 that number will be
4 slightly lower, the 2,275,759?

5 A Yes, it will.

6 Q But if you go to age 65, this number and this number,
7 but the top number would be larger because he'd be making the
8 1959 hours for another five years plus the benefits, vacation
9 annuity and all of that.

10 A The longer the work life, the larger the number. The
11 shorter work life, the smaller the number.

12 MR. McCORIE: I have nothing further.

13 THE COURT: Why don't we take a few minute recess.

14 Ladies and gentlemen of the jury, see you back in
15 ten minutes.

16 (Whereupon, the jury exited the courtroom.)

17 (Whereupon, a short recess was held.)

18 COURT OFFICER: Ready for the jury?

19 THE COURT: Yes.

20 COURT OFFICER: All rise. Jury entering.

21 (Whereupon, the jury entered the courtroom.)

22 THE COURT: Please be seated. We're about to start
23 the cross-examination Mr. Kaminsky.

24 CROSS-EXAMINATION

25 BY MR. KAMINSKY:

26 Q Good afternoon. Nice to see. Been a couple of weeks.

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)

2 A Nice to see you.

3 Q How was your flight up from Kentucky?

4 A Not bad.

5 Q Scheduled to get back there tonight?

6 A Hope so.

7 Q We'll try to get you out of here today.

8 It's been pointed out already you do a significant
9 amount of work on behalf of plaintiff's attorney; correct?

10 A Yes.

11 Q And just from working, because I said in opening
12 statement, just with working from the firm of Sacks and Sacks
13 you have generated income, your company, in excess of \$1
14 million.

15 A Yes.

16 Q Now as an economist, would you agree with me that you
17 have some flexibility in picking and choosing different numbers
18 teams?

19 A You exercise professional judgment, but if we all had
20 the same opinion I probably wouldn't be up here.

21 Q Exactly.

22 For instance, when you're using averages you get to
23 decide one year average, ten year average or 20 year average.
24 When you're using growth rates, you have to pick or decide which
25 averages and which numbers to use; correct?

26 A What you think is reasonable in the context, yes.

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)

2 Q And another economist might have a different opinion;
3 correct?

4 A Sure.

5 Q So, for instance, if I say to my stockbroker, how'd you
6 do last year and he says, up 30 percent, that sounds great, but
7 if I say, how'd you do the last ten years and he says down five
8 percent, that doesn't sound as good; correct?

9 A Sure.

10 Q So a financial advisor can pick and choose what years
11 he wants to use in saying how he performed; correct?

12 A He may choose to report his performance in that way, I
13 guess.

14 Q An economist can select how they want to pick certain
15 different ranges because the ranges they pick will effect the
16 projections. True?

17 A You pick something that you think is reasonable.

18 Q How do you view your responsibility today?

19 Do you view your responsibility to present numbers that
20 are fair and reasonable or do you view your responsibility today
21 to present numbers in a more favorable light of the plaintiff?

22 A I want to calculate something that's fair and
23 reasonable based on the evidence that I've been provided.

24 Q So then let's talk about that for a little bit.

25 Your company is called Vocational?

26 A Vocational Economics is the company I work for. Not my

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)
2 company.

3 Q I know. You tell me that at every trial. You're a
4 salaried employee of their company. Unfortunately, I guess for
5 you, you don't own that company.

6 A That is correct.

7 Q That company that you work for publishes a book;
8 correct?

9 A Yes.

10 Q And that book is called Jimbo and Gibson Work Life
11 Tables.

12 A Yes.

13 Q And in this book it makes references to different
14 methodologies that economists can use in determining things like
15 work life expectancy; correct? There's chapter after chapter in
16 this book.

17 A Most of it deals with disability and how it impacts
18 work life. So most of the target audience is actually
19 vocational experts, but I'm familiar with the book.

20 Q Well, isn't it true that in order to obtain a copy of
21 this book person has to fill out an affidavit which says, give
22 their name, I am a licensed attorney in the state of, whatever;
23 I do not represent and will not represent, nor does any member
24 of my firm represent an insurance company in any action; I will
25 never provide the information in this book to a defendant's
26 attorney; I will make every reasonable effort to make sure that

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)
2 a defendant will not be able to obtain the materials in this
3 book; I will resist defendant's request for confidentiality to
4 secretly or secrecy orders; I hereby acknowledge an affirmative
5 obligation to be a member of a plaintiff's lawyers only
6 organization and to keep the information learned in the
7 restrictive products from any defense lawyer or insurance
8 company.

9 Have you ever seen this affidavit? Yes or no.

10 A You showed it to me, something last trial. First of
11 all, I find this statement is false.

12 MR. McCORIE: This is not from their company.

13 Q My question is, have you ever seen this affidavit?

14 A I'm not sure but it does not apply to that book, I can
15 tell you that much.

16 Q Okay. This affidavit applies to the company that sells
17 the book retail; correct?

18 A It doesn't apply to the sale of that book. You
19 yourself said last time you bought it on Amazon.com.

20 Q Actually, I got it for a \$1.99 on Amazon.com. I didn't
21 have to fill out the form. Somebody put it up for sale, but I
22 was able to find this form.

23 Now does this in any way suggest to you, yes or no,
24 that the materials and the information and methodology you used
25 are geared more towards producing higher numbers than another
26 economist might project?

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)

2 A Not in any way.

3 Q Okay. Fine.

4 The fact that you used the methodology you used in such
5 a fashion to project the numbers you use, do you believe that
6 that in any way could help explain why plaintiff's attorney
7 flies you in from Kentucky over and over and over again as
8 opposed to using any of the thousands of economists in New York?
9 Yes or no.

10 A No.

11 MR. MCCRORIE: Objection. Thousands and thousands.

12 Q Dozens and dozens or hundreds and hundreds.

13 THE COURT: You don't know if they do or not.
14 There are lots of plaintiffs lawyers and lots of economists
15 out there. We don't know what's going on in other
16 courtrooms. That's essentially what the witness testified
17 to.

18 Q You mentioned repeatedly how important it is that the
19 pension fund is in the green; correct?

20 A Yes. It must be in the green to make any improvements.

21 Q Because if it's not in the green that's a problem;
22 correct?

23 A It's a problem in that, it might not be a problem about
24 the pension disappearing, but it indicates they need to do some
25 type of action to make the financing on a more firm ground.

26 Q And you're of the adamant opinion that the pension fund

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)
2 for this local is in the green.

3 A That's what the 2013 Siegel valuation says.

4 Q Okay. Tell me if you agree with the following
5 statement:

6 Notice of seriously endangered status to participants
7 beneficiaries participating and contributing employees, this is
8 to inform you that on September 27th, 2013, as required by
9 federal law, the actuary for the pension fund for ironworkers
10 Local 580 (in the fund or the plan) certified to the U.S.
11 Department of Treasury as to the board of trustee and to the
12 board of trustees that the fund is once again in seriously
13 endangered status for the plan year beginning July 1st, 2013.

14 Would you agree with that statement or not agree with
15 that statement?

16 A It contradicts the document that I reviewed from a
17 Siegel Corporation talking about their valuation for the year
18 2013.

19 MR. KAMINSKY: May I show this.

20 THE COURT: Mark it as Defendant's A.

21 (Whereupon, the item referred to is received and
22 marked Defendant's Exhibit A, for identification.)

23 MR. MCCRORIE: If he can just show it to the
24 witness with the Siegel report, that would be great.

25 THE COURT: Take a look at Defendant's Exhibit A.

26 Q Have you ever seen this document before?

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)

2 (Pause in proceedings.)

3 A I have not seen this document before.

4 Q Have you had a chance to glance through it?

5 A Glanced at it, yes.

6 Q Do you have any reason to doubt the authenticity of
7 that document?

8 MR. McCORIE: Objection. This is the subpoenaed
9 records that says Local 580 on it, but these are the records
10 that came from every party that subpoenaed them so that
11 should be in here. He should just find it in there. I
12 don't know what he's showing him. In terms of authenticity.
13 I'm not saying he can't show him the document.

14 THE COURT: Do you understand? You accept that as
15 authentic?

16 THE WITNESS: I haven't seen the document before.

17 Q You are routinely provided with documents such as that
18 document?

19 THE COURT: Did you use this document in coming up
20 with this analysis?

21 THE WITNESS: No.

22 THE COURT: There's your answer.

23 Q You regularly receive documents that are provided to
24 you from the union or from someone on behalf of the union;
25 correct?

26 A Sure.

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)

2 Q Is that the type of document that you would routinely
3 get?

4 A I've never seen a document quite like this. I usually
5 just see the wage and benefit scales from the union or, you
6 know, pension booklet or something like that. I never seen a
7 document similar to this one.

8 Q Have you had a chance to review the portion of the
9 document I made reference to?

10 MR. KAMINSKY: May I have it back, Officer?

11 (Handing.)

12 Q Dr. Missun, have you had a chance to review the very
13 beginning of the document?

14 A I looked at the document.

15 Q I'm going to ask you to read to yourself because it's
16 not in evidence, read the first paragraph.

17 (Pause in proceedings.)

18 A I've read that.

19 Q Okay. Does that in any way change the testimony you
20 gave us several times that this pension was in the green?

21 A I would need to see more information. It appears
22 you're taking an average. They're mentioning an average of
23 seven years being less than the 80 percent. The valuation I saw
24 for the most current year 2013 that valuation that I had was
25 over 80 percent. So I'm not sure if they're making that
26 determination based on the seven year average or how they're

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)
2 making that determination, but the one, the pension valuation,
3 the last one that's available that's been completed for 2013,
4 that one funding percentage was over 80 percent.

5 Q So that's another example of using different time
6 frames and having different findings; correct?

7 A Again, I don't know exactly how they're coming to this
8 finding.

9 Q What's the date of that document?

10 A They're saying as of September 27th, 2013.

11 Q Fair of me to say that that would be to your knowledge
12 the most recent document?

13 A That's more current than the actual valuation that's
14 dated January 1, 2013.

15 Q When you said it was in the green, in the green, in the
16 green, you would agree with me that a more recent document
17 suggests that that's not the case?

18 A I think it's at least possible. I would need to again
19 -- Again, I notice here the funding percentage that they're
20 talking about in this document here gives some details for 2010,
21 2011, 2012 and there's no mention of 2013. So I'm not sure the
22 reason for that. In that instance it's possible that more
23 current information may actually be in the Siegel report, but
24 without reviewing it fully I would need to look at it much more
25 closely.

26 Q Let me try my question again.

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)

2 Would you agree with me that the more recent document
3 from the union, which they are required by federal law to send
4 to all of the participants, including Mr. Naughton, would you
5 agree with me that the most recent document from the union
6 suggests that they are in serious financial trouble and they are
7 not in the green?

8 A I would agree that this document says they are not in
9 the green. I don't know how serious the problem is though.

10 Q Well, take a look at the first paragraph again.

11 A What I know if the percentage is anywhere under 80
12 percent, if it was 79.8 percent, they would call it seriously
13 endangered or whatever it is, so I wouldn't want to blow it out
14 of proportion if it's based on --

15 Q So you're just telling us it's a few tenths?

16 A No. I'm not saying that. I'm saying I don't know
17 completely everything involved with this document without
18 studying it more fully.

19 Q Does that document cause you to change your testimony
20 when you say the current state of the pension fund is in the
21 green? Yes or no.

22 A I would have to call into question what I said earlier
23 based on what's in this document.

24 Q Thank you.

25 MR. KAMINSKY: I would like to move that document
26 into evidence.

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)

2 MR. McCORIE: No, Judge.

3 THE COURT: Sustained.

4 MR. McCORIE: I object. He's completed --

5 THE COURT: I said sustained.

6 Q Let's look at your testimony concerning the life care
7 plan and, again, just so we're clear, and you told us this
8 already, you're not saying Mr. Naughton needs these items or he
9 doesn't need these items; correct?

10 A Absolutely correct.

11 Q You're just saying if he does need these items, this is
12 what they're going to cost.

13 A If he needs these items at the frequency that Dr.
14 Touliopoulos stated and that the cost stated, these are the
15 amounts.

16 Q And again, you had to use certain growth rates to
17 project into the future.

18 A Yes.

19 Q For instance, for medical services you use a short-term
20 growth rate of 4.2 percent, long-term growth rate of 5.9
21 percent, etc., etc. And you had to go back in time and average
22 the growth rates out.

23 A Yes.

24 Q And you went back how long?

25 A For the long-term is 60 years. For the short-term ten
26 years.

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)

2 Q Sixty years, okay.

3 Let's use the ten years because you have the ten years
4 here.

5 Would you agree with me that across the board the ten
6 year growth rate is significantly less than the long-term growth
7 rate?

8 A Ten year growth rate is less for each of the growth
9 rates.

10 Q So is it fair for me to say, by you selecting to use a
11 60 year growth rate, those numbers that you projected into
12 future value to reach \$446,000 are significantly higher than if
13 you would have used the ten year growth rates instead of the 60
14 year growth rates? True or false.

15 A They're higher. I don't know how significantly higher
16 they would be without running the numbers, but they are
17 obviously higher.

18 Q Well, these numbers compound themselves year after
19 year; correct?

20 A Yes.

21 Q So a difference in one percent over the course over 30,
22 40 years is a huge difference in reaching future value, is it
23 not?

24 A It can make a big difference.

25 Q In fact, if you would have used ten year growth rate,
26 instead of a 60 year growth rate, we can immediately bring this

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)
2 \$446,000 number down by almost half; correct?

3 A I'm not sure what the reduction would have been. I was
4 looking for something in my file, but it would obviously be
5 less.

6 Q Okay. Tell the jury, forget 60 years ago, remember in
7 the 1970s inflation was 18, 25 percent, yes?

8 A I don't think it was 25 percent. It was a little
9 exaggeration. It was pretty high, yes.

10 Q By choosing to go back that far you're able to capture
11 those years in these projections; true? Yes or no.

12 A It includes those years.

13 Q Without including those years, let's include the last
14 ten years. Instead of 18 percent interest, what's the current
15 interest rate today? If I went to a bank to go get money what's
16 the money I would get on a one year CD?

17 MR. McCORIE: Objection for anything other than
18 medical or wages. Bank rates.

19 THE COURT: Overruled.

20 A You're asking me about interest rates as opposed to a
21 growth rate?

22 Q Yeah, I am.

23 A It depends on what you invest in.

24 THE COURT: One year CD.

25 A It would be a low percentage. I think less than one
26 percent.

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)

2 Q Less than one percent. And would you agree with me,
3 again, that if we used the last five years in instead of the
4 last ten years, let alone the last 60 years, this number comes
5 down even more?

6 A The five-year average is probably less than the ten. I
7 have not looked at it but I think the jury is aware of what the
8 economy has been like the last five years. Wouldn't surprise me
9 if it was less.

10 Q So would you agree with me, I'm going to write down and
11 then I'm going to make this into a chart later on, but 446 for
12 future medical.

13 Just by using the short-term which you consider ten
14 year, forget the five years, you consider short-term to be ten
15 years and long-term to be 60 years. Just by using the
16 short-term, a ten year which a different economist may have
17 chosen to use, by using a ten year growth rate for these
18 different categories of service this number comes down almost in
19 half; correct?

20 A I cannot say that without running the numbers. If you
21 feel you have an economist that can defend that, they can come
22 in here testify to that.

23 Q Are you prepared to say something different?

24 A I don't know what the numbers are without running them.
25 I don't want to speculate on something like that.

26 Q Okay, that's fine. Then let's talk about some of these

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)
2 items because what I'm going to do is -- You know what? I'll
3 take off a little bit less than.

4 If we take off just from the change in growth rate we
5 can bring that number down to about 226,000.

6 THE COURT: I assuming it's hypothetical.

7 MR. McCRORIE: And there's different growth rates
8 for different services.

9 Q Just by using the short-term growth rates for the
10 different categories which you've already told the jury across
11 the board are less than long-term growth rates in each category,
12 just by bringing them down to your short-term numbers, ten
13 years, we can significantly reduce this number. Agreed?

14 MR. McCRORIE: Objection. Asked and answered.

15 THE COURT: Not in this form. Overruled.

16 A I said there would be lower. How much lower? I cannot
17 tell without doing the calculation.

18 Q Okay. The biggest number on here is left ankle
19 physical therapy - \$193,217.

20 Now, you have no idea if over the last ten years Mr.
21 Naughton has actually received any physical therapy.

22 MR. McCRORIE: Objection.

23 THE COURT: Kind of asked and answered. He's not
24 testifying as to his medical care and treatment.

25 MR. KAMINSKY: Okay.

26 Q Again, your projections are not based upon whether

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)
2 they're going to actually be necessary or not. They're just the
3 numbers. Correct?

4 A Based on what Dr. Touliopoulos says is necessary, which
5 I have no opinion on one way or another.

6 Q If the jury should determine that based upon Mr.
7 Naughton's past medical history, the number of physical
8 therapies he actually received is following or not following his
9 doctor's advice, if the jury were to determine that it is highly
10 unlikely --

11 MR. MCCRORIE: Objection.

12 THE COURT: Sustained.

13 Q If Mr. Naughton were not to receive 1,440 physical
14 therapy visits for the rest of his life, we can just cross off
15 hundred and --

16 THE COURT: You're arguing with the witness.
17 That's an argument for the jury.

18 MR. MCCRORIE: I'll concede. If he doesn't do it,
19 he'll take it off.

20 Q If he doesn't do it --

21 A If he doesn't need something on the table each item is
22 itemized and take that item amount off.

23 THE COURT: If he goes, twice as much.

24 Q You know what, if he goes to 5,000 physical therapy
25 sessions, if that's what the jury decides they can double that
26 number, right?

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)

2 A Whatever the percentage increase would be.

3 THE COURT: Are these rhetorical questions or
4 hypotheticals?

5 Q This is your summary of his past lost earnings and you
6 conclude that that comes to 640,614.

7 What time frame is that from again?

8 A It states on the bottom there. So it includes three
9 months missed in 2004 and then starts again October of 2008 and
10 includes a reduction for the hours that he actually worked from
11 2009 and 2010.

12 Q So this is from the date of the accident until today?

13 A It's for the three months into 2004 that he missed. If
14 he missed any time between then and October 2008, it's not
15 included. And then from October 2008 to present there's a loss
16 with a deduction for, I think he worked about 300 some hours or
17 so. Combining 2009 and 2010.

18 Q Okay. Did you by any chance make or take into
19 consideration that any of his past losses may have been for
20 downturns in the economy with work not being available as
21 opposed to his not being able to work because of his injuries?
22 Yes or no.

23 A I'm aware of the economy and that wouldn't be an impact
24 on my calculations for reasons I already stated.

25 Q So you did not consider that?

26 A No. I considered the possibility of it. The Siegel

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)
2 report --

3 Q Sir, let me rephrase my question, okay?

4 You considered it. My question is you did not factor
5 it into your calculations; correct?

6 A There was no reduction in those five years compared to
7 the prior years. Average hours in the union from 2008 to 2012
8 were actually five years prior.

9 Q When a person works as a union worker they go from job
10 to job; correct?

11 A Yes. His job eventually ends, goes to another one or
12 he may be off in between.

13 Q I'd like to show you this document and ask you if you
14 ever seen this document before?

15 MR. KAMINSKY: May we have it marked for
16 identification?

17 (Whereupon, the item referred to is received and
18 marked Defendant's Exhibit B, for identification.)

19 Q If could you just read that to yourself.

20 (Pause in proceedings.)

21 Q Would it be fair of me to say that just like the prior
22 document I showed you about the pension fund, would it be fair
23 of me to say that you never saw that document before either?

24 A I never seen that document.

25 Q And does that document indicate that there are periods
26 of time when union workers are laid off from work because work

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)
2 is not available?

3 A That can happen, obviously.

4 Q And does that document refresh your recollection as to
5 whether or not, in fact, Mr. Naughton was laid off of work
6 because of a lack of work and not because of his injuries? Does
7 it refresh your recollection?

8 MR. McCORIE: Objection.

9 THE COURT: Sustained.

10 Q Did you ever interview Mr. Naughton?

11 A No.

12 Q So you got up here and testified without even
13 interviewing him.

14 A Correct.

15 Q Did you ever ask him, Have you ever been laid off from
16 work?

17 MR. McCORIE: Objection. He never interviewed
18 him.

19 Q Through your attorneys, you met with his attorneys, I
20 assume; correct?

21 A Sure.

22 Q When did you meet with the attorneys?

23 A Met with them this morning.

24 Q Did you go over the nature of the documents in this
25 case and your charts and things like that?

26 A Yeah, what my opinions were.

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)

2 Q And was it ever indicated to you that there was a
3 period of time where, due to conditions in the economy, Mr.
4 Naughton did not work for reasons other than his injury?

5 A I don't recall.

6 Q Okay. Now look at that document and let me ask you
7 now, since you don't recall if that refreshes your recollection,
8 if there was a period of time that Mr. Naughton was out of work
9 because there was no work available and not because of his
10 injuries?

11 MR. McCORIE: I'll object. Unless he'll call the
12 payroll specialist from the upstate company that --

13 THE COURT: Overruled.

14 Q You can look at it and refresh your recollection.

15 (Pause in proceeding.)

16 A Obviously he could have been unemployed at any time
17 over his career. That's part of his average hours.

18 Q Does that suggest to you that he was in fact out of
19 work because of the economy?

20 MR. McCORIE: Objection.

21 THE COURT: At some point. Overruled.

22 MR. McCORIE: Why don't we give him the specifics
23 of the date.

24 Q What's the date of the letter?

25 A Date here says April 2nd, 2010.

26 Q Date of the letter but it refers to another date;

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)
2 correct?

3 A Yes.

4 Q What's the other date it refers to?

5 A It refers to a range of dates from December 22, 2009
6 until March 9th, 2010.

7 Q March 9th, 2010. The last day that the plaintiff
8 worked for the company; correct?

9 A Yes.

10 Q And that's the first day that he's saying he's disabled
11 because of this objection.

12 MR. McCORIE: Objection.

13 THE COURT: Overruled.

14 A I don't know when he claimed he was disabled.

15 Q Now, with that letter would that cause you in any way
16 shape or form to modify Mr. Naughton's past loss?

17 A Not at all.

18 Q Okay.

19 Now you said from this number, it would be appropriate
20 reduce that by 160,000?

21 MR. McCORIE: I gave the wrong number of years. I
22 said four years. It's five. Doing the math is five.

23 MR. KAMINSKY: Thank you, counselor. Counsel has
24 indicated that and I appreciate it --

25 MR. McCORIE: Not that the math was wrong. I said
26 four years.

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)

2 Q It's actually five years.

3 So you had previously testified that we should reduce
4 that amount by 160,000. With counsel's kind acknowledgment, we
5 can actually reduce that amount by \$200,000; correct?

6 A If he should have been working the last five years. So
7 if the jury believes he should have been able to had found
8 employment, worked the last five years, my testimony is with
9 benefits it would be about \$40,000 a year. So that would be
10 \$200,000 offset.

11 Q There's testimony that the plaintiff can return to work
12 in some capacity. Everybody agrees on that. So if the jury
13 finds that similarly over the last five years he could have
14 returned to work, earned approximately \$40,000, this number
15 comes down about \$200,000. That's simple math?

16 A Yes. If he could have worked all five of those years,
17 yes.

18 Q And in addition if he could have gotten job earning
19 more than \$40,000 you would have to make an adjustment even
20 greater than that.

21 A Hypothetically, yes.

22 Q And hypothetically if he could have gotten a job making
23 less than \$40,000 we would have to make an adjustment the
24 opposite.

25 A Yes.

26 Q So wages, benefits, annuity, and that's what you come

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)
2 up with.

3 By the way, you mentioned that post-accident he worked
4 less hours than he did pre-accident. True?

5 A Yes.

6 Q But did you mention that his income post-accident was
7 the same as it was before the accident because he made up the
8 difference in overtime?

9 A No.

10 Q But I'm correct in saying that, am I not?

11 A I don't know. I haven't seen his income taxes.

12 Q Wait a second. You haven't seen his income taxes?

13 A Correct.

14 Q You haven't interviewed him, you haven't seen his
15 income taxes.

16 A Correct.

17 Q Do you know when a person files income taxes they make
18 deductions on their income taxes; correct?

19 A Sometimes, yes.

20 Q Do you know if Mr. Naughton made deductions on his
21 income taxes. Would the fair thing to be you to make similar
22 deductions on his wages?

23 A Yes. You know I've testified to this before. If on
24 his taxes he has recorded a certain amount of money that he had
25 to spend in order to earn the money to be an ironworker, then I
26 would take a look at what percentage he's writing off on his

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)
2 taxes versus his income and figure out a percentage to reduce
3 the wages and the vacation pay by that percentage.

4 Q And in fact in some cases, as just pointed out, you did
5 that. Including the case when I had the pleasure of
6 cross-examining you last month; correct?

7 A Correct.

8 Q But here you didn't do that.

9 A Correct.

10 Q So if, again, hypothetically, if Mr. Naughton paid
11 union dues, if he had to buy work equipment, if he lives in New
12 Jersey, if he had to travel back and forth to work, if he had to
13 pay all those expenses you made no deductions of those expenses
14 from this number?

15 A Correct.

16 Q Would you agree with me that the fair thing to do would
17 be to make those deductions from these numbers?

18 A Absolutely.

19 Q But you didn't do it?

20 A Correct.

21 Q I'll try to move it along so you don't have to stay in
22 New York.

23 Let's go to the big item and that's the future alleged
24 loss of earnings.

25 Again, would you agree with me that the fair thing to
26 do is to reach the right number?

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)

2 A Yes.

3 Q Okay. This number here, 2,275,759. Did you, and this
4 would apply to the past wages as well, did you make any
5 deduction for income taxes?

6 A No.

7 MR. McCORIE: Judge, income taxes. There's no
8 deduction here. He's talking about deduction of income
9 taxes during the trial.

10 THE COURT: Overruled.

11 Q So this money if Mr. Naughton would have earned this he
12 would have had to pay taxes on this; correct?

13 A Yes.

14 Q Let's say 25 percent, 30 percent.

15 A I don't know.

16 Q He's making a lot of money as an ironworker. Let's say
17 30 percent. Let's make it easy. Just indulge me. Let's make
18 it 33 percent. Immediately the first thing we would have to do
19 is reduce this number by one-third; correct?

20 MR. McCORIE: Objection. Because of the jury
21 charge.

22 THE COURT: Overruled.

23 A No.

24 Q Would we have to make an adjustment for whatever his
25 income tax he would have paid?

26 A On his wages and vacation, yes.

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)

2 Q On his wages and vacation. So on the 1.5 million.

3 A And the \$600,000 on the postinjury as well.

4 Q Right. But you're saying if that's the case the income
5 tax, this number 1.5 million should be reduced by a third?

6 A I don't know what the tax rate is, but whatever if he
7 had, high income, well, then he can buy an expensive house and
8 use the mortgage in interest to --

9 Q We can get all, he can move to Florida and not pay any
10 state income tax, too. Let's not get off into crazy things.
11 Let's get off in reality. Reality is he lives in New Jersey.
12 One of the highest taxed states in the country.

13 MR. McCORIE: Objection.

14 THE COURT: Just phrase your.

15 Q This would have to be reduced by a third, give or take.

16 A Have to reduce by something if you count for taxes.

17 Q And similarly, he would had to pay taxes on this offset
18 as well because if he would have gotten another job he would
19 have to pay taxes on that job.

20 A And he would be in a lower tax break.

21 Q That's my next question. So it's not an offset per
22 offset. Once at higher rate than the other; correct?

23 A Yeah. Whatever the rate is, if you did tax analysis,
24 income tax rate for the offset job would be a lower one.

25 Q So right away we can take off, let's say, \$400,000.

26 MR. McCORIE: Objection, Judge. Continued for the

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)
2 line about taxes if we can approach in the back.

3 THE COURT: I'm aware of the jury charge.

4 Objection is overruled.

5 MR. McCORIE: Yes, your Honor.

6 Q And similarly we would have to take off from this
7 number, work related expenses; correct? Just like you did for
8 the past.

9 A Yes. That would be fair to do.

10 Q But you didn't do it.

11 A Correct. Because I didn't have the information to do
12 it.

13 Q You could've have asked Mr. Naughton for it. You could
14 have but you didn't. There was nothing preventing you from
15 doing it; correct?

16 A No.

17 Q What are the average work related expenses claimed by
18 ironworkers on their tax returns?

19 A It varies quite a bit from individual to individual and
20 I've never computed an average, but I've seen some low, some
21 high. Wouldn't speculate to what the average was or even the
22 range.

23 Q Just like you told us on direct examination, when
24 you're given two numbers you take the middle from your
25 experience, consider the low, consider the high and give us the
26 middle.

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)

2 A I don't know offhand. I haven't figured out work
3 related expenses by occupation and kept that in my memory bank.

4 Q Would \$10,000 a year sound reasonable?

5 A Sounds high to me, but I don't know what --

6 Q Let's say \$5,000 a year. Does that sound reasonable?

7 A It's possible that can be reasonable. It could be a
8 little high but I'm not sure.

9 Q Let's say \$4,000. There's something that you can got
10 to deduct from this.

11 MR. McCORIE: I'll stipulate to five if you want.

12 Q So let's \$5,000. That would be \$5,000 year after year
13 after year for his work life expectancy which you said is how
14 many years?

15 A Age 62.

16 Q And he is how old now?

17 A Forty-nine.

18 Q So that's 13 years of \$5,000. That's another 65,000 we
19 can take off because it's got to be adjusted, I would imagine, a
20 little bit each year?

21 A We'll make it \$100,000. How about that? How's that
22 sound?

23 Q That sounds good for me. Take off \$100,000.

24 Now for ironworkers there comes a point in time when
25 their pension vests; correct?

26 A Yes.

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)

2 Q When would Mr. Naughton's pension had vested given his
3 work history? At what age?

4 A Well, he was already vested. You vest when you get
5 five credits. So when he had five credits you would become
6 vested at that time.

7 Q And is there anything about age 55 or age 58 that a lot
8 of people choose to retire at in this field?

9 A I think age 57, if you have 30 years of credit I think
10 it is. I'd have to double-check the pension booklet.

11 Q So at age 57 there was an incentive for people with 30
12 years experience to retire because they get, they're getting
13 full benefits at that point and there's an incentive to retire.

14 A No, there isn't a incentive, because you're also giving
15 up the wages and benefits that you would earn over those years
16 and fact that they have retirement age is beyond 57 shows that
17 people choose to work past that age.

18 Q Because they start work later, but how about in Mr.
19 Naughton's case? Just bear with me.

20 A Did he start later?

21 Q Just hear me out.

22 You projected this number to age 62. Would you agree
23 with me that his earnings at age 62 would be his highest
24 earnings because of the compounding of that growth rate year
25 after year after year?

26 A Yes.

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)

2 Q So, in other words, today if he's making -- What was
3 the figure you used for today?

4 A Wages of 80,097 a year.

5 Q That 80,000 today at age 62 would be what about? Tell
6 us.

7 A Last full calendar years two -- I'm sorry, one second.
8 Hold on.

9 (Pause in proceedings.)

10 A I apologize. Last year would be 2026. Last full
11 calendar year. And in that year using the 2.7 percent growth
12 rate would project out to just under \$111,000.

13 Q So if he were to retire at age, just by retirement age
14 61 instead of age 62, this number can be reduced by 111,000;
15 correct?

16 A Actually more.

17 Q Tell me.

18 A I figured you'd want to get to know that.

19 Q No, because it didn't get sense if it would be so low?

20 A 111,000 for wages. Another 27,027 for vacation.
21 Another 36,731 for the annuity. And take off about \$10,000 for
22 the health coverage.

23 Q So by retiring at age 61 instead of age 62 we can
24 reduce this number by hundred \$70,000.

25 A If he were to retire at that age, which shows you the
26 incentive not to retire at that age.

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)

2 Q If he were to retire at age 60 we can reduce this
3 number by another roughly \$160,000, I would imagine.

4 A Again, same response.

5 Q And obviously if he would work to age 80 we would have
6 to inflate those numbers.

7 A If he worked past 62, yes.

8 Q For whatever reason he chose age 62. And the point I'm
9 making is just by retiring at age 60, because of the compounding
10 of the growth rate, this number comes down by over \$325,000.

11 A For those two years if he retired at age 60 appears to
12 be roughly impact on, rough impact on those benefits.

13 Q Thank you.

14 Now let's talk about the growth rate.

15 Again, you had to pick a period of time to use growth
16 rate; correct?

17 A Yes.

18 Q And what you picked was 20 years.

19 A Yes.

20 Q Now by going back 20 years you captured the boom years
21 in the construction industry; correct?

22 A Part of those are good years. Part are not.

23 Q Well, let's talk about which ones were good and which
24 ones weren't.

25 Would you agree with me that it's the most recent years
26 that are the most difficult for people in the construction

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Kaminsky)
2 industry?

3 A Not for this union. Maybe in general for the economy.
4 But this union, as I stated earlier, average hours for the years
5 2008 to 2012, those five years, average hours were higher in the
6 union than they were before that.

7 Q Did this union just make a concession for a reduction
8 in pay on an hourly basis, yes or no, in order to collectively
9 bargain work at different projects in New York so they wouldn't
10 lose them to nonunion workers?

11 MR. McCORIE: Objection.

12 THE COURT: Kind of --

13 MR. McCORIE: Different union from last trial.

14 It's not this union.

15 Q Have unions been making concessions collectively
16 bargained for lower pay?

17 MR. McCORIE: Objection.

18 THE COURT: Let's restrict ourselves to Mr.
19 Naughton's union.

20 (Pause in proceedings.)

21 Q The legally required benefits, that's social security,
22 isn't it?

23 A Primarily.

24 Q That's what all employees are required to pay.

25 A Yes. That's why it's called legally required.

26 Q That's after a certain amount of income you reach a

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Lombardo)
2 level where you don't pay any more; correct?

3 A Yes. It's well over, it's over the amount I'm assuming
4 he would earn.

5 Q But that's something that his next employer would have
6 to pay as well; correct?

7 A Sure. Any employer would have to pay that.

8 Q Okay.

9 Lastly, again, you've used different things, you've
10 used 60 year periods of time, you've used 20 year periods of
11 times. If we use ten year averages across the board, all the
12 numbers in all the categories come down; correct?

13 A All the numbers would be less if I use ten year
14 average.

15 Q And if we used the last five years where there has been
16 virtually zero growth in the economy, in fact, in some
17 categories of some coming down, if we use the last five years
18 all the numbers charts would have to come down?

19 A Yes.

20 MR. LOMBARDO: Just a couple of minutes, Judge.

21 CROSS-EXAMINATION

22 BY MR. LOMBARDO:

23 Q Good afternoon.

24 A Good afternoon.

25 Q Where did you fly in from?

26 A Louisville, Kentucky.

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Lombardo)

2 Q Who paid for that flight?

3 A The expenses will be billed to Sacks and Sacks.

4 Q And your ride from the airport, what airport?

5 A LaGuardia.

6 Q Took car here?

7 A Yes.

8 Q Those expenses being paid for as well?

9 A Yes.

10 Q Lunch as well?

11 A Yes.

12 Q Dinner at the airport going home?

13 A Yeah.

14 Q How much are you being paid to come here?

15 A Firm charges 2900 day rate, plus whatever my actual
16 expenses are.

17 Q Do you use the replacement rate of, I think, \$34,000
18 that if he goes back to work in another capacity; correct?

19 A Right.

20 Q If he goes back and furthers his education and gets
21 better job paying more than \$34,000 than your number only
22 becomes speculative number; correct?

23 A He could do that and again the number was based on
24 vocational opinions that I had, but if he could earn more than
25 that, of course, the number would be reduced more.

26 Q At this point it's only speculative as to what he may

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Lombardo)
2 or may not do; correct?

3 A Well, as an economist I don't opine to what a disabled
4 person can do, but the two vocational reports that I reviewed,
5 including plaintiff's and defendants, would be fairly consistent
6 with what is being done here.

7 Q Do you hold any professional licenses?

8 A There aren't any in my profession.

9 Q And you taught in Illinois.

10 A Yes.

11 Q Have you taught in New York?

12 A No.

13 Q Are you familiar with the construction industry here in
14 New York City?

15 A Yes.

16 Q Have you done any studies about the future of the
17 construction industry here in New York City?

18 A Nothing vague like that.

19 Q Have you read any recent articles about what the state
20 legislature will be doing with the construction industry here in
21 New York State?

22 MR. MCCRORIE: Objection.

23 Q Have you read any --

24 THE COURT: Overruled.

25 A No, I have not.

26 Q And don't you think that information would be important

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Lombardo)
2 to determine the future of the construction industry in New York
3 before you post these numbers? Would that be a factor you would
4 want to know about?

5 A I don't know what you're talking about. So, I mean,
6 based on what I've seen, I have his work history, what he's
7 worked, I've seen average hours for the union have been fairly
8 consistent the last five to ten years.

9 Q You've made projections for 15, 20 years into the
10 future by going back.

11 Have you looked at any other indicators that would
12 indicate that the future would support your theories?

13 A I got no reason to believe work would not be available
14 in Local 580.

15 Q So you wouldn't have done that research anyway;
16 correct?

17 A No.

18 Q Let me ask you something. This is all about income to
19 Mr. Naughton, is it not?

20 A In terms of the wages and the benefit loss, yes.

21 Q Did you look at his income tax returns?

22 A No.

23 Q Did you determine in the last five years he's had any
24 other sources of income?

25 MR. McCORIE: Objection.

26 Q They would go to your past future earnings.

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Lombardo)

2 THE COURT: Sustained. He's only talking about
3 lost earnings from the position that he had with the union.

4 Q But if he had an alternate form of employment in the
5 last five years, his past lost earnings would be different,
6 correct, than what you posted \$640,000.

7 A If he actually worked for someone and got paid for it,
8 whatever he earned through that work should be subtracted. I'm
9 not aware of anything like that.

10 Q You didn't even ask him about that.

11 MR. MCCRORIE: Objection.

12 THE COURT: Overruled.

13 A I didn't talk to him.

14 Q Now, your numbers with the growth rates for the
15 futures, that's what the value is in the future; correct?

16 A Future value, yes.

17 Q You didn't do any numbers for today's values, if he's
18 getting paid today.

19 A No. The issue I understand is not present value.

20 Q But today's money is worth a lot less than tomorrow's
21 money.

22 MR. MCCRORIE: Objection.

23 THE COURT: As a general proposition.

24 Q General question.

25 A You're asking about a concept of present value which, I
26 understand, is not the rule as to what I'm supposed to be

1 Ronald, Missun, Ph.D. - for Plaintiff - Cross (Mr. Tosca)
2 testifying to.

3 Q What year did Mr. Naughton join the union at? Is it
4 1995?

5 MR. MCCRORIE: Stipulated.

6 THE COURT: Stipulated. It's 1995.

7 A September '95.

8 Q How old was he?

9 A Let's see in '95, '95 he would have been 30.

10 Q Okay. So he started later in life; correct?

11 A Little bit later. There are people in the union that
12 start in their 30s past age 30. There's some start at age 19.

13 Q So if he started at 19 to go to age 65 or 60 he would
14 had worked for the union 41 years.

15 A Yes.

16 Q Last question.

17 Mr. Kaminsky has questioned you in other cases and just
18 recently about three weeks ago?

19 A Yes.

20 Q Did you notice he got his haircut since then?

21 MR. LOMBARDO: No further questions.

22 MR. TOSCA: If I may.

23 THE COURT: Mr. Tosca has a question or two.

24 CROSS-EXAMINATION

25 BY MR. TOSCA:

26 Q Good afternoon.

1 Ronald, Missun, Ph.D. - for Plaintiff - Redirect (Mr. McCrorie)

2 Sir, you had projections for lost benefits and part of
3 that included insurance; is that correct?

4 A Yes. Also health coverage.

5 Q Talking about health coverage. So that would cover his
6 medical expenses in the future; am I correct?

7 A To my knowledge, the health coverage doesn't cover the
8 cost in the life care plan.

9 Q Health coverage does not cover -- You're saying if he
10 applied for insurance it would not cover health expenses related
11 to this?

12 MR. MCCRORIE: Objection.

13 THE COURT: Sustained.

14 MR. TOSCA: No further questions.

15 MR. MCCRORIE: Just quickly.

16 REDIRECT EXAMINATION

17 BY MR. MCCRORIE:

18 Q Whether it was last month or any time, are you ever
19 asked in a court in New York to reduce by income taxes?

20 A No.

21 Q And Mr. Kaminsky doesn't even ask that last month.

22 MR. KAMINSKY: I did.

23 Q If Mr. Lombardo just asked you, just like on this you
24 did a straight projection, there were no reductions for work
25 related expenses and if we took five thousand you said it would
26 be 100,000 off the 2.2 million.

1 Ronald, Missun, Ph.D. - for Plaintiff - Redirect (Mr. McCrorie)

2 A Yes.

3 Q Same thing. Mr. Lombardo just said what if he goes to
4 college. You'll have to go take off the cost of going to
5 college, approximately \$50,000 a year for four years.

6 MR. LOMBARDO: Objection, Judge. He's testifying.

7 THE COURT: Sustained.

8 Q The cost of if, like he says, at the age of 49, he goes
9 back to school, whether it's to finish biomedical degree or to
10 start a new one, you would have to take off the cost of either
11 two or four year college and not give him the replacement job
12 during that time period; correct?

13 A Correct. It would be both extra cost and that's why
14 people around 50 usually don't go to college at that point
15 because the return, you couldn't get as many years return on it.

16 Q This affidavit that I'm going to hand up to you printed
17 from the Internet from something called Trial Guide. Is that
18 from your company?

19 A No.

20 Q So you don't ask anyone to swear to secrecy whether
21 they pay a \$1 or \$100 for your company's book?

22 A No.

23 Q You'll sell it to any vocational expert, any defense
24 attorney, anyone who wants the book to read about, right?

25 A Correct.

26 Q Whether or not the 580 is in the green or not, you used

1 Ronald, Missun, Ph.D. - for Plaintiff - Redirect (Mr. McCrorie)
2 the 20 year average because we don't necessarily knew they maybe
3 were not in the green last five years, it technically wouldn't
4 make a difference under your 20 year average whether or not
5 they're in the green right now?

6 MR. KAMINSKY: Objection, leading.

7 THE COURT: Overruled.

8 Q Would it be make a difference whether they're in the
9 green now when you're using the 20 year average?

10 A Twenty year average includes time period that they,
11 again, were putting in 30 percent more into the pension fund
12 with getting no benefit. That's almost a third of that time
13 period, six of 20 years. So that's considered in the average.
14 So they may be able to increase as soon as next year or even
15 later this year.

16 Q Just going to stop you. Only because I got more
17 questions to ask you.

18 The thing that you were shown about a company in
19 Upstate New York, that will be explained tomorrow by Mr.
20 Naughton, that may have had a little small job downstate that
21 didn't have any more job, left for them.

22 MR. LOMBARDO: Objection. Counsel is testifying.

23 THE COURT: Sustained. Ask a question.

24 Q You weren't asked anything about whether someone was
25 laid off or not; you just assumed they weren't working for the
26 disability. Correct?

1 Ronald, Missun, Ph.D. - for Plaintiff - Redirect (Mr. McCrorie)

2 A Yes.

3 Q Just the same as you didn't assume that like the
4 average World Trade Center work that he could have gone out and
5 made 3000 hours.

6 MR. LOMBARDO: Objection. Counsel is testifying.

7 THE COURT: Sustained.

8 Q Were you asked if you did any studies or if you looked
9 into whether or not there was work available in the city, as if
10 there was no construction going on out there?

11 MR. LOMBARDO: Objection.

12 THE COURT: What's the question?

13 Q Are you aware that the World Trade Center buildings
14 began going under construction in 2010, summer of 2010?

15 A I wasn't sure of the exact time.

16 Q Did that create in your --

17 MR. LOMBARDO: Objection, your Honor. Relevancy.

18 THE COURT: Let me hear the question.

19 Q Did that create construction jobs?

20 THE COURT: The question answers itself, doesn't
21 it? Sit down. Next question.

22 Q And this business about retiring at 57, fact that he
23 started later in life, would that give you an indication that
24 you were asked to assume what his testimony would be, but that
25 he's not going to retire -- withdraw that -- he would be in the
26 average retirement at 62 that he started later at 30 years old?

1 Ronald, Missun, Ph.D. - for Plaintiff - Redirect (Mr. McCrorie)

2 A Average retirement age overall is 62. Given that he
3 started later, I don't think would materially impact that
4 because it's age 30 is not extremely late.

5 Q And this will be the last question.

6 In terms of you're being conservative or not and not
7 taking off the \$5,000, you also didn't account for, as Mr.
8 Kaminsky pointed out, the overtime that he's always made and
9 could have made in the future. You did straight hours; correct?

10 A I believe the hours --

11 Q Into the future.

12 A I believe the hours reported on the pension summary
13 sheet actually include overtime.

14 Q But in terms of the future. Understood.

15 MR. MCCRORIE: Nothing further.

16 THE COURT: You didn't use any overtime rates. You
17 used just use straight time.

18 THE WITNESS: I used.

19 Q Straight time not overtime, meaning \$43.

20 A I didn't attach overtime to those figures.

21 MR. MCCRORIE: Nothing further.

22 THE COURT: Mr. Kaminsky.

23 MR. KAMINSKY: Nothing further. Again, hope you
24 appreciate what --

25 THE COURT: Nobody is offended by anything.

26 You may step down.

1 Ronald, Missun, Ph.D. - for Plaintiff - Redirect (Mr. McCrorie)

2 Ladies and gentlemen of the jury, we are concluded
3 for the day. Please don't do any research, economic or
4 otherwise, overnight and we'll see you tomorrow morning at
5 10:00. Don't discuss the case with anybody.

6 COURT OFFICER: All rise. Jury exiting.

7 (Whereupon, the jury exited the courtroom.)

8 (Whereupon, the trial matter was adjourned to the
9 following day.)

10 (Continue on next page.)

11
12 * * * *

13
14 Certified to be a true and accurate transcript of
15 the stenographic minutes taken within.

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18 William D. Leone
19 Senior Court Reporter.
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