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OF WEST VIRGINIA

Davis, J., concurring:

In response to the certified question presented in this case, the majority opinion has held that a negligently injured plaintiff may recover for the loss of future wages that are a direct consequence of an injury, without showing that the injury itself was permanent. I concur in this result. I have chosen to write separately because I believe the majority opinion should have explained the technical differences between the legal theories of “lost earning opportunity,” “lost or impaired earning capacity,” and “lost future income or wages.”<sup>1</sup> While I recognize that many courts tend to use the language of these legal concepts interchangeably,<sup>2</sup> my concern is that due recognition be given to the fact that the concepts require different types of proof.

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<sup>1</sup>I should point out that the original majority opinion that was filed in this case was withdrawn following the filing of my initial concurring opinion. As a result of some modifications made to the new majority opinion, my concurring opinion likewise has been modified.

<sup>2</sup>*See, e.g., Morris v. Milby*, 703 N.E.2d 121 (Ill. App. Ct. 1998) (involving lost earning opportunity claim, but court using concept of impaired earning capacity); *Williams v. Commonwealth Edison Co.*, 596 N.E.2d 759 (Ill. App. Ct. 1992) (applying concept of lost future income to earning capacity claim); *Burgess v. C.F. Bean Corp.*, 743 So. 2d 251 (La. Ct. App 1999) (same).

### *A. Lost or Impaired Earning Capacity*

The ultimate relief sought by the plaintiff in this specific case is compensation for wages and benefits lost as a result of being discharged from the Air National Guard, due to her apparent, non-permanent, injury. Under these specific facts, the circuit court believed that the “lost or impaired capacity” doctrine, announced in *Jordan v. Bero*, 158 W. Va. 28, 210 S.E.2d 618 (1974), precluded recovery because there was no permanent injury. The circuit court was correct in finding that the doctrine of “lost or impaired capacity” requires a permanent injury. However, as I will demonstrate, another legal theory permits recovery when no permanent injury exists.

In *Jordan*, a ten year old child was hit by a car while riding his bicycle. The child sustained permanent brain damage due to the accident. As a result of the brain damage, a jury awarded the child compensation for lost or impaired earning capacity. One of the issues the Court had to decide in *Jordan* was “whether sufficient evidence of future consequences from the negligent act of the defendant was proven to lawfully permit the jury to make an award for the future effects of the permanent injury.” *Jordan*, 158 W. Va. at 52, 210 S.E.2d at 634.

As an initial matter, *Jordan* held

that to form a basis of a legal recovery for the future permanent consequences of the wrongful 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 42, 210 S.E.2d at 629 (citation omitted). The decision next held that “[t]he prognosis of the future effect of permanent injuries . . . must be elicited from qualified experts, evaluated first by the court and then, if found sufficient, considered by the jury upon proper instruction.” *Jordan*, 158 W. Va. at 49, 210 S.E.2d at 633. *Jordan* then went on to provide a non-exhaustive list of examples of the types of claims that permit recovery for future damages:

Future damages are those sums awarded to an injured party for, *among other things*: (1) Residuals or those 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.

158 W. Va. at 52, 210 S.E.2d at 634 (emphasis added). The *Jordan* Court concluded:

There was ample evidence of permanency of an injury which was obscure only in its final and ultimate effects. Lay and medical evidence adduced in support of the plaintiff’s case demonstrated that in addition to the permanent injury, plaintiff had suffered deleterious effects from the automobile accident from which a jury may have reasonably inferred he will so suffer in the future and that such suffering and residuals will effect this capacity to function as a whole man in the future.

158 W. Va. at 58-59, 210 S.E.2d at 638.

I have labored thus far in presenting facts from the *Jordan* opinion in an effort to underscore two critical points. First, *Jordan* was concerned with future damages in the

context of a *permanent injury*. Second, because *Jordan* involved a permanent injury, the law applicable to the claim was the legal theory of “lost or impaired earning capacity.” *Jordan* recognized, as have other courts, “that impairment-of-earning capacity is recoverable only upon proof that an injury is permanent.” *Wheeler v. Bennett*, 849 S.W.2d 952, 955 (Ark. 1993). *See also Myrick v. Stephanos*, 472 S.E.2d 431, 434 (Ga. Ct. App. 1996) (“Recovery for ‘lost earning capacity’ is . . . a separate element of damages recovery of which physical injury to the plaintiff resulting in a permanent or total physical disability is the essential element.”); *Brown v. Guiter*, 128 N.W.2d 896, 902 (Iowa 1964) (“[L]oss of earning capacity is an element of permanent injury.”); *Snow v. Villacci*, 754 A.2d 360, 363 (Me. 2000) (“A lost earning capacity claim requires evidence that the injury caused by the wrongdoer has caused an ongoing impairment that has diminished or eliminated the plaintiff’s ability to earn income.”); *Gary v. Mankamyer*, 403 A.2d 87, 89 (Pa. 1979) (“Under Pennsylvania law, a plaintiff seeking recovery for [lost earning capacity] must show two things: (1) a permanent injury and (2) a total impairment of earning power.”); *Leak v. U.S. Rubber Co.*, 511 P.2d 88, 93 (Wash. Ct. App. 1973) (“Where a permanent injury has been established . . . plaintiff . . . is entitled to compensation for impairment of earning capacity.”). Indeed, in at least two prior decisions of this Court “[w]e have explained that ‘impairment of earning capacity is a proper element of recovery when two elements have been proven: permanent injury and reasonable degree of certainty of the damages.’” *Craighead v. Norfolk and W. Ry. Co.*, 197 W. Va. 271, 281, 475 S.E.2d 363, 373 (1996) (quoting *Adkins v. Foster*, 187 W. Va. 730, 733, 421 S.E.2d 271, 274 (1992)). Further, as explained in *Johnson v. LSU Medical Center*,

Lost earning capacity is loss of a person's potential and is not necessarily determined by actual loss. The plaintiff need not be working or even in a certain profession to recover such an award. What is being compensated is the plaintiff's lost ability to earn a certain amount and she may recover such damages even though she may never have seen fit to take advantage of that capacity.

867 So. 2d 884, 887 (La. Ct. App. 2004) (citation omitted). In other words, the legal theory of lost or impaired earning capacity "compensate[s] a plaintiff for loss of capacity to earn income as opposed to actual loss of future earnings." *W.R. Grace & Co.-Conn. v. Pyke*, 661 So. 2d 1301, 1302 (Fla. Dist. App. Ct. 1995). *See also Brazoria County v. Davenport*, 780 S.W.2d 827, 832 (Tex. App. 1989) ("Recovery for loss of earning capacity as a measure of damages in a personal injury suit is not recovery of actual earnings but, rather, recovery for the loss of the capacity to earn money.").

### ***B. Lost Future Income or Wages***

In the context of the instant case, the legal theory which permits recovery of future damages for a non-permanent injury is that of "lost future income or wages." Courts are in general agreement that "[a]n award of damages for loss of future earnings is appropriate when the plaintiff proves that she will lose wages in the future but has sustained no injury that will impair her earning capacity." *Generali-U.S. Branch v. Martinez*, 2004 WL 740021, at \*4 (Ark. Ct. App.). *See also Auto-Owners Ins. Co. v. Tompkins*, 651 So. 2d 89, 91 (Fla.1995) ("[A] permanent injury is not a prerequisite to recovering [lost future income or wages.]; *Olariu v. Marrero*, 549 S.E.2d 121, 124 (Ga. Ct. App. 2001) ("A recovery for

‘loss of future earnings’ is available where there is proof of loss of definite earnings that would have been received in the future but for an injury, even though the injury is not permanent.”). To establish a “lost future income or wages” claim, “the evidence must show: (1) the amount of wages lost for some determinable period; and (2) the future period over which wages will be lost.” *Generali-U.S. Branch*, 2004 WL 740021, at \*4 (citing *Peterrie Transp. Servs., Inc. v. Thurmond*, 90 S.W.3d 1 (Ark. Ct. App. 2002)). Unlike a claim for lost or impaired earning capacity, a claim for “lost earnings cannot be recovered by a person who is not employed at the time of injury[.]” *Jensen v. Osburn*, 701 P.2d 790, 791 (Or. Ct. App. 1985).

The distinction between impaired earning capacity and lost future income was summarized in *Kubista v. Romaine* as follows:

It is generally well recognized that there are normally two comp[o]nents or aspects which should be considered in attempting to measure the detriment an injured plaintiff has sustained when by reason of the injury he is unable to continue earning his prior wages. The first and most obvious component is frequently called “lost time,” “lost wages,” or “lost earnings.” That is, it is clear that if an injury [is not permanent], the plaintiff should be entitled to compensation for regular wages lost because of the disability. Secondly, when it becomes apparent that an injury was such that it occasioned a permanent disability, or permanent diminution of the ability to earn money, then the plaintiff should be entitled to compensation for what is generally called “impaired earning capacity.”

538 P.2d 812, 815 (Wash. Ct. App. 1975).

### ***C. Lost Earning Opportunity***

A claim for lost earning opportunity is distinct from a claim for impaired earning capacity and lost future income. The Supreme Judicial Court of Maine addressed the issue of lost earning opportunity in *Snow v. Villacci*, 754 A.2d 360 (Me. 2000). The plaintiff in *Snow* was involved in an automobile accident. When the accident occurred the plaintiff was near the end of a twenty-five month training program, conducted by his employer, to become a financial consultant. As a result of the plaintiff's injuries from the accident, he had to take time off from the training program. When he eventually returned to the program he failed to pass all of its requirements. The plaintiff filed a lawsuit over the injuries received in the accident and also asserted a claim for lost earning opportunity. Under the latter theory, the plaintiff contended that the interruption in his training caused by the accident was the reason why he failed the program. A verdict was rendered in favor of the plaintiff. The defendants appealed and assigned error to the trial court's denial of their partial summary judgment motion on the issue of lost earning opportunity.

The appellate court in *Snow* rejected the defendants' contention that no award could be obtained for lost earning opportunity. The court described a claim for lost earning opportunity as follows:

Unlike a loss of earning capacity, an earning opportunity may be lost when, during the period of disability caused by the defendant's negligence, a specific earning opportunity arises which could otherwise have been utilized by the plaintiff, but is lost because of a disability caused by the negligence of the

defendant.

One type of lost earning opportunity may occur when a person who is in an education or training program is injured and is unable to complete the program on schedule. If the injury resolves and the trainee is capable of returning to the program, the trainee may nonetheless recover damages representing the lost opportunity to obtain the improved income during the period of time in which the trainee would have begun to earn at the new level but remains in the training program.

*Snow*, 754 A.2d at 364. In affirming the trial court's denial of partial summary judgment, the appellate court crafted a test for establishing a claim for lost earning opportunity:

Accordingly, recovery may be had for the loss of an earning opportunity if the claimant proves, by a preponderance of the evidence, that: (1) the opportunity was real and not merely a hoped-for prospect; (2) the opportunity was available not just to the public in general but to the plaintiff specifically; (3) the plaintiff was positioned to take advantage of the opportunity; (4) the income from the opportunity was measurable and demonstrable; and (5) the wrongdoer's negligence was a proximate cause of the plaintiff's inability to pursue the opportunity.

*Id.* at 365. *See also Morris v. Milby*, 703 N.E.2d 121 (Ill. App. Ct. 1998) (holding that plaintiff may seek damages for lost opportunity to obtain promotion due to injury at time promotion was to be considered).

In summation, I believe the majority opinion correctly answered the certified question. However, I believe the majority opinion could have better served the bench and bar by explaining the technical differences between a claim for lost earning opportunity, lost or impaired earning capacity, and lost future income or wages.



Accordingly, I respectfully concur in the majority opinion.