SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CIVIL TERM - PART 62

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PRZEMYSLAW KSEPKA,

Plaintiff,

-against-

Index No.
111542/2010

CITYN OF NEW YORK, NEW YORK CITY DEPARTMENT OF EDUCATION, NYC SCHOOL CONSTRUCTION AUTHORITY, AND STONEWALL CONTRACTING CORP.,

Defendants.

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TRIAL

80 Centre Street
New York, New York
July 12, 2016

B E F O R E:

HONORABLE JAMES D'AUGUSTE, JUSTICE AND JURY

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

THE PERECMAN FIRM, PLLC
ATTORNEYS FOR THE PLAINTIFF
250 West 57th Street
New York, New York 10107
BY: DAVID PERECMAN, ESQ.

FABIANI COHEN & HALL, LLP
ATTORNEYS FOR DEFENDANT
570 Lexington Avenue
New York, New York 10022
BY: JOHN V. FABIANI, JR., ESQ.

DENISE M. PATERNOSTER, RPR
Senior Court Reporter

THE COURT: You may call your last witness.

MR. PERECMAN: Yes, I'm going to call my next witness, Miss Kucsma.

K R I S T I N K U C S M A, called as a witness by and on behalf of the Plaintiff, having been first duly sworn, testified as follows:

THE COURT: Please state your name and business address for the record.

THE WITNESS: Kristin, K-R-I-S-T-I-N, Kucsma, K-U-C-S-M-A, 293 Eisenhower Parkway, suite 290, Livingston, New Jersey, 07039.

THE COURT: You may be seated.

THE WITNESS: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. PERECMAN:

Q Miss Kucsma, would you be kind enough to tell the jury about your education, your background and what it is you do for a living?

A Sure. I am currently the managing director and senior economist of the Sobel Tinari Economics Group.

In terms of my educational background, I have a Bachelor of Arts degree in economics that I received from Seton Hall University, where I was graduated with highest honors. I have a Master of Arts degree in economics that I received from Rutgers University.

And in addition to the Master of Arts degree in economics, I completed all of my course work and pursued a Ph.D., passed my qualifying examination and wrote part of my dissertation.

After I that I finished my graduate work at Rutgers University, I began what I like to call my first career as a college professor. I was a member of the full-time faculty of Seton and Drew Universities. I was also an adjunct professor at Saint Peter's College in Jersey City and Rutgers University. I taught primarily economics at the graduate and undergraduate level, but on occasion I taught finances and statistics.

Once I completed my career as a college professor in the summer of '76, I went on to my current career, as I mentioned earlier, as a senior economist with the Sobel Tinari Economics Group?

Q What do you do at the Sobel Tinari Economics Group?

A Most of the work I do is the work of a forensic economist. What that means is most of the work I do involves working with attorneys; both plaintiff attorneys and defense attorneys, and evaluate economic losses for litigation matters, to determine the appropriate value of the economic losses suffered in that matter.

Q And did there come a time that I asked you to do a projection and an accounting economic forecast for the losses sustained by the plaintiff in this case, Mr. Ksepka, as a result

of the injuries that he sustained back in October of 2009?

A Yes.

Q And were you furnished with some data in order to do that?

A Yes, I was.

Q And what data were you furnished with?

A I was provided with some basic information about the plaintiff that included his date of birth, also information about what his employment had been prior to his injury. I also had been provided with documentation of what he earned in the two years prior to his injury.

And in addition to that, I was also provided with some information about his highest level of education and his family profile.

Q So, the tax returns, you should know, have now been marked into evidence as Plaintiff's Exhibit 16.

Let me ask you, take a look what at what you have in front of you, Plaintiff's Exhibit 17.

A Yes.

Q Can you tell us what that is?

A Sure. Plaintiff's Exhibit 17 contains a bullet point list of some of the information provided to me, as well as a summary of my calculations. In other words, Exhibit 17 includes my opinion of economic loss in this matter and all the calculations to show how I arrived at that opinion.

Q Okay. And in order to assist your testimony, would it help if the jury were able to see that in front of them?

A Yes, I think it would be very helpful.

MR. PERECMAN: Your Honor, I'm going to offer it into evidence after her entire opinion is done, but in the meantime I have working copies of what she has in front of her that I would like to put up on the board for her to use.

MR. FABIANI: I haven't compared the two. Just give me a second to compare the two.

(So done.)

MR. FABIANI: May I?

THE WITNESS: Sure.

(Handing.)

Q So explain to us what you have up there to begin with.

THE COURT: Would you like the witness to step down, I see her straining her neck?

THE WITNESS: May I?

Q Would you like to step down or I can highlight as you go long?

A Sure, we can do it that way. What you see now are basically two things. If you look at the bottom, I have identified what I call the components of analysis.

So the first thing I did in this case was review the information provided to me and determine what I call the appropriate elements of economic losses. In other words, I had

to determine what I would, in fact, be calculating. As you see here, what I have calculated in my analysis is the loss of adjusted earnings in past and future years.

In other words, I started by calculating how much additional income the plaintiff would have earned if he had not been injured in October of 2009. If he had been able to continue working as an electrical contractor, how much would he have earned from January 1, 2010 through the present time, middle of 2016.

I then also calculated how much the plaintiff would have earned if he had been able to continue working from today's date through his statistical date of retirement. In other words, I considered what I call his income in future years.

Now, in order for me to calculate the lost earnings in past and future years, there were three basic opinions that I needed to form:

I needed to determine on average how much the plaintiff would have earned each year if he hadn't been injured and he continued working.

Number two, I had to form an opinion about how many more years he would have continued to work.

And, number three, I needed to form an opinion about how much on average his income would have gone up each year.

I'm going to start by talking about how I determined how many more years the plaintiff would have worked if he had

not been injured in 2009.

Q Is that what we have over here, the statistical life expectancy (indicating)?

A It is the one right below it, statistical retirement.

Q I'm sorry?

A That is okay, yes.

So in order for me to determine how many more years the plaintiff would have worked if he hasn't been injured, I needed to consider what I call his statistical retirement age.

And in order for me to determine the statistical retirement age of the plaintiff in this matter, I reviewed several sources of information. I started by examining data that is published about the actual experience of workers here in the United States.

I looked at that data very closely. I looked at males who are about 29 years of age whose highest level of education was that they had some college but no degree. And I wanted to look at that data because that data best represented the plaintiff, a 29-year old male who had some college but no degree.

Based on my review of the U.S. data, I was able to determine that males in this category work until the average age of 64.96 years. In other words, based on that research I determined that if the plaintiff had not been injured in 2009, he would have worked through April 7, 2045.

Now, in addition to that, I also reviewed publicly available information about the Social Security retirement system in Poland. Poland has a Social Security system that is very similar to the one we have here in the United States.

Based on my review of the Social Security retirement system in Poland up until recently, the normal retirement age for males in Poland was age 65. And very recently the normal retirement age for males in Poland was raised to 67.

So what I was able to see was that my research, based on the experience of the American male was, in fact, in line with the publicly available data about the Social Security retirement system in Poland.

Q Okay. Now, we have work life expectancy tables here in New York, correct?

A Yes.

Q And the Court uses them. You are familiar with that; correct?

A Yes.

Q Okay. Were you able, in your research, to find work life expectancy tables in Poland?

A No.

Q Were you able to find life expectancy tables in Poland?

A Not specifically, and I did a fairly extensive research. As I mentioned before, the data recording the retirement age was available for Poland, but I was not able to

find any work life expectancy data.

Q Now -- I'm sorry, go ahead.

A I was simply going to say, for those of you who may be unfamiliar by what I mean by work life expectancy data, once I had determined the point at which the plaintiff would have retired, once I determined that if he hadn't been injured he would have worked through age 64.96, I had to take into account the fact that the plaintiff probably would not have worked continuously from January of 2010 through 2045.

In other words, I know he would have retired right around age 65 in 2045, but what I cannot do as an economist is assume that this plaintiff or any person would work continuously uninterrupted for a 35-year period. And the reason I can't assume that is because the statistical data simply doesn't support it.

So what I need to do when I calculate the lost earnings or lost income for an individual, is I have the take into account the probability that that person would miss work here and there. And I have to take that into account by making a downward adjustment every year to earnings.

Because if this plaintiff or any other plaintiff missed work here and there -- maybe he got ill, maybe he had a sick family member -- but if he missed work, he wouldn't have gotten paid and it wouldn't be fair for me to compensate for earnings he wouldn't have received anyway.

In order to make the appropriate adjustment --

Q Is that this one, by the way (indicating)?

A Yes, it is down below.

-- to consider what we call work life expectancy, the work life expectancy data is what shows me what proportion of the time a person will work until they retire. Or, alternatively, it allows me to take a look at how much time they're probably going to miss from work so I can adjust my figures downward each year.

In order for me to determine the work life expectancy in this case, I once again reviewed U.S. data. And I looked at the actual experience of 29-year old males who had some college, but no degree.

And based on my review of those males, I was able to determine that males in that category work about 87.4 percent of the time through retirement. Which means, alternatively, they miss work about 12.6 percent of the time because they get injured, ill, have a sick family member they need to take care of and so on.

So what I have done here when I calculated the lost earnings is that in each and every year, I have reduced the earnings by 12.6 percent to take into account the probability that the plaintiff would not have worked continuously every week, every month, every year for the next 35 years.

Q And the net effect of you doing that it lowers the

projection loss of income, correct?

A Yes.

Q By 12-and-a-half percent?

A Correct.

Q Okay, go ahead. Which board do you want me to put up next?

A Let's go to number two, please. That one (indicating).

Q All right.

A Now, once I had determined how many more years the plaintiff would have worked; in this case until approximately age 65, once I had determined what proportion of those years he would have missed work, the next thing I needed to determine was on average how much the plaintiff would have earned each year starting January 12, 2010 and continuing until 2045.

In order for me to determine on average how much the plaintiff would have earned each year, I reviewed documentation of what he had, in fact, earned as an electrical contractor, as an independent contractor providing electrical installation services.

And I reviewed documentation of what he had, in fact, earned in 2008 from approximately April of 2008, through December, and I also reviewed documentation of what he earned in that employment in 2009, from January 1st of 2009 through roughly May of that year.

And based on the documents that I have reviewed, I was

able to determine that from April to December of 2008, the plaintiff had earned 49,000 zlotys. And these figures, by the way, represented what we call his net income.

In other words, he was an independent contractor, which means that he did report revenues; how much money he earned when he provided services, and he did deduct from those revenues any expenses, any costs he incurred to provide those services.

Revenues minus expenses equals what we call net income, and that represents the profit or actual earnings or income that the plaintiff would have received.

Q Hang on, let me get the evidence.

Now, I am going to show you what has been marked as Plaintiff's Exhibit 16 in evidence.

(Handing.)

A Thank you.

Q Are those the tax returns that you used as your data?

A Yes.

Q Okay. Now, in 2008, what was the actual total earnings that he made without expenses?

A The revenue for 2008 was reported --

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

THE COURT: Sustained.

Q What were the revenues for that year?

A The revenue for 2008 was reported to be 76,567.56 Zlotys. Once we deducted expenses, the income was reported to

be 49,000 Zlotys, as we see up here on the illustration.

Q And the same question for 2009?

A For 2009, the revenue was reported to be 91,705.18 Zlotys. And once we deducted or reduced the revenue for the cost of conducting business, we arrived at an income figure of 51,000 Zlotys, as you see up on the chart.

Q Now, explain to the jurors what annualizing means?

A Sure. When we talk about annualizing figures, we are talking about situations why we have, for example, income for only part of a year. And the question that we're attempting to annualize, really, is very simple; if the plaintiff, for example, in 2008 had worked the entire year of 2008, not just from April through December, but if he had worked the entire year of 2008, how much would he have earned? That's what that annualized figure would represent.

In this case in the plaintiff earned 49,000 Zlotys from April through December. If he had in fact also worked in that capacity in January, February and March of that year, he would have earned more than 49,000 Zlotys, in this case. And he would have earned, approximately, another 15,000 Zlotys for a total of approximately 64,000 Zlotys in the year 2008.

Q Okay. But didn't annualize, correct?

A No, I did not use any annualized figures in my analysis.

Q And had you annualized, would the figures have gone up

or down?

MR. FABIANI: Objection.

THE COURT: Overruled.

A If I annualized all the figures in 2008 and 2009 to reflect the fact that the plaintiff did not work in this capacity for each of those years in totality, my numbers would have been higher.

Q So for those two years earnings -- well, go on to explain what you did with those earnings.

A Sure.

Q Then I'll ask you the next question.

A In order to determine on average what the plaintiff would have earned each year going forward starting in 2010, I simply looked at the documentation of what he had in fact earned in 2008 and 2009, and I took an average of those two figures.

And that's how I arrived on an average figure of 50,000 Zlotys, if the plaintiff had not been injured in '09 and continued to work. And I used, as my starting point, the average of what he had, in fact, earned in 2008 and 2009.

Q So the average yearly earnings that you came up with was 50,000 Zlotys based on the two years before, correct?

A Yes.

Q But over how long a period of time had he actually earned that 50,000 Zlotys?

A The average figure of $50,000 is based, again, on these

two partial years; about nine months from 2008 and about five, five-and-a-half months for 2009, from January to sometime in May of 2009.

Q So two months longer than one year?

A Yes.

Q Okay. So actually that earnings represents 14 months; not two years?

A Definitely.

MR. FABIANI: Objection, he is cross-examining his own witness.

THE COURT: Sustained. You mean he is leading his witness.

MR. FABIANI: He is doing both.

Q Go ahead, continue with your analysis, please.

A Sure. Once I determined on average how much the plaintiff would have earned each year, the last opinion I needed to form before I can actually calculate the lost earnings was I needed to form an opinion about how much on average the earnings would have increased each year.

In other words, if the plaintiff would have earned 50,000 Zlotys each year, I needed to take into account the fact that that income, those earnings would have increased each year.

And the reason I know those earnings would have increased each year is I reviewed economic data specifically for Poland. And what I saw was on average, wages increased each and

every year for individuals employed, working in Poland.

Most specifically though, I did look at data published by the Central Statistical Office of Poland. That is the data that you see up there -- oops.

Q You need a different board?

A Yes. Can we put 3 up? Sorry about that. I think 3 is down there (indicating).

(So done.)

A Based on my review of data published by the Central Statistical Office of Poland, I was able to determine that wages had in fact increased by 5.7 percent in 2011. And I looked very specifically at the industries in which the plaintiff would have been providing the electrical contracting services.

In 2012, I was able to determine that wages had in fact increased by .8 percent. Wages in fact increased in Poland by 4.5 percent in 2013, and they in fact increased by 4.2 percent in the year 2014.

I was then able to estimate, based on how much wages had increased from 2011 through 2014, what wages would have increased by in 2015 and '16. I estimated wage growth in 2015 and 16 at 3.8 percent.

So based on the actual increase in earnings and income in Poland, I was then able to calculate in the third column what the plaintiff's earnings would have been on average each year starting in 2010 through the present time. And, once again, I

used as my starting point that 50,000 Zlotys figure, the average of what he had in fact earned in 2008 and 2009.

Q Go ahead, please. Tell us what board you need next.

A Number 4, please.

(So done.)

Q Is that the past lost earnings you are going to do?

A Yes, thank you.

Q I believe we have a board there with it.

A There it is, perfect.

(So done.)

A Here is where I simply pull everything together in order to calculate how much money the plaintiff would have earned if he had not been injured in October of 2009 and he had been able to work as an independent contractor providing electrical contracting services in Poland from January 1, 2010, through the present time.

You see in column three the gross earnings? That's where I calculated how much the plaintiff would have earned each year if he never missed a day of work, if he worked continuously each week, each month, each year from 2010 through the present time. I took into account the fact that those earnings would have increased each year based on the actual increase in wages in Poland during that time.

In column four you'll see I've made that downward adjustment. In order to ultimately calculate the lost earnings,

I do not assume that the plaintiff never would have missed a day of work. Rather, based on my research, I made the downward adjustment each and every year to his earnings in the amount of 12.6 percent. And those are the figures you see in that last row (indicating).

Last but not least, once I calculated on average how much the plaintiff would have made each year, taking into account the fact that he would have missed work now and then, I determined that the plaintiff in this case would have earned 329,401 Zlotys if he had been able to continue working from January 1st through the present time.

Q Now, I noticed by looking at all your tables that in the end you took the Zlotys's and converted it to U.S. dollars, but you did it for the total amount?

A That is correct, I made that conversion at the end.

Q The jury is going to need that amount, 329,000 Zlotys, converted to U.S. dollars if they make an award in their verdict sheet for past lost earnings. So can you tell us what that amount would be converted?

A I could. My calculator, I'm sorry, is sitting in the back in my bag. I knew I should have brought it up here with me.

Q Is the conversion right, .25?

A It is .25.

Q It is only a quarter?

A Exactly. It is 329,401 Zlotys divided by four.
Q 81,600 and a quarter?
A Perfect, thank you.
MR. FABIANI: Let the record reflect Mr. Perecman is marking his own exhibit.
THE COURT: Sustained. Are you marking the document, counsel?
MR. PERECMAN: Yes, I'd like to mark this one.
THE COURT: Why don't we have her do it.
THE WITNESS: Sure.
Q You write more neatly than I do.
THE COURT: That is the actual exhibit, correct?
MR. PERECMAN: Yes, your Honor.
THE COURT: So we will have the witness write it on the exhibit.
(Witness complies.)
Q So now we have the past lost earnings and then we've get to the future, correct?
A Yes. As we discussed earlier, based on my research, I had determined that if the plaintiff had not been injured, he would have continued to work until he turned age 64.96 years of age on April 7, 2045. So I simply used exactly the same method I just described.
In column three you'll see in each and every year I calculated how much the plaintiff would have earned if he worked

continuously and never missed a day of work. You'll see that I did determine, based on my research, that the plaintiff's earnings would have increased on average 3.8 percent each year. That was based on the average of how much wages had in fact increased between the years 2010 and 2014 in Poland.

And then last but not least, I made that downward adjustment each and every year in the amount of 12.6 percent to determine how much the plaintiff would have earned each year, taking into account the fact that he probably would have missed some work here and there. I did that for every year from the present year through 2045.

And based on my analysis, I determined that if the plaintiff had continued working from the present time through approximately age 65 in Poland, he would have earned 2,965,827 Zlotys.

Q Okay. And we're also going to need that calculated to U.S. dollars. Would I be correct if I said that's $741,456.75?

MR. FABIANI: You are only correct if your calculator and my calculator are the same.

Q Well, the numbers are the same, yes?

A Yes, that would be correct. If I convert this into U.S. dollars, I determine that the plaintiff would have earned $741,456.75.

Q Did you put that on there?

A I did, indeed, from the present time through his age of

approximately 65.

Q Okay. And to recap all of this, could you put it together for us?

A Sure. In order to calculate the total economic loss in this matter, I started by determining how much additional money the plaintiff would have earned from January 1, 2010 through the present time, taking into account periods of missed work.

I calculated the lost earnings in past years at 329,401 Zlotys or $81,600.25.

I then calculated how much the plaintiff would have earned if he had not been injured in 2009, continued working from the present time through approximately age 65. I determined that the plaintiff would have earned an additional 2,965,827 Zlotys during that time period or, equivalently, he would have earned an additional $741,456.75 during that time period.

In other words, based on my research and my calculations, I determined that if the plaintiff hadn't been injured in October of 2009, if he had been able to continue working as an independent electrical contractor from January 1, 2010, through approximately age 65, he would have earned an additional $823,870.

Q Now, as a part of the calculations that you performed, did you perform any calculation that would have determined what his income loss would have been had his business started to grow

over the years?

MR. FABIANI: Objection.

THE COURT: Sustained.

Q Miss Kucsma, did you have an opportunity to review the affidavit of David Zaumeyer, the defendant's economist in this case?

MR. FABIANI: Objection.

THE COURT: Sustained.

Q Do you know of any other way to have performed these calculations?

MR. FABIANI: Objection.

Q Let me change the question. You used certain statistics that were United States statistics, correct?

A Some of the statistics I used, yes, were U.S. statistics.

Q Why is that?

MR. FABIANI: Objection.

THE COURT: Overruled.

A In this case, the statistics that I used that were based exclusively on the United States was the work life expectancy data. All of the other statistics; retirement age, wage and so on I was able to find the equivalent statistical data published by Poland.

Work life expectancy data though is unavailable for Poland. I did an exhaustive search for that data and I was

unable to find any statistics for the experience of males in Poland.

Q Is it economically viable or in accordance with good and accepted economic standards to do a projection based on that?

MR. FABIANI: Objection to the form.

THE COURT: Sustained.

Q Can you tell the jury what good and accepted economic principles are in terms of doing a forecast for someone from a country that doesn't have work life expectancy tables?

MR. FABIANI: Objection.

THE COURT: Overruled.

A Sure. We frequently work on cases involving individuals who are from another country who are injured or in some cases died while they were here in the United States. And in those cases the only way for me to value the economic losses sustained by a plaintiff or by the plaintiff's family members is to determine what those people would have earned in their home countries.

The generally accepted practice among economists is to do our due diligence. To the extent there is economic data available for other countries, we rely upon that economic data. However, in certain cases either because of the type of economic data or in some cases I work on matters involving people from countries that are not well-developed, and less developed

countries simply do not have the same sort of statistical data available for them.

In those cases, once I have done my due diligence, if I am unable to locate reliable sound economic data in the home countries of those individuals, I do typically rely on U.S. based economic data.

Q Now, the projection that you did for lost income is self-employment income, correct?

A Yes.

Q And the growth factor that you used was for what, again?

A The growth rates that I used technically reflect how much wages in Poland in industries related to that of the plaintiff in fact increased.

Q Can you explain to the jury why it is that you found it acceptable to use wage figures to project his future losses from self-employment?

A Sure. In this case, as I mentioned before, it is true that the plaintiff was self-employed. He was, however, self-employed as an independent contractor.

In other words, he was not running a small business in the sense of hiring a staff of people to work for him. He was self-employed. He was his own boss, but he was, for all intents and purposes, an independent contractor. Which meant what he was selling to his clients, to his customers, was largely his

own labor services.

Wages in the marketplace, wages simply are reflection of the price of labor, what somebody will pay an individual to provide labor services.

So in this case because the plaintiff was an independent contractor, the product, so-to-speak, that he was selling was simply his own labor. And in that respect I would expect the cost of his labor services to be very similar and to mirror the wage rates in related industries.

Q So to wrap it up, can you tell the jury with a reasonable degree of economic certainty what is the total value of the loss in U.S. dollars as a result of the accident that Mr. Ksepka sustained in October of 2009?

A I calculated the total economic loss to Mr. Ksepka at $823,807.

Q And same question, can you break that down into the past and future losses?

A Sure. I calculated the loss of earnings to Mr. Ksepka in past years at $81,600.25. And I calculated the loss of earnings in future years to Mr. Ksepka at $741,456.75.

Q Okay. And the two years that you used for his base earnings; 2008 and 2009, are you familiar with what the state of the world economy was in those years?

A Yes.

MR. FABIANI: I'm going to object to that.

THE COURT: Sustained.

Well, he can ask if she is familiar with the world economy. If you're going to ask any questions regarding it, I'm going to sustain it.

Q Let me ask you something: Did you take into account any questions regarding the state of the economy with regard to the numbers that you've projected?

MR. FABIANI: Your Honor, I object.

MR. PERECMAN: You know what, Judge, I'm done. Thank you.

THE COURT: Okay. So as you're going to be cross-examined now, you have been on the stand before, if they are yes or no questions answer them yes or no; okay?

THE WITNESS: I will do my best. Thank you, your Honor.

THE COURT: Proceed.

MR. FABIANI: Your Honor, if I can take a few minutes to look at her file before we start the cross-examination, it will help things move along quicker.

MR. PERECMAN: I'm sorry, Judge, I wanted to do one thing. I wanted to move these things into evidence.

THE COURT: Any objection?

MR. FABIANI: I have an objection, but I'm not going to make it.

THE COURT: Without objection, moved into evidence.

(Whereupon, at this time, Plaintiff's Exhibit 17 was received in evidence, as of this date.)

THE COURT: Member of the jury, we will take five minutes to give counsel a chance to look at the file and then, hopefully, we will be done for today.

This is the only witness we have on for today, but tomorrow you are going to receive summation and there is going to be the charge and then the case is going to be in your hands hopefully by the afternoon. Then it is up to you folks to render a decision.

Hopefully, you will be able to do that tomorrow. But I want you to make you understand that for these parties, obviously they have been waiting around a long time to have their case heard, so it is very important that you take the time to come to a correct decision, okay?

So don't do things just because you think you should get done quickly, do things because you are coming to what you think is the correct result.

So continue not to talk to each other about the case. Take five minutes and we will have you back in here to finish your cross-examination.

COURT OFFICER: All rise, jury exiting.

(Whereupon, the jury exits the courtroom.)

(Recess taken.)

(Recess taken.)

THE COURT: Bring in the jury.

COURT OFFICER: All rise, jury entering.

(Whereupon, the jury enters the courtroom.)

COURT OFFICER: Please be seated.

(So done.)

CROSS-EXAMINATION

BY MR. FABIANI:

Q Good morning, Kucsma.

A Good morning.

Q How are you?

A Good. How are you doing today?

Q Good. You and I have met before?

A We have indeed. It is good to see you again.

Q On more than one occasion, have we not?

A Yes, we have.

Q As the judge told you, to the extent you're capable of answering my questions with a yes or no answer, please do so. Is that okay?

A I will do my best, yes.

Q We have established in the past that you do know how to answer questions yes or no, right?

A Yes.

Q And we've also established in the past that sometimes you don't like to answer questions yes or no; isn't that

correct?

A If the questions are asked properly, I can answer them yes or no.

Q Very good. So let's proceed.

Now, you were asked to provide an opinion regarding an economic loss suffered by the plaintiff as a result of his inability to continue running a self-employment business in the country of Poland; is that basically what you were asked to do?

A Sort of, yes. But I was asked to calculate his lost earnings as a result of his inability to continue working as an independent contractor.

THE COURT: Was that a yes or no?

THE WITNESS: Well, I'm not sure the question --

THE COURT: Listen to the question. Was that yes or no? Are you saying no?

THE WITNESS: I'd say no to that specific question, yes.

Q Okay. So that was not what you were retained to do, okay. You were retained to determine an economic loss, correct?

A Yes.

Q And that economic loss was based upon plaintiff's alleged inability to continue his work as an independent contractor in the electrical field in the country of Poland, correct?

A Yes.

Q On how many occasions before today have you been called upon to testify in a case where your economic assessment was based upon Polish economic data?

A How many times have I testified in a case like that?

Q Yes.

A That I don't know.

Q Is the answer none?

A I don't know. I've worked on cases involving people living and working in Poland, but I don't know if I've testified or not.

THE COURT: So if you don't know, then don't give an explanation, just say I don't know.

A That I don't know.

Q Okay. You are a member of the National Association of Forensic Economists, correct?

A Yes, I am.

Q And as a matter of fact, in the introduction to the report that you wrote in this case you stated you are pledged to abide by the spirit and the letter of the Statement of Ethical Principles and Principles of Professional Practice of the National Association of Forensic Economists, correct?

A Yes.

Q And as a matter of fact, you've attached those principles to your report; correct?

A I did.

Q And you agreed to be bound by them, correct?
A I pledged to adhere to them, yes.
Q So let me read you number three, and tell me if you agree with this.
"Practitioners of forensic economics should employ generally accepted and/or theoretically sound economic methodologies based upon reliable economic data. Practitioners of forensic economics should attempt to provide accurate, fair and reasonable expert opinions, recognizing that it is not the responsibility of the practitioner to verify the accuracy or completeness of the case specific information that has been provided." Is that correct?
A Yes.
Q And you agree with that and that's what you're telling the ladies and gentlemen of the jury that you have done today, correct?
A Yes.
Q So let's talk about the reliable data upon which you've relied. You were given copies of tax returns for the years 2008 and 2009, correct?
A Yes.
Q Were you given any other information about Mr. Ksepka's business other than those tax returns?
A I don't believe so, no.
Q What, if anything, do you know about his business?

A I know what he did, what types of services he provided and, of course, I know what his revenues and net income was from that business for the years 2008 and 2009.

Q You would agree with me that self-employment income is different from wages of salaried employees; correct?

A Not necessarily.

Q Self-employed income is that income which is generated as a result of a person's own ability to generate business, correct?

A That's how I would define it, yes.

Q Is that an appropriate definition of how you would define it?

A No, it is an incomplete definition.

Q Why don't you define self-employed income for us?

A As I've mentioned earlier, it is important to identify not only whether someone is self-employed, but specifically --

THE COURT: Ma'am, you were asked to give the definition of self-employed.

THE WITNESS: I can't do that, your Honor, it is too broad a question.

THE COURT: Okay.

Q Let me ask you this question: What do you know, if anything, about Mr. Mr. Ksepka's customer base in Poland?

A I don't believe I have any specific details about that.

Q So, do you know how he was able to generate the income

that he reported in 2008 and 2009?

A Not specifically, no.

Q And you don't believe it is important --

THE COURT: Ma'am, if the answer is no, then answer no. The are lots of additional words coming out, and I want you to just answer yes or no. And if you can't answer yes or no, then say I can't answer.

THE WITNESS: Yes, your Honor.

A That I can't answer yes or no.

Q Okay. Would it be important to know what the sources of business were in order to perform an evaluation of the prospects for success of a self-employment business?

A That information -- not for this analysis, no.

Q I'm not asking you about this analysis. I'm asking you about valuing a self-employment business, would it be important to know what the sources of business are?

MR. PERECMAN: Objection.

THE COURT: Overruled.

A I can only comment on this case. And the answer is: It wasn't relevant for this case.

Q See, you can't answer questions yes or no.

A Well, I can't because --

THE COURT: Ma'am, if the answer is no, then say no. The only thing that should come out of your mouth is yes or no or I can't answer it. Anything else should not be

stated.

Continue.

Q Is the answer to that question yes or no or you can't answer the question?

A I cannot answer that general question yes or no.

Q That wasn't a general question, that was a pretty specific question relating to a valuation of a self-employment business.

MR. PERECMAN: Objection, your Honor. This isn't the valuation of a self-employment business.

THE COURT: Sustained. The jury is to disregard the comment of counsel.

Q Let's go back to the documents that you were provided, the data that you relied upon. You relied upon those two tax returns for 2008 and 2009, correct?

A Yes.

Q And in 2008, the tax returns indicate that Mr. Ksepka's self-employed business generated approximately $76000 -- 76,000 Zlotys in revenue?

A Yes.

Q And after deducting his business expenses, there was -- the business generated approximately 49,000 Zlotys in profit, correct?

A That's correct.

Q And that $49,000 -- 49,000 Zlotys in profit that Mr.

Ksepka reported on his tax returns, you're assuming that was income to him; correct?

A Yes.

Q And does it say that on the tax returns, that that was income to him as opposed to income to his business?

A He was the --

THE COURT: Just yes or no.

A Yes.

Q Okay. The tax return also reflects certain other expenses; does it not?

A Other deductions, do you mean?

Q Deductions, my apologies.

A Yes.

Q What are those other deductions?

A There is a line item for deductions for health insurance, that's it.

Q Okay. What is the national health insurance scheme in Poland?

A What do you mean?

Q What is the national health insurance scheme in Poland? That is a simple question.

A In this case, the plaintiff was paying for health insurance and was receiving health insurance.

MR. FABIANI: I move to strike the answer as not responsive to the question. I'll rephrase the question.

THE COURT: Granted.

Q Do you know whether Poland has a national health insurance scheme?

A I believe they do.

Q How does it work?

A I do not know specifically.

Q So other than -- oh, what other data did you rely upon in reaching your opinions that is contained in your file?

A I relied upon information about the plaintiff's level of education, his date of birth. I also relied upon updated data published by the Polish government.

Q Let's talk about the data that you relied upon that was published by the Polish government. Will you pull out that one sheet of paper?

A Sure.

(Witness complies.)

Q What is that one sheet of paper?

A This one sheet of paper represents the wages for individuals in Poland for the years 2005 through 2013.

Q What was the source? Where did that paper come from?

A Euro stat methodologies and working papers, it's available through the --excuse me for a second.

(Short pause taken.)

A It is publicly available information published by the Central Statistical Office of Poland.

Q Now, let's go back to that other piece of paper that had that one line on it.
A Sure.
Q You said that is wage information from Poland?
A Yes.
Q And for what category of wage earners is that?
A This data here specifically looks at wages and earnings for individuals working in the information and communication sector. Which involved, among other things, installing security systems, which was one of the things he did.
Q May I take a look at that? I'm trying to figure out where it says that.
A Sure. It may not say it. This document is hundreds of papers long, I only published and printed the data for today.
Q That is your entire file in this matter, correct?
A That's correct.
Q You didn't like take things out and leave them back in your office before coming here; did you?
A No. I never published this whole report, I simply viewed it online.
Q This is for wage earners which are salaried employees, correct?
A Yes.
Q And where in that document does it say that any of that information applies to self-employed independent contractors?

A I don't believe it states that in this document.
Q So where do you have the information that those statistics apply to self-employed individuals?
A I think I explained in my direct testimony why in my opinion I felt this data was the appropriate data to use to calculate the increase of income for this plaintiff in this matter.
Q Is it the appropriate data that you wanted to use because it was the only data that you could find?
A I don't recall whether I specifically found data for self-employed individuals in Poland. I don't believe that data was available.
Having said that though, as I explained in my direct testimony, as an economist, the price of labor, whether it is somebody providing labor as a wage earner or independent contractor, in my opinion this data is most appropriate.
Q What is the rate of small business failures in 2008 in Poland?
A That I don't know.
Q What was the rate of small business failures in 2009 in Poland?
A That I don't know.
Q What were the rate of small business failures in 2010 in Poland?
A That I don't know.

Q How about if I ask you the same question for every year?
A I don't know.
Q Okay. Do you know why Mr. Ksepka's business was suspended in 2009?
A I believe that he suspended it because he was having trouble finding business, which didn't surprise me, of course, because of what was occurring not only --
Q Here we go, I knew this was coming.
THE COURT: Sustained.
Q You are incorrigible. I mean --
THE COURT: So let me ask a very basic question. Would your economic --
MR. PERECMAN: She is incorrigible?
MR. FABIANI: Yes.
MR. PERECMAN: Did you forget about Friday?
THE COURT: Would your economic projections be appropriate if his business went out?
THE WITNESS: Yes, obviously.
MR. FABIANI: What was the question?
THE COURT: If he had gone out of business.
Q Your analysis would be appropriate if his business failed?
A Absolutely.
Q So let me ask you this question: If he didn't have a

business, who was going to pay him his wages?

A If his business had failed and he wasn't injured, he would have obtained alternative employment and received income that way.

Q And where in the report is that? Where is that in the report?

A He had the skills, clearly, as an independent contractor providing electrical services. That's in the record by way of the documentation of the income he earned by providing those services, so I know he had the ability to provide and sell those services.

If he hadn't been injured, I assume that if his business had gone under he would have gone out once the economy began to recover in Poland and elsewhere.

THE COURT: Sustained. The jury is to disregard those comments. There is no evidence presented that the economy had anything to do with the failing of his business.

MR. PERECMAN: Nobody said his business failed, your Honor, other than you.

THE COURT: No, actually counsel, your client testified that he wasn't able to -- he wasn't being very successful -- I forgot, we can go to the record. But I believe the reason why he came to the United States was because his business wasn't successful.

Q So let me ask you this: So you are adding to the

equation your assumption that if his business had failed he would have done something else to earn a living; is that correct?

A I'm not adding that to the equation, my understanding is before --

Q Is that a yes or no? Is the answer no, you are not adding that to the equation?

A No, I'm not adding that to the equation.

Q So the fact that he had skills -- I'll withdraw the question.

There was another piece of paper in there -- I'm sorry, let's take a look at that piece of paper that you just had.

A Sure.

Q And that indicates -- those wage earner statistics that you have there for 20 -- from 1999 to 2012, I believe it is?

A From 2005 through 2013.

Q To 2013. And that one line, what does that one line represent?

A Which one line?

Q The one line of numbers on the page. There is only one line of numbers on there, right?

A No, three lines.

Q Actually, we are both wrong, there are two. Two lines of numbers, unless you want to incorporate the dates as numbers.

A There are three; also the growth rates.

Q That is your calculations. What are those other numbers?

A These numbers here represent the wages and salaries in gross terms. Specifically, the average monthly gross wages and salaries in the national economy in those years.

Q Is that -- is that limited to Poland?

A Yes.

Q But that covers all areas of income in Poland; white collar and blue collar wage earners?

A No. As I mentioned earlier, this data that we are looking at right here specifically looks at individuals who provided services in the information and communication industry.

Q Where does it say that? Did I miss that?

(Handing.)

A The bottom.

Q That is Section J?

A Yes.

Q Information and communication, that's what that is?

A Yes.

Q So what you did was you calculated what the increase in the wage rate was for that category of workers from 2008 to 2009, correct?

A That's correct. That is one calculation that I performed, yes.

Q Right. And what did you calculate that to be?

A I didn't write it down, but let's see. From 2008 to 2009, you said?
Q Yes.
A It was approximately five percent growth from 2008 through 2009.
Q So wages went up in Poland from 2008 to 2009 five percent, correct?
A Yes.
Q Approximately. What about from 2009 to 2010?
A About four percent.
Q So from 2009 to 2010, wages in that particular sector of the economy went up by four percent?
A Yes.
Q What about from 2010 to 2011?
A 2010 through 2011, 5.7 percent.
Q So wages in that sector of the economy in 2010 through 2011 went up nearly six percent?
A Yes.
Q What about from 2011 to 2012?
A Only .8 percent.
Q So they were pretty flat, close to flat?
A Yes.
Q What about from 2012 to 2013?
A 4.5 percent.
Q What about from 2013 to 2014?

A 4.2 percent.
Q What about from 2014 to 2015?
A Those I had to estimate because 2015 data is not available yet.
Q Can I take another look at that?
A Sure.
(Handing.)
Q I'm sorry, I don't see the 2014 numbers on here.
A They are not. This hasn't been updated yet, that printout.
Q So where did you get the number you just gave us from 2013 to 2014?
A That figure came from my demonstrative aids today, which were updated since the time I prepared my report. The document that you have in your hand was printed out when I prepared my original report in August of 2015. I went back to that same site and I was able to get the 2014 data to update my calculations for today.
Q And what was the 2014 data? You just don't have it here?
A I didn't print on it out. But if you want to wait one minute, I can probably find it. For 2014, it was 6,423.53.
Q Now, so the projections that you have done on past lost earnings for Mr. Ksepka were utilizing that one database of information; wages for the information and communications

industry in Poland from 2005 to 2014; correct?

A Yes.

Q And it's your opinion that that is sufficiently reliable information upon which to base -- just answer yes or no -- that that is sufficiently reliable information upon which to base an opinion as to what Mr. Ksepka's self-employment loss was as a result of the injuries he sustained on October 7, 2009?

A Yes.

Q Now, what is your understanding of when Mr. Ksepka intended to go back to Poland to start up his or to -- I'll rephrase the question.

Do you have an understanding as to when Mr. Ksepka intended to go back to Poland to start up his electrical contracting business again?

A My analysis is based on the assumption that he returns to Poland in 2010.

Q What is that assumption based upon? Where did you get that? Did you make it up?

THE COURT: Sustained, the jury is to disregard counsel's comment.

MR. FABIANI: My apologies.

MR. PERECMAN: No, you don't.

MR. FABIANI: My apologies.

THE COURT: Disregard that comment, too.

A That information was provided to us, I believe, by

plaintiff's counsel.

Q Okay. So you don't know -- are you aware of any evidence in the record that Mr. Ksepka intended to go back to Poland in 2010 to start up his business again?

THE COURT: Sustained. She wasn't here for the testimony.

MR. FABIANI: I could ask if she was shown any evidence.

THE COURT: Evidence has a defined term, so-to-speak.

MR. FABIANI: I'll withdraw the question.

Q Are you aware that Mr. Ksepka testified that he would like to start an electrical contracting business here in the United States?

A At present?

Q Yeah.

A No, I'm not aware of what he testified to in court.

Q Well, let me ask you this question: If it was his intention to start an electrical contracting business here in the United States, would your opinions as to his economic loss in Poland be different?

A I suppose if his intention was to remain in the United States and provide electrical contracting services in the United States, my calculations would be different because I then would have based my calculations on U.S. data, on what an electrical

contractor in this country would have earned.

Q Assuming that Mr. Ksepka could have worked as an electrical contractor in this country --

A Yes.

Q -- which you don't know whether he could or could not.

A I don't see any reason why he couldn't have since he had the skill set.

THE COURT: I have a question. Do you know if he was making more money in the United States doing whatever he was doing or less money in the United States?

THE WITNESS: That I don't know.

Q Now, you've also projected economic loss into the future; correct?

A Yes.

Q And, again, that's based upon the expectation or your assumption that but for this injury, Mr. Ksepka would have returned to Poland, started up his electrical contracting business again and worked until 2045 every year subject to that 12.6 percent adjustment for unemployment; correct?

A Those are the calculations I made, yes.

THE COURT: Let me ask a question: What is the amount of money in American dollars you are assuming he was going to earn a year?

FABIANI: In Poland?

THE COURT: Yeah, but I mean in American money.

THE WITNESS: Converted to American dollars?

THE COURT: Yes.

THE WITNESS: $12,500 per year.

Q That was what 50,000 Zlotys were in 2009?

A That would be 50 Zlotys in U.S. dollars using the current exchange rate.

Q Now, if Mr. -- you applied a growth factor to the future, correct?

A Yes.

Q And the growth factor, if I recall correctly, that you applied to the future is 3.8 percent; right?

A Yes.

Q And there is, again, another sheet of paper in your file that contains some information, and you wrote 3.8 percent on that; is that correct?

A That is correct.

Q And could you take that piece of paper out?

A Sure. I have it.

Q Is that piece of paper something for the European Union?

A No, this piece of paper is simply the title page and the description of categories that accompanies the data that I used specifically for Poland.

This is all part of one document from which I got the wage data specifically for Poland. I simply wanted to have the

title page so we knew what the name of the document was. And I wanted to have a sheet with the industry sector categories listed. That's what you see there.

MR. FABIANI: Can I have in marked as an exhibit, please?

THE COURT: Mark it for I.D.

MR. FABIANI: Yeah, for identification, yes.

THE COURT: I assume we are going to mark all three pages?

MR. FABIANI: Just that one.

THE COURT: If you are going to mark it and it is the same document, you have to mark the whole document.

MR. FABIANI: I don't know that it is the same document, but --

THE COURT: Is it from the same document?

THE WITNESS: Two pages are from the same document; this identifies the source.

MR. FABIANI: Fine, those two pages.

THE WITNESS: Sure.

(Handing.)

THE COURT: And that other page that you are holding is not from that document?

THE WITNESS: It is related to that document.

THE COURT: It is related but not from it?

THE WITNESS: These are wage rates from that

document that I produced in an Excel spreadsheet.

THE COURT: I see. Off the record.

(Discussion held off the record.)

(Whereupon, at this time, Defendant's Exhibit A was marked for identification, as of this date.)

Q Could you take a look on this document that has been marked as Defendant's Exhibit A for identification and tell me where on this document it says that this applies to Poland and Poland alone?

A This is only one page of this document, it is page 43. You would have to look at the entire document to see that, in fact, there is data provided in this document for various countries including Poland. I don't believe there is specific reference to Poland on this page.

Q And right next to that category, you have -- you wrote -- you hand wrote the number 3.8 percent, right?

A I did.

Q Where on that document is the information that led you to write 3.8 percent on that document?

A This 3.8 percent written on this document is consistent with the updated data from this little spreadsheet that we were discussing before.

Q So the answer to the question I asked you is that the information --

THE COURT: You're asking for the contents of a

document that is not admitted into evidence.

MR. FABIANI: I'm just asking her if there is something in it, and the answer is it is not there.

THE COURT: Still, she is giving you your answer that this is Page 43 of a multipage document. You don't have the entire document here.

MR. FABIANI: All right.

THE COURT: Keep in mind these are her notes, you took it out of her file. So, I mean, it wasn't designed to be an exhibit in court.

Q Well, let me ask you the next question.

MR. FABIANI: Thank you, Judge. That actually leads me to the next question.

Q The next question is: As part of the Standards of Ethical Practice of the National Association of Forensic Economists, number four, which comes right after number three, is --

MR. PERECMAN: That makes sense.

Q "Practitioners of forensic economics should stand ready to provide sufficient detail to allow replication of all the numerical calculations with reasonable effort by other competent forensic economic experts, and be prepared to provide sufficient disclosure of sources of information and assumption underpinning their opinions to make them understandable to others."

You subscribe to that?

A Absolutely.

Q And it is your position that that one piece of paper that doesn't contain the word Poland on it, is sufficient -- is sufficient?

MR. PERECMAN: Objection, your Honor.

THE COURT: Sustained.

MR. FABIANI: I'll rephrase the question.

THE COURT: Counsel, that is not -- the rule doesn't require her to sit here in court and provide it.

She provided a report. I assume the report was exchanged and after the exchange you folks were certainly permitted to call your own expert in here and do what you wish in terms of that. And that complies with the ethical obligations.

So I don't think that is fair to challenge the -- this particular witness on the contents of one document that she put in her file as opposed to her report.

Q Well, let's take a look at your report.

A Sure, we can look at Page 6, actually. You'll see I've complied, of course, with the requirements of the Statement of Ethical Principles and Principles of Professional Practice.

What I did was I provided the full source for the data; Central Statistical Office of Poland, local databank, average monthly gross wages and salary, Section J.

So I clearly identified very specifically what data I

used. And I also provided the website address, so anyone who wanted to go access this publicly available information and review it could do so.

Q But you didn't bring all that information with you?

A No.

Q You just alerted us to where it is available?

A That is correct.

Q Now, your opinion is based upon the -- I'll withdraw the question.

Is your opinion, yes or no, is your opinion based upon the assumption that Mr. Ksepka is incapable of earning any income from any source in the future?

A My calculations are based on that assumption, yes.

Q And isn't it a fact that in your -- in preparing for your opinions, you've inquired as to whether Mr. Ksepka was capable of alternative employment; correct?

A I don't recall whether we specifically asked that question. But we may have, yes.

Q Well, you will agree with me that it is an accepted forensic economic practice in calculating an economic loss to determine whether there are any offsets to that loss; correct?

A Not necessarily. That does depend on the court rules.

Q Well, if there is an alternative income, that would constitute an offset to the loss; correct?

A Possibly.

Q And, indeed, if the alternative income is greater than the income loss, then the loss doesn't exist; correct?

A That would not necessarily be the case.

Q If the alternative income is greater than the lost income, there is still a loss; is that what you're telling us?

MR. PERECMAN: Your Honor, I'm going to object to this line of questioning. There is no evidence from the defendant --

THE COURT: Sustained.

Q Typically, when you perform an economic analysis in cases such as this, you determine what the loss of income was because of the plaintiff's inability to continue working in a particular field; correct?

A Yes.

Q And then you inquire as to whether there is any alternative income that the injured person can earn in other fields before you come up with your final number as to what the total loss is, correct?

A No.

MR. PERECMAN: Objection.

THE COURT: Sustained.

Q Do you inquire of, typically, whether there is any alternative income available when you perform your economic analysis?

MR. PERECMAN: Same question, your Honor.

MR. FABIANI: I think the form is better.

MR. PERECMAN: Objection.

THE COURT: Sustained.

Q What is alternative income?

A I'm not --

MR. PERECMAN: Objection.

THE COURT: I'll allow her to answer that.

A I'm not sure how you are defining alternative income.

Q I'll bite. How would you define it?

A In a very general sense, I suppose I would define alternative income as other income.

Q Okay, I'll go along with that.

Other income, earned income. Would you agree with me that other income, earned income would constitute an offset to an income loss, where your loss is predicated on the assumption that the plaintiff is completely and totally unemployable?

MR. PERECMAN: Objection.

THE COURT: Overruled. You can answer that yes or no.

A I'm not sure I follow your question.

Q Let me try to break it down. You've calculated a loss based upon total and complete unemployment, correct?

A Yes.

Q If the injured worker is capable of working, but in a different field, when you calculate the total economic loss you

should include a column for any alternative income that he could earn; correct?

MR. PERECMAN: Objection.

A No.

THE COURT: Overruled.

Q Why not?

THE COURT: That is an open-ended question, you can answer any way you want.

THE WITNESS: Great.

A I'm not a vocational expert or an employability expert or a member of the jury, I am an economic expert. Unless the plaintiff has, in fact, other income, it would be wholly inappropriate for me to theorize about what he may or may not be able to earn and deduct that from my analysis.

Q You're theorizing that he is not going to be able to earn income in the future, correct?

A Based on the information provided to me, yes, I have assumed that. Yes.

Q Okay. So if he can work, if he is capable of employment, would it be appropriate for you to theorize that in the future he would be able capable of earning alternative or other income?

MR. PERECMAN: Objection, your Honor.

THE COURT: Overruled.

A Now, to be clear for the record, my assumption that the

plaintiff cannot return to work is based on information provided by Dr. Barron. I didn't theorize that as an economic expert because I'm not a medical expert or vocational expert. I had information indicating that the plaintiff is incapable of returning to work.

Q And where is that information that Dr. Barron reporter that plaintiff is incapable of returning to work?

A What do you mean where is that information?

Q Where is it? You just told us that you relied on it, where is it?

A It was provided to me by plaintiff's counsel.

Q Where? I don't see it in your file.

MR. PERECMAN: Objection, your Honor.

MR. FABIANI: I'll withdraw the question, it is a good objection.

Q Where in your file is it?

A I don't believe I have any documentation of it, but it was communicated to me by plaintiff's counsel.

Q So you would agree with me then that if that information was wrong, then your opinions would be wrong because one of your assumptions is wrong; correct?

A I wouldn't agree with that. Certainly the trier of fact could adjust my numbers if they felt it was appropriate to do so. But my calculations --

MR. FABIANI: I move to strike the answer as not

responsive to the question.

Q If your assumptions -- if your calculations are based upon the assumption that Mr. Ksepka is incapable of any employment, and it is, in fact -- and he is, in fact, capable of employment, isn't one of the assumptions upon which you are basing your opinion incorrect?

A Possibly, yes.

Q And if the assumption is incorrect, then your opinion would be incorrect?

A No.

Q I'm going to ask you to assume that Dr. Barron has testified that Mr. Ksepka is capable of employment, just not in the field of heavy construction. Does that in any way change your opinion as to what his economic loss is in this case?

A No.

Q So, it don't matter to you whether Mr. Ksepka can work and earn money in determining what you're telling the ladies and gentlemen of this jury his economic loss is?

A That's not what I said. But certainly I have been provided with no information indicating what, if anything, Mr. Ksepka can do; how much, if anything, Mr. Ksepka could earn; how long he may be able to work. I haven't been provided with any of that information.

If the only thing I'm told is that he may be able to return to work and that's all I'm told, there is no way as an

economic expert I can make any adjustment to my calculations.

Q Can you -- you did inquire as to whether there was any possibility of alternative income in this case; didn't you?

A Yes, I did have that conversation.

Q And you were told that there was no possibility of alternative income, correct?

A What I was told is what I mentioned earlier, just that Dr. Barron indicated that the plaintiff could not resume his employment.

MR. FABIANI: May I approach?

THE COURT: Yes.

Q I show you what's in evidence as Exhibit 5. I direct your attention to the second page of the exhibit, which is Page 2 of two of Dr. Barron's office notes from August 4, 2015. Can you read just the first --

MR. PERECMAN: I'm going to object to this line of questioning. She doesn't know what Dr. Barron testified to here, it is unfair, your Honor.

THE COURT: Sustained. Sustained. The jury is to disregard the comment unfair, just that it is sustained.

Q If Mr. Ksepka was capable of earning additional -- of earning income and you were provided with appropriate information regarding the type of alternative income, the amount of alternative income he is capable of earning, would you have included that information in your analysis?

MR. PERECMAN: Objection, your Honor.

THE COURT: Overruled.

(Pause taken.)

THE COURT: You may answer.

THE WITNESS: Oh, I'm sorry. I didn't know what your Honor said.

A Probably, yes.

Q Why only probably?

A Without reviewing the document, without knowing where the document came from and so on, I could not say for sure. But it is possible that I would have included that in my analysis.

Q Well, you have done many, many reports in cases such as this, where you have included a column for loss of income in a particular profession, then you have included a column for alternative income, and then you have included a final column, which is the net loss -- which is the loss of income in the chosen field minus the alternative income and that comes to the net loss.

You have done that in other cases; have you not?

A In some --

MR. PERECMAN: Objection.

THE COURT: Sustained. She has answered the question and explained why she can't do that in this case.

MR. FABIANI: I understand. But I just want to make sure she has done that in other cases. Let me ask the

question differently.

Q Is it good and accepted -- would you agree with me that it would be good and accepted practice for a forensic economist such as yourself to include in an analysis alternative income when that information is available?

MR. PERECMAN: Objection.

THE COURT: Overruled.

A I'm not sure I can answer that yes or no. Would it be good and accepted practice for an economist to form a vocational opinion and integrate that into her analysis? Absolutely not.

Q That is not the question I asked you.

A When you say the information is available, I don't quite know what that means.

Q The amount of alternative income, it doesn't make a difference what it is, the amount of alternative income that is available?

A I mean, from where? Where am I getting this information?

Q Being given to you the same place where you get the other information, from the lawyer of the party that hired you.

MR. PERECMAN: I'm going to object, your Honor.

THE COURT: Sustained.

MR. PERECMAN: I'm not sure what I am objecting to, but I'm objecting.

THE COURT: Sustained. Keep in mind, counsel, I

think she testified the information she got on the finances came from tax returns; not from the lawyer.

MR. FABIANI: I understand.

Q In cases -- you inquired about whether alternative income was an issue here, correct?

MR. PERECMAN: Objection, your Honor. I think the questions here have been asked and answered quite a few times.

MR. FABIANI: I don't think that I have gotten an answer to the question.

THE COURT: You might have. But I'll let you ask the question one more time, then we've got to move on.

Q You've inquired about whether there was any alternative income available here, correct?

A We discussed whether the plaintiff was currently working, that's correct.

Q Because it is good and accepted practice as a forensic economist in your position, forming an economic analysis for loss as a result of an injury, to ascertain whether there is alternative income, and if so, to what extent alternative income is available; correct?

A No, that's -- I'm really not trying to be difficult, but that is what a vocational expert or employability expert does.

Q I'm not talking about whether --

THE COURT: Counsel, you're saying if he had a different job and there was money there and he was earning money in a different job, that would be the information that she would take into account; is that what you're asking?

MR. FABIANI: Yes, I am trying to get that information.

THE COURT: So if he had a 2014 tax return that said that, you know, he can make money as an artist; right, and made $5,000 from art profit, would that be something that you would take into account in terms of determining what his losses were in terms of going forward into the future?

THE WITNESS: Probably, yes.

MR. FABIANI: Thank you, your Honor.

Q So would you agree with me that if Mr. Ksepka is capable of earning an income at a job other than as a self-employed electrical contractor, that that calculation, that information would be important to have to determine his overall economic loss as a result of the accident?

A I can't say without seeing what this information is.

Q Well, let's put it this way. Let's start with the simple. You've projected a loss of two million -- what is the number again -- Zlotys?

A Three million. 3,295,000 Zlotys, okay, yes.

Q That is your projection. So if there was information

that he was capable of earning a million Zlotys, would that be something that you would consider important to incorporate in your analysis as to his economic loss in this case?

MR. PERECMAN: Objection.

A I suppose the jury could certainly adjust my figures to reflect it. Again, without knowing specifically where that information is coming from, in what form, specifically what it represents, I cannot say where it would be appropriate for me to include it in my analysis.

But certainly the jury and the trier of fact, I assume, could consider that information and adjust my numbers if they felt it was appropriate.

MR. FABIANI: I move to strike the answer as not responsive to the question.

THE COURT: But the answer is not exactly capable of being answered, because she is saying that the information has to be in a particular format for her to actually utilize it in adjusting her figures.

So if you want to say is there evidence, she answered the question in terms of if he actually earned money as an artist -- and profit, I assume because you have just $5,000 income, but if you spend $4,500 for it, that is only $500. But --

MR. FABIANI: Let's try this once more.

THE COURT: But assuming that, you know, she says

she needs to know where the information is coming from because not all information is the same.

MR. FABIANI: Got it.

Q Let's deal with the past, okay, economic loss?

A Okay.

MR. FABIANI: I think I put the right one up.

MR. PERECMAN: That is the past.

MR. FABIANI: That is past, okay.

Q If information were available to you that in 2010 -- try 2013. If information were available to you that in 2013, Mr. Ksepka was capable of employment in a job that would have earned -- that could have earned him 30,000 Zlotys for 2013; would that have been important information for you to include in your analysis?

MR. PERECMAN: Objection, your Honor. Asked and answered.

MR. FABIANI: No.

THE COURT: Are you saying that he was capable -- I mean, there is a difference between capable -- there are lots of jobs that people are capable of doing. But if there is no job there, then I don't think you would take that into account.

So the question is: Are you asking her to assume that the plaintiff deliberately decided not to work?

MR. FABIANI: I'm asking the witness.

THE COURT: I'm asking if that's what you are doing; so that you want the plaintiff to assume -- I mean, you want the witness to assume that this man could have worked earning whatever amount of money you're saying, and deliberately decided I'm not going to work, and would that be something she should take into account. Because right now he hasn't earned any money.

MR. FABIANI: I'll adopt the question.

A In that particular case, it would be up to the trier of fact. It would not be appropriate for an economist to form an opinion about whether a plaintiff went out and tried to find a job and deliberately turned down a job. That is absolutely not appropriate for any economic expert to have an opinion on.

THE COURT: So if I asked you to assume that the plaintiff had a -- give me a number, whatever the number is -- job waiting right there and -- because you are making lots of assumptions; correct? That he would continue to work in the field that he's in; correct?

THE WITNESS: Yes.

THE COURT: So let's assume that instead of working in that field, he could work in a different field and you had sufficient facts from a sufficiently reliable source to come to a conclusion that is not speculative that he would make 10,000 Zlotys, whatever, in 2013. Would that be a number you would take into account?

THE WITNESS: Possibly, yes.

THE COURT: All right.

Q Just a couple of more questions and then we are done.

What data do you have in your file that supports the assumption that Mr. Ksepka's business in Poland would have been able to generate a profit over time?

A I'm not sure I follow your question. I have statistical data, of course, on the wage growth for similar occupations in similar industries.

Q I understand that. What about small businesses; nothing, correct?

A No. As we've discussed earlier, I don't have any data for small businesses.

Q I just wanted to clear that up.

On Page 7 of your report, you mentioned that because plaintiff was self-employed, you do not apply an unemployment adjustment; is that correct?

A Yes.

Q So in your mind there are distinctions being between self-employed and a salaried employee, correct?

A Not in my mind. There are differences, yes.

Q Because -- so by your definition he can't be unemployed because being self-employed he is always employed, correct?

A That is one way of looking at it.

Q Being self-employed necessarily means you are not going

to make any money if you don't have any clients, correct?

A I suppose that is true.

Q Okay.

MR. FABIANI: I have nothing else. Thank you.

THE WITNESS: Thank you.

THE COURT: Members of the jury, during the examination I did make a comment to plaintiff's counsel that I think the term was failing business or something similar. That comment was something that I should not have said and you are to disregard it.

I am going to reread something I told you at the beginning of this case, which is:

You are the sole and exclusive judges of the facts and nothing I say or do should be taken by you as any indication of my opinion as to the facts. As to the facts, neither I nor anyone else may invade your province; okay?

Any opinions of mine on the facts would, in any event, be totally irrelevant because the facts are for you to decide; do you understand?

JURORS: Yes.

THE COURT: So it is your recollection of what anyone did or didn't testify to that is important, not mine; okay? So my comment with regards to the plaintiff's business should be disregarded by each of you. Can you all do that?

JURORS: Yes.

THE COURT: Okay. Now --

MR. PERECMAN: I won't be long, Judge. Thank you.

REDIRECT EXAMINATION

BY MR. PERECMAN:

Q Now, you don't know how much money he was making in the United States; is that correct?

A That's correct.

Q And that's not part of your loss projections, correct?

A That's correct.

Q Well, how does the 12-and-a-half thousand dollars a year compare to incomes in the United States?

MR. FABIANI: Objection.

THE COURT: Overruled.

A It's significantly lower than the incomes in the United States. And, specifically, if I look at the data available through the U.S. Department of Labor for what electricians, electrical contractors and so on in this area earn, those figures are in multiples of 12-and-a-half thousand dollars a year; anywhere from 43,000 to $70,000 per year.

MR. FABIANI: Objection, move to strike.

THE COURT: Sustained.

Minimum wage is about how much in the United States.

THE WITNESS: I believe the Federal minimum wage is

$8.75 per hour currently.

THE COURT: Working full-time in the United States, say, 40 hours a week?

THE WITNESS: If we took 8.75 times 2,080 hours, $18,200.

THE COURT: So the jury is not to consider in terms of whether he was to stay in the United States or not, if that is a factor to consider. You are not to factor money he would make as a plumber or electrician, counsel has indicated it is possible he may not have been able to work at that.

But the jury can take, and the Court can take, judicial notice of the minimum wage.

Q So, let me make sure, just so that the jury is clear. This business loss that he's sustained is really based on an amount of income that's about two-thirds of what a minimum wage worker would make in the United States?

A Yes.

Q And you assumed that he would continue to make that much income?

A Yes. On average with some modest increases, yes.

Q Yet businesses do fail, correct?

A Of course.

Q On the other hand, businesses, when you look at their first two years, are you able to tell us as an economist whether

the first two years of a business accurately reflect, assuming they don't fail, what their income may be in the future?

A Generally, economists talk about what we call a ramping up period for new businesses. And that ramping up business usually takes, depending upon the industry, two to five years.

In other words, during the first two to three years as the business is ramping up, the profits may be on the low side until they fully develop the business.

Q So you didn't take into account that the business may fail; on the other hand, you didn't take into account that the business can earn two or thee times as much as it grew?

A That's correct.

MR. FABIANI: Objection, it calls for speculation.

THE COURT: Overruled.

Q You simply based it on the amount that you had that he had made in profit for two years?

A That is correct. Not even a full two years, but that is correct.

Q And you can answer questions yes or no; can't you?

A Yes.

MR. PERECMAN: Thank you.

THE COURT: Recross?

MR. FABIANI: I need a second, your Honor.

THE COURT: Sure.

(Pause taken.)

MR. FABIANI: Just one question.
MR. PERECMAN: I'm going to hold him to it, Judge.
MR. FABIANI: One question, if she answers it.
THE WITNESS: I'll make you a deal, ask a good one and I'll answer it.

RECROSS EXAMINATION

BY MR. FABIANI:

Q You are aware, are you not, that Mr. Ksepka suspended the business because he didn't think it was successful enough; correct?

MR. PERECMAN: Objection, that is not quite what he said.

THE COURT: Sustained.

Q You are aware that Mr. Ksepka --

MR. PERECMAN: One question.

MR. FABIANI: One question I didn't get an answer to.

MR. PERECMAN: That could be all day.

MR. FABIANI: I can guarantee I will get an answer to this question.

Q Is today Thursday?

A No.

Q Good.

You are aware that Mr. Ksepka suspended the business in 2009, correct?

A Yes.

MR. FABIANI: That was it.

RE-REDIRECT EXAMINATION

BY MR. PERECMAN:

Q Do you know why they suspend businesses in Poland? Do you have any idea about the Polish?

A Some, yes.

Q Do you understand what the concept is of suspending a business and why?

A My understanding is that because of some of the regulations in Poland and the tax system, which when you bring workers on, it is very difficult to get rid of workers, you have to pay in advance for certain benefits and so on. So that when small businesses foresee a drop in activity, they will sometimes suspend business so they don't have to incur those costs for a period of time.

MR. PERECMAN: Thank you. Nothing further, Judge.

RE-RECROSS-EXAMINATION

BY MR. FABIANI:

Q What employees that Mr. Ksepka had that he had to lay off as a result of suspending his business?

A Just himself. He was self-employed, which means he was, in essence, his own employee.

MR. FABIANI: Thank you.

THE COURT: Anything?

(No response.)

THE COURT: Thank you, you are excused.

(Witness excused.)

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Certified to be a true and accurate transcription of the minutes taken in the above-captioned matter.

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Denise M. Paternoster, RPR

Senior Court Reporter