THE COURT OFFICER: Jury entering.

(The jury entered the courtroom.)

THE CLERK: Good morning jury. Please be seated.

THE COURT: Mr. Greenberg, call your next witness.

MR. GREENBERG: I call Dr. Charles Kincaid to the stand.

C H A R L E S K I N C A I D, having been called as a witness by and on behalf of the Plaintiff, having first been duly sworn, was examined and testified as follows:

THE CLERK: State your first and last name and spell it.

THE WITNESS: Charles Kincaid, K-I-N-C-A-I-D.

THE CLERK: Your address?

THE WITNESS: One University Plaza, Suite 510, Hackensack, New Jersey 07601.

THE COURT: You can inquire.

MR. GREENBERG: Thank you, your Honor.

DIRECT EXAMINATION

BY MR. GREENBERG:

Q Good morning, doctor.

A Good morning.

Q Could you share with us what you do for a living, what your title is?

A I'm a vocational rehabilitation counselor and evaluator and a life care planner.

Q What does a vocational rehabilitation counselor and life care planner do?

A As a vocational rehabilitation counselor and evaluator I evaluate individuals to determine their ability to work, to benefit from job re-training, to be placed on jobs and to earn money in their labor market. I assist in that process by doing counseling, testing, interviewing skills, resume writing skills.

Q What type of people and entities have used your services in the past?

A Individuals, families have used me. Both public and private agencies have used my services.

Q What kind of public agencies?

A Division of Vocational Rehabilitation in New Jersey have used my services. Public school systems for students who need this type of evaluation have used my services as well.

Q Could you please take a few moments and just share with us your educational background.

A I have a Bachelors of Arts in psychology, University of Wisconsin, Milwaukee. Certificate of rehabilitation management from DePaul's. A Master's degree in criminal justice administration, University of Wisconsin, Milwaukee. Ph.D. in rehabilitation counseling from Syracuse University. I have a certificate in life care planning from Capital University Law School.

Q How long have you been practicing in your area of

professionalism as a vocational rehabilitative counselor and evaluator?

A 35 years plus right now.

Q Do you presently hold any licenses or certificates in your area of practice?

A Yes. I'm a certified rehabilitation counselor. I am also certified by the American Board of vocational experts. I'm a certified life care planner. I'm a certified assistive technology professional.

Q Are you a member of any professional organizations in your area of professional practice?

A Yes. I'm a member of the National Rehabilitation Association, International Association of Rehabilitative Professionals, International Academy of Life Care Planners, American Board of Vocational Experts, International Association of Rehabilitative Professionals, division for life care planners.

Q Have you ever testified in a court of law before?

A Yes, I have.

Q About how many times?

A I have testified approximately 12 to 15 times a year over the last ten years.

Q Have you ever testified in a court of law at my request?

A Yes, I have.

Q When was that?
A On one occasion, I think must be ten years ago.
Q I think so.
Now, have you instructed others in your field of vocational rehabilitative counseling?
A Yes. When I was at Syracuse University I adjunct professor there. I taught, from 1993 to 1997, master's level students in the principles and practices of rehabilitation counseling, job development, job placement, assistive technology. Most recently I taught at William Pattern University, from 2002 to 2005, a course in assistive technology.
Q Did I hear you conducted a vocational evaluation of Marshall Starkman?
A Yes, you did.
Q Is Marshall Starkman, in your area of professional practice, your client?
A Yes. He would be considered a client.
Q Do you also call him an evaluee?
A That is the terminology that we use in my field.
Q When did you first perform the evaluation of Marshall Starkman?
A On February 10, 2012.
Q What did your evaluation consist of?
A First I reviewed medical records that have been provided to me by your office, as well as deposition

transcripts, and earning records from his employer, T-Mobile.

Q Let me take you through this for a moment, please. Did you review the records of Nassau University Medical Center?

A Yes, I did.

Q Did you review records from the South Nassau Communities Hospital?

A Yes, I did.

Q From the North Shore University Hospital?

A Yes.

Q From the orthopedic associate group of Orlin & Cohen?

A Yes.

Q From Dr. Douglas Goldberg, cardiologist?

A Yes.

Q From Urology Associates where Gary Goldberg is associated?

A That's correct, I did.

Q From Neurologic Specialties of Long Island?

A Yes.

Q From North Shore Pulmonary Associates?

A Yes.

Q From North Shore Partners in Pain Management?

A Yes.

Q For Dr. Fred Krellenstein?

A Yes, I did.

Q For Bellray Dermatology PC's records?

A Yes.

Q For the ambulance report from Nassau County Police Department?

A Yes.

Q Now did you, as part of your routine practice, take a history from Marshall Starkman, to perform your functions as a vocational rehabilitation evaluator?

A Yes. That is standard practice. I took a history from him regarding his background.

Q Where did that take place?

A That took place at his home.

Q How long did that history and interview take on the initial occasion?

A Approximately two hours.

Q Since that time have you had other opportunities, either in person or by phone, to continue taking a history or interviewing Marshall Starkman?

A Yes, I have. By telephone I have contacted either he or his wife on numerous occasions.

Q What was your goal in interviewing and speaking?

A In interviewing my goal was to gain knowledge about his background, how his medical condition was affecting him, how he was functioning, his current life status, to get a background in and where he was at this point in time.

Q Did you obtain his educational background?

A Yes, I did.

Q Can you share what you learned?

A He earned a high school diploma at Baldwin High School in 1985. Then he obtained a Bachelors of Science degree in finance and hotel management at New York University in 1989. And then he earned a Master's degree in business administration in 2004 at Hofstra University in Long Island.

In the course of his work he also studied for and passed Series 7 and Series 63 licenses, which allowed him to work in the finance industry.

Q As a rehabilitative evaluator, is that history of his education of any importance to you?

A Oh, yes, it's important. It tells me about the person's ability to be trained in types of jobs they can work in. With Mr. Starkman his Master's degree indicated he could be trained for skilled work.

It also tells me about what kinds of jobs the person might be qualified for. In his case it was business, finance management of market-type jobs. I look at how current the education is. The more current, the more likely the person has learning skills that they could apply to new subjects, if they needed to. So I look at those range of --

Q In addition to the history, did you do anything else to start your evaluation? In looking at the records, did you look at anything else?

A I evaluated his employment history using standard references, the U.S. Department of Labor dictionary of occupational titles, and the McCroskey Transferable Skills Analysis. That is a job-person matching program that allows me to match his employment experiences to the demands of jobs in his labor market to see where the two interact, what types of employment he may be qualified for.

MR. DEMERS: Your Honor, I can't hear the witness.

Q If you can talk a little bit louder, please?

A Okay. I will try to raise my voice.

THE COURT: Do you want the last question and answer read back?

MR. DEMERS: Just the last part of it. The voice failed and I lost it.

(The requested testimony was read back.)

Q Try to talk not as loud as me but maybe halfway there. How is that?

A I will try to do that.

Q What was Mr. Starkman's employment history?

A Mr. Starkman had been employed as a manager. Over the course of his employment history he first started with Smith Barney as a customer service manager. He did that for ten years, from 1986 to 1996.

Then he moved to Verizon, where he was a quality assurance manager for another ten years, from 1996 to 2006,

where he managed a call center. His job at the time that he was injured was with T-Mobile. He was a manager of a retail store where he was managing employees, customers service at the store.

Q Doctor, after the McCroskey Transferable Skills test program, and after you gathered the information about his employment, what did you do next?

A Then I would compare his work history to the demands of the jobs in this labor market. I would develop a pre-injury vocational profile, that would be based on the jobs that he had done in his work history. By doing that I can compare what his abilities and aptitudes were to the demands of jobs in the labor market to see where the two interact, to find out how employable he was, how many types of jobs he would be trainable for.

Q Did you actually conduct any tests?

A Yes, I did. I conducted two tests with Mr. Starkman. The first was called the Wonderlic Personnel Test, and the second was the Back Anxiety Inventory.

Q Could you describe for us what those tests measure?

A The Wonderlic Personnel explores problem solving, intelligence, thinking ability. The back anxiety inventory, as it's title signifies, measures the person's level of anxiety at that point in time.

Q What did those test results reveal to you?

A With Mr. Starkman, with the Wonderlic Personnel Test his score was about the 62 percentile, equivalent to an IQ of

108, which was lower than would have been expected. That is like middle average for the population. Based on his work that he had performed, his Master's degree, he should have scored in the above average range. It was lower then would have been expected.

With the Back Anxiety Inventory he scored in the severe range, indicating he was having severe anxiety symptoms occurring.

Q Doctor, what did you next do with reference to your evaluation?

A I used the medical records that I had been provided to determine his level of functional limitations resulting from his medical condition. And I just adjusted his pre-injury vocational profile, based on those limitations, to develop a post-injury vocational profile. I compared both the pre and post-injury vocational profiles to the demands of the jobs in this local labor market.

Q In doing that did you -- when you talk about the pre-injury profile and the post-injury profile, did you look at what his abilities, his physical abilities were and are?

A Yes, I did. Based on the medical records that I reviewed, there were indicated limitations for physical strength, lifting, carrying, pushing, pulling, climbing, balancing, stooping, kneeling, walking, standing, as well as for manual coordination; also limitations based on his low test

results, anxiety psychological condition for his general educational development, reasoning, language.

Q Did you look at the medications that Marshall Starkman was prescribed to take, the changes in those medications?

A Yes, I did.

Q How, if at all, did that come into account in your evaluation?

A Well, medications can have, do have an effect on the person's ability to concentrate, to think, to drive. So I look at the types of medications and the impact those might have on their ability to function.

Q Could you focus on the driving for a second.

A Yes. In a person's, for instance if the medication causes them to be drowsy, less attentive, or if they're narcotic medications, they may have an impact on the person's ability to drive.

Q In your area of professionalism do you speak to your clients about the advisability of driving when they are taking narcotic-based medications?

A Yes. I ask them about their ability to drive, they're physical condition, and also how the medications that they are taking affect their ability to drive. If they're refraining or trying to drive, what may be interfering with their ability to drive? I definitely research that with the person, because if you can't drive it really impacts your ability to travel to the

workplace to be available for work. It's a key issue.

Q Did you take into consideration the pain that Marshall Starkman is in, in doing your evaluation?

A Yes, I did. The pain can definitely affect an individual's ability both to perform physical activities and to perform consistently in a workplace. If a person is in severe pain, he may not be able to show up for work or to work a full day. They may need to take frequent breaks during the workday because of the pain. So the pain can definitely be an issue in terms of what type of work and the frequency of the work a person could do.

Q Could you please explain to us, in your area of professional practice, what is sedentary duty?

A Sedentary duty means a person, basically those are seated type jobs. A person has to be able to lift up to ten pounds occasionally. If you think of jobs that require you to sit for most of the day that would be sedentary-type work.

Q Did you form a conclusion, based upon a reasonable degree of certainty in your area of professional practice, whether Marshall Starkman should be advised or not advised to drive?

A Based on the medical records that I reviewed, that he would be advised not to drive.

Q Why is that?

A Because of the medications that he is taking, the pain

levels that he described to me, the lack of range of motion in his neck, which is restricted, my understanding is to 40 percent.

Q Now, what did you do next?

A Then I did what is called a transferable skills analysis. I charted the pre-injury post-injury vocational profiles to see how many jobs matched his profile. Looking at his pre-injury profile, before he was injured, he had transferable skills for approximately 241 jobs in the New York State labor market. That is about 19 percent of the most frequently hired jobs in the labor market.

Post-injury, with restrictions for his physical condition, for all of those physical activities, he had no job matches. There was no transferability of skills post-injury, based on his medical condition and functional limitations.

Q Is that your conclusion, based upon a reasonable degree of certainty in your area of professional practice?

A Yes, it is. That he is not employable based on his limitations.

Q Doctor, what are vocational rehabilitation services?

A They are public services in the State of New York. It's called ACCESS, adult career and continuing education services. So if an individual is hurt and injured in some way and can't return to their former work, ACCESS works with that individual, if they can, to assist them to be retrained, to be

placed in a job, to help them with resources to get back to the world of work as best they can.

Q Would Mr. Starkman be eligible, in your professional opinion, based upon a reasonable degree of certainty in your area of practice, for vocational rehabilitation services at this time?

A No, not unless he was released by his treating physicians to return to work. If they released him then he would be a candidate, and ACCESS would work with him. But he has to have a release from his doctors before they would start those services.

Q Have you formulated a conclusion, based upon a reasonable degree of certainty in your area of professional practice, regarding Marshall Starkman's vocational options now?

A Yes, I have. At this point he is not employable. He is involved in treatment, but until he is released by his physicians he is not employable, and has no further earning capacity until his medical condition improves, if it does.

Q Let's say there came a time that he is cleared. What would happen then?

A He would be a candidate for vocational rehabilitation services. They would work with him to try to help him return to work to his fullest capacity. In whatever he is capable of doing physically, mentally, in the workplace they would try to assist him to return to that level.

Q Doctor, have you formed a conclusion, based upon a reasonable degree of medical certainty in your area of professional practice, as to what Mr. Starkman's pre-injury earning capacity was?

A Yes. After reviewing his records, he had a base salary of $75,000 a year at T-Mobil. In 2009 he earned $78,715. That comprised his pre-injury earning capacity prior to his injury.

Q What is that a week?

A That is about $1442 gross per week at $75,000 a year.

Q Does that represent Mr. Starkman's pre-injury gross wage earning power?

A Yes, it does.

Q What is Mr. Starkman's post-injury earning capacity? And please answer this question only if you can tell us with a reasonable degree of certainty in your area of professional practice.

A His post-injury earning capacity is zero at this point. He's not employable, so he has no earning capacity.

Q That is your opinion, based upon a reasonable degree of certainty in your area of practice, sir?

A That's correct.

Q In your area or field of expertise, have you ever heard the term employability, placability, sustainability?

A Those are terms that are commonly used in my field of specialty.

Q Would you take them one at a time and discuss them with us, please.

A Employability means the person has ability, skills, aptitude that match or exceed the demands of jobs in the labor market. So if there are jobs where they have the appropriate skills, abilities, and aptitude they would be considered employable.

Placability means that there are employers and job opportunities in the labor market for individuals who, based on the person's aptitude, abilities, and skills there are available jobs for them.

Then in terms of sustainability, that means that a person has the ability to consistently perform work tasks and duties at a competitive level. So those are the three terms.

Q Please keep your voice up.

A Okay.

Q Could you now take those concepts, the concepts of employability, placability and sustainability and apply that, if you can, to Marshall Starkman?

A With Marshall Starkman he's not employable because he doesn't have ability, skills, aptitude that match the demands of the jobs in this labor market. Therefore, he wouldn't be placeable. He wouldn't be able to meet the demands of jobs that are available to him. He wouldn't be able to work consistently because of his medical condition, pain levels, and sustained

work activity if he was hired.

Q Rather than repeat it, may I just say, was your last answer given to us based upon a reasonable degree of certainty in your area of professional practice?

A Yes, it is.

Q Doctor, you mentioned when you first sat in that seat that you are a life care planner. Please tell us what is a life care planner?

A A life care planner is an individual who helps individuals, families, and prepares a life care plan, which is a concise document that contains, it's based on public standards of practice. It's also based on data analysis and research, and provides a concise plan of a person's medical needs and the associated costs. And that is prepared in a document that is used by individuals, families, or in matters like this.

Q As a life care planner what do you do day-to-day?

A I would evaluate individuals for their medical needs, their functioning needs in the community. And I would also research costs associated with those needs, and put them into a realistic plan that can be used to provide for those needs over the course of the person's life span.

Q We will talk more about this shortly.

Did you do those things that you generally do in your practice as a life care planner -- as a professional life care planner, did you do those things for Marshall Starkman?

A Yes, I did.
Q Over what period of time have you been doing those things?
A I've been doing that for approximately the last 12 years.
Q Regarding Marshall Starkman?
A I also did it for him.
Q Over what period for him?
A I met with him on February 10th of 2012, and I've been reviewing his records, adjusting the plan up until today.
Q What do you mean adjusting the plan?
A Well, part of a plan, a life care plan is a dynamic document. A person's needs may change. They may need new medications, surgeries. It's a document that can be adjusted based on the person's change in medical status.
Q Do you hold any licenses or certificates that are customarily held by professional life care planners like yourself?
A Yes. I am a certified life care planner. I have a certificate in life care planning from Capital University Law School, which is the only American board association, accredited life care planning program in the U.S.
Q Did you pass?
A I did.
Q Have you received specific training in the field of

life care planning?

A Yes. Through the certificate program I received training that prepared me for doing this type of work.

Q Are you a member of any professional organizations related to life care planning?

A Both the International Academy of Life Care Planners, the National Association of Rehabilitation Providers, life care planning division.

Q In preparing these life care plans, for 12 years now?

A Yes.

Q How many life care plans have you prepared over the last 12 years, approximately?

A Approximately 120 to 150, in that range.

Q Have you ever testified in court with regard to life care plans before?

A Yes, I have.

Q In your testimony, in general, who do you testify at the request of, people that are being sued? People suing?

A Both actually. I testify on behalf of both parties.

Q I want to turn your attention again directly to Marshall Starkman. Did you, in fact, prepare a life care plan for Marshall Starkman?

A Yes, I did.

Q Just, again, what were the dates you did that?

A I met with him on February 10, 2012. The actual date

it was prepared was on May 9, 2012.

Q Have you made amendments along the way?

A Yes, I have.

Q Why?

A Because of changes in his medical condition.

Q What research did you do to prepare?

A Well, to prepare I researched his medical records regarding his both physical and psychological condition. I also contacted his treating physicians to obtain feedback about his current and future medical needs.

Q In your practice, in your professional practice, is that what is customarily done to get reliable information, you contact the treaters?

A Yes, it is. It's standard practice.

Q Standard care?

A Yes.

Q What did you do next?

A Then I researched the cost for the items that had been identified in the medical records through his physicians.

Q Incidentally, did you analyze Mr. Starkman's needs as part of your life care plan?

A Yes, I did. In meeting with him and reviewing his records, and contacting his doctors to get input, I obtained information about his medical needs, as well as his needs for living in his current living situation, so a combination of

both. I obtained information for his psychological and medical needs.

Q In addition to speaking to his treating physicians, did you also examine all of their records?

A Yes, I did. All the records that you mentioned in the beginning, I examined all of those records, as well as meeting with Mr. Starkman, and contacting them to obtain follow-up information.

Q Did you then develop a life care plan of recommendations for Mr. Starkman?

A Yes, I did.

Q Could you please take your time and share with us, first generally, what those recommendations consist of?

A Those recommendations consist of medical care from providers, including orthopedic surgeon, neurologist, urologist, cardiologist, physiatrist, physical therapist, were some of the medical providers that would require evaluations as well as follow-ups.

I also included diagnostic testing, MRIs, x-rays, CAT scans, included medications that he will need in the future. I included therapies, including physical therapy, psychological counseling. I included aids for independent living, to assist him in his house. I included home maintenance, home health care, transportation services that he would need.

I think I've covered everything. Also some supplies

that he was using related to his condition; future hospitalizations and procedures as well.

Q What did you do next?

A Then I researched the cost associated with those medical services. I did that by relying on my knowledge of medical costs in the area, as well as confirming that by researching costs from at least three sources for each of the items, for physician services, for medications, for any equipment, for therapies, to arrive at a cost for those services in the future.

Q When you say you arrived at those costs, what are you looking at? Do you look at just like okay, this is the top cost, this is the bottom cost? Tell us how you do it.

A I average the costs. I get three costs from various providers or cost centers. I average those for each item. My plan contains an average cost in that person's local area.

Q Do you consider it's appropriate at all such things as generic medication, medicines, things on sale?

A I look for a range of costs, high to low. But I do the average as being most representative of what the cost would be to the individual over their lifetime.

Q Did you follow the standards and accepted practices of life care planning professionals, like yourself, that they follow?

A Yes, I did.

Q Did you prepare a series of tables summarizing your recommendations?

A Yes, I did.

MR. GREENBERG: With Court's permission, may we please put in front of Dr. Kincaid Exhibit 31 marked for identification purposes, your Honor?

THE COURT: When you say put in front of him?

MR. GREENBERG: Have the court officer show it to the witness.

THE COURT: Go ahead.

(A document was handed.)

Q Could you identify for us, please, what is Exhibit 31 marked for identification?

A These are life care plan tables that I prepared on behalf of Mr. Starkman, which contain all of the medical items, services equipment, and the associated costs, both in current cost per item as well as the annual cost, and then a total lifetime cost.

Q Does that document, Exhibit 31 for identification, is that the work product that you produced as a result of all that you have done for Marshall Starkman, that you have told us about this morning?

A Yes, that's correct. That is my work product.

Q Was that prepared in the regular course of your business as a life care planning professional?

A Yes. This is common practice. I prepare these in every life care plan that I create.

Q Did you maintain that document in the regular part of your practice as a professional life care planner?

A Yes, I did.

Q If anything was on the computer, did you take it right off the computer and bring it to us?

A It would have been on my computer, and I printed it out, yes.

Q You checked it for accuracy?

A Yes.

Q Find it to be accurate?

A Yes, it is.

MR. GREENBERG: I offer it into evidence, Exhibit 31 for identification at this time, your Honor.

MR. DEMERS: No objection, your Honor.

THE COURT: It's in evidence.

(Received and marked Plaintiff's Exhibit 31 in evidence.)

Q Will Exhibit 31 in evidence, the life care plan that you created for Marshall Starkman, aid you in effectively, as quickly as possible, being able to explain to us what your plan is?

A Yes. It would be very helpful to be able to use it to explain the plan and show it.

MR. GREENBERG: With the Court's permission, Judge, we have a blowup, a digital blowup. May we use that and have the witness step down to speak with the jury?

THE COURT: Is it identical to the exhibit that is in evidence?

MR. GREENBERG: It is.

THE COURT: Do you have any objection?

MR. DEMERS: No objection, your Honor.

THE COURT: Okay.

Q Doctor, would you please step down.

A Sure.

THE COURT: So, doctor, when you testify you are best off standing on the far end of that screen so your back is not towards my court reporter, otherwise she won't hear you. That is tricky. And at the same time don't block the last juror when you lien over.

THE WITNESS: Okay. I will start with this first chart. It shows the total lifetime annual cost for Marshall Starkman in a breakout of all of those categories that I discussed. It also shows the age period when I did his plan. I looked at his life expectancy from standard tables from the US Census Bureau. Mr. Starkman was 45.3 when I did the report. His life plan was to 78.9 years.

The annual cost, as you can see the total for all of those items is $106,585.66 per year. It's composed of

physician evaluations, follow-up care, $4,096. Diagnostic testing, $6,327.89. Therapeutic evaluations, physical therapy, psychology, $125.

Therapies will be $28,052.

Medications $13,142.20.

Future hospitalizations, $635 per year.

And then aids for independence, $22,62. Plus a small figure of $54.75.

Home health aide, that would be $32,732 a year. Home maintenance, which would be home cleaner, $7,020. Transportation to and from all of his therapies would be $12,076 a year.

And then case management, someone to assist in managing his care, making sure that he is getting the proper care changes that are needed, that would be $1800 a year.

Q An annual cost?

A An annual cost of $106,585.66.

MR. GREENBERG: Please put up page two of Dr. Kincaid's report please, Mary.

(A chart is displayed.)

Q What is that?

A Mr. Starkman also has one-time costs that, they're not annualized. They will just occur once. There are physician evaluations and follow-ups. And the cost of those are $4,768. One-time diagnostic testing, $2,370.66. Therapeutic

evaluations, one time, $616.66. Therapies $3,187.50. Hospitalization procedures, future surgeries, $263,134,14. Transportation $5,328.

MR. GREENBERG: Mary, could you please put up the third page.

(Page is displayed.)

Q Please continue.

A This is this lifetime projected cost for Marshall Starkman. So taking all of his annual costs, his life expectancy was 33.6 years. And then multiplying that across his life expectancy, to arrive at an annual cost for him over his lifetime, total lifetime cost, plus adding in all the one-time costs over here.

What you have is a total for his taking all of these various categories over his life span, and the annual cost multiplied by his total lifetime, $3,581,278.17. The one-time costs are totalled to $279,405.28. So that the grand total was $3,860,683.45.

Q These numbers are based on published data for his lifetime?

MR. DEMERS: Objection.

THE COURT: Sustained.

Q How did you determine the average that you would use?

A I used the U.S. Census Bureau. They had life expectancy data which is used by life care planners as standard

practice to determine, based on his ethnicity and his gender, what his life expectancy would be, based on the time that I interviewed him when he was 45.

Q Marshall Starkman, I want you to consider also that his grandmother is 98 year's old and alive. His grandfather died at 87. His father is alive at 85. His mom is 73.

My question is, if Marshall Starkman lives beyond 78.9 years, have you provided one penny for his care after that?

A No, I have not. I don't know. It only goes up to 78.9 years.

Q Before we go to the next pages, can you break this down for us. If the jury decides to calculate that Mr. Starkman would live less than the 78.9 years, or more than the 78.9 years, could they use your analysis chart? Would that be helpful, the $106.585.66 number?

A Yes.

MR. DEMERS: Objection.

THE COURT: Sustained.

Q How could your charts help the jury if they determine that 78.9 years is too long, they think he won't live that long?

MR. DEMERS: Objection.

THE COURT: Sustained.

Q Could you tell us how you can use the first chart for different age groups?

A That gives you an annual cost. So depending on what

you feel his life expectancy is, you can multiply by the annual figure. That would give you the total lifetime cost for that individual, minus inflation. It will give you a good estimate of what the cost would be for that individual.

MR. GREENBERG: Mary, can we go to the next page, please.

(The chart is displayed.)

THE WITNESS: This gives you more detail. This is about physician evaluations that he will require over his lifetime. So this gives you the type of evaluation. So, for instance, neurosurgeon, orthopedic surgeon, pain management specialist, neurologist and psychiatrist. And it tells you if they're going to be annual. It tells you the frequency. This neurosurgeon is a one-time lifetime. Same with pain management specialist and psychiatrist. The others are recurring yearly.

You have the cost of the visit. You also have the annual cost of those visits. So you have a combination of the annual costs, $725, and one-time cost of $1,358.32. It breaks down the physician evaluations for you.

MR. GREENBERG: Mary, can we go to page five.

(A chart is displayed.)

Q Please tell us what page five is.

A This is physician follow-ups. These would be recurrent visits for monitoring his care over his lifetime. So, for

instance, there is orthopedic surgeon, his urologist, cardiologist, his pulmonologist, and a pain management specialist. You have to cover the cost of each visit, which varies by specialty, ranges from a low of $125 to a high of $160 per visit. And then it gives you the frequency that is recommended for those visits by his treating physicians. And then you have an annual cost for each of those items. And the annual cost for all of those physician follow-ups is $3,371.60. There is also a one-time cost for a pulmonologist, and also for orthopedist as well. So that is $3,410.

Q These pages we are doing now, is this the breakdown of how you got to the lifetime number?

A That's right. This is the individual detail of what is involved, all the specialists, the costs, the length of time.

MR. GREENBERG: Can we go to page 6, Mary. Please put that on the board for us.

(A chart is displayed.)

Q Please continue, doctor.

A These are diagnostic tests that Mr. Starkman is going to need over the course of his lifetime. So it involves both things like x-rays, MRIs, cardiology, EKG, lab testing. That's blood tests. They're three different types of lab tests that would be required. Pulmonology testing of two different types. It gives you the cost for each of those, as well as the frequency, and then the total costs. Again, it's multiplying

one by the other. And you have an annual cost for those tests of $6,27.79, one-time cost of $2,370.66.

MR. GREENBERG: Can we go to the next page, Mary. Go to page seven, please.

(A chart is displayed.)

Q What is that?

A They are the therapeutic evaluations. They are different from physician evaluations. So for physical therapy he would need an annual evaluation to perform the appropriate type of physical therapy for him. That is a cost of $125.

There's psychological evaluation, two times lifetime, to determine his need for therapy and type of therapy. Then a one-time driving evaluation to see if he becomes able to drive in the future. I know he might do that.

MR. GREENBERG: May we go to the next page, Mary.

(A chart is displayed).

THE WITNESS: These are the therapies he will require. Physical therapy would be three times a week to life expectancy. Cost is $70 per session. You can see the annual cost is $10,080. Massage therapy $99.40 twice weekly. Gym membership, which would be annual at $150 per month. Psychological counseling once weekly at $137.50 per session. And marriage counseling 25 sessions, for a one-time cost of $3,187. Then we have the annual cost for all of these therapies $28,052.40, plus that one-time cost

for marriage counseling.

MR. GREENBERG: Mary, would you blowup page 9, please.

(A chart is displayed.)

Q Please continue, doctor.

A These were his medications at the time that I prepared my report. He was taking nine different medications.

Q Did you amend that report?

A Yes, I did.

Q Would it be expedient if we skipped that and go to the amended one?

A I think so. That should be at the end.

Q These were medications that he was taking at one time and then changed?

A Yes.

Q This is page ten. Please review that.

A These were current medications.

Q Page 9?

A Current medications at the end of 2013. So his medications had changed. So these would be the frequency that he takes the medications, the cost per pill, and then the annual cost for each of those. As you can see it ranges from $12,973. So that would be his cost today for his medications.

Q The ones that he is prescribed to take right now?

A Right now, yes.

MR. GREENBERG: Please, Mary, display the next page.

(A chart is displayed.)

Q This is page 10, I believe, of your report?

A Yes. These were hospitalization procedures that he was going to require at the time that I did my evaluation, life care plan. There was a hospitalization for heart, atrial fibrillation, as well as ablation procedure. Those were one-time lifetime, and then two times life time for his cardiac medial block injections, revision of his cervical fusion, as well as epidural injections. These were recommended at the time I did my --

Q Some of these have taken place?

A Some of these have occurred. There are the new ones that have been documented as well.

MR. GREENBERG: Can we go to page eleven of Dr. Kincaid's report, please.

(A chart was displayed.)

Q Please proceed, doctor.

A As part of my evaluation I am an assistive technology professional. I look to see what types of equipment can help an individual, both safety and help them function a little better. Mr. Starkman did not have either of these items. It would provide, increase his safety and security in the house. I included a hand-held shower and shower chair. And listed that

cost as only $22.62, because it's changed every five years. But it would be helpful for him to have those items.

MR. GREENBERG: Can we go to page 12, Mary.

(A chart is displayed.)

THE WITNESS: This would be considered Tylenol. It's not a prescribed medication, but it's something that Mr. Starkman is taking to help with his pain relief. It's an annual cost of $54.75. It is something that he had to add to his life because of the injury.

MR. GREENBERG: May we proceed to the next page.

(A chart is displayed.)

Q Please continue, doctor.

A This is a home health aide. When I did my evaluation I put in four hours per day for him. But now his wife is helping him with a lot of his daily needs, taking him to doctors' appointments, helping him with dressing and his daily needs at home. The home health aide would assist him to be more independent in his lifestyle as well as, because of his functional limitations declining, a home health aide would help him both safety-wise and increase his ability to function. The cost per hour is $22.42, per day that would be $89.68, per year is $32,733.20.

MR. GREENBERG: May we put up the next page, Mary.

(A chart is displayed.)

Q Please continue.

760



A House cleaning for the household would be once-a-week. He is no longer able to participate or help in any way. The cost per week is $135. Over the course of a year it would be $7,020.

MR. GREENBERG: Mary, please put up the next page.

(A chart is displayed.)

THE WITNESS: Mr. Starkman is unable to drive because of his physical condition and medications that he takes. He goes to a wide variety of therapist appointments. At the time I interviewed him they came to 262 trips per year. He uses a taxi when his wife can't take him. Now she's having to take him. This provides for transportation that he can use. And its $24 each way, $48 round trip for a taxi service from his house to his physicians. The annual cost is $12,576. There is a one-time cost of $5,328.

Q What is the one-time cost?

A Those are for the one-time evaluations and treatments, the ones that would only occur one time over the course of his life span.

MR. GREENBERG: Mary, please display the next page.

(A chart is displayed.)

Q Please review it with us.

A This is case management. I put in 18 hours per year. That's about an hour-and-a-half per month. This is an individual who would help to manage his total care needs so he

would abdicate for him. They would help him to make decisions about his care. They would find resources for him if he needed them. They would support him through his medical care. The cost per hour is $100, for $1800 per year.

MR. GREENBERG: May we proceed to the addendum, lifetime care tables please, Mary.

(A chart is displayed.)

THE WITNESS: As of December 31st these were new supplies that Mr. Starkman was using that he hadn't been before. So he was using Beyer Aspirin, 81 milligrams, vitamin D capsules, 1200 milligrams, as well as Excedrin extra strength. The cost of these, the individual items are contained here. And this is the frequency, once or twice per day. This would be the annual cost, which equals for all of those $164.25.

Q Just so we have a clear record, Dr. Kincaid, am I correct that the medications that you spoke to us about we took out of the addendum to the life care plan so the jury didn't have to see the original one, they could focus on the current one?

A That's correct.

MR. GREENBERG: Can we proceed with the next page, Mary.

(A chart is displayed.)

THE WITNESS: This increases the number of hours to

eight hours of home health because of his recent surgeries and decline in function. This accounts for the fact that he's going to need more assistance with his activities of daily living, and his increasing functional limitations. It shows what the cost will be of increases in his home health care to eight hours from four. It stays the same hourly cost, but the annual cost increases to $65,466.40.

Q Does that provide, if at some point it changes, that he needs the extra hours? Is that it?

A Yes. This would be actually what he would need now. So it would be eight hours. The initial life care plan had four hours. This would be with the loss of his function increasing, the need to eight hours per day.

MR. GREENBERG: Please continue to the next day, Mary.

(A chart is displayed.)

THE WITNESS: This is a surgery that is recommended by his treating orthopedic surgeon. Complex revision of the cervical spine, anterior and posterior fusion. The cost of that operation is $190,801.37. That is a one-time cost that would be added to his lifetime costs.

Q That is just for one of his spine surgeries?

A That's correct.

Q Those numbers that you just broke down for us in detail, are those the basis for the $106.585.66 per year costs?

A Yes, it is. That's correct.

Q All the numbers that you've reviewed with the jury just now, are they all based upon a reasonable degree of certainty in your professional area of life care planning and vocational rehabilitation?

A Yes, they are.

MR. GREENBERG: Thank you. I have no more questions at this time, Judge.

THE COURT: Okay. You don't have to come up here this second because we're going to take a ten-minute break. We will excuse the jury.

THE COURT OFFICER: Okay everybody.

(The jury left the courtroom.)

(A recess was taken.)

THE COURT OFFICER: Jury entering.

(The jury entered the courtroom.)

THE CLERK: Please be seated. Come to order.

THE COURT: Mr. Greenberg you may continue.

MR. GREENBERG: Thank you, Judge.

CONTINUED DIRECT EXAMINATION

BY MR. GREENBERG:

Q Doctor, the cost that you've told us about, what dollars are they in time?

A Those were in 2012 dollars.

Q Does that reflect any future increases in the cost of

these items?

A No. It does not reflect inflation or increases in medical costs.

Q The $106 plus number, does that include additional home health aide for the future surgeries?

A No, they do not. Those would be added costs for home health, the hospitalizations, additional supplies, and new medication costs.

MR. GREENBERG: Thank you.

THE COURT: Okay, doctor. Could you come back up.

(The witness resumed the witness stand.)

MR. DEMERS: May I inquire, your Honor?

THE COURT: You may cross examine the witness.

MR. DEMERS: Thank you.

CROSS-EXAMINATION

BY MR. DEMERS:

Q Good afternoon Dr. Kincaid.

A Good afternoon.

Q We have never met or worked before together, have we?

A Not that I recall.

Q You testified that you come to court on cases on behalf of both plaintiffs and defendants, correct?

A That's right.

Q Percentage-wise, how would you allocate the number of times you testify for plaintiffs versus defendants?

A Actually, testimony probably would be more on the plaintiff's side. I don't know actual percentage, but my case load is about 60 percent plaintiff attorneys and 40 percent defense attorneys at the current time.

Q Doctor, you met with Mr. Starkman back in February of 2012, correct?

A That's right.

Q That is almost two years ago?

A Approximately, yes.

Q Have you seen him since?

A No. I have spoken to him on the phone on a number of occasions.

Q Prior to having seen him, if I understood your testimony correctly, you had reviewed medical records that reflected his treatment and his condition, correct?

A That's right.

Q By the time you saw him you had some familiarity with the kinds of physical and mental things that he had been complaining about?

A Yes, exactly.

Q Now, since that time, since February of 2012 or thereabouts, have you received any updated medical records?

A Updates of a hospital procedure, and that was the only record that I've received since then.

Q The only hospital record is of an updated hospital

procedure?

A Yes, a surgery.

Q The surgery to the neck?

A Yes.

Q Did you ever receive records reflecting that Mr. Starkman had undergone a cardiac ablation procedure in July of 2012 which, I believe, was anticipated in the charts that you've shown us?

A Yes. That was my understanding. I don't recall seeing the record, but in talking to Mr. Starkman I understand he went through that procedure, yes.

Q Now, did you continue to talk to Mr. Starkman about his condition to update the history taking that you originally did?

A Yes, I did. I talked to him as well as his spouse.

Q What benefit did you find in speaking to his wife?

A In terms of his updated treatment, and he had medications that he was taking.

Q The reason that you couldn't get that directly from him?

A When I talked to him sometimes he didn't remember what all of the medications were, the dosages. She had a running list of them.

Q Did you check those medications that he was taking to determine the medication that he was taking?

MR. GREENBERG: Objection to the form, Judge.

THE COURT: Sustained.

Q One of the things that you mentioned was that you had to determine what you referred to as functional limitations?

A Yes, that's right.

Q How did you determine what Mr. Starkman's functional limitations were?

A Through the medical records, through questioning him. Primarily through the medical records. Then I corroborated what he told me through the medical records.

Q Do you recall any particular medical records that gave you input into what kinds of things he couldn't do physically?

A Dr. Faust's records regarding his inability to work, his psychologist regarding his limitations in terms of his psychological condition and inability to work because of that. There was indications in the medical records. But physical and psychological limitations that he was experiencing.

Q What did Dr. Faust have in his records that indicated his functional limitations or inability to work?

A He states that he's not able to work. He's not a candidate for return to work.

Q He didn't say why? He just said that he felt he was unable to work?

A Because of his functional limitations and his medical condition he was not a candidate for return to work.

Q When you say emotional limitations, what is your

understanding of the physical limitations?

A I'm sorry, you are asking me about emotional?

Q I thought you said emotional. I am asking you about physical limitations that the orthopedic surgeon may have documented in his records, that you may have reviewed to determine what his functional limitations were.

A That would have been for activities such as lifting, carrying, walking, standing.

Q Was there any indication in Dr. Faust's records specifically with respect to those activities?

A I don't recall where that would be. I don't recall offhand.

Q At some point, based on a record that you don't recall, you reached the determination that Mr. Starkman had functional limitations?

A Based on his physician's statements about his condition, as well as functional limitations and inability to work, yes.

Q Did you speak to Dr. Faust?

A I contacted him in writing and asked him to respond in terms of what Mr. Starkman's medical needs were and his projections for the future.

Q Did he respond to you?

A Yes, he did.

Q Do you have that response with you today?

A Yes, I do.
Q Could you produce that?
A Surely.
(Documents were handed.)
MR. GREENBERG: I believe this is in evidence as part of Dr. Faust's records.
MR. DEMERS: With that understanding, that this document is in evidence, and a concession that it is an accurate copy, I will have to accept it in evidence. Otherwise he will lay a foundation for this.
MR. GREENBERG: That's fine.
THE COURT: Okay.
Q You sent this questionnaire to Dr. Faust for him to fill out, correct?
A That's right.
Q Dated February 14, 2012?
A Yes.
Q Regarding Marshall Starkman. It says correct S-T-A-R-K?
A A misprint, yes.
Q You sent this to Dr. Faust and you told him that you were preparing a life care plan for Marshall Starkman, and that you needed medical information regarding future treatment needs, correct?
A Yes, that's correct.

Q Question number one. Dr. Faust was asked to indicate the number of follow-up visits. And he wrote two times per year for two years, correct?

A Yes.

Q That would be a total of four visits as of February 2012?

A Yes.

Q That the average cost for each of these visits would be $100?

A His office cost, yes.

Q And the next question was, what type of diagnostic procedures do you recommend? And the space with the MRI studies is blank.

A That's right.

Q The next line down says, x-rays one time per year for two years. That would be the diagnostic testing that his orthopedic surgeon is recommending as of the time of this questionnaire?

A At the time of this questionnaire, yes.

Q Was there ever a follow-up questionnaire?

A No.

Q This was before the second surgery, correct?

A Yes.

Q After he had the second surgery in early 2013, about a year after this, did you send another questionnaire to find out

if his functional limitations or his orthopedic surgery needs had changed?

A No, I did not.

Q Didn't you think that it was important to see if there was a change from his principal treating physician's point of view?

A If I am asked to do that I would have done that, yes.

Q Nobody asked you to do that?

A That's correct.

Q Now, let's skip to question three. Would Mr. Starkman benefit from therapy treatments? First one is physical therapy. And he wrote no?

A That's correct.

Q He checked off gym membership?

A Yes.

Q Massage therapy, that is left blank, correct?

A Yes.

Q Question 4, are there any specific types of equipment or orthotics that you recommend to assist with activities of daily living? Dr. Faust wrote no?

A That's right.

Q On the next question, question 5, Mr. Starkman has difficulty with activities of daily living due to pain and injuries. Do you recommend that he have home health? And Dr. Faust said no.

A That's correct.

Q Now, did you incorporate or was the information that Dr. Faust was providing to you as a medical, treating doctor in your assessment of Mr. Starkman's needs?

A Yes, I did.

Q Dr. Faust said that there was no need for any physical therapy. I believe your plan calls for some physical therapy, correct?

A Yes.

Q How much physical therapy does your plan call for?

A I believe we were at -- I am just going to go to that page. I don't want to misquote it. Three times a week.

Q Three times a week for how long?

A Life expectancy.

Q You're saying he needs to go to a physical therapist three times a week for the rest of his life? And Dr. Faust told you he didn't need physical therapy. What was the basis for you indicating in your plan that he needed all that physical therapy?

A The basis was the totality of the responses that I received, and to provide the therapy for him in the future so that he would have it available to him for his condition.

Q So you are just throwing that out there and saying, just in case he needs it we will throw in all this physical therapy, saying he needs it three times a week for the rest of

his life?

MR. GREENBERG: Objection.

THE COURT: Sustained.

Q Did any doctor say he needed physical therapy three times a week for the rest of his life? Do you have a questionnaire from anybody else?

A I'm just looking back through my notes. No specific recommendation.

Q Do you have any idea the source of the plan that you worked up suggesting that Mr. Starkman needed physical therapy three times a week for the rest of his life?

A Yes. As a life care planner we look at the provider recommendations. We also look at the nature of the injury and what is provided for individuals with those types of injuries. So that as a life care planner we would include them as necessary in the future, and provide the option of them being necessary. So it's a part of our life care planning profession to look at the total needs, and to include items both based on medical recommendations as well as standards practices.

Q I think in this sentence, that answer you said medical provider recommendations twice. I think you just told us that not only do you not have medical provider recommendations in your file, you have a specific answer from Dr. Kincaid saying he doesn't need physical therapy.

MR. GREENBERG: Objection to the form.

Q Doctor what I am asking you now is --

THE COURT: Overruled.

Q You're just getting it as some kind of standard practice that you life care planners do just to make sure in case he needs it he will have it. You built in thousands or hundreds of thousands of dollars.

MR. GREENBERG: Objection to the form.

THE COURT: Sustained.

Q You don't have any medical provider recommendation for physical therapy, do you?

MR. GREENBERG: Asked and answered three times.

THE COURT: Overruled.

A Not in the questionnaires that I sent out, no.

Q Do you know when you maintained contact with Marshall Starkman after he had his second surgery, Dr. Faust did order a course of physical therapy that went on for a couple of months, and that has been completed and there is no plan to have any future physical therapy. Are you aware of that?

A I know that he had two months of physical therapy, and it was stopped, to help him heal from the surgery. The option, my understanding was it wasn't ruled out but it was stopped to help him heal.

Q I want to talk about the home health aide. You said that Mr. Starkman needs somebody to help him out at home?

A Yes, that's right.

Q What exactly does he need help with?

A He needs help with his daily activities. He needs help with things like dressing, with cleaning things around the house, going to appointments. He needs basic household help.

Q Did he ever tell you that he needed basic household help?

A Yes, he did. And his wife also reinforced it.

Q Do you know that he dresses himself?

A I know that he has difficulty with part of the dressing process.

Q You are talking about shoes?

A Shoes, socks, bending down.

Q He showers by himself; is that right?

A Currently yes. I understand that.

Q He gets out of the house, takes walks?

A He is able to take short walks, it my understanding.

Q He makes breakfast for himself?

A I believe the last time I spoke with him, limited amount of breakfast.

Q He makes lunch for himself while his wife is away at work?

A His wife makes it for him and he puts it in the microwave.

Q Is that what your understanding is?

A Yes. That is my understanding. Currently his wife is

helping him. And if she wasn't available he would not have that help, or have the ability to do those things on his own.

Q He has dinner before his wife gets home from work, did you know that?

A I don't recall him saying that.

Q If that is what he testified to, would you dispute that?

A No, not if that is what he testified to.

Q At one time you said that he only needed someone four hours a day. Back when you wrote the original report in 2012 you said a person being with him four hours a day would be sufficient?

A Yes, that's correct.

Q Now you are saying he needs someone eight hours a day?

A Up to eight hours, because of the decline in his functioning from the surgery.

Q What is the decline in his function?

A His ability to perform physical activities, the pain levels, the loss of basic functional ability to care for himself.

Q From 2012 until now he had a heart ablation procedure and he had the posterior neck surgery. You're saying those things made him worse?

MR. GREENBERG: Objection to the form.

A The decline in his function.

THE COURT: Overruled.

Q From a functional standpoint you are saying he is worse now then he was before those procedures?

A Yes. That is my understanding, less function.

Q What is that based on?

A Based on his report, his wife's report, the medical reports from Dr. Faust.

Q He hasn't had a home health aide since the accident, correct?

A No. His wife has been doing all of those things for him. If she becomes unavailable he would not have that for himself.

Q She's not doing this for him eight hours a day, is she?

A I don't recall that she was doing it eight hours at this point.

Q You understand she works out of the home, correct?

A Yes. She assists him. She takes time off from work to help him.

Q Do you know how much time she takes for that?

A I don't recall the exact. She just mentioned that she does have to take time off for appointments, for special visits away from work.

THE COURT: Okay, we're going to break for lunch at this point. During lunch, members of the jury is not discuss this case among yourselves or with anyone else. You

are not permitted to let any party discuss the case with you or attempt to influence you. If anyone does, you are to immediately report that to me and not to the other jurors. Prior to your discharge you may not accept any payment or benefit for supplying any information concerning this trial. You are to keep an open mind until all the evidence has been presented and you are charged as to the law. You are not to visit the scene of the incident. Have a good lunch. We will see you back at two o'clock.

THE COURT OFFICER: Follow me jurors.

(The jury left the courtroom.)

(Whereupon, this matter was recessed for the luncheon recess.)

AFTERNOON SESSION:

THE COURT OFFICER: Jury entering.

(The jury entered the courtroom.)

THE CLERK: Please be seated.

Doctor, please remember you are still under oath.

THE WITNESS: Yes, ma'am.

THE COURT: We can continue cross-examination?

MR. DEMERS: Thank you, your Honor.

CONTINUED CROSS-EXAMINATION

BY MR. DEMERS:

Q Good afternoon, doctor.

A Good afternoon.

Q Doctor, I would like to briefly go back to the questionnaire that you had sent to Dr. Faust.

MR. DEMERS: If we could have page five, physician follow-up.

(A chart is displayed.)

Q Doctor, you have that on the screen in front of you now?

A I do, yes.

Q Physician follow-ups continuing, correct me if I am wrong, that would be continuing examinations and visits with the doctors that he had been seeing prior to your evaluation?

A Yes, that's right.

Q Orthopedic surgeon on the first line, that would be Dr. Faust, correct?

A Or whoever takes over for him, yes.

Q There has been nobody other than Dr. Faust up to now, correct?

A That's correct.

Q If you would look at the questionnaire from Dr. Faust that you had sent him and he had returned to you after he filled it out.

A Yes?

Q Line one, where he said follow-up visits two times per year for two years?

A Yes.

Q That would be four visits total, correct?
A According to his estimation, yes.
Q That is what he is telling you that he recommended?
A That he wants to do, yes.
Q That he charges $100 a visit?
A Yes.
Q What I want to ask you is, here you have $153.66 per visit. Where did you get that figure?
A That is an average of the cost of orthopedic surgeons in Mr. Starkman's area, local area.
Q Why wouldn't you use the actual figure that Dr. Faust gave you? He says it's $100, and he's been seeing him for several years. Dr. Faust testified here he's still seeing him periodically. Two visits for two years is $400, right?
A Yes. I definitely considered his input, but I have to look at the possibility that he may not be seeing Dr. Faust, that he may be seeing another orthopedic surgeon, and that costs would be higher than what Dr. Faust is charging him.
Q That is something that is -- the reality of it is $100. That is what he is charging Mr. Starkman for visits. And this is some number that is some kind of an average that you're getting from where?
A From researching the cost of orthopedic surgeons in his local area, three credible orthopedic surgeons. That would be the average costs across those three surgeons. If he was no

longer seeing Dr. Faust the cost would be higher. I have to account for the possibility that he may not, so I have to look at average cost.

Q You are trying to account for a possibility that really don't currently exist. But you're saying at some point that he may see somebody else that is why you raised the price?

A Well, I accounted for the average in the area. And you have to, as a life care planner you have to account for all possibilities for the individual. One might be that he would switch orthopedic surgeons.

Q You do know Dr. Faust is a fairly young orthopedic surgeon, right?

A I don't know his age. He's not as old as you and I.

Q If the total cost of that, if you're saying $153.66 three times a year, all your other frequency of visits indicate life expectancy five times a year for life and so forth. This three times a year doesn't say how long that's for. How long is that for?

A We'd have to go back to the original table.

Q It was an omission, doctor?

A I may just have forgotten to put it in, yes. But I will go back to that table. That was to life expectancy.

Q Just doing some quick math. If we take 153 three times a year times 33.6 years, that is his life expectancy, right, as of that time?

A Yes.
Q We come up somewhere over $15,000?
A That sounds approximately right, yes.
Q Dr. Faust said $400.
MR. GREENBERG: Objection, Judge.
THE COURT: Sustained.
Q Did Dr. Faust say two times per year for two years at $100 a visit?
A That is what he wrote, yes.
Q That is four visits times $100. I think we can all do the math. It's $400, right?
A Yes.
Q This fictitious orthopedic surgeon charging $153.66 three time a year for the rest of Mr. Starkman's 33.6 expected 33.6 year life span, takes us to about $15,000 something, right?
MR. GREENBERG: Objection to the form.
THE COURT: Sustained.
Q This calculation works out to a little over $15,000, right?
A That sounds about right. I haven't done the calculation with you. That sounds about right.
Q That is a lot more than what Dr. Faust told you when he filled out the questionnaire you sent to him, correct?
A That is a higher cost, yes.
Q He never said that he needed to see him three times a

year, correct?

A Not in his response, no.

Q Do you know how many times he actually saw Dr. Faust in 2013?

A I'm not -- I can't say with certainty.

Q I want to go back one page to the page physician evaluations, page four.

Now, a physician's evaluation is when a patient goes to see his doctor and he does an examination and sees what his status is at that particular time, correct?

A Yes. He will provide a diagnosis. He will determine if there is need for further treatment, and what type if he's a candidate for treatment. If there are changes that need to be made, technically that is when diagnostic testing is done and a treatment plan is developed for the foreseeable future.

Q What is different about an evaluation than an office visit?

A An evaluation is more thorough. It involves writing of a plan. It costs more. It's more intense. It's billed differently by physicians. So it includes more looking to the future rather than checking to see how the person is on the follow-up visit. It's developing a plan for future care.

Q Did you see any evaluations that were done by Dr. Faust?

A I reviewed his records, yes.

Q I understand that. In his records were there any evaluations?

A I don't recall him terming them evaluations. There were quite a few records, but some of them were evaluative in nature. I don't recall the codes that he used for this.

Q Did you see any office visits with Dr. Faust where he differentiated a visit where he would examine Mr. Starkman, decide on any tests that he needed to do, make any recommendations for future courses, be it physical therapy or some kind of medication, or whatever; as distinguished from what you might consider an ordinary office visit?

A I don't recall the distinction. That doesn't mean it wasn't there. I don't recall seeing it.

Q As a life care planner, is this kind of a standard procedure that you would like to see, to have all of the treating doctors see their patient and as opposed to doing the kinds of things that are ordinarily done in an office visit where a patient is examined, certain tests might be done, this is strictly to write up some kind of a plan?

A Oh, no, not at all. It's part of the medical needs for that person because the nature of their injury needs future care. It has to be planned. It has to be worked out thoroughly. And an evaluation is part of that, and various specialities, depending on the need of the person.

Q In any of the records that you looked at, all the

medical records, I believe you looked at least this many medical records of Mr. Starkman attached to your report (indicating)?

A At least that or more.

Q Did you see any doctor prepare an evaluation, a written evaluation that contained a plan for exactly how that course of treatment was going to be mapped out?

A There were definitely narrative reports which were evaluative in nature. I would have to look. I don't recall offhand. They were definitely evaluative in nature.

Q There were reports that were written that evaluated his condition at a particular time. It didn't involve any kind of special visit that was dedicated just for that. It was based on the treatments and the tests and everything that had gone before that, correct?

A Those types of reports, those visits are billed differently by doctors as evaluations, so they are a higher price. They involve more time of the physician, and typically a narrative, more thorough report than just office notes. That is why they are separated out.

Q From the point of view of a life care planner, this is the way it should be done, right? There should be some kind of a separate evaluation and a written plan that is carefully mapped out, backed up by the proper tests, and that office visits and examinations could take place other times?

A To support that plan, yes.

MR. DEMERS: May I see addendum page five?

(A chart was displayed.)

Q Now, Dr. Faust never sent you any kind of a supplemental response to the questionnaire that you sent him telling him, that he was planning on doing more surgery on Mr. Starkman's neck after the second procedure, correct?

A That is correct.

Q So on this page in your report you indicate Dr. Alfred Faust is planning to perform a complex fusion, front and back surgery after the trial. Are you referring to the trial of this case, this trial?

A Well, at the time that I wrote this it would have been in 2012. So my understanding is that the trial was going to be starting sooner.

Q Doctor, you wrote this on December 30, 2013, didn't you?

A You are talking about that addendum? I thought you were talking about the initial report.

Q I'm sorry.

MR. DEMERS: Let's put it up on the screen in front of you.

A Now I see. I thought you were referring to the earlier. Yes.

Q You just did that December 30th of last year, right?

A That's right.

Q About a month ago?
A Yes.
Q You said that after this trial is done he's going to have back surgery?
MR. GREENBERG: Objection. I think it's neck surgery.
THE COURT: Sustained.
Q Dr. Albert Faust is planning to perform a complex fusion, front and back surgery, after the trial?
MR. GREENBERG: Front and back, anterior/posterior.
THE COURT: Is there an objection?
MR. GREENBERG: Objection.
THE COURT: What is your objection?
MR. GREENBERG: He is calling it back surgery, your Honor. It's neck surgery.
MR. DEMERS: I am reading what is on the page, your Honor, as everyone can see.
THE COURT: Overruled.
Q Did he tell you that he was going to do this surgery after this trial was over?
A I would have contacted his office because the CPT codes, I could not get them without having input from his office. That's the way of pricing. These are all the procedures, the codes that would be used by the doctor's office. That would have been the codes that would have come from him.

The number of anesthesia units, that all would have come from his office.

Q You said CPT, that is what it says there?

A Yes.

Q Those are codes for billing?

A Yes. I wouldn't know those unless I got them from his office.

Q I am not so much asking about how this would be billed or how much it would cost or not. At this moment I am talking about the timing of the surgery.

Did Dr. Faust say that when this trial was over he was going to do this surgery?

A It's my understanding that it would be needed and it would be in the future.

Q That is after the trial. Doesn't sound like it's too far into the future. Would you and I agree?

A I don't think that necessarily means immediately after the trial, but it would be after this period of time.

Q I'd like to go back to Dr. Faust's questionnaire that he sent to you where he indicated that segments, degeneration levels above or below fusion may break down over time, 33 percent chance over ten years?

A Yes.

Q Is there any reason why he didn't indicate on that chart that it was only a 33 percent chance, and it was a number

of years possibly down the road, as opposed to saying after the trial?

A Well, what you are referring to was given to me in 2012 by Dr. Faust. I understand he went through additional surgery and that Dr. Faust indicated that he will probably need additional surgery in the future, and that would be the cost of it, at those levels with those procedures the CPT codes that he gave me or his office gave me.

Q Did you ask him when he would need that surgery?

A I didn't ask him for a specific date, but my understanding was it would be needed in the future, based on his condition and the ongoing deterioration.

Q Do you know what the cost of the first surgery was?

A I don't recall.

Q What about the second one?

A I know that I allocated a cost for that surgery. I could tell you what I allocated if you would like me to repeat that. It was 283. That was for a number of procedures. 163,386.

Q You said you were not able to get the codes. So the codes that you used were the codes that you believed would be used to reach that $190,000 number that you put up there?

A I didn't say that. Those were codes that were provided by his office. That is the only way I could have gotten them.

Q You got the codes from them?

A Yes.

Q Dr. Faust's office?

A Yes, that's right.

MR. DEMERS: Can we have page 4, physician evaluations?

(An exhibit was displayed.)

Q Now, this is the one time, or however often. Most of them are one time. You have a visit with a neurosurgeon in addition to an orthopedic surgeon. Did you know that Mr. Starkman was never treated by a neurosurgeon?

A That is my understanding.

Q How did you determine that there should be an evaluation by a neurosurgeon when he had an orthopedic surgeon who is a spine surgeon?

A As a life care planner you need to account for potential needs of the individual in the future. The evaluations, for instance, of the neurosurgeon, evaluation because of injuries, condition, is a distinct possibility, something that he would need. So I included the cost to account for that in the future, the evaluation to determine any future needs from a neurosurgeon. So it's accounting for the need in the future.

Q Would you agree that an evaluation by a neurosurgeon is something that, from a theoretical point of view as a case manager or as a life care planner, you would include that to be

safe, and that was based on a theoretical model as opposed to any doctor, any care provider saying that man should be seen by a neurosurgeon once to be evaluated?

A As a life care planner, having done many of these, you want to have as much arrows in your quiver for that person. They may need different types of evaluations. There could become complications. They might need more treatment. You want to have them have the possibility of being evaluated under those circumstances. You don't want to leave that out as a possibility for them.

Q You don't want to leave that out as a possibility, you want to generally be safe and be more inclusive and have as many possible theoretical care providers included in this life care plan just in case?

A Well, that are realistically related to that person's condition. A life care plan is a one chance for Mr. Starkman. I need to make sure that his needs are accounted for, and that is one that is realistically associated with his injuries that he could need that type of evaluation.

Q It's kind of belt and suspenders type of pricing. You are going to give him everything he could possibly need so you won't need anything else?

A That would be going overboard. You want to make sure it's realistically related and it's feasible, objective, that there is a basis for it. You don't want to throw everything in

the mix. It has to be related.

MR. DEMERS: Can we go back to page five?

(A document was displayed.)

Q Mr. Starkman saw a doctor by the name of Stamotos after his first surgery. He's a pain management specialist?

A Yes.

Q He saw him for a while but he has not seen him in quite a long time. I think he stopped seeing him in 2011?

A Yes.

Q He didn't see him at all in 2012. He had more surgery in early 2013. He didn't see him or other pain management specialist.

You have provided in your life care plan at $160 a visit once-a-month for the rest of his life that he should see a pain management specialist.

A Yes, that's correct.

Q Did any physician suggest to you that this would be appropriate, or that there was a plan or a goal to prescribe pain management for Mr. Starkman?

A Mr. Starkman was actively being treated by his orthopedic surgeon. Based on his types of injuries and the length of time, he has permanent pain issues, severe pain that, my understanding is, that is going to continue.

A pain management specialist deals with those pain issues on a long-term basis, more so than an orthopedic surgeon.

They specialize in that. Mr. Starkman, according to the medical records, is going to have ongoing severe pain issues. So that is a feasible recommendation.

Q You're a Ph.D., right? You are not a medical doctor?

A That's right.

Q Your recommendations, understanding, your background in managed care and so forth, the recommendation for pain management in Mr. Starkman once-a-month for the rest of his life, is something that you came up with?

A Based on life care planning practices, as well as his condition and the nature of it, and the permanent nature of it, permanent pain.

Q What is it based on? All I am looking for is it's coming from you. Mr. Starkman didn't say, I need a pain management doctor. I went to one. I want to go back to one. Or Dr. Faust, or anybody else, somebody saying he's going to need this so you should include in your life care plan. This is something that you came up with, right?

A Let me look at my notes there. I want to make sure of that.

Yes, based on my review of the records and my life care planning expertise and training, yes, I did.

MR. DEMERS: We can take that down.

Q You said something earlier that Mr. Starkman might be eligible for New York State provided rehabilitative care or

training to get him back into a work environment. But that he was not eligible because he had not been released by his doctors. Is that a fair statement?

A Yes. He would have to be released, signed-off from his treating doctors before ACCESS would initiate a case.

Q When you say released by his doctors, the doctors that he is seeing now every several months, are monitoring things like medication, monitoring his condition by doing certain tests. Would you say that, is that the active treatment that he hasn't been released?

MR. GREENBERG: Objection to the form, Judge.

THE COURT: Do you understand the question?

THE WITNESS: No, I don't.

THE COURT: Sustained.

MR. DEMERS: I will rephrase it.

Q If Mr. Starkman is continuing to see his doctors, but he's not actually being actively treated, but his conditions are being monitored. If you would permit me to ask it that way?

MR. GREENBERG: Objection, your Honor. Facts not in evidence.

THE COURT: Are you asking him to assume this?

MR. DEMERS: Yes.

Q Let me ask you, doctor --

THE COURT: So you are withdrawing the question?

MR. DEMERS: I am, your Honor, yes, for the record.

Q Doctor, assume that Mr. Starkman is seeing doctors that have treated him, but that other than, for example, monitoring his medication, perhaps taking an occasion imaging study, there is no active treatment as such. There is no ongoing therapeutic treatment. There is no physical treatment. Would that be the kind of thing that precludes eligibility for this kind of rehabilitation?

MR. GREENBERG: I know it's a hypothetical, but I still have to object.

THE COURT: Overruled.

A You have to look at -- you're saying that it's not active treatment, any follow-up visits?

MR. DEMERS: Let me withdraw the question. I will make it even simpler.

Q When a person stops seeing a doctor they say he's been discharged from their care. Fair enough?

A Okay.

Q I don't want to see you anymore. If you have another problem give my a call. Is that what you mean by released? Where the doctors have completely separated from the patient and said, you don't need to come back. I don't need to check up on you. We're done. We're done with the treatment.

A There are two forms of release. One would be that where the person has completely finished with treatment and the doctor said, we don't need to see you anymore. The other would

be where they're still activity following him, treating him, but they said, you could try to go back to work. You can try this program, see how it goes. We'll monitor it. But it's okay for you to try it medically. Or they will give them, usually, limitations. They can only do so many activities, work so long, so many hours. That is the other type of release, you can either/or.

Q Now, as a vocational consultant yourself, have you considered trying to rehabilitate Mr. Starkman from his condition?

A I was not hired to be --

MR. GREENBERG: Objection, Judge. What condition?

THE COURT: Sustained.

MR. DEMERS: I didn't hear the objection.

MR. GREENBERG: I said objection, what condition?

Q Have you been asked to consult with Mr. Starkman regarding rehabilitating him so he can be more functional and return to some form of employment?

A I have not been asked, no.

Q Did you make a determination as to whether or not he could be rehabilitated to go back to work?

A My determination, after my analysis, was that he was not a candidate for rehabilitation unless his medical condition improves.

Q You realize he has an MBA, correct?

A Yes.
Q Has computer skills?
A Yes.
Q Is able-bodied to the extent that he can take walks, he can go into vehicles, he can go from place to place.
Are there people that you have treated, as a rehabilitation consultant, that have much more severe disabilities than you believe Mr. Starkman has, but have gone to work?
MR. GREENBERG: Objection.
THE COURT: Overruled.
A Everyone is unique. There are people with the severity level, it's usually related to the function. There are people who have paralysis who can do things, that don't have the pain issues. So it's really a unique specific to that individual. Everyone's situation, you have to take them person-by-person. But I have worked with people with severe disabilities before.
MR. DEMERS: May I have a moment, your Honor?
(A discussion was held off the record.)
Q Doctor, if you would go back to your chart. I believe we had that as page 10.
Now, there is an item here, revision of cervical fusion. That is the same item we talked about a while ago that you got the codes from Dr. Faust's office?
A Yes. This was the one in 2012, so the one that was

projected.

Q That is one that has already been done?

A Yes.

Q What about epidural injections?

A I don't believe there have been any of those done yet.

Q I'm having a difficult time, doctor, understanding whether these are in the past or in the future. How are we supposed to tell?

A These were done in 2012, so they would have been projected for the future, going forward.

Q The heart atrial A-fib procedure, the hospitalization that has been done, that was done in July of 2012 and you saw him in February 2012?

A Right. I wrote my report in May of 2012.

Q You wrote in your report, hasn't been done yet. This is done, correct?

A That's correct.

Q We can exclude this item then?

A Unless it's going to be done again. But, yes, that's right.

Q I want you to assume that there's been testimony by Dr. Goldberg, Douglas Goldberg, that there is a 15 or 20 percent chance some time in the future of needing this procedure, this ablation procedure again.

MR. GREENBERG: Objection. I believe the doctor's

testimony was 20 percent.

THE COURT: Sustained.

Q Doctor, what I am asking you is, was that included at the time you included it, because it hadn't been done and it was planned at that time?

A It was planned at that time when I wrote this report, that's right.

Q The medial injections, medial back injections, that is something for the neck or the back, correct?

A That's right.

Q It says ablation, but that has nothing to do with the cardiac ablation, correct?

A Correct.

Q Do you know if any of those have been done?

A Not to this point, no. They are recommended by Dr. Faust though.

Q He hasn't done any yet?

A That's right.

Q Epidural injections, that is for the neck also, correct?

A That would be, yes, for the neck, the thoracic spine area.

Q Mr. Starkman has never had any of those, has he?

A Not as of yet. I have allocated every five years three injections. So they haven't occurred yet.

Q No one has ever prescribed those, correct?
A Not to my knowledge.
Q Dr. Faust never mentioned that he should have them, correct?
A Not the epidural, but the medial back he did.
Q These kinds of things are the life care planning, I call it belt and suspenders. You are putting everything in there he could possibly need even though he may never need it.
MR. GREENBERG: Objection to the form.
THE COURT: Overruled.
A I can't agree with the way you phrased it. You want to do things related to the person's condition that they're likely to need.
Q If he's had a neck injury, had surgery, you're going to include every possible kind of therapeutic modality that could be used because it could be done for that but it may never be done?
MR. GREENBERG: Objection, Judge.
THE COURT: Overruled.
A No. I didn't do that in this case.
MR. GREENBERG: Can I have the answer back.
(The requested portion was read.)
Q I want to talk about your indication that, we talked about this somewhat this morning on page, the addendum page four, regarding your perception that Mr. Starkman should have

someone, a home health aide helping him at home.

A Yes, that's correct.

Q How did you determine what the hourly rate was?

A My researching three cost sources in his local area.

Q You have to keep your voice up.

A Researching three different cost sources in his area.

Q Going back to page 14, housecleaning?

A Yes.

Q I am not sure if this was asked of you on direct examination. As part of the documents that you reviewed, were you given copies of the deposition transcripts that Mr. Starkman testified to in this case?

A I have two transcripts, yes. If there was more than two, but I have two.

Q Are you aware that in terms of housecleaning that Mr. and Mrs. Starkman, for years before this accident they had a house cleaner come in? They didn't do their own house cleaning. Are you aware of that?

A I don't recall that.

Q If that were the case and they always had a house cleaner, the fact that he had an accident, that shouldn't entitle him to have housecleaning, even though you perceive a need based on a disability that you feel he has. That he can't help his wife or do it himself, that should be included if they had a house cleaner before?

A Well, it's an activity of daily living people would do. And if he's unable to do it, then they have no choice but to have a house cleaner.

Q But if the Starkmans had a house cleaner going back to years before this accident, and I assume this is for the rest of his life. So if we take $7,000 a year, we take that out 33 years, that is a significant sum of money that he's looking for from my client, correct?

A Yes.

Q Would you think that you should have asked whether he had housecleaning before?

A I asked what his activities were around the house, what he was able to do before his injury. And he indicated that those were things that he could do, clean and do work around the home.

Q What about cooking, did you ask him about cooking?

A I think he said he relied mostly on his wife for cooking.

Q Did he ever tell you that his wife really doesn't cook much but that they mostly do take out?

A I don't recall him saying that.

MR. DEMERS: I want to talk about transportation. I have that as page 7. I'm not sure what slide that is.

(A chart is displayed.)

Q You have 262 trips per year?

A That's right.

Q Plus another 111 trips over the lifetime, spread over that 33 years of --

A Right, based on the plan recommendations.

Q 262 trips per year is like taking a taxi five days out of seven?

A Yes. He had a lot of appointments, if that includes physical therapy and all of his doctors appointments.

Q You are basing this on the physical therapy that he's not getting and hasn't been prescribed, three times a week for the rest of his life?

A It's all the trips outside of his home for medical care needs.

Q Including that physical therapy three times a week for the rest of his life?

A That's right.

Q That he has not gotten, hasn't been prescribed as of now?

A As of yet.

MR. DEMERS: I believe if we go back to physician follow-up. That's page five.

(A chart is displayed.)

Q So, if we would, just for the moment, take out the three times a week physical therapy, and we look at these visits. You have an orthopedic surgeon three times a year, the

urologist twice a year, cardiologist five times a year, pulmonologist let's say four times a year. We have pain management. We never talked about that. I am going to leave that out for now. We have three, five, ten, fourteen. I may be missing a factor in here with the cardiologist.

That is not going to amount to twice a week for an entire year, is it, to see these doctors? That is 52 weeks. That is 100 visits. I don't think we come anywhere near 100 visits?

A I'd have to do the calculations. But there are other visits that he has as well. There are other treatments, psychological counseling, marriage counseling. There would be massage therapy and gym membership. It all adds up.

Q The psychological counseling is in the therapy section?

A Yes, that's right.

Q You are saying all that adds up to 262 trips a year?

A That's right.

Q Now, if he were driving himself that would be an expense, correct? He would have to make car payments, put gas in the car, and pay for insurance and so forth?

A If he was able to drive the cost of an automobile would be an expense, yes.

Q If he were to make those 262 trips that you say he needs to make every year in his own car, there would be an expense involved, use to have that car available, correct?

A Yes, it would.

Q So if we're talking about cab rides at $24 to $48 a trip, wouldn't it be fair to deduct the cost of having to pay to maintain an automobile as opposed to the full price of a cab that he needs to get to where you say he needs to go?

A Not necessarily, no. He has no ability to use an automobile now.

Q I understand that. That is what I am saying. He doesn't have to care for an automobile. It kinds of relieves him of the burden of having to own and pay for an automobile.

You are saying he has to take a cab. Well wouldn't it be fair to deduct the cost of an automobile, what it would cost to operate and own an automobile to make those trips?

A Not necessarily, no.

MR. DEMERS: Doctor, I would like to go through some of the medications. That would be addendum, page two.

(A chart is displayed.)

Q How do you get the price of these medications?

A I would use -- this is the more recent one. There would have been the three sources of calling or visiting the one website.

Q You checked with CVS?

A Yes.

Q Walgreen's?

A Yes.

Q And GoodRX.Com?
A That's right.
Q Let's go through a few of these.
Amlodipine, Bystolic?
A Yes.
Q You have an annual cost of $474.50?
A Right.
Q If you look on GoodRx.Com you can get it at Walmart for $20.10, correct?
A You're probably looking at a prescription per month for 30, so it is misrepresenting a range. There is the average, so there are some that are lower, some that are higher.
Q There is a drug here called Atorvastatin. It's a cholesterol lower drug?
A That's right.
Q Did anyone indicate to you that Mr. Starkman had elevated cholesterol because of anything that happened in this accident?
A My understanding, he was not taking these before the accident. That this occurred, the need for them occurred afterwards.
Q They found out when he was receiving all this treatment that his cholesterol was elevated, right?
A The doctors discovered that, yes.
Q Do you know how long it had been since his cholesterol

had been tested before that?

A I don't recall that.

MR. DEMERS: Can we go to addendum, page three.

(A chart is displayed.)

Q The Bayer 81, that's like a baby aspirin?

A Yes.

Q Vitamin D, it's an over-the-counter vitamin?

A Yes.

Q These aren't expensive things other than the Excedrin. I believe you had Tylenol on another page somewhere?

A The earlier report, yes.

Q In the earlier report, okay.

Are these really necessary?

A Well, my understanding is the Excedrin is necessary, and the others are recommended, the Bayer aspirin, by his cardiologist along with the calcium and vitamin D to assist in the medication he is taking.

Q Besides all these tables that you have created when you draw up your life care plan for Mr. Starkman, you also wrote a narrative report, correct?

A That's right.

Q Do you have it in front of you?

A Yes, it's here.

Q On page 18 you have a section of that report that is titled life care plan recommendations, correct?

A Yes.
Q One of the recommendations that you have in paragraph three is that he should have a driving evaluation.
A Yes, that's correct.
Q I think that was in one of your charts, correct?
A Yes.
Q Has he had that?
A No, not to my knowledge.
Q But that was a recommendation of yours that he should have that driving evaluation?
A Yes. If his condition allows it, yes.
Q Now, in your work as a rehabilitation counselor you have worked with disabled folks who need to adapt to their environment in some way, correct?
A Yes, I have.
Q There are various technologies available to help people in those circumstances, correct?
A That's correct.
Q In your CV that you have provided, it indicates you were, in 1999 to 2000, coordinator of a company called, or just a division of the United Cerebral Palsy. I guess this was your title, Coordinator of Assistive Technology Services, correct?
A Yes, for the agency.
Q That is to help people who have disabilities adapt to using certain things, or adapting to their environment going

upstairs, using a wheelchair, anything like that?

A Yes. It's evaluating their needs to see what type or types of equipment or services can help them function as independently as possible.

Q A couple of years before that you were with New York City original technology related assistance. You were the director for an individual with disabilities center. Again that was with United Cerebral Palsy of New York?

A That's correct.

Q You managed providing information, referrals, and assistive technology services to individuals with disabilities?

A That's correct.

Q Would that include assistive devices that would allow disabled people to operate automobiles?

A Yes, it did.

Q As a matter of fact, there are many disabled people who operate automobiles, correct?

A (No response.)

Q With assistive devices.

A There are people with disabilities that require that and do use them.

Q Have you been involved in fashioned custom devices for people to be able to use automobiles?

A Not personally. I have recommended and I have worked with evaluators, companies who do that type of fitting. I have

made the recommendations for it.

Q The point of doing a driving evaluation would be to see whether and possibly what type of assistive devices Mr. Starkman might need if he were able to operate an automobile?

A If he were capable in the future of operating one safely, I would definitely want to do an evaluation for him. That is why I put it in.

Q I am talking about right now not in the future.

A I think I have a one-time evaluation. If he is capable of driving or is released to drive in the future he would need a driving evaluation. That is why I put it in.

Q You said that in 2012 that he should have a driving evaluation and you budgeted for it?

A I did a one-time evaluation. I didn't say it to be immediately. The funds should be there if he becomes capable of driving.

Q The way you determine whether he becomes capable of driving is by doing a driving evaluation, correct?

A First he has to be released by his treating physicians to drive. Then he would do the driving evaluation to determine what, if any, equipment or modifications he would need, or if he could do it safely.

Q You are saying that he has to ask Dr. Faust permission, or someone else permission if he could drive?

A The doctor would have to write the prescription for one

thing, for the driving evaluation, but also indicate that he would be a candidate for safely driving. And that would be evaluated.

Q If he wanted to give that a try and went to his doctor and said, could you write me a prescription, I want to see if I could do this, there is nothing to prevent that, right?

A He could ask the doctor if he was ready for it.

Q If he had any problems, if he couldn't turn his neck sufficiently in his own mind, that he couldn't see a side-view mirror or the other side-view mirror, there are devices to assist him with that, correct?

A There are devices. There is alerting devices. There is mirrors. A person has to be able to drive safely. There are modifications, but they have to be able to do it safely.

Q The assistive devices are exactly to allow him to drive safely, would you agree?

A They are to aid in that process, yes. Exactly.

Q Now, earlier you testified, and we've been over this a couple of times, you said that he needs someone to help him out at home eight hours a day and to do various things that you say he can't do by himself. Didn't you report in that same list of recommendations, that the home health care assistance would not begin until age 65?

A (No response.)

Q You said as he gets older he's going to need more help?

A I think I said as he gets older he will need more help.
Q You said that the home health assistance wouldn't begin until age 65. It's on page 19, doctor.
A That was a misprint then. That should have been at his current age of 45. Then as he ages he will need assistance with activities of daily living. My charts indicate it was current, so that it was a misprint.
Q It's two sentences. First you say that he is going to need assistance beginning at age 65. And then the assistance goes right along with it and says, as Mr. Starkman ages he's going to need assistance with activities of daily living. Not that he needs them now, he's going to need them in the future. That is not a misprint, is it, doctor?
A The age is. It was starting immediately. But as he ages he's going to need more assistance.
Q You knew that that document was going to be served on opposing counseling in this lawsuit, correct?
A Yes. I must have missed that.
Q You must have missed that. So you meant to say 47 or 46 instead of 65?
A Starting immediately, yes. And that it would increase as he ages.
Q Are there any other misprints that we should know about in your report, doctor?
A Not that I'm aware of.

Q You signed this report?
A That's correct.
Q You sent it to a lawyer knowing it was going to be used in litigation?
A Yes.
THE COURT: We are going to take a ten-minute break at this time.
THE COURT OFFICER: Okay everybody.
(The jury left the courtroom.)
(A recess was taken.)
THE COURT OFFICER: Jury entering.
(The jury entered the courtroom.)
THE CLERK: Have a seat, doctor. Please remember that you are still under oath.
THE WITNESS: Yes, ma'am.
MR. DEMERS: No further cross-examination, your Honor.
THE COURT: Any redirect?
MR. GREENBERG: Yes, your Honor.
THE COURT: Go ahead.

REDIRECT EXAMINATION

BY MR. GREENBERG:

Q I think one of the last areas you were asked about was about driving, Dr. Kincaid. Do you remember that?
A Yes.

Q You said that you work with people with severe disabilities. There are mirrors and things, and handles that can be put on vehicles and they can drive, correct?

A That's correct.

Q Is there anything you can do to a car so that somebody taking multiple narcotic drugs can drive safely?

A No.

Q We've heard testimony from psychologist, Dr. Hirsch, that Marshall Starkman should not drive because of his posttraumatic stress syndrome. He's essentially considering the fact he was run over by a multi-ton truck and that he fears that he will be hit again by a vehicle. Can you do anything to fix that in a car?

A No, I can't. There is no devices or equipment that can fix that.

Q You were asked questions about your plan and about really whether your plan was, I don't know, too broad over generous, right?

A That's correct.

MR. GREENBERG: I have separated from Exhibit 2 in evidence Dr. Faust's records, a portion on top. With the permission of the Court, can the court officer hand these to the doctor, please?

THE COURT: Yes.

(Documents were handed.)

MR. GREENBERG: Can you put up the page for the estimate of Dr. Faust's visits.

(A chart is displayed.)

Q You have an estimate, for instance, for orthopedic surgery, whether it's Dr. Faust or somebody else, on page five of three times a year, correct?

A That's right.

Q There were some questions well, why would he even see him three times a year? Correct?

A Yes.

Q You told Mr. Demers you wrote that report in 2012, right?

A That's correct.

Q That is before Marshall Starkman even had the second attempt to fuse his spine, right?

A That's right.

Q You have separated the visits for Dr. Faust in the year 2013?

A Yes.

Q You predicted three visits in 2013, correct?

A Yes.

Q That was your best estimate?

A At the time I wrote the report, yes.

Q Am I correct that he actually, that is Marshall Starkman, actually visited Dr. Faust on 1-8-13?

A Yes.
Q Had surgery on 2-8-13?
A Yes.
Q Had a visit on 2-19-13?
A Yes.
Q Had a visit on 2-25-13?
A Yes.
Q Had a visit on 3-26-13?
A Yes.
Q 5-14-13?
A Yes.
Q 6-25-13?
A Yes.
Q 8-27-13?
A Yes.
Q 1-22-13?
A Yes.
Q 12-10-13?
A Yes.
Q 12-17-13?
A Yes.
Q You guessed pretty low, didn't you?
A Yes, I did.
Q When we talk about a plan by somebody of your particular speciality and training, how does it work when you

talk about the interaction with doctors like Dr. Faust, for instance?

A Yes. You use a combination of your background, your experience and training, as well as the medical input. So you would consider all of the physician's input, and then prepare the plan based on your best estimate of what is necessary.

Q Do physicians write these plans?

A No, they don't.

Q When you prepared this plan you told us it's dynamic. You have made changes along the way, right?

A Right.

Q A person's medical condition can change and they can have additional needs or things that change or get better or worse. For instance, the pills, you found out there were different pills?

A Yes.

Q This report is static?

A The one I have presented, that was static.

Q What does that mean?

A At that point in time, in May of 2012, those were the services and the costs at that point.

Q Dr. Faust. Did you read Dr. Faust's testimony at trial?

A Yes, I did.

Q You therefore know now that Dr. Faust says that, with a

reasonable degree of medical certainty, that Marshall Starkman will need two more surgeries to his spine?

MR. DEMERS: Objection.

THE COURT: I'm not sure I know what the basis of your objection is.

MR. DEMERS: May we have a side bar?

THE COURT: Come on up.

(A discussion was held off the record.)

THE COURT: The objection is overruled.

Q So I was asking, do you now know, assume that Dr. Faust said on that stand that in the next reasonable amount of period of time Marshall needs two more surgeries, one actually to the cervical spine, he calls it, and one at the site of the lowest fracture, being the top of the thoracic spine. Did you make any allocation for those two surgeries in this report?

A No, I did not.

Q How much were the last spinal surgeries, for instance, about?

A The first one was 163 and the last one I priced was 190.

Q So those types of numbers aren't even in here, are they?

A No.

Q Is that, again, because while what you do is static --

MR. DEMERS: Objection.

THE COURT: Sustained.

Q You had no way of knowing that when you prepared this in 2012, is that correct?

A That's correct.

Q You don't have a bit of foresight, right?

A No.

Q Now, when you talk about physical therapy and a life care plan, could you please tell us what you mean by physical therapy? What are you referring to?

A There are two kinds of physical therapy, curative and palliative. Curative we see initially after an injury, where the people are getting conservative treatment, physical therapy, more proactive, using machines, stretching using bands to try to help their condition. Palliative is when curative hasn't worked and it's to alleviate the pain. That is associated to increased range of motion to help that person function a little bit better as a pain relief methodology.

Q Dr. Faust in his testimony told us with a reasonable degree of medical certainty, that Marshall Starkman will have permanent pain. Please tell us how does that, if at all, address the issue of the palliative therapy that you talked about?

MR. DEMERS: Objection.

THE COURT: Sustained.

A Palliative --

Q Does palliative therapy, in your professional practice, deal with permanent pain issues?

A Yes, it does. They would use a technique such as electrical stimulation, heat massage, ultrasound, to loosen up the areas and increase range of motion and function, and reduce pain.

Q As a life care planner it's not going to cure him because it's not curative. What is the importance of palliative?

MR. DEMERS: Objection.

THE COURT: Overruled.

Q What is the importance of palliative? Is there any importance to palliative care in a life care plan?

A Yes, there is. It assistants the person to alleviate pain, to function more independently, to improve the quality of life for that individual.

Q You put, I believe it's gone now but I believe on the same page when you were talking about the number of orthopedic visits as three annually -- withdrawn.

Do you mention a visit with a neurosurgeon somewhere in your report?

A Yes, I do, as a evaluation one time.

Q One time. Do you think, can you characterize that as conservative, is it generous? How you would categorize it?

MR. DEMERS: Objection.

THE COURT: Sustained.

Q Why did you select one?

A Because I don't know that he's going to need more than that. But he will need, in my estimation he will need one to determine the need for future treatment from that neurosurgeon. So that provides in his plan the cost for that evaluation. But it doesn't provide for follow-up care, just the evaluation.

Q In your report you were questioned about the ablation surgery. Do you remember those questions by Mr. Demers?

A Yes, I do.

Q He asked you about the cost that you had up there. There was one ablation surgery referenced, correct?

A That's correct.

Q Did you provide for another ablation surgery if Mr. Starkman is one of the 20 percent that require it? He was a young man when he had the first one.

A No, I did not.

Q What number would that be about, that you could have included and didn't?

MR. DEMERS: Objection.

THE COURT: Sustained.

Q You were asked questions at age 65, right?

A Yes.

Q How does the age 45 tie in with all the numbers that you've shown us, if at all?

MR. DEMERS: Objection.

THE COURT: Overruled.

A 45 is the age of initiation of services, and also the age to bring on his life expectancy.

Q In your report there is what you describe as a typographical error of 65. You were asked at length about it. Everything you told us is centered on the 45 years of age, correct?

A Absolutely everything shows 45.

Q Why did you pick 45? It was his age in 2012?

A That was his age right at the time of the writing of the report.

Q Not 65?

A That's right.

Q You provided for some services that are now being provided by Mrs. Starkman; is that correct?

A Yes, I do, for home health aides.

Q Why do you provide for services that Mrs. Starkman is providing right now for her husband?

A Because you can't assume that she's going to be available. She may become disabled or for some other reason can't provide those services. If she is not available then Mr. Starkman no longer has that service available to him.

Q I want you to assume that Dr. Faust testified that Marshall Starkman will get worse over time, his spine will get

worse over time. Can you tell us how, if at all, that relates to the information you've given us about his care?

A Well --

MR. DEMERS: Objection.

THE COURT: Sustained.

Q Did you consider when you wrote this report that somebody with the type of injuries that Marshall Starkman has sustained will get worse over time?

MR. DEMERS: Objection.

THE COURT: Overruled.

A I do. Looking at the prognosis that is indicated in the medical records, what the doctors are saying about the likely outcomes, I figured that into my life care plans.

Q Why is that important in the static report that we are seeing in the courtroom?

A You want to be able to provide services that the person is going to need as they age, or their condition deteriorates. Because this is their one opportunity to have the services set aside, money set aside for their services. You don't want to miss anything, if at all possible.

MR. GREENBERG: Thank you.

RECROSS EXAMINATION

BY MR. DEMERS:

Q Dr. Kincaid, I am not going to ask you to look at the list of medications that we looked at earlier unless you would

like to, but none of those medications are narcotics, are they?

A Yes. The Tramadol is. It's an opiate analgesic.

Q Tramadol is the only one?

A Yes, on that list.

Q Now with regard to the proposed future possibility of a surgery, maybe that 33 percent in the next ten years on Mr. Starkman's neck, you did allocate 163 some odd thousand dollars for that. As a matter of fact, we talked about the timing of it being after the trial or sometime in the future, correct?

A Yes. In the 2012 report, that is correct.

Q So you did allocate for a future surgery. Are you saying that is the cost of the second surgery?

A No. The second surgery the cost would be 190.

Q You've got the report from the second surgery, right? You've got those medical reports from Dr. Faust that he did the surgery in February of 2013?

A Yes.

Q You didn't update this report?

A No.

Q So, when this report went out, whoever read the report wouldn't know what you are referring to, whether it was a surgery that had already taken place or some surgery that was going to happen in the future?

A It's a life care plan. It's for future care. So they would have known it was for something in the future.

Q In terms of what you refer to as palliative physical therapy, you mentioned heat and massage and ultrasound. Regardless of whether you feel that is something that a patient, or a person, or a client, I think, as you referred to like Mr. Starkman in your mind would need that, or have the option of having that, no one has prescribed that, correct?

A Not to my knowledge yet. He's had physical therapy, I should say, but not since that period of physical therapy in 2013.

Q When you said that, I think you used the term misprint. When you said that this home health aide should start coming to Mr. Starkman's home when he is 65, and that that should have been 45, is that what you are saying?

A Yes.

Q Well, in all of those charts you used 45.3 correct, not 45?

A 45.3, that's right.

Q That was a misprint? It should have said 65.3, correct?

MR. GREENBERG: Objection, Judge.

A No, it was general.

THE COURT: Overruled.

A I'm more specific in the life care plans. That is a matter of costing out. I would just round numbers.

Q In the report you round up, but the chart you are very

precise and you give the age with a decimal point. So you still say that was a misprint?

A Oh, yes, definitely.

MR. DEMERS: Thank you, doctor.

MR. GREENBERG: Nothing further, Judge.

THE COURT: Thank you, doctor. You can step down.

(The witness was excused.)

THE COURT: Any other witnesses?

MR. GREENBERG: I do, your Honor. We call Michael Soudry.

M I C H A E L S O U D R Y, having been called as a witness by and on behalf of the Plaintiff, having first been duly sworn, was examined and testified as follows:

THE CLERK: State your name and your address, spelling your name for the record.

THE WITNESS: My name is Michael Soudry S-O-U-D-R-Y. My office address is 1700 Broadway, New York, New York.

THE COURT: You may inquire.

DIRECT EXAMINATION

BY MR. GREENBERG:

Q Hello.

A Hello.

Q Keep your voice up, please.

A Okay.

Q Thank you. Would you please share us with us your