IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA
CIVIL DIVISION

STEVEN GALBRAITH and DEBRA GALBRAITH,	:	
Plaintiffs,	:	
	:	**File No.: 2008 C 487**
vs.	:	
	:	**Civil Action**
CYNDEE DERR,	:	
	:	**Jury Trial Demanded**
Defendant	:	

Memorandum of law

I. Question Presented

A. May a Plaintiff Seek Damages for Future Lost Earning Capacity Even Though They Have Continued to Work and Have Received Compensation at or Higher than the Level They Received Prior to the Injury under Consideration?

Suggested Answer: Yes.

A. A Plaintiff May Seek Damages for Future Lost Earning Capacity Even Though They Have Continued to Work and Have Received Compensation at or Higher than the Level They Received Prior to the Injury under Consideration.

It has long been established under Pennsylvania case law that a plaintiff may seek damages for future lost earning capacity even though they have continued to work and have received compensation at or higher than the level they received prior to the injury under consideration. In 1917, the Pennsylvania Supreme Court stated:

> learned counsel for the appellant seem to think, in view of the fact that the plaintiff's weekly wage was the same after as before the accident, the earning capacity of the plaintiff had not been diminished by reason of the injury, and hence he was not entitled to recover damages in this case. That is not the standard by which the plaintiff's future earning capacity should be tested; it is whether the power or capacity to earn has been diminished as a

result of the injury. Yeager v. Anthracite Brewing Co., 259 Pa. 123, 128, 102 A. 418, 419 (Pa., 1917).

That court went on to hold that:

> **There was evidence in the case that the plaintiff's strength was much impaired, and that he was permanently unable to do as much or as heavy work as before the accident.** He may therefore, as could have been found by the jury from this evidence, be compelled in the future to accept less remunerative employment than if he had not been injured. **The fact that he was receiving at the time of the trial the same wage he had received previous to his injury was no assurance that in the future he would receive the same wage for similar employment, or that his injured condition would not compel him to accept a much smaller remuneration for labor which he could perform.** (Emphasis added) Id, Pa. 128-129, A. 420.

The Restatement of Torts codified this principle in 1939, in Section 924. That section states:

§ 924. Harm To The Person

> A person whose interests of personality have been tortiously invaded is entitled to recover damages for past or prospective
> (a) bodily harm and emotional distress;
> (b) **loss of earning capacity** or earnings;
> (c) reasonable medical and other expenses;
> (d) resulting harm to property or business. (Emphasis added) Restatement of Torts § 924

Subsequent to its ruling in Yeager, *Super*., our Supreme Court reiterated that this is the law of Pennsylvania in 1950 when it decided Mazi v. McAnlis, 365 Pa. 114, 74 A.2d 108 (Pa., 1950). Therein, the Pennsylvania Supreme Court held:

> **The consideration of loss of earning capacity is not solely the comparative amount of money earned before or after an injury. The true test is whether or not there is a loss of earning power, and of ability to earn money.** (Emphasis added) Id, Pa. 121, A.2d 112.

Three years later, in Bochar v. J. B. Martin Motors, Inc.,

374 Pa. 240, 97 A.2d 813 (Pa., 1953), the Supreme Court gave a detailed explanation of why a Plaintiff is entitled to recover lost earning capacity even if Plaintiff's wages increased after an accident where injury is suffered. In that matter, defendants contended that there was no evidence of impairment of earning power and that the fact that Plaintiff's wages were higher after the accident proved that there was no deterioration of earning ability. In responding to this false claim, the court held:

> A tort feasor is not entitled to a reduction in his financial responsibility because, through fortuitous circumstances or unusual application on the part of the injured person, his wages following the accident are as high or even higher than they were prior to the accident. Id, Pa. 244, A.2d 815.

The court went on to explain that:

> **It is not the status of the immediate present which determines capacity for remunerative employment. Where permanent injury is involved, the whole span of life must be considered. Has the economic horizon of the disabled person been shortened because of the injuries sustained as the result of the tort feasor's negligence? That is the test.** And it is no answer to that test to say that there are just as many dollars in the patient's pay envelope now as prior to his accident. The normal status of a healthy person is to progress, and to the extent that his progress has been curtailed, he has suffered a loss which is properly computable in damages. (Emphasis added) Id, Pa. 244-245, A.2d 815.

In 1963, this issue was again addressed before our Supreme Court in Messer v. Beighley, 409 Pa. 551, 187 A.2d 168 (Pa., 1963). In fact, therein the Supreme Court held that the failure of the trial judge to give the jury a charge on future lost earning capacity was reversible error. They held "**The mere fact that an**

injured person continues to work at his employment without diminution of wages does not preclude recovery for impairment of earning power, if he is in fact disabled." (Emphasis added) Id, at Pa. 555, A.2d 170.

In DiChiacchio v. Rockcraft Stone Products Co., 424 Pa. 77, 225 A.2d 913 (Pa., 1967), the Pennsylvania Supreme Court reiterated the holding in Bochar, *Super*. This was also confirmed be our Superior Court in 1978 in the matter of Wright v. Engle, 256 Pa. Super. 321, 389 A.2d 1144 (Pa. Super., 1978), citing Bochar, *Super*. and DiChiacchio, *Super*. *See*, *also*, O'Malley v. Peerless Petroleum, Inc., 283 Pa. Super. 272, 423 A.2d 1251 (Pa. Super., 1980), also citing Bochar, *Super*.

While Plaintiff herein has been unable to find any case law more recent than the O'Malley case decided in 1980, none of the decisions going back to 1917 has been overturned and all support Plaintiff's request for this court to charge the jury as to future lost earning capacity. In fact, the Suggested Model Civil Jury Charge 6.01D: Future Loss of Earnings and Lost Earning Capacity states:

> The plaintiff is entitled to be compensated for any loss or reduction of future earning capacity that will result from the harm sustained.
>
> In order to determine this amount, you must first determine:
>
> (1) the total amounts that the plaintiff would have earned [during [his] [her] life expectancy] [for the period during which [he] [she] will be disabled] if the injury had not occurred; and you must determine

(2) the total amounts that the plaintiff probably will be able to earn [during [his] [her] life expectancy] [for the period of disability].

The difference between these two amounts is the plaintiff's loss of future earning capacity due to the injury.

The factors that you should consider in determining these amounts are:

(1) the type of work that the plaintiff has done in the past or was capable of doing;

(2) the type of work, in view of the plaintiff's physical condition, education, experience, and age, that the plaintiff would have been doing in the future had the harm not been sustained;

(3) the type of work, based upon the plaintiff's physical condition, education, experience, and age, that the plaintiff will probably be able to do in the future, having sustained the injury;

(4) the extent and duration of the plaintiff's harm; and

(5) any other matters in evidence that you find to be reasonably relevant to this question.

The amount of lost future earning capacity should be expressed by you in a dollar amount. 6.01D (Civ)

WHEREFORE, based upon the foregoing, Plaintiff respectfully requests that this Honorable Court Properly charge the jury as to future lost earning capacity based upon the above cited case law

and Suggested Model Civil Jury Charge 6.01D.

Respectfully Submitted,

COHEN & FEELEY

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