

Feature Article

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Use of Income Tax Returns, or Failure to File Them, to Diminish Damages for Lost Income or to Attack Plaintiff's Credibility

In personal injury and wrongful death actions, oftentimes one side or the other will seek to introduce into evidence or otherwise use the income tax returns of the plaintiff (or plaintiff's decedent). Sometimes the evidence is offered to prove or disprove a claim for damages due to loss of income or loss earning capacity. At other times it is to attack the credibility of the plaintiff.

This article will discuss those situations in which the courts have allowed or refused evidence based on income tax returns, especially when proffered by the defendant. The article also will cover court decisions dealing with evidence that the plaintiff failed to file income tax returns.

It is common knowledge that most persons living in this country who earn more than a minimal amount of income during a given year are required to file federal and state income tax returns. It also is common knowledge that income tax returns are supposed to accurately report the taxpayer's income. Thus, when allowed to consider evidence from the plaintiff's (or the plaintiff's decedent's) tax returns, most jurors will conclude that the amount of income reported will provide a good basis for determining the amount of damages to be awarded for claimed lost income or lost earning capacity in a personal injury suit or lost financial support in a wrongful death suit. Similarly, when the plaintiff's claim is belied by the tax returns, the plaintiff's credibility can be greatly undermined in the eyes of the jury.

Given the effect that income tax returns can have on a jury's decision, the question is when can tax returns be admitted into evidence or otherwise used at trial?

In *Yakstis v. William J. Diestelhorst*, 61 Ill. App. 3d 833, 839, 378 N.E.2d 591 (5th Dist. 1978), the appellate court stated that a decedent's income tax return is "relevant evidence of the economic status of the decedent, and would tend to show the economic loss caused by his death." The court found that use of the plaintiff's decedent's tax returns by the plaintiff's economic expert to estimate the economic loss was appropriate.

By the same token, under Illinois law, use of the plaintiff's tax returns to discredit the plaintiff's lost income claim also generally is allowable. *Fettson v. James*, 298 Ill. App. 3d 77, 81, 697 N.E.2d 1131 (1st Dist. 1997). This is particularly true when the plaintiff's testimony "reveals a lack of certainty" about the amount of lost income. *Id.* at 81, 697 N.E.2d at 1134.

Other jurisdictions also recognize the appropriateness of use of the plaintiff's income tax returns when the plaintiff seeks damages for lost income. *E.g.*, *Collins v. Farley*, 147 So. 2d 593 (Fla. App. 1962) (finding reversible error in trial court's refusal to allow defense counsel to cross-examine plaintiff with tax returns, when plaintiff claimed lost income); and *Jordan v. Elex, Inc.*, 82 Ohio App. 3d 222, 232, 611 N.E.2d 852 (1st Dist. 1992) (finding tax returns relevant to lost income claim).

In a New York case, the court concluded that the income tax returns of the plaintiff (the decedents' father), were properly used for cross-examining the plaintiff, even though he filed the suit to recover, *inter alia*, damages for loss of support from his two sons, who were killed in an automobile accident. *Franchell v. Sims*, 73 A.D.2d 1, 424 N.Y.S.2d 959 (N.Y. App. Div. 1980). The appellate court noted that because the plaintiff had "elected to put his financial condition in issue, cross-examination with respect to his income tax returns was appropriate." *Id.* at 7, 424 N.Y.S.2d at 963.

In *Pozzie v. Mike Smith, Inc.*, 33 Ill. App. 3d 343, 337 N.E.2d 450 (1st Dist. 1975), the appellate court found cross-examination based upon entries made on the plaintiff's tax returns, which showed that the plaintiff was physically able to perform work, was proper, but detailed questioning based on other entries in the return was not. In *Pozzie* the plaintiff was injured while operating a forklift to unload a trailer. Subsequently he underwent back surgery. On cross-examination at trial, defense counsel questioned the plaintiff about whether he had operated a pickup truck with a snow plow approximately three years after the accident. The appellate court found the questioning was appropriate to the extent it addressed the plaintiff's capacity to perform physical activities. *Id.* at 346-47, 337 N.E.2d at 453.

Defense counsel in *Pozzie* also introduced into evidence the plaintiff's 1970 income tax return and questioned the plaintiff in detail about whether the plaintiff had purchased a snow blower and claimed it as a business expense on the return. The appellate court ruled that this cross-examination was improper, because "[i]t served only to imply that the plaintiff was dishonest and attempted to cheat the government out of tax revenue" and did not concern the plaintiff's ability to perform physical activities. *Id.* at 347.

It is probable that if defense counsel's cross-examination in *Pozzie* had inquired only about the post-accident use of the snow blower, without reference to the business expense deduction on the tax return, the court would have found the questioning to be appropriate.

Thornhill v. Midwest Physician Center of Orland Park, 337 Ill. App. 3d 1034, 787 N.E.2d 247 (1st Dist. 2003), presents an interesting contrast to *Pozzie*. *Thornhill* involved an action for wrongful birth of a child with Down's syndrome. The plaintiff, who was the child's mother, claimed that the defendant physician failed to inform her about the results of a prenatal genetic test until it was too late for an abortion. The plaintiff also claimed that if she had been timely informed, she would have had an abortion. The defendant physician, however, testified that the plaintiff told the physician that she would not have undergone an abortion even if she had learned of the test results earlier.

On cross-examination, the plaintiff testified that she had never cared for or had custody of anyone else's children. Defense counsel was then allowed to confront the plaintiff with her federal income tax returns for three years during which she improperly claimed dependent exemptions for two daughters living with her, when they actually were her goddaughters.

The jury in *Thornhill* rendered a defense verdict. On appeal the plaintiff claimed that the cross-examination about the tax returns was irrelevant to any issue in the case and "was highly prejudicial because defendants suggested that she was a tax cheater." *Id.* at 1048, 787 N.E.2d at 259. The appellate court disagreed finding no abuse of discretion by the trial court in admitting this evidence. The appellate court found that the plaintiff's credibility "was a central issue in the case" and that the plaintiff "was given ample opportunity to explain the apparent inconsistencies and rehabilitate herself." *Id.* at 1048.

In *Fettson v. James*, 298 Ill. App. 3d 77, 697 N.E.2d 1131 (1st Dist. 1997), the plaintiff, a professional singer, was involved in a motor vehicle accident when his automobile was struck in the rear by a school bus. The plaintiff claimed \$860 in medical expenses and \$82,500 in lost income from scheduled singing engagements that he was unable to fulfill within the two weeks after the accident. The jury awarded a total of \$25,000 to the plaintiff.

During cross-examination of the plaintiff, defense counsel attempted to question the plaintiff regarding the plaintiff's tax returns for the year of the accident and the three prior years. The plaintiff's attorney objected to any questioning about the plaintiff's tax returns from any years prior to or subsequent to the year of the accident, and the trial court sustained the objection.

On appeal the defendants asserted that it was error for the trial court to preclude questioning based on the plaintiff's tax returns from years other than the year of the accident. The appellate court found that precluding such questioning was within the sound discretion of the trial court and not error. *Id.* at 82, 697 N.E.2d at 1134. The court noted that testimony about tax returns from prior or subsequent years would not have been probative of the plaintiff's income or loss of income during the year for which the plaintiff claimed a loss. *Id.* There is nothing in the court's opinion which indicates that the defendant's attorney argued that something in the returns from the other years would have impeached the plaintiff's credibility.

A plaintiff's failure to file a tax return in one or more years may also be an appropriate subject for cross-examination either to diminish the plaintiff's lost income claim or to attack the plaintiff's credibility. The case of *Cervený v. American Family Ins. Co.*, 255 Ill. App. 3d 399, 626 N.E.2d 1214 (1st Dist. 1993) provides a good example. *Cervený* involved an underinsured motorist's claim tried before a jury after a waiver of arbitration. The plaintiff was a real estate salesperson, who claimed loss of past income and loss of future earning capacity as a result of the accident. On direct exam, the plaintiff "portray[ed] herself as a successful real estate salesperson, leaving the impression with the jury that her lost future earnings would be as substantial as her past income apparently had been." *Id.* at 411, 626 N.E.2d at 1223. However, "she never offered any proof of actual past earnings." *Id.*

On cross-examination the defendant's attorney questioned the plaintiff about the amount of net income she had reported on her federal income tax returns during the past several years. The plaintiff responded that she had failed to file income tax returns during some of those years.

Unhappy with the amount of damages awarded by the jury, the plaintiff appealed. One of her arguments on appeal was that it was error for the trial court to have allowed cross-examination about her failure to file tax returns. The plaintiff argued that the error was similar to that found in *Pozzie*. The appellate court disagreed, finding that "the questions put to her regarding her tax returns were relevant to the issue of damages" for lost income. Therefore, the questions were proper. *Id.* at 411-12. The appellate court distinguished the case before it from *Pozzie* by noting that "here, defendant did not verbally scrutinize each entry on plaintiff's return before the jury in an attempt to lead it to infer that the return was fraudulent . . ." *Id.* at 412.

Evidence of the plaintiff's failure to file tax returns can be admissible whether the plaintiff's claim is for actual lost income or for a loss of earning capacity. *See, e.g., Newson v. City of Oakland*, 37 Cal. App. 3d 1050, 1055, 112 Cal. Rptr. 890 (1st Dist. 1974) (claim for lost income); *Martinez v. Jordan*, 553 P. 2d 1239, 1240-41 (Ariz. App. 1976) (claim for lost income and impaired earning capacity); and *Smith v. Deere & Co.*, No. 87-7998, 1989 U.S. Dist. LEXIS 2693 (E.D. Pa. March 20, 1989) (claim of impaired earning capacity).

Fugate v. Sears Roebuck and Company, 12 Ill. App. 3d 656, 299 N.E.2d 108 (1st Dist. 1973), provides a valuable lesson with respect to preserving the issue for appeal, when the trial court has refused to allow cross-examination regarding the plaintiff's failure to file a tax return. In *Fugate* the plaintiff was severely injured due to the explosion of a water heater in an apartment building. After a verdict against the defendant who was the apartment building manager, the defendant appealed. The defendant raised several issues regarding evidence the trial court had excluded, which the defendant contended was relevant to the issue of damages. One issue raised was whether the trial court erred in excluding evidence of the plaintiff's failure to file income tax returns. The defendant argued that evidence of failure to file tax returns was relevant to the issue of damages. The appellate court rejected this argument on the basis that the defendant had not raised an issue on appeal about whether the damages awarded were excessive. The court found that the admission or exclusion of evidence on damages is not prejudicial error where the issue of an excessive verdict is not raised on appeal. *Id.* at 674, 299 N.E.2d at 121.

In a footnote, the *Fugate* opinion also pointed out that the plaintiff had not asked the jury for damages due to lost wages or loss of earning capacity. Thus, the plaintiff had "removed these issues from the case prior to the trial." *Id.* n.3.

The footnote cited above from *Fugate* points out how a prescient plaintiff's attorney can avoid the potentially devastating affect on the outcome of the case that evidence of the plaintiff's failure to file a tax return can have. By withdrawing before trial any issue of lost income or loss of earning capacity, the plaintiff

can prevent the jury from hearing that he failed to file a tax return. However, this tactic may not always be successful.

For example, in *Boomhower v. Huntington*, 183 Vt. 530, 944 A.2d 234 (2007), although the plaintiff filed tax returns, he failed to report all of his income. In that case the plaintiff sued for injuries from an automobile accident. Immediately before the trial the plaintiff withdrew his claim for lost income. Nevertheless, the trial court permitted defense counsel to cross-examine the plaintiff regarding his failure to report all of his income on his tax return.

On appeal the plaintiff in *Boomhower* claimed that the cross-examination was prejudicial error. The Vermont Supreme Court disagreed. The court found that the cross-examination about the failure to report income, which the plaintiff originally claimed was lost due to the accident, was a proper attack on the plaintiff's credibility. *Boomhower* is in accord with *Thornhill* in allowing cross-examination based on income tax returns when the returns cast doubt on the plaintiff's credibility.

The credibility of a witness is always at issue (*People v. Garth*, 31 Ill. App. 3d 716, 719, 334 N.E.2d 359 (5th Dist. 1975)), as long as the evidence is not offered in an attempt to make an improper "end run around the relevancy rule." See *Baraniak v. Kirby*, 371 Ill. App. 3d 310, 317, 862 N.E.2d 1152 (1st Dist. 2007) (photos of minimal vehicle damage from accident not admissible to attack credibility of plaintiff, when no expert testimony offered to establish materiality of photos).

In summary, cross-examination based on the plaintiff's tax returns or failure to file them can be very useful for diminishing a plaintiff's claim for a loss of income or a loss of future earning capacity from an accident. In appropriate circumstances the tax returns or failure to file them can provide an effective and permissible means of attacking a plaintiff's credibility.

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