SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX : CIVIL TERM : PART IA-4

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GLORIA DOOMES,

Plaintiff, Index No.
- against - 16893/94

BEST TRANSIT CORP., WAGNER M. ALCIVAR, J&R TOURS, LTD., and WARRICK INDUSTRIES, INC., d/b/a GOSHEN COACH,

Defendants.

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KELLI RIVERA,

Plaintiff, Index No.
- against - 17408/94

BEST TRANSIT CORP., WAGNER M. ALCIVAR, J&R TOURS, LTD., and WARRICK INDUSTRIES, INC., d/b/a GOSHEN COACH,

Defendants.

----------X

ANA JIMINIAN,

Plaintiff, Index No.
- against - 16954/96

BEST TRANSIT CORP., WAGNER M. ALCIVAR, J&R TOURS, LTD., and WARRICK INDUSTRIES, INC., d/b/a GOSHEN COACH,

Defendants.

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851 Grand Concourse
Bronx, New York 10451
January 20, 2017

B E F O R E :

HONORABLE HOWARD SHERMAN,
Justice, and a Jury of Six plus two alternates

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Senior Court Reporter

(Whereupon, the following transpired in open court, in the presence of all parties:)

(Plaintiff's Exhibit No. 95, model of knee, is premarked for for identification marked.)

THE COURT OFFICER: All rise. Jury entering.

(Jurors enter.)

THE COURT: Good morning. Welcome back. Have a seat.

First of all, obviously we lost someone else. Whoever got sick first, I'm not going to blame you for it, but I'm going to ask the rest of you to please take vitamin C, stay healthy. We're a couple weeks away and we're all dependent on your staying here to finish the trial. I guess if somehow we didn't finish this trial, apart from emotionally and all psychologically what that would do to the parties in particular and the attorneys, I can't even begin to tell you how much money is invested in a trial. So I'm just going to beg you to please make all efforts to be here.

And the other thing this brings up is welcome to the first row. And I know you're getting lonely there in the back row.

Plaintiff ready with their next witness?

MR. SHRAMKO: Yes, your Honor.

THE COURT: Go ahead.

MR. SHRAMKO: At this time Plaintiff Kelli Rivera calls Dr. Eric Strauss.

THE COURT: Doctor.

E R I C S T R A U S S, M.D., having been called as a witness by and on behalf of the Plaintiff Kelli Rivera, having been first duly sworn/affirmed, took the witness stand, was examined, and testified as follows:

THE COURT OFFICER: Raise your right hand; place your left hand on the Bible.

Do you swear the testimony you're about to give will be the truth, the whole truth, and nothing but the truth, so help you God?

THE WITNESS: I do.

THE COURT OFFICER: You could have a seat.

THE WITNESS: Thank you.

THE COURT OFFICER: In a loud clear voice, please state your name and business address.

THE WITNESS: My name is Dr. Eric Strauss. My business address is NYU Langone Medical Center at 333 East 38th Street, 4th floor, New York, New York 10016.

THE COURT: Good morning, Doctor.

THE WITNESS: Good morning, your Honor.

THE COURT: I'm just going to ask you to keep your voice up and sort of direct yourself towards the microphone, it helps a little bit, because the acoustics

are horrible.

THE WITNESS: Yes, your Honor.

MR. SHRAMKO: May I, Judge?

THE COURT: Yes.

MR. SHRAMKO: Thank you.

DIRECT EXAMINATION

BY MR. SHRAMKO:

Q. Good morning, Dr. Strauss.

A. Good morning.

Q. Sir, are you licensed to practice medicine in the State of New York?

A. Yes, I am.

Q. When did you first become licensed?

A. In 2007.

Q. And have you continued to be licensed to practice medicine in New York State?

A. Yes, sir.

Q. Are you licensed to practice in any other state?

A. No, sir.

Q. Can you give the jury an idea of your educational background, briefly?

A. Yes, sir. Good morning.

I went to medical school at Cornell University, where I graduated with honors in research and AOA, which is the top five percent of the graduating class. I found out early on

I really wanted to do orthopedic surgery so I did my residency at NYU, where I currently work. I took an extra year during my five-year planned residency training to dedicate time to doing research, trying to figure out ways to do things better in the world of orthopedic surgery.

After I completed this now six-year residency training program, I went out to Chicago for a sports medicine fellowship where I was one of the assistant team physicians for the Chicago Bulls and the Chicago White Sox; but more importantly, I focused my training on cartilage surgery and joint preservation techniques. So I returned to NYU, where I've developed a sports medicine practice, taking care of knee and shoulder injuries. My real focus is on cartilage injury and repair and joint preservation techniques.

I teach a fair amount. One to two times per year I teach other surgeons, both nationally and internationally, on how to do cartilage repair, and I lecture quite a bit on these subjects.

Q. Have you published any chapters in medical texts or articles?

A. Yes, sir.

Q. Approximately how many?

A. I'm creeping up on 160. I think the last I checked there was 158 publications in peer-reviewed journals and books.

Q. And the research that you mentioned, can you describe

the area of research that you mentioned?

A. Yes, sir. What we're going to talk about is cartilage doesn't heal, it lacks a blood supply so once it's injured it's injured, and it leads to bad arthritis. So what my research has been focused on since I was a resident is things that we can do to change the natural history, what could we do that after someone gets an injury to their knee, to help them avoid the inevitable total knee replacement that happens. So I've been doing both clinical and and what we call basic science research, doing animal surgery and things in the lab, to try to treat our ability to treat cartilage injuries.

Q. And how is that research funded?

A. A variety of ways. I have money from my department to dedicate to these research endeavors. I have a number of industry sponsored studies. So different companies that are interested in what I'm looking at will support it. I have a few subspecialty society grants, which means -- there's a sports medicine society, there's an arthroscopy society, and they have money for research activities like I perform. And I have a number of grants submitted to the National Institutes of Health.

Q. And do you also, in the course of your duties at NYU Langone, do you also see patients on a regular basis?

A. I do, twice a week.

Q. And on days that you see patients, approximately how many patients would you see in a typical day?

A. Between 60 and 70 per office day.
Q. And today is Friday. Would this normally be a patient day?
A. Yes, sir; today would be a patient day.
Q. And you would normally see 60 to 70 patients today?
A. Yes, sir; that's correct.
Q. So you're taking time out of practice.
A. Yes, sir.
Q. Are you being compensated for your time today?
A. That's correct. To cover the lost revenue, I am being compensated for my appearance in court today.
Q. And what is the amount of your compensation?
A. We charge a $7,500 for a court appearance to cover those lost revenues.
Q. How often do you testify in court?
A. This would be the third time I've testified as an expert witness.
Q. And have you testified on both on behalf of plaintiffs and defendants?
A. Yes, sir, both.
Q. The past two?
A. One each.
Q. One each. Okay.
Now, you didn't testify in the first trial of this action, 2006?

A. No, sir. I was still a resident.
Q. I was going to say you might have been in college in 2006. Okay. You were a resident.
Okay. Did there come a time that I contacted you on behalf of Shramko & DeLuca and Kelli Rivera to see Kelli Rivera in some capacity?
A. Yes, sir. That was in June of 2015.
Q. And can you explain the circumstances that I described to you?
A. Yes. Mr. Shrako contacted my office about seeing his client, Miss Kelli Rivera, who had been involved in a significant bus accident. Her treating provider had retired and was no longer seeing patients. So she was having increasing symptoms and functional limitations so they were looking for an orthopedic surgeon to provide continued care. Mr. Shramko had initially contacted Dr. Jerry Lubliner, who was one of my teachers when I was a resident, but he's get a little older so he referred Miss Rivera to my office for evaluation and management.
Q. And did there come a time that you actually met with Kelli Rivera?
A. I did.
Q. When?
A. In June of 2015.
Q. And in conjunction with meeting with her, did you

do certain things? Did you, for example, take a history from her?

A. Yes, sir.

Q. And what was the history you received about the sequence of events that led her to come to your office?

THE WITNESS: Is it all right, your Honor, if I just look at my notes?

THE COURT: Go ahead. Try not to read out of them, but just to refresh your memory.

THE WITNESS: Yes, sir. I understand.

A. So when I saw Miss Rivera, she came in with complaints of bilateral or both knee pain, and her history included being involved in a major bus accident in April of 1994. So in my discussion with her about the circumstances of that injury, it was explained to me that she had been ejected from a minibus that had had run off the New York State Thruway at high speed. She was found by EMS sitting in eight inches of water with a number of injuries, including orthopedic injuries to her knees.

Q. Did you go into any of the other injuries that she had sustained in the accident during the course of that?

A. We made a list of the major injuries, but we really focused on her knee complaints at the time I saw her.

Q. And what did you do next in terms of -- in that consultation?

A. Subsequent to reviewing her past medical history, past surgical history, the medication she was on, whether or not she was currently employed, social history meaning married, smoker, things like that, we performed a physical examination where we really took a good hard look at both of her knees.

Q. Were you also provided by my office with copies of her prior medical records?

A. Yes, sir.

Q. What records were you provided with?

A. I had the records from Glens Falls Hospital. That included the EMS report, the emergency department report, the care that she had received at Glens Falls Hospital up until her discharge, there were some notes from the previous doctor, Dr. Adar. And to my recollection, that's the complete record that I was provided.

Q. Did you also send her for X-rays?

A. Yes, sir, I did.

Q. And where were those X-rays performed?

A. In my hospital, in the office setting on the sixth floor, we have a radiology suite.

Q. So you took a set of X-rays, was that bilateral knees?

A. Yes, sir, we did a complete series of her bilateral knees.

Q. And did you then conduct a physical examination?

A. That's correct, I did.

Q. Can you describe what the physical examination consisted of and what your findings were based on that examination?

A. Yes, I can. So the first thing that we do when we're evaluating a patient for the first time is we just take a look at them and it's just like a gross evaluation. So I had her stand up and I evaluated what the alignment of her knees were, and because of her injuries she has what we would call malalignment. The right side is knock-kneed excessively and the left side is slightly bowed. So they call that a wind swept deformity, it's like the wind is blowing her knees, one knee goes in and the other knee goes out and that's secondary to the pathology present. So I watched her walk and she does so with what we call an antalgic gait. She walks basically with a limp due to her injuries.

I then had her lie down on the examination table where I could examine each knee individually. And from reviewing my notes, she had evidence of what we call an effusion, meaning there was extra fluid in each of her knees. That's usually indicative of something not good going on within the joint.

I palpated her, touched multiple areas of her knee to see what hurt and what didn't, and she was tender on each knee in various spots which corresponded to her areas of injury.

I evaluated her range of motion, like how well the knee bends and extends, and there were limitations on each side compared to what I normally see.

Thankfully, she did have a stable kneel so when I tested her ligaments they were in tact, and she had normal strength and sensation, but she definitely had areas of tenderness and pain in addition to the swelling due to her pathology.

Q. And did she show any signs, when you mention mechanical systems, could you mention any particular findings with respect to mechanical systems? For example, did you notice clicking or catching in the knee joint?

A. I'm just trying to review, I apologize.

So not that I could see from a quick review of the notes, but I would not be surprised if we did note mechanical symptoms.

Q. Doctor, if I could just direct your attention to the third paragraph of the first page of your report?

A. Yes, sir. Thank you very much.

Yes, I actually did directly comment on mechanical symptoms in the form of clicking and catching. I apologize for missing it.

Q. That's okay.

Can you describe to the jury what clicking and catching is and what the find significance of those findings

are?

A. Of course. What we're going to talk about further is arthritis. And what arthritis is by definition is worn away cartilage, and cartilage is this smooth compressive material that covers the ends of our bones in all of our joints.

When someone has an injury like Miss Rivera had, it leads to irregularity of the cartilage surface. So when she bends and extends, it's a not smooth surface rubbing against a not smooth surface, and that leads to clicking and catching and pain. So that would be what I describe as mechanical symptoms.

Q. And that's a mechanical symptom of arthritis?

A. Correct.

Q. Now, in reviewing the Glens Falls Hospital record, did you have an opportunity to review the surgical report with respect to Kelli Rivera's right knee?

A. Yes, sir.

Q. To assist the jury in seeing what was actually done, I'm going to put this up and you could describe.

A. I apologize, this is a new thing with the glasses.

So the preoperative diagnosis is fracture of right lateral tibial plateau, so that's the upper portion of the lower leg bone. And the post-operative diagnosis is what they found during the procedure that not only was this fracture present but there was also a torn lateral meniscus, which is a very

important shock absorber, a specialized piece of cartilage on the outside of the knee. And what this procedure entailed was an incision along the outside of Miss Rivera's knee where they were able to access the fractured area.

Q. Doctor, would this model help explain the significance of the meniscus?

A. Yes.

Q. That model you brought in this morning from your office?

A. Yes, sir. This is a model of a knee that I use in my daily activities with patients.

So if it's okay, Mr. Shramko, if I take a step back. So the knee is four bones; there's the femur or thigh bone, the tibia or shin bone, the fibula is this strut on the outside, and then we have a kneecap.

And if you look as shown in this model, the ends of our bone are covered in cartilage. It's shown in blue. So that's this very specialized tissue that distributes weight so when we're walking around, up and downstairs, rising from a chair, all of our weight is spread out over a larger area which is beneficial for our joints.

In between the bones, which I hope you guys could see, are these two specialized pieces of cartilage called the meniscus. The one on the inside looks a little more like a C. That's called a medial meniscus. That's the inside part of the

knee. The one on the outside of the knee, that looks like an O and that's the lateral meniscus. So these specialized pieces of cartilage live between the bones and they're shock absorbers that help limit the amount of stress that particular cartilage, shown in blue, sees.

So when this surgeon is describing, in addition to the fracture which was basically a crack in the bone right here, they're also describing a tear of this meniscus tissue, that that special tissue on the outside.

So as you go through this procedure, what this surgeon describes is that they put retractors in to spread things out, to really visualize the broken bone, and what they notice is that there was a very bad tear of this meniscus that like while I typically try to fix these whenever I can, the tear was significant enough that the piece just had to be removed.

Q. What meniscus is that?

A. The lateral meniscus, the meniscus on the same side of the knee as the fracture.

So what the surgeon then did was, if you see here it says large lateral fragment was then reduced and held with a clamp, they took a big metal clamp and tried to get those fractured bone pieces together in perfect alignment. Then they put two screws across the bone so it traversed the fractured area in an effort to get the pieces perfectly lined up. So

there are two screws, and 6.5 millimeters is the size of the screw. It's a pretty large screw, but it is -- there are two that were required to fix this particular fracture.

So as we go down, they also describe that during this injury when they assessed it in the operating room, not only was there a fracture and tear of the meniscus but there was an injury to the ligament on the inside of the knee, this thing called the medial collateral ligament.

Q. What is the function of the medial collateral ligament?

A. So what the medial collateral ligament does, along with its partner, the lateral collateral ligament, it stabilizes the knee in this direction, from side to side. So that's really important when you're doing -- if you're doing any pivoting or twisting activities.

Thankfully, these injuries to the MCL as noted by Dr. Sellig can heal without surgery. So the procedure for Miss Rivera really entailed fixing the fracture and, unfortunately, removing this large portion of torn meniscus.

MR. SHRAMKO: Judge, may I approach?

THE COURT: Go ahead.

Q. Doctor, we've prepared a number of illustrations which may further help the jury understand what this surgery was all about.

Does that assist you in explaining the surgical

procedure that was performed to the jury?

A. Yes, sir.

Q. Okay. Thank you.

A. So we could take it step by step.

So as you see in the image on the upper left, that's the incision on the outside part of Miss Rivera's knee.

As you come down to this bottom view, once they expose the knee, they moved the fat aside, they moved some of the tendons aside, and they're really just looking at the fracture site, and the meniscus, they noted that that meniscus was very badly torn and simply removed from the joint space, which has major implications post-operatively.

As we described here, that's the insertion of the two large metal screws that traversed the fracture, like you see in the image on the bottom right.

What I think is really important, that you guys, I'm hoping you understand, this fracture is what we would call intra-articular. It goes into the joint space. So not only is it bone that's cracked, it's a crack of that very special material, that cartilage, and you need to get it perfect in order for it to have a good outcome. Any displacement, any step off, any irregularity of the cartilage related to that fracture is going to portend a very bad outcome.

When you couple that with the fact that you're losing meniscus, if not done perfectly this is a highway to

significant and progressive arthritis, what we call posttraumatic arthritis.

Q. Just to be clear then, the X-ray image in the upper right-hand portion there, that's not an X-ray image that was taken at the hospital, correct, immediately after the surgery; that's an extra taken at NYU when you saw the patient, is that correct?

A. That is correct.

Q. Now, when you saw Kelli Rivera in June of 2015, you mentioned you had sent her for X-rays that were done at the hospital?

A. Yes, sir.

Q. Let me show you images that were taken at that time. Are you familiar with those images?

A. Yes, sir.

Q. What are they, what do they show?

A. So, Mr. Shramko, would it be possible to show normal?

Q. It would be very possible to do that.

MR. SHRAMKO: Judge, with your permission, Mr. Timko is going to put it up.

THE COURT: Yes.

MR. SHRAMKO: An X-ray of a normal knee.

THE COURT: Any objection?

MR. KAMINSKY: No.

THE COURT: Okay.

MR. SHRAMKO: Can everybody see that?

THE WITNESS: Your Honor, would it be possible for me to point at things?

THE COURT: Absolutely. Go ahead.

A. When someone comes in with a knee injury, an X-ray is a screening tool. It only shows bones is one of the issues, but it's a great thing to assess for the status of the patient's joint.

So if you guys remember, the ends of the bones are covered with that material called cartilage, which is shown in blue. Since all we're seeing on an X-ray is bone, cartilage and meniscus is seen as space, so this is a healthy normal knee.

So this is a patient that's standing there facing us. So you could see it says with a little R indicates right, so they're facing us. So just like we saw on the model, up here is the femur or thigh bone. Here is that tibia or shin bone. There's the fibula. And if you guys could make out that circle, that's the kneecap.

What I really want you to see is look at the space in between the bones. There's clear space between the femur and the tibia on both the right side and the left. This is a healthy joint. The cartilage is nice and thick, the meniscus is in tact. That allows us to see clear space on this X-ray. So this is perfectly normal. This is from one of our teaching files.

So then if we go over here to Miss Rivera's knee at the time I saw her in June of 2015, you could obviously see the hardware from her surgical procedure. Those are those two large six and-a-half millimeter screws.

Q. That's the right knee we're looking at?

A. Yes, sir. This is the right knee; this is the left.

So what you'll notice is there's absolutely no space on the outside of her right knee. It's completely obliterated. And the reason that happened is because she lost meniscus in that initial surgery, and her intra-articular fracture, that fracture that went into the joint, wasn't perfectly lined up. So this is a posttraumatic arthritis.

And the left knee, the one that was the better knee, the one that was treated non-surgically, it has some issues as well related to the injury.

Over here is where that fracture was and it healed in what we would call a depressed setting. We call it a malunion. It didn't heal right. And what this has done is led to an environment where she's had significant wear and tear throughout her knee joint, and you could see there's a good amount of narrowing on that left side as well.

We grade arthritis on an X-ray zero to IV. Zero is like the day you were born, like that X-ray, large space between the bones.

This is bone-on-bone arthritis. That's a Grade IV.

So it doesn't get worse with respect to X-ray classification of arthritis in Miss Rivera's right knee.

Q. And with respect to her left knee, is there a grade?

A. This would be a Kellgren Lawrence Grade III. There's still some space, but significantly narrower compared to normal.

Q. Now, was there some anomaly in those between the way her right knee healed and the way her left knee healed in terms of the side of the bone that was affected most?

A. That's an interesting question. So she had fractures that were nearly identical on the outside of each to the lateral tibial plateau, but if you notice on the right side her disease is predominantly on the outside of the knee. On the left side, her degenerative disease predominantly on the inside of the knee.

Q. Could you describe why that happened?

A. Yes, sir. As we said, cartilage primary function is to distribute weight and it's a smooth material that when we bend and we move, it's smooth against smooth.

When a fracture heals not perfect, that malunion where there's a step off between the levels, you're now having irregular rubbing against regular. So this at one point in time was smooth, now this is irregular from the fracture. That creates an environment in the joint where degenerative enzymes, things that break down cartilage, dramatically increase and it leads to breakdown of cartilage throughout the knee joint.

The reason the right knee progressed so much faster and more so on the outside is directly related to the fact that the surgeon had to remove all of her meniscus.

Q. You talked a little bit about the development of posttraumatic arthritis. Just to explain the etiology of how that condition develops.

We reviewed these beforehand. You're familiar with this image?

A. Yes, sir.

Q. Would that help you explain how posttraumatic arthritis develops in a joint?

A. Yes, sir.

So if you look at the picture on the upper right, just like we showed you in the model, you could see what's labeled as the bone, it's covered by articular cartilage that we saw in blue and it's also in blue on this image. So at the top would be the femur, at the bottom would be the tibia, and just like in our model you see in between those surfaces is the meniscus, that extra shock absorber.

Q. Would you be able to step down just briefly, with the Court's permission.

THE COURT: Go ahead.

Q. To actually point to what you're referring to?

A. Yes, sir.

So this would be the femur, so this would be bone.

That would be the covering of the bone, the cartilage, that weight distributing material.

Q. And the femur is the large bone in the thigh, right?

A. Yes, sir. So this would be the thigh bone. This would be the shin bone; femur and tibia.

So we have cartilage surfaces on each side and they're protected by this triangular shock absorber called the meniscus.

What happens is at the time of the injury, as you see here -- and just remember, this is on the outside of Miss Rivera's knees, both the right and the left -- the crack in the bone propagates and goes into the joint. It breaks not only the bone but also the cartilage. They did their best to fix it and get the cartilage to line up and the bone to line up, but in these high energy injuries sometimes that's very difficult to do.

So what ends up happening is you end up having an irregular surface, like we said, and that leads to dramatic breakdown and degeneration of the surface, of that cartilage surface.

So here is more of where she is now. She has no cartilage. We saw it in her X-ray. It's bone against bone. So here's she has no cartilage on the femur or the thigh bone. She has no cartilage on the tibia or shin bone. She has absolutely no meniscus. So every time Miss Rivera rises from a chair, it's

bone against bone and that hurts. When she tries to go up and down stairs, it's bone against bone and it hurts. It's pain, swelling, it's grinding. So it really impacts a patient's daily function when they have arthritis to this extent.

Q. Immediately after an injury like these or injuries like these, what would the normal course in orthopedic practice be to rehabilitate the knee or to try to minimize the symptoms of these injuries?

A. That's an excellent question and it's one of the things we're actively researching to try and avoid this course, this natural history.

After a fracture like this, the patient has to initially be immobilized and they're non-weight bearing. So when you have a fracture that your non-weight bearing on both sides and you're in casts, like Miss Rivera was, it's very difficult, but we want to get them out of casts and get these knees moving as quickly as we can. So after the initial period, the patients end up in a lot of normal physical therapy where the physical therapist is actively working with them to bend and can extend their knees, the idea being that getting their motion back is going to help not only heal the fracture but try and minimize the negative effect it's having on the cartilage surface.

So you try and maximize flexibility, you try and restore strength, which is often very difficult to do, and you

try and restore daily functioning, so getting up from a toilet, up and down stairs in an intelligent safe way, careful navigating uneven surfaces, because these are all things that when someone has significant posttraumatic arthritis can be significantly affected.

Q. Okay. And were you aware from the records you reviewed, particularly Dr. Adar's records, whether Kelli engaged in a series of rehabilitation efforts immediately after the accident?

A. Mr. Shramko, I'm just going to find Dr. Adar's notes.

So throughout Dr. Adar's treatment of Miss Rivera, which immediately following her treatment and discharge from Glen Falls Hospital, he documents over and over again her participation in physical therapy, working on all the things we discussed, range of motion, strength, functioning.

Q. And how long did Dr. Adar follow Miss Rivera ?

A. He initially saw Miss Rivera on May 11 of 1994, so just a few weeks after her accident, and his last note is in 1999, September 13.

Q. And during that time was he seeing Miss Rivera on fairly regular basis?

A. Yes, sir. At the very least, each year; many years, a few times during that year.

Q. And in taking the history from Miss Rivera, did she

tell you you that she attended physical therapy sessions, numerous physical therapy sessions?

A. Yes, sir.

Q. Now, I know you're not a rehabilitation doctor. The rehabilitation doctor, could you explain the difference between a rehabilitation, physical medicine and rehabilitation physician and an orthopedic surgeon?

A. Yes, sir. So we're all under the umbrella of what we would call musculoskeletal care, but an orthopedic surgeon and a PM&R doctor are two very different things. We're both working toward restoring function and minimizing symptoms, but orthopedic surgeons, we tend to fix things that are broken or not functioning right, and a PM&R doctor is more about physical therapy, accommodating pathologies, strengthening, alternative approaches to symptoms. So we fix and they help us return to normal activities after we fix.

Q. In 1994, other than the physical therapy you've described, were there any other modalities available to a patient with these types of knee injuries to minimize their symptoms or to help them get better?

A. The world of cartilage surgery was basically in its relative infancy back in 1994. A lot of the things that I do now to treat these type of injuries just weren't available. I think she was -- Miss Rivera got the standard of treatment at that time, and that the unfortunate thing is that at that time

this constellation of injuries has one pathway and that's a pathway to what we've seen with her and that's very significant posttraumatic arthritis that has one solution: she needs knee replacements.

Q. By the way, going back again briefly to the history that you obtained from Miss Rivera, did she mention anything about whether this bus had seat belts?

A. She did.

MR. KAMINSKY: Objection. Not relevant to this witness.

THE COURT: I'll allow that. Overruled.

Q. Did she testify whether she was wearing a seat belt?

THE COURT: Did she testify?

Q. I mean did she indicate to you whether she was wearing a seat belt?

A. When I met Miss Rivera as part of her history she describes being involved in this major motor vehicle accident that the minibus lacked seat belts so she was an unrestrained passenger and that this led to her being ejected from the minibus.

MR. KAMINSKY: Objection, your Honor, and I move to strike. Self-serving statement, too.

THE COURT: I will allow everything up until what it led to, but that it lacked seat belts and she was an unrestrained passenger will remain.

MR. SHRAMKO: Thank you.

Q. Doctor, do you have an opinion with a reasonable degree of medical certainty what Kelli Rivera's future course of treatment will involve?

A. Yes, sir.

Q. What is that?

A. Unfortunately, she has end stage arthritis of her right knee which has one solution and that's a total knee replacement. So when I saw Miss Rivera back in June of 2015, we discussed this at length. There's no alternative treatment for her. There's no non-surgical treatment for he her. She needs knee replacement surgery. And because of her injuries, it's not the most straightforward knee replacement.

Q. With respect to the left knee, do you have an opinion with a reasonable degree of medical certainty what future therapies or treatments she will require?

A. She's going to end up requiring a total knee replacement on the left side as well.

Q. Are these injuries the type that become, quote/unquote, stable and do not progress any further?

A. So her fractures healed. Her fractured healed, not in the best position but they're healed. The status of her knees is definitely not stable. Arthritis is a progressive disease. It doesn't go backwards, it only goes forwards. And you can see that clearly, when Miss Rivera saw me in June of '15

we had the X-rays that you saw here. She then came back and saw one of my colleagues for evaluation for a knee replacement and it had a repeat set of X-rays and even in that nine month span the X-rays worsened. So I would not call this stable. I would call this a progressive condition.

Q. You mentioned that you referred or recommended a arthroplasty surgeon, a knee replacement surgeon?

A. Yes, sir.

Q. Who was that?

A. Dr. James Slover.

Q. Is he a colleague of yours at NYU?

A. He is.

Q. Is that his specialty?

A. He is a joint replacement doctor.

Q. Are you familiar with the techniques and so forth of knee replacements, being a joint surgeon yourself?

A. Yes, sir. I performed a number of knee replacement surgeries earlier on in my career.

Q. Now, you mention because of some particular circumstances in Kelli's case, this would not be a typical knee replacement. Can you explain that?

And you can use this illustration to explain what you mean by that.

First of all, can you explain what is typically done in a knee replacement?

A. Yes, sir. So when a patient's arthritis gets to a point where it's significantly impacting their daily function and activities, a knee replacement is an option. So what the procedure entails is removing all of the damaged ends of the bones and replacing it with metal.

So as you see in the images here -- sorry -- as you see in the images here, a saw is taken and cuts the damaged end of the femur away and cuts the damaged end of the tibia away. That's replaced with the specialized metal components and in between the metal is plastic. So the metal is basically reconstituting the articular surface, that cartilage surface, so it's smooth again. And the plastic in between gives a nice smooth articulation. Instead of it being rough bone rubbing against rough bone, it's smooth metal rubbing against smooth cartilage, and it's a pain relieving, function improving procedure.

To address your other question, why would this be harder in Miss Rivera -- am I allowed to move this?

Q. Sure.

A. A straightforward knee replacement is where the knees are straight up and down, you simply cut straight across making a flat cut to the femur and a flat cut to the tibia. You put the metal on, it's cemented in place, the plastic goes in between, and you're all set.

The first thing you think of with Miss Rivera's case

is she has these two large metal screws in there, so that would have to be removed, which is not always the easiest thing in the world. A lot of times bone overgrows the head of the screw and requires a considerable amount of chipping away even to access it. There are other times when we can't even get the screws out and we actually have to saw through them. So that's number one.

Number two, she is in an increased knock-kneed position. She's malaligned, like we noticed when she was just standing there facing us during my examination. So instead of being a nice, easy, straight cut across, there are a lot of technical things that need to be done to compensate, and a lot of it has to do with what we call ligament balancing. It's just not straightforward.

And in patients that have this increased knock-kneed alignment during knee replacement, they have increased rates of nerve injuries, wound complications, because you have to basically straighten out what's been knock-kneed excessively for 23 years.

Q. What is the approximate cost in today's dollars of a total knee replacement? We're talking about one knee.

A. I'll try not to fall again.

THE COURT: If you do, you're the only doctor here.

THE WITNESS: I'm looking around, I'm in trouble.

MR. SHRAMKO: Whatever you do, don't hurt your

knee.

A. Based on Medicare rates in New York State, a total knee replacement, when you talk about hospital costs and surgeon costs, is approximately $35,000. That doesn't include a lot of the post-operative care, the months of rehabilitation, any accommodations that need to be made at home. The actual surgery itself is approximately $35,000, based on Medicare rates.

Q. And does it entail a hospital stay?

A. It does.

Q. Approximately how long would the hospital stay be?

A. Anywhere between one to three days.

Q. And do you have any information about what the recovery period is after the knee replacement? How long is a person -- withdrawn.

Does a person, patient have to go to therapy after a knee replacement?

A. Yes, sir.

Q. Approximately how long does that therapy last, in general?

A. There's obviously every patient is individualized, but I would say on average a patient will be in formal therapy for anywhere between three and six months following a total knee replacement.

Q. So that if she required the knee replacement bilaterally, on both sides, the number that you just gave us

would be doubled, right? It would be thirty-five for each knee, approximately?

A. There is some billing requirements in New York State where it's not exactly double, but it's close.

Q. Now, Kelli Rivera was 33 years of age when this accident happened. She's now 55. Is there a life span or a -- withdrawn.

How long, with the typical knee replacement that's done today, how long does it last?

A. There have been a ton of studies on what we call survivorship of the knee replacement, how long does it last. Depending on the study you look at, there's a range, but there's a ten-year survival of a knee replacement of about 90 to 93 percent. But when you actually look out to be twenty years, that number drops significantly, into the 65 to 75 percent range. So we really try to put off knee replacement surgery in younger patients as long as we can because you know that if they're young, they're going to require what we call a revision, you'll have to go back and remove the worn out parts. And the reason that's problematic is because you end up then having to do a big surgery on a 75 or an 80 year old where they're sicker and they're less capable of tolerating the impact, the trauma of a big surgical procedure.

-Transcript continued on next page-

Q. Is the age of 55, is that the appropriate time, is that early, is it late in terms of considering a total knee replacement?

A. It's still on the early side. On average, Americans live to about 80 years of age. If Miss Rivera has knee replacement surgery now, she has a more than 50 percent likelihood of requiring a repeat surgery in her lifetime.

Q. Thank you. Doctor, do you have an opinion with a reasonable degree of medical certainty as to the permanency of a bilateral knee fractures that Kelli Rivera sustained in this accident?

A. Yes, sir.

Q. What is your opinion?

A. As you can see in the x-rays, which clearly show it, the fracture being intraarticular, the fact that it led to loss of major meniscus tissue led to this posttraumatic arthritis, which is permanent and progressive like we discussed. It doesn't go backwards. It only goes forward.

Q. Do you have an opinion with a reasonable degree of medical certainty as to the level of disability this is causing Kelli Rivera at the present time?

A. Yes, sir. Grade four arthritis, like we see here, has a major functional impact on a patient. As we said, it's bone against bone with just about any weight-bearing activity. Stairs are very difficult. Ambulation of more than a few blocks

can be very difficult. Rising from a chair can be very painful. Even just sitting, even just sitting at a desk with the knees bent is extremely painful.

Q. And, in fact, given the history that you took from Miss Rivera and the physical examination of her when you examined her confirm the symptomology of this level of disability?

A. Yes, sir. Her exam findings corroborated by her x-ray findings show a significant posttraumatic arthritis that's really affecting this patient.

Q. Doctor, I'm going ask you a couple of hypothetical questions.

I want you to assume that on April 23, 1994 Kelli Rivera was a 33-year-old woman in otherwise reasonably good health. She was a passenger on a bus traveling at approximately 60 miles an hour. She was not wearing a seat belt. There was no seat belt in the bus. The bus veered off of the highway and subsequently turned over, five quarter turns, landed on its left side, the driver's side. Kelli Rivera was ejected from the bus and sustained the injuries that you saw in the hospital record and that you've testified to about here today.

Do you have an opinion with a reasonable degree of medical certainty as to what the mechanism of these particular injuries was?

A. Yes, sir, I do.

Q. What is your opinion?

A. The mechanism of the injuries that we see for Miss Rivera on both of her knees are high energy impact injuries. So the way a tibial plateau fracture happens is a high energy impact, but that's not just it. Because it's a fracture of the outside part of that tibia, what happened is when Miss Rivera made contact, her knee went into this accessibly knock-knee position, like you see here. The femur, the bone up here, is stronger of the two, acted like a pile driver and piled right through the tibia and caused the fracture like we saw.

We know how high energy an event this was because not only did that fracture happen but she has an associated fracture of her fibula, right here at the same level. She severely damaged her meniscus. And because that knee was knock-knee in that position to such an extent she ended up tearing that MCL, that medial collateral ligament, on the inside. So, the mechanism is a high energy impact. It's a blunt force trauma for both knees.

Q. Okay. Doctor, I want you to assume all of the facts that I just recited to you. Kelli Rivera, 33 years old, traveling in a bus going approximately 60 miles an hour with no seat belt. The bus veered off the road and turned over, five quarter turns. She was ejected from the bus and sustained all of the injuries that you've testified to and reviewed the

hospital records in evidence. Do you have an opinion with a reasonable degree of medical certainty as to what the cause of her injuries was?

A. I do.

Q. What is that?

A. After reviewing everything, all the records and examining her, looking at these images, I believe the cause of the injury was her being projected out of her seat and coming into contact with either a different part of the interior of the minibus or with contact with the ground when she was ejected from the vehicle.

MR. KAMINSKY: Objection to the speculation. Move to strike.

MR. SHRAMKO: There's evidence in the hospital record?

THE COURT: Overruled.

Q. Just would you bear with me one moment.

Doctor, do you have an opinion with a reasonable degree of medical certainty as to the status of Miss Rivera's pain symptoms going forward?

A. Yes, sir.

Q. What is that?

A. Posttraumatic arthritis of this extent is extremely painful. Until she gets her needed knee replacements, she is going to be in pain. She will have, in my opinion, daily pain.

She's going to have difficulty in pain with any flexion activities, so any activity that requires her to bend her knees. She's going to have significant night pain. When she's lying in the bed at the end of the day, each of those knees is going to ache from her arthritis.

Q. Doctor, thank you very much.

MR. SHRAMKO: Judge, I have nothing further at this time.

THE COURT: Okay. We'll take our morning break, ten to fifteen minutes, and the we will resume. Don't discuss the case.

COURT OFFICER: All rise. Jury exiting.

(A brief recess was taken.)

COURT OFFICER: All rise. Jury entering.

(Jury enters courtroom; the following occurred:)

MR. KAMINSKY: Seat.

THE COURT: Have a seat.

Whenever you're ready.

MR. DEMPSEY: I have no questions, Your Honor.

THE COURT: Okay.

CROSS EXAMINATION

BY MR. KAMINSKY:

Q. Good day, Doctor.

A. Hello.

Q. My name is Alan Kaminsky. We've never met before. Pleasure.
A. Nice to meet you.
Q. You're a young guy. Congratulation on your successful career.
A. Oh, thank you.
Q. You canceled up to 70 patients to come to court today?
A. Yes, sir. That's correct.
Q. Did you reschedule?
A. I did my best. I saw patients on Wednesday and Monday is going to be very ugly, but I'll get through it.
Q. You didn't really lose any money. You really just rescheduled. Withdrawn.
You said that if Kelli Rivera has the replacement -- this is a quote -- "it will be pain relieving function improvement." End quote.
A. That's correct. That's an accurate statement.
Q. Okay. Now, I just want to -- I've said this to Miss Rivera and I'm going to say it to you. I do not dispute anything you said about her injuries to her knee. Okay? I'm not going to ask you any questions about that. So take a deep breath. Okay. I'm not challenging your expertise in any way, but I do want to ask you a couple of other questions.
A. Yes, sir. No problem.
Q. Okay. Now, you did an examination of her on June 19,

2015; right?

A. You took --

Q. I have your report.

A. Okay.

Q. I'm sorry.

A. It's okay. I'm pretty sure I could do it.

Q. Okay. She came to your office.

Just so you know it's proper for an attorney to review an expert's files. That's what I did during the break.

A. Yes, sir. No problem. I was just asking.

Q. Now, she came to your office on June 19, 2015; correct?

A. Yes, sir. That is correct.

Q. And you took a history from her; correct?

A. That is correct.

Q. Did she understand the questions you were asking her?

A. Yes.

Q. You had a fluid conversation?

A. Yes, sir.

Q. Okay. How long did you speak with her?

A. I don't recall exactly the time. As long as it took to get an adequate history.

Q. Okay. And I would imagine it would be more of a detailed thorough history, because, as a doctor, you need that information; correct?

A. I did a thorough standard history.

Q. Okay. When you took the thorough standard history, you had a fluid conversation. She knew what you were asking and you understood what she was saying?

A. To the best of my recollection, yes.

Q. There was no problems communicating; correct?

A. Not that I recall.

Q. And she was able to provide you and recall things from the past; correct?

A. Yes.

Q. Okay. Did you make any notations in your report that she had difficulty remembering things or anything like that? Why don't I read to you from the report?

A. Sure.

Q. "Miss Rivera," the first page bottom paragraph, "Miss Rivera presented to my office on June 19th of 2015 for evaluation and treatment recommendation. Her chief complaint was bilateral knee pain, swelling, limited motion.

During the office visit, we reviewed her he medical history and on and on and on. We also reviewed the surgical history. The interview concluded. Review of social, family history and ten-point review of symptoms."

Okay. Now, during that interview --

MR. SHRAMKO: Just a point of clarification the word was not symptoms. The word was systems.

MR. KAMINSKY: I'm sorry. Where am I?

MR. SHRAMKO: Ten-point review of symptoms. It was a ten-point review of systems.

MR. KAMINSKY: You're right.

Q. The interview also included a review of her current medications, her social and family history and ten-point review of systems and continues.

A. Yes, sir.

Q. Okay. So all these things that you discussed she was able to provide you with requested information?

A. Based on my documentation, yes, sir.

Q. She gave you the history that she needed?

A. She answered my questions.

Q. The family history, the social history, the medications. Yes?

A. Yes, sir.

Q. She was able to recount all the therapy she received and the treatment she received. All the things that you asked her, she was able to give you; correct?

A. To the best of my recollection, yes.

Q. Did you make any notes in your file that she seem to have any sort of cognitive difficulty?

A. Oh, we talked about what you left out.

Q. My question is did she understand -- in your opinion, did she seem to understand the questions you were asking?

A. Yes.
Q. You had no difficulty having this conversation with her?
A. Not that I recall.
Q. Okay. And then you did a physical examination of her; correct?
A. That is correct.
Q. How long did the physical examination take?
A. To be honest, June of 2015, however long it took me to look at both knees, I would say ten minutes.
Q. Okay. During that examination, was she cooperative?
A. Yes, sir.
Q. Did she understand what you were asking her to do?
A. Yes.
Q. And did she comply with your instructions and things like that?
A. All you have to do is lie down on the table.
Q. It's not difficult. I understand, but did she comply with what you asked her to do?
A. To the best of my recollection, yes, sir.
Q. Was she disruptive or not understand what you were asking her?
A. No, sir.
Q. Okay. Now, in the -- you mention in the report from Glens Falls Hospital --

A. Yes.
Q. -- can you tell us, as a medical doctor, what does it mean when a person is reported to be alert?
A. That they are alert.
Q. Okay. Being alert, does that mean that they know where they are? They can answer questions? They are coherent?
A. I think that makes sense to me. To be honest, it's not my specialty.
Q. I understand, but you said that makes sense?
A. Sure.
Q. And if a person is oriented, again, it would make sense that they know where they are and they are coherent; correct?
A. I think there are specific definitions for orientation. That would be like a neurologic thing but, yes, that would make.
Q. Okay. And if a person is observed to be in no apparent distress, I mean that's speaks for itself; correct? I mean I'm sure there's a specific neurological medical definition that's not your field, but, as a medical doctor, finding that someone is in no apparent distress, is coherent, is alert, is oriented, those are all favorable findings; correct?
A. I don't know favorable.
Q. As opposed to not being --
A. I think that makes sense and there's obviously grades

of distress.

Q. Yes, of course, but no distress would be a good thing. That's what you would want to see; correct?

A. Sure.

Q. Okay. And similarly, when it's reported that the patient says there's no loss of consciousness, that's something that's important to consider; true? I mean I know this is not your field, but since you're here, when a person says there's no loss of consciousness, that's better than saying that they were unconscious; correct?

A. That's a common sense answer.

Q. Okay. Now, I took the liberty of -- in your file, apparently, you were provided by her counsel some photographs; correct?

A. There were photographs in the file.

Q. Okay. And you reviewed them; correct?

A. I looked at them, yes, sir.

Q. How you made notations in your report that Miss Rivera specifically told you that the bus she was in did not have seat belts -- correct? -- and you know --

A. That is correct. It's in my note, both the office note and the narrative.

Q. Did you have an opportunity to speak to her attorney before testifying today?

A. Yes, I did.

Q. And when was that?
A. It was this week. I think it was Tuesday.
Q. Okay.
A. So I had a big week.
Q. That's okay. That's okay. I understand.
Did you discuss -- did the term "seat belts" come up at all during that conversation? Yes or no.
A. No.
Q. Okay. So the information here is from Miss Rivera?
A. Correct.
Q. Okay. Now, she said that the bus did not have seat belts, but did you ask her where she was sitting on the bus?
A. No, I did not.
Q. Did you ask her if she was seated straight ahead?
A. No, I did not. I didn't think it was relevant.
Q. Okay. Okay. Did you ask her if she was seated in any specific manner in the bus?
A. I did not ask her anything about how she was sitting.
Q. Okay. I'm going to give you back the photographs here.
A. Sure.
Q. I'm just going to let you take a look at that and show this to the jury to remind them what I'm referring to. The bus had windows; correct?
MS. DeLUCA: Which one?

MR. KAMINSKY: For the record.
MR. TIMKO: That's 34-C.
MR. KAMINSKY: 34-C?
MR. TIMKO: I think you have the colored copies there.
MR. KAMINSKY: Whatever you have. That's easy. It's okay. I'll be quick. Okay. Just so the jury remembers.
Q. Now, you don't know where she was sitting on this bus; correct?
A. No, I do not.
Q. I want you to assume she was sitting on a window seat?
A. Okay.
Q. Okay? That would be the window seat?
A. Sure.
Q. I want you to assume the seat next to her was empty. Okay.
A. Okay.
Q. I want you to assume that she had her back up against the window. Okay?
A. Okay.
Q. And I want you to assume that she was sitting with her back up against the window and her foot on the empty seat. Okay?
A. Okay.

Q. I want you to assume that she was trying to fall asleep before the incident happened. Okay?
A. Okay.
Q. It's a long drive home. Makes sense; right? People want to get comfortable. It's a long drive home --
A. Yes.
Q. -- stretch out, whatever. Just like I asked you the other questions. Does it make common sense? You said yes. Would it make common sense that for a long bus ride home the person wants to make themselves comfortable, and in this case Miss Rivera did that, she put her back against the window and her foot on the open seat. Makes sense?
A. I wasn't there. So I don't know how she was sitting.
Q. Okay. But I want you to assume that's her testimony.
A. Sure.
Q. That would make sense to you; right?
A. If she said that.
Q. Okay. Here's the picture.
A. Thank you.
Q. Sure. Now, if she's sitting in that position -- and, again, this is common sense. I know this is not your area of expertise -- would it had been possible for her to wear a seat belt? Yes or no.
A. I'm an orthopedic surgeon, not a seat belt expert.
Q. I know, but I'm asking you common sense.

A. You're asking a question I'm not comfortable answering. If you ask me about a knee operation --

Q. You can't answer it. You can't answer it.

A. I don't know.

MR. KAMINSKY: Okay. Nothing further.

THE COURT: Anything else?

MR. SHRAMKO: Yes, Your Honor.

REDIRECT EXAMINATION

BY MR. SHRAMKO:

Q. Dr. Strauss, your speciality is orthopedic surgery?

A. That's correct.

Q. Do you have any specialized training in neurology or cognitive injuries of any kind?

A. I do not.

Q. I believe when counsel was asking you a question you wanted to explain something a little further about something in your report. He was asking you about the history you took of Kelli Rivera. Do you recall what you wanted to say?

A. Yes, sir. When he was reading from my report, what was left out is the fact that in her review of medical history she has anxiety and depression following involvement in this major motor vehicle accident with chronic pain and limitation she's experienced since.

Q. Okay. Would that have any affect on your opinion on her ability to remember, to comply with your request?

A. Mr. Shramko, unfortunately, I'm an orthopedic surgeon. I don't know the answer to that.

Q. And the types of requests you were making, as you said, is things like could you lie on the table? Could you raise your right knee? Could you extend your right knee?

A. That is correct, very focused orthopedic history and physical examination.

Q. But the questions were of that nature; right?

A. Yes, sir. That's correct.

MR. SHRAMKO: Thank you. Nothing.

MR. KAMINSKY: Very briefly.

RECROSS EXAMINATION

BY MR. KAMINSKY:

Q. You see hundreds of patients a week; right?

A. Approximately 100 to 120.

Q. Miss Rivera seemed to be a, you know, typical, average intelligence, anything unusual?

A. I can't recall anything that would say otherwise.

Q. Nothing that would say otherwise?

A. Yes, sir.

Q. My last question is can we agree -- I asked this of the witness yesterday and I wanted to leave on a cooperative note. So I would ask you the same question.

A. Sure.

Q. Can we agree that the cause of all of Miss Rivera's

injuries was the bus accident?

MR. SHRAMKO: I'm going to object, Judge. We have been through this before.

THE COURT: I'm going to sustain the objection.

Q. I'm going to ask it in a different way.

A. Sure.

Q. You wouldn't be here today if there wasn't a bus accident; correct?

MR. SHRAMKO: Objection. Same question.

THE COURT: Overruled.

Do you know whether you would be here today if there wasn't a bus accident?

THE WITNESS: I don't know. I really don't know where you're going, but I don't know.

Q. Well, she was injured in the bus accident; right?

A. If she was restrained, she wouldn't likely not have had these injuries.

Q. So now you are a seat belt expert.

A. I didn't say that. I think from my experience --

Q. I asked you a question if the accident didn't happen you wouldn't be here; correct?

A. I guess.

Q. Okay. So now I want to go back to what I asked you before.

A. Sure.

Q. You can't wear a seat belt if your back is against the window with your foot on the seat; correct?

MR. SHRAMKO: Objection. He's testifying.

A. I don't know that to be true.

THE COURT: Overruled.

Q. You don't know that to be true. That's not common sense to you. When is the last time you wore a seat belt on a bus? Ever.

A. I can't recall, and I haven't been on a bus in a long time.

Q. Do you recall in your entire life ever wearing a seat belt on a bus?

A. I don't know.

Q. You don't know? I take that as a no.

A. You could take it how you like.

Q. Okay. Thank you.

THE COURT: Anything else?

MR. SHRAMKO: No, your Honor.

THE COURT: You can step down.

THE WITNESS: Yes, sir.

THE COURT: With that, I believe that's all we have for this morning.

MR. KAMINSKY: Judge, I move to strike the portion of his testimony about the seat belt. It was unresponsive to the question.

THE COURT: We'll talk about that in a minute.

So I think it's five to twelve. It means you get a two-hour lunch. Please be back at 2:00 o'clock. We have another witness and I think, as I indicated, I can never guarantee this, but it shouldn't take all afternoon. Enjoy your lunch and don't discuss the case.

COURT OFFICER: All rise.

(Jury exits courtroom.)

THE COURT: Okay. Go ahead.

MR. KAMINSKY: Judge, I move to strike his answer to the question. When I asked him, he interjected an answer that was totally unresponsive to my question. I move to strike it. There's no foundation for it. It's speculative.

MR. TIMKO: Can we have that read back?

MR. SHRAMKO: Let's see whether it was responsive or not.

THE COURT: I believe the question was can we agree that if this accident didn't happen we wouldn't be here today.

MS. DeLUCA: I don't think that was the question.

MR. KAMINSKY: That was the question.

THE COURT: Let's go back maybe two or three questions and hear maybe like the last three questions. Off the record.

(The testimony, as requested, was read back by the reporter.)

MR. SHRAMKO: The question was we wouldn't be here except for the accident.

MR. KAMINSKY: Which is true.

THE COURT: Okay. Let her finish.

MS. DeLUCA: No, no, it isn't because --

THE COURT: One at a time. One at a time.

MR. TIMKO: We're here because there was an accident and people were injured in that accident.

THE COURT: Right.

MR. TIMKO: What the doctor was -- the doctor answered the question: We wouldn't be here if there hadn't been an accident. No. If there had been seat belts on this bus, we probably wouldn't be here. We're here because they are injured, and he was answering why were they injured and why are we here litigating the injuries, and it's because they were unbelted, and she was thrown around the inside of this bus.

MR. KAMINSKY: Judge, that answer was nonresponsive to my question. And prior to that question, he admitted that he's not an expert on seat belts. So it was a gratuitous answer and I move to strike it.

MR. TIMKO: When you asked the question, you opened the door to the answer. You didn't get the answer

you wanted now, you're objecting.

MR. KAMINSKY: We would not be here if there was no accident. You objected to the question. Your objection was overruled.

MS. DeLUCA: The only issue that had to be decided is what was the cause of this accident we wouldn't be here but that's not why we're here. We're here to determine what the allegation of fault is for the injury.

THE COURT: There is merit to what you are all saying. I'm going to try to simply it. In the content of what this witness was called to testify about what he did testify about, his answer that he is not an expert on seat belts and the limited question would we not be here if there was not an accident was just yes, no or maybe or could have expanded on if given the chance, and then I would have had other objections.

I am going to strike his answer regarding we wouldn't be here if she was wearing seat belts. There are other witnesses that are going to come in here and tell us that.

MR. CORLEY: No. We understand that but the question -- the answer I'm not a seat belt expert, when Mr. Kaminsky asked the question about how she was situated lying against the window --

MR. TIMKO: That's a different question and the

second question that he asked as to we wouldn't be here if there wasn't this accident.

MS. DeLUCA: Right, Judge. Also he can't ask him questions about the seat belt and try to elicit an answer from him and then turn around and when he gets an answer he doesn't like and say you have to strike the answer because he's not a seat belt expert.

THE COURT: No. But I'm not even doing it so much on that as I'm doing it on his question was would we be here if there wasn't a bus accident, and his answer was essentially yes because. He didn't ask because if he did or not. His answer was yes, no or I don't know.

I'm not going to allow the gratuitous seat belt on an expert that was called without any notice about him testifying about the seat belt. Now, he opened it up by asking -- it was opened up on direct when the history was given about the seat belt, but I'm not going to allow that answer to that particular question. So the application is granted. When the jury comes back, I'll tell them it's stricken. 2:00 o'clock.

MR. CORLEY: Thank you, your Honor.

(A luncheon recess was taken.)

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

COURT OFFICER: All rise. Jury entering.

(Jury enters courtroom; the following

occurred:)

THE COURT: Welcome back. Have a seat.

As I said, we have one witness this afternoon and then we'll break for the weekend.

Before I call that witness, I just want to -- you heard an application made when you were on your way out. As I said, we'll talk about it more.

After further discussion, I have granted defendant's application to strike the answer of the last witness when counsel asked could we agree that if this accident didn't take place we wouldn't be here today and the witness gave an answer that went beyond that, wearing seat belts, that answer is stricken and to be disregard by the jury.

Your next witness is.

MR. SHRAMKO: Plaintiff Kelli Rivera calls Kristin Kucsma.

(Witness approaches witness stand.)

COURT OFFICER: Remain standing. Raise your right hand.

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

COURT OFFICER: Have a seat. Please state your name and address for the record, please?

THE WITNESS: Kristin Kucsma, K-r-i-s-t-i-n, K-u-c-s-m-a. And my address is 293 Eisenhower Parkway, Suite 190 in Livingston, New Jersey 07039.

THE COURT: Good afternoon. And I'm just going to ask you. You seem to be speak loud. So make sure you keep speaking loud because the acoustics in here are terrible.

THE WITNESS: I will, Your Honor. Thank you.

THE COURT: Go ahead.

MR. SHRAMKO: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. SHRAMKO:

Q. Could you tell the jury, please, what your current occupation is?

A. Sure. I am the Senior Economist and Managing Director of the Sobel Tinair Economics Group.

Q. And can you give the jury an idea of your educational background, please?

A. Yes. 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's of Arts degree in economics that I received from Rutgers University, and in addition to my Master of arts degree, I also completed additional course work in pursuit of a Ph.D., passed my qualification examinations and begun working on my dissertation.

Q. Okay. And are you currently employed as an economist?
A. Yes, I am.
Q. Okay. In addition to your educational background, did you have an opportunity to teach in the field of economics?
A. I did. I joined the Sobel Tinari Economics Group in January of 2008. Prior to that, I enjoyed what I like to call my first career as a college professor. I was a member of a full-time faculty at Seton Hall University and Drew University and I was an adjunct professor at Saint Peters College in Rutgers University. I taught primarily in the department of economics at both the graduate and undergraduate level. I also taught on occasion finance and statistics.
Q. And have you published in the field of economics in any peer review journals?
A. Yes, I have. The article that is probably most relevant for today's discussion is an article that was published in the Journal of Forensic Economics and specifically that article talks about how to calculate economic damages in matters involving wrongful death and personal injury. That article did focus on the State of New Jersey, but the methods that I used, as an economist, do not change whether I'm in New Jersey or New York.
Q. Now, you mentioned forensic economics. Can you explain to the jury what that means?
A. Sure. Forensic economics refers to the application of

basic economic methods and tools and a techniques for a very specific purpose, and that purpose is to calculate and evaluate economic damages in matters in which one person is suing another person.

Q. And is that primarily what you've been doing in Sobel Tinair Economics?

A. Yes. Most of the work that I do involves working with attorneys both plaintiff's attorneys and defense attorneys to evaluate matters involving personal injury, wrongful death, employment related matters and so on, and in each of those cases I will evaluate the impact that an incident has had on earnings future medical costs and so on.

Q. And have you spoken at any academic conference to other economists?

A. Yes, I have. As a college professor and in my current role, I continue to participate regularly in academic conferences, most of which are sponsored by the Eastern Economics Association. I present papers at those conferences. I review the work of other economists and so on.

Q. Okay. Now, part of what you do for Sobel Tinari Economics is an analysis of damages, both from the plaintiffs and from the defendants; correct?

A. Yes.

Q. So do you do an analyses on behalf of both?

A. Yes, I do. I work with both defense attorneys and

plaintiff's attorneys.

Q. Can you give us an estimation of plaintiff versus defendant, what types of analyses you do?

A. Sure. About 30 percent of work I do involves working with defense attorneys which means about 70 percent of work I do involves working with plaintiff's attorneys.

Q. Okay. Are you being compensated for your time here today?

A. My firm is, yes.

Q. Okay. You're an employee of the firm; is that correct?

A. I'm a salaried employee. That's correct. It doesn't matter where I go. I'm paid the same amount.

Q. Do you know what the compensation is?

A. My firm received $4,100 for my appearance here today.

Q. Okay. Did there come a time in 2015 that my office contacted your office in connection with preparation for the analysis of lost earnings and other economic losses on behalf of Kelli Rivera?

A. Yes.

Q. Okay. Were you provided with any materials in connection with that analysis by my office?

A. I was provided with several documents. I was provided with some legal documents. I also was provided with some documentation of Miss Rivera's earnings things like W2, wage and

tax statements, pay stubs, tax returns. I also was provided with a neuropsychological evaluation issued by Dr. Knight.

Q. Okay. And did there come a time that you started to conduct an analysis based on the information that you had at hand?

A. Yes. The first thing I did was review the information provided to me, determine what elements of economic damages I would be analyzing, and once I had determined that, the next thing I needed to do was perform some basic economic research.

Q. Okay. And what areas of economic loss did you determine relevant in this case?

A. Based on the information provided to me, I determined that I would be analyzing two elements of economic loss. First, I would be analyzing and calculating the lost earnings. So the additional money that Miss Rivera would have earned if she had not been injured in 1994 and been able to continue working full time and, in addition, I also needed to consider the cost of surgery that Miss Rivera is going to need.

Q. Okay. And were you aware at a certain period of time Miss Rivera did stop working and was disabled from working?

A. Yes. That was my understanding.

Q. Okay. Can you tell the jury how you began your analysis and how you followed through?

A. Sure. The first thing that I needed to do in order to calculate the lost earnings in this matter was do some basic

research and, specifically, I needed to determine how far into the future Miss Rivera would have worked if she had not been injured in 1994, which she had worked another five years, ten years, 20 years. In other words, I needed to determine Miss Rivera's statistical retirement age, and I did that by looking at U.S. Government data. Very specifically, I did that by looking at the actual experience of the U.S. population and, in particular, what I did was look at the actual experience of roughly 33, 34-year-old females who had had some college but no degree, and I looked at that group because that's the group into which Miss Rivera fit at the time of her injury.

Based on my research, I was able to determine that 33, 34-year-old woman who had had some college, but on degree, would be expected to retire on average at the age of 63.9 years of age. In other words, based on my research, if Miss Rivera hadn't been injured in 1994, I determined that she would have retired sometime on or around November 16, 2024 when she turned approximately 64 years old.

Q. Did you prepare some materials to assist the jury in understanding your testimony today?

A. Yes, I did?

MR. SHRAMKO: Your Honor, if I may approach?

THE COURT: Yes.

THE COURT: Would you be more comfortable just standing next to it?

THE WITNESS: It probably would be most helpful. Would you like a copy, Your Honor?

THE COURT: Thank you.

THE WITNESS: You're welcome.

A. You see down here the components of analysis that I described before, the adjusted earnings, what Miss Rivera would have earned if she hadn't been injured in 1994 as well as the cost of surgery. Up top, here are some of the basic information provided to me like Miss Rivera's date of birth, the date on which she was injured, her highest level of education, her employment at the time of her injury. That information was necessary for me. I needed that before I could conduct some of the economic research I was describing before.

As I mentioned a moment ago, one of the things I needed to do was to determine how far into the future Miss Rivera would have worked. I had to determine her statistical retirement age. And as I mentioned a moment ago based on U.S. Government data and the actual experience of 33, 34-year-old women with some college, no degree, I was able to determine that if Miss Rivera hadn't been injured in 1994 she would have continued to work until the age of 63.9 years of age or until November 16, 2024. So my calculation of lost earnings are going to extend or continue through 2024.

Now, this statistical retirement data tells me one thing and one thing only. What it tells me is that if

Miss Rivera hadn't been injured in 1994 she would have permanently removed herself from the work force in November of 2024. What it doesn't tell me is that if Miss Rivera hadn't been injured in 1994 that she would have worked continuously for 30 years. It doesn't still me that she would have worked continuously from 1994 through 2024.

In fact, if I look at the actual experience of 33, 34-year-old women with some college, no degree, I find that they do not work continuously for a 30-year period. In fact, based on my research, I was able to determine that women in this category on average will spend about 16.6 percent of time out of the work force or alternatively they'll spend 83.4 percent of the time working.

Why would they miss work? They may become injured. They may have children. They may already have children and become injured. They may need time to take off to care for their parents. But based on my research, I determined that if Miss Rivera hadn't been injured in 1994 she most likely would not have worked continuously every week, every month for 30 years but, in fact, she would have missed work now and then. So what I'm going to do in each and every year I'm going to reduce my calculation of Miss Rivera's earnings by 16.6 percent to take into account the likelihood she would have missed work now and then. If she missed work, she wouldn't had been paid and it certainly would not be reasonable for me to compensate her for

money she would not had earned any way.

Now, in addition to that, I also needed to take into account, as I mentioned before, what Miss Rivera's position was at the time of her injury, and I also needed to take a look at her statistical life expectancy.

In order for me to determine Miss Rivera's statistical life expectancy, I simply reviewed again U.S. data. I looked at something called the National Vital Statistics report. Those are the reports that the U.S. Government puts out every year, tables that we can look at, that they can tell us on average how many more years people of a particular age are likely to live?

Based on my review of the National Vita Statistics reports, I determined that Miss Rivera's statistical life expectancy is 82.53 years for, on average, I was able to estimate that her life expectancy would extend through July of 2043.

Q. Using that basic information, did you then conduct an analysis of her earnings history?

A. I did. In order for me to calculate the lost earnings, the first thing I needed to do was determine how many years into the future Miss Rivera would have worked. I determined she would have worked until the age of 63.9 years where she would have retired in 2024.

The second opinion I needed to form though was an opinion about how much Miss Rivera would have earned, on

average, each year going forward. If she hadn't been injured in 1994, if she had been able to continue working full time, 1995 and going forward, how much would she have earned, on average, each year.

In order for me to determine that, I started by looking at Miss Rivera's earnings history. In other words, I reviewed her W2 wage and tax statements. I reviewed tax returns. I reviewed some pay stubs and I was able to compile the history of what Miss Rivera had, in fact, earned.

One of the things I saw was that Miss Rivera had, in fact, earned $15,080 in each of the two years proceeding the accident, $15,340 in the year of the accident. I also was able to determine that Miss Rivera did continue to work, albeit, in a limited capacity after the accident until she was rendered totally disabled and stopped working altogether in the year 2002. So once I reviewed this information, I also reviewed benchmarks statistical data published by the U.S. Department of Labor. I wanted to examine the median earnings, the average earnings, of women that were in the type of employment, secretarial employment like Miss Rivera would have been at the time of her injury.

So based on the benchmark statistical data and Miss Rivera's only actual earnings, I determine that if Miss Rivera had not been injured in 1994 she would had been able to continue working as a secretary as she had within in the

years proceeding the accident, she would have continued to earn, on average, $15,340 each year, and that was based on what she had earned in the year, the last year of employment, the year in which the accident occurred.

Now, once I determined, on average, how much Miss Rivera would have continued to work if she had been able to continue working as a secretary, the next thing I needed to do was take into account the fact that if Miss Rivera had continued working her wages would have continued to increase year over year. And reason I know that Miss Rivera's earnings would increase year over year is because I examined U.S. Department of Labor data, and I looked very specifically at what had happened to wages in 1995, '96, '97 and so on. I was able to look back at the U.S. Department Labor data and see how much wages had, in fact, increased in each year in the past. Specifically, I was able to start in the year 1994 and look at what wages were in every year up to and including 2015. 2016 just ended. That data is not available yet.

Based on my review of how much wages, in fact, increased each year, on average, from 1994 through 2015, I was able to determine that wages had, in fact, increased, on average, three percent each year. In recent years, after the recession we just had wages, were not growing at three percent a year, but in the years just prior to the most recent recession, wages had been increasing by 3.8, 4 percent in some of those

years. On average, the wages actually increased 3 percent each year. So in this case, I needed to take into account that if Miss Rivera hadn't been injured in 1994 she would not still be making $15,000 today because her wages would have increased, on average, 3 percent each year.

In the years 2016 and 2017, I did estimate how much Miss Rivera's earnings would have increased in each of those years. In this case, I did base my estimate only on what wages had done in the very recent years following recession. The economy is recovering. It hasn't fully recovered yet. So I just wanted to make sure I filled in the effects of the recession.

Now, once I determined how much, on average, Miss Rivera's earnings would have increased each year over the last 22, 23 years, the last thing I needed to do before I could actually calculate the lost earnings was I had to make three downward adjustments each year to may calculations.

So on average, Miss Rivera was earning about $15,000 in 1994. She would have continued to earn that amount of money. Her wages would have increased over time, but before I could actually calculate the economic losses, I needed to make these three downward adjustments. The first one I already mentioned.

The first downward adjustment I'm going to make each and every year is a downward adjustment of 16.6 percent. Every year I'm going to reduce Miss Rivera's earnings by 16.6 percent

to take into account the likelihood that she would not had worked every week -- every month of every year, but she would have missed some time because of injury, illness and so on.

The second thing I had to take into account though is the likelihood that Miss Rivera might have missed some work now and then, not because she was sick or a family member was sick, but she may have become unemployed. If Miss Rivera had become unemployed, I determined that the appropriate adjustment to make every year was another downward adjustment of 2.4 percent.

I base that adjustment on two things. First of all, I took a look back. I looked at the average unemployment rate had been for women at various stages, the ages of Miss Rivera was, and I looked at what the actual unemployment rate had been over the past years.

In addition to that though, I did take into account the fact that if Miss Rivera had become unemployed, she would not had been fully without income. It's not like she would have no money coming in. She would likely have received some unemployment benefits. So once I took those two things into account, I determined that it was necessary for me to make another downward adjustment each year of 2.4 percent.

Last but not least, I also took into account the fact that if Miss Rivera had continued working, she likely would have some job related expenses. She would have had to spend some money getting to and from work. She may have bought a cup of

coffee in the morning, a hot dog for lunch, but I need to take into account that she would have continued to have these job related expenses if she had continued to work.

I estimated those job related expenses at 5 percent of her earnings, and I estimated those job related expenses based on, again, U.S. Government data. I looked, for example, data published by the the IRS about unreimbursed business expenses, and I also looked at something called the consumer expenditure survey which is a survey conducted by the U.S. Government about how people spend their money upon a wide variety of things including job related expenses.

(Continued on the next page ...)

Q. Now, Miss Kucsma, what is the ultimate result of these three downward adjustments you're referring to? What affect would they have down the road and in terms of your final analysis, would they tend to increase the number, the damages, or would they tend to decrease the damages?

A. No, as a result of those three downward adjustments in each and every year I'm going to be reducing my calculation of earnings by about 22, 23 percent, so in each year I'm going to be reducing my calculation of earnings before I calculate the economic losses.

Q. Okay. Please continue.

A. Sure. I started my calculation of lost earnings in 1995, and the reason I did that was because when I reviewed Miss Rivera's W-2 for 2014, it appeared as if she had been paid for the entire year and in fact it was reported to me that she had in fact been paid for the whole year even though she did not work for the whole year.

Q. You're referring to 1994?

A. In 1994, exactly. It was reported to me that Miss Rivera spent about six months after the accident completely out of work. She was not working. She then attempted to return to work about six months later. She was, however, paid during that six month period so it certainly would not be appropriate for me to compensate her when she was in fact paid for that time out of work. So I began my calculation of lost earnings then starting

January 1st, 1995.

As I mentioned earlier, based on what Miss Rivera had actually earned in the years leading up to the accident as a secretary, I was able to determine that starting in 1995, Miss Rivera, if she had been able to work full time in her old capacity, she would have earned $15,800.

That figure, though, assumes that Miss Rivera would never have missed a day of work in 1995, she would have worked every week, every month of 1995. It also assumes that she would have had no job related expenses. Clearly, I can't assume she never would have missed work and I have to assume she would have had job related expenses. So what I do, I make those three downward adjustments.

So in 1995, I estimate that if Miss Rivera hadn't been injured, if she had been able to work in 1995, taking into account job related expenses and some periods of missed work, she would have earned $12,218.

Now, after reviewing Miss Rivera's W-2's and pay stubs and tax returns, I know that she did earn money in 1995. In fact, I know she continued to earn some money all the way through the year 2002.

In 1995, then, I had determined if she hadn't been injured she would have earned $12,218. I know that she did earn $3,137. I assume she would have had some job related expenses, so I'm going to take 5 percent out of that, which means in 1995

if she hadn't been injured she would have earned $12,218. She did continue working though. She did earn some money. After job related expenses, she earned $2,980, which means I calculated her economic loss, lost earnings, in 2000 in 1995 at 12,218 minus what she did in fact earn, $2,980. So in the year 1995 if Miss Rivera had not been injured, based on my calculations, I determined she would have earned an additional $9,239 over and above what she was able to earn in that year.

I then performed that calculation in each year. As I mentioned before, Miss Rivera did continue continue to work until she was deemed totally disabled in 2002. In each of these years, I start calculating what she would have earned if she never missed a work, made those downward adjustments, subtracted what she actually earned, and that's how I calculated the yearly loss.

Starting in 2003, since Miss Rivera was no longer working in any capacity, I did not need to deduct any adjusted earnings.

Based on my calculation, I determined if Miss Rivera had not been injured in 1994, she continued working as a secretary in the capacity that she was working in before the accident, through the present time, through the beginning of 2017, she would have earned an additional $341,456.

Q. That, as you said, is a conservative figure because you made those three downward adjustments, correct?

A. I made those adjustments in each and every year, that is correct.

Q. Could we move on then to her earnings analysis and loss in future years?

A. Sure. As I mentioned earlier, based on the actual experience of 33, 34 year old women with some college, no degree, I determined that if Miss Rivera hadn't been injured in 1994, she would have continued to work until she was about 64 years of age. She would have continued to work until November 16, 2024. So I needed to continue my analysis to calculate how much Miss Rivera would have earned in each year, this year 2017, 2018, and through 2024.

I used exactly the same method that I just described. In each year, I calculated what Miss Rivera would have earned as a secretary if she never missed a day of work, had no job realted expenses, and then in each and every year I made those three downward adjustments I described before.

In this case I did have to form an opinion about how much wages are likely to increase going forward starting in 2018. In order for me to do that, I reviewed two different sources of information. One I've already mentioned and that is I did look back in time at how much wages had in fact increased in the past. I looked at U.S. Department of Labor data. I did see that following the recession, wage growth was rather slow. In the years preceding the recession, however, wages had been

increasing by 3.84 percent a year.

I did examine though another source and that is the annual report of the board of trustees of the Social Security Administration. I looked at that report because that report includes projections of how much wages are expected to increase going forward. Those projections build in anticipated inflation, and the projections in that report for wage growth are 4, sometimes a little bit higher than 4 percent.

Based on my review of all of those sources, I determined that on average if Miss Rivera would have been able to continue working her wages would have increased by 3.7 percent each year.

Based on my analysis then, taking into account three downward adjustments each year, I was able to determine if Miss Rivera had not been injured, if she had been able to continue working for another approximately seven years, she would have earned on average $200,727.

Q. And again, you could have, based on the board of trustees of the Social Security Administration, calculated the yearly increase at 4 perecent, but you did not, right?

A. The projections are in excess of 4 percent, that's correct.

Q. You used the figure of 3.7?

A. Yes.

Q. Why did you do that? You wanted to be conservative

about the numbers you were using?

A. Well, again, I certainly needed to take into account the impact of the recent recession and I had to take into account the fact that while the economy is improving and wages have been increasing and increasing more year over year, they still are working their way back up to the pre-recession economic conditions.

Q. Did we also ask you to do a calculation based on the cost of future medical care on behalf of Miss Rivera?

A. Yes.

Q. Could you discuss that for a moment?

A. Sure. I had been provided with information indicating that Miss Rivera is going to require a bilateral total knee replacement surgery. The cost was estimated to be $65,000 in the year 2015. What I needed to do then as an economic expert is take into account the fact that these medical costs, the cost of surgeries, hospitalizations, has been increasing year over year. So while it may have cost $65,000 to have that surgery in the year 2015, it is going to cost more now in the year 2017 to have that surgery.

In order for me to determine on average what the cost of surgery would be this year compared to 2015, I looked again at U.S. Department of Labor data, but I looked very specifically at something called the Consumer Price Index. And the government produces or publishes a Consumer Price Index very

specifically for hospitalization services and what the government does is take a look at, for example, how much it costs to go into the hospital and get surgery in 1995, take a look at how much it costs to go into the hospital and get surgery in the year 2015, and then just compare the cost and the U.S. government is able to calculation on average how much that cost increased year over year by seeing what it would have cost to get that surgery in 1995, what it would cost to get it in the year 2015.

Based on my review of that U.S. government data, the cost of hospital services has been increasing on average 6 1/2 percent each year, and this has continued to hold you true even through recent years.

So based on my research then, I determined that the surgery that would have cost $65,000 in the year 2015, this knee replacement surgery, will cost Miss Rivera $73,725 this year in 2017.

Q. Okay. I want you to assume that there was testimony this morning from Miss Rivera's treating orthopedic surgeon that in all likelihood there is a high probability that she will require a revision of that knee replacement surgery bilaterally within her lifetime.

Were you able to calculate the additional costs associated with that surgery?

A. I had been asked to consider what the cost of that

surgery would be if it were required a second time ten years from now, in 2027, and also if it were required a third time twenty years from now, in 2037.

Based on my analysis, surgery that would have cost $65,000 in 2015, the cost of that surgery would increase on average 6 1/2 percent each year. By 2027, that surgery would cost $138,391. By the year 2037, that same surgery will cost $259,779.

Q. Based on your analysis of the tax returns, the W-2's, the pay stubs, and your calculations based upon Department of Labor statistics, Social Security statistics, did you come to any conclusion overall about plaintiff Kelli Rivera's past lost earnings as a result of the injuries sustained in this accident, her future lost earnings, and the cost of future medical care?

A. I did. Based on my analysis, I calculated the total value of loss based on what Miss Rivera would have earned from 1995 through the present time, what she would have earned from the present time through her retirement in 2024, and also including the cost of one knee replacement surgery. I calculate the total value of that loss at $615,908.

Q. Thank you very much?

A. You're welcome.

THE COURT: Counsel, do you have any cross?

MR. DEMPSEY: I do not.

THE COURT: You want to take a short break or are

you okay?

MR. KAMINSKY: Sorry, Judge, that was just a personal reflection, moment of silence, given today's events. My own personal.

THE COURT: Okay.

CROSS EXAMINATION

BY MR. KAMINSKY:

Q. How are you, ma'am?

A. I'm doing well. How are you?

Q. I've had the chance to cross-examine you many times, have I not?

A. You have indeed, and it's always a pleasure.

Q. I'm looking forward to doing it again.

A. As am I.

Q. Okay. You said that -- let's see where we'll start .you're here to give a fair presentation, not a biased presentation, correct?

A. I am here to present an objective calculation of economic losses in this matter, yes.

Q. Okay. You said that roughly 70 percent of the work that you do -- by the way, let's just back up. The company you work for is?

A. Sobel Tinari Economics Group.

Q. And the sole reason that company is in existence is to provide services to attorneys, correct?

A. That is most of what we do, yes.
Q. Not most. That's virtually all of what you do, correct?
A. It's about 95 percent of what we do, that is correct, yes. We do a small number of non-litigated projects.
Q. Okay. So let's see if we could be on the same page. Virtually all of your company's work is related to providing services to attorneys, correct?
A. Certainly the overwhelming majority of it is, yes.
Q. And you testified that if you broke it down, roughly 70 percent is on behalf of plaintiff and roughly 30 percent is on behalf of defense?
A. Yes.
Q. Do you remember testifying in a case that I cross examined you on just last year that you've testified in court at that time it was about 170 times?
A. That was correct, yes.
Q. And did you testify that of the 170 times, 169 of the times were on behalf of plaintiffs and you were able to recall way back one case where you think you testified for the defendant in Philadelphia? Yes or no?
A. It is true that most --
Q. Is that a yes?
A. I believe that's true, yes.
Q. Okay. So 169 out of 170 times you've come to court

and testified on behalf of plaintiffs' attorneys, true?

A. Defense attorneys do not ask me to come to court, that is correct. You're right, plaintiffs' attorneys are the ones that request my presence in court, defense attorneys don't. I would be happy to come to court if they asked me to.

Q. I assure you, I will not be asking you. But my question is - it's a yes or no question - 169 out of 170 times has been on behalf of plaintiffs, true?

MR. SHRAMKO: Asked and answered, Judge.

MR. KAMINSKY: Well, it's been asked. It hasn't been answered.

THE COURT: To the extent counsel asked it to be a yes or no, if she can I'll allow it. And if you can't answer it yes or no, just say 'I can't answer it'.

A. I believe that probably is a correct statement, yes.

Q. Now, as far as giving an objective analysis, there's some -- you have to make some subjective determinations in your calculations, correct?

A. I'm not sure I would call them subjective, but certainly I did need to make some assumptions in my calculations, yes.

Q. And obviously it's your testimony that those assumptions are as objective -- I mean as fair as could be, correct?

A. Well, they are based on generally accepted economic

methods.

Q. Okay.

A. U.S. government data, yes.

Q. The Tinari company that provides litigation services overwhelmingly for plaintiffs' attorneys actually advertises, do they not?

A. We do, yes.

Q. You do cute little things like give out pencils and cups and things like that, true?

A. I don't know if that's cute, but we do have pens, that's correct. And we used to have cups, we don't any longer.

Q. So long cups. In fact, they publish a website, do they not?

A. We do have a website, yes.

Q. And talks about upcoming presentations that you're going to be doing?

A. Among other things, yes.

Q. And is it fair of me to say that you yourself give presentations to plaintiffs' attorneys?

A. I actually give presentations to all members of the legal community, not just plaintiffs' attorneys.

Q. Okay. Let's talk about some of the presentations that are on your website, okay?

A. Sure.

Q. Did you ever give a presentation called "How to

Maximize Economic Damages In a Personal Injury Lawsuit"?

A. Did I --

Q. Yes or no?

A. Well, I can't answer that yes or no.

Q. Okay.

A. That was the name of the CLE, but it was not the name of my presentation.

Q. Were you on that panel?

A. I was part of the CLE, yes, but my presentation was actually entitled "How to Provide a Comprehensive Assessment of Economic Damages."

Q. Did you present at the "Master's in Trial Tactics, How to Maximize Your Damages," in Philadelphia, Pennsylvania in October of 2015, yes or no?

A. Sure. That's the one we were just discussing, yes.

Q. Did you present presentations to attorneys in New Jersey?

A. I have, yes.

Q. Attorneys in New York?

A. Yes, I have.

Q. Attorneys in Pennsylvania?

A. Yes.

Q. Attorneys in other states?

A. I believe I did teach one CLE in Chicago a number of years ago.

Q. "How to Prepare for Direct and Cross Examination"?
A. I don't believe that was the title of that particular CLE, but I also have taught CLEs with that subject, yes.
Q. "How to Properly Use a Vocational Expert and Economic Expert From Start to Finish, From Intake to Trial"?
A. That is --
Q. Sound familiar?
A. Yes, that is the name of another CLE in which I participated.
Q. And there's dozens more, are there not?
A. I don't recall specifically how many, but that may be true, yes.
Q. Okay. Did you speak at presentation, "Proof of Damages, How Big is Your Case," in Iselin, New Jersey; does that sound familiar?
A. It was quite a number of years ago, I believe, but yes, I do believe that was the name of the CLE and I was asked to make a presentation there.
Q. Okay. Just so we're clear, you are -- are you a PhD?
A. No, I do not yet have my PhD.
Q. Have you been testifying for over the last ten years that you're working on getting your PhD?
A. I certainly have testified over the last nine years that I have not completed my dissertation, yes, but I certainly have not testified that I've been actively working on it because

I haven't been. I'm not registered in any sort of graduate program. I've been focused on managing the Sobel Tinari Economics Group.

Q. So when you say you're working on getting a PhD, you're not even enrolled in a school to get a PhD?

A. That is correct. At present I'm not enrolled, that's correct.

Q. And actually there so you've taken advanced courses to your PhD, correct?

A. I've completed all of my course work, yes, and passed my qualifying examinations in pursuit of my PhD.

Q. But there is a time limit in which you need to complete in order to get your PhD, correct?

A. If you stay enrolled, that is correct. I have not been enrolled in graduate school for a number of years.

Q. So you're not even enrolled, you're not even qualified presently to get a PhD?

A. That's --

MR. SHRAMKO: Objection.

THE COURT: Overruled.

A. -- not a correct statement, no. Part of it is correct, I'm not currently enrolled. To say I'm not qualified, that's not a correct statement.

Q. You have to finish within seven years, correct?

A. Again, if you maintain your matriculation in school,

I believe that is correct. However, I was no longer enrolled in the graduate program. I believe 1995 or 1996 was the last year in which I was enrolled, just prior to both of my parents unfortunately getting very sick.

Q. Sorry to hear about your parents, but would you agree with me that it's a stretch to say that you're close to getting your PhD?

A. Actually, not at all.

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

A. Yes, I have been.

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

A. Not specifically, no.

Q. If it were posted on the school you went to, if it was posted on their website that those are the criteria, would you disagree with what's posted on their website, yes or no?

A. I can't say one way or another, but I will accept. If you say it's posted there, I certainly will not disagree with you.

Q. The past calculations that you came up with -- by the way, where does Miss Rivera live?

A. At present, I believe she's still living in Florida.

Q. And is the job market the same in New York, Florida,

wherever?

A. It's completely irrelevant for my analysis. According to the information provided to me, Miss Rivera moved to Florida very specifically because of her injuries. Had she not been injured, she would have stayed up here.

Q. Now, if -- you said you made deductions on your charts because of a couple of different factors, and I appreciate that you took those factors into consideration and I won't have to cross examine you on them.

You made several downward adjustments. Did you make any downward adjustments for the concept of secondary gain?

A. No.

Q. Could you tell the jury, what is secondary gain?

A. I don't know how you're using it in this particular context, so I couldn't say.

Q. Well, what is your understanding of secondary gain?

A. Depends how it's applied.

Q. Okay. Well, when someone is in a lawsuit and they potentially stand to benefit from the outcome of a lawsuit, and that affects them in a certain way, would you agree that that could be secondary gain?

A. I'm not sure I could answer that simply because I'm here as an economic expert, not as a legal expert. I'm certainly not a judge. So I'm not sure I could answer that question.

Q. Okay. But if she -- your understanding is she is totally disabled?
A. Yes.
Q. Can't work in any capacity, correct?
A. Based on the records I reviewed, yes.
Q. Now, if she were to go back to work in some sort of capacity, whatever it may be, and she were to earn a certain amount of dollars, you would make a deduction from the future loss of earnings, correct?
A. Possibly.
Q. Well, if you're claiming -- let's say, let's take your number that she was earning $15,000 a year, roughly. If she were to go back to work earning that amount, you would deduct it from your projections, correct?
A. If she were actually earning money, then I probably would have made a deduction for that, as I did here for the years 1994 through 2002, yes.
Q. If I understand, if she were to get a job you'd only probably make a deduction?
A. Probably, yes.
Q. Probably or the right thing to do would be to make the deduction?
A. It would depend, of course, on what she was earning and what capacity, but most likely than not I would need to subtract those earnings from my calculations, yes. I couldn't

say for sure without seeing them.

Q. Let's say hypothetically she undergoes a knee replacement, her condition improves, she's able to hold a job. Let's say she's able to hold a job for the same amount of money that you're claiming she lost. If that were the case, she would have no loss of future earnings, correct?

A. I certainly would not agree with that statement. As I said --

Q. Okay. Then let me try to ask it a different way, okay? You made a projection that she needs X number of dollars for a knee replacement?

A. Yes.

Q. Now, by the way, I want you to assume the doctor who testified this morning said if she were to have the knee replacement, it could last her the rest of her life. Okay?

You not only have made projections for the cost of the knee replacement, you've made projections for the cost of a second knee replacement and you've made projections for the cost of a third knee replacement, true?

A. Those are not reflected in those calculations.

Q. Okay.

A. But I certainly was asked on direct to perform those calculations and I did, yes.

Q. Are you aware that there's absolutely no testimony that she will even remotely need a third knee replacement, have

you been provided that?

A. I was simply asked to calculate what this surgery would cost.

Q. Okay.

A. Ten and twenty years from now.

Q. Okay. Then let's go back. All right.

The reason she would have the knee replacement, according to the doctor who testified this morning, would be to greatly improve her condition, remove the pain, give her more mobility, and he said it would be very helpful to her.

Are you aware of people with knee replacements who have been able to go back to work; yes or no or you can't answer it?

A. I'm not sure I could answer that.

Q. Okay. Then don't answer.

I want you to assume if she's able, let's say she has a knee replacement, if she has a knee replacement and is motivated and is able to go back to work earning what she would have earned if this incident did not happen, we can cross off all of her future loss of earnings, true? Yes, no, or you can't answer it yes or no?

A. I can't answer that yes or no.

Q. Okay. Now, same thing, let's talk about the cost of the medical expenses. What is the law currently in the United States for health insurance?

MR. TIMKO: Objection. She can't testify to the law.

THE COURT: If you know within your area of expertise.

MR. KAMINSKY: Withdrawn.

Q. If a health insurance policy were purchased for the plaintiff, would that cover her medical expenses; yes, no, or you can't answer that?

A. That I don't know.

Q. Do you know what the cost of a health insurance policy would be for the plaintiff; yes, no or you don't know?

A. Off the top of my head, I don't know.

Q. Now, you said that you used a rate of 3.7 percent? Is that --

A. In future years, yes. Starting in 2018, that's correct.

Q. Isn't it true that the U.S. Department of Labor says that for the last ten years it's actually been 2.4 percent?

A. That may be correct for the last ten years, I don't know off the top of my head.

Q. Okay. So if we use 2.4 percent instead of 3.7 percent, those numbers would have to be reduced by a fair amount, true?

A. No. Certainly if I used 2.4 percent instead of 3.7 percent my numbers would be lower, but I would not say by a

considerable amount, no.

Q. They would be lower?

A. All other things held constant, yes.

Q. Same thing with the cost of physician services, you projected that at what rate?

A. Six and-a-half percent.

Q. Are you aware that the U.S. government uses a 2 percent rate to project the cost of future physicians services?

A. These are hospitalization services.

Q. Would that, would the 2 percent rate bring the numbers down, instead of the 6 percent rate; yes, no or you can't answer it?

A. The 2 percent rate would be wrong.

Q. So the federal government would be wrong in this instance or -- let me re-ask the question.

If you used 2 percent, would that bring the number up, down, or it would stay the same?

A. It would be wrong, but if for whatever reason I used 2 percent instead of 6 1/2 percent, then my number would lower, of course.

Q. Now, let me just take a look at your charts.

Could I see your file?

A. Sure. It's just copies of the charts.

Q. Let me back up. What is the compensation your company is receiving for you coming to court today?

A. $4,100.
Q. Okay. Roughly how many times a year do you come to court?
A. I would estimate that last year in the year 2016 I testified approximately 40 times in court, give or take.
Q. And is it 4,000 each time?
A. For my firm, yes. Not for me, but for my firm, yes.
Q. You're the economist, what's 4,000 times 40?
A. So that would be about 160,000.
Q. And in addition to that, how many other cases do you work on where you don't come to court, per year?
A. I work on a total of anywhere from 550 to 650 cases each year.
Q. So let's round that to 600. What is the cost, in addition to coming to court to testify, what is the cost associated with your doing the analysis such as the analysis you did in this case?
A. In this case my analysis was a little more basic than it is in many other cases because it didn't include fringe benefits and so on.
Q. What's the average, would you say?
A. I would say the average for the reports that we prepare, the average cost is about $4,000.
Q. So 600 times 4,000 is how much?
A. I believe that is about 2.4 million.

Q. 2.4 million dollars. I'm sorry, I'm just letting that number sink in, okay.

2.4 million dollars a year?

A. To my company, not to me.

Q. Oh, I know.

A. Not by a long shot.

Q. Yes, of course.

A. We have a parent company that owns us.

Q. Yes, yes, I know you've got --

A. I have sixteen members of my team, all of whom need to be paid. They're provided with benefits. I have rent to pay. I have utilities to pay. I have to buy paper. All of that comes out of these revenues.

Q. I'm sorry, did I ask you any of that, or is that just a rehearsed answer?

A. I'm just --

Q. Because I've heard it before.

A. I'm just making sure that it's very clear what that money is being used for.

Q. Okay. And pens, you got to pay for pens?

A. Yes, we have to pay for our pens, of course.

Q. Two million four hundred thousand. Another hundred sixty thousand for you to come to court and testify. So you're well over two and a half million dollars a year, correct?

A. That's correct.

Q. So for the last ten years your company has generated over 25 million dollars writing reports and coming to court for attorneys, true?

A. No. The 2.5 million dollar figure is a current figure. That certainly is not what the group had been generating five, six, seven years ago. That's not what the revenues were when I joined the group.

Q. So you're doing such a good job for the plaintiffs' attorneys, business is growing. Good for you. Okay.

You also advertise, do you not?

A. We do. I think we mentioned that before, but we do, yes.

Q. You know what? It's Friday afternoon. Everybody wants to get out of here. They're looking at me like let's get out of here. So I have no further questions.

A. Thank you.

THE COURT: Any redirect?

MR. SHRAMKO: Your Honor, I have just a few follow-up questions.

THE COURT: All right.

REDIRECT EXAMINATION

BY MR. SHRAMKO:

Q. Miss Kucsma, counsel asked you whether you participated in some continuing legal education seminars titled "How to Maximize Damages," right?

A. Yes.
Q. You didn't present on that particular question but you were there at the seminar that was titled "How to Maximize Your Damages"?
A. That's correct.
Q. Okay. Let me ask you, a corporation -- withdrawn.
Plaintiffs in personal injury cases are not the only parties that can sue for economic damages, correct?
A. That's my understanding, yes.
Q. You're aware that every day in hundreds of courtrooms, if not thousands of courtrooms around this country, corporations sue --
MR. KAMINSKY: Objection.
Q. -- other corporations for economic damages, correct?
THE COURT: Overruled.
A. That is my understanding, and I have worked on a number of cases involving commercial types like that, yes.
Q. Okay. So if a corporation came to you and said we have a case against Joe Smith or the Smith Ccorporation and we've been harmed, they've cost us money, okay, would they be coming to you for an analysis to maximize their damages in that case?
A. I can't speak for what they would hope I would do, but what I can say is I have worked on cases like that and what I've done in those cases is the same thing that I've done here

today and that is provide an objective analysis of the economic damages in their case.

Q. Now, you were also asked about the possibility of purchasing health insurance by Miss Rivera.

Do you have any idea what the cost in the future, given what's happened in the last few months in this country, what the cost of insurance or even whether insurance will be available to someone like Miss Rivera with a preexisting conditions such as she has in her knees, do you have any idea whether it will even be available to her?

A. No, I can't offer an opinion on that.

Q. And you certainly have no idea what the cost of that might be, even if she could obtain insurance?

A. Off the top of my head, no.

Q. Okay. You were also asked about whether your calculation or another calculation being 2 percent or your calculation being a little higher, why one was wrong and the other was right.

Why was the 2 percent figure presented by counsel, why was that wrong? You were trying to explain that.

A. Sure. In that question I believe counsel referred to the federal government's statement about physician services. The data that I reviewed, of course, is U.S. federal government data. I looked at CPI data. They're actually is a Consumer Price Index for physician services, so there is a category that

is consistent with the reference that counsel made earlier. In this case though I'm looking very specifically at surgery, so there also is a Consumer Price Index component published by the the federal government specifically for hospital services and if you go to the U.S. government's website and you look at what is included in hospital services, it is surgical procedures and the costs of the physicians, the supplies, the hospital stay, everything that would be necessary for a surgical procedure is reflected in the Consumer Price Index not for physician services but for hospital services, and that's what my analysis is based on.

Q. Okay. One final question: Do you have an opinion with a reasonable degree of economic certainty that the figures of economic loss sustained by Kelli Rivera in this case that you've testified about here today are accurate?

A. Yes.

Q. And what is your opinion?

A. To a reasonable --

MR. KAMINSKY: Objection.

THE COURT: Sustained.

MR. SHRAMKO: She's an expert. I'm asking for her opinion.

THE COURT: She already gave her opinion. Those are opinions that she's testifying.

Q. There were some questions about some testimony about

three knee replacements. In fact, the analysis that's on your sheets is based upon one set of knee replacements, correct?

A. Yes.

Q. And because of the testimony this morning by the orthopedic surgeon that the implants may last ten years or twenty years, we asked you to do a calculation of the cost if it were done ten years out versus the cost if Miss Rivera had those revisions done twenty years from now. So we're only asking you to do two calculations, right; one if she had them this year and then one if she had a revision at some time in the future, the costs of which may vary whether she has them ten years from now or twenty years from now, correct?

A. Yes.

Q. So you gave us a figure which is in your analysis there of what the cost would be today?

A. Yes.

Q. And then you also offered the jury a cost of what it would be if Miss Rivera had to have the revisions done ten years from now, that was one figure?

A. That's correct.

Q. And then you also gave a figure if she waited twenty years until she was 76 to have revisions when she would be sicker and older obviously and that was another figure, correct?

A. Yes.

-Transcript continued on next page-

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