SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF KINGS : CIVIL DIV. : PART 95

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FATIMA ASSIL,

Plaintiff,

- against - Index No. 004819/2011

CAMBA, INC., CHURCH AVENUE MERCHANTS BLOCK ASSOCIATION, INC., D/B/A CAMBA; & 2211 CHURCH AVENUE REALTY, LLC,

Defendants.

----------X **TRIAL**

360 Adams Street
Brooklyn, New York
December 5, 2019

B E F O R E :

HONORABLE REGINALD A. BODDIE,
Justice of the Supreme Court, and a Jury.

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

DELISO & ASSOCIATES
Attorneys for Plaintiff
505 Court Street, Suite 4A
Brooklyn, New York 11231
BY: JOSEPH A. DELISO, ESQ.

KAUFMAN DOLOWICH & VOLUCK, LLP
Attorneys for Defendants
40 Exchange Place, 20th Floor
New York, New York 10005
BY: GINO A. ZONGHETTI, ESQ.
KENNETH B. DANIELSEN, ESQ.

CANDACE M. HAMMOND, RPR
SENIOR COURT REPORTER

COURT OFFICER: Ready, your Honor?

THE COURT: Yes.

COURT OFFICER: All rise. Jury entering.

(Whereupon, the jury entered the courtroom.)

THE COURT: Good morning. You may be seated.

MR. DELISO: Good morning.

THE COURT: Counsel, you may call your next witness.

MR. DELISO: Okay. Your Honor, I call Dr. Debra Dwyer. She is in the hallway, please.

(Whereupon, the witness entered the courtroom.)

COURT OFFICER: Just stand in front of the chair.

THE CLERK: Please raise your right hand.

Do you swear or affirm, under penalty of perjury, that the testimony you are about to give is the truth, the whole truth, and nothing but the truth?

THE WITNESS: I do.

THE CLERK: You may sit.

Please state and spell your name, with any appropriate title, and give us your address, which can be a business address.

THE WITNESS: Okay. It's Debra, D-E-B-R-A, Dwyer, D-W-Y-E-R, Ph.D., and my address is 17 Springbriar Lane, Springbriar is one word, and it's B-R-I-A-R. That's in --

THE CLERK: B-R-I --

THE WITNESS: I-A-R.

THE CLERK: Gotcha.

THE WITNESS: That's why I always spell it.

Centereach, C-E-N-T-E-R-E-A-C-H, New York 11720.

THE CLERK: Thank you.

THE WITNESS: You're welcome.

THE COURT: Okay. Good morning.

You may inquire, counsel.

MR. ZONGHETTI: Thank you.

D E B R A D W Y E R, Ph.D., a witness called on behalf of the Plaintiff, having been first duly sworn by the Court Clerk, testified as follows:

DIRECT EXAMINATION

BY MR. ZONGHETTI:

Q Good morning, Dr. Dwyer.

A Good morning.

Q Can you tell us what your -- what your business is, what is your profession?

A I'm an economist.

Q Okay. And can you tell us about your professional background?

A Sure. I got my bachelor's in economics and English literature from Queens College in Flushing, New York. I went on to get my master's and my Ph.D. in labor and health

economics from Cornell University. I spent a couple of years working in Washington, D.C. for the Social Security Administration.

And then I spent the last 21 years working as a professor at Stony Brook University, where I've taught basic economics and advanced economics at all levels mentoring from high school all the way to Ph.D. In the Department of Economics, I've chaired health care policy and management in engineering and in business and in political science.

I'm a teacher, I'm a researcher, and I've served on the finance and budget committee and I have done a lot of administration in my career in the dean's office. Currently I'm teaching graduate students statistics and health care policy and health care economics.

Q Doctor, have you written or have you been published in your field of specialty?

A Yes. I've published a couple of dozen -- over a couple of dozen peer reviewed journal articles in the areas of labor and health economics in a variety of ways. I've also served as a reviewer for peer review journals, several journals in the area of labor economics, health economics, public health, general economics. And I serve as a reviewer for the National Science Foundation.

Q Doctor, in the course of your professional career, have you done work in the area of law and economics?

A Yes.

Q Can you explain what is your role in this case?

A Sure. Well, in general, my role in a case like this one is to determine what future costs are going to be, what the damages are associated with potential injuries; so it could be lost work or it could be the costs of medical needs.

In a case like this one, what I'm doing is I'm taking a doctor's recommendations -- I'm not a medical expert; so I can't speak to what the physical or emotional requirements are going to be in terms of medical services for any plaintiff.

But what I do is I take the opinion of an expert and my job is to project what those costs are going to be over the remainder of the plaintiff's life. In order to do that, what I'm doing is I'm projecting over uncertainty into the future.

So we don't know -- we don't have a crystal ball, we don't know what the price of a physical therapy visit is going to be ten years from now given what it is today. So you bring someone like me in to make assumptions about what we think is going to happen in the future based on our expertise.

So one of the things I do is determine what's going to happen in terms of prices, inflation. You've heard of the Consumer Price Index. The Consumer Price Index that you see in the papers is for a general bundle of goods that most households use.

The Bureau of Labor Statistics collects price data for

many categories -- all categories of goods and services, including medical care. So someone like me would come in and say, okay, which inflation rates am I going to use, how far back am I going to go historically to predict over the next 30 years what I think that physical therapy visit is going to be in the year 2030, 2040, 2050.

So a growth rate is just an inflation rate. It's the amount that I think the same service -- if I say the price went up or it costs more for that physical therapy visit, it's the same physical therapy visit. It's just like when I first started taking the subway, it was less than a dollar and now it's $2.50, the same subway ride. So that's one of the assumptions I make.

The other assumption I have to make is for how long am I going to project these medical care services; and that's the life expectancy. And we get that from federal data as well, the National Center for Health Statistics. So I'll go through this in more detail, but, in general, my role as an economist is to come in with my expert opinion about what I think is going to happen to the economy in the future to be able to make these projections on damages.

MR. DELISO: Your Honor, I offer Dr. Dwyer and ask that she be accepted and certified as an expert in the field of economics.

THE COURT: Any objection?

MR. ZONGHETTI: No objection.

BY MR. DELISO:

Q Doctor, did there come a time when my office asked your office to perform an analysis of the future care costs in this particular case involving Miss Fatima Assil?

A Yes.

Q And did you do such analysis?

A Yes.

Q And did you furnish a report?

A Yes.

Q Did you revise the report as late as of yesterday to take into consideration evidence that came before this jury at this trial with respect to the medical costs evidence?

A Yes.

Q Okay. And do you have a copy of the report with you today?

A I do.

Q Okay. May you take it out? Please take it out.

A Okay.

Q And as you know, Doctor, that if you need to refer to your report and your analysis at any time to refresh your recollection, you may do so.

A Thank you.

Q Okay.

MR. DELISO: Your Honor, may we have this marked

for identification?

THE COURT: As Plaintiff's 26.

(Whereupon, the item referred to was marked Plaintiff's Exhibit 26 for identification.)

BY MR. DELISO:

Q Dr. Dwyer, I'm showing you what we have marked as --

MR. DELISO: May I, your Honor, come closer?

THE COURT: Yes.

Q I'm showing you what we have marked as Plaintiff's Exhibit 26 for identification. And I ask you if you could take a look at the report that you brought with you and that you prepared yesterday and compare it with this Exhibit 26 for identification.

A Yes. It's the same chart.

Q Same chart?

A Yes.

MR. DELISO: Okay. Your Honor, I offer Plaintiff's 26 into evidence.

MR. ZONGHETTI: Objection. There's no foundation for it.

THE COURT: Sustained.

BY MR. DELISO:

Q Doctor, what does this chart include?

A So this is the categories of medical services that were recommended by Dr. Hassan yesterday in testimony. I took

those categories and I project them into the future what they're going to cost to come up with the total cost of the services as recommended by Dr. Hassan.

MR. DELISO: Your Honor, I'd offer this into evidence, Plaintiff's 26.

MR. ZONGHETTI: Same objection.

THE COURT: Sustained.

BY MR. DELISO:

Q Doctor, the -- are you taking -- in terms of 26, do you -- are you taking the costs that Dr. Hassan testified to at the trial two days ago?

A It was two days ago. Okay. So it was based on Dr. Hassan's testimony. So, for example, physical therapy one to two times a week at $127 a visit, that's what I used to come up with that baseline number, which is in today's dollars, and that comes out to $4,403 in 2020 dollars. We only project into the future; so I began January 1st, 2020.

I take that number and I grow it, I do it for every category of medical services that had been recommended by Dr. Hassan.

Q Okay. And is this a chart or an analysis that's done by economists in this type of situation where you're projecting medical costs into the future?

A Yes.

MR. DELISO: Okay. Your Honor, I offer this into

evidence, the report.

MR. ZONGHETTI: Same objection.

THE COURT: Sustained.

MR. DELISO: Okay. May the witness use this report as a demonstrative?

COURT OFFICER: Turn it the other way.

MR. DELISO: May the witness use --

THE COURT: Yes.

MR. DELISO: -- use this demonstratively --

THE COURT: Yes.

MR. DELISO: -- so that she can explain to the jury?

THE WITNESS: Yes.

MR. DELISO: Okay. Turn it around. I'm going to set it up on the easel.

BY MR. DELISO:

Q Before I do that, Doctor, just hold on a second, I have a couple preliminary questions.

A Sure.

Q Just a couple of preliminary questions before we get into that.

Doctor, in terms of the work that you're doing with us in this particular case before the jury, are you charging a fee?

A Yes, I am.

Q And is this -- what is the fee for you to come to court today?

A $4,600 is the flat rate for my time away from work and for preparing.

Q And did you, in addition to preparing, we talked about you revised the report. Did you revise the report based upon new numbers that came in --

A Yes.

Q -- with respect to the costs?

Okay. Doctor, did you want to explain the growth rate further or can you go into more detail about what a growth rate is?

A So I think that that's what I explained is the inflation rate or what happens to prices over time. If I'm going into a bit more detail at this point, I'll tell you what I did to get these growth rates.

I went back 25 years of trends in medical care prices and subcategories. So there's general medicine, which is pretty broad. And then within medicine, you'll have things like medical care office visits, physical therapy, other professional services. So I went to the Bureau of Labor Statistics data and I take the last 25 years.

How far back I go is part of my expertise. That's how far back I think I need to go to get what I think is going to be the average over the next 30 years. And so I could go back

20 years and my growth rates would be lower because we had just come out of a rescission. I could go back 30 years and they would be much higher because we had spells of double digit inflation in the 1980s and late 1980s in this country.

So I go back 25 years because that's what economists believe is standard for capturing what we call a business cycle into the future. So that growth rate is just the average of the prices -- how prices have gone up over time over the last 25 years for the specific categories of medical services that we see up on that chart.

Q Doctor, would it be helpful at this time to step off the stand and just explain to the jury how this chart is set up?

A Sure.

Q And then we'll get into the details.

A Okay. May I?

Q Yes.

A Okay. So what you see here are one, two, three, four, five, six categories of medical services that Dr. Hassan testified to that Miss Assil will need over the remainder of her life. I'm going to go into more detail in how I calculated that first column of numbers, and then it's the same methodology for all of the other columns.

So can I just go ahead and proceed?

Q Yes, please.

A Okay. So in the category of physical therapy, Dr. Hassan recommended one to two visits a week at a rate of $127 per visit. Whenever a medical professional gives me a range like that, one to two, I just take the midpoint; so what I did was I took 1.5 visits per week for 52 weeks times 127, and you get this $4,403 for the annual cost of physical therapy visits in today's dollars.

The growth rate that I find for other professional services -- so those are things like occupational therapy, physical therapy -- is 2.5 percent. So we've come a long way because that's lower. That's a slower growth rate than the general rate of inflation, which is 3 percent. So I use the 2.5 percent growth rate. So what that says is in 2021, those same visits, 1.5 a week, are now going to cost $4,513 annually.

I do that every year until her life expectancy. According to the 1997 National Center for Health Statistics life tables -- so the National Center for Health Statistics produces tables -- survive probability tables; they're mortality rates. And it's based on gender and age.

The courts rely on the 1997 tables; so that's what I used here. And her life expectancy would be age 81.8; so that brings us to the year 2050 where she is expected to pass in the middle of the year, and that's why that number is a little bit lower in the final year.

So for the next 30 years, the cost of those same 1.5

per week visits of physical therapy, the total cost over Miss Assil's lifetime is $200,215.

Now, I'm going to do that same exact methodology for every other category. What I will do is provide you with the frequency, and the cost of the service, the cost at baseline, and what the growth rate is, and then the total. And it's the same methodology.

So Dr. Hassan recommended MRIs once every two to three years at $1,500. So, again, I used 2.5 years -- every two 2.5 years, which comes out to, if I annualize it, $600 per year, the growth rate on average for those kinds of evaluative medical services is 3 percent, and the lifetime cost for those MRIs is 29,638.

Medications. You have probably heard pharmaceutical price haves risen faster than the generate rate of inflation and we're concerned about our pharmaceutical prices. The good news is, on average, it's growing now at a rate of 3.8 percent compared to the double digits that I talked about in the past.

So here we use a 3.8 percent growth rate for the $300 a month of medication that was prescribed by Dr. Hassan. So for the first year, it's just 300 times 12, 3600. Over the remainder of her life, the cost of her medications, based on Dr. Hassan's recommendations, is $203,557.

Urine tests every three months, $600 each, comes out to $2,400 a year. Again, the general rate for medical care is

3 percent. Total cost for the urine tests over her lifetime, $118,550.

The EMGG/NCF studies, so another diagnostic test, one every two to three years, $800 each; so 800 over 2.5 years, annually $320, also 3 percent growth rate; total lifetime cost, $15,807.

And, finally, the injections, the cervical epi injections six times per year at $180 per injection is $1,080 a year; 3 percent growth rate; total lifetime cost, $53,348.

So the total lifetime costs for the recommended medical services that Dr. Hassan prescribed is $621,115.

Q Doctor, is the opinion on the total -- your opinion on the total costs in each of the categories that you have explained to the jury based upon a reasonable degree of economic certainty?

A Yes.

Q And with respect to the given different growth rates that are being applied, did you -- you explained why this -- it's different in some categories, but could you just go through why is it 3 percent on the categories involving, like, the urine test?

A Because it's -- it falls under the category of general medical care; so general medical care -- and that's the routine care -- is 3 percent per year.

You should know the average overall, if I did the

overall all sectors of the health care economy, it's 4 percent over time. So none of these categories are those high growth rates areas; even pharmaceuticals is slower than the overall average. The surgical procedures, the hospitalizations, those things have higher growth rates associated with them, but the general medical care, routine stuff has been growing at the same right rate as the general economy at 3 percent.

Q Are there different statistical databases that you utilize in determining the different growth rates?

A They all come from the U.S. Bureau of Labor Statistics.

Q Okay. And is the Bureau of Statistics that U.S. Labor --

A Labor Statistics.

Q -- Labor Statistics, is that an accepted database for the growth rate?

A Absolutely. It's one of the most reliable sources for labor economists.

Q Okay. Now, Doctor, Dr. Hassan testified that he charges -- with respect to the physical therapy, he charges $127 a session, but he accepts $109 per session.

How, if it does, how does that affect your results?

A So I did do the analysis for the lower rate as well. And that's a good point that part of the reason why I rely on a medical expert is there really is a lot of variation in the

same procedures across physicians, across patients because of differential intensity in different costs; so costing the pricing is pretty complex in health care. And I am not qualified to be able to say the level of intensity that a patient is going to need for physical therapy say.

This discrepancy where he is saying that he charges 127 and accepts 109 is not that unusual in that there is a going rate according to the government. The government sets the usual rates for all kinds of procedures for Medicare and through Workers' Compensation.

Physicians still have the autonomy to charge what they want based on their own specific costs. So even though the government might be willing to pay 127, some physicians will charge more than that, and then they have to decide whether they're going to accept the 127, some will accept less. Honest physicians will -- will charge what they think it should be. And so, in this case, it sounds like Dr. Hassan is acknowledging the 127 that the government would consider normal, but for the services he is producing 109 is acceptable.

Q Okay. And, Doctor, before you sit down, did you make a chart with respect to using the 109 number?

A Yes. I didn't even answer that question. Obviously if I'm going to use a lower price, it's going to be a lower number at the end, and so I did.

MR. DELISO: May I show -- may I mark this for

identification, Judge?

THE COURT: Yes.

(Whereupon, the item referred to was marked Plaintiff's Exhibit 27 for identification.)

BY MR. DELISO:

Q Doctor, could you take a look at your report and compare it to what we have marked Plaintiff's Exhibit 27 for identification.

A Yes, it's identical.

Q Identical.

MR. DELISO: Your Honor, may I?

THE COURT: Yes.

Q Okay. Could you tell us what Plaintiff's Exhibit 27 for identification is?

A Exactly the same chart that I showed you a minute ago, except the first column is different because instead of 127, we're using 109 for those 1.5 physical therapy visits a year; so where I had 4,403 before, I have 3,779 as a base. That reduces the lifetime of physical therapy cost to 171,838. Everything else is identical.

The total cost then under that scenario is $592,737. And just so you have it in front of you, this is 592,737 versus 621,115 if we use the higher rate.

Q Doctor, in -- just so we have the record clear, in terms of doing this calculation with respect to life

expectancy, did you assume that Miss Assil was born on 12-31-1968?

A Yes.

Q Okay. And is -- her date of birth, is that what you used as an assumed fact in order to offer your opinion as to what the life expectancy was? I'm sorry.

Is her date of birth what you use to calculate her life expectancy?

A Yes. Just a correction, the date of birth I have is December 13th, 1968, although, maybe I wrote it wrong here.

In any case, it makes no difference. December of 19868 is what I use for the basis for life expectancy. I look up the survival probabilities for a woman born that year.

Q Okay. And is there a difference -- withdrawn.

Now, can you -- do you have an opinion -- before you sit down, do you have an opinion, with a reasonable degree of economic certainty, what the lifetime cost of care in total will be for Miss Assil?

A Yes.

Q And what is it?

A So the lifetime --

Q And could you state that opinion with a reasonable degree of economic certainty?

A Absolutely.

Q Okay.

A So -- and by reasonable degree of economic certainty, remember, I said I'm projecting over uncertainty. So I'm making an educated hypothesis and it is within a reasonable degree of certainty because it's grounded in federal statistics and research.

And the range would be between $592,737 and $621,115, with the government's valuation of those services as the latter.

MR. DELISO: That's all I have, your Honor.

THE COURT: Okay.

MR. DELISO: Keep it up or down?

THE COURT: I don't know.

MR. ZONGHETTI: You can take them down for now.

CROSS-EXAMINATION

BY MR. ZONGHETTI:

Q Okay. Good morning, Dr. Dwyer.

A Good morning.

Q My name is Gino Zonghetti. I have a few questions for you.

A Okay.

Q If I'm understanding correctly your testimony, you're an economist, correct?

A Yes.

Q And you had your undergraduate education -- bear with me one moment -- at Queens College; is that correct?

A Yes.

Q And then you got a master's in labor and health economics?

A Yes.

Q And then you got a Ph.D. as well?

A Yes.

Q Same field?

A Yes.

Q Okay. And they were both from Cornell?

A Yes.

Q An Ivy league institution?

A Yes.

Q Okay. And then you went to work for a while in Washington, D.C.?

A I skipped that I spent a year in a post-doctoral fellowship at Syracuse University in the Center for Policy Research, and then I went to Washington, D.C.

Q And at some point you became a professor at the State University of New York at Stony Brook?

A Yes.

Q When did that happen?

A 1998.

Q Okay. Are you a full professor there.

A No.

Q What --

A I'm a research associate professor is my title.

Q Research associate professor?

A Correct.

Q Okay. And you teach some courses in economics to students.

A Yes.

Q And what courses do you teach?

A I'm currently teaching statistics and health economics and public policy, but I have taught microeconomics, principles of economics, intermediate economics, health care economics, statistics and research methods, teaching practicum, lots of things.

Q Okay. And do you have an office at SUNY Stony Brook?

A Yes.

Q Do you have access to administrative services in that office?

A Yes.

Q And you sort of share this practice of consulting in legal cases with another employee of SUNY Stony Brook; is that correct?

A You're referring to Dr. Alan Leiken?

Q Yes.

A He's retired from Stony Brook, but yes, that's where we met.

Q Okay. So he's no longer at Stony Brook; is that the

case?

A Correct.

Q But you are?

A Yes.

Q He had been there for some period of time; is that correct?

A Probably about 30 years, yes.

Q Okay. And while you overlapped together at Stony Brook, you became involved in this legal consulting business?

A Correct.

Q And that's what it is, you -- you use your expertise and assist lawyers in lawsuits in that business; is that correct?

A Correct.

Q And what -- what happens is you're hired by an attorney or a law firm, you're given some information, you're told what the -- what the ultimate issue to be resolved is, and you come up with a report, right?

A Yes.

Q And you're paid for that report; is that correct?

A Yes.

Q And then if the case goes to trial or perhaps in Federal Court to a deposition, you're called upon to testify in support of your report; is that the case?

A Yes.

Q And you're also paid for that, right?

A Correct.

Q So how many of these reports do you do per year, these legal economic reports?

A It has been steadily growing over time. So I began this work in 2012, and it's probably up to about 50 or 60 reports a year.

Q Presently?

A Yes.

Q Okay. And that would be one, one-point-something per week about, 50?

A Yeah.

Q About one a week.

And how much do you charge for those reports?

A It ranges from 2,600 to 5,000 depending on the nature of the case and what's involved.

Q Is there an average of what you charge?

A I would say 3,000.

Q So if we use the 50 number, on average is it correct that from writing the reports, you're earning about $150,000 per year?

A Yes.

Q Could be more, could be less?

A Correct.

Q Okay. And then on top of that, does it matter if you

have to revise a report, like you said last night you revised your report, is there a charge for that?

A No.

Q So the 3,000, if that was the fee in this case, that would be a flat fee for no matter how many reports or revisions you have to do or --

A Unless it's, like, a revision that's a total overhaul, I don't typically charge. This I would also consider time away from my work as part of preparing to be here today as well.

Q Okay. So do you charge for preparing for trial?

A No. Well, I'm sorry, it's included in. It's a flat rate.

Q Okay. And how many times do you testify a year?

A I would say probably a couple times a month; so 24.

Q Do you keep statistics on that?

A I do.

Q Okay. And I assume you have those somewhere?

A Yes, on a computer.

Q Okay. So is it about 24 or is it more than 24 for, let's say, 2018, complete year of 2018?

A I would say it was about 24.

Q Okay. And you testified, I believe, that your rate for testifying in court was -- was it 4200?

A 4600.

Q Forty-six. So that's another $110,000?

A Yes. That sounds about right.

Q So we're talking from this consulting business about $260,000 a year you earn?

A Yes.

Q And what percentage of your annual income would you say the consulting -- the legal consulting business is?

A As of 2018, I would say it's probably about 68 percent, like, around there.

Q So that would mean that the Stony Brook job you have is about 30 percent or so of your annual income?

A Yes.

Q So your job as an actual professor of economics is sort of the minority of your income; is that correct?

A Of income, yes.

Q Does Dr. Leiken still do expert reports?

A Yes.

Q So when you gave me those numbers of 50 to 60 reports a year and 24 times in court, that didn't include the Dr. Leiken side of business, what he generates?

A Correct. Correct.

Q That's just you?

A That's just me.

Q Now, when you do these reports, do you work out of your Stony Brook office to do these reports?

A No.

Q Where do you do them?

A At home.

Q Okay. So all of the reports you do and so on and so forth you do out of your house?

A Correct.

Q And I assume that you have a separately incorporated business that you operate out of or an LLC or some sort of business structure that you operate this legal consulting business out of?

A No.

Q Well, what do you operate out of.

A It's just self-employed?

Q But you have business expenses that go along with that, right?

A Yes.

Q Travel, right?

A Yes.

Q Office expense?

A Uh-huh. Yes.

Q Okay. So you work out of your -- do you have an office in your house?

A Yes.

Q And you work out of that office, you crank out these reports doing the work you have to do and generate income and, of course, you take business deductions from that, right?

A Yes.

Q Now, you've been doing this for how long?

A Since 2012.

Q So seven years?

A Yes.

Q Do you have any idea how much income you've generated from this legal consulting those seven years; would it be well over a million dollars?

A No. It didn't really pick up at the pace it's -- there were a lot of decisions along the way in my career; so it's picked up over time, but it was very slow in the beginning. I was a chairperson when I started, and so I -- I would say it's less than a million, but...

Q Close?

A I would say probably around 700,000.

Q But it's probably -- you would agree it's the most lucrative business endeavor you've been involved in; is that fair to say?

A Yes. Yes.

Q Now, your role as an expert, did anyone ever teach you how to be an expert witness?

A No.

Q Self-taught.

A Well, Alan -- so Dr. Leiken and I work together and he was doing it longer and he brought me into it because he had a

lot of work, but this comes from my training as a labor economist and health economist. So he presented it to me as how would you go about doing these damages, and we consulted on the assumptions that needed to be made.

What he did train me with is the legal side of it because that part I was not trained in.

Q Okay. So you got training in the legal side?

A Correct.

Q What does that mean?

A So, for example, I said that I used the 1997 life tables. If I were left on my own as a researcher, I would use the 2016 life tables because they're more recent, but my understanding -- and I've learned to say, okay, my understanding is that the courts do it differently. And there was no way I was going to be trained in how the courts do things.

Q What about in terms of coming in and testifying as an expert, what your role is, things of that nature; did anyone teach you that?

A Well, sure, Alan -- Dr. Leiken gave me pointers on what kinds of questions would be asked and the key is always to be honest.

Q Okay. Now, in terms of the questions that are asked, since you testify 24 times a year, it's really not much of a surprise at this point as to what you're going to be asked,

right?

A Every now and then I get one, but, yeah, for the most part, this is familiar to me.

Q But a question you always get is whether you have your billing records with you; isn't that common?

A No. Actually, not typically.

Q Well, do you?

A I don't.

Q Okay. You've been asked that question many times before, right, whether you have billing records in a particular case with you?

A Actually, not.

Q No?

A Not to my recollection. I've been asked how much I earn as you -- how much I have earned, but I've never been asked for my billing records or if --

Q Never?

A Not that I recall.

Q How much have you billed the Deliso Law Firm in this case total?

A Myself, 4,600. And in conjunction with Dr. Leiken, it's another 2700; so it would be 7300.

Q $7,300 to prepare the report and for you to come in here; is that correct?

A Right.

Q The -- the idea that you've presented in this case is this plaintiff Fatima Assil has certain future expenses that she's going to incur, you've come up with a projection as to those medical expenses, you've presented it to the jury as potential damages; is that all fair?

A Yes.

Q And damages in terms of this type of damages are what a plaintiff would be out of pocket over the next, was it, 30-something years?

A Thirty.

Q Thirty years; is that correct?

A Yes.

Q Okay. So what you're trying to do is have the jury -- or what you're presenting is for the jury to award a sum that the plaintiff will be out of pocket for this period of 30 years?

A Actually, my understanding of it as a labor economist is it's the value of the injury. So I don't think of it as out-of-pocket expenses so much as the cost of what it would take to treat her.

Q Okay.

A It's not quite the same thing.

Q Okay. But it's her cost, the plaintiff's cost, correct?

A Correct.

Q This is not some academic endeavor. You're trying to calculate what the plaintiff will bear in terms of costs for her treatment over the next 30 years, right?

A Well, that's kind of my point is I'm not deciding who pays it.

Q Right.

A I'm just saying what the cost is and the liability of who pays it is outside of my area.

Q Okay. Now, you -- I assume that you requested from Mr. Deliso -- plaintiff's counsel's firm the actual treatment records for things like physical therapy -- physical therapy, MRIs, medication, urine tests, EMGs, and cervical epidurals so you could get the actual facts as to how many treatments she has had historically; am I correct?

A No. That's completely irrelevant to me.

Q Okay. Just -- could you just answer my question. I know you've been on the stand quite a few times.

You didn't do that; is that correct?

A Correct.

Q You understand that there's a history of ten years of treatment in this case; is that correct?

A Yes.

Q Okay. Getting back to something I was asking you about a little bit earlier. In terms of what you understand your role to be as an expert, and whatever was taught to you by

Dr. Leiken and the experience you picked up along the way, would you agree with me that an expert is not supposed to be an advocate for one party, but someone who comes in with expertise so that they can assist the jury in understanding the issue being presented?

A Absolutely.

Q You're not supposed to take one side or the other; is that correct?

A Correct.

Q Just right down the middle provide them with the assistance they may need to understand the issues and to come up with a verdict, fair?

A Fair.

Q Okay. And in that role, would you agree with me that it would be -- would not be of assistance to the jury if you overlooked important facts in rendering your opinions?

A Sure.

Q It would not be of assistance to the jury if you presented a one-sided or a slanted opinion; would you agree with that?

A I agree.

Q Okay. In taking on one of these assignments, is there anything that prevents you from asking for actual factual records of treatment?

A Of course not.

Q Is there anything that prevents you from asking for actual costs of billing -- I'll withdraw that.

Is there anything that prevents you from asking for actual payment records that are received by the health care providers that are involved in the particular case?

A No, nothing is stopping me.

Q And if I'm correct, you've done neither in this case; is that correct?

A That's correct.

Q Now, you testified about your opinions are based upon what Dr. Nassef Hassan testified to; is that the case?

A Yes.

Q I assume you have somewhere in your file a copy of his testimony?

A I do not. I just have a summary of it from the law firm.

Q Okay. So what you have and what you've based these nice big charts on which -- by the way, you didn't prepare those big charts, that was plaintiff's law firm?

A Correct.

Q Okay. You've based that upon what plaintiff's counsel has told you, correct?

A Correct.

Q And assuming it's all correct, right?

A Correct.

Q Now, one item you have listed on both charts is cervical epidural injections; is that the case?

A Yes.

Q Did Dr. Hassan mention cervical epidural injections in his testimony at all?

A I didn't read the testimony; so I don't know precisely what he said.

Q Do you know at all whether he actually talked about epidural injections?

A No. I'm just trusting the word of the law firm.

Q If, in fact, Dr. Hassan didn't talk about epidural injections at all, that column would be a mistake, right?

A I don't know if it goes back to the original life care plan or the testimony. It came from somewhere, but if it's deemed not necessary, then that column would be deducted.

Q Okay. I didn't really ask that.

If Dr. Hassan didn't talk about -- didn't testify about epidural injections, the inclusion of that column, which comes out to $53,000 and change, would be a mistake, right?

A It would need an amendment, yes.

Q What do you mean, needs an amendment? If he didn't mention epidural injections and you're including that in your report, and the basis for your testimony is on Dr. Hassan's testimony, then that would be a mistake?

A Okay. We'll call it a mistake.

Q Right.

Do you know whether that's just simply perhaps a description mistake by the attorney in filling out that -- in giving you that information or some other type of mistake?

A I wouldn't know.

Q Okay. And you've done no independent investigation to determine whether, in fact, Dr. Hassan gave epidural injections or is recommending epidural injections for Mrs. Assil; is that correct?

A Correct.

Q I believe -- I believe that when you testified about the $4,200 you received, if I'm not mistaken, whatever the number was, 46 or 4200.

A 4600.

Q Thank you. You said that's to compensate you for your time away from work?

A Yes.

Q Are you suggesting that at SUNY Stony Brook for a couple of hours of work or a half day of work you earn $4,600?

A No. I'm suggesting that's the value of my expertise and my time.

Q Well, you said to compensate you from being away from work. Unless I understood you --

A No. My work is more than just Stony Brook, but -- and so I'm not an hourly employee and my rates are different

whether I'm at Stony Brook or doing this work.

Q But you're at work now, right?

A Yes.

Q So that rate is what you've decided the market will bear for the value of your services, right?

A That's very well put, yes.

Q It's not because you're missing out on other work, that's what you're -- you believe you should be --

A That's the value of my time.

Q Okay. Now, if I understand correctly, you've assigned a -- you've taken what you believe is the testimony of Dr. Hassan regarding in the first -- the first chart we saw what he charged for certain services -- what he charges for certain services and the frequency of those services and you've multiplied those numbers and you've come up with the 2020 baseline number; is that fair?

A Yes.

Q And that's just simple multiplication, right?

A Correct.

Q And then in order to run those numbers out into the future for 30 years, you went to the Bureau of Labor Statistics published charts, right?

A Yes.

Q And you've come up with these -- these percentages of increases which are tracked back to the Bureau of Labor

Statistics for 25 years?

A Correct.

Q And I believe you said that if you had used a shorter time frame, that those percentages might be somewhat lower because of different trends?

A Yes.

Q If we took a snapshot, for example, 10 years back as opposed to 25 years back, so if we went back to 2009 and we were talking about physical therapy, do you know what the difference between the 2.5 percent you used?

A If you look at -- yeah, the last ten years would be significantly lower, less than 2 percent.

Q Okay. And how about the MRIs?

A All of them would be lower. The MRIs would be in the -- probably if I went back ten years, about 2.2, 2.4 percent.

Q So if you use the ten -- a 10 percent look back -- a ten year look back, all of the percentages would be lower and the numbers that you come up with at the end of the day, these total numbers would be lower as well, right?

A Yes.

Q Okay. Now, you understood from -- I assume from Dr. Hassan's testimony that the plaintiff has Medicare insurance that pays her bills, right?

A It's my --

MR. DELISO: Objection, your Honor.

THE COURT: Overruled.

A So it's my understanding that we don't take that into account.

Q I didn't ask you that.

A Okay. I did not know.

Q Okay. I asked you to assume that Dr. Hassan testified that the plaintiff has Medicare insurance that pays her bills, all of her medical bills. Do you understand that so far?

A Okay. Yes.

Q And what you're -- if I'm not mistaken, what you're asking or what you're presenting to the jury is that there's a range of damages that she may suffer because of what she may pay in the future that ranges from 592,000 to 621,000 and change, right?

A Those are the costs incurred, yes.

Q Okay. Now, if, in fact, the plaintiff doesn't pay any of those costs because she has insurance, if the jury was to award that to her, she would be getting a windfall, wouldn't she?

A That's a collateral source and my understanding is this is about who should pay.

Q Okay. But the point is if she's not paying, why should she get an award?

A Again, it's a collateral source and it's not my job to

say who should pay.

Q Okay.

A If you want taxpayers to pay, it goes through Medicare. If somebody else is found liable, then somebody else pays. But that's -- my job is just to say this is the value of the damages.

Q But either way, we know the plaintiff is not paying that money, right?

A I do not know.

Q Well, assume that she has full medical insurance. That's what Dr. Hassan testified to. That would mean she is not paying, right?

A Okay. So --

Q Is that correct?

A That's correct.

Q Okay.

A Or some of it or whatever is covered by Medicare.

Q Well, he said everything -- everything is covered. That's what his testimony was.

A With no copayments?

Q Doctor, I'm telling you what his testimony was.

A Okay.

Q Okay.

A Okay.

Q Now, and Miss Assil, no matter what happens in this

case, will continue with her medical insurance, right, no reason that she wouldn't?

A Presumably, yes.

Q Whether the jury gives her $592,000 or not, right?

MR. DELISO: Objection, your Honor.

THE COURT: Overruled.

Q Right?

A Yes.

Q Okay. Now, in terms of the expertise as an economist in preparing these charts, what you do is you take what you're told by the plaintiff's lawyer are the numbers that have been testified to by a doctor, you plug them into I assume a spreadsheet?

A Yes.

Q You go to the Bureau of Labor Statistics and you look up the percentages associated with a 25-year snapshot for these different services?

A Correct.

Q And then you just run the numbers on a snap -- on a spreadsheet, right?

A Based on my expertise, yes.

Q Well, what expertise is there in running a spreadsheet?

A Keeping up with what's going on in the trends by doing research and teaching in these areas so that I know what to

expect in the future and how far back to go and what I believe to be reasonable within a reasonable degree of certainty when we face uncertainty.

Q Well, for how long have you and Dr. Leiken been using this 25-year look back?

A Since the beginning.

Q All right. And that's something you've been using for, would you say, the six years you've been doing this?

A What did I say? 2012, seven years.

Q Seven years. Okay. So you use this 20 -- 25-year look back and, once you establish that, all you have to do is look at the Bureau of Labor Statistics, right?

A Mechanically, yes, it's simple.

Q Okay. And in terms of the spreadsheet, I mean, you get hired to do this, you're sitting at home in your office, Mr. Deliso sends you some numbers, you know you're going to use the 25-year look book --

MR. DELISO: Objection, your Honor. I didn't send any numbers.

MR. ZONGHETTI: Well, he sends --

THE COURT: Overruled.

Q The plaintiff's lawyer sends you the numbers, right?

A From the testimony, yes.

Q Yes. You know you're going to use this 25 percent [sic] look back, you're doing a report a week at least; so

nothing changes, right, you just plug the numbers in and you run it, right?

A There is ongoing research in the background to consistently update our expectations on these assumptions.

Q But what -- what ongoing research changes your assumptions if you've been using the same 25-year look back and the Bureau of Labor Statistic every year; you just have to look at the Bureau numbers, right?

A And I need to be prepared to defend those numbers in terms of what I believe as a policy analyst will happen in the future.

Q Okay. Well --

A And that's what you're paying for.

Q But couldn't -- couldn't a bright high school student be given the numbers who understands spreadsheets, which is taught in high school now, be given the numbers and just run the spreadsheet?

A And you would have to rely on the expertise of a high school student to know how, perhaps, a 2020 election and the Affordable Care Act and all of that might have an impact.

Q Well, if you just told a high school student, I want you to look at the Bureau of Labor Statistics for the last 25 years, what the Consumer Price Index was for medical care in these categories, and I want you to run a spreadsheet based upon these numbers, you would get the same exact spreadsheet

that you prepared, right?

A If the courts are satisfied with that, yes.

Q And this is what you do over and over and over again, right, in your business, in this legal consulting business?

A Each case is different, but yes.

Q But it ultimately comes down to you taking the numbers, plugging them into the spreadsheet, and ripping out the report, right?

A And it's the numbers that go in that qualify me.

Q When is the last time -- I think I asked you this -- the 25-year look back you've been using for seven years, right?

A The numbers have changed over those 25 years, but that has been adequate for capturing a business cycle, yes.

Q Now, in terms of what you actually did in this case, I got a report last night e-mailed to me at 5:00 -- about 5:00 p.m. and the total future cost of health care in that report was $800,924. Did you prepare that report?

A That sounds like the earlier version, yes.

Q Okay. That was the 5:00 p.m., right?

A 5:00 p.m. last night?

Q Around there, yeah. I was sitting in my office and I got an e-mail.

A So the only revisions I made last night were the ones I presented today.

Q And between --

A Oh, okay. I see what you're saying. Yes, there was a -- there was a version where I was not clear on what categories I was supposed to use. So, again, I'm not the medical expert.

Q Then later that night, we got one that $621,592, right?

A Correct.

Q Okay. And before that, in October, we got one that said 1.1 million. Do you recall that one?

A Sounds about right, yeah.

Q So this is sort of a -- are we done, is this the final version?

A You tell me.

Q You're the expert.

A I'm not the medical expert; so you tell me that there's an amendment to the medical recommendations and I make the changes.

Q Okay. So let's talk about amendments to the medical recommendations.

The difference between the 592 and the 621, if I'm reading this correctly, is that Dr. Hassan, you believe, testified that he charges $127 for a physical therapy session but he accepts 109,000 -- $109, right?

A Correct.

Q Now, you were certainly aware of his testimony -- so

what you've done is you've given two versions to sort of capture what this doctor's actual fee acceptance rate is, right?

A Correct.

Q And that's fair, right?

A Yes.

Q He testified that he bills $1,500 for -- or $800 for EMGs, but he accepts something like 300. Did you factor that in at all?

A No, I did not.

Q You weren't told that by the attorney, right?

A Correct.

Q I assume that since Mrs. Assil has Medicare, that one of the things you would have done in order to be fair to capture exactly what the costs that she is never going to pay were was you looked at the Medicare reimbursement rates; is that correct?

A No. I mean, yes, it's correct.

Q That's my answer. That's my question.

A Okay. I could explain.

Q So did you or did you not look at the rates for Medicare reimbursement?

A No. I'm aware of what some of the averages are, but I rely on the medical expertise.

Q Okay. So if you're aware of what the averages are,

would you agree with me that her physical therapy, for example, for the type of services that Dr. Hassan provides, that the reimbursement is about $84 and not 109?

A I'm not -- there is so much variation in the price of physical therapy depending on the intensity of the care that I really am not qualified to speak to the type of care that Dr. Hassan has prescribed on average it's between 100 and 150.

Q But that's something that you could receive -- you could have received from Dr. Hassan had you asked the questions in doing your report, right?

A I just relied on his judgment; I didn't ask.

Q That's something you could have received if you asked that question; is that correct?

A So the Medicare reimbursement rates for what he does you mean?

Q Yes.

A Yes.

Q MRIs, $1,500 each. There's no doctor that's getting paid $1,500 for an MRI; isn't that correct?

A I'm not aware.

Q Reimbursement for that is less than half of that, isn't it?

A It depends on what type of MRI.

Q Medication, 300 per month. You understand that the medications that the plaintiff testified to and Dr. Hassan

testified to are these three medications; do you understand that?

A No. I just had the total monthly value of the medications.

Q And that the reimbursement rates for medications are something like much, much, much less than $300 a month?

MR. DELISO: Objection, your Honor.

Q Do you have any understanding of that?

THE COURT: Sustained.

Q Do you know what the reimbursement rate for tramadol per month is?

A No, not off the top of my head.

Q You could have looked that up though, right?

A I could have.

Q And if all of those rates are much, much less, those reimbursements rates, what the actual cost will be than this number -- this number 592 that you came up with, you would expect that to be much, much lower, right?

A If the -- if the input is lower, yes, the numbers would be lower.

MR. ZONGHETTI: That's all I have. Thank you.

THE COURT: Okay. Let's take a brief recess.

All rise.

COURT OFFICER: All rise. Jury exiting.

(Whereupon, the jury exited the courtroom.)

THE COURT: You may step down.

THE WITNESS: Thank you.

(Whereupon, the witness exited the stand.)

(Brief recess taken.)

MR. ZONGHETTI: Judge, is it possible that I could ask a couple more questions? I sat down forgetting to ask a couple questions.

THE COURT: Sure.

MR. DELISO: I'm just going to run out and get the client.

THE COURT: Sure.

(Whereupon, the witness resumes the stand.)

(Pause in the proceedings.)

COURT OFFICER: Ready, your Honor?

THE COURT: Yes.

COURT OFFICER: All rise. Jury entering.

(Whereupon, the jury entered the courtroom.)

THE COURT: You may be seated.

You're going to ask a couple of follow-up questions.

MR. ZONGHETTI: Yes. I apologize, your Honor. I had a couple more things, a couple more questions.

BY MR. ZONGHETTI:

Q Doctor, the physical therapy sessions, you used a rate of one to two a week, and I believe you said you averaged that

out?

A Yeah, 1.5 per week.

Q So would that come out to six per month?

A Yeah.

Q Okay. And did you -- did you ever ask to see what the actual frequency that Mrs. Assil attended physical therapy over the last ten years was?

A No.

Q Okay.

MR. ZONGHETTI: I'd like to have marked the records of Dr. Nassef Hassan.

(Whereupon, the item referred to was marked Defendant's Exhibit H for identification.)

THE COURT: Officer, is that H for ID?

COURT OFFICER: H, yes.

THE COURT: Okay.

(Handed.)

MR. ZONGHETTI: Your Honor, I would move those into evidence.

MR. DELISO: Your Honor, my only objection is that goes up to February, it's not up to current. And Dr. Hassan was here and gave testimony and his records would be duplicative of his testimony that he gave; so that's not a current record. That's my only objection.

THE COURT: Can I see that?

THE WITNESS: Sure.

(Handed.)

THE COURT: You're saying it goes up to February 2019?

MR. DELISO: It goes up -- the stamp of the Court is February 2019, see on the subpoena?

THE COURT: February 22nd.

MR. DELISO: Whatever, February 22nd.

THE COURT: Well, this is what was available at the time; so so admitted.

(Whereupon, the item referred to as Defendant's Exhibit H was received in evidence.)

BY MR. ZONGHETTI:

Q Now, ma'am --

MR. ZONGHETTI: May I just approach, your Honor, for a moment?

THE COURT: Yes.

Q Doctor, what I've done is I've put post-its so that we could hopefully move along a little quickly on this.

On the physical therapy records that are contained in Dr. Hassan Nassef's -- Nassef Hassan's records, and I'm going to, with the Court's permission, show them to you.

And do you see that those are physical therapy records that start with 2016 at the top?

A Okay.

THE COURT: Is that yes?

THE WITNESS: Yes.

THE COURT: Okay.

Q If we go through for example, if you pick a year, let's say, in 2016 --

A Okay.

Q -- are you able to count how many times Miss Assil went to physical therapy that year?

MR. DELISO: Objection, your Honor. He is asking this witness to interpret a physician's medical records. It's improper. I object.

THE COURT: Let me see this.

(Handed.)

THE COURT: Overruled.

A So starting from December 13th, 2016?

Q Well, do you have January 11th, 2016, if we -- on one of the pages?

A I have January 11th, 2017.

Q Let's start there, okay?

A Okay.

Q If you start there and you count how many times she attended PT, physical therapy, in 2017, can you tell us how many times?

A Sure. Fourteen.

Q So that would be a little bit more than one time per

month, right?

A Yes.

Q And how about for 2018, do you have those?

A Yes.

Q Can you count those?

A It ends in November, and that's 14.

Q Okay. Based upon those records, the six times per month that you used in your calculation, that would come out to 72 sessions a year, right?

A Correct.

Q So we're actually -- we're looking at actual records showing how much the plaintiff actually attended physical therapy would show about 14 sessions in two consecutive years, '16 and -- '16 and '17 or is it '17 and '18, correct?

A Correct.

Q If you ran those numbers of $109 per session on the basis of 14 sessions and not 72 sessions, what would that bottom line number of 171,000 come out to?

A 1,526 for a year. You're asking for the whole --

Q Yes. So the 3,779 would become what?

A Sorry. I had the wrong table. 3,379 would be 1,526.

Q Okay. And if we ran that out to 2050, what would it become? Are you able to do that here?

A I would need a computer because it's growth rates and compounded annually. You could guesstimate that it would be, I

guess, roughly a third. So let me see.

Q Okay.

A I'm going to give you a crude estimate.

If it were 40 percent of it, and I'm doing this off the top of my head, instead of 171,838, it would be 68,735.

MR. ZONGHETTI: Okay. That's all I have. Thank you.

REDIRECT EXAMINATION

BY MR. DELISO:

Q Doctor, you were asked questions just now about the number of physical therapy sessions that Miss Assil went to in one particular year, I believe, right?

THE COURT: You have a question about the records?

MR. DELISO: We can leave them out. I don't think so. I don't think so. No, I don't.

THE COURT: Okay. You can take it.

Q You were just asked questions about the times she went. Do you know whether or not the -- the number of sessions she was allowed by the insurance was limited to the number of sessions of 14?

A I do not. I know that's often the case, but I -- I don't know.

Q What is your experience with that and knowledge?

MR. ZONGHETTI: Objection.

Q What do you mean it's often the case that the insurance company limits the amount of physical therapy sessions that they will pay for in a particular year?

MR. ZONGHETTI: Objection.

THE COURT: Sustained.

Q Explain what you mean by that that's often the case?

MR. ZONGHETTI: Objection.

THE COURT: Sustained.

Q Okay. Do you know what the number of visits the insurance company would pay for for physical therapy in the year 2016?

A It really depends on the plan that she has, but that's part of the reason why I said it was a collateral source.

Q Okay. Now, does that go back to your evaluation to this jury is the value of the loss; is that right?

A That's correct. It's the value of the damages as prescribed by a medical expert, and that's why compliance is irrelevant to me.

Q So I think you said in -- in your cross-examination testimony that you're not considering who pays for it or whether it's ever paid, you're just giving the value of the loss; is that right?

A That's exactly right.

Q Now --

THE COURT: Counsel, this is your witness.

Please do not lead.

Q Okay. Now, did you consider whether if Miss Assil gets a recovery in this lawsuit, that Medicare would have a lien on the recovery? Did you consider that?

A Yes.

Q And was that something -- Medicare's lien on the recovery of this lawsuit for the amount of money they paid in medical expenses, was that factored into your analysis and calculation?

A Again, the way it's factored in is I don't get into who pays; so it's -- a collateral source means it's -- it's within the case and it has nothing to do with what I do in terms of the damages. But, yes, Medicare could recover some of those costs and that's, again, related to who should pay.

Q Okay. And in terms of the future, did you consider whether if the plaintiff recovers in this case, she may lose Medicare for the part of her body that was injured over the future? Did you consider that?

A Again, yes. And in the same way that I considered anything to do with Medicare.

Q Okay. So in terms of she's never going -- withdrawn.

Is it a fair statement that counsel made that Miss Assil is never going to pay for her medical costs into the future; is that a fair statement?

A Could you repeat it?

Q Based on the fact that she may -- she will lose Medicare in terms of the treatment for the injured part and that Medicaid -- Medicare would have a lien, is it a fair statement that Miss Assil will never pay for her medical costs?

A Yes -- oh, no. Wait. No. I'm sorry. If there's a lien and she doesn't have the Medicare, she will have to pay for it. I guess I wasn't following the statement.

Q Is that a fair statement that was made to you that she won't have to pay?

A No.

Q Okay. I want to talk to you about your chart.

MR. DELISO: If I may, your Honor.

THE COURT: Yes.

Q Doctor, when this case --

THE COURT: Which exhibit?

MR. DELISO: This is Exhibit 26, Judge.

Q When the case was first -- when you were first contacted to do this case, were you given the assumption -- you were given assumptions, correct?

A Yes.

Q And one of the -- was one of the assumptions future -- the cost of surgery?

A Yes.

MR. ZONGHETTI: Objection, your Honor.

THE COURT: Sustained.

Q Okay. And one -- is one of the -- withdrawn.

In the first reports that you made, did you include the cost of surgery?

MR. ZONGHETTI: Objection, your Honor.

THE COURT: Sustained.

MR. DELISO: May I approach, Judge?

THE COURT: It's not necessary.

MR. DELISO: Okay.

Q Was one of the items that you took out of your calculation the cost of surgery because it wasn't evidence in the case, the cost of surgery?

A Yes.

Q Okay. Is that why you revised -- one of the reasons you revised your report?

A Yes.

Q Okay. So now I want you to -- I would ask you to -- in addition, was the first report that you did, did that include physiatrist's visits?

A Yes.

Q Okay. And at a cost and six visits -- cost, et cetera, right --

A Yes.

Q -- to go to the doctor?

A Correct.

Q Now, was one of the reasons you revised your report

because we didn't have evidence of the cost of the physiatrist visits --

MR. ZONGHETTI: Objection, your Honor.

Q -- and that's why you took it out?

THE COURT: Sustained.

Q Okay. What was the reason you took out physiatrist's visits?

MR. ZONGHETTI: Objection.

THE COURT: Sustained.

Q Okay. Did you remove the category of physiatrist's visits because we didn't have evidence of the costs at the trial here?

A I removed it because based on Dr. Hassan's testimony and that is the reason I would imagine.

Q Okay. And, likewise, did you have in your first reports the cost of neurologist's visits over the future?

A I did.

Q And did you revise your report to remove neurologist's visits from your calculation because we didn't have evidence of the cost of neurology visits?

A Yes, same reason.

Q Okay. And, in addition, did you have the cost of neurosurgeons in your first reports?

A Yes.

Q And did you revise your reports to the most recent

report to remove the cost of neurosurgeons because we didn't have evidence of the cost of neurosurgeons?

A Yes.

Q Okay. And is that the reason -- one of the reasons you revised your report last night?

A Yes.

Q Okay. Now, counsel asked you about him receiving an e-mail and then another e-mail last night.

A Yes.

Q Okay. Last night did you revise your report to remove the cost of the surgery?

A I did.

Q Okay. And is that why you revised -- you revised your report to what we have shown in 26?

A Yes.

Q Okay. So now I want you -- I'd ask you to assume that we had evidence in the case of physical therapy, one to two times a week at a cost of $127 a session.

Did you use those assumed facts in order to make your calculation for physical therapy?

MR. ZONGHETTI: Objection, your Honor. This is -- this is not redirect. This has been done.

THE COURT: Sustained.

Q Okay. So the parts -- the categories that you gave in this report here, is that based on what I asked you to assume

was the evidence in the case?

A Yes.

Q Okay. And is the -- is that the reason why you're not including future surgeries --

MR. ZONGHETTI: I object, your Honor.

THE COURT: Sustained.

Q -- and the other thing?

THE COURT: Sustained.

(Pause in the proceedings.)

MR. DELISO: Okay. That's all I have. Thank you.

THE COURT: Okay.

MR. ZONGHETTI: I just have a few questions, Judge.

RECROSS-EXAMINATION

BY MR. ZONGHETTI:

Q Doctor, if I'm understanding the last line of questioning from counsel, you revised your reports because the initial reports were not based on actual evidence, right?

A I revised reports because the testimony changed and I changed it accordingly.

Q Right.

A The reasons behind it didn't --

Q Didn't he just ask you, you removed this because there was no evidence of that, you removed that because there was no

evidence?

A Yes.

Q Isn't that what he just asked you?

A And I said --

Q And you revised your reports because the initial ones weren't based on actual evidence, right?

A I would imagine so, yes.

Q Okay. You were asked about if there's recovery, Medicare can certainly -- do you remember being asked about that?

A Yes.

Q If there's no recovery of these damages, this 600,000, 500,000, there's no lien right, there's no recovery, right?

A Ask it again.

Q If there's no award --

A Oh, right.

Q Yeah. Okay. And you weren't --

THE COURT: I don't think she answered.

MR. ZONGHETTI: She said yes, right?

THE COURT: Did you answer?

THE WITNESS: Yes.

Q And you were asked, well, if she gets a recovery, she could lose benefits; you remember that?

A Yes.

Q Okay. Why would she want a recovery if she could lose

benefits.

MR. DELISO: Objection, your Honor.

THE COURT: Sustained.

Q Okay. It's counterintuitive, isn't it?

THE COURT: Sustained as to the form of the question.

MR. ZONGHETTI: That's all I have.

FURTHER REDIRECT EXAMINATION

BY MR. DELISO:

Q Doctor, if Miss Assil losses Medicare benefits, will she be able to get medical services, medical care in the future?

MR. ZONGHETTI: Objection.

THE COURT: Sustained.

MR. DELISO: No further questions.

THE COURT: You may step down.

THE WITNESS: Thank you.

(Whereupon, the witness was excused.)

THE COURT: Please approach.

(A discussion was held at the bench off the record between counsel and the Court.)

THE COURT: All right. Ladies and gentlemen, we'll continue Monday at 9:30.

COURT OFFICER: All rise, jury exiting.

THE COURT: Have a wonderful weekend.

THE JURY: You, too.

(Whereupon, the jury exited the courtroom.)

THE COURT: Okay. Have a good weekend.

MR. DELISO: Thank you, your Honor.

MR. ZONGHETTI: Thank you, your Honor.

Your Honor, could I -- one thing, we never dealt with the MetroPlus records. We had offered them at the -- at the very end of Dr. Hassan's testimony and counsel objected. We just said we'll deal with that later. We don't have to deal with it today, but --

THE COURT: Oh, the records are over there?

MR. ZONGHETTI: They would have been marked for ID; so I don't know where they're keeping those.

THE COURT: What number?

MR. DANIELSEN: Oh, your Honor, I believe it was marked as -- MetroPlus would have been marked as E for identification, Defendant's E.

THE COURT: And what was the basis of the objection?

MR. DELISO: The basis of the objection is relevance. Her whole MetroPlus records encompasses everything that's happened to her in terms of health. And what is the relevance? What is the showing of the relevancy to the issues in this case?

MR. ZONGHETTI: They show what Dr. Hassan was

paid for his services, which, obviously, the plaintiff's expert has testified that's relevant, you know.

THE COURT: Well, you did raise the issue; so if they have --

MR. DELISO: I raised the issue of what?

THE COURT: As to what he was paid.

MR. DELISO: I raised the issue -- just today?

THE COURT: No, not today. When Dr. Hassan testified and the discussions about what he was paid.

MR. DELISO: He testified what he was paid. To use those records to cross-examine -- those records should have been used to cross-examine Dr. Hassan when he was on the stand.

MR. ZONGHETTI: I tried to and he objected.

MR. DELISO: So that's --

MR. ZONGHETTI: And the objection wasn't resolved because I was trying to do Mr. Deliso a favor by getting the witness off the stand.

THE COURT: Right. Correct.

MR. ZONGHETTI: I move to put them in, you know, and we can read from them later if we want to, but you know, that's what happened.

MR. DELISO: I didn't understand --

THE COURT: That's correct. What he says is accurate.

MR. DELISO: Well, I didn't understand that the MetroPlus records was holding him. I know he did me a favor by getting him off the stand. I'm not denying that.

THE COURT: That's how it came off.

MR. DELISO: I thank him for that.

THE COURT: And that's why it was delayed.

MR. DELISO: Well, but the thing here now is this evidence could have been done in the beginning of the cross-examination or someplace else in the cross-examination if it was important.

When Dr. Hassan testified what he was paid and there was contrary evidence to that, that should have been brought up when that evidence came out. Isn't it true that you weren't paid $109, you were paid X amount of dollars. To bring that up now, it's independent evidence to impeach a witness that's not on the stand --

MR. ZONGHETTI: Why can't a jury --

MR. DELISO: -- and he can't explain it.

MR. ZONGHETTI: Why can't a jury just consider it, I mean, like any other evidence? It's certified. It's --

THE COURT: Well --

MR. DELISO: But it's being used for impeachment purposes.

MR. ZONGHETTI: It's not being use for

impeachment. It's being used as affirmative evidence.

THE COURT: Well, your position is that he -- if it was in evidence at the time the doctor testified, he would have been required -- defendant would have been required to use it. That's not the case.

MR. DELISO: No, not required to use it.

THE COURT: Correct.

MR. DELISO: When Dr. Hassan said he was paid $109 per physical therapy session --

THE COURT: Right.

MR. DELISO: -- and there's an impeaching piece of evidence saying that he is paid whatever, less, you impeach him when he is on the stand so he could explain it. Now he is not on the witness stand and he can't explain it.

THE COURT: Well, the record will be the best evidence of what he was actually paid. So no matter what his explanation is, the number is the same.

MR. DELISO: What if he was paid part by MetroPlus, part by another insurance carrier?

THE COURT: The record would show that.

MR. DELISO: What if was paid part by MetroPlus, part -- the MetroPlus records are not going to show that, who else paid.

What if there was a copay involved?

THE COURT: Well, the record would show what

MetroPlus paid.

MR. DELISO: Right. But what if he is collecting part from MetroPlus, part from Medicare or some other type of personal insurance company payment? And what if there's a copay that's involved that brings it to 109. It's going to be confusing to the jury to hear this.

And it's going to be prejudicial because the witness is not here, he can't explain it. Let's say those records say $89 and he is saying he gets paid 109, what if $20 is the copay?

THE COURT: Let's go off the record for a moment.

(Discussion held off the record.)

THE COURT: At the time this was raised, the parties both agreed to hold this -- as to the decision be held in abeyance to accommodate the doctor.

The admission of these records doesn't alter the doctor's testimony any. And it was understood that they were being offered as the best evidence of what the doctor actually was paid.

And although plaintiff is alleging prejudice, there is absolutely no prejudice in admitting it whether it was admitted before the doctor's testimony or after the doctor's testimony because the bottom line is it's the best of evidence of what he was paid; so I'm going to admit it. So E is admitted.

(Whereupon, the item referred to as Defendant's Exhibit E was received in evidence.)

MR. ZONGHETTI: Thank you, your Honor.

(Whereupon, court was recessed and the case adjourned to Monday, December 9, 2019, at 9:30 a.m.)

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This is certified to be a true and accurate transcript of the above proceedings recorded by me.

Candace M Hammond

CANDACE M. HAMMOND, RPR
SENIOR COURT REPORTER