

**IN THE SUPREME COURT OF TENNESSEE  
AT NASHVILLE**

**JOE W. KING, JR., and wife  
JOANNE KING,**

Plaintiffs-Applicants

v.

**GENERAL MOTORS  
CORPORATION, SATURN  
CORPORATION, and ALFRED A.  
SOULLIERE,**

Defendants-Respondents.

Sup. Ct. No. \_\_\_\_\_

Ct. App. No. M2004-00616-COA-R3-CV  
Maury County Circuit No. 9481

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**APPLICATION FOR RULE 11 REVIEW  
ON BEHALF OF JOE W. KING, JR.**

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Stephen C. Knight - 15514  
Baydoun & Knight, PLLC  
Suite 2650, Financial Center  
424 Church Street  
Nashville, Tennessee 37219  
(615) 256-7788

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## **I. Introduction**

At issue in this case are two fundamental principles of tort damages law. The first principle is that the purpose of tort damages is to fully compensate a wronged party for damage caused by another's misconduct. See Overstreet v. Shoney's, Inc., 4 S.W.3d 694, 703 (Tenn. Ct. App. 1999) (citing, among others, Inland Container Corp. v. March, 529 S.W.2d 43, 44 (Tenn. 1975); Louisville, Nashville & Great Southern R.R. v. Guinan, 79 Tenn. 98, 103 (1883); Restatement (Second) of Torts § 901, cmt. a (1979)). The second principle is that, with respect to calculation of damages, a tortfeasor must bear the risk of uncertainty caused by its own wrongdoing. E.g., Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563-64 (1931).

Historically, courts have not always faithfully applied these principles. Artificial, inflexible rules have at times denied plaintiffs full compensation or required plaintiffs to suffer the consequences of uncertainty caused by another's wrongdoing. But the clear trend has been towards liberalizing damages law to more closely approximate the ideal of full and fair compensation. Arbitrary rules have gradually been replaced by flexible standards and case-by-case analysis. See, e.g., R. Posner, The Problems of Jurisprudence 45 (1990); Jason S. Johnston, Uncertainty, Chaos, and the Torts Process: An Economic Analysis of Legal Form, 76 Cornell L. Rev. 341, 343 n.6 (1991) (listing "a sample of excellent articles that reveal the pervasiveness of the movement from rules to balancing across many doctrinal areas"). As a result, juries have been allowed more freedom to hear and weigh evidence. See U.S. v. Scheffer, 523 U.S. 303, 328 (1998) (Stevens, J.,

dissenting) (“Over the years, with respect to category after category, strict rules of exclusion have been replaced by rules that broaden the discretion of trial judges to admit potentially unreliable evidence and to allow properly instructed juries to evaluate its weight.”)

The Court of Appeals opinion in this case departs from this trend, favoring artificial rules over flexible standards. The opinion declares that it is “speculative” for the sole proprietor of an eight-month-old business to estimate his future earnings based upon eight months of sales and five months of profits; and it concludes that proof of these past profits is therefore *inadmissible*. The opinion also announces a rule that requires a new business to prove that it has contracts for future sales before it can establish expected future profits. Finally, the opinion holds that prejudgment interest is never available in a personal injury case, even on pecuniary damages such as medical expenses and lost earning capacity. All of these decisions make it more difficult, and in some cases impossible, for a personal injury plaintiff to obtain full and fair compensation for damages caused by another’s wrongdoing.

## **II. Rule 11(b)(1) Statement**

The Court of Appeals entered judgment in this case on December 22, 2005. King filed a petition for rehearing on December 29, 2005, which the Court of Appeals denied on January 17, 2006.

### **III. Questions Presented:**

This is a personal injury case in which a panel from the Western Section sitting in the Middle Section (1) reversed a jury award for lost earning capacity, (2) reversed a jury award for future medical expenses, and (3) held that a personal injury plaintiff may never recover prejudgment interest on pecuniary damages. The case presents three issues that merit review by this Court:

1. Once a plaintiff establishes the existence of damages, may the plaintiff present evidence of the amount of damages based upon the facts reasonably available under the circumstances? More generally, does the rule against speculative damages apply to proof of the *existence* of damage or to proof of the *amount* of damage?
2. To prove expected future profits, is a new business required to prove that it has contracts for future sales?
3. May a personal injury plaintiff ever recover prejudgment interest on pecuniary damages such as medical expenses and lost earning capacity?

If the Court decides to hear this case, the following issue should also be considered to ensure a fair resolution and to avoid an unnecessary retrial:

1. Is evidence that Joe King could expect to incur \$9,243.65 to \$9,695.67 in future annual medical expenses sufficient to support a \$225,000 verdict for future medical expenses over a 22.5 year period?

### **IV. The Case**

When Joe King left for work on June 5, 2000, he was not planning to bring a personal injury lawsuit. At the time, King was a self-employed carpenter, real estate agent, and stone excavator. He didn't draw a salary, he didn't have an employment contract, and he hadn't negotiated any long-term sale contracts. But King did have a

strong work-ethic, good business connections, and good business-sense. And his eight-month-old stone excavation business had a good track record. Like many independent businesspeople, King considered his self-reliance an asset. But when a negligent General Motors test driver permanently disabled King later that day, Joe King became a personal injury plaintiff, and in the eyes of the Court of Appeals King's self-reliance became a liability.

At the time of the accident, King had been excavating and selling limestone for about eight months. (Tr. 333). For the first three months King had contracted-out the harvesting work to independent contractors. See id. at 332-33. King was able to sell the stone and pay the independent contractors, but he did not make enough to clear a profit. Id. at 334. It didn't take King long to figure out that the business opportunity was not in owning the stone quarry, but in excavating the stone. So at the beginning of the year 2000, and for the next five months, King excavated the stone himself, and he made a nice profit. Id. at 333.

During his eight months of operation, King never had any trouble selling stone. Id. at 381. In fact, King testified that his buyers wanted long-term sale contracts, but King declined. Id. at 380-81. King began by selling stone to Joe Mashburn and to Jones Stone. Id. at 331, 385, 772. Mashburn testified that King was the only reliable supplier he had for a particular type of blue taupe, (Mashburn Depo., Ex. 24, at 13), and that he wanted an ongoing relationship with King because the relationship was so profitable. Id. at 14-15. Mashburn even tried to convince King to stop selling to other companies and to

sell all of his stone to Mashburn. Id. at 24. Mashburn’s testimony also confirmed that King had every reason to believe that the market for his limestone would remain strong. Mashburn testified that his communications to King regarding his need for stone consisted of “Hey, keep pouring it on. Keep it coming.” Id. at 33. Even after King’s accident Mashburn continued to call King asking for more stone. Id. at 14.

The economic experts for both parties agreed that King had suffered damages from his inability to continue excavating and selling stone. (E.g., Tr. 889, 902; Exs. 27, 32, 33). In fact, both experts used King’s five months of profitable solo operation to estimate his lost future profits. (Tr. 897-98; Exs. 27, 32, 33). The experts used the projected lost profits to estimate King’s lost earning capacity. General Motors’ economic expert did contend that the future of King’s stone business was uncertain—but he purported to account for the risk by applying a 40 percent present-value discount rate. (Tr. 891-92). Neither expert asserted that expected profits from the stone business were so speculative that they could not be reliably estimated. After considering the testimony of the two economic experts, the jury reached a verdict consistent with the lost earning capacity estimate presented by King’s economic expert. The trial court approved that verdict.

The Court of Appeals reversed the jury and the trial court, holding that evidence of King’s stone excavation profits was inadmissible. The court did not dispute the experts’ conclusion that King had suffered some damages from his inability to continue excavating stone. Nevertheless, the court held that “lost business profits may not be used in this case to show lost earning capacity because of their speculative nature.” Opinion,

at 5. The court also held that, as a new business with only five months of profitable operation, King was required to have contracts for future sales in order to establish lost business profits. Id. at 4.

In addition, the Court of Appeals reversed the jury verdict for future medical expenses, holding without further explanation that the evidence did not support the amount of future medical expenses awarded by the jury. Id. at 8.

Finally, the Court of Appeals affirmed the trial court's holding that prejudgment interest is never available to a personal injury plaintiff, even on pecuniary damages. Id. In support of this holding, the court relied upon two Court of Appeals cases that in turn rely upon an 1891 Tennessee Supreme Court case, Louisville & N.R. Co. v. Wallace, 17 S.W. 882. Id.

**V. The Court of Appeals opinion creates conflict and confusion concerning the proper application of the rule against speculative damages.**

The familiar prohibition on “speculative damages” began as an absolute prohibition upon recovery of expected profits in breach of contract cases. See Pettee v. The Tennessee Manufacturing Company, 33 Tenn. 381 (1853). The rule has been reinterpreted and revised many times, but the rule retains much of its outdated terminology. This terminology provides little guidance to litigants and courts: “In this area catch phrases abound, but [they do] little to explain the process by which courts determine whether the plaintiff’s proof is sufficient.” Robert M. Loyd, Contract Damages in Tennessee, 69 Tenn. L. Rev. 837, 876 (2002). In fact, catch phrases such as “damages

may never be based on speculation” and “damages must be proven with reasonable certainty” invite confusion. See, e.g., Bara v. Clarksville Memorial Health Systems, Inc., 104 S.W.3d 1, 4 (Tenn. Ct. App. 2002) (quoting Jeff L. Lewin, The Genesis and Evolution of Legal Uncertainty About “Reasonable Medical Certainty”, 57 Md. L. Rev. 380, 400-01 (1998)) (“The very notion of ‘reasonable certainty’ is almost an oxymoron, because the adjective ‘reasonable’ qualifies and essentially negates the absolute implications of the noun ‘certainty.’”); Bert Black, A Unified Theory of Scientific Evidence, 56 Fordham L. Rev. 595, 669 (1988) (“reasonable certainty adds nothing to the law except the opportunity for confusion”). In these vague formulations defendants, and sometimes even judges, perceive insurmountable barriers to recovery of uncertain damages. These perceptions are inconsistent with the modern rule against speculative damages.

Since 1999, the best explanation of the modern rule against speculative damages has been provided by Overstreet v. Shoney’s, 4. S.W.3d 694, a Middle Section opinion by Judge Koch. Overstreet carefully reviews and explains the proper scope of the rule against speculative damages. Overstreet explains that “uncertain or speculative damages are prohibited only when the existence, not the amount, of damages is uncertain.” Id. at 703. Overstreet also explains that proof regarding the amount of damages need only be sufficient to “enable the trier of fact to make a fair and reasonable assessment of the damages.” Id. With respect to lost earning capacity in particular, Overstreet makes the common sense observation that “proof concerning impairment of earning capacity is, to

some extent, speculative and imprecise,” but that this fact does not justify excluding such proof. Id. at 704. These holdings are consistent with other Tennessee caselaw and with the principle that a tortfeasor should not profit from uncertainty caused by the tortfeasor’s own wrongdoing.

In the sixteen years since Overstreet was decided, courts have repeatedly relied upon the opinion’s explanation of the rule against speculative damages. In fact, Overstreet’s explanation is so well-established that it is cited in two different sections of the Tennessee Judicial Conference’s Tennessee Pattern Jury Instructions: Civil (5th ed. 2005): § 14.13 Loss of Earning Capacity and § 14.50 Determining Future Damages Without Speculation. Overstreet’s analysis of the rule against speculative damages has therefore been incorporated into countless sets of jury instructions.

The Court of Appeals decision in this case rejects Overstreet’s analysis without discussion. The opinion draws no distinction at all between proof of the existence of damage and proof of the amount of damage. It simply labels King’s proof “speculative” and therefore inadmissible. Opinion at 5, 5 n.2. By failing to distinguish between proof of the existence of damage and proof of the amount of damage, the opinion necessarily abandons the principle that a plaintiff who proves the existence of damage need only submit sufficient evidence to provide a reasonable basis for calculating the amount of damage.

The opinion actually seems to acknowledge that King suffered some loss of earning capacity because of his inability to continue excavating. The opinion explicitly

assumes that with King doing the excavation himself “his business . . . would be profitable.” Id. at 4. Applying the Overstreet analysis, once the existence of damage was established, King was only required to provide a reasonable basis for estimating the amount of that damage. The evidence of (1) eight months of sales and five months of profitable solo operation, and (2) strong demand from King’s customers, even after the accident, would seem to establish a sufficient basis for estimating King’s lost future profits. The problem with the Court of Appeals decision is that it applies the same test to proof of the existence of damage and proof of the amount of damage: “Is it speculative?” This catch phrase test, as applied by the Court of Appeals, is inconsistent with Overstreet and with the modern understanding of the rule against speculative damages.

By casting doubt on Overstreet, the Court of Appeals decision creates conflict and confusion in an important area of law, and the decision should be reviewed by this Court:

- The Court of Appeals decision creates a split of authority within the Middle Section regarding the meaning of the rule against speculative damages. Review by this Court is therefore appropriate under Tenn. R. App. P. 11(a)(1) because of the need to secure uniformity of decision.
- By casting doubt on Overstreet, the Court of Appeals decision confuses an already difficult area of law, leaving trial judges without reliable guidance on important damages issues that regularly arise in tort cases, contract cases, and cases raising statutory claims. Review by this Court is therefore appropriate under Tenn. R. App. P. 11(a)(2) because of the need to secure settlement of an important question of law.
- The Court of Appeals decision conflicts with several sections of commentary in the Tennessee Pattern Jury Instructions. Review by this Court is therefore appropriate under Tenn. R. App. P. 11(a)(1) because of the need to secure uniformity of decision, and because of the need to provide guidance to trial courts.

- The Court of Appeals decision conflicts with the principle that a tortfeasor should not profit from uncertainty caused by the tortfeasor's own wrongdoing. Review by this Court is therefore appropriate under Tenn. R. App. P. 11(a)(2) because of the need to secure settlement of an important question of law.
- The Court of Appeals decision creates uncertainty regarding important damages issues that this Court has not directly addressed. Review by the Court is therefore appropriate under Tenn. R. App. P. 11(a)(2) because of the need to secure settlement of an important question of law, and under Tenn. R. App. P. 11(a)(4) because of the need for the exercise of the Supreme Court's supervisory authority.

For trial courts, the practical consequences of leaving the Court of Appeals opinion unreviewed are not acceptable. This case was presided over by a conscientious and able trial judge who carefully considered the parties' arguments on speculative damages. The court properly applied the principles set out in Overstreet, and allowed the jury to consider evidence of Joe King's five months of profitable operation. The next time that the Circuit Court of Maury County has to resolve a speculative damages dispute, the court will be required to reconcile Overstreet with King v. General Motors. It will not be able to do so. For example, how would the court decide whether it may still instruct a jury that speculative damages are only prohibited when the existence of damage is uncertain, not when merely the amount of damage is uncertain, as the commentary to §§ 14.13 and 14.50 of the Tennessee Pattern Jury Instructions: Civil explains? Under Overstreet, the instruction is proper; under King, the instruction is improper. Currently, there is no authority from this Court that can resolve this conflict.

**VI. The Court of Appeals opinion introduces a new rule that is unfair and impractical, and that will affect a wide range of cases.**

The Court of Appeals opinion interprets a decision of this Court as creating a *per se* rule that is unfair and impractical, and that will affect the outcome of any case in which the value of a new business's expected future profits is relevant. The opinion holds that Burge Ice Machine v. Strother, 273 S.W.2d 479 (Tenn. 1954), excludes evidence of expected future profits for any new business that does not have contracts for future sales. In fact, Burge does not impose any such rule.

Burge is a breach of contract case in which the plaintiff was starting a frozen food business. The plaintiff contracted with the defendant to purchase refrigeration machinery, the defendant defaulted, and the plaintiff asserted a claim for lost profits. This Court held that the plaintiff had not established that he had suffered any injury because (1) the plaintiff's business never got started and had apparently never made a sale, (2) the only evidence presented of a market for the plaintiff's products was the owner's bare assertion that he could sell the products, and (3) the plaintiff did not have any buyers who had contracted to purchase his products. *Id.* at 485-86. The court was careful, however, to clarify that it was not holding that lost profits could not be established merely because the plaintiff was a new business. *Id.* at 485 ("We agree with the opinion of the Court of Appeals that the proof as to loss of profits was speculative. We do not interpret the opinion of the Court of Appeals as holding merely [sic] that loss of profits cannot be shown merely because it is a new business.").

The Burge court did not identify the absence of sale contracts as the sole determining factor—nor did it imply that an absence of sale contracts should be determinative in other cases. The court simply acknowledged that in the case of a business that never got started and that had never made a single sale, the absence of any sale contracts is relevant. See id. at 485-86. The plaintiff’s problem in Burge was that the *only* evidence presented that future sales would be made was that plaintiff’s bare assertion that he could have made such sales. Id. The Burge holding is consistent with the modern formulation of the rule against speculative damages. Even under the modern rule, a plaintiff’s bare assertions about the number of sales he would have made and his profit margin on those sales would not provide a reasonable basis for estimating his lost future profits. Burge does not purport to impose a per se rule requiring a new business to prove that it has contracts for future sales before it can establish lost future profits. The Court of Appeals’ interpretation of Burge should therefore be rejected.

The rule announced by the Court of Appeals should also be rejected because it is unfair and impractical:

- Most businesses do not rely upon sale contracts, so the absence of such contracts says nothing about the probable future success of the business. Electricians, toy stores, lawyers, landscapers, fast food franchisees, doctors, and numerous other businesses and self-employed workers survive and thrive without any guarantee of future business.
- The absence or existence of sale contracts is just one element of an endless array of evidence potentially relevant to an estimate of future profits—it does not deserve to be singled out as the determinative element.

- A sale contracts requirement unfairly discriminates against small businesses, sole proprietors, and entrepreneurs, and against most industries outside of the manufacturing sector.
- A sale contracts requirement unreasonably limits a factfinder's ability to consider damages likely to occur after the expiration of existing contracts. Even businesses that employ sale contracts are unlikely to have long-term contracts. So even when recovery of lost future profits is available under the Court of Appeals' rule, recovery could be unfairly limited by the time-period of existing contracts.

Adoption of a sale contracts requirement would lead to unjust results in tort cases, in contract cases, in intellectual property cases, in cases involving valuation of a business, and in any other case in which expected profits are relevant. Review by this Court is therefore appropriate under Tenn. R. App. P. 11(a)(2) because of the need to secure settlement of an important question of law.

**VII. A rule prohibiting prejudgment interest on pecuniary damages in personal injury lawsuits prevents a personal injury plaintiff from obtaining full compensation.**

This case raises an issue that no Tennessee court has directly addressed: whether a court may award prejudgment interest on pecuniary damages such as medical expenses and lost earning capacity in a personal injury case. The issue merits review by this Court for a number of reasons. First, the purpose of tort damages is to fully compensate a wronged party for damage caused by another's misconduct. See Overstreet, 4 S.W.3d at 703 (citing, among others, Inland Container Corp. v. March, 529 S.W.2d 43, 44 (Tenn. 1975); Louisville, Nashville & Great Southern R.R. v. Guinan, 79 Tenn. 98, 103 (1883); Restatement (Second) of Torts § 901, cmt. a (1979)). If a plaintiff cannot receive

prejudgment interest for pecuniary damages, a plaintiff cannot receive full compensation. See Myint v. Allstate Ins. Co., 970 S.W.2d 920, 927 (Tenn. 1998) (“a court must keep in mind that the purpose of awarding the interest is to fully compensate a plaintiff for the loss of the use of funds to which he or she was legally entitled”); Scholz v. S.B. Intern., Inc., 40 S.W.3d 78, 83 (Tenn. Ct. App. 2000) (“Fairness will, in almost all cases, require that a successful plaintiff be fully compensated by the defendant for all losses caused by the defendant, including the loss of use of money the plaintiff should have received.”). Second, the issue should arise in every personal injury case involving pecuniary damages—in other words, almost every personal injury case. Third, recognition of a right to seek prejudgment interest for pecuniary damages in personal injury cases would be consistent with the general trend away from arbitrary rules and towards fair and flexible standards. Fourth, the precise question whether a court may award prejudgment interest on pecuniary damages in a personal injury case has never been directly addressed by any Tennessee court, including the Court of Appeals in this case. For all of these reasons, review by this Court is appropriate under Tenn. R. App. P. 11(a)(2) because of the need to secure settlement of an important question of law.

In this case, General Motors has argued, and the trial court and the Court of Appeals have agreed, that an 1891 Tennessee Supreme Court case, Louisville & Nashville R.R. Co. v. Wallace, 17 S.W. 882, forbids prejudgment interest in all personal injury cases. In the last twenty years, several other Tennessee courts have also applied Wallace to deny prejudgment interest in personal injury cases. But none of these

decisions have examined the basis of the Wallace decision. The decisions have not considered whether a blanket prohibition on prejudgment interest in personal injury cases makes sense, nor have they attempted to reconcile Wallace with Myint. Instead, courts have relied solely on the doctrine of stare decisis. McKinley v. Simha, 2002 WL 31895715, at \*23 (Tenn. Ct. App.) (“Wallace has not been overruled . . . .”); Sterling v. Velsicol Chemical Corp., 855 F.2d 1188, 1215 (6th Cir. 1988) (“The Wallace decision has not been overruled . . . .”).

Stare decisis does not, however, compel Tennessee courts to prohibit prejudgment interest in all personal injury cases. This case differs from Wallace because the Wallace jury returned a general verdict, and the jury in this case made separate awards for non-pecuniary damages and pecuniary damages. The Wallace decision is based upon an old common law rule prohibiting prejudgment interest on claims involving *non-pecuniary* damages such as pain and suffering. See Theodore Sedgwick, Arthur G. Sedgwick and Joseph H. Beale, A Treatise on the Measure of Damages 468 (8th ed. 1891) (cited by Wallace, 17 S.W. 882 *passim*); Arthur G. Sedgwick, Elements of Damages 135-37 (1896) (citing Wallace). This common law rule also allowed prejudgment interest on claims involving only *pecuniary* damages. *Id.* The rule did not address the availability of prejudgment interest when a jury awards non-pecuniary damages and pecuniary damages separately. Because Wallace involved a jury verdict awarding non-pecuniary and pecuniary damages “in gross,” it did not address the availability of prejudgment interest when a jury awards non-pecuniary damages and pecuniary damages separately. Recent

Case, Prejudgment Interest Allowed Under Death On High Seas Act, 110 U. Pa. L. Rev. 612, 615 n.30 (1962). The statement in Wallace that prejudgment interest is prohibited in personal injury cases is therefore an inaccurate over-generalization—equally important, it is dicta. See McCormick, Interest as Damages, 9 N.C.L. Rev. 237, 255-56 (1930-31) (describing the “generalization” that prejudgment interest is prohibited in personal injury cases as “hasty,” “injudicious” “dicta”). Wallace does not, therefore, compel courts to deny prejudgment interest on pecuniary damages simply because those damages were suffered in a personal injury case.

One might expect that adopting King’s interpretation of Wallace would require this Court to reject more than a century of precedent. After all, if Wallace stands for the proposition that prejudgment interest may never be awarded in a personal injury case, it should have affected every single personal injury case filed since 1891. One might therefore assume that Wallace was a landmark decision that has been relied upon many times. The truth is that as of 1988 Wallace had had *no* discernable effect upon Tennessee’s prejudgment interest jurisprudence. In fact, King has been unable to identify any published or unpublished opinion before 1988 by any Tennessee state or federal court citing Wallace for the proposition that prejudgment interest is prohibited in a personal injury case.<sup>1</sup>

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<sup>1</sup>In 1904, the Tennessee Supreme Court quoted Wallace’s discussion of the availability of prejudgment interest in actions for the destruction of personal property. Louisville & N.R. Co. v. Fort, 80 S.W. 429, 435. The quotation notes that the rule is different in personal injury actions, but Fort was not a personal injury case.

There are two likely reasons for Wallace's longstanding obscurity. First, Tennessee has not adopted a practice of determining whether to award prejudgment interest based upon whether a case can be categorized as a "personal injury case," a "property damage case," a "breach of contract case," or some other category of case. Second, the distinction between pecuniary and non-pecuniary damages receded in importance over time. Instead of considering whether damages were pecuniary or non-pecuniary, courts focused on whether damages were liquidated or unliquidated. See Myint, 970 S.W.2d at 927. Courts purported to deny prejudgment interest on all unliquidated damages, whether pecuniary or non-pecuniary. Id. There was, therefore, no point in distinguishing between unliquidated pecuniary damages and unliquidated non-pecuniary damages.

The Wallace decision finally resurfaced in a 1988 federal opinion denying prejudgment interest in a personal injury case: Sterling v. Velsicol Chemical Corp., 855 F.2d 1188 (6th Cir.). Because Wallace's denial of prejudgment interest had not been cited in many decades, its appearance in Sterling is almost certainly the result of the advent of electronic legal research. Since Sterling, several courts have applied Wallace to deny prejudgment interest in personal injury cases. But none of these cases have considered whether a distinction should be drawn between pecuniary and non-pecuniary damages.

If Tennessee courts are going to prohibit prejudgment interest on pecuniary damages in all personal injury cases, they should do so only after carefully considering

the implications of such a rule. Certainly, such a sweeping rule should not be imposed based upon a questionable interpretation of a superceded, century-old case that has been reanimated by electronic legal research. There are reasonable arguments in favor of prohibiting prejudgment on non-pecuniary damages such as pain and suffering—but King is not aware of any serious argument against awarding prejudgment interest on pecuniary damages just because the lawsuit involves personal injuries.

**VIII. The evidence that Joe King could expect to incur \$9,243.65 to \$9,695.67 in future annual medical expenses is sufficient to support a \$225,000 verdict for future medical expenses over a 22.5 year period.**

With respect to future medical expenses, the Court of Appeals summarized the record as follows:

Each doctor stated that the previous year's medical expenses would be a reasonable estimate of the costs King would incur per year as a result of the accident. In addition, Appellees presented all of King's medical bills incurred as a result of the accident. The parties have also stipulated as to the amount of medication expense King will incur per year in addition to his medical treatment expenses.

Opinion, at 8. The doctors' testimony, the medical bills, and the stipulated medication expenses established that King had incurred between \$9,243.65 and \$9,695.67 in medical expenses related to the accident in the year before trial. (Wolfe Depo., Ex. 29-A, at 30-37; Exhibit 4 to Wolfe Depo., at A00842-915; Tr. 1049-50). As a mathematical proposition, \$9,243.65 to \$9,695.67 in annual medical expenses over King's 22.5 year life-expectancy is sufficient to constitute material evidence to support the jury's \$225,000 award for future medical expenses. The Court of Appeals opinion does not explain why it

disagrees with this conclusion—it simply states that the record does not “support the full extent of the jury’s award for future medical expenses.” Opinion, at 8. This conclusion is erroneous. If this Court hears this case, it should correct this error and spare the parties an unnecessary retrial on future medical expenses.

## **IX. Conclusion**

The Court of Appeals opinion in this case has eliminated Joe King’s ability to obtain full and fair compensation for his injuries. The opinion prohibits King from presenting the best available evidence of his lost earning capacity because the *amount* of King’s damages is uncertain. The opinion also prohibits King from presenting the best available evidence of his lost earning capacity because King declined to enter into long-term sale contracts with his customers. And the opinion prohibits King from recovering prejudgment interest on pecuniary damages simply because King suffered personal injuries.

The opinion is inconsistent with existing law and inconsistent with important general principles of tort damages law. If the opinion is not reviewed, the consequences will not be limited to Joe King, nor will they be limited to tort damages law. The issues presented in this case arise frequently in many different contexts. This case is therefore appropriate for review by the Tennessee Supreme Court under Tenn. R. App. P. 11.

Respectfully submitted:

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Stephen C. Knight - 15514  
Baydoun & Knight, PLLC  
Suite 2650, Financial Center  
424 Church Street  
Nashville, Tennessee 37219  
(615) 256-7788

### **Certificate of Service**

I hereby certify that a copy of the foregoing was served upon **Jonathan Cole**, Baker, Donelson, Bearman & Caldwell, 211 Commerce Street, Nashville, Tennessee 37201, and upon **Philip L. Harris** and **Julie A. LaBunski**, Jenner & Block, LLP, One IBM Plaza, 40th Floor, Chicago, Illinois 60611, on this \_\_\_ day of March, 2006.