

Stan V. Smith and Thomas R. Ireland: A Personal Forensic Economic Retrospective from March 2003 to May 2020

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As of March 16, 2003, I wrote an unpublished paper that contained “my account of events that have involved Stan Smith and myself as participants in the forensic economics arena, starting on December 12, 1988 and continuing through March 16, 2003 and beyond.” It ended with a section entitled “Beyond March 2003,” in which I said:

This account was written as of March 16, 2003. At some point in the near future, the Montana Supreme Court will issue its ruling about the admissibility of hedonic damages. *Dorn v. BNSF* has been appealed to the 9th Circuit Federal Court of Appeals and a decision will someday be announced. I have been retained in other cases against Stan Smith. Some of those cases involve hedonic damages and some do not. . . . The story of Stan V. Smith and Thomas R. Ireland will continue.

I had not looked at this paper for a number of years, but was recently contacted by an attorney who found it at my website, www.umsl.edu/~irelandt. It seemed useful to provide a similar account of events from March of 2003 to the present, which at this writing is May 2020. This account will presume that the reader has read the original paper that ended in March 2003. If not, that paper remains available at the website listed above.

Structure of this Account

As regards the ending section of my March 16, 2003 paper, the Montana Supreme Court has never ruled on the admissibility of expert testimony on hedonic damages. A number of lower courts in Montana had rejected hedonic damages testimony. As a result, attempts to have experts admitted to provide hedonic damages testimony in Montana had largely ended by the time of my March 16, 2003 paper, so that the issue never reached the Montana Supreme Court. The 9th Circuit eventually ruled on the defendant’s appeal of *Dorn v. BNSF* in 2005, as will be discussed later in this paper. This paper started with that background and cover events that have occurred between March 16, 2003 and August 31, 2019.

***Walden v. United Rentals* on May 9, 2003. (Nevada)**

Walden v. United Rentals involved a closed head injury to Justin Walden on July 27, 1998 at the age of 13.7 years. It was venued in Las Vegas. Walden was 18.4 years of age at the time of Stan Smith’s first report on February 3, 2003 and was living with his girlfriend and two siblings in his parents’ home. Smith had calculated loss of wage and benefits for a number of scenarios, cost of a life care plan and reduction in value of life for Justin Walden. Smith had also calculated loss of guidance and loss of companionship for Walden’s parents and siblings. (Smith had not yet started calling “loss of companionship” with the term “loss of accompaniment services,” which he currently uses, at that time.) In other respects, Smith’s calculations were not unusual for plaintiff-side reports he was issuing at that time. The defendant filed a successful objection to Smith’s “loss of guidance” and “loss of companionship” calculations on the basis that parents and siblings were not allowed to recover damages in personal injury cases under Nevada case law.

After the court's ruling on "loss of guidance" and "loss of companionship" to Walden's parents and siblings, Smith issued an "Addendum" report on April 30, 2003. Smith then calculated values for Justin Walden's loss of guidance and loss of companionship *to himself*, with present values of \$522,406 for his loss of self-guidance and \$732,826 for his loss of self-companionship. My response to Smith's addendum was written on May 9, 2003. My task in responding to Smith's *Walden* "Addendum" was the single most enjoyable task I have had during my consulting career.

This case subsequently settled before my deposition was taken for an amount that is unknown to me.

Wilson v. Sundstrand in September of 2003 (Illinois)

This case was unusual in that it involved an air crash in Indonesia in which 26 passengers were killed. The large majority of the decedents were Indonesian, but several were from other countries, not including the United States. The case was filed in the U.S. District Court for the Northern District of Illinois, Case No. 99-C-6944, under the 1929 Warsaw Convention Treaty, to which the United States was a signatory. The case was filed in this venue because of the location of the defendant Sundstrand. Stan Smith was the only economic expert retained by the plaintiffs, but the defense had retained me, Cornelius Hofman and an economist from Northwestern University who was an expert on the Indonesian economy. My remaining records from this case are limited to a "rough copy" of the deposition of Smith and a January 6, 2003 court order (2003 U.S. Dist. LEXIS 4) from Federal Judge Matthew F. Kennelly denying a motion to exclude the testimony of Stan Smith.

Smith had provided calculations for each of the 26 decedents, but had only provided a complete report for one of the decedents. For the remaining 25 decedents, Smith had provided only damages calculations, but not complete reports. Smith's calculations included a variety of damages elements, including loss of enjoyment of life (hedonic damages). Judge Kennelly held that this was inadequate and that complete reports should be filed for all decedents. Judge Kennelly sanctioned plaintiff attorneys with a fine and set the trial date further in the future, but did not exclude Smith on that basis. Judge Kennelly said:

Smith's original report regarding one of the deceased passengers adequately explained Smith's opinions, the basis for those opinions, and his reasoning, and plaintiffs state without contradiction that the supplemental reports for the other twenty-five follow a similar format. The apparent flaws exposed by Sunstrand may provide ample ammunition for cross examination of Smith, and they conceivably provide a basis for challenging some or all of his testimony via a motion *in limine*, but they are not of sufficient magnitude to warrant striking the original or supplemental reports or barring Smith from testifying at trial.

Subsequent to Judge Kennelly's ruling, the defense retained Cornelius Hoffman to respond to Smith's damages other than hedonic damages, while my role was to respond specifically to hedonic damages. The defense also retained an economic expert on the Indonesian economy.

Smith's deposition had been taken before my deposition in September of 2003. (I do not have records indicating the exact dates of his or my depositions.) The focus of my deposition was exclusively on the hedonic damages portions of Smith's reports, which by that time were available for all of the decedents in the Indonesian air crash. I do not recall anything particularly unique about Smith's calculations or my objections to those calculations other than the argument that values of statistical lives in Indonesia and the countries non-Indonesian plaintiffs were different from American values. This was an issue not addressed in Smith's reports. My deposition was held in Chicago, which required that several large boxes of materials had to be transmitted to Chicago for my deposition and then transmitted back to me after my deposition. The plaintiff attorney apparently intended to inject some element of drama into my deposition by having Smith suddenly appear at the moment my deposition was scheduled to begin. Smith sat in my deposition feeding questions to the plaintiff attorney. I recall that this was not particularly distracting and that I was pleased to have Smith sit in on my deposition.

After my deposition, the large boxes were returned to me, where they sat in my office for the next several years as the case continued for several years before settlement. This was the only Warsaw Convention case that I have worked on during my career.

***Durham v. Marberry* on March 25, 2004. (Arkansas)**

Stan Smith and Tom Ireland were both involved in the case of *Durham v. Marberry*, which resulted in a decision of the Arkansas Supreme Court on March 25, 2004. Stan Smith and I may have been already working on that case as of March 16, 2003, but that case did not seem significant until it resulted in an appeal to the Arkansas Supreme Court, resulting in the decision described at my website as follows:

Durham v. Marberry, 356 Ark. 481; 156 S.W.3d 242 (Ark. 2004). The Arkansas Supreme Court held that a 2001 Arkansas Survival Action Ark. Code Ann. § 16-62-101 (Supp. 2003) created a new element of damages in circumstances of wrongful death called “loss of life” and that an injured plaintiff did not have to have survived beyond the fatal injury to have the right to recover this loss element. The Court indicated that “loss of life” and “loss of enjoyment of life” are different elements even though “both are hedonic.” In doing so, the *Durham* court cited *Sterner v. Wesley College, Inc.*, 747 F. Supp. 263 (Del. 1990) and *Willinger v. Mercy Catholic Medical Center*, 482 Pa. 141, 393 A.2d 1188 (1978) as drawing a distinction between “loss of life” and “loss of enjoyment of life.” *Willinger* has been interpreted as not allowing recovery for lost enjoyment of life in death cases in Pennsylvania and *Sterner* is one of the decisions that precluded an economist from offering hedonic damages testimony in Delaware. The *Durham* Court appeared to indicate that it would probably not allow expert testimony about the amount of damages to be awarded for “loss of life.” The Court cited its own decision in *Clark & Sons v. Elliot*, 251 Ark. 853 (1972), as indicating that “there is no hard and fast rule to determine compensatory damages for non-pecuniary losses.”

Neither Smith nor Tom Ireland were mentioned in the *Durham* decision, but I had been asked to review Smith’s report for that case and he had presumably had a chance to review my response to his report. The appeal in *Durham* was on the general question of whether loss of life damages were available because of the 2001 Arkansas Survival Action and did not deal with specifics of how those damages were to be presented to the trier-of-fact. At the end of the decision, the *Durham* court said:

Though the appellants do not argue this point on appeal, the appellees have noted that the appellants retained an economist to provide expert testimony about loss-of-life damages. This expert testimony was the subject of a motion *in limine* filed by the appellees, requesting that the expert testimony be excluded. However, the trial court did not reach the issue of the motion *in limine* because it granted summary judgment on the claim for loss-of-life damages. . . While we do agree with the appellees that the determination of damages is within the purview of the jury, without a trial court ruling or order before us on the issue of expert testimony, this issue is not ripe for consideration.

Ireland Rejoined NAFE on or about July 21, 2004

My earlier paper discussed the reasons why I resigned my membership in the National Association of Forensic Economics (NAFE) in October 2003. I remained a non-member of NAFE from October 2003 until July 2004. At the beginning of that period my cat Hector became a stand-in member of NAFE so that I could continue to receive the *Journal of Forensic Economics (JFE)*. Hector became known as “the NAFE Cat” during this period, a circumstance that has been introduced in a number of my cases opposite Stan Smith. In spite of Smith’s suggestions to the contrary, Hector did not vote in any NAFE election. The sole purpose of his membership in NAFE was to allow me to continue receiving the *JFE* and other meeting notices from NAFE. Later, Hector’s membership became enough of an issue that the NAFE Board of Directors had an attorney determine that a cat could not be a member of NAFE,

but the board also created the new status of “subscriber” to the *JFE*. From that point forward, I continued to receive the *JFE* as a “subscriber” until July of 2004.

As of December 2003, other NAFE Board members became more concerned about Stan Smith’s use of different methods when working for plaintiff attorneys than he used when working for defense attorneys. This was the issue that had prompted my resignation in October 2003. In particular, NAFE Board member were concerned about Stan Smith’s testimony in deposition that the NAFE statement of ethical principles was only advisory and “like a Sunday church sermon.” This was a major factor in a decision by the NAFE Board of Directors to revise the NAFE Statement of Ethical Principles into the NAFE Statement of Ethical Principles and Protocols of Professional Practice (SEPPPP), to which adherence was a membership requirement.

Stan Smith campaigned against the new SEPPPP, especially its membership requirement of adherence to the new SEPPPP in a message posted on the NAFE-L on June 23, 2004. I still retain a copy of his strong exhortation to NAFE members to vote against the SEPPPP that was posted on the NAFE-L on June 23, 2004. The NAFE membership voted overwhelmingly to adopt the new statement and membership requirement. Then NAFE President Stephen Horner announced the results of the voting process in an e-mailed posting on July 21, 2004 indicating that the new SEPPPP had been adopted by a vote of 262 to 26, with 91 percent voting for approval. I decided that this vote of the NAFE membership was a sufficient response to allow me to rejoin NAFE after a non-membership period of 21 months. And thus I rejoined NAFE at that time.

Anderson v. Coulson Oil Company on July 27, 2004 (Arkansas)

Stan Smith’s report for *Anderson v. Coulson Oil Company*, Cause Number CV02-12208 in the Circuit Court of Pulaski County, Arkansas, was issued on March 4, 2005 and his deposition was subsequently taken on July 27, 2004, subject to case law in Arkansas. His deposition was taken in Chicago. I was asked to attend Smith’s deposition and flew to Chicago with the defense attorney who retained me. This was the only case in which I have sat in on a deposition of Stan Smith. This was a wrongful death action based on the death Chad Anderson at the age of 30.6. Smith calculated values for loss of wages, net of personal consumption, loss of royalty income, loss of guidance to Anderson’s parents, loss of accompaniment to Anderson’s parents, loss of value of life and loss of relationship with Anderson of Anderson’s parents. The manner in which Smith performed his calculations was typical of other cases at that time with the exception of a speculative calculation that Anderson had lost \$24,750,416 in royalty income as a result of his death, with no subtraction for personal consumption or clear explanation for how this calculation fit Arkansas law. This was in spite of the fact that his father was in line to receive royalty payments from the same invention.

Smith’s deposition in *Anderson* was fairly straight forward and the case subsequently settled before trial.

Banks v. Sunrise Hospital on December 17, 2004 (Nevada)

Stan Smith was not the plaintiff economist in the case of *Banks v. Sunrise Hospital*. The plaintiff expert who testified to hedonic damages in the *Banks* case was Robert Johnson of Palo Alto, California. However the 2004 decision in *Banks* opened the door for many attorneys to retain Stan Smith in cases tried in Nevada state courts. *Banks* had originally been tried in 1998. The result had been successfully appealed to the Nevada Supreme Court, which had remanded the case to the trial court for retrial. I had testified oppose Robert Johnson in the first trial of Banks and had been the named defense expert for the second trial. I was also retained as the defense expert for the second trial, which took place in 2002. I had been expecting to testify in that trial and had even flown from St. Louis to Las Vegas, expecting to testify the next morning. However, defense counsel, apparently thinking that things were going well, decided not to have me testify in the second trial. The decision went very badly for the defense, which resulted in an appeal of the second verdict. That appeal resulted in the decision of the

Nevada Supreme Court that has led to a number of retentions of Smith to present hedonic damages testimony in Nevada state courts. The description of the *Banks* decision at my website is as follows:

Banks v. Sunrise Hospital, 102 P.3d 52; 2004 Nev. LEXIS 121 (Nevada 2004). This decision held that the trial court was not in error for admitting the hedonic damages testimony of Robert Johnson that Banks' hedonic loss from being in a persistent vegetative state fell between \$2.5 million and \$8.7 million based on consumer purchase and wage-risk studies in the value of life literature. The court said:

Johnson's methodology for the valuation of hedonic damages assisted the jury to understand the amount of damages that would compensate James for the loss of his enjoyment of life. Johnson's valuation theories were matters within the scope of his specialized knowledge concerning the monetary value of intangibles. Moreover, the probative value of Johnson's testimony was not substantially outweighed by the danger of unfair prejudice. Therefore, the district court properly exercised its discretion in qualifying Johnson as an expert and permitting him to testify concerning hedonic damages. We observe that Sunrise had the ability to use traditional methods of disputing Johnson's testimony, such as presenting witnesses on its behalf to persuade the jury that Johnson's methods were inaccurate or unreliable. The jury was then free to determine whether Johnson's valuation theories were credible and to weigh his testimony accordingly.

In effect, the Nevada Supreme Court indicated that defense counsel should have had me testify. The *Banks* decision has also been notable because plaintiff experts have tried to argue that *Banks* was a ruling that an economist is, by law, able to calculate reliable dollar values for household services. That argument is clearly a misinterpretation of *Banks*, but it was accepted by Nevada State Judge Jesse Walsh in *Chanin v. Desert Shadow Endoscopy* (2010), as will be described below.

Banks was also unique in another way. Since *Banks* was in a near persistent vegetative state, he had lost his entire capacity to enjoy life as a result of his injury. If *Banks* had been killed, his estate could not have recovered for his loss of enjoyment of life because the Nevada Wrongful Death Statute does not allow states to recover for that element of damages. If *Banks* was not in a near persistent vegetative state, the issue of what amount of life enjoyment he retained after his injury would have been an issue. *Banks* was also a holding by the Nevada Supreme Court that lack of consciousness does not preclude recovery for loss of enjoyment of life in a personal injury case, reversing a federal judge's ruling to opposite effect in an earlier case.

***Dorn v. BNSF* on February 7, 2005 (Montana)**

My March 16, 2003 paper indicated that the 9th Circuit was considering an appeal of the trial court decision in *Dorn v. BNSF*. It reached that decision on February 7, 2005, which is described at my website as follows:

Dorn v. Burlington Northern Santa Fe Railroad Company, 397 F.3d 1183 (9th Cir. 2005). This was an appeal of a wrongful death decision under Montana law, not an FELA action. The trial court judge had permitted Stan V. Smith to present hedonic damages testimony, but had not allowed Thomas R. Ireland to testify in opposition to the validity of hedonic damages testimony. As one of a number of errors that resulted in a reversal of the trial court decision, the 9th Circuit held that it was reversible error for the trial court not to have admitted Ireland's testimony. The 9th Circuit evaluated Montana's position on hedonic damages and the admissibility of expert testimony on hedonic damages as ambiguous and therefore did not hold that the admission of Smith's hedonic damages testimony was reversible error. It did, however, express concerns about the validity of that testimony.

At the trial court level of this Federal Employer Liability Act (FELA) case, the plaintiff had presented two economic experts. Joseph Kasperick, a long time economic expert in Montana, had presented lost earnings and lost fringe benefits analysis. Stan Smith had been retained purely for presenting hedonic damages. Defense counsel were more concerned to have me focus on the shortcomings of

Kasperick's analysis than to counter Smith's hedonic damages testimony. The defense filed a motion *in limine* to exclude hedonic damages testimony, but did not involve me in that motion. To the apparent great surprise of defense counsel, Federal Judge Richard F. Cebull denied the motion *in limine* and allowed Smith to testify about hedonic damages during the *Dorn* trial. My primary role in the case then switched to testifying opposite Joseph Kasperick on ordinary damages to testifying opposite Smith on hedonic damages. However, at in a *voir dire* hearing before trial continued, Judge Cebull indicated that the appropriate place for my testimony would have been at the motion in limine level and that my testimony would effectively be that Judge Cebull should not have allowed Smith's testimony. On that basis, Judge Cebull granted plaintiffs motion to exclude my testimony about the invalidity of hedonic damages testimony.

This result is one of two instances in which I was not permitted to testify opposite Smith. The other instance, *Chanin v. Desert Shadow Endoscopy* (2010), will be described below. However, the 9th Circuit decision reversing and remanding the *Dorn* decision in part because I was not permitted to testify has made this an instance I have particularly enjoyed discussing during my depositions. There was nothing particularly unique about Stan Smith's trial court testimony in the *Dorn* case, nor did he and I have any direct personal interaction in the process of this case.

Gutierrez v. Phelps Dodge Corporation in March of 2007 (Arizona)

Stan Smith's report for *Gutierrez v. Phelps Dodge Corporation* in the Superior Court of Maricopa County, Arizona, Cause Number CV2005-003042, did not include loss of enjoyment of life (hedonic damages) calculations, but did include loss of wages and benefits and loss of household services. Smith's household services calculations included components for "accompaniment services," which the judge excluded as being part of consortium. Thus, Smith's testimony included only elements that would be expected in the report of any economic expert regarding loss of wages and benefits and loss of household services and my trial testimony only addressed those calculations. This was one of only five occasions from my first case in opposition to Stan Smith to the present that I testified in a trial about Smith's calculations. The first was *Wright v. Von's Industry* in Las Vegas in October 1999. The second was *Gutierrez* on March 17, 2007. The third was *Delgado v. Borysewich* in August of 2007. The fourth was *Dasbach v. ACBL* in Chicago in January of 2009. The fifth was *Garcia v. Averbach* in March of 2016. Neither *Gutierrez* nor *Dasbach* involved hedonic damages, so *Wright*, *Delgado*, and *Garcia* have been the only cases to date in which Smith presented hedonic damages testimony and I testified in opposition to Smith's hedonic damages testimony. *Delgado* will be discussed immediately below. *Dasbach* and *Garcia* will be discussed later in this paper.

Delgado v. Borysewich in August of 2007 (Nevada)

Delgado v. Borysewich was the first of two cases in which I appeared in the Las Vegas courtroom of Nevada state Judge Jesse Walsh. The cause number was A482360 in the District Court of Clark County. *Delgado* was a personal injury case in which Stan Smith had projected loss of wages and benefits, loss of household services, cost of life care plan and loss of enjoyment of life damages for Carol Delgado and loss of enjoyment of life damages only for Anna Cochran. Both of the plaintiffs had been injured in an automobile accident. Smith's calculations for each of these damages elements were typical for Smith's calculations at the time. My testimony in opposition to Smith's testimony was generally typical for my reports opposite Stan Smith. The key limitations imposed on me were that I was not allowed to refer to hedonic damages testimony as "junk science" as I had in my reports and I was not allowed to refer to the opinions of other economists regarding their lack of acceptance of hedonic damage calculations. Kevin Kirkendall was also retained as an economic expert in the *Delgado* case and permitted to testify without major limitations.

The trial, however, was anything but typical. I was permitted to observe the testimony of the defense life care planning expert, Robert Taylor. Taylor's testimony seemed normal and typical for a vocational expert, but Judge Walsh quite suddenly dismissed Taylor and told the jury to disregard his testimony, which then resulted in my being the next witness. As Taylor explained to me later, his report

had used the term “CPT Code” (as had the plaintiff expert Dr. David Oliveri). In a sidebar, the plaintiff attorney argued to Judge Walsh that “CPT Code” was linked to “insurance,” which became the reason for her exclusion of Taylor. My direct testimony was uneventful, but the plaintiff attorney, Robert Eglet, made negative comments to the jury about then president George W. Bush as part of his cross examination of me. This was in the nature of comments to the jury during my cross examination rather than asking me about any of my political opinions. However, this is the only trial I was ever involved with in which an attorney has ever made any political comments to a jury. In those ways, Judge Walsh’s courtroom was more of a circus than any other courtroom in my career. This case was to take on greater importance when I next tried to testify in front of Judge Walsh in *Chanin v. Desert Shadow Endoscopy* on April 29, 2010.

Slater v. Jelinek and Frontier Cooperative Company in December of 2008 (Nebraska)

Slater v. Jelinek and Frontier Cooperative Company was a personal injury case filed in the Federal District Court of Nebraska, No. CV 00638, probably in 2007. Stan Smith issued his report containing hedonic damages calculations on September 13, 2007. His deposition was taken on January 21, 2008. I issued my first response to that report on February 16, 2008. To the best that I can remember, my deposition was not taken during the process of that case, which was ultimately scheduled for trial early in January of 2009. Prior to this case, the Nebraska Supreme Court had ruled in two prior cases that Stan Smith’s hedonic damages testimony was not admissible [in *Anderson v. Nebraska Department of Social Services*, 538 N.W.2d 732 (1995) and *Talle v. Nebraska Department of Social Services*, 541 N.W.2d 30 (1995)]. No federal court had previously admitted hedonic damages testimony. Yet Smith’s report projected hedonic damages for the injured plaintiff.

The trial court judge had not ruled on motions in limine, but the plaintiff attorney suddenly withdrew Stan Smith’s hedonic damages testimony just before trial was scheduled to commence. This case was the stimulus for of my 2009 paper in the *Journal of Legal Economics* (16(1):91-109) on “The Last of Hedonic Damages: Nevada, New Mexico and Running a Bluff.” Smith’s projections for the cost of Slater’s life care plan at between \$8 million and \$12 million and lost earnings between \$1.8 and \$2.9 million. Smith’s present value for hedonic damages was between \$3.1 and \$4.6 million plus a “loss of society and relationship” for Slater’s parents of another \$2.4 million. Presumably, the plaintiff attorney did not want to put Smith’s ordinary economic losses at risk of being discredited by the rejection of more controversial damage projections.

Dasbach v. ACBL in January of 2009 (Illinois)

Dasbach v. ACBL, Cause Number 05 L 010281 in the Circuit Court of Cook County, Illinois, was case involving an injured barge worker that was tried in Chicago in January of 2009. This was the third and most recent time that Stan Smith and I have testified in the same trial. Stan Smith’s report and testimony did not include loss of enjoyment of life (hedonic damages) or loss of guidance or loss of household services. Smith’s calculations for Dasbach’s loss of wages and benefits were significantly higher than my calculations, but there were no other unusual aspects in his or my testimonies. My testimony came immediately after Smith’s testimony, but neither of us was allowed to sit in the courtroom while the other testified. Smith was asked by plaintiff attorneys to remain outside the courtroom until my testimony was completed so that he could be brought back for rebuttal if plaintiff attorneys desired. Plaintiff attorneys did not elect to call Smith back to the stand, but this resulted in Stan Smith and I being able to have a short pleasant conversation after my testimony.

Esparza v. BCI Coca-Cola Bottling Company of Los Angeles on July 2, 2009 (Arizona)

Esparza v. BCI Coca-Cola Bottling Company of Los Angeles, Cause Number CV 2007-091884 in the Superior Court of Maricopa County, Arizona. Stan Smith had calculated present values for loss of

wages and benefits at either \$1,024,743 or \$1,366,341, loss of household services at \$546,665, and “reduction in value of life” at \$1,271,930 or \$2,725,573. My report dated November 9, 2008 provided alternative calculations for loss of wages & benefits and household services, but argued against Smith’s hedonic damages calculations as completely without merit. I also provided a declaration in support of plaintiff in support of the defense’s motion in limine to exclude Smith’s hedonic damages calculations. Judge Karen Potts granted the defense motion to exclude Smith’s hedonic damages testimony on July 2, 2009, saying:

Dr. Smith has based his entire opinion upon a hypothetical person, and has not considered this case or the particular activities in which this particular person participated before the injury. Indeed, Dr. Smith’s Report is wholly devoid of any description of the life activities enjoyed by the plaintiff, Mr. Esparza, and Dr. Smith does not consider those activities in his opinion. Hedonic damages are not meant to compensate any person for any injury but rather to compensate a particular plaintiff for the loss of enjoyment he/she enjoyed prior to the injury and thus are unique to each plaintiff. Under Dr. Smith’s analysis, however, the dollar value would be the same in every case, adjusted only for the life expectancy of the plaintiff.

After Judge Potts issued her order, the case settled before trial.

Chanin v. Desert Shadow Endoscopy on April 29, 2010 (Nevada)

Chanin v. Desert Shadow Endoscopy resulted from Henry Chanin’s contraction of hepatitis C after having a colonoscopy at Desert Shadow Endoscopy. Its cause number was A571172, Dept. X in the District Court of Clark County, Nevada. Chanin had been successfully treated for hepatitis C and had not lost earnings as a result of his illness so that his “loss of enjoyment of life” was the primary damage element in the case. Stan Smith calculated a value of about \$150,000 for Chanin’s loss of household services and \$6 million for Henry Chanin’s loss of enjoyment of life and his wife Lorraine’s reduced quality of relationship with Henry Chanin. Other than the nature of the injury, there was nothing particularly unusual about Smith’s report or my extended report critiquing Smith’s report, indicating that I considered his hedonic damage calculations completely without merit. I was retained by Teva Pharmaceuticals, an Israeli firm that manufactured propofol, an anesthetic used in colonoscopies.

Smith had testified in Chanin trial and left by the time that I reached the courtroom of Judge Jesse Walsh. Upon arrival, I was told that I would not be permitted to testify about hedonic psychology or mention the lack of acceptance of hedonic damages testimony of other economic experts. When my testimony commenced, the plaintiff attorney Robert Eglet, almost immediately asked for permission to question me *voir dire*. He asked if I had testified in Judge Walsh’s courtroom in the case of *Delgado v. Borysewich* and I said that I had done so. He asked if I had testified that I could not calculate anyone’s hedonic damages and I said that I had done so. On that basis, he asked Judge Walsh to exclude my testimony on the grounds that it was Nevada law that an economist could testify about hedonic damages and that I had testified that I was not qualified to do so. Judge Walsh ruled that Eglet was correct and I was asked to leave the stand without testifying about Stan Smith’s hedonic damages testimony. This has subsequently been referred to as the “unicorn issue” that if one does not believe in unicorns, one cannot testify about the non-existence in the real world of unicorns.

Subsequently, an appeal of the decision in *Chanin*, which included Judge Walsh’s decision exclude my testimony, was filed by the defendants with the Nevada Supreme Court, but the parties settled before the appeal was decided. After this decision, I made it a personal policy not to accept cases that were to be tried before Judge Jesse Walsh. This continued until she left the bench in 2017. Since the *Chanin* decision, Smith has regularly testified about what happened to me in the *Chanin* case in an effort to impeach my testimony

Donlin v. Montano, M.D., on February 13, 2012 (Connecticut)

Donlin v. Montano, M.D., Cause Number HHB CV 09 5012648 S in the Superior Court of Connecticut, Judicial District of New Britain, was a medical malpractice case involving the death of Kerri Donlin. Connecticut uses a “loss to the estate” standard for recovery in wrongful death actions, but it is an unresolved question whether a decedent’s estate recover for loss of enjoyment of life and whether expert economic testimony is permissible if an estate can recover for loss of enjoyment of life. During this period, several plaintiff attorneys in Connecticut attempted to have Smith present hedonic damages testimony. Because of those lurking legal questions, *Donlin* took on more significance that might otherwise have been the case. Smith’s deposition was taken three times in that case and my deposition was taken once on February 13, 2012. Ultimately, the case settled before trial and before any significant rulings on the pending legal questions. However, I was asked to write a number of reports that addressed each of Smith’s deposition transcripts.

Pennington v. Salt Lake Regional Medical Center on December 21, 2012 (Utah)

Pennington v. Salt Lake Regional Medical Center, et al, Cause Number 090907103 in the Third Judicial District, Salt Lake County, Utah, involved a personal injury suffered by Jamie Pennington for which Stan Smith projected loss of enjoyment of life (hedonic damages) of either \$2,167,673 or \$3,249,989 depending on whether a 40% or 60% “benchmark” was used. Smith’s report was issued on January 10, 2012. My two reports responding to Smith’s report in that case were both issued on October 11, 2012. My first report was my standard response to Smith’s hedonic damages calculations for a personal injury case. My second report was a response to plaintiff’s memorandum in opposition to excluding Smith. It is my impression that I was hired in *Pennington* because of mentions of me in Plaintiff’s Memorandum. In many cases, Smith has preemptively attempted to discredit me by negative statements made about me in his depositions and by suggesting inclusions in legal filings about me even though I was not involved with those cases. On a number of occasions, this has resulted in my being retained in those cases, as in this instance.

Judge Kate A. Toomey issued her order on December 21, 2012 excluding the testimony of Smith on either hedonic damages or loss of household services. She rejected Smith’s testimony on hedonic damages on the basis that: The “models proposed by Smith are not generally accepted in the forensic economics expert community as a basis for determining damages for loss of enjoyment of life.” She also rejected Smith’s calculations for loss of household services on the following basis:

In Dr. Smith’s opinion, Ms. Pennington sustained loss of household services in a diminishing percentage amount (70% in 2008; 50% in 2009; 30% in 2010), but these percentages are not substantiated by facts establishing that these represent the extent of Ms. Pennington’s alleged losses, and are therefore speculative as to what appears to be an arbitrary assignment of percentages of disability. As such, they are not an appropriate basis for expert testimony.

Judge Toomey tentatively allowed Smith to testify about loss of wage and benefits if an adequate foundation for those losses was established at trial. After Judge Toomey’s order was issued, my role in the *Pennington* Case ended.

Allen v. Bank of America on March 19, 2013 (Maryland)

Allen v. Bank of America was the first case in which I was asked to address Stan Smith’s package of damages relating to credit expectancy. Rick Gaskins was also retained as an economic expert by a co-defendant in this case. In a credit expectancy case, there is no physical injury, but an injury to the plaintiff’s credit cause by some type of financial mismanagement. Smith calculates loss for credit expectancy itself as the additional interest that would have to be paid if the plaintiff borrowed money during the period when the plaintiff’s credit rating was reduced, loss of the value of the time the plaintiff spent dealing with resolving the problem created by financial mismanagement, and reduction in the value of the life of the plaintiff caused by the financial mismanagement. Smith prepared his re-

ports for three members of the Allen family on December 5, 2010. I responded to Smith's report on January 29, 2012 and prepared questions for Smith's deposition as of July 20, 2012. The defense filed a motion *in limine* to exclude Smith's credit expectancy calculations from the trial, which was responded to in a court order issued on May 19, 2019. The description of the decision that appears at my website is as follows:

Allen v. Bank of America, 2013 U.S. Dist. LEXIS 37815 (D. Md. 2013). This case had to do with alleged bank violations of provisions of state and federal law in the provision of mortgage servicing and mortgage payment services to the Allens. Plaintiffs offered Stan Smith as an economic expert to testify about hedonic damages and loss of credit expectancy by the Allens. Judge Catherine Black granted a defense motion to exclude Smith's testimony on hedonic damages, but reserved judgment regarding his credit expectancy calculations. She said:

BANA has moved to exclude all of the testimony of the Allens' designated damages expert, Stan V. Smith, asserting that he is unqualified to offer his proposed expert opinions and that the opinions themselves are irrelevant and unreliable. The Allens seek to offer his testimony on two types of damages they allegedly suffered because of BANA's actions: loss of credit expectancy and "hedonic damages" (also known as "loss of enjoyment of life"). The Allens, in turn, have moved to exclude the expert BANA seeks to offer to rebut Smith's testimony. For the reasons set forth below, Smith's testimony on "hedonic damages" will be excluded (as will any testimony by BANA's expert rebutting as much), but the parties' motions will otherwise be denied without prejudice as the relevance and reliability of their expert opinions on the Allens' credit expectancy is an issue for trial.

BANA's argument seeking to exclude Smith's testimony on "hedonic damages" largely focuses on Smith's qualifications and the reliability of his opinions on this issue. Setting aside the question of Smith's credentials and methods, which raise significant doubts about his proposed expert opinions, the court finds that any testimony on so-called "loss of enjoyment of life" or "hedonic damages" would not "help the trier of fact to understand the evidence or determine a fact in issue" as required by *Fed. R. Evid. 702(a)*. See, e.g., *Mercado v. Ahmed*, 974 F.2d 863, 870-71 (7th Cir. 1992). While the Allens are correct that they may seek "noneconomic damages" for emotional injuries they suffered because of BANA's actions, (citations deleted) a jury is perfectly capable of determining such damages without any expert testimony (citations deleted). The court is not convinced that an expert whose opinion is based almost entirely on asking laypersons how a particular event has affected their enjoyment of life would provide any assistance to the jury in making that determination for themselves. Accordingly, BANA's motion to exclude testimony on this topic will be granted.

This case ultimately settled before trial.

***Garcia v. Awerbach* in March of 2016 (Nevada)**

Garcia v. Awerbach, Cause Number A637772 was filed in the District Court of Clark County, Nevada, as a personal injury lawsuit. Stan Smith's first report in that case was dated July 11, 2013. Smith's first report calculated Ms. Garcia's loss of wages and benefits with a present value of \$1,005,615, loss of household services with a present value of \$859,813, the cost of a life care plan with a present value of \$406,979, and her hedonic damages with present values of either \$2,333,430 or \$3,629,742. This case did not go to trial until March of 2016. During that period, Smith's and my depositions were taken, Smith provided an update report in late 2015 and I produced a total of seven reports during my work on the *Garcia* case. Stan Smith and I both testified at trial in March of 2016.

Prior to trial, the plaintiff filed a motion in limine to limit my testimony in exclude portions of my testimony. The order was granted in part and rejected in part. The part that was granted precluded me from testifying about Nevada law, which I had no intention of doing. My testimony about Stan Smith's method for calculating hedonic damages was permitted in full. However, Stan Smith has as-

serted in various depositions since *Garcia* that my testimony was excluded in the *Garcia* case. During the *Garcia* trial, I was not limited in any way that had any effect on my testimony.

Hemminger v. LeMay, M.D., in February of 2017 (Illinois)

Hemminger v. LeMay, Cause Number 05-L-39 in the Circuit Court of Whiteside County, Illinois, was an unusual case in that Stan Smith filed his original report in that case on May 4, 2007. I responded to Smith's report on September 19, 2007. Smith's deposition was taken on July 12, 2007, but my deposition was not taken until March of 2016. As trial approached in 2007 or 2008, the plaintiff sought to have Smith's report updated, but the court ruled that his testimony must be based upon his 2007 report. At trial, the defense sought and received summary judgement from the trial court judge. After the trial the plaintiff appealed the summary judgment and eventually won the appeal, bringing the case back to life as of 2016. At that point, the court's 2008 ruling that Stan Smith must testify based upon his May 4, 2007 report was still in force. I had been under no similar constraint and could have updated my report. I sent a letter dated October 16, 2016 identifying ways in which my September 19, 2007 opinions of Smith's May 4, 2007 report would have changed in light of the passage of nine years. I also asked in that letter whether I should update any of my calculations. I was directed by counsel not to do so in that my doing so might allow Smith to update his report. My deposition was then taken in February of 2017 based upon my September 19, 2007 evaluation of Smith's May 4, 2007 report of the damages suffered by the children of Tina Hemminger resulting from her death on April 7, 2002. The plaintiff subsequently withdrew Smith and this ended my involvement in the case.

Smith's May 4, 2007 report did not include hedonic damages, but did include calculations for loss of guidance and loss of companionship as well as loss of wages and benefits, net of personal consumption, and loss of ordinary household services.

Haak v. Ryniers in September 2018 (Wisconsin)

Haak v. Ryniers, Cause Number 17-CV-0128 in the Federal District Court of Eastern Wisconsin, was a case that involved the allegedly wrongful death of Erik Haak in a home for mentally limited persons and had been put there by his parents because they were no longer able to deal with the consequences of his mental limitations. Stan Smith's October 26, 2017 report included calculations for Erik Haak's loss of enjoyment of life with a present value of \$4,986,305, reductions in the abilities of his mother and father to enjoy their own lives at \$833,582 for Erik's mother and \$742,128 for Erik's father. Smith also projected loss of accompaniment services for Erik's mother with a present value of \$250,276 and for Erik's father at \$221,048. My response report was issued on March 29, 2018 and argued that none of Smith's calculations had any merit. Smith's deposition was taken on April 24, 2018 and my deposition was taken in September of 2018. The case later settled on terms that were not provided to me. What made this case memorable was that Smith did not take into account any of the very serious limitations of Erik Haak in arriving at his calculated values.

Gurwood v. GCA Service Group in January of 2019 (South Carolina)

Gurwood v. GCA Service Group, Cause Number 2015-CP-10-2191 in the Circuit Court of the 9th Judicial District of South Carolina, was based on a personal injury to Karrie Gurwood on August 5, 2012, at the age of 47.2. Stan Smith's report was dated on February 14, 2017. My first response report was issued on July 8, 2017, responding to Smith's calculations of hedonic damages for Karrie Gurwood and calculations for loss of relationship of Howard Gurwood with Karrie Gurwood (also hedonic damages). My second response report was issued on February 5, 2018, and responded to Smith's present value calculations for Karrie Gurwood's loss of wages and benefits, loss of household services and the present value cost of a life care plan. My deposition was taken in January of 2019, but Smith's deposition was not taken. The case settled shortly after my deposition. Unlike most states, South Carolina calculates damages on an after-tax basis. To that extent, Smith's and my calculations were different

than in most other states, but there were no other unique differences. This case is included in this paper primarily because this is the only South Carolina case that I have ever worked on.

***Ripley v. Shankar, M.D.* in February of 2019 (Illinois)**

Ripley v. Shankar, M.D., Cause Number 16-L-78 in the Circuit Court for Jackson County, Illinois, involved the alleged wrongful death of Merrill Ripley on March 9, 2016. Stan Smith's report was issued on November 29, 2018 and my report responding to Smith's report was issued on December 21, 2018. My evidentiary deposition for use in the trial was taken in February of 2019. Smith's deposition was not taken. In spite of the intended trial use for my deposition as part of the impending trial, the case settled before trial. Merrill Ripley, the decedent, was retired at the time of his death and was living alone. Smith calculated present values for loss of enjoyment of life damages for Merrill Ripley at \$3,036,016 and loss of society and relationship damages for the three adult children of Merrill Ripley at approximately \$2 million each. There were no earnings loss or household service losses that affected the adult children so that all of the losses were loss of enjoyment of life for Mr. Ripley and his three adult children. Since Illinois law does not permit decedents to recover for their own losses, the legally relevant calculations were for the loss of society and relationship for the three adult children of Merrill Ripley. There was nothing unique about how Smith calculated those damages.

What was unique enough to make this case memorable was the role of the plaintiff attorney, John Womack of Murphyboro, Illinois. This was the fourth time that Womack has taken my deposition regarding an expert proffering hedonic damages over period that extends back twenty years. On the first occasion, his hedonic damages expert was Ike Mathur of Southern Illinois University. On the next three occasions, Womack's expert was Smith. All of the cases ultimately settled. In at least two of the cases, and possibly all four, my deposition was taken as an evidentiary deposition to preserve my testimony for trial. Womack was always courteous and pleasant in taking my depositions, and even once drove me home after my deposition in downtown St. Louis, to prevent me from having to take our Metro train back to my office. None of these cases ever involved any of Smith's various efforts to impeach my testimony by referring to organizational matters in forensic economic organizations.

Currently and Beyond March 1, 2020

As of May 15, 2020, I have 14 open files with Stan Smith as the opposing plaintiff economic expert. That number is a bit smaller than has been average for recent years. Over the course of my career I have been on the opposite side of cases from Smith in cases venued in 27 states that I can identify with confidence, but there could possibly one or two more. I have no exact count, but think that I have been retained in between 100 and 150 cases in which Smith was the opposing expert. Two of the cases were cases in which I was the plaintiff economic expert and Smith was the named defense economic expert. Most of the others have been in cases in which Smith had projected hedonic damages and/or "loss of guidance" and "loss of companionship/accompaniment services" for the plaintiffs. A few cases involved only ordinary economic damages that might be provided by any other economic expert.

I am 77 years old and Smith is 73 years old. How long each of us will want to continue as forensic economic experts and able to do so remains to be seen. Research that I have done for other papers suggests that Smith is the named economic expert in least half of all cases reported by LEXIS in which an economic expert is named as having proffered hedonic damages testimony (Ireland, 2012, 2018). That ratio significantly increases if cases in the state of New Mexico are treated separately. New Mexico has least three home-grown economic experts, Brian McDonald, Allen Parkman, and William Patterson, who together provide a large share of all cases reported by LEXIS as involving hedonic damages. It is my impression that economic expert testimony involving hedonic damages is gradually declining and that there will be a dramatic reduction of cases involving calculations of hedonic damages when Smith is no longer providing testimony. In the meantime, I suspect that there will be more cases and more stories to tell.

Author Note

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