

**IN THE COURT OF CLAIMS OF OHIO**

MICHAEL RERICHA, et al.

Plaintiffs

v.

OHIO DEPARTMENT OF  
REHABILITATION AND CORRECTION,  
et al.

Defendants

Case No. 2019-01000JD

Magistrate Robert Van Schoyck

DECISION OF THE MAGISTRATE

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{¶1} Plaintiffs Michael and Karen Rericha bring this action for negligence and loss of consortium, respectively. The case arises from an October 26, 2017 motor vehicle collision involving a vehicle operated by Michael and another owned and operated by an employee of defendant, Ohio Department of Rehabilitation and Correction (ODRC), which occurred 13 days before Michael was involved in a second motor vehicle collision with non-party Pauline Dolph on November 8, 2017. The parties stipulated that ODRC “breached its duty of care and is liable for causing the accident on October 26, 2017”. (Stipulation filed January 26, 2022.) The case proceeded to trial before the magistrate.

**SUMMARY OF TESTIMONY**

{¶2} Michael testified that both collisions occurred while he was driving a company-owned Toyota Prius to or from appointments in the course of his employment with Acorn Stairlifts. Recounting the first collision, Michael stated that he was traveling east on the Ohio Turnpike (Interstate Route 80) in the far-left lane at a speed of 50 to 60 miles per hour when he approached a construction zone and took his foot off the accelerator. Michael recalled that the vehicle behind him then collided with the rear end of his vehicle at a moderate impact, causing his vehicle to ‘fishtail’ back and forth. According to Michael, even though he wore a seatbelt his body moved back and forth, striking the driver’s-side door and center console, but he was able to gain control of the vehicle and stop in the

median. Michael stated that no airbags in the vehicle deployed. As Michael described, he had some pain in his left knee and left shoulder from striking, respectively, the dashboard and door.

{¶3} Michael testified that he telephoned his employer to report what happened and determine what he should do to follow company procedure, and he was instructed to obtain a police report. Michael stated that he next called his wife to let her know what happened, then exited the vehicle and spoke to the other driver, who apologized and wanted to know if he was okay. Michael stated that a law enforcement officer stopped at the scene and talked with both drivers. Michael recalled telling the officer what happened and saying he did not think he was hurt but felt 'wobbly', and when the officer asked if he wanted an ambulance he declined. According to Michael, the rear bumper of his company vehicle was dented and the right rear quarter panel was a little out of place, but the damage was minor. Shown a photograph of the vehicle after the collision, Michael was unable to discern any damage. (Defendant's Exhibit O.) Michael thought that the other vehicle, a van with a state government license plate, had a dent in the front bumper.

{¶4} Michael testified that he drove himself home and once he got there he felt shaky, his left knee and shoulder still hurt, and his lower back began to hurt. The next morning, Michael stated, he drove himself to the emergency room at Lodi Hospital complaining of a headache and pain in his left knee, left shoulder, lower back, and neck. Michael stated that after being examined, he was prescribed a muscle relaxer and a pain reliever and instructed to rest and apply ice and to follow up if his symptoms persisted. Michael was off work for three or four days, during which time his neck, lower back, and left knee bothered him, but the pain in his left shoulder subsided, he stated.

{¶5} Michael testified that when he returned to his job, which involved climbing stairs and taking measurements for the fabrication of custom stairlifts, his symptoms worsened. Michael explained that he consequently made an appointment for November 9, 2017, to be evaluated at the Advanced Spine Joint and Wellness clinic in Medina.

{¶6} Describing the second collision, Michael testified that on November 8, 2017, he was in Canton traveling home from a work appointment and stopped at a red light when his vehicle was rear-ended with a heavy impact by a van driven by Pauline Dolph.

The van was traveling at such speed that it spun around and came to rest in front of his vehicle, Michael testified. Michael, who stated that the airbags in his vehicle did not deploy, explained that he was in immediate pain and believes he momentarily lost consciousness, having hit his head on the driver's side window. Michael stated that his left shoulder also struck the window and his left knee struck the dashboard at about the same spot it had in the first collision. Michael recalled that two off-duty nurses who were bystanders approached him and said they had already called 911, and the emergency medical service personnel who responded helped him out of the vehicle because his door was stuck and he could not move well, and they put a cervical collar on him, put him on a stretcher and transported him to the emergency room at Aultman Hospital.

{¶7} Comparing the two collisions, Michael testified that the second one clearly had more impact on his vehicle but not necessarily on him; rather, he stated that the impacts to him were similar and his pain symptoms after each collision were similar. He admitted that he apparently told one of his medical providers later that the impact from the second collision was worse, though. (Plaintiff's Exhibit 23.) Michael also acknowledged that after the first collision, he was not immediately certain if he had been injured. Michael authenticated photographs of the Toyota Prius after the second collision as well as a repair estimate totaling \$12,124.78. (Defendant's Exhibits R, S.)

{¶8} Michael stated that his wife met him at the emergency room and that police investigating the collision spoke to him there. Michael recalled undergoing a physical exam and x-rays of his lumbar and cervical spine as well as his left knee, and he recalled that his neck, low back, and knee were hurting, and that he was given pain-relief medication. Michael recounted that when being discharged later that day he was instructed to use the medication and apply ice as needed, and not return to work until he followed up with his primary care provider or other physician; however, he never returned to work.

{¶9} Michael testified that the next day he visited Advanced Spine Joint and Wellness, at which time his neck, low back, and left knee were in substantial pain. Michael stated that he continued treating for some time at Advanced Spine Joint and Wellness and went through several forms of treatment including physical therapy, chiropractic care, ultrasound therapy, heat therapy, and prescription pain relievers or

muscle relaxers. Michael recounted having problems with the basic activities of daily living, such as standing or doing chores around the house, and his overall pain was increasing. Michael explained that the bottoms of his feet hurt, which he later learned was due to nerve damage, and his shoulders started tingling. Eventually the providers at Advanced Spine Joint and Wellness referred Michael to a pain management doctor, he stated, but it would be a two-month wait to see that doctor and he saw some unfavorable reviews online about that doctor, so on his own he came to be seen by another pain management specialist, Dr. Samir Shaia.

{¶10} When he saw Dr. Shaia, Michael stated, he complained of radiating pain in his legs and shoulders, and of worsening back and neck pain. As Michael described, Dr. Shaia took some diagnostic studies and made recommendations but the treatments he recommended were not approved by the Bureau of Workers' Compensation, with whom Michael had an active claim. Michael testified that he next went to see his primary care provider, Dr. Robert Lebron, who recommended medication that did not provide meaningful relief. According to Michael, Dr. Lebron referred him to a sports medicine specialist, a Dr. Crawford, who recommended surgery and referred him to Crystal Clinic Orthopaedic Center but he came to understand that Crystal Clinic did not see patients injured in motor vehicle collisions. Michael testified that by the time he found another orthopedist, Dr. Grubb, his symptoms had worsened, and in particular his legs and feet hurt and he had tingling down to the fingers in both hands.

{¶11} As Michael recalled, after reviewing the results of an MRI Dr. Grubb recommended a fusion surgery in the cervical spine that was supposed to be minimally invasive, but there were complications that resulted in him spending two or three days in the hospital. When he went home, Michael testified, his wife had to help him tie his shoes, bathe, and use the restroom, and he could not navigate the stairs. Michael went on to explain that there was some improvement with his neck pain but his low back pain was bad, and when he followed up with Dr. Grubb he was referred to a pain management specialist who recommended epidural injections but they failed to relieve his low back pain. Dr. Grubb ultimately performed a decompression surgery to address the low back symptoms, and while there were no complications and he was only in the hospital for a day or so, Michael stated, it was very difficult getting out of bed initially and he had to rely

on his wife for help and use a cane for a couple of months. Michael explained that his back pain persisted after that surgery, however, despite going through physical therapy, and he does not feel like he ever recovered from the surgery.

{¶12} According to Michael, both of the surgeries performed by Dr. Grubb failed and he sought opinions from other providers. A Dr. Krivosheya had him undergo additional diagnostic imaging and, finding that the cervical spine was in worse shape than the lower back, recommended another cervical spine surgery, and she referred him to a surgeon, Dr. Pelley, who performed the operation, Michael recalled. After Dr. Pelley's operation, there was a complication involving swelling that he could feel in his neck and he had to be rushed back into surgery to replace some hardware, and he also had a violent hallucinatory reaction to the anesthesia, Michael stated. Dr. Pelley was the first provider to diagnose him with myelomalacia, Michael stated, which was described to him as a softening of the spinal cord due to injury. Michael testified that he was in the hospital recovering for an extended time and even when he went home he needed his wife's help to do anything, even ambulating. Michael recalled using a cane and wheelchair for about six months as he recovered and that a physical therapist came to his home to work with him. Regarding his cervical spine, Michael stated that at the time of trial his recovery had progressed to where he only had a little bit of pain in his neck.

{¶13} Michael testified that he also underwent a second operation on his lumbar spine, this one performed by a Dr. McClain, who went through the front abdomen to access the spine and perform a fusion and discectomy; Michael described the scars on his body from this and other surgeries. After about three days in the hospital, Michael stated, he returned home where his wife again had to help him for about six weeks to two months. Michael explained that he went through physical therapy and additional treatments, including injections from a doctor at the Akron Spine Institute, but he still has low back pain. About three weeks before trial, Michael stated, he underwent radio ablation treatment at the recommendation of a doctor and it seemed to provide some relief.

{¶14} Michael discussed his interactions with expert witnesses who testified on his behalf in the case and he authenticated records of benefits he received from the Bureau of Workers' Compensation as well as settlements he reached with his insurer and with

Pauline Dolph. (Defendant's Exhibits V, X, Y.) Michael testified that his medical expenses were paid in part by one or more health insurance plans and by the Bureau of Workers' Compensation.

{¶15} Michael testified that prior to the motor vehicle collisions in 2017, he was involved in one other, in 1994. As Michael recounted, he was life-flighted from that collision and was off work for two to four weeks. Michael recalled primarily having lower back issues from that collision for which he treated with pain management providers and went through physical therapy, but his injuries resolved and he returned to work. Michael also testified that in 1986 he underwent a cervical spine discectomy and fusion and was off work for about six months while recovering but he had no further problems. Michael stated as well that he had never been diagnosed with arthritis in his back or neck prior to the motor vehicle collisions in 2017.

{¶16} Michael talked about his life before and after the collisions, explaining how it has changed. Michael related that after graduating from high school in 1972, he worked many years at a series of jobs in the sales and home improvement fields. Michael had been working for Acorn Stairlifts for no more than about two months at the time of the first collision, he stated, and he does not believe he could do that kind of work again because he cannot negotiate stairs very well. Michael identified several hobbies or other activities that he enjoyed before the collisions, including horsemanship, gardening, woodworking, cooking, and being an avid golfer with some professional experience, and he explained that while he can still cook and clean up the kitchen, and he can do some limited woodworking, he can no longer golf or ride horses, nor can he take care of a yard or remove snow, tasks that his wife, Karen, now performs. As Michael explained, he and Karen sold their log home that was situated on a two or three-acre property in Medina County because he could no longer navigate the stairs, and they moved to a one-story home in North Ridgeville.

{¶17} Michael stated that he does not do much of anything for enjoyment anymore, other than some woodworking, and his personality has become withdrawn. Michael, who acknowledged having dealt with depression prior to the collisions, does not like leaving the house anymore and no longer hosts or attends large family gatherings like he used to, he stated. Michael discussed how his and Karen's marriage has been affected

negatively, including no longer dining out, enjoying movies, or being intimate, and since he no longer golfs they do not share that pastime either, whereas Karen used to caddy for him at tournaments. Karen works outside the home and became the sole breadwinner, Michael testified. Although Karen had to drive him at times, being one of the various ways that she cared for him after his operations, he is now able to drive a vehicle himself.

{¶18} Plaintiff, Karen Rericha, testified that she and Michael met about 35 years ago and have lived together as a couple for almost 30 years, the last several of which they have been married. Recalling the spinal surgery Michael underwent in the 1980s and his 1994 motor vehicle collision, Karen stated that he recovered from those without physical limitations and did not complain of neck or back pain before the two collisions in 2017. Prior to the 2017 collisions, Karen stated, she and Michael enjoyed riding and caring for their three horses, including cleaning stalls, feeding them twice a day, brushing them, and leading them to pasture. They also enjoyed gardening, and, Karen explained, Michael took care of cutting the grass and snow removal. At the time of the collisions in 2017, Michael golfed two to four times per month and she caddied for him, Karen stated. Michael enjoyed his job with Acorn Stairlifts and thought he would remain there until retirement, according to Karen.

{¶19} Karen testified that when the first collision happened, Michael called to let her know about it and she offered to come get him but he declined. Karen stated that she left work early to meet him at home and could see he was in pain. Karen recalled him limping, not getting out of bed, and having difficulty negotiating the stairs in their two-story home. Although Michael obtained a release from a doctor to return to work after missing three or four days, he had not recovered, according to Karen. She recalled having to help him with a work appointment after he returned to the job because he could not negotiate a client's stairs, and in her recollection his condition got worse in the time leading up to the second collision.

{¶20} Karen testified about meeting Michael in the emergency room after learning of the second collision and about how she accompanied him to all his subsequent surgeries, including the neck surgery where he had complications and she could not see him for 12 hours, and when she did see him he convulsed and she did not know if he would survive. After that surgery, Karen recounted, Michael was in the hospital for at

least two weeks and could not get out of bed for about a month when he returned home. It was another three or four months before Michael could move around on his own, and all the while she had to bathe and dress him and otherwise assist him with anything he needed, Karen recalled. Karen testified that she adjusted her work schedule to provide this care and that she had to provide such care to him again for a later back surgery. Karen testified that she moved all their bedroom furniture downstairs to accommodate Michael and they made the decision that they needed to move to a one-story home so that he would not have to use stairs anymore. Karen also testified about how she had to give up some of her personal life, like seeing friends, so she could care for Michael.

{¶21} Reflecting on their life after the collisions, Karen stated that Michael can cook but otherwise does not do anything around the house, nor can he handle lawn care and snow-removal duties, all because of his physical limitations, which include not being able to walk far or stand for long. Michael tries to garden, Karen stated, but he can do little more than direct her on how to do the gardening, and they sold their horses and he no longer golfs. According to Karen, Michael's mood changed after the collisions, he became reclusive and sank into a black hole, they do not get along as well as before, and they are not intimate. Karen described having financial struggles when Michael stopped working and explained that she is now the sole breadwinner and works two jobs, although Michael receives Social Security income in the amount of about \$1,100 a month.

{¶22} Kevin Trangle, M.D. testified as an expert witness for plaintiffs. Dr. Trangle went over his educational and professional background and discussed his current practice which mainly involves occupational and environmental medicine, but he also has a small internal medicine practice, and he works mainly out of an office in Mayfield Heights and to a lesser extent Akron and Columbus. Dr. Trangle testified that he has been licensed to practice medicine in Ohio since 1986 and is board-certified in internal medicine and occupational and environmental medicine. Dr. Trangle also testified about the expert witness work that he performs in legal matters, which he said is split about equally between plaintiffs and defendants. Dr. Trangle described the materials that he reviewed for this case as well as his independent medical examination of Michael.

{¶23} Describing what he understood of Michael's history, Dr. Trangle noted the 1986 surgery and the 1994 motor vehicle collision, and that Michael did not undergo

further treatment after recovering from those episodes. After the first collision, on October 26, 2017, Dr. Trangle stated, Michael had pain in his knee and neck and the next day visited the emergency room reporting pain at a level of 6 on a scale of 1 to 10. At the emergency room, Michael complained of neck and mid-to-low back pain along with knee discomfort, but no imaging was ordered, and between that visit and the second collision Michael never really had time for additional treatment, Dr. Trangle stated.

{¶24} Following the second collision, on November 8, 2017, Michael reported knee and back pain to the EMS responders, according to Dr. Trangle, and after they transported him to the emergency room he received x-rays of the cervical and lumbar spine and left knee. Dr. Trangle testified that Michael was diagnosed in the emergency room with a neck and back strain and a left knee contusion, and that these were similar to the diagnoses following the first collision.

{¶25} Michael then started treating with Dr. John Kocka at Advanced Joint Spine and Wellness, Dr. Trangle related, making 19 visits altogether for various therapies including massage, heat, ultrasound, chiropractic manipulation, and injections. Dr. Trangle explained that in January 2018 Michael saw his primary care provider, Dr. Roberto Lebron, who oversaw his medication but did not provide any other therapy, and around the same time he treated with a chiropractor, Dr. Jeremy Good, for at least eight sessions and he had a session with a physical therapist. Michael then began treating with a pain management specialist, Dr. Samir Shaia, at which time he chiefly complained of pain radiating down his arms and legs, Dr. Trangle stated, and Dr. Shaia diagnosed him with spondylosis and gave him trigger point injections.

{¶26} The first operation Michael underwent after the collisions was a multi-level disc fusion in the cervical spine performed by Dr. Mark Grubb on March 7, 2018, which occurred after other courses of treatment had failed to alleviate Michael's neck symptoms, Dr. Trangle explained. Michael continued seeing Dr. Grubb as follow-up, and also for his lower back or lumbar spine complaints which ultimately were not alleviated by more conservative courses of treatment and Dr. Grubb ended up operating again on February 20, 2019, to address a lumbar herniated disc and lumbar stenosis, basically opening up space between the discs.

{¶27} On January 24, 2020, Michael underwent a decompression procedure in the neck and had complications, including bleeding and an inflammatory response which required another operation to drain the affected areas, relieve pressure, and remove some screws, according to Dr. Trangle. Afterward, Dr. Trangle stated, Michael underwent physical therapy through a Cleveland Clinic home health program and continued pain management treatment. Dr. Trangle related that on June 23, 2020, Michael had a fifth operation, this one being a fusion in the lower back performed by Dr. Robert McClain, and afterward Michael went through more injections, physical therapy, and chiropractic care.

{¶28} Dr. Trangle discussed his own examination of Michael which took place on November 5, 2020, at which time Michael chiefly complained of activity-based neck pain and stiffness and persistent lower back pain radiating down to the legs, his knee and shoulder complaints having dissipated by this time. Michael reported difficulty ambulating and using a cane for balance, and having given up many activities he formerly enjoyed, including golf, riding horses, and woodworking, according to Dr. Trangle. As Dr. Trangle explained, Michael had limited range of motion in both his neck and lower back associated with his fusion operations, and he had foot and ankle issues that were consistent with nerve irritation at a high level of the spine. Michael had degenerative disc disease of the cervical and lumbar spine which predated the collisions, according to Dr. Trangle.

{¶29} Discussing the nature of Michael's injuries, Dr. Trangle noted how after both collisions Michael reported lower back, neck, and left knee pain, and how he was similarly diagnosed after both collisions with a back and neck strain and left knee contusion. While acknowledging that the second collision was more severe, as it involved higher force and speed, and that Michael reported greater pain after the second collision, Dr. Trangle testified that the force of the first collision was still significant, especially for an individual of Michael's age and medical history. Indeed, according to Dr. Trangle the amount of force in the first collision was enough for a patient like this to sustain the stenosis, disc herniations and other harm that Michael was ultimately found to have. On the subject of photographs of Michael's vehicle taken after each of the collisions, Dr. Trangle testified that there is not necessarily a direct correlation between the damage to a vehicle and injury, as there are many variables and he has seen great disparity going both ways.

{¶30} Dr. Trangle discussed the nature of soft tissue injuries and the process of recovering from them and explained that if Michael had only sustained soft tissue injuries in the first collision, an older person with the preexisting degenerative changes that Michael had can take up to several months to recover, meaning Michael would have been in the acute phase of recovery at the time of the second collision. But Michael had persistent 5/10 or 6/10 pain between the collisions, and although he scheduled further medical evaluation for his injuries he had not yet undergone any diagnostic imaging before the second collision, Dr. Trangle stated, and in his opinion there is a high probability that Michael had more than just soft tissue injury from the first collision, such as aggravation of degenerative changes in the spine. At minimum, Dr. Trangle explained, the first collision, by causing ongoing inflammatory changes in the ligaments and tendons, made Michael more susceptible to further harm consistent with the harm seen later in imaging, but again, the first collision alone was enough to cause the harm that imaging later revealed. In Dr. Trangle's opinion, the degree to which Michael's injuries were caused by one collision versus the other cannot be pinpointed, as they are intertwined and indistinguishable. Thus, Michael's injuries are not divisible from a medical standpoint, according to Dr. Trangle, who opined within a reasonable degree of medical certainty that both collisions caused Michael's injuries, including shoulder and knee contusions along with substantial aggravation of preexisting cervical thoracolumbar degenerative disc disease and disc herniations.

{¶31} Along the same lines, Dr. Trangle testified that if only the first collision or only the second collision had occurred he cannot opine what treatment would have been needed. But if neither collision had occurred, Dr. Trangle opined, Michael probably would not have needed all the treatment he received. In Dr. Trangle's opinion, the five surgeries and all the other medical treatment Michael received, amounting to \$531,000 in expenses, was appropriate and was related to both collisions.

{¶32} Significant medical intervention will be necessary for the rest of Michael's life, in Dr. Trangle's view, and it is highly unlikely he will be able to work again. Dr. Trangle explained that Michael will need to see physicians in multiple disciplines annually for a total of about five visits a year and will need regular diagnostic studies of his neck and lower back, along with an EMG study of nerve damage. Dr. Trangle also explained the

pain management care that will be appropriate for Michael, including injections and radio frequency ablation, and he stated that Michael should have a trial for a spinal cord stimulator; indeed, there is a high likelihood that Michael will need a stimulator, according to Dr. Trangle's report. Dr. Trangle testified that while the goal is to put off further surgeries as long as possible, Michael will remain highly susceptible to further spine problems and probably need two more neck operations and at least one fusion in the lower back, and after each operation he will need physical therapy and potentially chiropractic care. Dr. Trangle testified that he coordinated with Maryanne Cline and Barbara Burk in their respective preparations of a life care plan and vocational analysis and agrees with their work.

{¶33} Maryanne Cline, R.N., a life care planner based in Cleveland, testified via deposition as an expert witness for plaintiffs. (Plaintiff's Exhibit 71.)<sup>1</sup> Cline went over her educational and professional experience and explained the work that life care planners perform. Cline explained that she became involved in this case after being contacted by Dr. Trangle, with whom she has worked a few times previously, and she reviewed his report as part of developing a life care plan for Michael.

{¶34} As Cline explained, on December 13, 2020, she interviewed Michael and assessed his functional limitations as part of her usual process for developing a life care plan, determining what he could do before the two collisions and what he can do now. Cline understood that Michael had chronic low back pain with tingling to his lower extremities, along with difficulty walking, negotiating stairs, standing, sitting, lifting, and reaching overhead, all of which prevents him from doing household chores and yardwork. Cline also understood Michael mostly relied on his wife to drive him, as he has limited range of motion in his neck which prevents him from looking side to side while driving, and he can only tolerate about an hour of sitting in a car before his pain necessitates that he gets out and stretches.

{¶35} Cline talked about the life care plan that she prepared (Plaintiff's Exhibit 7) and explained how she identifies a patient's medical needs now and into the future,

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<sup>1</sup> The objections in the deposition transcript on pages 18, 34, 48, 51, and 52 are OVERRULED; the objections on pages 35 and 37 are SUSTAINED.

determines the costs of those needs—for example using the Centers for Medicare & Medicaid Services cost for a physician visit—and adds up the costs of all those needs. Cline testified that she determines a patient's life expectancy from the life tables produced by National Vital Statistics Report, which in Michael's case was 17.4 years from the time she prepared her report. As Cline explained, from her review, including the recommendations made by Dr. Trangle, the costs that she identified Michael would reasonably need during his life expectancy total \$1,121,128, and if he needs a spinal cord stimulator this would add another \$155,000.

{¶36} Cline went through her report explaining in detail the various categories of costs and how she calculated them, including medical surveillance (i.e. doctor visits), diagnostic studies, pain management care, surgical interventions, physical therapy, and medication. Cline also explained that she calculated the cost of replacing services that Michael can no longer perform around the house, determining that replacing 15 hours of lost household services per month, at a cost of \$25 per hour, means the annual replacement cost is \$4,500. Finally, according to Cline, the cost of some home modifications that Michael will need is approximately \$25,000.

{¶37} Cline acknowledged that she did not review any medical records in this case and that her knowledge of any medical issues comes from Dr. Trangle's report and her interview with Michael. As Cline explained, her role does not involve providing medical diagnosis or opining on the causation of injuries. Cline stated she was aware Michael returned to work after the first collision and could not opine as to whether he would have continued working if not for the second collision. According to Cline, she did not talk with Michael about one collision being more severe than the other, and she had not seen photographs of Michael's vehicle taken after either collision. Cline testified that she does not know if Michael has Medicare or other health insurance and that life care planning typically does not take insurance into account because it is not known what benefits the individual will have going forward, so the costs she identifies are what a private-pay patient would incur.

{¶38} Barbara Burk testified via deposition as an expert for plaintiffs in the field of vocational rehabilitation, which she explained to involve working with individuals who have a disability that creates a barrier to employment, with the goal of overcoming the

barrier and returning to the competitive labor market. (Plaintiff's Exhibit 72.)<sup>2</sup> Burk testified about her educational and professional background, which includes serving as an expert in this field since 1974.

{¶39} Burk identified Dr. Trangle's report and other materials that she reviewed for this case and stated that she also interviewed Michael, at which time he was 66 years old. Burk stated that among other things her vocational analysis took into account Michael's age, work experience and education, and in his case his age is very significant in that someone at 66 years old needs work that is closely related to work they have done in the relevant past. Customarily, Burk stated, she looks at the work an individual has performed in the last 15 years and their skill level, and Michael's experience included consulting work in the home remodeling industry and sales-related occupations, all involving sedentary or light work as defined in the federal Dictionary of Occupational Titles. Burk also noted that Michael's education has limited transferability.

{¶40} Burk explained that employers hesitate to hire disabled individuals who have been out of the workforce for an extended period, and that in this case Michael has not worked since November 2017. Burk described the concept of residual functional capacity, involving an injured person being left with reduced functionality, and how this is determined by a doctor, not her; she examines an individual's function, not their disability. Burk stated that it was not her role to evaluate the causation of Michael's injuries, and instead she simply looks at an individual as he or she presently exists without evaluating the cause of their issues. Burk's knowledge of medical issues in this case is limited to what is in Dr. Trangle's report, she stated. Asked about the resemblance of her report to Dr. Trangle's report, Burk explained that she liked his format and decided to use it for her own report.

{¶41} In Burk's opinion, Michael is not a candidate for employment on a sustained basis. Burk admitted that at 66 years of age, many men have retired, and when asked when men typically retire she stated that the Social Security retirement age has been 65 and is going up to 67. According to Burk, though, Michael told her that he liked working and had planned to continue working.

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<sup>2</sup> The objections in the deposition transcript are OVERRULED.

{¶42} Clint Boldt testified via deposition that he is the Vice President of Human Resources and the chief records custodian for Acorn Stairlifts, based in Orlando, Florida.<sup>3</sup> (Plaintiff's Exhibit 73.) Boldt authenticated a set of records and explained how they document the gross salary and commissions of individuals employed as surveyors, which was the position Michael held. (Plaintiff's Exhibit 5.)

{¶43} Alex Constable testified via deposition as an economics expert for plaintiffs, first explaining his education and professional experience, including his history of expert legal work, and then explaining the concept of present value and how it is calculated.<sup>4</sup> (Plaintiff's Exhibit 74.) Constable testified that in formulating his opinion in this case he reviewed Michael's tax returns, the salary survey from Acorn Stairlifts, the reports prepared by Maryanne Cline and Barbara Burk, and public information from the Bureau of Labor Statistics. Constable testified that, assuming Michael is no longer a candidate for sustained employment activity as Burk concluded, using the wage information from Acorn Stairlifts to determine the median income of the surveyors working there (and assuming Michael to be at the fiftieth percentile of that average), plus the estimated value of fringe benefits, and estimating from labor statistics that say a male at Michael's age would work another 4.2 years, until age 71, he places the present value of Michael's lost earning capacity at \$611,684. According to Constable, this figure represents the total wages Michael would have earned had he continued working for Acorn Stairlifts from the time of the second collision until 2026; he admitted that across the workforce significant shares of workers retire at age 62, when they are eligible for Social Security, and at age 65, when they are eligible for Medicare. Constable explained that he relied on the median income for surveyors at Acorn Stairlifts rather than the actual income Michael had earned because he worked there for such a short time—51 days by his count.

{¶44} When questioned about separating out the two collisions, Constable stated that it was not his area of expertise, although under cross-examination he was asked about the value of the three days of lost earnings Michael had after the first collision and

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<sup>3</sup> The objections in the deposition transcript are OVERRULED.

<sup>4</sup> The objections in the deposition transcript on pages 16, 38 (lines 13, 19), and 39 (line 13) are OVERRULED; the objections on pages 23, 24, 34, 37, 38 (line 4), 39 (line 19), and 40 are SUSTAINED.

he calculated that to be \$682. Constable stated that he does not know if Michael draws Social Security income but that it would not change his calculations because it would have no bearing on Michael's earning capacity. Constable also acknowledged that even though he relied on the wage information from Acorn Stairlifts, Michael only worked there a short time and in some of the years preceding the collisions he earned significantly less than what he was making with Acorn, as shown in the historical income table of the report he prepared. (Plaintiff's Exhibit 3.)

{¶45} Looking at the total cost of Michael's future care as calculated by Cline, using a life expectancy of 16.8 years from the time of his testimony, Constable calculated the present value at \$1,252,358, including the cost of the spinal cord stimulator. Constable acknowledged that his report does not take into account whether Michael has insurance that would cover some of the costs calculated by Cline.

{¶46} Constable testified that he also calculated the present value of Michael's lost household services for the remainder of his life expectancy (age 83) at \$315,934, or, alternatively, if it were assumed Michael could still perform all such services but would need an hour longer every day to do so, the present value would be \$131,053. As Constable explained, in calculating these amounts he based the number of hours of Michael's lost household services on the amount of time an average American man provides services around the home, and he understood Michael provides no household services at all.

{¶47} Brian Hill testified that he has worked for ODRC for 22 years, currently serving as an Infrastructure Specialist 2 in the information technology department. As Hill explained, at the time of the October 26, 2017 collision he was traveling for work purposes in a state-owned Dodge Grand Caravan through a construction zone on the Ohio Turnpike at a rate of 55 to 60 miles per hour when Michael, in the vehicle directly ahead, slammed on the brakes. Hill stated that he slammed on the brakes too and was able to slow down but not in time to avoid the collision, which he did not deny causing. Hill testified that the front bumper of his vehicle struck the rear bumper of Michael's vehicle, and that he did not observe Michael's vehicle fishtail. Both drivers pulled over, Hill stated, and he got out, approached Michael's vehicle and asked Michael if he was okay. Hill recalled Michael saying something to the effect that the collision was a 'hard hit', which

did not make sense to Hill because it had not felt like a hard hit to him. Michael said nothing about injuries and did not appear to be injured, Hill stated, and he had no concerns about Michael, although he acknowledged that they only interacted briefly and he did not observe Michael get out of his vehicle. Hill observed no damage to Michael's vehicle. For his part, Hill stated that his air bags did not deploy, no part of his body struck the inside of his vehicle, he had no seatbelt soreness, he had no loss of consciousness or dizziness, and indeed was not hurt at all.

{¶48} Hill testified that there were instructions in his vehicle about what to do in the event of a collision, providing that he was to call the State Highway Patrol, and, if there were injuries, to call 911. Hill stated that he accordingly called the State Highway Patrol, which dispatched a trooper to the scene. To the best of Hill's recollection, the photographs of the vehicles admitted as Defendant's Exhibits N and O were taken by the trooper. Hill testified that he too took photographs on a state-issued mobile phone but did not know what happened to them. Hill acknowledged that under ODRC policy he should have prepared an Incident Report right away but he did not do so until two months later.

{¶49} Douglas Morr, an expert witness for ODRC, testified that he is a licensed professional engineer serving in the role of Discipline Lead with the firm of SEA, Ltd. in Columbus, where he has worked in a variety of roles since 2000. Morr went over his educational and professional history, which includes many peer-reviewed publications and involvement in several professional organizations. According to Morr, 70 to 80 percent of his work involves biomechanics, while the balance of his work involves mechanics and accident reconstruction; he stated that he has investigated thousands of accidents. Biomechanics, Morr explained, is a multidisciplinary science combining engineering and medical principles. Biomechanical analysis is not part of diagnosis or treatment, looking instead at the forces causing motion of the body and the forces inside the body caused by that. Morr maintains engineering licenses in Ohio and 23 other states, he stated.

{¶50} In this case, Morr explained, he was asked to review the available evidence and analyze, for accident reconstruction and biomechanical purposes, both collisions and to compare the two. Morr concluded that the magnitude of the second collision was larger

than that of the first and would be more likely to cause injury. In terms of how he arrived at that conclusion from his investigation and analysis, Morr identified the materials that he reviewed, such as crash reports and photographs, and publicly available data on collision testing of the vehicle models involved. Morr authenticated a copy of the report he prepared, along with separate analyses and calculations for both collisions from reconstruction and biomechanics standpoints. (Defendant's Exhibits J, P, U.)

{¶51} With regard to the first collision, Morr testified that from a photograph of the van driven by Brian Hill, it appears the front license plate was slightly bent and there was some minor alteration on the bumper consistent with the van being slightly to the left of center of Michael's Prius at the time of impact. Photographs of the Prius show no significant alteration from the collision but on the bumper there is evidence of impressions from a license plate and license plate screws, again consistent with the van impacting the Prius to the left of its center, Morr stated. Photographs of the Prius following the second collision, Morr testified, show significant damage, including the bumper structure being gone and the structural components in the rear portion of the vehicle being damaged.

{¶52} From a biomechanics standpoint, Morr made certain assumptions about Michael, such as his height, weight, and that he was not braced for impact in either collision, he stated. After explaining some physics principals as they relate to his analysis, Morr testified that in the first collision he assumed Michael's Prius was traveling 50 miles per hour, and he explained how from the photographs the fastest speed the van could have been traveling was 55 miles per hour, which means that the maximum change in the speed of the Prius from the collision was 4.6 miles per hour. Based on his analysis, Morr testified, the Prius could not have fishtailed from the first collision, although a driver could perceive it that way, for example if they lost their grip of the steering wheel. Side-to-side movement of the body would be seen in a sideswipe collision or a hydroplaning vehicle, but in this case even if the impact was a little off center that sort of movement was outside the plane of impact, Morr explained.

{¶53} For the second collision, Morr explained, the Prius was stopped and the van operated by Pauline Dolph was traveling 13.5 to 16.5 miles per hour, which means that the maximum change in the speed of the Prius from that collision was 9.4 to 11.1 miles per hour. The second collision thus produced more than twice the forward speed change

to the Prius than the first collision. In terms of energy, the average force experienced by Michael in the first collision was no more than about 1.7 g's whereas in the second collision it was 4.1 g's, Morr testified. According to Morr, the amount of force that Michael's body experienced in the first collision was no more than the force he would have experienced in activities that he used to participate in, like golf and riding and dismounting from horses. While the type of motion Michael went through in the collisions was similar, Morr stated, the kinetics experienced by a driver like Michael in the first collision were significantly smaller than in the second collision, and from a biomechanics standpoint the second collision would be more likely to contribute to injury. Morr could not rule out an injury being caused by the first collision, though, and he admitted that preexisting injuries are generally a risk factor and can be aggravated even in low-speed collisions, and he agreed that an individual with a C4-C6 spinal fusion would be more susceptible to injury above and below the fusion.

{¶54} Morr acknowledged that he did not visit either accident scene, which he said he does in certain cases where helpful evidence may be gained, and he noted that the site of the first collision had been altered by construction. Morr also acknowledged that he did not inspect any of the vehicles. Morr was asked several questions on cross-examination about the movement of Michael's head in the collisions, and he testified that he assumed Michael's headrest was fully lowered and his head was away from the headrest, because that would be the worst case scenario, and by his calculations the second collision had more than double the peak head movement of the first collision.

{¶55} Francis Mencl, M.D. testified by way of deposition.<sup>5</sup> As Dr. Mencl related, he is an attending physician in the emergency room at Penn State University Hershey Medical Center in Hershey, Pennsylvania and serves as a Professor of Emergency Medicine there. Dr. Mencl detailed his educational and professional experience and stated that he is board-certified in emergency medicine.

{¶56} Dr. Mencl testified that on October 27, 2017, he saw Michael in the emergency room of Lodi Community Hospital, where he occasionally moonlighted while working primarily at another northeast Ohio hospital. Michael chiefly complained of back

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<sup>5</sup> The objection in the deposition transcript on page 30 is SUSTAINED.

and neck discomfort following the collision caused by Hill one day earlier and reported having had a headache and nausea, Dr. Mencl testified. The level of pain Michael reported to a nurse when he arrived at the emergency room was 6/10 and it remained the same when assessed 54 minutes later, Dr. Mencl said. Dr. Mencl explained that Michael's vital signs were normal except for some preexisting hypertension.

{¶57} Upon examination, Dr. Mencl stated, he noted some tenderness in the right upper quadrant near the gallbladder and liver but no rebounding, guarding, or bruising from the seatbelt, so there was no concern for injury to internal organs or internal bleeding. Dr. Mencl related that he found some tenderness in the soft tissue on the sides of the neck but no tenderness over the bones in the neck, nor any sign of nerve damage from the cervical spine, so he did not order any imaging because the exam did not suggest there was any injury that could be detected in an x-ray, plus he did not want to expose the patient to unnecessary radiation and add additional expenses. Dr. Mencl's diagnosis was a cervical or neck strain, he explained, meaning an injury to the soft tissue and muscles and supporting structures rather than to the bones. Dr. Mencl believed that he was aware of Michael's having a previous cervical laminectomy with a fusion with hardware, as his surgical history was noted in the records either by a nurse or by auto-populating, and when asked if he would want to check the hardware from such a procedure he testified that if a patient were rear-ended at a complete stop and had symptoms, he would, but if the patient was rear-ended while moving and had no symptoms, he would not.

{¶58} All in all, in Dr. Mencl's view, Michael's complaints were straightforward and his exam was uncomplicated. Dr. Mencl testified that to alleviate the pain he wrote a prescription for a muscle relaxer to be taken twice daily for up to five days and he recommended taking an over-the-counter non-steroidal anti-inflammatory such as ibuprofen. Additionally, Dr. Mencl testified that he recommended applying ice to alleviate swelling and pain, and he instructed Michael to seek further medical attention if he experienced increased neck or back pain together with tingling or loss of feeling.

## ANALYSIS

{¶59} “[T]o establish actionable negligence, one seeking recovery must show the existence of a duty, the breach of the duty, and injury resulting proximately therefrom.” *Strother v. Hutchinson*, 67 Ohio St.2d 282, 285, 423 N.E.2d 467 (1981). Plaintiffs bear the burden of persuasion with respect to every aspect of their claim. *Stinson v. England*, 69 Ohio St.3d 451, 455, 633 N.E.2d 532 (1994). As stated earlier, the parties stipulated that ODRC “breached its duty of care and is liable for causing the accident on October 26, 2017”. “In a personal injury case where liability is already determined, ‘the only remaining issue is the nature and extent of injury as determinative of the amount of damages to be allowed.’” *Krannitz v. Harris*, 4th Dist. Pike No. 00CA649, 2001 Ohio App. LEXIS 248, \*3 (Jan. 19, 2001), quoting *Cleveland Rwy. Co. v. Kozlowski*, 128 Ohio St. 445, 191 N.E. 787 (1934), paragraph one of the syllabus.

{¶60} “‘Proximate causation’ is described as ‘some reasonable connection between the act or omission of the defendant and the damage the plaintiff has suffered.’” *Marsh v. Heartland Behavioral Health Ctr.*, 10th Dist. Franklin No. 09AP-630, 2010-Ohio-1380, ¶ 40, quoting Prosser, *Law of Torts* (5 ed.1984) 263, Section 41. “The reasonable connection may be broken by an intervening act.” *Id.* “Proximate cause does not require that the conduct of one defendant be the sole cause of a legal injury. As a matter of law, there may be more than one proximate cause of an injury.” *Kelemen v. Williams*, 10th Dist. Franklin No. 92AP-1205, 1993 Ohio App. LEXIS 1325, \*11 (Mar. 4, 1993), citing *Taylor v. Webster*, 12 Ohio St.2d 53, 231 N.E.2d 870 (1967).

{¶61} “‘Where a plaintiff suffers a single injury as a result of the tortious acts of multiple defendants, the burden of proof is upon the plaintiff to demonstrate that the conduct of each defendant was a substantial factor in producing the harm.’” *Sotos v. Edel*, 10th Dist. Franklin No. 02AP-1273, 2003-Ohio-6471, ¶ 42, quoting *Pang v. Minch*, 53 Ohio St.3d 186, 559 N.E.2d 1313 (1990), paragraph five of the syllabus. “‘The word “substantial” is used to denote the fact that the defendant’s conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using the word in a popular sense, in which there always lurks the idea of responsibility, rather than the so-called “philosophical sense,” which includes every one of the great number of events without which any happening would not have occurred.’” *Horton v. Harwick Chem. Corp.*, 73 Ohio St.3d 679, 686, 653 N.E.2d 1196 (1995), quoting *Restatement of the Law 2d*,

Torts (1965), Section 431, Comment a. “An ‘actor’s negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent.” *Skinner v. N. Market Dev. Auth.*, 10th Dist. Franklin No. No. 96APE12-1655, 1997 Ohio App. LEXIS 3015, \*7 (July 10, 1997), quoting Restatement of the Law 2d, Torts (1965) 430, Section 432(1). “[T]he substantial factor test as spelled out in *Pang* does not change the traditional concepts of proximate cause in cases where the actions of more than one tortfeasor join to cause a single, indivisible injury to a plaintiff.” *Pancoe v. Dye*, 9th Dist. Summit Nos. 15546 & 15583, 1992 Ohio App. LEXIS 5419, \*11 (Oct. 21, 1992).

{¶62} Once a plaintiff has met the burden of demonstrating that the conduct of each tortfeasor was a substantial factor in causing an indivisible injury, “a prima facie evidentiary foundation has been established supporting joint and several judgments against the defendants. Thereafter, the burden of persuasion shifts to the defendants to demonstrate that the harm produced by their separate tortious acts is capable of apportionment.” *Pang* at 197.

{¶63} Upon review of the evidence presented at trial, the magistrate finds as follows. On Thursday, October 26, 2017, ODRC’s employee, Brian Hill, negligently operated a state-owned van such that it struck the rear end of the Toyota Prius operated by Michael while traveling on the Ohio Turnpike; each of them was driving in the course and scope of their employment. Michael was traveling at least 50 miles per hour and Hill was traveling about five miles per hour faster. As explained by Douglas Morr, the maximum change in the speed of the Prius from the collision was 4.6 miles per hour. Michael, who apparently struck the driver’s side door and dashboard, had pain in his left arm and shoulder and left leg, particularly at the knee. When the responding State Highway Patrol trooper asked if he needed an ambulance, Michael declined, stating that he planned to have his wife take him to the hospital.

{¶64} Michael drove himself home from the accident scene, but once he got home he felt shaky, his left knee and shoulder still hurt, and his lower back began to hurt. Michael went to the emergency room the following morning, Friday, October 27, 2017, complaining of a headache, some nausea that had gone away, pain in his left knee, left shoulder, lower back, and neck. Michael, who did not undergo any diagnostic imaging at

this visit, was diagnosed with a cervical or neck strain. Michael was prescribed a muscle relaxer and a pain reliever and instructed to rest and apply ice and to follow up if his symptoms persisted. Michael rested for a few days before returning to work, during which time his neck, lower back, and left knee bothered him, but the pain in his left shoulder subsided.

{¶65} While Michael had undergone a cervical spine discectomy and fusion in 1986 and suffered a lower back injury in a 1994 motor vehicle collision, he recovered from those many years ago and had no long-term complaints. Michael's neck and back complaints began after the first collision, have persisted since then, and will probably persist for the rest of his life. His complaints after the first collision were significant, including 6/10 pain at the time of his emergency room visit. Michael, who had only been working for Acorn Stairlifts for a few weeks, was motivated to return to the job and managed to do so after missing three or four days of work but had great difficulty negotiating stairs—including those in the home where he lived at the time—and needed Karen to help him when he was unable to climb and measure a client's stairs. From the testimony of both Michael and Karen, his condition worsened in the time leading up to the second collision. Michael therefore made an appointment for November 9, 2017, with Advanced Spine Joint and Wellness in Medina.

{¶66} On November 8, 2017, non-party Pauline Dolph negligently operated a van such that it struck the rear end of the Toyota Prius operated by Michael while he was stopped at a red light on his way home from a work appointment. As with the first collision, Michael was not at fault and he wore a seatbelt. As Morr explained, Dolph was traveling approximately 13.5 to 16.5 miles per hour, and the maximum change in the speed of the Prius from the collision was somewhere between 9.4 to 11.1 miles per hour. Michael apparently hit his head on the driver's side window, and his left shoulder also struck the window or door and his left knee struck the dashboard similar to what happened in the first collision. Emergency medical service responders transported Michael to Aultman Hospital, where he received x-rays and was diagnosed with a neck and back strain and a left knee contusion. As Dr. Trangle stated, the diagnoses were similar to those he received following the first collision. Michael was discharged from the hospital later that day.

{¶67} Michael subsequently sought care at Advanced Joint Spine and Wellness, where he already had an appointment owing to the first collision. Michael went on to receive extensive care and treatment from several providers in the months and years that followed, including five surgeries on his spine at the cervical and lumbar levels, the last of which took place in June 2020. Michael's course of treatment was difficult and included some significant setbacks and complications, and the recovery process for some of the operations was long and arduous. His providers took a conservative approach to his treatment, though, and as established by Dr. Trangle all his medical treatment was necessary. By the time Dr. Trangle examined Michael on November 5, 2020, his knee and shoulder complaints had substantially resolved but he still had activity-based neck pain and stiffness and persistent lower back pain radiating to his lower extremities.

{¶68} It was established that the actions of both Hill and Dolph caused Michael's injuries, including shoulder and knee contusions along with substantial aggravation of preexisting degenerative disc disease and disc herniations, and that his injuries are not divisible between the two collisions. Michael's complaints and diagnoses after the collisions were similar and he had persistent pain between the collisions. The collisions were close in time and Michael was still in the acute injury phase following the first collision when the second one occurred. The specific extent of harm resulting from each collision could not be medically determined, but it was established that the extent of the effect of the first collision was enough to substantially factor in Michael's injuries. Indeed, as established by Dr. Trangle, the amount of force in the first collision was enough for a patient like this to sustain all the injuries Michael was ultimately found to have. Though ODRC, without presenting an independent medical expert of its own, argued that Michael only sustained soft tissue injury in the first collision, Dr. Trangle established that there is a high probability Michael had more than just soft tissue injury from the first collision.

{¶69} Although the second collision involved greater force and resulted in more than twice as much forward speed change to Michael's vehicle compared to the first collision, the force of the first collision was still significant, especially for an individual of Michael's age with a history of spinal injury. While Morr opined that the force involved in the first collision was similar to the forces that might be expected in golfing, the forces Michael experienced were unexpected in that he had no idea he was going to be hit and

was in no way braced or prepared for impact. And even if the force of the collisions was not equal, in each collision the front end of a van struck the rear end of Michael's vehicle and caused his body to move in similar ways, striking the driver's side door and dashboard. Neither collision caused airbags to deploy in Michael's vehicle. Morr was unable to rule out the first collision as a cause of injury and he admitted that Michael was more susceptible to injury than the average person because of his prior cervical spine fusion. ODRC contends that the photographs show the Prius was damaged much worse in the second collision, but the photographic evidence of the Prius following the second collision depicts it with some of its body removed, including the bumper, making it difficult to meaningfully compare, and as Dr. Trangle explained there is not necessarily a direct correlation between the damage to a car and injury.

{¶70} Accordingly, Michael demonstrated by a preponderance of the evidence that the conduct of each tortfeasor in the first and second collisions was a substantial factor in producing his harm. Since Michael established this prima facie evidentiary foundation, it was ODRC's burden to demonstrate that the harm produced by the separate tortfeasors is capable of apportionment. See *Pang*, 53 Ohio St.3d at 197, 559 N.E.2d 1313. ODRC did not carry this burden. The evidence does not demonstrate that the harm produced by its employee and by Dolph is capable of apportionment.

{¶71} ODRC argues that Dolph's causing the second collision was an intervening and superseding cause that cut off its liability, but since Michael established that the conduct of both ODRC and Dolph were substantial factors in producing his harm, and defendant did not demonstrate that the harm is capable of apportionment, ODRC's liability is not cut off by Dolph causing the second collision. *Id.* Dolph's negligence cannot relieve ODRC of liability where it was not "of itself an efficient, independent, and self-producing cause" of Michael's harm. *Berdyck v. Shinde*, 66 Ohio St.3d 573, 585, 613 N.E.2d 1014 (1993).

{¶72} ODRC also seemed to argue that its liability is limited by the 'eggshell plaintiff' rule. "The 'thin skull' or 'eggshell plaintiff' rule is a creature of tort law, which states that, 'a defendant who negligently inflicts injury on another takes the injured party as he finds her, which means it is not a defense that some other person of greater strength, constitution, or emotional makeup might have been less injured, or differently

injured, or quicker to recover.” *Fleckner v. Fleckner*, 177 Ohio App.3d 706, 2008-Ohio-4000, 895 N.E.2d 896, ¶ 22 (10th Dist.), quoting *McDevitt v. Wenger*, Tuscarawas App. No. 2002AP090071, 2003-Ohio-6096, ¶ 34. The eggshell plaintiff rule “is a rule of damages \* \* \*.” *Weinkauf v. Pena*, 10th Dist. Franklin No. 19AP-707, 2020-Ohio-3293, ¶ 17. The rule does not limit ODRC’s liability in this case. Before the collisions Michael was already more susceptible to injury than the average person, as established by Dr. Trangle. ODRC and Dolph each took Michael as they found him, whether or not some other person might have been less injured or injured differently, or quicker to recover.

{¶73} “In a tort action, the measure of damages is normally that which will compensate and make whole the injured party.” *Corwin v. St. Anthony Med. Ctr.*, 80 Ohio App.3d 836, 840, 610 N.E.2d 1155 (10th Dist.1992). “It is axiomatic that every plaintiff bears the burden of proving the nature and extent of his damages in order to be entitled to compensation.” *Jayashree Restaurants, LLC v. DDR PTC Outparcel LLC*, 10th Dist. Franklin No. 16AP-186, 2016-Ohio-5498, ¶ 13, quoting *Akro-Plastics v. Drake Indus.*, 115 Ohio App.3d 221, 226, 685 N.E.2d 246 (11th Dist.1996). “[D]amages must be shown with reasonable certainty and may not be based upon mere speculation or conjecture \* \* \*.” *Rakich v. Anthem Blue Cross & Blue Shield*, 172 Ohio App.3d 523, 2007-Ohio-3739, 875 N.E.2d 993, ¶ 20 (10th Dist.).

{¶74} Dr. Trangle identified the gross amount of Michael’s past medical expenses as \$531,104.53, but those expenses were paid at least in substantial part by one or more health insurance plans and by the Bureau of Workers’ Compensation. Because R.C. 2743.02(D) provides, in part, that “[r]ecoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant”, ODRC is not responsible in damages for the amount of the medical benefits that Michael received. See *Community Ins. Co. v. Ohio Dept. of Transp.*, 92 Ohio St.3d 376, 378, 750 N.E.2d 573 (2001). The evidence presented at trial did not sufficiently establish the amount of any out-of-pocket medical expenses paid by Michael or the amount of medical expenses, if any, not paid by a collateral source that remains due and owing. Accordingly, there shall be no award for past medical expenses. See *Yoe v. Ohio Dept. of Agriculture*, Ct. of Cl. No. 2005-09006, 2010-Ohio-2178, ¶ 10.

{¶75} It was established, however, particularly through Dr. Trangle's testimony, that Michael will probably require additional medical care and treatment for the rest of his life as a result of the harm sustained in the collisions, including doctor visits, diagnostic studies, pain management, spinal surgeries, spinal cord stimulator placement, chiropractic or physical therapy, and medication. Using Dr. Trangle's recommendations, Cline reasonably established the corresponding cost of this future medical care and treatment, using mortality tables to estimate his life expectancy. *See Adae v. State*, 10th Dist. Franklin No. 12AP-406, 2013-Ohio-23, ¶ 36 (mortality tables are generally admissible on the issue of life expectancy). Accordingly, Michael is entitled to the cost of future care for medical surveillance, diagnostic studies, pain management, surgical interventions, therapeutic modalities, medications, and a spinal cord stimulator as identified in Cline's report.

{¶76} Regarding the estimated \$25,000 in future home modifications that Cline calculated, she reasoned, in part, that Michael would require "two stair glides" for his house, but he and Karen live in a one-story home. Based on this and the otherwise inadequate support for home modifications, there shall be no award for the same.

{¶77} With regard to the loss of household services, the evidence established that Michael is no longer able to perform certain work that he formerly did in and around the home, such as cutting grass, snow removal, and outdoor and indoor maintenance, but he can still provide some services, such as cooking, cleaning the kitchen, and some limited garden management. The services that Michael can no longer provide are now provided by Karen or must be hired out. The calculation for the cost of replacing household services that Cline made after interviewing Michael is a reasonably certain estimate, being \$4,500 annually; as adjusted for present value by Constable over Michael's life expectancy, this amounts to \$74,130 total. Plaintiffs, though, also sought to recover the \$315,934 that Constable calculated as representing the value of Michael's lost household services. It was not shown that plaintiffs are entitled to both amounts for the same loss of services; for example, Cline and Constable each cited cutting grass as a service that Michael lost the ability to provide and each of their valuations would compensate for the loss of him no longer providing that service. Comparing the two, Constable's valuation has less evidentiary support, as he assumed in error that Michael performs no household

services at all, and Cline seemed to have a better understanding of the actual type and amount of household services that Michael lost the ability to perform. Accordingly, \$74,130 shall be awarded for the loss of household services.

{¶78} Using Cline's figures for the cost of all future medical care and treatment, home modifications, and replacement of household services, Constable calculated the total present value of the same to be \$1,252,358. Less the \$25,000 in home modifications that were not supported by a preponderance of the evidence, Michael is entitled to \$1,227,358 for future medical care and treatment and lost household services.

{¶79} Regarding wage loss, as a result of the harm sustained in the two collisions, Michael is no longer a candidate for sustained employment activity and is entitled to damages for lost wages. As to the method of calculating lost wages, Constable's use of the median salary information from Acorn Stairlifts was reasonable to set an average monthly wage, particularly under the circumstances where there was limited wage information for Michael because of his short tenure with the company. See *Ratliff v. Colasurd*, 10th Dist. Franklin No. 98AP-504, 1999 Ohio App. LEXIS 1985, \*14-15 (Apr. 27, 1999) (plaintiff must offer "sufficient evidence of the extent of prospective damages flowing from the impairment"). The greater weight of the evidence does not support Constable's assumption that Michael would continue working until age 71, however. Although Constable testified that statistically from the time of trial Michael's work life expectancy was another 4.2 years, or until 2026, Michael's work life expectancy from the time of the first collision was 5.4 years, or until 2022, according to Constable's report. As Michael testified, he had already been semi-retired once before, and his testimony did not establish that he had intentions of working as long as Constable assumed, which was longer than the average person. Michael had worked for Acorn Stairlifts for only about 51 days when he stopped working and had worked a series of previous jobs, the last two being about six months and three and a half years, respectively. Reducing Constable's estimate of \$611,684 in lost wages to account for Michael most likely working another 5.4 years from the time of the first collision, Michael is entitled to \$340,000 in lost wages.

{¶80} Because R.C. 2743.02(D) provides, in part, that "[r]ecoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant", the amount Michael recovers for lost wages

shall be reduced by the indemnity benefits that he received from the Bureau of Workers' Compensation in the amount of \$271,891.44. (Defendant's Exhibit V.) Accordingly, Michael's award for lost wages shall be \$68,108.56.

{¶81} Michael's pain and suffering have been significant, including having to undergo and recover from five surgeries on his spine and enduring great physical pain—at times utterly debilitating. Plainly the injuries have had a negative effect on Michael's physical and emotional well-being and lowered his quality of life, and this is likely to be the case for the rest of his life, as established by Dr. Trangle. The injuries have also had a deleterious effect on Michael and Karen's marriage. For her part, Karen had to change her lifestyle in a significant way, giving up some of the things she used to enjoy doing with Michael and selling their home to move to a more accessible one, having to be his caregiver for long periods of time after surgeries, dealing not only with his physical changes but his emotional changes as well, picking up responsibilities around the house that he used to perform, not being able to socialize as much, and becoming the breadwinner. Michael is entitled to \$175,000 for past pain and suffering and \$175,000 for future pain and suffering. Karen is entitled to \$150,000 for loss of consortium.

{¶82} Based on the foregoing, Michael's economic damages for future medical care and treatment, lost household services, and lost wages amount to \$1,295,466.56. Michael's non-economic damages for pain, suffering, and mental anguish amount to \$350,000, and Karen's non-economic damages for loss of consortium amount to \$150,000.

{¶83} Because R.C. 2743.02(D) provides, in part, that "[r]ecoveries against the state shall be reduced by the aggregate of insurance proceeds, disability award, or other collateral recovery received by the claimant", Michael's damages shall be reduced by both the \$50,000 settlement made with Pauline Dolph and her insurer, Motorists Mutual Insurance Company (Defendant's Exhibit Y) and the \$800,000 settlement made with Travelers Home and Marine Insurance Company, which provided underinsured motorists coverage to Michael's employer. (Defendant's Exhibit X.) Plaintiffs argued that these collateral recoveries should be reduced by the amount Michael was said to have paid to settle multiple subrogation liens (\$189,647.17), because he did not 'receive' those funds, but it is apparent from the settlement agreements that Michael received the settlement

proceeds as to constitute a collateral recovery, regardless of whether he used some of the settlement proceeds to satisfy subrogation liens. See *also* Defendant's Exhibit W (a subrogation lien settlement in which Michael acknowledged "that he received" \$850,000 as described above).

{¶84} After the reductions required by R.C. 2743.02(D), Michael is entitled to a total recovery of \$795,466.56 and Karen is entitled to a total recovery of \$150,000.

## CONCLUSION

{¶85} Based upon the foregoing, it is recommended that judgment be entered for plaintiffs in the total amount of \$945,491.56, which includes the \$25 filing fee paid by plaintiffs.

*{¶86} A party may file written objections to the magistrate's decision within 14 days of the filing of the decision, whether or not the court has adopted the decision during that 14-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. A party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion within 14 days of the filing of the decision, as required by Civ.R. 53(D)(3)(b).*

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ROBERT VAN SCHOYCK  
Magistrate