2023 WL 11893610 (N.Y.Sup.) (Expert Trial Transcript)
Supreme Court of New York.
Kings County

Edmund LOZANO, Plaintiff,
v.
U.S. MERCHANDISE, INC., and Juan P. Martinez, Defendants.

No. 522124/2018.
June 7, 2023.

Testimony of Plaintiff's Expert Witness, Debra Dwyer - Direct Examination

Name of Expert: Debra S. **Dwyer**, Ph.D.
Area of Expertise: Accounting & Economics >> Economic Damages
Area of Expertise: Employment & Vocational >> Teachers, Instructors & Educators
Representing: Plaintiff
Jurisdiction: Kings County, New York

For the Plaintiff: Clark, Gagliardi & Miller, P.C., The Inns of Cout, 99 Court Street, White Plains, New York 10601, By: Carlos Calderon, Esq.

For the Defendants: DeSena & Sweeney, LLP, 1500 Lakeland Avenue, Bohemia, NY 11716, By: Matthew Marino, Esq.

Before: Honorable Francois A. Rivera, Judge.

THE COURT: All the members of the jury panel are present.

Mr. Calderon, are you ready to present evidence this morning?

MR. CALDERON: Yes, Your Honor, I am.

The plaintiff would like to call Debra Dwyer to the witness stand.

THE COURT: All right. Just follow the officer's instructions, please.

COURT OFFICER: Follow me.

(Whereupon, the witness took the witness stand.)

THE CLERK: Good morning.

THE WITNESS: Good morning.

THE CLERK: Please raise your right hand.

Do you swear to tell the truth, the whole truth, and nothing but the truth.

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THE WITNESS: I do.

THE CLERK: Can you please give us your name and address? Please say it slowly and clearly.

THE WITNESS: Sure.

THE COURT: That would be business address please.

THE WITNESS: Sure, it's Debra, D-E-B-R-A, Dwyer, D-W-Y-E-R. And the address is 17 Springbriar Lane, one word, and it's B-R-I-A-R. That's in Center Reach, C-E-N-T-E-R-E-A-C-H, New York 11720.

THE CLERK: Thank you. You may be seated.

THE WITNESS: Thank you.

THE COURT: Good morning.

THE WITNESS: Good morning.

THE COURT: There's two lawyers. Each are going to get a chance to ask you some questions. The one thing I want you to keep in mind is when you're asked the question let them finish it before you answer because we can only take down one voice at a time. If any of the lawyers stand up and say objection I want you to stop, look to me. I'll let you know whether you should answer that question.

THE WITNESS: Okay.

THE COURT: You may inquire, counsel.

THE WITNESS: Thank you.

MR. CALDERON: Thank you, Your Honor.

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

DIRECT EXAMINATION

BY MR. CALDERON:

Q. Good morning, Ms. Dwyer. How are you?

A. Good. How are you?

Q. I'm doing well.

Ms. Dwyer what is your occupation?

A. I'm an economist and a professor.

Q. And are you personally employed?

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A. Yes.

Q. What business are you employed by?

A. So currently I working at Farmingdale State College where I teach health, economics, and public policy. And I'm the codirector of a project called a financial literacy project. We received a grant, the chair of economics and myself, to do financial literacy training and curriculum in New York for vulnerable populations. Before that I spent two decades as a professor, a chairperson, and a Dean at Stonybrook University where I have been teaching economics at all levels from undergraduate all the way through to the Ph.D. Currently, I started my own business as well. So it's called Deb Dwyer Analytics. And I do policy analysis and I also do this type of work.

Q. And can you tell us what is your educational background?

A. Sure. I got my bachelor's degree in English literature and economics from Queens College in Flushing, New York. I went on to get my master's and my Ph.D. in economics from Cornell University with specialties in labor, health and public economics. And I did a one year post doctoral fellowship at Syracuse University in their center for policy research.

Q. So as an economist what is it that you do when presented for example with information regarding a life care plan for a particular person?

A. Sure. My role in a case like this when there's an injury and there's health care costs that are going to be required into the future, health care services that have costs associated with them, so my role is to make sure that the injured party has enough money to cover the expenses for the rest of their life. I am not a medical expert so I don't make any decisions about what kind of health care services. I take that as given from a medical expert. So the medical expert provides me with the category of care, the frequency, the current costs, and the duration for how many years into the future. What I do then, my role, the reason you bring me in is because we know prices go up over time. And so if the doctor's pricing it out today and we're projecting out over 16 years, then we know that the price is of a physical therapy visit, if it's 150 or 200 today, is going to be, cost more ten years from now. By how much more? That is my job.

Q. Ms. Dwyer, have you testified in court before as an expert in the field of economics?

A. Yes.

MR. CALDERON: Your Honor, I would like to offer Ms. Dwyer as an expert in economics for this trial.

THE COURT: Sure. Any objection?

MR. MARINO: No objection, Your Honor.

THE COURT: She is deemed an expert in the field of economics. By being deemed an expert she is permitted to give an opinion in the field of economics for the benefit of the court and the jury. Please continue.

MR. CALDERON: Thank you, Your Honor.

Q. Ms. Dwyer, did you receive a life care plan for a patient called Edmund Lozano?

A. I did.

Q. Who provided you with a life care plan?

A. It was Dr. Ali Guy, back in 2021.

Q. And have you had the opportunity to work as an economist and analyst for other patients?

THE COURT: Have you had the opportunity to do what, sir? I missed the last part.

Q. To examine and analyze life care plan for Dr. Ali Guy in the past.

THE COURT: I see. Please, you may answer.

A. Yes.

Q. So what has Dr. Guy provided you for this particular case for you to make your analysis?

A. So Dr. Guy gave me the categories, as I said earlier, things like medical care and diagnostic studies. He gave me the cost of those services and the frequency, how often he expects that Mr. Lozano to go see the, use these services and for the rest of his life or the next five years, that was the duration. So he provided me with all of that information.

Q. So could you please walk us through the process of how you do your analysis and before you give us your conclusions.

A. Sure. So I take each category. Let's say medical care services. And I total them up. If Dr. Guy tells me it's a midpoint like somewhere between 5,000 and 10,000, I'm going to take the midpoint. If he says it's going to be, he is going to require it every other year, then I'm going to divide by 1.5. So that's part of the methodology. I annualize everything. So I take the annualized amount in current dollars then I project out what it's going to cost every year for the rest of his life. I don't have a crystal ball so I have to make some assumptions. I'm an expert and so those assumptions are made with my expert opinion based on decades of experience and research.

So I take that annualized amount. In this case, medical care is going to cost about $5,100 annually in today's dollars. I have to decide what inflation rate to use. Inflation is the indicator, the measure of what's happening to prices over time. I'm sure you have heard of it. You have been hearing a lot about it over the last couple of years since Covid. The inflation rates have been extremely high.

So let me explain how I decide what inflation rate to use. The US Bureau of Labor Statistics provides us with the data on what happens with prices. They put out the consumer price index which is the basis for the inflation rate that you see. And that inflation rate is, is a compilation of goods and services, prices for goods and services that most Americans use. So it's a combination of goods and services.

In order to collect that data, they collect data by specific categories, including medical care. So for starters I'm going to use the medical care inflation rates put out by the bureau of labor statistics. And they even break it down within medical care hospitalization, surgery, pharmaceuticals, et cetera. So I try to find the closest match of the category from the federal date to what Dr. Guy prescribed.

The next question is once I have the category of inflation, how far back do I go to take an average? Because I'm going to take an average. I'm not going to use today's. If I use just today's growth rate and project the next 16 years at six percent, or five percent, I will be exaggerating how much money Mr. Lozano will need because we don't expect that the inflation rate is going to remain as high as it has been over the next 16 years.

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If we had the unfortunate situation where we were doing this in 2009 during a bad rescission, the growth rates were below one percent in some categories. If I had used that year it would be an underestimate of what Mr. Lozano would need. So what economists do is we take an average. It's pretty easy to take an average. The hard part is how far back do you go in order to get it right for projecting over the next 20 years or so? So we go back 25 years. This is pretty standard in health care.

We do that -- health care prices are pretty volatile. They tend to rise faster than the general rate of inflation. Since Covid, that's an anomaly. The health care prices have actually not risen as fast as the eight percent that you were hearing about in general inflation. More like six percent, five percent. The average though over the last 25 years, when you take into account periods where we had a recession, and the growth rates were below one percent, and periods where it was nine percent. Taking an average comes out to typically between three and five percent for health care categories. So that was a lot.

But that's pretty much the methodology I use. I take the annualized amount and I project it forward using these growth rates. And I project it through to Mr. Lozano's life expectancy for most categories. Dr. Guy says he will need most of these services for the rest of his life.

Q. Now obviously, you don't have a crystal ball so you don't know the interest rates are going to go up or down in the manner that you described, correct?

A. Well, I have expert opinion about what's going to happen. So that's, so I say I use the federal data, but I also use my experience. So I see what's happening in government. I see what's happening with policies that are definitely going to affect health care prices. I take all of that into account.

Q. And also you, at this time you don't know if Mr. Lozano would undergo all the treatments that Dr. Guy designated in his life care plan, correct?

A. Correct.

Q. You also don't know if he actually may have to undergo more treatment than what he has in his plan.

A. Correct.

Q. So what you're doing is you're doing an analysis based upon the statistics and the averages as you know them from your experience and your studies of the economic growth in the country, correct?

A. Right, and taking Dr. Guy's recommendations as given.

Q. Now Ms. Dwyer, can you please tell us what your conclusions and findings are, and if you can break it down in a, you know, in numbers for the jury to see, that would be fantastic.

A. Sure, okay.

Q. Do you want to use something to write your numbers down, so?

A. Yes, that would be helpful since it's a lot of numbers, for me to present it to the jury.

THE COURT: Give her the pad and the marker. You will see if you can work with what you have. If you need something else you will let me know.

THE WITNESS: Sure, thank you.

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THE COURT: Thanks.

COURT OFFICER: (Handing)

THE WITNESS: Thank you.

A. Should I use it from here?

Q. Would it be easier to use an easel?

A. Yes.

COURT OFFICER: Step down.

THE COURT: If you want to step down, step down. And counsel, if you need to.

MR. MARINO: Thank you, Your Honor.

THE WITNESS: Thank you. Sure.

A. Can everybody see this? Okay. Okay, so I'm just going to start. I'm going to go in more detail with the first category which I already mentioned was medical care. What I'll do is I will write the starting value. The category, the current price annually.

THE COURT: Doctor, I have an idea. There's two clips on the bottom. We can make them higher so you don't have to like bend down. Let the officer handle it.

THE WITNESS: Thank you. That's good.

THE COURT: Okay.

THE WITNESS: Thank you.

THE COURT: You're welcome.

A. Then I'll do the growth rate. So inflation rate will I be using for that category, and then the lifetime total. So the first category's medical care. And that's visits to specialists, to doctors, office visits. So for medical care specifically he included final surgeon visits, physiatrist visits, pain management visits, $5,100 annually.

The growth rate that I use for medical care is the average over 25 years of 2.8 percent. So as you can see it's actually slower than the general rate of inflation. And over the last year it has been much higher. It was more like five percent. When you take that average it comes out to 2.8 percent. I believe that's extremely reasonable for projecting over the next 16 years, which is what we're projecting over.

So that the total for the next 16 years -- one thing I didn't mention was his life expectancy. So I use the 1997 life tables put out by the national center for health statistics. Another federal agency that collects data and produces what's called the life table. They're survival probabilities. Given the year you're born and your gender, how many years do you have left?

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On average, the number of years for somebody born in 1959 that he has left is another 16 years from now, basically. Which would bring him to the age of 80, 80.6. So the life expectancy age is 80.6. I'm just going to put that up here. And we're projecting over 16 years. So the total over that 16-year period is $106,577. And this commences July 1, 2023. So I had originally done this report last year in 2022 and then I started August 1, 2022. So I had to update it because my job is only to do what happens in the future. That's where the uncertainty is. Past happened already. Anything that was incurred is known. I am taking it from July 1st forward to the year that he turns 80.6.

The next category is diagnostic studies. That will include things like MRIs, lab tests. I am just going to call that diagnostic. The annual cost is 2,100. And again it's a growth rate of 2.8 percent. I use the same growth rate that I use for medical care because these are prescribed by doctors, so they involve office visits.

For the diagnostics the lifetime cost then is $43,885 for those services. Physical therapy, 10,005 -- sorry, 10,400 annually. I'm just going to call it PT. 10,000 -- because this is weekly, Dr. Guy prescribes weekly physical therapy, 10,400. And 2.2 percent growth rate. That falls under what we call other professional services. This one, I was being conservative. The growth rate last year for things like PT and other professional services rose faster. It was over five percent so that it, the average was getting closer to 2.3. I just kept it at 2.2 which is what I had used last year when I started it. So $10,400 annually for the rest of his life will come out to $206,419.

The next category, outpatient surgical injections. So these are pain management injections and they typically take place in an outpatient facility. That's another category where we saw huge rises in prices. The growth rate there, I will just tell you that here, is three percent. And Dr. Guy prescribed these procedures, these injections, over the next five years. And I'm just going to write injections here. Annually, the cost of the injections and the facility is 33,000. And again it's only five years. And I start it in July. So I'm knocking off half a year. So the total comes out to $158,701 for the injections.

And another pain management procedure that takes place in an outpatient clinic are the ablations. So medical ablations, again, will have a three percent growth rate. And these are more expensive so it's 18,000. I said more expensive. Actually, it's less expensive. $18,000 annually for a lifetime cost of 382,709. And that's more because it goes to the rest of his life not just five years. Then there is a potential surgery that Dr. Guy recommends.

Because it's potential I can give you the total with and without that surgery. So the total cost of the surgery, and I'm putting it in as a one time cost, which means no growth rate, is $261,900. Now if that happens this year, that's how much it's going to cost. If it happens ten years from now a growth rate of at least four percent should be applied because hospitalizations and surgeries have a pretty high growth rate. But again I'm, because I don't know when it will happen or if it will happen, I'm just putting it in as a one time cost.

Then the last category is medications. And you probably heard that pharmaceutical prices in the US rise pretty fast. So there we have a growth rate of 3.5 percent with the cast of $4,000 worth of medication annually. Gives us lifetime cost of $88,820. That's all of the categories. And let me just say on medications, it was a lot higher this year. It was six percent. But because of the policies that are coming out I kept it at last year's rate of 3.5, just because I anticipate over the next eight -- 16 years that, that would be a reasonable rate.

So the total future cost of health care for all of these categories is, total comes out to $1,249,010. So that's the total for all categories. If I remove the 261,900, I'm actually going to do this math here because I realize I had the number from last year here. So it's -- sorry. So the total would be -- I did something wrong. Hold on. I'm missing a number. I'm just going to say it's close to what I had last time. It's going to be about, yeah, so it's going to be about $970,110. The original number I had using from August of last year was 987,000. So 970,000 makes sense.

Q. Okay. So these numbers are the numbers that you, that you got from your analysis and your calculation, correct?

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A. Yes.

MR. CALDERON: Your Honor, I would like to mark this page as Plaintiff's Exhibit 6.

THE COURT: Are we up to 6?

MR. CALDERON: I think we are.

THE COURT: We'll mark it as Plaintiff's 6.

Can the witness return to her chair?

MR. CALDERON: Yes, thank you.

THE COURT: You can come back to the witness stand.

THE WITNESS: Thank you.

THE COURT: You may continue.

MR. CALDERON: Thank you, Judge.

Q. Ms. Dwyer, other than what you already mentioned are there any other variables to be taken into consideration regarding the cost of future medical care based upon Dr. Ali Guy's life care plan?

A. I believe I covered it all. I believe these are all within a reasonable degree of economic certainty.

Q. Thank you.

Now Ms. Dwyer, you are here, you were asked to come here on behalf of the plaintiff to testify as to your finding, correct?

A. Yes.

Q. You are being paid to be here today, correct?

A. Correct.

Q. What is the fee you charge to be here today to give your testimony?

A. $4,800.

MR. CALDERON: I don't have anything further. Thank you, thank you, Ms. Dwyer.

THE COURT: You may cross examine.

MR. MARINO: Very brief.

CROSS EXAMINATION

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BY MR. MARINO:

Q. You said that you're not a medical expert, correct?

A. Correct.

Q. So you did not examine plaintiff at all, correct?

A. Correct.

Q. You didn't review any of the medical records beside that one report that Dr. Guy gave you.

A. Correct.

Q. You don't know if, if those numbers -- excuse me -- if he needs that treatment or not, correct?

A. Correct.

Q. You don't know if the numbers Dr. Guy gave you are fair and accurate, correct?

A. Correct. I'm not a medical expert.

Q. So essentially, you were given a report and on blind faith you took those numbers and projected them out into the future, correct?

A. Correct.

Q. If I were to give you a report from a different doctor that says he is discharged from care and he needs no further treatment would that analysis be necessary?

A. I have no way of knowing which medical expert opinion is more valid because I don't have a medical degree. So it's, it could change but I would need some information from someone else. An expert to tell me why.

Q. Okay. If I was taking one of the records that, and testimony from the doctor who testified the other day, said he discharged the plaintiff from his care and he reached maximum improvement, doesn't need any other --

MR. CALDERON: Objection, Your Honor.

THE COURT: To the form, the form is bad. Sustained.

MR. CALDERON: Okay.

Q. Hypothetical question. If a doctor testified the other day that he discharged the plaintiff from care would that information be sufficient for you to make some type of analysis for the future if he is discharged from care?

A. My role in that would be if he is discharged from care and will not need anything else then the cost would be zero. Whether that's accurate or not is not my expertise.

Q. Correct. Just like this report that Dr. Guy gave you, you don't know if that's accurate or not either, correct?

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A. Correct.

MR. MARINO: Thank you. No more questions.

THE COURT: Redirect.

MR. CALDERON: Just very brief.

REDIRECT EXAMINATION

BY MR. CALDERON:

Q. Ms. Dwyer, you have -- you have done analysis for other doctors besides Ali Guy as part of your job, correct?

A. Yes.

Q. And would you say that the numbers of Dr. Ali Guy has given you regarding future cost, cost of medical services are on par with what you have seen from the other doctor that you have worked with?

A. Sure, sure. I didn't see -- if I see something that looks like it might be a mistake, because I've done this before and it's an outlier, I point it out. In this case I didn't see anything that looked out of the ordinary.

Q. And now you don't know the history of Mr. Lozano's medical.

THE COURT: Could you repeat the question?

Q. You don't know the history of Mr. Lozano's medical treatment, correct?

A. Correct.

Q. Are you aware that after this doctor that has been referred to said that there was no further need for his services, Mr. Lozano had at least 16 procedures?

A. Not aware of it, no.

Q. Does that sound to you like somebody that doesn't need any more medical services, a person has 16 services after the doctor discharge them from his care?

A. Clearly, it's revealed that he didn't.

Q. When Dr. Ali Guy gave you his numbers, he is talking about not just procedures or services that he will provide but by different doctors as well, correct?

A. Different specialist, yes.

Q. So the fact that the specialist may discharge a patient doesn't mean he is discharged from everybody's care, does that -- does it?

A. Yes.

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MR. CALDERON: Nothing further.

THE COURT: Recross?

MR. MARINO: No, Your Honor.

THE COURT: Thank you, you may step down. You're free to go.

THE WITNESS: Thank you.

THE COURT: Thanks.

MR. CALDERON: Thank you.

THE WITNESS: Thank you.

(Whereupon, the witness was excused.)

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