

ARE VOCATIONAL EXPERTS NECESSARY FOR THE DEFENSE? A  
*RATIO BELLICA* FOR THE FORENSIC ACCOUNTANT TO INCLUDE  
VOCATIONAL HYPOTHETICALS IN ECONOMIC DAMAGE ANALYSIS

*James A. DiGabriele & Victor Nicholas A. Metallo*

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*James A. DiGabriele*\* & *Victor Nicholas A. Metallo*†

**Abstract**

*This Essay presents a novel solution to an overlooked question as to the most efficient way to present forensic accounting testimony for economic damages. Oftentimes, parties in a case employ forensic accountants to determine economic losses. But questions arise as to how a party who claims economic damages may have a duty to mitigate damages. Vocational experts are used to present possible employment alternatives in light of a plaintiff's medical injuries. This Essay posits the forensic accountant is in the best position to serve both functions: projecting economic loss and vocational alternatives. It also presents the conclusions of various studies as to how courts weigh a forensic*

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*accountant's credentials and projects how judges might view a forensic accountant who also serves as a vocational expert. This Essay will aid legal professionals in discerning how to employ a forensic accounting expert and perhaps spark community dialogue as to what constitutes "best practices" in this area.*

## INTRODUCTION

Forensic accounting spans a seventy-year history.<sup>1</sup> The discipline had its start in fraud detection, but today has expanded into "subfields" including business valuation, economic damages, computer forensics, e-discovery, bankruptcy, and pre-acquisition due diligence.<sup>2</sup> In the United States, CPAs make up the majority of the forensic accounting experts, although non-CPAs can be certified as fraud examiners and certified in financial forensics.<sup>3</sup> Moreover, internationally, they are used by global regulators for fraud investigation and prevention in developing countries.<sup>4</sup>

Yet an essential function of the forensic accountant is to assist the "forum," or "decision-making body,"<sup>5</sup> which in most cases is a jury, to understand the "gap" between two core competing forensic accounting concepts: "perception and reality."<sup>6</sup>

Take fraud cases, as an example, where generally the fraudster intends to benefit financially by deceiving an unwitting victim and depriving them of their money.<sup>7</sup> From the fraudster's point of view, he or she "perceives" they will never get caught, or to paraphrase what is known in financial circles as the proverbial

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<sup>1</sup> Yigal Rechtman, *The Past, Present and Future of Forensic Accounting*, THE CPA J. (Apr. 2020), <https://www.cpajournal.com/2020/04/10/the-past-present-and-future-of-forensic-accounting>.

<sup>2</sup> *Id.* See also Richard Fecter, *The Forensic Accountant's Role in Due Diligence*, BERKOWITZ, POLLAK, & BRANT (Mar. 5, 2013), <https://www.bpbcpa.com/the-forensic-accountants-role-in-due-diligence-by-richard-fechter>.

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Id.* ("The English word was derived from a Latin word ... meaning 'of the marketplace or forum, public,' which in turn comes from the Latin word forum, meaning 'market place, forum.'" The forum can be any decision-making authority within its context: judges, jury, public officials, insurance companies, or investors are all examples of forums for which the results of a forensic accounting analysis is delivered and decided upon.").

<sup>6</sup> *Id.*

<sup>7</sup> Rechtman, *supra* note 1.

initialism, “IBG/YBG,” that is, “I’ll be gone, and you’ll be gone”<sup>8</sup> before “they find us.” Thus, in fraud investigations, the forensic accountant brings “perception” closer to “reality” for the factfinder by aggregating existing data about the fraud and making educated inferences about data that is missing.<sup>9</sup>

In testimony involving other “subfields,” such as valuation and economic damages, a forensic accountant’s calculations use reality to determine perception.<sup>10</sup> The “gap” to be filled by the forensic accountant’s testimony is what one “perceives” something to be worth or what one economically believes is lost due to an injury. The testimony’s probative value depends upon what the evidence shows to be the “reality.”<sup>11</sup> The forensic accountant’s testimony, then, is essential to truth in fact-finding, because on this information and in conjunction with other evidence, the jury can better decide how to apportion damages.

Forensic accountants arguably have led the field in transforming damage calculations from theory into practice.<sup>12</sup> Parties to a lawsuit generally rely upon forensic accountants to present “before and after” damage projections to prove or disprove an allegation or a legal theory.<sup>13</sup> For example, plaintiffs will use them to calculate loss of earnings from an injury caused by a defendant’s negligence. Defendants will also hire them to counter that the plaintiff was not as economically damaged as he or she claims.

But defendants will also use another strategy. They may employ vocational experts in addition to forensic accountants to argue the plaintiff failed to mitigate damages. In other words, even if the plaintiff was injured as claimed, he or she could have found another means of employment despite the injury.

Vocational experts are routinely used in the social security disability benefits process.<sup>14</sup> They assist an administrative law judge in determining whether or not a person who is claiming disability benefits can find suitable work despite the disability.<sup>15</sup> Similar to forensic accountants, vocational experts also testify in

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<sup>8</sup> Eric Dash, *What’s Really Wrong with Wall Street Pay*, N.Y. TIMES (Sept. 18, 2009), <https://economix.blogs.nytimes.com/2009/09/18/whats-really-wrong-with-wall-street-pay/>.

<sup>9</sup> Rechtman, *supra* note 1.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> See *Disability Benefits Help Page*, SOCIAL SECURITY ADMINISTRATION, <https://www.disability-benefits-help.org/glossary/vocational-expert>.

<sup>15</sup> *Hearing and Appeals*, SOCIAL SECURITY ADMINISTRATION, <https://www.ssa.gov/appeals/ve.html>.

personal injury and employment cases,<sup>16</sup> but critics hold that examination of vocational data is not an “exact science.”<sup>17</sup> Moreover, there are debatably no clear standards as to whom may become a vocational expert.<sup>18</sup>

This essay argues forensic accountants are in a better position through education and training to evaluate loss of earnings cases than a vocational expert. They can incorporate in their analysis tax consequences, fringe benefits, and investment opportunities lost, where the vocational expert may not have the qualifications to opine in those areas.

Moreover, in addition to the above, forensic accountants can opine as to what impact, if any, an alternative vocation would have on damages. Certainly, for the client, using one expert instead of two is more economical and less time consuming for the attorneys who would have to depose duplicative experts. When testifying for the plaintiff, the forensic accountant can anticipate defendant’s argument as to whether loss of earnings would be as significant if the plaintiff were employed in another job. In contrast, the forensic accountant testifying for the defendant would include an alternative vocation to support the argument the plaintiff can mitigate damages. As this essay will show, courts tend to favor forensic accountants with multiple credentials, which is why in addition to the strategic benefit a forensic accountant that serves as a certified vocational expert may have a better chance of surviving a *Daubert* challenge.

Part II of this essay presents an overview of the federal rules surrounding expert testimony, including a survey of how the courts view forensic accounting testimony as evidence in various types of litigation, including tax, fraud, and bankruptcy valuation cases. Part III reviews the historical and contemporary use

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<sup>16</sup> Julie Sawyer-Little, *Vocational Damages in Personal Injury Cases*, ATTORNEY AT LAW MAGAZINE NORTH CAROLINA TRIANGLE, Vol. 4, No. 1, 14-15 (2016), <http://digitaleditions.walworthprintgroup.com/publication/?m=30195&i=288810&p=14>.

<sup>17</sup> Nathaniel O. Hubley, *The Untouchables: Why a Vocational Expert's Testimony in Social Security Disability Hearings Cannot Be Touched*, 43 VAL. U. L. REV. 353, 353 (2008); see also David F. Traver, *Social Security Disability Advocate's Handbook* § 1400 (2006).

<sup>18</sup> See *id.* at 356; see also *The American Board of Vocational Experts*, <https://abve.net> (stating a broad range of disciplines including “rehabilitation, psychology, economics, assessments and consulting.”); see also *Becoming a Vocational Expert*, SOCIAL SECURITY ADMINISTRATION, <https://www.ssa.gov/appeals/ve.html> (describing general knowledge of “labor markets,” “occupational trends,” and “[i]nvolvement in or knowledge of vocational counseling and the job placement of adult, handicapped workers into jobs”).

of vocational experts, including the positives and negatives of permitting such testimony. In Part IV, this essay argues the better strategy is to use a forensic accountant to make a more comprehensive analysis of loss of earnings, including the impact on those earnings by choosing among probable alternative vocations. Finally, Part V concludes the forensic accountant is a better choice of expert to interpret and deliver loss of earnings evidence to a jury.

## I. OVERVIEW OF EXPERT WITNESS TESTIMONY UNDER THE FEDERAL RULES

The U.S. Supreme Court ruled in 1993 that trial judges have a gatekeeper duty to assure that scientific testimony is reliable and relevant. *Daubert v. Merrell Dow Pharm., Inc.*<sup>19</sup> focused on two basic themes: (1) expert testimony should be scientific and based on knowledge using the scientific method; and (2) the scientific information needs to help the trier of fact understand the evidence, provided the reasoning or methodology in the testimony is scientifically valid. In a corollary case, *Kumho Tire Company, Inc., v. Carmichael*,<sup>20</sup> the Supreme Court established that a trial judge's gatekeeper responsibility applies to technical testimony as well.<sup>21</sup>

To qualify as an expert witness under Federal Rule of Evidence 702, a person should possess the necessary skills, knowledge, experience, and education within the expert discipline.<sup>22</sup> Yet, a judge has great latitude to exclude an expert. When considering whether to include or exclude an expert, judges turn to the *Daubert* factors: (1) whether the theory or technique in question can be (and has been) tested; (2) whether the theory or technique in question has been subjected to peer review and publication; (3) whether the theory or technique has a known, or potential error rate; and, (4) whether the theory or technique has attracted widespread acceptance within the relevant community.<sup>23</sup> The trial court is the

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<sup>19</sup> *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 587 (1993).

<sup>20</sup> *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 138 (1999).

<sup>21</sup> Crumbley, D.L., & Cheng, C.C., *Avoid Losing a Daubert Challenge: Some Best Practices for Expert Witnesses*, 12(1), THE ATA J. OF LEGAL TAX RES., 41, 41-53 (2014).

<sup>22</sup> Fed. R. Evid. 702. 4

<sup>23</sup> See *Daubert*, 509 U.S. at 593; *Kumho*, 526 U.S. at 159, (Scalia, J concurring) (“I think it worth adding that it is not discretion to perform the [gatekeeping] function inadequately. . . . ‘the Daubert factors are not holy writ.’”); see also Yee, K. K., *Dueling Experts, Evidence Production, and Imperfect Verification*, 28, INT’L REV. OF LAW AND ECON., 246, 246–55, (2008).

typical venue for *Daubert* decisions. A *Daubert* review applies to scientific disputes, whereas technical cases involving experts who are not scientists, e.g. forensic accountants, involve *Kumho Tire's* “technical” and “other specialized knowledge.”<sup>24</sup>

A. *The Role of the Forensic Accountant Expert in Testimony-Studies of Judges' Views Regarding Forensic Accounting and Rulings Involving Potential Bias*

Forensic accountants provide expert testimony in various cases: “business termination, bankruptcy, loss of earnings, accounting for assets, antitrust price fixing, water utility rate disputes, trademark infringement profits, independent contractor or employee determination, breach of contract, business valuations, shareholder disputes, estate distribution among beneficiaries, divorce disputes, malpractice litigation against CPAs as well as tax-related matters such as tax fraud, various tax assessment disputes and disallowance of exempt status.”<sup>25</sup> There are times when financial litigation includes scientific testing such as a difference of means-testing and regression analysis.<sup>26</sup>

Forensic accountants testify in both state and federal courts, but are generally subject to federal standards since eighty-four percent of the states have adopted *Daubert's* precepts for vetting expert testimony.<sup>27</sup> On this basis, it is helpful for forensic accountants to understand the rules surrounding expert testimony to prepare them to testify in either federal or state court. As gatekeepers of information before the jury, and in determining what is relevant evidence, judges will oftentimes decide on motions *in limine* to allow or exclude a forensic accountants' findings. Therefore, it is up to the discretion of the trial judge to determine whether to exclude forensic accounting expert testimony. The primary grounds for exclusion are lack of independence, conflicts of interest, lack of objectivity, and interpretation of the law.<sup>28</sup>

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<sup>24</sup> *Kumho*, 526 U.S. at 141.

<sup>25</sup> Muehlmann, B., P. A. Burnaby, and M. A. Howe., *The Use of Forensic Accounting Experts in Tax Cases as Identified in Court Opinions*. 4(2), J. OF FORENSIC & INVESTIGATIVE ACCT., 3, 3–4, (2012).

<sup>26</sup> Crumbley, *supra* note 21, at 44.

<sup>27</sup> J.L. Hill, *The States of Daubert After Florida*, LEX VISIO (Jul. 9, 2020), <https://www.lexvisio.com/article/2019/07/09/the-states-of-daubert-after-florida> (last visited Jan. 4, 2021) (Florida became the 42<sup>nd</sup> state to adopt the *Daubert* factors).

<sup>28</sup> Crumbley, *supra* note 21, at 41.

Communicating evidence to juries on complex forensic issues is certainly an essential skill the forensic accountant needs to develop, as well as getting across the notion that the expert is assessing and presenting their findings objectively, even though that expert appears on the side of a party. Dispelling bias is something the forensic accountant needs to accomplish not only to get past the *Daubert/Kumho* hurdle of reliability, but also to maintain objectivity before a jury.

In one study surveying various types of litigation, including matrimonial litigation, valuation of economics damages in civil litigation, issues in partner/shareholder disputes, merger/acquisition litigation, and bankruptcy, the researchers attempted to answer the question as to whether the forensic accounting experts conclusions is simply biased towards the party that is paying.<sup>29</sup> The study found that expert witness valuation opinions can differ significantly from one to another,<sup>30</sup> and it suggests valuation biases have been persistent side effects in different areas of valuation litigation.<sup>31</sup> The results from the study also indicated that objectivity among various credentialed valuation experts may be regularly compromised, despite codes of conduct that govern the various disciplines.<sup>32</sup>

According to a tax litigation study, judges generally view forensic accounting testimony in a positive light.<sup>33</sup> The study considered how often forensic accountants appear in various tax venues; how the experts are identified; the reasons for retaining the expert; the specific issues addressed; and judges' opinions of the forensic accounting experts' performance. Under the sample, the study concluded that judges viewed the testimony of a forensic accounting expert generally as "effective," but predominantly favor those who are credentialed, meaning they hold a CPA, CFE, or CVA.<sup>34</sup> This advances the argument that since courts prefer forensic accounting experts with the relevant experience and credentials,<sup>35</sup> it would behoove any forensic accountant who testifies in damage assessments to certify as a vocational expert, especially when opining on possible vocation alternatives. Arguably, having the certification would give more weight

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<sup>29</sup> James A. DiGabriele, *The Adversarial Bias of Accounting Experts in Financial Litigation: An Empirical Analysis of Compromised Objectivity in Accounting Expert Testimony*, 8 J. ACCT., ETHICS & PUB. POL'Y, 2007, at 1, 4.

<sup>30</sup> *Id.* at 11.

<sup>31</sup> *Id.* at 12.

<sup>32</sup> *Id.*

<sup>33</sup> Brigitte W. Muehlmann, Priscilla Burnaby & Martha Howe, *The Use of Forensic Accounting Experts in Tax Cases as Identified in Court Opinions*, 4 J. FORENSIC & INVESTIGATIVE ACCT., no. 2, 2012, at 1.

<sup>34</sup> *Id.* at 22, 34.

<sup>35</sup> *Id.* at 21.



to that testimony, since they may be deposed as to whether they considered those possibilities.

In addition, according to this study, when a forensic accountant's testimony is rejected by a court, the disqualification is not only due to common factors, such as not having enough time to do a comprehensive review.<sup>36</sup> Rather, the rejection is essentially based on the most obvious reason, which is lack of certifying credentials. Most notably, experts who had IRS experience, dual or multiple certifications, such as the CPA, CFE, CVA, or CMC, are considered more reliable experts than someone who is simply a "self-proclaimed" forensic accounting expert.<sup>37</sup> It is vital to the case that the forensic accountant's testimony survives a motion *in limine*. A motion *in limine* is the general mechanism for opposing counsel to remove or limit a forensic accountant's testimony, so having an expert's report rejected at this stage of the litigation, due to perhaps a finding the proffered expert lacked credentials, can be a costly gamble to a client.<sup>38</sup>

*B. Other Studies on Potential Biases in Determining the Admissibility of Forensic Accounting Testimony*

Generally, judges rule objectively in evaluating the testimony provided by accounting experts in *Daubert/Kumho* challenges, but at least two studies suggest several biases may enter the analysis, including gender; political affiliations; age of the case; types of assets evaluated; and the number of experts proffered by a party. There were mixed results for the association between court valuations and case age, complexity, size, and court venue.<sup>39</sup> Further, the tenure of the judge was not significant in court valuations.<sup>40</sup> But there are other factors that show a correlation to a judge's decision whether to include or exclude forensic accounting testimony.

One study by Pippin and Wong involving tax cases reveals most judges' decisions on permitting forensic accounting testimony are binary. In other words, the judge will either take the side of the IRS or the taxpayer, instead of finding a

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<sup>36</sup> *Id.* at 19.

<sup>37</sup> *Id.*

<sup>38</sup> Madeline A. Domino, Matthew Stradiot & Mariah Webinger, *Factors Which May Bias Judges' Decisions to Exclude Accounting Expert Witnesses Testimony*, 28 ACCT. RSCH. J. 59, 62 (2015).

<sup>39</sup> Mark Jackson, Sonja Pippin & Jeffery A. Wong, *Asset and Business Valuation in Estate Tax Cases: The Role of the Courts*, 35 J. AM. TAX ASS'N. 121 (2013).

<sup>40</sup> *Id.* at 131.

happy median.<sup>41</sup> However, “factors such as the judge’s political affiliation, the nature of the asset being valued, the number of appraisers used by the taxpayer, and the age and complexity of the case are all related to the court’s valuation decision.”<sup>42</sup> The results from the study also signal that presenting an extreme value to the court and expecting the judge to settle through a negotiated value is generally untenable.<sup>43</sup>

Another study conducted by the same researchers suggested that gender and tenure of judges are correlated to outcomes in estate tax cases.<sup>44</sup> This study concluded a disparity of outcomes in estate value estimates. The researchers found that male judges tend to favor taxpayers with lower asset valuations.<sup>45</sup> In comparison, female judges tend to favor the government with higher valuations, “consistent with the argument that females are more liberal and, therefore, more likely to be ‘pro-government,’ while males tend to be more conservative and more ‘anti-tax.’”<sup>46</sup> The findings are robust while controlling for political affiliation, whereas “Republican appointees” are inclined to rule for the taxpayer.<sup>47</sup>

Aside from the above challenges a forensic accountant may face, there is also the problem of presenting duplicative experts to curry favor with a court. For example, a party may employ a strategy to provide multiple experts on business valuations to ensure their case survives dismissal in case one expert fails the *Daubert/Kumho* test. While there is no significant relationship between the “number” of business valuation experts proffered, when multiple experts are presented to a court as to which valuation makes it to the jury,<sup>48</sup> judges tend to rule for the lower value of the experts presented. What this shows is that having a forensic accountant and a vocational expert present for the same party may not benefit the client more. Instead, having a credentialed forensic accountant include a vocational analysis within a damage report may be more advantageous and avoid overwhelming the court with extraneous testimony.

In sum, the above studies show a forensic accounting expert faces many challenges in court disassociated from their underlying mathematical conclusions. It stands to reason, however, that given these challenges, the more credentials the

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<sup>41</sup> *Id.* at 131.

<sup>42</sup> *Id.* at 122.

<sup>43</sup> *Id.* at 133.

<sup>44</sup> Mark Jackson, Sonja Pippin & Jeffrey A. Wong, *Court Rulings in Estate Tax Cases: Is Gender a Factor*, 12(2) THE ATA J. OF LEGAL TAX RES. 74-84 (2014).

<sup>45</sup> *Id.* at 82.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> Jackson, *supra* note 39, at 125.

expert presents to the court, including that of a vocational expert when such an expert is needed, the less subjective biases can be dispositive on surviving a *Daubert/Kumho* hearing.

C. *The Seminal Bankruptcy Case of In Re Med Diversified Can Be a Source of Guidance for Courts in Determining the Adequacy of Forensic Accounting Credentials*

Price Waterhouse notes that courts exclude forensic accountant testimony mostly when they consider it unreliable.<sup>49</sup> The way experts use various methodologies and a lack of sufficient data are consistently the main reasons for exclusion. But there is another problem when experts either lack the requisite credentials or shift their testimony beyond the scope of their role. Courts can exclude forensic accounting testimony because the expert acted more as an advocate rather than an impartial observer. Arguably, this can happen when a forensic accountant tries to opine in areas beyond their expertise to bolster their credibility to further aid the client. As will be discussed later, this may also be seen at times when vocational options have not been considered.

Generally, when it comes to valuation disputes, the bankruptcy courts recognize three accepted methodologies for valuing debtor companies: (1) the discounted cash flow (DCF) provides a present value based on future cash flows; (2) valuing a company based on “comparable” or trading prices of similar companies; and (3) finding a value based on the average prices for mergers and acquisitions of similar institutions or the “comparable transactions” approach.<sup>50</sup> Courts are reluctant to veer from these three methodologies, even though they are not totally reliable, as judges are “often placed into the difficult position of having to choose between two extreme polar values.”<sup>51</sup> The most commonly used DCF method can “sometimes rest on a shifting foundations of assumptions and subjectivity”<sup>52</sup> and can lead to disproportionate results.

*In Re Med Diversified, Inc.*, the Trust brought an action to disqualify defendant’s expert witness opining on a constructive fraudulent transfer of \$7.5

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<sup>49</sup> PWC FORENSIC SERVICES, EMERGING TRENDS, DAUBERT CHALLENGES TO FINANCIAL EXPERTS, A YEARLY STUDY OF TRENDS AND OUTCOMES 2000–2015, <https://www.pwc.com/us/en/forensic-services/publications/assets/pwc-daubert-study-whitepaper.pdf> (May 2016).

<sup>50</sup> See McFaul, et al., *Are A Debtor's Trading Prices Reliable Evidence of Its Enterprise Value?*, AM. BANKR. INST. J. 56 (2011).

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

million dollars, because although he had certain accounting experience, he did not have any formal training in business valuations.<sup>53</sup> In an adversary proceeding, the plaintiffs attempted to recover \$7.5 million in an alleged fraudulent transfer of stock through a motion *in limine* to exclude the defendant's expert testimony.<sup>54</sup> This was a case of first impression for the bankruptcy court.<sup>55</sup>

The factual background of the case involves a Stock Purchase Agreement (SPA) where plaintiff agreed to buy all defendants' shares for \$15 million in cash, \$22.5 million in notes, and \$20 million in shares of defendants' stock at closing.<sup>56</sup> Subsequently, the parties entered into a modification of the SPA that in lieu of the \$20 million purchase of shares, a \$40 million promissory note would replace that transaction.<sup>57</sup> The parties then negotiated an additional amendment to the modification, which was reflected by a writing yet-unsigned.<sup>58</sup> The amendment gave plaintiff the option of purchasing all of defendant's shares for \$7.5 million within a six month period.<sup>59</sup> The plaintiff would lose the right to a credit against the "Exercise Price" of \$1 million of the \$7.5 million each month of the approximately six months.<sup>60</sup> The plaintiff argued contingent on the amendment's enforceability, it would forfeit any right to recover the \$7.5 million if it failed to close prior to the end of the six-month period.<sup>61</sup>

From the \$15 million in cash deposited in the joint escrow account (the amount in controversy), \$7.5 million, was released in two payments: \$4 million to defendant company and \$3.5 million to the principal shareholder, who spent it for "other personal investments."<sup>62</sup> The plaintiff did not close on the purchase, but the principal shareholder retained the money.<sup>63</sup> Initially, the plaintiff filed suit in state court to demand the return of the \$7.5 million and subsequently filed a Chapter 11 petition for relief.<sup>64</sup>

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<sup>53</sup> *In Re Med Diversified, Inc. v. Addus Healthcare, Inc.*, 334 B.R. 89, 96 (E.D. Bankr. 2005).

<sup>54</sup> *Id.* at 92.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.* at 93.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *In Re Med Diversified, Inc.*, 334 B.R. at 96.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 93–94.

<sup>63</sup> *Id.* at 94.

<sup>64</sup> *Id.*

The defendants proffered an expert “on all issues of business valuation” which the plaintiffs challenged as to his qualifications.<sup>65</sup> The expert admitted he had no peer-granted certifications and that “his Expert Report is not to be read as a certified business valuation report . . . that he personally does not issue business valuation reports, although he relies upon members of his support staff who are certified business valuers for their input.”<sup>66</sup> The expert further admitted the report cannot be “considered a certified business appraisal of value” since it did not meet the uniform standards accepted within the profession.<sup>67</sup> The court did note, however, sufficient experience in the relevant field can overcome formal training and certification.<sup>68</sup>

Ultimately, the court rejected the expert on these grounds: (1) given his twenty-year experience as an accountant and serving as a liquidating agent or bankruptcy trustee does not equate to a “satisfactory substitute” for formal education and training in business valuations; (2) the expert “did not employ the same level of intellectual rigor that characterizes the practice of an expert in the field of business valuations; and (3) an ethical conflict based on his prior engagements as a fraud auditor.<sup>69</sup>

In addition, the court excluded the expert on the grounds that he was negligent in attempting to apply peer-reviewed methods of business evaluation. In particular, the court noted the bias in the selection of subjective inputs in the valuation models of the subject company and found there was bias in applying the discounted cash flow method (DCF) due to a lack of details regarding forecasted revenues.<sup>70</sup> The court found that the expert selected different periods to calculate each multiple used in the comparable companies' valuation method to benefit their client.<sup>71</sup> Moreover, the court found the expert selected a small group of comparable transactions and excluded transactions that were considered most comparable, therefore skewing the value. In sum, the expert compromised the objectivity standard by moving from impartiality to advocacy. Moreover, the case shows the significance and importance of being properly credentialed before testifying.

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<sup>65</sup> *In Re Med Diversified, Inc.*, 334 B.R. at 94.

<sup>66</sup> *Id.* at 96.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 97.

<sup>70</sup> *In Re Med Diversified, Inc.*, 334 B.R. at 98.

<sup>71</sup> *Id.* at 90–102. *But see* *Celebrity Cruises Inc. v. Essef Corp.*, 434 F.Supp.2d 169, 182 (S.D.N. Y. 2006) (holding loss profits analysis by an expert with a finance and international banking background was qualified as an expert, however, rejected the testimony based on the experts' pricing factor led to inadequate reliability).

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## II. THE HISTORICAL AND CONTEMPORARY USE OF VOCATIONAL EXPERTS

Vocational experts are persons who opine as to the monetary loss of earning capacity and have been used by the courts over physicians, at least since the late 1970s.<sup>72</sup> Essentially, the vocational expert “specializes in employment placement and occupational requirements.”<sup>73</sup> Their purpose is to provide the court with an assessment as to what skills and exertion levels are required for any alternative work and whether the claimant can transfer his or her skills over to that new position.<sup>74</sup> For example, if the physician says the injured party has permanent physical restrictions, the vocational expert will attempt to assess a job based on loss of earnings and loss of access to jobs available in the future.<sup>75</sup>

Vocational experts are widely used in Social Security disability benefits cases. Considered to be a relatively new discipline, vocational expert analysis and testimony is “a building block” of the Social Security administration process.<sup>76</sup> A vocational expert testifying in a Social Security disability case will rely on the Dictionary of Occupational Titles (DOT) to formulate an opinion, but critics hold the data within the DOT is not entirely reliable.<sup>77</sup> The DOT defines various types of jobs. Although vocational experts can become certified by the American Board of Vocational Experts, the discipline is not an exact science.<sup>78</sup>

The interesting paradox is that courts seem to rely upon the vocational expert as much as what has been determined medically, or at least, where an impairment is not listed in the Social Security Regulations. Thus, if the claimant has an unlisted impairment, the question becomes whether the claimant can do the work they did before the impairment considering their “residual functional capacity” (RFC).<sup>79</sup> If

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<sup>72</sup> Jay E. Grenig & Nathan A. Fishbach, *Loss of earning capacity—Role of vocational expert*, 2A WIS. PRAC., METHODS OF PRACTICE § 90:80 (5<sup>th</sup> ed.) (Oct. 2020).

<sup>73</sup> *Id.* at 368.

<sup>74</sup> Carolyn A. Kubitschek, *Social Security Disability: Law and Procedure in Federal Court*, WEST PUBLISHING, 158, 224 (1994).

<sup>75</sup> *Id.*

<sup>76</sup> Hubley, *supra* note 17, at 354–55.

<sup>77</sup> *Id.*

<sup>78</sup> *Id.* at 355; *see generally* AMERICAN BOARD OF VOCATIONAL EXPERTS, <https://abve.net>.

<sup>79</sup> 20 C.F.R. § 404.1520(f) (2012).

the answer is in the negative, then the vocational expert will determine what work the claimant can do within the national economy based on the person's RFC, age, education, and work experience.<sup>80</sup> Arguably, this is the point where the administrative law judge relies heavily upon the vocational expert's testimony.<sup>81</sup>

The vocational expert's testimony is invaluable to the judge because both the judge and the claimant do not have the background to analyze what "exertion and skill" is necessary to the work listed in the DOT.<sup>82</sup> The testimony then becomes the "foundation" of the judge's decision.<sup>83</sup> What this indicates is that a forensic accountant who can opine not only as to damage calculations, but also could give some indication of suitable work alternatives, would be able to provide broader context to the conclusion. That places a forensic accountant in a better position before a jury in terms of credibility than simply the proffered testimony of the vocational expert without any damage calculations.

### III. FORENSIC ACCOUNTANTS, THROUGH THEIR EDUCATION AND TRAINING, ARE BETTER SUITED TO INCLUDE ALTERNATIVE EMPLOYMENT OPPORTUNITIES IN THEIR MONETARY DAMAGE ANALYSIS

The notion of a forensic accountant providing employability analysis appears to be a novel trial strategy. Although there is nothing under the federal rules to require it, the proposition is plausible since forensic accountants, through their education and training, may be in a better position to supplement their findings with probable vocational alternatives in economic impact analyses. A New Jersey sex-discrimination case is on point with the theory.

In general, plaintiffs in employment discrimination cases must show lost income as damages due to defendant's intent to discriminate.<sup>84</sup> Lost income is the difference between the income that would have been gained if the plaintiff continued in their job and what he or she is earning as a result of the separation from employment.<sup>85</sup> The defendant's burden is to show the plaintiff could have earned more in a different job but for their failure to mitigate damages.<sup>86</sup> For future damages, a plaintiff must show what he or she would have earned if defendant did not engage in discriminatory conduct and how long the plaintiff would have

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<sup>80</sup> Hubley, *supra* note 17, at 365.

<sup>81</sup> *Id.* at 367.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Quinlan v. Curtiss-Wright Corp., 425 N.J. Super. 335, 364 (2012).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

received that income compared to the reasonable likelihood the plaintiff would not earn the same income in an alternative job.<sup>87</sup>

In *Quinlan v. Curtiss-Wright Corp.*, plaintiff Joyce Quinlan worked for defendant company for approximately 23 years.<sup>88</sup> She was applying for promotion to Corporate Director of Human Resources and Management Development, but the company selected a male for the position who became her immediate supervisor.<sup>89</sup> Plaintiff filed a lawsuit under the New Jersey Law Against Discrimination (NJLAD) statute claiming gender discrimination primarily based on her then-supervisor's lack of HR experience compared to hers as well as the defendant's lack of oversight in allowing an office environment replete with gender discrimination.<sup>90</sup> Among the types of relief plaintiff sought were backpay, front pay, "retaliatory discharge," and punitive damages.<sup>91</sup>

The case was tried with the first jury deadlocked.<sup>92</sup> Plaintiff succeeded in the second trial with the jury awarding \$4,565,749 in compensatory damages, which included \$3,650,318 in future earnings losses and front pay.<sup>93</sup> Punitive damages were awarded in the same amount as compensatory damages.<sup>94</sup> A final judgement was entered in the amount of \$10,649,117, which included attorneys' fees, pre-judgement interest, and negative tax consequences.<sup>95</sup>

Part of the court's decision, which is pertinent to the central argument of this essay, concerned the front pay issue and the disposition of the expert used to calculate that amount. The court explains that "front pay" is a legal remedy to make the plaintiff "whole" again.<sup>96</sup> Through expert testimony, a plaintiff may show the defendant wrongfully discharged the plaintiff and the harm is projected to be "ongoing" long after the trial is concluded.<sup>97</sup> Both federal and state laws recognize front pay calculations to be added as damages to put the plaintiff back into a position (or as close as reasonably possible) had no discrimination occurred.<sup>98</sup> "Front pay is conceptually related to, but slightly different from, the notion of

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<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 343.

<sup>89</sup> *Quinlan*, 425 N.J. Super. at 343.

<sup>90</sup> *Id.* at 344.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 345.

<sup>94</sup> *Quinlan*, 425 N.J. Super. at 345.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 350.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*



damages awarded to a plaintiff for lost future earnings in a tort case.”<sup>99</sup>

The court alluded to the Seventh Circuit’s distinction between front pay and loss of future earnings as the latter is a “broader” category where the discriminatory firing results in a “diminution” of earnings over time,<sup>100</sup> or a before-and-after value of earnings due to the causal act or omission. Front pay is intended to compensate from the period of immediate loss post-firing to a presumed point where the employee would have naturally left the place of employment.<sup>101</sup> The court implied the aggrieved can receive consequential damages flowing from any defamation suffered where the person discriminatorily fired will have difficulty finding new work due to loss of reputation.<sup>102</sup> Generally, courts do not automatically presume either way whether the employee would have continued with the employer; therefore, courts would provide a test to determine “relevant factors” to award front pay.<sup>103</sup> But there is still an expectation that a plaintiff made reasonable efforts to mitigate their damages.<sup>104</sup>

The court in *Quinlan* focused on the expert’s role in proving damages. The triers of fact, and arguably by extension, experts, are not to presume damages that are “unduly speculative” or to damages beyond those claimed.<sup>105</sup> The plaintiff in a loss of income case, including front pay damages, may not have to prove actual mitigation of damages, but the plaintiff must prove the “likely duration” of damages going forward.<sup>106</sup> In other words, there is still a duty to make reasonable efforts to mitigate damages, but neither party bears a specific burden that such future mitigation will or will not occur.”<sup>107</sup>

In practically all cases of economic damages, plaintiffs must show by a preponderance of the evidence that their loss is either permanent or will reasonably last for a demonstrable time period. The *Quinlan* court noted there is no requirement that either party produce an employability expert,<sup>108</sup> and other jurisdictions might follow the same rubric. The expert which plaintiff proffered in the case did not render an employability opinion, nor did he qualify to give one.<sup>109</sup>

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<sup>99</sup> *Quinlan*, 425 N.J. Super. at 350.

<sup>100</sup> *Id.* (citing *Williams v. Pharmacia, Inc.*, 137 F.3d 944, 953–54 (7th Cir. 1998)).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 352.

<sup>104</sup> *Id.*

<sup>105</sup> *Quinlan*, 425 N.J. Super. at 344–55.

<sup>106</sup> *Id.* at 369.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 370.

<sup>109</sup> *Id.* at 372.

Nonetheless, the court said there was no abuse of discretion by the trial court to allow the expert to testify as to his projection of plaintiff's lost income through her anticipated retirement date.<sup>110</sup>

The expert did not offer any opinion as to why the plaintiff would not be able to earn similar income in another position as she had with the defendant.<sup>111</sup> But the court found the trial judge should have at least instructed the jury "to determine whether plaintiff proved [the expert's] projection was consistent with a reasonable time period for plaintiff to earn income comparable to what she would have earned with defendant if she had not been discharged."<sup>112</sup> This is arguably where it would have been helpful if the plaintiff's forensic accountant expert had been qualified as a vocational expert to make the connection for the jury as to the probability the plaintiff could not have gained comparable employment in the future.

Defendant's expert opined the plaintiff "could be expected to recover her prior level of earnings within five years" and that her future damages would cease if she found alternative employment.<sup>113</sup> The expert, however, was also not qualified to opine on employability.<sup>114</sup> This left the jury at a crossroad as to which party bore the responsibility to prove loss of income. Although not necessarily a requirement, as the court explained, a forensic accountant for either side could opine as to the likely duration of the loss of income, thus assisting the trier of fact who has the burden to make the ultimate decision.

#### CONCLUSION

Forensic accountants provide an invaluable service to help judges and juries understand the numbers in order to bring "perception" closer to reality. Economic damage analysis is certainly part of torts and employment cases, and plaintiffs in any case have the burden to prove those damages are more likely than not caused by the defendant. Vocational experts can also be employed in these venues to either determine or limit damages depending on what kind of post-termination work is available to a plaintiff.

Most jurisdictions do not require either plaintiff or defendant experts to show the plaintiff failed to mitigate damages per se by failing to obtain another job; however, plaintiffs should be able to show a jury a good-faith effort was made to find alternative employment, or if no other employment could be found, that the

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<sup>110</sup> *Quinlan*, 425 N.J. Super. at 372.

<sup>111</sup> *Id.* at 373.

<sup>112</sup> *Id.*

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

damages flowed from defendant's actions. Arguably, the best expert to aid a trier of fact would be a forensic accountant, who has the vocational background to present to a jury competing conclusions and the impact of probable lost earnings.