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**State of Michigan
In the Circuit Court for the County of Wayne**

Giovanni Davis, a Minor, by his Next Friend and)
Mother, Elizabeth Hollins, and Elizabeth Hollins,)
Individually,)
)
Plaintiffs,)
)
vs.) Case No. 06-606015-NH
)
Henry Ford Hospital, a Michigan Corporation,)
Henry Ford Health Systems, a Michigan)
Corporation, and Henry Ford Health System d/b/a/)
Henry Ford Hospital, Jointly and Severally,)
)
Defendants.)

Affidavit of Anthony M. Gamboa, Jr., PhD, MBA

COMES NOW, Anthony M. Gamboa, Jr., PhD, MBA, being first duly sworn upon his oath states the following:

Defense has filed a motion to exclude my testimony. This motion centers around the following key areas:

1. My qualifications
2. Reliability of the methodology
3. Validity of the data
4. Fringe benefits
5. Wage growth

Each of these points is refuted in the discussion that follows.

1. My Expertise

Defense states that, because I am not an economist, I should not be allowed to testify. They also object to my “self-anointed role as a causation expert.” Neither of these statements is accurate, as will be shown below.

1.1. My Qualifications

The requirement that an expert’s specialized knowledge assist the trier of fact to understand the evidence is in keeping with my vocational economic assessment. This is true both in the

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vocational context of understanding the effect of disability on ability to work and earn money and in the *economic* context of determining present value. My opinions regarding Giovanni Davis's earning capacity and worklife expectancy are vocational and statistical issues. I understand both of these issues thoroughly and am well qualified to address them.

I have a PhD in Guidance and Counseling, specializing in vocational counseling and have since completed post-doctoral study in vocational rehabilitation and the economics of disability (see Attachment A). I have 25 years experience within the field of disability as a vocational counselor, researcher, and university professor. From 1977 to 1992, I was under contract as a vocational expert with the U.S. Department of Health and Human Services, Social Security Administration. In this capacity, I provided opinion testimony regarding the employment potential of persons with disability who were seeking Social Security disability benefits. I provided such testimony at the government's request on numerous occasions.

My education and experience provide me with specialized knowledge pertaining to the immediate and ongoing needs of persons with disability in finding and maintaining employment. In addition, data are available from the U.S. Census Bureau's American Community Survey (ACS) that pertain specifically to the earnings and worklife expectancy of persons with and without disability. These data are analyzed in various publications and articles, demonstrating the impact of disability on earnings and employment (worklife). This combination of education, experience, and technical data enables me to assess the loss of lifetime earnings of Giovanni Davis in a way that is beyond the realm of common knowledge.

Though acknowledging my vocational education and experience, defense impugns my credentials, noting that I do not have a degree in economics. They confuse the basis of my testimony, which is not purely economic in nature. For this case, I offer the court *vocational* expertise on the expected impact of disability on Giovanni's annual earnings and worklife expectancy. This expertise requires knowledge of available statistics and how disabilities impact a person's ability to perform work and earn money. These are the skills that I have used continuously for over twenty years.

In addition to the vocational experience, I completed postdoctoral study in economics and finance at multiple universities and was awarded an MBA from the University of Chicago. I have provided expert testimony throughout the United States on the vocational and economic consequences of disability.

In the current case, the economic issues addressed are the growth and discount rates applied to the wages to derive the present value of the plaintiffs' losses. My opinions on growth and discount rates are based on government sources regarding historical rates for compensation growth (which includes growth on both wages and fringe benefits) and the historical rates for 91-Day Treasury Bills. A review of these data both on a long-term basis and in recent years, indicates that compensation growth is essentially equal to the 91-day Treasury bill – hence an “offset.” Data on these rates can be readily obtained on the internet at the following sites:

Growth Rates: U.S. Bureau of Labor Statistics. Major Sector Productivity and Costs Index: Hourly Compensation. Series ID: PRS84006103. Washington, DC.
<http://data.bls.gov/cgi-bin/srgate>

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Interest Rates: Federal Reserve Bank of St. Louis. 3-Month Treasury Bill (Secondary Market), Averages of 1954 to 2000 Daily Closing Bid Prices.

http://www.federalreserve.gov/releases/h15/data/Annual/H15_TB_M3.txt

1.2. Causation

Defense further objects to my testimony, saying that my opinion is based on a faulty foundation of medical malpractice causation. This is wrong.

Liability and causation are irrelevant to my assessment of lost lifetime earnings. What are important are the limitations that exist for the individual and the probable effects of these limitations on ability to work and earn money in the future. Even the fact that Giovanni may or may not have cerebral palsy, which can have vastly different impact on different individuals, is not as relevant as his specific limitations.

Giovanni has a variety of limitations, such as difficulty following directions and organizing information. He also has problems with his speech and with headaches and seizures. The neuropsychological evaluation by Dr. Bradley G. Sewick (September 12, 2006) reveals additional difficulties, some of which are impairments of attention, memory, information processing speed, problem solving, and adaptive functioning. Dr. Sewick notes that Giovanni is below the 1st percentile in terms of intellectual functioning, that his “potentials within academic, vocational, social and even recreational spheres will be seriously compromised,” and that his “potential for independent living is also significantly impacted.” Because of these limitations, I determined that he will be unable to participate in substantial, gainful work activity as an adult. Who caused these problems does not enter into my analysis.

2. Reliability of the Methodology and Data

Defense objects to my opinion, stating that the methodology is not used outside litigation, is not generally accepted, is negatively peer-reviewed, and that the data are self-reported. These issues will be addressed below.

2.1. Use Outside Litigation

The basic methodology for assessing loss of lifetime earnings has been questioned by defense because it is not performed outside litigation. With reference to this assertion, damage calculations are not called for except within the context of litigation. Damages are not calculated unless damages are sought. The model used in assessing loss of lifetime earnings due to injury is very basic. The model was not created by me, but is simply used in my assessment in order to fulfill the needs of the Court. Key elements used by all experts are as follows:

- Lifetime earnings absent injury - this includes both how much the Plaintiff could have earned and how long the Plaintiff could have worked;
- Lifetime earnings with injury - this includes both how much the Plaintiff can earn and how long the Plaintiff can be expected to work with the injury;

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- Present value assessment - this includes the determination of appropriate wage growth and discount factors.

In fact, the methodology we employed was explicitly addressed in a recent peer-reviewed article specifically addressing assessment of earning capacity (see Attachment B). The article discusses the assessment of annual earning capacity, worklife expectancy, and lifetime loss. A more complete explanation of the basic methodology can be found in the Vocational Economic Rationale that accompanied Giovanni's assessment.

2.2. General Acceptance / Peer Review

Defense criticizes the methodology and data used to derive worklife expectancy, saying that they are not generally accepted. The type of analysis conducted in this case is requested in order to assist the trier of fact in deriving a fair award.

Forecasting a plaintiff's future earnings stream is not an exact science. "General acceptance" does not require universal or majority usage in the scientific community. There is no single step in the loss computation process that enjoys universal acceptance in the vocational and economic communities. As such, it is predictable that experts may disagree on the method for computing lost earnings. This is true of defining earning capacity, computing worklife expectancy, projecting earnings growth, and determining discount rates. However, the underlying data and computational methodology that I used all have substantial (general) acceptance throughout the vocational, economic, and disability research communities.

The methodology used to develop worklife expectancy, for instance, was developed by Michael Brookshire and William Cobb and published in *For the Defense* in 1983 (see Attachment C). It was further refined by Brookshire, Cobb, and me in 1987 to include persons with disability. In a 1991 article in the *Journal of Legal Economics*, Gary Albrecht applied this methodology to assessments of earnings for partially disabled individuals. In addition, a 1999 publication by Richards and Abele, *Life and Worklife Expectancies*, looks at several generally accepted ways of computing a statistical worklife, including the method used in my assessment of Giovanni's loss.

Defense mentions one peer-reviewed article that criticizes my use of US Census Bureau disability data from the Current Population Survey (CPS). Use of this article to defend their position is problematic for two reasons. First, I did not use the CPS in my analysis of Giovanni's loss. Second, the article critiques the disability statistics contained in the CPS. Since Giovanni will be unable to perform substantial, gainful work activity as an adult (see Section 1.2), I did not use disability-specific figures, rendering the critique irrelevant to this case.

Defense fails to mention that articles favorable to worklife expectancy (see Attachment D), the methodology used to develop worklife expectancy (see Attachment C), and government data all are supported by other peer-reviewed articles of a forensic or non-forensic nature (see

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Attachment E).¹ Peer-reviewed journals frequently publish articles espousing opposing viewpoints, providing an outlet for professional discussion; they are not necessarily the universally accepted ideas/methods in the field.

Two of the supportive articles noted in Attachment D were written by non-VEI individuals. John Johnson wrote an article entitled “Assessing Risk in Enhanced Earnings Valuations.” In it, he discusses the value of VEI’s worklife expectancy statistics and of the Life, Participation, Employment method of calculating worklife expectancy for calculation of enhanced earnings in matrimonial litigation. In addition, Misra, Bua-lam, and Majumder wrote an article discussing the value of the worklife statistics when performing benefit-cost analyses of rehabilitation programs.

2.3. Self-Report

In criticizing the data from the American Community Survey (ACS), defense contends that the presence of an article on Jerome Staller’s website (not in a peer-reviewed publication) constitutes a negative peer review dealing with the self-reported nature of the ACS disability data. The main issue seems to be that, since disability for those responding to the ACS is self-reported, one cannot say with certainty that the disability data are accurate. Respondents could be influenced by other factors, such as current employment status.

What defense suggests in this position is a study that would be so enormous as to be impossible. Acquiring independent verification from the thousands of people interviewed and following them over time would be very difficult, at best, and probably impossible. In those cases of persons identified as having physical, mental, or sensory impairment, it would require an independent medical evaluation (IME) of the selected sample in order to resolve the bogus issue of self-reporting error. Following the individuals over time, including additional IMEs in the future, simply adds another major obstacle.

All survey research of a macro nature relies on self-report, but the large sample size reduces, if not eliminates, the supposed problem regarding errors in self-reporting. In fact, Stern (see Attachment F) tests for this problem by measuring labor force participation using self-reported disability. He finds that any potential bias is small and that “the standard disability measures are powerful and reasonably exogenous predictors of labor force participation” (p. 392).

The surveys rely upon self-reported answers from respondents. As such, the criteria used by the Census Bureau to classify a respondent’s disability status depend upon

- the respondent’s ability to recognize the disability, and
- the truthfulness of the response

¹ Articles are included with Attachments C and D. Attachment E is included since it responds to Defense’s mention of the Skoog and Toppino article, which criticizes use of CPS disability statistics. Since my analysis of Giovanni’s loss uses the American Community Survey, I am not including the CPS articles. These are available, if desired.

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Critics speculate that one or both of these requirements are not met in enough cases as to skew the results. Though fairly new, the ACS is already being used by independent researchers to study issues related to earnings and employment for individuals with disability. Conducted by the US Census Bureau:

The American Community Survey is a new nationwide survey designed to provide communities a fresh look at how they are changing. It will replace the long form in future censuses and is a critical element in the Census Bureau's reengineered 2010 census plan.²

The entire survey is self-reported. Despite this, it is relied upon for measurements of employment, earnings, education status, age, and other characteristics of the US economy.

The government does not require a CPA to verify the income reported, employers to verify employment status, or birth certificates to verify age. Yet, vocational and economic experts and social scientists in general routinely rely upon the resulting income, employment, and age statistics both in forensic and nonforensic settings. However, when it comes to the ACS questions on physical disability, challengers contend that respondents are incapable of or unwilling to give an accurate response. This is a nonsensical double standard. Those who contend that self-reporting is a problem themselves routinely use self-reported data specific to earnings, level of education, and age.

3. Fringe Benefits

Defense objects to my use of a 26% national average fringe benefit rate, stating that it is unreliable and that some of mandatory benefits are "too remote, contingent, and speculative" to be included (e.g., 6.2% for Social Security). As with earning capacity, worklife expectancy, and present value calculations (see Section 2.2), there are various accepted methods in the peer-reviewed literature for calculating fringe benefits. This includes using a percentage of annual earnings to represent benefits (see Attachment G), as I have done in this case.

The 26% national average included in my report is derived from US Bureau of Labor Statistics' data contained in *Employer Costs for Employee Compensation – March 2006*, published in June 2006. The figure includes 10.2% for insurance (mostly health), 5.4% for retirement and savings plans, and 10.1% for mandatory benefits (Social Security, Medicare, workers' compensation, and unemployment).

The article by Franz and Aubertin, though dealing specifically with survivors in wrongful death cases, notes the appropriateness using a percentage of earnings. The articles by Ray and by Thornton also both note that benefits are calculated as a percentage of annual earnings. Thornton specifically mentions the case of a youth who has not yet begun working, and notes:

In such cases, what forensic economists usually do is to take the estimated dollar wage loss and increase it by the percentage of wages paid out as fringe benefits to the average worker, as reported in any of the several surveys on the subject.

² www.census.gov/acs/www/index.html.

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The article by DeBrock and Linke explores the issue at greater length and also concludes that using employers' contributions to Social Security is reasonable when assessing lost lifetime earnings. My analysis regarding Giovanni's loss is consistent with these economists.

4. Wage Growth

Defense states that my use of a 5.6% compensation growth rate is inappropriate because, first, there is no support for the figure, and, second, the correct growth rate is between 2% and 3%. Both of these statements are inaccurate.

Relying upon average growth rates for wages only when projecting future earnings will underestimate compensation growth because an employee's total annual compensation consists of two components: wages and fringe benefits. Over the past 50 years, fringe benefits, which include health insurance and retirement contributions in addition to mandatory benefits, have grown considerably faster than wages, resulting in an average annual increase in total compensation roughly one percent larger than the growth rate in wages alone. Therefore, average growth rates in total compensation are more relevant for computing present value than the average growth rate for wages alone.

The US Bureau of Labor Statistics (BLS) provides data on growth in compensation³ from 1947 to the present (see Attachment H). An analysis of these data (1947 index = 7.0; 2006 index = 172.6) reveals an average annual growth rate of 5.6%, the figure used in my analysis of Giovanni's loss.

Defense quotes a different source from BLS that provides data on wage growth alone. Not only does this underestimate actual growth, as noted above, but the growth figure noted by defense is inaccurate. An analysis of the BLS data mentioned by defense (1964 average = \$2.53; 2005 average = \$16.11), as published in the 2006 *Economic Report of the President*⁴ (see Attachment I), shows that the actual annual average wage growth rate is 4.6%, considerably higher than the 2% to 3% noted by defense.

³ Downloadable from <http://data.bls.gov/cgi-bin/srgate>, using series ID# PRS84006103

⁴ Downloadable from <http://www.gpoaccess.gov/eop/tables06.html>, Table B-47.

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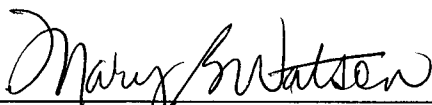
FURTHER, THE AFFIANT SAYETH NAUGHT.



Anthony M. Gamboa, Jr., PhD, MBA
Senior Analyst

* Signed electronically with Dr. Gamboa's permission to avoid delay.

Subscribed and sworn to before me, a notary public, in this 21st of February 2007.



Notary Public

My Commission Expires July 13, 2010