

Stan V. Smith and Thomas R. Ireland:
A Personal Forensic Economic Retrospective 3/3/03

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Introduction

This is my account of events that have involved Stan Smith and myself as participants in the forensic economics arena, starting on December 12, 1988 and continuing until the present. Events are generally presented in chronological order.

The Wall Street Journal Story in December 1988

On December 12, 1988, the *Wall Street Journal* ran a front page story by Paul M. Barrett, entitled, “The Price of Pleasure: New Legal Theorists Attach a Dollar Value to the Joys of Living.” Additional by-lines were: “‘Hedonic’ Damage Argument By Economist Stan Smith Stirs Debate in Death Suits;” and “The Worth of Smelling a Rose.” The coverage in that issue of *Wall Street Journal* was extensive, extending a full column of the front page and an even longer section on page A6, detailing the kind of testimony that Stan Smith had provided in the case of *Sherrod v. Berry*¹ in 1985.

As of December 12, 1988, I had been a practicing forensic economist for fourteen years. It had never occurred to me that a professional economist would claim to be able to measure the value of the joys of life. Uses of the value of life literature as the basis for Stan Smith’s testimony were quite surprising. At that time, my teaching responsibilities included Public Microeconomics, a course in the UM-St. Louis Masters of Public Policy Administration program. That course included the value of life literature as part of the benefit-cost literature in economics and thus I was reasonably familiar with the value of life literature. This was the first time I had heard of Stan Smith or the term “hedonic damages.”

The NAFE Hedonics Symposium in December 1989

In December 1989, the National Association of Forensic Economics (NAFE) sponsored a symposium about hedonic damages at the meetings of the Allied Social Sciences in Atlanta, Georgia. I was in the audience, but played no active role in the discussion that took place at that symposium. Thomas Havrilesky was the Chairman of that symposium, which was organized with the help of Ted Miller. Participants included W. Kip Viscusi, Ted R. Miller, Stan V. Smith,

¹*Sherrod v. Berry*, 629 F. Supp. 159 (N.D.Ill. 1985); Affm’d, 827 F.2d 195 (7th Cir. 1987); Rev’d on other grounds, 856 F.2d 802 (7th Cir. 1988).

and William T. Dickens. This symposium was to later become controversial, but was not controversial at the time. Papers by each of the authors plus an additional paper by Thomas Havrilesky were published in the Fall 1990 issue of the *Journal of Forensic Economics* (Volume II, Number 3).

Huncovsky vs. Gates Rubber Company

The earliest case that involved both Stan Smith and myself appears to have been *Huncovsky v. The Gates Rubber Company*, Cause NO. 568478 in St. Louis County Circuit Court in early 1990. Ironically, while this case mentioned the value of life literature, Stan Smith was apparently retained directly by the Gates Rubber Company as an unnamed expert for the defense. I was a named expert for the defense in this case, which settled shortly after my deposition was taken. The economic expert for the plaintiff was W. Kip Viscusi, who testified generally about the value of life literature in that case, but more importantly attempted to place instructional values on the pain and suffering involved with a burning death.

I was not to become aware of the full nature of Stan Smith's involvement until April of 2002, when Smith explained his involvement on the NAFE-L. (The NAFE-L is an electronic listserv for members of NAFE.) This case became important in 2002 because of Stan Smith's characterization that Kip Viscusi had testified in this case in favor of hedonic damages. However, this was a Missouri wrongful death action in which a plaintiff could not try to recover for lost enjoyment of life. The purpose of Viscusi's testimony was to establish benchmarks for dollar amounts that might be awarded for pain and suffering. In that context, Kip Viscusi had testified about the value of life literature and had offered this as one number a jury could consider in thinking about awards for pain and suffering in a burning death.

Martel v. Levey in 1991

The first case in which I was involved in opposition to Stan Smith was *Martel v. Levey*, Cause No. 892-2337, in the Circuit Court of the City of St. Louis. Smith's report in this matter included both wage loss and hedonic damages, but I was asked to address the wage loss issued in the case and not the hedonic damages issues. The defense relied on depositions of Lauraine Chestnut, Daniel Violette and Thomas Hopkins to counter Stan Smith's hedonic damages testimony.

The First Hedonics Primer in 1992

Early in 1992, Walter Johnson, James D. Rodgers and I published "Why Hedonic Damages are Irrelevant to Wrongful Death Litigation" in the *Journal of Forensic Economics*, 2(1): 49-54 (1992). Later in 1992, I was an associate editor for *A Hedonics Primer for Economists and Attorneys*, John O. Ward, editor, published by Lawyers & Judges Publishing Company in 1992. The *Hedonics Primer* also reprinted all of the papers that had been included in the Fall 1990 Hedonics Symposium issue of the *Journal of Forensic Economics* and a number of subsequent papers including two of Stan Smith's papers and three of my own. Because my primary responsibilities were with papers that opposed hedonic damage testimony, however, I had no direct contact with Stan Smith in the compilation of this book.

The ABA TIPS Mock Trial in August 1992

Sometime in the winter of 1992, Stan Smith asked if I would be interested in doing a mock trial

about hedonic damages with him that summer. This program was a Tort and Insurance Practice Session at the national meetings of the American Bar Association in San Francisco on August 10, 1992. I was delighted to have this opportunity and the kind of exposure that would go with being on a program at the national meetings of the American Bar Association. This was my first direct contact with Stan Smith and our dealings relating to this event were comfortable. Both Stan Smith and I worked with our designated attorneys to prepare for a mock trial. Video tapes were produced and continued to be in limited circulation for years thereafter.

In general, the mock trial involved standard recitations of positions for and against hedonic damages. However, one thing happened during the mock trial that I was to remember years later. During Stan Smith's direct examination in the mock trial, Smith testified that a majority of the NAFE Board of Directors had signed affidavits in support of hedonic damages. At that time, I was a member of the Board of Directors of the National Association of Forensic Economics, which consisted of seven voting members. I wondered who among the Board of Directors had signed those affidavits and what they might have said. However, I did not ask Stan Smith afterwards about that claim, nor did I make other efforts at that time to find out more about those affidavits. I was to learn more about those affidavits four years later.

August 1992 to June 1996

From August 1992 to June 1996, there was little contact between Stan Smith and myself .

The Hedonics Affidavits Appear in June 1996

On June 3, 1996, during my deposition in the matter of *Marianne Johnston vs. Mary I. O'Connor, M.D., et al.*, in the Circuit Court, Fourth Judicial District in Duval County, Florida, I heard about those affidavits again. By this time, my term of office on the NAFE Board of Directors had expired. I was retained to counter the hedonic damages testimony of Joseph Perry, an economics professor at the University of North Florida. I was asked a series of questions about my participation in NAFE and then asked a series of questions about Frank Slesnick, Patrick Gaughan, Luvonia Casperson, Everett Dillman, Michael Brookshire, and Charles DeSeve. The lawyer asked if those people had expressed opinions different than mine on the issue of hedonic damages. I responded that Frank Slesnick had not expressed an opinion but that I thought the others had indicated support of the hedonic damages concept.

The opposing attorney went on to develop the point that a majority of the voting board members of NAFE when I was on that board supported hedonic damages, suggesting that I held a minority view within NAFE. The plaintiff attorney indicated that he had affidavits indicating that the NAFE Board of Directors supported hedonic damages. On June 4, 1996, I received copies of the affidavits that had been issued by Gaughan, Casperson, Dillman, Brookshire and DeSeve by facsimile. (DeSeve's affidavit was not written when he was a member of the NAFE Board of Directors, did not mention NAFE, and was not controversial.) While the economist involved in this case was Joseph Perry, the materials that were presented included materials that are normally provided to a plaintiff attorney when Stan Smith is involved in a case. While it is possible that Smith's materials were provided to the plaintiff attorney in *Johnston v. O'Connor* by another attorney, it seems more likely that they were provided by Stan Smith to help meet the challenge being raised to the testimony of Joseph Perry, who was relying exclusively on Stan

Smith's methodology in presenting hedonic damages testimony. Thus, while Smith was never identified as having played a role in this case, it is my opinion that he was involved.

Stan Smith's Continuing Use of the 1991 Hedonics Affidavits

The use of the 1991 hedonics affidavits of Michael Brookshire, Luvonia Caspertson, Everett Dillman and Patrick Gaughan in 1996 triggered a number of events that were independent of Stan Smith. They were one of the reasons for the candidacy by Jim Plummer for the NAFE Board of Directors that was very divisive in 1999, and recriminations taken against me personally by three of the four signators at the January 2000 meeting of the National Association of Economic Arbitrators. Stan Smith's only role in the "fallout" issues that stemmed from the use of the affidavits was his continuing use of those affidavits in litigation, even after a request by Gaughan that Smith stop using his affidavit and either affidavits or NAFE-L statements from all four of the signers that NAFE support for hedonic damages should not be inferred from those affidavits.

During the winter of 1997, I discovered that the 1991 affidavits had been introduced by Stan Smith in the case of *Laing v. American Honda Motor Co., Inc.*, 628 So.2d 196 (La.App.2 Cir.1993) for the purpose of trying to discredit the testimony of Jerome Staller, a NAFE member. They have been produced by Stan Smith in a number of cases in which I have been involved since 1996, continuing through at least 2000. Stan Smith has a standard packet of materials that he supplies to plaintiff attorneys to defend against motions *in limine*. That standard packet includes the four 1991 affidavits.

The New Hedonics Primer in 1996

The original *Hedonics Primer* in 1992 had done very well for Lawyers & Judges Publishing Company. John O. Ward, the editor of that project, asked me to join him as co-editor for the New Hedonics Primer for Economists and Attorneys instead of being an associate editor, as had been the case in 1992. A number of papers were carried over from the original primer to the *New Hedonics Primer*, but the *New Hedonics Primer* involved a completely different concept of the collection. The 1992 *Hedonics Primer* had focused almost entirely on uses of hedonic damages testimony in death cases. The 1996 *New Hedonics Primer* had separate sections on the use of hedonic damages testimony in personal injury cases and for the purposes of measuring dollar values for loss of relationship.

Based on the written suggestions of both Stan Smith and Michael Brookshire, I obtained permission for reprinting W. Kip Viscusi's important *Journal of Economic Literature* paper, "The Value of Risks to Life and Health," 31(December):1912-1946 (1993). At the request of Stan Smith, I also secured permission to reprint his paper on "Hedonic Damages in Personal Injury and Wrongful Death Litigation" from *Litigation Economics*, edited by Patrick A. Gaughan and Robert J. Thornton and published by JAI Press (Greenwich, CT) in 1993. (This was the only paper for which we had to pay royalties.) I also encouraged Stan Smith to write a short paper on "The Value of Life to Close Family Members: Calculating the Loss of Society and Companionship," which was then published in the *New Hedonics Primer*.

Rothganger v. Union Pacific Railroad Company in 1996

Hedonic damages were not involved in the case of *Rothganger v. Union Pacific Railroad Company*, No. 942-10174, County of the City of St. Louis Circuit Court (1996). Stan Smith had projected the lost earnings of Johnnie Rothganger to increase at a real growth factor of 0.63 percent and had used a real discount rate of 1.90 percent to reduce future real earnings to present value. That meant a net discount rate of 1.262 percent ($1.0190/1.0063 = 1.01262$, where 1.2625 percent is the net discount rate). I had previously obtained a copy of Stan Smith's deposition transcript testimony in the case of Stan Smith in the matter of *Branum v. Slezak Construction Company*, No. 89 L 01238, Circuit Court of Cook County, taken on September 9, 1993. In that case, which involved projecting the lost earnings of a construction worker, Stan Smith had testified to a net discount rate of 3.68 percent. In *Branum*, Stan Smith's testimony was entirely in nominal terms. The defense wanted me to testify about the significance of the difference between a 1.26 percent net discount rate and a 3.68 percent net discount rate in calculating damages. I had a copy of Smith's *Branum* transcript with me and was waiting in the hall outside the courtroom when this case settled.

Stan Smith's Letter to David Flynn on April 2, 1997

Stan Smith sent a one page letter soliciting defense business to David Flynn on April 2, 1997. The letter emphasized the usefulness of using Stan Smith's services on defense. As a part of stressing that usefulness, Stan Smith emphasized the following paragraph, reproduced here as it was presented in his letter:

I will NEVER volunteer that I had been retained by your firm on other matters when I am on the opposite side of your case. If asked to list various firms that I have worked for in the past, I will not mention your firm, if you are on the opposite side. This policy holds true for deposition, at trial, and even in informal conversations with the attorneys who have retained me. Period. [Bolding and underlining as in the original.]

I received a copy of this letter anonymously in an envelope without a return address sometime during the year 2000. Because of the anonymity of the source, this letter could have been a fraudulent attempt to discredit Stan Smith rather than a copy of a letter Stan Smith had actually written. It was on Stan Smith's letterhead and appeared to be Stan's signature, but a copy of a letter could have been manufactured if someone was trying to unfairly discredit Stan Smith. Therefore, I made no public reference to this letter for a number of months after receiving it. However, in early summer of 2001, Kip Viscusi sent me a copy of his own deposition in the case of *Hartman v. Burlington Northern and Santa Fe Railroad Company*. Viscusi's deposition had been taken on May 22, 2001 and I received this transcript copy in June of 2001. It mentioned Stan Smith's letter to David Flynn. I contacted the defense attorney and received a copy of Stan Smith's deposition in that case, which also contained discussion of the April 2, 1997 letter to David Flynn. In that deposition transcript, Stan Smith acknowledged writing the letter.

The AREA Mock Testimony with Stan Smith and Tom Ireland in May 1999

In May, 1999, Stan Smith and I appeared together in panel discussion on "What Constitutes Credible Expert Testimony/Difficult Issues to get into Evidence" at the annual meetings of the American Rehabilitation Economics Association in Reno, Nevada. Justice Maupin of the Nevada

Supreme Court listened to cross examinations of Smith and myself by two attorney panelists and offered suggestions about what he thought was effective and ineffective about our presentations. I had invited Stan Smith to participate in this program on behalf of AREA. This was an interesting, well attended discussion, but had no other major consequences than that Stan Smith claimed at a later time to have “won” in this panel discussion.

***Wright v. Vons Industries* – November, 1999**

In 1999, I had worked on the case of *Wright vs. Vons Industries* in Las Vegas, Nevada. This case was interesting because the plaintiff had retained both Tony Gamboa and Stan Smith, while the defense had retained both Bob Male and myself. In that case, Linda Wright’s pre injury annual ability to enjoy life as of 1999 was \$83,300, according to Stan Smith. Smith’s \$83,300 figure for “annual whole life enjoyment” was based on a methodology of adding cost of living adjustments to the \$60,000 value of life Stan Smith started with in 1988. This “whole life” figure was then reduced by several “benchmark” percentages to reach the values Smith testified to in the *Wright* case. The only change in Smith’s methods compared with what I had seen in previous cases was that he no longer claimed real growth over time in the ability to enjoy life, based on growing worker productivity and had changed to using increases in the CPI.

The “Hedonic Damages – Ten Years Later” Symposium on January, 2000

The second hedonics symposium, “Hedonic Damages – Ten Years Later” took place the day after the events at the NAEA meeting. This program included Peter Marks as chair and papers by W.Kip Viscusi, J. Paul Leigh (replacing William Dickens from the December, 1989 symposium), Ted Miller, Stan Smith and Tom Ireland (replacing Thomas Havrilesky from the December, 1989 symposium). The concept had been to look at what had happened in the ten years since the previous hedonics symposium. Kip Viscusi had been somewhat reluctant to accept, and did not do so with certainty until the last minute. This was both because of matters relating to his desire to go skiing and because of his ongoing annoyance with the fact that Stan Smith had continued to claim that Kip Viscusi had endorsed Stan Smith’s methods during the question and answer session of the previous hedonics symposium. The initial organizing efforts were made by John O. Ward and myself, with Peter Marks stepping into Ward’s role when Ward was unable to attend.

Kip Viscusi spoke about uses and misuses of hedonic values of life in legal contexts. Ted Miller spoke about QALYs (Quality Adjusted Life Years). Paul Leigh spoke about problems with value-of-life estimates based on labor market data. Stan Smith presented a paper based on his recently completed doctoral dissertation about jury verdicts and the dollar value of human life. My paper was about the trend in recent legal decisions regarding hedonic damages. This was a very successful program and the papers from this panel session were ultimately published by the *Journal of Forensic Economics* in the Spring/Summer issue, Volume 8, Number, co-edited by Peter Marks and myself with considerable help from Ted Miller.

***Tongard v. State of Alaska* in 2000**

In 2000, I was retained to counter Stan Smith’s hedonic damage testimony in *Tongard v. State of Alaska*. Between *Tongard* and *Wright vs. Vons Industries*, Stan Smith’s annual value of the ability to enjoy life had increased dramatically. In *Wright*, Linda Wright’s ability to enjoy life as

of 1999 was \$83,300. This was based on a methodology of adding cost of living adjustments to the \$60,000 value of life Stan Smith started with in 1988. The \$83,300 value he attached to the “whole value” of Linda Wright’s ability to enjoy life was \$60,000 in 1988 increased by the CPI to its value in 1999. However, in 2000 William Tonsgard’s “whole” pre injury ability to enjoy life had increased to \$118,100. This was a 41.8 percent increase from one year to the next. As a part of my work in *Tonsgard*, I was able to determine that the 41.8 percent increase in life enjoyment was an artifact of a change in Stan Smith’s calculation methodology. (The increase from \$60,000 in 1988 to \$83,300 in 1999 was 41.2 percent, so this increase in one year from 1999 to 2000 was larger than the entire increase from 1988 to 1999.)

As set forth in my second affidavit in *Tonsgard*, Stan Smith’s derivation in 1988-89 was to start from \$3.1 million. He then subtracted \$800,000 for human capital of the average living person to get \$2.3 million. He then determined that \$60,000, increasing at a real growth rate (in his book of 1.29 percent) and reduced to present value at a real discount rate of 3.13 percent, was the starting figure needed to generate \$2.3 million over a 45 year life expectancy. In subsequent years, Stan Smith had dropped the real growth rate and substituted use of the rate of increase in the CPI-W, but his annual life figures as of the 1999 *Wright* case were still based on \$60,000 as of 1988-89. What he had done to produce the higher figure in *Tonsgard* was to increase the \$2.3 million by the CPI-W, which increased the \$2.3 million in 1988 to \$3.2 million in 2000. He then determined the starting value annual life enjoyment value from that figure and a real discount rate of 2.45 percent to be \$118,100. Having determined this, I issued an affidavit describing the process on April 28, 2000. When Stan Smith’s deposition in *Tonsgard* was taken on June 12, 2000, he indicated that I had correctly described the change in his methods. His explanation was that he had realized that because of changes in the interest rate he had been under compensating his clients for years.

Cristofferson v. City of Great Falls in June 2001

In the spring of 2001, I was retained to counter the testimony of Stan Smith in *Christofferson v. City of Great Falls* in Montana. This resulted in a bifurcated *Daubert* hearing in which I testified against Stan Smith being permitted to testify on June 4, 2001 and Stan Smith testified on his own behalf on June 6, 2002. The bifurcation resulted in the plaintiff being able to provide Stan Smith with a transcript of my testimony to comment upon. After hearing both my testimony and Stan Smith’s testimony, the trial court judge issued a written order prohibiting Stan Smith from presenting hedonic damages testimony. All of the materials leading up to the judge’s order during the trial were published on a CD-ROM by Lawyers & Judges Publishing, entitled *A Daubert Hearing on Hedonic Damage Testimony* by Thomas R. Ireland. This case resulted in a defense verdict on liability issues and has since been appealed to the Montana Supreme Court. One of the grounds for the appeal is the trial court judge’s refusal to permit hedonic damages testimony and the Montana Trial Lawyers Association filed an *amicus* brief in support of the plaintiff’s appeal on that issue. A hearing before the Montana Supreme Court was held on October 29, 2002. No decision had been announced at the time this was written.

Stan Smith’s Letter to David Flynn Arrives in a Plain Envelope

At some point the winter or spring of 2001, I received a copy of a letter Stan Smith had written to David Flynn dated April 2, 1997. David Flynn is an attorney with Querrey & Harrow, a well-

known defense firm in Chicago. The purpose of the letter was to solicit Mr. Flynn to retain Stan Smith in Defense cases. The letter covers a paper Stan Smith had published in the *FICC Quarterly*, a defense oriented publication, in the Fall 1996 issue on “Pseudo-Economists – The New Junk Scientists.” The paper itself was defense oriented and focused on the deficient credentials of some other very plaintiff oriented economic “experts.” Having emphasized the possible advantages to a defense attorney of hiring an expert who did 75 percent of his litigation work for plaintiffs, Stan Smith tried to reassure Mr. Flynn that hiring Smith would not come back to haunt Mr. Flynn in future cases. Smith did so by indicating that he had adopted the following policy, for both plaintiff and defense cases (indenting, emphasis and underlining as in the original):

I will **NEVER** volunteer that I had been retained by your firm on other matters when I am on the opposite side of your case. If asked to list various firms that I have worked for in the past, I will not mention your firm if you are on the opposite side. This policy holds true at deposition, at trial, and even in informal conversations with the attorneys who have retained me. Period.

Having received this letter from an unidentified source, I thought that it was possible that someone had created this letter falsely to discredit Stan Smith. For that reason, I made no public mention of the letter until after I saw the letter referenced in the transcript of a deposition taken of W. Kip Viscusi on May 22, 2001 in *Hartman v. BNSF* in Montana. Viscusi was the defense economic expert in that case for the purpose of opposing the hedonic damages testimony of Stan Smith. The April 2, 1997 letter to David Flynn did not play a big role in that deposition, but it prompted me to write to the defense attorney in that case to request a copy of Stan Smith’s deposition transcript in that case, which was taken on May 22, 2001. In that transcript, Smith attempted to explain what he meant by the passage above. That made it clear that Stan Smith had written the letter and freed me to discuss it publicly.

In the late summer or fall of 2001, I posted the complete text of the David Flynn letter on the NAFE-L, indicating that I considered this a promise to tell less than the whole truth at deposition and trial. Stan Smith did not respond. When I posted this letter again on the NAFE-L in April of 2002, it triggered very angry responses from Stan Smith, accusing me of having various mental illnesses and being on drugs.

Stan Smith and the Viscusi Affidavits in Summer 2001

The reason that Kip Viscusi had sent me a copy of his deposition transcript in *Hartman v. BNSF* in June of 2001 was not Stan Smith’s letter to David Flynn. The reason was claims Stan Smith had posted on the NAFE-L in March of 2002 about what Kip Viscusi has supposedly said in December 1989. Stan Smith had claimed over the years that Kip Viscusi had supposedly said he would use Smith’s hedonic damages methods in certain types of court cases. Smith had been claiming that Viscusi made this statement during the question and answer period at the December 1989 Hedonics Symposium sponsored by NAFE.

While I was arranging the 2000 “Hedonic Damages – 10 Years Later” symposium for NAFE in January 2000, Kip Viscusi let me know of his annoyance that Stan Smith had been making these

claims, even in deposition transcripts. Kip Viscusi made it clear to me that he had made no such statement. Viscusi told me that he had found it modestly annoying to have to respond to such claims for years after the December, 1989 program. As a result Peter Marks and I made special efforts to make it clear that no one should quote anything from that session other than a published account that Peter and I prepared. Kip Viscusi began his presentation by saying, “I hereby deny what anyone will claim I said at this session,” with some humor.

In the spring of 2001, Stan Smith responded to one of my postings on the NAFE-L by repeating this claim about Kip Viscusi’s statements in 1990. When I challenged Stan Smith about this matter, he posted a message on the NAFE-L claiming to have a number of affidavits from persons who were present in 1990 attesting that Kip Viscusi had made this statement. I challenged that on the grounds that it was implausible that anyone ran around gathering affidavits about what someone said in a question and answer session. I also notified Kip Viscusi of this claim by Stan Smith. In response, Kip Viscusi sent me a copy of his deposition transcript from *Hartman vs. BNSF*, dated May 22, 2001. Stan Smith was pointedly asked questions about these supposed “Viscusi said” affidavits in his own deposition on May 17, 2001. Smith was let off the hook by the attorney in that case after saying that this was no longer relevant because he was willing to let Kip Viscusi speak for himself.

In *Hudspeth v. Canal Wood* on August 3, 2001, however, Stan Smith was forced to answer questions about the affidavits he supposedly had gotten from attendees at the 1990 Hedonics symposium. His answers were that he had no copies of any such affidavits, but that one had been written by Michael Brookshire (the co-author of Smith’s book). I then asked Michael Brookshire to produce a copy of his affidavit concerning what Kip Viscusi might have said at the NAFE Hedonics Symposium in 1990. Michael Brookshire responded by saying that he remembered what he remembered, but would not say whether or not he had produced an affidavit or what he claimed to have remembered from this session. Ted Miller offered some conjecture as to what might have been said in a posting on the NAFE-L, but had not produced an affidavit and did not have clear memories (which was not surprising, given that this was more than eleven years later). Stan Smith’s answers under oath in *Hudspeth v. Canal Wood* directly contradict Stan Smith’s explicit claim on the NAFE-L that he had several affidavits of persons present at the 1990 Hedonics symposium. Under oath, he admitted that he had no such affidavits.

Stan Smith’s Discounts, Credits, and Value-Added Billing Arrangements

In his deposition in *Adams v. O’Leary* in 1990, Stan Smith admitted that he had given the attorney who retained him in that case a ten percent credit upon request. At various times, he had spoken of his policy of extending credit to attorneys trying cases and of considering the value he added to the outcomes of cases in determining whether to reduce fees he charges for his services. I had never seen a copy of Stan Smith’s “Complete Service and Billing Policy” until I obtained a copy of his 2002 version. That version contains as his last clause:

Review: Upon review of each billing matter, we may conclude, at our own discretion and after taking all factors into consideration, that a reduction in charges is fair and appropriate for the service rendered.

This has presumably been Smith's policy for a number of years. With this clause, Stan Smith appears to take the position that when cases do not go well for retaining attorneys, particularly with respect to his testimony, he will reduce his charges correspondingly by amounts he deems "fair and appropriate." While this is not a contingency arrangement per se, it apparently signals an informal willingness to make reductions in fees when cases do not go well.

Stan Smith and the NAFE-L from March to May 2002

My relationship with Stan Smith was fairly smooth until March and April of 2002. While my respect for him had declined significantly over the years, we had gotten along fairly well personally. In March of 2002, an exchange of postings erupted on NAFE-L, a listserv for forensic economists, disrupted that smoothness. There were strongly negative postings from each of us about the other. The focus of my postings was Stan Smith's letter to David Flynn, his claims about the supposed affidavits regarding Kip Viscusi's 1989 remarks, and changes in Stan Smith's hedonic damage methodologies from 1985 to the present. Since that period, Stan Smith has sent me various private messages indicating his personal unhappiness, but I have not returned his messages.

***Dorn v. BNSF* in April 2002**

Dorn v. BNSF was tried in Billings, Montana in April 2002. In that case, the plaintiff had retained two economists, Joseph Kasperick to provide testimony about ordinary economic damages and Stan Smith to provide hedonic damages testimony. The trial court judge allowed Stan Smith to explain the concept of hedonic damages, but not to testify to specific numbers purported to be the hedonic damages losses of the plaintiff. The trial court judge did not permit my testimony in opposition to the hedonic damages concept. The judge argued that doing so was effectively to allow me to argue to the jury that the judge was wrong in admitting Stan Smith to explain the hedonic damage concept. This case was appealed on a number of grounds, including the admission of Stan Smith's hedonic damages testimony and the refusal to permit my testimony in opposition to that concept. Since it was tried in federal court, I assume that it was appealed to the 9th Circuit. No results are known.

***Christian v. Keene and Southeast Logging, Inc.*, in May 2002**

Christian v. Keene and Southeast Logging, Inc. was a Savannah, Georgia case that settled in June of 2002. Stan Smith's deposition was taken twice in this case. I had not been retained in this matter at the time of Smith's first deposition on December 21, 2001, but was retained by the time of his second deposition on May 24, 2002. Thus, I had been able to suggest questions for the second deposition, which was based on a new report he had issued on May 20, 2002. The changes in his hedonics calculations between his September 5, 2001 and his May 20, 2002 reports were based on changes in the period of discounting. The primary difference between the two reports was the addition of Smith's valuation of a life care report produced by Robert Voogt. On a pro forma basis, his attorney objected to questions about methods of hedonic valuation that could have been asked in his first deposition. However, there had been no agreement that the second deposition would be limited to Smith's evaluation of the Voogt life care report and Smith's retaining attorney was prepared, subject to objection, to let Smith answer questions about Smith's methods for calculating hedonic damages.

Smith refused to answer some of those questions on his own authority. Whether this was because he was aware that I had become involved in the case is a question I cannot answer, but I have never in the past seen an economic expert refuse to answer questions about his methods of calculation on his own authority. On pages 62 and 63 of that deposition, an interesting exchange took place that provides insight into Stan Smith's approach to handling deposition questions.

Q: Dr. Smith, are you a member of the American Academy of Economic & Financial Experts?

A: I've attended their meetings. I'm not sure if I'm a member. Maybe, if one of those organizations were that you paid \$25, I guess you're a member. [This sentence may contain errors by the court reporter.] I don't know if my membership is current or if I have ever been a member. I've been to one of their meetings.

Q: Okay. Do you know whether or not that organization maintains a disclosure statement that's printed in every copy of their *Journal of Legal Economics* that states as follows: "The American Academy of Economic & Financial Experts encourages its members to clearly state sources of information and material assumptions leading to their opinions. Such disclosure should be in sufficient detail to allow identification of specific courses relied upon by a competent economist with reasonable effort." Have you ever seen that disclosure statement before?

A: I don't recall. It's not a disclosure statement. It's a suggestion.

Q: Okay. Have you seen that suggestion?

A: I answered your question.

Q: And do you feel that your report, with respect to life-value calculations – I'm sorry – the cost of future care gives adequate information for someone to go back and figure out how you got the 5.18, the assumed real growth rates for those various items.

A: I believe that if someone reads my deposition and reads the report, that they will be able to replicate my work, yes.

Stan Smith attended the AAEFE meetings in April of 2002 in Las Vegas. He has been a member of AAEFE for a number of years. As any AAEFE member would know, the disclosure statement is listed as a "Disclosure Statement" in every issue of the *Journal of Legal Economics*. It is not listed as a "Disclosure Suggestion." It is interesting that Stan Smith could not remember whether he had ever seen the AAEFE Disclosure Statement, but was definite that it was a "suggestion" and not a "disclosure statement." Stan Smith resigned his membership in AAEFE sometime in 2002.

In Smith's assessment of life care and for his assessment of lost enjoyment of life, he had projected a number of growth rates for various life care cost components. These growth rates

were derived from Georgia's legally mandated 5 percent discount rate. For example, Smith subtracted his real discount rate of 2.75 percent from the Georgia 5 percent legally mandated discount rate to obtain a projected rate of inflation of 2.25 percent. With his life care components, he also added percentages equal to the "real" growth of those components to 2.25 percent to obtain his growth rates. It is only because I had seen other Smith reports that I was able to figure out how those growth rates were calculated. Earlier in the deposition transcript, my retaining attorney had asked questions about what I assumed Smith had done to come up with those growth rates and Smith had answered in the affirmative. Thus, Smith's carefully couched last answer was correct. If an economist read this deposition transcript and his May 20, 2002 report, the economist would be able to replicate his work. Without questions I had developed for my retaining attorney, that would not be true. Most economists would not have been able to replicate Smith's calculations based on his reports in this case.

Stan Smith's Defense Reports Obtained in Late Spring 2002

I was able to obtain copies of two Stan Smith defense reports late in the spring of 2002. Both reports were written in 2000 and used as deposition exhibits on behalf of defendants. These defense reports were written on May 5, 2000 in the case of *Leitner v. Convention Services, Inc.*, and on October 19, 2000 in the case of *Garcia v. Mi-Jack Products, Inc.* Both defense cases were Illinois cases. I compared these defense reports with Stan Smith's plaintiff reports written on January 21, 2000 in *Tongard v. State of Alaska*, an Alaska case, and on March 10, 2000 in *Ramsey v. Synthes*, an Oklahoma case. Stan Smith's discount rates in the defense cases were 13.80 percent, 9.90 percent and 6.00 percent, compared with his discount rate in both plaintiff cases of 2.45 percent. Most other differences between the two sets of reports favor the defense and the plaintiff, respectively.

My Resignation from NAFE in October 2002

Based on the compilation of documents showing a number of ethical problems with the work of Stan Smith, I argued that some sort of motion expressing disapproval of Stan Smith's unethical practices should occur. The Board of Directors of the National Association of Forensic Economics felt differently and passed a resolution during a special telephonic Board meeting held in October that no such resolution would be permitted. When I learned of this resolution, I resigned from my membership in the National Association of Forensic Economics. I received from three of the seven voting members of the NAFE Board of Directors and the incoming president of NAFE indicating that they did not personally approve of Stan Smith's unethical practices and from one of the others indicating that the resolution should not have been interpreted as supporting Stan Smith, a fellow Board member. Nevertheless, I felt that I could not continue as a member of NAFE in light of what I knew about the unethical practices of Stan Smith, as indicated above.

Threats to Sue the University of Missouri at St. Louis and Tom Ireland Personally

On November 22, 2002, Andrew B. David, representing Stan Smith, sent letters to the Chancellor of the University of Missouri at Kansas City, several officials at the University of Missouri-St. Louis, and me a letter threatening to sue the University of Missouri and me personally on the basis of several comments I had supposedly made about Stan Smith being a dishonest person who had promised to tell less than the whole truth in deposition. No source

was given for comments attributed to me, but they seem to express the truth of my opinions about Stan Smith. The letters demanded that something be done about my use of university e-mail to “libel” Stan Smith and complained that several papers, including an earlier version of this paper, that were supposedly “libelous” of Stan Smith were posted on web space provided to me by the University of Missouri. Stan Smith followed this letter with a personal letter of his own on November 25, 2002, to the same effect. A second letter from Mr. David was sent on December 12, 2002, worrying that I was about to submit the two papers on my web site that were “libelous” to either *The Earnings Analyst* or the *Journal of Legal Economics*. A third letter was sent by Mr. David to the university counsel, but not me, on January 31, 2003 expressing surprise that there had been no response to his earlier letters. This remains a pending matter.

Estate of Whitfield v. Insulation Division, Inc., in January 2003

Both James D. Rodgers and this writer prepared long affidavits (19 pages and 14 pages, respectively) to oppose the admission of hedonic damages testimony in the Georgia case of Estate of Whitfield v. Insulation Division, Inc. The trial court judge did not permit Stan Smith to testify about hedonic damages.

The Second Letter to David Flynn Emerges in January, 2003

In January, 2003, Stan Smith provided a second version of his letter to David Flynn. This second version was also dated April 2, 1997. This copy was almost identical to the first version in appearance, but the indented paragraph had been modified to read as follows:

I will **NEVER** volunteer that I had been retained by your firm on other matters when I am on the opposite side of your case. If asked to list *only some of various* firms that I have worked for in the past, I will initially not mention your firm if you are on the opposite side. *If asked whether I have worked for your firm, I would of course say yes*. This policy holds true at deposition, at trial, and even in informal conversations with the attorneys who have retained me. Period.

[Italics were supplied for words added to the first version and strike-out used to indicate that the word “various” was dropped from the first version.]

It has been reported to me that Smith testified in January that someone at David Flynn’s law firm had seen the letter after it was sent to David Flynn. Stan Smith could not remember who that person was, but that person had supposedly called Stan Smith to indicate that the letter might be misunderstood. According to his testimony as reported to me, Stan Smith then produced the revised version of the letter containing the new language and sent it to David Flynn.

This raises the question of why this second letter was not brought up during Smith’s May 22, 2001 deposition in Hartman v. BNSF or during the angry discussions on the NAFE-L in April and May of 2002. The second letter would appear to answer Smith’s critics by suggesting that the wording in the first version was unfortunate and accidental when Smith really intended the meaning conveyed in the second letter. Even the second letter, however, suggests that Smith would respond strategically in answering questions in deposition and at trial rather than simply telling the truth, the whole truth and nothing but the truth. The second letter, assuming that it was

produced within several weeks of the first, conveys a message that is less unethical than the first letter. However, it still conveys a message that I regard as unethical.

Beyond March 2003

This account was written as of early March 2003. At some point in the near future, the Montana Supreme Court will issue its ruling about the admissibility of hedonic damages. *Dorn v. BNSF* has been appealed, presumably to the 9th Circuit Federal Court of Appeals. I have been retained in other cases against Stan Smith. Some of those cases involve hedonic damages and some do not. Stan Smith's threat to sue the University of Missouri at St. Louis and me personally has not yet been acted on. The story of Stan V. Smith and Thomas R. Ireland will continue.