

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

September 2004 Term

No. 31703

TIFINIE M. COOK,
Plaintiff Below, Appellant

v.

FAITH WOODS COOK,
Defendant Below, Appellee

FILED
December 1, 2004

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SUPREME COURT OF APPEALS
OF WEST VIRGINIA

Certified Question from the Circuit Court of Kanawha County
The Honorable Irene C. Berger, Judge
Civil Action No. 00-C-3159

CERTIFIED QUESTION ANSWERED

Submitted: September 8, 2004

Filed: December 1, 2004

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JUSTICE ALBRIGHT delivered the Opinion of the Court.

JUSTICE DAVIS concurs and reserves the right to file a concurring opinion.

SYLLABUS BY THE COURT

1. “The appellate standard of review of questions of law answered and certified by a circuit court is *de novo*.” Syl. Pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 475 S.E.2d 172 (1996).

2. “Future damages are those sums awarded to an injured party for, among other things: (1) Residuals or future effects of an injury which have reduced the capability of an individual to function as a whole man; (2) future pain and suffering; (3) loss or impairment of earning capacity; and (4) future medical expenses.” Syl. Pt. 10, *Jordan v. Bero*, 158 W.Va. 28, 210 S.E.2d 618 (1974).

3. “To form a legal basis for recovery of future permanent consequences of the negligent infliction of a personal injury, it must appear with reasonable certainty that such consequences will result from the injury; contingent or merely possible future injurious effects are too remote and speculative to support a lawful recovery.” Syl. Pt. 7, *Jordan v. Bero*, 158 W.Va. 28, 210 S.E.2d 618 (1974).

4. “The permanency or future effect of any injury must be proven with reasonable certainty in order to permit a jury to award an injured party future damages.” Syl. Pt. 9, *Jordan v. Bero*, 158 W.Va. 28, 210 S.E.2d 618 (1974).

5. The test governing future damages as set forth in syllabus points seven and nine of *Jordan v. Bero*, 158 W.Va. 28, 210 S.E.2d 618 (1974), requires that either the negligently inflicted injury or its direct consequences be proven by a reasonable degree of certainty to have a lasting, permanent future effect.

6. “Where an injury is of such a character as to be obvious, the effects of which are reasonably common knowledge, it is competent to prove future damages either by lay testimony from the injured party or others who have viewed his injuries, or by expert testimony, or from both lay and expert testimony, so long as the proof adduced thereby is to a degree of reasonable certainty. But where the injury is obscure, that is, the effects of which are not readily ascertainable, demonstrable or subject of common knowledge, mere subjective testimony of the injured party or other lay witnesses does not provide sufficient proof; medical or other expert opinion testimony is required to establish the future effects of an obscure injury to a degree of reasonable certainty.” Syl. Pt. 11, *Jordan v. Bero*, 158 W.Va. 28, 210 S.E.2d 618 (1974).

Albright, Justice:

This case involves a certified question from the Circuit Court of Kanawha County, presented to this Court pursuant to West Virginia Code § 58-5-2 (1998) (Supp. 2004)¹ and in adherence with Rule 13 of the West Virginia Rules of Appellate Procedure.² The question, certified by order dated November 6, 2003, arose in an underlying tort action and concerns the nature of evidence needed to support a claim for future damages in the form of lost earnings. The question as certified as well as the trial court's answer follow:

Does *Jordan v. Bero*, 158 W.Va. 28, 210 S.E.2d 618 (1974), require a personal injury plaintiff to demonstrate through medical evidence the permanent deterioration of her physical condition where her claim for lost future wages

¹West Virginia Code § 58-5-2 reads as follows:

Any question of law, including, but not limited to, questions arising upon the sufficiency of a summons or return of service, upon a challenge of the sufficiency of a pleading or the venue of the circuit court, upon the sufficiency of a motion for summary judgment where such motion is denied, or a motion for judgment on the pleadings, upon the jurisdiction of the circuit court of a person or subject matter, or upon failure to join an indispensable party, may, in the discretion of the circuit court in which it arises, be certified by it to the supreme court of appeals for its decision, and further proceedings in the case stayed until such question shall have been decided and the decision thereof certified back. The procedure for processing questions certified pursuant to this section shall be governed by rules of appellate procedure promulgated by the supreme court of appeals.

²Rule 13 of the West Virginia Rules of Appellate Procedure is the rule referenced in West Virginia Code § 58-5-2 with regards to the method for processing certified questions.

depends not on the lasting effect of her injuries, but rather on Plaintiff proving that a specific employment opportunity has been forever lost to her as a proximate cause of the defendant's tortious conduct?

Answer of the circuit court:

West Virginia law requires proof of a permanent injury before future damages can be claimed; thus, prior to claiming damages for the "future permanent consequences" of a personal injury, the plaintiff must establish a permanent medical injury resulting from the accident.

For the reasons stated below, this Court disagrees with the conclusion reached by the lower court.

I. FACTUAL AND PROCEDURAL BACKGROUND

The issue of future damages before us has emerged from a personal injury action involving an automobile collision which occurred on September 8, 1999. It is alleged that on that date the car of Faith Woods Cook, defendant below and appellee herein (hereinafter referred to as "Appellee"), collided into the rear of the car of Tifinie Cook.³ At the time of the accident, Tifinie Cook, plaintiff below and appellant herein (hereinafter referred to as "Appellant"), was a member of the Air National Guard. Appellant filed a negligence suit against Appellee in which Appellant sought to recover, among other damages, future Air National Guard wages and benefits that she allegedly lost as a result of

³Although the parties share the same surname, we are advised that they are not related.

Appellee's negligence. According to Appellant, due to the injuries she sustained in the accident she not only was involuntarily discharged from the Air National Guard but also became ineligible for reenlistment. On July 1, 2002, the lower court granted Appellant's motion for partial summary judgment on the issue of liability. Thereafter, Appellant filed a motion in limine seeking a ruling on whether she could, solely within the context of her claim for future Air National Guard wages and benefits, demonstrate the "future permanent consequences" of her injuries by proving the permanent nature of her military discharge. *Syl. Pt. 7, Jordan v. Bero*, 158 W.Va. 28, 210 S.E.2d 618 (1974). In ruling on Appellant's motion, the lower court concluded that, contrary to Appellant's requested ruling, under West Virginia law proof of a permanent medical injury was an essential prerequisite to sustain a claim for lost future wages and benefits. Nevertheless, the lower court found the question appropriate to certify to this Court because of its importance to the issues remaining for adjudication in this case. Appellee objected to the certification, contending that the facts involving the matter certified were in dispute. On February 25, 2004, this Court granted review of the certified question.

II. STANDARD OF REVIEW

The record and briefs of the parties fully support Appellee's assertion that the facts surrounding the question certified are largely in dispute. Nevertheless, the relevance of the facts to the resolution of causation and damage matters yet pending before the lower

court turns on the legal issue presented in the certified question. As a question of law, we find the question to be within this Court’s jurisdiction as authorized by West Virginia Code § 58-5-2. Our “ appellate standard of review of questions of law answered and certified by a circuit court is *de novo*.” Syl. Pt. 1, *Gallapoo v. Wal-Mart Stores, Inc.*, 197 W.Va. 172, 475 S.E.2d 172 (1996).

III. DISCUSSION

A. Future Damages

To place the issue presented in the certified question in proper context, we initially review some basic relevant concepts of compensatory damages. Generally, a tort plaintiff is entitled to all damages proximately caused by a wrongdoer’s actions. “The basic goal in awarding damages is to fairly and adequately compensate the plaintiff for the injuries and losses sustained.” *Flannery v. U.S.*, 171 W.Va. 27, 29, 297 S.E.2d 433, 435 (1982). Thus, “the aim of compensatory damages is to restore a plaintiff to the financial position he/she would presently enjoy but for the defendant’s injurious conduct.” *Kessel v. Leavitt*, 204 W.Va. 95, 187, 511 S.E.2d 720, 812 (1998).

To fulfill this overarching goal of making an injured party whole, compensatory damages include not only actual losses but also the anticipated losses due to the future effects of an injury caused by negligence. Future damages are “awarded to an

injured party for, among other things: (1) Residuals or future effects of an injury which have reduced the capability of an individual to function as a whole man; (2) future pain and suffering; (3) loss or impairment of earning capacity; and (4) future medical expenses.” Syl. Pt. 10, *Jordan v. Bero*, 158 W.Va. 28, 210 S.E.2d 618 (1974). In syllabus point seven of *Jordan* we formally adopted the test, first articulated in *Wilson v. Fleming*, 89 W.Va. 553, 109 S.E. 810 (1921), for recovering future damages:

To form a legal basis for recovery of future permanent consequences of the negligent infliction of a personal injury, it must appear with reasonable certainty that such consequences will result from the injury; contingent or merely possible future injurious effects are too remote and speculative to support a lawful recovery.

We further explained in syllabus point nine of *Jordan* that “[t]he permanency or future effect of any injury must be proven with reasonable certainty in order to permit a jury to award an injured party future damages.” 158 W.Va. at 29, 210 S.E.2d at 623.

B. Certified Question Clarified

The question as submitted refers to the future damages at issue as lost wages.

The parties interchangeably employ the terms “impaired earning capacity,” “lost earning opportunity” and “lost future income or wages” to characterize the damages involved.⁴ In

⁴These various legal theories have different meanings and require different types of proof. Circuit courts have routinely managed cases invoking these theories although we have not had occasion to engage in a comparative analysis of these theories in a single case or to assign precise definitions to each theory. Given the fact that a complete record
(continued...)

actuality, the relief sought by Appellant as the plaintiff below is compensation for future wages *and* benefits lost as a result of her discharge from the Air National Guard. In order to accurately represent the future damages being sought, we invoke our discretion to reframe the question as certified⁵ in the following way:

⁴(...continued)

involving the relevant theories has not been developed to date in the instant case, the opportunity to address these distinctions is again not before us. We simply note that one authority explains the theories in the following way:

The injured plaintiff may recover either specific [future] income loss . . . *or* loss of earning capacity. . . . [As to the former,] [t]he plaintiff is entitled to recover any kind of income lost as a result of injury, including the value of fringe benefits. . . . An estimate of lost earning capacity is not an estimate of specific present or future wage loss; it is rather an estimate of lost present ability to work in appropriate occupations, now and in the future. . . . Thus one who is earning the same wages after the injury as before might still have a loss of earning capacity, representing a likely diminution in earnings at some point in the future, or an increase in the effort required to keep earnings at the same level. In a real sense it may even be said that even if capacity for work remains the same but injury reduces the chance of being hired, the plaintiff has a measurable loss [of opportunity].

2 Dobbs, *Law of Remedies* § 8.1(2), 361-63 (2d ed.) (1993) (footnotes omitted) (emphasis in original).

⁵“When a certified question is not framed so that this Court is able to fully address the law which is involved in the question, then this Court retains the power to reformulate questions certified to it under both the Uniform Certification of Questions of Law Act found in *W. Va. Code*, 51-1A-1, *et seq.* and *W. Va. Code*, 58-5-2 [1967], the statute relating to certified questions from a circuit court of this State to this Court.” Syl. Pt. 3, *Kincaid v. Mangum*, 189 W. Va. 404, 432 S.E.2d 74 (1993).

Does *Jordan v. Bero*, 158 W.Va. 28, 210 S.E.2d 618 (1974), require a personal injury plaintiff to demonstrate through medical evidence the permanent deterioration of her physical condition where her claim for lost future income depends not on the lasting effect of her injuries, but rather on whether the defendant's tortious conduct was a proximate cause of plaintiff losing forever a specific employment opportunity?

The court below answered the question as certified in the affirmative based on the conclusion that *Jordan* and subsequent relevant cases require that future damage claims be premised on "a permanent medical injury resulting from the accident." We proceed with an examination of the issues of permanence and type of injury which this response raises.

C. Permanence

Appellant essentially asserts that a permanent injury is not a prerequisite to a recovery for future damages and instead asserts that the test set forth in *Jordan* allows recovery for future permanent consequences of the negligent infliction of a personal injury if it appears reasonably certain that such permanent consequences will result from the injury. Appellee claims that a permanent injury to the person is a long-standing precondition to an award of future lost earnings. We find neither argument entirely representative of the relevant law as announced in *Jordan* or as applied in cases following *Jordan*.

We return to the previously cited language of syllabus point seven of *Jordan* for the test governing future damage claims:

To form a legal basis for recovery of future permanent consequences of the negligent infliction of a personal injury, it must appear with reasonable certainty that such consequences will result from the injury; contingent or merely possible future injurious effects are too remote and speculative to support a lawful recovery.

158 W.Va. at 29, 210 S.E.2d at 622-23. It is plain that the test for future damages as set forth in *Jordan* requires that the “consequences of the negligent infliction of a personal injury” be demonstrated with a reasonable degree of certainty. *Id.* (emphasis added). The consequences to which the reasonable certainty standard is to be applied are later characterized in syllabus point nine of *Jordan* as “[t]he permanency or future effect of any injury.” 158 W.Va. at 29, 210 S.E.2d at 623. Our subsequent opinions employed an abbreviated alternative reference to permanent consequence as permanent injury. *See e.g. Adkins v. Foster*, 187 W.Va. 730, 733, 421 S.E.2d 271, 274 (1992) (stating that *Jordan* requires proof of “permanent injury and reasonable degree of certainty” as prerequisites to recovery for impairment of earning capacity). Unfortunately, this alternative characterization has apparently led to confusing the permanency of the consequence with the permanency of the negligently inflicted injury forming the basis of the lawsuit.

As we have noted, the relevant language in *Jordan* clearly focuses on the consequences resulting from the negligent act rather than the nature of any injury sustained as a result of that act. This approach to future damage claims is in full accord with the overall goal of compensatory damages – providing an injured person the opportunity to be

placed in as similar a position as he or she would have been but for the negligent conduct. Were we to follow Appellee's suggestion that the direct injury sustained due to negligence must be a permanent injury, we would be undermining this long-accepted principle of recovery of damages. By limiting recovery of future damages to such permanent injuries, we would be denying the possibility of recovering future damages in situations where a person suffers an injury with temporary or short-duration medical impairment that may readily be proven to have a permanent or reasonably certain future consequence based on some level of recovery within a specific time period. To be made whole with respect to future damages in such cases, a plaintiff would be compelled to delay a trial on the issue of damages until all loss had been actually sustained. Such a resolution is manifestly impractical if not wholly impossible. It can be said that the very reason for the theory of allowing future damages to be proven with reasonable certainty arises from the need to avoid such impractical and impossible results while still providing a whole recovery.

Contrary to the conclusion reached by the lower court, the test applicable to future damages in *Jordan* has never required that the injury sustained by a plaintiff in a personal injury case be permanent in nature or result in permanent impairment to the person in order to qualify for recovery of future damages. Rather, the test governing future damages as set forth in syllabus points seven and nine of *Jordan v. Bero*, 158 W.Va. 28, 210 S.E.2d

618 (1974), requires that either the negligently inflicted injury or its direct consequences be proven to a reasonable degree of certainty to have a lasting, permanent future effect.

D. Nature of the Negligently Inflicted Injury

By answering the certified question in the affirmative, the lower court implies that the *Jordan* test applicable to future damages requires a personal injury plaintiff to demonstrate through medical evidence the permanent deterioration of a medical condition. We conclude that the lower court unduly relies on the permanent physical nature of an alleged physical injury in describing the type of evidence needed to establish a reasonable degree of certainty under the future damages test of *Jordan*.

The test formulated in *Jordan* grew out of a case involving a serious physical injury. In *Jordan*, a ten-year-old had sustained a severe and permanent brain injury after being hit by a car while riding his bicycle. We were called upon in *Jordan* to delineate the quantum of evidence necessary to meet the established reasonable certainty standard to support a jury instruction on the issue of damages for lasting and permanent effects of an injury suffered at the hands of a negligent defendant. Our decision in *Jordan* necessarily focused on the medical evidence needed to prove a permanent physical injury in the context of an earnings capacity claim because of the plaintiff's reliance on his physical injury as the reason for his impaired earning capacity. Likewise, subsequent cases on the propriety of

awards for loss or impairment of earning capacity have frequently discussed the medical permanency of a physical injury because a physical injury, at least in part, was the reason for loss of future earnings. *See e.g. Gerver v. Benavides*, 207 W.Va. 228, 530 S.E.2d 701 (1999) (severe groin pain resulting from medical malpractice affected future earning capacity); *Liston v. Univ. of West Virginia Bd. of Trustees*, 190 W.Va. 410, 438 S.E.2d 590 (1993) (permanent injury to right arm and elbow from slip and fall accident claimed to have affected future earning capacity); *Adkins v. Foster*, 187 W.Va. 730, 421 S.E.2d 271 (1992) (permanency of cervical strain and exacerbation of preexisting depression resulting from car accident forming basis of loss of earning capacity claim). Nevertheless, this Court has never definitively stated that a physical injury, with permanent effects, is a prerequisite for recovery of future damages based on lost future income or lost earning capacity. Rather, the test we adopted in syllabus point nine of *Jordan*, focuses on a heightened level of proof which is necessary to support a jury award for any future damages. In applying the same future damages test to a claim involving medical expenses we said: “Although *Jordan* and cases dealing with similar subject matter sometimes speak in terms of compensating a plaintiff for the anticipated cost of treating a ‘permanent injury,’ we have never held that lasting physical harm is an absolute prerequisite for recovery of future medical expenses.” *Bower v. Westinghouse Elec. Corp.*, 206 W.Va. 133, 139, 522 S.E.2d 424, 430 (1999).

Appellee contends that *Bower* is inapplicable since the present discussion involves future damages to earnings rather than damages in the form of future medical expenses. The standard *as announced* in *Jordan* thirty years ago is applicable to *any* type of future damage claim. Consequently, we would have to ignore or modify that standard in order to arrive at the conclusion Appellee proposes. Moreover, to find that the legal sufficiency test of *Jordan* limits awards in future lost income cases to permanent physical injury would once again serve to defeat the primary purpose of compensatory damage awards. If we were to follow the course urged by Appellee and uphold the lower court's limitation on the pursuit of a future damage claim for loss of income, we would also be eliminating an injured party's ability to be made whole for such things as a negligently caused intellectual impairment, permanent or temporary, affecting loss of income. No such limitation appears in *Jordan*. Furthermore, we tacitly recognized mental impairments as a basis for claiming lost future earnings when we applied the *Jordan* principles in the later case of *Adkins v. Foster*.

Instead of categorically eliminating recovery of future damages for any particular type or degree of injury, this Court chose in *Jordan* to sanction future damage awards for any injury so long as it is shown with reasonable certainty that the future permanent consequence of that injury will result. Whether that consequence involves a physical or mental impairment, lost opportunity, permanent discharge from the military or

other matter is irrelevant as long as the evidence establishes by a reasonable degree of certainty that it is a permanent consequence of the negligent act of the defendant. To ward against speculative, abstract or purely theoretical claims, the trial court bears the responsibility for examining the evidence in each case in order to withhold such flawed claims from jury consideration.

Likewise, *Jordan* did not attempt to prescribe the specific type of evidence needed to support every conceivable kind of injury which may occur as a result of the negligent acts of a defendant. Instead of defining such specific standards, or only determining the standards applicable to the facts of the case then before it, this Court in *Jordan* set forth an evidentiary paradigm governing future damages in syllabus point eleven of *Jordan* reads:

Where an injury is of such a character as to be obvious, the effects of which are reasonably common knowledge, it is competent to prove future damages either by lay testimony from the injured party or others who have viewed his injuries, or by expert testimony, or from both lay and expert testimony, so long as the proof adduced thereby is to a degree of reasonable certainty. But where the injury is obscure, that is, the effects of which are not readily ascertainable, demonstrable or subject of common knowledge, mere subjective testimony of the injured party or other lay witnesses does not provide sufficient proof; medical or other expert opinion testimony is required to establish the future effects of an obscure injury to a degree of reasonable certainty.

158 W.Va. at 30, 210 S.E.2d at 623. This flexible model may be readily applied to cases involving the consequences of any type of negligently inflicted injury, and by its terms does not limit relevant evidence of reasonable certainty to medical evidence in all circumstances. For instance, we surmise from the arguments in the case before us that verifying the lasting consequence of discharge from the military without reenlistment opportunity would require Appellant to produce expert testimony regarding military regulations and procedures as familiarity with such consequences are not obvious or within common knowledge.⁶

Appellee expresses serious concern that allowing future damage claims on a basis other than permanent physical impairment will promote excessive awards for trivial injuries. This concern might be justified if plaintiffs in personal injury cases only had to demonstrate a lasting future effect of a negligently inflicted injury in order to be successful in obtaining an award for loss of future income or earning capacity. One authority addressing the further proof needed in future lost income and future earning capacity claims states:

Evidence in the wage loss claim reflects loss of specific opportunities, such as those presented by an existing job. Proof typically shows past wage and future prospects in the job, coupled with proof that the plaintiff *can no longer work or can work only part time*. Evidence in the lost capacity claim, on the other hand, often focuses on the nature of the injury and the kind of *diminished working capacity* such an injury tends to

⁶Our narrow example is not intended to imply that medical evidence is not relevant to the full development of this case.

cause. In such cases, there may be no evidence at all of past earnings or of specific jobs the plaintiff might have held in the future.

2 Dobbs, *Law of Remedies* § 8.1(2), 364 (2d ed.) (1993) (footnotes omitted) (emphasis added). It is clear then that a plaintiff seeking damages for future losses in the form of specific income or capacity to earn a living, including lost opportunity,⁷ must show how his or her economical situation has been impeded. Such proof is necessary to assure adherence to the principle underlying compensatory damages: placing the injured party in the same, *not better*, financial position he or she would have been in but for the negligent act. Requiring proof of this nature is also in keeping with the doctrine of avoidable consequences, which “states that a party cannot recover damages flowing from consequences that the party could reasonably have avoided.” 22 Am.Jur.2d Damages § 340 (2003) (footnote omitted). The purpose of the avoidable consequences doctrine, applied in the context of claims for lost future income or diminished earning capacity, is “to reduce the recovery by amounts the plaintiff actually did earn or could reasonably have earned.” 2 Dobbs, *Law of Remedies* §

⁷Jurisdictions which have decided claims alleging lost opportunity generally analyze the claims as they would an impairment to lost or diminished earning capacity. See William H. Danne, Jr., *Admissibility and Sufficiency, in Personal Injury or Wrongful Death Action, of Evidence as to Earnings or Earning Capacity from Position or Field for Which Person Has Not Fulfilled Education, Training, or like Eligibility Requirement*, 2002 A.L.R. 5th 25 (2002-2004) (available in 2002 WL 31829068). We refrain from further comment about a claim based on lost opportunity, saving that discussion for another day when the issue is properly presented for our review on a fully developed record accompanied by the reasoning of the lower court.

8.1(2), 369 (1993). We embraced the spirit of the doctrine of avoidable consequences in *Adkins v. Foster*, 187 W.Va. 730, 421 S.E.2d 271 (1992), when we advised that:

[P]rudent plaintiff's counsel would seek to introduce vocational evidence in addition to medical evidence . . . to assist the jury in ascertaining the extent and permanency of the plaintiff's alleged inability to engage in gainful employment. Similarly, prudent defense counsel would also present such evidence in order to assist the jury in determining whether the plaintiff would be capable of some other future employment which might mitigate the damages for loss of future earning capacity.

Id. at 735, 421 S.E.2d 276. Accordingly, the prediction of loss of future earnings must be established with reasonable certainty before an award for impaired future earnings can be made. The trial court is well equipped to test the evidence actually adduced on the issue against any contention that such evidence is too speculative, abstract or theoretical to support the claim asserted. To counter or reduce a lost earnings claim, it may also be shown under the facts of a given case that a plaintiff is able to accept suitable alternative employment but has failed to do so. *See Stein on Personal Injury Damages* 3d § 18:17: *Avoidable Consequences and Duty to Mitigate* (1997).

IV. Conclusion

Acknowledging that we do not have the benefit of a fully developed record in approaching the subject raised by the certified question, we appropriately leave application of the legal conclusions we have reached to the capable hands of the trial court. In summary, we have determined that a permanent physical impairment is not the only type of lasting

consequence which will sustain an award of future damages, including future earnings, under the standards set forth in *Jordan*. The relevant evidence of a lasting or permanent consequence is determined by the nature of the consequence and does not necessarily involve medical evidence; nevertheless, the relevant evidence in all cases must establish the lasting or permanent consequence to a reasonable degree of certainty.

For the reasons stated herein, we answer the certified question, as reformulated, in the negative.

Certified Question Answered.