SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM : PART 65

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RODNEY RAMIREZ,

PLAINTIFF,

-against-

Index No.
1998/2015
Jury Trial

ALL COUNTY PLUMBING & HEATING, INC., and
JAMES E. EGAN,

DEFENDANTS.

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Supreme Courthouse
360 Adams Street
Brooklyn, New York 11201
November 14, 2017

B E F O R E:

HONORABLE LOREN BAILY-SCHIFFMAN,
J U S T I C E, and a Jury

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

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FRANCESCA CIOFFI, CSR, RMR
Senior Court Reporter

MR. PANEK: Your Honor, plaintiff has two motions in limine, just to preclude defendant from cross-examining the economist on one, the discount rate which is something that the Court does or has an economist do during a 50B calculation is not proper to ask an economist to do that while they're on the stand. That's basically talking about present value of.

THE COURT: Right. But does the discount rate go into the numbers? Is it calculated in the numbers?

MR. PANEK: No, and that goes with part 2, the Court's charge, and also is to preclude any questions about income taxes which is in the PJI as well. That those are things for the Court to determine and they're not going to be put in front of the jury.

THE COURT: Well, no. Hang on a second. The documents that you're relying on or that the economist is relying on for income is the Fed Ex records?

MR. PANEK: Yes.

THE COURT: Not the income tax records?

MR. PANEK: No, the Fed Ex records, the W2s from Fed Ex and the employment records.

THE COURT: Okay.

MR. KAMINSKY: And that's the concern because we don't have the tax returns. Plaintiffs generally say because the PJI says that you shouldn't consider income

taxes in your award, that doesn't mean that I should be precluded from asking the economist -- in other words, the economist is, I believe, going to give total gross alleged loss of earnings. In other words --

THE COURT: Yeah.

MR. KAMINSKY: But that's not the actual loss of earnings because the plaintiff pays income tax on his earnings.

THE COURT: And that's exactly what the jury should not be considering; they're only supposed to consider gross numbers.

MR. KAMINSKY: I don't think that's correct.

THE COURT: Yeah, that is correct.

MR. KAMINSKY: If that's your Honor's ruling, I won't ask about it but I certainly take exception to it.

THE COURT: Okay.

MR. KAMINSKY: What I would be asking the economist so that there's an offer of proof, I would be saying to the economist: These are the gross numbers of the total earnings; did you take into consideration income tax? Did you look at the plaintiff's tax returns?

THE COURT: Hang on a second. What's the answer to that question? Did he take into consideration income taxes?

MR. PANEK: No.

THE COURT: Just gross numbers.

MR. PANEK: And for the record, straight out of the commentary from the PJI Court of Appeals Law, "The courts do recognize the possibility that --

THE COURT: Slow down.

MR. PANEK: "The courts have recognized that the possibility that a tax-conscious jury may in ignorance of relevant rules in this highly specialized field proceed on erroneous speculation and assumption to render a fair and inaccurate verdict." And that's from L-A-N-S-A-N-O versus New York Court of Appeals 519 NE2d 331 1988.

THE COURT: I'm not sure that deals with -- that goes to the issue that we're talking about.

MR. KAMINSKY: Exactly.

Here's how I see it --

THE COURT: Go ahead.

MR. KAMINSKY: If the plaintiff doesn't pay income tax on his award and he's getting -- and I'm not allowed to ask about the income tax he pays on his earnings, he's getting an unfair advantage in the award because he's getting a tax free award on his gross earnings that he would have had to pay income tax on had he worked.

So we can use round numbers. If he's making $50,000 a year paying $10,000 a year in taxes, why should I not be allowed to point out that his net earnings are only $40,000 and not 50 thousand?

MR. PANEK: The PJI takes that out of the jury's consideration because it's pure speculation to say what --

MR. KAMINSKY: It's pure speculation because the income tax returns aren't here and they haven't been reviewed.

THE COURT: Stop. My turn.

MR. KAMINSKY: Sorry, Judge.

THE COURT: The jury takes out of -- the PJI takes out of the jury's consideration any increase or decrease in the award having -- on account of income taxes. To some extent, that presumes that the evidence in the case deals with gross numbers but not necessarily. But I still think that that's basically the courts deal with this.

So that's the ruling. No questions about income taxes, okay? Your exception is noted.

MR. KAMINSKY: Thank you, Judge.

THE COURT: There was another part.

MR. PANEK: Yes, it's referred to in economics as the discount rate or the present value calculation.

THE COURT: Okay. Mr. Kaminsky, you want to talk to that?

MR. KAMINSKY: Judge, I agree with counsel on that issue.

THE COURT: Fine.

MR. KAMINSKY: I do have an application to make.

THE COURT: Go ahead.

MR. KAMINSKY: I renew my application from yesterday that --

THE COURT: We're not renewing applications.

MR. KAMINSKY: It ties into this witness. The admission of the life care plan I think does not provide a proper foundation for this witness to -- with this witness being the economist to testify about projections.

I don't think a proper foundation has been made so I object to the testimony of this witness based upon the insufficiency of the testimony of their expert who prepared the life care plan. In addition --

THE COURT: Hang on; deal with it one at a time. The economist based on his opinions on the life care plan that is in evidence.

MR. PANEK: Correct, the tables that are in evidence.

THE COURT: Overruled or denied. I'm not precluding anything I'm allowing that.

MR. PANEK: And, your Honor, just for the record, I want to make clear that the report of -- not the report but the tables of Dr. Khan that were received in evidence as a business record were the same exact tables which were previously published to the jury with no objection on Thursday of last week.

THE COURT: Yeah, that's clear. But the fact that he didn't object doesn't make it in evidence and that's why you brought the doctor back and I think that was the right way to do it. And they're now in evidence.

You had another application?

MR. KAMINSKY: Yes, I would ask the 3101(d) expert disclosure of the economist be marked as a Court exhibit.

THE COURT: Sure.

MR. KAMINSKY: It just lists totals, it doesn't show anything specific. I don't think it's sufficient to allow this witness to testify.

MR. PANEK: Your Honor, it doesn't just show totals. The footnotes lay out the exact -- what is the correct term -- I'm sorry, off the record.

(Whereupon, an off the record discussion was held, after which:)

MR. PANEK: The photo notes of the 3101(d) show the exact inflation rate or the growth rate that the economist is going to use by category and also states where that growth rate came from.

The starting number and the basis of the starting number is given along with the growth rate and the end rate, all of the pertinent information as to what the economist is going to be testifying to is contained in the 3101. I think this is the third time that we've dealt with this

application concerning that disclosure and for the record, I did not in the time that it was served back in September up until trial ever receive any objection to the sufficiency of the 3101(d); the first time it came was after the jury was selected and we were here.

But in any event, the disclosure is more than enough to apprise defendants of what the economist is going to be testifying to.

THE COURT: First of all, I don't think that these kinds of objections would be made to a 3101(d) before the witness testifies. This has to do with the witness's testimony and whether the 3101(d) supports it. And essentially, the ruling that I made previously is the ruling that I'm going to make today.

If you have objections as we go along that the testimony is beyond the four corners of the 3101(d), you can object then but I'm not going to globally preclude anything at this point.

MR. PANEK: Off the record.

(Whereupon, an off the record discussion was held outside the courtroom, after which:)

MR. PANEK: Can we have these marked as Plaintiff's?

THE COURT: As?

MR. PANEK: I think 22.

THE COURT: No, the letter from MTA was 22; this is 23 in evidence. Mr. Kaminsky?

MR. PANEK: The W2s.

MR. KAMINSKY: I think they already were but if not yet --

MR. PANEK: They weren't put in.

THE COURT: Okay.

(Whereupon, the aforementioned document was marked as Plaintiff's Exhibit 23 in evidence as of this date.)

THE COURT OFFICER: All rise. Jury entering.

(Whereupon, the jury entered the courtroom.)

THE COURT: Good morning, ladies and gentlemen. You may all be seated.

Plaintiff, what's next?

MR. PANEK: Your Honor, plaintiff calls Dr. Debra Dwyer.

D E B R A D W Y E R, called as a witness by and on behalf of the Plaintiff, after having been first duly sworn, was examined and testified as follows:

THE CLERK: Please state your name and address for the record.

THE WITNESS: Debra Dwyer, D-E-B-R-A D-W-Y-E-R, the address is 17 Springbriar Lane, B-R-I-A-R, Centereach, C-E-N-T-E-R-E-A-C-H, New York 11720.

THE COURT: You may proceed.

MR. PANEK: Thank you, Judge.

Morning, everyone.

DIRECT EXAMINATION

BY MR. PANEK:

Q Morning, Doctor.

A Morning.

Q Dr. Dwyer, are you currently employed?

A Yes, I am.

Q And what do you do for a living; tell the jury, please?

A I'm an economist and faculty member at Stony Brook University where I've been employed for almost 20 years now. I have faculty affiliations in economics, health sciences and engineering. I've been a faculty member until recently; now besides teaching and doing are research, I've been promoted to assistant dean for strategic planning and research in the dean's office in arts and sciences. So, I teach economics and public policy.

I do research in the areas that cross between disability, health and work, so social security policy, health care policy and I'm also very dedicated and interested in the well-being of young people. So adolescence health and disabilities and addictions and now that might translate into educational outcomes and work.

So broadly speaking, I'm an economist and public policy analyst. As a dean, I do a lot of work on budgeting at the

University and how we can serve our students well.

Q Would you prefer I call you Doctor, Dean, Professor; which is it?

A I'm indifferent; very flexible.

Q I'll stick with Doctor. Tell the jury about your educational background, please.

A I started off with my Bachelor degree in Economics and English Literature from Queens College in Flushing, New York. I went on to get my Master's and Ph.D. from Cornell University in Labor and Health Economics. I also did a postdoctoral fellowship at the Center for Policy Research at Syracuse University and from there, I spent a couple of years -- I was recruited by the Social Security Administration where I worked in Washington, DC for a couple of years.

Q And what have you taught at Stony Brook University?

A I've taught and mentored everyone from the high school level all the way to the Ph.D. level, so I've taught generally macroeconomics, general economics which includes micro and macro; intermediate micro economics and then Ph.D. level graduate economics, health economics and economics in public policy more generally. I also have taught research method and I taught how to teach.

Q And are you published, Doctor?

A Yes, I am.

Q Would you tell the jury a bit about your publications?

A Sure. I have more than a couple of dozen peer reviewed published articles, again in the areas that cross over the labor market and the health market. So journals like *The Journal of Health Economics*, *The Journal of Adolescent Health*, *Review of Economics and Statistics*, so I have some methodological contributions; broad range of research publications.

I've also gotten some grants from the Social Security Administration and some from some private foundations to do work on health and disability and work.

Q And in addition to your work at the University and your publications, do you also do consulting as an economist?

A Yes, I do.

Q Can you explain what consulting is to the jury?

A Sure. So, I've done a variety of consulting, mostly in the area of personal injury medical malpractice. I've also done some larger class action lawsuits to assess damages.

So my job -- I'm not a medical expert; my job is to say what is the value of the loss, whether it's from lost earnings or whether it's from injuries that require health care services because my area of expertise is health care and labor. That means I study those two markets and those two markets are among the largest markets that we face.

So what's happening to crises in health care, what's happening to wages and unemployment, those are the kinds of things that I would have to follow to be able to do the research

that I do.

MR. PANEK: Your Honor, at this time, I'd ask that Dr. Dwyer be accepted by this Court as an expert in economics.

THE COURT: Any objection?

MR. KAMINSKY: No.

THE COURT: So certified.

Q All right. So, Dr. Dwyer, you were retained by my firm in this case to perform an analysis regarding Mr. Ramirez, correct?

A Correct.

Q And what type of analysis? Can you explain what you did in this case; what you were retained to do?

A Sure. So in this case, I was told that Mr. Ramirez would not work any more. So there was loss associated with the inability to work. So what I did was I took his last full year of earnings, I get -- what I get from that is a sense of what his earnings capacity is, what he could have earned had he continued to work for the remainder of his work life expectancy.

I calculate what those earnings would be now and what they would be each year from now until he reaches his retirement age. In order to do that, I have to make a couple of assumptions. I have to figure out when I think he's going to retire, so I use what I believe is reasonable for a retirement age for someone born the year he was born, and then I also have

to make assumptions about what kinds of pay increases he would get over time.

So, I keep him at the same position he was a Fed Ex employee. I don't give him promotions but I do raise his wages according to average growth rates of earnings over time. So that's the first part of the analysis.

Q Okay. Just before we get there, you were retained to do an economic analysis regarding wages and medical costs, is that fair to say in this case?

A Yes.

Q And have you done that for my law firm in the past?

A No, as far as I know -- so, I've done a report, I haven't testified for you before.

Q When is the first time that you and I met?

A Thursday last week.

Q And when you prepare your reports, do attorneys ever get input or do they give you feedback on how you do your analysis of what you do or how does it work?

A No, typically what happens is the law firm contacts me and says what do you need, so I recommend what I think the categories of loss are based on the information that he gives me. So I need to know whether they would return to work, what kind of work history they had, what kind of injuries they had.

So I collect the information I need but then I do the report; the law firm doesn't tell me how I should go about

assessing these damages.

Q And what is your compensation for preparing the report and for being her here to testify for the jury?

A $4,400.

Q Okay. And, Doctor, in this case with Rodney Ramirez, what -- by the way, you said that he wasn't going to work. Is that your opinion or where do you get that opinion from or how does that work?

A So, that I get from you and I assume that comes from the medical experts, so Dr. Khan and others.

MR. KAMINSKY: Objection.

THE COURT: Overruled.

Q And I want you to assume that Dr. Kyriakides, Dr. Faloon and Dr. Khan have all testified that Mr. Ramirez will not return to work; is that congruent with the plan that you prepared for Mr. Ramirez?

A Yes, it is.

Q Please continue and just tell us about the analysis that you did and I'll ask you to come down and explain it in the charts whenever you're ready.

A Sure, right now I'm giving you the general categories of loss and how I go about determining these losses. The other category from earnings that we typically include is any compensation, so benefits in this case that all -- all that I considered was social security losses.

So, had he continued to work the remainder of his work life expectancy and achieved his normal age of retirement which under the social security system is age 67 -- that's the age that you can collect full pension benefits from the Social Security Administration -- had he been able to continue working, that monthly benefit would be higher than it will be now because he wasn't able to complete his work life expectancy.

So, the other categories associated with his labor market earnings that I include as losses is loss of social security earnings over the remainder of his life. So that would commence at the time of retirement until his life expectancy which brings me to the next assumption that I need to make, and that is when do I think Mr. Ramirez would die? And we use National Center For Health Statistics.

The federal government collects a lot of data and so what I used was the averages for someone born the year that Mr. Ramirez was born, which was 1981, and his gender and I use the average life expectancy. In this case, I use it from the Pattern Jury Index which is a source that we use in court, the 1997 data and age of 75.9. So that's the earnings loss.

Then there are also injuries associated with the incident that are going to require health care services over the remainder of his life. I'm not a medical expert so there's no way I could know what those medical services would be; I don't know the categories, the frequency, the duration. I get all of

that from a medical expert and that was provided to me by Dr. Khan.

So I took all of the categories of medical services and the value of those services, there's a wide range in types of services even within say medical care like pain management. The doctor gives me the value of those services in real dollars today and what I need to do is figure out how much will those same exact services cost next year, ten years from now up until the time of his death.

So, with my expertise and what's going on in the health care market and prices, I'm able to project what's going to happen to those prices and the value of those services that he will require for the rest of his life and I rely on federal statistics to make those projections.

Q And, Doctor, I just want to show you what's in evidence as Plaintiff's 19?

MR. PANEK: May I approach the witness, your Honor?

THE COURT: Yes.

Q (Handing.) Were you provided with these tables that the jury saw yesterday and Thursday of Dr. Khan concerning the cost associated and a layout of the years categories; was that provided to you?

A Yes.

MR. PANEK: And do we have the W2s?

Q I'm also going to show you Plaintiff's Exhibit 23 and

24 in evidence and just what are those and were those provided to you? (Handing.)

A Yes, these are the W2s for 2012, 2013 and 2014 and that's what I used to determine what his past earnings capacity was in order to be able to project into the future.

Q Just to be clear in case anyone is not sure, what is a W2?

A That's a statement you get from your employer of how much you earned that year for tax purposes.

Q And the document under that, I believe it's 24, the Fed Ex records, you were also provided with those, correct?

A Yes.

Q And how far back? That goes back to the beginning of his Fed Ex employment, correct?

A Correct, I think it was 2004.

Q So, Doctor, when you received that information, were you able to formulate projections or calculations of what the earnings loss would be for Mr. Ramirez based on those numbers?

A I was.

Q Okay. And before I have you step down, can you explain to the jury what a growth rate is and what why it's important here?

A Sure. So, growth rates are inflation; you've heard the rate of which prices go up over time. So, I use a growth rate for wages I mentioned and that's because people get pay

increases hopefully consistent with the general rate of inflation, the rate that prices are rising.

So, growth rate is the rate by which the same exact services cost more over time.

Q So, the easy version of that is a candy bar 20 years ago versus a candy bar today, what the cost would be today?

A I used to work in a pizza shop. So the cost for pizza, when I was a teenager, was 50 cents a slice; now it's $2 a slice.

Q Down here it's 3.50.

A Yes, inflation. It's the same slice of pizza; that's the point.

Q Doctor, can you explain what -- or actually, it's $5 a slice.

Can you explain what the growth rate is or where you get the growth rate from in this analysis? How do you arrive at that figure?

A Sure. The Bureau of Labor Statistics is where I get most of my data from including consumer price index.

Q I'm sorry to interrupt. Can you explain what the Bureau of Labor Statistics is?

A That's a federal agency that studies the labor market, so a lot of my colleagues who graduate go to work for the Bureau of Labor Statistics and that's where they collect all kinds of data about prices including employment and earnings.

So you get all kinds of statistics on who's working, how they're working, what's happening in specific occupations and you get average growth rates and wages over time which is something that's very interesting to all of us in terms of what's going on in the economy.

They also collect data on prices. So they construct the Consumer Price Index which you've heard of inflation based on a standard bundle of goods is what we call it and that's the general goods that most people buy food and clothing and other items. They also do this for subcategories like medicine.

So, there are categories of health care. The general rate of inflation for health care, you've heard probably prices rose faster than the general rate of inflation. So on average over the last 25 years, health care prices have risen by 4.2 percent compared to 3 percent for general prices.

But the Bureau of Labor Statistics also breaks it down by subcategories, like other professional services, prescription drugs. So I use those subcategories and match them to the categories of services that Dr. Khan recommends and I use those to project what's going to happen to prices in those subcategories.

Q So at this point, Doctor, with the Court's permission, I'm going to move this a little bit closer so everyone can see and I'm going to ask that you come down and explain the analysis to the jury.

A Sure. (Complying.)

Q Go ahead, Doctor.

A Okay. So, the accident occurred in 2014 at the end of the year in December. So the first year that he lost earnings is 2015 -- I think I already explained how I do this so I won't bore you with the details of what each one of these numbers are, but I'll tell you in general what I did.

So in 2014, by December 23rd, what he earned was $42,156. What we do is grow that by the average rate over the last 20 years. Wages have risen by 3 percent on average, so if you grow 42,000 by 3 percent, you get $43,421. That's what we project he would have earned for his job in 2015.

We do that every year; grow it by 3 percent every year. That assumes he's getting a 3 percent raise every year until the year that he turns the age 67, which is in September. So I have him retiring in September of 2047 and you see that he's only getting partial year earnings that year because he's retiring in September. The total value then of every year's earnings summed up is $2,472,152. That's how much he would have earned had he continued to work till age 67 as a Fed Ex driver.

The social security category that I said is the difference between what he will collect if he retires at age 67 and what he would have collected. And so that difference in future dollars -- so here I use a growth rate of 2 percent and that's based on what social security actually uses for their

cost of living adjustment.

So they grow the benefits at 2 percent a year. So the value of the loss the difference is $23,785 for the first full year. And that continues until -- as I said, I used an expected date of death of 75.9, so that brings us to the year 2057. He will die partway through the year if he's --

MR. KAMINSKY: That's pleasant.

THE COURT: If he's expected.

A -- considered average -- sorry.

THE COURT: The life expectancy tables show that?

THE WITNESS: He will not definitely die, I don't have a crystal ball to be able to predict that. It is based on expert opinion that his life expectancy will be around age 76 which brings us to the year 2057, so that the total loss in his future social security benefits will be $225,076.

So, if you sum these two columns, you get a total income loss of $2,697,228.

Q So, Doctor, based on the date of retirement, date of death, fair to say economics doesn't care about your feelings; those are numbers?

A Yes.

Q Now, you said that you used a growth rate of 3 percent based on 20 years of data. Can you explain why that number was chosen, what the rational is and why that is done?

A So, one of the challenges when you're trying to make these kinds of assumptions is how far back do you go? And so what's standard in the labor market is to go back 20 years to capture what we call a business cycle.

So we have periods where we have high wage growth, we go into recessions where we have very low wage growth and you don't want to pick an outlier year, you don't want to pick a year where the growth rate was .5 percent and you don't want to pick a year when it was 5 percent because those are not the norms, so you want to smooth it out.

So, it's the amount of time that represents a series of peaks and troughs. Economists have been using 3 percent for a growth rate for quite a while so that's pretty standard. As you look back, as Mr. Panek said, I had access to his earnings records to his time at Fed Ex. The average growth rate was 3.2 percent and it's consistent. We use a slightly lower number to grow his wages.

Q If the growth rate was used in his actual employer, those numbers would be slightly higher by .2 percent?

A Correct.

Q Again, economists have no feelings; they choose the numbers, right?

A I do have feelings but this is based on these -- this is based on expert opinion.

Q Okay. Now, Doctor, you did the same analysis regarding

the cost of future health care. I'm pulling that up because the jury now -- can you explain and just go through categorically what the growth rate for each category was --

MR. KAMINSKY: I apologize, counsel. Can we approach for a second?

THE COURT: Sure.

MR. KAMINSKY: Can that be taken down for a minute?

MR. PANEK: Sure.

(Whereupon, an off the record discussion was held outside the courtroom, after which:)

Q Doctor, please proceed and I just ask that you go through categorically and explain the growth rate for each category and why it was chosen, what was chosen.

A Sure. So, what we have here based on Dr. Khan's report are the medical services that Mr. Ramirez were will require, medical care and evaluation. So that's a broad category that includes things like physiatrist, doctors visits. What he recommended was a time period for which he would need a certain number of visits and then it changes over the course of his life, so you'll see that we accounted for all of the details from that report.

What's relevant mostly is the growth rate, as Mr. Panek said. So what we use as a growth rate for general medical care and evaluations is a rate of 3 percent for that subcategory I

said before. Health care prices have risen at 4.2 percent but for doctor office visits, more like 3 percent. That's true for the next category as well, pain management, which is another norm of office visits typically.

I had said that sometimes the frequency that he needs to go within a year changes over the course of his life, so you see that he has a couple of one time large fees in 2018, 2019; a little bit more intense in pain management and then it slows down. So, we take exactly that frequency and duration from Dr. Khan's report and then we grow the prices at 3 percent.

So just to reinforce what the growth rate means, one doctor's office visit in 2018 will cost more next year, the same exact visit. So this grouping of medical care services that are worth $3,492 in 2018 exactly, the same services -- well, that's not a good example because in 2019 those services change. In 2019 and 2020, those are the same services. So, $3,185 worth of services exactly the same number of visits is going to cost $3,281 so it goes up slightly over time. So, medical care is 3 percent, pain management is 3 percent, things like physical therapy, therapies and evaluations we use a rate of 2.5 percent.

So, the prices have risen slower than average in categories like physical therapy. Medications, however, is the highest interest rate that we're using here. Pharmaceutical prices have risen in general faster than the general rate of inflation and we use a rate of 3.8 percent for medication.

Equipment and supplies, manufacturer type goods, much lower rate of inflation; 1.5 percent is very low. Home and community-based services 2.5 percent, transportation 2.5 percent, and I don't need to give you a growth rate on surgery and home modification because that's incurred dollars; it all happens in 2018 which we consider the present crisis.

What you have is all of these continue at the rates that Dr. Khan recommended up until the year 2057 when he is expected to pass and so you get total values in the last row. And do you want me to read every bit of those?

Q You can just read -- is there a sum total of those figures?

A Yes. So the sum total -- if you sum all the totals of every category, the amount of medical services recommended by Dr. Khan based on his injuries over the course of his life will be $3,069,641.

Q So, Doctor, essentially, that's if we swap out the pizza analogy, that's the 50 cent slice of pizza versus the $5 slice of pizza of medical costs over his life; fair to say?

A And that includes that he's having those services every year, yes.

MR. PANEK: Your Honor, may we approach?

THE COURT: Sure.

(Whereupon, an off the record discussion was held outside the courtroom, after which:)

MR. PANEK: Your Honor, at this time, plaintiff is going to offer the charts of Dr. Dire, the spreadsheets with the numbers into evidence for the jury.

MR. KAMINSKY: Objection.

THE COURT: The objection is overruled. Have we marked these?

MR. PANEK: We have not.

THE COURT: So this is 25.

MR. PANEK: 25.

THE COURT: In evidence.

(Whereupon, the aforementioned documents were marked as Plaintiff's Exhibit 25 in evidence as of this date.)

Q Dr. Dire, you can take your seat.

A (Complying.)

Q I want to be clear for the jury I'm going to ask you categorically in terms of income loss, based on your analysis and the growth rates used, what is the total income loss for Mr. Ramirez?

A From income without social security you mean?

Q Yes.

A So, that's $2,472,152.

Q What about his loss in social security retirement income; what is that total?

A $225,076.

Q And what about the future cost of health care for Mr. Ramirez?

MR. KAMINSKY: Objection, Judge.

THE COURT: Overruled.

A So, the category of medical care and evaluations, the total loss is $221,630. For pain management --

MR. KAMINSKY: Objection.

THE COURT: Okay. These documents are all in evidence and the documents that she's reading from at this point, your objection is to them going into evidence?

MR. KAMINSKY: Yes.

THE COURT: Okay. You have an ongoing objection to anything that she's testifying to from the record.

MR. KAMINSKY: With that understanding, I won't object to everything she says, that's fine. It's also for other reasons which I will put on the record at an appropriate time.

THE COURT: Okay.

Q Please continue, Doctor.

A So, the value of the pain management services that Dr. Khan says he requires is $57,548. Therapies and evaluations, the total loss is $275,106. The medications he'll need is $790,862. Equipment and adaptive assistive devices, $83,934. The home care and community based services, $1,313,143. Transportation help will be $70,168. The surgery that he

requires early on is $247,500, and the home modifications amount to $9,750. And that's where the $3,069,641 comes from.

Q So that the total economic loss, just to be clear, is $3,069,641, is that correct?

A For health care cost.

Q Okay. And what is and just -- by the way, assuming this jury heard from Dr. Capiola and Dr. Faloon, that two of the surgeries will actually take place in 10 to 20 years, those surgery costs are likely higher than they are in your report, is that fair to say?

A Yes, the growth rate for surgeries and hospitalization is 4 percent, so it's higher than the other rates. So it would increase the cost of those surgeries significantly.

Q And all the surgeries you put at present dollars?

A Yes.

Q Doctor, when you sum up all of the economic losses that Mr. Ramirez sustained as a result of the accident, what is the total economic loss?

A So, from all categories, the total loss is $5,766,869.

Q And, Doctor, all of the opinions that you've rendered here today, are they within a reasonable degree of economic certainty?

A Yes, they are.

MR. PANEK: Thank you.

No further questions, Judge.

THE COURT: Cross.

MR. KAMINSKY: Judge, as indicated in the hallway?

THE COURT: I'm sorry.

Ladies and gentlemen, we will take a break for a few minutes. All rise. Jury may exit.

(Whereupon, the jury exits the courtroom.)

THE COURT: You may be seated.

MR. KAMINSKY: Thank you, Judge; I appreciate it.

MR. PANEK: Your Honor, perhaps the doctor should step outside?

MR. KAMINSKY: No, it's okay.

THE COURT: Okay.

MR. KAMINSKY: Judge, I objected to the tables being shown to the jury as part of the 3101(d); we were never provided with these tables. This is the first we're seeing these tables, so that's one of my objections.

THE COURT: Okay.

MR. PANEK: These are Excel spreadsheets that essentially show the work of -- they give the beginning number, the growth rate and the end number. These just lay out line-by-line annual increase but the 3101(d) makes clear that that's how you get from start to finish; it just shows the work.

THE COURT: Okay. So if I understand it correctly, the 3101(d) has all of the basic -- all of the bases on

which the calculations are done and the report is just the -- or the chart is just the calculations themselves?

MR. PANEK: Correct.

THE COURT: Overruled.

MR. KAMINSKY: Okay. And, Judge, also again, I believe the witness's testimony is based on a life care plan that we believe should not have been placed into evidence. And I renew that application.

THE COURT: I'm not changing my ruling on that. It's still in evidence.

MR. KAMINSKY: Thank you.

THE COURT: Okay.

(Whereupon, a brief recess was taken, after which:)

THE COURT OFFICER: All rise. Jury entering.

(Whereupon, the jury entered the courtroom.)

THE COURT: Let's continue.

Cross, we're doing cross.

MR. KAMINSKY: Morning, jurors.

CROSS-EXAMINATION

BY MR. KAMINSKY:

Q Morning.

A Good morning.

Q I've had the opportunity to cross-examine you previously, correct?

A Yes.

Q Several times?

A I don't know about several times but at least once I recognize you.

Q And in addition, you work with the -- who's the person you work with?

A Dr. Alan Leiken.

Q You know I have cross-examined him many times, right?

A I'm not aware of how many times but I'm sure more than me.

Q Let's start with your -- how many times have you testified in court?

A Over the course of five years when I started this work, I would say about 60, 65.

Q So, once a month?

A On average, yes.

Q Would it be fair of me to say that each and every time has been on behalf of the plaintiff's law firm?

A Yes.

Q In addition to testifying in court, do you also prepare reports on cases that for whatever reason end up not going to court?

A Yes.

Q Approximately how many such reports have you prepared?

A I personally have probably prepared fewer than the 60, probably about 35.

Q What about Dr. Leiken?

A So I have no idea actually how many Dr. Leiken does; I know he does more than I do. But I can't tell you a precise number.

Q Well, let me see how I can phrase this. When we were advised you were going to testify, you're aware we were told it was either going to be you or Dr. Leiken?

MR. PANEK: Objection.

THE COURT: Approach.

MR. KAMINSKY: I'll try and save some time.

Q But you and Dr. Leiken work together, correct?

A Correct.

Q And the reports you prepared, just like the testimony you bring to court, are they all on behalf of plaintiff's attorneys?

A Yes.

Q And to your knowledge, when Dr. Leiken comes to court and testifies, is it always on behalf of plaintiff's attorneys?

A I believe so, yes.

Q And the reports he prepares, are they also always on behalf of plaintiff's attorneys?

A I believe so.

Q Do you have a company?

A No, it's an informal relationship.

Q What percent of your income is generated from the work

you do on litigation-related matters?

A Between 50 and 60 percent.

Q So at least half, possibly more?

A Yes.

Q Okay. Now, let's start with, as an example, the medical projections. You try and be as fair as possible, right?

A Yes.

Q You're not trying to inflate anything for purposes of a case, you're trying to give the jury a fair and accurate picture; true?

A Absolutely, yes.

Q So, in Dr. Khan's life care plan, he gave a range of medical costs, did he not?

A Yes.

Q And that range was from 1.2 million roughly to 1.7 million, correct?

A I didn't actually sum it up that way but that sounds reasonable.

Q And your projections, were your projections based on the $1.2 million low end or were they based on the 1.7 million high end?

A So, I always took the midpoint when a range was offered. So Dr. Khan in some cases would say it would be between three and four visits or 10,000 and 20,000; I would pick 15,000. So I always took the midpoint.

Q So, your projections are based on the midpoint?
A Correct.
Q Now, if we used the low end of the projections, obviously that would bring the numbers down, correct?
A Correct.
Q Okay. And for instance, on the life care plan --
MR. KAMINSKY: Can you bring that up, if you would? Do you mind bringing it up on the screen?
MR. PANEK: You want access to my computer?
MR. KAMINSKY: I'm asking as a courtesy or we can use the charts.
THE COURT: It's in evidence; he's just asking it to be projected.
MR. PANEK: Yeah, I'm just saying --
MR. KAMINSKY: You don't have to, it's okay.
MR. PANEK: I'm saying do you need to --
MR. KAMINSKY: May I approach?
THE COURT: Yes.
THE WITNESS: Did you want the life --
MR. KAMINSKY: The spreadsheets.
THE WITNESS: Okay, here it is. (Handing.)
MR. KAMINSKY: Thanks, I appreciate it.
Q By the way, just so we're clear, did you interview Mr. Ramirez before testifying today?
A No, I did not.

Q Did you interview his wife before testifying today?

A No.

Q Did you speak with any of the doctors before testifying today?

A No, I did not.

Q Did you speak to Dr. Khan, life care plan expert, before testifying today?

A Not directly, no.

MR. PANEK: Counsel, sorry to interrupt you. You can control and that enlarges, that reduces. Any of my notes, I ask that you give me a chance to cut them off.

MR. KAMINSKY: Thank you; I appreciate it.

Q Did you speak to him personally?

A No, I did not.

Q You said the information that was given to you was given to you by Mr. Panek?

A Correct.

Q You have no opinion as to whether or not Mr. Ramirez will need any, some, or all of the information on your life care plan, correct?

A Correct.

Q On your projections, correct?

A Correct.

Q Similarly, you have no opinion as to whether or not Mr. Ramirez can return to work in any capacity, correct?

A That's correct.

Q Now, you said that you are familiar with the labor market?

A Yes.

Q Would you agree with me that the unemployment rate is very low right now?

A Yes.

Q Would you agree with me that there are job opportunities in the labor force right now for sedentary positions, meaning nonphysical labor for people with a work history, with the ability to speak English and Spanish; would you agree me?

MR. PANEK: Objection.

THE COURT: Sustained. Beyond the scope.

MR. KAMINSKY: I believe the witness spoke about --

THE COURT: You want to argue it? We will argue it outside.

MR. KAMINSKY: Okay.

Q You used a work life expectancy to age 67, correct?

A Yes.

Q Have you ever testified in other cases that the work life expectancy should be age 62?

A In some cases, yes.

Q In this case, what would happen to your projections if you lowered the work life expectancy to age 62? It would go

from what to what?

A So, we would deduct five years of earnings.

Q Before you continue, because of the growth rates, right, those five years are the highest five years, correct?

A Correct.

Q So, what would happen to your projections if you used age 62 instead of age 67?

A We would knock approximately 500,000 off of his lifetime earnings if he retired earlier and that --

Q Okay, you answered --

THE COURT: You've got to let her finish.

MR. KAMINSKY: I believe that answers my question.

THE COURT: She didn't finish what she was saying. You stopped her in the middle of a sentence.

MR. KAMINSKY: Okay.

Q If --

A All I was going to say is that would also have an effect on social security.

Q And that was my next question so I'm sorry about that. What would be the effect on the alleged loss of social security if, as you have testified in other cases, the work life expectancy is to age 62? What would it do to that number?

A So, it would increase it because you're getting it for more years but it would lower the amount for each year, so it might balance out on the social security.

Q So just then if you can, tell us just by reducing the work life expectancy from age 67 to 62, that would reduce your projections by half a million dollars, approximately?

A Yes, if you're willing to make that assumption.

Q Now, in addition, you also said you want to be fair, not overexaggerate things; your projections are based on the W2s, correct?

A Correct.

Q The W2s are the gross earnings that a person receives, correct?

A Correct.

Q Did you have the opportunity to look at Mr. Ramirez's tax returns?

MR. PANEK: Objection, your Honor.

MR. KAMINSKY: I will be abiding by your Honor's ruling.

THE COURT: Sustained. No, you're not.

MR. KAMINSKY: Yes.

THE COURT: Approach.

(Whereupon, an off the record discussion was held outside the courtroom, after which:)

THE COURT: The objection is sustained.

Ladies and gentlemen, let me remind you that a question without an answer provides you no evidence whatsoever.

Q Now, all of your opinions about the -- while we're still on the topic of alleged loss of earnings, okay? Again, you have no opinion if the plaintiff is capable of returning to work, correct?

A Correct.

Q If the jury were to conclude that the plaintiff were able to return to work, whatever his earnings were in his position, do you agree with me that those earnings would have to be deducted from the alleged loss of earnings?

A Yes.

Q Same thing for social security?

A Yes.

Q And would you agree with me -- what would the plaintiff -- were the plaintiff's earnings based on his W2 at the time of this incident?

THE COURT: Is that annual earnings?

MR. KAMINSKY: Yes, please.

A $42,156.

Q So for instance, let's just use round numbers. If the plaintiff were able to return to work and earn 20 more thousand dollars a year, your projections would have to be reduced by half?

A Correct.

Q If the jury were to conclude that the plaintiff was able to return to work earning $42,000 a year or more, that

would eliminate all of the alleged loss of earnings, correct?

A Correct.

Q Now, on the medical-related expenses, you have things such as taking what Dr. Khan says plaintiff will need for things such as transportation expenses and you use growth rates and you come out with your calculations, correct?

A Correct.

Q So, if you went through these item by item, the jury determined he's capable of taking public transportation and he didn't need these things, it would be appropriate for the jury to take them out of the life care plan out of your projections, correct?

A If he didn't --

Q Correct?

A Yes, if he didn't need what Dr. Khan recommended, it would lower the amounts.

Q Now, the total amount of your projected alleged loss of medicals, right, the total number was what?

A $3,069,641.

Q Can you agree with me that the largest component of that is housekeeping and things like that?

A Yes.

Q If we take out just that component from your projections, what does your projection come out to?

MR. PANEK: Just objection. We're talking about

just housekeeping or that entire category?

MR. KAMINSKY: That entire category.

A So if we remove home and community based services, that was 1.3 million from 3 million, it would come out to like 2.8 million -- I'm sorry, 1.8 million.

Q So by far, the biggest component in your projections is the alleged need for somebody to come and do housekeeping, for somebody to do shopping, for somebody to provide nursing services and --

THE COURT: Not nursing services.

MR. PANEK: Objection.

THE COURT: That's not in that category.

Q Just that category alone is almost half of the total projections, correct?

A For medical, yes.

Q And so if the jury were to conclude that just those items were not appropriate or not necessary, they can reduce your projections by almost half just on that one category alone; true?

A For health care services, yes.

Q Now, in addition, there are things such as gym membership, weight loss training, exercise trainers, gym equipment, membership dues to a gym, correct?

A Yes.

Q If the jury were to find that those items were not

necessary, that would also cause you to lower your projections, correct? Just yes or no?

A I would have to say no then.

Q Okay.

THE COURT: Actually, the answer can be yes, no or I can't answer it yes or no.

A I can't answer it yes or no.

THE WITNESS: Thank you.

Q Similarly, you have no opinion if he needs all of the physical therapy in the life care plan stated by Dr. Khan, correct?

A Correct, I'm not a medical doctor.

Q And you have no opinion if he needs all of the occupational therapy?

A Correct.

Q And you have no opinion if he needs the marriage counseling?

A Correct.

Q So, if we look at --

MR. KAMINSKY: Judge, just for clarification, the home and community services does provide for visiting nurses, just for the record, okay? Thank you.

Q So, if the jury were to -- not to belabor it but this may be hard to see. Can you see this?

So, just from the home and community based services

which includes effective virtually immediately, that category alone is $1.3 million, correct?

A Correct.

Q Similarly, transportation, okay, $70,000, correct?

A Correct.

Q Do you know if the plaintiff takes public transportation?

MR. PANEK: Objection.

THE COURT: Sustained.

Q And just like if the jury finds he doesn't need all of that home community services, health care, nurses --

THE COURT: Counselor, you have asked this question at least six times. Move on. Move on.

MR. KAMINSKY: Okay.

Q Same thing, medications. $790,000 were for medications, correct?

A Correct.

Q Do you know what medications plaintiff is currently taking?

MR. PANEK: Objection.

THE COURT: Sustained.

Q He's currently taking Tylenol.

MR. PANEK: Objection, objection.

THE COURT: This was a statement, not a question.

Q So, if the jury decides that Mr. Ramirez doesn't need

$790,000 worth of medications, okay, they can similarly take that amount off of your projections; true?

A Yes.

Q And if we went over category by category, item by item, if Dr. Khan says he needs something ten times a year, if the jury concludes he only needs it five times a year, he doesn't need it at all, again we'd have to recalculate your findings, correct?

A All of these numbers are based on Dr. Khan's recommendations.

Q That's what I'm trying to get at.

Everything you've testified to is based on Dr. Khan's findings, correct?

A Correct.

Q Did you review any other documents before testifying today other than the records or the life care plan?

A No.

Q In your life care plan are things such as the need --

THE COURT: It's not her life care plan.

Q In your projections on the life care plan are things such as hospital bed, a scooter, renovations to a house, correct?

A Correct.

Q And again, the jury finds that those things are not necessary, they can be deducted from the plan, correct?

A Correct.

MR. KAMINSKY: Judge, can we approach on an issue?

THE COURT: Sure.

(Whereupon, an off the record discussion was held outside the courtroom, after which:)

MR. KAMINSKY: Judge, we usually get lucky when I ask for a two minute break, so can I have a two minute break? It might save us.

THE COURT: All rise. The jury may exit.

(Whereupon, the jury exits the courtroom.)

MR. KAMINSKY: Judge, if I can make a record on a couple of points.

THE COURT: Quickly.

MR. KAMINSKY: Thank you. I just asked the witness if she had the opportunity to review --

THE COURT: Do you want the doctor excused at this point?

MR. KAMINSKY: No, it's okay. She can stay; I don't mind.

I asked the doctor if she had the opportunity to review the plaintiff's income tax returns. I fully intend -- while I take exception to it -- to abide by your Honor's rulings that I can not talk about any taxes that Mr. Ramirez may have paid.

The reason I was asking if she had reviewed the tax

returns is because she's giving gross projections off of a W2. I think an income tax return would show things such as deductions, work related expenses, in other words, a net amount separate and apart from taxes other than the gross amount and I think it's appropriate to question on the net amount.

The witness has not seen them but I would ask her if there were things such as transportation related expenses that --

THE COURT: This is totally -- totally and completely speculative. There is nothing in the record that would support these questions whatsoever. It is also beyond the scope completely. But the income taxes are not in evidence. And I'm not going to permit this witness to speculate about what might be in them.

MR. KAMINSKY: But as part of doing a fair and accurate analysis, I think I can ask her if she reviewed them and if it would be appropriate -- I'm not going to ask her to speculate what's in there. I would ask her if it would be appropriate to make deductions for travel expenses, for business related expenses --

THE COURT: How could she possibly know?

MR. KAMINSKY: So, the fact the plaintiff didn't provide her with that information means I can't ask about it?

THE COURT: No, that's not the issue. Even if they were provided, they're not in evidence and she can't testify about anything that's not in evidence. End of discussion on that. Not in evidence.

MR. KAMINSKY: Okay, I take exception to that, your Honor. I would ask that Mr. Ramirez come back to court with his income tax returns.

THE COURT: We're not doing that.

MR. PANEK: Your Honor, for the record, in the Second Department, Case Law is very clear that his income taxes and tax returns are not discovery unless he's self-employed, which he's not. He's a W2 employee so this is the appropriate manner in which the economics are presented to a jury.

MR. KAMINSKY: I disagree with that but okay.

THE COURT: I think as far as I recollect from being in practice, although it was quite a long time ago, that basically was the rule.

MR. KAMINSKY: Judge, also in the hallway we had a sidebar. I wanted to bring to your attention before I asked the question to prevent any issues. So what I indicated outside was what the effect would be on all of these medical projections if Mr. Ramirez had insurance coverage.

For instance, I have reason to believe that he is still covered by federal express. I also have reason to

believe that he would be covered under his wife's policy. So, as far as a lot of the medical expenses, and your Honor said outside they haven't been testified to yet --

THE COURT: No, I don't think they're going to be testified to. Insurance is not an issue that appropriately comes up in a trial of this type.

MR. KAMINSKY: If he were to get a new job that had insurance benefits, if he were to still be covered by Federal Express, if he were covered under his wife's policy -- there were representations by the plaintiff that he can't afford certain things, that he's afraid of being homeless. I objected to all of that.

I think all of these things, I don't think I need them to open the door to this line of questioning but they certainly are an additional basis as to why I think insurance is relevant.

THE COURT: Plaintiff.

MR. PANEK: Plaintiff's view is these are entirely issues of collateral sources which are appropriately made after the trial at a collateral source hearing without commenting at all as to what Mr. Kaminsky's reasons to believe are or what he believes it will show.

For the record, even things like that he might in the future get a job with insurance coverage, that wouldn't even cut it at a collateral source hearing so how can it

come here before the jury? It does nothing other than confuse the simple issues at trial.

MR. KAMINSKY: In addition --

THE COURT: Wait a second. You made your record. The ruling is it will not come in. They're all collateral source issues and they're totally beyond the scope and half of it at least is speculative. So that's the ruling of the Court.

Next issue. No other issues?

MR. KAMINSKY: No, if I can have that two minute break.

THE COURT: I told the jury it would be more than two minutes; go ahead.

(Whereupon, a brief recess was taken, after which:)

THE COURT: All rise. Jury entering.

(Whereupon, the jury entered the courtroom.)

THE COURT: Let's continue.

CROSS-EXAMINATION(CONTINUED)

BY MR. KAMINSKY:

Q Doctor, in your projections for loss of earnings, you assume that Mr. Ramirez would work continue usually up to age 67, correct?

A Yes.

Q And again, I asked you if you were here to be give a fair representation and you said yes, correct?

A Yes.

Q Would you agree with me that age 67 is a projected retirement date, correct?

A Yes.

Q Would you agree with me that there is a difference between a projected retirement date and a work life expectancy, yes or no?

A Possibly, yes.

Q Are you aware -- you made reference to the United States Department of Labor. Are you aware that the Department of Labor issues work life expectancy reports?

A Yes.

Q Okay. And you've reviewed them and you're familiar with them?

A I'm familiar with them, yes.

Q Would you agree with me that work life expectancy, according to the United States Department of Labor, is not the same as the retirement age, correct?

A That's correct, one is based on averages and the other is based on the law, yes.

Q So, would you agree with the following statement: "The work life is a statistical construct that takes into account contingencies that would cause a person to leave the work force either permanently or temporarily. Examples would include death, disability -- " other than the one that is involved in

this lawsuit, "long term unemployed --"

MR. PANEK: Objection.

THE COURT: No, no. You can't add that because that's not what the statistical construct says.

MR. KAMINSKY: Okay.

Q Would you agree, according to the Department of Labor, when you take all the different variables into account, the average work life expectancy is to age 60.3 years; yes or no?

A No.

Q You have not seen the work life -- the recent work life data report of the United States Department of Labor?

A I don't know if what I've seen is the most recent but that's definitely on the low end.

Q Are you familiar with -- well, in your projections to age 67, did you take into consideration any other contingent factors such as he may lose his job from Federal Express or he may -- or other factors such as that; yes or no?

THE COURT: Or I can't answer it yes or no.

A I would say yes, I did take that into account.

Q Okay. Are you familiar with the US Department of Labor study prepared by Skoog, next name is Ciecka and Krueger that says that --

THE COURT: No, no. Just are you familiar with it?

Q Are you familiar with it?

A Not off the top of my head, no.

Q Those names don't sound familiar to you at all?

A Is it Alan Krueger?

Q Yes.

A I'm familiar with Alan Krueger's work, yes.

Q Okay. And would you agree that the average work life expectancy according to those studies --

MR. PANEK: Objection.

THE COURT: Sustained. You can't ask it that way.

MR. KAMINSKY: Okay.

Q What would happen -- I asked you what would happen to your projections if you lowered them from age 67 to age 62, okay? You said approximately half a million dollars.

A Yes, half a million dollars.

Q What would be the effect on your projections if you lowered them from age 67 to age 60?

A Even lower. So you want the number?

Q Please.

A So, you would -- another 200,000 to that, about another 700,000 off.

Q So, we're left with what?

A About 1.6, 1.7 million.

Q Instead of?

A 2.5.

Q Okay. And again, if the jury concludes that he is able to return to work at the same or even a greater salary, you can

eliminate the entire loss of earnings, correct?

MR. PANEK: Objection.

THE COURT: Sustained.

MR. KAMINSKY: Thank you.

THE WITNESS: You're welcome.

THE COURT: Redirect.

MR. PANEK: Thank you, Judge.

REDIRECT EXAMINATION

BY MR. PANEK:

Q All right. Doctor, do you need to speak to or interview Mr. Ramirez or his wife or anyone to prepare this report or can you rely on the data that you did?

A I can rely on the data.

Q Okay. Now, you don't have an opinion about medical necessary -- injuries, things like that, correct?

A I do not.

Q Is it appropriate for you as an economist to have an opinion on that?

A No, I'm not a medical doctor.

Q So, the medical doctors are the people who would presumably have those opinions, correct?

A Correct.

Q So, asking you whether or not obviously if you take -- subtract any sum from your sum, it's going to be less, right? No matter what, that's math, right?

A Right.

Q Numbers have no feelings?

A Right.

Q But whether or not they believe this, those are probably good questions for Dr. Khan to answer, right?

MR. KAMINSKY: Objection, Judge.

THE COURT: You can rephrase that.

Q Would you agree with me that it's more appropriate to ask rather than just saying, "If we deduct it, it's less," whether or not it belongs there? That's a question for a medical doctor like Dr. Khan, right?

MR. KAMINSKY: Objection.

THE COURT: Overruled.

A So, I do not have the expertise to say whether these are required or not. It would take medical expertise to decide what is required and I just take that as given and then decide how much it would cost.

Q So, Dr. Khan, assuming that he said those are the numbers that he believes and he gave the basis to this jury as to why they're there, that's an issue Mr. Kaminsky should have taken up with Dr. Khan if he had to?

MR. KAMINSKY: Well --

THE COURT: Sustained. Don't answer that.

Q So, you struck Dr. Khan's numbers right in the middle, right? The projection it was 1 point -- it was -- if we round

up, if we round appropriately in the spirit of economics, it's 1.3 to 1.7 and you struck that in the middle for your projections, right?

A Correct.

Q If we took the high end of those, the numbers would be greater, right?

A Yes.

Q If we took the surgeries in the future, the numbers would be greater, right?

A Yes.

Q Okay. Why did you strike everything in the middle as an economist?

A When we get ranges like that, we go with what we call the expected value which is the midpoint. I have no expertise to be able to tell whether it's going to be more likely on the lower end or the higher end, so I use a 50/50 chance and that's what brings you to the middle; that's how you get an expected value.

Q If the jury heard a cross-examination of Dr. Khan and decided, "You know what? I think it's going to be on the higher end," that's not on --

MR. KAMINSKY: Objection. Leading.

THE COURT: Overruled.

Q If they said it's going to be on the higher end, meaning closer to 1.7 that's not accounted for here, money is

off the table, correct?

MR. KAMINSKY: Objection.

THE COURT: Overruled.

A Yes.

Q But you operate on the principles of economics, correct?

A Correct, I used all of the standard methodologies that we would use.

Q When we were getting into the 62, 67, 60, you remember that discussion?

A Yes.

Q I wrote this down. You said if that's an assumption that you're willing to make, recording 62 versus 67, correct?

A Correct.

Q In your report, you used 67, correct?

A Correct.

Q Please explain why you used 67 as an economist.

A So, unless I have reason to believe that he didn't have a strong attachment to the labor force, I tend to use 67. When I use 62, it's often because I have a conversation with the lawyer or the plaintiff that says they were planning to retire earlier or they were in some sort of profession -- had personal reasons why they would take the penalty and retire earlier. So I don't give the penalty for retiring earlier than the normal age unless I have reason to believe that the plaintiff would

retire earlier than the normal age.

In this case, he had a consistent work life and it seemed reasonable to assume the normal age without penalty.

Q A ten year work history with one employer, is that a strong attachment to the labor force?

A Yes, for his age.

MR. PANEK: No further questions.

THE COURT: Recross.

RECROSS-EXAMINATION

BY MR. KAMINSKY:

Q Did you say your testimony is based in part upon what Mr. Panek told you?

THE COURT: No, he didn't say that -- she didn't say that; sorry.

Q Okay. Regarding the information that you relied upon, wouldn't it be a good idea to have more information or a complete picture of the information?

MR. PANEK: Objection.

THE COURT: I think that your question is not sufficiently specific.

Q Did you review his work records from Federal Express?

A Yes.

Q Yes or no?

A Yes.

Q Did you see all sorts of reprimands there, Doctor?

MR. PANEK: Objection.

THE COURT: Are the documents in evidence?

MR. PANEK: Yes.

THE COURT: Rephrase your question.

MR. KAMINSKY: Sure. Can I have the Federal Express records?

THE COURT: All the evidence is in front of me.

MR. PANEK: Your Honor, may we approach?

THE COURT: Sure.

(Whereupon, an off the record discussion was held outside the courtroom, after which:)

THE COURT: The objection is sustained and again, ladies and gentlemen, a question without an answer provides you no evidence.

Q In other cases, have you testified that it was proper to use 62 as a retirement age when a plaintiff is a fairly heavy smoker?

MR. PANEK: Objection.

THE COURT: Sustained.

MR. KAMINSKY: Judge, I would ask that the Federal Express records --

THE COURT: They're in evidence.

MR. KAMINSKY: Okay. They are in evidence?

THE COURT: Yes, they're in evidence.

MR. KAMINSKY: Okay, thank you.

Nothing further.

THE COURT: Your may step down, Doctor; thank you.

THE WITNESS: Thank you.

(Whereupon, the witness stepped down from the stand.)

THE COURT: Counsel, approach right here.

(Whereupon, an off the record discussion was held at the bench after which:)

THE COURT: Ladies and gentlemen, we have another witness this afternoon but in the interim, we're going to fill in with continued testimony with the plaintiff but we need a couple of minute break.

So all rise, the jury may exit.

(Whereupon, the jury exits the courtroom.)

THE COURT: Plaintiff.

MR. PANEK: I want to put the caveat -- Mr. Kaminsky asked if the Federal Express records are in evidence two times in front of the jury. I want to add the caveat they are subject to redaction. We have not gone through them and agreed upon the redactions so yes, they're in evidence subject to redaction.

THE COURT: Yes, okay.

(Whereupon, a brief recess was taken, after which:)

MR. KAMINSKY: Judge, yesterday the plaintiff gave testimony along the lines of he had to take out his family