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STATE OF NEW YORK
SUPREME COURT COUNTY OF RENSSELAER

CAROL FARRELL,

Plaintiff

-against-

JULIUS J. GABALIS and
DOROTHY B. GABALIS,

Defendants

BEFORE: HON. F. WARREN TRAVERS,
Justice of the Supreme Court

Transcript of the testimony of EDMUND A. PROVDER from the trial proceedings held in the above-entitled matter at the Rensselaer County Courthouse, Troy, New York, on January 10, 1992.

APPEARANCES:

EDWARD P. RYAN, ESQ.
Attorney for Plaintiff

CARTER, CONBOY, BARDWELL, CASE,
BLACKMORE & NAPIERSKI
Attorneys for Defendants
By: EUGENE E. NAPIERSKI, ESQ.
KEVIN P. BURKE, ESQ.

(January 10, 1992.)

(The jury returned to the courtroom at 10:45 a.m.)

THE COURT: Thank you. Good morning. Mr. Ryan?

MR. RYAN: Yes, your Honor. Just a moment, please. Your Honor, at this time I would call Edmund A. Provder.

(Edmund A. Provder was duly sworn.)

MR. RYAN: I would like to mark this as Plaintiff's, I believe, 31.

(Plaintiff's Exhibit 31 was marked.)

MR. RYAN: And also ask that the easel be deemed 32.

THE COURT: It will be deemed 32 for identification.

DIRECT EXAMINATION

BY MR. RYAN:

Q. Mr. Provder, good morning.

A. Good morning.

Q. Mr. Provder, as you know, I'm Ed Ryan, and I'd ask you to hold your voice up and speak back to me so the ladies and gentlemen of the jury can hear.

A. Yes. Okay. I'll try to speak up as best as possible.

Q. Mr. Provder, would you tell me your training, education and experience, please.

A. Yes. Upon graduation from high school I attended and graduated from the Pennsylvania State University, graduating with a bachelor's degree in rehabilitation counseling. Then I then proceeded on and received a master's degree in rehabilitation counseling from the Pennsylvania State University. Between the years 1975 and 1985 I continued on with my education in rehabilitation counseling, attending New York University, where I completed 60 credits towards my doctorate. I left the university in 1985 with my dissertation not completed. So I completed all my course work but not my dissertation.

Q. All right. What is your field of specialty?

A. Rehabilitation counseling.

Q. Would you explain to us what that means?

A. Yes. Rehabilitation counseling is a field that was developed after World War I to assist people who have sustained various physical, emotional or cognitive impairments, and to assist them in two particular ways. Number one, vocationally, that means to assist people who have various types of limitations and assist them in returning to work, given those limitations. So, for example, if you had an individual who sustained an injury

that affected their ability to use their arm you would try to place them in job where they would still be able to perform some other type of work requiring the use of only one arm. The second specialty that we have is working with people that have severe impairments, catastrophic impairments. And rehabilitation counselors are involved in developing and managing cases for such individuals, meaning that we look at what types of services they will require over their lifetime in order for them to live the best life possible given their limitations. We look at such areas as the therapies that they need, any modifications they may need in their home, as well as supplies or equipment they may require, any architectural renovations they may require, as well as any assistance in maintaining themselves at home or at a facility. So we look at the entire individual and develop plans for them and help them manage those plans.

Q. And what is the name of the corporation or company that you do business as?

A. Occupational Assessment Services.

Q. And is the purpose of that business to do the services you just described?

A. Yes.

Q. Now, in addition to your professional

expierence what, if any, professional affiliations do you have?

A. I don't believe we went over my professional experience. We just noted my present experience.

Q. Go on, please.

A. I'm sorry. Well, upon graduating from Penn State in 1973 I became employed as a rehabilitation counselor at the Federation of the Handicapped in New York City. And I was involved in working in a program called the Higher Horizons for the Homebound. As the name indicates, it was a program geared to people who were so impaired or disabled in some manner that they could not leave their home by themselves, they needed to be transported to our facility. I worked with them in performing the basic functions as a rehabilitation counselor in a vocational setting, meaning I was involved in providing individual and group counseling to help them cope and adjust to their particular impairments and limitations. I performed vocational evaluation and testing to find out what they could or could not do. In addition, I assisted them in preparation for work, being involved in their work adjustment services. And, lastly, I was involved in job placement services to find out -- to help them locate feasible jobs that they could perform.

This, again, these were people who have severe physical impairments, as well as individuals who have developmental disabilities or mental impairments. I did that for about a year and a half and then became employed as a supervisor of vocational facilities at Mt. Sinai Hospital, Department of Rehabilitation Medicine, where I was involved in providing direct rehabilitation services, as well as administrative services, in an acute care hospital setting. I worked with people that had, again, physical impairments, as well as people that had severe physical impairments and people that had emotional impairments. And I was involved in performing the same types of functions, individual and group counseling, vocational evaluation and testing, work adjustment services, as well as some job placement service. I also served as a liaison between the Mt. Sinai Hospital vocational program and the New York State vocational rehabilitation program. And I did that for two different occasions, from 1974 to 1978 and again from 1979 to 1981. From 1975 to the mid-'80's I served as an expert for the federal government, being called in by the Office of Hearings and Appeals, Social Security Administration, to testify on issues of employability for people who are applying for Social Security disability benefits.

Q. After that, Mr. Provder, did there come a time when you were a director of any national organization?

A. Yes. Well, at that time -- well, after the first time I left Mt. Sinai Hospital I developed my own rehabilitation -- direct rehabilitation service program which I'm involved in to date. And we provide direct rehabilitation services. Again, the same types of things, counseling, evaluation, job placement services, work adjustment services. We also are involved in developing and managing catastrophic injury cases. So at the present time I do evaluative work as well as actual direct rehabilitation services.

Q. And your principal office is where?

A. Is in New York City.

Q. Now, in addition to that -- is that the extent of your professional experience?

A. Yes.

Q. Okay. In addition to that what, if any, professional affiliations do you have?

A. I am a certified rehabilitation counselor, which is a national certification of rehabilitation counselors, and I have been such since the beginning of certification in the mid-'70's. I'm a diplomate of the

American Board of Vocational Experts, which is a credentialing organization for people who are in the field of rehabilitation and are interested in doing work in rehabilitation as it pertains to legal matters. I'm also a professional member of the National Rehabilitation Association, professional member of the National Rehabilitation Counsel and Association, professional member of the National Association of Rehabilitation Professionals in the Private Sector, professional member of an organization called R.E.S.N.A., which is an organization that's involved in developing various equipment and supplies for people who have catastrophic injuries. I'm also a member of the Head Injury Foundation.

Q. Thank you, sir. Sir, in light of that background did there come a time when I contacted you and retained your services?

A. Yes.

Q. And would you tell me approximately when I did that?

A. Early in the summer of 1990.

Q. And about a year and a half ago?

A. Correct.

Q. And for what purpose did I contact you?

A. To perform an assessment on Miss Farrell and develop a life care plan to assess her needs.

Q. And in response to my request did you render services?

A. I did.

Q. All right. And would you tell me, we will go step by step, would you tell me what was the first thing that you did?

A. The first thing I did was request various records from your office which I received and reviewed.

Q. Would you tell me what some of those records were?

A. Yes. I reviewed a number of hospital records. You want me to name the hospitals?

Q. Yes, if you would.

A. St. Mary's Hospital, April 19, 1989, May 1, 1989, May 22, 1989. Sunnyview Hospital and Rehabilitation Center, January 8, 1990, to January 16, 1990. Those were the hospital records I reviewed at that time.

Q. Now, did there come a time when you came to the Albany area to see Miss Farrell?

A. Yes.

Q. And would you tell us what you did in that regard?

A. Well, what I did was I interviewed her and observed her to ascertain what her current level of functioning was from from a rehabilitation standpoint. I took an extensive history and extensive interview of her.

Q. And when was that?

A. That was on July 30, 1990, and it was conducted at her home.

Q. And in addition to interviewing her at her home -- well, strike that. I take it part of your job is to make certain observations when you first meet a person that needs your services?

A. Yes, a client, correct.

Q. A client. Excuse me. And in that regard what, if any, physical observations did you make of Carol Farrell when you first saw her? Limited, of course, to your specialty.

MR. NAPIERSKI: Objection, your Honor. I would like an opportunity to voir dire this witness as to his so-called specialty before he starts expressing any observations.

THE COURT: You may inquire, yes.

BY MR. NAPIERSKI:

Q. My name is Napierski, Mr. Provder. I'm going to ask you some questions. And try to follow me. If I

ask you a question you don't understand you tell me, okay?

A. I understand.

Q. You talked for about five minutes about your background. You give this speech in court very often?

MR. RYAN: Objection.

THE COURT: Sustained as to the characterization.

Q. Do you give that recitation in court very often?

A. I testify in court anywhere from six to ten times a year.

Q. Now, you told this jury that you have a national certification, didn't you say that, sir?

A. Yes.

Q. Does that mean the United States government has certified you?

A. As a rehabilitation counselor.

Q. Well, I guess you didn't understand my question. You said that you had a national certification.

A. Yes.

Q. Issued by whom?

A. Board of Rehabilitation Counseling.

Q. And that has nothing to do with the federal government, does it?

A. That's correct.

Q. It's a private group of you guys get together and you give each other certifications, isn't that true?

A. No, that's not true.

Q. Are you licensed by the State of New York?

A. There is no licensing for rehabilitation counselors.

Q. That's a no, isn't it? You are not licensed to perform any services by the State of New York, is that true?

A. That's true.

Q. You are not licensed by any state in this entire country to perform any such services, are you, sir?

A. No, I'm not.

Q. You are not licensed by the federal government to perform any services, are you, sir?

A. There is no such license.

Q. That's right. You are in the business of coming to court for a fee and telling juries about the money that your so-called clients --

MR. RYAN: Objection.

Q. -- need, isn't that true?

THE COURT: Sustained.

Q. You are in the business of being an expert

witness, isn't that true?

A. It's part of my practice.

MR. NAPIERSKI: Your Honor, I move to exclude any testimony by this person. He's not competent to express anything whatsoever about the medical needs of this patient, of this person. No foundation whatsoever. Not licensed to do anything.

THE COURT: Mr. Ryan?

MR. RYAN: Your Honor, just one question.

BY MR. RYAN:

Q. Mr. Provder, have you not been retained by Mr. Napierski's firm in the past to render expert opinions?

A. I have.

MR. NAPIERSKI: Tell me who that person is and I'll fire him tomorrow.

THE COURT: That's a statement.

MR. RYAN: Mr. Conboy or Mr. Carter.

MR. NAPIERSKI: If he's going to continue to testify, your Honor, I want to put him under oath.

THE COURT: You made a few statements yourself. We will call it even.

MR. NAPIERSKI: I move to strike that as totally irrelevant.

THE COURT: The motion is denied. The witness is entitled to testify and the weight that the jury gives to it will be up to the jury to decide based upon the instructions that I give the jury. I will instruct you later as to expert testimony and how you are to regard it. And an exception granted.

MR. NAPIERSKI: Thank you, your Honor.

MR. RYAN: Thank you, Judge.

BY MR. RYAN:

Q. Now, where were we, Mr. Provder?

A. Observations.

Q. Okay. When you arrived in the summer of 1990 I was with you, correct?

A. Yes.

Q. What, if any, physical observations did you make of Carol Farrell?

A. Miss Farrell was wheelchair-bound, she was wearing a brace on her right knee. As she sat during the interview in her wheelchair her head moved from side to side. Also observed was some stuttering as she spoke.

Q. Did you have an occasion to talk to her?

A. Yes.

Q. And what type of questions -- tell us, if you would, I don't want to put words in your mouth. Mr.

Napierski --

MR. NAPIERSKI: Object to that, your Honor. Self-serving declaration by the attorney.

THE COURT: Sustained. The jury is advised to disregard the statement.

Q. Just tell us in your own words the chronology of events after we arrived there and after you made those initial physical observations.

A. Well, after I arrived there and observed her I proceeded to interview her regarding her background, the impact of her impairment on her ability to function, as well as took a work history, education history, and then proceeded to take some measurements regarding her home.

Q. Can you give us a -- can you just tell us as to how cooperative, if at all, she was.

MR. NAPIERSKI: I object to the form of the question.

THE COURT: No. "If at all." Overruled.

A. She was cooperative. She was able to respond to the questions.

Q. In fact, was she very cooperative?

A. Yes.

MR. NAPIERSKI: Objection. Leading, suggestive.

THE COURT: Sustained. Stricken. Jury disregard.

Q. She was nonetheless cooperative. That's your term, correct?

A. Yes.

Q. Now, were you able to observe whether or not she was able to move around in the trailer?

A. In her wheelchair?

Q. Yes.

A. Yes.

Q. And at that point -- at any point did you see her ambulate or move around without the wheelchair?

A. No.

Q. Did you question her as to whether or not she was able to do so?

A. She was -- I did question her.

Q. And what was her response?

MR. NAPIERSKI: Objection, your Honor.

THE COURT: State your objection.

MR. NAPIERSKI: It's hearsay, your Honor. He's going to be talking about what somebody else told him when nobody else was present to cross-examine.

THE COURT: Sustained.

BY MR. RYAN:

Q. Did you prepare a report based upon all these discussions?

A. Yes.

Q. Okay. And did you eventually provide me with a signed copy of that report?

A. I did.

Q. And is that a document that's been marked as Plaintiff's 31 for identification? By the way, you can refer to that and tell -- just tell me if that's the document.

A. Yes.

Q. And in that document you reduced your findings to writing, correct?

A. Yes.

Q. Okay. Did you take a social history from Miss Farrell?

A. Yes, I did.

Q. And what did that consist of?

A. Well, it consisted of information regarding her age, marital status, living situation.

Q. Now, can you tell me about the physical dimensions of the trailer?

A. Yes. Well, first, before you get into the trailer there's a curb that goes into a screened-in

entrance which is 32 inches wide. Once in the porch it's a pretty significant-sized porch. There are three steps of eight inches each that have to be navigated in order to enter into the home. The rooms of the trailer are small, the bathroom not wheelchair accessible. The hall that accesses the bathroom is narrow. The entrance to Miss Farrell's bedroom is 27 inches wide, and she is able to propel her wheelchair in the kitchen-dining area, as well as in the living room.

Q. Okay. Thank you. Did you inquire as to any means of transportation for Miss Farrell?

A. Yes.

Q. And what did that consist of?

A. She has to be taken wherever she has an appointment.

MR. NAPIERSKI: If your Honor please, there's no foundation for this man to make any such statements. He's making medical assessments.

THE COURT: Sustained. Stricken. Jury disregard the answer.

Q. What, if any, type of questions did you ask her in regard to her transportation needs?

A. Well, as part of a rehabilitation plan you want to know what kind of -- whether a person can drive

independently, whether they are able to transfer from a wheelchair to a car, whether a person would need a van for transportation, whether the person is independent in getting out of their own home for safety reasons by themselves. So that's all reasons why I ask those questions.

Q. And based upon your qualifications as a rehabilitation specialist did you form an opinion in regard to those needs?

MR. NAPIERSKI: Objection, your Honor. There is no such thing recognized in the State of New York as a rehabilitation specialist that this man holds himself out to be. Totally improper and no proper foundation.

THE COURT: Overruled.

MR. RYAN: Thank you, Judge.

MR. NAPIERSKI: Exception, your Honor.

THE COURT: Exception is granted.

Q. Go ahead.

A. I'm sorry. I don't recall what the question was.

MR. RYAN: Read back the question, please.

THE COURT: Read it back, please.

(The court reporter read back the last question.)

A. Transportation needs. I guess that was the

question?

Q. Right.

A. Yes.

Q. And what was that opinion?

A. She is not able to drive by herself. She --

MR. NAPIERSKI: Objection, your Honor. You already ruled on that and told the jury to disregard the statements about what she can or can't do. He's not a physician.

THE COURT: Sustained.

MR. RYAN: You ruled, Judge, if I understand, he can still express an opinion as to her transportation needs.

THE COURT: But not based on medical.

MR. RYAN: Not based on medical. Based from purely within his specialty as a rehabilitation person --

THE COURT: Put a question then. Put another question.

BY MR. RYAN:

Q. Mr. Provder, strictly within your specialty as concerning rehabilitation, what, if any, transportation needs exist?

MR. NAPIERSKI: Again, your Honor, I would like to make a continuing -- there is not such specialty

that he just invented to come here to this courtroom. It's a prejudicial --

MR. RYAN: He's making a speech.

THE COURT: Just a moment, please, gentlemen. Not in the presence of the jury. I understand your objection and I do overrule it and grant you an exception.

MR. RYAN: Thank you.

Q. Go ahead.

A. Yes. Miss Farrell requires a van in order to transport herself to her appointments.

Q. And, to the best of your knowledge, does she presently possess such a van?

A. No.

Q. Did you make any observations as to any appliances that may have been attached to Miss Farrell?

A. Yes.

Q. And what, if any, observations did you make in that regard?

A. She was wearing a brace on her right knee.

Q. And, in addition to that, did she have any -- anything else? Let me rephrase it. In regard -- did you make observations in regard to her bathroom activities?

A. Yes.

Q. And what, if any, bathroom activity

limitations were there?

A. She indicated that she had an in-dwelling catheter.

Q. And we all know what that is, a tube that goes into her, correct?

A. Yes.

Q. And any other external appliance or receptacle?

A. Yes.

Q. And what was that? In relation to the catheter.

A. Yes. I understand. Yes, she uses disposable and non-disposable leg bags.

Q. Plastic bag, correct?

A. Yes.

Q. To collect the urine?

A. Yes.

Q. And that's external, strapped to the leg or bed?

A. That's correct.

MR. NAPIERSKI: Your Honor, please, I would request the lawyer be instructed not to testify.

THE COURT: Sustain the objection. Leading.

Q. What, if any -- just describe it, briefly.

A. Essentially, it's a plastic bag that's attached to the catheter that could either be strapped to the leg or strapped to the wheelchair.

Q. Now, assume, Mr. Provder, it's already in evidence through testimony yesterday by her neurologist, that that in-dwelling catheter is an irreversible and permanent condition, and assume further that Dr. Oberheim, her urologist, testified that it may lead -- that comes with a 100 percent probability of urinary tract infection. And that assume further it's already in evidence that that urinary tract infection may in turn lead, per Dr. Oberheim's opinion, to kidney stones and eventually even to renal or kidney failure --

MR. NAPIERSKI: Your Honor, I object. This is prejudicial, it's inflammatory, there was no connection made that there was any probability with regard that condition to this patient. And I submit it's prejudicial and that --

MR. RYAN: Your Honor, my recollection of the testimony is that Dr. Oberheim responded to my questions and answered each of these, and basically the same way as I'm characterizing them. And I submit it's up to the jury to form its own recollection and that recollection will control.

THE COURT: Before I rule at all I instruct the jury that throughout this case and at the end of this case it will be your recollection that controls, your recollection of the testimony and the facts of this case, not what the attorneys say and not what I say. And, more specifically, as to the objection made, I sustain it as to the probability portion.

BY MR. RYAN:

Q. Assume further, Mr. Provder, that there was testimony from Dr. Oberheim that -- that complications, complications of an in-dwelling Foley catheter include renal failure and requiring, if there is renal failure, requiring either dialysis or transplant. Now, have you taken into account in any way in your assessment the possibility of urinary tract infections?

MR. NAPIERSKI: If your Honor please, I submit total speculation, no foundation. This man is not competent to make any such statements --

THE COURT: Excuse me. Sustain it as to the medical conclusion sought.

MR. RYAN: Judge, just so we all understand, no question as to medical conclusion. I'm simply referring to whether or not he took into account the need for plastic tubes, plastic bags, that sort of thing.

THE COURT: That was not the question.

MR. RYAN: All right. Excuse me then. I will rephrase it.

BY MR. RYAN:

Q. Mr. Provder, you heard this commentary. Have you taken into account the need for catheter tubes and plastic bags?

A. Yes.

Q. And that is part of your report?

A. That is.

Q. Did you make -- not medical findings now, did you make any assessment as to her needs for bowel evacuation?

A. Yes.

Q. And what did that consist of?

A. Well, she indicated that --

MR. NAPIERSKI: Objection, your Honor. It's hearsay.

THE COURT: Yes, sustained.

Q. Just what was your assessment in equipment or property point of view?

MR. NAPIERSKI: Objection, your Honor. If assessment is based upon hearsay, your Honor, then there's no foundation and I submit he can't give any such

speculation.

MR. RYAN: Judge, I don't want to argue in front of the jury. His assessment is based upon his professional review of her needs. He is not expressing a medical opinion, he's telling us and will tell us in detail what items she will need.

MR. NAPIERSKI: And my point is this man is not competent to make any such speculation.

MR. RYAN: And, without arguing, he's competent enough to be retained by Mr. Napierski --

THE COURT: No, let's not get into that.

MR. NAPIERSKI: That's such nonsense. Whoever did it I'm going to fire, anyway.

THE COURT: The objection is overruled.

MR. RYAN: Thank you. You can answer.

A. Yes. Fleet enemas, which are done three times a week.

Q. And you calculated a cost for those Fleet enemas?

A. Yes. She also takes a stool softener in addition to that.

Q. And that's part of the report and the details that we will see, correct?

A. Yes.

Q. Is the -- not to belabor it, is the Foley catheter urine bag disposable or non-disposable?

A. The Foley catheter is changed on a monthly basis. The urine bags, there are disposable and non-disposable urine bags.

Q. Did you make any assessment of her daily scheduling needs, that is to say what her morning routine would be, from a rehabilitation point of view?

A. Yes.

Q. And what were those findings?

A. Well, it takes her about one hour to dress herself, wash and take care of her toileting needs. At the time that I saw her that was performed by her nieces. She notes that she gets up at 8:30 in the morning, and takes her from 8:30 to 10:00 to get dressed and take care of her daily activities. She goes to bed at 7:30. She also takes a nap during the day on two occasions. So that's basically her daily schedule.

Q. Now, what, if any, appliance -- well, we will get into the appliances. I'll do it another way. I believe in your interview with her -- what, if any, speech pattern did she evidence?

MR. NAPIERSKI: Objection, your Honor. No proper foundation.

THE COURT: Sustained as to form, at least.

Q. What, if any, modalities or needs did she need, in your professional opinion, in regard to speech --

MR. NAPIERSKI: If your Honor please, this is not an omnibus expert. If a physician came in here --

THE COURT: Just a moment. I'm going to sustain your objection.

Q. You told us about the stool softeners. What about the urinary tract infection, sir? Anything that she takes for that?

A. She has it on occurrence of several times a month, which she takes antibiotics.

Q. And the cost of that is figured into your report?

A. Yes.

Q. And, in addition to that, she takes other medications, correct?

MR. NAPIERSKI: Objection. Leading and suggestive.

THE COURT: Sustained as to leading, yes.

Q. Given the urinary problem that we already talked about at length, what, if any, other needs does she have, particularly in regard to clothing?

A. I'm sorry. I didn't hear the question.

Q. Particularly in regard to clothing.

MR. NAPIERSKI: Objection. He's leading the witness and suggesting an answer.

THE COURT: Sustained.

Q. What, if any, other needs does she have in that limited vein?

A. I'm sorry. I don't understand the question.

Q. Well, I take it she's incontinent, she has a bladder problem?

A. Yes.

MR. NAPIERSKI: Objection. He's leading the witness.

THE COURT: No. Overruled as to that.

Q. And, based on your experience, when one has that type of problem do they need any additional items?

A. Yes. At night they require a protector for the bed, which is called a chuck.

Q. And when you saw her was she on any kind of program for her bowels?

A. Yes, she was.

Q. Would that be referred to as a bowel management program?

A. Yes.

Q. And in regard to her skin, what, if any,

considerations did you take into account concerning her skin?

A. The possibility of having what we call decubiti ulcers or skin breakdowns.

Q. In laymen's terms, bed sores?

A. Yes.

Q. And what, if anything, did you factor into your analysis to provide for that?

A. Preventive measures such as skin lotions, as well as the use of a wheelchair cushion to preclude -- to try to prevent any types of occurrences, as well as any cost of potential complications for that.

Q. You mentioned her cleaning herself. What, if any, rehabilitative needs -- did you form an opinion in regard to -- concerning her ability to take care of personal hygiene?

A. She was dependent.

Q. And what does that mean, in plain English?

A. That somebody has to assist her in performing these activities.

Q. And --

MR. NAPIERSKI: I'm going to object, your Honor, move to strike. He's not competent to make those --

THE COURT: No, I'm going to allow it. Overruled.

MR. RYAN: Thank you, Judge.

Q. And do you make an assessment as to one's physical impairments as it relates to their ability to clean themselves and take care of themselves?

A. Yes.

Q. Okay. And assume it's already in evidence that her orthopedic doctor, Dr. Khanuja, testified yesterday that as recently as three days ago when he examined her she had no use of the lower left extremity, she had no use of the upper left extremity; assume that it's in evidence that she had two dropped feet, a drop foot on each foot, if that's the correct English, that she had basically hemiparesis -- do you know what this term means?

A. Yes.

Q. Would those be significant factors in assessing her daily needs?

MR. NAPIERSKI: Ojbection, your Honor. I want to object. The question sets forth a reference to testimony by an orthopedic specialist who testified only concerning his findings relative to the first few months following the accident as being causally related to the

accident. He was never asked and expressed no opinion --

MR. RYAN: Your Honor, he's making a speech.

MR. NAPIERSKI: Your Honor --

THE COURT: Gentlemen, please.

MR. NAPIERSKI: He made his speech.

THE COURT: If you are going to make a speech it will be outside the presence of the jury. Members of the jury, we are about to discuss now a matter of law, which is for me to handle. You handle the facts. So you are excused with the same instruction to the jury. Sir, you may step down.

(The jury left the courtroom at 11:20 p.m.)

MR. RYAN: Judge, I think we are quibbling over procedure. He unquestionably has a right on cross to bring out that there may --

MR. NAPIERSKI: If your Honor please, I have an objection that I have been interrupted on, and I want to finish.

THE COURT: The was the purpose of getting rid of the jury.

MR. NAPIERSKI: He's interrupting me and I haven't had a chance to put it on the record.

MR. RYAN: I thought you were finished.

THE COURT: You may proceed, Mr. Napierski.

MR. NAPIERSKI: Your Honor, Dr. Khanuja was asked a question concerning causal connection between some physical problems of this patient and the accident. He expressed his opinions, essentially that there was a cervical strain, dorsal and lumbar strain which he causally related to the happening of the accident. The foot drop he specifically said he would have to retract his testimony because he admitted he didn't have enough information to relate that to the accident.

He was never asked to causally relate any hemiparesis, to causally relate any problems with the left side of her body, or any other problems that she may have exhibited in January of this year when he examined her. He was specifically not asked by plaintiff's lawyer to associate that present condition with the accident, and he expressed no opinion about it. The only opinion he expressed dealt with her condition as it existed in 1989 from April through October.

MR. RYAN: There's no question he expressed no opinion. It was not my intent to express any opinion. I operated within the strict confines of my understanding of what I expected to elicit from Dr. Khanuja. But I'm perfectly entitled to quote or refer back to testimony, testimony that he made that's in evidence as to her -- his

physical observations of her on that date. We are talking about two different things. The causality issue is a totally separate issue from this man seeing her and expressing what her physical needs are.

Subsequent to Dr. Khanuja, as the Court is well aware, Dr. Oberheim said that there was a neurological problem which caused neurogenic bladder, among other things. I'm going to bring in yet other people to testify as to other aspects as to her disability. I have a right to reflect that on January 7, only three days ago, when she presented herself, when she was brought in in her wheelchair to Dr. Khanuja, he made certain physical observations. I'm not asking this man to express an opinion of causality. And I feel quite strongly that because I did not ask Dr. Khanuja as to causality that doesn't constitute a motion in limine or some way of keeping me from asking him that. Here are the office notes from Dr. Khanuja. And these were -- that was the basis for my questions from Dr. Khanuja.

THE COURT: Now, Dr. Khanuja said this and that and something else. But if he doesn't causally connect them it can't go before this jury. So I'm going to sustain the objection, allow you to limit your question to the parts where it is established. That is

eliminating the drop foot and eliminating the hemiparesis.

MR. RYAN: Judge, still, if I understand your ruling, he still has the -- it's anticipated that the defense in this case will be one of conversion reaction. We all know that. That's what Dr. Barron alluded to. And we are dealing with a psychological overlay.

THE COURT: Do you expect to get this in through this witness?

MR. RYAN: No.

THE COURT: Then can't we proceed with the examination of this witness based upon the ruling that I made to the objection?

MR. RYAN: Well, it's not that big of a piece of the examination of this witness, Judge. But I would have preferred to ask him questions --

THE COURT: You can ask him portions relating to Dr. Khanuja's testimony as to which he did establish causality.

MR. RYAN: Okay. I'll move on.

THE COURT: Jury, please.

(The jury returned to the courtroom at 11:25 a.m.)

THE COURT: Mr. Ryan?

MR. RYAN: Yes.

BY MR. RYAN:

Q. Mr. Provder, continuing in regard to her home care needs, did you make any assessment as to the amount of care she needed from people coming into the house, that is to say how many hours a day?

A. Yes.

MR. NAPIERSKI: If your Honor please, again, I would respectfully object. This is total speculation and it's no way connected to the issues in this lawsuit. At least there hasn't been any foundation connecting it.

THE COURT: I'm going ot allow it. Overruled.

Q. What was that determination?

A. That at the time that I saw her she was being cared for for the most part by her nieces.

Q. All right. And that was on a part-time basis?

A. Yes.

Q. Did you make any assessment or any recommendation as to what her future needs would be?

A. Yes.

MR. NAPIERSKI: Objection, your Honor. Total speculation as to future needs.

MR. RYAN: Judge --

MR. NAPIERSKI: No foundation.

THE COURT: Can I have the question back, please.

(The court reporter read back the last question.)

THE COURT: No. Future needs. I'm going to sustain the objection as to form.

BY MR. RYAN:

Q. What, if any, assessment did you make?

A. I assessed Miss Farrell's ability to take care of herself, both performing her physical functions, her ability to manage her bowel care, bladder care, as well as her ability to dress and take care of her activities of daily living, as well as various safety factors.

Q. And did you -- did there come a time when you reduced these assessments to dollar figures?

A. Yes.

Q. All right. And can you tell us the bases for that dollar assessment? In other words, what methods, what methodology did you use?

A. Okay. What I did is after reviewing the records, interviewing Miss Farrell, I looked at what type of rehabilitation plan would be most feasible for her in nine or ten different areas. I set out what the items were going to be that she needed and then researched the

cost of these items in the Capital District.

Q. You say the Capital District. You are from New York City. When you are referring to the Capital District you mean right here. Are there different numbers for different parts of the state?

A. Yes.

Q. Is it fair to say the numbers in the Capital District are lower than what they would be in New York City?

A. They are.

Q. And what year's dollars did you put those?

A. 1990.

Q. Because that's when you saw her and prepared the assessment, correct?

A. Correct.

Q. And you are not an economist, right?

A. No.

Q. You leave it to an economist to move those numbers --

MR. NAPIERSKI: I ask the lawyer be directed not to testify --

MR. RYAN: I will withdraw it.

THE COURT: The objection --

MR. NAPIERSKI: And permit me the courtesy of

completing my objection on the record.

THE COURT: Yes, Mr. Ryan. Let Mr. Napierski complete his objection.

MR. RYAN: Yes, your Honor.

THE COURT: The question is now withdrawn.

BY MR. RYAN:

Q. Now, Mr. Provder, as part of that report -- can you tell us what divisions or subdivisions you made of that report?

A. Yes. I started out with evaluations. This report was constructed from a rehabilitation standpoint, to prevent any complications. So evaluations are an important part of the preventative-type of a plan. So I noted what evaluations would be required on a yearly basis. The next section was therapy, and I considered what type of therapy she would require. Medical care, essentially this was similar to exactly what her schedule was at the time I saw her. We then looked at supply needs, any orthotic or medication needs that she had, any equipment needs that she would have, positioning needs, such as wheelchairs; transportation needs, architectural renovations and home care needs and, lastly, any cost of potential complications.

Q. Thank you. And within each of those needs or

subsections did you further subdivide it? I don't want to go through each detail now. We will get to that. Did you make further subdivisions?

A. Yes.

Q. And did you make any -- what, if any, calculations did you make for, say, years of purchase?

A. Well, each figure is basically done on a yearly basis for equipment such as wheelchairs and vans. The replacement values of those items differ.

Q. And you likewise set forth the purpose of each of those categories?

A. Yes.

Q. And then, finally, you set forth a dollar amount, correct?

A. Yes.

Q. And would it be fair to say in most instances you set forth a range --

MR. NAPIERSKI: Objection, your Honor. He's testifying.

THE COURT: Sustained.

Q. What, if any -- did you state one number or a range of numbers in most instances?

A. Usually a range.

Q. And those are based upon established figures

in the Capital District?

A. Yes.

Q. In addition, these are all based upon needs at home, correct?

A. Yes.

Q. In addition to that did you make any projections as to needs in the event that Miss Farrell was cared for not at home?

MR. NAPIERSKI: Your Honor, you ruled about his future projections as being precluded here, and I submit -- I renew my objection on that regard.

THE COURT: Sustained.

MR. RYAN: Let me back up, Judge.

Q. Within your specialty, Mr. Provder, you have an occasion to interview various people in need of rehabilitative services, correct?

A. Yes.

Q. And, correct me if I am wrong, sir, but is it fair to say that some of these people then go into a --

MR. NAPIERSKI: I object to the form of the question, your Honor. He's leading the witness, he's testifying.

THE COURT: Sustained as leading.

BY MR. RYAN:

Q. Without talking about Miss Farrell for a second, could you tell us what your experience is in assessing individuals who have needs such as Miss Farrell in the home, just in a general sense.

A. Okay. In doing a rehabilitation plan and working with individuals who have catastrophic injuries it's prudent to consider the cost of care if the person is not cared for at home.

Q. And where would that be?

A. Could be anything from a rehabilitation facility that specializes in catastrophic injuries to a skilled nursing facility.

Q. And would you as a supplement or an additional calculation likewise take that into account?

A. Yes.

Q. And did you reduce that to writing, as well?

A. Yes.

Q. That's part of your report?

A. Correct.

Q. In addition to her present existing situation and as a further supplement to the report, not part of the basic numbers, did you take into account any complications?

A. Yes.

Q. What were they?

MR. NAPIERSKI: Objection, your Honor. This man is not competent to talk about medical complications. He has no right to be here in that regard.

THE COURT: The question doesn't say what kind of complications.

MR. RYAN: Judge, I can go one by one if need be.

THE COURT: Sustained.

MR. RYAN: Thank you.

BY MR. RYAN:

Q. Did you take into account any potential complication, decubitis ulcers?

MR. NAPIERSKI: Objection, your Honor. That is obviously a medical condition. He's not competent.

THE COURT: Sustained.

MR. RYAN: Judge, he already said -- excuse me, but he's already said there's a -- we have already established there's a possibility for ulcers. At least that's my recollection.

MR. NAPIERSKI: Objection, your Honor. Total speculation.

MR. RYAN: There's testimony as to bed sores.

MR. NAPIERSKI: Your Honor --

THE COURT: Yes?

MR. NAPIERSKI: Your Honor, there's no foundation, there's no evidence in this case of any such condition and it's total speculation on his part.

THE COURT: For that reason, and for the qualifications of the gentleman, sustained.

BY MR. RYAN:

Q. We have established that there's a -- not only a potential, but there is a 100 percent chance for a urinary tract infection, correct?

A. Yes.

Q. And in addition to your basic set of numbers more than a year ago did you take into account that potential complication?

A. Yes.

Q. And did you assess numbers for that?

A. Yes.

MR. NAPIERSKI: I will object to that also, your Honor. The man is not competent to make crystal ball predictions.

MR. RYAN: Your Honor, please, one so-called crystal ball projection that has been substantiated by the urologist. Secondly, all he is saying is in the event this exists these are the dollar numbers that are

associated with it.

THE COURT: The objection is overruled.

MR. RYAN: Thank you.

Q. And likewise did you take into account a potential complication for thrombophlebitis?

A. Yes.

MR. NAPIERSKI: Objection, your Honor. No foundation for that whatsoever.

THE COURT: Sustained. Answer stricken, jury disregard.

Q. Now, Mr. Provder, did you do -- in any way you want, we have a chalk board, we have a flip chart, for lack of a better term, which is deemed marked for identification as Plaintiff's 32. If you would like I would like you to -- first of all, I would like to offer Plaintiff's 31 into evidence as his report. You signed that, did you not?

A. I did.

Q. And that expresses your opinion as to the items which we discussed?

A. Correct.

MR. NAPIERSKI: Objection, your Honor. He's here to testify. I'm going to object to any such reports. I want to be able to cross-examine him, not a piece of

paper. And his verbal testimony is the best evidence of what he's going to say.

MR. RYAN: Judge, the report itself, as we know, is a very --

MR. NAPIERSKI: If your Honor please, I object to him making speeches in front of the jury.

THE COURT: All right. Members of the jury, I hate to keep sending you out. We do have a matter of law to resolve, and you are sent to the jury room. Same instruction applies. You may step down.

(The jury left the courtroom at 11:37 a.m.)

(The witness was excused.)

THE COURT: There's an offer of the report into evidence and there's an objection.

MR. RYAN: Correct.

MR. NAPIERSKI: Well, if your Honor please, the report is not only totally speculative, it obviously contains things, projections upon which you have already ruled indicating that he can't express an opinion about it. And to now backdoor your Honor's ruling saying, "I got it in writing, maybe I can't say it but I got it in writing," I submit, your Honor, we should be able -- this man should be able to testify, question and answer question and answer. I'll have an opportunity to object

and your Honor will make appropriate rulings. Simply putting forth this multi-page document which is without foundation, I submit, is extremely prejudicial.

THE COURT: Mr. Ryan?

MR. RYAN: Your Honor, first of all, I already marked my copy of the report as to those items that you have sustained. I have no intention of going into a so-called back door. I marked it so that I would not even refer to it when he reduces it to writing.

Secondly, I would agree that before that copy would be shown to the jury it could be redacted to eliminate those items such as the thrombophlebitis that you sustained. I have no problem with that at all. But my experience, much less than Mr. Napierski, is that a report like this is a part of the record, and particularly in the event that there is any appeal you have the best of both worlds, you have the transcript and you have the report. It seems, you know, it almost seems like a step backwards, times-wise, when we get involved in chalk boards and magic markers and then the jury can't read what the admissible parts are of the report are. It's here, he's a professional, he's established his qualifications, and it's there. And if need be it would be a nice clean part of the record.

MR. NAPIERSKI: What is there, your Honor, is a mishmash of, again, self-serving declarations by people involved here who have an interest, totally based upon hearsay. There's pages and pages of commentary in there. And then there's pages and pages of speculation. There are astronomical numbers, projections in the future, for things he hasn't even yet asked this man about. There are pages -- at this point in time he seeks to put into evidence a report -- he calls it a report. I have another term for it but I don't choose to put it on the record, your Honor. But this is totally prejudicial and I vigorously oppose entering into the court record this report.

MR. RYAN: You know, Judge, I had a thought where we can reconcile this. If there's any doubt that -- if there's any doubt I'm trying to do something through the back door I'll do it this way. I intended to have him come down, explain these numbers one by one. This is marked as an exhibit. It stands to reason once the numbers are scribbled on the easel if they are in clean, typewritten fashion there can hardly be any objection to them.

MR. NAPIERSKI: I don't understand what that means, your Honor. I have an objection as to the

admissibility of a document. There's no foundation for that document. And I stand on my objection.

THE COURT: Yes, Mr. Ryan. The ruling is that the witness is here, he has been allowed to testify and is going to be allowed to continue to testify. And by testimony already elicited it's obvious that some of the report is based upon hearsay statements. For that reason alone I can't let it in. But, in general, the offer is not received.

MR. RYAN: All right. Your Honor, at this time when the jury comes back I will have Mr. Provder come down and reduce to the easel which would become -- which I will offer at that point, presumably become part of the record. I will do it that way.

MR. NAPIERSKI: Do I understand Mr. Ryan to say he's going to have this man come down and put numbers on the bulletin board without having properly questioned him. I submit I will object to that.

MR. RYAN: Judge, we have been -- now we are going --

THE COURT: We have to see how this case unfolds. He has a right to proceed.

MR. RYAN: Judge, thank you.

THE COURT: Jury, please. Sir, would you

come back up.

(The jury returned to the courtroom at 11:42 a.m.)

THE COURT: Mr. Ryan.

BY MR. RYAN:

Q. Mr. Provder, how is your handwriting?

A. I try to make it as clear as possible.

Q. Okay. I'd like you to come down, I'm going to ask you questions, and I believe that's Plaintiff's 32 for identification. I would like, in response to my questions, I would like -- if I could stand someplace where I'm not in the way, if that's possible. I'm going to go through here --

MR. NAPIERSKI: Excuse me, Mr. Ryan. Your Honor, can I change my position?

THE COURT: Sure.

MR. RYAN: Use my seat if you wish.

MR. NAPIERSKI: It's not electrified, is it?

(There was a pause in the proceedings.)

BY MR. RYAN:

Q. If I can, I'm going to go through the separations of the life care plan that we discussed, not reading any portion to which the judge sustained an objection. In regard to the overall life care plan, first part of it, if you will, were you able to form an

evaluation -- were you able to form an evaluation within your specialty as to her need for physical therapy?

A. Yes.

Q. Okay. And could you tell me what that need was and, if so, put the dollar figures on the board and explain how you arrived at it?

MR. NAPIERSKI: Objection, your Honor. There's no foundation for him to make any such projections or evaluations as to physical therapy. He's not a certified physical therapist. He has no basis to make such projections.

THE COURT: Sustained at this point. I will allow to you inquire further of the witness.

BY MR. RYAN:

Q. As part of your overall evaluation did you have an opportunity to review her physical therapy needs from a rehabilitation point of view?

MR. NAPIERSKI: If your Honor please, he is being asked a question about assessment of physical therapists. We have in this state certified physical therapists, we have licensed medical doctors, we have licensed nurses and we have certified social workers who are involved in rehabilitation, who are involved in medical care. This man is none of them and he wants to be

able to tell this jury an opinion about all of them.

MR. RYAN: I would like the record to reflect the dramatic speech-making.

THE COURT: Let's forget about that.

MR. NAPIERSKI: This man is not qualified to make projections about physical therapy or medical needs, your Honor. He has no basis to be here to do that.

MR. RYAN: Judge, he's totally qualified to assess dollar amounts within his rehabilitative specialty, having seen the person, reviewed the medical records. He can say she needs X dollar amounts of physical therapy.

THE COURT: I'm going to overrule that objection and allow Mr. Ryan to inquire.

MR. RYAN: Thank you, judge.

MR. NAPIERSKI: I --

THE COURT: In other words --

MR. NAPIERSKI: I understand your Honor's ruling.

THE COURT: The weight of his testimony is for the jury.

MR. NAPIERSKI: I would like to indicate I want to reserve the right to make a motion --

THE COURT: All rights are reserved.

MR. NAPIERSKI: Thank you, your Honor.

BY MR. RYAN:

Q. Now, go ahead.

A. The first thing I considered was the cost of an evaluation of physical therapy. And the cost of the evaluation was 90 to 150 dollars per year.

MR. NAPIERSKI: If your Honor please, at this time I would like to make another statement on the record, a form of an objection. If a licensed physical therapist were to testify here and make a statement as to cost, that person would be required to state that the cost was a fair and reasonable item and based upon his knowledge as a licensed physical therapist. This man is not licensed to do anything, and I submit it should be stricken.

MR. RYAN: Your Honor, he's already told us he arrives at these costs based upon generally-available data for the Capital District. This is information that's available for this very purpose. And he sets forth the range. I submit to you -- well, you can give it whatever weight you want, but 90 to 150 per year is not that much money to be quibbling over.

MR. NAPIERSKI: If your Honor please, we all know where he's going here. And if a mechanic came in, the man who testified as to the value of the repair of an automobile, he has to be in that field. And otherwise he

could not express an opinion about the fair and reasonable value. That man is not in the field of physical therapy and nursing and medicine, and in home rebuilding. These are the things we all know he's going to try to testify.

MR. RYAN: Judge, he's already been qualified for those items that, where objections have not been upheld, he's a qualified rehabilitation person. Call him a specialist, whatever you want.

THE COURT: Excuse me, Mr. Ryan. It has not been established how he knows what this woman will need.

MR. RYAN: Let me ask him.

BY MR. RYAN:

Q. Mr. Provder, as set forth in numbers for physical therapy, as the judge inquired, how have you arrived at that determination that she will need physical therapy?

A. That she will need physical therapy.

MR. NAPIERSKI: That's not the question his honor asked.

THE WITNESS: Or the cost?

MR. RYAN: The judge wants to know, if I understand the Court correctly --

MR. NAPIERSKI: If your Honor please, excuse me, Mr. Ryan. Your Honor, I'm not comfortable having my

back to your Honor or to the jury. Can we just have this witness stand where Mr. Ryan is and I think we all can return to our normal positions here?

THE COURT: Sure.

MR. NAPIERSKI: Please?

THE COURT: You have to move the easel.

MR. RYAN: Judge, may I inquire --

THE COURT: I don't think you can see that, can you? They say yes.

JUROR: I can't. The marker needs --

THE COURT: Do you have a better marker?

MR. RYAN: This is a "Mighty mark." Maybe this will do.

THE COURT: Mr. Ryan, you want to put a question, please.

BY MR. RYAN:

Q. Mr. Provder, you made an evaluation for physical therapy, correct?

A. Yes.

Q. How did you arrive at the need for that evaluation?

A. At the time that I saw her she had had prior physical therapy. She had, as noted through one of the questions, she was observed having limited function of her

left side. And physical therapy evaluation on a yearly basis to ascertain need for yearly physical therapy is appropriate.

THE COURT: Is what?

THE WITNESS: Is necessary.

MR. NAPIERSKI: That's his opinion, your Honor, based upon no foundation. And I submit, your Honor, it should be stricken.

THE COURT: Sustained. And the answer is stricken.

BY MR. RYAN:

Q. Had you had an opportunity to review physical therapy notes?

A. Yes, there were notes in the records.

Q. And based upon those notes and based upon your training and education and experience as a person in the field of rehabilitation, have you been able to form an opinion as to whether or not she would need this basic evaluation?

MR. NAPIERSKI: If your Honor please, there's no foundation for him express an opinion about the need for physical therapy evaluation in the future based upon his review of some notes. That's the only foundation he has. It's not sufficient.

THE COURT: Sustained.

Q. You are in the field of occupational therapy, are you not?

A. No, rehabilitation.

Q. Rehabilitation aspect of it. But --

MR. NAPIERSKI: I object to the form of the question.

Q. Have you formed an opinion as to whether or not this person is in need of occupational therapy?

THE COURT: I'm sorry. Did you get --

MR. NAPIERSKI: He said he's in the field of occupational therapy.

THE COURT: Read it back, please.

(The court reporter read back the last question.)

MR. NAPIERSKI: Your Honor, occupational therapy is a licensed profession in the State of New York.

THE COURT: The objection is sustained.

BY MR. RYAN:

Q. Did you make a notation as to what, if any, medication she was taking?

A. Yes.

Q. And are there unit costs or generally available data that sets forth what that -- what those drugs were or prescribed drugs would cost to her?

A. These are the actual costs of the drugs that she was taking from the pharmacy that she uses.

Q. Okay. And if we can go through these. We established that she has a urinary tract infection, correct?

A. She has it on --

Q. Chronic urinary tract infection?

A. Yes.

Q. And there's antibiotics for that, right?

A. Correct.

MR. NAPIERSKI: Excuse me, your Honor. I object to the form of the question. The doctor's testimony was that she had a urinary tract infection in January of 1991. No testimony at all as to what her condition is now. Dr. Oberheim hasn't seen her in more than a year, he told the jury.

MR. RYAN: Judge --

THE COURT: As to that, overruled.

MR. RYAN: Thank you.

Q. And you can assume it's in evidence that she takes an antibiotic for that infection.

MR. NAPIERSKI: If your Honor please, that's a misstatement. Dr. Oberheim stated yesterday that he prescribed an antiseptic, not an antibiotic. That's what

the record will show.

MR. RYAN: Your Honor, I believe you can assume it's in the evidence from the medical -- that she has a chronic urinary tract infection for which she takes an antibiotic each and every day.

MR. NAPIERSKI: If your Honor please --

THE COURT: I'm going to sustain the objection. My recollection is he said an antiseptic. The recollection of the jury, of course, will control.

BY MR. RYAN:

Q. You've mentioned other drugs, Colace, Cardizem, Vasotec, Lasix, Synthroid, Zantac, Cuprimine --

MR. NAPIERSKI: Objection, your Honor. There has been no such mention by anybody here.

MR. RYAN: It's in his report.

MR. NAPIERSKI: Objection, your Honor. That report is not in evidence. You ruled on it. Move to strike it.

THE COURT: Sustained. The reference to the report is stricken, jury disregard that reference.

MR. RYAN: We will come back.

BY MR. RYAN:

Q. You talked about the Foley catheter, the need for the Foley catheter and the disposable plastic bags,

correct?

A. Yes.

Q. And have you made a determination of what they cost?

A. Yes.

Q. And what is that cost?

A. Foley catheter is, yearly basis, 120 dollars. The disposal bags, 240 dollars per year.

Q. And could you make notes of those, just quickly.

MR. NAPIERSKI: If your Honor please, the first matter, physical therapy has been stricken, as I understand it. They should use a new page.

THE COURT: Yes.

Q. And when one has use of a Foley catheter -- and you testified, I believe, that the registered nurse has to attend to it, that it has to be attended to once a month. Is there any normal solution that is used in that regard?

A. Yes, sterile solution.

Q. What is that, saline solution?

A. Yes.

Q. What's the cost of that?

A. 192 dollars a year.

Q. Okay. And, in addition to that, are there trays, other appliances that have to be used?

A. When it's changed there's a tray that's required.

Q. How much is that?

A. 70 dollars a year.

Q. And, likewise, changing any rubber gloves or anything like that?

A. Rubber gloves are used for the bowel program.

Q. How much are they?

A. 80 dollars a year.

Q. And you referred to the need for chucks. What's the cost for those?

A. 127 dollars a year.

MR. NAPIERSKI: Can I make an inquiry, your Honor, at this point?

THE COURT: Yes.

MR. NAPIERSKI: Sir, the information that you have just given to this jury is something that you went to some pharmacy, supply house and looked up, is that right?

THE WITNESS: I contacted a supply house, yes.

MR. NAPIERSKI: Move to strike it all as hearsay, your Honor. There's no testimony that it's a

fair and reasonable value.

MR. RYAN: Your Honor --

MR. NAPIERSKI: It's a prime -- I said enough.

MR. RYAN: He's been qualified as a person in this field that is knowledgeable in the field, an expert in the field. And he has used available information that's applicable to this very economic district, the Capital District, as opposed to any other district, and I submit to you these are very reasonable numbers.

MR. NAPIERSKI: Whether they are or not, your Honor, there is no such field recognized by the State of New York. There are licensed physical therapists, licensed occupational therapists, licensed social workers, licensed doctors and nurses. He is none of them.

THE COURT: Well, I will sustain it on foundation, allow you to inquire as to how he obtained these prices.

BY MR. RYAN:

Q. Mr. Provder, we are setting forth prices and I ask for you to finish. You set forth saline solution, catheter, tray, gloves and chucks. Tell us just briefly what steps you took to arrive at those numbers?

A. Contacted three home care agencies that

specialized in this type of material and looked at the costs for these items.

Q. And is that -- is that a customary and normal practice within your business?

A. Yes.

Q. Okay. And do these numbers fairly represent the available cost?

A. Yes.

MR. NAPIERSKI: Move to strike as hearsay, your Honor.

THE COURT: No, overruled.

MR. RYAN: Thank you, Judge.

THE WITNESS: Put them down?

MR. RYAN: Sure, go ahead.

Q. I'm going to skip the support stockings for a moment. Now, I'm going to skip around a little bit, if you don't mind. You were asked a question as to potential complications concerning urinary tract infection.

A. Yes.

Q. And could you tell us what cost you arrived at in that regard?

MR. NAPIERSKI: I object to the form of the question, your Honor.

THE COURT: Sustained.

Q. Did you arrive at a cost figure?

A. Yes.

Q. And what was that?

MR. NAPIERSKI: Objection, your Honor to the form of the question. Cost figure for what? He may be trying to sneak in things you already ruled are improper.

THE COURT: Just a moment. The objection is sustained.

MR. RYAN: Judge, if I recall, you overruled the objection --

MR. NAPIERSKI: If your Honor please, you sustained my objection.

MR. RYAN: No --

THE COURT: Sustained this most recent one.

MR. RYAN: I'm going back. There were three potential complications. You overruled his objection as -- he objected to all three. You overruled his objection as to the potential complication for urinary tract infection. At this point I would like to elicit --

THE COURT: Maybe you can.

BY MR. RYAN:

Q. Mr. Provder, you set forth in your report, and we previously asked you a question about it, as to potential complications for a urinary tract infection.

MR. NAPIERSKI: If your Honor please, I object to the form of the question and his reference to a report, which you ruled is improper.

THE COURT: Sustained as to the report, yes.

BY MR. RYAN:

Q. Did you make an assessment, as part of your overall evaluation, using your training, education and experience, as to whether or not there was a potential complication for a urinary tract infection?

MR. NAPIERSKI: That's outside the scope of this man's ability to testify, your Honor. That's a medical conclusion.

THE COURT: In that respect, yes, sustained.

BY MR. RYAN:

Q. Leaving aside the medical conclusion, in your experience -- and how many years experience do you have?

A. 20.

Q. In your 20 years' experience with people similarly situated as Miss Farrell, in your professional opinion is there a potential cost, is there a potential cost for providing for urinary tract infection?

MR. NAPIERSKI: If your Honor please --

THE COURT: I'm going to sustain it as to form.

BY MR. RYAN:

Q. Given your overall assessment of Miss Farrell, what, if any, dollar amount did you provide for urinary -- potential complication arising from urinary tract infection?

MR. NAPIERSKI: Objection, your Honor.

THE COURT: Again, sustained.

MR. RYAN: I'll come back to it.

BY MR. RYAN:

Q. Now, when you saw her a year and a half ago you stated that she was confined to a wheelchair, correct?

A. Yes.

Q. And what, if any, mobility did she have in that wheelchair?

A. She was able to propel the wheelchair using her right leg.

Q. Okay. Do you know whether or not she still is able to do that?

A. No.

Q. No?

A. I do not know.

Q. Okay. What, if any, provisions did you make in your assessment for a wheelchair?

A. Cost of wheelchair and replacement time, as

well as maintenance.

Q. And what are those dollar figures?

A. Cost of the wheelchair which she has is 1200 dollars, maintenance of the chair is anywhere from 120 to 150 per year. Wheelchair cushion, 265 dollars.

Q. And those are -- strike that. Will you reduce those to the chart, please.

(The witness complied.)

MR. NAPIERSKI: Your Honor, I would make the same motion with regard to this being based upon hearsay information.

THE COURT: Same ruling. Overruled.

MR. RYAN: Overruled. Thank you, Judge.

BY MR. RYAN:

Q. Okay. In regard to home furnishings and accessories, when you interviewed her a year and a half ago did you make a determination as to whether or not there was an equipment need for any type of bed?

A. Yes.

Q. And what was that determination?

MR. NAPIERSKI: Objection, your Honor. No foundation.

THE COURT: What was the last word, bed?

MR. RYAN: Bedding, Judge, and the cost of

the bed.

THE COURT: Overruled.

MR. RYAN: Thank you.

A. Yes, I did.

Q. And what was that projection?

A. That she have an electric hospital bed to assist her in transferring and positioning.

Q. And what is an electric hospital bed?

A. Well, it's a bed that will allow the individual to change positions so that the head can go up or the back or the front of the bed can go up so that her care providers could transfer her more easily, clothe her more easily, as well as take care of her bowel or bladder needs more easily.

Q. And what was the cost of that?

A. 1500 dollars.

Q. Would you set that forth, please.

(The witness complied.)

Q. And in addition to the hospital bed itself what, if any, other related equipment is needed, particular attachments or covers?

A. An alternately pressurized mattress.

Q. What is the cost of that?

A. 325 dollars.

MR. NAPIERSKI: Again, your Honor, I object. No foundation, based upon hearsay.

MR. RYAN: The cost of the bed, Judge, the cost of the mattress is certainly within the realm of this man's expertise.

THE COURT: Objection overruled.

MR. RYAN: Thank you.

BY MR. RYAN:

Q. Mr. Provder, just a note in passing. If my eyes are not as good as the jurors, I'm kind of squinting. One time's five, one times two, et cetera, would you explain what the significance of that is?

MR. NAPIERSKI: Objection, your Honor. These are projections. He's going to be making speculation about what happens every five years into the future, and you ruled on that.

THE COURT: Just a moment, please. I thought he was putting down figures you elicited.

MR. RYAN: Yes, the figures are here, of course. And this -- and that presumably, Judge, a wheel --

THE COURT: I don't recall any question about years.

MR. RYAN: That's why I'm bringing it out.

THE COURT: It's already on the board.

MR. RYAN: Okay. If I may, maybe we can --

BY MR. RYAN:

Q. Mr. Provder, within your field, after you determine that a piece of equipment is needed is there also a determination made as to its average life expectancy or use expectancy?

A. Yes.

Q. Are these generally-available bits of information?

A. From the manufacturers, yes.

Q. Okay. And do you rely on those in making your assessments?

A. Yes.

Q. And it's a normal part of your profession to include that calculation?

MR. NAPIERSKI: Object to the leading and suggestive --

Q. Is it --

MR. NAPIERSKI: May I have the courtesy of making my objection, please?

THE COURT: Yes. The objection is overruled.

Q. And do those numbers represent the average replacement time?

A. Yes.

Q. Okay.

MR. NAPIERSKI: That was leading and suggestive, your Honor.

MR. RYAN: Please.

Q. Just --

MR. NAPIERSKI: If your Honor please --

THE COURT: Just a moment. Sustained.

Q. Would you just tell the ladies and gentlemen of the jury then what those numbers mean.

A. Yes. The numbers are the replacement values, replacement times for the various items. For example, a wheelchair has to be usually replaced anywhere from once every five years, hospital bed replaced once every nine years.

Q. Okay. In addition to the bed and the mattress what else comes with that?

A. Okay. Well, it was recommended an over-bed tray, which would assist eating and activities while in bed. Wheelchair commode or shower chair, to assist in transfers to the shower, commode chair to provide support during bathing, and shower hose to assist her in bathing.

Q. Fine. And would you -- in regard to the overhead tray, when we say tray, we mean hospital tray

where one sits in a bed and can eat?

A. Yes.

Q. Okay. What is the cost of that?

A. 175 to 180 dollars.

MR. NAPIERSKI: Objection, your Honor. No foundation for that.

THE COURT: Sustained.

MR. RYAN: Judge, it's the same situation as --

THE COURT: You may inquire.

MR. RYAN: Okay.

BY MR. RYAN:

Q. Within your specialty, Mr. Provder, as a rehabilitation expert or specialist, do you have an occasion to determine the cost of an overhead bed tray?

A. Over-bed tray, yes.

Q. I'm sorry. Over-bed tray?

A. Yes.

Q. All right. What steps do you take to inquire as to what that -- what that cost figure is?

A. Call various manufacturers who produce this item or market the item and find out what the cost is.

Q. Okay. And is this data generally available to you and within your profession?

A. Yes.

Q. And you make access to that information for the specific purpose of preparing this analysis?

A. Yes.

Q. And based upon that, and your professional education, training and experience, do you know what a -- do you have an opinion as to what an overhead bed tray costs?

A. Over-bed tray, yes.

Q. I keep saying that. Over-bed tray cost?

A. Yes.

Q. And what is that?

MR. NAPIERSKI: Objection, your Honor. It is based upon hearsay, it's rankest hearsay. He just told us --

MR. RYAN: Judge, a person within the profession is certainly --

MR. NAPIERSKI: There is no such profession.

MR. RYAN: It's a profession that you use.

THE COURT: Just a moment. The objection is overruled.

MR. RYAN: Thank you.

Q. What is that cost of that over-bed tray?

A. 175 to 180 dollars.

Q. Okay. 175 to 180. Would you put that down, please?

(The witness complied.)

Q. And you listed a commode chair. I think we all know what a commode is. That's to help her with her basic going to the bathroom, correct?

A. Yes.

Q. And how did you determine the cost? What publications or references did you check with to determine the cost of the commode chair?

A. Contacted various manufacturers and find out what the cost is for this particular item.

Q. And based upon your training, education and experience what was the cost of your -- you arrived at?

MR. NAPIERSKI: I object to the form of the question. Training, education and experience have nothing to do with making a phone call. That is pure hearsay. I object.

MR. RYAN: It's within -- his objection, Judge, is -- he can do it any way he wants, but it's the same as checking on the cost of a wheelchair, which has been allowed. It's a piece of equipment. That man is in the rehabilitation business. He should know what a commode costs.

THE COURT: Is there --

MR. NAPIERSKI: I'm sorry. I understood that your Honor does not grant continuing objections, so I am compelled, I have to object every time --

THE COURT: You are perfectly right. In this case overruled.

MR. NAPIERSKI: Thank you.

BY MR. RYAN:

Q. Go ahead.

A. The cost for a commode chair is 610 dollars.

Q. 610 or 310?

A. 310 for the commode chair itself.

Q. Okay. You're right. And we already got now, we are down to -- 610 refers to the --

MR. NAPIERSKI: Objection, your Honor.

Q. -- wheeled commode --

THE COURT: Sustained.

Q. Are we talking about one or two chairs?

A. There are two chairs, one for assisting in showering, one for bathing.

Q. Okay. And is the 610 that you mentioned --

MR. NAPIERSKI: He hasn't mentioned 610.

THE COURT: He hasn't mentioned that. I think you are mentioning it.

MR. RYAN: Maybe --

MR. NAPIERSKI: I move to strike, your Honor.

MR. RYAN: Let's back up.

Q. There's a piece of equipment called a wheeled commode shower chair.

MR. NAPIERSKI: Objection, your Honor. He's referring to the document you already indicated is inadmissible.

THE COURT: Sustained as to form.

MR. RYAN: Judge, I have a copy of the report. I can refer to a report that's not evidence,

THE COURT: But the form of the question --

MR. RYAN: I am referring to my own work product. And I'm entitled to do that.

THE COURT: Yes, you are. But it's leading.

BY MR. RYAN:

Q. Per my request you saw this person, you made certain -- wrote down certain specifications as to what she needed. Now, in regard to the chairs, how many chairs does she need?

A. She needs one chair, but I considered two alternatives.

Q. And what are those alternatives?

A. The first alternative is if she has no

modifications to her home she would use the chair that we discussed, the 310 dollar chair. If she obtains what's called a wheel-in shower then she would require a wheel-in commode chair or shower chair.

Q. How much does that cost?

MR. NAPIERSKI: Objection, your Honor. It's total speculation.

THE COURT: Overruled.

Q. Go ahead.

A. 610 dollars.

Q. It's either/or as to those?

A. That's correct.

Q. Would you put those down.

(The witness complied.)

Q. And, in addition to the chair, what, if any, other equipment is needed for her sanitary purposes?

A. Where she's located now she needs a shower hose to attach to the bathtub.

Q. And that's for the purpose of assisting her in bathing?

A. Correct.

Q. And, likewise, you determined a cost for that, did you not?

A. Yes.

Q. And what was that cost?
A. 45 dollars.
Q. Could you list that, please.
(The witness complied.)
Q. Are you familiar with the medications that she's taking?
A. Yes.
Q. Okay. And based upon your review of the record do you know what those medications were?
A. Yes.
Q. And do they include -- I'm using medications loosely now, Fleet enemas?
A. Yes.
Q. And Colace?
A. Yes.
Q. That's the stool softener you referred to?
A. Correct.
Q. The Zantac, do you know whether or not that is a prospective thing? Is that something she might need in the future as opposed to now?
MR. NAPIERSKI: Objection, your Honor. No foundation.
THE COURT: Sustained as to form.
Q. Do you know whether or not she's presently

taking Zantac?

A. She was taking it at the time that I saw her.

Q. All right. And skin care lotions?

A. Yes.

Q. Which we already discussed. And she was taking those at the time --

A. Yes.

Q. All right. In regard to the -- and also an antibiotic, correct? I think, as the Court directed, another item, antiseptic?

A. Yes.

Q. All right. Do you have knowledge as to what an antiseptic would cost as opposed to an antibiotic?

A. No.

Q. In regard to the skin lotions, what was the cost for that?

A. 120 dollars per year.

Q. Could you list that, please.

(The witness complied.)

Q. Did you make any determination as to -- not medical determination, but based upon your review of the records were there any indications contained therein that pertained to the need for cognitive rehabilitation?

MR. NAPIERSKI: Objection, your Honor.

Totally out of --

THE COURT: Sustained.

BY MR. RYAN:

Q. Based upon your review of the records did you make any -- strike that. You described what the premises looked like, and I think you used the term that they are not wheelchair accessible, correct?

A. Yes.

Q. And within your field, within your specialty now, did you arrive at a cost figure for making the facility wheelchair accessible?

MR. NAPIERSKI: Now, your Honor --

THE COURT: Sustained.

Q. Within the facility itself, inside the apartment -- inside the trailer, would you describe the physical dimensions? And you took measurements, did you not?

A. Yes, I did.

Q. Yes.

A. There's, as I noted, the entranceway. There's a curb to get over, then you go into a porch where there are three steps, eight inches height each step. You go into a landing that's 39 inches in size, enter into the kitchen and dining and living room area, which is all in

an opened area. Towards the back of the trailer there is a guest -- there's a narrowing hallway that goes from 29 inches down to 27 inches. Her bedroom is at the far end and the bathroom is down at that end, also.

Q. Okay. And have you arrived at any kind of figure as to what would have to be done to modify the inside of that trailer?

MR. NAPIERSKI: Objection, your Honor.

THE COURT: Sustained.

MR. RYAN: Judge, I would like -- may I approach the bench?

THE COURT: Yes.

MR. RYAN: I want to make reference to some other notes and I would like about a five-minute recess just to do so.

MR. NAPIERSKI: I'm sorry. I didn't hear you.

MR. RYAN: I want a five-minute recess to refer to some notes.

THE COURT: We have been going pretty steady. Members of the jury, we are going to take a little recess now. It has been going on all morning, it's about 12:25. You are excused to the jury room. Same instruction applies. Take a brief recess.

(Court recessed at 12:25 p.m. and reconvened without the jury at 1:00 p.m.)

THE COURT: Do you want to make an application outside the presence of the jury?

MR. RYAN: Outside the presence, your Honor. Your Honor, with the Court's permission I would conclude my direct testimony of Mr. Provder at this time, with the exception that I would reserve the right to apply to the Court to recall Mr. Provder at a later time as part of my case in chief, subject to his availibility and subject to the content of the anticipated testimony from Dr. Davolos, Dr. Marrazo and any other health care provider.

THE COURT: On that application, Mr. Napierski?

MR. NAPIERSKI: I resist and oppose it, respectfully, your Honor. The trial is to be conducted in a continuous fashion. I understand that your Honor's not prejudging the issue here, but I just want my position on the record.

THE COURT: Correct.

MR. RYAN: And, your Honor, I'd also ask that these be marked at this time. I think we had 32 for identification, which we -- there was a marking on it and then I believe there was an objection and that was

sustained. I would be willing to withdraw that particular sheet, if that's consistent with your memory, and mark as 32A the sheet entitled, "Bowel and bladder needs," and 32B, what was "Drugs." Then the testimony was curtailed at that point.

THE COURT: And be marked for identification?

MR. RYAN: They are marked for identification and at this time now I would offer them. This would be something, if need be, the jury could take with them.

THE COURT: Mr. Napierski?

MR. NAPIERSKI: Well, obviously I don't -- I don't object to his objective here, that is to preserve these exhibits. But I don't want to consent and then that way obviate all the objections I had made initially to those, to the information. So I don't object to his having it marked and preserved, but I still, you know, renew my objections to the information.

THE COURT: What about the documents being received into evidence?

MR. NAPIERSKI: Well, that's my point, your Honor. I object to it. I don't want -- I'm not trying to be contrary here. But if I don't object to it being received into evidence then what I've done is obviously vitiate the objections I made before.

THE COURT: What if we preserve all of your rights?

MR. NAPIERSKI: Then I wouldn't have any objection.

MR. RYAN: That's fine.

THE COURT: So then, as I understand it, we will mark them 32A and 32B in evidence and preserving the rights of Mr. Napierski.

MR. RYAN: Yes. We can do that at the break.

THE COURT: Now, on your application to terminate the examination of this witness at this time and allow Mr. Napierski to cross-examine at this time, I will grant you the right to make your application if that need arises. I'm not passing yes or no on which way I would rule on that. I do reserve your right to make such an application.

MR. RYAN: And I would also ask, Judge, consistent with what we discussed, call it a motion in limine or whatever at this point, that I expect Mr. Napierski's examination to be limited to my direct-examination at this point.

THE COURT: Well, in that respect, Mr. Napierski?

MR. NAPIERSKI: I will do my best, your

Honor.

THE COURT: In any event it would be, and you are free to make an objection if you think he's gone beyond. The jury, please.

(The jury returned to the courtroom at 1:06 p.m.)

(Plaintiff's Exhibits 32A and 32B were marked and received.)

THE COURT: You may be seated. Mr. Ryan?

MR. RYAN: Your Honor, I have no further questions for Mr. Provder at this time subject to my application to the the Court.

THE COURT: Mr. Napierski?

MR. NAPIERSKI: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. NAPIERSKI:

Q. Mr. Provder, you testified, as I understood it, that the business that you're in provides a service, including counseling to clients to look at public services available. Did I understand you to say that, sir?

A. No.

Q. Did you make a statement that you in this case looked at public services available? Did you tell the jury that?

A. I did not, no.

Q. You want to bet? Would you state the accuracy of everything that you've said this morning on the fact that you never said that you looked at public services available, if I find it in the court reporter's notes?

A. I don't recall me saying that.

Q. So you don't recall it but it's possible you said it, right?

A. Very doubtful.

Q. Very doubtful. Very doubtful you said it.

MR. NAPIERSKI: I would request the court reporter to mark that in the notes for future reference.

THE COURT: You don't want it at this point?

MR. NAPIERSKI: Well, actually, your Honor, it's in the very beginning of his testimony. I am sure Dan could find it.

THE COURT: Do you want him to get it?

MR. RYAN: What's the question?

MR. NAPIERSKI: I don't need it right now, your Honor.

THE COURT: Okay. You may continue.

MR. NAPIERSKI: Thank you.

BY MR. NAPIERSKI:

Q. In the list of your experiences that you gave

to the jury did I understand you correctly to state that you assisted people applying for Social Security disability benefits? Did you say that?

A. Served as an expert for the federal government testifying in cases dealing with Social Security disability issues and employability issues.

Q. You didn't say people applying for Social Security disability benefits?

A. These were people -- I testified in cases dealing with Social Security.

Q. This morning --

A. People who were applying.

Q. This morning, this morning, did you testify to this jury that in your experience you were involved with people applying for Social Security disability benefits or not? You haven't been involved?

A. I don't understand the question.

Q. Do you or have you in the past assisted people in applying for Social Security benefits?

A. I have evaluated people who are applying for Social Security disability benefits, yes.

Q. Does that mean you assisted them?

A. Well, the issue in Social Security is employability, and I perform employability evaluations,

and that could be construed as, quote-unquote, assisting them.

Q. And you testify on their behalf, in other words?

A. Yes.

Q. Okay. But you were not then in the Social Security Administration?

A. Not when I'm, quote-unquote, assisting them, no.

Q. Have you ever been?

A. Yes.

Q. Okay. That's what I thought you had said. When was that?

A. Yes. That was --

Q. When was that?

A. I believe the dates are something like '77 to '85.

Q. So do you have knowledge today as you sit there as to what Social Security disability benefits are available to people like Miss Farrell, in this case?

A. You are talking about the dollars? Are you talking --

Q. Whatever. I don't know what they are. Do know what benefits are available to a lady like Miss

Farrell?

MR. RYAN: Your Honor, I'm going to object. The line of questioning is outside the scope of the direct testimony.

THE COURT: No, overruled.

MR. RYAN: I made no inquiries concerning social security.

THE COURT: But he did so testify. Overruled.

A. I'm not an expert in social security benefits.

Q. The one field you worked in you are not an expert?

A. No. I'm an expert in assessing employability. That relates to --

MR. RYAN: Objection.

Q. I didn't ask you that.

THE COURT: There's an objection. Sustained.

Q. So you, as a rehabilitation specialist, have no idea of what public services the taxpayers would provide for a person in Miss Farrell's situation?

A. I don't believe I testified to that.

Q. I'm asking you.

A. I said what the benefits are.

Q. Please --

A. For dollar amounts, no, I can not tell you that.

Q. You can tell us how much a commode costs but you can't tell us how much money this lady would get if she applied to the federal government --

MR. RYAN: Objection, your Honor.

Q. -- is that right?

A. That's correct.

MR. NAPIERSKI: Your Honor, I'm happy to say I have nothing more for this man.

THE COURT: Mr. Ryan, anything further?

MR. RYAN: No further questions.

THE COURT: Thank you, sir. You may step down.

THE WITNESS: Thank you, your Honor.

(The witness was excused.)

C E R T I F I C A T E

I, DANIEL E. MAYO, an Official Court Reporter for the Unified Court System, Third Judicial District, certify this to be a true and correct transcript of the foregoing, as noted in the heading hereof.

PLAINTIFF'S WITNESS

EDMUND A. PROVDER

DIRECT	2 - 81
CROSS	85 - 90

PLAINTIFF'S EXHIBITS

		Marked	Received
31	Report of E. Provder	2	
32	Flip Chart	2	
32A	Page from Flip Chart	85	85
32B	Page from Flip Chart	85	85