

1 SUPREME COURT OF THE STATE OF NEW YORK
2 COUNTY OF QUEENS : CIVIL TERM : PART 35

3 -----X

4 HYUN SOOK KIM, Index No. 8968/14

5 Plaintiff, JURY TRIAL

6 -against-

7 NEAL WALTER KLUGER,

8 Defendant.

9 -----X

10 Supreme Courthouse
11 88-11 Sutphin Boulevard
12 Jamaica, New York 11435
13 October 16, 2017

14 B E F O R E:

15 HONORABLE TIMOTHY J. DUFFICY,

16 Justice, and a jury

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

18 FOR THE PLAINTIFF:

19 SCHWARTZAPFEL LAWYERS, P.C.
20 600 Old Country Road - Suite 450
21 Garden City, New York 11530

22 BY: CHRISTOPHER F. HOLBROOK, ESQ.

23

24 FOR THE DEFENDANT:

25 PICCIANO & SCAHILL, P.C.
1065 Stewart Avenue - Suite 210
Bethpage, New York 11714

BY: FRANCIS J. SCAHILL, ESQ.

A L S O P R E S E N T:

Grace Kim - Official Korean Interpreter

23

24 MICHAEL BERG

25 -and-

SUSAN NAPOLI, CSR, RMR, CRR

Senior Court Reporters

mb

A. Leiken - Plaintiff - Direct

1 remain standing and face the clerk, please.

2 THE COURT CLERK: Sir, please raise your right
3 hand.

4 A L A N L E I K E N, Ph.D, a witness called on behalf of
5 Plaintiff, after having been first duly sworn by the Clerk
6 of the Court, took the witness stand and testified as
7 follows:

8 THE COURT CLERK: Please have a seat.

9 State your name and full address for the record.

10 THE WITNESS: Alan Leiken, L-E-I-K-E-N, 18 Abbey
11 Lane, East Setauket, New York, 11733.

12 MR. HOLBROOK: May I inquire, Judge?

13 THE COURT: Go ahead.

14 DIRECT EXAMINATION

15 BY MR. HOLBROOK:

16 Q Good afternoon, Alan.

17 A Good afternoon.

18 Q Professor Leiken, I should say.

19 I just want to ask you a few questions regarding
20 economics in this case and I'm going to start by asking you to
21 tell the jury about your background. In other words, where did
22 you go to school? Tell them your work history and so forth.

23 A Sure. I actually grew up in Queens and I went to Queens
24 College where I majored in both economics and mathematics and
25 minored in secondary education. I was thinking for a while of

A. Leiken - Plaintiff - Direct

1 becoming a high school math teacher and actual did some field
2 work at Jamaica High School.

3 I then went to graduate school at Stony Brook, where I
4 received a Master's degree in economics and a Ph.D. in economics.
5 So any reference to Dr. Leiken refers to my Ph.D. I am not a
6 medical doctor.

7 Back in 1978 when I received my Ph.D., Stony Brook had
8 just built a major teaching hospital and a health sciences
9 center, including schools of medicine, dentistry, nursing, social
10 welfare and allied health. My specialty in the economics
11 department, where I did my research to get the Ph.D., was in the
12 area of healthcare policy and healthcare manage:

13 So Stony Brook, in the health sciences center, they
14 wanted an economist to teach, to do research, to develop a
15 curriculum related to healthcare policy, healthcare management.
16 So I was the person they hired back in 1978.

17 So since then, up until December of last year when I
18 retired after being on the faculty for 38 years, so while I
19 graduated the economics department, my faculty appointment was in
20 the health sciences center. I taught courses in statistics, in
21 research, economics of healthcare. Most of my students were
22 graduate students who already have clinical degrees and work in
23 healthcare. They were nurses, social workers, doctors, dentists
24 and they came back into our program to learn how to manage and
25 plan healthcare programs, healthcare systems.

A. Leiken - Plaintiff - Direct

1 For over a dozen years I was chairman and the head of
2 the department of healthcare policy and management. I was
3 responsible for the faculty, for the students and for the
4 curriculum. I wrote the proposal to establish the Master's
5 degree in healthcare policy management. I published over 60
6 articles related to healthcare policy and management and I was on
7 the faculty for 38 years.

8 Q Professor Leiken, I want to discuss what the field of
9 economics is generally and then if you could also explain the
10 relationship to healthcare cost to the jury as well.

11 A The kinds of issues you hear about relatively regularly
12 on the popular press relates to inflation rates. Inflation rates
13 are low typically when the economy is not doing that well and
14 they want to keep interest rates low, so that people can buy
15 houses, to stimulate sales of automobiles, purchases of consumer
16 goods.

17 You also hear about unemployment and a lot of
18 information about wage increases, that because of, quote, the
19 great recession we had in 2009 up until a few years ago wage
20 increases have been lagging. We'd like to see wage increases
21 higher than they've been, in the two and a half percent range,
22 again more recently.

23 And inflation is the price of goods and services going
24 up. So, again, given I'm in Queens, a slice of pizza back in
25 1972 on Main Street, two slices and a coke was 25 cents. Now the

A. Leiken - Plaintiff - Direct

1 same two slices and a coke are over \$5. That's inflation. The
2 coke didn't change, the pizza didn't change. It's only the price
3 that changed. And if I told somebody 20 -- back in 1972 that the
4 price of two slices and a coke was going to be over \$5, they
5 would have looked at me like, wow, you're crazy, but that's
6 inflation.

7 Healthcare inflation has actually been greater than the
8 inflation in the overall economy, but it's not immune to
9 downturns. So, again, since the economy has been relatively
10 sluggish over the past seven or eight years, inflation and
11 healthcare has been less than it had been prior to this bad
12 economy that we had starting in 2008, 2009.

13 Healthcare costs, like costs in general, are still going
14 up, but they're going up at a slightly lower rate. So while they
15 were going up at 5, 6 percent per year 30 years ago, 25 years
16 ago, more recently, if you look at the more recent 25 year
17 period, they've been going up at a little over four percent per
18 year, overall healthcare costs. There are differences depending
19 on the services and the products, but overall healthcare costs
20 have been going up by four percent per year.

21 Q So using that as a reference point, is it fair to say
22 then that healthcare costs rise at a greater level than average
23 goods?

24 A Yes, that's been the experience and I don't anticipate
25 that to change.

A. Leiken - Plaintiff - Direct

1 Q Doctor, have you -- or Professor, whichever, have you
2 testified as an expert before and we'll say in the New York State
3 Courts, this particular courthouse, in the field of economics
4 specifically with regard to healthcare costs?

5 A Yes.

6 Q And have you ever been denied the ability to testify as
7 an expert in those fields?

8 A No.

9 Q Now, my office retained you as an expert in this case,
10 correct?

11 A Correct.

12 Q And as part of your work, you prepared a report, maybe
13 it was probably nearly two years ago or 18 months ago, a while
14 ago you prepared a report, right?

15 A That's correct.

16 Q And you charged my office for your time in preparing
17 that report?

18 A Yes, I did.

19 Q Do you recall the amount?

20 A I believe it was \$2,700.

21 Q Now, for your time to be here in court today, have you
22 also charged my law firm for your time to testify?

23 A Yes.

24 Q And what is that?

25 A For pretrial preparation and for being here today it's

A. Leiken - Plaintiff - Direct

1 \$4,400.

2 Q Now, you reviewed certain records in connection with
3 this case in coming to your determinations regarding healthcare
4 costs for my client Miss Kim?

5 A Yes, I did.

6 Q And what records would you have reviewed in this
7 particular case?

8 A I reviewed the report by a Dr. Richter, who laid out
9 what he believes to be the future healthcare needs for Miss Kim
10 and what the current costs are for those needs. He's the expert,
11 my understanding is he'll be here tomorrow, who has determined
12 what she needs and what the current costs are. My role is to
13 determine what those costs will be over her lifetime.

14 Q Professor, you've testified for my law firm before,
15 correct?

16 A Yes.

17 Q Do you work with anyone else or is it just you?

18 A Over the last several years I've brought somebody else
19 on.

20 Q Who's that?

21 A Her name is Deb Dwyer.

22 Q Is she a professor at Stony Brook University?

23 A Yes, she is.

24 Q And did she testify for my law firm a couple of weeks
25 ago at a trial in Nassau County?

A. Leiken - Plaintiff - Direct

1 A I believe so, yes.

2 Q Okay. And over the last five years is it fair to say
3 you've testified for my law firm maybe an average of once a year?

4 A Yeah, something like that. It's not a lot.

5 Q Maybe less?

6 A One sounds reasonable.

7 Q And from your consulting work, not from your work in
8 academia, approximately how much would you say you would have
9 earned last year approximately from your work as a economics
10 consultant?

11 A Probably over \$500,000.

12 Q Now, when you testify do you ordinary testify for folks
13 who are injured and need future healthcare and then you come in
14 and talk about what their needs are?

15 A Yes.

16 Q So, in essence, does that lend yourself as testifying as
17 a plaintiff's expert?

18 A I am typically in court on behalf of the request of the
19 plaintiffs. I do reviews for defendants, but they typically
20 don't bring an economist into court.

21 MR. HOLBROOK: Now, at this time, your Honor, I am
22 going to proffer Professor Leiken as an expert in the field
23 of economics, specifically with respect to healthcare costs.

24 THE COURT: Any objection?

25 MR. SCAHILL: No objection.

A. Leiken - Plaintiff - Direct

1 THE COURT: He's an expert in that field.

2 Q I want to talk to you, you indicated you reviewed
3 Dr. Richter's report. Now, following the review of Dr. Richter's
4 report, did you make calculations as to the costs of her
5 healthcare needs going forward?

6 A Yes, I did.

7 Q Now, explain to the jury how you made those
8 calculations.

9 A Dr. Richter, and I'll show you this shortly on the table
10 I've prepared, has identified a variety of different healthcare
11 needs, physical therapy, for example, medical technology,
12 medications, surgeries, and I determined the annual cost based on
13 the information he provided.

14 So, as an example, if he says she needs 30 physical
15 therapy visits a year at \$150 a visit, then the cost for physical
16 therapy per year is \$4,500. So for each of the categories he
17 identifies, he also identifies the frequency and the current
18 cost. I then determine the annual cost from that information
19 starting in 2018.

20 Q Did you take into account Miss Kim's age when you made
21 the calculations?

22 A Yes.

23 Q And why is that important?

24 A Because I'm doing these projections over what's called
25 the life expectancy. Dr. Richter has -- offers an opinion that

A. Leiken - Plaintiff - Direct

1 she will need many of these services over the remainder of her
2 life expectancy. So the date of birth or the age is useful as
3 well as her gender in determining her statistical life
4 expectancy, and there are statistical tables in what's called the
5 Patent Jury Instructions that's stated from the United States
6 National Center for Health Statistics, given somebody's current
7 age and gender, what their statistical life expectancy is.

8 So in her particular case, given her age and given that
9 she's a woman, she has a statistical life expectancy to age 82.
10 It's only a statistic. The only issues relating to what affects
11 life expectancy that is captured in these tables is current age
12 and gender. The older you are, the longer your life expectancy
13 will be because you've already achieved certain milestones.
14 Women will live typically several years more than men, but
15 there's nothing else in these tables. There's nothing specific.
16 Do I smoke? Do I have high cholesterol? Did my parents live a
17 long age?

18 The only thing -- the only variables that are considered
19 in this particular table that's in the Patent Jury Instructions
20 is age and gender. So everybody is in there. It could be people
21 with low cholesterol, high cholesterol, good healthcare habits,
22 bad healthcare habits. It's a statistic and, of course, there's
23 no guarantee that she would live to age 82. She can live longer,
24 she can live shorter.

25 Q In making your calculations for future healthcare costs,

A. Leiken - Plaintiff - Direct

1 did you rely or consult with any government data or statistics?

2 A Yes, I did.

3 Q What would those be?

4 A There's data from the U.S. Bureau of Labor Statistics.

5 You hear some of that data when they say that healthcare -- that
6 they say inflation this year or that social security this year is
7 going up two percent. That's based on inflation in the overall
8 economy.

9 They also have data that is specific to different
10 industries and within healthcare they have data which is specific
11 to different items within healthcare. So they have inflation
12 data for physician services, for nonphysician services, for
13 hospital care. All that kind of data exists.

14 And what I have done is taken that data and I've
15 computed a statistical average, which I'll tell you about in a
16 few minutes, over the last 25 years. And the reason I look at
17 data over 25 years is, you don't look at the lowest inflation
18 rates and you don't look at the highest inflation rates. There
19 are times when inflation is higher than other times and, again,
20 you don't cherrypick and pick the highest or the lowest. You
21 pick an average over an extended period of time.

22 MR. HOLBROOK: Your Honor, with the Court's
23 permission, I would ask that the witness be able to step down
24 into the well to reference what's in evidence as Plaintiff's
25 31A and I guess it's -- it's either 31A and 31B or 32.

A. Leiken - Plaintiff - Direct

1 THE COURT: You can step down.

2 MR. HOLBROOK: 31A and B.

3 Can everybody see?

4 Q Professor Leiken, can you please explain what we're
5 looking at?

6 A Yes. This row over here, this is information that is
7 going to be projected and it was presented to me in a report that
8 Dr. Richter wrote regarding the future healthcare needs.

9 So in his report he mentioned spine specialists, two to
10 three visits per year at \$155 per visit over the remainder of her
11 life expectancy. So some years will be two, some years three.
12 So I determined the annual cost by multiplying \$155 by two and a
13 half visits per year and that annual cost is \$388. I then apply
14 an inflation rate, which I discussed in this case for physician
15 services of three percent per year, and that's data from the U.S.
16 Bureau of Labor Statistics.

17 So once you determine the annual amount and then you
18 determine the inflation rate, the rest is arithmetic. So
19 somebody makes \$20,000 and they get a five percent raise, they
20 get \$1,000 more. Five percent of \$20,000 is \$1,000. Now they're
21 making \$21,000. Then when they get a raise the following year,
22 it's not based on the \$20,000. It's based on the \$21,000.

23 So you'll see that the amount goes up more then at the
24 beginning because the amount it cost per year is growing. So you
25 see that every year it goes up based on the average of three

A. Leiken - Plaintiff - Direct

1 percent per year. You notice the last year it goes down. It's
2 not because -- it goes to \$689, where the year before it was
3 \$837. It's not because the costs are going down. It's because,
4 given her life expectancy at age 82 and given that her date of
5 birth is October 22nd, it's not the full year. So that's why
6 that last number goes down.

7 To get the total cost for the spine specialists, I added
8 this column up. So the total cost for the spine specialists
9 visits is \$16,485.

10 The next category --

11 Q I just want to stop you here before we go on.

12 So when we're looking at this year, you're saying
13 between two and three visits, so two and a half visits at \$155
14 apiece is roughly \$388, right?

15 A Correct.

16 Q And then \$400 with the inflation next year and so on and
17 so forth?

18 A Correct.

19 Q Okay. Just to be clear, Professor, if Miss Kim didn't
20 go to the doctor in 2018, that would be zero?

21 A Correct.

22 Q And then if she went five times in 2019, it would be
23 more than \$500?

24 A That's correct.

25 Q So the numbers are an estimate based on what Dr. Richter

A. Leiken - Plaintiff - Direct

1 has put forth, subject to change, they could be up or down?

2 A Correct.

3 Q Please continue.

4 A So the pain specialists of five visits per year at \$155
5 per visit is \$775 per visit -- per year, rather, increased by
6 three percent per year, and now you see how the costs grow over
7 the rest of her life expectancy, and you see that the total cost
8 for this pain specialist is \$32,927.

9 Physical therapy, 30 visits per year at \$130 per visit,
10 annual cost of \$3,900. Physical therapy falls in the category of
11 other healthcare professionals. That's how the Bureau of Labor
12 Statistics has the data. They don't have anything specific for
13 physical therapy. So I used that category of other healthcare
14 professionals and that's two and a half percent inflation rate.
15 So I apply the two and a half percent inflation rate to this
16 \$3,900 figure. The cost over the remainder of her life
17 expectancy, \$153,934.

18 Annual costs of medication, \$216. Medication costs have
19 been increasing at a higher rate than these services. I used
20 3.8 percent per year for prescription medication, increase over
21 life expectancy, total cost for medication, \$10,348.

22 Now, she needs an MRIs of the spine, two every two to
23 three years at \$1,600 each. You start by putting \$1,280 away
24 this year, increase by three percent per year, and then she'll
25 have enough money to purchase the MRIs every two to three years.

A. Leiken - Plaintiff - Direct

1 So that lifetime cost for the MRIs \$54,383.

2 Same analysis for the EMGs, two every two to three years
3 at \$1,500 each. So \$1,200 the first year, increased by three
4 percent per year. Lifetime cost for EMGs, \$50,984.

5 X-rays, two every two to three years, at \$300 each,
6 start by putting away \$240 the first year, increased by three
7 percent per year. Lifetime cost, \$10,197.

8 And just to remind you, all this information on this
9 first row is from Dr. Richter (indicating). I'm not offering an
10 opinion on what she needs. I do have an opinion on pricing and
11 cost, as a health economist, but Dr. Richter has provided that
12 information.

13 MRIs of the knee and the shoulder, two every four years
14 at \$1,600 each. Start by putting away \$800, increased by three
15 percent per year. So it's \$33,989 for the MRIs of the knee and
16 the shoulder.

17 She'll need lumbar spine surgery within 10 to 15 years
18 at a current cost of \$42,500. I increased surgical costs by four
19 percent per year. Hospital costs have been increasing at a rate
20 in excess of that. So that surgery that currently costs \$42,500,
21 in the year 2029 will cost \$68,044.

22 Knee surgery within 10 to 15 years and revision, 10 to
23 15 years thereafter, at a current cost of \$56,000, increased by
24 four percent per year, will cost \$89,658 in approximately
25 12 years, and then 12 years thereafter that same surgery will

A. Leiken - Plaintiff - Direct

1 cost \$143,545.

2 And lastly, cervical spine fusion surgery within 10 to
3 15 years, which currently costs \$100,000, increased by four
4 percent per year, will cost \$160,103.

5 The total cost for knee surgery is \$233,203.

6 So to get the total future costs for healthcare I add up
7 the lifetime cost in each of these categories and that total
8 future cost, starting January 2018, continuing over the remainder
9 of her life expectancy to age 82, is \$824,597.

10 Q Just a few more questions before you return to your
11 seat.

12 Let me ask you a question. If we were figuring out,
13 let's say Miss Kim never took another medication again related to
14 this crash, and we wanted to deduct the \$10,000, then her total
15 cost would go down to 800 and roughly 14,000?

16 A Correct.

17 Q Okay. And so on and so forth. If we thought she only
18 needed one to two visits, just adjust accordingly, or if we
19 thought she needed four to five, and so forth.

20 Let me ask a question, since you brought it up, with
21 respect to Dr. Richter's estimated costs for the particular
22 healthcare service, based on your knowledge and your opinion, is
23 that an aggressive cost or a high cost or is it on the low side?

24 MR. SCAHILL: Objection.

25 Q What's your experience been?

A. Leiken - Plaintiff - Direct

1 THE COURT: Overruled.

2 A They're reasonable costs. These are costs that I
3 regularly see. There are sometimes higher, there are sometimes
4 lower, but these are -- it's in the range of the higher and
5 lower.

6 Q Now, I want you to assume for purposes of this question
7 that Miss Kim had a -- well, I'm going to withdraw that.

8 Now, are all the opinions you offered with respect to
9 that chart you prepared with a reasonable degree of economic
10 certainty?

11 A Yes.

12 MR. HOLBROOK: All right. If you can just return
13 to your seat, I just have a few more questions. Then I will
14 be all finished with you. Thank you, Professor.

15 Q Just a couple of questions for you. Why not or why is
16 it inappropriate to not just take the 155, and say it's, let's
17 even say it's 2.5 visits, because it's in between two and three,
18 and just multiply that for as many years as we think Miss Kim is
19 going to live?

20 A Because if we do that, it wouldn't take inflation into
21 account and she wouldn't have to -- have enough money to buy the
22 future services, which are going to cost more.

23 Q I'm a simple man, Professor Leiken, so I'm going to ask
24 you in a simple way. The cost of an MRI today in 2017, it's
25 going to be different in 2030?

A. Leiken - Plaintiff - Direct

1 A Absolutely.

2 Q And that's what your chart reflects?

3 A Correct.

4 Q Now, we've already gone over, you're not a medical
5 doctor, you have a Ph.D. So you're relying on Dr. Richter,
6 right?

7 A That's correct.

8 Q So if Dr. Richter is wrong, if he's just -- we'll hear
9 from him tomorrow, the jury will make their decision, but if he's
10 wrong, then your numbers are also off?

11 A Correct.

12 Q If Miss Kim decided, for whatever reason, never to get a
13 stitch of treatment again in her life, then the number would be
14 zero?

15 A Absolutely.

16 Q And if she decided to get more treatment, then the
17 number will go up, right?

18 A Correct.

19 Q This is also, as we discussed, subject to her living the
20 average statistical age of an American female. She could live
21 less and the cost -- in other words, if she died in 2032, we'd
22 stop her chart there, wouldn't we?

23 A Yes.

24 Q And if she lived to 90, well, then it would go up,
25 wouldn't it?

A. Leiken - Plaintiff - Cross

1 A That's correct.

2 MR. HOLBROOK: Okay. I have nothing further.

3 Thank you, Professor.

4 THE WITNESS: You're welcome.

5 THE COURT: Cross-examination.

6 MR. SCAHILL: Thank you, your Honor.

7 CROSS-EXAMINATION

8 BY MR. SCAHILL:

9 Q Good afternoon, Dr. Leiken.

10 A Good afternoon.

11 Q My name is Frank Scahill and I represent the defendant
12 in this case, Neal Kluger.

13 Doctor, you've testified over 400 times?

14 A Over the last 25, 30 years, sure.

15 Q And you've testified in both state and federal court; is
16 that correct?

17 A Yes.

18 Q And you've told us that most of your work now testifying
19 in court is for plaintiffs, correct?

20 A It always has been, that's correct.

21 Q And the income that you have discussed, that \$500,000
22 per year, that's not income from teaching, that's income from
23 your work as a consultant on personal injury lawsuits, correct?

24 A Yes.

25 Q And you're no longer teaching anymore, you're just

A. Leiken - Plaintiff - Cross

1 purely consulting on personal injury cases; is that correct?

2 A That's correct.

3 Q When were you retained as an expert in this case?

4 A I think it was towards the end of the last year.

5 Q In 2016?

6 A I believe so.

7 Q And you said you have worked for the plaintiff's law
8 firm before?

9 A That's correct.

10 Q Do you know how many times you've testified for them
11 during your career?

12 A Oh, I don't know going back 25, 30 years. I know it's
13 maybe one or two a year.

14 Q So approximately 25 to 30 times you've testified for the
15 plaintiff's law firm?

16 A I really, really don't know. I know it's not more than
17 a couple of times a year.

18 Q And you're here to give an opinion on the cost, the
19 projected cost for future healthcare for the plaintiff in this
20 case for the rest of her life; is that correct?

21 A Yes.

22 Q And for that service and for you testifying in court,
23 what was the total amount of your fee?

24 A \$7,100.

25 Q \$7,100?

A. Leiken - Plaintiff - Cross

1 A That's correct.

2 Q And I presume you interviewed the plaintiff extensively
3 and found out what healthcare she's currently receiving?

4 A My analysis, I believe I said, is purely based on
5 Dr. Richter's report. It has nothing to do with what she may or
6 may not have received. It obviously has nothing to do with my
7 opinion, as a Ph.D. economist. It's purely based on the life
8 care plan developed by Dr. Richter.

9 Q Doctor, I know that you have been cross-examined before.
10 Do you or can you follow an instruction that if I ask you a yes
11 or no question, I'd ask you to answer with a yes or no. If you
12 can't, let me know and I'll either rephrase the question or I'll
13 move on.

14 A Okay.

15 Q So that was a good example. Did you interview the
16 plaintiff to find out what type of healthcare she is receiving
17 currently?

18 A Did I do that? No.

19 Q Do you know, and this is also a yes or no question, do
20 you know that she has not been to any doctor for any treatment
21 for at least the last 18 months, a year and a half?

22 A Do I know that? No.

23 Q Did you speak to -- and the \$7,100 fee, again, is for
24 doing your research, preparing your report and for testifying in
25 court; is that correct?

A. Leiken - Plaintiff - Cross

1 A That's correct.

2 Q Do you know or did you speak to any of her physicians in
3 this case, Dr. Berkowitz, Dr. Das, Dr. Rafiy, Dr. Shiau, and ask
4 them what her future healthcare needs are? Did you speak to any
5 of those physicians that I just mentioned?

6 A No.

7 Q Did you at any time ask any of those physicians what the
8 costs are for their services?

9 A I never spoke to them, so I never asked them.

10 Q Now, you presented two charts to the jury in this case,
11 correct?

12 A Yes.

13 Q And do you stand by the accuracy of the numbers that you
14 presented as to the cost of future healthcare for the plaintiff
15 in case, Miss Kim?

16 A Based upon Dr. Richter's report, I stand by the
17 projections I have made.

18 Q That was a yes or no.

19 A Well, it wasn't.

20 Q Now, did you prepare any other reports with different
21 figures in this case?

22 A I can answer that, but it requires more than a yes or
23 no.

24 Q Well, this is one set of reports (indicating). Did you
25 prepare another report with different figures in this case?

A. Leiken - Plaintiff - Cross

1 That's really a yes or no.

2 A They -- well, it's not really a yes or no, but I can
3 answer it if you'd like.

4 MR. SCAHILL: Okay. I'd ask that this be marked
5 for identification and I'd like this to be shown to the jury.
6 Shown to the witness. Sorry, your Honor.

7 MR. HOLBROOK: Judge, I have no objection if he
8 wants to move it into evidence.

9 THE COURT: Okay. Then move it into evidence.

10 MR. SCAHILL: Can you mark that as Defendant's?

11 (Whereupon, the document referred to was marked in
12 evidence as Defendant's Exhibit D.)

13 THE COURT OFFICER: Defendant's Exhibit D marked
14 and received in evidence.

15 MR. SCAHILL: Thank you.

16 Q Dr. Richter, did you prepare a report in connection with
17 this case in 2016?

18 A I'm Dr. Leiken and, yes, I did. You said Dr. Richter.

19 Q I'm sorry, Dr. Leiken.

20 And in the 2016 report, did your figure, your total cost
21 of healthcare for Miss Kim, did that equal \$857,931?

22 A Yes.

23 Q For the \$7,100, do you make up a file for the
24 plaintiffs?

25 A I'm not sure what you mean do I make up a file.

A. Leiken - Plaintiff - Cross

1 Q Do you have a file? Do you have any documents other
2 than what you have in front of you for that \$7,100 fee?

3 A I issue a report.

4 Q That's approximately a six-page report?

5 A Probably even less than that.

6 Q Five-page report?

7 A It might be a three- or four-page report.

8 Q And how much is the report again? Is it \$2,700 you
9 said?

10 A That's correct.

11 Q And the testimony is \$5,000?

12 A \$4,400.

13 Q In that 2016 report you had a different number for spine
14 specialists visits over the course of her lifetime, correct?

15 A Yes.

16 Q And in that 2016 report you had a different number for
17 pain specialists, correct?

18 A Absolutely.

19 Q You had a different number for physical therapy?

20 A Yes.

21 Q Medications?

22 A Yes.

23 Q Each one of those categories, correct?

24 A The one on the first table, yes.

25 Q And you included 2017 costs for the cost of her future

A. Leiken - Plaintiff - Cross

1 medical care, correct?

2 A Correct.

3 Q And for future medical care, are you aware that past
4 medical services are not being claimed in this case? So up until
5 the time of this trial Miss Kim is not asking the jury to award
6 her anything for 2017 costs?

7 A That's why I revised the table to start the future costs
8 in 2018 and that's why the numbers are different.

9 Q My question is, are you aware that Miss Kim is not
10 asking for any past medical expenses?

11 MR. HOLBROOK: Objection. He just said yes.

12 THE COURT: Okay. Sustained.

13 Q Now, in the course of your research in order to prepare
14 this four-page report about Miss Kim's future medical care, did
15 you know whether or not Miss Kim was employed? That's a yes or
16 no question.

17 A No.

18 Q Do you know whether she's employed with any medical
19 benefits? That's a yes or no question.

20 A No.

21 Q Do you know if she's on Medicaid or any other type of
22 federal medical program?

23 A No. Medicaid is state and federal.

24 Q Do you know what her out-of-pocket costs are?

25 MR. HOLBROOK: Objection, your Honor. This is

A. Leiken - Plaintiff - Cross

1 subject to a posttrial hearing called a collateral source
2 hearing. The jury will be instructed on it.

3 THE COURT: Sustained.

4 Q Do you know what her out-of-pocket costs were?

5 MR. HOLBROOK: Objection.

6 THE COURT: Sustained.

7 Q Would it have been a more accurate picture to present to
8 the jury as to her actual costs rather than your projected
9 figures based on Dr. Richter's report?

10 MR. HOLBROOK: Objection, Judge. It goes directly
11 against the Court's instructions the jury is going to hear.

12 THE COURT: Sustained.

13 Q I want to ask you about your methodology, Doctor.

14 You talked about the government publications that you
15 use in determining the percentage figures that you're inputting
16 to obtain these figures, correct?

17 A Yes.

18 Q And I presume you do this on a computer, you have a
19 program that you put in the percentage and it will give you
20 future costs?

21 A Do I do what in the computer?

22 Q Prepare these reports.

23 A Yes.

24 Q So you have a program that you could put in a dollar
25 amount and a percentage rate and it will give you all of these

A. Leiken - Plaintiff - Cross

1 figures, correct?

2 A I use Excel and I use the commands in Excel. It's not a
3 program that I wrote. I just use the Excel program.

4 Q That was my question. You don't do these by hand, you
5 put it in a computer and it spits out these numbers, right?

6 A I wouldn't use the word "spit out," but I use Excel to
7 do the calculations.

8 Q Now, you talked about the Bureau of Labor Statistics.
9 That's a government agency that publishes data on the costs of
10 consumer goods, correct?

11 A Yes, Department of Labor.

12 Q And the Department of Labor and the Bureau of Labor
13 Statistics tracks the costs of consumer goods and it also tracks
14 the cost of medical care in the United States, physician
15 services, prescription drugs and services by other medical
16 professionals, correct?

17 A Absolutely.

18 Q The services by other medical professionals, that
19 includes the category of physical therapy, correct?

20 A Yes.

21 Q So you use a 25 year average?

22 A Correct.

23 Q To obtain the growth rate in order to put this on an
24 Excel spreadsheet, correct?

25 A I used the 25 year average to determine the appropriate

A. Leiken - Plaintiff - Cross

1 or reasonable inflation rate, which I then utilized Excel to do
2 the calculations.

3 Q I want to ask you about those percentage rates that you
4 used.

5 You indicated the cost of medication will increase by
6 3.8 percent per year, correct?

7 A On average, correct.

8 Q The cost of physical therapy will increase by
9 2.5 percent per year?

10 A Correct.

11 Q The cost of surgeries will increase by four percent?

12 A Correct.

13 Q And the other costs will increase by three percent?

14 A Correct.

15 Q And you're indicating that healthcare as a whole will
16 increase at an annual average of 4.2 percent?

17 A It has over the last 25 years.

18 Q And that's based on the data that you obtained from the
19 Bureau of Labor Statistics since 1991?

20 A Correct.

21 Q Do you know what the increase cost was in 1991, what the
22 percentage of increase was?

23 A Off the top of my head, no, but I might have that
24 information in my briefcase.

25 Q I have a copy if you -- if I can present it?

A. Leiken - Plaintiff - Cross

1 A Oh, actually, excuse me, it is in the report. Hold on.

2 In 1991 it was -- wait, I can't see. Is that nine
3 percent or eight? Eight percent.

4 Q 8.7.

5 A Okay.

6 Q Now, do you know what the cost in 1991 was of physician
7 services?

8 A That I don't have in front of me.

9 Q I have these tables. Maybe to move this along, would
10 you agree that it was six percent per year?

11 A Again, I don't know -- if you want me to look, I can
12 look in my briefcase. I don't know off the top of my head, but
13 that doesn't sound unreasonable.

14 Q I can give you the tables that I'm referring to and
15 perhaps that might be worthwhile for purposes of this discussion.

16 MR. SCAHILL: We can mark these for identification
17 only after the fact, if that's okay, Judge.

18 THE COURT: Yes. We'll mark them for ID only.

19 MR. SCAHILL: To move this along.

20 Give these to the doctor (handing).

21 THE COURT OFFICER: (Handing.)

22 Q Can you turn to the table where it indicates physical
23 therapy services by other medical professionals?

24 Do you have that, Doctor?

25 A Yeah. It doesn't say physical therapy. It says other

A. Leiken - Plaintiff - Cross

1 medical professionals.

2 Q But you already told me that the physical therapy
3 category is included in that umbrella, correct?

4 A Correct.

5 Q And in 1991 the cost of the increase in the cost of
6 services by other medical professionals in the United States was
7 what?

8 A 5.3 percent.

9 Q And what was it in 2016?

10 A 1.2 percent.

11 Q Do you know what the last 10 year average or 15 year
12 average for the increase of services by other medical
13 professional was in the United States? Let's take the period
14 from 2002 to 2016.

15 A Well, according to this calculation, it's 1.6 percent.

16 Q And the 20 year average from 1997 to 2016, do you know
17 what the cost of that increase was?

18 A According to this calculation, 2.3 percent.

19 Q Is that accurate?

20 A I'd have to do the arithmetic, but let's assume it's
21 correct.

22 Q Okay. So the years that you're using in that 25 year
23 time period, 1991, 1992, 1993, 1994, those were years of high
24 growth rate, correct?

25 A Well, it's 3.2 percent in '93. It's relatively higher

A. Leiken - Plaintiff - Cross

1 than it is now for the reasons I already explained and you still
2 get 2.3 percent if you don't use that data.

3 Q In 1991 it was 5.3 percent for prescription drugs. In
4 the United States in 1991 it was 9.9 percent. For medical care,
5 the average cost, it was 8.7 percent in '91. Physician services
6 was 6 --

7 MR. HOLBROOK: Objection. I don't mind him asking
8 questions about the document, but at this point it seems he's
9 reading from a document not in evidence. That's my
10 objection.

11 THE COURT: Sustained.

12 Q Am I correct that the 1991 numbers are almost double
13 what the current rates are?

14 A What the current one year rate is, yes, that's correct.

15 Q And would it have been more accurate for you, to give a
16 fairer picture to the jury, to use a ten year average on each one
17 of these categories, medical care, prescription drugs, physician
18 services, et cetera? Would that have been a more accurate
19 portrayal rather than go back to high inflation years of 1991
20 through 1995?

21 A What I said to the jury, it wouldn't be reasonable to
22 use the high, only the high inflation years, which were '91 to
23 '94, and it wouldn't be reasonable to use the lowest inflation
24 years, which is more recent. That's why you take an average.

25 Q Well, compared to the numbers that you provided to the

A. Leiken - Plaintiff - Cross

1 jury, I'll ask you about physician services, a ten year average
2 of physician services, which includes surgeries, correct?

3 A No.

4 Q A ten year average of physician services, the growth
5 rate is two percent. You indicated in your report that it was
6 four percent; is that correct?

7 A I used -- I utilized three percent.

8 Q A ten year average of medical care in the United States
9 is 2.7 percent. You indicated in your report it was 4.2 percent.

10 MR. HOLBROOK: Objection.

11 Q Is that correct?

12 MR. HOLBROOK: A ten year average, what years are
13 we talking about?

14 THE COURT: Yes, you have to specify which years.

15 Q Well, we're talking about an average. From 2002 to 2016
16 the average growth rate for medical care in the United States is
17 2.7 percent. You used 4.2; is that correct?

18 A Well, first of all, I didn't use 4.2 in any of the
19 calculations and, second of all, I don't see where that says
20 that, and you're talking about a 15 year average, not 10.

21 Q And is that correct, 15 year average, the cost of
22 medical care has increased 2.7 per year?

23 A I don't see that on any of these tables.

24 Q Medical care in the United States, average, all urban
25 U.S. city average, 2002 to 2016, 2.7 percent, do you see that?

A. Leiken - Plaintiff - Cross

1 A That's not for all medical care in any of the tables you
2 gave me.

3 Q Well, Doctor, is it fair to say that the numbers you
4 used, the percentage you used were each higher than the yearly
5 average for 2016, each percent?

6 A Then just for the year 2016?

7 Q Yes.

8 A Of course, yeah, sure.

9 (Whereupon, the following was recorded by Senior
10 Court Reporter Michael Berg:)

11 (Continued on following page.)

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A. Leiken - Plaintiff - Cross

1 CROSS-EXAMINATION (Continued)

2 BY MR. SCAHILL:

3 Q Were they also higher, the percentages that you used
4 for the years 2010 through 2017?

5 A Well, you don't have 2017 here, but yes.

6 Q And is it a fact that your percentages were higher than
7 what the average cost increased over the last 10 years for each
8 of the categories that you talked about?

9 A Well, you don't show hospital care and I think hospital
10 care still might have been over 4 percent per year. You didn't
11 show the data, but, yes, as I mentioned, the last 10 years to be
12 the lowest inflation and it's not fair to use the lowest rates
13 of inflation. We went through the biggest what some call the
14 super recession since the depression in the year 2008.

15 Q That's been over for 10 years, Doctor, would you agree
16 on that?

17 A No. It didn't happen until 2008, so it's not been over
18 for 10 years.

19 Q In terms of the percentages that you are applying, a
20 small percentage difference in the inflation rate, in the growth
21 rate will result in a high -- much higher number as a bottom
22 table, correct?

23 A Depends. You have 2.7 here for physicians versus 3
24 percent. The hospital data you don't have, but if you even look
25 at the last 10 years, 15 years, I think it's about 4 percent.

mb

A. Leiken - Plaintiff - Cross

1 That's half of the cost right there. Even if you use the lowest
2 10 years, I think it's still about 4 percent.

3 The issue related to physical therapy, I think for the
4 last 15 years you had 2.3 percent, I used 2.5 percent. You
5 wouldn't have that major of an impact.

6 Q For example, the cost of physical therapy which you
7 indicated is 130 visits per year and 130 per visit.

8 By the way, you have no idea whether she's going to
9 physical therapy now, correct?

10 A I have no idea. That's correct.

11 Q You have no idea whether she's planning to go to
12 physical therapy in 2018, correct?

13 A No.

14 Q And you have no idea whether she has any plans to have
15 any type of visits with a pain specialist, correct?

16 A Correct.

17 Q But you included five visits per year on each one of
18 these charts, correct?

19 A Well, in that category. Dr. Richter, his opinion is
20 that she'll need five visits every year.

21 Q That's true for all of the other categories that you
22 have here, you have no idea whether she's getting two to three
23 -- two every two to three years EMGs, X-rays, MRIs, et cetera,
24 correct?

25 A I have no idea what she's been getting and I have no

A. Leiken - Plaintiff - Cross

1 idea what she needs. I'm an economist.

2 Q Let me talk about the percentages then.

3 In terms of the growth rate, if you use the 10-year
4 average, you told us that would result in a much lower growth
5 rate over the course of the entire projection that you have,
6 correct?

7 A I didn't use the term "much lower." I said I used 2.5
8 and it's 2.3. In hospital care, I think it's about the same.
9 In prescription medication, I used 3.8, you had 3.7. I think
10 the biggest difference -- the physician services, if you take
11 out those five years that have the higher inflation rate, it's
12 2.8 percent, I used 3 percent.

13 Q Let's talk about medical care in the United States as
14 an average. I would like you to assume for the moment that the
15 average over the last 15 years, the growth rate was 2.7 percent.

16 You have the annual inflation rate on medical care in
17 the United States at 4.2 percent, correct?

18 A Yeah, but I didn't use it in those tables.

19 Q I understand that. I'm asking you a hypothetical
20 question.

21 If you used the lower number, the 2.7 number, that
22 would result in a drastic reduction in overall cost, correct?

23 A I didn't use --

24 Q That's a yes or no.

25 A No. In order to answer that fairly and appropriately,

A. Leiken - Plaintiff - Cross

1 I need to explain. I can't answer that question with a yes or
2 no.

3 Q Mr. Holbrook can ask you any question he wants.

4 Are you telling me that if you applied a number by 2.7,
5 if you multiplied a number by 2.7, that's going to come out to
6 the same amount as if you multiplied that number by 4.2?

7 MR. HOLBROOK: Objection, your Honor. He did not
8 testify he used 4.2. That's not what he said.

9 THE COURT: Sustained.

10 Q What is the annual rate of growth that you have for
11 healthcare costs in your projections and in your report?

12 A In my projections, I did not use the overall rate of
13 growth for healthcare costs. I used the specific categories in
14 the type of data you showed me. I mentioned that the overall
15 medical care costs have been increasing at 4.2 percent over the
16 last 25 years, but that figure was not used in any of my
17 calculations.

18 Q Let's use a specific category.

19 Prescription drugs, you have the rate of increase of
20 prescription drugs at 3.8 percent, correct?

21 A Correct.

22 Q Okay. Now, the 15-year average, I would like you to
23 assume for the moment if you went back from 2002 to 2016, the
24 growth rate is actually 2.6 percent. I would like you to assume
25 that for the moment.

A. Leiken - Plaintiff - Cross

1 A Okay.

2 Q If you applied the 2.6 percent rather than the 3.8
3 percent, you are going to have a much lower number; is that fair
4 to say?

5 A Yes.

6 Q That's a yes or no.

7 So, in terms of that percentage, point I'm trying to
8 make with you, if you use the lower percentage on the 15 years
9 average for each one of those categories, it would result in a
10 much lower figure? That's a yes or no.

11 A I can't answer that yes or no, but I can answer it.

12 Q Okay. Would it have been a more accurate and fairer
13 picture to present to the jury the 15-year average rather than a
14 25-year average that you talked about before? That's a yes or
15 no.

16 A Absolutely not.

17 Q Okay. Now, as far as these projected costs that you
18 have, did you ever speak to any of the medical providers that
19 Miss Kim is calling in court to testify, the expert witnesses
20 that have testified in this case?

21 A Specific to this case, did I speak to anybody?

22 Q Right.

23 A No.

24 Q Did you ever speak to Dr. Richter?

25 A Specific to this case?

A. Leiken - Plaintiff - Redirect

1 Q Yes.

2 A No.

3 Q And, yet, you used Dr. Richter's report to prepare your
4 report?

5 A Correct.

6 MR. SCAHILL: Nothing further, your Honor.

7 Thank you.

8 THE COURT: Okay. Redirect?

9 MR. HOLBROOK: Briefly, Judge.

10 THE COURT: Okay.

11 REDIRECT EXAMINATION

12 BY MR. HOLBROOK:

13 Q Professor Leiken, you are an economist that does work
14 in statistics and data and compiles reports, right?

15 A Yes.

16 Q Not part of your job to interview my client?

17 A No. Not specifically to this type of case, no.

18 Q Not part of your job to interview doctors who don't
19 even specialize in future healthcare?

20 A No.

21 Q I'm saying relative to your work.

22 You were asked, and I think you answered it, but I will
23 just ask it again.

24 The old chart -- in other words, when you were first
25 retained as an expert during the course of this litigation say a

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A. Leiken - Plaintiff - Redirect

1 year and a half ago, you prepared a chart and this one was
2 updated, right?

3 A Correct.

4 Q Why did you update it?

5 A Because I would overestimate the cost if I used the old
6 chart, because the old chart begins with future costs in January
7 of 2017. Now I'm here to present in October of the year 2017,
8 so the future costs begin January 2018. So, the numbers are
9 lower and, to be fair and reasonable, I updated the chart.

10 Q You were asked a lot about rates from the defense
11 lawyer.

12 A Yes.

13 Q And so I guess the parameters used was where they are
14 at now and maybe where they were in the early 90s?

15 A Yes.

16 Q And they were different?

17 A Sure.

18 Q How do you reconcile that, in other words, to come up
19 with the rate that you used?

20 A As I mentioned, you don't take the highest rates of
21 inflation, which if I used the 10-year period, for example, from
22 1991 to 2001, the rate would be much higher than the rate of
23 inflation which exists over the last 10 years when we have a
24 lower inflationary period. And going forward, over 37 more
25 years, excuse me, 27 more years, we have an extended period of

A. Leiken - Plaintiff - Redirect

1 time during which sometimes the rates of inflation will be lower
2 and sometimes the rates of inflation will be higher.

3 Q Professor, with respect to the -- I want you to assume,
4 for purposes of this question, that these numbers -- well,
5 withdrawn.

6 I asked you on direct and I will ask you again, if you
7 -- Mr. Scahill said if you used two point whatever instead of
8 three, it would be lower. That's obvious, right?

9 A Sure.

10 Q I asked you if you used no inflation, then it would be
11 lower, right?

12 A Sure.

13 Q Because if she didn't get the treatment, it would be
14 lower?

15 A Absolutely.

16 Q If in years past she had more than two visits to a
17 spine specialist and then in years future she will have more,
18 but this year, she doesn't.

19 Does this just represent an average?

20 A It's an average, that's correct.

21 Q It could be more in some years, less in others?

22 A Absolutely.

23 Q As of right now, Mr. Scahill asked you -- well, if
24 there were no visits to the doctor in the calendar year 2017,
25 that would be less?

A. Leiken - Plaintiff - Redirect

1 A Of course.

2 Q But if in 2015, which is not a part of your chart, but
3 for hypothetical purposes there were more, then the number would
4 be higher?

5 A Correct.

6 Q That's how it's looked at going forward through --

7 A Going forward, it's based upon what Dr. Richter's
8 opinion is about what her future needs are. It's not even based
9 on the past. There are a lot of reasons the people don't get
10 the medical care they need in prior years, but, yet, when funds
11 are available and a doctor says you need it, it's a different
12 story.

13 Q Just to be clear, as you understand Dr. Richter's --
14 when he comes up with two to three visits and then calculate and
15 you say I will use 2.5, that's accounting for the fact that in
16 2022, she might may not go to the specialist at all, but in
17 2025, she may go 10 times?

18 A As I say, it's an average. Some years will be less,
19 some years will be more.

20 Q One last question.

21 You were asked about wouldn't it have been better for
22 you to use a 15 year as opposed to 25 year and you said no,
23 absolutely not.

24 What do you mean by that?

25 A Because, again, you would be giving a lot of weight to

A. Leiken - Plaintiff - Redirect

1 the period after 2008 where the economy has been, and it's a
2 sluggish economy, we're trying to get it better, it's not fair
3 to use the lowest rates of inflation which happened to have
4 occurred in 2008 when you have Lehman Brothers fail, you had --
5 it was a very atypical economy we had in 2008 until 2014, '15.
6 It's a different situation now than the way in 1991 than it was
7 in 2009.

8 By going through an extended period of time, you will
9 capture some of the likely future changes where -- the economy
10 never grows at the same rate, it has cycles. It goes up higher,
11 goes up a little lower. So, you have to take that into account.
12 If you just picked the lowest five years or the highest five
13 years, you wouldn't be taking that into account.

14 Q You basically picked the middle --

15 A Took the average.

16 Q -- sample data from 25 years and said what's the
17 average over the last 25 years?

18 A Correct.

19 Q That's what you used for this chart?

20 A Correct.

21 MR. HOLBROOK: Nothing further.

22 MR. SCAHILL: Nothing further.

23 THE COURT: Okay. Thank you.

24 THE WITNESS: Thank you.

25 THE COURT: At this point, we will take our