Transcript of the Testimony of
Edmond A. Provder

Date: January 23, 2017

Case: Jose Bauta v. Greyhound Lines, Inc., et al.

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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JOSE BAUTA,

Plaintiff,

-v-

GREYHOUND LINES, INC., SABRINA ANDERSON, AKOS GUBICA, KAROLY GUBICA, CAV ENTERPRISE LLC, FIRST GROUP AMERICA, INC., and FIRSTGROUP, PLC,

Defendants.

Case No.: 14-3725 (FB)(RER)

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575 Madison Avenue
New York, New York

January 23, 2017
9:32 a.m.

Deposition of EDMOND A. PROVDER, pursuant to Notice, before Darby Ginsberg, RPR, a Notary Public of the State of New York.

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(EXHIBITS TO BE PRODUCED)

EDMOND A. PROVDER, called as a witness, having been first duly sworn, was examined and testified as follows:

EXAMINATION BY

MR. BARMEN:

Q. Mr. Provder, my name is Brad Barmen. We just met. I am one of the lawyers representing Greyhound Lines, Inc. and Sabrina Anderson in the Bauta case currently pending here in federal court in New York.

We are here to take your deposition this morning. Okay, sir?

A. I understand.

Q. I understand you have been deposed before.

A. I have. This is my 44th year doing this work.

Q. Okay. So you know the ground rules, fair?

A. I do.

Q. All right. I am not going to run through them, but I will say this: If I ask you a question that's unclear or that you don't understand, please tell me that. Okay?

A. No problem.

Q. If you answer my question, I am going to assume you understood it. I am going to rely on the answer; is that fair?

A. Yes, sir.

Q. All right. We are going to be here just so long as it takes for me to understand the basis of your opinions. I don't take more time than is necessary, but there is a good amount of information to go through. So if at any point in time you want to take a break for any reason, please tell me, and I will accommodate you. Okay?

A. I appreciate that.

Q. I would just ask that if there is a question on the table, that you answer that question before we break; is that fair?

A. Okay.

Q. I would like to go ahead and mark your file, which you have given me in two binders, correct?

A. Yes. I would suggest that you mark them on the index page because when it goes back to my office, it will go out of the binders. So we will know that if it's on the index page, that everything on the index -- in that file has been

marked.

MR. BARMEN: And that's fine.

We will mark that file, binders 1 and 2, as Provder Exhibit 1 and 1 B.

(Provder Exhibit 1, Binder 1, marked for Identification.)

(Provder Exhibit 1B, Binder 2, marked for Identification.)

BY MR. BARMEN:

Q. Okay. We have marked binder 1 of 2 as Provder 1 and binder 2 of 2 is Provder 1B for identification purposes.

Does this constitute your entire file, all the material you reviewed and considered in forming your opinions in this case?

A. No.

Q. What's missing?

A. There are reports from Dr. Mobin that I don't have in the file that I wasn't -- didn't bring with me. They just didn't make their way into the file. That's all.

Q. Okay. And would that specifically be the supplemental report from Mobin that takes into consideration the neuroradiology?

A. Yes.

Q. Okay. Is there anything else that you considered in formulating your opinions that is not included in either Exhibits 1 or 1B?

A. No, sir.

Q. No electronic material that you reviewed?

A. No, sir.

Q. No disk anywhere?

A. No, sir.

MR. McELFISH: Do you have Mobin's main report?

THE WITNESS: Yes. That was reviewed also. His main report was reviewed, too.

BY MR. BARMEN:

Q. Okay. And I would assume, based on the timing of when he sent his supplemental report, that when you issued your report, nothing in the supplemental report impacted your opinions?

A. True.

Q. All right. Would you state and spell your name for the record, please, sir?

A. Edmond, E-D-M-O-N-D, Alan, A-L-A-N, Provder, P-R-O-V-D-E-R.

Q. What is your professional address?

A. 300-3 State Road 17 South, Suite 4A,

Lodi, L-O-D-I, New Jersey 07644.

Q. I am sorry. Suite number?

A. 4A, as in apple, zip is 07644.

Q. What is the name of your business?

A. Occupational Assessment Services.

Q. What is your position at OAS?

A. President.

Q. How many employees do you have?

A. Eight.

Q. How many are administrative as opposed to substantive when it comes to doing vocational or rehabilitation assessments?

A. Seven.

Q. Seven are --

A. Administrative, and one other rehabilitation professional.

Q. What is the other rehabilitation professional's name?

A. Brian Daly, D-A-L-Y.

Q. And did Brian Daly have any role in formulating your report or your opinions in this case?

A. No, sir.

Q. Okay. So is it fair to say that all the substantive work in this case relative to

Mr. Bauta was done by you alone?

A. Yes, sir.

Q. And does that include the interview and the testing?

A. Yes, sir.

Q. Obviously, we are here to talk about your opinions relative to Mr. Bauta, but before we do that, I want a little background.

Have you worked for Mr. McElfish prior to this case?

A. Yes, sir.

Q. How many times?

A. One time before this case, went all way in the '90s.

Q. So you worked once for him in the '90s, and you haven't worked with him since until this case, fair?

A. This was the first case I had since that one. That would be fair. Yes, sir.

Q. Okay. Have you ever worked with an attorney out in Philadelphia by the name of Jon Ostroff?

A. No.

Q. Anybody in his office that you are aware of?

A. The name doesn't ring a bell to me.
Q. What's the breakdown of your work plaintiff versus defense?
A. Little bit more defense than plaintiff.
Q. Okay. When you say a little bit, is it --
A. About 55 percent defense.
Q. And has that been consistent throughout your career?
A. No. I would say it's consistent for the past five years. Prior to that, there was more plaintiff than defendant.
Q. Are you familiar with a guy by the name of Fred Goldman?
A. Yes.
Q. Have you worked with Fred in a case?
A. Yes.
Q. How many times have you worked with Fred?
A. That's hard to say because a lot of times I don't know he is in the case or that -- that I see a report from him; that I know of, probably about four or five times over the years.
Q. Well, I talked to him yesterday, and he sends his regards.

A. Okay.
MR. McELFISH: Did you make a note of that?
MR. BARMEN: About what?
MR. McELFISH: That he sends his regards?
MR. MOROKNEK: I wrote that down.
MR. McELFISH: Okay.
MR. BARMEN: Is that an objection of some sort?
MR. McELFISH: Just so the record is preserved his regards were sent.
MR. BARMEN: Are you done for now?
MR. McELFISH: Done.
MR. MOROKNEK: For now.
BY MR. BARMEN:
Q. How long have you been doing this kind of work for OAS?
A. Well, OAS started in August 1981. I have been doing forensic rehabilitation since 1976 or '77. Started out as an expert for the federal government being called by the Federal U.S. Administrative Law Judges to render opinions as to the employability of people seeking social security disability benefits. I was probably one

of the most widely-used vocational experts by the Administration. I worked for them. I did over 2500 cases being called by the government.

Q. Give me a quick rundown of your educational background from high school forward.

A. From -- starting from high school?

Q. Yes.

A. Went to George Washington High School in Philadelphia, 1967; bachelor's degree in Rehabilitation Counseling, Pennsylvania State University 1971; continued with my education at Penn State graduating with my master's in Rehabilitation Counseling in 1973.

Came to New York City to start working and then began my program at New York University in rehabilitation counseling completing the 42 credits required towards a doctorate, leaving the university to be -- my dissertation to be completed.

Q. So you have completed your dissertation?

A. I have not.

Q. So you are not a Ph.D.?

A. I am not.

Q. You are not a medical doctor?

A. No, I am not.

Q. You don't treat patients clinically; is that fair?

A. Such as a doctor does? No, I do not.

Q. You qualified that a little bit.

Tell me what you do with a typical client that comes to see you.

A. Okay. Well, we call -- well, we have two particular individuals that I work with. We have what we would term a "client." That would be somebody who has become injured, either has a catastrophic injury, a congenital injury, a traumatic injury; and what I do is I try to assist them in returning to work.

In the more catastrophic cases I will provide what's called case management or life care planning services to them.

In my forensic cases we call -- it's not called a client. It's called an "evaluee." We would evaluate an individual such as this particular person; interview them, review medical records, administer a battery of vocational tests; find out what they can and cannot do; make an assessment as to their employability and their earning capacity.

If we will -- if I believe they are

employable, I will look at types of jobs they can do, what the jobs pay in the geographical area.

Also, on many of my cases I will do what's called life care planning, looking into the cost of care and type of care that's going to be required in their geographical area.

I also do -- I have done consulting work throughout the years.

Q. You are a certified life care planner?

A. I am.

Q. And by what body certifies you?

A. It's called the Commission on -- I think it's Commission on Health Services? I think that's the name of it. It's based in -- based outside of Washington.

Q. You reviewed the report of Wendy Cummings, right?

A. I did.

Q. She is also a certified life care planner; is she not?

A. I don't know. I would have to look at the report. There are people that can be certified life care planners. They could be certified nurses, certified nurse life care planners. So I'm not sure which one she is.

Q. Whatever she is, she is some sort of certified life care planner; correct?

A. To the best of my recollection, yes.

Q. What was your role in this case relative to Mr. Bauta?

A. I was asked to evaluate his employability and his earning capacity and his long-term life care planning needs.

Q. So you really had two separate functions here, correct?

A. Yes. I -- because my background is in rehabilitation counseling, I do both. I do both the vocational as well as the life care planning.

(Provder Exhibit 2, report dated December 9, 2015, marked for Identification.)

BY MR. BARMEN:

Q. Exhibit 2 is a copy of your report, correct?

A. Yes, sir. Just --

MR. BARMEN: Please take your time. Make sure it's complete.

(Provder Exhibit 3, November 28, 2016, supplement relative to the report of Wendy Cummings, marked for Identification.)

(Provder Exhibit 4, November 17, 2016, supplement relative to Capotosto, marked for Identification.)

THE WITNESS: Looks complete.

BY MR. BARMEN:

Q. And that report is dated December 9, 2015, correct?

A. Yes, sir.

Q. I am also going to hand you what we have marked as Exhibits 3 and 4, respectively. 3 is the November 28, 2016, supplement relative to the report of Wendy Cummings, and 4 is the November 17, 2016, supplement relative to Capotosto, and you also address Wendy Cummings in that one as well.

MR. McELFISH: Those are the rebuttal reports, right?

MR. BARMEN: Yes. The supplements, 3 and 4.

MR. McELFISH: 3 and 4. Okay. What's 1 and 2?

MR. BARMEN: 1 is his file. 1B being binder 2; 2 is his main report; 3 and 4 are his supplements.

MR. McELFISH: Okay. Thank you.

MR. BARMEN: I do have copies of the supplements here if you would like them, but I assume you have them.

MR. McELFISH: Okay.

BY MR. BARMEN:

Q. Other than what I have handed you, Exhibits -- specifically Exhibits 2, 3 and 4, did you author any other reports in this case relative to Mr. Bauta?

A. No, sir.

Q. Are there any drafts that weren't submitted or circulated?

A. No, sir.

Q. Okay. As we go through the deposition today, please feel free to refer to anything in front of you, including your file material. This is not a memory test. Okay?

A. That's fine.

Q. All right. Here is a document that I pulled out of your binder Exhibit 1. Please tell me what that is.

A. These are my notes in preparation for the deposition today taken from my reports.

Q. Okay. So that was not something prepared when you sat down with Mr. Bauta; that

was prepared in preparation for today?

A. True.

Q. What else did you do in preparation for the deposition today?

A. Reviewed my binders, all the records that I have in Provder 1 and Provder 1B.

Q. Did you meet with Mr. McElfish?

A. I did.

Q. For how long?

A. About half hour.

Q. Today?

A. I did.

Q. Did you talk to Mr. McElfish on the phone in preparation for today?

A. I did not.

Q. You met with Mr. Bauta one time for about three hours, correct?

A. Yes.

Q. Okay. And that was on September 14, 2015?

A. I need my notes back. Thank you.

Q. You are welcome, sir.

A. Yes. September 14, 2015.

Q. Okay. And in going to through your report, in one section you talk about the life

care plan, and the other section you talk about his employability.

A. Yes.

Q. And in both sections you note that you met with him for three hours?

A. Yes.

Q. Did you meet with him for three hours on each section or three hours total?

A. Total.

Q. Okay. So you didn't meet with him for six hours; you met with him one time for three hours, and then through your review of the information and your meeting with him you formulated your opinions, correct?

A. True.

(Discussion off the record.)

BY MR. BARMEN:

Q. Mr. Provder, we were talking about the scope of your retention in this case, and you met Mr. Bauta one time, correct?

A. Yes, sir.

Q. Is there a standard questionnaire you give someone, an evaluee, when they come to you? And you are looking at Exhibit 1.

A. There is a questionnaire that's

forwarded to the evaluee prior to the interview. However, it appears that Mr. Bauta did not complete the questionnaire.

Q. Okay. Do you know how you forwarded it to him? I mean, by that I mean, did you send it in the mail? Was it emailed to him? Do you have any idea?

A. I don't know. Usually it's either forwarded to the attorney or forwarded to the evaluee, or both. I just don't know. That's handled by my office.

Q. When you mentioned potentially forwarding something to the attorney, in your file, your binders, I didn't see any correspondence between you and Mr. McElfish.

Did you correspond with Mr. McElfish?

A. I couldn't answer that question. I don't handle that. My office does.

Q. Okay. So there could be email correspondence, it's just not in your file; and it wouldn't be with you, it would have been with one of your administrative personnel?

A. True.

Q. Who does your scheduling for you?

A. My office manager.

Q. And that person's name?
A. Judy Landolfi.
Q. Can you spell the last name, please?
A. L-A-N-D-O-L-F-I.
Q. Anybody else other than Judy who could have been communicating with Mr. McElfish?
A. No.
Q. What is Judy's email address?
A. Jlandolfi@OASInc.org.
Q. All right. I am assuming Mr. Bauta isn't the first evaluee who didn't fill out the pre-evaluation questionnaire, correct?
A. True.
Q. What do you do under those circumstances, typically?
A. Same thing I do if they fill out the questionnaire. I start asking them questions.
Q. Okay. And do you take notes while you are asking those questions?
A. On the computer.
Q. Okay.
A. I literally write the report as I am interviewing them.
Q. Okay. So are there separate notes on a computer that are not contained in your file, or

are those actually comprised into your report?
A. Comprised into the report.
Q. Okay. So there is no extraneous notes anywhere; is that fair?
A. No. The only notes that would be handwritten would be observations and test results that are done by hand.
Q. Okay. And where are those notes?
A. Under Tab 2.
Q. Okay. May I see that, please? Thank you.
Okay. Tab 2 is Vocational Evaluation Test Results Form, correct?
A. Yes.
Q. Observations and Reported Discomfort.
Now, are you actually trying to evaluate the evaluee as he is there or are you just taking what he tells you as gospel?
A. His history. Any complaints that he has during the evaluation is taken.
Q. Okay. So other than his subjective telling you what his issues are, are you doing anything to try and actually physically observe him?
A. Yes, of course. The evaluation is

conducted basically at a table similar to what we are sitting at. I am observing him while he is doing the testing. He sits across from me, and I am observing him during the testing.

Q. What are you looking for?

A. Well, looking for many different things.

First thing I am looking for, whether the person understands the directions; is able to successfully complete the test sample portion of the test; whether the person is working in a steady manner; whether they are having any observable physical problems; whether they have to change position during the testing, and then lastly, any complaints they have.

Q. Okay. And the part about observing whether they are having any physical discomfort or changing position, do you record that anywhere?

A. I do.

Q. Can you show me in Tab 2 of Exhibit 1 where you are actually recording in your observations?

A. Okay. On the manual vocational, this is Tab 2, Provder 1, he is given the Vocational Aptitude Battery Manual Dexterity Test, and this

is a test that's done in a standing position, and he had difficulty with his balance when he performed that test. That's an observation.

Q. Okay. Well, stop right there. And I don't mean to cut you off, but I want to ask you: When you say he had difficulty with balance, what do you recall observing?

A. That he had difficulty remaining in a standing position while he was doing the test.

Q. Okay. That test, is his head -- is he looking up? Is he looking down?

A. Down.

Q. Okay.

A. It's a standing test, but he is working at an industrial-height workbench, so he is looking downward as he is doing the test. This test is the test of his ability to use his hands quickly and accurately, and it involves the assembly of a three-part assembly, but the items in the assembly are approximately six inches in diameter. So it involves movement and turning and placing with both hands, and he is working in a standing position.

Q. You reviewed a lot of medical records in this case prior to ever meeting Mr. Bauta,

correct?

A. Yes.

Q. Do you recall reviewing any medical records where he had complained about problems with balance?

A. I don't recall.

Q. Okay. What else did you observe?

A. There was -- that was the only observation that I made. However, there was an observation that on performing the Employee Aptitude Survey Manual Speed and Accuracy Test, he reported experiencing seeing double when he performed this particular test.

Q. Okay.

A. That's not an unusual complaint when people do that particular test.

Q. Okay. Relative to the review of his medical records, do you recall ever seeing anything where he complained about blurred vision or diplopia before?

A. No.

Q. So other than those two observations, everything else in those reports is based on either the test results or what Mr. Bauta subjectively told you; is that fair?

A. True.

Q. Okay. Let me have that back, please. Thanks.

What did Mr. Bauta tell you about his work history prior to the motor vehicle accident of October 2013?

A. He stated at the time of the accident he was not employed. He stated that from 2006 to October 2012, he was employed as a restaurant shift manager for McDonald's in Ogdensburg, New York. He stated that he was involved in supervision of about 15 people. He also worked as a fast food worker making and selling hamburgers, chicken and french fries. His job also involved taking inventory, operating a cash register, providing customer service. He was a key holder to this business. He opened the store. He prepared the cash drawers and any incident reports.

What I did is I classified his work as he described it to me, and at -- well, first I took his job description of the job, and I coded it using the U.S. Department of Labor's Dictionary of Occupational Titles, and it's found on page 134 of the dictionary; and it is given

the Dictionary of Occupational Titles Code Number 185.137-010. The job would be considered light work as it involves mostly standing and walking, and he also stated that he lifted cartons of food that weighed up to ten pounds. Reported working five to six days a week, eight to ten hours a day. Reported earnings of $9.70 per hour, working a 40- to 45-hour work week for about $21,500 per year.

Prior work as a fast food worker at McDonald's from 2004 to 2006, and from 1993 to 2003, he reported being an unarmed security guard for Burns Security in Saratoga and Majestic Security in New York City. He stated his job involved guarding school construction site.

Then I prepared his job description as he noted with the Dictionary of Occupational Titles. The job of a security guard is found on page 269 of the dictionary, and found -- and is given code number 372.667-034. Again, this is light work. This involves alternately sitting and standing. He reported experience -- earning $8.75 an hour, working a 40-hour week. The job would be considered semi-skilled in nature, and he stated that he has not worked or looked for

work since his accident.

Q. Okay. Among other things, did you review any tax returns for Mr. Bauta?

A. I have to have my file. I didn't review any tax returns, but I reviewed W-2 wage statements.

Q. Okay. Did you see any year that Mr. Bauta made more than 20 grand in a given year?

A. No, sir.

Q. The records I have indicate the most he ever made in a year working was just shy of 19 grand, and that was in 2010 and 2011.

A. True.

Q. Okay. Any records that you reviewed that contradict that in any way, shape or form?

A. No, sir.

Q. Okay. So working full time at McDonald's as a shift manager, 40-plus hours a week, he never made more than $19,000?

A. True.

Q. Okay. Did you ever do the math to see if that worked; that he was working 40-plus hours a week six or -- five or six days a week and never made more than $19,000?

A. I am not sure I understand your question.

Q. Okay. Well, did you actually check to see that he was working full time when he said he was?

A. Again, I am not sure that I understand your question. Did I divide 18.9 -- 18,931 by 40 to find out what his rate would be? Is that what you are asking me?

Q. For starters.

A. I did not.

Q. Okay. Let me have that again. Thanks.

How long was Mr. Bauta out of work between the time he last worked and the time of the accident, which occurred on October 9th, 2013?

A. About a year.

Q. Okay. What did Mr. Bauta do to try and find work during that year?

A. No information regarding that.

Q. Did you ask him?

A. I don't recall.

Q. Is that something that would have been relevant or important in trying to determine his employability, how motivated he was to work prior

to him being injured?

A. Again, I don't recall what I asked him at that time. I am sorry.

Q. Well, is that something in your years of experience you would typically ask someone who was out of work for a long time before they were ever injured?

A. Well, a year is not really a long time in a span.

Q. Okay.

A. But I don't recall whether I asked him what he was doing during that time. No, sir.

Q. So you have no idea how he was supporting himself during that year he was out of work prior to the accident at issue in this case?

A. True.

Q. Do you know what his level of physical activity was in that year he was out of work prior to the accident in this case?

A. Not sure what you mean by "physical activity."

Q. Okay. Did he exercise?

A. I don't know.

Q. Do you know why Mr. Bauta lost his job in 2012?

MR. McELFISH: Objection. Relevance.
You may answer.
THE WITNESS: No, sir.
BY MR. BARMEN:
Q. You didn't ask him why he was out of work?
MR. McELFISH: Objection.
THE WITNESS: Again, I don't recall.
BY MR. BARMEN:
Q. Okay. Well, in your file, Exhibit 1, there are a couple of documents. One is "FDNY felons welcome." One is, "Highest paying jobs for felons." One is, "FDNY hires nine ex-felons amid effort to boost diversity." One is, "NYC approves bill that removes felony conviction checkbox from job application." One is, "List of jobs for felons." And then a document from the New York City Council titled, "A local law to amend the Administrative Code of the City of New York in relation to prohibiting discrimination based on one's arrest record or criminal conviction." And then there is another one. "Felon hiring in New York."
Looks like someone did a search engine search. Did you do that?

A. Yes.
Q. Okay. Why?
A. Well, I knew that Mr. Bauta had had several felony situations.
Q. How many?
A. I believe there is two.
Q. Okay.
A. Okay. And I had a specialty, if you want to call it that, of working with people who were wrongfully incarcerated and have done work with the Innocence Project with Barry Scheck, and have testified in cases with the effect of somebody being noted as a felon on their earning capacity.
So when I reviewed my documents, I went back and researched the impact of having a felony conviction on an individual's employability at the present time.
Q. Can the type of felony someone is convicted of or pleads guilty to impact their employability?
A. Yes.
Q. What was Mr. Bauta convicted of?
A. I believe it's attempted rape. I believe that's the last one if I remember

correctly.

Q. And he did time in prison because of that, correct?

A. I believe less than a year.

Q. And the other one was he got arrested for selling crack cocaine?

A. Yes, I believe so.

Q. Did you ask him what that was all about, the attempted rape conviction?

A. I did.

Q. What did he tell you?

A. Well, I found out that it was an underaged individual.

Q. Fourteen years old, correct?

A. That's what I understand.

Q. At the time he was having sex with her?

A. Yes.

Q. Do you know if Mr. Bauta is a registered sex offender?

A. I believe he is.

Q. Can that impact someone's employability?

A. Yes.

Q. Was he fired from his job at McDonald's because he failed to disclose his felony rape or attempted rape conviction?

A. I don't know.
Q. You didn't ask?
A. Again, I don't know. I don't recall.
Q. Is that in any way relevant to your evaluation?
A. Well, the fact that somebody has a felony conviction or the fact that he was terminated from his job?
Q. Both.
A. Okay. Well, I didn't include the felony conviction in my report because there are many jobs that people can do with a felony conviction.
That's what all the documentation was I showed you.
Q. Okay.
A. In fact, as we noted, even in the New York City Fire Department they are accepting individuals with felony convictions into their class of firefighters.
Also, the City of New York has eliminated the checking of a box that says whether you have a felony conviction or not on job applications. So there are many jobs people can do with felony convictions. I don't believe that the fact that he had a felony conviction

affected his ability to be employed if not for this accident.

Q. Okay. Your report is 29 pages long.

A. Yes.

Q. You don't mention once that he has felony convictions.

A. I didn't believe it was vocationally relevant. There were other jobs that he could do; many jobs that he could do with a felony conviction.

Q. A registered sex offender with a history of sex crimes against children, you think that's someone that's going to get a job in fast food?

MR. McELFISH: Crime. Crime.

THE WITNESS: I didn't say fast food.

There are many jobs that people can do.

BY MR. BARMEN:

Q. Answer my question, please, sir. And then we will talk about where you are going.

A. I would say that wouldn't be the preferable place I would place him in a job.

Q. Okay. Do you know under New York law whether or not Mr. Bauta is required to disclose his felony sex crime conviction on a job application?

A. Again, I am not sure. The law, as I have -- on the documents that I provided -- do not specify felony sex crimes. It says whether you are convicted of a felony does not have to be disclosed.

Q. Do you know under the law in New York City whether or not Mr. Bauta has to disclose that conviction on a job application?

A. Conviction of a felony? Is that what you are asking me?

Q. His particular felony that he pled guilty to, do you know?

A. I don't know. All I know is that if he is convicted of a felony conviction, that he does not have to disclose it on a job application that he is giving in the City of New York.

Q. Do you know if that applies to sex offenders?

A. I do not.

Q. Would it have been relevant for you to find out?

A. It would have been, but I don't recall ever seeing anything particular to that.

Q. Would it have been difficult for you to find that out?

MR. McELFISH: Objection. It's argumentative.

You may answer.

THE WITNESS: I don't know. I did not do it.

BY MR. BARMEN:

Q. Did you make any effort whatsoever to find out if there is any requirement that he disclose the fact that he's a registered sex offender on a job application?

A. No.

Q. Same question relative to the State of New York. Do you know if the State of New York has a requirement that a registered sex offender disclose that on a job application?

A. I do not know.

Q. Did Mr. Bauta tell you why he lost his job when he did in 2012?

A. I don't believe he did, no.

Q. Based on your understanding from meeting with Mr. Bauta, at the time you met with him in September of 2015, what was a typical day for him?

A. I don't know what you mean by a typical day.

Q. What was he doing with his life?

A. He basically indicated to me that he was getting treatment, and he had been treating -- was treated by Dr. Lattuga and Dr. Cordiale; treating doctors once every three weeks. He had received periods of physical therapy three times a week. He was being treated by a pain management doctor, Dr. Chen, once every three weeks.

I asked him what he did during the day, what type of activities of daily living he did.

Q. We will get into the specifics.

At the time you met with Mr. Bauta in September of 2015, did he have any type of assistance for his activities of daily living?

A. Meaning did he have --

Q. Did he have someone helping him?

A. Hold on. No. He did things by himself, but it took a longer period of time, and he was in pain when he did those activities.

Q. But he was able to do those things on his own; they just took longer, correct?

A. True.

Q. And he was able to get to his doctors' appointments, correct?

A. True.
Q. And he was able to clean his apartment, correct?
A. True.
Q. He was able to take care of himself?
A. Somewhat, yes.
Q. When he came to meet with you on September 14, 2015, he got there on his own, right?
A. I am not sure what you mean by "on his own."
Q. He wasn't driven there by his lawyer or anybody else; he managed to get there under his own accord?
MR. McELFISH: Objection. Argumentative.
MR. BARMEN: How is that argumentative?
MR. McELFISH: Because there is no facts in the record to suggest that his lawyer would have driven him there. It's a little argumentative.
MR. BARMEN: I didn't think it was argumentative.
MR. McELFISH: I am not stopping you.
MR. BARMEN: I know you are not stopping

me, but --

MR. McELFISH: I don't care.

MR. BARMEN: You'll know when I'm arguing.

THE WITNESS: Yes, he came by himself by subway.

BY MR. BARMEN:

Q. From the time of the accident until the time you saw him, was he adhering to any of the recommendations in your life care plan, to your knowledge?

A. I am not sure I understand the question.

Q. Well, it was probably a bad question. Strike it.

Let's take a look at your life plan. It really starts on page A-1, correct?

A. Yes, sir.

Q. Before we get there, in the tests you gave Mr. Bauta, did any of them -- are any of them designed to measure his level of effort?

A. The tests themselves?

Q. Yes, sir.

A. No, sir. The observations test his effort. That's one of the reasons the testing is done on a one-to-one basis, so the person is

observed during the evaluation.

Q. In your report you do mention the neuropsychologist retained by plaintiff, Dr. Honor; you have read his report?

A. Yes.

Q. You don't mention in your report, when talking about Honor, how Mr. Bauta did on the validity test he took with Dr. Honor; you saw that, though, right?

A. I did, but let me take a look at his report.

Q. Whose report?

A. Honor's.

Q. I don't have it.

A. Well, you have my files. If you would give me my files back, I will be able to gather that report.

Q. This one or the next one?

A. That one.

MR. McELFISH: Off the record.

(Discussion off the record.)

THE WITNESS: Yes, I see it.

BY MR. BARMEN:

Q. Okay. How did Mr. Bauta do on the validity test that Dr. Honor gave him?

A. Well, Dr. Honor gave the test called the Tomm, T-O-M-M, Test. "Responses were below expectation for an individual investing normal effort. At the same time, scores were above chance responding. The same pattern was noted on the WMT, period quote B test. Results indicating an average number of omissions but a below average number of additions. The Rey 15-item test was within normal limits."

So on the Tomm Test, which is a test of effort, work effort on a test, he was below average.

Q. Did you see the defense neuropsychology report for Mr. Bauta?

A. Who was that?

MR. McELFISH: Morgan.

BY MR. BARMEN:

Q. Morgan.

A. I did not.

Q. Can an evaluee's level of effort impact your test results?

A. Yes.

Q. Let's talk about your life care plan.

First off, before we get into the specifics, what are you basing these needs off

of?

A. Two things: I have Dr. Lattuga's report where he lays out various items, and I also have had a conversation with Dr. Mobin, who reviewed my life care plan with me orally, and agreed with my findings. So I have actually two medical physicians finding that my report -- providing a medical foundation for my report.

Q. Two physicians retained by Mr. McElfish?

A. Yes.

Q. When did you talk to Mobin?

A. Oh, I guess within the past month or so.

Q. How long did you talk to him for?

A. About 15 minutes.

Q. Why did you talk to him?

A. Well, I know that he had done a review, and I understood that he was going to be testifying, and so I wanted him to have a second foundation if possible.

Q. Was it your idea to talk to Dr. Mobin?

A. Yes.

Q. Have you ever spoken to Dr. Lattuga?

A. No.

Q. Do you know how many times Dr. Lattuga actually saw Mr. Bauta?

A. I need my records. The best of my count looks like five.

Q. Okay. Other than Dr. Lattuga's report and your conversation with Dr. Mobin, any other experts, medical experts or providers for Mr. Bauta that you have spoken with?

A. No, sir.

Q. One of the criticisms you have of Wendy Cummings is she -- her projections were not made from live research.

A. Yes.

Q. What does that mean?

A. It means that she took all of her information from a book, a fee book.

Q. And what did you do differently?

A. Live research.

Q. Which is what?

A. Contacted various -- I need my other binder. It's not in here, but I contacted various vendors that provide services in his geographical area, contacted at least three to five vendors.

Q. For each modality?

A. Yes.

Q. And you have a list of who you

contacted?

A. I have a sheet with everybody I contacted. What I am going to do is when we take a break, have my office send it over here so we have it.

MR. BARMEN: Let's take that break, and if you would make that call, please.

THE WITNESS: Okay.

(Break taken.)

BY MR. BARMEN:

Q. All right. Mr. Provder, we took a little break. You were looking for your notes relative to the vendors you contacted for your live research.

My understanding is your office is working on getting it over to us, and then we will go back to that topic.

A. Okay.

Q. But they are going to get it over, right?

A. That's fair. Yes.

Q. Let's talk about the life care plan.

On some of these pages you have at the bottom "listed sources."

A. Yes.

Q. And some of these pages you don't.
A. Yes.
Q. How do I know what the sources are for the items that you don't list your source?
A. That's what we are waiting for.
Q. Okay.
A. I have a -- I have a page for every contact, every phone call that I made for every item that we have in the life care plan.
Q. Okay. And do you have some sort of reference or resource you look at to determine who you are going to call for any particular item?
A. Yes. I start with the treating physician, and I work out to any physicians of a similar nature in their geographical area.
Q. And do you have some sort of database that you look at?
A. No. I use Google, and I will start with where the person lives. I will start with the treating physician. Then I will go outward looking for other -- for example, one of the doctors I have written here is physiatrist, a doctor of physical medicine and rehabilitation. So I will look at the different doctors of

physical medicine and rehabilitation, based in his geographical area, and I will start contacting them.

Q. Okay. And do you do all of that live research yourself or do other people in your office help with that?

A. I do it. I make all the calls myself.

Q. Okay. And is it fair to say this took some time, considering the number of items if you are checking every one?

A. It did.

Q. And do you have some sort of time records?

A. No. I just use a general -- I don't have time records. I -- in order to project out the cost of a life care plan, vocational evaluation, I do it on a sliding scale depending on how complex it is.

Q. And how complex was this one on your range of what you are used to doing?

A. Moderate.

Q. And so what did you charge for putting together this life care plan?

A. I believe this was $7,500.

Q. Okay. And that's $7,500 regardless of

the amount of time spent?

A. Yes.

Q. Now, looking at page A-1 of your life care plan, sir, just on Item Number 1, Rehabilitation Plan Development. What is that?

A. That's basically what we are looking at, a life care plan. That's to be done once every five years to assess what Mr. Bauta's condition is at that period of time.

Q. And up until now, what, if anything, has Mr. Bauta been doing in terms of following the life care plan?

A. Well, he hasn't had a life care plan up until now. He has been receiving some services contained in the life care plan.

Q. But he doesn't have a case manager?

A. He does not.

Q. And he is surviving?

A. I didn't hear.

Q. He is surviving; he is getting by?

A. Yes, he is.

Q. Okay. Let's look at page A-2, please.

MR. McELFISH: I like that. I am going to write that down.

MR. BARMEN: What?

MR. McELFISH: "Surviving, getting by."
MR. BARMEN: We all got to.
MR. McELFISH: Getting by.
MR. BARMEN: Pretty much the way he was before the accident.
BY MR. BARMEN:
Q. Case manager, rehabilitation counselor. He is going to need that throughout the course of his life, correct?
A. Yes, sir.
Q. And you have no opinion as to his life expectancy?
A. No, sir. Out of my area of expertise.
Q. Of course. Four times a year?
A. Yes, sir.
Q. At a cost of 125 to $180 per hour?
A. Yes, sir.
Q. How do you come up with that range of 125 to 180 per hour?
A. Okay. Let me explain how I do the research.
Q. Please do.
A. We will be able to -- once I get all the documents, you will be able to see it.
Q. Okay.

A. What I do is I contact anywhere from three to five different vendors of each service. I include the high vendor and the low vendor as the range. So the high vendor in this case manager service is $180. The low end is 125. So that's why we have a range.

Q. Do you do anything to determine the qualifications of the vendors?

A. I am not sure what you mean by "qualifications." These are all individuals -- well, let's go back. Okay?

Let's go to A-3, and I will be able to explain a little better.

Q. Page A-3?

A. Yes.

Q. Okay.

A. These are all the medical treatments, so I don't look at whether somebody is board certified say, for example, in a doctor of physical medicine and rehabilitation. So I don't look at their credentials. I look at the fact that they are holding themselves up as a physical medicine and rehabilitation specialist. So I don't look at qualifications.

Q. Okay. So the second item on A-3,

internal medicine --

A. Yes.

Q. -- you have got a range of 75 to $300.

A. Yes.

Q. Okay. You are not going to give an opinion that the service he could get for $75 an hour is any different than the service he could get for 300?

A. I am not.

Q. Okay. Down the list, psychiatrist. The range is 110 to $425 per hour?

A. Yes.

Q. If he could get the same service for $110, why would he ever pay 425?

A. Because the 110 may not be available at the time that he needs it. That's why I contact anywhere from three to five vendors of service.

Q. Okay. Orthopedist you have got a range of $300 to $2,000?

A. Yes.

Q. Cognitive therapy, a range of $95 to $200?

A. Yes.

Q. What is cognitive therapy?

A. Cognitive therapy is therapy provided to

people who sustained a traumatic brain injury and provides them with modalities to help them compensate for their limitations.

Q. You are certainly not qualified to opine as to whether or not someone has a cognitive brain injury, correct?

A. True. I am not a neuropsychologist or a neurosurgeon.

Q. But Mr. Bauta certainly understood your instructions and was able to take your tests, fair?

A. He did.

Q. And he was able to communicate with you clearly?

A. He was.

Q. So cognitive therapy, you have a range of $95 per session to $200 per session?

A. Yes.

Q. Let's look at A-5. These are the meds that Mr. Bauta told you he was taking, right?

A. Yes, sir.

Q. Percocet, Zanaflex, which is an antiinflammatory, and Motrin, right?

A. Yes, sir.

Q. Do you have a range for Percocet from

$37 to $140 --

A. Yes, sir.

Q. -- a pill?

A. (Witness nods head.)

Q. Per unit, right?

A. Yes, sir. Well, per month.

Q. Okay. But Percocet is Percocet no matter where you buy it, right?

A. Well, the low end of the range is from the Internet, Internet cost.

Q. Okay.

A. So what I do is I provide the range both for Internet cost as well as cost in a brick and mortar pharmacy, such as CVS or Walgreens.

Q. Okay.

A. So that's why I provide the range. The reason being -- actually, two reasons: Number one, a lot of people don't like to buy medication over the Internet, so they would rather have it at the brick and mortar store. So I provide those quotes.

In addition, people are leery about buying medication on the Internet, whether it's really Percocet or not. So I provide both ranges.

Q. Did you ask Mr. Bauta if he was leery about buying medication over the Internet?

A. I did not.

Q. So if he can get the same drug for $37 a unit, why would he ever pay $140 a unit?

A. That's true. But I will tell you that many people don't like to have drugs over the Internet.

Q. Okay. But assuming Mr. Bauta doesn't have that fear, why would he ever pay more than $37 a unit?

MR. McELFISH: Lacks foundation.

THE WITNESS: I understand what you are saying, but I am going to tell you that most of the people that I evaluate, they like to go to the brick and mortar store, so I provide both and give them the option.

BY MR. BARMEN:

Q. Okay. But I already asked you -- and correct me if I am wrong -- you said you didn't ask Mr. Bauta that question.

A. I did not.

Q. Okay. But you ask most people that question?

A. No.

Q. Well, then now do you know most people that you evaluate don't like to buy it over the Internet?

A. Well, because when I review their life care plan with them, they will say, I would rather have it through the regular pharmacy as opposed to the Internet.

Q. Did you review this life care plan with Mr. Bauta?

A. I did not.

Q. Is that something you typically do with evaluees?

A. Sometimes. Not every one.

Q. Forgive me if I did ask you earlier, but I don't recall. In terms of your business at OAS, how much of your business is doing evaluations, forensic evaluations in litigation versus anything else?

A. About half.

MR. BARMEN: Off the record.

(Discussion off the record.)

(Provder Exhibit 5, Life Care Research Information Forms, marked for Identification.)

BY MR. BARMEN:

Q. Sir, we have marked as Exhibit 5 your Life Care Plan Research Information Forms that you were kind enough to get us, and it looks like there are roughly 75 -- or 75 pages. That's what that is?

A. Yes, sir.

Q. And there is --

A. I didn't do a count, but 75 is a good estimate.

Q. I was just looking at, this says 2 of 76, so --

A. Oh, that's fine.

Q. And there is a corresponding sheet for every item contained in your life care plan?

A. At least one. There should be more than one for every one.

Q. May I have that back, please?

A. For example, the first one is neuropsych evaluations, which we were just talking about, cognitive rehabilitation. There is three for that. We talked about case management. There is one, two, three, four, five case management forms.

Q. Does Mr. Bauta live in New York City? Does he live in Manhattan?

A. Brooklyn.

Q. Are medical services typically more expensive in Manhattan than they are in other parts of the city or state?

A. Other parts of the state, yes.

Q. And just, again, I haven't looked -- had the opportunity to look through all 75 pages, but it looks like your referral source for the vast majority of this is Google?

A. Yes.

Q. So you would just Google the type of service you were looking for, and then how did you determine which ones to use as your examples?

A. Again, I start with the treating source, if there is a treating source, and I work out as it's listed in Google.

Q. Okay. But when you say as it's listed in Google --

A. Well, it comes down priority-wise in Google say in medical rehabilitation doctors in Brooklyn or New York City, whatever it is, and then they list it down. So I will start calling people, gathering information.

Q. Okay.

A. If they are not available, I move to the

next one.

Q. Would you agree with me generally, whether Mr. Bauta is paying for the service himself or someone else is, if he could get comparable service for a lower amount of money, that's what he should do?

A. Yes.

Q. Let's look at A-6. Grab bars, I mean, it's pretty self-explanatory. They are the bars that you screw into the wall to have something to hold onto in the shower, right?

A. Yes.

Q. Explain the range here, $39 versus $96?

A. Just each vendor charges a different amount.

Q. Okay. Well, if he can get the same product for $39, he shouldn't pay 96, right?

A. True.

Q. And the fact that you put in here that it's available at 39 means he could get it for that, right?

A. True.

Q. Same thing with the hand-held shower hose; he could get it for 21 as opposed to 43?

A. True.

Q. So why do we have even have a range there?

A. Because, as I explained to you before, they may not be available, or the lower end may not be available at the time that he needs the service. That's why I provide the range.

Q. Okay. But is it fair to assume that if you put the range in here, that lower price was available at the time you did the research?

A. Yes.

Q. Page A-8, straight cane, ranges $8 to 20. At the time you did this, you could get it for 8, right?

A. Yes.

Q. A-9, the cervical fusion and lumbar fusion. First and foremost, you have no opinion whether or not he is going to ever need additional surgery, right?

A. True. That's out of my area of expertise.

Q. How did you come up with the range for the cervical fusion of 50 -- let's call it 59,000 versus 80,000?

A. You see here, prices were -- the general range noted by -- I have to take a look. Hold

on.

Q. Mount Sinai Hospital, New York Presbyterian?

A. Yes. Exactly. Yes. They came from the hospitals themselves.

Q. Let's look at A-10, homemaker. You are not talking about skilled nursing care for Mr. Bauta, right?

A. No.

Q. You are talking just someone to help him with his ADLs?

A. ADLs and homemaking activities.

Q. For instance, homemaking, what do you mean?

A. Shopping, cooking, taking care of his house.

Q. All of the stuff that he is capable of doing himself now?

A. At some level, yes.

Q. Okay. Is there some point in time where you think he is not going to be able to continue doing those things himself?

A. He is doing it now, but he has pain and discomfort, and it's taking him a long period of time to do each activity.

Q. Well, his pain and discomfort is based on his subjective history to you, right?
A. True.
Q. Okay. And if he is not being a hundred percent honest with you, would that impact your opinions?
A. It could.
MR. McELFISH: Objection. Argumentative.
You may answer.
THE WITNESS: It could. It's one of the basic assumptions that I make in my life care plan and vocational evaluation, a person being truthful and accurate to me. If it's not truthful and accurate to me, then it's going to affect my opinion.
BY MR. BARMEN:
Q. Of course. And it could affect your opinion significantly?
A. It could.
Q. Still on A-10 with the homemaker, 22 to $24 per hour, right?
A. Yes.
Q. Four hours per day, seven days a week.
You think he needs somebody every day?

A. Yes.
Q. And what do you base that on?
A. Based on my experience, but also I had -- I spoke with Dr. Lattuga. Dr. Lattuga also noted this, I believe, and Dr. Mobin did note it. So they indicated that this was appropriate. Dr. Mobin for sure.
Q. Have you ever actually spoken to Dr. Lattuga?
A. I did not speak with him, no. But he laid out a lot of stuff in his life care plan, in his addendum to his report dealing with long-term care needs.
Q. Now, you mentioned early on in the deposition that you do as much or more work on behalf of the defense in litigation?
A. Yes.
Q. And I know for a fact that at times you have actually negotiated homemaker rates, have you not?
A. In the past I have. It's possible, depending on the vendor, to negotiate rates, yes.
Q. To as much as between 30 and 50 percent you have done in the past?
A. Possible.

Q. Why do you not consider that when you are doing a life care plan for a plaintiff?

A. It's neither plaintiff or defendants because of the fact that in order to negotiate a rate with a vendor, you have to have a certain amount of money to negotiate with.

So, therefore, say, for example, this case settles, okay, and there is $35,000 -- well, let's say $32,000 a year for homemaker services. A case manager or rehabilitation counselor could go to the agency, say, look, I need 28 hours of home care per week; and I can give you in advance $25,000. Would you negotiate with me?

It depends on the vendor. If the vendor negotiates, yes, you can negotiate a rate. It depends on the vendor and what they can provide, but have I negotiated in the past? Yes, I have.

Q. As much as 35 to 50 percent.

A. I have.

Q. Okay. And certainly you would agree with me that Mr. Bauta would not have any funds to fund this plan unless and until this case settles or he collects on a verdict?

A. True.

Q. And at that point he would have money

available to do what you suggest, if he really needed this service, to negotiate a better rate?

A. Yes. Of course the rate would depend on the agency that he is negotiating with.

Q. The point is, it can be done?

A. Yes.

Q. And it could save a significant amount of money?

A. Yes. I would say at least, I would say 30 percent.

Q. But you didn't consider that in this report?

A. I did not. There is no basis for it at the present time.

Q. Well, do you remember being involved in a case of Parminder Kaur, K-A-U-R, a temporary guardian of Rasham Singh against Craig Tennenbaum, M.D.?

A. Does not ring a bell at all.

Q. It was a Supreme Court of the State of New York's County of Queens, and one of the cases that you were involved with Fred Goldman, right?

A. Well, this regards LPN and RN care.

Q. Right. But does it ring a bell now?

A. No.

Q. No?

A. Nothing. We have a -- that would be 2008. No idea.

(Provder Exhibit 6, Supplemental CPLR 3101-D Response, Kaur versus Tennenbaum, Supreme Court of New York, marked for Identification.)

BY MR. BARMEN:

Q. Sir, we marked that document, that's Exhibit 6, and it's Supplemental CPLR 3101-D response in the case of Kaur versus Tennenbaum in the Supreme Court of New York. On the last page of this, would you turn to it, please?

A. Sure.

Q. Which is 814, the last page, please, sir?

A. The last page?

Q. Yes. This one.

A. Oh, I see.

Q. That is one of -- that is from one of your life care plans, correct?

A. It appears so.

Q. And this was done in the course of litigation when you were retained by the defense, correct?

A. Yes.
Q. And under LPC, licensed practical nurse, you actually did the reduction, 20 to 50 percent prior to there being any pot of money, right?
A. But I didn't testify in this case; and in addition, if I would have testified, I would have stated what -- just as I told you, that there is a pot of money necessary in order to negotiate the rate. The money has to be in advance.
Q. I appreciate that, but do me a favor and answer the question I asked you, and then you will have an opportunity --
MR. McELFISH: Argumentative.
BY MR. BARMEN:
Q. -- to explain yourself.
You actually took into consideration the reduction of 20 to 50 percent in the life care plan before there was a pot of money, correct?
A. Yes. That's what I was -- yes, that's what I did.
Q. And you did that in preparation of a life care plan for the defense in litigation, right?
A. Yes.

Q. Thank you.

Let's talk about his employability and earning capacity, and I kind of want to start from the back and work up from your ultimate opinion and then work to how you got there if that's okay.

It's your opinion that because of the injuries Mr. Bauta suffered in this accident, that he is out a little more than $40,000 a year in wages throughout his work life expectancy; am I understanding that correctly?

A. Yes.

Q. Explain to me, if you can, please, how you think he lost over $40,000 a year when he never made more than $20 when he actually worked?

A. Okay. When I do an evaluation, whether for the plaintiff or defendants, I am looking at the person's employability and their earning capacity over their work life.

At the time that I evaluated Mr. Bauta, he was 39 years of age. People's earnings don't freeze at any particular point in time.

Q. Correct.

A. So we look at the average earnings of somebody over their work life. So what I did is

I selected the average earnings of somebody doing a similar job that he did in the New York City area, use that as the average of his -- what we call his pre-injury earning capacity; what he could have earned if he would not have been hurt over his work life.

Q. Okay. And I understand that, but I guess what I don't understand is: You have Mr. Bauta's actual history to work from, right?

A. Yes. I had a post -- a pre-injury, as we discussed before, W-2 forms.

Q. And at least four years' worth?

A. I did.

Q. And in those four years, he never earned more than $19,000 in any one year?

A. True.

Q. So why isn't his earning history, premorbid earning history, relevant to what he would have made but for this accident?

A. As I explained, I am looking at his earning capacity over his work life.

Let me give you an example. You have an individual who is 30 years of age. He has practiced his -- he practices as an attorney, just passed the bar, becomes injured. Is his

earning capacity what he would have earned as an associate at $50,000 a year or is it the average earnings of an attorney in the New York City area? It would be the average earnings of an attorney in the New York City area representing the person's preinjury earning capacity, not frozen in time as you are suggesting.

Q. Well, I am not -- and I guess I am just not understanding because I don't think I am suggesting anything frozen in time. I am looking at the actual history of this man's earnings.

A. You are. You are suggesting that, based on his history, that he would never earn more than that particular amount of money, and that would be erroneous.

Q. So is it your opinion that, but for this accident, he would currently be earning more than double what he ever earned before the accident?

A. That's not what I am saying. What I am saying is that if we look at his entire earning stream from the time of the accident up until the time of retirement, his average earnings would be the $40,000 mark. We look at every year between now and then and tabulate it. Doesn't mean he could be earning less. He could be earning

$25,000 more. He could be earning $40,000 more. He could be earning more than that, although when we look at the entire earning stream to 67, it will add up to the $40,000 wage.

Q. Okay. So that $40,000 rough number is an average between now and the end of his statistical work?

A. That is absolutely correct.

Q. Got it.

In your review of the medical records, did you come across any medical records indicating that Mr. Bauta had a history of chronic migraines before the accident?

A. Before the accident?

Q. Yes, sir.

A. Hold on. I did not have any records, medical records prior to the accident, so I can't answer that question.

Q. Okay. So then it's fair to say you also never saw any medical records indicating he had chronic back pain before the accident?

A. True.

Q. Would those records be in any way relevant to your opinions?

MR. McELFISH: Lacks foundation. Lacks

evidence.

Go ahead.

THE WITNESS: Well, I would like see all records. However, I am not a causality witness. So therefore, I like to see that information to know that I have seen it, but I am not a causality witness weighting one occurrence against another.

BY MR. BARMEN:

Q. Did you ask for any of Mr. Bauta's pre-accident medical records?

A. I did not ask for them. That's not a standard thing that I ask for and --

Q. Is it -- okay. I am sorry. I didn't mean to cut you off.

A. Give me a second.

In fact, page 4 of my report, one of the questions I ask is whether the person was been involved in any prior accidents, on-the-job accidents or have any medical conditions affecting their ability to work. His answer is no. If his answer would have been yes, I had a back problem before because I had to lift something at work five years ago, it would have triggered me trying to search out additional

records; but because he answered no, there is no prior history, I didn't request records prior to the accident.

Q. When you saw Mr. Bauta in September of 2015, right --

A. Yes.

Q. -- did he mention to you that he had gone to the hospital after falling on ice in February of 2014?

A. February 2014? After the accident?

Q. Correct.

A. Did he personally mention to me?

Q. Yes.

A. He did not.

Q. Did you see any medical records about that trip to Brookdale Hospital when he fell on ice and went to the hospital on February 18, 2014?

A. Not on February 18th. I have a record of February 19th, 2014.

Q. That says what?

A. Chief complaint, leg pain.

Q. First off, what record is that from?

A. It's from Brookdale Hospital Medical Center dated 2/19/2014. Must be emergency room.

Discharged same date.

Q. And that's after he slipped and fell on ice, right, the day before, February 18?

A. Yes. That's what he states. Provided by the patient, slipped on ice. Fell 16 hours ago.

Q. Do you know if he was walking with a cane on February 18th or 19th, 2014?

A. I do not.

Q. Did you know that Mr. Bauta went to a doctor after falling and injuring his shoulder, his low back, and his legs in April of 2014?

A. No. I saw no such records, and no history was given to me of that occurrence.

Q. Do you know that Mr. Bauta has been sexually active since the accident at issue in this case?

A. I do not. It's not a question I ask.

Q. You read his deposition?

A. I did.

Q. Do you recall what he said about his sex life in his deposition?

A. I don't recall.

Q. You realize he was deposed twice?

A. The deposition I have is May 21st, 2015.

Q. So you weren't aware that he was also deposed in December of 2015? You were never given that transcript to review?

A. I was not.

Q. Understanding he was deposed a second time, is that something you would have liked to have had to review before issuing your opinions in this case?

A. Well, that deposition was after I did my evaluation, but I certainly would have liked to have seen that document prior to this deposition.

Q. Well, you did provide a supplement after your initial report, right?

A. Yes.

Q. In doing your vocational evaluation, you assume that he is disabled for purposes of the evaluation, right?

A. I don't know what you are reading from.

Q. Well, I am looking on page 2 of the vocational part under Purpose of Referral.

A. For both questions?

Q. I'm sorry?

A. Give me a second. Purpose of Referral?

Q. Yes, sir. "Mr. Bauta was referred to Occupational Assessment Services for a

comprehensive vocational evaluation to assess the effect of his handicapping condition on his vocational capacity."

A. Yes. His injuries on his ability to work.

Q. Are you assuming that he is disabled at the time when you say "handicapping condition"?

A. No. No. There is no -- no opinion reached prior to the person having an evaluation. Nobody would come to me for an evaluation who is not handicapped or impaired in some manner. That would be the purpose of the evaluation.

Q. When he came to you, what was your understanding of his impairment or impairments?

A. Well, he had a number of impairments he gave to me. He stated that he injured his head, his neck, his low back and his right leg in this accident, and he had a number of complaints relating to those areas: Constant low back pain, occasional neck pain, low back spasms, easy fatigue, headaches, difficulty sleeping, weakness in the left leg.

So those were the complaints that he had during my evaluation.

Q. What did he tell you specifically to the

head injury he claims to have suffered?

A. Again, I am not sure if I understand your question. He stated that he hit his head in the accident.

Q. Okay. But did he tell you that he was having cognitive difficulty? Did he tell you he was having memory problems? Did he tell you he was having any problems with cognition at all?

A. No.

Q. It's your opinion that Mr. Bauta is completely and totally disabled from earning a living?

A. He is unemployable. The word "disability" is really a -- "disability" is a medical opinion.

Q. Okay.

A. And unless you are an Administrative Law Judge in social security, that's the word they use, "disability."

Q. And that's not your area?

A. That's not my area of expertise. I evaluate people regarding their ability to work and their ability to earn money. It's my opinion that he is unemployable and has a total loss of earning capacity.

Q. He is unemployable why?

A. Because he's got reduced functional capacity. He stated to me that he is limited in his ability to stand, 30 to 45 minutes; sit, 30 to 45 minutes; walk, 35 minutes; slowly climb a fight of stairs, lift and carry five pounds, difficulty bending, and he has pain while he preforms those activities.

Based on my interview with him, my review of the records, there is a report from Dr. Lattuga that I believe states that he is -- Mr. Bauta is disabled, and my evaluation of him I did not believe he is employable.

Q. You agree with me that people with disabilities can and do earn a living?

A. People with impairments or injuries can and do earn a living; yes, sir.

Q. And people that are actually disabled under the definitions that you mentioned earlier can and do earn a living?

A. Individuals -- well, we are going to use the word "disability" as used by the Social Security Administration?

Q. For starters. Yeah, sure.

A. Social Security Administration defines

disability as the inability to perform any substantial gainful work activity, and that means any work activity.

However, even if you are found disabled by the Administration, you are still able to earn -- you are still allowed to earn some monies in addition to what you receive from social security.

Q. So is that a yes to my question? People who are disabled --

A. By the -- people that are disabled.

Q. -- earn a living?

A. I'm sorry. I just talked over you.

People that are receiving of social security disability can earn some monies.

MR. BARMEN: Let's take five.

MR. McELFISH: That was a yes to your question.

MR. BARMEN: I figured as much.

(Break taken.)

BY MR. BARMEN:

Q. I am looking at page 5 of the Vocational Evaluation portion of your report.

A. Yes, sir.

Q. Specifically under the part that says

Vocation Evaluation Assumptions?

A. Yes, sir.

Q. And this is what you talked about earlier, "The vocational opinions regarding Mr. Bauta's employability, earning capacity and vocational rehabilitation potential expressed in this report are based on the assumptions that," and then you list eight specific assumptions, right?

A. Yes, sir.

Q. One of them being number three, "The evaluee did not intentionally exaggerate or give false information regarding his physical or psychological symptoms, right?

A. Yes, sir.

Q. You know when you asked Mr. Bauta on one of your questionnaires if he had any prior injuries or issues he said no?

A. True.

Q. Okay. And you are now aware that there are medical records that indicate that that might not be accurate?

A. True.

Q. Okay. Are you also aware that he filled out a job application after his conviction, but

before the accident at issue where he denied ever having been convicted of a felony?

A. No.

Q. Would that be something that would be relevant to your opinions?

MR. McELFISH: That's not in evidence.

THE WITNESS: No, not necessarily.

BY MR. BARMEN:

Q. In your experience do you find that people that are dishonest in one area are generally honest in another?

MR. McELFISH: Vague and ambiguous.

You may answer.

THE WITNESS: I can't answer that question. I don't draw any conclusions one way or the other.

BY MR. BARMEN:

Q. Are you familiar with the term "secondary gain"?

A. Yes.

Q. What is secondary gain?

A. Secondary gain is an exaggeration of symptomatology or functional capacity to mislead the evaluator so that the person will gain -- gain some other benefit, and the benefit is

usually money.

Q. Usually in litigation?

A. Yes.

Q. Are you familiar with the term "malingering"?

A. Yes.

Q. What is malingering?

A. Malingering would be that somebody is holding back their performance during an evaluation or pretending to have symptomatology that they don't have from a physical or mental standpoint.

Q. You talked earlier when you -- relative to your opinion that lost earnings were roughly 40,000 a year, that that's based on an average of his earnings going up over time through his life work expectancy, right?

A. Yes, sir.

Q. Would you agree with me that because of his felony sex crime conviction that it could impact his earnings the other direction?

A. It could.

Q. Did you take that into consideration?

A. I did not.

Q. Did you do any kind of evaluation to see

the earning capacity for someone who is a convicted sex offender?

A. I did not.

Q. It's important when doing these valuations to compare apples to apples, right?

A. Don't understand your question.

Q. I thought you testified that you compared Mr. Bauta to other people in his industry and looked at what they made over a specific period of time?

A. True.

Q. Did you look at any sex offenders to see what they earned over a period of time?

A. No such data exists that I know of.

Q. Did Mr. Bauta indicate to you that he would like to get a job?

A. I don't recall whether he verbalized an opinion one way or the other.

Q. Is someone's motivation something to consider when trying to determine if they are employable or not?

A. Yes.

Q. Did you do anything to determine Mr. Bauta's motivation in trying to actually find work?

A. No.
Q. Do you know when Mr. Bauta was working as a shift manager at McDonald's, whether he ever prepared payroll?
MR. McELFISH: Whether he prepared payroll?
MR. BARMEN: Yes.
BY MR. BARMEN:
Q. And I am specifically looking at page 17 in your report, second-to-last full paragraph from the bottom.
A. Oh, I see. Oh, these were just general statements from the Occupational Outlook Handbook, U.S. Department of Labor, some of the things people do given his job category.
Q. Okay.
A. It doesn't necessarily mean that he did those items.
Q. Okay. Did you ever ask Mr. Bauta if he did any of these things enumerated on page 17?
A. He --
Q. That he did any sort of administrative assignments, keeping employee work records, preparing payroll, completing paperwork to comply with licensing laws, reporting requirements of

tax, wage and hour, unemployment compensation; do you know if he ever did any of those things?

A. The history he gave me included those items. He did not say he did those items.

Q. Did you ask him if he did those things?

A. No. I went to the other way. What did you do when you performed the job? And I recited what he told me, what his job duties were.

Q. It's your opinion that he is unemployable even with reasonable accommodation?

A. Yes. Because you have to work eight hours per day, five days a week, working at a competitive level. I don't believe he can do that.

Q. Are the complications you see for Mr. Bauta down the road just what Dr. Lattuga has laid out in his report?

A. Yes. Could I just amend that answer?

Q. Sure.

A. I think Dr. Mobin also talks about future surgery. That would be another area.

Q. What is Mr. Bauta's level education?

A. High school graduate.

Q. When did he earn his GED?

A. GED was earned in January of 2014, high

school diploma.
Q. Four months after the accident at issue?
A. He did.
Q. So shortly in the time after the accident he was able to complete that?
A. Yes.
Q. You don't believe that any vocational rehab would benefit Mr. Bauta?
A. Not at this time, no.
Q. What would have to happen for him to get to a point where it would benefit him?
A. He would have to have the capability to perform work activities that require at least the sedentary physical demands, which means he has to be able to sit for at least six hours out of an eight-hour day; be able to lift up to ten pounds.
Q. When Mr. Bauta goes to the grocery store, he carries his own groceries home, right?
A. That's what he stated.
Q. Do you have any idea what Mr. Bauta did in terms of trying to find a job between when he lost his job in 2012 and the accident in 2013?
A. You asked me that question before. I don't know.
Q. Sorry. I forgot I asked you before. I

am just trying to go through my notes and finish up here. So if I am redundant, I apologize.

A. Okay.

Q. One of the things you noted when he was -- "he," Mr. Bauta -- was doing your tests was impaired concentration?

A. Yes.

Q. Tell me how you observed that or is that something he told you?

A. Something he told me.

Q. What's your understanding of Mr. Bauta's family life?

A. I don't understand your question. I believe when I saw him, he was living with a roommate at the time I saw him.

Q. Does he have a wife? Does he have kids? Does he interact with them?

A. I believe he has -- I believe two kids that live in the geographical area that he lives in. I believe he sees him them on a regular basis.

Q. In reviewing the medical records, did you review the EMS run report?

A. Which one?

Q. The EMS?

A. The ambulance report?
Q. Yes, sir.
A. That's usually a document I don't have, but -- no, sir.
Q. Fair to say you disagree with Mr. Capotosto about Bauta's employability?
A. Yes.
Q. Mr. Capotosto believes he could do sedentary and even light-duty work?
A. Yes.
Q. Do you know that Mr. Bauta by his own admission does home exercises for his back?
A. I saw that in the records.
Q. Okay. We have already gone over he takes public transportation?
A. Yes.
Q. He makes it to his appointments?
A. Yes.
Q. He does his laundry?
A. Yes.
Q. He cleans his own apartment?
A. Yes, we talked about that.
Q. He goes to the grocery store?
A. Yes.
Q. He carries his own groceries?

A. Yes.
Q. He can walk for 20 minutes at a time without a problem?
A. Yes, with a cane.
Q. He is sexually active?
A. I am sorry?
Q. He is sexually active?
A. That I don't know. I didn't review anything about that.
Q. He does his ADLs without any assistance since the accident?
A. He does his ADLs.
Q. And you believe he can't work?
A. True.
MR. BARMEN: Give me a minute to talk to my esteemed colleague. If we are not done, we are very nearly done.
(Break taken.)
MR. BARMEN: Let's go back on the record. I have no further questions for you, sir. I appreciate your time.
MR. McELFISH: I might have one or two.
Just a couple of questions, just in the event there is motions. I wouldn't normally ask but --

MR. BARMEN: Yes, you always do. You always ask questions.

EXAMINATION BY
MR. McELFISH:

Q. So, Mr. Provder, let's talk about the employability. Are there jobs that Mr. Bauta can do even if he has the conviction?

A. Were there jobs he could do notwithstanding his injuries?

Q. Yes.

A. Yes.

Q. Why is it you did not consider the felony in your report?

A. Because there were jobs that are available and open to him that he could have done even with the felony convictions.

Q. And you have listed all of those?

A. Yes. Well, I said that he could go back and do his old job, but if not for this injury; but also there are other jobs frequently that I had in my experience, felons that have been employed in the construction industry, and they have been employed in a similar capacity, as the defense expert noted, assembly work, packaging work, inspection-type work. All of those pay

anywhere from 25,000 and up to -- inspection up to about $40,000 in the New York City area.

Q. And you read in his deposition that during the -- from the time he worked in McDonald's until the accident he was doing labor work? Do you recall that?

A. Yes, I do.

Q. And did you consider that in terms of forming your opinion for future construction work and labor work?

A. Yes.

Q. Explain.

A. Well, it's very frequent that there are individuals with felony convictions employed in the construction industry. In fact, I have had a number of them that have been union members and working as construction laborers. So I considered that as a factor in determining his preinjury earning capacity.

Q. And to your knowledge, in the New York City area, are employers allowed to consider whether or not somebody has a felony?

MR. BARMEN: Objection.

Go ahead.

THE WITNESS: Well, as noted in the

documents that we have previously -- I believe they have been marked in -- there have been numerous efforts in the New York City area to not have a box that states felony conviction on a job application, and there are major efforts by the State of New York as well as the City of New York to take individuals that have felony convictions and have them reenter the labor market; and, in fact, they are -- in one of the documents there is a list of different employers that have been known to be -- make allowances for the felony conviction in their hiring practice.

BY MR. McELFISH:

Q. Are employers allowed to pay less for a given occupation or a given job if somebody had a history --

A. No.

Q. -- such as a felony?

A. No.

Q. And is that another reason why you did not consider it in forming your opinion in terms of the future occupations and the amounts they pay?

A. Yes.

Q. In other words, someone can't say, well, I was going to pay you 50,000, but because you have a felony, I am going to pay you 30,000; is that your understanding?

A. No. People don't do that. They have a need, and they hire an individual if they believe can do the job.

Q. Mr. Barmen was asking you about the employment history in terms of what you have in terms of W-4, do remember those questions?

A. Yes. W-2s.

Q. W-2s, right. Why is an employment history not a complete indicator of what future wages, in terms of your professional opinion, in terms of what future wages may be or how they average out?

A. Because when somebody does a vocational evaluation in this setting, we are looking at the person's earning capacity over their work life, not over any particular point in time. So many times the preinjury actual earnings does not represent their earning capacity into the future.

Q. Okay. And Mr. Bauta was fully employed, to your knowledge? Was he fully employed from

2006 until 2012?

A. That's the history he gave me, yes.

Q. What was he doing?

A. He was shift manager, restaurant shift manager for McDonad's, 2006 to 2012, October 2012.

Q. Continuously?

A. That's the history he gave me.

Q. Okay. And prior to 2005, he was employed at McDonald's as well?

A. He was employed at McDonald's from 2004 to 2006, and then prior to this, 2000 -- '93 to 2003, as an unarmed security guard.

Q. All right. Now, with respect to your interview with Mr. Bauta, did he indicate to you he did not want to work?

A. He did not.

Q. In fact, in his deposition he indicated he looked for work and did work between McDonald's and the accident?

MR. BARMEN: Objection.

BY MR. McELFISH:

Q. What was your answer? What was your answer to that?

A. Yes.

Q. Okay. All right. Now on the life care plan, Mr. Barmen asked you a number of questions about whether or not Mr. Bauta needed any of the services that you have indicated today or now in the present period if you will.

Can you explain for us, please, how the life care plan works and why or why not a person may need the services immediately or not?

A. Yes. Well, a life care plan details the cost of care and the type of care that somebody is going to require over their lifetime. It looks at not only the medical care, the medications, therapies that are going to be required, but also their homemaking activities they are going to need. The fact that somebody can do some activities such as going to the store, carrying a small item, dressing themselves is not necessarily indicative of their need for a homemaker's services. When somebody is performing these activities and they are doing it in pain and discomfort and limitations, they are going to -- they need these types of services.

In fact, I also consider Mr. Bauta's condition now as well as his condition into the future as he ages.

Q. And, to your recollection, Mr. Provder, how many more years of life, based on the tables, mortality tables, does Mr. Bauta have to contend with these issues?

MR. BARMEN: Objection. Move to strike.

MR. McELFISH: What's the basis?

MR. BARMEN: He has already testified that he's got no opinion as to this guy's life expectancy.

MR. McELFISH: Oh, okay. Fair enough.

BY MR. McELFISH:

Q. But you have done an evaluation as to what you think he would need into the future regardless of what that statistical number is?

A. Yes.

Q. Oh, all right. Are there any -- back to the vocational just for a second -- are there any jobs or employments that you are aware of that Mr. Bauta would have qualified for prior to the accident that he would not be able to do because his felony conviction?

MR. BARMEN: Objection. Go ahead.

THE WITNESS: Well, there is a range of jobs that would be precluded from him performing given the nature of the type of

offense that he had, but certainly, as I indicated before, he could have worked in security. He could even work in security as an unarmed security guard. I have had people with felonies perform that occupation. He could work at -- in construction, as I noted. He could work at all of those factory-related jobs that the defense vocational expert noted.

BY MR. McELFISH:

Q. And given his background in the restaurant industry or the fast food industry, he could have continued to do that, even given the nature of the offense?

A. True.

Q. Such occupations that perhaps would be sensitive to the nature of the offense that perhaps may involve minors would be something that might be precluded?

A. True.

Q. But anything else would not have the same preclusive effect?

A. True.

MR. McELFISH: I don't have anything else.

EXAMINATION BY
MR. BARMEN:
Q. I just want to clarify two things real quick. Number one, it's your professional opinion that a gentleman who pled guilty to a sex crime against a child could get a job as a security guard?
A. I am going to say that I have had individuals that have -- I don't know what their felony was, but I have had people with felony convictions that have been employed as security guards after the felony conviction. Whether they were sex offenders, that I do not know.
Q. And when you are talking about whether or not the New York law is going into effect where he doesn't have to check the box about being a felon, you don't know --
A. It is in effect.
Q. It is in effect?
A. Yes.
Q. Do you know if that applies to sex offenders?
A. Again, I have answered that question already. I do not know now.
Q. Well, I know you answered. I want to

clarify for the record.

A. I don't know.

Q. Okay. And that would have been something that you could have found out pretty easily if you thought to look?

A. I saw no indication of that, but I don't know.

Q. You talked briefly about the labor work he was doing between losing his job at McDonald's -- you understand he lost his job at McDonald's when they found out that he hid his conviction, right?

A. Yes, I understand.

Q. Okay. And after that he was doing labor work, right?

A. Yes.

Q. Was he an employee of somebody or was he working under the table off the books?

A. I don't recall. I am sorry.

MR. BARMEN: I don't have anything else for you. Thanks.

(Time noted: 12:09 p.m.)

A C K N O W L E D G M E N T

STATE OF)

) ss.:

COUNTY OF)

I, EDMOND A. PROVDER, hereby certify that I have read the transcript of my testimony taken under oath in my deposition; that the transcript is a true, complete and correct record of my testimony, and that the answers on the record as given by me are true and correct.

_____

EDMOND A. PROVDER

Signed and subscribed to before me, this _____ day of _____, ____.

Notary Public, State of _____

C E R T I F I C A T E

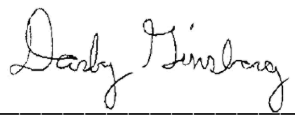
STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

I, DARBY GINSBERG, a Notary Public within and for the State of New York, do hereby certify:

That EDMOND A. PROVDER, the witness whose deposition is herein before set forth, was duly sworn by me and that such deposition is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage; and that I am in no way interested in the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my hand this 31st day of January, 2017.



DARBY GINSBERG
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