In The Matter Of:

EVANS v.

YONKERS

April 19, 2016

Aldorine Walker

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

RICHARD EVANS,

Plaintiff,

-against-

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

Defendants.
----------X
Index # 107866/09
TRIAL

71 Thomas Street
New York, New York 10007
April 19, 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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Senior Court Reporters

K. Kucsma - Cross/Mr. Kaminsky

THE COURT OFFICER: Jurors entering.

(Whereupon, the jury enters the courtroom.)

THE COURT: Come on in. Please sit down.

And, gentlemen, I know it gets really warm in here. We will not be offended if you take off your jackets, so please feel free.

MR. McCRORIE: Thank you.

THE COURT: Can we have our witness back on the witness stand.

(Whereupon, the witness resumed the witness stand.)

THE COURT: And I remind you that you are still under oath, having previously been sworn.

We were in the midst of cross-examination.

Mr. Kaminsky.

MR. KAMINSKY: Thank you, Judge.

BY MR. KAMINSKY:

Q Thank you for coming back this afternoon.

A Sure. My pleasure.

MR. McCRORIE: Hope everybody had a chance to vote.

THE COURT: 6 a.m., just say.

Q You told us you had everything but your dissertation to be a Ph.D., correct?

A That is correct, yes.

Q Now, when were you enrolled in this school for that program?

A I believe I was last enrolled in the program sometime in or around 1995 or 1996.

Q Okay. So, we have established that you are here to be candid and not exaggerate things or not inflate any of these claims, correct?

A Yes.

Q And those lectures and seminars that you gave, those weren't to work with plaintiffs' attorneys to help them buildup their amount of alleged losses, those were more like teaching tools, correct?

A To plaintiffs' attorneys, defense attorneys and also judges and paralegals, yes.

Q And we have established that you have testified in court roughly 150 times, perhaps once or twice on behalf of the defendant, correct?

A I don't recall specifically how many times on behalf of the defendant, but it is a very small handful of times; that is correct.

Q You agree that, statistically, since you deal in a lot of statistics and you deal in a lot of studies, statistically, you are heavily favored towards testifying for plaintiffs, correct?

A No. I would certainly say, statistically, I have testified more on behalf of plaintiffs. That would be a correct statement.

Q And similarly, not only have you testified at trials, but you have also testified at depositions, true?

A That is correct, yes.

Q And, in fact, just like you boast about all the cases you have testified in at trial on your website, you also boast about all the cases you have given deposition testimony in, don't you?

A I don't think I boast. Federal law requires that I publish that information.

Q Federal law requires that you publish this information?

A Rule 26 requires that I keep the last four years of my trial and deposition testimony available for anyone that would like to review it, yes.

Q Does it require that you post it on your website, yes or no?

A Probably not, but that makes it available to everybody.

Q Let's try and answer my questions "yes" or "no."

You got 30 pages close to another 150, if not 200 cases, where you have testified in depositions, correct?

A Probably, yes.

Q And of those cases, roughly almost all, I'm not saying all, almost all were on behalf of plaintiffs, correct?

A Yes.

Q And in addition to the cases that you have testified in trial and the cases that you have testified in depositions,

K. Kucsma - Cross/Mr. Kaminsky

there are also cases where you are retained that doesn't require you to either testify in trial or testify at depositions, true?

A Yes.

Q Can we agree that there have been hundreds of those cases?

A That's correct.

Q Can we agree that, without an exact number, 95 percent, 99 percent are on behalf of plaintiffs?

A No, that actually is incorrect.

Q Okay, if the answer is incorrect --

A About 30 --

THE COURT: Please restrict your answers, as counsel has directed. Mr. McCrorie will have another opportunity to question you in a more open-ended fashion.

Q Now, when you say you have everything but your dissertation to being a Ph.D., what is your dissertation in?

A It actually is about a crisis that occurred in the mutual savings bank industry in the 1870's.

Q And isn't it true that you aren't even qualified to do dissertation now because you have been out of the school program for more than seven years, true or false?

A That I don't know.

Q You don't even know if you can complete your dissertation?

A I have not inquired whether I can return without, for

example, taking additional courses.

Q So, the reality is, when you say all but a dissertation, you are not even close to your dissertation, true, because you are not even enrolled in the school and you are not even qualified to be enrolled in the school and you don't even know that, true?

A That's not a correct characterization of my current status, no.

Q Are you enrolled in the school?

A No.

Q Have you been out of the school for more than seven years?

A Yes.

Q Are you aware that in order to be qualified for a dissertation you can't be out of the school for more than seven years, are you even aware of that?

A That is not my understanding, no.

Q If it were the understanding of the school you went to on their website, would you have any reason to disagree with it?

A No.

Q So, would you agree then that by you telling this jury you have all but your dissertation to be a Ph.D. is a little misleading?

MR. McCRORIE: Objection.

Q Yes, or no?

THE COURT: Rephrase, please.

Q You told the jury that you have all but your dissertation to be a Ph.D., correct?

A Yes.

Q You are not enrolled in the school, correct?

A That's correct.

Q You are not even eligible to be enrolled in the school. You don't even know that, correct?

A I have not looked into that, that's correct.

Q So, you are far away, if ever, from obtaining your Ph.D., true? True or you disagree?

A Your questions, I think --

THE COURT: True or you disagree, please?

A I don't agree with it but it's also --

THE COURT: Please just restrict your answer as it is asked.

THE WITNESS: I will try to do so if the questions were honest.

THE COURT: Go ahead, Mr. Kaminsky.

Q Yesterday we spoke about your projections for the life care plan, correct?

A Yes.

Q And I asked you questions about health costs, health care, correct?

A Yes.

K. Kucsma - Cross/Mr. Kaminsky

Q You studied the course associated with obtaining health care?

A Health insurance?

Q Health insurance?

A Yes.

Q And you made projections that came to $202,000, correct?

A I believe that's correct, yes.

Q What's the purpose of a person having health insurance? Is it to cover them for health-related costs?

A It is to cover them for costs permitted under their plan, yes.

Q So, $202,000. Just to sum up kind of where we were yesterday, some, many or all of the items listed on the plan may be covered under the health insurance up to his retirement age, true?

MR. McCRORIE: Objection continued from yesterday.

A I would not expect all of them to be covered. But as I said yesterday, I can't say whether anything might be covered.

Q In your experience, does healthcare cover some or most of the items on that life care plan?

MR. McCRORIE: Objection.

THE COURT: That objection I will sustain.

Q Now, as far as the past earnings that you have projected, okay, what you did, you told us, is you took

averages, you took averages of how many hours he would have worked, you took averages of what his pay would have been, you adjusted them upwards certain percentage over the course of years and came up - we are talking about past now - and then came up with $398,930, true?

A That's not entirely correct because I made downward adjustments as well.

Q You made downward adjustments but, basically, what is being shown to the jury right here, correct?

I want to talk about past. Obviously, you work on an awful lot of cases, correct?

A That is correct, yes.

Q How many cases at any time could you be working on?

A I have no idea.

Q More than ten?

A I regularly review approximately 40 to 55 cases per month.

Q Can we agree that's a lot of cases?

A There are economists that work on far greater number cases and some work less.

Q And you work on a lot?

A I work on about 40 to 55 per month.

Q And would you agree, let's just say, because of the volume of cases you are working on there may be some errors in your calculations?

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A I wouldn't say it has anything to do with the volume of work, but certainly it's always possible there could be a mistake in a report, yes.

Q Well, for instance, for the past earnings, are you aware that in two of these years you are claiming Mr. Evans lost earnings, are you aware that for two of these years he couldn't possibly work because he was being treated for leukemia?

A Oh, sure. That's why I made the adjustment for work life expectancy.

Q I'm asking you for the past years. Did you cross off the years that he could not work, yes or no?

A That's not the way I handle periods of missed work for illness, no.

Q So, you included those two years in your calculations, correct?

A Technically, yes.

Q Well, not technically. You did, true?

A Technically, yes.

Q Which of the two years that he couldn't work, do you even know?

A I don't recall specifically.

MR. KAMINSKY: For the record, I am crossing off the years 2011, 2012, the years that Mr. Evans was unable to work because of his being treated for leukemia.

Q So, if we just make that adjustment, this comes down by

roughly $90,000. And, of course, if he would have offset his earnings by securing other employment, again, we would have to offset this amount as well, correct?

A Well, that amount is statistically and mathematically incorrect. But if there had been some actual earnings in past years, yes, then it would be appropriate to deduct those from my calculation of $389,930.

Q Now, if we take everything you have projected at face value, which I don't intend to do, I'm going to question you about, but if we were to take everything you have projected at face value, you are aware that -- and what you heard yesterday the parties have stipulated that Mr. Evans can return to work but there is a dispute as to how much he can earn, correct?

A That's my understanding, yes.

Q And so, under the stipulation, if the plaintiff earns $15,000 a year, your number comes down to 831,000.

Under the stipulation, if the plaintiff can earn $36,000 a year, that comes down to 250,000. If we were to take, roughly, the middle ground and, say, the plaintiff can earn $25,000 a year, this number comes down to, roughly, $550,000. It's not exact?

MR. McCRORIE: It's actually on there.

(Pause in the proceedings.)

Q So, what Mr. McCrorie is saying is if you reduce it by half, the offset would be 620,000, okay. And I will accept that

number for purposes now. 620,000.

So, if we accept your projections at face value, just we accept everything you say as to how many hours he would work, everything else, the parties have agreed that the number has to be reduced, it has to be offset somewhere between 15 and 36,000. And if you take the middle ground, it's approximately 620,000, okay.

So, at the outset, at the outset, under your analysis, his largest potential claim for loss of earnings is 831,000. If the jury chooses to, they can reduce it further, correct?

A That is my understanding of what you all have stipulated to, that's correct.

Q Now, I asked you if you exaggerated or inflated or used certain math techniques to get those numbers higher, and you said "no," okay?

A Correct.

Q So, I want to ask you this, and you can look at your notes. What was the average hour per year that you used -- what was the average hours per year that you suggested he was going to work?

A After the adjustment for work life expectancy, I estimated an average number of hours per year in the amount of 1,022.

Q And you did that by using what calculation?

A I first started by examining the number of hours that

Mr. Evans had in fact worked in 2005 and 2006. I then calculated how many hours he was on track to work in 2007, added those --

Q I'm sorry. What was the number you projected for 2007?

A 1,639 hours.

Q Now, obviously, if you would have used a lower number for 2007, that would reduce all your calculations, correct?

A It would reduce my pension calculations. That is correct, yes.

Q Well, it would also reduce his earnings, correct?

A I did not calculate his earnings from his hours. I calculated his earnings based on documentation of his earnings.

Q But you projected what he would have worked in 2007 as part of your formula?

A I certainly did have to annualize both his earnings and hours for part of '07, yes.

Q Are you aware that in 2007 the reason his hours was so high in the first half of the year is because he was working on an extremely unique development, a mini city; he was working on a development for four months, and that that project came to an end --

MR. McCRORIE: Objection.

Q -- in August, are you aware of that?

MR. McCRORIE: Objection.

THE COURT: Overruled. Are you aware of that?

Q Are you aware, yes or no?

A Again, I don't recall --

THE COURT: It is a yes or no. Are you aware of it?

THE WITNESS: I don't recall that is the answer.

Q And so, if he did not keep up the same pace for 2007, he would not have worked 1,639 hours, true?

A That singular statement is true, yes.

Q And, again, if you would have projected a lower number of hours for 2007, all your projections on these charts would have to be reduced, true?

A Possibly.

Q Let me see if I can understand how you can even possibly use the word "possibly," okay.

MR. McCRORIE: Objection.

Q You calculated his loss of earnings based upon how -- one of the factors was based upon how many hours he would have worked, correct?

A Yes.

Q If he would have worked fewer hours than you projected, your projections would be lower, true?

A If it were appropriate for me to use a lower projection, then, absolutely, my figures would be lower. That's correct.

Q Can we save a lot of time and just try and answer the

question, true, false, yes, no, depending how I ask it to you, okay? Thank you.

Now, you also took averages based upon government statistics and union records to project that he would work to age 60, did you not?

A That is the data that I relied upon, that's correct.

Q Is there a difference between relying on generalized data or specific information relative to a specific person?

A I'm not sure I follow your question.

Q I will give you an example. Let's say government data shows that the average height of 100 men is 5'11" okay. Now, accept my representation that I am 6'2", okay. Under your theory, does that make me 5'11" or does that make me 6'2", yes or no? Am I 5'11" because that's the average or am I 6'2"? Answer the question.

A Right now today --

Q All right, you don't want to answer the question.

A It's not that I don't want to answer, it's that we are talking about projections in the future.

THE COURT: There are two choices. The answer is either 5'11" or 6'2", one of those or you can't answer the question?

THE WITNESS: I suppose you would be 6'2" today.

MR. KAMINSKY: Thank you.

Q Now, here is what I want to relay back to, when you did

your average that the average retirement age for this union, according to the union records, is 60, okay. Did you take an overall average of everyone that's worked in that union, or did you factor in unique situations attributable to Mr. Evans?

A I'm not sure I follow your question.

Q We have established that some people work less than to age 60, some people work more to age 60, the average is 60, correct?

A According to the union documents, yes.

Q I want you to assume that the plaintiff suffers from deep vein thrombosis. I want you to assume that he has diabetes. I want you to a assume that he is obese. I want you to assume that he was out of work for two years for leukemia. I want you to assume that he has all sorts of unrelated health issues, okay. Is he someone who is less likely to work to age 60 or more likely to work to age 60 under your studies?

MR. McCRORIE: Objection.

Q If you could answer or you can't answer?

THE COURT: I will allow it.

A I am not a medical expert, so I could not answer that question.

Q So, you took the average, you did factor in specific information relative to Mr. Evans, true?

A That, actually, is a false statement.

Q If Mr. Evans were not to work to age 60, if he were to

work, say, to age 55, we would have to take off five years of losses, true?

A Of future earnings, yes, that would be correct.

Q So, if the jury feels that Mr. Evans medical condition is such that he would be one of the workers that would not work to age 60, which is the average, if they would assume, for instance, he would work to age 55, we would have to cross off five years, correct?

A They could do that, of course, yes.

Q And, of course, if they felt he was going to work to age 70, they can add ten years?

A Sure.

Q If we simply reduce his work life expectancy to age 55, these numbers have to come down significantly, true?

A I wouldn't say significantly but, certainly, they would decline, all other things held constant, yes.

Q Would you agree with me that the highest earning years, because of the way you have compounded things, are the last five years?

A Of course.

Q So, if they were to take off the last five years, that would be approximately $400,000. And if we are going to use 50 percent of that, because that's what we have done here, you are going to offset it, that's $200,000. Just by retiring at age 55 instead of 60, we would have to make adjustments accordingly,

true?

A Certainly, the jury could make such adjustments if they felt it appropriate.

(Continued on the following page.)

Kucsma - Cross/Mr. Kaminsky

VP2 CROSS-EXAMINATION (Continued)

BY MR. KAMINSKY:

Q And similarly, if it turns out that he would not have worked 1639 hours during the last year, 2007, if he would have work, say, 1200 hours, we'd have to reduce this number even further; correct?

A Again, all other things held constant, yes.

Q If we simply change 1628 to 1300, this has to come down by 110,000, true?

A That, I couldn't say. That's not a calculation I performed.

MR. McCRORIE: In terms of writing down numbers that are coming from --

THE COURT: It's all right, counselor. The witness has --

MR. McCRORIE: I, know but he's putting the numbers there that have no calculation.

MR. KAMINSKY: It is a chart.

MR. McCRORIE: I don't know how the calculation --

THE COURT: Let's be clear. This is not in evidence.

MR. McCRORIE: I understand, but it's before the jury.

THE COURT: It is for demonstrative purposes,

he is showing the jury what numbers he is talking about. I have no problem with that, and of course, I remind the jury that what the attorney puts on the chart is not evidence.

Indeed, the small version of this witness' chart is in evidence and that will be available to you during your deliberations.

Q Now, in this union, isn't there such a thing as early retirement?

A Yes.

Q And that is at age 55, correct?

A Not necessarily.

Q Are you aware that in this union, it is age 55?

A Again, I don't believe that the only criteria is age 55, I believe you also have to have accrued a certain number of credits and so on.

Q Would you agree with me that by age 55, Mr. Evans would have accrued enough credits to have his pension fully vested; correct?

A Oh, he certainly would be fully vested, there's no question about that --

Q And so would you agree with me that the overwhelming majority of workers in this union retire when their pension fully vests, because at that age they start to receive their pension. True?

A Not at all --

Q Okay, you dis --

A -- the union vests after five years of service --

Q If you disagree with me, say I disagree with you.

A I disagree --

Q Okay, fine.

Just going back to the past, if he were able to return to work, the jury would have to make some sort of an offset correct?

A If he had actually received any earnings, I would have deducted those. That is correct.

Q Now, on unemployment, you've made increases to the unemployment; correct?

A Yes.

Q Isn't it true that unemployment cannot be -- is not increased by cost of living, it is only increased by statute, the legislature of the State of New York is the only one that can increase unemployment benefits, correct?

A That's correct.

Q But you've taken it upon yourself to increase unemployment benefits every single year beginning in 2017, true?

A On average, that's correct, yes.

Q And you've done that by four percent; correct?

A On average, that's correct, yes.

Q And for the last -- how many years -- are you aware that from 1998 to 2014, the unemployment rate did not change, let alone go up four percent a year. Are you aware of that, yes or no?

A You asked me about the unemployment rate. I assume --

Q Not the rate of people unemployed, the rate of unemployment benefits.

A I assume you mean the weekly benefits and that is correct, which is why I held these constant in the past years. Correct.

Q You held them constant in the past years, but you sure didn't hold them constant in the future years; correct?

A That's correct.

Q So if we were simply to drop that 3.9 percent down to one percent, which is generous, based upon what's happened in the past, these numbers would have to be significantly reduced, which would also mean that these numbers would have to be significantly reduced, as well, true?

A If it were appropriate to use an average annual increase of one percent, yes. My numbers would be lower.

Q And so, again, just by changing the unemployment benefits, this number would have to come down by approximately $45,000.

So when I asked you if you've gone out of your way to try and inflate the alleged losses, is it still your testimony that you have not?

A Absolutely.

Q Okay, but you didn't take into consideration Mr. Evans' specific physical condition, true?

A No, I would not agree with that statement. No.

Q You took a national average; correct?

A And I also looked at union data, that's correct.

Q You looked at union data, and you looked at national averages, you did not make any changes based upon Mr. Evans' personal condition; correct? You just put him in there with the average, true?

A I didn't just put him in there. I'm not a medical doctor. It would never be appropriate --

Q Is that another way of you saying my question is correct?

A No, your question is not fully correct, it is a little misleading, unfortunately.

Q Okay, let me try and not be misleading.

When you told us you took the averages from the union, and you took the averages from the federal government, did you make any modifications to that based upon Mr. Evans' personal condition, yes or no?

MR. McCRORIE: Personal medical condition?

Q Personal medical condition, yes or no?

MR. McCRORIE: Asked and answered.

THE COURT: Overruled.

A I did not make any modifications. It was not --

Q Okay, so then my question is not misleading, true?

A Your question --

Q Okay. Withdrawn.

A Your question -- would not be appropriate --

THE COURT: Oh, my goodness, this isn't a conversation. We have a question and we have an answer.

Please answer the question that is asked.

Mr. McCrorie will have another opportunity to ask you questions.

Q Now, similarly, you used statistical averages -- now I'm going back to the life care plan -- you used statistical averages as to how long the average -- I think you said the average high school graduate lives, according to the statistical tables; correct?

A No. That wasn't my testimony unfortunately.

Q Tell me what you said.

A I relied upon the National Vital Statistics data on the average life expectancy of males who are approximately 40 years of age.

Q And again, did you make any modifications to those projections based upon Mr. Evans' personal health

conditions, yes or no?

A Of course not, no.

Q So -- and I hope he lives to be one hundred, but you just took an average; correct, you just took the statistical number?

A I relied upon the statistical life expectancy, that's correct.

Q So statistically if he lives longer, you would have to add to the life care plan?

A Yes.

Q And if he doesn't live as long -- again, I hope he lives to be one hundred, but if he doesn't, you would have to reduce it down; correct?

A That's correct.

Q And I'm going to try and be brief, but just like we went over the -- just like we went over the loss of earnings and said it would have to be reduced downward if he worked to age 55 as opposed to age 60, you would have to do the same thing to the pension benefits, true?

A No. As a matter of fact, if he retired earlier, he would start collecting pension benefits earlier and you would need to add numbers of years to calculate the pension benefits.

Q So would you have to reduce his income, but you wouldn't touch his pension benefits?

A I would have to add an additional five years during which he would collect pension benefits.

Q Which would be lower because he worked less?

A That's correct.

MR. KAMINSKY: Judge, may I see the witness' file?

THE COURT: Yes.

Let's take a five-minute break.

Do you have your file?

THE WITNESS: Sure. Most of it is in my bag.

(The jury leaves the courtroom.)

THE COURT: Go ahead.

She said most of it is in the bag.

(Recess taken)

(The jury enters the courtroom.)

MR. KAMINSKY: Almost finished.

Q When you calculated the loss of earnings, you told us one of the things you had to do was figure out how many hours -- we've gone over this, how many hours he would have worked, correct?

A That's correct.

Q And you came up with a yearly annual total of, what?

A As I mentioned earlier, I calculated before I made the work life adjustment an average annual number of hours

in the amount of 1153.

After I made the adjustment for work life, I ultimately used an adjusted number of 1022 hours per year.

Q You got that from his working in 2005, 2006 and roughly the first half of 2007, which you then projected out for the rest of the year; correct?

A That's correct.

Q Now, as an economist, you have some flexibility in the numbers you want to use, true?

A No. There is an appropriate method to use.

Q Sometimes when you -- in all the cases you've testified, have there ever been cases where you've testified averaging four years of a person's work history instead of three?

A Sure.

Q In this case, you picked three, 2005, 2006, 2007; correct?

A That is correct.

Q Now, are you aware that in 2004, the plaintiff worked 436 hours?

A Sure. I mentioned that during my direct testimony --

Q So now my question to you is, like you do in some of the other cases where you average four years, if you would have averaged four years, in this case, that would

have dramatically brought down the work life number of 1022; correct?

A I would not use the first year in which --

Q I didn't ask you that question.

A Again, your questions are a little misleading.

Q No, your answers are a little misleading in my opinion with all due respect.

MR. McCRORIE: Judge --

THE COURT: All right, you know, it's never about the attorneys. Let me just remind you about that.

Q If you would have taken into consideration 2004, this number would have to be dropped down significantly, because the average of his worked hours per year would be less, true?

A I don't know about significantly, but yes, if I had used 2004 in my average, then my numbers would drop.

Q I'm, trying to remember what this came to.

I may be low, but I think we have to make another adjustment if the jury determines it's appropriate to look at his entire work life history and not just the years you picked, is it fair of me to say that there have been cases that you've testified in where you specifically have gone back a longer period of time to capture years where someone has worked higher numbers of hours, yes, no or you don't recall?

A I'm not sure I follow your question. I've gone back here --

THE COURT: Okay, yes, no, or I don't recall.

Do you want to rephrase it, counsel, she didn't follow it?

Q You've testified in 150 cases almost all, not all, almost all for plaintiffs.

In calculating future loss of earnings, have there been cases where you've selectively gone back to capture years where a plaintiff has worked more hours, yes, no, or you don't know?

A No.

Q Have there been cases such as this one, where you don't go back a certain number of years to leave out years where a plaintiff has not worked a large number of hours, yes, no, or you don't know?

A I'm not sure I follow your question, again.

MR. KAMINSKY: I have nothing further. Thank you for coming back.

THE WITNESS: Sure.

REDIRECT EXAMINATION

BY MR. McCRORIE:

Q Can you tell the jury why you never include a union member's first year in the union in the calculation?

A I never include the first year of union membership

Kucsma - Redirect/Mr. McCrorie

and I frequently also do not include the second year --

THE COURT: The question was about the first year. Could you please answer the question that is posed.

A -- simply because most union members when they first join a union, until they have some level of seniority, it's not unusual for the number of hours they work in the first year or two in membership to be relatively low and to be a bad reflection of what they would have continued to work once they became full union members.

MR. McCRORIE: Your Honor, if I'm going to be quick, do you mind if I stay here?

THE COURT: I don't mind at all.

MR. McCRORIE: Excuse my back.

Q Rather than relying on Mr. Kaminsky's math, whether it's correct or not, have you had cases where the defense has chosen to actually question your method by bringing their own economist?

A Yes.

Q You have testified on both sides, right.

On the website that Mr. Kaminsky brought up that you had a section that was marked plaintiff services.

Is there one entitled defense services?

A Of course.

Q Do defendants hire you?

A Yes.

Q Can you tell the jury regardless of whether or not a defendant, who is being -- has a litigation against them whether or not they choose to call you before a jury, how often, what's the percentage of defendants hiring you to plaintiffs?

A Roughly 30 percent of the work I do involves work where I'm retained by the defense.

Q And only because the question said plaintiff's voted you this --

THE COURT: Question, please.

Q On your website it is a New York Law Journal -- the New York Law papers, that you were voted by, by the readers of that journal, right, not plaintiffs?

A That's correct.

Q By all readers of that journal?

A My understanding all members of the legal community, that's correct.

Q You were not in any way involved in -- in the creation of the life care plan?

A That's correct, I was not.

Q You took the numbers of the first life care plan, applied it to the math and the growth rate?

A Yes.

Q When you testify for plaintiffs, you do understand

that plaintiffs have the burden to prove a case to the jury?

MR. KAMINSKY: Objection.

THE COURT: Sustained.

MR. KAMINSKY: Leading.

Q Without your testimony of growth rates, four percent for doctors, three percent for physical therapists, how else would a jury know --

MR. KAMINSKY: Objection. Objection.

THE COURT: Sustained.

Ask the question without inserting --

MR. McCRORIE: Okay.

Q Have you testified -- you listed on your website, many cases where a union member is losing health coverage either for himself and his family and is also seeking the cost of medical care into the future?

A Yes, many times.

Q What category does the health care coverage as part of his compensation package, what category is that in?

A That is included in my calculation of the overall compensation Mr. Evans would have continued to receive if he had been able to maintain his employment.

Q The wages part?

A That's correct.

Q When does that stop? When does his health coverage stop under your calculation of the wages?

A At age 60.

Q Or before --

A Or before. Whenever he stops working, that's correct.

Q When did the life care plan stop?

A At his statistical date of death.

Q Goes on for -- here you have 79?

A Goes on for approximately an additional 20 years.

Q And so you don't choose to do it in this case, whenever a union member has that as part of the package, it's included as part of the package?

A Yes.

Q And it was pointed out you don't know what any hypothetical health coverage would cover or not -- or reject, you don't know what they would cover?

A That's correct.

Q You're simply giving the jury the cost of the care over his life?

A That's correct.

Q And why would it be inappropriate if we didn't have an economist, if someone made $50,000 a year and was going to lose 20 years to just say they're going to lose a million dollars, 50 thousand times 20. Why is that inappropriate to do as an economist?

A There are a number of adjustments that need to be

included to determine, to a reasonable degree of economic certainty, what someone's compensation would have been.

Some of those are upward adjustments to take into account, for example, wage growth. Some of them are downward adjustments to take into account the probability that somebody might miss work here and again.

Those are the types of adjustments I make when I calculate or project how much somebody will earn over a 10, 20, 30 year period into the future.

Q And can you please describe -- because you use a term of your art, work life adjustment, can you just tell the jury again that's a downward adjustment?

A Yes.

Q What does the work life adjustment account for over -- in this case, Mr. Evans' life or any plaintiff or defendant?

A It accounts for the probability that Mr. Evans would not have worked continuously from 2007 through his 60th birthday, but rather he would have missed periods of work here and there because of illness, injury and so on and that's why it's necessary for me to make that downward adjustment to take into account periods of time where he would have been unable to work and would not have been receiving income.

Q And have you -- is it difficult to calculate the

pension formula, bring it to a mathematical equation and put it out over someone's work life?

A If you are not familiar with how union pension benefits are calculated, it can be a bit complicated and overwhelming.

Q And I actually, during the questioning on the direct for the defendants was saying take off the higher years at the end for the unfortunate cancer diagnosis that he had, not even in the beginning, take it off at the end to go to 58, but whether you knew he has cancer or not, what does that downward adjustment -- what was the percentage of downward adjustment? Is it up here on this board?

A It is on one of the previous slides, but specifically for the work life adjustment, I made a downward adjustment each year in the amount of 11.4 percent.

Q Is that the 88.60?

A Yes.

Q Okay. So what is being shown is 88.60 percent of what he would have made, taking money off for the times he would be down and out of work?

A That's correct.

Q Having nothing to do with unemployment?

A That's correct.

Q Did you have an understanding, other than having his actual unemployment that he collected, did you have an

understanding -- withdrawn.

What if any understanding do you have in the construction industry, understanding the majority don't work anywhere near 2000 hours, whether or not they collect unemployment on a regular basis because that's their trade?

A That is common practice in the construction industry.

Q And if they can't work due to injury, do they get to collect unemployment?

A No.

(Continued on next page)

K. Kucsma - Redirect/Mr. McCrorie

Q And if they can't work due to injury, do they get to collect unemployment?

A No.

Q Different than, say, a line-of-duty-injury for a police officer or maybe a teacher who might get health for life, when a union worker is in this union or any of the unions you know of the New York and construction, when they can't work and earn the hours, do they get health coverage going forward?

A Typically, no.

Q In this case, no?

A No.

Q In addition to the depositions and other things where you testified about health coverage and life care plans, you actually had listed on your CV and the website defendant-specific talks and papers that defendants have asked you to give, correct?

A Sure.

Q The role of an economist in assessing damages --

THE COURT: Counsel, let's not read from something not in evidence and don't lead the witness.

Q Mr. Kaminsky was reading you the names of every single one you did. Do you know any of the defendants ones that defendants have you come and speak to them?

(Pause in the proceedings.)

Q You know what, that's fine.

A Are you sure? I just found it.

THE COURT: We are pressed for time. Do you have another question?

Q You do get called to speak before defendants, correct?

A Sure, absolutely.

Q Other than Mr. Kaminsky putting numbers, the 110, the 40, where we don't know where he got them, have you seen any report on behalf of the defendant challenging any of your methods or growth rates whatsoever in this case?

A No.

Q The national statistics you utilized for the life care plan for a male of 40, can you tell the jury why you utilized statistics when we are speaking about what will go on in the future rather than a specific known person?

A Sure. There are two main reasons. Number one, I don't have a crystal ball, so I'm not capable of specifically determining how long a particular person will live. But a greater significance, from a statistical perspective, the life expectancy tables that I use are based on the actual experience of roughly 40, 42-year-old males, and take into account all of the factors, health conditions, life-style conditions, the age of a person's parents, grandparents, siblings, etcetera, all of the factors that typically influence a person's life expectancy.

Q And I had you on the direct do the same numbers Mr. Kaminsky had you do, bring it down to 831,000, right, or another

number?

A Yes.

Q And the stipulation was, assuming he goes through a state-run --

MR. KAMINSKY: Objection.

Q Assuming he gets retrained --

MR. KAMINSKY: No. Objection.

THE COURT: Sustained.

MR. KAMINSKY: That's not the stipulation.

THE COURT: Is there a question?

Q Regardless of the reduction of the wage that's been stipulated to, does the pension calculation stand?

A Yes.

Q Tell the jury why?

A The pension benefits were a function of Mr. Evans union employment in this case. Unless he is able to get similar employment in a similar union, work the same number of hours, be eligible for the same type of pension, he more likely than not will not become enrolled again in a pension. He will lose permanently the pension benefits because of his inability to return to work in the same capacity in the same union.

Q With regard to the union information you have as to the age of 60 being the average age of retirement and the potential for 55 being early retirement, right?

A Yes.

K. Kucsma - Redirect/Mr. McCrorie

Q That also list the information about when a person start in the union, right. The greater majority start in their 20's?

A That's correct.

MR. KAMINSKY: Objection.

THE COURT: Sustained.

Q Mr. Evans started --

THE COURT: Stricken.

Q -- when he was 32, you know that, correct?

A Yes.

MR. KAMINSKY: Objection.

THE COURT: Sustained. Stricken.

Q Do you stand by all of the numbers and all of the calculations as being, with a reasonable degree of economic certainty, at the outset of what the numbers would be?

A Yes.

MR. McCRORIE: Thank you. Nothing further.

MR. KAMINSKY: Judge, could we just approach for a second?

THE COURT: Yes.

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

THE COURT: Anything?

MR. KAMINSKY: No. Thank you.

THE COURT: You can step down.

(Witness excused.)

K. Kucsma - Redirect/Mr. McCrorie

THE COURT: I understand you have another witness?

MR. McCRORIE: Yes, Your Honor.

THE COURT: Call your witness.

MR. McCRORIE: The plaintiff calls Richard Gasalberti, M.D.

THE COURT: Welcome, sir. Please take the stand. Remain standing.

R I C H A R D G A S A L B E R T I, M.D., a witness called by and on behalf of the Plaintiff, upon being duly sworn, testified as follows:

THE CLERK: Sir, in a loud, clear voice, please state your full name.

THE WITNESS: Richard A. Gasalberti, G-A-S-A-L-B-E-R-T-I.

THE CLERK: What is your business address?

THE WITNESS: 111-20 Queens Boulevard, Forest Hills, New York, 11375.

THE COURT: You may inquire.

MR. McCRORIE: Your Honor, could I have the witness' original file marked as 2A, subject to any redactions?

THE COURT: Let's mark it.

Any objection, Mr. Kaminsky?

MR. KAMINSKY: No.

(Whereupon, Plaintiff's Exhibit 2A so marked in

Dr. R. Gasalberti - Direct/Mr. McCrorie

evidence.)

MR. McCRORIE: May I inquire, Your Honor?

THE COURT: Please.

DIRECT EXAMINATION

BY MR. McCRORIE:

Q Good afternoon, Dr. Gasalberti.

A Good afternoon.

Q Dr. Gasalberti, prior to you coming in, I got reprimanded for speaking fast. I met you twice. You speak very fast. So, I am going to ask you to speak loudly and clearly, okay?

A Certainly.

Q Can you please tell the jury, are you a medical doctor?

A Yes.

Q When did you become licensed in the State of New York?

A 1988.

Q Can you please tell the jury, without leaving anything out, up to your current practice, leaving out any outside -- just leading up to when you started your current practice, could you tell us your educational background and, then I will ask you some questions about it?

A I completed medical school, Ross University School of Medicine, then went on to two years of general surgery at New York Hospital, which is now Queens Medical Center, part of Columbia Presbyterian. I then went on to go to Mount Sinai

School of Medicine where I underwent rehabilitation, formal training. I went on to do a fellowship at the Hospital for Joint Disease, which was NYU.

During my training, I also have visit Sweden to work with the National Institute of Swedish Doctors for sports medicine. Since that time, I have held various positions and honors. I am the president of the Queens County Medical Society, president of the First District of Queens County.

Q A little slower, please?

A President of Queens County which encompasses all the counties, the lower, Brooklyn, Manhattan, Bronx, Staten Island, Nassau.

In addition, I started and cofounded the New York City Pain Society in the wake of addiction medicine. All the deaths that occurred from overdose of opioids which started about five years ago. I recently completed my second year term as president.

In addition, I volunteer for the New York Guard where I serve as captain active duty presently, 244 Camp Smith, attached to the 102nd.

In addition, I also work on Visions, board of directors for Visions for the visually impaired. During that time, I am also in the midst of producing a handbook of pain which, hopefully, publication will occur in July, end of July. I have also lectured on various topics of interventional pain, and in

addition has written multiple articles. I continue to teach at NYU. I have assisted clinical assignment, and also Downstate Medical Center. I teach residents, attendings and the other physicians.

Q If you could, please, direct all your responses to the jury, Doctor.

Are you board certified?

A Yes.

Q In what area?

A I'm board certified in two areas, rehabilitation physical medicine rehab and pain management. Board eligible in sports medicine.

Q Do you currently have a practice?

A Yes.

Q When did that start?

A I originally was in a group practice when I finished in 1989, and then started my own practice in 1991.

Q What is the name of the practice?

A Richard A. Gasalberti Sports Medicine and Rehabilitation.

Q Describe your current practice?

A I have various jobs I do. New York Hospital Queens where I'm an attending.

Q Slowly, please.

A New York Hospital Queens where I'm an attending. I

take care of musculoskeletal injuries, pain management. At Dry Harbor Nursing Home Rehab where I am director, I see in-patients for rehabilitation. In my private office, a variety of musculoskeletal and multiple medical problems, and I do interventional pain. Interventional pain is surgical procedures such as cervical/lumbar area, injecting medication through a needle and using fluoroscopic, which is imaging technique.

In addition, I also serve as assistant clinical professor at Downstate, and at NYU where I do some teaching still as well.

Q Do you sit on any boards?

A Multiple boards.

Q Please tell the jury -- just do it -- I know it's your cadence, but go a little slower for the court reporter and the jury.

Please direct to the jury what you currently do in addition to the nursing home and your practice, what boards do you sit on?

A I serve as chairman of Worker's Compensation for Queens County, which anyone applying, in terms of physician to require Worker's Comp number to treat Worker's Compensation patients, I sit on the board for evaluation their credentials and then approving them to go on to the state to get a number. I also sit on boards for analyzing --

THE COURT: Every time he tells you to slow down, I

don't think you change your speed. The court reporter has to take down every word you say. So, please, be kind.

MR. McCRORIE: And it won't go any faster by speaking faster.

THE WITNESS: Yes, Your Honor.

A I also sit on the New York Police Department Article 2 medical board, which there are three members. We evaluate line-of-duty injuries to police officers. I've been doing that for about 12 to 15 years.

Q How often do you do that?

A Every Thursday morning.

Q What do you mean you are evaluating the line of duty?

A Officers who have been injured on their line of duty or during their tour of duty, they come before us. At that point, we will determine whether or not they are fit for duty or they get a disability or they are just retirement in terms of ordinary. Meaning, there is no line-of-duty injury that occurred. But an example would be, if you injured your knee and you have arthritis in your knee, and it was only towards the arthritis, you would get an ordinary. Whereas, if there was a line of duty, and you are running after a criminal and you injured your knee, and it had required surgery due to the fact that the injury that you get was in the line of duty, and the disability would be much different.

Q Where is your practice currently? Is it one address,

more than one?

A My office address is in Forest Hills. And I travel to the hospitals, as I said, New York Hospital of Queens, which is Columbia Presbyterian and Metalines which is on Fordham Road in the Bronx, which I also do surgical procedures there as well.

Q What's the address in Forest Hills?

A 111-20 Queens Boulevard, Forest Hills, New York 11375. I formerly was at St. Vincent's Medical Center. When the hospital was open, I was chief of the department of rehabilitation where I had an office in the city as well.

Q I want to show you it's Plaintiff's Exhibit 1 in evidence. There is an address written on the discharge papers. Is that your dress on the document of that discharge?

A Yes.

Q Your file is in evidence. Did you also have an office within St. Vincent's Hospital?

A Yes. My office was actually on the fifth floor where I ran the out-patient and in-patient unit at the hospital, served as director until their closing.

Q What were your duties back then before the hospital closed down as the director of, you said?

A Rehabilitation and sports medicine. My job duties were to oversee the physical therapy department, consultation, in-patient, out-patient. Musculoskeletal injuries that were not fractured, broken bones, they were referred from the emergency

room to evaluate and to initiate treatment as well as pain management for them.

Q So, you said 1989 you opened your practice?

A Correct.

Q Can you tell the jury how many times you have actually come to court on behalf of the patient in all that time?

A If I had to guesstimate, approximately ten, not counting Worker's Comp, which is basically giving your deposition.

Q In front of jury, though. In front of jury on behalf of the patient, how many times?

A No more than 10.

Q Did you do it at all this year?

A No.

Q Or last year?

A I don't recall last year.

Q Other than coming to court on behalf of patients to talk about treatment, had you ever been retained by either a plaintiff or defendant to come in as an expert?

A Yes.

Q And have you testified in front of the jury before?

A Yes.

Q And in the field that you are board certified in?

A Correct.

Q And when was that?

A To recall, maybe two or three years ago. The majority of my practice is clinical teaching. And the majority of the time I'm called upon by my patients to come to court for them. That's the majority of the time.

Q Does your practice accept work accident cases where the rule and procedure connect?

A Yes. I'm Worker's Comp certified, which mean that I accept Worker's Comp injuries.

Q Does that mean you accept the fees that are given to you in accordance with that?

A Yes. Worker's Comp have a fee schedule that no matter what you bill them, you will get paid a set fee.

Q The jury already heard PM&R, physical medicine, rehabilitation and physiatry. What is the purpose of physical medicine and rehabilitation regarding a spine injury?

A Physical medicine rehab is the third phase of medicine. Dr. Rusk, after World War II, was a general practitioner. And there were many soldiers coming back from World War II who survived the war who couldn't go back to normal life. So, it's considered they had medically been stabilized from certain medicine, but yet they couldn't go home to their families and enjoy life. They couldn't walk, they couldn't eat, they couldn't drink. It was a field that was based upon modality such as heat, electric stim, massage, exercise. And giving them adoptive devices so they could walk again and enjoy their life,

which they fought for this country for. And that's how the field evolved.

In relationship of back pain, musculoskeletal, we are able to first diagnose, and not only making the first diagnosis, various treatments to eradicate the symptoms and make them functional again. So, it's a functional field, not only the treating field like acute medicine does, but it's a functional field, to restore you back to your normal function to enjoy your life.

Q Have you worked in emergency rooms?

A Yes.

Q And have you been in the emergency room of St. Vincent's prior to its closing?

A Yes. Also, during my training in general surgery, we had the trauma team. So, our job was to answer the trauma calls, look over the call residents, the SICU's, the OR, and to do it all on four-hour sleep before they changed the law where you had to sleep every 12 hours on, 12 hours off.

Q Can you please tell the jury the goal of emergency room treatment?

A Emergency room treatment is very simple, live or die. If you are going to live, can they be treated and sent home? If they are going to die, prevent them from dying and prolong their life.

Q Whether or not someone comes by ambulance, does that

dictate how they are treated?

A No. If it's a true emergency, they would call ahead by the ambulance to let them know the type trauma coming in to allow them to prepare themselves.

Q Back in June of 2007 and prior to that date, did you ever receive referrals from the St. Vincent emergency room department staff for a patient that had been through that emergency room?

A Yes. We had a protocol that all back injuries who did not require surgery, in terms of acute fractures, or no fracture of a limb or the spine that we would see them if they were discharged.

Q Utilizing your file or the notes, it's just a stapled copy of your notes in date order.

Can you tell the jury did Richard Evans become a patient of yours or appear in your office?

A Yes.

Q I would like you to assume the emergency room where you were -- I mean the hospital where you were working at that time on June 6, 2007, Mr. Evans was seen, and your name appears as having been referred. When did he first come to you?

A The date is 6/8/07.

Q I would like you to assume that 6/6 is a Wednesday, 6/8 is a Friday, did you have Friday office hours back then?

A Office hours six days a week.

Q And, in fact, you brought your office physical therapy records as well?

A Yes.

Q If I tell you that he started on 6/9/07 and that was a Saturday, you would have been there as well?

A Yes.

Q Please go to the first note. Did you have access -- withdrawn.

A person doesn't have their medical record as soon as they walk out of the hospital, do they?

A Majority of the time they don't.

Q Did you have access as the head of PM&R department for St. Vincent to the record and information from the record?

A Yes. We would either call ahead and have them faxed or speak to the ER physician, or someone would have records and forward them to us or speak directly to them.

Q I would like you to assume his address is in the record, that Mr. Evans was living out in Suffolk County, which office did he appear to see you at on 6/8/07?

A In Forest Hills.

Q Did you take a history?

A Yes.

Q Your history is written there. Have you had patients tell you whether they lost consciousness or not and not be sure of it?

Dr. R. Gasalberti - Direct/Mr. McCrorie

MR. KAMINSKY: Objection.

THE COURT: Sustained as to the form.

Q What did he tell you about when he gave the history?

A He had told me that he had sustained several seconds with loss of consciousness.

Q What did that mean to you?

A Well, it would mean that he had a head trauma that caused him to not be aware of his surroundings. There is different levels of head trauma. So, his was enough that he was not aware of his surrounding.

Q Not sustained several seconds?

A Correct.

Q What were the complaint he was making to you?

A The complaint was that he sustained injury to his elbow. He had a CAT scan of his brain. He had residual headaches. Pain discomfort in his left elbow.

Q It's written there, and you can technically read from it, did he tell you about his past medical history?

A Yes.

Q What did he tell you?

A He had informed me that his left lower leg he had a DVT, deep vein thrombosis, which is clot in the vein. He had a stent put in, which it prevents the clots from coming back up. Because if they go into your lung, it could kill you. He was on Coumadin, which is a blood thinner.

So, if you are on a blood thinner, like when we have an injury, if you hit your arm it gets a little discoloration, but people on Coumadin they could have bleeding into that spot. And depend where it is, it can cause life-threatening problems, particularly in the brain where you have a closed cavity.

Q On your review of systems, what did you write for musculo -- well, type or dictate for musculoskeletal and neurological? There is other systems there, but for those two?

A Musculo, as above. Neurological, none.

Q On the physical examination?

A The physical examination --

Q What did you have down just for his weight?

A I have about 170.

Q Now, approximately, did you and I and Mr. LoRusso meet within the last two weeks?

A Yes.

Q I know you didn't examine him, but did you see Richard Evans?

A Richard is a big gentleman.

Q Was he 170?

A No. He is bigger than me, and I'm pretty big.

Q I would like you to assume he said he was 270, would that be a typo?

A I would say he is close to that.

Q You examined his neck, and you had done other things,

but just go to the neck on that page. Tell us what that was?

A His cervical motion was unrestricted. Normal motion is zero to 80 degrees. If you put you head straight and turn to you shoulder that's not really 80. Flexion/extension is 0-35, you put your chin on chest. So at that point, he had no restrictions or spasms to his neck.

Q Going to Page 3, the musculoskeletal neurological examination, can you go through that with the jury, please?

A Yes. The examination of his elbow, he had pain over the medial aspect, the epicondyl area. There was restriction in pronation, supination, meaning that we have all heard of tennis elbow, there is also golfer's elbow. Tennis elbow is on the outside, golfer's elbow is inside. If you have tennis, it's on the inside. When the pronate and supinate they talk about, supination hands are up, and pronation down. He had restriction. So that was finding on exam of the elbow.

Q Continue, Doctor.

A In his lower lumbar area, if you put your hand behind your back, the buttock area here, the lower back above, he had a large area of ecchymosis. Meaning when you bleed into the skin - we have all had black and blues when we have fallen, he was ecchymotic, meaning discoloration of a large area on both sides. He also had straight leg raising which was positive.

Q Tell the jury what that mean?

A Straight leg raising, it occurs when you lift the leg a

certain degree. If there is impingement upon the cord from a disk or some other problem affecting the spine, you will have a positive finding of pain, which he did.

Q So, positive doesn't mean good, right?

A Correct.

Q You are using terms of art, I just want to read: Right lower gluteal maximus area revealed a 5X4 centimeter area of ecchymosis, as well as a left side 3X2 centimeter area. Quite tender to touch on palpation.

Could you stand up - it might be embarrassing - show the jury where the gluteus maximus is?

A Sure. The size would be taking an apple and a grapefruit and behind your buttock area or lower back you put them right here. That's where they would be (demonstrating.)

Q Is that different than the flank area?

A The flank area is more lateral in terminology.

Q You said you had access to it then and it's referenced, but did you, prior to testifying here today, review in your file the St. Vincent's Hospital record of the day of the accident?

A Yes, I did.

Q And do you see, it's been talked about, but the ecchymosis to the flank?

A Correct.

Q Do you know whether or not, by looking at the record, the emergency room department took down his pants or asked him

to take down his pants and examined his buttocks on either side?

A I couldn't tell you how they examined him, but they did mark off. And all I can tell you is the day I examined him, there were two areas of discoloration in that location.

(Continued on the following page.)

Dr. Gasalberte - Direct/Mr. McCrorie

(VP4) DIRECT EXAMINATION (Continuing)

BY MR. McCRORIE:

Q Right after that sentence, it says: Deep palpation revealed paraspinal spasms L4-L5.

So I just on this first note, I don't want to skip over the exact words.

What does that mean and is that objective or subjective?

A Subjective finding -- if you have a model -- one second or I'll just make it easier for visualizing.

Q This model?

A That's perfect.

MR. McCRORIE: Plaintiff's 22 for identification.

A This is the lumbar spine, there's five vertebral bodies and the disc interfaces. It's the lower half.

And the muscles in this area, so this L5-4, that level was spasm, meaning there's different texture when you palpate, so this is what I found on his exam at that level.

That can either indicate some type of trauma the muscle or nerve irritation which presented.

Q It says: No pain over the SI joints. Where are they and what did that indicate, if anything?

A The SI joints are like shoulder joints. Women are

able to bear children, why? Because the pelvis expands, it has to occur. There's a joint called the SI, it is a real joint like a shoulder and knee and there's a cartilage in between and that can expand and sometimes you can develop pain there which could mimic back pain and hip pain. And there was no tenderness there.

Q When you in your reports write the word Impression,'s is that synonymous with diagnosis? Other doctors have said that.

A Correct.

Q What was your -- after examining him, after hearing the history, after -- well, what was your impression on that day?

A My impression was work related injury 5/6 -- 6/6/07, resulting closed head injury, residual post concussion syndrome, left elbow derangement, lumbar derangement, rule out hematoma of the gluteal maximum muscle bilaterally.

Q And understanding that was two days later, the headaches he complained of resolved eventually?

A Yes.

Q There was no post concussion or anything like that, going forward?

A And also we had to give him a note for work and for him that he had lumbar derangement, lumbar radiculopathy. I

wrote on his note for him.

Q What date is that, that note, telling him for work, indicating lumbar radiculopathy and derangement?

A 6/8/2007.

Q Now, I'd like you to assume this -- not assume it, it is a fact. On page one of the St. Vincent's Hospital record it says he's excused from work through 6/9/07. And he is referred to you.

When you take on the patient as a referral from St. Vincent's, who has the say after examination as to whether or not he should go to work?

A The fiduciary responsibility is the physician who he comes to then to determine whether or not he will go back to work or any additional workup or care.

So the receiving physician then supersedes that note and will make a determination whether or not he can return to work and in what capacity if he is able to.

Q Did you take -- what if any testing did you do? Try to just go --

A X-rays were performed, I did x-rays of the lumbar spine, besides examining him and made recommendation when he should do it.

Q Is that your file from the last nine years?

A Yes.

Q Could you just hold it up and show the jurors where

the x-rays are? Are they in a different form?

A (Indicated.)

Q It's in picture form?

A Picture form. We're able to now -- new technology, instead of having the big, large x-ray films, you can put it onto a small size paper.

Q What did the x-rays indicate, as noted in your file?

A The x-rays demonstrated narrowing at the L4-5 level. Again, five, four, three, two, one. So at the L4-5 level, there was a narrowing.

In addition, some degenerative changes of the space narrowing you have to say there's some changes.

Q The jury has heard the term degenerative --

A And as well the green-filled filter, you will see looks like a butterfly there, that was also there present, too.

Q You can see it in the x-ray?

A See it in the x-ray.

Q The jury has heard the term degenerative. Were there expected degenerative changes? Describe them for the jury.

A We are bipedal, we walk on our feet. After the age of 24 the discs start to change. After the age of 50, discs are memories.

Q Go back to the recommendation section and after having examined Mr. Evans, after having done the x-rays, what were your recommendations?

You've already told us you told him to stay out of work and you wrote that down.

A My recommendation were to see a neurologist, a Dr. St. Martin. I did the x-rays already, I also had referred him for -- to start therapy, wear a back brace support and then gave him a patch of Lidocaine, a topical cream to prevent pain.

The fact he's on anticoagulation which thins his blood, there's a lot of medications you don't want to give because it can accelerate bleeding to death, so I opted to let him talk to his primary doctors, other than this Lidocaine which doesn't react and wouldn't cause a problem.

Q Lidocaine is something injected.

I'll ask you to go a little slower.

It says Lidoderm patches?

A Lidoderm which is a Lidocaine, it is a medication that blocks pain. Whoever had dental procedures where they say I'll give you a little injection to numb the pain, that's what that is. Except this is put into a form of a cream which he can apply a patch -- apply to the skin and stop pain.

Q There's also is a referral to another doctor

different than the St. Martin. Who is Dr. Goldman?

A Dr. Goldman is an orthopedist. My two concerns with this patient, someone is on blood thinners who falls, and hits their head, and I see these large ecchymosis, one, he could still have a bleed in his brain even though the CAT scan done at the hospital is negative, they sometimes, you have to watch a day or two later that if there was a bleed, it's called tamponade, like a patch, it blocks it off, it can rebleed. That was the first concern. That could kill you.

The second is if he had this bleeding in this muscle which is quite large, they can fill up with blood like a balloon and it can compress on nerves at that level. And then if that is not an acute problem, it's not expanding, the problem can develop is heterotropic bone, which means there's calcium in the blood, becomes like bone hard, it becomes painful. We see this in spinal cord patients who have traumas and so forth.

So those were my two concerns at the time I saw him.

Q And you wrote it was medically necessary to attend something. Your words, what did you say, it says it is medically necessary to?

A Oh, what I also put -- I felt medically necessary to undergo an MRI, to rule out disc herniation.

Dr. Gasalberte - Direct/Mr. McCrorie

Q I see that back in the recommendation number four, it is medically necessary to attend outpatient formal program.

Could you just read that starting on page four.

A It was medically necessary to attend outpatient formal program including myofascia release techniques, heat, massage, lumbar spine, trunk, stabilization, abdominal strengthening, proper ergonomics, biomechanics of lifting, sitting, standing, ultrasound, left elbow, P-R-E, which is progressive resistance exercises, attend three times a week, for two weeks, and be reevaluated.

Q Is that a physical therapy program?

A That's a physical therapy program.

Q Did you start him on that the very next day three times a week?

A Yes.

Q What's number six, what did -- what if any devices did you prescribe to him?

A A lumbosacral corset. The reason for that -- think of a cylinder, the Guass law. The cylinder stands upright, you hold on, you can stand on it, but if there's an indentation, it will fall over.

So what the corset does, it gives abdominal support to hold your stomach in, that takes the pressure off the disc and it aids as a local massage and feedback to

remind you you have back problems, don't go lifting.

That's the reason for the corset and what the indications were.

Q Understanding this was a work accident, when you write: The patient is totally disabled from prior duties until further notice, what did you mean?

A That he should not work until I see him back for re-evaluation.

Q And you wrote what the goal of physical therapy would be. Could you go to the first physical therapy note of 6/9/07.

And understanding you wrote it in a physical note that's in the file on 6/8, that there was lumbar radiculopathy, can you read the DX, the diagnosis, on 6/9/07 at the physical therapy visit?

A Lumbar derangement. Lumbar radiculopathy, low back pain, myotomal pain syndrome, left elbow pain.

Q The jury has heard it, but can you tell them what lumbar radiculopathy indicates to you and why you would order an MRI or seek authorization to do one on that first date after hearing that?

A Radiculopathy means a nerve involvement. It is a dermatome, meaning that the body has nerves and they go around certain parts of the body which are mapped out.

Myotomal is a muscle, which is a muscle

pattern, so my feeling was I thought he might have a disc herniation, because of the fact when he had the spasm at the L4-5 level, the nerves there are two types, you split them, the anterior rami, posterior, one is motor, for movement; the other one is just sensory in the lower back. So I thought that was being irritated. That's why I wanted to order it and this is the diagnosis on the exam. It is a myotomal muscle, radiculopathy. He had both.

Q From the first bill you submitted to get paid forward, what did you indicate was the problem on --

A Do you have that?

Q They're in your file, don't read anything but the --

A Back pain radiculopathy, lumbar.

Q If a board certified physician were to come in on behalf of the defendants, an orthopedist and say there was no radicular complaints or radiculopathy noted for months, would he be incorrect, if that's what he based his opinion on?

MR. KAMINSKY: Objection.

THE COURT: Sustained.

Q You treated Mr. Evans from two days after the accident, correct?

A Correct.

Q And in writing you told the entity that needed to

pay that he had radiculopathy, correct?

A Correct.

Q And that was documented in your file?

MR. KAMINSKY: Objection to the leading questions.

THE COURT: Sustained.

Q In addition -- what was the -- understanding he had radiculopathy, lumbar radiculopathy and the spasm and the limited motion and the straight leg raising, what was the goal of -- with those specific complaints, putting him into three times a week physical therapy?

A The goal was reduce pain, increase flexibility, increase strength. Those are three goals.

Q Did you know what he did for a living?

A Yes.

Q I'd like you to go to the second -- not the physical therapy, I understand he was compliant with his physical therapy for three times a week for a period of time.

A He did, yes.

Q Go to the second PM&R visit, 6/21/07, okay.

A All right.

Q By that time, had you received authorization to do the MRI to investigate the radiculopathy?

A I --

Dr. Gasalberte - Direct/Mr. McCrorie

Q When was the MRI performed, sir?

A The MRI was performed -- the MRI was performed 8/6/2007.

Q That's the date of the report, the date of the exam right underneath it?

A However, he had to have an x-ray of the orbis because he worked in construction, make sure he had no metallic in his eyes. That's why it was done before the x-ray.

So an x-ray had to be done to confirm there's no metallic -- with the MRI, which is magnetic resonance imaging, which is large magnets, so something could be projected at you 400 miles an hour, comes out if you have something metal, that's why if you have medical devices you can't go under MRI. They had prophylactic to do an x-ray of his orbis because he worked in construction.

Q It says physical therapy evaluation, but the PM&R notes are typed, physical therapy handwritten, is that fair to say --

A Yes.

Q Going back to the PMR notes, 6/21/07, in the Impression you crossed out the word rule out with hematoma of the gluteus maximus.

What is the difference between ecchymosis and hematoma?

A Ecchymosis is discoloration through the skin.

A hematoma is a formation or -- you have a -- if you ever have a cut and also there's a scab there on top of the skin, think about underneath the skin, that's what hematoma is. It's walled off, it's not bleeding more, so now it has to absorb.

Q Did you observe Mr. Evans' ecchymosis on his right and left gluteus maximus become hematomas?

A Yes.

Q I don't know if -- you told us -- we read the size five by four centimeters, then three by two. How big is that?

A I would have to say size of a little bit more than an apple, grapefruit, somewhere between there. Depending -- because, again, they're not just circumferential, it's not demarcated, they're spread out a little bit, so kind of when you measure, you try to measure from the center as far out -- out of the point.

Q On 6/21/07, can you please tell the jury on that topic that you -- degree of disability, did you tell the patient whether or not he should go to work?

A Yes.

Q What was that?

A I told him that he was unable to work, he was totally disabled from his duties till further notice.

Q What is the last date that you saw Mr. Evans -- you or the physical therapy, but under the typewritten note?

A 10/20/2007.

Q At that time, 10/20/2007, when you write: Resolving hematoma of the gluteus maximus bilaterally, did he still have a hematoma then?

A It was -- he still had ecchymosis and swelling but it was resolving which -- there was no new progression or bleeding. So he was getting better.

Q Coumadin could make it stay longer?

A Well, if he had -- you have to understand with any type of injury when you're on coumadin, once -- you have a cut, scab forms and sometimes you pick it, it starts bleeding again, that's a physiological plug.

So what can occur in a hematoma that is below the skin, it can move a little bit, disrupt itself and it re-bleeds, so in his case, his was not getting larger, it was reducing in size, he was better.

Q On 7/27/07, 8/13/07, 10/20/07 and all of the other dates in physical therapy in between, you saw Mr. Evans, was there ever a time during that time period that you ever changed the degree of disability telling him he could go to work?

A No.

Q So I would like you to assume that Mr. Evans went

to work from June 26th, for that week, through various different times, were you made aware of that prior to testifying here today?

A Yes.

Q And I'd liked you to assume seven hours the first week, 14 hours the next, 21 the next, and then varying sometimes full 35-hour weeks, up until the work payday of August 7th, okay?

A Uh-hum.

Q Was that against your recommendation?

A Yes.

Q Was Mr. Evans the first person to ever go to work after you recommended not going to work?

MR. KAMINSKY: Objection.

THE COURT: Sustained.

Q Is that something that happens typically?

A Well, it's not --

MR. KAMINSKY: Objection.

THE COURT: Sustained as to form.

Q I'd like you to assume Mr. Evans testified he went back in a slightly limited capacity and was experiencing pain when bending --

MR. KAMINSKY: Objection.

THE COURT: I'll allow it. Go ahead.

Q -- would you expect him to have pain to the area of

the low back if he went back to work --

MR. KAMINSKY: Objection.

Q -- during the time you told him not to?

THE COURT: Go ahead. You can answer the question.

A In his case, the fact that he has disc herniation, back injury, his fall and he has to do lifting, his type of work is heavy lifting, he's in construction, he probably would have symptoms.

MR. KAMINSKY: Objection. Move to strike.

THE COURT: Overruled.

Q Could you go to July 26, 2007. Just read the first line to the jury?

A The patient last evaluated 6/21/07 reportedly -- reporting tightness in the lower lumbar, worsening of symptoms.

Q And four days later the MRI was done; correct?

A Correct.

Q The MRI, did you interpret the MRI yourself?

A I do read MRIs. I also receive copies of the report from the radiologists.

Q And the physical MRI here, just the jury has seen it, on 5C, can you tell the jury what the red arrow is pointing to in the 4-5 and S1?

A I'll explain -- can I stand up? Is that possible?

I can hand it to you.

MR. McCRORIE: With the Court's permission, I'll have you step down.

THE COURT: It's fine. It's fine.

A The MRI, first of all, how it works is magnetic waves and radio waves -- --

Q To save time, the jury has heard it.

MR. KAMINSKY: I'm going to object to the doctor talking about this.

Q Were you his treating doctor?

THE COURT: We're pressed for time. Ask your question, please.

Q What are these?

A -- these are what appears to be disc herniation L4-5, L5-S1 level.

MR. KAMINSKY: Objection.

Q Are they disc herniations?

THE COURT: Overruled.

A Yes.

Q Is that noted in your file?

A Yes. There's also at L1-2 levels as well.

Q Did you tell Mr. Evans before that his MRI of 8/4/2007 revealed herniated discs?

A Yes.

Q I'd like you to assume he stopped working that week

and 8/7 was his last paycheck, for the job site where the accident occurred, okay, he listened to you after that, all right.

Did you continue to treat Mr. Evans after telling him he had herniated discs?

A Yes.

Q Did you continue to do physical therapy to Mr. Evans?

A Yes.

Q On 10/20/07, the last date that you saw him --

A Correct.

Q -- did you indicate then the degree of disability --

A Yes.

Q -- what was that?

A He had a total disability.

Q Did you, in fact, write another note to stay out of work?

A Yes.

Q What if any indications on that note on 10/20/07 did you make about radiculopathy?

A I wrote: Lumbar spine radiculopathy, lumbar derangement, low back pain, myofacial pain syndrome.

Q Did you -- what if any knowledge did you have that Mr. Evans was going to be moving further out east in the

month of early November 2007, did you know he was doing that?

A No.

Q Did you know he was going to stop seeing you on 10/20/07 when you saw him?

A No.

Q Did you make any referrals for him to see any other physicians within your -- not a physician -- another medical provider within your office?

A Yes.

Q What type of doctor was that?

A He saw a Dr. Venditteli.

Q Who is Dr. Venditteli?

A He's a chiropractor.

Q I'd like you to assume his letterhead says his office is at 7136 110th Street. Was he also within your office back then?

A Yes.

Q Do you know where Mr. Evans saw Mr. -- Chiropractor Venditteli?

A I'm not sure which office. His office -- he has two offices. The one office in the area of Forest Hills has no disability access -- has no accessibility for disabled. You have to climb up stairs and since he has patients that -- with wheelchairs and have difficulty ambulating

through assistive devices, he then uses my entrance at street level.

MR. KAMINSKY: Objection.

THE COURT: Overruled.

Q You already -- skip the positive stuff, meaning he didn't have headaches -- start with the second paragraph on 10/20/07, your physical examination.

A Deep palpation paraspinal muscles -- excuse me, deep palpation revealed paraspinal spasms L4-5 --

Q Can you just tell -- is paraspinal spasm expected at the area of a herniation?

A If it's symptomatic.

Q What causes -- what does that mean?

A Okay, in the spine, there are nerves that come out. Anterior rami and posterior rami, the ones in the front are the motor, the ones are just sensory, and when they're irritated, in his case, they create spasms, and then you would expect to find at that level spasms, they could be involved in the lower level, as well.

Q Okay, straight leg raising on that date was negative?

A Correct.

Q What does it mean after that, no restricted secondary. Read that, tell us what that means.

A That means --

Q Read it first.

A Straight leg raising is negative. Though restricted to secondary to hamstring tightness to approximately 70 degrees.

Means that before restricted due to the nerve root irritation, now it's hamstring tightness, which could be either one, his muscle is tight, or the nerve to that area is causing a spasm causing him to have restriction.

Q Despite the straight leg being negative you still wrote and found the radiculopathy you said?

A Correct.

Q Can --

A Also, I might add, since he had the hematomas to his gluteus maximus muscle, which are your hip muscles which are you able to walk and stand, that also can cause restriction, too, when you are moving the leg up, could be tight with spasm, so it was a combination.

Q What were the recommendations?

A I advised him to continue his outpatient therapy, use the patch, the Lidoderm patch as I told him, and also at home, do some therapy at home, mineral ice, warm showers on his own and at that time I referred him to Dr. Venditteli.

Q What is the note of -- that you made there, it says note?

A A long term goal was to increase range of motion,

decrease pain, muscle spasms, increase strength.

Q And again, the degree of disability on that date, the last date you saw him?

A Temporary totally disabled from his prior duties.

Q On that date you saw and examined him as a board certified physical medicine rehabilitation in 2007; correct?

A Correct.

Q Can you tell the jury the amount you billed? I know you said you don't always get paid it, but what did you bill in 2007 for that visit?

A $200.

Q Was that customary even back then, $200 for a physical medicine rehabilitation doctor to do a full exam of the patient?

A Yes.

Q Is that higher now or lower?

A It is higher, but Workers' Compensation has --

Q That's fine.

You don't get the same rate, understand.

A Correct.

Q The jury knows the term desiccation, they know degenerative.

Is there degeneration on the MRI film just as you said there was on the x-ray film?

A You would better visualize it on the T1 --

Q Is it present?

A Yes, it is.

Q Can you characterize it in any way?

A Okay, desiccation --

Q No, not define it. Characterize it. The jury has heard it already and they will hear it from several other doctors.

A Degree, oh, I would say would be mild.

Q In order to treat Mr. Evans under the work accident system, were you required to give your opinion as to whether or not it was related to the accident?

A Yes.

Q I'd liked you to assume that both on your intake in evidence --

MR. KAMINSKY: Objection. This is a treating doctor.

THE COURT: So go from the records, tell him what's in the records.

Q From only your record and the hospital record, I'd like you to assume that the hospital and your records indicate that he had private insurance from his union and you were to treat him under one or the other, why did you choose to treat him under the work accident system and put in for all the authorizations?

MR. KAMINSKY: Objection.

THE COURT: Overruled.

A The Workers' Comp guidelines, if you work compensation boarded and you have a number and the person or individual has a work-related injury, you have to treat him under the Workers' Compensation rules and insurance.

You cannot -- you cannot treat him under private. As a matter of fact, you can lose your license, you get reprimanded by the Supreme --

MR. KAMINSKY: Objection.

THE COURT: Sustained. Just answer the question.

Go ahead.

A Okay, yes, you have to abide by the Workers' Comp guidelines and treat them only under Workers' Comp if there's a work injury.

Q What area did you get all the authorization to treat him for under the work accident system?

A Workers' Compensation.

Q What area of his body?

A His lumbar spine.

Q Is that the back?

A Yes.

Q Doctor, I want to get -- you just gave your opinion as to what it is.

Can you please state your opinion for the time

that you treated Mr. Evans from two days after the accident within 48 hours, up until October 20, 2007, do you have an opinion, with a reasonable degree of medical certainty, as to the cause of Mr. Evans' lumbar spine herniation and injury that you treated?

MR. KAMINSKY: Objection.

THE COURT: Sustained.

Q Were you his treating physician from 6/8/07 to 10/20/07?

A Yes.

Q Did you examine him on all of the occasions physically?

A Yes.

Q And did you look at his --

THE COURT: Stop leading him.

MR. McCRORIE: Okay.

Q Can you tell the jury why you put this in through the work accident system, back injury, what was your basis for doing that?

MR. KAMINSKY: Objection.

THE COURT: He can answer that.

A It was a work-related accident. History, that he gave me, therefore, as a Workers' Compensation physician, I had to treat him under that --

Q Did you base that on physical examination?

A History, and also referral from the hospital.

(Continued on next page)

Dr. R. Gasalberti - Direct/Mr. McCrorie

Q How about the physical examination and examinations that you did?

A Yes.

Q Is your opinion that you just gave that it was work related to the accident of 6/8/07 of where he received the injury to his back, is it your opinion with a reasonable degree of medical certainty --

MR. KAMINSKY: Objection.

THE COURT: The testimony is the testimony. Let's go.

Q I just need to know, for the record, if it is with medical certainty?

MR. KAMINSKY: Objection.

Q Reasonable medical certainty under the standard?

THE COURT: Is it?

THE WITNESS: Yes.

MR. McCRORIE: No further questions.

THE COURT: Cross.

CROSS-EXAMINATION

BY MR. KAMINSKY:

Q Doctor, good afternoon.

A Good afternoon.

Q My name is Alan Kaminsky. I represent the defendants in this case. We have never met, true?

A True.

Dr. R. Gasalberti - Cross/Mr. Kaminsky

Q Now, is it fair of me to say that this happened long time ago and you have no personal recollection of actually treating Mr. Evans, for the most part?

A Correct. That's why I have my reports.

Q Is it also fair for me to say your memory was refreshed when you had the opportunity to meet with Mr. McCrorie and Mr. LoRusso?

A Yes.

Q When did you meet with them?

A Approximately last week.

Q Where was that meeting?

A In my office.

Q And how long did that meeting last?

A 20 minutes, 15, 20 minutes, half an hour.

Q Half hour or so?

A Approximately.

Q And did Mr. McCrorie or his colleague explain to you what this case was about?

A No.

Q Did you talk about Mr. Evans?

A Yes.

Q And did they tell you --

A Actually, he brought Mr. Evans to my office.

Q Thank you for that.

MR. McCRORIE: I brought it out on my direct.

Dr. R. Gasalberti - Cross/Mr. Kaminsky

MR. KAMINSKY: Thank you.

A So, I recollect him when I saw him.

Q Fair enough.

A Large-sized gentleman.

Q So, that helped to refresh your conversation with Mr. Evans, your conversation with Mr. McCrorie, that helped you refresh your recollection of what this was about, correct?

A I asked him how he was doing. It's been a long time. Obviously the patient, nice person.

Q Thank you.

I just want to go over a couple of things.

You are being compensated for being in court today?

A My time away from my office, time to travel here. And the longer you keep me on the stand, the longer it is going cost him.

Q So, if I keep you here a long time, it will cost him more?

MR. McCRORIE: Not past five, though.

A Yes.

Q What is the compensation, give us?

A 500 an hour.

Q And when you talk about the ecchymosis, the hematomas, the black and blues, can they be exaggerated by someone that's -- I don't mean exaggerated as being not true, I mean can they be enhanced or exaggerated in that regard by someone who is

Dr. R. Gasalberti - Cross/Mr. Kaminsky

taking blood thinner medication?

A Well --

Q Just yes or no?

A Yes.

MR. McCRORIE: Just for the record, the word exaggerated --

MR. KAMINSKY: I don't mean --

MR. McCRORIE: I know, but for the record.

THE WITNESS: It needs explanation, if that's okay, Your Honor?

THE COURT: Right now, let's stick to the question and answer.

Q Let me ask you, a person that has DVT and is taking blood thinner medication, if they suffer something that causes a black and blue, they could react differently than someone who doesn't have that condition, correct?

A Correct.

Q So, the size of it could be affected by the underlying condition and not the trauma, correct?

A Correct. The trauma is directly related to the size.

Q And the recovery period could be affected by the underlying condition, correct?

A No. They actually --

Q Okay. Let's go over the timeframe, okay. He goes to the emergency room and he is released, correct?

A Correct.

Q Now, he comes under your care and you see him on June 8th of '07?

A Correct.

Q And you take a history, you write: Patient is a 32-year-old male who states he works for J&E, and when walking on a plank with steel beam on his shoulder, he slipped and fell seven feet onto his head two days earlier. He was wearing a hard hat and sustained several seconds with loss of consciousness. He was taken to St. Vincent Midtown Hospital for evaluation. He also sustained injury to his left elbow with negative X-rays obtained. CAT scans of the brain with negative intracranial bleed. He reports residual headaches. He denies blurry vision and difficulty swallowing. He denies bowel or bladder dysfunction. He reports residual pain and discomfort in his left elbow.

Now, is it fair of me to say that when you took your history from him he talked about his head, he talked about his elbow, and at this time he doesn't even mention his back, true?

A Well --

Q According to the history that I just read you that you yourself wrote, is that a correct statement?

A That's a correct statement.

Q Okay.

THE COURT: I am just going to stop you one minute.

Dr. R. Gasalberti - Cross/Mr. Kaminsky

There is a juror who needs to use the restroom. We are going to take a very quick break.

THE COURT OFFICER: All rise. Jury exiting.

(Whereupon, the jury exits the courtroom.)

(Whereupon, a recess was taken.)

(Whereupon, the proceedings resumed.)

THE COURT OFFICER: All rise. Jurors entering.

(Whereupon, the jury enters the courtroom.)

THE COURT: Please sit down.

Q Doctor, I'm going to back up. St. Vincent's Hospital, you worked there, you worked in the emergency room?

A No, I worked as an attending at the hospital, not the emergency room.

Q You have worked in emergency rooms?

A Yes, I have.

Q And you were affiliated with St. Vincent's Hospital?

A Correct.

Q You have full confidence in the emergency room?

A Yes.

Q So, if in the emergency room they treated him and sent him home, you agree that was the correct thing to do, correct?

A I can't comment on the treatment.

Q You would have no reason, as you sit here, based upon your experience and your affiliation with the hospital, you wouldn't disagree with that, true?

Dr. R. Gasalberti - Cross/Mr. Kaminsky

A Good decision.

Q And you have looked at the emergency room records, correct?

A Correct.

Q And the emergency room records noted abrasion to his elbows, correct?

A Correct.

Q They did not note an abrasion to his back, correct?

MR. KAMINSKY: May I approach to save some time?

THE COURT: Yes.

A They have circled back.

Q No, I circled that, actually. Is there anything circled there?

A You circled this?

Q Yes.

A Who circled the back? It says back there.

Q This is what I am pointing to. Do you see here?

A You have it head, head and face abrasions.

Q And did they note an abrasion for the back?

A No, but the back is circled, so it was involved.

Q You are missing my question.

I apologize.

Did they circle "abrasion" next to head?

A Can I have this please?

Q Sure.

A Head. I'm going to come across. It says abrasion, correct.

Q Yes.

Now, for back, did they circle abrasion, yes or no?

A I'm going to take the back and come across, there is no abrasion.

Q Now, let's go back to what I read from when he first saw you. The part that I read to you, the history, you said to him, what's wrong? Tell me what's wrong? Okay. And he told you the injury to his head, loss of consciousness. And he told you that they did a CAT scan of the brain and that that was negative. He told you he sustained an injury to his elbow. X-ray was taken and it was negative, correct?

Now, when you took that history, did I read that paragraph correctly that the patient, Mr. Evans, never even mentioned his back?

A To myself?

Q Yes.

A Well --

Q Did I read the history correctly?

A From the ER record?

Q No, from the paragraph, the history you took, your record.

A Yes, what you just read is correct.

Q Okay. So, if Mr. Evans got on the witness stand and

Dr. R. Gasalberti - Cross/Mr. Kaminsky

testified that the day after the accident he woke up and his back hurt so much, he felt like he got hit by a truck --

MR. McCRORIE: Freight train.

Q Or a train, or something. When he came to you two days later, his complaint, his primary complaints were to his head and his elbow, true?

A In the history.

Q Okay. And that's what a doctor goes by, you go by the patient's history, correct?

A Yes.

Q He if someone woke up the day after an accident and said their back hurt so much that they felt like they got whacked by a train or a bus or whatever he used, I don't remember exactly, would you expect that person to come to you and at least say my back hurts, yes or no?

A Yes.

Q He reports residual headaches. He denies blurry vision, denies difficulty swallowing, denies bowel/bladder dysfunction, reports residual pain and discomfort in his left elbow, okay. That is the complete history that you took from Mr. Evans two days after the accident, true?

A Correct.

Q So, complete history from two days after the accident, Mr. Evans never mentioned his back, correct?

A Correct. However --

Q There is no however, okay.

Then after you took a history about what happened, and you were concerned, your main concern at that time was to his head, correct?

A And his lower back.

Q Obviously, if someone sustained a head injury and says, especially if they had loss of consciousness, you are concerned about post-concussion syndrome, things like that, correct?

A Correct.

Q And that's what the hospital was concerned about because they did a CAT scan of his brain, correct?

A Correct.

Q You wrote down loss of consciousness. Are you aware that in the emergency room the plaintiff denied having a loss of consciousness, are you aware of that?

A Yes, I read the record.

Q So, there is an inconsistency with what he told the hospital and what he told you as to whether he sustained any loss of consciousness, correct?

A Yes.

Q Now, you took a past medical history, because you not only wanted to know what his complaints were, you wanted to know what the past was, correct?

A Correct.

Q And he denied ever having a prior history to his head

or left elbow?

A Correct.

Q And the reason you asked him about his head or left elbow was because those were the areas he was complaining about, correct?

A Correct.

Q So, if he comes to you complaining about his head and his elbow, one of the things you want to know is did you ever injure your head or elbow before, correct?

A Correct.

Q And he said no, correct?

A Well, I asked him did he have trauma previously or medical surgery.

Q I may not be using the exact terminology, but to save time, generally speaking, is that fair for me to say?

A Yes.

Q There is no mention of anything to his back, correct?

A Correct.

Q And that's because he didn't complain about his back, correct?

A Correct.

Q Okay. So, if he doesn't complain about his back, there is no reason to ask him, did you ever hurt your back before, correct?

A Correct.

Q So, he is in your office --

A No, no, no. When you ask a history --

Q Let me rephrase the question.

A Or I will answer whatever way.

Q Let me rephrase the question.

He comes into your office two days after being sent home from the emergency room. He complains about his head and his elbow. You asked him, did you ever injure your head or elbow before? Since that's what he is complaining about, and he says no. In layman's terms, correct?

A Correct.

Q He doesn't complain about his back, so you don't ask him, did you ever injure your back before?

A I asked him history. Did you ever have trauma to any other part. That's what you do with the medical history or the surgical history.

Q He denied trauma, correct?

A Correct.

Q But specifically, you asked him about his head and his elbow because that's what you were dealing with, correct?

A Correct.

Q And specifically, you did not ask him about his back, correct?

A I asked him his complaints.

Q And he didn't mention his back, correct?

A Correct.

Q Review of symptoms, because now that you know he is complaining about his head and he is complaining about his elbow, you want to know what his symptoms are. So, you asked him a whole bunch of questions so you could like pinpoint what any potential problem might be, correct?

A Correct.

Q You asked him everything from cardiovascular to musculoskeletal to urological to psychiatric, you are going over a whole range of different medical fields, correct?

A Right.

Q And they are all negative, true?

A Correct.

Q So, is it fair of me to say that since there were no complaints to his back that, obviously, means there were no complaints of pains radiating from his back to his leg at this point, correct?

A Correct.

Q And would that be consistent or inconsistent with someone who said I got up the next day and felt like I got hit by a truck and the pain was radiating excruciatingly down to my leg, would that be consistent or inconsistent or you don't know?

MR. McCRORIE: Objection. He didn't say that.

THE COURT: Overruled.

A I don't know.

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Q On Page 2, you continue your evaluation. And by the way, Mr. McCrorie, rightfully, pointed out that your initial evaluation was $200, correct?

A Correct.

Q Your initial evaluation is very time consuming --

MR. McCRORIE: Excuse me. 10/20/07 was $200.

MR. KAMINSKY: I stand corrected. I will get to that.

Q On Page 2, you did a physical examination, correct?

A Correct.

Q And there is a typo. We all agree he was not 170 pounds, correct?

A Correct.

Q He was significantly heavier than that, true?

A Correct.

Q General appearance: Well developed, well nourished, speech within normal limits with no language barrier or cognitive impairments. And the reason you do that is because you want to know is he able to speak, is he able to think, does he know what is going on, correct?

A Correct.

Q And that was all fine, correct?

A Correct.

Q Now, you did an examination of his head, correct?

A Correct.

Q You did an examination of his eyes, correct?
A Correct.
Q You did an examination of his ear, nose and throat?
A Correct.
Q You did an examination of his neck?
A Correct.
Q You did an examination of his respiratory system?
A Yes.
Q His cardiac system?
A Yes.
Q His vascular system?
A Yes.
Q His chest?
A Yes.
Q His abdomen?
A Yes.
Q His skin?
A Yes.
Q And psychiatric, correct?
A Correct.
Q And for the most part, they are all within appropriate findings, correct?
A Correct.
Q So, we then get to the next part of your examination. And you know the ecchymosis that you told us about, right?

A Correct.

Q And as was read by Mr. McCrorie, deep palpation revealed paraspinal spasms?

A Correct.

Q Now, do you know if before the date of this examination, do you know whether or not Mr. Evans ever had spasms before?

A I wouldn't know that.

Q If he did, is that something you would want to know?

A Well, this is objective finding, physical exam.

Q Okay. My question is, do you know if he has ever been susceptible to spasms before?

A I would have no way of knowing that.

Q Now, you note that there is no pain over the S1 joint, correct?

A SI joint.

Q SI joint. I'm sorry. There is no pain, correct?

A Correct.

Q And on Page 4 -- we are still on the first visit. Page 4 of the first visit, there is functional range of motion of the hips, knees and ankle. Pulses are symmetrical. These are all good findings, true?

A Sure.

Q Sensory: Testing is intact to pinprick and light touch. Manual muscle testing, 5/5. Deep tendon reflexes are

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symmetrical, 2 positive, knees and ankle.

And again, these are all positive findings, correct?

A Correct.

Q No problems?

A Correct.

Q Impression: History of a work-related injury 6/6/07, result in closed head injury. And that's because you potentially thought he may have lost consciousness, correct, when he banged his head, correct?

A Well, the history of trauma.

Q To his head?

A Falling seven feet, hitting his head.

Q Residual post-concussion syndrome, because you thought he had a concussion?

A Yes.

Q Left elbow derangement, lumbar derangement. Rule out herniation of the gluteal maximus muscle bilateral?

MR. McCRORIE: Rule out hematoma.

Q Rule out hematoma. Thank you, Mr. McCrorie.

Rule out hematoma of the gluteal maximus bilateral. I'm not going to repeat what your recommendations are. But you found him to be totally disabled, correct?

A Correct.

Q And based upon what I just read to you and, again, I know you have no recollection of this visit. I wouldn't expect

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you to, but from what I just read to you, would you agree with me that the reason you said he was totally disabled was because of your concern of his head injuries?

A No. You left out also part of my exam, which is important.

Q Everything has been read so far, either by me or by Mr. McCrorie?

A But you didn't mention --

THE COURT: All right, gentlemen. I want you to know we have ten more minutes.

MR. KAMINSKY: Judge, I'm not going to finish today.

THE COURT: Come up.

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

Q On 6/8 - now, I'm on Page 5 of your exam - you ordered X-rays of his back, correct?

A I performed X-rays.

Q You performed the X-rays yourself?

A Correct.

Q And the X-rays show degenerative changes, correct?

A Correct.

Q We know what degenerative changes are?

A Correct.

Q At no time did you write that the X-ray showed herniated disks, true?

A X-rays don't show herniated disks. They only show bone.

Q At this time, there is no films that show any sort of herniations, correct?

A Correct.

Q So, you tell him, for whatever reason, whether it be head injury or elbow injury or concern about DVT or whatever it may be, you tell him not to go back to work, true?

A Based upon my findings --

Q True or not true?

A Yes.

Q But he doesn't listen to you, and he does return to work, correct?

A Correct.

Q And after he returns to work, are you aware that he went back to work for 24 hours the week of 6/26; 33 hours the week of 6/30; 14 hours the week of 7/3; 40 hours the week of 7/10; 45 hours the week of 7/17; 21 hours the week of 7/24; 29 hours the week of 7/31, are you aware of that?

A No.

Q Now, there does come a point in time on 7/26/07 where he comes back and says he got tightness in his lower back, worsening of symptoms, true?

A Say that part again?

Q 7/26/07, worsening of symptoms, true?

A Yes, correct.

Q Do you know if the worsening of symptoms had anything to do with his returning to work, yes or no?

A I don't know.

Q Okay. And then an MRI is taken. And then, at this point, on -- before we get to the MRI, on 7/26/07, straight leg raising is negative, correct?

A Correct. I didn't say it was negative. I said it was tight hamstrings, 70 degrees.

Q Well, the hamstrings, could they be attributable to the DVT?

A No, two different anatomical.

(Continued on the following page.)

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VP6 CROSS EXAMINATION (Continuing)

BY MR. KAMINSKY:

Q And on 8/13/07, the MRI shows L5-S1 disc herniation; correct?

A Well, you left out some of the rest of the reading. Do you want me to --

Q I'm trying to make it so you don't have to come back another day.

A No problem.

THE COURT: Five minutes.

A I just want to answer correctly, the question.

Q And on that day, 8/13/07, on a pain scale of one to 10, 10 being the worst, the patient feels about zero; correct?

A Correct.

Q Now, let me -- let's put aside -- by the way, do you know what Mr. Evans does day-to-day? Do you know what his work was?

A Can I just go back to what you said, there was a mistake because that should have been a 10. On all my patients, when I write the physiotherapy, I put the pain scale, we ask them. It is a 10, it is a typo.

Q Is that a typo?

A Yes. It should be a 10 not zero.

Q Another typo. You got the weight wrong, you got

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the pain scale wrong, typo -- but it happens, right?

A Of course.

Q Do you have a specific recollection that he told you it was a 10?

A Well --

Q All right --

A Whenever I ask a patient --

Q I don't want to argue with you. Withdrawn.

A Okay.

Q Now, let's put this incident aside, okay.

If you -- do you know what he does on a day-to-day basis at work?

A The exact job description, he's in construction, heavy construction.

Q If I were to tell you he was in heavy construction carrying 150 pounds of rebar on his shoulder, on a very complicated, very complex construction site with a lot of different trades, lot of different workers, things like that, okay, if you had a patient that had DVT, prior bouts of leukemia, was on blood thinning medication, and you described if he got cut it could be life threatening --

A Not cut, trauma --

Q Okay.

A Would you -- if that patient was your patient, would you advise that patient to work in this field, yes or

no --

MR. McCRORIE: Objection.

Q -- or you can't answer?

THE COURT: Overruled.

A Only with an explanation.

Q Just yes, no, or I can't answer.

A Can't answer.

Q All right.

Let's go to 10/20/07. Straight leg raising is negative, though restricted secondary to hamstring tightness to approximately 70 degrees.

Manual muscle testing both lower extremities five over five.

What is five over five?

A That's the strength of the muscle. Zero is no strength, five is --

Q So it is a good finding?

A It is a good finding, yes.

Q It's as good as it could be?

A Correct.

MR. McCRORIE: Can you come back tomorrow, Doctor?

THE WITNESS: I have a full case load of surgery.

MR. McCRORIE: Can you come back Thursday?

THE WITNESS: I'm on the police department, they will be very upset with me if I don't show.

MR. McCRORIE: Could you come back Monday?

THE WITNESS: Monday I could do it. I'll change my schedule. I serve, too, but I'll push it up.

MR. McCRORIE: He'll come back Monday.

MR. KAMINSKY: I apologize. Mr. McCrorie, I apologize.

MR. McCRORIE: With the Court's permission, we'll have you come back Monday.

THE COURT: All right, then, we're going to break for the day. We'll see this witness again Monday morning at 9:30. We have another witness coming tomorrow morning --

MR. McCRORIE: Yes, there's two witnesses tomorrow for the defense.

THE COURT: And that's it?

THE WITNESS: Your Honor, my records, should I leave them here?

THE COURT: Yes, you should leave them here.

JUROR: Did you say something about tomorrow?

THE COURT: I'm getting there.

9:30 tomorrow morning.

Don't talk about the case among yourselves or with anybody else. Don't do any independent research.

See you tomorrow.

COURT OFFICER: All rise, jurors exiting.

(The jury leaves the courtroom.)

THE COURT: Thanks, Doctor, you can step down.

THE WITNESS: Thank you.

THE COURT: Close the record, please.

(Whereupon, the case was adjourned to April 20, 2016, at 9:30 a.m.)

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