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STATE OF INDIANA )  
 )SS:  
ST. JOSEPH COUNTY )

IN THE ST. JOSEPH SUPERIOR COURT  
CAUSE NO. 71D06-0305-CT-00116

OPY

DALENO F. ANGLIN and )  
MARGIE ERWIN, )  
 )  
Plaintiffs, )  
 )  
v. )  
 )  
PHYLLIS L. REED, )  
 )  
Defendant. )

**PLAINTIFF'S RESPONSE TO DEFENDANT'S MOTION TO EXCLUDE THE TESTIMONY OF DR. ROBERT BARKHAUS**

Comes now the Plaintiff, Daleno F. Anglin, by counsel, and responds to the Defendant's Motion to Exclude the Testimony of Dr. Robert S. Barkhaus. Dr. Barkhaus was retained to perform a vocational assessment of the Plaintiff and to assess his damages with respect to lost future income. Dr. Barkhaus' credentials and qualifications as a vocational expert are contained within his curriculum vitae that is attached as Exhibit 1. It is the Plaintiff's position that Dr. Barkhaus is eminently qualified to render opinions regarding economic damages suffered by the Plaintiff as a result of Defendant's negligent conduct. Although the Defendant has attacked the methodology of data sets upon which Dr. Barkhaus relied when formulating his opinion on Plaintiff's worklife expectancy, the weight of legal opinion and academic literature reveal just the opposite. Put quite simply, Dr. Barkhaus is a credible expert and the data he relied upon in formulating his opinions passes the *Daubert/ Kumho/Manuilov* muster.

Due to the numerous arguments made the Defendant in her motion to exclude (with deposition attached), Plaintiff is now forced to respond to each of the many subjects touched upon in Defendant's five page brief and 66 page deposition. This brief will demonstrate that Dr. Barkhaus relied upon well accepted data when reaching his conclusions. Because of the complexity of the underlying issues and because of the numerous points brought up in the Defendant's attachments, the Plaintiff is forced to address each issue in his brief and the Exhibits attached hereto. Plaintiff apologizes to the Court for the length of the brief.

## FACTUAL BACKGROUND

Daleno F. Anglin is a 39 year old white male, who at the time of this collision was working for the City of South Bend Sewer Department. On March 30, 2002, he was driving in a GMC Jimmy with his then fiancé (they are now married), Margie. As Daleno F. Anglin (Dale) was driving east on Cleveland Road, he had stopped for traffic that was stopped for a red light at the intersection of Cleveland Road and State Road 23. Behind Dale was a sport utility vehicle driven by a man named Scott Kizer. The Defendant, Phyllis Reed, drove her car into the rear of the Kizer SUV and the force of the impact pushed Scott Kizer's vehicle into the rear of the vehicle driven by Dale Anglin. Dale had neck and back pain immediately after the collision. The pain worsened over the next day, forcing Dale to go to the emergency room at Memorial Hospital of South Bend on April 2, 2002.

In the days after the collision, Dale's pain worsened. He attempted to return to his physically demanding job with the City of South Bend Sewer Department and managed to stay at work for approximately 3 ½ weeks. Dale was eventually forced to stop working when his pain and headaches became too severe. Dale was then ordered by his family doctor, Stephen DeLee, D.O., and a "work" doctor at Memorial Center for Occupational Health to refrain from working until his condition resolved. Dale's condition has not improved and he has not returned to work.

Dale was eventually forced to apply for Social Security. Two doctors, Steven DeLee, D.O. and a physiatrist, Paul Desmarais, M.D. wrote letters saying that Dale was severely disabled. (Copies of those letters are included as Exhibits 2 and 3). On November 10, 2003, Dale received a favorable decision from the Social Security Administration adjudicating Dale to be disabled. A copy of the Social Security Administration favorable decision is attached as Exhibit 4. Some highlights of the decision include:

**The medical evidence that Mr. Anglin has residuals from a motor vehicle accident including whiplash with chronic neck pain, C6 radiculopathy, and headaches which are considered to be severe impairments. Accordingly, Mr. Anglin has an underlying medically determinable impairment, or combination of impairments, that could reasonably be expected to cause pain or other symptoms.**

\* \* \*

The most recent evidence is an April 17, 2003 letter from S. DeLee, D.O., who has followed Mr. Anglin for his headaches since April 12, 2002. Dr. DeLee summarized his care and explained that sedentary work for Mr. Anglin was not possible and definitely not optimal.... He recommended that Mr. Anglin be approved for disability since he cannot do sedentary work at this time.

\* \* \*

Based on all the evidence of record, I find that due to his condition of severe impairments including chronic pain, Mr. Anglin is unable to sustain even sedentary work activity for an eight-hour workday and is unable to maintain adequate work attendance.

\* \* \*

Because the evidence supports a finding that Mr. Anglin has had a substantial loss of ability to meet the demands of basic work related activities on a sustained basis, the unskilled sedentary occupational base is significantly eroded and a finding of disability is justified under Social Security Rulings 96-8p and 96-9p. Mr. Anglin is disabled within the meaning of the Social Security Act and Regulations.

Unfortunately, Dale's condition has not improved since he was adjudicated disabled in November of 2003. Dale has treated with numerous doctors and has had significant amounts of diagnostic testing. Because the diagnostic testing cannot identify a surgically treatable pathology, it is likely that Dale's pain is untreatable and permanent.

Because Dale's medical condition is permanent, it is unlikely that he will ever be able to work again. To determine the extent of Dale's work disability and to determine his lost earning potential, the Plaintiff hired a vocational expert by the name of Robert Barkhaus, Ph.D. When making a determination as to Dale's lost earning potential, Dr. Barkhaus used the **New Worklife Expectancy Tables – Revised 2002**. [Hereafter "**The Tables**." A complete copy of **The Tables** is attached as Exhibit 5.] A copy of the **The Tables** were originally developed in 1987 to examine the impact of work disability on the expected number of years of employment for an individual, given his or her age, gender and level of education. A report from Dr. Barkhaus was provided to the Defendant in February of 2004.

Two weeks before trial, the Defendant filed a motion seeking to have the testimony of Dr. Barkhaus excluded. The Defendant claims that **The New Worklife Expectancy Tables**, used by Dr. Barkhaus as a reference when he formulated his opinion, are not scientifically reliable and that any testimony that relied on them should not be allowed.

## DAUBERT AND ITS PROGENY

Defendant has brought this challenge stating that Indiana Rule of Evidence 702 and under *Daubert*, the Plaintiff's expert must be excluded. Indiana Rule of Evidence 702 states that:

**a) If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.**

**(b) Expert scientific testimony is admissible only if the court is satisfied that the scientific principles upon which the expert testimony rests are reliable.**

Defendant discusses IRE 702 and court decisions interpreting the evidentiary rule to show that Dr. Barkhaus' opinion needs to be based upon reliable principles and methods. We agree. Furthermore the Plaintiff acknowledges that it is his burden to prove by a preponderance of the evidence that Dr. Barkhaus' testimony meets the criteria set out in IRE 702 and the cases that interpret that same rule.

However, as shown in the remainder of this memorandum and the attached documents, Defendant is simply wrong in virtually every one of her contentions. Dr. Barkhaus has based his opinions on a sound methodology that is well accepted in the community of vocational experts. No expert and no methodology is going to be able to provide the trier of fact with "absolute knowledge" of Plaintiff's future. This, of course, is not possible for anyone. In the absence of a crystal ball, it is necessary to estimate based on appropriate population statistics that are applied to the facts of Dale's case. **The Tables**, although not perfect, provide the best reference to assist the trier of fact in helping to determine Dale's damages.

The United States Supreme Court addressed this very concern in *Jones and Laughlin Steel Corporation v Pfeifer*, 462 U.S.523 (1983), where they noted the impossibility of producing statistics that exactly match the plaintiff's future:

**First, by its very nature the calculation of an award for lost earnings must be a rough approximation. Because the lost stream can never be predicted with complete confidence, any lump sum represents only a 'rough and ready' effort to put the plaintiff in the position he would have been in had he not been injured. *Jones and Laughlin*, 462 U.S. at 546.**

The Court went on to deride attempts at coming up with such a "perfect" testimony:

**We do not suggest that the trial judge should embark on a search for "delusive exactness." It is perfectly obvious that the most detailed inquiry can at best produce an approximate result. Jones and Laughlin, 462 U.S. at 546.**

However, before going into how the courts have treated lost earnings analysis in particular, we first look at the case law surrounding IRE 702 and expert testimony.

*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), provides four factors to consider in determining whether scientific evidence is admissible. The guidelines are (1) testing; (2) peer review and publication; (3) error rates; and (4) general acceptance in the relevant community. As the U.S. Supreme Court explained in *Kumho Tire Co., Ltd. v. Carmichael*, 526 U.S. 137, 150 (1999), "the factors identified in *Daubert* may or may not be pertinent in assessing reliability, depending on the nature of the issue, the expert's particular expertise, and the subject of his testimony."

Indiana has not adopted *Daubert*, but does consider the factors set forth in it as guidelines. However, there is no exclusive set of factors that an Indiana court must consider in determining whether an expert's methodology is scientifically reliable. *McGrew v. State*, 682 N.E.2d 1289, 1292 (Ind.1997). ("In determining reliability, while various factors have been identified, there is no specific 'test or set of 'prongs' which must be considered in order to satisfy Indiana Evidence Rule 702(b)"). (footnote omitted); *Dartey v. Ford Motor Co.*, 104 F.Supp.2d 1017 (N.D. Ind. 2000). And a factor may be unnecessary in a given case; e.g., *McGrew*, 682 N.,E.2d at 1291 n. 4 ("A 'reliability' assessment does not require, *although it does permit*, explicit identification of a relevant scientific community and an express determination of a particular degree of acceptance within the community"); *Dartey v. Ford Motor Co.*, 104 F. Supp.2d 1017, (N.D. Ind. 2000) (holding a metallurgist could testify regarding his theory about how cables on a truck tailgate broke even though he had not conducted any testing of his theory).

In Indiana, the trial court is left as the gatekeeper using the factors as flexible guidelines to assure that the expert employs the same level intellectual rigor as he or she would apply outside the courtroom when working in the relevant discipline. As the Indiana Supreme Court has explained, "Once the trial court is satisfied that the expert's testimony will assist the trier of fact and the expert's general methodology is based on reliable scientific principles, the accuracy, consistency, and credibility of the expert's

opinions may properly be left to vigorous cross-examination, presentation of contrary evidence, argument of counsel, and resolution by the trier of fact." *Sears Roebuck and Co. v. Manuilov*, 742 N.E.2d 453, 461 (Ind. 2001). The trial court need not separately evaluate every subsidiary point made during the testimony of a qualified expert. *Id.* Rule 702 directs the court "to consider the underlying reliability of the general principles involved . . . , but it does not require the trial court to re-evaluate and micromanage every subsidiary element of an expert's testimony within the subject." *Id.*

The role of a judge as gatekeeper is tempered by the *liberal* thrust of the rules of evidence as well as the presumption of admissibility. *Bunt v. Altec Industries, Inc.*, 962 F. Supp. 313, 317 (N.D.N.Y. 1997). As the Second Circuit Court of Appeals explained after *Daubert*: "First by *loosening* the strictures on scientific evidence set by *Frye*, *Daubert* reinforces the idea that there should be a presumption of admissibility of evidence. *Borawick v. Shay*, 68 F.2d 597, 610 (2d Cir. 1995). (emphasis added). "Second, it emphasizes the need for flexibility in assessing whether evidence is admissible." *Id.*

As explained in *Daubert*, the test for the admissibility of scientific evidence is "whether the reasoning or methodology underlying the testimony is scientifically valid and whether that reasoning or methodology properly can be applied to the facts and issues." 509 U.S. at 592-93. The Court stressed that this inquiry is "to be a flexible one" and "must be solely on principles and methodology, not on the conclusions that they generate." *Id.* at 595. In other words, the focus is "not on what the experts say, but what basis they have for saying it." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 43 F.3d 1311, 1316 (9<sup>th</sup> Cir.), *cert. denied*, -- U.S. --, 116 S.Ct. 189 (1995)(*on remand*).

The Court must apply the *Daubert* analysis "with a clear understanding that (it was) devised specifically for scientific testimony. In other words, the *Daubert* analysis should be modified in the case of social science or other non-scientific expertise." *State of Ohio ex rel. Montgomery v. Louis Trauth Dairy, Inc.*, 925 F. Supp. 1247, 1252 (S.D. Ohio 1996). Because "[n]either economics or statistics seems to completely qualify as 'scientific knowledge,' the inquiry is altered to some extent. *Id.* Court's should always keep in mind that the reliability test is a 'flexible one' that must 'tied to the facts' of a particular case. *Kumho Tire v. Carmicheal*, 526 U.S. 137 (1999). "[W]e conclude that

the trial judge must have considerable leeway in deciding in a particular case how go about determining whether particular expert testimony is reliable." *Id.*

The Indiana Supreme Court has stressed that the 'reliability' analysis allows trial courts to use their common sense when looking at expert testimony. In *Sears v. Manuilov*, 742 N.E.2d 453 (Ind. 2001), the Indiana Supreme Court instructed trial courts to consider the general principles and general methodology underlying the reliability of an expert's testimony, leaving the accuracy, consistency, and credibility of the testimony to be determined by the trier of fact after the testimony has been subjected to the adversarial process at trial. Once the trial court is (1) satisfied regarding the underlying reliability of the general principles involved in the subject matter of the expert's testimony; and (2) satisfied that the testimony will assist the trier of fact, the Court is not required to re-evaluate and micromanage each subsidiary element of the expert's testimony.

The primary problem with the Defendant's legal analysis is that it uses the "hard science" standard for admission suggested in *Daubert* to determine the admissibility of opinions relating to the "soft science" of the projection of the future worklife expectancy of a disabled person. *Daubert* was clarified in the case of *Kumho Tire Company, Ltd., et al v. Patrick Carmichael*, 526 U.S. 137, 119 S. Ct. 1167 (1999). *Kumho* applied the *Daubert* ruling to the soft sciences and gave greater guidance to trial judges. The four guidelines offered in *Daubert* are suggestions that need not be used for all experts or in every case. It is the trial judge's discretion to decide how to determine the relevance and reliability of the expert's method. The *Kumho* court noted that experienced-based expert testimony can be admissible, and used as an illustration a perfume tester who was able to distinguish between 140 odors at a sniff based purely on his experience.

Vocational analysis and lost earnings determinations clearly qualify as a soft science which cannot be demonstrated with absolute scientific certainty. The United States Supreme Court recognized that, "by its very nature the calculation of an award for lost earnings must be a rough approximation." *Jones and Laughlin Steel v. Pfeifer*, 462 U.S. 523 (1983). In the 7<sup>th</sup> Circuit, Judge Posner, who is known for his economic savvy, has stated that regarding calculations for lost future wages, "we recognize that the exactness which economic analysis vigorously pursued appears to offer is, at least in the litigation setting, somewhat delusive." *O'Shea v. Riverway Towing Co.*, 677 F.2d

1194, at 1201 (7<sup>th</sup> Cir. 1982). In *O'Shea*, Judge Posner went on to recommend the type of vocational economic analysis in a personal injury case that was employed by Dr. Barkhaus in the present case. See **The Tables**, page 4.

Defendant's reliance upon *Ollis v. Knecht*, 751 N.E.2d 825 (Ind. App. 2001), is misplaced. First, *Ollis v. Knecht*, involved the consideration of a novel approach for determining the entire economic loss of the plaintiff. In that case, the method used by the expert for determining both the growth rate and discount rate known as the 'mirror image approach.' The challenge to the expert testimony in *Ollis v. Knecht* was that the expert provided no support whatsoever to show that his method had a sound economic pedigree. Our situation is entirely different. Dr. Barkhaus will make it clear that vocational experts commonly use the New Worklife Expectancy Tables to determine lost future income.

The Court of Appeals in *Ollis v. Knecht* did not say what *Daubert* factors should be used when applied to economics. However, the Court of Appeals made it plainly clear that if the expert in that case had provided any support in literature that supported the use of the 'mirror image approach,' the testimony would have been admitted.

**In their appellate briefs, Appellants cite case law and academic publications to support the admissibility of Dr. Park's testimony. However, a review of the record reveals no evidence that Appellants submitted these authorities to the trial court. Our holding here today is not that the mirror image approach lacks the scientific validity to be admissible under Ind. Evidence Rule 702(b). Rather, we hold that the trial court did not abuse its discretion when it excluded the testimony of Dr. Parks under Ind. Evidence Rule 702(b) because the appellants failed to carry their burden of proving to the trial court the scientific reliability underlying the methodology employed by Dr. Parks. *Id.***

Plaintiff has done exactly what the expert in *Ollis v. Knecht* did not. He has provided ample documentation supporting the data sets used by Dr. Barkhaus and which supports the notion that his methodology is commonly used by vocational economists when evaluating lost future income.

The *Reference Manual on Scientific Evidence* fairly summarized the use of *Daubert* in attacking expert economic testimony.

**On the one hand, it would appear that an economist serving as a damages expert is unlikely to succumb to a *Daubert* challenge because most damages analyses operate in the familiar territory of restating economic flows using a combination of professional judgment and standard tools. The parts of economics that might be accused of verging on junk science are rarely used in damages work. See Reference Manual, p. 282-283. [Emphasis added.]**

Defendant has not, and could not, establish that Dr. Barkhaus has not adhered to valid methodologies and reasoning. There is little doubt that Dr. Barkhaus has the academic and experiential qualifications to render the expert opinion proffered in his opinion. Furthermore, consistent with his extensive knowledge and experience, Dr. Barkhaus' methods and testimony are grounded upon valid economic, statistical and econometric methodologies and reasoning. In order to fully examine the applicability of Dr. Barkhaus' proposed testimony as compared to the *Daubert/Kumho factors*, it is necessary to look at the entire background of this situation. As such, we will first look at Dr. Barkhaus' qualifications before discussing the reliability of the data sets he used when arriving at his expert opinion.

### **DR. ROBERT BARKHAUS' QUALIFICATIONS**

Doctor Barkhaus has extensive training and experience as a vocational and economic expert. Dr. Barkhaus' knowledge, skill, experience, training and education all combine to qualify him as a vocational expert. As noted in his curriculum vitae, he has a Masters Degree in College Administration, and a doctoral degree in philosophy where he concentrated his coursework in subject areas specific to vocational counseling.

In addition to his education, Dr. Barkhaus has over almost 35 years of experience of work experience specific to career counseling. In particular, he was employed by Purdue University for four years as an Assistant Dean of Students and by Indiana-Purdue University for 11 years as the Director of Counseling, Testing and Placement Services. Dr. Barkhaus is board certified as a vocational expert, a Certified Vocational Expert (CVE) and has served as a Diplomat of the American Board of Vocation for over 20 years. Dr. Barkhaus has been accredited as a Certified Counselor and a Certified Career Counselor by the National Board of Certified Counselors. Dr. Barkhaus has spoken at numerous professional conferences and is the author of numerous publications. For over 27 years, Dr. Barkhaus has served the United States Government by acting as a Vocational Expert Witness for the Social Security Administration's Bureau of Hearing Appeals. In this capacity, he provided opinion testimony regarding the potential employment of disabled persons seeking Social Security benefits. (In this capacity, Dr. Barkhaus has been called upon to serve as a

Vocational Expert for the United States Government in thousands of cases.) In addition to his other pursuits, Dr. Barkhaus and his company, National Career Consultants, is also sought out to provide expert consulting services to numerous area and national companies in the areas of human resources, career counseling and placement.

Dr. Barkhaus' education and experience provide him with specialized knowledge pertaining to the immediate and ongoing needs of persons with disability in finding and maintaining employment. In addition to his training and experience he also relies upon data that is available from the U.S. Census Bureau that specifically addresses the earnings and worklife of persons with and without a work disability. This combination of education, experience, and technical data enables Dr. Barkhaus to assess the loss of lifetime earnings of Plaintiff in a way that is beyond the realm of common knowledge and which will assist the jury in its fact-finding tasks. With this background he offers the trier of fact the ability to review Dale Anglin's impairments in conjunction with Dale Anglin's age, education and work experience to assess the impact of the impairments on his ability to work and to earn money/benefits.

When Dr. Barkhaus is retained as an expert witness for cases such as Mr. Anglin's, he is asked to estimate the loss of earning capacity that Plaintiff will sustain over his lifetime as a result of work disability. As noted by the Supreme Court in *Jones and Laughlin Steel v. Pfeifer*, this is not an exact calculation; at best the estimate is a "rough approximation." What is necessary is that Dr. Barkhaus consider specifics relating to the Plaintiff; e.g., age, education, work history, work-related limitations, in combination with relevant population statistics to derive the most reasonable estimate possible. This is what he has done in estimating Mr. Anglin's lost earnings.

The details of why **The Tables** are reliable have been the subject of numerous peer reviewed scholarly articles, legal decisions and reports. Many of those have been provided with this brief or summarized in the attached affidavits and documents. Dr. Barkhaus' methodology, when relying on *The Tables*, can be summarized as follows:

1. Determination of pre-injury earning capacity;
2. Determination of pre-injury worklife expectancy;
3. Determination of post-injury earning capacity;
4. Determination of post-injury worklife expectancy.

When Dr. Barkhaus' testimony is complete, the jury will be left with a firm understanding of the economic loss sustained by the Plaintiff that is backed up not only by reliable data but is also made to "fit" the facts and circumstances of this case.

We would be remiss if we did not mention several tertiary but important points. Dr. Barkhaus has been retained by the United States Government, as well as litigants to serve as an economic expert in over 3,100 legal cases and administrative hearings. Dr. Barkhaus has been retained by both plaintiffs and defendants in personal injury actions. Dr. Barkhaus' testimony has never been excluded or limited in any state court, federal court, or other judicial board or body on the basis that his methodology is unreliable.

### **RELIABILITY OF THE NEW WORKLIFE EXPECTANCY TABLES**

The Defendant has taken the position that because Dr. Barkhaus relied upon **The Tables** and because these tables are scientifically unreliable, that Dr. Barkhaus should therefore be excluded. The Defendant in this case has taken the "shotgun blast" approach of attacking Dr. Barkhaus by asking the Plaintiff and the Court to analyze a 66 page deposition for kernels of truth about the reliability of the tables. Finally, the Defendant supplied the Court with an article that criticizes *an entirely different edition of the Worklife Expectancy Tables*. At best, that deposition can be said to have generally restated criticisms that have been made of **The Tables** prior to the publication of the revised 2002 edition. Of course, in "soft" sciences like vocational rehabilitation and economics, it should not be shocking to the Court that there exists differing opinions on the usefulness and reliability of certain data sets.<sup>1</sup>

Since **The Tables** are used regularly in the litigation setting, Vocational Econometrics, Inc. opened their 2002 edition of the tables with an extensive dissertation on why **The Tables** meet the reliability standards enunciated in *Daubert*. A complete copy of that material can be found in pages 1-36 respectively of **The Tables** which are attached as Exhibit 5. To further assist the Court, Plaintiffs counsel requested that the

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<sup>1</sup> In fact, while the Defendant criticizes the peer reviews of the articles that support the use of CPS Data and The Tables, she fails to mention that the very article included with the Defendant's brief was penned by an author [Gary Skoog] that owns a company [Legal Econometrics] that is in direct competition with the company that produces **The New Worklife Expectancy Tables**, Vocational Econometrics.

President of Vocational Econometrics, the very company that researched, created and published **The Tables**, to prepare an Affidavit that completely analyzes and addresses each and every point raised by the defendant in her motion. This Affidavit, along with several attachments, are included as Exhibit 6. Along with Mr. Gibson's Affidavit, I have included an article "*Daubert, Disability and Worklife Expectancies*" by Mr. Gibson that goes into great detail as to why **The Tables** are scientifically reliable under the *Daubert* standard. [Attached as Exhibit 17]

The Plaintiff has attached orders from several Judges that contain extensive discussions of why several judges have found expert testimony using **The Tables** to be reliable under *Daubert*. For example, I have provided an order from Judge Caroline M. Craven of the United States District Court of the Eastern District of Texas, Texarkana Division in *Middleton and Middleton v. Sears, Roebuck and Co.*, Cause No. 5:99CV157 (March 2, 2001) [attached as Exhibit 7] wherein a vocational expert was allowed to testify despite a Motion to Strike citing identical criticisms made by the Defendant in the present case. The vocational expert in that case also used the **The Tables** in formulating his opinion. "The fact that Dr. Casenave's methods have been criticized does not necessarily make his methodology incorrect or unreliable." Order a Page 4. Also included is a Memorandum Opinion and Order from Magistrate Judge James B. Todd of the United States District for the Eastern District of Kentucky in *Wright v. Werner Enterprises et, al.*, Civil Action No. 01-2390JBT (August 28, 2002) [Attached as Exhibit 8]. In *Wright* a vocational expert who used the worklife tables was allowed to testify by the court. "Since the New Worklife Expectancy Tables utilize more recent government data than the government tables published in 1986, the Court concludes that it was appropriate for Mr. Tierney to use those tables rather than the stale information contained in the 1986 government tables." That court also went on to say that the use of the Current Population Survey by **The Tables** was appropriate. A Transcript of Proceedings before Judge Theresa Sprintman of the United States District Court for the Northern District of Indiana in the case *Maicki and Maicki v. G.A. Johnson & Sons*, Docket No: 2:99-CV-337 RL-3, (2000). [Attached as Exhibit 9] In that case, the court considered the opinion of Anthony Gamboa, a vocational expert who actually is the author of the New Worklife Expectancy Tables. Using a *Daubert* analysis, the Court found Dr. Gamboa's testimony reliable for a number of reasons:

1. Dr. Gamboa relied upon independent body of statistics to formulate his opinions.
2. The New Worklife Expectancy tables have been subjected to extensive peer review. "Its not whether the publication of a particular expert's theory has been only extolled or approved....The fact is that [The Tables] have been subjected to peer review. It's the publication aspect of it, not necessarily whether it has been universally recognized or agreed with." Transcript at Page 5.]
3. The Tables were formulated using a method "consistent with generally accepted methods for gathering scientific evidence.
4. The vocational expert, using The Tables, would be helpful to the trier of fact in trying to understand the element of damages.<sup>2</sup>

Judge John Michael J. Kraker of the District Court for the Ninth Judicial District of the State of Minnesota made the following comments when considering a *Daubert* challenge of a vocation expert who used the tables in the case *Langer v. Anderson*, Case No. C1-02-1211 (March 17, 2003):

**The Defense claims that the vocational economic assessment for the Plaintiff is not specific enough to warrant the assessment reliable. However, the assessment applies methodology tools to Plaintiff's age, education, previous work experience and personal interview in which to determine the outcome of the assessment. Some aspects of the assessment will be speculative, as predicting the future is not an exact science. However, the method plaintiff's expert used in this case does not appear overly speculative nor unreasonably statistical. Statistical data is admissible so long as it will assist the trier of fact in determining future earning capacity.**

We have included a copy of the *Langer* order as Exhibit 10.

The Court should note two important facts. First, the Defendant has failed to provide the Court with one single appellate decision wherein the methodology employed by Dr. Barkhaus has been found to be unreliable under the *Daubert* standard. Further, nowhere in the Defendant's voluminous attachments does she provide this court with a single deposition, affidavit or authoritative treatise by a vocational expert who offers this Court any alternative to the methodology employed by Dr. Barkhaus. In the case, *Kossmann v. Northeast Illinois Commuter Railroad Corporation*, 211 F.3d 1031 (7<sup>th</sup> Cir. 2000), the court held that the Defendant's failure to "articulate what standard the trial judge should have used or what contrary evidence to put forth as to plaintiff's future lost earnings" constituted a waiver of the issue. 211 F.3d at 1038.

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<sup>2</sup> Because he tables are used so extensively in litigation, the Court did not feel that the tables passed the "created independent of litigation" aspect of the *Daubert* test. However, the Court did not find this factor critical given all the other factors weighing in favor of the **The Tables** reliability.

Even the Defendant's own evidence suggests that the Court should rule against the Defendant's motion. In the deposition of Dr. James A. Bernard provided by defense counsel, there is expert evidence stating that **The Tables** are reliable. This exchange occurred in the very deposition cited by the Defendant as being proof that the Court should consider:

**Q** Okay. Would you agree or disagree with the statement that the tables constructed by Vocational Econometrics, Inc., when applied to specific individuals are invalid and unreliable for use in forensic economics?

**A** I wouldn't say they're invalid.

**Q** And what's the basis of that?

**A** They use, my understanding, statistical methods to generate tables and then classify people by degree of disability, and if they're using standard statistical methodology to do that, then it would be a valid statistical method. (Bernard Dep. pp 25-26).

Defendant criticizes the fact that **The Tables** uses data from the Current Population Survey or CPS. Dr. Barkhaus, when using the The New Worklife Expectancy Tables, was essentially using tables that are statistical compilations of CPS data and which rely on the United States Census Bureau's work disability categories. The CPS represents a survey of over 100,000 persons surveyed each month. In addition to being the largest regular survey in the world, the Census Bureau uses "stratified sampling" techniques where the sample size is scientifically computed and selected to represent the overall U.S. Economy. The CPS is the primary source of employment data for persons in the United States – the source of monthly unemployment rates that are largely quoted by the media. According to a joint website maintained by the Bureau of Labor Statistics and the Census Bureau:

**The CPS is the primary source of information on the labor force characteristics of the U.S. Population. The Sample is scientifically selected to represent the civilian non-institutional population.**  
([www.bls.census.gov/cps/overmain.htm](http://www.bls.census.gov/cps/overmain.htm)) (emphasis added).

In March of each year beginning in 1981, the CPS had been expanded to collect more and more information on income and employment. This supplement forms the basis for the rates of participation and employment used in the **The Tables** through expanded questions that specifically address work disability.

The contention that the CPS was not intended to identify work disability is clearly wrong. The Census Bureau began publishing data from the March Supplement in 1983 in a publication entitled *Labor Force Status and Other Characteristics of Persons with a*

*Disability: 1982.* The introduction of the publication at page one addresses the issue of measuring experiences of persons with disability.

**One of the issues that this country has tried to address through the Federal statistical system is the extent to which persons with a disability are able to participate in the labor force. Programs and policies have been established to discourage discrimination and encourage training and rehabilitation, but the success of these programs and policies cannot be measured without some type of statistical monitoring system. Statistics on persons with a disability are obtained from two sources: program statistics and surveys. While the former source is critical for certain purposes, the basic unit in statistical monitoring system must be household surveys. Only through household surveys is it possible to obtain estimates of the number of persons with a disability and learn how their situation changes over time.**

**Recent changes to the questionnaire used in the March Income Supplement to the Current Population Survey (CPS) make it possible for the March CPS to be used as a source of information on the labor force status and other characteristics of non-institutional persons with a work disability.**

In the 1989 U.S. Department of Commerce publication *Labor Force Status and Other Characteristics of Persons with a Work Disability*, the Census expands on the reasoning behind these questions. At page one, the article states:

**According Saad Nagi, a major figure in the development of survey data on persons with disabilities, a person has a disability if he or she has a limitation in the ability to perform one or more of the life activities expected of an individual within a social environment. The primary way this basic concept is operationalized in the March CPS is to ask whether any household member has a health problem or disability which prevents them from working or which limits the kind of work they can do.**

The CPS is the largest statistically selected survey conducted by the government and is second only to the decennial census in size. It is widely recognized by vocational rehabilitation experts and non-forensic researchers throughout the world for its value and reliability. Contrary to the Defendant's contention that the CPS is unreliable for use in vocational evaluation, numerous government and non-forensic researchers use the CPS to study the earnings and employment experiences of persons with a work disability.<sup>3</sup> This extensive listing gives an idea of the variety of the researchers using

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<sup>3</sup> "Estimating Worklife Expectancy: An Econometric Approach," *Journal Economic Literature*, January 2002; See Acemogul, Daron and Joshu Agrid. "Consequences of Employment Projection? The Case of the Americans with Disabilities Act." National Bureau of Economic research Working Paper Series, July, 1998; Burkhauser, Richard V., Mary C. Daly, and Andrew J. Houtenville. "How Working Age People With Disabilities Fared Over the 1990s Business Cycle." Paper presented at the NASI Conference on Ensuring Health and Income Security for an Aging Workforce. January 26-27, 2000;

CPS data. The use of the CPS by this sampling of government and non-government researchers corroborates the validity of the CPS for purpose of studying the work experience of people with a disability.

The CPS is an extremely comprehensive survey that questions people about many things in addition to work disability, such as age, education, gender, occupation, employment, and earnings and other income. In fact, Dr. Barkhaus also used many of these other elements when he prepared his opinion regarding Plaintiff's earning capacity; e.g., occupation and income, and worklife expectancy; e.g., age, education, disability status. In applying this data, Dr. Barkhaus only used the most appropriate statistics for cohort groups most similar to Plaintiff, using, for instance, only data for males with a similar education level. In other words, Dr. Barkhaus has used only the data that "fit" the Plaintiff in this particular case.

In 1999, the *Journal of Forensic Economics* published an article by Skoog and Toppino, criticizing **The Tables**. It is interesting to note that that despite Defendant's studious readership of the *Journal of Forensic Economics*, she failed to have listed the numerous other articles published in that very same journal that support **The Tables**

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Daly, Mary, and Richard Burkhauser. "Recent Declines in Work and Income among Men with Disabilities." *FRBSF Economic Letter*, Number 2000-28, September 22, 2000; Gamboa, A.M. Jr., D.S. Gibson, and J.P. Tierney. "Americans with Disabilities Act: Short Term Effects." Paper delivered to the Authors' Bazaar at the Sixth Annual Meeting of the American Law and Economics Association (May 10-11, 1996); Andrew J. Houtenville. "Economics of Disability Research Report #2: Estimates of Employment Rates for Persons with Disabilities in United in the United States by State, 1980 through 1998." Research funded by the U.S. Department of Education, National Institute on Disability and Rehabilitation Research, 2000; Misra, Sita Pisnu Bua-lam, and Ranjit K. Majumder. "A Realistic Assessment of Economic Benefits of the Rehabilitation Program Using Worklife Expectancy Tables" *Journal of Rehabilitation Administration*, February 1992, p. 15-20.; U.S. Bureau of the Census. "Facts for Features: 11<sup>th</sup> Anniversary of Americans with Disabilities Act (July 26)." July 2001; Yelin, Edward H. and Patricia P. Katz. "Labor force trends of persons with and without disabilities." *Monthly Labor Review*, October 1994, p. 36-42.; Yelin Edward. "The Labor Market and Persons with and without Disabilities: Analysis of the 1993 through 1995 Current Population Surveys." Paper presented for the Conference on Employment and Return to Work for People with Disabilities, sponsored by the Office of Disability, Social Security Administration, and National Institute on Disability and Rehabilitation Research (October 31-November 1, 1996); Yelin, Edward and Laura Trupin. "Successful Labor Market Transitions for Persons with Disabilities: Factors Affecting the Probability of Entering and Maintaining Employment." Report presented for the Conference on Employment Post the Americans with Disability Act, sponsored by the Office of Disability, Social Security Administration, and National Institute on Disability and Rehabilitation Research, November 17-18, 1997. [Many of these articles are included as an attachment to David Gibson's Affidavit.]

and the use of the data contained in the CPS. The very people cited by Skoog and Toppino as criticizing **The Tables** later gave sworn testimony refuting that contention and stating that the **The Tables** make appropriate use of the CPS data. John McNeil, former Special Assistant on Disability Statistics with the Census Bureau, authored the article "Comment on Skoog and Toppino" that specifically refutes some of the key points in the Skoog and Toppino article. [Attached as Exhibit 27] His article points out errors made by Skoog and Toppino when referring to research he performed while at the Census Bureau. Herman Miller, Economic Consultant and former Chief of the Population Division of the Census Bureau, has also supported use of the CPS in measuring the employment impact of disability. In an Affidavit signed on August 6, 2001, Miller states that the CPS data is "the most appropriate source for studying the employment experiences of people with a work disability. ***In my opinion, The New Worklife Expectancy Tables published by Vocational Econometrics, Inc, makes appropriate and accurate use of these data.***" (A copy of the McNeil Affidavit is attached as Exhibit 11 and the Miller Affidavit is attached as Exhibit 12).

The Defendant also fails to address one extremely important issue. There are no other credible worklife expectancy tables beyond **The New Worklife Expectancy Tables -- Revised 2002** created by the labor of Vocational Econometrics. The last set of government produced worklife tables were published in 1986 using data from 1979-1980. (See *Worklife Estimates. Effects of Education and Race*, U.S. Department of Labor, Bureau of Labor Statistics, 1986)[Attached as Exhibit 13]. This is in stark contrast to the "fresh" data that is available when using the CPS and the 2002 New Worklife Tables. So the alternative when trying to gauge worklife expectancy is to either use 25-year-old data available through the Bureau of Labor Statistics or to use the data now available through the Census Bureau and upon which the New Worklife Expectancy Tables were created. The government tables are also flawed in that they do not take into account disability.

The presence of a disability is widely known to affect both earnings and worklife expectancy. This finding is documented in results from various surveys, including the Current Population Survey, conducted by the U.S. Bureau of the Census. The CPS Survey is the primary source of employment data for persons in the United States, the source of the government's monthly unemployment rate, and is used by private

researchers to study employment by the United States population. This is the data which has been approved for purpose of determining post-disability worklife expectancies by John McNeil of the U.S. Bureau of Census in the aforementioned Affidavit. This disability effect is the cause of such events as the passage of the Americans with Disability Act, the existence of the President's Committee on Employment of People with Disabilities, and the practice of rehabilitation counseling itself. Data from the current population survey, for instance, shows that persons with occupational disability are, on average, not as likely to be employed as persons without disability. In addition, even when persons with disabilities work year round, full-time, they earn less than their counterparts without disabilities. Any assessment of damages in a personal injury case, therefore, should consider the effect of disability on earnings and worklife expectancy in order to be acceptable as relevant under *Daubert/Kumho*. In any given case, it is the responsibility of the expert to use his or her education and experience to determine how specific disability would affect the plaintiff's future earnings and worklife. Data from sources such as the CPS provides an appropriate basis for that assessment.

The Defendant's representation that Dr. Barkhaus' methodology and **The Tables** have not been peer-reviewed is demonstrably false. **The Tables** and the use of CPS data to measure employment rates of persons with a work disability is the subject of multiple articles. Further, the Skoog and Toppino article cited by the Defendant does not even address the version of **The Tables (2002)** that was used by Dr. Barkhaus. Substantial revisions to how the data was calculated occurred when the 2002 tables were created. The following is a partial listing of those articles and shows that **The Tables** have been extensively peer reviewed in scholarly literature and that the CPS data have been used by researchers for both forensic and non-forensic purposes:

**Clauretje, Terrence M. "Book Review: The New Worklife Expectancy Tables: 2002 Edition." Journal of Legal Economics, Fall 2001, 105-108.**

The author favorably reviews the 2002 version of The New Worklife Expectancy Tables. He notes the added value in this version of discussion related to court cases dealing with the tables and the fact that the publication deals directly with controversy surrounding the tables and the data underlying them. [Attached as Exhibit 14]

**Clauretje, Terrence M. "Review: The New Worklife Expectancy Tables: 1998." Journal of Legal Economics, Winter 1997/1998, 75-76.**

The author favorably reviews the 1998 version of *The New Worklife Expectancy Tables*, noting the added value in this edition of worklife expectancies for persons with severe and nonsevere disabilities. See the responses below by Gluck (1996) and Gibson (1998). [Attached as Exhibit 15]

**Gamboa, A. M., Jr. "Under Examination: New Worklife Tables: The Final Word." *Medical Malpractice Law and Strategy*, March 2001. (Includes a response by Jerome Staller)**

In answering Staller's response in Gluck & Sachnin (2000), the author points out that *The New Worklife Expectancy Tables* have withstood *Daubert* challenges. He also notes that the segregation of severely and nonseverely disabled data in *The Tables* pulls out of the nonsevere statistic many of the persons with chronic disability that Staller is concerned about. Staller responds by stating his continued belief that it is not possible to apply the data to a specific plaintiff. [Attached as Exhibit 16A]

**Gamboa, A. M., Jr., John P. Tierney, and Gwendolyn H. Holland. "Worklife Expectancy and Disability." *Journal of Forensic Economics*, April 1989, 29-32.**

The authors point out the importance of considering disability when addressing worklife expectancy. They discuss the value of the U.S. Census Bureau's Current Population Survey data for estimating the worklife expectancy of people with and without work disability. [Attached as Exhibit 16B]

**Gibson, David S. "Daubert, Disability, and Worklife Expectancies," Monograph, Vocational Econometrics, Inc., 2001.**

This monograph is an extended version of Gibson & Tierney (2000). It adds a section specifically applying to *The New Worklife Expectancy Tables* the reliability and relevancy requirements of expert witness testimony from the *Daubert* and *Kumho* decisions. In addition, it presents statistical evidence supporting the reliability of data from the Current Population Survey. [Attached as Exhibit 17]

**Gibson, David S. "Gamboa Worklife Tables, 1995 and 1998 Versions: A Comment." *Journal of Forensic Economics*, Fall 1998, 267-268.**

The author responds to Corcione (1996), specifically addressing Corcione's concern over the static nature of the nondisabled statistic and the use of statistical averages. [Attached as Exhibit 18]

**Gibson, David S. and Andrew L. Gluck. "Vocational Economic Analyses: A Response to Staller, Sullivan, and Friedman." Paper presented to the 26th Annual Conference of the Eastern Economics Association, March 2000.**

After pointing out some basic errors in the paper by Staller, Sullivan, and Friedman (2000), the authors discuss the role of the vocational expert and defend the validity of data from the Current Population Survey for estimating the employment and earnings experience of people with a work disability. [Attached as Exhibit 19]

**Gibson, David S. and John P. Tierney. "Disability and Worklife Expectancy Tables: A Response." *Journal of Forensic Economics*, Fall 2000, 309-318.**

This article addresses the critiques discussed by Skoog & Toppino (1999) regarding *The New Worklife Expectancy Tables*. In it, they defend the use of a multi-year

average and the validity of data from the Current Population Survey regarding the employment experience of people with a work disability. [Attached as Exhibit 20]

**Gluck, Andrew. "Regarding the New Worklife Tables." *Journal of Forensic Economics*, Fall 1996, 335-337.**

The author responds to the critique of *The New Worklife Expectancy Tables* by Corcione (1995). He discusses the benefit of multi-year averaging and the use of a continuum placement by vocational experts to adjust the average disability statistic for a specific plaintiff. [Attached as Exhibit 21]

**Gluck, Andrew and Stuart Sachnin. "'New Worklife Tables' Meet the Challenge of the Daubert Standard." *Medical Malpractice Law and Strategy*, December 2000. (Includes a reply by Jerome M. Staller and Edward A. Friedman)**

In this article, the authors point out errors in the critique by Staller (2000; *Medical Malpractice*) and note the importance of considering the effect of work disability on a person's future work experience. In addition, they note that the definition of work disability was created and is used by the U.S. Census Bureau and that the Current Population Survey (CPS) data, which uses the definition, are validated through their use by nonforensic researchers. The article contains a brief response by Staller and Friedman, who continue to assert that it is not possible to use the CPS data to evaluate a specific plaintiff. [Attached as Exhibit 22]

**Johnson, John R. "Assessing Risk in Enhanced Earnings Valuations." *Family Law Monthly*, August 2001.**

The author discusses the value of *The New Worklife Expectancy Tables* and of the Life, Participation, Employment method of calculating worklife expectancy for calculation of enhanced earnings in matrimonial litigation. [Attached as Exhibit 23]

**McCollister, George M. and Christopher C. Pflaum. "Predicting Reduced Worklife from Disabilities." Paper presented at the National Association for Forensic Economics sessions of the Allied Social Science Association meeting, San Diego, CA, January 3, 2004.**

The authors discuss the use of data from the National Health Interview Survey to estimate worklife expectancies for individuals with varying health conditions. The article presents worklife expectancies by education level and age for individuals with no injury and individuals with back pain. They find that the disability does negatively affect the probability of being employed and that this drop becomes more profound with age, a finding similar to data from the Current Population Survey used in *The New Worklife Expectancy Tables*.

**McNeil, John. "Comment on Skoog and Toppino." Unpublished manuscript, 2002.**

The author corrects points made in the article by Skoog and Toppino (S&T). In particular, contrary to S&T statements, he notes that he believes that the CPS is an important data source when studying the relationship between disability and worklife. In addition, he notes the importance of understanding the differences in definitions of disability when applying disability data. This article was submitted to the *Journal of Forensic Economics* as a response to the comments made by S&T,

correcting the use of McNeil's research in the S&T article. The *Journal of Forensic Economics* rejected the article due to "severe space limitations."

**Misra, Sita, Pisnu Bua-lam, and Ranjit K. Majumder. "A Realistic Assessment of Economic Benefits of the Rehabilitation Program Using Worklife Expectancy Tables." *Journal of Rehabilitation Administration*, February 1992, 15-20.**

The authors discuss the value of *The New Worklife Expectancy Tables* when performing benefit-cost analyses of rehabilitation programs. [Attached as Exhibit 24]

**Pflaum, Christopher C., George M. McCollister, Robert M. Shavelle, David, J. Strauss, and Michael J. DeVivo. "Disability and Worklife: The Case of Spinal Cord Injury." May 2003.**

Using data from the National Spinal Cord Injury Database, the authors developed a model of worklife expectancy specific to persons with spinal cord injury. They compare their results with *The New Worklife Expectancy Tables*, finding their estimates to be sometimes higher, sometimes lower than those found in *The Tables* [Attached as Exhibit 25]

There have also been numerous articles on the methodology employed in developing **The Tables**. [See Attachment A to the Gibson Affidavit.]

Numerous courts have allowed the use of expert testimony that relies on the Gamboa's Worklife Expectancy Tables and/or their underlying data. *Michels v. U.S.*, 815 F. Supp. 1244, 1258-1259 (S.D. Iowa 1993)(expert relied upon the 1987 version of Dr. Gamboa's tables). *Nilavar v. Osborn*, 2000 WL 353266 (Ohio App. 2000), *unpublished opinion*, (expert on future losses survived *Daubert* by relying upon Dr. Gamboa's tables and methodology). As stated above, Plaintiff has also included numerous court orders where **The Tables** and testimony relying on The VEI tables were held to be reliable under the *Daubert* Standard.

Critics of the use of CPS Data have also cited another article that is said to be critical of the use of CPS Data. This article was written by John McNeil (2000) and is entitled "Employment, Earnings, and Disability." As confirmed by McNeil, this article in no way invalidates use of the CPS for worklife expectancy purposes for the following reasons:

**McNeil's article studies results from the Survey of Income and Program Participation (SIPP), a survey conducted by the U.S. Census Bureau. One of McNeil's purposes in his study was to determine whether or not an appropriate measure exists for measuring the employment experience of people with a disability. In doing this, his focus was a definition of disability consistent with the Americans with Disabilities Act.**

\* \* \*

**McNeil used the SIPP because its definition of disability is more consistent with the ADA definition than the CPS definition, which focuses on work disability only. The SIPP definition is a much broader one that includes persons *who* do not have limitations in the kind or amount of work they can perform. For forensic purposes, when assessing loss of lifetime earnings, the most important and direct focus is on persons who have a work disability, the definition used in the CPS. For this reason, the worklife tables use data from the CPS. See *Affidavit of Gibson*.**

Most importantly, in a related matter, McNeil signed an affidavit, attached hereto, stating his support for the use of the CPS for studying the worklife expectancy of people with a work disability. In addition, during a November 2000 presentation before the National Association of Forensic Economics (NAFE), McNeil reaffirmed the application of CPS data for the study of persons with a work disability.

Criticisms of the CPS are not new. They are either irrelevant to the worklife expectancy calculations conducted by Dr. Barkhaus, or are not substantial enough to warrant discontinuing use of the CPS for estimating the worklife expectancy of persons with and without work disability. In addition, many of the reservations expressed by the critics are contradicted by the use of the CPS by many leading researchers to study the impact of disability. [See Footnote 3 above and attachment B of Gibson Affidavit.] There is no official government position against use of the CPS to define work disability. In fact, the Census Bureau regularly generates cross-tabulations of these data and publishes them on its website.

Defendant also attacks the use of statistical averages in the creation of the tables. This criticism seems to stem from a need for a very precise formula to apply these population statistics to an individual plaintiff. Averages from various populations have long been accepted as a means for prediction - life expectancy, earnings, and others. No statistic, no matter how fine-tuned, can provide an exact predictor of an individual's future. This is as true of worklife expectancies as it is of various measures of annual earnings and growth and discount rates. The expert must use available statistics about populations and mold them to meet the specifics of the case. Economists, actuaries, insurance companies, gambling establishments and self-insured trucking companies, like Werner, use population averages when making rational bets on human outcomes. The basic belief is that in the absence of more specific and precise information, the best predictors of outcomes are statistical averages or relative

frequencies. Following this, disability data does not have to be segregated by type, severity, or duration of disability in order to be reliable or meaningful.

Even if segregated data existed, its use would be limited at best. Persons with same diagnosis and the same length of time since injury can have significantly different experiences in terms of their experience in the workplace, especially when education level is factored in. When assessing persons with disability, the expert should be familiar with the effects of impairment on ability to work and earn money, as well as the experiences of persons with disability in the labor market. Dr. Barkhaus has the knowledge and experience necessary for performing such a calculation.

In this case, Dr. Barkhaus determined Mr. Anglin's pre-injury earning capacity by looking at his well documented earning history and his limited education. Dr. Barkhaus used Dale's latest earnings at the South Bend Sewer Department to represent Dale's prior earning capacity. Dr. Barkhaus then went on to figure Mr. Anglin's pre- and post-injury worklife expectancies by reference to **The Tables**, which he then fine tunes, based upon his extensive experience, to fit Mr. Anglin's very specific level of occupational disability after referencing his medical records, the social security records, and an extensive interview with the Plaintiff.

Dr. Barkhaus is widely recognized as an expert on the very issues Plaintiff has asked him to address in this case. He has testified extensively on these issues in state and federal courts throughout the midwest and is regularly relied upon by the Social Security Administration to act as a Vocational Expert. He has specialized knowledge that will not otherwise be available to the jurors and his experience and training will provide them with helpful information in understanding the consequences to Dale Anglin for the injuries that he suffered in March of 2002. Based on all the materials provided to the Court in Plaintiff's motion, there should be little doubt that the data upon which Dr. Barkhaus relied in rendering his opinion was valid under *Daubert/Kumho/Manuilov* **or any other standard.**

### **REDUCTION TO PRESENT VALUE**

The Defendant has totally mischaracterized the legal and factual issues with respect to reduction to present value. First, Indiana law does not require a reduction to

present value. Secondly, Dr. Barkhaus has *de facto* used a discount method known as the total offset method. Many courts have held that, as a matter of law, consideration should be given to the effect of anticipated inflation on an award of damages for future losses by not reducing the award to its present value, since the discount rate used to make such a reduction would be entirely offset by the anticipated rate of inflation and rises in real wages. 22 Am. Jur. *Damages*\_ Section 145. This allows the jury to arrive at a damage amount without forcing the parties to put into evidence the complicated machinations we often see in litigation from expert economists.

The leading Indiana case on the use of a "discount rate" to reduce future damages to present value is *Griffin v. Acker*, 659 N.E.2d 659 (Ind. App. 1995). In *Griffin*, plaintiff argued that she was permanently injured and was entitled to receive \$5 to \$10 per day for the rest of her life. She also claimed that she would incur future medical expenses. The defendant, without introducing the testimony of an economist or any other expert, sought to introduce a copy of a recent edition of the Wall Street Journal containing the prevailing rate of 30 Year Treasury Bonds. The prevailing rate of the 30 Year Treasury Bonds was 30%. The trial court excluded evidence of the current 30 Year Treasury Bond, stating that there was insufficient to conclude that the 30 Year Treasury Bond should be used as the proper discount rate. At the conclusion of the evidence, the defendant sought an instruction mandating the jury to reduce any future damages to "present value." The trial court refused defendant's present value instruction and the jury rendered a \$90,000 verdict. The defendant appealed. On appeal, the Indiana Court of Appeals issued the following holdings:

**(1) Although evidence of present value may assist the jury in the determination of a reasonable award, it is not essential to an award of damages. *Id.* at 662.**

**(2) Courts will not presume to "dictate" a proper discount rate for present value purposes. *Id.* at 663.**

**(3) An awareness of general inflation and a constant depreciation and cheapening of money lies "within the zone of discretion given to the trier of fact." *Id.* at 663.**

**(4) The parties can, if they wish, agree on the appropriate discount rate. *Id.* at 663.**

**(5) In general, the determination of the real interest and real inflation rates, as well as the degree to which they combine to produce a particular market rate, are matters "best left to the trier of fact." The determination of the proper discount rate "lies within the zone of discretion" given to the trier of fact in the assessment of damages. *Id.* at 663.**

**[We have attached a complete copy of the *Griffin v. Aker* decision as Exhibit 26]**

Contrary to Defendant's contention, *Ollis v. Knecht* does not state that there must be a reduction to present value. A close reading of the case shows that the Defendant has misrepresented what the Court of Appeals said in this decision. As mentioned above, *Ollis v. Knecht* involved the consideration of a novel approach for determining the entire economic loss of the Plaintiff. During the Court's discussion of what experts do, they summarized an article by Henry N. Butler, "Economic Analysis for Lawyers." During that summarization of the article, in dicta, the Court walked through the steps an economist takes when making a reduction to present value. As part of that discussion, the Court said the words "then the economist must discount that income to present value." ***This decision does not in any way shape or form require that damages be reduced to present value in Indiana.*** The Defendant is simply wrong that Indiana law requires an economist to make a reduction to present value. We have attached as Exhibit 27 a complete copy of the *Ollis* decision.

The truth is that there are many methods and ideas about how damage awards should be considered. There is little agreement on a preferred methodology. See 22 Am.Jur. 2d *Damages* Section 143:3, *Stein on Personal Injury Damages*, Section 15:11 (3<sup>rd</sup> Ed. 1997). Courts have generally adopted one of three approaches: (1) the current dollar earnings and current interest rate or "inflation discount method"; (2) the real earnings and real interest rate or "real interest rate method"; and (3) the "total offset" method. See *Curran*, 72 Connecticut B.J. at 37, Michael I. Krauss and Robert A. Levy, *Calculating Tort Damages for Lost Future Earnings*, 31 Gonzaga L.R. 325, 341 (1995-96). The first approach figures damages with inflation built in. *Curran*, 72 Connecticut B.J. at 380, *O'Shea v. Riverway Towing Co.*, 677 F.2d 1194, 1200 (7<sup>th</sup> Cir. 1982). The second approach projects damages without inflation built in (real interest rate). *Id.* The third approach, and the approach used by Dr. Barkhaus, assumes that the discount rate is completely neutralized or offset by the inflation rate and real increases in wages over time. *Pfeifer*, 462 U.S. at 544. As stated above, neither our legislature nor our Courts have mandated that any particular method be used in personal injury cases.

The total offset method, or offset rule, as it is sometimes called, is based upon the assumption that expected wage rate growth will on average equal the nominal rate of interest. Under this method, no discount to present value is required on the theory

that any interest rate which might otherwise drive a discount would be totally offset by such things as price inflation and real wage increases. *Baker v. John Morrell & Co.*, 263 F. Supp. 2d 1161 (N.D. Iowa 2003). This assumption allows a simplified calculation of damage awards, particularly in personal injury and wrongful death cases. The offset rule reduces the need for the courts to hear testimony concerning expected rates of inflation, real rates of interest, growth in labor productivity, expected wage increases, and expected wage inflation. Simply put, if the assumptions of the offset rule are applicable, then a loss of \$10,000 per year expected to last for 25 years would be appropriately compensated by \$250,000, there would be no need for discounting or other calculations to take interest rates of growth into account.

Numerous cases and scholarly articles support the use of the total offset method. In one article, the authors study the relationship between wage growth and interest rates and determine that the relationship is random. Based on this, they conclude that the total offset method is the least biased method of calculating present value. "Methodological Issues: Interest Rate and Wage Growth Forecasting." *Journal of Legal Economics*, Winter 1994, 55-61. Another study looks at historical earnings for various industries and concludes that the total offset method results in awards that are not significantly different from fair awards. Pelaez, Rolando F. "The Total Offset Method." *Journal of Forensic Economics*, April 1989, 45-60. Another study notes that relating income growth to interest rates should be done over a longer period in order to derive reasonable results for estimating fair awards. When this is done, the rates approach equality, making the total offset method a fair one for estimating lost earnings. Schwartz, Eli. "Below-Market Interest Rates and the Total Offset Method Revisited." *Journal of Forensic Economics*, Winter 1997, 91-94. Yet another study shows that when looking at the relationship between inflation and the pre-tax real interest rate, the total offset method is an appropriate method for calculating present value. Schwartz, Eli and Robert Thornton. "The Effect of Taxes and Inflation on the Real Interest Rate." *Journal of Forensic Economics*, Winter 1991, 71-73. Below is a list of articles supporting use of the total offset method for calculation of present value of lost earnings:

**Palaez, R.F., "Calculating awards for lost earnings: an empirical assessment of Beaulieu." Journal of Legal Economics 5(1):49 -62 (1995).**

**Anderson, G.A. and D.L. Roberts, "Economic Theory and the Present Value of Lost Future Earnings: an integration, unifications and simplification of court adopted methodologies." University of Miami Law Review 39:723-751. (1985)**

**Brody, Michael T. "Inflation, Productivity, and the Total Offset Method of Calculating Damages for Lost Future Earnings." *The University of Chicago Law Review*, 1982, 1003-1025.**

The author applies four different methods of calculating present value to historical data and finds that the total offset method predicted lost earnings most accurately.

**Carlson, John A. "Economic Analysis v. Courtroom Controversy: The Present Value of Future Earnings." *American Bar Association Journal*, May 1976, 628-631.**

The author discusses issues related to earnings growth and discounting and influences that are common to both. He concludes that the pure offset method is a reasonable one to use when estimating the present value of future earnings.

**Carter, R.A.L. and Palmer, John P. "The Offset Rule: Some Multinational Evidence." Unpublished paper presented at the 8<sup>th</sup> Annual Law and Economics Workshop, Maasricht. (1995)**

The authors state that in civil cases involving personal damages, courts are concerned with providing the injured person with a lump sum award to adequately compensate the victim for the loss of an expected flow of income. To convert this expected flow into a present stock, the courts implicitly or explicitly take the present discounted value of the expected nominal dollar value of the loss in each future time period during which the victim expects to suffer the loss. The process can become quite complex and costly, as plaintiffs and defendants contest the underlying assumptions about expected rates of real interest, expected rates of inflation, and the expected growth in labor productivity, which are just a few of the variables usually introduced in personal injury trials. This cost can be avoided. The evidence supports that courts can avoid the costs associated with these battles by simply multiplying the amount of the loss per annum by the number of years the loss is expected to occur. There is no need to engage in costly litigation concerning these variables because the expected nominal aggregate growth in labor productivity tends to "offset" the nominal rate of interest.

**Lawlis, Frank and Robert Male. "Methodological Issues: Interest Rate and Wage Growth Forecasting." *Journal of Legal Economics*, Winter 1994, 55-61.**

The authors study the relationship between wage growth and interest rates and determine that the relationship is random. Based on this, they conclude that the total offset method is the least biased method of calculating present value.

**Pelaez, Rolando F. "Pennsylvania's Offset Rule: Fantasy Masquerading as Economics." *Journal of Legal Economics*, Winter 1995, 1-16.**

The author notes that the offset method in Pennsylvania offsets interest, not with wage growth, but with inflation. This results in overcompensation of the plaintiff, since productivity increases are not included in this offset. The author concludes that the total offset method has a lower error rate.

**Pelaez, Rolando F. "The Total Offset Method." *Journal of Forensic Economics*, April 1989, 45-60.**

This paper evaluates historical earnings for various industries and concludes that the total offset method results in awards that are not significantly different from fair awards.

**Schwartz, Eli. "Below-Market Interest Rates and the Total Offset Method Re-Visited." *Journal of Forensic Economics*, Winter 1997, 91-94.**

The author notes that relating income growth to interest rates should be done over a longer period in order to derive reasonable results for estimating fair awards. When this is done, the rates approach equality, making the total offset method a fair one for estimating lost earnings.

**Schwartz, Eli and Robert Thornton. "The Effect of Taxes and Inflation on the Real Interest Rate." *Journal of Forensic Economics*, Winter 1991, 71-73.**

The authors note that when looking at the relationship between inflation and the pre-tax real interest rate, the total offset method is an appropriate method for calculating present value.

Finally, the Plaintiff makes one last important point. Courts around the country have made it clear that the vagaries of the marketplace usually deny a sure knowledge of what the plaintiff's situation would have been in the absence of the defendant's tortious conduct. See *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981).

### **CONCLUSION**

Dr. Barkhaus is not seeking to offer testimony in a hard science like physics or mathematics. Instead, he is seeking to offer an opinion on Daleno Anglin's lost earning potential. As Judge Newman stated in the *Pfeifer* case, the **"average accident case should not be converted into a graduate seminar on economic forecasting,"** *Id.* at 548. Certainty is probably impossible looking back in time and impossible looking forward in time. But, **"Daubert does not require a scientific opinion to be**

***beyond criticism before it becomes admissible.***" *A Woman's Choice - East Side Women's Clinic v. Newman*, 904 F.Supp. 1434, 1460 (S.D. Ind. 1995). To the contrary, the United States Supreme Court instructed lower courts to continue to rely on "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" as the means for dealing with "shaky but admissible evidence." *Daubert*, 509 U.S. at 596. While the Defendant has been able to muster some weak criticism of **The Tables**, this criticism has been completely refuted. The Defendant's criticism does not even approach the level that would require exclusion under the *Daubert/Kumho/Manuilov* standard. As such, the merit of Defendant's criticisms should be weighed and assessed by the ultimate finder of fact --- the jury. This Honorable Court is left with no basis to exclude Dr. Barkhaus' testimony and the Defendant's motion should be unequivocally denied.

Finally, we add, "[a] defendant whose wrongful conduct has rendered difficult the ascertainment of the amount of damages suffered may not complain that they cannot be measured with exactness and precision." *Pacific Coast Agr. Export Assoc. v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1207 (9<sup>th</sup> Cir. 1975).

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**CERTIFICATE OF SERVICE**

I certify that on the 20th day of May, 2004, a true and complete copy of the foregoing pleading or paper was served upon each party or attorney of record herein by depositing the same in the United States Mail in Envelopes properly addressed to each of them and with sufficient first-class postage affixed.

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