In The Matter Of:

EVANS v.

YONKERS

April 18, 2016

Aldorine Walker

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CIVIL TERM - PART 15

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RICHARD EVANS,

Plaintiff,

-against-

YONKERS CONTRACTING COMPANY, INC., GOTHAM CONSTRUCTION COMPANY, LLC, RIVER PLACE II, LLC and SILVERSTEIN PROPERTIES INC.,

Defendants.

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Index # 107866/09
TRIAL

71 Thomas Street
New York, NY 10007
April 18, 2016

B E F O R E:

HONORABLE EILEEN A. RAKOWER
Justice, and a jury.

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

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Proceedings

THE COURT: Anything before we bring the jury in?

Are we going to take another witness?

MR. McCRORIE: The life care planner, we're going to mark the life care plan into evidence, the small one. We did not enlarge it.

THE COURT: Can we have the next number on the exhibit list, please.

(Plaintiff's Exhibit 26, Carfi life care plan, was so marked in evidence)

THE COURT: The application was for this witness or the next witness?

MR. LoRUSSO: The next expert.

MR. McCRORIE: It is a motion, they served it on us on the weekend.

THE COURT: Okay, let's bring in the jury.

COURT OFFICER: All rise, jurors entering.

(The jury enters the courtroom.)

THE COURT: Good morning, everyone. Come on in. Please sit down when you reach your chair.

Everyone else, please sit down.

So again, in order to accommodate the schedule of a particular witness, we're going to break in again to the testimony of Mr. Evans, and we're going to have a new witness this morning.

Dr. Carfi - Direct/Mr. McCrorie

Please call your witness.

MR. McCRORIE: Joseph Carfi, MD. C-A-R-F-I.

J O S E P H C A R F I, M.D.,

having been first duly sworn/affirmed by the clerk of the court, testified under oath as follows:

THE CLERK: Please be seated.

Doctor, in a loud, clear voice, please state your full name.

THE WITNESS: Joseph Carfi, C-A-R-F-I, MD.

THE CLERK: What is your business address?

THE WITNESS: 2001 Marcus Avenue, Suite Number N219, Lake Success, New York 11042.

DIRECT EXAMINATION

BY MR. McCRORIE:

Q Good morning, Dr. Carfi.

A Good morning.

Q Dr. Carfi, the configuration of the courtroom is that the jury is in one whole line. If you can speak louder than you normally would so I can hear you back here as well as all the jurors. Okay?

A Yes, sir.

Q Can you please tell the jury when you became licensed to practice medicine?

A That would be in 1982.

Q And can you please give the jury -- they've already

heard from a doctor, you don't need to define residency, fellowship.

Can you give them as succinctly as you can, without leaving any of the accolades out, your educational background, leading you up to your current positions or practice. Okay?

A Sure. I have a bachelor of science in biology from SUNY Albany. I have a master's of chemistry from Rensselear Polytechnic Institute, that's in Troy, New York. Then I did my medical training at the Mt. Sinai School of Medicine here in Manhattan.

I then went onto my residency program in physical medicine and rehabilitation, that was at the Rusk Institute For Rehabilitation Medicine, New York University.

So that's my educational background.

Q If you could please tell the jury, do you have a specialty in medicine or an area of practice?

A My specialty is physical medicine and rehabilitation.

Q So you said physical medicine and rehabilitation. Is that also known as PM&R?

A Yes, sir.

Q And physiatry?

A Yes.

Q What is a physiatrist?

A Well, we're trained to -- well, the physical medicine side of what we do is we take care of people that have pain, you hurt your back, hurt your neck, shoulder, whatever the situation is, and why it may be, we'll diagnose, treat and hopefully get you better.

The rehabilitation side is for the individuals that have more permanent types of problems. It could be a spinal cord injury, an amputation, brain injury, multiple sclerosis, polytrauma, something which permanently disables somebody.

And so we're trained to take care of the person that has that disabling condition and by that I mean there are many times medical or surgical issues that the doctor has to be concerned about that may affect someone with a specific type of disability like a spinal cord injury.

But that human being may have psychological reactions to their injury, there may be vocational issues, family issues, they need equipment, special wheelchair, they need certain therapies or assistance at home.

So we're trained to -- it's more of a holistic approach trained to take care of that human being that has that disabling situation.

Q Do you maintain a private practice?

A I do.

Q Are you board certified?

A I am.

Q In what area?

A I'm board certified in physical medicine and rehabilitation.

Q And in addition to your practice -- for how long have you maintained a practice where you see patients?

A Well, I have been in practice in one way or another since 19 -- finished in 1984, so since 1984, I've been in practice.

Q And where is that practice, doctor?

A Currently the practice is on Long Island in Lake Success.

Q Do you maintain -- do you do any teaching?

A I do.

Q Please tell the jury.

A I have maintained a voluntary position at Mt. Sinai Medical Center. I used to be full-time many, many years ago, but I've always maintained my affiliation with them on a volunteer basis, so I supervise the brain injury clinic there once a month is my general charge right, now it's twice a month, they're shorthanded, but typically once a month I supervise the brain injury clinic at Mt. Sinai.

Q In your private practice in physical medicine rehabilitation, do you have occasion to refer patients out to other forms of doctors such as orthopedists, neurologists

and such?

A Absolutely, yes.

Q Is a PM&R, physical medicine rehabilitation doctor, is that someone who oversees the physical therapy of a particular patient?

A Yes, that would be one thing that we might prescribe and oversee.

Q Can you please tell the jury -- I guess you could limit it to the injury here, to a back injury or disc injury, and I'd like you to assume, Dr. Alongi testified he has a failed back syndrome, Mr. Evans.

Could you please tell the jury the purpose of physical therapy with someone with a sustained prolonged back injury?

A Sure. Physical therapy can provide at least temporary relief, because of the heating -- heating pad, ultrasound, electrical stimulation, medical massage, things of that nature can give someone at least temporary relief. Doesn't cure the condition, of course, but they will have some temporary relief, plus exercise is very important in terms of maintaining whatever muscle strength they have, range of motion, stretching, things of that nature.

And the supervision is important to make sure that the form, how the exercise is done, that the individual is complying with the program, that sort of thing.

Q And when you say complying with the program, other than going to the physical therapy, why is it important to have a professional supervise not every single movement, but on a timely basis, the physical therapy someone does to rehab?

A Well, specific to the exercise portion, as I mentioned how you do the exercise is important, so you don't want to do it in a way that causes additional pain or an additional injury perhaps, and so the physical therapist is there to reinforce the technique of how it is done.

Q Have you testified in court prior to today?

A I have.

Q And have you ever testified on behalf of Mr. LoRusso or myself or anyone at the firm of Mike LoRusso?

A I have not, no.

Q Do you testify -- withdrawn.

Do you do evaluations of injured persons for both plaintiffs and defendants?

A I do.

Q Are you being paid for your time away from your practice and your other duties?

A Yes.

Q What is the half day rate to come here and testify this morning?

A It's $4,450 for the half day.

Q Were you also paid to do the examinations and write the reports the two previous examinations that you did? We'll go over them in a little bit, but you were paid for that, as well; correct?

A Yes.

Q Did you and I at least speak on the phone to prepare, based on your reports over the last week or so?

A Yes, we did.

Q And is this morning the first time we met?

A That is correct.

Q Can you tell the jury what a life care plan is?

A Yes. A life care plan is a document that details the medically necessary services, equipment, medications, treatments, that somebody who has been seriously or catastrophically injured will require.

Q Did there come a time when our office asked you to examine Mr. Evans, go over medical records and give your opinion as to what, if any, life care plan he would need, based on the injuries he sustained?

A Yes.

Q Can you please tell the jury your qualifications to render a life care plan, what makes you qualified to do so?

A Well, that has to do with my training. I am trained to take care of somebody who has a disabling condition, as I described it to you before.

So all I've done is taken that knowledge and training and I've organized it in a way that you can look at it and it makes some kind of sense, and then the only final piece really is what does it cost, what does physical therapy cost, what does a wheelchair cost.

And those are things that I've just developed over the 25 years I've been doing this.

Q In your own private practice in the 25 years of practicing, are you familiar with the cost of physical therapy in the tri-state area?

A Yes, I am.

Q Are you familiar with the cost of MRIs and x-rays in the tri-state area?

A Yes, I'm generally familiar with those costs, yes.

Q And the cost of not just a physical medicine rehabilitation doctor, but what a orthopedic charges in the tri-state area?

A Yes.

Q How about the cost of pain relief medication?

A Yes, generally so, yes.

Q And durable medical equipment?

A Yes, sir.

Q In addition to being familiar with the cost from your own private practice, do you utilize a particular resource to -- in a life care plan, to get national costs,

the average costs?

A I do do that. The research is really to make sure that my numbers are up-to-date, so to speak.

The resource I use specifically is something called National Fee Analyzer. This year is 2016. Every year they come out with a new book of costs.

Q And in this particular case, did you, in addition to your 25-years-plus of experience, did you also utilize a national fee -- the National Fee Analyzer?

A I did.

Q Did you specifically analyze any part of the country? Did you narrow it down?

A Well, surely. I narrowed it down to --

(Phone interruption)

THE COURT: Can we just take one second. Twilight zone. There's a phone going off and I don't know where it is. A lot of people noticed it, so I thought we'd let it finish.

Go ahead.

A I narrowed it down to the area in which Mr. Evans lives.

Q On how many occasions prior to your testimony did you physically examine Mr. Evans?

A Twice. I saw him twice.

Q Can you please tell the jury when it was that our

office retained your services, or at least around the time, when did you first do the exam?

A I first examined him actually, that would be March 14, 2013. So the office would have been contacted, clearly, sometime before that. Likely, late February, sometime.

Q And without necessarily reading from your report, which is not in evidence, the life care plan, can you tell -- first, I'll ask you, were you provided with medical records of Mr. Evans' treatment from at least 2007, June, until approximately March 2013?

A Yes.

Q And if you could just, for the record, you were provided with all of his treating physicians or at least with -- do you want to just list what you reviewed?

A Sure. I just have to refer to my report because there's lots of them.

THE COURT: Just don't read from it. Feel free to refresh your recollection.

THE WITNESS: Thank you, your Honor.

A So the various hospitals, St. Vincent's Hospital, Good Samaritan Hospital, Huntington Hospital, St. Charles Hospital.

The various physicians that I saw the records from, that would be including Dr. Venditelli,

Dr. Giambertone, Dr. Alongi, Dr. Gasalberte, Dr. Shanon, Dr. Shetty, Dr. Wolin, a Dr. Ritholz, Dr. Hausmann, Dr. D'Ambrosio, Dr. Meinhard, Dr. Emmanual, I don't think I mentioned that one. BAB Radiology. Maximum Motion Physical Therapy. Rosalind Zuger. Tinari Economics Group, and Dr. Lim.

Those are the records -- I don't think I missed any of them, for the first report when I saw him in 2013.

Then when I saw him again in 2016, there were some additional records from Dr. Alongi, Dr. Erlanger, Huntington Hospital and Dr. Mendelsohn.

Q In addition -- in addition to -- withdrawn.

Did you review all the records you were sent?

A Yes.

Q In addition to reviewing the medical records, did you do an examination of Mr. Evans on each occasion?

A I did.

Q What is the purpose of your physical examination after reviewing the medical records prior to rendering a life care plan?

A Well, the purpose of the examination is to assess whether the individual before me makes sense, given the records that I'm reviewing, is the presentation consistent with what is documented here, to get a sense of the individual, him or herself; to find out what the various

physical limitations are from the perspective of the individual; and then do the physical examination to see and to measure what the actual physical limitations might be, weakness, range of motion, things of that nature, what's painful, those are the general things that I would do.

Q What if any knowledge did you have of prior medical conditions of Mr. Evans when he came to you on the first occasion, in other words, what other than what he was -- withdrawn -- other than his accident-related injuries he was claiming, what had gone on in his past?

A The primary thing that I was aware of previously was the deep vein thrombosis, he had a remote history of a DVT in the left leg. I believe that was the main thing, if I could just refresh my recollection here.

And high blood pressure. Yes.

Q And after seeing Mr. -- after examining Mr. Evans and reviewing the medical records back in 2013, did you prepare a life care plan that you gave to us in written form?

A I did.

Q Did any part of that life care plan, any part of it, have -- have anything to do with his DVT?

A No.

Q Deep vein thrombosis.

Was the entire life care plan solely for his

accident-related injuries to his back?

A That would be correct, just for the back.

Q Because we're here about -- withdrawn.

You then did one in 2016; is that correct?

A Yes.

Q Can you please tell the jury when you -- when did you re-examine Mr. Evans?

A I re-examined him January 6th of this year, 2016.

Q And did Mr. Evans on each of the occasions tell you the medications he was taking as prescribed by his doctors?

A Yes.

Q Both for the accident and if he was taking something otherwise, like coumadin or something?

A Well, I knew he was on coumadin. My primary interest though I focused on what the accident-related medications would be.

Q When you saw Mr. Evans again in February of -- January, I'm sorry, of 2016, did you re-interview him?

A Yes, I did.

Q And did you also do a physical examination?

A Yes.

Q The life care plan you prepared, it's in evidence, I think it is Plaintiff's 26, it's in front of you, before we get to it or the questions about it, is there any portion of that life care plan that has any treatment, any

recommended treatment other than for his accident-related back injury?

A No, there's nothing in here other than specific for the back condition.

Q And just so we can get it clear, is there anything in that life care plan that has to do with the DVT?

A No.

Q Or obesity?

A No.

Q How about a subsequent cancer diagnosis after the accident?

A No, nothing.

Q And how about diabetes that developed in 2013 after a weight gain?

A No, no costs in there for that.

Q When Mr. Evans -- what if any knowledge did you have of further surgeries since the first time you examined him, so when he came to you in 2016, what if any knowledge did you have of additional surgeries that he had?

A So, yes, what he had had between my two examinations was removal of hardware, except for half a screw, which was broken and embedded in his sacrum, but he had had a removal of hardware procedure subsequent to my examination -- my first one.

Q And to save time, when we go through your plan, the

jury has already heard all of the anatomy or anything like that, if there's a diagnosis that you are basing it on you, can state it and I'll state it in a question form. Okay?

A Yes, sir.

Q Just so the record is clear, too, between 2013 and -- even after 2013, you were aware of his leukemia diagnosis; correct?

A Yes.

Q And treatment?

A I'm aware of that -- I was aware of that, as well.

Q Can you tell the jury if his medication had changed as he informed you, from 2013 to 2016?

A Yes, there was a change.

Q What was he taking in 2013 and the dosage?

A I just have to refer to my plan from then.

At that time he was taking Flexeril, which is a muscle relaxant medication. And that was ten milligrams -- taking that once or twice a week.

He was also taking Percocet, 10/3/25, Percocet is an opioid pain medicine, and he was taking four to eight pills in a day at the time that I had seen him originally.

Q And was the cost of Flexeril and Percocet included in the -- at the dosage he was taking included in the first plan?

A It was, yes.

Q Did those costs go down dramatically?

A Compared to my second plan, yes. In the second plan the medication cost dropped dramatically, yes.

Q Is it common if a case is actually going to trial to re-examine and redo the life care plan to see if anything has changed if there's been a passage of time such as three years in this case?

A It very individual specific, it has been three years, that's one reason it would be done. Also, I understood that he had another surgery, so things can change.

And those are the two main reasons why I specifically would have re-examined Mr. Evans and, of course, there was a change in the medication, so all these things need to be documented and assessed, et cetera.

Q What is more expensive, Percocet or OxyContin?

A Depends on the milligrams, but generally Percocet is more expensive than OxyContin.

Q If you are taking more Percocet, you said it was four to eight Percocet and it goes down to four OxyContin, does -- other than the cost of the pill, does that greatly reduce the annualized cost?

A Yes, the annualized cost is much less.

Q What was your knowledge of the milligram and type of narcotic pain medication Mr. Evans was on as he told you?

A He had told me he was taking the OxyContin, 30 milligrams, two to four tablets in a day. That was the dose.

Q Is that, in fact, what you based your plan on?

A Yes.

Q I'd like you -- did you -- did we show you records from '95 and '84, indicating a severe learning disability and mental retardation to a mild level of Mr. Evans?

A You did show me those records.

Q I'd like you to assume that the other day Dr. Alongi testified that it's not OxyContin, it's Oxycodone and that he takes it four times a day. Or that's -- is Oxycodone more or less than OxyContin?

A Oxycodone is less expensive.

Q So today, when you give your opinion, you are going to change the -- because Mr. Evans gave you the wrong name of the medication, are you going to change it and modify it down; correct?

A Yes. With new information, I will certainly adjust my opinion appropriately.

Q Other than that mistake that Mr. Evans made to you, is there any other change, before we get to the life care plan because we're going to ask you to actually change it on the plan?

A No, no change.

Q Okay. I don't know if I asked, did you actually do a physical examination again in January of 2016 in addition to reviewing the medical records?

A I did.

Q I'm going to ask you -- that you render all of your opinions with a reasonable degree of medical certainty from this point forward, okay?

A Yes, sir.

Q At any time you couldn't, whether I ask it or not, you will please need to let us know for the record, okay?

A I will.

Q I'm going to give you a hypothetical based on facts and based on testimony that has occurred, okay?

A Yes, sir.

Q And then ask you questions about your opinions as to his future life care plan.

I'd like to you assume that on the date of the accident, 6/6/07, Mr. Evans was 32 years old, he fell approximately off a plank on a construction site five feet from where his feet were and where from his head was onto his head and back onto a floor.

We went to the emergency room and made all of the complaints that are in the emergency room record that's in evidence that you reviewed -- you did review it, correct?

A Yes.

Q So we don't need to go over the complaints that are in there.

I'd like to you assume he saw all of the doctors for the records that you reviewed but more specifically Dr. Gasalberte, Dr. Giambertone, Dr. Erlanger Dr. Shetty and Dr. Paul Alongi, you reviewed all of those?

A Yes.

Q As well as several physical therapy facilities, North Shore and the ones listed?

A Yes, sir.

Q I'd like you to assume that Mr. Evans, after having localized pain the day of the accident, developed in the days after radiating lumbar radiculopathy. An MRI was ordered and showed herniated disc at the L4-L5 and a bulging disc at L5-S1.

I'd liked you to assume that he had the surgeries as indicated in the Huntington Hospital records, both the first and second surgery, one in 2011, one in 2014, okay?

A Yes, sir.

Q I'd like to you assume that he had the prior DVT, two subsequent DVTs, that he subsequently after the accident developed leukemia and that he had gone through two rounds of chemotherapy and was eventually determined to be disease free for now, in remission, okay?

A Yes, sir.

Q I'd like you to further assume he had a diagnosis of diabetes in 2013 from a doctor at Stony Brook, and I'd like you to assume that all of the findings in the medical records and your physical examination are what they were, okay?

A Yes.

Q I'd like you to further assume that Dr. Alongi testified the other day that Mr. Evans has what's called a failed back syndrome, failed laminectomy, post laminectomy syndrome, one in the same.

That it is his opinion that Mr. Evans will be in pain the rest of his life to his lower back.

I'd liked you to assume that the first surgery relieved the radiating pain from his back to his mid thigh on the left side and the back to the buttocks on the right side, but he still has localized pain and that Mr. Evans, although not then testifying yet, has testified that he does have localized back pain that is relieved through painkillers, okay?

A Yes.

Q I'd like you to assume that Dr. Alongi testified that he was on Percocet and it's in his records and that he is not on Oxycodone, not OxyContin, okay?

A Yes.

Dr. Carfi - Direct/Mr. McCrorie

Q And further, I'd liked you to assume that given the permanency to his back pain, that he would be either on narcotic painkillers the rest of his life or undergo something called a spinal cord stimulator. The doctor explained to the jury what it would be and what it would hope to do to reduce or eliminate painkillers.

Do you have an opinion, with a reasonable degree of medical certainty, as to the future lifetime life care needs, of both in medicine and durable medical equipment for Mr. Evans?

A I do.

Q Taking each category of the life care plan, can we do that. Taking medical care, the first page, do you have an opinion as to -- withdrawn.

Why don't you tell the jury with a reasonable degree of medical certainty the types of medical care in the future then, we can go over the purpose and frequency?

A Well, the types of medical care would be the rehabilitation physician like myself, his treating doctor, Dr. Gasalberte, orthopedist, and a pain management physician, those would be the three types of doctors specific for his back condition.

Q Okay.

When you said rehabilitation specialist, that was Gasalberti, Dr. Alongi is what type of doctor?

A He's a surgeon, he would be the orthopedic spine surgeon.

Q So please tell the jury, with a reasonable degree of medical certainty, a rehabilitation specialist, the purpose of it, the frequency and the cost per visit. Okay?

A So the rehabilitation doctor would be basically monitoring Mr. Evans' functional status, meaning how he does his things day-to-day.

Equipment, which we'll be going over in a little bit, therapy, which again we'll be discussing -- we've already discussed it and it will be at the end of the plan. That will be twice a year. That costs $194.40 per visit so times two, gives you an annualized cost of $388.80.

Q And you have a resource there, on page seven, a lists the resources, but where did you get that cost --

A That cost comes from the National Fee Analyzer which gives you a national average and then there's another table that gives you a conversion factor to convert it really to any geographical area you might be interested in in the country, so that's where that specific dollar amount comes from.

Q And for the record, do you have an opinion as to whether or not this entire life care plan is due to the accident-related back injury sustained on June 6, 2007?

MR. KAMINSKY: Objection.

A Yes, I do --

THE COURT: No, no, no, wait, wait. No, no.

Sustained.

(Continued on next page)

Q You previously testified that nothing in this plan has anything to do other than as far as the accident-related injury, correct?

A I did testify to that, yes.

Q So, please tell the jury for what period of time does this plan --

MR. KAMINSKY: Judge, I am going to object.

THE COURT: Let's bring the jury out, please.

(Whereupon, the jury exits the courtroom.)

THE COURT: Doctor, you may step down.

(Whereupon, the witness exits the courtroom.)

THE COURT: I wanted to give you an opportunity to make a fuller record.

As I understood the objection, this is not a causation witness.

MR. KAMINSKY: Correct. This is a Life Care Plan expert. And he is not here to bolster the testimony of either the plaintiff or any other witnesses to state an opinion as to what he thinks the cause of the doctor is. That's not what he has been disclosed for. That is not what he is here to testify to.

There has been several times during the hypotheticals posed by Mr. McCrorie that he said, you are only testifying as to what was caused by the accident. I am trying not to object to every question. For the record, I

do object to the hypotheticals, to the extent that Mr. McCrorie says they were casually related to the accident. I think they should be modified to say the life care plan pertains only to the plaintiff's back injury and not attribute them to any particular cause. So, I would move to strike the hypothetical, unless Mr. McCrorie wants to have the hypothetical deemed modified to save some time.

MR. McCRORIE: Certainly.

MR. KAMINSKY: But I think it is important that this witness not be led down a path to say that the injuries were caused by the accident or ask him his opinion about anything to do with that. I would move to strike all the questions and answers in that regard.

THE COURT: Indeed, I will strike the questions and answers in that regard. And for the purposes of amending your hypothetical, you did go through: I want you to assume he walked a cross a plank; I want you to assume he fell from five feet from the plank; ten feet from his head, etcetera, etcetera. And I think we should stay away from that with this witness.

MR. McCRORIE: Yes, Your Honor. In terms of amending it --

MR. KAMINSKY: I understand and --

MR. McCRORIE: I will amend it.

MR. KAMINSKY: I would ask that some type of

instruction be given to the jury to clarify that this witness is not here, and Mr. McCrorie's hypothetical is being amended to take that out.

MR. McCRORIE: And it is their choice whether --

MR. KAMINSKY: Ultimately, it would be their decision. It's just that I am saying this witness is not here for that.

THE COURT: Let's bring in the witness. Let's bring in the jury.

(Whereupon, the witness resumed the witness stand.

THE COURT OFFICER: Jury is entering.

(Whereupon, the jury enters the courtroom.)

THE COURT: Come on in. Please sit down.

I just want to clarify for the jury that Dr. Carfi is not here to establish the causation for any injuries. He is here to discuss the life plan with you.

And I will ask you to make sure that the questions reflect that.

MR. McCRORIE: Yes, Your Honor.

Q Dr. Carfi, regarding orthopedists, could you please continue with your recommendation as to future orthopedic care?

A Yes. So, the orthopedist would be seeing him once a year to monitor his spine. That would be the same 194.40 for the visit. That's the annualized cost, 194.40.

Q Continue, please, with the pain management?

A Pain management, the pain management physician would be monitoring the medications, monitoring his pain, treating the pain specifically. Because he is on the opioid pain medicine, that needs to be done on a monthly basis. Again, that's 194.40 for the doctor's visit; times 12, now gives you an annualized cost of $2,323.80.

Q The spinal cord stimulator, what type of doctor puts that in and treats that modality?

A Typically, it could either be the pain management --

MR. KAMINSKY: Judge, I object. I don't think there has been evidence that he is going to have these procedures.

THE COURT: Sustained.

Q So, if you would go to the next page, Doctor.

On Page 2, what is listed on that page?

A Well, Page 2 is the medication page. And that's where I had the OxyContin that Mr. Evans had told me about when he came to visit me in January.

Q Do you have a pen on you to cross out the number that's there?

A Yes.

THE WITNESS: Write on the evidence?

THE COURT: Gentlemen, write on the evidence? This is marked in evidence.

THE WITNESS: I don't want to mess up.

MR. KAMINSKY: It's okay. I'm okay.

THE COURT: Okay.

Q If you just write the word "Oxycodone" instead of OxyContin, leaving the 30 milligrams there.

And the OxyContin have a price that you listed there. What was that price, although it is going to go down by a lot.

A The OxyContin price is $565.57 for 90 pills.

Q OxyContin, Oxycodone are they both -- just describe the difference for the jury?

A Surely. Both have the same active ingredients. In other words, the active ingredients in OxyContin is Oxycodone, but the difference is OxyContin is sustained release. So when you take it, it releases very slowly over time. The idea is you take it a couple of times a day; it reaches a certain level and it stays at that level 24/7 essentially.

Oxycodone is more what you call immediate relief. You take the medicine. 45 minutes to an hour it peaks. It stays there a little bit. And then after three, four hours it starts to drop and then you have to take another one to bring it up. So, it's more a cyclical concentration in the blood. That's the different.

Q The Oxycodone what is cost for the four times a day, the reduced cost?

A That's going to be $110.61 for 120 pills.

Q And what does that change the annual cost to? So,

please cross out the annual cost and put the new annual cost. What is the new annual cost?

A The new annual cost is $1,345.76.

Q And on each of these you list the resource, and there is a key to tell where you got the resource from?

A Yes. There is a key on the back like an index that shows you where the numbers come from.

Q I would like you to assume there was testimony -- withdrawn.

With regard to future MRIs, do you have an opinion as to whether or not he should have MRIs, the frequency of same?

A Yes. His back needs to be monitored. It could be five years, a lumbar MRI.

Q Okay. And what is the cost, the annual cost?

A The MRI cost $2,974.90. So, every five years divided by five, that gives you your annualized cost of 594.98.

Q On medical supply and equipment, if you could start with the second one, Doctor?

A Yes.

Q Why don't you just list your opinion as to the medical supplies he will need over his lifetime?

A Okay. So, this is the medical and supply equipment sheet. And what I have listed here is a thermophore heating pad, a reacher, long-handled shoehorn, electric scooter, a trunk lift for that scooter, a lightweight manual wheelchair, a

cushion for that wheelchair JAY-basic cushion and a cushion cover. That's the list on that page.

Q Could you tell the jury the purpose of these medical supply and equipment as it relates to his failed back syndrome and his injuries?

A Surely. So, the first thing I mentioned is the thermophore heating pad. That's basically for his own pain management at home. So, he can put a heating pad on his back to help reduce his pain.

The reacher is to allow him to reach items. That's the thing on it with a pistol grip. It has a gripper at the end so he can reach a cabinet, pick something off of the floor so he doesn't have to bend over so much. That's less painful.

The long handled shoehorn is so that he can put on his shoes more easily without having to bend over and stick his finger in the back of his heel to get that shoe on, he has the long handle shoehorn to assist him with that.

Now, the electric scooter, the purpose of that is he has some limitation in how long he can walk. Sitting is less limited. So the purpose of the scooter is to allow him to engage in activities in the community. So, if he and his girlfriend wanted to go to a flea market, they wanted to go to the zoo, if they wanted to do something else that would require him to move around a lot, that's what it is for. It is for him to engage in social activities with friends, family, girlfriend,

that sort of thing.

Q What is the annualized cost for that?

A The scooter is $1,649. They last about five years. So divided by five gives you the annualized cost of $329.80. That's on the scooter.

Now, the trunk lift, because you may need to transport the scooter to a location, Bronx Zoo or Brooklyn Aquarium or something of that nature, anywhere really.

And the next item, the lightweight wheelchair, that's going to be a situation where maybe the scooter is not practical to transport or take, and this would allow someone to push him, if that's necessary, for longer distances, of course. It gives him someplace to sit.

The JAY-basic cushion. JAY is a brand name, basic. They are really basic cushion. But every wheelchair really needs to have a cushion. And then the cushion cover is to cover that so it isn't soiled.

Q Doctor, are those last few items due to his back injury or his obesity?

A Those are specific for his back injury, and the functional limitations he has as a result of the back injury.

Q Would you continue with any home equipment adaptations that you recommend?

A So, this is another sheet of, basically, equipment, but I entitled it home equipment and adaptations.

The first one is the shower chair, so that he can sit while he showers as opposed to having to stand. Shower is a slippery environment. You don't want to have an accident and fall.

So, because he is sitting, he needs the handheld shower, a shower wand, essentially. Because he is immobile, so that shower head has to be mobile. A long handle bath brush is next on the list. That allows him to access various body parts without having to bend over as far, reach his back, that sort of thing.

Then the grab bars, a set of two in the bathroom, bathtub/shower area so he has stable purchase when he has to get in, get out, that sort of thing.

And then the last thing is something called a toilet safety frame, which is basically handlebars, essentially, for the toilet so he can boost himself up, lower himself down carefully to minimize his pain and those transitions.

Q Can you just go over the annualized costs of those?

A Sure. The shower chair annualized cost is $31.07. Handheld shower $10.24. The long handle bath brush annualized $23.25. The grab bars annualized to $5.98. And the safety frame for the toilet, annualized to $14.05.

Q Do you have an opinion with a reasonable degree of medical certainty as to the physical therapy he needs going forward for Mr. Evans?

A Yes. He should continue with, essentially, maintenance physical therapy. I'm not suggesting therapy is going to make him better. It's really to maintain what he has going forward and provide some pain relief.

Q And for what period of time --you have already said it, but what period of time should he be in physical therapy?

A Well, that will for life. His condition is permanent. So, that would be physical therapy ongoing for life.

Q Would this be in addition to any home therapy he is doing?

A Well, this would in addition to anything that he might try to do for himself, yes.

Q Please tell the jury the opinion and the frequency and the annualized cost?

A That would be twice a week. That costs $131.10 per treatment. So, doing the math, over the course of the year comes out to $13,634.40.

Q And I would like you to assume that since the time of his accident, as early as a week later he started physical therapy for the first time in his life, and even up until a few weeks ago he was in aqua therapy. Are there different types of physical therapy?

A There are different types. Some therapists have subspecialties and different types of manipulation therapies. So there are all different types. And they can cost

differently, certainly. But this is just basic types of physical therapy with the stimulation and heating treatment and therapeutic exercise. That's what this cost is.

MR. McCRORIE: Nothing further, Your Honor.

CROSS-EXAMINATION

BY MR. KAMINSKY:

Q Good morning.

A Good morning.

Q My name is Alan Kaminsky. I represent the defendants. I am going to ask you some questions, okay?

A Surely.

Q You first provided a life care plan in 2013, correct?

A Yes.

Q Did you total up what that life care plan came to?

A I did not do that. I generally don't give you a total for everything.

Q Did you do the annualized cost of that life care plan?

A I did not total the entire annualized plan, no.

Q You just did gave it item by item by item by item, correct?

A That would be accurate, yes.

Q Is it fair of me to say kind of like when somebody gets a credit card bill in the mail, item by item by item by item, right?

A I listed the items, yes.

Q You revised it earlier this year, correct?

A Yes, sir.

Q Fair of me to say you significantly reduced it, correct?

A Significantly reduced the medication cost, yes.

Q So, the item by item by item costs when you total them up, they were lower the second time around, correct?

A The medication item was less. The other things may have gone up, may have gone down, individual items but I don't know what the total is.

Q But you still have to check everything. You have to check every item to see if it's valid or not valid, correct?

A I recheck every item every year, yes.

Q And you want to check the prices, your sources. You want to check to make sure everything on there is legitimate, correct?

A Yes, sir.

Q And if it's not, you cross it off, correct?

A If somebody doesn't need something anymore, sure I would cross it off.

Q Let's go over your most recent plan that's in evidence, okay?

A Yes, sir.

MR. KAMINSKY: May I have it, with the Court's permission?

THE COURT: Yes.

(Document handed to Mr. Kaminsky.)

Q This is Plaintiff's Exhibit 26 in evidence. And on this plan, you list item by item, all sorts of things that you claim that the plaintiff is going to need for his life care plan, right?

A That's correct.

Q Now, on this life care plan, you say that you have already made one change on Page 2. You agree that instead of $6,800 a year for his medicines, you have reduced that significantly, you reduced it to $1,345, correct?

A I did do that, yes.

Q Before I even ask the question, the annual costs are down by over $5,000, true?

A On the medication, yes, sir.

Q And would you agree with me that in your life care plan the medications are one of the most significant costs on an annualized basis, correct?

A It depends on the individual. It can be, surely.

Q I'm only talking about Mr. Evans. I'm not interested in your other -- well, you raise a good question. How long have you been doing these life care plans?

A About 25 years.

Q And roughly, how many life care plans have you done?

A In last 25 years, I have roughly authored 2,500 to

3,000 plans.

Q And of those 2,500 to 3,000 plans, virtually all of them are on behalf of plaintiffs who are in some sort of litigation, correct.

A It's the majority, most of them. Yes, sir.

Q Would you consider 95 percent or more to be the majority?

A In terms of plaintiff versus defense, yes.

Q You have testified in other cases, correct?

A Surely.

Q 95 percent of your 3,000 plans are on behalf of plaintiffs who are in litigation, true?

A Yes.

Q Have you ever checked to see if any of those 3,000 plans were actually funded?

MR. McCRORIE: Objection.

THE COURT: Overruled.

Q In other words, have you ever gone back to check to see if anyone has ever actually abided by your plans or your recommendations?

MR. McCRORIE: Objection.

THE COURT: Overruled. Have you ever checked?

THE WITNESS: I have never checked, no, Your Honor.

Q So, you drafted 3,000 plans for plaintiffs who are in litigation, and you don't even know if one of them ever followed

any of your recommendations, true?

A Yes, sir.

Q Let's talk about this life care plan for Mr. Evans. I asked you if the medications were one of the highest annualized cost. And as far as Mr. Evans goes, you agree with me that it is, correct?

A I would say, yes, that would be correct.

Q Now, because if we look at some of the other ones, the second highest cost --

MR. KAMINSKY: May the witness step down, Your Honor?

THE COURT: Sure.

MR. KAMINSKY: Could you step down.

THE WITNESS: Sure.

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

Q Let's go over all the items, item by item as if this were a credit card. Let's go over this in front of the jury.

Medical cost, rehabilitation specialist. And you say that that's got on annualized cost of $388 a year, okay.

An orthopedist, he needs to see an orthopedist once a year. And that's based on the testimony of Dr. Carfi, correct?

A Me, yes. Yes, I just say that.

Q And you said that -- by Dr. Alongi. I'm sorry. I stand corrected.

You said that cost of that is $194 a year, correct?

A Yes.

Q How much did Dr. Alongi charge the plaintiff?

A That, I don't know.

Q Are you aware that it's actually $92?

MR. McCRORIE: Objection. Comp rates. Objection.

THE COURT: Overruled. However, if an expert is asked to give their opinion about something or asked to assume certain facts and you find the facts to be different from those which the expert is asked to assume, you are free to reject the testimony of the expert on that issue.

Q You put down $193 for an orthopedist, such as Dr. Alongi, correct?

A Yes.

Q And are you aware that the plaintiff has testified that he intend to continue to treat with Dr. Alongi?

A I was not aware of that testimony.

Q Have you seen how much Dr. Alongi charges for a visit? Have you looked at the records?

A No.

Q Are you aware that it's approximately 93 or maybe $95 a visit?

A I am not aware of that.

Q Would you take this pen and do me a favor and cross off --

MR. McCRORIE: Objection.

THE COURT: Again, here we are asking him to mark up what is in evidence. Now, I allowed him to do so during the direct.

MR. McCRORIE: Because of a mistake, and Dr. Alongi's billing is not in.

THE COURT: Let's do it in a different color.

MR. KAMINSKY: Okay.

MR. McCRORIE: Can we approach, Your Honor?

THE COURT: Yes.

(Whereupon, an off-the-record discussion was held.)

THE COURT: Let's take the jury out.

(Whereupon, the jury exits the courtroom.)

THE COURT: You can step out. Thank you.

(Whereupon, the witness exits the courtroom.)

THE COURT: For the record, the sticking point is the issue of what the plaintiff pays Dr. Alongi. And it has come up at conversation at the bench that Dr. Alongi gets a Worker's Compensation rate, a reduced rate for this.

MR. KAMINSKY: Judge, I have the relevant information. It's $93 a visit.

MR. McCRORIE: And plaintiff's issue is that's the amount that the doctor is mandated to charge under Comp. The jury is going to get a charge that he has to pay everything back after this trial, which is what the life

care plan deals with, the future. We stipped to the amounts. We don't get into the fact that Worker's Comp does a reduced rate. In the future, the client needs to do a Medicare set aside in this case, and he will be charged, whatever doctor he goes to, the full rate, not a Comp rate. And I don't -- although Your Honor says can you raise it up, this is the testimony of what it is for an orthopedic. I mean, his doctor is going to come in. I assume some of them take Comp. And when Comp is over, if they continue to treat the person, the rate goes up to the regular rate. But I don't believe the testimony of the amount of Comp compared to regular costs ever comes in or should come in.

THE COURT: So, of course, the witness has already established -- he is out of the room. He has already established how he comes up with these rates. And you are asking him to put a different rate in his life care plan based on what the rate that Mr. Evans has been paying to Dr. Alongi.

MR. KAMINSKY: Correct.

THE COURT: You are free to argue in your summations, Mr. McCrorie, that he shouldn't be bound to keep going to the same doctor, and that you heard testimony about what the average rate is or what the accepted rate is from the witness and how he comes up with these rates. And you could ask them to then increase it again.

MR. McCRORIE: I just think, respectfully, Your Honor, just the issue isn't -- that doctor, as any doctor, is mandated by law to take the Comp rate until the verdict.

THE COURT: Let's be clear, not all doctors accept Comp.

MR. McCRORIE: Understood. And Mr. Kaminsky did not cross-examine the doctor about it. I submit, if I said to the doctor on direct, do you charge more when the case is over and the client gets his money? This is totally improper. It's never allowed in a case to bring up the difference between the compensation rate and what he has to pay going forward.

MR. KAMINSKY: Judge, it is part of every case. Because on the verdict sheet, the jury is going to be told what the past medical expenses are. And under Mr. McCrorie's theory, the past medical expenses would be five times higher. And I'm certainly allowed to ask what the past medical expenses are, and I can break them down item by item.

THE COURT: I agree. And absolutely, if you want to bring in testimony at a collateral source hearing that those rates are deflated and that we can expect that the plaintiff will be paying much higher rates, we can deal with the life care plan in the collateral source hearing as well.

MR. McCRORIE: Collateral source hearing doesn't

allow, Your Honor, to increase the plan. If the jury reduces to say he has to get Comp rates in the future, he is losing a hundred dollars a visit. It's not allowed. If the jury is not going to know there is a different rate that the law requires a doctor to accept under Comp as to the general in the Tristate area, I submit, it's improper. But whatever Your Honor is going rule, you are going to rule. But unless there is going to be an instruction to them other than the final instruction that he has to pay the Comp back, that Worker's Comp charge that he has to pay it back, but that still doesn't prove to the jury that there are different rates.

MR. KAMINSKY: I don't have anything else to say. I don't understand the objection.

THE COURT: Sometimes Mr. McCrorie speaks so fast and thinks so fast that he doesn't even complete a sentence before he goes to his next sentence. We are all trying to fill it in.

MR. McCRORIE: In this particular case, the reason that may be happening is this has never happened in a trial with Mr. Kaminsky or myself where a doctor is now going to be permitted to just cross out a life care plan without telling the jury the Comp rate is mandated to be lower and to not explain it to a jury. So, to knock a plan down by what would be 75 percent on each of the items because it's

not Comp. If going forward Comp ends, there is a jury charge for it. And I do have other doctors, if Your Honor is going to permit it, to explain it through other doctors that there is a different rate, I guess.

THE COURT: Now, I have not looked at the records. Are these bills going in?

MR. McCRORIE: They are not in. And what we stipulated, all of the Comp forms were taken out of every single doctor's record. The clean records are in, as they always go in. And the first I'm hearing about the Comp rates is now. If he cross-examined him on it, I would have redirected. Those bills, the file might be here, but we have already said any treating doctor's records from that file --

(Continued on the following page.)

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THE COURT: So am I to understand that you were going to stipulate to past medical expenses without any itemization going before the jury? Is that what your plan was?

MR. McCRORIE: Yes.

THE COURT: Because for them to get past medical expenses, they have to have the bills.

MR. KAMINSKY: Obviously.

MR. McCRORIE: What we stipulated was the number not the causation. The whole number meaning their case is nothing to do with this case --

THE COURT: Just so we're clear, because there's no stipulation yet on the record so I don't know what your agreement has been.

MR. McCRORIE: I believe the stipulation is the same agreement not just with Mr. Kaminsky, but with most defendants that their position is the back is not related, it's preexisting.

THE COURT: Why don't we save the record for a minute, have a conversation with Mr. Kaminsky and tell me what your stipulation is.

MR. KAMINSKY: The stipulation --

THE COURT: No, no, talk to each other and then we'll put it on the record.

Proceedings

(Discussion held off the record.)

MR. KAMINSKY: We stipulate that the amount of the past medical expenses is approximately $195,000. We stipulate to the amount.

We disagree that the past medical expenses are attributable to the accident. But we stipulate to the amount.

And so on the verdict sheet -- no, withdrawn.

MR. McCRORIE: And so that's -- the jury -- it's going to be 195 or nothing, meaning if he didn't need any of these, if it was all preexisting, the herniated disc ---

THE COURT: That's just the point. What if he needed some of it and not all of it and you are litigating the cause, how are they supposed to parse it out when they get that line item on the verdict sheet?

MR. McCRORIE: Number nine went into evidence. Dr. Alongi's record, stripped of any Comp form --

THE COURT: I understand, Mr. McCrorie, but how are you going to ask the jury to set an amount of past medical expenses attributable to this accident if they don't have a breakdown of what the past medical expenses were?

MR. McCRORIE: We say it's all attributable, they say none of it is.

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THE COURT: I understand --

MR. McCRORIE: It's all or nothing, we're going to get zero or 195.

THE COURT: Is that true, Mr. Kaminsky?

MR. KAMINSKY: Not necessarily. There may be some things the jury says are attributable and some things they say aren't attributable. My position will be, I will argue against causation -- some of it is, some isn't. So they need the backup information and I accept your Honor's ruling and I think it is appropriate.

Mr. McCrorie --

MR. McCRORIE: Does Mr. Kaminsky have the amounts for every MRI, every physical therapy? We don't do that, we never did --

THE COURT: Mr. McCrorie, this is not every other time, this is this trial. We have one record. You have many, many, many medical records that have come into evidence.

Now you tell me they have been stripped of these bills. Perhaps the bills need to go in if the jury is to award past medical expenses that are attributable to this accident.

MR. McCRORIE: The bills have AIG all over them and we -- the bills don't go in in the Comp case. The

stipulation has been -- I believe the stipulation was all or nothing. We're not getting -- their doctors say there is nothing but a lumbar strain. That's it. Nothing but a lumbar strain. So we've agreed we get nothing if the jury finds there's no causation.

THE COURT: I haven't looked at the medical bills, but I would assume that after the accident he goes to an emergency room, there are some costs that are attributable to this accident, whether it's from the hit on the head or from the black and blue that had to be dealt with because of his coumadin or whatever his situation was, I'm not prepared to say there is zero that's attributable to this accident.

It is a damages only trial. He goes from the accident to an emergency room. There is something that is attributable to this accident. How are they supposed to determine what that is?

MR. McCRORIE: Judge, I don't know, but we've -- it was all or nothing. But other than that, we don't put in the Comp -- the amounts that are billed and if they did, I would have had Dr. Alongi say this is how much it was under this way. If there's no compensation, this is how much it would be.

If he is saying that's what he wants me to recall him back, I'll consider that. If it wasn't

crossed and now stuff that's not in evidence and wasn't stipulated into evidence, I have no way to get ahead of it and I had no way to get ahead of it, unless I'm permitted to do it with the rest of the doctors.

MR. KAMINSKY: This is a life care plan expert who I believe is using grossly inflated figures not just for this item but for numerous other items and I'm certainly allowed to cross-examine him on them and as a practical matter, even if Dr. Alongi were to come back in and say my non-compensation rate is $150 an hour, virtually no one pays the full amount anyway.

THE COURT: But we already had a motion in limine regarding that and we're not going to do that with the jury.

MR. KAMINSKY: I understand.

MR. McCRORIE: They have a life care planner Jonathan Garay, I'm sure he's not going to come in and say he gets less than 194. He's the witnesses that can say 194 -- he's coming Wednesday -- 194 is the incorrect amount, it should be $100 less.

They have their life care planner. It's not for our life care planner -- what about if he gets Aetna, that's a different rate. What about if he gets another health care? What about Social Security because he has Medicare?

Proceedings

There are so many different rates. That's all done after. We don't let -- this is the general cost. If you now have insurance, that might be a different amount. If you go under SSD, through Medicare, that's a different amount.

This is the cost, their life care planner and not our life care planner crossing out every item. There's 13 different costs it could be.

THE COURT: You're saying 25 things at one time. I do agree with you that we shouldn't have this witness marking up that which is in evidence, with these impeachment areas, and that if you want to put into evidence a document that is adjusted through your life care planner, you can.

MR. KAMINSKY: All right, I won't ask the witness to cross things out on the evidence.

THE COURT: Thank you.

MR. KAMINSKY: I'll leave that.

MR. McCRORIE: It's our position he is asking the jury -- he's having a collateral source hearing in front of the jury even bringing up the Comp amounts. If he does, I think I should be permitted to talk about all the different types of coverage, but if there is none, it has to come out of his pocket, this is how much it is.

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THE COURT: Off the record.

(Discussion held off the record.)

THE COURT: For the record, we are not going to have this witness on cross-examination mark up Exhibit 26. Defense can do that with their own life care planner.

With regard to what the defense is doing, he has a good faith basis to ask the questions about Dr. Alongi only charging $90-some-odd per visit, and seek to impeach the numbers that are on Dr. Carfi's life care plan.

He is not mentioning the Workers' Comp rate and neither will you, Mr. McCrorie.

MR. McCRORIE: Sure, and that is what we believe we need to do. Your Honor has said we cannot, we take exception to that, and see -- that's it, take exception to that.

THE COURT: Thank you.

MR. McCRORIE: And for the record, those numbers -- the number is in evidence. The specific line items -- we don't even have all of Dr. Alongi's bills here or the amount for the hospital records, but -- and he'd be showing him something not in evidence, as to --

THE COURT: I'm not sure what all you're talking about.

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MR. McCRORIE: Here is something from a Comp file that's not in evidence.

THE COURT: Where did you get that? What is that?

MR. KAMINSKY: It's from -- these are the costs from -- that have been subpoenaed to court.

THE COURT: You are not showing him anything that is not in evidence.

MR. KAMINSKY: I'm asking him -- I'm using it to impeach the doctor.

THE COURT: You can certainly use it to show your good faith basis to ask the questions. You can mark it for ID if you'd like. No, it will not come into evidence.

I'm not sure what the objection is or what the comment is.

MR. McCRORIE: The objection is showing the doctor an item that's marked having to do with Comp rates of $93. We don't even know what specifically was done on this date.

There are -- there is the code 99214, we don't know --

THE COURT: You are waving around a piece of paper that's not been marked. Let's mark it for ID.

(Defense Exhibit C, health insurance claim form

page was so marked).

THE COURT: Do not show that to the jury.

MR. KAMINSKY: All right.

THE COURT: Anything else?

MR. McCRORIE: No, your Honor.

THE COURT: Let's bring in Dr. Carfi, let's bring in the jury.

Let's have Dr. Carfi on the witness stand, please.

(Joseph Carfi, M.D., resumed the witness stand)

THE COURT: Counsel, items not in evidence, take them off the rail.

COURT OFFICER: Jurors entering.

(The jury enters the courtroom.)

THE COURT: Please sit down. Thanks for your patience.

Let's continue.

BY MR. KAMINSKY:

Q Doctor, your life care plan is seven pages; correct?

A Yes, sir.

Q The first page you listed as medical care and I just indicated to you, I had asked you to step down, since this document is in evidence, I'm not going to ask you to write on it, okay, I would like to show you Defendant's C

Dr. Carfi - Cross/Mr. Kaminsky

that's been marked for identification, just for you to take a look at it.

A Sure.

(Handed.)

Q Just listen to my question carefully and just say yes or no. All right?

You say that the plaintiff is going to need to see an orthopedic surgeon once a year for the rest of his life at the cost of $194.

Take a look at the document I showed you and tell me isn't it true that the fee that Dr. Carfi has charged him is actually $93 a visit and not $194 a visit, true? Just answer true or false.

A You said the wrong doctor's name. Dr. Alongi. It is true.

Q Thank you. That's almost as embarrassing as when I was wearing the judge's glasses the other day.

THE COURT: What was wrong with those glasses?

MR. KAMINSKY: They look good on you, it's just when I was wearing them.

Q Dr. Carfi, Dr. Alongi's actual fee is $100 a year less, approximately, than your annualized cost; correct?

A According to this document, you are correct.

MR. McCRORIE: Objection.

THE COURT: Overruled.

Dr. Carfi - Cross/Mr. Kaminsky

MR. McCRORIE: Continued objection.

Q As far as someone to monitor his pain medication, you have an annualized cost of $2,332.

So basically you are saying once a month, someone needs to monitor his pain medications, and it comes to $2,332 a year?

A Yes, sir.

Q Now, Dr. Alongi testified that if the plaintiff were to lose a significant amount of weight, he may not need to take the pain medications.

Are you aware of that?

A I'm not aware of that testimony, no.

Q So if the plaintiff were to lose a significant amount of weight, and did not need to take the pain medications, the jury could be free to just cross off $2,332 a year, true?

A Correct.

Q Now, the next item on your life care plan, you've already crossed off for me. You said, on your plan -- and I want to back up a second, because the way this works and you know how this works -- you compare a life care plan, like you've done upwards of three thousand times -- and by the way, could you tell the jury, roughly, how much compensation you've received, not just from testifying in court, but from meeting with attorneys, preparing life care plans, for

studying, or looking at medical records, anything related to litigation, how much compensation do you receive roughly on an annual basis?

A Roughly, gross, that's about $600,000. That's of course before all the expenses.

Q $600,000 a year, to prepare these plans; correct?

A In part, yes; correct.

Q Now, on this plan, which was already greatly reduced from the one you did in 2013, you wrote down an annualized cost of $9,107.50 for something called the spinal cord stimulator, correct?

A I did, yes.

Q You've already crossed that off for us, before I even asked you a question; right?

A I believe I was asked not to say anything about it, so yes.

Q And on the second page -- now we're done with page one, let's go to page two.

Page two, before I've even asked you a question, you've reduced the medications from $6,884 to $1,345; correct?

A Yes, sir.

Q Now, if, just like Dr. Alongi said he may not need the medications, and you just told us on page one, if he doesn't need the medications, he doesn't need anybody to

manage the medications, so common sense tells us if he were to lose a significant amount of weight, and not need to take those medications, we can, or the jury, if they so choose, they can cross off the $1,345 a year; correct?

A If his pain resolves, of course.

Q Now, medications have patents on them; correct?

A Yes.

Q And eventually they come off patent and generic drugs are made; correct?

A Yes.

Q Are your costs the price of the name brand drug or the generic version?

A The Oxycodone is generic.

Q So this is already the generic price; correct?

A Correct.

Q So the only thing the jury would have to decide is whether or not he will need this or he won't need it, true?

A Correct.

Q On page three you say he will need a lumbar MRI once every five years at a cost of $594.98, correct?

A On an annualized basis.

Q Because you say the cost of the actual -- the actual cost of an MRI is $2,974.90; correct?

A Yes, sir.

MR. KAMINSKY: Can this be marked for

Dr. Carfi - Cross/Mr. Kaminsky

identification as Defendant's D?

MR. McCRORIE: Can I just see it, please.

MR. KAMINSKY: Yes.

MR. McCRORIE: I object to it.

THE COURT: Can I see it?

(Complied)

(Defense Exhibit D, Workers' Compensation document was so marked for identification)

MR. KAMINSKY: May this document just be shown to the witness, your Honor?

THE COURT: Yes, just to the witness. It is ID only.

Q Just like I asked you to look at the last document, I'm going to ask you to look at this document, okay.

(Handed.)

Q The plaintiff, we've already established that he's been treated by Dr. Alongi; correct? We've established what the rates were; correct?

A Yes.

Q Are you aware that he has also had MRIs taken in this case?

A Yes.

Q Now listen to my question carefully because it's the same question I asked you before, except I'm going to change Dr. Alongi to MRIs. All right.

Dr. Carfi - Cross/Mr. Kaminsky

Would you agree with me that the cost of the MRIs the plaintiff had in this case, one was $575?

MR. McCRORIE: Objection.

Q And one was --

THE COURT: Sustained.

Come up.

(A bench conference was held off the record.)

Q Now, doctor, is it fair for me to say you've never seen that document before?

A I've never seen it; correct.

Q Is it fair for me to say now that you've looked at that document, that the costs of the MRIs the plaintiff has had to date are significantly less then $2,974 each?

A Yes.

Q Significantly less; correct?

A Yes.

Q So, if the jury so chooses, they can take your annual cost, and significantly reduce it, true?

A That's the jurors' job, they may do that. Of course. Yes.

Q So when you -- withdrawn.

So let's go to the next page of your life care plan, page four, and again, the first item on your page is an annualized cost of over $4,000 a year for spinal cord stimulator hardware.

Dr. Carfi - Cross/Mr. Kaminsky

And would you agree with me that you've already crossed that off your plan before I even asked you a question?

MR. McCRORIE: Objection, didn't cross it off. We were permitted -- we didn't question --

Q That item is no longer on your plan, true?

MR. McCRORIE: I don't know why --

THE COURT: That's is proper cross-examination.

A It is no longer on my plan. Correct.

Q And that is one of the more significant annualized costs; correct?

A Yes.

Q Because the next item of thermal heating pad, you can -- that's $11 a year; correct?

A Yes.

Q A reacher, that's $12 a year?

A Approximately, yes.

Q You even have a shoe horn listed on your plan for the cost of $1.15 cents a year; correct?

A Yes, sir.

Q An electric scooter, the cost is $1,649 and you say he needs one once every five years, correct?

A Yes.

Q So you come up with an annualized cost of $329.80. You cite a source for that price; correct?

A Yes, I do.

Q Are you -- would you agree with me that there are numerous different scooters available at numerous different prices?

A That would be accurate.

Q And would you agree with me that the model you picked is the highest priced and the worst consumer rated model? Or do you even know that?

A Certainly not the highest price. I don't know about the consumer rating.

MR. McCRORIE: Where is the model name?

Q You identify your sources; correct, where you get your prices from, true?

A Yes.

Q Now, if the plaintiff were to lose a significant amount of weight and be able to move around with more agility, he might not even need a scooter, correct?

A If his pain resolves in the scenario that you indicate, that would be accurate, yes.

Q But I want to you assume that Dr. Alongi has testified that if plaintiff were to lose a significant amount of weight, his pain could very likely subside?

MR. McCRORIE: Objection.

THE COURT: Overruled.

It is your recollection of Dr. Alongi's

testimony that will guide you.

Q Have you had a chance to read Dr. Alongi's testimony before testifying today?

A No, sir.

Q Have you been briefed by Mr. Evans' team of attorneys on what Dr. Alongi has testified to?

A Couple of issues only.

Q Well, let me give you another one. Okay?

I want you to assume that he has testified that if Mr. Evans were to lose a significant amount of weight, it could alleviate the pain in his back. Okay?

A Yes.

Q So would you agree with me, just like he may not need the pain medications, just like he may not need someone to monitor his pain medications, he may not need a scooter, true?

A If his pain resolves, that would be true, of course.

Q And if he doesn't need a scooter, he doesn't need $151.73 a year to lift the scooter into the trunk of his car, true?

A Correct.

Q Same thing you also list, a wheelchair. Correct?

A Yes.

Q Same hypothetical, if he were to lose some weight,

he might not need the wheelchair; correct?

A As you've been explaining to me, yes, that would be accurate.

Q If he doesn't need a wheelchair, he doesn't need $31 a year for a cushion to sit on the wheelchair; correct?

A True.

Q And if he doesn't need the wheelchair, he doesn't need $25 a year for a cushion cover to go on the cushion that goes on the wheelchair; correct?

A Yes, sir.

Q Let's go to page five of your life care plan. These are what you refer to as home equipment adaptations. $31 a year for a chair to shit -- sit -- oh, boy.

Could that be stricken from the record, Judge?

THE COURT: I'm not sure he got it.

THE REPORTER: Unfortunately, I did.

Q $31 a year to sit in his shower; correct?

A Yes, sir.

Q $10 a year for a hand-held shower bar, $23 a year for a long-handled back brush, and then something you call tub area number two, $5.98 a year for a grabber bar in the tub; correct?

A Yes, sir.

Q And then $14 a year for something for him to hold onto on the toilet, call it a safety frame?

A Yes.

Q So those are all relatively insignificant costs, not to minimize them, but compared to the things we've either crossed out or potentially reduced, these are $5, $10 items; correct?

A Essentially, yes.

Q So the next item, and this is the biggest cost on your life care plan is physical therapy; correct?

A Yes.

MR. KAMINSKY: Now, I'm going to ask that this document be marked as Defendant's E.

THE COURT: E for ID.

MR. McCRORIE: Can I see it?

MR. KAMINSKY: Yes.

And if it can be shown to the witness after it's marked.

(Defense Exhibit E, Chartis document was so marked for identification.)

Q Have you ever seen that document before?

A I've not, no.

Q Now, you say he needs physical therapy, twice a week, each session is $131 and he needs that for the rest of his life; correct?

A Yes, sir.

Q Now just look at that document and tell me if you

agree or disagree with the following statement:

Up until today, the plaintiff has had physical therapy; correct?

A He has, yes.

Q And would you agree with me that the cost per session of the physical therapy is significantly less than $131 a session?

A According to this bill, yes.

Q So if the jury chooses to, they may significantly reduce your life care plan, true?

A If they choose to, of course.

MR. McCRORIE: Objection.

THE COURT: Overruled.

Q Now, how many physical therapy sessions has the plaintiff had in the last year?

A That, I do not know.

Q Do you know if it's more than ten?

A I don't know.

Q Do you know if it's more than five?

A I do not know.

Q Do you know if it's more than 20?

A I can't tell you.

Q Yet even though you don't know these things, you've taken it upon yourself to say: He needs to go 104 times a year, every year for the rest of his life; correct, at

$131.10 per session?

A Yes, I did say that.

Q Which comes to $13,634 a year, correct?

A Yes.

Q But you've already told us that from looking at the last document that was shown to you, the cost of the actual physical therapy sessions the plaintiff has had up till today is significantly less than what you itemized it at, true?

A That is accurate, yes.

Q Now, what if I told you that over the last year, the plaintiff hasn't come close to 104 physical therapy sessions, would that surprise you?

A Does not surprise me, no.

Q What if I told you it hasn't come close to 50, does that surprise you?

A No, sir.

Q What if I told you it hasn't come close to 20, would that surprise you?

A No.

Q So, would you agree with me that you have grossly inflated the number of physical therapy sessions he may need, the cost of the physical therapy sessions and the total annualized costs, do you agree or disagree?

MR. McCRORIE: Objection.

Dr. Carfi - Cross/Mr. Kaminsky

THE COURT: Overruled.

A I disagree.

Q Now let's explain to the jury how this works. You know how this works, the next witness the jury is going to hear is an economist; correct?

A I don't know what the schedule is, but economists typically come after me at some point.

Q Because what you do is you provide a life care plan and say this is what the plaintiff needs; correct?

A Yes, in essence, yes.

Q And you say this is what the plaintiff needs and this is how much it costs; correct?

A Yes, sir.

Q Then an economist comes in and takes your life care plan and says, well, Dr. Carfi says the plaintiff needs 104 sessions of physical therapy every year for the rest of his lay.

And what the economist does -- and you know this -- what the economist does is says every year those costs are going to increase; correct?

A Generally they put an inflation factor in, yes.

Q So for the first year, the annualized cost under your notes is $13,634 but for the second year it will rise, the third year it will rise, the fourth year it will rise and then eventually it gets astronomical, these costs;

correct?

A I don't know about the word astronomical --

Q I'll change the word astronomical.

This $13,000 is a baseline. Every year the economist is going to project them to be higher and higher and higher, correct?

A Generally, yes.

Q Not only for the physical therapy, but that's what the economist is going to do for every single itemized bit of information on your life care plan, true?

MR. McCRORIE: Objection.

THE COURT: Overruled.

A Based on inflation, I would imagine so, yes.

Q So -- just so we're clear -- if you have wrong information on your life care plan, the economist will have wrong information on his or her plan, true?

MR. McCRORIE: Objection.

THE COURT: Let's not get too far afield.

MR. KAMINSKY: Okay.

(Continued on next page)

Q If we have crossed something off your life care plan, then that would need to be crossed off the economist's projections as well, correct?

A I would assume so.

Q Well, you are not assuming. You know, correct?

A Well, if it is not on my plan, it wouldn't be in the economist's projections, of course.

Q Okay. So, the economist relies on the validity of your life care plan?

A Yes.

Q Doctor, you reviewed the medical records before testifying today, correct?

A Yes.

Q What did the X-ray show of the plaintiff's elbow in St. Vincent's Hospital?

A Oh, my goodness. I believe it was negative.

Q What did they show of his head?

A There was nothing going on, no brain issues.

Q What did the X-ray show of his back?

A I don't believe they took a back X-ray.

Q They didn't take a back X-ray. Good.

How long was he admitted to the hospital?

A I believe it was just that day. He went in and was evaluated and discharged, but I would have to look at my notes.

Q Okay. Now, I asked you about the specific items on

your life care plan. If the jury were to find that the plaintiff's back injuries were not caused by this accident, then this life care plan the jury is free to not only significantly reduce --

MR. McCRORIE: Objection. I wasn't allowed to go into causation.

THE COURT: You can ask the question.

Q The question is, if the jury were to find that the plaintiff's back injuries were not related to the accident, then they are free to totally disregard everything in your life care plan, true?

A It make sense, yes. True.

Q You listed things in your life care plan that even go down a shoehorn for $1.15. Is there anything in your life care plan that would help the plaintiff lose weight?

A The only thing might be the physical therapy for the exercise. But other than that, no, sir.

Q Would you agree, as a medical doctor, would you agree with Dr. Alongi that it is in the plaintiff's best interest to lose weight?

A Of course.

Q And would you agree with Dr. Alongi that if the plaintiff were to lose weight he may not need some of the things in your life care plan?

A He may not. That would be correct.

Q And would you advise him to lose weight?

A If he was my patient, I would certainly be having that conversation with him, yes, sir.

Q Now, you have had no role in treating the plaintiff, true?

A Correct.

Q You have provided no medical treatment to him at all?

A Correct.

Q Have you had any discussions with the doctors who are actually treating the plaintiff?

A I have not, no.

Q Now, I had asked you, and you acknowledged that what will happen next is an economist is going to come in and make projections taking your items to the life care plan, right?

A Yes, sir.

Q You told us you have not added up your costs. Have you seen the economist's report?

A I have not.

Q Do you know what the total amount of your life care plan comes to after it's adjusted for inflation and other costs by the economist?

A I do not.

Q Are you aware that it comes to approximately --

MR. McCRORIE: Objection.

THE COURT: Sustained.

Q Could you tell the jury -- I want you to assume that to date the plaintiff has been to the emergency room, he had a laminectomy, he incurred costs at the hospital, the surgical costs, the anesthesiologist cost, the physical therapy cost, the MRI cost, the CAT scan cost, you told us you reviewed all the records, all the different doctors that he has seen, all the different treatment that has been provided to him, the revision surgery that was done, the admission to the hospital that necessitated the result of the second surgery, the hospital cost associated with that, everything from 2007 up until today, can you tell us what the plaintiff's total medical expenses have been from 2007, almost nine years later, what have the total expenses been for all of those surgeries and everything else?

MR. McCRORIE: Objection.

THE COURT: Well, if you know. Do you know?

THE WITNESS: I do not.

THE COURT: Let's move on.

MR. KAMINSKY: Judge, five minutes?

THE COURT: Yes.

MR. KAMINSKY: Thank you.

THE COURT: Let's take a five-minute break.

(Whereupon, a recess was taken.)

(Whereupon, the proceedings resumed.)

THE COURT OFFICER: Jurors entering.

(Whereupon, the jury enters the courtroom.)

Dr. J. Carfi - Redirect/Mr. McCrorie

THE COURT: Please sit down. Let's continue.

MR. KAMINSKY: Doctor, you were kind enough to let me review your file during the break. I thank you for that.

No further questions.

REDIRECT EXAMINATION

BY MR. McCRORIE:

Q Dr. Carfi, you were asked to assume that Dr. Alongi said certain things. I ask you to assume that Dr. Alongi said that if he lost weight it may reduce his pain but would not reduce the need for painkillers, and it may. Who knows.

Does someone with a failed back syndrome who from the age of 15 --

MR. KAMINSKY: Objection to the leading question.

THE COURT: Sustained as to the form.

Q What effect would it have on someone who had been approximately 250 pounds for 15 years to have a back fusion and then a failed back syndrome regarding their weight gain?

A Well, the effect would be because they are less active they can't work as hard. They are more sedentary. The effect would be for them to gain weight, typically is what happens.

Q The cost of physical therapy visit at $131 per visit, you gave the resource, that's the National Fee Analyzer?

A Yes, 2016.

Q And you, in fact, have utilized physical therapists on a regular basis, not you yourself, meaning your patients?

A I refer to physical therapy frequently, yes.

Q Can you tell the jury what a physical therapist does so they can assess whether the $131 is appropriate. What kind of schooling do they go through?

MR. KAMINSKY: Objection.

THE COURT: If you know.

THE WITNESS: I do.

THE COURT: Go ahead.

A Well, currently, all physical therapists get doctorate. It's a DPT, doctors of physical therapy. I believe it's a four-year school. So, it's lots of training in terms of learning the body, anatomy and, of course, how you treat various types of conditions. So, it's rather intensive education. And then, hopefully, they can get a job or go into practice.

Q And I would like you to assume that Dr. Alongi testified that he is seeing Mr. Evans under the work accident system, and we will stipulate any of the bills from the entire work accident system file, we will stipulate them in. Going forward, Doctor --

MR. KAMINSKY: Objection. Has there been a ruling on this?

MR. McCRORIE: I will stipulate the bills?

THE COURT: So, a stipulation generally takes two people. So, we have to fashion what that stipulation is going to be before we call it a stipulation.

Dr. J. Carfi - Redirect/Mr. McCrorie

Q Assuming Mr. Evans needs to go into his pocket --

MR. KAMINSKY: Judge.

THE COURT: Come up. Take the jury out, please.

(Whereupon, the jury exits the courtroom.)

THE COURT: Doctor, step out.

(Whereupon, the witness exits the courtroom.)

(Whereupon, an off-the-record discussion was held.)

THE COURT: Bring him back, please.

(Whereupon, the witness resumed the witness stand.)

THE COURT: Bring in the jury, please.

THE COURT OFFICER: Jurors are entering.

(Whereupon, the jury enters the courtroom.)

THE COURT: Please sit down.

Q Doctor, I would like to go so the jury can assess where you got your information from that a doctor in Mr. Evans' zip code or area code, an orthopedic, for instance, if he sees him once a year, his cost would be 194.40. Where exactly did you get that information?

A Well, that exactly came from the National Fee Analyzer. I use the 50th percentile average fee nationally. They also give you 75th percentile; I used the 50th. And then there is a conversion table that I can convert it to Suffolk County, convert it to Anaheim, California. But the basic is the national average with a conversion factor average. And that's the fee for the Suffolk County area.

Q And what resource number is that, so the jury could see? Is the resource listed on the one that's in evidence?

A It should be Page Number 7.

Q Can you just tell us if that is there?

A It is there from the National Fee Analyzer, 2016.

Q Wherever that resource says Number 1, what does that indicate? You said where you got it, orthopedist. But, for instance, rehabilitation specialist, pain management, it says resource Number 1, what does that mean?

A Well, again, it's a physician's visit. They don't break it down by specialty. It's an M.D. visit. And so, I used the same number for each type of M.D.

Q Do all orthopedists charge the exact same amount?

A No, sir.

Q Some charge more, some charge less?

A That would be accurate.

Q The same goes with any of the other doctors?

A Yes.

Q During the cross-examination, it was said to you that there was wrong information, and two things were listed. One, that was definitely wrong based on Mr. Evans saying the word "OxyContin," but we found out it's "Oxycodone," correct?

A Correct.

Q That was wrong based on his information?

A That's accurate.

Dr. J. Carfi - Redirect/Mr. McCrorie

Q I would like you to assume that in terms of, wrong or not wrong, that the spinal cord stimulator was never submitted for a cost with the economist, ever and never put down for them, it is stayed in your plan because Dr. Alongi had it in his record?

A He did.

Q Understanding whatever his testimony was, it was never once put forth, it's not included in that number that Mr. Kaminsky was saying to you.

So, is that a mistake, the fact that you had a spinal cord stimulator in there?

A No, it's not a mistake. It was based upon the records and also Mr. Evans report that that had been discussed as a treatment option with him.

MR. KAMINSKY: Objection. Move to strike.

THE COURT: Overruled.

Q I would like you to assume that Dr. Alongi did, in fact, tell this jury with reasonable certainty that Mr. Evans will be in pain the rest of his life due to his failed back syndrome whether he looses weight or not, okay?

A Yes, sir.

Q Do you stand by your opinion that he should see an orthopedist to monitor the area of surgery where they took out bones, put in hardware and removed hardware which is causing him a failed back syndrome, do you stand by that opinion that he

should see once a year such an orthopedist?

A I do.

Q Do you stand by your opinion that he should get some form of physical therapy?

A I do, yes.

Q To an area of his back, and that even just this year he was sent, in the records of Dr. Alongi, to an aqua therapy, and that whenever he is granted authorization he goes for same?

MR. KAMINSKY: Objection. Move to strike.

THE COURT: Sustained. Is that a question? Stricken.

Q I don't remember the numbers he got, whether it was 20 or 50, he has been in physical therapy some form or another since the accident?

MR. KAMINSKY: Objection.

THE COURT: Sustained. Counsel, you don't get to testify. If you have a question, ask it.

Q Going forward with a failed back syndrome, do you stand by his opinion that a supervised physical therapist at the rate you say, $130, should supervise his physical therapy twice a week?

A Yes, sir.

Q Tell the jury the purpose of that with his failed back syndrome?

A The purpose is again --

Dr. J. Carfi - Redirect/Mr. McCrorie

MR. KAMINSKY: Objection. Beyond the scope.

THE COURT: Overruled.

A I don't anticipate him to be cured of his condition. It is maintenance. It is to provide at least temporary pain relief through the heat treatments, ultrasounds, stem, medical massage, things of that nature, as well as a supervised exercise program so that he can maintain what he has in terms of his flexibility, strength, etcetera, as to maintenance, not curative.

Q And it was read to you before, different price, stipulated that because of his eyes it's 912 is the amount that was for one of the MRIs.

I would like you to assume to date just to the back there have been four MRIs, okay?

A Yes, sir.

Q Going forward -- withdrawn.

And that two of them had been after the surgeries, okay?

A Yes.

Q Going forward, do you stand by your opinion that Mr. Evans with a failed back syndrome, having had two surgeries, every five years should get one MRI?

A I do stand by that.

Q I would like you to assume that Mr. Evans has testified that since his surgery, more specifically the second, he is

still testifying, but that he can't bend down to tie his shoes, can't get that far down due to his back. Do you stand by, whether it be a dollar or $151, all of these items in the durable medical supply and equipment are due to his lumbar issues?

A Yes. My opinion has not changed.

MR. McCRORIE: I have nothing further.

MR. KAMINSKY: Just very briefly.

RECROSS-EXAMINATION

BY MR. KAMINSKY:

Q Mr. McCrorie pointed out that the cost of the prior MRIs were approximately $912. In your life care plan, you set forth the cost of the MRIs once a year for five years for the rest of his life to be --

MR. McCRORIE: Once every five years. You said once a year.

Q Once every five years for the rest of his life, you set forth the cost of each MRI to be $2,974, correct?

A Yes, sir.

Q Which is significantly more than $912, correct?

A It is.

Q So, this is another category, if the jury chooses to, they can significantly reduce the cost of your life care plan, correct?

A If they choose to, of course.

Q Now, I just want to go over one last thing. Dr. Carfi, you have him going to the orthopedist one time a year. You have gone over the difference in the cost between what you claim, something I showed you, specifically the MRI. For the physical therapy, we also went over the difference in the costs, true?

A Yes.

Q Would you agree with me that there is a difference between the costs associated for an initial visit to a doctor compared to a followup visit?

A That's true.

Q Would you agree with me that there is a difference between a cost associated with an initial visit to a physical therapist and the followup visits, correct?

A Sure, yes.

Q And that's because for the initial visit the physical therapist has to spend more time taking the history, understanding what is going on, and asking a lot of questions, and the first visit takes a lot more time, much more encompassing than the followup visits, true?

A Generally, yes.

Q And that's why the first visits cost more than the follow up visits, correct?

A True.

Q Now, you say in your report that Mr. Evans needs to go for physical therapy twice a week for the rest of his life at

$133 a visit, correct?

A Yes.

Q Isn't it true that, according to your own sources, the $133 that you cite is the cost of an initial visit, and you used the cost of an initial visit for every visit for the rest of his life and did not make a change for the costs of the followup visits which you told us are less than the initial costs, yes or no?

A No.

MR. KAMINSKY: Nothing further.

REDIRECT-EXAMINATION

BY MR. McCRORIE:

Q When you say "no," can you please -- where did you get that resource? We didn't go over physical therapy. Where did you get the resource for what it will cost Mr. Evans to go for physical therapy?

A Again, that's the National Fee Analyzer. And actually that total fee is a sum of three different codes, a code for the heat treatment, a code for electrical stimulation and a code for therapeutic exercise, three code. You add them up, you get the average for that treatment. And then I converted that to the local cost.

It's interesting Mr. Kaminsky found it very similar to the initial PT cost evaluation. That's purely coincidental. I didn't even realize that, but that is the sum of three separate

Dr. J. Carfi - Re-redirect/Mr. McCrorie

treatment codes.

Q And the MRI at the amount, what is the resource you used for that?

A Again, that's the National Fee Analyzer, average cost converted to. And that's with or without contrast, because he had surgery where. So, it was a more expensive test because of that.

Q Explain that?

A I'm sorry?

Q Explain the with or without contrast?

A Once you have surgery, one of the important things you need to differentiate between a scar tissue versus recurrent disk herniation, and it's the contrast material that gives you that information. So, scar tissue lights up because it's vascular. The contrast would show you.

A herniated disk remains dark. You can see it, but it don't light up with the contrast. That's how we tell. So having had two surgeries, in fact, the contrast is important and that increases the cost. But, again, this is based upon the average cost converted to the Suffolk County area.

MR. McCRORIE: Thank you. Nothing further.

MR. KAMINSKY: Nothing further.

THE COURT: Thank you. You may step down.

(Witness excused.)

(Continued on the following page.)

Proceedings

VP5

THE COURT: Come on up.

(A bench conference was held off the record.)

THE COURT: It is a beautiful day, so we are going to break for lunch until 2:00.

Don't talk about the case among yourselves or with anybody else. Don't do any independent research on any personal devices and we will see you at 2:00.

(The jury leaves the courtroom.)

MR. McCRORIE: We do have the one issue, about stipping in the union records, the union witness due to scheduling is unavailable until next Monday.

We agreed to put in the union files of the work history, the wage sheets and if Mr. Kaminsky wants him for cross, if something comes up with the economist, he will be here to get crossed.

MR. KAMINSKY: Yes, Judge, as a courtesy --

THE COURT: So this stipulation, we stipulate to.

MR. KAMINSKY: Yes, because I realize that technically the economist cannot testify to certain things without the testimony of the representative of the union.

As a courtesy to Mr. McCrorie, scheduling issues and whatever, he certainly has been courteous to

me throughout this trial, I agree to that stipulation.

The union records can come in as the basis for the economist's testimony and then I reserve my right to have the union rep called so I can question him.

THE COURT: Let's mark the union records 27 in evidence.

MR. McCRORIE: Whether it's in there or not, we'll stipulate that the average age is 60.

MR. KAMINSKY: That's fine.

MR. McCRORIE: But he testified before your Honor at the last trial, so I can't say anything --

THE COURT: Again, I don't really bring anything from one trial into another trial.

MR. McCRORIE: I understand. I was just telling Mr. Kaminsky that that is the average age.

THE COURT: So you stipulate that the average age is 60?

MR. McCRORIE: Of retirement for a Local 20.

MR. KAMINSKY: I don't think that's the average time and age for someone with the physical --

THE COURT: So it's not stipulated?

MR. McCRORIE: For average workers --

MR. KAMINSKY: I'll stipulate that that is what he would have testified to, yes.

MR. McCRORIE: I'm not saying --

Proceedings

MR. KAMINSKY: It is a modification to a stipulation.

THE COURT: Let's get the records together and we'll mark them 27 in evidence.

(Plaintiff's Exhibit 27, union records, were so marked in evidence.)

(Luncheon recess taken.)

Proceedings

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

MR. McCRORIE: Plaintiff, in discussing with defense counsel, we are withdrawing a claim for household services, it won't be mentioned on direct or cross, but it's taking out $300,000, but we took the pages out of the plan that's being -- the report -- the numbers being stipulated, so pages 15 through 19 are out, Ms. Kucsma has already reduced for the Oxycodone, the medical plan down by over $400,000, so, just stating that -- we'll white the pages out at the end, but it's missing four paging of household services that we're not claiming.

THE COURT: And, "it" is what?

MR. McCRORIE: The component analysis of what Ms. Kucsma is going to testify to as to the losses --

THE COURT: And you are offering it into evidence?

MR. McCRORIE: Yes, it's been stipulated into evidence and then Mr. Kaminsky --

THE COURT: Mr. Kaminsky --

MR. McCRORIE: Is going to do what he does with the years.

THE COURT: Are you stipulating to this coming into evidence minus the four pages?

MR. KAMINSKY: Yes, I mean -- this has to be

revised. I will let -- as a courtesy, I will let him put it into evidence, but I would prefer that we wait until we get the revised.

MR. McCRORIE: I was going to ask her to revise it, it's going to go down by the four hundred --

MR. KAMINSKY: No, I understand.

MR. McCRORIE: You want her to revise a cleaner -- I thought you would want to do --

THE COURT: I'm not taking it into evidence, if it's coming out of evidence.

So do you want to just take the testimony subject to connection to another document?

MR. KAMINSKY: That's fine. Whatever is easiest for Mr. McCrorie, that's fine.

MR. McCRORIE: We have the charts so she could step down, she's going to just use --

THE COURT: So, gentlemen, what is it that you are agreeing to?

MR. McCRORIE: It will go in and --

MR. KAMINSKY: The document Mr. McCrorie is holding in his hand I consent can go into evidence and we'll both address it and make changes to it as appropriate.

MR. LoRUSSO: There will be some redactions, Judge.

Proceedings

THE COURT: I didn't take that to mean there would be redactions, I take that to mean they're going to be cross-outs on the boards or something like that.

MR. McCRORIE: That's what I --

THE COURT: All right. So the jury will see the changes?

MR. KAMINSKY: Yes.

THE COURT: There we go, all right.

Mark this Plaintiff's 28.

(Plaintiff's Exhibit 28, economic analysis was so marked in evidence.)

COURT OFFICER: All rise, jurors entering.

(The jury enters the courtroom.)

THE COURT: Please sit down.

Let's call our next witness, please.

MR. McCRORIE: Plaintiffs call Kristin Kucsma, K-U-C-S-M-A of Tinari Economics.

K R I S T I N K U S C M A,

having been first duly sworn/affirmed by the clerk of the court, testified under oath as follows:

THE CLERK: Please be seated.

Madame, in a loud and clear voice, please state your full name.

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

THE CLERK: What is your business address?

Kucsma - Direct/Mr. McCrorie

THE WITNESS: 293 Eisenhower Parkway, Suite 190, in Livingston, New Jersey. 07039.

MR. McCRORIE: May I inquire, your Honor?

THE COURT: You may.

DIRECT EXAMINATION

BY MR. McCRORIE:

Q Good afternoon, Ms. Kucsma.

A Good afternoon.

Q Would you please tell the jury what your occupation is?

A Sure. I am an economist and at present I am the managing director and senior economist with the Sobel Tinari Economics Group.

Q Can you please tell the jury what is an economist, what's the role of an economist?

A Sure. As an economist, I study a wide variety of parts of what we call the economy. I study things like unemployment rates to understand why they rise and fall.

I study things like prices, again, to understand why prices sometimes rise very quickly and other times they don't rise quickly at all.

I study patterns of earnings, why earnings for union workers typically differ from the wages that are paid to people who are not in unions.

I study interest rates, but these are just some

of the things that I study and I look back to understand how these things have changed in the past so I can have a better understanding of how they most likely will change in the future.

Q Can you please tell the jury your educational background, any teaching positions you've held, leading up to where you just said you work now, Tinari Economic Group, so give your employment history, as well?

A Sure. I have a Bachelor of Arts degree in economics that I received from Seton Hall University, where I was graduated with highest honors.

I have a Master of Arts degree in economics that I received from Rutgers University.

And I am also technically ABD, which literally stands for all but dissertation, and what that signifies is that over and above the requirements for a Master of Arts degree in economics, I completed all of my course work, passed all of my qualifying examinations in pursuit of a PhD, wrote part of my dissertation but I have not yet completed it.

Once I finished with my graduate studies, I started what I like to call my first career and that was as a college professor. I was a member of a full-time faculty at both Seton Hall University and Drew University and I also taught as an adjunct professor at Rutgers University and

Saint Peters College. I taught primarily in the Department of Economics at both the graduate and undergraduate levels. But I also on occasion taught finance and statistics.

In January of 2008, I began my second career, my current employment, as an economist with the Sobel Tinari Economics Group.

Q And can you tell the jury what type of economics analysis you performed for Sobel Tinari Economics Group since 2008?

A Sure. Sure. Most of the work that we do involves working with attorneys, both plaintiff's attorneys and defense attorneys, to evaluate economic losses in lawsuits.

So when one party files a lawsuit against another, we get involved to determine what the economic damages may be.

We work on a number of different types of cases that include personal injury matters, wrongful death matters, I also work on a large number of employment related cases where people are claiming discrimination and harassment.

And in each one of those cases my job, as I said, was to determine the appropriate value of the economic losses.

Q And you said you get retained by both plaintiffs and defendants?

A Yes.

Q Are you in any way an owner of Tinari Sobel or an employee or something else?

A I am an employee, I do not have any equity ownership in Sobel Tinari Economics Group.

Q Is Sobel Tinari being paid for your time away from the practice there and to be here today to give your testimony about your economic analysis?

A Yes, they are.

Q At what rate are they being paid?

A For a half day, my company is receiving $4,100.

Q And are you receiving any personal monies or is it your company that is being paid?

A Other than my salary, no.

Q In this particular matter, the Richard Evans matter, was your company retained to perform an economic analysis for certain categories of losses?

A Yes, it was.

Q Can you please tell the jury the categories of losses you were retained to analyze?

A Sure.

In this case, I analyzed two basic categories of economic losses. I started by examining the loss of compensation.

So I started by examining what additional

compensation Mr. Evans would have received if he had not been injured and he had been able to maintain his union employment. And when I analyzed the loss of compensation, I considered the two parts of Mr. Evans' compensation, the salary or the wages that he would have received when he got a paycheck every week or every other week, but I also had to include the value of the fringe benefits that he received as a member of the union.

Very specifically, he received what we call annuity benefits. Annuity benefits are like a savings type of retirement fund. As a member of the union when Mr. Evans went to work his employers would put money into this sort of savings account and that money would then be available for Mr. Evans when he retired. That was that annuity I need to do include because it's extra money that Mr. Evans would have received.

In addition to that, Mr. Evans also received health insurance as a member of the union. And he also was enrolled in a pension plan, as well.

The pension plan is another different type of retirement plan, that also would have provided Mr. Evans with some compensation, some benefits once he had retired, so I needed to take all of that into account.

In addition to evaluating the additional compensation that Mr. Evans would have received, I also

considered a second element of economic losses in this case and that is the future medical costs.

I had been provided with what we will call a life care plan by Dr. Carfi. I'd been basically provided with a list of various types of medical care, medications, therapy, and so on, that Mr. Evans will need for the remainder of his life expectancy. My job was to calculate the total amount of money necessary to cover the cost of all of those future medical costs.

So that's the second part of my analysis.

Q Whether it's this case or any case, specifically for medical costs, do you ever render any opinion as to whether or not a particular person needs or doesn't need medical care?

A No.

Q And when I say are you simply doing the math, I understand it's complicated math, but are you doing the math, assuming the life care plan to be true?

A I am. I am not a medical doctor, I'm not a life care planner and I'm not a member of the jury, so my job is relatively simple for the future medical costs.

I am provided with a list of care that Mr. Evans will require, I'm provided with a description of how often he will need that care, and I've also been provided with what we call the base costs, how much it would

cost for him to get that care this year.

My job then is to take into account that over the remainder of Mr. Evans' life expectancy the costs of care will increase each year. I'm going to determine on average how much the cost of care will increase each year, so I can ultimately calculate the total amount of money that will be needed to pay for all of that care.

Q And regarding future wages and the ability to work, do you ever render any opinion as to someone's ability to work or do you just assume that they won't work for a period of time and give a number leaving it to the jury to take off any other numbers?

A Again, in this case as an economist, I am not here to offer any opinion about what Mr. Evans may or may not be able to do work-wise going forward.

What I've done, instead, is provide a framework that the trier of fact can use to ultimately determine specifically what the loss of compensation should be depending on what they believe Mr. Evans may or may not be capable of doing in the future.

Q Prior to getting into any of your specific analyses, can you please discuss with the jury the concept, whether it was wages or medical, of growth rate and compounding, as you go out into the future, the growth rate?

A Sure.

In each case when I am calculating either Mr. Evans' wages or the cost of medical care, I have to take into account that over time wages increase on average each year, and so to the costs of medical care. The cost of medications, the costs of physical therapy and so on.

In order for me to determine what these figures will be in the future, as an economist, I need to determine the growth rates or how much wages and costs will increase on average each year.

The notion of compounding simply means that. When I am calculating, for example, the increase in the cost of medical care, if I'm looking at an item that costs $100 this year, if that item is expected to increase in price by five percent, that item would cost $105 next year. If it was expected to increase by another five percent, that would be five percent more on top of the 105, so the compounding simply refers to the fact that costs and wages increase on average each year, year after year, and I'm going to build that into my analysis.

Q Prior to today, have you and I ever met?

A No.

Q Or had you ever met Mr. LoRusso prior to today?

A Not until today, no.

Q And had you ever testified on behalf of the firm before?

A No.
Q But we did retain you in this matter; correct?
A Yes, you did.
Q Your firm?
A Yes.
Q When did that first occur?
A I don't recall specifically. I believe we were retained sometime in or around 2012, originally.
Q And did you eventually prepare an initial assessment, economic assessment?
A Yes, I did.
Q What was the date of that initial assessment --
A That, I apologize. I do not specifically recall, but I believe it was in the fall of 2012 that I prepared my original report.
Q And when you prepare these reports especially on a case that can take a little bit of time, is it customary for you to amend the report as the trial approaches?
A It is, but in this case I actually did issue an amended report dated April 29, 2013. And I had to issue an amended report at that time because when I prepared my original report in 2012, I had not yet been provided with the life care plan.

So my original report had no costs to future medical care because I had not yet been provided with the

information I needed to value that.

I was then provided with a life care plan which allowed me to amend my report in April of 2013 to include the cost of medical care, because I had been provided with the necessary information.

When I then was told that I would be testifying here in the year 2016, I once again updated my calculations to reflect the fact that it is now three years later, there is new economic data available to me that was not available back in 2013, data published by, for example, the US Department of Labor, the Federal Reserve System, there also is new union data, that was not available to me, specifically data about the wages and benefits that Mr. Evans was receiving as a union member, updated data that was not available to me in 2013.

So the calculations that I'm going to testify about today are based on my report from 2013, but they have been updated to reflect data now available three years later.

Q Okay. Were you provided with, in 2016, the updated life care plan?

A Yes, I was.

Q And whenever a life care plan changes the numbers, such as in this particular matter, going from Percocet being more expensive to, originally it said OxyContin, do you

update the numbers according to the life care plan?

A Absolutely. Any time I'm provided with any new information about a life care plan, changing costs, additional items, deletions of items, I certainly update my calculations to make sure that I am capturing the most current medical needs of Mr. Evans.

Q And did there come a time after the testimony of Dr. Alongi that our office contacted you to let you know that it was not, in fact, OxyContin like Mr. Evans thought, it was Oxycodone and that Dr. Carfi amended the costs --

A Yes, you did inform me of that.

Q Did you amend those numbers in the report?

A Yes, I did.

Q And you'll amend them here today?

A I will, yes.

Q I'm just going to hand you up Plaintiff's 26 that's in evidence. That's the life care plan. 28 is your analysis. And 27 has been stipulated into evidence, the union records from Local 20, including Mr. Evans' work hours, the concrete cement workers wage scale starting in 1954 going to the end of 2015, the updated wage and benefits scales right through today from the collective bargaining agreement, as well as the collective bargaining agreement and pension plan, okay?

A Great, thank you.

Q Had you previously been provided all of that information prior to rendering your final opinion?

A Yes, I had.

Q What is a collective bargaining agreement?

A A collective bargaining agreement is basically a contract. It is a document that usually is the result of negotiations that take place between a union and various employers.

And during those negotiations, the union and the employers typically discuss wages. How much are the employers going to be required to pay the union members for regular pay, for overtime pay, how much are those wages going to increase each year, what types of benefits does everybody agree the employers are going to provide to the union members: annuity benefits, health insurance, pension benefits and so on.

So it really is a contract that is very helpful to me because it clearly identifies and defines the elements of compensation for particular union workers.

Q If I could just -- could you tell the jury, using this sheet, in 2012 when you were first retained, what was the hourly amount a concrete worker was making back then?

A $38.98 was the yearly rate.

Q And how about when Mr. Evans first got into his accident in 2007?

A The yearly rate in 2007 was $32.65 per hour.

Q And if you can take the most recent through June 2016, most recent information, what is the hourly rate a union concrete worker in Local 20 makes currently?

A $42.48 per hour.

Q Can you please go through the -- with the jury, you used the word fringe benefits. Can you tell the jury according to the wage and benefit scale, what are the current amount of benefits a worker makes in addition to the $42.48 per hour each hour he works -- or she works in the union?

A Yes, the benefits schedule that I'm looking at here, includes what we call the employer contributions into these benefit funds and as I mentioned earlier, as a union member, Mr. Evans was receiving three basic types of fringe benefits: health coverage through a welfare fund, annuity benefits, as well as pension benefits.

According to this schedule, the employers are paying $8.50 per hour, so that means for each hour Mr. Evans works that's what they pay into the welfare fund which covers, among other things, the cost of health insurance.

The employers are also required to pay $8 an hour into the pension fund and they are also required to pay $5.50 for every hour worked of straight time for the annuity, $8.25 per hour for the total time-and-a-half hours

into the annuity, and $11 per hour into the annuity for any double time that a particular union member may have worked.

Q Were you additionally, as part of the records there, but were you provided with Mr. Evans' work history as it related to when he began the union in 2004 up until the date of the accident and even a year after?

A Yes, I was.

Q It's in evidence, but can you just tell the jury what the union has, what amount of hours for the first year, and tell the jury each succeeding year?

A Sure. According to this document, in the year 2004, which is the year that Mr. Evans joined the union, he reportedly worked 436 hours.

In 2005 he worked 641 hours.

In 2006, he worked 1,100 --

MR. KAMINSKY: Sorry, sorry, can you go back and start, I apologize.

THE WITNESS: Oh sure.

MR. KAMINSKY: Go back to 2004.

A Sure. 2004, he reportedly worked for 136 hours.

2005, he worked 641 hours.

2006, he worked 1178.5 hours.

In 2007, he worked 983.5 hours.

Now, of course that doesn't represent a full year, because Mr. Evans was injured in June of 2007 and he

stopped working in August of 2007.

But nonetheless he worked 983.5 hours in 2007.

And lastly, there are a reported 28.5 hours for the year 2008.

Q Did you utilize -- withdrawn.

Did you ever calculate the average number of hours including when he first got in until the time he had the accident?

A I did calculate the average number of hours. Specifically, I calculated the average number of hours that Mr. Evans had, in fact, worked in 2005, 2006, and what he was on track to work in 2007.

In other words, I calculated how many hours he would have worked if he had not been injured in June of 2007, but he had worked through the end of 2007 and I then took an average of the hours he worked in 2005, '06, and what he was on track to earn before he was injured in 2007.

Q And how would you calculate what he would have been on track to earn --

A In this case, I --

Q -- had the accident not occurred?

A I know from the union documents that he, in fact, worked 983.5 hours in 2007.

I also know that he stopped working in August of 2007, so for roughly the first 60 percent of the year, he

worked 983.5 hours. If he had worked for the entire year, I estimate that he would have worked a total of 1639 hours.

(Continued on next page.)

Q Now, I would like you to assume that it has been stipulated through the union records that there is an average age of retirement for people in that union at about 60 years old. So 60, okay?

A Yes.

Q Prior to 2016, having the information from the union as to the average age of retirement, did you utilize a different age?

A Yes. When I prepared my original reports, both in 2012 and 2013, I calculated the loss of compensation to Mr. Evans through what we call his statistical retirement age. I examined U.S. government data, and I looked very specifically at, on average, the age which 32, 33-year-old males with a high school diploma. That's the group into which Mr. Evans fit when he was injured. And based on my research, on average, 32, 33-year-old males with a high school diploma worked until the age of approximately 64 years of age.

So, in my original reports, my loss of compensation was calculated through approximately Mr. Evans 64th birthday.

Q What is the calculation you will be doing today?

A For purposes of my testimony today, I have calculated the loss of compensation through Mr. Evans 60th birthday.

Q And that would be the outside extent of his work life, meaning the furthest you went out up to age 60?

A That's correct, yes.

Q Regarding before you stepped down his life life for any permanent medical expenses the jury may find, what age did you utilize and why?

A For purposes of calculating the cost of future medical care, I had to determine Mr. Evans statistical life expectancy. And in order for me to determine Mr. Evans life expectancy, I relied upon U.S. government data. I looked at what we call the National Vital Statistics Reports. I looked at the most current data, which was published 2015. And based on that data, I was able to determine that males of Mr. Evans current age will live, on average, to an age of 79.68 years. In other words, I would expect Mr. Evans statistical life expectancy to extend through March 13, 2054 based on this U.S. government data. So, my calculation of future medical cost will continue over that time period.

Q Okay. You have brought enlarged versions of the analysis to discuss with the jury. Would that aid you, in stepping down with the Court's permission, to go through it with the Court's permission?

A Yes.

THE COURT: Sure.

THE WITNESS: Thank you, Your Honor.

Q Ms. Kucsma, I would like to ask you to state all of your opinions with a reasonable degree of economic certainty.

A Of course.

Q And had you prepared the analysis, with reasonable degree of economic certainty, the one that's before - the smaller version is in evidence, but have you prepared same?

A Yes, I have.

Q If at any time any of your opinions can't be with reasonable economic certainty, please tell us, okay?

A Of course.

Q So, first, before we get to the opinions, can you tell us, this first chart, in terms of the earning history, what information you were provided? The first page, that is just stating Richard's --

A Yes, this is just really some background information. Some of this information was provided to me by Mr. Evans or Mr. Evans counsel, like his date of birth, his date of injury and so on. That was necessary for me so that I then could do some research, research about, for example, Richard's life expectancy, something we call the work life adjustment. I will tell you what that is in just a few minutes. But all of the information here is just basic background information. It was necessary for me to begin my analysis.

Q Regarding earnings history, would you please tell the jury why you selected those years, and you actually had the, what you testified to, the annual hours. They are underneath, correct?

A Sure. As I mentioned before, my first piece of the

analysis was to examine the additional compensation that Mr. Evans would have received if he had not been injured in June of 2007, if he had been able to continue working as a union member what additional compensation he would have received year after year.

In order for me to calculate the additional compensation that Mr. Evans would have received, I needed to form three basic opinions. Number one, I needed to determine, on average, how far into the future Mr. Evans would have continued to work as a union member. As I described a few moments ago, in this case I have calculated the lost compensation through Mr. Evans 60th birthday. You will see I am going to calculate the additional compensation he would have received each year starting in 2007, all the way through his 60th birthday in the year 2034.

Now, the second opinion I needed to form was an opinion about, on average, how much Mr. Evans would have continued to earn each year and, on average, how many hours he would have continued to work each year. In order for me to determine, on average, how much Mr. Evans would have earned each year and how many hours he would have worked, I started by taking a look at how much he had, in fact, earned and how many hours he had in fact worked for the union. In other words, I just looked at a history of his employment with the union. He joined the union in 2004. So I started by examining how many hours he had worked

in 2004 and how much he had earned in 2004. And I continued to examine how much he had, in fact, earned as a union member through the time of his injury in 2007. And I also looked at how many hours he, in fact, worked each year through 2007, the year in which he was injured.

Now, in addition, though, to considering the money that Mr. Evans was earning as a union member, I also took into account that as a union member in this particular industry, Mr. Evans routinely had periods of unemployment. So, when he wasn't working through the union, he was collecting unemployment benefits. And this is fairly common in construction-related industries where individuals are what we call seasonally unemployed. Each year, year in and year out, they have periods where they are not working. And during those periods, they are able to collect unemployment benefits. And from reviewing some of the documents provided to me, I saw that Mr. Evans was, in fact, doing that. Part of the year he was receiving earnings while he was working for the union. When there was no work for him, he was unemployed and collecting unemployment benefits.

Q I would like you to assume that Mr. Evans also testified to that fact, that he has periods of unemployment?

A Yes, as supported by the documents I reviewed.

Q If you could just, please, the earnings amounts does that state what he made in 2004, '05, '06?

A Yes. If you look here, based on my review of pay

stubs, W-2 wage and tax statements, tax returns, in other words documentation of Mr. Evans earnings, I was able to determine that he was paid $24,542 in 2004.

Q For union work?

A For his union work. $20,496 in 2005 for his union work. $35,043 in 2006 for his union work. And he was paid $31,821 in 2007 for his union work. Again, keeping in mind that he was injured in June of 2007 and he stopped working altogether in early August.

I then annualized this figure. I wanted to determine how much Mr. Evans would have earned if he had been able to work to the end of December of 2007. He earned just shy of $32,000 for the beginning of August. Based on my calculations then, if he had not been injured and he continued working through the end of year, he would have earned $53,035 through his union employment.

I did the same thing for the hours. Once again, I was provided with union documents that showed me, in fact, how many hours Mr. Evans worked each year. In 2007, as we discussed earlier, he in fact worked 983.5 hours through early August. If he had been able to work the remaining five months of that year through December, I estimate he would have worked 1,639 hours in that year.

So, once I have reviewed how much Mr. Evans, in fact, earned each year and how many hours Mr. Evans, in fact, worked

each year, I was then able to determine what I call his pre-injury earnings base, and his pre-injury unemployment base. In other words, I was now ready to answer the question, on average, how much income would Mr. Evans have received each year if he had not been injured.

So, if he had not been injured in 2007 and he continued his union employment, I estimated that he would have earned, on average, $46,191 each year. And that was based on an average of how much he, in fact, earned in 2005, how much he, in fact, earned as a union worker in 2006, and that he was on track to earn as a union worker in 2007.

I also was able to determine how much he would have received, on average, in unemployment benefits. And I did so by looking at the most recent year in which he was receiving unemployment benefits, at least the most recent year for which I had documentation, and that was 2005.

So based on my review of the documentation of earnings, I was able to determine that if Mr. Evans had not been injured in 2007, what would he had earned each year on average $36,191 each year through union employment, and $7,274 each year through unemployment benefits.

Now, lastly, in order to properly calculate the pension benefits that Mr. Evans would ultimately have received when he retired, I needed to use the formula provided to me through the collective bargaining agreement. There is what we call a

summary plan description. And in that summary plan description, there is a formula. And that formula is what I can use, in fact, is what the union uses to calculate how much somebody receives in their pension benefits.

Q I would like you to just assume that's in evidence. I would like you to assume that a union worker, per the documents in evidence, cannot vest, cannot collect a pension unless he has least five credits, okay?

A That is correct, yes.

Q Can you tell the jury how many credits Mr. Evans had up until the time of the accident?

A Up until the time of his injury, Mr. Evans had accumulated three pension credits. So he had not yet vested.

Q So as of now, he gets no pension?

A That is correct.

Q And if he had up to five credits, he would at least get a pension?

MR. KAMINSKY: Objection to the leading.

THE COURT: Sustained.

Q What does vested mean regarding pension?

A Sure. Once an individual has vested, that means they are now entitled to receive some pension benefits. The magnitude of those pension benefits will depend on this formula I was describing. But once somebody has vested, they will be entitled to at least some minimum pension benefits once they

reach a particular age. If an individual has not yet vested, they are not eligible for any pension benefits even if they reach, for example, the normal retirement age as defined through the summary plan description.

Q The summary plan is part of the documents that are there, but please continue describing the analysis before we get to the numbers?

A Sure. In order for me to properly calculate the pension benefits, as I said before, I do have to use the formula that is provided in the summary plan description. And that formula, it's just a mathematical equation, but it is an equation that is based specifically on the average number of hours that a union member worked. So, I have to plug in the number of hours that Mr. Evans would have worked.

So, based on my review of how many hours Mr. Evans, in fact, worked in 2005 and '06, how much he was on track to work in 2007, I determined that if Mr. Evans had not been injured, he continued working as a union member, he would have worked, on average, 1,153 hours per year.

Now, in order for me to calculate the loss of compensation, there is one other opinion that I need to form. I have already determined that in this case Mr. Evans would have continued to work as a union member through age 60. I have determined that, on average, he would have earned $36,191 each year. Remember, this figure of 53,000 is what he was on track

to earn in 2007. But the third opinion I need to form in order to determine how much Mr. Evans would have earned on average each year was I needed to form an opinion about how much, on average, his wages would have increased each year. I know, as a union member in this case, that Mr. Evans wages would have increased year over year. I know that because there are collective bargaining agreements in place, and there are wage schedules provided that show the hourly wage rate in 2007, '08, '09, '10 and so on.

So, I was able to review those documents and calculate the yearly increase that Mr. Evans would have received as a union member. And that's what you see here in this second column. These are the yearly increases that I determined Mr. Evans would have received. His wages would have increased each year by these various amounts. And these amounts are based on wage and benefit schedules published by the union.

So, I was able to determine then, for example, if Mr. Evans had not been injured and he had worked in 2009 in the same sort of similar capacity, same number of hours, patterned working he was doing before, he would have earned $37,204. If he were able to work for the full year of 2016 in a similar capacity to that in which he was working back in 2005, '06 and '07, he would have earned $45,341 through his union employment.

His projected unemployment benefits I held them constant in past years. And I did that because in New York,

there also is a formula that determines how much you collect in unemployment benefits. And for a number of years in the past, that weekly amount was fixed. It has recently increased but for many years in the past, there was a flat amount of unemployment benefits that someone in New York could receive.

I'm almost done. These figures here represent the gross earnings that Mr. Evans would have received if he had continued his union employment and had that seasonal unemployment. These figures, though, that you see here in this third column, these figures represent the total amount of money that Mr. Evans would have earned each year through his union employment. If he never missed a day of work, and if he had no what we call job-related expenses, so if he never missed a day of work, had no job-related expenses and got no fringe benefits, what would he have earned in each year from 2007 through the present time.

Now, there is a problem, though, with what I just described. As an economist, I cannot assume that Mr. Evans or anybody, for that matter, would have worked continuously year after year after year uninterrupted. In other words, I can't assume, as an economist, that Mr. Evans, if he had not been injured in June of 2007, would have worked straight through 7, 8, 9, 10, 11 12, all the way through his 60th birthday in 2034. The reason I can't assume that is because the statistical data says otherwise. If I look at U.S. government data and I look at

the actual experience, 32, 33-year-old males with a high school diploma, that's the category Mr. Evans was in when he was injured, if I look at the actual experience of males in that category, I see they do not work 100 percent of the time to retirement. In fact, they work 88.6 percent of the time. In other words, 32, 33-year-old males with a high school diploma spend about 11.4 percent of the time out of the workforce. They get injured. They get ill. They have a sick family member they some time to take care for. Regardless, Mr. Evans is no different. Even if he had not been injured in June of 2007, there is a probability going forward that he would have missed some time from work because of an illness, an injury, caring for a sick family member and self.

Q And I would like you to assume that Mr. Evans did, in fact, have leukemia diagnosis that would have kept him out of the work between 18 months and two years, is that accounted for with that analysis?

A It is. And that's precisely why I need to make a downward adjustment to my calculations of 11.4 percent, take into account the probability of events just like that.

Now, in addition to that, it also would not be reasonable for me to assume that Mr. Evans had no job-related expenses. If went to work day in and day out as a union member, he would have had expenses; transportation, getting to and from the job site, maybe a hot dog for lunch, some coffee in the

morning, union dues, for example. So, I also needed to make a second downward adjustment to his union earnings to account for what I call job maintenance or these job-related expenses. And I estimated the value of those job-related expenses at 10 percent. That was based on U.S. government data, but also based on a review of Mr. Evans own tax returns. So, based on my review of those documents, I determined that, on average, Mr. Evans spent about 10 percent of his paycheck on these job-related expenses. So, I am going to deduct those from my calculations of his earnings.

Now, last but not least, I know that Mr. Evans received fringe benefits through his union employment. I know that. He got annuity benefits. He got health coverage, and he got pension benefit. I know that from reviewing union documents. I am going to calculate the value of the health insurance and the pension benefits separately. Pension benefit I have to value separately because they could only be calculated if I take that formula from the summary plan description. The annuity, however, is really just kind of like an add-on to Mr. Evans earnings. For every hours that he worked, his employers were required to contribute about 13 percent of his hourly rate into this annuity fund. So, as I mentioned earlier, there is kind of this savings account set aside. And for every hour that Mr. Evans worked, his employers were required through this contract to put extra money, five, $8 into this annuity account. That

account is specifically for Mr. Evans, and that annuity money would be available for him once he retired. So, I would add 13 percent each year to take into account those extra dollars that are going to go into that retirement savings account.

Q What I would like you to do before you get into the next chart, I would like you to assume the following to be true:

I would like you to assume that Richard Evans testified exactly as to what you have in evidence here, Plaintiff's Exhibit 26; that he was a accepted into Local 20 as a concrete worker, as a laborer, iron worker in 2004. He worked through the day of the accident, okay?

A Yes.

Q I would like you to assume that he was a journeyman making journeyman wages on the date of the accident, and that he testified he intended to work at least until 62, but that the union average is 60, so we are going to ask you to use 60, okay?

A Sure.

Q I would like you to assume that he was getting all of the fringe benefits that you just testified to, the annuity, that he was building pension credits and that he had three credits up until the date of the accident, okay?

A Yes.

Q I would like you to assume that on June 6, 2007, he had an accident, that other than a brief period of time through August 7th, after two weeks of staying home where he tried to go

to work for varying hours that are in the record, and one day in December 2007 at the end of the year trying to go to work and three days in May of 2008 that he was unable to work due to his injury through the present time, okay?

A Yes.

Q I would like you to further assume his doctor, his surgeon, Paul Alongi, came in, told the jury what surgeries he did and said that it is his opinion that he cannot return medically to the field of construction work, specifically as a union concrete worker, okay?

A Yes.

Q Do you have an opinion with a reasonable degree of economic certainty as to the amount of past lost earnings through today?

A I do. I have calculated, to a reasonable degree of economic the certainty, the loss of income in past years at $398,930. And you will notice that I began my calculation of lost income in past years in August of 2007. So, I am looking at the remaining 40 percent of that year all the way through the first half of 2016, since I'm focusing on the past year. This lost income figure of $398,930 include both sources of income for Mr. Evans. It includes what he would have earned through his union employment, taking into account periods of missed work, job-related expenses and those annuity benefits. And it also takes into account the unemployment benefits that he would

have received each year during the time that he was seasonally employed. So, through his earnings from the union and the unemployment benefits, I determined that if Mr. Evans had been able to continue his union work through the first half of 2016, he would have earned an additional $398,930.

Now, I then extended this analysis into the future.

Q Before we get into the future, if the jury determines Mr. Evans could have done another job up until that date, and the amount you suggested, what can they do with the $398,930 number?

A Certainly, the jury could adjust this figure any way they see fit if they felt that Mr. Evans should have been able to earn some money through the present time.

Q Adjust it downward not up?

A I would presume so, yes, that's correct.

Q Before we go further, Ms. Kucsma, can you just give the jury an idea -- so, Mr. Evans average hours, and I would like you to assume it was his testimony that his first year until he built up a reputation he had done these hours, but give the jury, when someone works a 40-hour work week - construction workers don't, they work a 35 hours, but someone who works a 40-hour work week and they worked 50 weeks out of the year, how many hours would that add up to?

A In that case, that person would work 2,000 hours per year.

K. Kucsma - Direct/Mr. McCrorie

Q I would like you to assume the statistical data for this union is 1,400 hours for the average worker. We are using a number less than the average worker because we have the four years to deal with, correct?

A That is correct, yes.

Q Please continue.

A So, I had mentioned earlier that if Mr. Evans had not been injured, he would have worked through his 60th birthday in 2034.

Q 60th is the outset, correct? I would like you to do this, I would like you to assume the same assumptions from the past wage question, and that Dr. Alongi has said he cannot return to this field.

I would like you to assume it was Richard's intention to work to 60. So, assuming that could happen, not that it will happen, what would the loss be with a reasonable degree of economic certainty?

A If Richard had not been injured and he had worked through his 60th birthday, July 2034, I calculated the additional compensation that he would have earned through both his union employment as well as his seasonal unemployment at $1,240,850.

Q And that would be totalling with -- are there any increases, any gross increases?

A Yes. This takes into account the fact that Richard's

wages would have continued to increase on average each year. It also take into account the fact that he likely would have missed some time from work. He certainly would have had job-related expenses, and his employers would have required to deposit money into that annuity fund.

Q Let's go back to the starting point. Taking next year, 2017, the first full year, what is the amount you started with and how did you arrive at all of these amounts including the 3.9 increase?

A Sure. In this case, in order for me to determine on average how much Richard's earnings would have increased each year going forward, starting in 2017, I considered several sources. Number one, I examined the wage growth in past years. I started by examining the yearly increases that members of this union had in fact received in past years pursuant to the wage and benefits schedules published by the union.

Secondly, I considered data published by the U.S. Department of Labor. And I looked very specifically at how much wages had, in fact, increased in past years in general in the construction industry.

And third and finally, in addition to those two sources, I also considered projection of wage increases published by the board of trustees of the Social Security Administration. The board of trustees of the Social Security Administration publishes, among other things, their projections

of, on average, how much wages will increase in the future.

So, I considered those three sources, actual union increases, actual construction industry increases, projections. And based on my review of those documents, I determined that, on average, Richard's wages would have increased by 3.9 percent each year going forward. So, that in 2017, to answer your question, he would have earned $47,110.

Q Now, can you go across, using the 2017 before we add increases to it, what the 91.26 is, why the number goes down and what the total is?

A Sure. $47,110 represents how much Mr. Evans would have earned as a union worker in 2017 if he never missed a day at work, didn't get any annuity benefits and had no job-related expenses.

(Continued on the following page.)

Kucsma - Direct/Mr. McCrorie

VP7 DIRECT EXAMINATION (Continuing)

BY MR. MCCRORIE:

Q And just so we're clear, he earned $35,000 back in the year before the accident, in 2006; correct?

A Yes, that's correct.

Now this figure of $42,992, that represents those downward adjustments I described before, in 2017 taking into account periods of missed work, taking into account the job-related expenses that Mr. Evans would have had to pay, and taking into account the dollars that his employers would have had to put into that annuity fund, his compensation would have been $42,992 in 2017 through his union employment.

Unemployment benefits, as I mentioned earlier, were increased in New York, in the year 2017, I estimate that Richard would have collected $7,558 in unemployment benefits when he was seasonally unemployed.

I also had to adjust those figures down, your unemployment benefits are a function of what you pay into them, if you missed some work, you don't pay into the system, so I had to make that downward adjustment for the work life expectancy to those benefits, as well.

Q And then the final number is in here, it's $49,688, if the jury were to find that next year he could get a job for $25,000, assuming that that's close enough to 50, but

they would take that number off the $49,000 number?

A Correct. They could or alternatively what I have done here is I've actually provided a framework that the jury can use to adjust this figure of one thousand -- $1,240,850 downward, if they feel that Richard does have the ability to return to work. This figure, $1,240,850, represents what the lost income would be if Richard were completely incapable of ever returning to any sort of employment ever again.

If on the other hand -- and I pick these figures here just for examples, if, for example, the jury felt that Richard was capable of returning to work and, in fact, he could return to work and earn a wage that was about half of what he had earned through his union employment, then he'd be entitled to a 50 percent loss and the jury could simply take this figure of $1,240,850, multiply it by .5 and they would determine the appropriate loss of income would be $620,425.

Q If they were to determine he would work to the age of 58, they would just do the math by taking off the two numbers and so on, if they want to reduce --

A Correct, reduce the figures to reflect fewer years worked.

Q Because that's in evidence we're going to try to move --

THE COURT: We're going to take a break.

All right, let's take a few minutes.

(The jury leaves the courtroom.)

(Recess taken.)

COURT OFFICER: Jurors entering.

(The jury enters the courtroom.)

THE COURT: All right, please sit down.

Don't hesitate to bring candy or coffee or anything you think would be helpful to keep you focused on the testimony.

All right. And if you need a break, let me know, don't fall asleep. Just let me know you need a break.

All right, let's continue.

MR. McCRORIE: If could you just step down --

THE WITNESS: Sure.

Q No offense, but it is math --

A Well -- I think it's exciting.

MR. KAMINSKY: It's thrilling, actually.

THE WITNESS: Thank you.

Q I think I misspoke, just to clarify one thing you said you were using 1100 hours which was the average that you kept, but did you, in fact, use a different number of hours, lower?

A We did. In fact, we used 1022 hours, again,

because the figure of 1153 hours did not take into account the probability of missing work because of injury, illness and so on, so ultimately I'm using a little over 1000 hours per year.

Q If you could go back to the future loss with the tables on the bottom -- there.

I would like to you assume, in order to save time, defense and plaintiff have decided to not call vocational experts and that there are assumptions of -- Mr. Evans has testified, I'd like you to assume that he intends to go back to work, wants to go back to work in some form.

I'd like you to assume that previously in his life he'd been through a state vocational testing at the age of 19 for mentally impaired, it is on there handicapped, and he's been through some form of state training in the past.

It's plaintiff's position, he can go back and work part-time approximately making $15,000. Defense position, $36,000, okay?

A Yes.

Q How would that affect the numbers here, if he earned $15,000, how much would come off if he earned $36,000 and then there would be other numbers in between?

A Sure. If he earned $15,000 a year and I compare that to his current union earnings of 45,341. He would be

able to earn about one-third of what he had earned as a union worker.

Q We're going to ask you to give the numbers.

A Sure. In that case he could earn about one-third of what he was earning as a union worker, he would be entitled to a 67 percent loss. I would simply take $1,240,850, multiply it by two-thirds, which is .67 and I would get a loss compensation in future years in the amount of $831,370.

Alternatively --

Q It could be approximately --

A Approximately $831,000.

Alternatively, if he could earn $36,000, that would be roughly 80 percent of what he would have earned through the union, in 2016, that would entitle him to a 20 percent loss, based on his union earnings, if I took .2 times $1,240,850, I would get lost compensation in the amount of about $250,000.

THE COURT: So if could you slow the numbers down, the reporter would be able to keep up.

THE WITNESS: I apologize.

Q We both wrote them down and we'll write them on your smaller version.

Ms. Kucsma, if we could go now -- I'd like you to assume you already said health coverage was afforded, the

loss in health coverage, full health benefits that were afforded to him for his non-accident-related whatever was going on in his life.

A Sure.

I determined the average value of the premium for single health courage $6,631 per year. That's based on data published by the Kaiser Institute, they've been collecting this data for decades.

Based on that same study, I was able to determine that health insurance premiums have increased on average five percent per year, so I was able to calculate the value of the health insurance premium that would have been paid for through the union as long as Mr. Evans continued to work through age 60.

And I calculated the total value of the health insurance that would have been provided to him through the union, $2,105.

Q You've already explained compounding. Where did you get the five percent growth rate, just for the record?

A Sure the five percent growth rate is based on the average annual increase in health insurance premiums over the past approximately 20 years, and that is based again on data published by the Kaiser Institute.

Q Whether he could make $15,000 or $36,000 or some other number, do you have an opinion as to whether or not

there is a pension loss for his not receiving a pension from the concrete workers union?

A Yes, I have calculated the loss of the pension benefits, these were benefits, of course, that Mr. Evans was entitled to very specifically, because of his membership in this particular union.

The pension benefits are based on a formula, as I mentioned before, the formula is based on the final average monthly earnings, so in other words, how much Mr. Evans would have been earning when he retired in the years leading up to his retirement at age 60 and also based on the number of pension credits.

The number of pension credits that Mr. Evans received would have been based on the number of hours he worked each year.

So based on the average number of hours that Mr. Evans would have worked each year, I was able to determine that according to the summary plan description, he would have been eligible to receive one service credit per year --

Q I'd like you to assume that after someone reaches 1000 hours as per the pension plan, they get the credit they can never get more than one credit in a year?

A That is correct. Yes. Thousand hours, you get one credit per year, and Mr. Evans would have worked, on

average, just slightly more than a thousand hours per year.

In addition to that, the formula is based on the number of credits which is based on the number of hours. It's also based on the average earnings of Mr. Evans in the five years leading up to his retirement at age 60 in the year 2034.

So in order to calculate his average monthly earnings in the five years leading up to his retirement, I simply considered what the wage rate would be in those years. It is currently -- excuse me -- it is currently $42.48 per hour, it will increase each year for the next 18 years. I determined that on average he would work 1022 hours each year, so in order to calculate his monthly earnings, I simply took the hourly wage rate times the number of hours he would have worked each year and divided by 12 to get the monthly average.

And then I simply plugged these numbers, the average monthly earnings and the number of credits into the formula that is laid out in the summary plan description and based on that I was able to determine that starting that at his 60th birthday when Richard would have retired as a union worker, he would have started to receive a check from the pension fund each month in the amount of $3,679 or, in other words, he would have received a total of $44,146 per year starting when he retired at age 60 and continuing for the

remainder of his life expectancy.

There was no cost of living adjustment specifically stated in the summary plan description, so I did not build one into my analysis. And I was able to calculate then that if Richard retired when he turned 60 in 2034, and he lived through the year 2053, he would have received $44,146 each year in the form of pension benefits for a total of $834,799.

Q So is that your opinion with a reasonable degree of economic certainty, as to the pension loss, assuming it is a full loss?

A Yes.

Q I'm going to now have you move to the life care plan, okay?

A Sure.

Q To save time, it's getting late, the same process would apply to growth rates if you do one category as to another category; correct?

A That's correct, yes.

Q But the growth rate may change, correct?

A That's correct.

Q So we'll only do one category or two categories for speed and then I'll stop, but could you tell the jury, first give the life care plan component, the different categories of the life care plan and why they're on different long term

growth rates?

A Sure. There are different types of care contained in the life care plan. So, for example, Dr. Carfi said that there are medications that Richard will need. There are various types of therapies, visits to doctors, so there are all different types of care that according to Dr. Carfi's life care plan, Richard is going to need over his remaining life expectancy, life expectancy as of today's date now.

Now in order for me to calculate how much it will cost to pay for all of this care, I have to take into account that the costs that Dr. Carfi testified to, what it costs today for medications, physical therapy, visits to the doctors, those costs are not going to stay the same through 2054, they're going to increase each year. Different types of care, those costs rise at different rates.

For example, if I look at US government data, I am able to determine based on the average annual increase in physicians' services over the past, about 30 years, I'm able to determine that over the past 30 years, visits to doctors, for doctors' visits, the costs of those types of visits increased on average four percent each year.

On the other hand, if I look very specifically at the cost of visiting other medical professionals, not MDs, not doctors, but physical therapists, occupational therapists, for example, if I take a look back at the last

20 to 30 years and I examine on average how much those costs have increased each year, they've increased by three percent each year.

If I looked, for example, again at hospital services, the cost of hospitalization, surgery, and I look at the last five to ten years as well as the last 20 to 30 years, I see on average the cost of any sort of hospitalization, those costs have been increasing and continue to increase at approximately 6.5 percent each year.

Lastly, in terms of medicines, if I look at the cost of prescription drugs over the last 10, 20, 30 years, I see on average the cost of prescription drugs has increased each year by four percent.

So when I calculate how much it's going to cost to provide all of the care outlined in Dr. Carfi's life care plan, I'm going to use different yearly increases depending on whether he needs to go to an MD, whether he needs physical therapy, whether he needs prescription medication -- whether he needs surgery and so on.

Q I'd like you to assume in the first analysis you did in the first life care plan, Mr. Evans was taking eight Percocets a day after his first surgery and that Percocets were at a much greater rate than even something called OxyContin.

Did your number for medication go down

drastically when it went from eight Percocets to four OxyContins or two to four?

A Yes.

Q And did you, once again, downwardly adjust that number when you learned in the last week that it was Oxycodone that Mr. -- although Mr. Evans believes he's taking OxyContin, he's taking Oxycodone?

A Yes, I re-calculated the cost of lifetime medication.

Q Always going down, never going up, correct?

A That is correct, yes.

Q Were you, in fact, despite the fact it's in a life care plan, were you told not to put in a spinal cord stimulator, even though it's in the plan?

A Yes.

Q So --

A I was asked to exclude that.

Q And that's been excluded, that's not part of the -- not just in the last week, it's been excluded?

A That's correct, I did not include that in my calculation of future medical costs.

Q Let's take the medication since it needs to be corrected and if you have your original report we're going to ask that you correct it on your original report, because that's in evidence --

A Sure. Sure.

Q -- one that's marked.

A I had originally calculated the cost of medications at $594,239. That would have been the cost that -- that would have been the amount of money Richard would have needed to cover the cost of those medications over a lifetime.

Q If you would put the medication up here, we're not going to do every single one because it's getting late, the jury has the total.

A Sure. So originally I calculated the cost -- the lifetime cost of medication at $594,239 based on the most recent information provided to me about the frequency and the annual cost of the Oxycodone.

I calculated the lifetime cost of Oxycodone for Richard from July 1st of 2013 over his remaining life expectancy at $116,217.

Q And the jury heard the number of 1.9 many times, that was the number when it was thought he was taking OxyContin --

A That is correct.

Q So just in case it was anywhere else in your plan, could you just go to -- why don't you go to, for instance, another large one is physical therapy.

Could you find the physical therapy and show

the jury the increase on the chart?

A I think the only chart that I enlarged for the jury -- I didn't enlarge them all because we'd be here for a very long time -- I enlarged actually the chart I prepared for the medical supply and equipment.

Q But the physical therapy, as well as any other modality, should the jury choose to take it off, is in -- it's in evidence?

A I believe so. I assume you entered it into evidence, yes.

Q Let's just pick one so we could do it, talk about what a growth rate is --

A Sure.

Q For instance --

A I'll pick one, if we pick the electric scooter, for example.

Q I was going to try to pick a yearly one, but go ahead.

A Okay. I don't think we have yearly ones here, unfortunately, but what you've seen I've done here is simply shown how I calculated the future medical costs. The information you see up here, the types of care, or in this case supplies that Mr. Evans will need, how often he'll need it and how much it costs in 2016, all of that information was provided to me by Dr. Carfi.

What I did then was simply determine on average how much the costs of these items will increase over time and then I calculated how much these things will increase in the future.

So, for example, an electric scooter, according to Dr. Carfi, would cost $1,649 today, in 2016. It would need to be replaced every five years. I would expect the cost of the electric scooter to increase on average 2.7 percent each year. Which means in 2021, which would be the first time Mr. Evans would need to replace the scooter, he would have to spend $1,884 to buy a new scooter.

Q Let's do this: If the jury said he wasn't entitled to any of the one whole medical supply in equipment, the total they would take off would be on the bottom right, $72,467 from the 1.4 million and change?

A That's correct, and if they felt he needed everything but the electric scooter, they could simply take this total figure of $72,467 and subtract the individual component of $22,021, if they felt he needed everything else but the electric scooter.

Q Going to physical therapy, if you could find it --

A Sure.

Got it.

(Continued on next page)

Q The growth rate is lower than the medical cost growth rate. It's 3 percent. Why is that?

A That's correct. Because in this case, visits to physical therapists, these represent visits to other medical professionals. It is not a prescription medication. It's not a visit to an M.D. Based on my review of the U.S. Department Of The Labor data, the cost of visiting physical therapists and other medical professionals has increased, on average, 3 percent per year over last 20 to 30 years.

Q And so, based on the life care plan and the recommendation of Dr. Carfi of two times a week, for instance, the total is 944,000. It's the largest item, the physical therapy, 515. If the jury felt he would only go once a week or 50 times a year, that number would be half?

A Sure. Absolutely. If they felt instead of two visits per week he only needed one, they can simply divide that figure in after.

Q Or 25 percent or whatever number. They have the numbers here?

A Absolutely. Yes.

Q Have these calculations of the life care plan been calculated math-wise with a reasonable degree of economic certainty?

A Yes.

MR. McCRORIE: I have nothing further.

K. Kucsma - Cross/Mr. Kaminsky

THE COURT: Let's take five minutes.

(Whereupon, the jury exits the courtroom.)

(Whereupon, a recess was taken.)

(Whereupon, the proceedings resumed.)

THE COURT OFFICER: Jurors entering.

(Whereupon, the jury enters the courtroom.)

THE COURT: Please sit down. Please.

CROSS-EXAMINATION

BY MR. KAMINSKY:

Q Good afternoon.

A Good afternoon.

Q Are you okay if I call you "ma'am?"

A Sure.

Q My name is Alan Kaminsky. I represent the defendants. We have met before. And I am certainly familiar with the company that you work for, Sobel Tinari.

Fair of me to say that -- are you here to give an unbiassed opinion as to the plaintiff's alleged losses or are you in any way trying to maximize the allegations?

A No, I am here to offer an objective, unbiassed opinion based on information provided to me.

Q And would you agree with me that you have participated in numerous conferences and presentations to plaintiffs' attorneys, discussing with them strategies and ways to maximize claimed losses, just yes or no?

A No, I actually wouldn't agree with that.

Q Have you spoken on panels to plaintiffs' attorneys where the topic is using an economist to maximize your claimed losses?

A Not really. And the reason I say that is because --

Q If the answer is no, the answer is no. Okay.

Have you actually charged, been part of programs that charge attorneys fees where the topic is maximizing your damages with an economist, just yes or no, or say I can't answer that yes or no?

A I have never charged a fee, and I have never been paid a fee for teaching any of these continuing legal education courses.

Q I understand when you say "you," just like you aren't directly being compensated today, but your company is, so has your company ever given such presentations to attorneys on how to maximize claims through using an economist, just yes, no or you don't know?

A Again, my answer would be the same as I started to answer before and that --

THE COURT: But the answer has to be yes, no, or I can't answer the question.

A Technically, the answer is no.

Q Maybe if we have time, we will get into the technical reasons for that in a little while.

On October 22, 2015, did you give a presentation at the masters and trial tactics entitled How to Maximize Your Damages in Philadelphia, Pennsylvania?

A Yes, I did.

Q And did you give a presentation as recently as February 6, 2016 to plaintiffs' attorneys entitled how to present an economist at trial, a live demonstration and panel discussion on the finer points of direct examination, yes or no?

A Yes, I did.

Q And on February 8th, 2016 -- I'm sorry. On 3/18/2016, did you participate in Saddle brook, New Jersey on how an economist can best work with a life care plan expert, yes or no?

A I believe that was part of that lecture. I don't believe that was the title, though, no.

Q But that's what the content was, correct?

A Some of it, yes.

Q And, in fact, on the Sobel Tinari website -- by the way Sobel Tinari advertises, correct?

A Yes, we do.

Q Towards plaintiffs' attorneys primarily, true?

A No.

Q Did you, in fact, were you voted one of the top economic experts to testify at trial by plaintiffs' attorneys just yes, no, or you don't know?

A All I can tell you --

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Q Ma'am, I don't mean any disrespect. It is a yes, no, or I don't know?

A It really isn't only because --

THE COURT: No, no. I'm hearing words that are other than the three options. So, please just answer the question the way it is phrased.

THE WITNESS: I can't because I don't think it is phrased properly.

Q On February 11, 2015, did you give a presentation on how to effectively quantify economic damages in personal injury cases, and that was in Edison, New Jersey?

A I believe so, yes.

Q Thank you. And on December 23, 2014, did you speak on integrating vocational experts and economists in documenting damages in personal injury cases, and that was a dinner reception at the Saddle Brook Marriott?

A I don't remember the specific date, but I believe that's correct, yes.

Q And did you give a presentation on March 30, 2015, quote, "Telling the damages story effectively, proving damages at trial." Do you recall giving that presentation to attorneys?

A Again, I don't recall the specific date.

Q Let's put the data aside?

A Yes, that sounds correct.

Q Let's put the date aside, but I will tell you it was

March 26, 2015.

Did you also speak at a program: Building the house of damages using a vocational expert, life care planner and an economist?

A Again, that sounds correct, yes.

Q Okay. And that's a sampling of some of the things you have spoken about during your years at Sobel Tinari, correct?

A That's correct, yes.

Q And would you agree with me that the other employees and/or owners, including Frank Tinari himself also speak at programs such as this, correct?

A I couldn't agree with that simply because Frank Tinari officially retired last fall.

Q Up till last fall?

A Yes, but he used to teach those same type of courses, yes.

Q And these are types of programs attorneys would go to and the Tinari Group would give out pens and magnets and all those kind of things to try and get business, correct?

A I don't think we have magnets, but we probably should get them. But we do have pens, and I do believe we give them out, yes.

Q But my point is, you actively solicit business for plaintiffs' attorneys, correct?

A Not through those programs, not as far as I am

concerned. My main objective --

Q If your answer is no, your -- I would imagine your main objective is to teach?

A Yes, it is. Absolutely.

Q So, you want to teach plaintiffs' attorneys how to maximize their damages, correct?

A No. I want to teach plaintiff and defense attorneys how to make sure the most comprehensive analysis is completed.

Q Would you agree with me that the overwhelming majority of the work that your company does is for plaintiffs' attorneys?

A I would have to agree that about 70 percent of the work I do does involve working with plaintiffs, yes.

Q And you have testified, have you not, many times in court?

A Yes, I have.

Q How many times would you say you have testified in court?

A I would estimate that to date I have probably testified in court approximately 160 or 170 times.

Q Would you agree with me that maybe 155 to 165, if not more of those times, have been on behalf of plaintiffs?

A I am rarely asked by defense attorneys to actually testify; that is correct.

Q So, the short answer to my question is, yes, I am correct, true?

A I don't know if those numbers are specifically correct, but they are probably approximately correct, yes.

Q Well, you are aware that there is a database that's kept when experts testify at trial, correct?

A I'm aware of the fact that I publicly post on my website all of my trial testimony, if that's what you are referring to?

Q Yes, which I have taken the liberty of printing out. And would you agree with me that you name all the cases and that there are about 150, like you said. And I found one that was for defendant. I may be wrong. There may be others, but would you agree with me that almost every time, if not -- well, virtually every time, and the one time was an arbitration, it wasn't in court. Would you agree with me that every time you have come to a courtroom like this, it's been for plaintiffs' attorneys?

A No. Because I can tell you at least one case on that list in a Philadelphia court for which I did testify on behalf of the defense.

Q Then I stand corrected. So, 149 out of 150 have been for plaintiffs, true, roughly?

A Again, I don't know if that number is true, but there is no question about the fact that defense attorneys do not ask me to testify at trial very often, no question about that fact.

Q Would you like to start -- let me give you the choice.

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Would you like to start with the loss of earnings? Would you like to start with the life care plan?

MR. McCRORIE: Objection to give her the choice.

THE COURT: Overruled.

A It's entirely up to you, whatever you would like to start with. The cost of lifetime care is already up there on the board, if would you like to start there.

Q Okay. Let's start there.

Now, again, you have taken Dr. Carfi's statements and you have just projected them, correct?

A I have based my calculations on Dr. Carfi's recommendations, yes.

Q So, as you have told us, you are not a doctor. You have no opinion whether or not Mr. Evans actually needs any of these items, true?

A That is correct.

Q So, if Dr. Carfi made certain concessions about his plan, you would, in turn, have to make concessions that correlate to those on your projections, correct?

A Yes.

Q Which is what you did concerning the cost of the medicines, true?

A Yes.

Q Now, I am going to just back up to the loss of earnings, because one of the things you say my client is

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responsible for is approximately $200,000 in lost health insurance, correct?

MR. McCRORIE: Objection. She is not saying they are responsible or not.

THE COURT: Overruled.

Q One of the claims of damages is that because Mr. Evans is not employed, he lost approximately $200,000 in health insurance, correct?

A That is correct, yes.

Q Well, if he were to receive the health insurance, wouldn't that by its very nature cover --

MR. McCRORIE: Objection, Your Honor.

THE COURT: Overruled.

Q -- cover all of the items on the health care plan?

MR. McCRORIE: Objection.

THE COURT: Overruled.

A Probably not, no.

Q You are not a doctor. You don't know, true?

A I am not here to offer that opinion. That is correct.

Q Okay. But you agree with me that you are claiming $200,000 in loss of health insurance, but you are also itemizing all sorts of things that the health insurance may or may not cover, true --

MR. McCRORIE: Objection.

Q -- or you don't know?

THE COURT: I heard the objection the first time. You have a standing objection. I am going to allow it.

MR. McCRORIE: Yes, Your Honor.

Q Do you know or do you not know?

A I do not know.

Q Okay. So, for instance, if in fact, Mr. Evans does need to go to an orthopedic surgeon once a year, do you know if that would be covered by his health insurance, yes, no, or you don't know?

A That I don't know.

Q The next question is, if Mr. Evans did need physical therapy, would that be covered by his health insurance, yes, no, or you don't know?

A That I can't say.

Q If Mr. Evans did need an MRI once every five years, do you know if that would be covered by his health insurance, yes, no, or I don't know?

A That I can't say.

Q Do you know if Mr. Evans needed to go to a pain management specialist once a month or once a year, do you know if that would be covered by his health insurance, yes, no, or I don't know?

A Again, I can't say.

Q If Mr. Evans needed to take pain medication, do you know if the cost of the pain medication would be covered by his

health insurance, yes, no, or I don't know?

A My answer would be the same. I cannot say.

Q You don't know?

A No, I can't say.

Q So, for $200,000, Mr. Evans can be provided with health insurance, according to your calculations, that's how much it would cost for the rest of his career. You have told the jury $202,000. For $202,000, you can't tell us if that would cover everything that's on here, which you claim comes to $1,433,820, and you don't even have an opinion or you don't even know if he needs this stuff, true?

MR. McCRORIE: Objection.

A No. I can tell you for an absolute fact that the insurance would not cover the cost of lifetime care without a doubt.

Q I didn't say that.

A That's what that figure is it.

Q I said his work, his work career.

A That figure, though, is through his life expectancy.

Q And you have assumed he is going to work to age 60, and you have assumed his life expectancy is to age 79 plus, correct?

A I believe that's correct.

Q And that's after you revised your original report where you said he was going to work to age 66, true?

MR. McCRORIE: 64.

Q 64?

A 64, which in my professional opinion, based on the U.S. government data, is the appropriate age.

Q But not according to the union records, correct?

A It's not correct. If you look at the union records, you see that, in fact, many people retire after the age of 60 before the age of 65.

Q And many people retire before the age of 60, which is why you get an average, true?

A That is correct.

Q So, some people retire at age 60, some people retire at age 65, some people retire at age 55. You get an average of 60, correct?

A I believe so, yes.

Q And that's what the union record show. The union records are different than the government statistics for other kind of workers that don't work in such hard manual work, they may work longer careers, but the average union worker retires at age 60, true?

A No. For this union, that may be true for current years. It's not a historical number. It's not across all union numbers.

Q Ma'am, I don't want to argue, and I apologize for raising my voice.

But for this union, the average retirement, according

to the records that are in evidence, is age 60?

A It has been recently. That does not mean it has been historically, and it does not necessarily mean it will continue to be going forward.

Q Okay. We have agreed. Mr. McCrorie and I, we have stipulated.

A Exactly, which is why I used age 60.

THE COURT: All right. One at a time.

Q I apologize to you. I don't mean to argue with you. It's a lot of material I want to cover, okay.

All right. So, if the jury says medical expenses, medical health care, 202,000, this number may or may not have to be adjusted just by providing health care, correct --

MR. McCRORIE: Objection.

Q -- or you don't know?

A That I couldn't say.

MR. KAMINSKY: Judge, if you want, there is no way I am going to finish today.

THE COURT: Fair enough.

Come back tomorrow at 2:00. Do not talk about the case among yourselves or with anybody else. Don't do any independent research. Tomorrow is my calendar day, so I have things that I have to take care of in the morning but I will see you at 2:00 tomorrow.

(Whereupon, the jury exits the courtroom.)

K. Kucsma - Cross/Mr. Kaminsky

(Whereupon, the trial was adjourned to Tuesday, April 19, 2016 at 2 p.m.)

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