TRIAL TRANSCRIPT OF DEBRA SABATINI DWYER, M.S., Ph.D.; 2017 Trial Trans. LEXIS 495

Supreme Court of New York, Special Term, Nassau County

Index No. 605234-15, Index No. 605146-15

September 28, 2017

Reporter
2017 Trial Trans. LEXIS 495 *

AMADOR PADRON, Plaintiff, -against- KEVIN O'BRIEN and ROBYN O'BRIEN, Defendants. JENNIFER LOPEZ, Plaintiff, -against- KEVIN O'BRIEN and ROBYN O'BRIEN, Defendants.

Expert Name: Alan M Leiken, Ph.D.Dr. FRANK RICHTER, III, M.D.Debra Sabatini Dwyer, Ph.D., M.S.

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Counsel

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FOR THE PLAINTIFF JENNIFER LOPEZ: ROBERT K. YOUNG & ASSOCIATES, P.C., 2284 Babylon Turnpike, Merrick, New York 11566, BY: GARY J. YOUNG, ESQ. And NICOLE CHAN, ESQ.

FOR THE DEFENDANTS: PICCIANO & SCAHILL, 1065 Stewart Avenue, Bethpage, New York 11714, BY: GILBERT J. HARDY, ESQ.

Judges

BEFORE HONORABLE DENISE L. SHER, Justice, and a jury

Proceedings

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[9]Mineola, New York

[23]

W I T N E S S:

[24]DEBRA DWYER

[25]KRISTIN YOUNG, RPR
Official Court Reporter

[2]

[1]THE COURT: Are we ready for the jury?

[2]MR. HARDY: Yes.

[3](Whereupon, the jury entered the courtroom.)

[4]THE COURT: Members of the jury, I **[*2]** hope you had a

[5]good evening.

[6]Welcome back.

[7]Thank you for your patience.

[8]We had some legal issues, I don't want you to

[9]think when I tell you to come early I keep you waiting but

[10]there are certain things that come up all time that you

[11]cannot participate in, so that's the reason.

[12]We are now continuing with Plaintiff Padron's

[13]case, Mr. Reiner.

[14]MR. REINER: At this time Plaintiff Padron calls

[15]Debra Dwyer.

[16]D E B R A D W Y E R,

[17]a witness called on behalf of the Plaintiff Padron, after being

[18]duly sworn, took the witness stand and testified as follows:

[19]THE CLERK: State your name and address for the

[20]record.

[21]THE WITNESS: Debra - Dwyer D-W-Y-E-R, 17

[22]Springbriar Lane, Springbriar one word and that's in

[23]Centereach 11720.

[24]THE COURT: Just a couple of admonitions. If you

[25]hear an objection and you will, if I overrule it, you can

[3]

[1]answer the question. If it's sustained, you can't.

[2]I'll help you as you go along.

[3]If you can keep your voice up so the last juror

[4]can hear you.

[5]DIRECT EXAMINATION

[6]BY MR. REINER:

[7]Q Good morning, **[*3]** Professor Dwyer.

[8]A Good morning.

[9]Q Tell us what you do for a living?

[10]A I'm a faculty member and now a Dean at Stonybrook

[11]University.

[12]I'm an economist, so I have appointments in the

[13]economics department. I have an affiliation to the health

[14]sciences center because I'm a health economist and I also have

[15]an affiliation in the college of engineering where I teach

[16]economics and public policy to engineers.

[17]Q Can you tell us about your educational background?

[18]A I got my bachelor's degree from Queens College in

[19]Flushing, that was in English literature, and economics I went

[20]on to get my Master's and my PhD from Cornell University and

[21]from there I did a post doctoral fellowship at Syracuse

[22]University in the Center For Policy Research where I wrote a

[23]book chapter in collaboration with others comparing health

[24]systems and disability systems internationally.

[25]Q Professor, can you tell us about your professional

[4]

[1]background other than your current employment?

[2]A I spent a couple of years working in Washington, D.C.

[3]for the Social Security Administration in the division of

[4] **[*4]** economic research where I continued my research in the areas of

[5]labor and health commission for economics, so I studied

[6]basically how health effects work, the interaction between

[7]health and labor and then I came to Stonybrook University. I've

[8]been there for about 19 years so I started off as an assistant

[9]professor in the economics department, I grew into a position of

[10]chairperson in health sciences and now I'm an assistant Dean for

[11]strategic planning and research for the University, that means I

[12]spent a lot of my time on finance and budget kind of issues and

[13]strategic planning for the university while I continue to mentor

[14]PhD students. I mentor students from high school to the PhD

[15]level and I do some economics and public policy.

[16]Q How long ago did you become a Dean?

[17]A Only a couple of months, as of July.

[18]Q Congratulations.

[19]A Thank you.

[20]Q Do you have any professional affiliations in the field

[21]of economics?

[22]A I do.

[23]Q Can you tell us about those?

[24]A You mean professional organizations?

[25]Q Organizations?

[5]

[1]A The American Economic Association the **[*5]** Society for

[2]Labor Economists and Eastern Economics Association.

[3]Q And in addition to your professional background, do

[4]you do legal consulting work like you're doing here today?

[5]A Yes, I do.

[6]Q And if you had to put a percentage on it the amount of

[7]time that you spend on your job at Stonybrook mentoring students

[8]and your legal consulting work, would you be able to put a

[9]percentage?

[10]A I would say less than five percent consulting most of

[11]my time is spent at the university.

[12]Q But you have testified as an expert in the field of

[13]economics before, correct?

[14]A Correct.

[15]Q And where have you testified?

[16]A I've testified in the Bronx, Queens, Brooklyn,

[17]Westchester, Nassau County, Suffolk County.

[18]Q Approximately how many times have you testified

[19]before?

[20]A I started this in 2012. I probably average about one

[21]a month of testifying so it was about 60. 65 maybe.

[22]Q And have you ever been denied qualifications as an

[23]expert in the field of economics before?

[24]A No.

[25]Q My office retained you as an expert in this case,

[6]

[1]correct?

[2] **[*6]** A Yes.

[3]Q How much have you been compensated for your time?

[4]A $ 4,400.

[5]Q And if you were not here in court today where would

[6]you be?

[7]A At the university in the Dean's Office.

[8]MR. REINER: Judge, at this time, I proffer

[9]Professor Dwyer in the field of economics.

[10]THE COURT: Any objection?

[11]MR. HARDY: Other than the standing that it's not

[12]proper in state court, but that's fine.

[13]THE COURT: So qualified.

[14]Q Professor Dwyer, are you familiar with life care

[15]plans?

[16]A Yes.

[17]Q Can you tell the jury what those are?

[18]A A life care plan is put out by a medical expert, a

[19]medical professional that determines the future health care

[20]needs, so what health care services, how often for how many

[21]years of people who are in need of health care services, so it's

[22]a plan.

[23]Q And can life care plans help guide you in your

[24]analysis of the costs of future health care?

[25]A Sure.

[7]

[1]I'm not a medical doctor so I have no way of knowing

[2]what type of services the value of those services, I would have

[3]to rely on a medical expert. I -- my expertise **[*7]** comes in what do

[4]I think is going to happen to the prices for those services, how

[5]long do I think this person is going to live for, how many years

[6]do I have to project what those costs are going to be so that I

[7]can come up with a total value of the loss.

[8]Q And in this particular case, there came a time again

[9]where my office retained your services to give us an opinion

[10]regarding the cost of you future health care for Amador Padron?

[11]A Yes.

[12]Q What records did you review in connection with many

[13]Mr. Padron's case?

[14]A I looked at the November 2016 report of Dr. Edwin

[15]Richter.

[16]Q And following your review of Dr. Richter's report, did

[17]you calculate the future cost of health care for Mr. Padron

[18]based upon the date, date that was provided by Dr. Richter?

[19]A Yes.

[20]Q Can you explain to the jury generally how you come up

[21]with those calculations?

[22]A Basically Dr. Richter's life care plan provides me

[23]with the categories of medical services that Mr. Padron would

[24]need, so for example if the pain specialist is one of the

[25]physicians that he recommends that he would need for **[*8]** the rest of

[8]

[1]his life, he would say how often he would have to see that

[2]doctor, he also gives me the current price, the value of that

[3]service. The prices vary for different doctors' visits

[4]depending on the intensity of the treatment need.

[5]As an economist, I don't know that intensity. He

[6]gives me the starting value of the services today, how often he

[7]would have to go within a year and then what I do is take those

[8]numbers and I project them over the rest of my -- for Mr.

[9]Padron's life what the cost would be and I sum them up.

[10]Q Did you take into account Mr. Padron's age when

[11]calculating your numbers?

[12]A Yes, I did.

[13]Q And did you also then take into consideration Mr.

[14]Padron's life expectancy?

[15]A Yes.

[16]Q And how do you do that?

[17]A So I rely on statistics, medical statistics to project

[18]how long somebody is going to live. There is a lot of

[19]uncertainty when you're projecting into the future. I have to

[20]make assumptions, which is something we as economists get

[21]criticized for.

[22]I'm an expert in the area. These assumptions are

[23]based on my expertise knowing **[*9]** what is going to happen in the

[24]markets and also historical trends using federal statistics when

[25]it comes to the life expectancy the National Center of Health

[9]

[1]Statistics gives a lot of data based on your gender and the year

[2]you were born, what your life expectancy is going to be.

[3]I rely on those sources. I came up with a life

[4]expectancy of Mr. Padron of 77.9 that is based on Pattern Jury

[5]Instructions, what is used in the Courts.

[6]Q When you come up with your calculations, Professor

[7]Dwyer, do you look forward in terms of the growth rate?

[8]A Yes.

[9]Q Do you also look backward for the history?

[10]A Yes, I have to look backwards so basically the way we

[11]make our projections or the assumptions on what is going to

[12]happen in the future is based on what happened in the past and

[13]it has been reliable, pretty consistent so what I did for health

[14]care growth rates what I'm looking for is if physical therapy

[15]costs $ 130 today, what is that same visits going to cost ten

[16]years from now. We know it's going to be higher like the price

[17]of gas is going to be higher today and the price of a metro ride

[18] **[*10]** is higher than today. I look back at the things I have to

[19]decide when I look back is how far back I do have to go. I go

[20]far enough back to capture what I refer to is a business cycle

[21]or a period of time that represents the remainder of

[22]Mr. Padron's life and so it's 25 years that I go back for health

[23]care.

[24]I look at the averages overall so on average health

[25]care prices have been rising by four percent per year over the

[10]

[1]last 25 years. Some categories it's been higher, so health

[2]insurance prices have been rising faster than four percent

[3]something like physical therapy rising at 2.5 percent.

[4]The Bureau of Labor Statistics breaks this down by sub

[5]categories of medicine and I use those sub categories to project

[6]what is going to happen to prices in the future.

[7]Q Do you also consult with government data for

[8]statistics?

[9]A Yes.

[10]Q Based upon the records that you reviewed as well as

[11]the applicable data that you also reviewed did you make a

[12]calculation as to Mr. Padron's future health care costs?

[13]A I did.

[14]Q And did you put your findings in some sort of a chart?

[15] **[*11]** A Yes.

[16]MR. REINER: I'm going to ask that this be marked

[17]for identification.

[18](Whereupon, Plaintiff Padron's Exhibit was marked

[19]for identification, 4.)

[20]Q I ask that you take a look at what has been marked as

[21]Plaintiff's Exhibit 4, do you recognize that?

[22]A Yes.

[23]Q What is that?

[24]A That is the report that I produced summarizing my

[25]findings on the future health care cost for Mr. Padron.

[11]

[1]Q That a fair and accurate copy of the original chart

[2]that you prepared?

[3]A Yes.

[4]Q I'm going to ask at this time if Professor Dwyer can

[5]step down and utilize the projector to explain to the jury her

[6]findings?

[7]THE COURT: Okay.

[8]Q Professor Dwyer, I want you to assume that Mr.

[9]Padron's date of birth is August XX, 1963, okay.

[10]And I want you to assume that the testimony of

[11]Dr. Richter, who also prepared that report, is his testimony

[12]being in accordance with his report.

[13]And are you able to form an opinion as to the future

[14]medical care costs for Mr. Padron to a reasonable degree of

[15]economic certainty?

[16]A Yes.

[17]Q Can you please **[*12]** discuss your findings regarding the

[18]cost of future medical care to the jury?

[19]A Sure.

[20]So I'm just going to go through category by category

[21]I'm going to read every single number so you're bored out of

[22]your mind, but what I will do is explain in more detail explain

[23]the first column and the same procedure for all of the others.

[24]So in the category of pain specialist, Dr. Richter, according to

[25]his report said that Mr. Padron should visit a pain specialist

[12]

[1]five times per year at $ 155 per year that comes out to $ 775 per

[2]year.

[3]I start the losses October 1st, 2017.

[4]Future health care loss means starting into the

[5]future. So I only add in a portion of this a quarter of this

[6]number, but I put the full amount so you see what the annual

[7]cost would be, so it's $ 775 worth of pain specialist visit and

[8]2017 beginning in October 1st.

[9]So the first full year of the loss would be 2018 and

[10]you see the number's higher, that's what I was explaining. The

[11]$ 798 means the same five visits are going to cost $ 798 next

[12]year. That's a projection. I don't have a crystal ball, but I

[13]am very confident **[*13]** in these numbers.

[14]So I use the three percent growth rate for doctor

[15]visits like pain specialists that is based on the Bureau of

[16]Labor Statistics over the last 25 years, that is what has been

[17]happening with prices. I have no reason to believe it wouldn't

[18]go up by three percent for next year and the year after that so

[19]the reason these numbers are going up is because they're all

[20]rising by three percent per year, so if we go down to the bottom

[21]we see that by the year 2040 the same five visits are going to

[22]cost $ 1,530.

[23]The last year is only a partial year because I said

[24]before that his life expectancy is 77.9, that is what I used.

[25]So based on his birthday that brings us into the year 2041, but

[13]

[1]only half way through the year is when he's expected to pass.

[2]The total cost over the remainder of his life for

[3]those pain specialist visits is $ 26,887.

[4]So now I'm going to do the same thing for every other

[5]category. And just tell you what the starting point is the

[6]growth rates and the total.

[7]So the second category, physical therapy in the report

[8]Dr. Richter said 30 visits per year **[*14]** at $ 130 per visit my
[9]understanding based on a conversation with Mr. Reiner this
[10]morning is that he said because that included physical therapy
[11]for the wrist, we're going to take off 20 percent from that.
[12]So it's actually 24 visits per year at $ 130, so these
[13]numbers are going to be slightly higher.
[14]I did do the calculation instead of $ 3,900 per year
[15]we're going to start at $ 3,120 per year the growth rate that I
[16]used for physical therapy is 2.5 percent. As I said, the prices
[17]for what I said not primary care doctor visits, things like
[18]occupational therapy or physical therapy, the growth rate has
[19]been 2.5 percent slower than the general rate of inflation that
[20]$ 3,120 over the remainder of his life would end up with a total
[21]cost of physical therapy for the remainder of his life of
[22]$ 106,930.
[23]Next category are the medications, the prescription
[24]painkillers that he's been prescribed. Medicine as you probably
[25]have heard pharmaceutical prices rise higher than the general
[14]
[1]rate of inflation. I'm using a conservative system of
[2]3.8 percent for the growth of pharmaceuticals, the total annual
[3] **[*15]** cost for medication is $ 3,480 and if I total that over the
[4]remainder of his life rather than taking time to keep forward
[5]and I'm going to read it to you, the total cost is for
[6]medication is $ 134,216 over the remainder of his life.
[7]Next category are the MRIs. And he would need three
[8]every four years or so $ 1,600 split over 4 years, 3 times comes
[9]out to an annual cost of $ 1,200 so I annualized all of them.
[10]And MRI we use a growth rate of three percent and if
[11]you grow that over the remainder of his life the total cost for

[12]those MRIs would be $ 41,631.

[13]The last two columns as you can see have mostly

[14]dashes. Those are surgeries so the total cost of the surgeries

[15]Dr. Richter gave me a range 47,000 to some higher number what I

[16]use is the midpoint of that range which is $ 56,000.

[17]Now he says that these surgeries would be needed 10 to

[18]15 years out, so I took the midpoint of that as well and I had

[19]them in the 12th year so what matters is which year because that

[20]is how for how long I have to grow the price.

[21]So if it costs $ 56,000 in 2017 for a knee replacement

[22]in 12 years in the year **[*16]** 2029 that same surgery is going to cost

[23]$ 89,658.

[24]Dr. Richter estimated that both the right knee and the

[25]left knee would cost the same, which makes sense so the two

[15]

[1]surgeries each are $ 89,658 and that is the total for lifetime

[2]since he's only going to have it once.

[3]So I can give you the total loss which is a little bit

[4]different than the one that is on the chart anyway since I took

[5]out the 20 percent from the physical therapy.

[6]The total health care loss commencing October 1st

[7]would be $ 488,980, that's for all of his medical services or for

[8]over the remainder of his life related to this for his injury.

[9]Q All the opinions you just gave regarding the numbers

[10]are those to a reasonable degree of economic certainty?

[11]A Yes.

[12]Q The witness can take the stand.

[13]Professor, when you're making these calculations, why

[14]not just calculate the number of treatment by the cost and just

[15]add up the years?

[16]A That's something you could have done.

[17]What would end up happening is Mr. Padron would not

[18]have enough so cover all of the experiences since we know prices

[19] **[*17]** go up so if you don't grow those prices, the number of physical

[20]therapy visits he could have 50 years from now is less than

[21]five.

[22]Q So within a reasonable degree of economic certainty,

[23]do you have an opinion whether those costs will remain the same

[24]over the next 30 or so years?

[25]A I have no reason to believe they would stay the same

[16]

[1]so given my expertise, they're going to go up. I'll leave it at

[2]that.

[3]Q And you're not a medical doctor, correct?

[4]A Yes.

[5]Q And that's why you rely on Dr. Edwin Richter's report?

[6]A Yes.

[7]Q And if Dr. Richter's numbers are off, fair to say,

[8]that you would have a different opinion, true?

[9]A Yes.

[10]Q And if Mr. Padron would need more medical care than

[11]Dr. Richter suggests, your numbers would actually go up, right?

[12]A Yes.

[13]Q And on the other side of that, if you needed less,

[14]your numbers would go down?

[15]A Yes.

[16]Q And if the growth rate was lower, it would be less of

[17]a cost, correct?

[18]A Yes.

[19]Q And if the growth rate was higher, he would have a

[20]higher cost?

[21]A Yes.

[22] **[*18]** MR. REINER: Thank you, Professor Dwyer.

[23]I appreciate your time.

[24]THE COURT: Could I ask a question?

[25]What date of birth did you use?

[17]

[1]THE WITNESS: August XX, 1963.

[2]THE COURT: Cross.

[3]MR. HARDY: Yes.

[4]CROSS-EXAMINATION

[5]BY MR. HARDY:

[6]Q Good morning, Dr. Dwyer.

[7]My name is Gil Hardy. I represent the defendants.

[8]I have a couple of questions for you.

[9]The -- so the report that you generated in connection

[10]with this litigation when was that?

[11]What is the date of that report?

[12]A September 23rd, 2017.

[13]Q And was there a report prepared in November of 2016?

[14]A Yes, there was.

[15]Q And who -- so there are two reports?

[16]A Yes.

[17]Q And the second report, what does that consist of, just

[18]a chart?

[19]A Yes.

[20]Q So the first report is actually a written report

[21]consisting of three pages, right, and then charts in the back?

[22]A Yes.

[23]THE COURT: Meaning first September?

[24]Q No, November 16, 2016, report?

[25]THE COURT: Okay.

[18]

[1]Q And who -- your name is on that report, correct?

[2] **[*19]** A Correct.

[3]Q And as well as who?

[4]A Dr. Allen Leiken.

[5]Q Dr. Leiken.

[6]Dr. Leiken actually prepared that report, is that

[7]correct?

[8]A Yes.

[9]Q And did you ever review that report before coming here

[10]today?

[11]A Yes.

[12]Q When did you review that report?

[13]A We consult when it first comes up and then again

[14]recently.

[15]Q Recently.

[16]And everything that he wrote in here you think is

[17]accurate?

[18]A So that report had been updated based on updated

[19]information.

[20]But given the information that he had at the time, yes

[21]that was accurate.

[22]Q And included in that report were was what -- what were

[23]you making, what were you figuring out in that report, what

[24]categories?

[25]MR. REINER: Just again the same objection as

[19]

[1]yesterday, which you sustained regarding certain claims

[2]that have been withdrawn.

[3]THE COURT: Mr. Hardy.

[4]MR. HARDY: I'm going to cross-examine her on the

[5]report.

[6]I can't cross-examine her on the report?

[7]THE COURT: You can, but I'm going to restrict

[8]you from going into certain areas. **[*20]**

[9]Q So what was included in that report, what areas?

[10]MR. REINER: Judge, the answer to that question

[11]is going to cross right into --

[12]THE COURT: I'm going to allow a little leeway.

[13]Do you know what was included in that report?

[14]THE WITNESS: Besides just future health care

[15]loss, it also included a loss in earnings.

[16]Q And loss of Social Security retirement income?

[17]A Yes.

[18]Q And that's been eliminated now?

[19]A Yes.

[20]Q Did a new report get drafted at some point?

[21]A No, all we did is update the chart.

[22]Q So several columns were removed from the chart?

[23]A Yes.

[24]Q Okay.

[25]And so we were talking about -- I'm sorry for another

[20]

[1]second here.

[2]Doctor, Dr. Leiken, is he on the faculty at

[3]Stonybrook?

[4]A He just retired.

[5]Q He just retired.

[6]Does he testify in court also?

[7]A Yes.

[8]Q He's testified over 500 time in the past?

[9]A I don't know how many times, that's probably fair

[10]enough.

[11]Q Was there a period of time when you both worked

[12]together at Stonybrook?

[13]A Yes.

[14] **[*21]** Q And isn't it a fact, ma'am, that you would sort of be

[15]in charge of his scheduling for his classes?

[16]A Yes.

[17]Q So isn't it true, ma'am, that in the past you made

[18]sure that his scheduling for trial testimony didn't conflict

[19]with his duties at the school is that true?

[20]MR. REINER: I'm going to object.

[21]Professor Leiken is not on the stand right now.

[22]THE COURT: Overruled.

[23]A So if I recall the question what you said was that I

[24]scheduled him based on his consulting work?

[25]Q Yes, based on his need to testify in court?

[21]

[1]A Absolutely not.

[2]Q And now you've been testifying for how long?

[3]A Since 2012, so about five years.

[4]Q And under the first line of the report under future

[5]cost of health care you wrote or it is written -- you didn't

[6]write it, this paragraph?

[7]A No, he wrote it first.

[8]Q He wrote it.

[9]You agree with everything he wrote?

[10]A Yes.

[11]I didn't catch anything.

[12]Q And it's for -- it states Mr. Padron requires health

[13]care?

[14]A Yes.

[15]Q And you agree with that?

[16]A Yes.

[17]Q And **[*22]** that's not your call, that's the call of a doctor,

[18]right?

[19]A Correct, based on Dr. Richter, a medical expert.

[20]Q And if he doesn't require health care, then the

[21]report, there is no need for the report?

[22]A Yes.

[23]Q Are you aware of whether or not he was actually

[24]receiving health care at the time of this report was written?

[25]A I was not.

[22]

[1]Q You don't know either way, right?

[2]A It's not relevant for my work.

[3]Q Of course.

[4]Okay.

[5]By the way, the various categories here and I'm

[6]looking at the paragraph that says future cost of health care

[7]that includes the cost of medications, that goes up?

[8]A Yes.

[9]Q Cost of physical therapy?

[10]A Yes.

[11]Q Cost of surgeries?

[12]A Yes.

[13]Q And then the other costs are increased by the way,

[14]what is other costs?

[15]A That would be everything that grows at the rate of

[16]three percent because a lot of things grew at three percent that

[17]would be the pain specialist, any MRI, any diagnostic.

[18]Q So isn't it true that you obtained these from the

[19]Bureau of Labor and Statistics?

[20] **[*23]** A Yes.

[21]Q And the cost of really almost all consumer goods

[22]including medical care services you can look that up on the

[23]website?

[24]A Yes, you can.

[25]Q And the government keeps track of past prices and

[23]

[1]their increases, right?

[2]A Yes.

[3]Q And on all sorts of goods and services everything from

[4]bananas to doctor services, right?

[5]A Yes.

[6]Q And so that is what for -- that was the source that

[7]you used to come up with or that Dr. Leiken used to come up with

[8]these figures?

[9]A So the actual growth rates is keeping track of growth

[10]rates is what I do, so Dr. Leiken wrote the first report but we

[11]consult on a regular basis on what is going on with growth rates

[12]and because I use them in my research and in the classroom, for

[13]us it's common knowledge. We're using what is standard and

[14]practice.

[15]Q Okay.

[16]Well, did you for this particular matter did you

[17]consult with -- do you know if Dr. Leiken got these numbers from

[18]using those figures from the National Bureau of Statistics?

[19]A Labor statistics.

[20]Q That is where he got them from?

[21]A We do **[*24]** that together, yes.

[22]Q When you do that, there are categories that are for

[23]medical care, correct?

[24]A Correct.

[25]Q And if you just looked at medical care overall, you

[24]

[1]can actually look at that figure, it kind of groups them all

[2]into one, aggregates them?

[3]A Yes.

[4]Q And I believe in the report that you indicated the

[5]cost of medical care has been increasing by 4.2 percent?

[6]A Yes.

[7]Q On average?

[8]Do you have the customer price index with you?

[9]A I do.

[10]Q If we looked at the -- and by the way when we're

[11]looking at the consumer price index, you can look at urban

[12]centers or rural, is that correct?

[13]A Yes.

[14]Q And in this case obviously we're looking at urban?

[15]A Correct.

[16]Q And if you take a look at the medical care in U.S.

[17]city and the U.S. cities and you go back to, well I suppose

[18]25 years you go back to 1992?

[19]A Yes.

[20]Q So from 1993 for 92 to 2016 is the average growth rate

[21]actually 3.93 percent?

[22]A So the one I --

[23]Q Instead of 4.2 percent?

[24]A The one that I brought with me is exactly the **[*25]** same

[25]table you're talking about, but I calculated it from 1988 so

[25]

[1]it's 4.4 percent that I have here.

[2]But if you go back to 1991, it's in the 4 to 4.2

[3]range. This particular set of numbers that you're looking at

[4]it's possible it came out to 3.9 percent.

[5]Q And back in the 80s and 90s isn't it true that the

[6]prices were going up at a much higher rate than they are today?

[7]A Absolutely.

[8]Q And in fact on your report there is a little graph at

[9]the bottom, is that right?

[10]A Yes.

[11]Q And do we have a spare copy of the report, I just want

[12]to mark the graph?

[13]A I don't.

[14]Q You don't have your report, ma'am?

[15]A I don't.

[16]I grabbed what I was using for today.

[17]MR. HARDY: Oh, you don't -- I put a circle on

[18]this.

[19]Can I mark this page?

[20]MR. REINER: You're just marking for ID, you're

[21]not trying to move it into evidence?

[22]MR. HARDY: No. No. No.

[23]THE COURT: So it's Defendant's J.

[24](Whereupon, Defendant's Exhibit was marked for

[25]identification, J.)

[26]

[1]THE COURT: It's a page of the November 16, 2016,

[2]report **[*26]** of Dr. --

[3]MR. HARDY: L-E-I-K-E-N.

[4]Q Do you recognize the chart on the bottom that's under

[5]future health care costs?

[6]A Yes.

[7]Q Do you recognize the chart at the bottom.

[8]A Yes.

[9]Q Is that accurate?

[10]A Yes.

[11]Q Does that show an overall downward trend in the

[12]fluctuation of prices for the medical care services?

[13]A It shows ups and downs that you're right from the

[14]1980s where we had double digit inflation in medical care.

[15]It has come down and never gone back up to that level.

[16]I think that is what you're trying to say.

[17]Q Very good.

[18]I'll take that back.

[19]THE COURT: Mr. Hardy, can you hold that thought

[20]for a second.

[21]MR. HARDY: Sure.

[22](Whereupon, a recess was taken.)

[23]THE COURT: Sorry.

[24]Q Back to the overall increased cost of medical care

[25]would it be accurate to say over the last five years the cost

27

[1]has gone up three percent on average?

[2]A Yes.

[3]Q Okay.

[4]And over the last ten years, it's been -- what has it

[5]been over the last ten years, the increase?

[6]A So there is **[*27]** 4s and 3s and so I would still say about

[7]three percent.

[8]Q And would it be more accurate predictor of the future

[9]increase in cost of medical care to look back ten years instead

[10]of all the way back to the 80s, like you say?

[11]A No.

[12]Q It wouldn't.

[13]So as far as prescription drugs, I believe you

[14]indicated that the growth rate is going to be about 3.8 percent?

[15]A Yes.

[16]Q And do you have the consumer price index for

[17]prescription drugs there?

[18]A I didn't bring all of the categories.

[19]Q You didn't bring all the categories?

[20]A Just the general medical care I used the prescription

[21]drugs for the analysis, but what I brought in my file is just

[22]the general.

[23]MR. HARDY: Okay, well can I have this marked for

[24]ID.

[25](Whereupon, Defendant's Exhibit was marked for
28

[1]identification, K.)

[2]THE COURT: It's being shown to the witness.

[3]MR. HARDY: Yes.

[4]Q Dr. Dwyer, does that appear to be a print out from the

[5]Bureau of Labor Statistics with respect to the annual increase

[6]in prescription drug costs in urban cities?

[7]A Yes.

[8] **[*28]** Q And isn't it not true that over the last four years

[9]the price has averaged an increase of 3.44 percent?

[10]A Yes.

[11]Q And in fact in 2013 the price of prescription

[12]medication only went up .6 percent?

[13]A That is correct.

[14]Q And in fact the only time that I -- if you look from

[15]92 to 2001, the increase is about 4.1 percent, correct?

[16]A That is -- that sounds about right.

[17]Q And ever since then the amount of change has steadily

[18]declined except for maybe a pump in 2010, 2011?

[19]A Well and it's going up again.

[20]Q And the cost of physical therapy, would that be under

[21]the category of services by other medical professionals in the

[22]consumer price index?

[23]A Yes.

[24]Q And do you have that with you, by the way?

[25]A No.

29

[1]MR. HARDY: Officer.

[2](Whereupon, Defendant's Exhibit was marked for

[3]identification, L.)

[4]Q Does that appear to be a printout from the Bureau of

[5]Labor Statistics with respect to services by other medical

[6]professionals?

[7]A Yes.

[8]Q And the let's say in 2000, in your report you

[9]indicated it was going to increase **[*29]** by 2.5 percent a year on

[10]average?

[11]A Yes.

[12]Q Isn't it true that in 2016 it increased by 1.2

[13]percent?

[14]15, 2.8 percent?

[15]A Yes.

[16]Q And it increased for the last five years only about

[17]1.2 percent?

[18]A Yes.

[19]Q And over the last ten years, maybe 2 to 3 percent

[20]increase?

[21]A Right.

[22]Q And the highest increase in the last 25 years was in

[23]2008 in 4.1 percent?

[24]A Yes.

[25]Q So in the last five years the increase was about
30

[1]1.22 percent?

[2]A That is correct.

[3]Q And that is about half of the 2.5 percent for the

[4]entire 25 year period you looked at?

[5]A Slower recovery from the recession, correct.

[6]Q And I didn't ask for the reason, but thank you.

[7]Last and I just want to ask you about the physician

[8]services and when Dr. Lichen reports speaks to the average cost

[9]of surgeries.

[10]And you in your chart say that that is pain

[11]specialist, is that the same thing or not the same thing?

[12]A Surgery is not the same thing as pain specialist.

[13]Q The report says surgeries or we are concerned about

[14]that?

[15] **[*30]** A We are concerned.

[16]They are two separate categories.

[17]Surgery is four percent growth rate and pain

[18]specialist is more like a medical doctor, that is three percent.

[19]Q So if I looked on the consumer price index would I

[20]look at physician services to correlate with pain specialist?

[21]A Yes.

[22]Q And isn't it true, do you have that index?

[23]A I do not.

[24]MR. HARDY: One more.

[25](Whereupon, Defendant's Exhibit was marked for

[31]

[1]identification, M.)

[2]Q What is the growth rate that you had applied to the

[3]increase for pain specialists every year?

[4]A Three percent.

[5]Q Three percent.

[6]Isn't it true, by the way, what you're being shown is

[7]that a period also from the Bureau of Labor Statistics?

[8]A Yes.

[9]Q And over the last five years, was the increase about

[10]2.14 percent?

[11]A Yes.

[12]Q And if you want to calculate it, we have -- you have a

[13]calculator, I assume on your phone, if you need it, do it.

[14]I don't want anyone to guess.

[15]And the increase between 92 and 2001 that was high,

[16]that was four percent, correct?

[17] **[*31]** A Yes.

[18]Q And wouldn't it be more accurate to look at a recent

[19]history like a ten-year period instead of going all the way back

[20]to the 80s when you're looking at these growth rates?

[21]A Definitely not.

[22]Q As far as the need for surgeries, that is obviously

[23]not up to you, correct?

[24]A Right.

[25]Q And did you ever speak to Mr. Padron?

[32]

[1]A I have not.

[2]Q Did you find out who he is seeing presently, what kind

[3]of doctors?

[4]A I did not.

[5]Q Did you ever speak to Dr. Richter?

[6]A I did not.

[7]Q And did you ever meet with Dr. Richter?

[8]A No.

[9]Q Are you aware that there is no claim in this case for

[10]past medical expenses?

[11]A I didn't calculate them.

[12]MR. REINER: Objection to the form.

[13]None -- I don't know what he means by that.

[14]No claim for that.

[15]Q Do you know if Mr. Padron has spent any money out of

[16]his pocket for medical care?

[17]A I don't know that.

[18]Q Would that change your opinion as far as future health

[19]care costs hypothetically speaking that he hasn't spent a dollar

[20]out of his own pocket yet? **[*32]**

[21]MR. REINER: I'm objecting for obvious reasons.

[22]THE COURT: Sustained as to form.

[23]Q Now you weren't provided with any documents when you

[24]came up with this chart, right?

[25]Other than from Dr. Richter?

33

[1]A Correct.

[2]Q And in fact Dr. Richter's report was given to

[3]Dr. Leiken correct?

[4]A Originally, yes.

[5]Q Did you conduct any sort of independent analysis

[6]outside of what Dr. Leiken did as far as these growth rates are

[7]concerned?

[8]A I always do them simultaneous, so I do them separately

[9]and we bring them together, yes.

[10]Q So the growth rates you've given us so far you were

[11]just kind of -- you just remembered them?

[12]A No, I have them in my files and on my computer at

[13]home.

[14]Q But you're sitting here testifying about them, but you

[15]said you didn't have the report in front of them so you remember

[16]them?

[17]A I do remember them.

[18]I know them.

[19]Q And --

[20]MR. HARDY: That's all I have.

[21]I do have one other question.

[22]Q If we looked at these growth rates and we said well

[23]maybe the last ten years is more accurate, **[*33]** that would certainly

[24]change the numbers in your chart, right?

[25]A I would never say that, but yes if I relied on the

[34]

[1]last ten years it would change them dramatically. If I relied

[2]on the last 30 years, it would change them dramatically. So I

[3]picked the years that I look back carefully.

[4]Q And 25 years, you're telling us is the better

[5]predictor for the future than the last ten years?

[6]A Absolutely.

[7]MR. HARDY: Thank you, doctor.

[8]MR. REINER: Just a couple, Judge.

[9]THE COURT: Redirect.

[10]REDIRECT EXAMINATION

[11]BY MR. REINER:

[12]Q Professor Dwyer, can you explain to the jury why you

[13]go back to the 80s when calculating these numbers?

[14]A I don't go back to the 80s.

[15]If I went back to the 80s, these would be much higher

[16]because we had double digit inflation in the 80s.

[17]Q So why do you go back as far as you do?

[18]A I go back 25 years, in my expert opinion that captures

[19]in a good way within a reasonable degree of certainty what is

[20]going to happen in the future.

[21]The last ten years we've experienced a recession,

[22]we've experienced policy changes **[*34]** and so if I try to rely on an

[23]outlier year, I mentioned a business cycle.

[24]Business cycle is a period of time when we experience

[25]peaks and troughs. If you took any economic, you probably heard
35

[1]any for those terms highs and lows, if you pick just one point

[2]in time when there is a low, you're not going to capture what is

[3]going to happen over a business cycle, which is what we

[4]anticipate, we know is going to happen in the next 10 or

[5]20 years.

[6]If I went back only ten years or God forbid only two

[7]years, I would definitely be projecting way too low.

[8]If I went back 30 years, I would include the double

[9]digits which I hope we never get back to and I would project too

[10]high.

[11]I would -- I capture the amount of time that given my

[12]expert opinion and it's not just a matter of looking at federal

[13]statistics, but working in this area for a long period of time

[14]just knowing how to predict what is going to happen in the

[15]future, that is how I decide.

[16]Q And Professor, speaking of just picking the low

[17]numbers, I know that Mr. Hardy on his cross-examination

[18]highlighted some of those low **[*35]** trends.

[19]Can you take a look at what has been marked as

[20]Defendant's K, which is the prescription drug CPI?

[21]A Yes.

[22]Q This is physician services --

[23]MR. REINER: I'm sorry then.

[24]A This is M.

[25]MR. REINER: Defendant's K.

36

[1]Q Professor, in looking at Defendant's K, can you please

[2]describe for the jury what the rate has done since 2014?

[3]A It has been going up.

[4]Q Different from the numbers that Mr. Hardy talked to

[5]you about in 2013 where it went down substantially, correct?

[6]A We had a real outlier year in 2013 in a growth rate of

[7]only .6 percent, kind of a lag of what was happening from the

[8]recession, but jumped to 3.6 percent and currently is in the 4.8

[9]to 5 percent range again.

[10]Q So we're on an upward trend?

[11]A Yes.

[12]MR. REINER: Thank you, Professor.

[13]THE COURT: Any recross?

[14]MR. HARDY: Yes, please.

[15]Just a moment.

[16]RECROSS-EXAMINATION

[17]BY MR. HARDY:

[18]Q If we look at like 92, 93 for that or really any of

[19]the other ones, which one do you have up there?

[20]A I have prescription drugs and physician **[*36]** services.

[21]And I have the medical care for my own.

[22]Q So the greatest swing in the entire last 25 years was

[23]those first two years of the 25 for physician services?

[24]In other words, 1992 was a 6.3 increase and 93 was a

[25]5.6 increase?

37

[1]A That was not the biggest year, though if you go back

[2]to 1989 to 1990, we went from 11 percent.

[3]Q I'm confused.

[4]You didn't use those numbers?

[5]A Correct.

[6]Q But we're saying the ones you did use, let's not use

[7]the ones you didn't use.

[8]So 92 was the highest increase at 6.3 percent?

[9]A Yes.

[10]Q 93 was the second highest increase at 5.6 percent?

[11]A Yes.

[12]Q And 94 was the next highest increase, 4.4 percent and

[13]95 was the next highest at 4.5 percent in the last 25 years?

[14]A For physician services, yes.

[15]Q If you eliminated those years 92, 93, 94, 95, the

[16]percentage would go down, correct?

[17]A Correct.

[18]Q And up didn't have any swings above 4.0 percent from

[19]97 to 2016?

[20]A We had swings, but not above four percent and if you

[21]look at the prescription drugs it's a different **[*37]** story, but yes.

[22]Q That's fine.

[23]Do you have the medical care one, overall medical

[24]care?

[25]A Yes.

38

[1]Q And isn't it true, also in those early years, 92, the

[2]increase was 7.4 percent, 93 the increase 5.9 percent?

[3]A Correct and the increase --

[4]Q I didn't ask you that, please.

[5]In 1994 the increase was 4.8 percent, right?

[6]A Yes.

[7]Q And then it never again increased by 4.8 percent or

[8]anything more than that, correct?

[9]A 2002 was 4.7 percent.

[10]Q 4.7, so that was maybe an aberration also?

[11]A No, because it was 4.6 range, 4.5 range.

[12]Q So from 02 to the present, it didn't increase by 4.7

[13]again or more, did it?

[14]A No.

[15]Q Last I'll make the point with respect to services by

[16]other medical professionals, does the same hold true that the

[17]greatest swings, the greatest increases were in 92, 93, 94?

[18]A I have to say no to that. Only the tables you're

[19]showing me, there is a reason why I started in 92 and not 88.

[20]You're asking me were the highest swings in 92, no.

[21]Q The highest swings in the last 25 years?

[22] **[*38]** A Yes.

[23]Q And in 92, 93, 94, correct?

[24]A Yes.

[25]MR. HARDY: Thank you.
39

[1]MR. REINER: Nothing further.

[2]THE COURT: Can I see counsel for a moment.

[3](Whereupon, at this time, there was a side bar

[4]conference held, off the record.)

[5](Whereupon, at this time, the proceedings

[6]continued.)

[7]****

[8]CERTIFIED THAT THE FOREGOING IS A TRUE AND ACCURATE EXCERPT OF

[9]THE ORIGINAL STENOGRAPHIC MINUTES IN THIS CASE.

[10]

[11]

[12]KRISTIN YOUNG, RPR

[13]Senior Court Reporter

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