SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS - CIVIL TERM - PART 27

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MARIO MONTERO,

PLAINTIFF,

-against-

MYRTLE AVENUE BUILDERS LLC
and MYRTLE OWNER LLC,

DEFENDANTS

----------X

Index No. 7479/2010
TRIAL

360 Adams Street
Brooklyn, New York
April 17, 2014

B E F O R E:

HONORABLE ARTHUR M. SCHACK,

Justice

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

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THE CLERK: Case on trial continued, Index 7479/2010, Mario Montero against Myrtle Avenue Builders LLC.

OFFICER: All rise.

Jury entering.

Turn off all cell phones, please turn off all cell phones at this time.

(Jury enters the courtroom.)

THE COURT: Okay.

Everybody please be seated.

Good morning, members of the jury.

We're going to continue.

Going to come back later to Mr. Montero.

We have a witness out of turn.

Do you want to call your witness.

MR. MIKLOS JR.: Sure.

The plaintiff calls Kristin Kucsma.

K R I S T I N K U C S M A, called as a witness, having been first duly sworn, was examined and testified as follows:

THE CLERK: Have a seat.

State your full name for the record.

THE WITNESS: Kristin Kucsma, K-U-C-S-M-A.

THE CLERK: And your business address?

THE WITNESS: 293 Eisenhower Parkway, Suite 190,

in Livingston, New Jersey, 07039.

THE CLERK: Thank you.

THE COURT: Ms. Kucsma, you have with you whatever notes or a report you made in this case, etcetera.

THE WITNESS: Yes, I do your Honor.

THE COURT: Only because I don't want to waste time.

Sometimes you have a witness who says 'I have it back in my seat with my coat.'

THE WITNESS: I have it right here.

THE COURT: Excellent.

DIRECT EXAMINATION

BY MR. MIKLOS JR.:

Q Ms. Kucsma, could you tell us where you presently work?

A I'm presently an economist with the Tinari Economics Group.

Q And Ms. Kucsma, if you could take us through your educational background, undergrad starting first?

A Sure.

I have a bachelor of arts degree in economics that I received from Seton Hall University where I was graduated summa cum laude.

I have a master of arts degree in economics that

I received from Rutgers University.

And I'm also technically "ABD" which literally stands for "all but dissertation."

What that means is, over and above the requirements for a master of arts degree in economics, I completed all of my course work, and passed all of my qualifying examinations in pursuit of a PhD.

The only thing I have left to do is complete the dissertation.

Q If you could tell the jury your work experience, following your education?

A Sure.

I joined the Tinari Economics Group on January 2, 2008.

And that is, of course, where I am employed presently today.

But before that, I spent what I would like to call my first career as a college professor.

I was a member of the full time faculty at both Seton Hall and Drew universities.

And I was also adjunct professor at St. Peters College and Rutgers University.

I taught primarily in the department of economics at both the graduate and undergraduate level.

But I also on occasion taught courses in finance

and statistics.

Q If you could just explain to the jury what, when you are referring to "economics" what are you referring to?

A As an economist, my main job, if you will, is to study what we call the economy.

I study things like inflation rates; my job is to understand why prices rise and fall over time, why it costs more for some things today, than it did 10 years ago, to try to understand what is going to happen to prices in the future; are they going to go up very quickly, very slowly.

I also study things like labor markets, so I study, for example, changes in the unemployment rate: Why does the unemployment rate rise very quickly sometimes? What can we do to try to prevent it from going up any further? What can we do to try to hopefully decrease it?

I study things like interest rates, and I understand what changes in the interest rates means for the average American.

If interest rates are lower, becomes cheaper for people to borrow money.

As they rise becomes more expensive for them. Those are examples of some of the things.

THE COURT: Can you give you us a simple definition of economics?

THE WITNESS: Yes.

Economics is technically a social science that studies how scarce resources are used.

So, I study human behavior, I look at consumers, I look at businesses, I look at the government, and I study how they make decisions about what to do with their resources, their money their goods their time and so on.

Q Are you a member of any professional organizations, currently?

A I am.

Q What organizations are they?

A I'm a member of the National Association of Forensic Economics; I'm also a member of the Eastern Economics Association; and I am a member of the Attorney Ethics Committee in the State of New Jersey.

Q And Ms. Kuscma, have you testified --

THE COURT: All I can say is, after hearing St. Peters, Rutgers, Drew, glad you crossed the Hudson River.

Q Have you testified before in court?

A Yes, I have.

Q And on prior occasions, when you testify in court, have you been deemed or qualified as an expert in economics on prior occasions?

A Yes, I have.

Q Approximately how many times have you been qualified as an expert in Supreme Court?

A I have been qualified a little over 100 times in both Federal and state courts.

MR. MIKLOS JR.: At this time I would like to deem Ms. Kuscma an expert in the field of economics.

THE COURT: Any need for voir dire?

MR. FABIANI JR.: None whatsoever.

THE COURT: Ms. Kucsma -- pronouncing it correctly?

THE WITNESS: Yes.

THE COURT: Deem Ms. Kucsma to be an expert in the field of economics.

Again, members of the jury, she can render opinions about the facts of this case, or any hypotheticals that the lawyers might pose to her.

You don't have to accept it if you believe the facts are different.

Let's go.

MR. MIKLOS JR.: Thank you.

Q Did my law firm retain you are you to come testify today?

A Yes, you did.

Q Are you being compensated for your time today?

A Yes, my firm is being compensated for my time today, that's correct.

Q And did we also compensate you for the preparation

leading up to today, including issuing reports?

A Yes, you did.

Q And did you in fact issue a report based on Mr. Montero's case here today?

A Yes, I did.

Q And if you could tell me, what it was that you reviewed, in issuing or drafting the reports that you created?

A In order to form my opinion of economic loss in this matter I reviewed several documents that included tax returns, W2 wage and tax statements.

I also reviewed the deposition transcript of the plaintiff; and I was also provided with some other basic information that I needed to conduct my analysis, things like, Mr. Montero's date of birth, the date on which he was injured, his highest level of education, and some other details about his life.

Q And if you could explain to the jury what it was you were hired to do?

What were you here to testify about, what findings, what specific findings?

A My job was to calculate the economic losses that Mr. Montero has suffered as a result of his injury in August of 2008.

And, very specifically, what I did was I calculated two general elements of economic loss.

Number one, I calculated what I call his lost earnings.

So, in other words, I calculated how much money Mr. Montero would have earned had he not been injured in 2008, had he continued working through, what I call the statistical date of retirement, how much money would he have earned.

And, secondly, I also considered the cost of the future medical care that Mr. Montero is going to require as a result of his injury.

And I calculated the total amount of money that Mr. Montero will need to have so he can cover the cost of that medical care over his remaining life expectancy.

Q In order to make those calculations, did you have to make some sort of assumptions about Mr. Montero, and his future?

A There were several assumptions that I needed to make.

For one thing, I needed to form an opinion about how far into the future Mr. Montero would have worked had he not been injured.

So, in order for me to calculate how much money he would have made, I needed to know how many more years he have worked: Five 10, 15 years.

I also needed to form an opinion about how much money, on average, Mr. Montero would have earned in each of those years.

I also needed to estimate on average how much those earnings would have increased in each of those years.

Those were the basic assumptions that I had to make before I could calculate how much money Mr. Montero would have earned, had he not been injured, and been able to continue working.

Q Could you please explain to the jury how you reached Mr. Montero's statistical retirement age?

A Yes.

In order for me to estimate Mr. Montero's statistical retirement age, I considered data that is provided by the U.S. Government.

And, basically, what this data does is, this is data that looks at the actual population of men in the United States.

It takes a look at men in the United States who are about 35 years of age.

That's how old Mr. Montero was at the time of his injury.

And men who have less than a high school education.

I wanted to look very specifically at that group of men in the United States, because that was the group into which Mr. Montero would fall.

And, based on this data, based on the actual

experience of men, who are about 35 years of age, that have less than a high school education.

I estimated Mr. Montero's statistical retirement age would have been 62.7 four years.

In other words, had he not been injured in 2008, Mr. Montero would have continued to work until he was 62.74 years of age.

And at that point he would have permanently removed himself from the work force, and decided that he was not going to work any longer.

Q And did you also have to make a determination as to the life expectancy of Mr. Montero?

A I did.

Q How did you form that life expectancy?

A In order for me to calculate the future medical costs, in other words, in order for me to determine how much money Mr. Montero will need to cover the cost of all the medical care that he will need, I needed to estimate what Mr. Montero's statistical life expectancy is.

In other words, I needed to determine how many more years he is going to live, so that I can determine how many years of medical care he's going to need.

In order for me to estimate Mr. Montero's life expectancy, I considered information, again, provided by the U.S. Government.

Very specifically, I considered something called a National Vital Statistics Report. That's a report that the Centers For Disease Control puts out.

And, again, that's a report that's based on the actual population of the United States.

It's a report that compiles how many more years individuals of various ages will live; how much longer will somebody 50 years old today, live.

Q And did you also make an assumption as to his expected working years?

A I did.

Another assumption I needed to make was an assumption regarding something we call "work life expectancy."

So, you may recall just a moment ago, I told you that based on my research, if Mr. Montero had not been injured in 2008, he would have been working until he was 62.74 years of age.

In other words, he would not have permanently stepped out of the work force until May of 2036.

Now, when I talk about the statistical retirement age, or the date, the year 2036, that is the point at which Mr. Montero would have stopped working all together.

What that does not mean, though, is that if Mr. Montero, had not been injured in 2008 he would have worked continuously, 52 weeks out of the year, 40 hours a week for the

next 28 years.

What I need to do, is take into account the probability that he would not work 28 straight years.

Realistically, as an economist, I cannot assume anybody would work 52 weeks out of the year, 40 hours a week for 28 years straight, because the research doesn't support that.

So, again, I went back and I looked at research provided by the U.S. Government.

I looked very specifically at the actual population of the United States: Men, who are about 35 years of age, with less than a high school education.

And I asked the following question: Between 2008, and 2036, what proportion of that time would Mr. Montero, or a man like Mr. Montero, would have actually been working, and what proportion of that time would he probably not have been working?

Because he was injured, he got sick, he had a sick child to care for, he decided to take some time off.

And based on my search, I estimated that between 2008 and 2036, Mr. Montero would have been in the work force, would have been working approximately 78 percent of that time.

In other words, 22 percent of the time between 2008 and 2036, Mr. Montero would not have been working.

Why not? He may have sprained an ankle; may have

become sick; may have had a sick child to care for.

Certainly would not be reasonable for me as an economist to compensate Mr. Montero for money he would not have earned anyway.

What you will see, I will make a downward adjustment to my calculations of earnings of 22 percent to take into account the fact that part of that time Mr. Montero would have been out of the work force, not earning money, and therefore is not entitled to be compensated for money he would not have earned anyway.

Q Have you covered all the assumptions you made in order to make your calculations?

A I believe so.

Probably the only other two issues briefly discuss I did make two other adjustments to my calculation earnings.

In addition to taking into account the possibility that Mr. Montero might have been injured in any given year, or might have gotten sick, I also needed to take into account the possibility that he may have become unemployed.

That's technically different.

The work life adjustment takes into account injury, illness, sick children, and so on.

The unemployment adjustment takes into account

the possibility that Mr. Montero may have been perfectly healthy, but may have been out of work, because he might have been laid off.

I made another downward adjustment to my earnings of 5.6 percent to also take into account the fact that between 2008 and 2036 there's a real possibility Mr. Montero may become unemployed.

And, lastly, I made one final downward adjustment to my calculation of earnings, and that was to take into account something that I refer to as job-related expenses.

If Mr. Montero had not been injured and continued going to work, he would have incurred certain expenses associated with that work: Transportation to and from the job, a hot dog for lunch, for example, so I made another downward adjustment to my calculation of lost earnings to take into account those type of expenses.

Q And we've been discussing a lot of numbers.

I want to get into what your calculations are.

Would it be helpful and would it assist you in explaining to the jury if we show the jury a blowup of your calculations?

A I believe it would, yes.

MR. MIKLOS JR.: Your Honor with your permission if I could set up my easel and put up the poster.

THE COURT: Certainly.

I'll ask the officer to set up the easel.

THE CLERK: He has his own.

THE COURT: We have one here, too.

MR. MIKLOS JR.: Quick setup.

THE COURT: Do you want Ms. Kucsma to come down into the well.

MR. MIKLOS JR.: Yes.

THE COURT: Mr. Fabiani, you may move around.

MR. FABIANI JR.: Thank you.

THE COURT: I see.

I thought you were going to show the other side, it looks like an EKG.

MR. MIKLOS SR.: It's an old board.

THE WITNESS: Would you like to have one.

THE COURT: Thank you very much.

THE WITNESS: You are welcome.

Q Ms. Kucsma, if you could tell us what this first page of your report contains, what type of information?

A This first page of my report contains two chunks of information, if you will.

If we look at the bottom first you will see the bottom is where I have identified the two elements of economic loss that I described for you a couple of minutes ago.

Number one calculated the lost earnings.

I did split my calculations up into what I call

past and future years.

When I'm talking about the past years, I'm simply talking about the period of time that starts when Mr. Montero was injured in 2008, and continues through the present time, through the first quarter of 2014.

And when I'm talking about the future years, I'm simply talking about the period of time that starts today, first quarter of 2014, and extends through Mr. Montero's statistical date of retirement, which, as we discussed a few minutes ago, is May 3, 2036.

Then you will see here, of course, the second general element of loss I calculated.

And that's that cost of the future medical care that I discussed.

On the top, you see really a summary of some of the basic information that I needed to use in order to calculate both the lost earnings and the cost of the medical care, the date of birth, the date of injury.

As I talked about before, how old Mr. Montero was at the time of injury, where he lived, his level of education, the statistical retirement age that I estimated based on the U.S. Government data; the work life ratio that I estimated based on the U.S. Government data; life expectancy and information about some of his family members.

Q In order to do your calculation also, did you have to

look at his past earnings history?

A I did.

Q If you could tell the jury how you came to his past earnings history?

A In order for me to calculate how much money Mr. Montero would have earned from 2008 through 2036 if he not been injured, one of the opinions I need to form was an opinion about how much on average Mr. Montero would have earned each year going forward.

If he had worked the rest of 2008, 2009, 2010, 2011 and so on, how much he would have earned each year in order for me to form that opinion, I wanted to consider two things.

Number one, I wanted to consider how much money Mr. Montero was earning at the time of his injury. I was provided with W2 wage and tax statements for 2008. So I was able to determine how much Mr. Montero had, in fact, earned in 2008, up to the time of injury.

He, in fact, earned $27,356 through the end of August, 2008, through the date of injury.

I also was provided information by way of deposition testimony about the fact that at the time of his injury Mr. Montero was earning approximately 28 dollars per hour.

So based on the W2 for 2008 and based on that

information about Mr. Montero's hourly wage rate I was able to calculate how much Mr. Montero would have made in 2008 if he had worked the entire year.

When he worked the first two-thirds of the year I know in fact he earned $27,356.

If he had worked another third of the year, if he worked all the way through December 31 of 2008, I calculate that he would have earned $42,086.

And this calculation is based very specifically on what he in fact earned based on the W2 wage and tax statement.

Now I also, though, wanted to take into account in addition to what he was earning at the time of his injury, I wanted to take into account what his earnings had been in the recent past.

So, in order to do that I took a look back at W2 wage and tax statements from 2005 and 2006.

And according to my review of the W2 wage and tax statements in 2005, Mr. Montero had a pretty good year, earned $35,805.

According to the W2 for 2006, he had not so good year, $11,184.

At the time I prepared my report, I had not been provided with the W2 for 2007.

In addition to that, Mr. Montero reported to me

that he started his employment with his current employer at some point in 2007.

So I didn't have information about how much he had earned in 2007, or for whom he had been working when.

Q If you could explain to the jury in the bottom about the preinjury earnings how did you reach that number at the bottom of the page?

A Sure.

So, ultimately, as I mentioned a moment ago I needed to determine how much Mr. Montero would have earned on average each year going forward.

In order for me to determine that, I considered how much he had earned in 2005, 2006, and what he was on target to earn in 2008.

And I took an average of those three figures.

If I take an average of these three figures, I estimated that Mr. Montero would have earned, again, on average, going forward, $29,358 each year.

This takes into account the likelihood that in future years he would have some good years like he was on target to have in 2008.

He would have some decent years as he had in 2005.

Now, he probably would also have a few bad years like he did in 2006.

This pattern of earnings is reflected in my average estimate of $29,358.

Q And if you could explain to the jury what earnings adjustment you made on the following page, page 3.

A As I mentioned earlier, it would not be reasonable for me to assume that Mr. Montero worked 52 weeks, 40 hours a week every year.

It wouldn't be reasonable; in other words, for me to assume that he earned $29,538 every year in 2009, 2010, 2011, all the way through to 2036.

Why not?

Well, for one thing, as we discussed a few moments ago, he might have been injured.

May have strained an ankle, may have gotten the flu, may have had a sick child he needed to care for.

There are a variety of reasons why more likely than not Mr. Montero would not have worked the full year every year, which means he would not have earned the full $29,538 every year.

In fact, the first downward adjustment I make is that 22 percent adjustment that I discussed before.

The first thing I do is reduce that figure of 29 thousand and change by 22 percent.

I also made another downward adjustment to take into account that while he may have been healthy in any given

year: No sprained ankle, no flu, no sick children, there may simply may not have been work available for him, may have become unemployed.

In order to take into account that possibility, I reduced my calculation of earnings in each year by another 5.6 percent.

And, incidentally, my estimate of 5.6 percent is based on data, provided by the U.S. Department of Labor, I took a look at actual unemployment rates among males looking back; and, specifically, I looked back at the last 28 years or so, because I'm projecting Mr. Montero's earnings going forward for a period of 28 years, 2008 to 2036.

And last, but not least, I made one final downward adjustment to that figure of 29 thousand dollars and change of five percent.

This is to account for that portion of his paycheck that Mr. Montero would have had to spend on job-related expenses: To get to and from work, to buy a hot dog for lunch, cup of coffee in the morning.

I estimated he would have spent five percent of his paycheck.

Q And if you could tell us what upward increases did you make, with regard to the bottom of the report, with regard to wage increases?

A The third and final general opinion I needed to

determine before I could actually calculate the lost earnings is, I needed to form an opinion about how much on average Mr. Montero's earnings would have increased each year going forward.

I'm calculating how much he would have earned over a 28-year period.

I needed to form an opinion about how much on average his hourly wage rate and therefore his overall earnings would have increased each year going forward.

Based on my research, and I'll tell you what that research was in just a moment, but I estimated that had Mr. Montero not been injured in 2008, had he continued working, his wages would increase by .8 percent in 2010; 1.9 percent in 2011; 1.4 percent, sorry, 7 percent in 2012; 1.4 percent in 2013; and 1.4 percent in 2014.

Q If you could explain to the jury how you got the wage increases.

A Sure.

My estimate of how much Mr. Montero's wages would have increased is based on data that is provided by the U.S. Department of Labor; and, very specifically, what I did was I took a look back at how much wages had in fact increased in the construction and extraction industry; wanted to look very specifically at the construction industry since that is the industry in which Mr. Montero was employed.

And these figures, for the year 2010, 2011, 2012, and 2013 are a reflection of how much wages in fact increased among construction workers, according to the U.S. Department of Labor, Bureau of Labor Statistics.

Since we are only part way through 2014, I estimated the increase in 2014, based on past information.

Q And after making all these adjustments you just testified, did you calculate his past loss of earnings?

A I did.

Q Can you explain to the jury how you calculated the past lost earnings?

A Sure.

Here is where I combined everything I just described to you.

Once again, looking at the past years starting in 2008, since that is the year in which Mr. Montero was injured, and I am extending my calculations through the first, really, one-third of 2014.

I had already determined before, based on how much money Mr. Montero would have earned by August of 2008, I had estimated that if he had worked for the remainder of the year through December 31, he would have earned $42,086.

Now, he's not entitled to the entire $42,086 for the year of 2008, because he did work.

We know he worked through August of 2008.

So I needed to subtract the amount of money that he had already earned in 2008.

And I did adjust that to take into account the fact that while he was working through August of 2008 and earning money, he also was spending a little bit of it on transportation, coffee and so on.

So the loss in the year 2008 is $3,451, that takes into account, number one, the difference between what he would have earned had he not been injured, and what he did in fact earn, but it also takes into account those downward adjustments.

I had to make a downward adjustment to this figure to take into account the fact that between August and December of '08, he could have been injured in another accident.

He could have become sick.

And he could have become unemployed.

This figure of $3,451 takes into account all of those things.

I'm not assuming he necessarily would have worked from August to December of 2008.

Not assuming he wouldn't have been injured, sick or lost his job.

And I'm also taking into account the fact that he did work for part of the year, and he had expenses associated

with that employment.

Q Can you tell the jury what your calculations were, to predict earnings from 2009 to 2014?

A Based on my calculations, I have estimated that had Mr. Montero not been injured in August of 2008, had he worked through the present time, he would have earned an additional $115,768.

And, again, that takes into account the fact that any given year he might have become injured, ill, unemployed, and those job-related expenses.

Q Is it your opinion with a reasonable degree of economic certainty that Mr. Montero's past lost earnings is $115,758?

A Yes, it is.

Q And just look at the bottom page, if you could explain the yearly increase future years?

A In order for me to calculate the total lost earnings that Mr. Montero has experienced; in other words, for me to calculate how much money he would have earned from 2008 through 2036, his statistical date of retirement, I needed to continue this same basic analysis.

So I'm not going to go through it step by step again, but this same basic analysis into future years, from now, from April of 2014 through 2036.

My basic analysis is going to be exactly the

same.

I am going to increase his earnings each year, going to make those three downward adjustments I described.

The only difference is the rate of increase that I am going to apply to his earnings.

Q And did you, in fact, calculate Mr. Montero's future loss of earnings?

A I did.

Q And do you have an opinion with a reasonable degree of economic certainty what Mr. Montero's future loss of earnings are?

A I do.

I was going to say before I tell you what it is, though I probably should just tell you how I arrived at the figure of 3.9 percent.

In my professional opinion I estimate that had Mr. Montero been working today, and continued working through 2036, his earnings would have increased, on average, 3.9 percent each year.

Some years they would have gone up more slowly; some years gone up more quickly.

Based on my research I estimate on average the earnings would have increased by 3.9 percent.

I consider two sources.

There are two sources I used to come up with that

figure of 2.9 percent.

Number one, I looked back, I went back to the U.S. Department of Labor, and I took a look back in time, at, in fact, how much wages had increased in the recent past.

I wanted to make sure I was capturing the affect of the recession.

I then also considered the annual report of the Board of Trustees of the Social Security Administration.

And in that report, the Board of Trustees of the Social Security Administration makes projections of what wage growth is expected to be going forward.

Based on my review of both of those sources, again, I calculated on average Mr. Montero's earnings would increase by 3.9 percent each year.

Q What year did you predict Mr. Montero would be working, in your calculations?

Tell the jury what year you did those calculations up to.

A I calculated those earnings through Mr. Montero's statistical date of retirement, which was May of 2036.

Q Based on your explanations, do you have an opinion with a reasonable degree of economic certainty what Mr. Montero's future loss of earnings are?

A I do.

Q And what is that?

A I calculated the total amount of money that Mr. Montero would have earned starting today, had he worked starting today, through 2036, at $749,387.

Q Ms. Kucsma, did we also ask you to review Dr. Schuster's life care plan?

A Yes, you did.

Q If you could generally tell the jury what kind of information was contained in the life care plan?

A I was provided the life care plan by Dr. Schuster in that life care plan there were three pieces of information that were important for me as an economist.

Number one, Dr. Schuster provided a detailed list of all of the categories of medical care that Mr. Montero is expected to need over his remaining life expectancy: Medications, physical therapy, and so on.

Number two, Dr. Schuster provided me with information about the frequency; in other words, how often Mr. Montero will need these things: Every day, every week, every month.

And, third, and finally Dr. Schuster also provided me with information about how much that treatment is going to cost currently.

Q Did you make a calculation on what the cost of the future life care plan, and do you have an example you could show the jury?

A I do, yes.

Rather than take hours and hours and hours to show you all of the calculations for all of the elements of Dr. Schuster's life care plan, I selected one section of his life care plan, just as an example.

In this case, I selected the portion of Dr. Schuster's life care plan that talked about the visits that Mr. Montero will require with a physiatrist or a pain management specialist; the visits Mr. Montero will require with a spinal surgeon; and the physical therapy that he is expected to need as a result of the injury he suffered in 2008.

As I mentioned before, Dr. Schuster told me what Mr. Montero will need.

I'm not a medical doctor.

I'm not a life care planner.

I have no opinion about those things.

Dr. Schuster also told me how frequently Mr. Montero will need these things, yearly, or in this case every five years.

That's why we have this jump.

And Dr. Schuster also told me how much it would cost to visit a physiatrist, go see the spinal surgeon, and get physical therapy in 2013.

My job as an economist, then, is simply to determine how much these costs are going to increase each year.

Mr. Montero is expected to live through approximately the age of 79; expected to live through the year 2052.

It is certainly not reasonable for me to assume that in the year 2046, 33 years from now it's going to cost exactly the same amount of money to go to the physical therapist as it does today.

Certainly, the costs of going to the physiatrist and going to the physical therapist is going to increase over time.

So that 33 years from now, it is going to cost more money to get this medical care than it costs today.

It was my job then to form an opinion about what I called the growth rate; in other words, how much these costs will increase year over year.

In order for me to do that I had to take into consideration two things.

Number one, I had to take into consideration the fact that the costs of different types of medical care rise at different rates.

So for example, if I look at how fast the cost of prescription medicines go up compared to how fast the costs of generic medicines go up, they don't rise the same way.

Usually, the cost of prescription medicines rises more quickly, so year over year it becomes more and more

expensive to buy your prescription medicines, you don't usually see as big an increase in year in, say, generic medicines.

So I had to take into account the fact that using a single inflation rate for all of the different types of care outlined in Dr. Schuster's life care plan would be inaccurate.

In order for me then to determine in fact how much the costs of these different categories of care will increase, I relied upon information provided by the U.S. Government, the Bureau of Labor Statistics, and, specifically, I looked at something called the consumer price index, or the CPI.

And for those of you who may not be familiar with the consumer price index, the consumer price index in general is a statistic that we all can use to estimate, on average, how much costs, in general, are going up each year.

And what the Bureau of Labor Statistics does is they take a basket, and fill it up with things that the average American buys week in and week out.

They take their basket: Toothpaste, bread, socks, they fill it up with all of the things the average American buys week in and week out.

And then it's very simple take a look of how much it would cost to buy that basket of goods.

Take a look back, say, 10 years back.

Take a look to buy that very same basket 10 years

ago, and the change in the cost of that basket is a reflection of how much costs are going up in the United States.

The Bureau of Labor Statistics has more than one price index.

They have more than one basket, and they have several different price indexes for different types of medical goods.

For example, they have a price index for prescription medical supplies.

They take a basket, fill up it up with prescription, see how much it costs today look back 10, 20, 30 years see how much that basket cost 10, 20, 30 years ago, and use that to estimate how much the cost of prescription medical supplies are going up.

They have a basket that has, they have a basket with a visit to the doctor, with a visit to the neurologist, with a visit to the physiatrist take a look at how much it would cost today to visit those types of people go back 10, 20, 30 years ago, take a look how much it costs to visit those professionals 10, 20, 30 years ago.

And, again, that's an estimate of the cost of how much going to the doctor have increased over the last 10, 20, 30 years and so on.

So I took a look then at these different types of price indexes, these baskets for physician services

prescription medical supplies, other medical professionals, people like physical therapists that are not really doctors.

And based on my research about how these costs in fact increased over the last 10, 20 and 30 years, I was able to form an opinion about how much those costs are going to increase on average each year over Mr. Montero's life expectancy.

So you can see in this example based on my research the cost of physicians services, the cost of visiting a physician of some type, has increased on average, a little more than four percent over the last 30 years.

So, based on my review of the data I estimate, going forward, the cost of visiting the doctor will increase on average four percent each year.

My review of the basket full of other medical professionals, these would be people who are not medical doctors, but that provide a variety of services like conducting MRI's, conducting x-rays, providing physical therapy, based on my review of the basket of other medical professionals in the past 10, 20 or 30 years, I saw that the cost of visiting those types of other medical professionals, or having diagnostic tests performed by them has increased on average about three percent a little more than three percent over the last 10, 20, 30 years.

So, again, in my professional opinion, I expect

the cost of visiting these types of medical professionals and getting these types of medical tests to increase on average three percent each year over Mr. Montero's life expectancy.

Q Did you actually calculate the future medical costs for Mr. Montero?

A I did.

Q Could you explain to the jury how you chose the number?

A There we go.

Based on information provided in Dr. Schuster's life care plan so based on all the different categories of care that Dr. Schuster said Mr. Montero will need over his life expectancy, based on the frequency provided to me by Dr. Schuster, I have no opinion about how often Mr. Montero will need these types of medical care, I relied upon Dr. Schuster for that information and based on how much it would cost today for Mr. Montero to get this care, I estimate that over his life expectancy, taking into account the fact that the costs will increase each year from now through 2052, the total cost of the future medical care that Mr. Montero requires is calculated at $6,716,215.

This is the total amount of money that Mr. Montero will need to cover the cost of every category of care for every year starting in 2014, and extending through his statistical date of death in 2052.

Q Is it your opinion within a reasonable degree of economic certainty that Mr. Montero is going to need $6,716,215 in the future?

A To cover the cost of his medical care, yes, it is.

Q And, lastly, if you could tell the jury, did you calculate the total, the grand total of economic loss Mr. Montero has suffered?

A I did, yes.

In my professional opinion, to a reasonable degree of economic certainty, I have calculated the total value of Mr. Montero's economic loss at $7,581,369.

This includes, of course, my calculation of how much money he would have earned from 2008 through the present time, had he been able to work and I calculated that at $115,768.

It also includes how much money Mr. Montero would have earned, had he not been injured, had he been working today, and that he continue working through his statistical date of retirement in 2036.

I estimated that figure at $749,387.

And, again, to calculate those lost earnings, I, of course, took into account the fact that he had some good years, some bad years, some in-between years.

And I took into account the fact that, going forward, he may have become injured, may have become sick, may

have become unemployed, and certainly would have had to spend money getting to and from work and for lunch.

And lastly, of course, the other general category of economic loss that I calculated was the cost of the lifetime care that Dr. Schuster has said Mr. Montero is going to need, starting today, and extending through Mr. Montero's statistical date of death in 2052 and I calculated that of course at $6,716,215.

MR. MIKLOS JR.: Thank you.

Your Honor, I have no further questions.

THE COURT: Do you want to come back here, Doctor.

So sorry I promoted you, called you doctor.

THE WITNESS: Not yet.

THE COURT: Mr. Fabiani, are you going to use those charts.

MR. FABIANI JR.: Eventually.

THE COURT: All right.

Your witness.

MR. FABIANI: Thank you, your Honor.

CROSS-EXAMINATION

BY MR. FABIANI:

Q Ms. Kucsma, quickly, your testimony regarding the amount of medical expenses, the amount of money that Mr. Montero will need to pay his medical expenses over the balance

of his life, you are not a medical doctor, right?

A That is correct; I am not a medical expert.

Q You are not any kind of doctor.

You mentioned Dr. Schuster. What kind of doctor is Dr. Schuster?

A Dr. Schuster, I believe, among other things is an expert in rehabilitations services.

I have forgotten as I sit here today, though, specifically what his advanced degrees are in.

Q You called him "doctor" because somebody told you he was a doctor?

A I called him doctor, because I have at one point seen his curriculum vitae.

I don't recall, as I sit here today, specifically what his advanced degrees are in.

I believe he has, among other things, an advanced degree, perhaps, in psychology.

Q He's not a medical doctor?

A Not to my knowledge.

But, again, that's probably a question better suited for him, than me.

That was not my impression.

Q I was just wondering, you were calling him doctor, saying your calculations were based on information regarding medical costs that were given to you by Dr. Schuster; I just

wanted to make sure you didn't think he was a medical doctor.

A Oh, no, and I do appreciate that.

But I am well aware of the fact that what he did was review the medical reports of other medical doctors, but he is not a medical doctor himself.

Q Now, you, let's talk a little bit about your analysis of Mr. Montero's earnings, before we get to the medical costs.

You would agree with me that one of the things that economists do, and I think you testified about is you look to the past to help predict the future?

A That's one of the things we can, yes.

Q And one of the things you did here in determining Mr. Montero's economic loss in terms of wages, was you looked at his past earnings to try to develop a model to predict what his future earnings would be.

Correct?

A That was one of the things I considered, yes.

Q Well, you want to talk about, you want to give an opinion about Mr. Montero not about some hypothetical person who is not in the courtroom.

We want to talk about Mr. Montero's earnings history.

A I want to consider two things.

I certainly want to consider Mr. Montero's

earnings history, which I of course did, but I also need to consider general economic conditions, because had Mr. Montero not been injured, he would have been working in the general economy, and would have been subjected to the same sorts of economic conditions that all of us would be subjected to.

Q Are you aware of Mr. Montero's immigration status?

A I believe I am, yes.

Q And what is his immigration status?

A I believe he is here legally, I believe.

Q Do you know when he came to the United States?

A No, not that I recall, no.

Q You have his earnings for 2005, based on a tax return.

Correct?

A Yes.

Q And you have his earnings for 2006 based upon a tax return.

Correct?

A Yes.

Q 2007, you have some anecdotal information that he began working for New York Steel Fabricators sometime in 2007, but you have no information regarding his actual earnings for the year 2007.

Correct?

A That is correct, yes.

Q And for 2008, you have his tax return and his W2 for

the five-and-a-half months that he worked for New York Steel Fabricators.

Correct?

A I have a W2 that reflects that he earned through the date of injury, that is correct.

Q Did you inquire of Mr. Montero what his actual earnings were, for the year 2007?

A What was?

Q Yes or no, did you inquire of him what his actual earnings were for the year 2007?

A That, I don't recall.

Q You don't know whether you asked what he earned in 2007?

A I don't recall if whether we requested that or not we had not been provided with that documentation.

Q Would it have been good and accepted economic practice to have that information in order to determine what Mr. Montero's average annual earnings were for his, to before the accident?

A Well, as I indicated a moment ago.

Q Yes or no?

A I don't recall whether we requested that, but we had not been provided with that documentation, that's correct.

Whether it would have been helpful, I can't really say without seeing that documentation, but it may have

been.

Q If you are trying to determine what his average annual wage is, and he doesn't work for an entire year when you do your averages, doesn't that year get a zero?

A That --

Q Yes or no?

A Not necessarily, no.

Q Did you inquire of him what his, what he earned in 2003?

A No.

Q Did you inquire of him what he earned in 2004?

A No.

Q So you took the three years that you had earnings for, the year, that you had records for 2005, 2006 and 2008.

Now, 2008, you used what he had earned for the time period that he had worked, and then you projected out that, assuming that he would have continued to work at the same hourly wage, he would have earned an additional sum of money that year.

Correct?

A I took the earnings that he had earned through August of that year and I extended them through the end of December, yes.

Q Now do you know where he was going to work after August of 2008?

A Not specifically, no.

Q Are you aware that the job that he was working on in August of 2008 was over as of the first week of September 2008?

A I don't recall whether I was, whether that was mentioned in the deposition transcript, but not specifically, no.

Q Would that have been a useful piece of information for you to have in performing your economic analysis as to what his prospects were for further earnings during the year 2008?

A Possibly, not necessarily.

Q The fact he may not have had a job after August of 2008 is not an important factor to you in considering what his earnings would have been for the year 2008, going forward, but for this accident?

A I didn't say that.

Keep in mind that --

Q Then that's --

A I did an adjustment very specifically, I made adjustments for both work life and unemployment because it would absolutely have not been reasonable for me to assume that he would have worked full-time from August 2008 to the end of 2008 and in fact I didn't make an assumption; I made a downward adjustment of 22 percent to take into account that he more likely than not would not have worked all of those four months, and also made a downward adjustment for unemployment to take

that into account.

Q You told us you've been qualified as an expert witness approximately 100 times?

A Yes.

Q You've been cross-examined approximately 100 times?

A Indeed, yes.

Q You know when a witness, when a question calls for a yes or no answer, you are supposed to answer the question yes or no.

Haven't you been so admonished by lawyers and judges on that, on numerous occasions?

A Actually, no; I'm usually told that I have answer it yes or no only if the question is properly asked, so that I can answer it yes or no.

Q Oh, really.

Well, let's do it this way.

We're going to do it by rules unless Judge Schack tells me differently.

If you can't answer the question yes or no, don't answer the question.

All right.

A Sure.

Q It's very simple?

THE COURT: Just, let's play by Judge Schack's rules as well.

MR. FABIANI JR.: Unless you tell me differently I'll abide.

THE COURT: I understand you want "yes or no" answers.

However, if the witness then states, 'I can't answer it yes or no,' and you want to pursue it, I'll -- that's if you want to pursue it.

MR. FABIANI JR.: At my option.

THE COURT: Then she can then elaborate as to why it is not a "yes or no," or whatever she as to say.

Q All right.

So, do you have your calculator with you?

A No, I'm sorry.

THE COURT: Here is a calculator.

THE WITNESS: Wonderful.

Thank you, your Honor.

MR. FABIANI JR.: Thank you, your Honor.

THE COURT: You are welcome.

MR. FABIANI JR.: Happy we're playing by Judge Schack's rules.

THE COURT: Outside of the presence of the jury I think both of you know what I would tell you.

It's not bad, members of the jury; the lawyers know what I'm trying to get them to do with this case.

Let's move on.

Q I think you added up, took the 2005, you took gross earnings of $34,805, which is what he reported on his 2005 income tax return.

Correct?

A And his W2, correct.

Q So, put that in the calculator.

A All right.

Q For 2006, $11,184?

A Correct.

Q Work with that in the calculator.

A Adding them, I presume.

Q You are adding them.

A You have to tell me.

You just told me put them.

Q 2007, we have a zero.

You don't have to do anything for 2007.

For 2008, using your increased projections come up with $42,008?

A Correct.

Q Add that in.

What do you?

A $88,075.

Q Since that covers four years, let's divide it by four.

What do you come up with?

THE COURT: Two thousand, something.

THE WITNESS: There you go.

A $22,019.

THE COURT: I did very well in math.

MR. MIKLOS SR.: I didn't see any fingers, either.

(Laughter.)

Q So, twenty-two, what was that number again?

A It was --

THE COURT: Do it again if you have to.

A $22,019, technically $22,018.75.

Q His average annual earnings for the four years for which you have information, was $22,019.

Is that correct?

A I wouldn't necessarily agree with that, no.

Q But you chose a number of $29,358.

Correct?

A I used, yeah, average of his earnings of '05, '06 and '08, that is correct.

Q You completely discounted the fact of the 2007 when you did your calculations?

A No, I wouldn't agree with that.

Q When -- you didn't ask anything about his earnings history in 2003.

Is that correct?

A That is correct.

Q And you didn't ask anything about his earnings history in 2004?

A That is correct.

I had no information about that, correct.

Q Did you ask?

A For 2003 and '04, no, no.

Q I'll let you talk on this.

Why didn't you ask for '03 and '04?

A Generally we do not go back too many years into the past because what I want to calculate, and the opinion that I want to ultimately determine, is a good approximation of what the plaintiff was earning at or around the time of his injury.

Q You know he was earning $28 on this job.

Right?

A Yes.

Q And you know that he never earned $28 an hour on any job before this.

Correct?

A That, I don't know.

Q Well, do you know how much he earned an hour in 2005 and 2006?

A No.

Q Did you inquire as to how much he earned an hour in '05 and '06?

A No.

Q Yet, when you did your calculations projections he would have earned in the balance of 2008, you used it on $28-an-hour earnings.

Is that correct?

A No, that's actually wrong.

I calculated the $42,008 figure from one place and one place only.

And that is based on the information about how much Mr. Montero, in fact, earned as reported on his W2 wage and tax statement for that year.

Q Actually, my question was correct, because the earnings that he earned were at the rate of $28 an hour.

Correct?

A Possibly, but your question was whether or not I used the $28 per hour to calculate his earnings.

And I did not.

Q You didn't use the $28 an hour.

You used the number that resulted from multiplying how many hours he worked, times $28 an hour. That's what you are telling us?

A Not specifically.

Because had he worked overtime he would have gotten paid time-and-a-half.

I don't know specifically how the figure of

$27,356 reported on his W2 was calculated, but what I do know is that, that is an accurate representation of how much he did in fact earn, whether he worked regular time, overtime, or a mix, I don't know, but I do know that's how much he actually earned through August of 2008.

Q So, let's do the math again.

Let's do the $34,805 for the year 2005.

Let's do the $11,184 for the year 2006.

What were his actual earnings for the year 2008, not your projected earnings?

A $27,536.

Q That was what he earned, working in the job that was ending, just about when he had his accident.

Correct?

A From what I know it's what he earned through the date of injury.

Any additional information, I can't say.

Q Add those four numbers together.

MR. MIKLOS SR.: Which four numbers?

THE COURT: Three numbers.

Q And the zero for 2007.

THE COURT: Thank you.

Now you have?

MR. MIKLOS SR.: Is zero a number?

MR. FABIANI JR.: Technically zero is not a

number, it's a zero.

MR. MIKLOS SR.: It's a nothing.

Q What do you come to?

A $73,345.

Q And if you can divide that by four, on the computer, the calculator, faster than Judge Schack, you win a prize.

A I don't know about that.

THE COURT: 18.

THE WITNESS: $18,336.25.

Q That so $18,336 is the actual average of what he earned for the four-year period from 2005 to 2008.

Correct?

A No.

Q It's not?

A No.

Because it only extends through part of 2008.

It does not reflect a full four-year period.

Q Average of what he actually earned that entire year. Did he earn any more money that year, that you are aware of?

A Not that I'm aware of but --

Q So he actually earned 28, whatever that number was, in 2008.

Correct?

A If I consider the time period after his date of injury, then yes, that is correct.

Q What is so hard about saying that that's what he actually earned?

He can't spend this extra income that you are talking about, could he?

A This is the problem with this, is that my job is to consider what he would have earned had he not been injured.

By you asking me to consider the fact that he didn't earn any money from August of '08 through December of '08, I'm now mixing in the fact that he didn't earn any money; you are right, but he didn't earn any money because he was injured.

My job as an economist --

Q Says who? Says who?

You say, you are telling the ladies and gentlemen of this jury he didn't earn any money in the balance of 2008 because he was injured?

MR. MIKLOS JR.: Objection.

It's argumentative.

MR. FABIANI JR.: It's cross-examination.

She's the one sticking her neck out.

MR. MIKLOS JR.: Objection.

THE COURT: I'll strike the "stuck her neck out."

MR. FABIANI JR.: My apologies.

THE COURT: The point is, there is a difference

of opinion, obviously, as they go over it.

But, he's allowed.

Clearly, Mr. Fabiani can ask that question.

MR. FABIANI JR.: Thank you, your Honor, since I stuck my neck out.

THE COURT: I'll allow you bring it back without it getting cut off, you can explain your answer.

THE WITNESS: I don't want my head chopped off.

THE COURT: Your head is not going to be.

THE WITNESS: Since I have stuck my neck out I have certainly assumed liability in this matter.

As an economic expert I am not the trier of fact.

What I have done is I have assumed liability.

I have assumed that but for his injury Mr. Montero would have continued to work.

That is definitely an assumption I made.

It is certainly an assumption that the jury may or may not agree with, but definitely made that assumption in this case.

Q Thank you for that explanation.

And when you -- I'm sorry.

Refresh my recollection, you never spoke to Mr. Montero?

A That is correct, I did not.

Q And when -- but you did read his deposition?

A Yes.

Q Now, when you talked about his earnings for the year 2008, hold on a second, just lost my train of thought.

Okay.

You reviewed his tax returns?

A Yes.

Q Did you inquire, not speaking to him you don't know if he was engaged in any other businesses.

Is that correct?

A That is correct.

Q The 2005 tax return, get the tax return, what exhibit is it?

17 or 18, I forget that.

THE COURT: Just so we're clear, the tax returns were supplied to you by Mr. Miklos' law firm.

THE WITNESS: Yes, your Honor.

THE COURT: Okay.

Do you have the appropriate return?

MR. FABIANI JR.: 2006 is actually the one I'm looking for.

THE COURT: You have it.

MR. FABIANI JR.: It's here, yes.

May I present it to the witness.

THE COURT: Let the officer do that.

MR. MIKLOS SR.: She's worried about her neck.

(Laughter.)

THE WITNESS: I'm a little nervous after that neck-chopping comment.

THE COURT: Mr. Fabiani, the officer has something on her waist, you don't have to protect her neck.

MR. FABIANI JR.: I've already been warned by the court officer --

MR. MIKLOS SR. (Int'g): If you threaten a witness.

MR. FABIANI JR. (Cont'g): -- to stay away from certain parts of this courtroom at my own peril; I heed that warning.

THE COURT: You have that in front of you, correct, the 2006 tax return.

THE WITNESS: Yes.

THE COURT: You have a question then, Mr. Fabiani?

MR. FABIANI JR.: Yes.

Q Could you look at line 36.

A 36.

THE COURT: Which is the adjusted gross income.

THE WITNESS: Close, that's 37.

THE COURT: Good guess.

MR. FABIANI JR.: Line 35.

36 has --

THE COURT: It's an adjustment.

A 36 does have something on it, too, as does 35.

I'll be happy to look at one or both.

Q What is line 35?

A Line 35 references a domestic production activities production in the amount of $2,500.

Q What is a "domestic production activity production"?

A It also makes reference to attachment of 48903; that is not a form that I have, so I could not say specifically what the $2,500 represents.

Q You don't know why Mr. Montero deducted $2,500 from his income in the year 2006?

THE COURT: It is not a deduction; it's an adjustment.

There's a difference.

Q Domestic production activities is not a deduction?

THE COURT: The point I'm trying to make is, my prior life I used to do a lot of tax law.

So I'll take judicial notice, what it means, there's something involved with producing some kind of oils, usually it's oil and gas production, and it means you take off dollar-for-dollar as opposed to a deduction which is a percentage; you get a better deal.

MR. FABIANI JR.: Farming.

THE COURT: Farming would be Schedule D, which would be above the total.

Q Did you see anything in any of the materials that you were given, suggesting that Mr. Montero was engaged in the oil and gas business in 2006?

A Not that I can recall, no.

Q Now, what I really want you to do now is, let's's take Mr. Montero's actual earnings for the year 2007, the number that you don't have.

And what we're going to do is going to show you Exhibit 18.

THE COURT: What is Exhibit 8.

MR. FABIANI JR.: 18.

Q Payroll records from New York Steel Fabricators?

THE COURT: 2007.

Q And 2008.

THE COURT: Okay.

Those are records, I think we stipulate, that were not provided to their economist; is that correct?

MR. MIKLOS SR.: Yes, your Honor.

Q Now, if you look at 2007, you see that Mr. Montero worked from October of 2007 to December of 2007.

Right?

A That appears to be the case, yes.

Q And if you add all that up, you come with, I did the math, $11,116?

A Maybe right, doesn't look inconsistent with the figures I'm looking at for each week.

Q If you have any hesitancy that my math is wrong on that, you have a calculator and we can wait the 30 seconds or so.

A What was your number?

Q $11,116.

A Okay.

(Pause.)

THE COURT: Mr. Fabiani, before she adds that up, as I explained to both you and Mr. Miklos, I would like to stop a little bit early for lunch, in about two or three or four minutes.

MR. FABIANI JR.: I can stop after this line of questioning.

THE COURT: And then come back at 2:15.

All right.

A It may have been just been a rounding issue, $11,116 appears to be correct.

Q Yes.

Now, let's add up the actual earnings for 2005, '06, '07, and 2008, the actual, earnings, and see what you get, $34,805, and you come up with $84,861?

A I do.

Q If you divide that by four, $21,115.25?

A I do.

Q So you would agree with me that Mr. Montero's actual average annual wages for the years 2005, '06 and '07 were $21,115.25?

A I think.

THE COURT: '05, '06, '07.

THE WITNESS: And eight.

THE COURT: You left out eight.

Q I'm sorry, meant the four years: '05, '06, '07 and '08.

A Yes, I would agree.

Q And just two more questions, and then we can break.

THE COURT: That's fine.

Q Now, you applied a growth factor when you did your projections of past and future lost wages?

A Correct.

Q We'll discuss that in greater detail in the future, but that basically assumes that wages are going to increase over time.

Correct?

A Not technically, because it is an average, but certainly does assume that, on average, they will increase over time.

Q You would agree with me, that in 2006, Mr. Montero earned approximately 66 percent less than he earned the year before.

Correct?

A That would be approximately correct, yes.

Q And in 2007, he earned less than he earned in 2006?

A Slightly less, yes.

Q And then in 2008, when he had this job that was ending in August or September of 2008, he made more money.

Correct?

A Yes.

MR. FABIANI JR.: It's good stopping point.

THE COURT: We'll stop at this point members of the jury.

We'll come back at 2:15.

Enjoy lunch.

And please don't discuss this case among yourselves or anyone else.

Please follow the instructions of the officer.

Thank you.

OFFICER: All rise.

Jury exiting.

(Jury exits the courtroom.)

THE COURT: Let the record reflect that the jurors and alternates have now left the room.

Anybody have anything to put on the record?

MR. MIKLOS SR.: No.

MR. FABIANI JR.: No.

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: Enjoy lunch.

You can leave the calculator there.

A F T E R N O O N S E S S I O N

THE CLERK: Case on trial continued, Montero against Myrtle Avenue Builders LLC, Index Number 7479/2010.

Officer.

THE CLERK: Jurors are entering.

(Whereupon, the jury entered the courtroom.)

(Witness, Ms. Kucsma, resumes the stand.)

THE COURT: Everybody please be seated.

And we're going to continue.

Mr. Fabiani, you may continue.

CROSS-EXAMINATION

BY MR. FABIANI JR. (Continuing from the a.m. session):

Q Ms. Kucsma, you would agree with me that if instead of using an annual base income of about $28,000, we used about $21,000, which reflects his actual earnings over the average actual past earnings over the past five years, your projected for future lost income would be lower.

Is that correct?

A Not necessarily.

Q Now, you did a report in this case.

Correct?

A Yes, I did.

Q And do you have a copy of that report in front of you, please.

A I do.

(Pause.)

THE COURT: What do you need?

MR. FABIANI JR.: The first sheet of assumptions.

THE COURT: I have a copy of it, if that helps.

MR. FABIANI JR.: The summary information on the chart that was presented to the Court.

(Pause.)

THE WITNESS: I actually have one other copy, if you would like it.

Q That's okay, I know what I'm asking about.

You had the plaintiff's name on the chart that you showed the jury?

A Yes.

Q And you also had his date of birth, and the date of injury?

A Yes.

Q And his residence?

A Correct.

Q And then you go to his education.

Right?

A Correct.

Q On your report that you prepared back in July of 2013, when you were initially hired in this case, you had another category in there, did you not?

A Yes, I believe so, yes.

Q And before you presented your evidence to the jury, you deleted that category.

Is that correct?

A I actually never include that category when I testify, because it is a category referring to the health of the plaintiff before his injury.

And since I'm not here to testify about any medical opinions, I never include it in my trial tables, when I present my economic opinion to the jury.

Q Well, isn't it a fact that in the report you prepared dated July 22nd, that was exchanged with me, you wrote down, "prior health assumed normal."

Isn't that were what you wrote in your report?

A Yes, I did.

Q And that was information that was given to you to assist you in your opinion in preparation of your opinion,

correct?

A Not really.

And I'm not trying to be difficult, but the reason --

Q You are doing a very good job.

(Laughter.)

A That wasn't very nice.

THE COURT: We'll play by my rules: If she wants to go a little further, I am going to let her, in this one particular instance.

MR. FABIANI JR.: Just this one, all right.

THE COURT: Then --

MR. FABIANI JR.: I'll let you have this one.

A Since I'm not here to offer a medical opinion, when I relied, or when I had to make an assumption about life expectancy, I relied upon the average life expectancy, based on the information provided by the National Vital Statistics.

It would not have been appropriate for me to do anything other than that, since I'm not a medical expert, and it is not clear to me why his health conditions would have been important, other than whether they might have had an impact on either his life or work life expectancy.

THE COURT: The adjustment, so we're clear for the benefit of the jury, and they will hear this later on at the end of the trial when I instruct them on the law,

the life expectancy age figure that you came up with is from a statistical table of millions of people.

Correct?

THE WITNESS: Yes.

THE COURT: Doesn't guarantee you, you will live that period, and could live a shorter period of time; could live a longer period of time.

THE WITNESS: Yes.

Q Can you continue down on the page in your report, the next paragraph, paragraph two.

A Yes.

Q And you gave a, I wasn't planning on doing this now since you brought it up, you said that he had a life span averaging 77.6 years, employing a statistical date of April 5, 2051.

Is that correct?

A I want to be very specific.

That was what his statistical life expectancy was at the date of injury, based on the life expectancy data available, when I prepared this report.

And the only reason I bring this up, since I prepared this report, the National Vital Statistics have issued an updated report.

And I did rely upon the updated life expectancy figures to calculate the medical costs, to which I testified

earlier today.

Q Using those figures you came up with an extra year.

A I believe, that's correct, yes. Let me just.

Q 2052.

THE COURT: For whatever it's worth.

A Yes, so, as of today's date, because people are all now living a little bit longer than they were back in 2008.

Mr. Montero's statistical life expectancy is August 17, 2052.

THE COURT: Let me take judicial notice for something I am going to tell the jury at the end, and that table is older, according to the life expectancy tables that we, the Court uses, I am going to instruct the jury that it's 36.2 years for a 40-year-old male which would get to you to 76 and change.

It is what it is.

Again, doesn't mean he's going to live that long, or could live a lot longer.

MR. FABIANI JR.: Stops a couple of years earlier.

THE COURT: Correct.

Q What is the -- I'm looking at the report that was provided to us, and it seems to me that the information that you relied upon last year was information that was effective as of September 24th, 2012.

Is that correct?

A Yes.

Q And when was the information that you are now relying on, effective?

Where would I find that if I wanted to look for that?

A The reports that I'm preparing now, the economic appraisal reports, are relying upon information that was, again, provided by the Centers For Disease Control National Vital Statistics reports.

And I believe the most recent publication came out in January of this year.

Q So that's January of 2014.

If I want to find it, where would I look at it?

A You should be able to go to the same website, on page 3 of my report, paragraph two, but the extension right at the end the to the PDF, that would probably need, that extension right at the end refers to the name of the actual document; if you go to www.cdc.gov back slash NCHS, I believe you should be able to fairly easily find that document there.

Q Let's go back to the work life expectancy, and work life analysis.

You were asked to assume his health was normal, because that would impact upon his ability to continue working in his chosen field if there were problems with his health; you

would agree with me?

A Again, any health conditions he may or may not have had probably would have no effect in my analysis for two reasons.

One, I'm not a medical doctor it would not be appropriate for me to have an opinion about how some medical condition may or may not affect a person's life or work life expectancy.

But, secondly, the data that I relied upon is based on males in the actual population.

An actual population that has all kinds of people in it, some that have some health conditions, some that have severe health conditions, some that have no health conditions implicitly.

Whatever health conditions Mr. Montero any or may not have had I have accounted for by use of that data.

Q Let's analyze that.

You use data that deals with people who are in perfect health, people who are in okay health, and people who are in poor health?

A Probably, yes.

Q And you would agree with me, people in perfect health, they have longer work expectancies within that work life, tend to be employed more often than people who have health problems.

Correct?

A Again, I'm not a medical expert.

I cannot comment, A, on how to identify whether somebody is very healthy or not, and, B, it would be improper for me to offer any sort of opinions about how certain factors might affect a person's life expectancy.

Q I'm sorry.

I thought that's one of the things an economist did, they study how different factors affect employability and the job market, and things that economists testify about; did I misunderstand that, yes or no?

A What we don't study is how medical conditions affect life expectancy.

That's really the question you've been asking me about.

Q I really don't mean to beat this, Ms. Kucsma, can you say the word "yes"?

A Yes.

Q Can you say the word "no"?

A Yes.

Q Can you practice.

I just want to make sure it was within your vocabulary.

Now, I note that in your analysis, you've basically assumed that Mr. Montero will never ever be gainfully employed in any capacity whatsoever.

Correct?

A That is correct.

Q And have you been provided with a copy of the report of the vocational rehabilitation consultant that my firm retained to interview and evaluate Mr. Montero's employability?

MR. MIKLOS JR.: Objection, your Honor.

THE COURT: Overruled.

A No.

Q Were you provided with a copy of Dr. Schuster's report, in which he discusses Mr. Montero's chances of being employed in the future?

A Yes.

Q And yes or no, does Dr. Schuster give an opinion that Mr. Montero has the realistic earning potential of $32,685 per year when able to find employment?

Does he give that opinion?

MR. MIKLOS JR.: Objection, your Honor.

THE COURT: I am going to sustain that.

The report --

MR. FABIANI JR.: His testimony was in evidence, and she based it on the report.

THE COURT: Did you see that report?

THE WITNESS: I did.

THE COURT: I'm sorry.

Then she can answer it.

THE WITNESS: I actually do reference it in my report.

Q I know, that we'll come to that.

A Dr. Schuster's opinion, as noted in my report, is that, quote, for all practical purposes --

Q I thought you told us you can say the words yes or no?

A I cannot answer your question yes or no because, I believe, and I could be wrong, but I believe it misrepresents Dr. Schuster's entire opinion, at least the way that I read it.

And I quoted his opinion in my report.

And I believe the question you just asked me is only a part of his opinion.

So I couldn't agree that that is his opinion.

Q I didn't ask you did that was his opinion.

I asked you if that's what he put in his report, yes or no?

A That singular statement appears in his report, yes.

Q Thank you, yes.

Now, did he go on to state in his report, that because of certain factors that he considered Mr. Montero has a 75 percent loss in lifetime work force participation?

A That was another part of his opinion, yes.

Q And did he then conclude that as a result of that, he had an average annual wage of approximately $8,171.25 per annum

could be anticipated; did he put that in his report?

A Again that was another part of his report, yes.

Q And I am going to ask you to assume that when he came into court last week and testified, that that is exactly the testimony that he gave.

Can you assume that?

A I wasn't here to hear it.

MR. MIKLOS JR.: Objection, your Honor.

MR. FABIANI JR.: That's exactly.

THE COURT: Overruled.

Go ahead.

Answer it.

Q Can I ask you to assume that.

A It isn't consistent with what I read in his report.

Q Yes or no, in your analysis of Mr. Montero's future earnings loss, did you factor into account any alternative income that he might earn in other alternative employment between now and when he stops working, yes or no?

A No.

Q It wasn't that hard.

MR. MIKLOS SR.: Objection, your Honor.

THE COURT: Sustained. Strike "it wasn't so hard."

MR. FABIANI JR.: My apologies.

MR. MIKLOS SR.: Side comments have to stop;

disrespectful.

MR. FABIANI JR.: The jury will decide who is being disrespectful here.

THE COURT: Move on.

Q You also, when you use of the growth factor, for, to grow the income of his past lost earnings you used increased factors ranging from .8 percent to 1.9 percent for the people of 2010 through 2013, correct?

A Technically, point seven percent to, or, 1.9 percent.

Q 1.4 and 1.9?

A Yes.

Q And for the future lost earnings, starting in 2014, you used a growth factor of 3.9 percent.

Correct?

A On average, yes.

Q Now, you also, you took some credits, deductions, rather, off.

One of the things you talked about was unemployment.

Right?

A Yes.

Q You put an up employment factor in of I believe it was, 5.6 percent.

Is that right?

A Yes.

Q Now in your report, you noted that for construction workers, from 2000 through 2012, the average unemployment rate for construction workers was 11.1 percent.

Correct?

A Yes.

Q But you chose to use a 5.6 percent rate rather than 11.1 percent rate, that statistics show for construction workers, yes or no?

A I did, and I explained why in my report.

Q Okay.

Let's talk about the future medical expense.

You, I think you made it very clear that you are not telling the ladies and gentlemen of this jury that Mr. Montero is going to need any of the medical costs that were, any of the medical treatment that's in the chart that you presented.

Correct?

A That is correct.

Q So, basically, let me understand this correctly, you were provided with services to be performed, the cost of those services, the time period during which those services are to be performed by Dr. Schuster, and then you researched growth factors for the cost of those services, and then did the math to come up with what the projected cost of those figures, of those services, was going to be, over Mr. Montero's life

expectancy, using your life expectancy number.

Correct?

A I believe so.

The only thing that was a little unclear to me is what Dr. Schuster provided me with specifically was information about the frequency, how many times Mr. Montero would require these services.

Dr. Schuster did not tell me over what time period.

Q The frequency?

A Just want to be clear about that, yes.

Q I'm okay with that, I stand corrected.

Now, when you did your initial report back a year ago, you made projections for what Mr. Montero would incur in these same categories for certain items in certain years, correct?

A Yes.

Q Now, for the year 2013, your projection was that for medical and therapeutic evaluation during the year 2013, Mr. Montero would incur the cost of $1,359.

Correct?

A Let me take a look.

Yes.

Q And how much did Mr. Montero incur in medical and therapeutic costs in 2013?

A That I don't know, and I don't know whether or not he was receiving all of the care that he should have been receiving; that I just don't know.

Q You say "should have been receiving," because that's what you have been told by Dr. Schuster.

You are not telling the ladies and gentlemen that it's your opinion he should be receiving certain medical care?

Is that correct?

A That is correct, yes.

Q I want to be clear on that.

You also in your projections you indicated that during the year 2013, you expected that Mr. Montero would incur $19,385, in medical and therapeutic care; is that an accurate statement?

A Yes.

Q And can you tell us, during the year 2013 how much did Mr. Montero incur in medical and therapeutic care?

A My answer would be the same. I don't know. And I don't know whether he received any or all or none of the care that Dr. Schuster said that he would need.

Q In your report, you have, for the year 2013, that Mr. Montero would incur $22,500 in hospitalization costs; is that correct?

A Yes.

Q And do you know how much Mr. Montero incurred in hospitalization costs in 2013?

A My answer would be exactly the same, I don't know.

And I don't know whether he received any all or none of the care that Dr. Schuster said he should have gotten.

Q You also have the number of $3,979 for medication, during the year 2013.

Do you know whether Mr. Montero received, obtained, any medication in the year 2013?

A Again, my answer would be the same.

Q How about laboratory tests, $196 in laboratory tests?

A My answer would be exactly the same.

Q And $7,847 in diagnostic tests?

A Same answer.

Q $300 for orthopedic and adaptive equipment?

A Same time anyplace.

Q $2,099 for support care?

A My answer would be the same.

Q Let's use the growth factors that you used for these various calculations, and multiply the actual amount spent by Mr. Montero in 2013, times those growth factors, what do you come up with?

A Well, I don't know what he did spend in 2013, but that was not the purpose of my analysis.

The purpose of my analysis was to calculate how

much it will cost to provide him with the care that Dr. Schuster says that Mr. Montero needs to receive.

Q But let's talk about reality.

Let's talk about the actuality of what care he did undergo during 2013, if I read correctly you projected would cost $57,664?

A If he had gotten the care that Dr. Schuster said he should have gotten, that is correct.

Q Are you aware that -- I'll withdraw that question.

If we go back to my original question which is to ask you to multiply the actual expenses in 2013, times the growth factor, what would you come with?

MR. MIKLOS JR.: Objection, your Honor.

THE COURT: Overruled.

Go ahead.

A I don't know what his actual expenses were.

Q I ask you to assume his expenses were zero what happens when you grow zero?

MR. MIKLOS JR.: Objection.

THE COURT: Overruled.

A Certainly, if you grow zero, you can't really grow zero; zero remains zero.

Q My point exactly, thank you.

Back in 2013 when you did the projections, you also projected what his expenses would be in 2014?

A I want to be very careful; what I projected, very carefully, is how much it would cost for Mr. Montero to go out and get all of the services, treatment, medications, tests, surgeries, etcetera, that Dr. Schuster said he needed and should have gotten, that is specifically what I calculated.

Q Dr. Schuster said he should have gotten this medical care last year.

Where did you see that?

A Dr. Schuster authored a report dated June 11, 2013. And in that report he provided a detailed list of all of the care that Mr. Montero needed as of that moment, as a result of the injury that he suffered in August 2008.

Q Let's get it clear. Dr. Schuster is not a medical doctor. Dr. Schuster didn't know what Mr. Montero needed or didn't need. Dr. Schuster priced out certain modalities and treatment services without rendering an opinion as to whether they're medically necessary, because he can't render that opinion. Is that correct?

A That I entirely disagree with that. The role, I assume Dr. Schuster was deemed qualified expert in this court and the role of a life care plan --

Q You disagree, you disagree. Enough. You disagree with me. Let me just ask you this.

For 2014, did you project that Mr. Montero would incur the sum of $69,360 for medical and therapeutic care this

year?

A I projected that if he had gotten the care that Dr. Schuster said he needed, it would have cost him $69,360 for the year 2014.

Q Do you know how much Mr. Montero has incurred in medical expenses in the six years since this accident happened?

A No, I do not.

Q Would you be surprised that it's less than $69,360?

A I have no idea what it is.

Q And you would agree with me, would you not, that if Mr. Montero does not undergo any of this medical care that has been projected for him, that it won't cost anything for him to do that. Correct?

A I have calculated what it would cost to get the care that Dr. Schuster has said he needs. Whether he gets the care, where the money comes from, that is not my job as an economist.

Q Okay.

MR. FABIANI JR.: May be just about done, let's see.

(Pause.)

MR. FABIANI: I don't think I have anything else. Thank you.

THE WITNESS: Thank you.

THE COURT: Thank you. Any redirect?

MR. MIKLOS SR.: One minute.

THE COURT: Sure.

(Pause.)

MR. MIKLOS JR.: No redirect.

THE COURT: Thank you.

Witness excused.

THE WITNESS: This is an exhibit. I don't want it to get lost. And this is your calculator. Don't want to walk out with that.

(Handing.)

THE COURT: Thank you.

(Witness withdrew.)

THE COURT: Are we ready to recall Mr. Montero to the stand.

THE CLERK: We need the Spanish interpreter.

THE COURT: He'll be here momentarily.

You know what, let's take a short break.

Use the facilities, if you so desire.

We'll be back in a few moments.

(Jury exit the courtroom.)

THE COURT: Let the record reflect the jurors and alternates have now left the room.

Anybody have anything for the record.

MR. MIKLOS JR.: Nothing your Honor.

THE COURT: Are you ready.

Let's bring the jury in.

(Carmen Muriel, Official Court Interpreter enters the courtroom.)

OFFICER: All rise.

Jury entering.

(Whereupon, the jury entered the courtroom.)

THE COURT: Everybody please be seated.

Mr. Montero, you can sit down.

Members of the jury we've recalled Mr. Montero back to the stand.

Mr. Montero, I remind you again, you are reminded you are still under oath.

And we have the presence of a different Spanish interpreter than we had yesterday, but we have an official New York State Court Spanish interpreter.

Give us your name.

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