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1 has sufficient background information to render it
2 scientifically valid?
3   A. Sure.
4   Q. And you told us earlier that you're
5 unaware of any minimum standard for wage information
6 in making a calculation of lost wages?
7   A. No, I told you I did.
8   Q. Have you ever testified on behalf of a
9 party who was challenging another economist in a
10 Daubert type challenge?
11   A. No.
12   Q. Are you aware of any published standards
13 for economists to follow that deal with calculation
14 of front and back pay?
15   A. If it is, it would be on a -- by case law,
16 as I appreciate it. This is federal cause of
17 action?
18   Q. (Nodding head.)
19   A. The federal case law seems to me would be
20 a -- would apply. That would be the Pfeiffer
21 decisions, low market method of -- low market
22 discount methodology and all the other cases that
23 impact that.
24   Q. Does your calculations take into
25 consideration any potential for retraining of these

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1 two individuals?
2   A. No.
3   Q. Have you done that in the past, made
4 calculations for -- excuse me. Taken into
5 consideration retraining of individuals?
6   A. I have, but it's at the -- I'm relying on
7 the opinion of a vocational expert. I'm not a
8 vocational expert. I don't know if they're capable
9 of being retrained or they need to be retrained.
10 But if there's evidence to come forward that they
11 would benefit by retraining, I certainly would
12 consider that.
13   Q. You did take that into consideration,
14 correct?
15   A. I did -- did or didn't?
16   Q. The potential that they could work in a
17 job other than a furniture salesman and increase
18 their wages?
19   A. I would assume so. I don't know what it
20 would be. I'm not a vocational person. I don't
21 know what they could do to improve their lot in
22 life.
23   Q. Did you take their race into consideration
24 in doing any of your analyses?
25   A. No. I took the gender into

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1 consideration. Worklife tables are driven primarily
2 by education. There are some out there for race,
3 but I used the gender tables.
4   Q. Did you use a computer program in
5 rendering a report?
6   A. Yes.
7   Q. What is the name of the program?
8   A. Excel.
9   Q. Okay. Other than Excel, did you use any
10 particular software that is used specifically for
11 the purpose of calculating either front pay or back
12 pay issues?
13   A. No.
14   Q. For example, software that has included
15 within it certain governmental tables and private
16 tables where you can pick and choose what you want
17 to use to generate a report?
18   A. No.
19   Q. Would you agree that economic projections
20 can vary substantially depending on the hypothesis
21 used?
22   A. Absolutely.
23   Q. Would you agree that economic projections
24 can vary substantially depending upon the
25 foundational facts that are used?

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1   A. Absolutely.
2   Q. What type of inflation rate did you
3 assume?
4   A. I didn't assume any.
5   Q. You assumed no inflation?
6   A. I used the Culver Pfeiffer roots.
7   Q. Do you know the difference between an
8 expert opinion and speculation?
9   A. I suppose speculation comes from an
10 expert. I have no idea. I would think that
11 speculation would be when there's no reasonable
12 basis for the assumption.
13   Q. Can you also -- something be a matter of
14 speculation if you don't have sufficient data from
15 which to draw conclusions or opinions?
16   A. Well, I think if you embrace it with those
17 words, everything comes under that umbrella. When
18 you have enough information to really say that
19 you've reached the stage of clairvoyance, if you
20 ever get there.
21   Q. Have you ever had a case in all your years
22 where we were looking for a matter of clairvoyance?
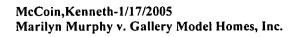23 Have you ever been asked to testify and be
24 clairvoyant?
25   A. Well, yeah. They want it. They want --

28 (Pages 106 to 109)

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1 they demand clairvoyance.
2   Q. Let me be clear. I'm not asking you for
3 your clairvoyance here. I'm exploring your opinions
4 and whether or not they're based upon reasonably
5 accurate information. And if they're not, then of
6 course I would contend that it's not a reasonable
7 accurate expert report.
8   A. Sure.
9   Q. Would you agree with me that if an expert
10 report is not based upon reliable data, then it is
11 closer to speculation than expert opinion?
12   A. Yeah, it's closer to error. Whether you
13 label it expert or speculation, if the data are
14 deemed to be unreliable, the results that flow from
15 it would be deemed unreliable.
16   Q. Did you take into consideration the
17 potential for early retirement of either of these
18 individuals?
19   A. Yes.
20   Q. Okay. Did you take into consideration
21 layoffs?
22   A. Yes.
23   Q. Did you take into consideration illnesses
24 or career changes? -
25   A. Yes.

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1   Q. Can you show me in your report where you
2 did that.
3   A. It's in the worklife expectancy tables.
4   Q. All right. So when you say you took
5 into -- you took into consideration -- for example,
6 you didn't -- would it be fair to say that you
7 didn't take into consideration Mrs. Murphy or
8 Mr. McDaniel's thoughts about early retirement?
9   A. Correct.
10   Q. Or any potential for layoffs as to them
11 specifically?
12   A. Correct.
13   Q. And you didn't take into consideration
14 specific to them potential for illness or career
15 changes?
16   A. I made no ad hoc adjustments. The courts
17 have spoken on that in Madorie and other cases.
18 There's been no personalization of these statistics.
19   MR. MEYER: Objection,
20 nonresponsive.
21   Q. (By Mr. Meyer) How much time have you
22 spent on this case prior to today?
23   A. Nine hours.
24   Q. Have you ever worked for Mr. Newar before?
25   A. One prior case.

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1   Q. When was that?
2   A. Just recently. It was a wrongful
3 termination case.
4   Q. Did that case go to trial?
5   A. Did not.
6   Q. Was your deposition taken?
7   A. Was not.
8   Q. Did it get resolved?
9   A. Yes.
10   Q. Have you ever testified for an employer in
11 a case such as this?
12   A. Yes.
13   Q. Who was the last employer you testified
14 for?
15   A. I can't remember. I've got one now with
16 HISD. I couldn't remember the employer.
17   Q. Have you rendered a report in the HISD
18 litigation?
19   A. I'm about to.
20   Q. Is your work predominant in one side of
21 the bar or the other?
22   A. Yes. Most of it is plaintiffs. Probably
23 60 percent of it is plaintiffs and the rest
24 defendants.
25   Q. If one were to do a study of your case

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1 list here, is it your testimony that 60 percent of
2 these cases you've worked on behalf of the
3 plaintiff's side?
4   A. No, that's more like 90, 95 percent. It's
5 testimony.
6   Q. So, this case list here, Exhibit 13,
7 somewhere in the 90 to 95 percent range is cases
8 where you've worked on behalf of the plaintiff?
9   A. Testified on behalf of the plaintiff.
10   Q. Testified on behalf of the plaintiff.
11 Well, are you telling -- I don't know how many cases
12 that are here, but let's assume there's --
13   A. It's about 200.
14   Q. 200 cases here. So there must be another
15 100 cases that you've worked on behalf of the
16 defense and they're not disclosed here during this
17 same time period?
18   A. Yeah.
19   Q. Why wouldn't you disclose cases you worked
20 for the defense?
21   A. There are defense and plaintiff there.
22 That's a Rule 26 testifying list. It's not a work
23 list.
24   Q. So if you're designated as -- you put down
25 on this Exhibit 13 cases that you've given a

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1 deposition or trial testimony in, correct?
2   A. Correct.
3   Q. Taking all of these cases in Exhibit 13
4 and setting them to the side, have you been retained
5 in other cases to act as an economist where there is
6 litigation ongoing?
7   A. Where there is litigation ongoing. What
8 do you mean by that?
9   Q. A plaintiff or defendant hired you but you
10 were not deposed.
11   A. Oh, sure.
12   Q. Or gave trial testimony.
13   A. Right.
14   Q. And what is the percentage of those cases
15 plaintiff and defense?
16   A. Well, that's what I said, 60/40. In terms
17 of work, it's about 60 percent for plaintiff, 40
18 percent for defendant. In terms of the testimony,
19 it's about 90, 95 percent in favor of the
20 plaintiff. Most of the times you're hired by a
21 defense firm, they don't necessarily want you to
22 testify, they want a consulting expert, someone who
23 can give a yea or nay on the opinion that they're
24 looking at.
25   Q. When you testified in Sweetwater, were you

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1 for plaintiff or defense?
2   A. Plaintiff.
3   Q. Do you keep records of who retained you?
4   A. No formal records, no.
5   Q. If I wanted to hypothetically test your
6 statement that 60 percent of the parties that retain
7 you were involved in litigation for plaintiffs, do
8 you have sufficient records to evaluate that?
9   A. I don't know that I do.
10   Q. How about over the last two or three-year
11 period?
12   A. That's what I'm speaking of.
13   Q. What percentage of your time is spent as
14 an expert involved in litigation matters?
15   A. About 80 percent.
16   Q. And what do you do otherwise?
17   A. Teach.
18   Q. Where do you teach?
19   A. Houston Baptist.
20   Q. Are you an adjunct professor there
21 presently?
22   A. Yes.
23   Q. Are you teaching a course presently?
24   A. Come again?
25   Q. Are you teaching a course presently?

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1   A. Just finished up a course on investment.
2   Q. How many hour course was that?
3   A. Oh, I don't know. It's four hours a week.
4   Q. So you taught the fall semester --
5   A. Right.
6   Q. -- at Houston?
7   Do you have any plans to teach again?
8   A. I don't. I think they have plans for me
9 to teach again, but every year I say I'm not going
10 to teach anymore and somehow I show up...
11   Q. Discount rate, what rate did you assume?
12   A. 1-1/2 percent below market.
13   Q. And how did you determine market? This is
14 for the bonds, government bonds or T bills?
15   A. Yes.
16   Q. And why is it that you chose short-term
17 rates rather than long term?
18   A. Well, because wages are short-term rates.
19 You're trying to replace wage income with investment
20 income and you need something to be responsive to
21 inflation as an investment the same way that wages
22 are responsive to investment. So, short-term rates.
23   Q. Right now, are short-term rates higher or
24 lower than long-term rates?
25   A. Lower.

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1   Q. Is a six-month rate higher than a
2 three-month?
3   A. Generally.
4   Q. Is a one-year rate higher than a
5 six-month?
6   A. Yes.
7   Q. And how many years are you projecting out
8 this loss of income on the plaintiffs?
9   A. Well, if we look at Mrs. Murphy -- I think
10 she's the longer one -- it would be about nine years
11 so.
12   Q. If we were trying to use an interest rate
13 for Mrs. Murphy to compensate her for 2006, would
14 you use three-month, six-month, one-year T bills?
15   A. Three-month.
16   Q. Even though a longer time period generates
17 a higher return?
18   A. Absolutely.
19   Q. And is there a difference in risk between
20 a three-month and a one-year T bill?
21   A. Absolutely.
22   Q. Is there a meaningful real risk?
23   A. Absolutely.
24   Q. What do you believe is the meaningful real
25 risk between a three-month T bill and one-year T

30 (Pages 114 to 117)

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1 bill?
2   A. The risk of inflation changing.
3   Q. Is inflation rates taken into
4 consideration by the market in determining what the
5 valve of T bills are?
6   A. Absolutely.
7   Q. So if the market has gotten sufficient
8 historical information, recent information on
9 inflation, wouldn't you expect the market to be able
10 to tab the appropriate price for a T bill?
11   A. As best the market can.
12   Q. And why did you choose 1-1/2 percent?
13   A. Well, the historical record, as we saw
14 earlier, is about 1.39 percent. There's been a
15 recent trend in the last 10 years, maybe longer, for
16 interest rates to go up. I rounded it up to 1-1/2
17 percent.
18   Q. And what inflation rate did you assume?
19   A. I didn't assume any.
20   Q. I thought you said you took -- that you
21 had to take -- you chose three-month T bill because
22 anything longer you would be taking into
23 consideration inflation would increase the risk.
24 Now you're saying that you didn't take inflation
25 into consideration.

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1   A. I think you're misconstruing what I said.
2 Longer securities are subject to purchasing power
3 risk. If you lock yourself into a 30-year bond,
4 then you're at the mercy of what inflation does over
5 the next 30 years. You've locked in the return side
6 but you haven't locked in what it will buy. So as a
7 consequence, you've locked in today's low interest
8 rate at 2 percent or whatever it is, and inflation
9 goes back to 15. That's not a good deal. You're
10 opening yourself up for financial failure.
11   Q. Does your calculation assume any residual?
12   A. Residual what?
13   Q. Residual funds remaining?
14   A. No.
15   Q. So you're projecting X amount of dollars
16 in as of trial date and at the end of their worklife
17 expectancy, whether it's a true worklife or not, at
18 the end of their worklife expectancy those funds
19 won't run out?
20   A. Exactly.
21   Q. And you assumed a steady interest rate
22 over time?
23   A. Yes.
24   Q. And has it ever been a steady interest
25 rate over time?

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1   A. No.
2   Q. And in fact, interest rates are projected
3 to increase over time, aren't they?
4   A. They're projected by someone to increase,
5 they're also projected by someone to decrease. But
6 my view is that they will be increased.
7   Q. Are you familiar with Mr. Murphy -- I'm
8 sorry, Mr. McDaniel or Mrs. Murphy's experience in
9 their new jobs -- this is post-Gallery -- with
10 absenteeism?
11   A. No.
12   Q. Do you know whether or not they have been
13 disciplined in their new jobs?
14   A. Don't know.
15   MR. MEYER: If we could take a final
16 break for just a moment, I think I'm about done. I
17 just want to make sure that that's the case.
18   (Recess taken.)
19   MR. MEYER: Pass the witness.
20   MR. NEWAR: Plaintiff lawyers reserve
21 questions until the time of trial.
22   MR. MEYER: On behalf of the
23 defendant, we don't have any problem with Mr. McCoin
24 acting as custodian for the originals of Exhibits 1
25 through 11. And if we have need access to the

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1 originals, we ask they be made available in a
2 reasonable period of time.
3   (Proceedings Adjourned.)

4
5   * * *

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 1      IN THE UNITED STATES DISTRICT COURT
        FOR THE SOUTHERN DISTRICT OF TEXAS
 2           HOUSTON DIVISION
 3
    MARILYN MURPHY AND    )NO. H-04-0621
 4  MARTIN G MCDANEL,     )
    INDIVIDUALLY, AND ON  )
 5  BEHALF OF OTHERS      )
    SIMILARLY SITUATED    )
 6                        )
       Plaintiffs         )
 7                        )
    VS              )JURY DEMANDED
 8                        )
    GALLERY MODEL HOMES,  )
 9  INC D/BA GALLERY      )
    FURNITURE         )
10                )
       DEFENDANT      )
11
           REPORTERS CERTIFICATION
12     ORAL DEPOSITION OF KENNETH MCCOIN
           JANUARY 17, 2005
13
          I, Jill Phillips, Certified Shorthand
14  Reporter in and for the State of Texas, hereby
    certify that this deposition transcript is a true
15  record of the testimony given by the witness named
    herein, after said witness was duly sworn by me.
16
          I further certify that I am neither
17  attorney nor counsel for, related to, nor employed
    by any of the parties to the action in which this
18  testimony was taken. Further, I am not a relative
    or employee of any attorney of record in this cause,
19  nor do I have a financial interest in the action.
20        Further certification requirements
    pursuant to the Rules will be certified to after
21  they have occurred.
22        SUBSCRIBED AND SWORN to on this the
    31st day of January, 2005
23  _____
    Jill Phillips, Texas CSR 5966
24  Expiration Date 12/31/05
    1300 Texas Avenue
25  Houston, Texas 77002
    (713) 228-2311
```

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