THE COURT: Let's get started and go to noon any way.

MR. BROUSSEAU: Can we approach for just a second, Judge.

(Off the record bench conversation held)

PROCEEDINGS HELD AFTER BENCH CONVERSATION:

MR. MILLS: Your Honor, I call Dr. Kenneth Reagles to the stand.

THE CLERK: Do you solemnly swear that the answers you shall give will be the truth, the whole truth, and nothing but the truth, so help you God?

DR. REAGLES: I do.

MR. MILLS: Dr. Reagles, would you give your name to our jury please.

A Sure, my name is Kenneth Reagles.

Q And sir, what is your profession?

A I'm a specialist in vocational rehabilitation.

Q Would you describe for the members of our jury what that entails, that is what does the field of vocational rehabilitation entail?

A Yes, essentially vocational rehabilitation specialists are concerned with the consequences of injury and disabilities especially permanent disability. We're interested in the effect of any injuries,

disabilities, and resulting functional limitations upon the individual's capacity to work in the competitive labor market. For individuals who have such disabling conditions, rehabilitation specialists also look for accommodations, that is the use of adaptive and assistive devices to overcome or reduce the limitations imposed by disability, and of course vocational means work. Rehabilitation specialists help individuals access the work environment, makes accommodations to the work place. For individuals whose disabilities are so severe that they don't have the capacity for competitive employment, then the goal is to assist them in becoming independent as possible.

Q Dr. Reagles, where is your office for your practice in vocational rehabilitation?

A It's in Syracuse, New York.

Q And can you just tell the members of our jury about that practice generally, what is it that you do on a regular basis.

A Sure. Essentially day to day what I do is evaluate individuals who have become disabled usually as a result of the negligence of others, could be motor vehicle crashes, it could be work related instances, could be an instance like this where an allegation of medical malpractice is an issue so what I do is to do

evaluations of the limitations that people have. For adults, we often do vocational testing. If an individual has been employed in one capacity, can't do that work as a result of their disability, then the question becomes what else could they do within the competitive labor market. That's what we do is assist them in that process.

Q Dr. Reagles, I'd like you to tell the members of our jury about your educational background leading to your practice of vocational rehabilitation starting with your undergraduate work and then continuing right up to your doctorate.

A Sure, I'm originally from Wisconsin. My undergraduate is from the State University of Wisconsin at Lacrosse with specialization in physical education. I then obtained a Master's degree in counseling and guidance from San Diego State University. That was in 1967. In 1969 I completed a Ph.D., a doctorate of philosophy in rehabilitation counseling from the University of Wisconsin at Madison. Since then I've been out in the practice of rehabilitation counseling or rehabilitation psychology.

Q Doctor, in conjunction with your work in vocational rehabilitation, do you belong to any organizations, any national or local organizations in

that field?

A I do.

Q Would you tell the members of our jury about those organizations and to the extent that you've held any office, any leadership positions in those organizations, would you provide that information as well?

A Sure, I belong to the International Association of Rehabilitation Professionals, the National and American Rehabilitation Counseling Association, the National Council of Rehabilitation Educators, the National Rehabilitation Association. I also belong to the National Association of Forensic Economists. I've been the national president of the American Rehabilitation Counseling Association. Also been the national president of the National Council of Rehabilitation Educators.

Q Doctor, have you published in the field of vocational rehabilitation either for those organizations or otherwise?

A Yes, I have. I've authored or co-authored five books, one chapter appeared in books that others have edited, approximately eighteen monographs. Monographs are a short book eighty to a hundred twenty pages long, they were typically the final project reports of

research projects that I directed while I was at the University of Wisconsin, and I have nearly sixty articles that have been published in the professional journals.

Q I think there came a time when you came to the State of New York, is that correct?

A Yes.

Q When was that?

A That was in 1975. I became a professor and associate professor at Syracuse University within the Rehabilitation Counseling Education Program there.

Q Can you tell these folks a little bit about that program, what your position was and how long you were affiliated with that university?

A Yes, as I said, I came as an associate professor. Two years later I was promoted to full professor and chairman of the Department of Rehabilitation Services and held that position for an additional thirteen years, and I became what's called professor emeritus in 1996 so I spent twenty one years at Syracuse University. We prepared rehabilitation counselors at the Master's and doctoral level. The ones prepared at the Master's level worked for such agencies as New York State Commission for the Blind and Visually Impaired, what used to be called the Office of Vocational Rehabilitation. Then it

became VESID. Now, it's called ACCESS VR, but rehabilitation counselors work in a variety of situations where the employability or rehabilitation potential of individuals is at stake. The doctoral level people we prepared went on to become rehabilitation counseling educators, directors of programs, researchers, and as I said, I did that for twenty one years. Also at that time I and a physician had an outpatient clinic where we provided direct services to individuals with disabilities both medical and rehabilitation services and the name of that agency was called Pelion, and in was in downtown Syracuse and that I was a co-owner administrative director of that agency for eighteen years.

Q Doctor, at the present time do you have a business involved in the vocational rehabilitation field?

A Yes, I do.

Q What's the name of the business?

A It's called K. W. Reagles and Associates.

Q How long has that organization existed?

A Since 1969. This is our forty third year.

Q As a part of your profession, do you work with attorneys such as myself and many others to assess and evaluate the degree of disability of persons who have

been injured for whatever reason or cause?

A Yes.

Q How long have you been actually working with attorneys to assist them in the evaluation of their client's injuries?

A Forty three years.

Q Generally speaking, can you explain the methodology that you have developed and used over those years when you are asked to become involved in a case where someone has sustained a disabling injury, what is it that you do, what do you request and then tell these folks about the process?

A Yes.

Q That you go through?

A The process usually begins with the referral from an attorney, and we work for both plaintiffs and defendants, about sixty five percent of my work is for plaintiffs such as the Hands. The other thirty five percent would be for defendants. Essentially what I'm asked to do is evaluate the individual's nature to find out the nature of their injuries, their disabilities, how their injuries have been treated, what are the permanent consequences of those injuries, what kinds of limitations do they have, how do those limitations impact on their capacity to work not only in the labor

market but also at home. Many of the individuals that we evaluate are not employed with the labor market. Their work is at home. Some are young adults, even infants. What we want, we have a notion of what the injuries were, what the permanent disabilities are, what's the limitations. Then we begin to ask a number of questions related to the potential economic consequences of their disability. Do they have a diminished capacity to work, can they go back to the work that they once did. If not, is there other work they can do. In the instance of a minor such as Rachel Hand who has never worked before, what are the potential economic consequences of having a permanent disability such as she has, how will it impact on her capacity to even find employment, if she becomes employed, what are the types of accommodations that have to be made. So the first issue is about the impact of the injury and disability upon the person's capacity to work again not only in the labor market but also at home. The other element that I've become involved with is the development of what's called a life care plan. A life care plan is essentially an itemization of all of the anticipated future health related goods and services that individuals will need as a result of their disability, all of the doctors visits, all of the

diagnostic studies, the medications, the therapies, the equipment that they may have, it may include future surgeries. That life care plan is, my role is to determine the cost of those goods and services. I'm not a physician so I can't prescribe those goods and services, but I work closely with the physicians, get their consent about what it is that should be in the life care plan, and then I determine the cost of those goods and services, and the final thing I do is prepare a report of my findings and share that with whoever has retained me.

Q Doctor, in conjunction with your work, have you given testimony before today in the courts of the State of New York and elsewhere with regard to your evaluation, your assessment of the degree of disability and your opinions both in terms of those limitations and the cost of services to deal with those limitations?

A Yes, I have.

Q And can you give our jury an idea of the geographic area where you've given testimony and particularly in the courts of the State of New York where you've provided that testimony.

A Sure. Well, this court, Judge Demarest and I have seen each other in the past. Testified in Malone. I've testified in Watertown. I testify essentially all

across the state. Yesterday I was in Buffalo, but it could be Rochester, could be Binghamton, Syracuse, Ithaca, all downstate, but I testify in other states as well. My practice is limited to what I call catastrophic disabilities where there are significant injuries, significant disabilities that warrant a full examination of what the future health related goods and service need will be, what are the consequences for the person's capacity to work, and so my work is essentially all over the country, but I would say probably seventy percent of it is located in the northeast.

Q In this case, the case of Rachel Hand, did there come a time when my office contacted you and asked you to perform an evaluation and assessment of her injuries, her disability, and then to provide us with your opinion with regard to a life care plan?

A Yes.

Q And when did that contact occur?

A I was just looking at our agreement. It's dated November 5, 2009.

Q And at that time, Doctor, had you done work for our office in the past for other clients of ours previous to November of 2009?

A Yes.

Q And if you could if you recall, approximately how

many times had you worked with me or my office in regards to doing such an assessment and evaluation?

A I would estimate maybe six or eight times.

Q Now, in November of 2009 if you would tell the members of our jury what you did in conjunction with our request for you to assess and evaluate Rachel Hand's limitations, her disabilities and her needs?

A Well, essentially what I began with is an examination of the medical records to find out what was the nature of her disability, and of course it was this shoulder dystocia essentially called sometimes called an Erb's palsy, but essentially she had her right upper extremity including the shoulder mechanism didn't function very well. And so I learned about what we call what residual function she had and learned about the fact that she had been involved in, well, at that time she'd only been involved in I believe four surgeries, and then subsequently last December had another surgery so a total of five surgeries where the physicians had been simply trying to increase the function of that injured upper extremity. Then I also since she was a minor I took an extensive family history, and the reason that I did that is we know from research results and experience that the adults who are around the child as that child develops have a pronounced impact on that

child with regard to values towards education and work. Those are the things I was concerned about. So I interviewed the parents with regards to their family structure, their family history, their grandparents, their parents, their brothers and sisters which would be Rachel's aunts and uncles, the cousins, what did all of these people do to get essentially a perspective of the environment if you will in which Rachel might be raised and the type of influences these people might have on her with regard to values toward education and work. Then I had an opportunity to interview and evaluate Rachel herself. When I say evaluate her, I gave her an intelligence test, I gave her an intelligence test even though at the time I did that she was at an age of where any vocational interest would be considered tentative and so it would not be predictive of what she would like to do in the future but would certainly give us some indication of her areas of interests, and that might be potentially fruitful for vocational pursuits in the future. I also took into consideration her academic achievement. Rachel is certainly a young lady of above normal intelligence. Her academic achievement is consistently in the eighties and nineties which is a very good thing because I have evaluated many individuals with shoulder dystocia who do not have the

intellectual gift that Rachel has so as a result of her intelligence gift has many more options than a child that doesn't have these gifts so those are the kind of factors that I took into consideration as I began to explore what her future might have been had this incident not occurred, had she had a normal upper extremity that functioned, had she not developed a scoliosis that I learned she eventually developed so that's how I began this process.

Q You mentioned that you did some testing. Where was that done?

A That was done in my office in Syracuse, New York.

Q And who was present at that time?

A Her parents were there. They brought her for the interview, and my associate Karen Simone who has a Master's degree in rehabilitation counseling administered the tests while I interviewed the parents.

Q Other than that meeting, have you actually met with Susan and Pat Hand and Rachel at any other time?

A No, I've not. We've had many telephone conversations, but we've not met in person other than that once.

Q If you would, Dr. Reagles, tell our jury why it is you had these many telephone conversations and follow up to that original meeting.

A Sure. Well, in the nearly three years that I've transmitted opinions since I got involved in this case, the circumstances have changed. Rachel's a teenager so her development is progressing quickly as she becomes a young adult. She had an additional surgery. There was concern for the scoliosis and so other reasons to contact the parents were to find out how Rachel was changing, what kind of concerns they had about her future. I asked them about specific examples of things that she could and couldn't do around the house and taking care of her personal hygiene and accomplishing activities of daily living, what were her avocations, how was she doing emotionally, how was she adjusting socially. When I met her, she impressed me as a shy young adult. I learned that she has a few close friends but that she is well liked and making essentially a relatively positive adjustment to her life circumstances. I also contacted the parents to ask specific questions about the life care plan. The folks know very intimately what services she's getting, what they see as her needs for additional therapy, how she's handling the prosthetic device that she has, what has been her reaction to the surgeries, what was the impact of the surgery as they were able to observe it so those were some of the reasons that I talked to them.

Q In addition to speaking to Mr. and Mrs. Hand and Rachel herself, did you also speak to or have direct contact with any of her treating physicians or health care providers?

A Yes.

Q Please tell our jury about that.

A Well, in developing a life care plan, I had an opportunity to submit the what I would consider a draft of the life care plan to her treating physicians principally Dr. Laflair, Dr. Nath, and I met personally with Dr. Palomino. Her office is in Syracuse so she was easily accessible, met with her regarding the concern about the scoliosis and what the prospects were for the future with regard to that condition, what Dr. Palomino's involvement would continue to be going forward into the future so those were the things that I did.

Q In conjunction with those communications whether in person or otherwise, did you obtain the agreement of those health care providers with the contents of your life care plan and utilize their input in finalizing that life care plan?

A Yes, I did.

Q Can you tell these folks about what is it that you do, how do you go about communicating that to the

physicians and what do you ask them to do?

A Sure. Essentially the life care plan is submitted to them in its entirety, but if they have a particular specialty, we highlight areas of the life care plan that are pertinent to their specialty and ask them to only react to those. They're invited to comment about other areas of the life care plan but particularly interested in the areas of the life care plan that are consistent with their specialization. In the instance of Dr. Palomino, I actually had a chance to sit down and talk with her about it and discuss it in what I would call more intimate detail than we might have in the instance of physicians to whom the plan was sent for the reaction and they send me back either their comments or their agreement with the life care plan.

Q In the case of Dr. Tracey Laflair, the primary care physician, what contact did you have with her and what was the communication that she then had with you with regards to your proposed plan?

A Yes, well, essentially I sent the life care plan to her, and we received it back with essentially she indicated that I have reviewed and am in agreement with the contents of the life care plan as drafted.

Q Now, Dr. Reagles, with regards to your contact with Dr. Nath, what was the extent of that and did you

get a response from him?

A It was sent to him, but we did not receive a response back from him. But then I learned that he intends to see her only one more time, and so there's only one element of a life care plan, and that's only a very, my understanding is that it's the intention of Dr. Nath to see her just one more time.

MR. BROUSSEAU: Objection.

THE COURT: Well, that's... You were told, right?

DR. REAGLES: That's correct, yes.

THE COURT: I'll allow it.

MR. MILLS: With regard to Dr. Palomino, can you tell these folks about your contact with her and what her response was to your inquiry of her.

A Yes, we had sent her the life care plan, and then I had an opportunity to meet with her, and we went through the life care plan in some detail with regards to those issues that were of concern with her. And it really had to do with the scoliosis, that's her principal involvement here, and so her indication was that through the developmental period which we consider to be age twenty one that she would see her with a frequency of...

MR. BROUSSEAU: Objection, your Honor.

THE COURT: Sustained. Don't get into what you talked to her about. Go ahead.

DR. REAGLES: Essentially we went through those elements in a life care plan that pertained to her expertise, and I made modifications to the original life care plan based upon what she had to tell me.

MR. MILLS: Okay, other than those providers, have you had contact with any other health care providers with regards to the life care plan?

A No, I have not.

Q Dr. Reagles, what is a functional limitation?

THE COURT: Mr. Mills, before you switch gears, I think maybe this would be a good time to take a lunch break, okay. All right, ladies and gentlemen, it's a little after noon. I ask you to be back shortly after one o'clock, let's say one ten. Will that give you enough time? Remember all the rules. Keep them in your head. Don't discuss the case with anybody. Don't do any independent research. We'll be back shortly after one.

(Recess of the court)

PROCEEDINGS HELD AFTER RECESS IN THE COURTROOM WITH THE JURY PRESENT:

MR. MILLS: Dr. Reagles, just before the

Break, I was asking you about the term functional limitation.

A Yes.

Q How is that used in your profession?

A Well, functional limitations are essentially consequences of injury and disabilities. It's was an individual is not able to do or can't do as well as a result of their injury. And we use them in two ways. The first is to determine in the instance of an individual who's already employed whether or not they can continue to do the work that they once did, and if they're unable to do that, then the question becomes what else can they do. That's one way that we use them. In an instance such as this when we're dealing with an individual who's not been employed, the functional limitation can be assessed by a vocational guidance counselor or rehabilitation counselor to assist the individual in their decision making regarding occupations or careers in which their functional limitations would have the most minimal impact. So that's where vocational guidance really comes into play.

Q And in your profession, is there a method or methodology used in assessing functional limitation and in the situation we have here where Rachel was not employed or has not yet been employed?

A Yes, there are.

Q Could you tell these folks about the method that is used and customarily used by those in your profession?

A Yes, there is, our U.S. Department of Labor has developed a classification system. Essentially what it consists of is the physical demands that are associated with work, and each occupation that is catalogued in what we call the dictionary of occupation titles has the functional demands to do that job. And so what a rehabilitation counselor is working with an individual who has functional limitations, they use that classification system to determine whether or not the individual can do the work that they once did and the work that we do. That's how we would use that.

Q Did you in fact use it in conjunction with your evaluation of and assessment of Rachel's functional limitations?

A Yes.

Q Did you make a determination then based upon your review of the documents, based upon your direct contact with her and your use of that methodology to determine what her functional limitations are?

A I did, yes.

Q Do you have an opinion, an opinion you can state

with a reasonable degree of certainty in your profession as to what Rachel's functional limitations are?

MR. BROUSSEAU: Objection. Foundation.

THE COURT: No, overruled. You can answer.

DR. REAGLES: Yes, first of all, let's think about Rachel who has this impairment of her right upper extremity. She has a diminished capacity to lift and carry things. She has a diminished capacity to finger, to feel, to manipulate with her right upper extremity. She has diminished capacity to lift her arm up to do what we might call bimanual tasks. She is, has difficulty raising her arm past her mouth. She cannot lift her arm over her shoulder. She can't reach her hand behind her back. So not only does she have that diminished capacity for those physical functions but now she has the scoliosis in her back which gives her additional limitations regarding the capacity to bend, to stoop.

MR. BROUSSEAU: Objection.

THE COURT: I haven't seen the addendum to the report. Does that make a difference?

MR. BROUSSEAU: Can we approach?

THE COURT: Yes.

(Off the record conversation held at the bench)

PROCEEDINGS HELD AFTER BENCH CONVERSATION:

THE COURT: I'll ask you to rephrase your question in light of that objection.

MR. MILLS: Doctor, I was asking you about your opinion with regard to Rachel's functional limitations and to what they are. Do you have an opinion, again an opinion you can state with a reasonable degree of certainty in your profession as to whether or not those functional limitations involve actions and motions of her body that are related to her Erb's palsy that she has, the brachial plexus injury and to whatever degree the injury to her back was relevant to your inquiry and again based upon your own communication with Dr. Palomino?

A Yes.

Q And if you would then tell these folks what that is?

A Sure. I was talking about the limitations associated with the scoliosis, the back condition, diminished capacity to bend and also what we call stoop which is to bend at the waist, there's a bending of your upper torso, there's a bending from the waist, has diminished capacity for that. She also has diminished capacity for balance. Why would someone with an arm problem have diminished capacity? What happens when you

lose your balance, you throw your arms out to the side. Her right arm doesn't work that way so she has diminished capacity for balance, fine motor skills are difficult for her. Such things as writing, keyboarding she essentially is a one handed keyboarder. We also have diminished capacity for climbing. So those were the functional limitations that I was able to identify.

Q In conjunction with those findings, did you perform an analysis or evaluation of her ability to perform certain classifications of work?

A Actually I did not. I didn't look for someone as young as Rachel, I didn't look at specific occupations with regard to what she could and couldn't do because there's too much uncertainty. What I did do was to look at what were her probable educational level of attainment had she not had the disabilities that she has.

Q And what did you do in that regard, what was the method that you used to make that assessment?

A Yes. If you recall earlier, I talked about the importance of family and relatives around an individual who as they grow up so what I did was look at the educational accomplishments of the parents, grandparents, aunts and uncles, cousins, that sort of thing to form an opinion about what her probable level

of educational attainment would have been had this incident not occurred.

Q And in that regard, what were your findings?

A It's my opinion that based upon the, well, just some factual information that went into that opinion, both of her parents have undergraduate degrees, professional jobs. We have on the father's side of the family we have several individuals with four year college degrees, two with Associate's degrees. On the mom's side of the family, we have certainly individuals all of whom have education, high school, some of whom had college educations, cousins who are in college, one of whom recently graduated so based upon the educational accomplishments of the parents, grandparents, and relatives, it was my opinion that had this incident not occurred that Rachel certainly would have been capable of completing a two year college degree, a four year college degree, or even a Master's degree.

Q And again, was that based with a reasonable degree of certainty in your field of profession?

A Yes, it is.

Q Did you also do an analysis, Dr. Reagles, of whether or not Rachel has a diminution of earning capacity?

A I did.

Q First of all, can you define that term for the members of our jury what that means?

A Earning capacity is essentially earning potential. It is what an individual is capable of with regards to their capacity to work and the earnings associated with the work that they're able to accomplish.

Q And in conjunction with that, what information did you look at as it pertained to Rachel's situation?

A Well, sure. Essentially what I did was to look at the earnings that are associated with the various levels of employment for women within the U.S. economy.

Q What resources did you utilize in that regard?

A What I used were the statistics from the U.S. Department of Labor that compile average wages by level of education and age range for individuals such as Rachel, essentially a white female.

Q What were your findings in that regard?

A Well, essentially I learned that had she completed an Associate's degree, it was likely she would have entered the labor force at age twenty. She would have had nearly thirty five years of work life expectancy, that is the time that she would have spent in the active labor market and that her starting wage in today's dollars would be approximately twenty five

thousand dollars. This would have gone up to a high of slightly more than forty six thousand dollars and that she somewhere in the age in her late forties and then have declined to approximately forty five thousand dollars per year when she would have last been engaged in employment.

Q And again, this is with a two year Associate's degree?

A That's correct. You'll see the impact of additional education. With a Bachelor's degree, it's anticipated she would enter the labor force at age twenty two, but she would actually have had slightly more work life, slightly more than thirty five years. The reason for that is that people with more education have longer work lives because they tend to work in less risky occupations so professionals, attorneys, physicians, and so on often times work well past age sixty five and certainly into their seventies whereas individuals with less education who are frequently doing more strenuous risky work have shorter work lives. Those individuals would have entered the labor force and have earnings approximately thirty three thousand dollars a year at age twenty two. The highest salary range for such individuals would be again in their late forties, nearly fifty seven thousand dollars per year,

declining to approximately fifty four thousand dollars near the termination of their work life expectancy. Now, with a Master's degree, the entry level was expected to be at age twenty four. The work life expectancy approximately thirty three and a half years, starting salary of nearly thirty eight thousand dollars a year, highest average salary again slightly later in life, between the ages of fifty and fifty four of slightly more than sixty six thousand dollars and declining only to about sixty five thousand dollars near the termination of the work life expectancy so that's what I learned about the potential earnings of individuals such as Rachel with the assumptions of the three levels of education.

Q And is that a methodology that's customarily used in your profession to make an assessment of loss of future wage capacity?

A It is in the instance of a minor, that's correct.

Q Now, Doctor, there's a term in your report called residual earnings capacity?

A Yes.

Q What is that, can you explain that for us?

A If you think of the term residual, it's what's left, and that's what rehabilitationists work with, what the individual can still do. It's unfortunate that

Rachel has certain limitations, but the focus from the rehabilitation standpoint is what can she still do. She certainly has intellectual gifts. She certainly has competence if the left upper extremity. She's certainly learned to make lots of accommodations. The right arm doesn't work very well. She has a problem with her back. The question is is there work that she can still do, is she still capable of educational achievement. That was the next step in the process what we call residual employment or residual earnings capacity.

Q Then did you continue your analysis as it pertains to the diminution of her future earnings capacity?

A Yes.

Q First of all, would you explain to the members of our jury what that means and what the methodology that is customarily used in your profession?

A Okay, essentially it's the answer to the question what does it mean to be a person with a disability in our society especially an individual who has an obvious disability. Her flail right arm is obvious to other people if not immediately, it would be very shortly. What happens to people like that. Well, the research evidence suggests that individuals who have disabling conditions over the course of their lifetime do not work

as long as their able-bodied peers. When they're unemployed, they're typically unemployed for longer periods of time. They may have medical conditions that take them out of the work force from time to time, additional surgeries, additional therapies, whatever. And as a group, individuals with disabling conditions tend to retire earlier than individuals that are able bodied. The first impact is reduction of work life expectancy, and then there we have a whole other realm that is called the loss of competitive advantage. Even though individuals who have disabling conditions may be successful in finding employment, they're usually paid at lower rates. They do not receive promotions at the same rate as able-bodied individuals. They're not able to make transfers to other employment opportunities as easily as individuals who are able-bodied. They don't receive promotions. They don't rise to the same level of what we call the professional development if you will as individuals who are able-bodied. This is a whole phenomena called the loss of competitive advantage.

Q In conjunction with your analysis of Rachel's case, did you formulate an opinion, an opinion you can state with a reasonable degree of certainty in your profession as to what that loss of competitive advantage means for her?

A Yes, I did.

Q And can you tell the members of our jury what your opinion is?

A First of all, it's my opinion that her capacity to continue with her education will be unimpaired with the exception that she will have to be guided into courses of study and the pursuit of occupations and professions where the functional limitations that I've mentioned will not be significant factors essentially where she can use her intellectual gift. Having said that, essentially I think she's still capable of achieving the two year college degree, the undergraduate degree or even the Master's degree, but the work life expectancy in my opinion will be reduced by approximately ten to twenty percent, that is her work life expectancy will be ten to twenty percent less as a result of her disablement as contrasted with individuals like Rachel who are not impaired. The second area is loss of competitive advantage. It's my opinion there that her earnings over the course of her lifetime will be reduced by approximately fifteen, twenty percent compared to her able-bodied peers or compared to Rachel's potential had she not had this particular problem so we have reduced work life expectancy and the loss of competitive advantage.

Q Dr. Reagles, can you explain for our jury the basis for that opinion?

A The basis for the opinion is that research evidence that suggests, not only suggests, that confirms that individuals with disabling conditions have shorter work lives and individuals with disabling conditions do over the course of their lifetime earn significantly less than their able-bodies peers, and the more severe the disability, the greater impact on work life expectancy and competitive advantage.

Q In conjunction with your review and analysis of Rachel Hand's disabilities, did you also look at the issue of household work and her ability to perform that household work?

A Yes.

Q And first of all, what is the method that is used in your profession to make that type of assessment?

A Sure. The functional limitations that impair an individual's capacity to work in the competitive labor market also impact the individual's capacity to do work at home. I've developed a questionnaire that I use in my work, disabilities check list. It is a way in which individuals can indicate to me the kind of activity around the house that they have difficulty doing or can no longer do. Now, I used to ask people you tell me the

kinds of things you can't do around the house. Somebody pretty good, maybe ten, twelve, fourteen things. I knew there were lots more things that we did around the house than that. So this questionnaire has literally dozens of activities two pages, goes on and on, and it's broken into categories such as food cooking and clean up, inside housework, outside housework, vehicular care, child care and so on so I use this as a reference if you will for thinking about the things that Rachel will have difficulty doing as an adult, even has difficulty doing now, but that are classified as household work. Her interests in horses is commendable, but it's not part of household work. So that's the method that I went through in arriving at my opinion about the extent to which she will need assistance as an adult to perform these activities around the house.

Q And Dr. Reagles, what were your findings and what is your opinion with regards to the needs that she will have as far as future household work?

A It's my opinion that, I didn't make any presumption about whether she would get married, would have a husband to assist or anything like that 'cause I don't know what's going to happen in the future, but I did in looking at the nature of the things that she is unable to do and has difficulty doing, it's my opinion

that she will require approximately two hundred, two hundred fifty dollars per month to secure the services to do things around the house that she would have been able to perform independently herself had these incidents not occurred.

Q And Doctor, is that an opinion again that you can state with a reasonable degree of certainty in your profession?

A Yes.

Q And the basis for that opinion is what?

A Well, essentially the lack of correspondence between her functional capacity and the demands to do things around the house. Let me give you a couple of examples. If you put yourself in Rachel's situation, you're essentially functioning largely as a one armed person. She can use her right arm to assist in certain kinds of things. But how would you chop, dice, and mince foods. How would you make the beds. How would you hold pots and pans. How would you hold silverware to cut your meal, to cut your food, washing dishes, washing pots and pans, changing the bed linens. Can you imagine doing that with one arm. Ironing, she'll never knit or crochet. Putting up and taking down holiday decorations, repair of any kind that involves the use of two competent upper extremities. Raking and bagging

leaves, shoveling the driveway and walks. These are the kinds of things she's going to need assistance with.

Q Are those the kinds of things that you included in your evaluation and assessment that resulted in your conclusion that she will need between two hundred and two hundred fifty dollars per month of those services to assist her?

A Yes.

Q Doctor, what else did you do in conjunction with your evaluation and assessment of her disabilities?

A The last element was the development of a life care plan. That is the anticipated health related goods and services that Rachel will require over the course of her lifetime that are related to her medical conditions.

Q And did you in fact perform that analysis and develop a life care plan?

A Yes, I did.

Q I think earlier in your testimony this morning you explained that you prepared a draft of that plan and then submitted that to Dr. Laflair, had some discussions with Dr. Palomino about that, is that correct?

A That is correct, yes.

Q Can you tell the members of our jury about the categories that you included in your life care plan just the general categories to begin with?

A Yes, the first category, periodic evaluations, these would be the examinations by physicians and other health care providers to assess Rachel's status and progress towards any kind of treatment plan. If there was let's take scoliosis for example, the periodic examinations by Dr. Palomino, and then Dr. Palomino may make recommendations for what needed to be done about the scoliosis if anything. It could be Dr. Nath examining her for the purpose of assessing the status of the surgeries that have been performed, the function of the right upper extremity and that sort of thing, and of course Dr. Laflair being the primary care physician kind of monitoring all of this.

Q And did you in fact then do that assessment as to what those periodic evaluations are and include it in your assessment report?

A Yes, I did.

Q Doctor, you have prepared a report with regards to your findings, is that correct?

A That is correct.

Q And we've had that marked as an exhibit, I'll offer it in a few minutes, but I'd like to have you turn to that portion of it that are those periodic evaluations that you just referred to.

A Yes.

MR. MILLS: Your Honor, we've had marked as Plaintiff's Exhibit 61-A the actual chart itself of the doctor's report that has been provided to Mr. Brousseau. I'd like the opportunity to have Dr. Reagles explain that through the use of that exhibit to our jury.

MR. BROUSSEAU: I object to it going into evidence. I don't object to him referring to it.

THE COURT: I think we're just going to use it for demonstration purposes, right?

MR. MILLS: For right now.

THE COURT: Go ahead.

MR. MILLS: Doctor, I'm showing you this Exhibit 61-A, I need to zoom it back down a bit so we can see the top, have to zoom it back a little bit more to get the entire thing. Is that a copy of your periodic evaluations?

A Yes, it is.

Q I'm going to just move it down a bit so I can zoom in on the individual aspects of it. In terms of orthopedic evaluations, first of all what is it that you did by way of your analysis coming up with this chart of periodic evaluations, who did you contact in that regard and what information did you utilize in preparing your life care plan?

A If I could before I answer that, let's take a look at dimensions of this table, four columns on the far left-hand side, there's what we call type, this is also known as the elements of the life care plan. Then there's duration, that is for how long is it going to last, is this a one time event or is it going to be over the course of her life expectancy. Then the frequency, how often is this service provided and what is the unit cost. If I take the frequency and the unit cost, I can come up with the present annual cost. So in answer to your question with regards to the very first, Dr. Nath, I relied upon the medical records in which he indicated that he would need to see Rachel one more time in a year post the surgery that was done in actually a year from his most recent evaluation. One time, that cost, the cost of his evaluation would be two hundred and sixty dollars so that is a single expenditure estimated at two hundred sixty dollars for Dr. Nath's next and presumably final evaluation of Rachel.

MR. BROUSSEAU: Can we approach just a second, your Honor?

THE COURT: Yes.

(Off the record bench conversation)

PROCEEDINGS HELD AFTER BENCH CONVERSATION:

THE COURT: Are you all able to read the

document on the screen?

THE JURORS: Yes.

MR. MILLS: I'm sorry?

THE COURT: I just wanted to make sure the jury can read the document. They seem to be all right with it.

MR. MILLS: Doctor, the inquiry was that there was a fourth column on one of the iterations of your report that had to do with the basis for that determination of frequency?

A Yes.

Q Do you have that in the original?

A It's in my addendum. It's in the addendum, yes, it's not on the chart that we sent to you for essentially demonstration here today.

Q Okay, just so that there's no confusion about it. That last column which is included in your addendum actually explains the basis for your determinations of frequency, is that correct?

A Yes.

Q In this instance, orthopedic evaluations the first item on your periodic evaluations, what was the basis?

A Dr. Nath's medical records.

Q Okay, all right, the next item is orthopedic

evaluations, again this is talking about Dr. Palomino. What were your findings and what were your determinations as reflected in that report?

A Dr. Palomino's opinion is that through age twenty one Rachel would need to be seen once every two years, and that this, the evaluation when she saw Rachel would be one hundred fourteen dollars so present annual cost is a hundred fourteen dollars. Now, that means that in the year that she has the evaluation the cost is a hundred fourteen dollars, not a hundred fourteen dollars every year. Then from age twenty two to the life expectancy, Dr. Palomino's estimate was that she would need to see Rachel as needed but that would average approximately one time every five years, and in the year they saw Rachel in today's dollars would cost a hundred fourteen dollars.

Q Did you have a last column for that item as well?

A Yes, that's actually by meeting with Dr. Palomino on July 8th of 2011.

Q The third item, family physician evaluation, Dr. Laflair, what were your findings and what did you include in the periodic evaluations?

A Dr. Laflair indicated that she would need, there would be reason to see Rachel on an average of one additional visit per year, I say one additional because

all of us are going to go to our primary physician, upper respiratory infection, unusual rash on our arm or whatever, but there would be for reasons related to the Erb's palsy or scoliosis, that would be one additional visit per year. Dr. Laflair's office visits cost sixty seven dollars.

Q Is there a last column associated with that item?

A Again, the medical records of Dr. Laflair and her concurrence with the earlier life care plan.

Q Doctor, the next item under periodic evaluations is physical therapy evaluations, what were your findings there, and that's with regard to Christine Cecot, the therapist at Seaway Orthopedics, is that correct?

A Yes, keep in mind this is the evaluation, this is not the actual provision of physical therapy. This is where Rachel's progress would be assessed, treatment plans would be modified or therapy plans would be modified. It's anticipated Rachel will need the physical therapy over the course of her lifetime. The frequency of these evaluations would be one time every two months at eighty dollars so six of them in the year would cost four hundred eighty dollars.

Q Is there a last column associated with that item of the periodic evaluations?

A Yes, that is from the physical therapist, but

concurred by Dr. Laflair.

Q Doctor, the last item on the periodic evaluations is the occupational therapy evaluations, is that correct?

A Yes, this was essentially in similarity to the physical therapy evaluation, but the occupational therapist is not only concerned about fine motor movement and upper extremity function but occupational therapists are also useful, one of their areas of expertise is helping individuals become more independent around the house so there would be periodic evaluations related to that. The frequency is to age twenty one, one time per year at three hundred four dollars per evaluation because it includes the home visits and then from age twenty two to life expectancy one time every two to three years, again three hundred four dollars per evaluation.

MR. BROUSSEAU: Objection. Move to strike on lack of foundation.

THE COURT: Overruled. I do believe Dr. Laflair mentioned the fact that she'd need occupational therapy.

MR. MILLS: Dr. Reagles, is there a last column for that item as well?

A Yes, that is the, well, the home visits aspect of

that is based upon in my professional opinion, but Dr. Laflair's concurrence with that as well.

Q The last item under periodic evaluations is on the second page of that report, it's entitled radiological and related imaging, diagnostic studies, can you tell the members of our jury about your findings in that regard and include in that the basis for that determination?

A Yes, to age twenty one, it's anticipated that according to Dr. Palomino which is the basis for this as well as Dr. Laflair's concurrence with this, one x-ray of her right upper extremity and one x-ray of her spine per year. Those sets of x-rays anticipated cost is eight hundred sixteen dollars from age twenty two to live expectancy, one x-ray of her spine every five years to monitor the scoliosis, that x-ray would cost or that set of x-rays would cost approximately four hundred two dollars, and again the basis of that is Dr. Palomino.

Q All right, Doctor, in addition to the periodic evaluations, did you then consider the category of therapeutic modalities?

A Yes, I did.

Q Can you tell the members of our jury what that is when you say therapeutic modalities?

A Therapeutic modalities are essentially treatments

and interventions as well as therapies, medications, and so on.

Q I'm going to put on the screen what has been marked as Exhibit 61-B, that's as large as I can get it, Doctor, what is included in this portion of your report?

A The first element medications, this is a consideration made for antidepressant medication to assist Rachel with coping with depression secondary to her disablement especially through the transition presently through high school through college entering the labor force. This was essentially my recommendation to begin with, concurrence by Dr. Laflair that from the age of seventeen to thirty, that consideration for the provision of antidepressant medication be provided. The estimated cost is nearly two hundred sixty nine dollars for a month or three thousand two hundred sixty seven dollars.

MR. BROUSSEAU: Objection. Move to strike. Foundation.

THE COURT: Let me see counsel.

(Off the record bench conversation held)

PROCEEDINGS HELD AFTER BENCH CONVERSATION:

THE COURT: Objection is overruled.

MR. MILLS: Doctor, when you say that you originally made the recommendation for these

medications, can you tell the members of our jury about the basis for that recommendation.

A Yes, it's based upon my assessment presently I think Rachel is in considerable denial about the consequences of her medical condition and that as she actually leaves the very protective environment of the family structure in a school structure to go to college, enter the world of work that it is probable that we will see some emergence of some emotional issues. The two most common would be depression or anxiety.

MR. BROUSSEAU: Objection, your Honor. Goes beyond the scope of his expertise.

MR. MILLS: I can ask him some questions.

THE COURT: Better lay a foundation.

MR. MILLS: Doctor, the issue is your experience in making such assessments, can you tell these folks about your education, your work experience, and your participation in the field of your profession as it pertains to making these type of assessments.

Q Well, again my degree is in rehabilitation counseling psychology which includes the study of the adjustment issues of individuals who have disabling conditions. My work within the clinic with Dr. Dougherty, we dealt with a number of individuals who had disabling conditions almost in their entirety had some

degree of emotional reaction to what had happened to them. Most frequent reaction as I said was either depression or anxiety, and essentially that was the basis for my recommendation including what I had observed with regard to Rachel and discussions with her parents about Rachel's emotional reaction to what was going on and that and then that was also shared with Dr. Laflair who concurred with the recommendation of at least making that provision in the life care plan to the extent that if she needed that medication that the resources would be available for it.

Q And the recommendation that you made in this case, was that based upon an opinion you have based upon your education, your training, your work experience, your work with other people who have disabling conditions, and is it a recommendation made with a reasonable degree of certainty in your profession?

A It was, but it was again if Dr. Laflair had said that that was not reasonable, I would have taken it out, and so I think we have with her concurrence I felt comfortable in leaving it there.

Q Now, with regard to that, the medications, you said that the annual cost would be three thousand two hundred twenty seven dollars. Where did you get that information?

A Essentially what I did was to look at the cost of four separate antidepressant medications, Cymbalta, Effexor, Lexapro, and Zoloft. I found that the cost ranged from a low of a hundred thirty three dollars fifteen cents for Lexapro to a high of four hundred twenty eight dollars a month for Effexor, but the average was two hundred sixty eight dollars and eighty nine cents, and the annual cost based upon that monthly average was three thousand two hundred twenty six dollars and sixty four cents.

Q And using that information and that average of cost, is that done within a reasonable degree of certainty in your profession?

A Yes, without knowing what the antidepressant medication selected by whatever treating health care provider would be, I gave a range of values.

Q And in terms of making recommendations such as this, is that a method that is customarily used by those in your profession in preparing a life care plan such as this?

A Yes, it is.

Q Dr. Reagles, the second item, physical therapy, where does that information come from and why is it included in your life care plan?

A The second is the actual physical therapy. These

are the muscle strengthening, range of motion for the right upper extremity to prevent deconditioning, to address specific problems amenable to physical therapy as well as provides instructions for carrying out physical therapy activities at home. This is expected to be necessary for the course or her life expectancy, one to two times per week, and again this is based upon the medical records, the physical therapy records as well as the concurrence of Dr. Laflair.

Q And what are your findings in that regard?

A That the frequency of one to two times per week at a hundred thirty dollars per session essentially what I did is take one point five sessions per week and multiplied it by a hundred thirty and multiply that by fifty two, annual cost is ten thousand one hundred forty dollars.

Q The next item of your therapeutic modalities is what?

A Is an orthotic device, essentially it looks like a cast, it goes from the upper arm all the way down to the wrist, and the reason for that is the contracture of the elbow joint and that cast is fabricated locally, and it looks like a cast that's been cut in two and it has a hinge on one side and velcro snaps on the other. She wears that at night to prevent contractures of her right

elbow. That would be replaced one time every five to six years. The cost of that orthotic device was two hundred seventy dollars.

Q And the last item under therapeutic modalities was what?

A Vocational guidance. This is by a certified rehabilitation counselor. This is to assist Rachel through her developmental process of getting through high school, choosing courses of study in college, even choosing a college that may have some, have more, better accommodations than others, what we call the office for students with special needs. Now through her age twenty one, two times per month three hours per session, ninety two dollars per hour, annual cost of that was calculated to be six thousand six hundred twenty four dollars.

Q Now, in addition to the periodic evaluations and these therapeutic modalities, what other recommendations did you make with regard to Rachel's further care?

A Well, the next category is called adaptive equipment and assistive devices, you remember in my earlier testimony I talked about rehabilitation specialist in using assistive devices to try to minimize the consequences of disability or to enhance function where an individual's functional capacity is diminished by their medical condition or disablement.

Q How do you go about making those recommendations, Dr. Reagles, can you explain the methodology that's used for that?

A Sure. Going back to the functional limitations, as a rehabilitation specialist begins to look for devices that have been manufactured or developed that are for specific kinds of limitations or for individuals with specific kinds of functional consequences of their disabilities, for example a person who is unable to walk as a result of spinal cord injury may become dependent upon a wheelchair. If the spinal cord lesion is low enough, they can use their arms to propel that wheelchair. If it's high enough, they may need a powered wheelchair so here we have an individual where an individual has substantially diminished competence of their right upper extremity in many respects are like a person with one arm and so trying to find devices or apparatus that will enhance her capacity to accomplish that function and many of which will have corollaries in the world of work.

Q Doctor, in your report you've got the chart entitled adaptive equipment and assistive devices, is that correct?

A Yes.

Q I've marked that portion of your report Exhibit

61-C. Because of the width of it, I'm going to have to, can you tell the members of our jury about that chart itself that we're now looking at and why that information is included in your recommendations for Rachel's life care plan?

A Yes, the first are home exercise equipment that have been recommended by the physical therapist. First item is an elbow immobilizer. That is expected to last one time every two to three years, cost on the average thirty six dollars. So when it's replaced, it would cost thirty six dollars. Then a part of her at home exercise regiment is using her left arm to get her right arm to range of motion, and that includes a wall mounted pulley system. That would be replaced approximately one time every five years. When it's replaced, it would cost seventy two dollars.

Q Likewise personal hygiene items that you've listed in the life care plan, what are they and what is the basis for your recommendation?

A Well, again the fact that she is essentially a one arm one handed individual so they make a device that's a table top nail clipper so this is a device that attaches with a suction cup to a table top, and you can use one hand to trim the fingernails on the hand that still works. She needs it for, because she can't use

the one, the right hand. And then the same thing is again a suction mounted cleaning brush that one can use for a thorough cleaning when necessary. The cost of the table top nail clippers cost seventeen dollars, expected to last ten years, the brushes, one in the bathroom, one in the kitchen one every six years, they cost seventeen dollars each.

Q Did you find that those items were reasonably necessary to include in Rachel's life care plan?

A Yes, they would be typically found in a life care plan for someone in her condition who has one upper extremity that essentially doesn't function very well.

Q The next item in the adaptive equipment and assistive devices is kitchen equipment, is that correct?

A Yes, it is.

Q And Dr. Reagles, there are several items here, I'm not going to go through every one of them, but you have listed certain things, I'd like to just take some of them, for instance beverage carton holder, what is the basis for that recommendation that there be two such holders every four years, why is that?

A These would be for the half gallon rectangular shaped cartons, they slip in there so that she can essentially grasp a handle rather than grasping the carton itself. Primarily for safety and convenience.

Q Likewise with rolling food cutter, what is the reason for that?

A Difficulty cutting, the slicing motion with a knife. So the rolling cutter allows her to cut pizza, sandwiches, lots of other things.

Q And is that true for each of the items that you've contained or placed in the life care plan for Rachel?

A Yes, it is.

Q Are those items that are customarily found in life care plans for individuals with her disabilities?

A Yes.

Q Again without going through all of them, they continue, the kitchen equipment continues with slicing guide, cut resistant gloves, is that correct?

A Yes.

Q Why do you include cut resistant gloves?

A Simply because of the diminished function in her right upper extremity when she is holding objects supporting them with her impaired right hand we want to make sure she doesn't injure that hand because the diminished sensation that she has in it.

Q The next item or at least in the next category is aids for daily living. First is a spring assisted scissors?

A Yes.

Q Why is that included in Rachel's life care plan?

A It's hard to explain. The scissor itself does have a spring mechanism so that the handle opens up easier to allow her to use that scissor with greater safety, greater comfort, and essentially to use it longer.

Q And the price for those items as well as the kitchen equipment items, where did you get that information?

A They're each, my report has an appendix to it, and each of these tabs corresponds to the item that is in the life care plan so it's essentially how the cost of these items was determined.

Q In each case, what was the source or the resource you used to obtain those?

A These would be on line sources, for example let's take one here. The no slip pad is from a company called Dysum, and we also found approximately ten other sources of non slip pads including National Scrubs, Sears, Health Mobility, Home Health Super Store. The internet has made it possible to find resources that were very difficult to find even five, ten years ago. My office used to have enormous numbers of catalogues of these kinds of things, now we can go to the internet. It's

much more efficient, not only efficient for me, but efficient for families like the Hands who are looking for resources. Apple computer, IBM have within their websites they have resources for individuals with special needs so those are available to everyone.

Q And is that true of each of the items that you included in this life care plan?

A Yes.

Q You included card shuffler under aids for daily living, why is that included in Rachel's life care plan?

A Well, we presume that she might have the opportunity to play cards like the rest of us, and so to have an automatic card shuffler may seem superfluous. It's an illustration of the fact that even the most sedentary social or recreational activity represents a barrier to Rachel but can be overcome with the use of a device such as this.

Q In conjunction with that item and others in the life care plan, did you review them with Mr. and Mrs. Hand as well as to their inclusion in this life care plan?

A They had an opportunity to review this as well, that's correct.

Q The last category or next to last I guess is computer aided voice recognition and single handed

ergonomic keyboard, where did you get that information from, and why is that included?

A Now, we're getting into more technical kind of things, things that would really be beneficial to Rachel. The voice recognition software, you've probably seen the ads. You talk, it types. One of the most popular is one called drag and dictate, and essentially it does that. You talk and it will type, and the more you use it, the more accurate it becomes. Some of you may even have on your iPhone the drag and dictate. You can speak what you want to text message or say in your e-mail message, and it will do that. That is available at, an embryonic version of that is available for iPhones, but remember she has one competent upper extremity. For her to do keyboarding, to do compositions or reports, correspondence, whatever can be made much more efficient with this voice recognition software. This is the one item if I were to choose any one item in this whole life care plan other than medical services that would be beneficial, this would be the one I recommend most highly.

Q Is that true of single handed ergonomic keyboards as well?

A Correct.

Q Dr. Reagles, last item under adaptive devices,

personal reading device, why is that included in this life care plan?

A It's my opinion that especially as she gets into the upper years of high school and goes to college for essentially educational purposes, the use of an iPad or some similar device that is similar to that would be very beneficial to her. She could download textbooks. She could download notes, whatever, I think that the efficiency with which she can do that with one of these devices would make it very appealing to her.

Q And again, the cost of that item is what, where did you get that information?

A This actually came from Apple's website. The one that we selected cost eight hundred thirty five dollars.

Q And the recommendation was for one every four years, is that correct?

A Yes.

Q Why is that?

A It's essentially the, based upon the anticipated turn over of the technology that would occur in the future.

Q Doctor, the last element of your life care plan is mobility equipment, I'm sorry, is mobility equipment and personal care services, is that correct?

A Yes, that's correct.

Q Showing you what's marked as Exhibit 61-D, mobile equipment, where does that recommendation come from, what's the basis for that recommendation that that be included in the life care plan?

A Well, it's a recognition that many of the essential controls of the automobile are located on the right-hand side of the steering column. Talking to her mom, and she'd talk about how Rachel reaches through the steering wheel with the key to put it in the ignition to start the car, not a very safe thing. Quite easily that can be put over onto the other side. This would be transferring the right-handed essential controls to the left-hand side. I would anticipate that would be done over the course of her life expectancy at a frequency of one time every six years. That costs approximately thirteen hundred dollars to make those accommodations.

Q You list Autocrafting as the source for that information, what is Autocrafting?

A Autocrafting is a business that was in Syracuse that does this sort of mechanical transpositioning of these controls.

Q You list in-car communication software similar to what's known as Sync. Why is that part of the life care plan?

A Well, essentially it's primarily for safety.

Now, this is another name for you hear talk about blue tooth connections. This is similar to this. In fact, if it became an industry standard that there would be something comparable to blue tooth or Sync installed in all cars, then this need for this would be eliminated sometime in the future, but for the purposes of safety and operating the motor vehicle and while communicating, that is included in the life care plan.

Q At the present time there is no requirement that that be included in all vehicles?

A That is correct.

Q Dr. Reagles, the last item of your life care plan is personal care services, is that correct?

A It is, yes.

Q And first of all, you have two items there, personal care aide and laser hair removal?

A Yes.

Q With regards to the aide, why is that included and in your judgment necessary for this life care plan?

A Well, Rachel has relied upon other family members for doing these activities of daily living. She likes to have straight hair. So you want to get straight hair, use a flat iron, how do you apply deodorant to the armpit of the other side, in other words to the left side, how do you apply make-up. These are the issues

for someone like Rachel who has used her older sister Hillary. Now her older sister's gone. Now she's recruited her younger sister to help her out. When she goes away to college, she goes out on her own, she will need this kind of assistance from age eighteen when she leaves for college for the course of her life expectancy one to two hours a day of such assistance. The average cost is twenty one dollars thirty three or thirty two cents a day. The annual cost of that would be eleven thousand six hundred eighty six dollars.

Q And with regards to the laser hair removal, why is that included in Rachel's life care plan?

A Well, she for vanity reasons or hygiene reasons, shaving under arms, she's unable to shave under her left arm, and so therefore her mom has made arrangement to have laser hair removal so that that is not an issue on a day in day out basis, four to seven sessions per year estimated frequency when she has that done, cost eighty to a hundred dollars each or ninety dollars per session on the average and the mid point of that, five and a half of those will be four hundred ninety five dollars per year. Year two over the course of her lifetime maintenance sessions one to two sessions per year or a hundred thirty five dollars a year. You can see the initial cost is about five hundred dollars, but then it

goes down to about a hundred thirty five dollars per year.

Q Dr. Reagles, that's the conclusion of your life care plan, is that correct?

A That is correct, yes.

Q With regards to each and every one of those items, have they all been reviewed by you with Susan and/or Pat Hand as to their, getting their information and their opinions with regard to those items in the life care plan?

A Yes.

Q And with regard to the life care plan, each and every item in it, have they all been reviewed by Dr. Tracey Laflair and received her concurrence that they are reasonable and necessary to be included in the life care plan?

A I wasn't here to hear her testimony, but I understand that that is true.

Q And with regards to the life care plan, you've indicated that that was something you've made by way of recommendation but didn't finalize it until you had Dr. Laflair sign off on it, is that correct, especially the medically related elements?

A Life care plan, that's correct.

Q Now, the elements of this life care plan, are

they all included in there based upon a reasonable degree of certainty in your field in your profession that they should be and are necessary to be included in this life care plan?

A Yes.

Q Doctor, did you do anything further other than what we've already talked about in conjunction with your review, your analysis, your evaluation of the degree of disability, the future economic cost and effect on Rachel's life based upon her disabilities other than what we've already talked about?

A I did not.

Q Does this then conclude your involvement in this evaluation and assessment of Rachel Hand?

A It does.

MR. MILLS: Dr. Reagles, thank you very much. That's the end of my questions.

THE COURT: Let's take a short break, mid afternoon break, ladies and gentlemen, and give Mr. Brousseau an opportunity to prepare for cross. Remember all the rules. Don't discuss the case. See you back in a few minutes.

(Recess of the court)

PROCEEDINGS HELD AFTER RECESS IN THE COURTROOM WITH THE JURY PRESENT:

THE COURT: Mr. Brousseau?

MR. BROUSSEAU: Dr. Reagles, my name is Shawn Brousseau. I'm the attorney for Dr. Lizardi. I'm going to ask you some questions. Hopefully, I won't be too long. First of all, I just want to clear up exactly what your qualifications are. You're not a medical doctor, right?

A No, I'm not.

Q And you're not a psychiatrist?

A I'm not.

Q You're not a psychologist?

A I'm not a licensed psychologist, that's correct.

Q You can't prescribe medicine?

A No, I can't.

Q You can't prescribe therapy?

A No, I can't.

Q You're not certified with the State of New York?

A There is no certification by the State of New York for my profession.

Q You're not licensed or regulated in any way by the State of New York, right?

A That is correct.

Q You're not an economist?

A I'm not an economist.

Q You don't teach economics?

A I do not.

Q You're an Emeritus of Syracuse, but you haven't taught since 1996, right?

A I haven't been an active professor, but I've certainly taught since then.

Q And how much are you getting paid to review records for Mr. Mills? I think there was some testimony there was a three thousand dollar retainer?

A Starts with the three thousand dollar retainer. I bill against that at my hourly rate which is three hundred eighty dollars per hour.

Q How much do you bill to testify at court?

A Five thousand dollars.

Q And is that five thousand dollars a day or five thousand dollars for a certain amount of hours?

A It's for four hours or less.

Q And I think you said you just recently testified in Buffalo?

A Yes.

Q Do you have a place you're going to testify next week?

A Actually, I go back to Buffalo next week.

Q How much of your income do you derive from consulting for attorneys in cases like this and provide life care plans?

A Since I have essentially retired from the university, nearly one hundred percent of my income is derived from my business.

Q And with regard to Rachel Hand in particular, you've consulted for this lawsuit, you haven't given her any actual counseling now, have you?

A No, my role was to do an evaluation of the consequences of her disabilities.

Q And you evaluated her in your office, her parents came I think you said sometime in November of 2009?

A I believe it was.

Q And did you speak to Rachel?

A Yes.

Q How long did you interview Rachel for?

A Rachel and I probably only spent half an hour together I'm estimating but, you know, the parents and I spent the better part of more than an hour and well, as I mentioned in my direct testimony, Rachel took some tests.

Q Okay, and when's the last time you talked to Rachel?

A It probably was then. I think all of my communications about her has been through her parents.

Q Okay, and with regard to all the things that you've testified regarding physical therapy, regarding

future orthopedics, regarding diagnostic studies, the best people to comment on what she's going to need in the future are her doctors, the doctors who have already testified in court?

A Certainly.

Q If those doctors testified any differently than what you put in your report, you would defer to their professional opinion?

A Yes, I would.

Q With regard to Dr. Nath, the surgeon who's done five surgeries and corrected her Erb's palsy, you've never spoken to him?

A Actually, no.

Q He didn't return your letter?

A That's my recollection, yes.

Q And at that point at least from your life care plan with regard to Dr. Nath, it indicated that only one more follow-up visit was to be required in the life care plan, one in May of 2012?

A That was all that was determined probable. There may be something beyond that, but if there is, I'm not aware of it.

Q Dr. Nath hasn't told you he anticipates any future surgeries for her or anything?

A That is correct.

Q Now, do you know what Rachel's current occupational therapy treatment is?

A Say it again.

Q Do you know what Rachel's current occupational therapy treatment is?

A Let me take a look. She currently is not receiving any occupational therapy.

Q Now, I'm going to back up and talk about the residual earnings capacity, loss of, let me get the terminology you've been using. You've been using the term of limitation of her work life as a result of her...

A The reduction of her work life expectancy, yes.

Q Now, you testified that you got that information from Department of Labor and Statistics, right?

A In part, yes.

Q That's based on every range of disabilities, correct, the general disabled population?

A Yes, that is correct. Well, there is a distinction, there's several distinctions made between those individuals who are currently active in the labor market versus those who are not. Another source of information about work life expectancy breaks it down into mild, moderate, and severe disability. But as you can imagine there's such a broad range of disabling

conditions, there are not tables that relate to specific disabilities.

Q In your experience you're not able to say what somebody for example with a moderate Erb's palsy disability, what type of reduction in their earnings reduction in the future what that person will have specifically?

A Well, there isn't a table published by the Department of Labor or using Department of Commerce statistics for that specific disability. If the disablement would be classified as mild, moderate, or severe according to the Department of Commerce and the Bureau of the Census statistics, then there would be such work life expectancy that corresponds to that.

Q What was the diminishment of her work life expectancy?

A I estimate that it was in the range of ten to twenty percent.

Q And again, that's based off the general work life expectancy reduction in all disabled people as a group, is that correct?

A Well, it has to do with first of all the statistics are specific to gender so I used the table for females. Also used their tables that are related to level of education because level of education is so

important relative to work life expectancy so I used work life expectancies that are permanent to two year, four year, and Master's degree college graduates.

Q All right, but in each case though the general statistics as far as what their reduction in their work life expectancy is based on lumping of disabled people together in a group, a paraplegic with somebody with a more minor disability, correct?

A I think I've already explained that that there aren't tables specific to specific disabilities simply because of the enormous number of unique disabling conditions.

Q So her work life, it's possible her work life expectancy could exceed that of an average person?

A But it could also be lower, but I agree that that is a range, and since we don't know what's actually going to happen in the future, I would concede that it could be longer than that, but it could be shorter as well.

Q Now, you made some assumptions what she could do in the future and what her earning capacity could be by three different educational achievements, one would be an Associate's degree, the second would be a BA, and the third would be a Master's?

A Yes.

Q Is it your testimony she can't get a Ph.D., she cannot get an MBA, she cannot get a JD, she cannot get a doctorate?

A Actually, that's not my opinion, but I think the probability of that is low enough that I didn't express it as an opinion for these folks, correct.

Q Well, the probability when you came up with that, you were looking at what her potential was?

A Yes.

Q What her potential was before she had any kind of disability if she was born without an injury, correct?

A Correct.

Q You're saying with her being born without an injury, it's a remote possibility that she would get a Master's degree?

A Well, I didn't consider a Master's degree. I consider that an advanced degree.

Q She comes from a family as you said that's very educated and has valued education for generations, true?

A True.

Q Isn't it true that in most families each generation tends to be more educated, more professional, tends to get more degrees?

A That was true until recently. Now that phenomena, that upward mobility from intergenerational

from one generation to the next is not as pronounced as it once was.

Q Let's assume for the sake of argument then she were to with her limitations in her arm graduate from college, go to law school, become a lawyer. She would have exceeded all the educational expectations you had for her even if she had been born without a disability, correct?

A I would agree, yes.

Q There's a lot of jobs that she can do that earn good money that you can do with a reduction of use of your right arm, aren't there?

A Of course, and that's why I acknowledged as part of my opinion that she's still capable of going to school, getting a degree, even getting an advanced degree, but that she's going to be at a competitive disadvantage.

Q You're knocking right off the top ten or fifteen, you're saying ten to twenty percent less than she would have if she hadn't been injured?

A I said I think her work life expectancy, the probability would be reduced ten, twenty percent and that her competitive advantage would be a reduction of ten to fifteen percent.

Q So let's say her first job and say she gets an

Associate's degree, she goes to SUNY Canton, gets an Associate's degree, then her first job, everybody else is going to make twenty two thousand, and they're going to start her off at fifteen?

A No, I'm saying over the course of her lifetime, the probable consequences of her disablement, the fact she has an obvious disability that she is going to be competing with able-bodied individuals. The sum total of all of those adverse experiences will result in a life long diminution of her competitive advantage that I estimate to be in the range of ten to fifteen percent.

Q Certainly, if she was trying to go into a line of work that did require full use of both arms, I don't dispute she'd certainly be at a competitive disadvantage to anyone else, but aren't we assuming that she's going to go into a line of work that she can do in the first place?

A I'm assuming that even with that vocational counseling that's in the life care plan with the counseling that she would receive to pursue courses of study, to select occupations, professions where the limitations imposed by her disabilities are less pronounced, then she will still have this reduction of competitive advantage in the range of ten to fifteen percent.

Q And that's just based on studies that you've read regarding the general disabled population in America, correct?

A It is about individuals with different severities of disability, that is correct. Again, there's not a, there's not tables that are so specific as to a particular type or degree of Erb's palsy.

Q From the education that you've had and the experience and training that you articulated to Mr. Mills, I mean are you limited to simply looking up things in tables or can you use your professional experience to determine what this individual girl is going to be able to do in the future?

A Not at her young age. I think we have from the interest inventory that she has high interest in vocational activities that are out of doors, and she has a high artistic interest. The combination of those could be used to formulate some tentative hypothesis about what she might do as an adult, but because of her young age, it would be inappropriate, it would not be appropriate to select specific occupations or professions for her.

Q It would be speculative, correct?

A That would be speculative, absolutely.

Q But it is not speculative to be incredibly as

general as possible?

A I'm not, I don't think that that's what I've done. I think that what I've done is I've pinpointed with the greatest accuracy that I can the level of the education attainment that I believe are possible for her, and that based upon the experience of other individuals that she will experience diminution of her work life expectancy. She will have a diminution of her competitive advantage in the degree and extent that I've now testified.

Q Let's go back to the loss of competitive advantage, I mean you know, I'm sure you're aware of the Americans with Disabilities Act?

A Yes.

Q New York State Human Rights Law Section 296.

A I know it well.

Q It's illegal to discriminate against people based on their status as disabled persons, correct?

A That's the law.

Q Is it not the experience of people with disabilities that an employer is required to engage in an interactive process to provide reasonable accommodations to individuals to perform essential requirements of the job, is that correct?

A Actually, for people already employed, the

Americans with Disabilities Act has had a positive benefit. Accommodations have been made in their behalf, but for people who are not yet employed that have disabilities, the law has actually made it harder for them to be employed because employers rightly or wrongly have the perception that it's going to cost them money to hire somebody with a disabling condition so they find ways to avoid that by not hiring people with disabling conditions. I'm not saying that all employers do that or that's the experience of every person where there's disabilities, but the research shows that people who are not yet employed who have disabling conditions, the law has actually made it harder to obtain employment.

Q Again just so we're clear, if an employer did do that, didn't hire someone based on their disability, that would also be illegal, correct?

A Under the law it would be, but how do you prove it. Employers say I hired the person who was the best suited for the job.

Q You've been involved in cases where you've been retained to prove it, haven't you?

A Have...

Q Haven't you been involved in litigation to prove that someone wasn't hired that those types of things occurred?

A I've been involved in some discrimination issues, but typically they weren't involved, they didn't involve physical disabilities.

Q At this time Rachel's not been diagnosed with depression, right?

A Not to my knowledge, that's correct.

Q And in her life in her sixteen years, she's never been diagnosed with depression, correct?

A Not to my knowledge.

Q No one has prescribed any antidepressant medications for her up to this point, correct?

A Not to this point, correct.

Q Dr. Laflair, you weren't here for Dr. Laflair's testimony, were you?

A No, I was not.

Q Dr. Laflair said it's possible that she could have adjustment issues, but it's possible that she couldn't too, correct?

A Sure, but she doesn't have a chance to come back here and say now I'm twenty two years old, I've got depression, I need some resources for antidepressant medication. It's a one shot deal.

Q Now, she's now in the tenth grade, correct?

A She is, yes.

Q Do you know what her current GPA is?

A Not specifically, but I know it's quite good, B plus, A minus average.

Q There's been some testimony from her mother that her GPA is currently ninety three.

A That would be in the range that I've cited.

Q And the last time you spoke to Ms. Hand about what she wanted to do with her life or what she felt she was able to do or what she felt she had problems with was back in 2009?

A Yes.

Q Have you watched the day in the life video that was shown in this courtroom?

A Actually I haven't, no.

Q Have you actually had Rachel come to your office and say some of the activities from that check list that you listed off, have you observed her try to do those things or have you asked her to give you a list of things that she can't do?

A We did, and also I had pictures taken of her. Her mom took pictures of her showing the extent to which she could take her affected right upper extremity through various ranges of motions, different bodily plains, yes.

Q And those were the range of motions that I saw in your file?

A Yes, that's correct.

Q Let's go back now to the household services that you said she was going to need to cost two hundred to two hundred fifty dollars for her to have things done around the house?

A Yes.

Q I mean a lot of that, isn't it just guesswork, Dr. Reagles, if she grows up and regardless of her disability, she decides she wants to live in a condo, she doesn't have to mow the lawn?

A I would agree. As I said in direct, I didn't assume she was going to get married and have a husband that was going to assist her. I didn't make any of those assumptions if you will. Essentially that she would live in a house.

Q You've been making a lot of assumptions about what does occur. The average person in general society, I mean the average young lady does go on and get married, correct?

A On the average, yes.

Q Some of these things, I'm not going to go over everything that's in the health care plan or the life care plan, but some of the things on the adaptive equipment simply I don't understand. A rolling food cutter for pizza and sandwiches, she's going to need

that, and I want to ask you a question, doesn't everybody have a pizza cutter?

A I think the point is she doesn't have a choice, in other words she needs to have one of these. I don't have a rolling pizza cutter. I like to cut my pizza with a knife, but the point here is that the reason it's in there is because she doesn't have a choice.

Q And beverage carton holder, she can hold a beverage in her left hand, can't she?

A She can, but not as safely as she could with one of these devices.

Q But there's nothing wrong with her left hand?

A There's nothing wrong with her left hand. This is so she can safely do that.

Q So could I, right?

A Again, I think the point is that she doesn't have a choice. I think this one is perhaps not as clear as the rolling food cutter, but again based upon the kinds of limitations that she has was to have one of these devices would be to her benefit.

Q During direct, you were talking about she requires an iPad for school every four years?

A The typical replacement would be approximately one time every four years.

Q A lot of schools now are having programs where

the kids get some type of laptop or tablets for school, right?

A It is true, but I didn't make the assumption that that was true in this instance.

Q And again like her work, if she were go off to college, the college would be obligated to provide reasonable accommodations for her to allow her to be able to take the classes, attend class, and be able to participate?

A To the greatest extent possible, yes.

Q The vocational guidance that she's going to need, so far she hasn't had any, right?

A No, she's just at a point in time it would be my recommendation that that be initiated.

Q Are you saying she should have it with you?

A No.

Q That's going to add up to, vocational guidance adds up to a lot of money per year, correct?

A Depends on how you value it. If it assists her in making the right choice about her future, it could become very inexpensive.

Q Personal care services.

A Yes.

Q The personal care aide that you valued at eleven thousand six hundred eighty six dollars per year?

A Yes.

Q It's your testimony if she's sixteen now, she's about two years away from going to college?

A Yes.

Q Is it your testimony that she can't go away to college unless she's got somebody who attends to her one to two hours a day every day at a cost of eleven thousand six hundred eighty six dollars a year?

A I think it's in order to avoid her dependence upon other people. Since she's no longer in the family and dependent upon other people in the school that the provision of this service would be essential.

Q You have that from age eighteen to life expectancy?

A I do.

Q So when she's fifty years old, she's still going to need a personal care aide come to her house, come to her house?

A She'll still need assistance with these activities, yes.

Q You've done a total of four reports so far over the course of the years in this case, correct?

A I believe I have, yes.

Q And you had to make changes in those reports over the four years?

A As circumstances change, yes.

Q So this report isn't actually reliable even over the course of four years, is it?

A Say that again.

Q These reports aren't terribly accurate or reliable over the course of even four years, are they?

A Well, the circumstances have changed and adjustments have had to be made.

Q Certain things you thought she was going to need in 2009, now you know she doesn't need, correct?

A That is true, correct.

Q That can very easily happen two years from now, twenty years from now?

A Sure, this is our best estimate of what will be needed in the future. I don't have a crystal ball, the physicians don't have a crystal ball. It's the best estimate based upon the present circumstances.

Q I know you said that Rachel can't come back here and ask for more money, but if the jury awards everything in this life care plan, can I come back and say she's an attorney, Dr. Reagles, she didn't have any diminution of earning capacity, she didn't have any diminution of her work life expectancy?

MR. MILLS: Object to the form of that question.

THE COURT: Argumentative. I'll sustain it.

MR. BROUSSEAU: That's all I have.

MR. MILLS: I have no further questions. Thank you very much, Dr. Reagles.

DR. REAGLES: Thank you.

THE COURT: Thank you, Doctor. Have a safe trip home.

DR. REAGLES: Thank you. Nice to see you again.

THE COURT: I understand you've exhausted your witness list for the day?

MR. MILLS: I have, your Honor.

THE COURT: All right I'm going to let you go for the weekend. Ask you to be back Monday at eight thirty. Again, over the weekend it's really important to keep people at home at bay and tell them you'll talk about it when it's over. It looks very good we'll be giving you this case on Wednesday. In all likelihood, the testimony will finish sometime Tuesday. Then the attorneys and I have to work a little bit on instructions, and we'll have summations first thing Wednesday morning. So resist the temptation of Googling and twittering and

whatever else you do. Don't talk to people at home. Don't talk to any of the parties or their attorneys. We'll see you back Monday morning. Have a great weekend, and thank you for your attention all this week. I appreciate it.

--------End of Proceedings Held 6/22/12---------

Certified to be a true and accurate transcript of jury trial proceedings held in the afore-mentioned matter in St. Lawrence County Supreme Court on 6/22/12 to the best of my ability.

Dianne M. Hardy
Official Court Reporter