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COURT OF APPEALS

DIVISION I

OF THE STATE OF WASHINGTON

ALEX SALAS, Petitioner

v.

HI-TECH ERECTORS, Respondent

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STATE OF WASHINGTON  
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RESPONDENT  
AND  
CROSS APPELLANT'S BRIEF

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## 1A. ASSIGNMENTS OF ERROR

*Assignment of Error No. 1: The trial court erred in limiting the testimony of defense witness George Canney.*

Issues Pertaining to Assignment of Error:

Whether in a construction site accident case, the owner of defendant company, who has considerable experience in his industry, who was identified in responses to discovery, who was identified as a witness by plaintiff's counsel, and who was deposed prior to trial should be limited from testifying regarding industry standards and compliance with safety regulations.

*Assignment of Error No. 2: The trial court erred in partially granting the plaintiff's motion for summary judgment.*

Issues Pertaining to Assignment of Error:

Whether the Court erred by ruling on summary judgment that respondent violated WAC 296-155-480 as a matter of law when the requirements of that regulation are inapplicable and the applicable regulation is WAC 296-155-483.

## B. STATEMENT OF THE CASE

This case involves a construction site accident that occurred on October 22, 2002. Appellant was an employee of general contractor Charter Construction when he fell from a scaffold ladder on the job site. The scaffold and ladder were provided by respondent, a subcontractor. Respondent erected

the scaffolding in early June of 2002. Generally, respondent would not return to the job site until the job is completed. VRP 5/22/06, pp. 110-111. The scaffolding and ladder were intended to be used by employees of Charter Construction, as well as the employees of other subcontractors on the job. CP 2.

It is undisputed that at the time of the accident, appellant was an illegal alien, or “undocumented worker.” In fact, his visa had expired in 1994, approximately eight years before the accident in question. VRP 2/22/06, p. 33. In trial testimony, appellant admitted that he is currently in the United States illegally. VRP 2/22/06, p. 63. Prior to trial, appellant moved *in limine* to exclude any evidence relating to appellant’s status as an illegal alien. During argument on that motion, Judge Hayden noted that the appellant had provided him with no legal authority that appellant could make a claim for future wage loss and exclude evidence of his immigration status. VRP 2/15/06, p. 28. Judge Hayden properly noted that if appellant intended to make a claim for impairment of future income, his status as an illegal alien was probative on the issue. VRP 2/15/06, pp. 26-27. Appellant elected to make a claim for loss of future income, so evidence as to his immigration status was allowed.

Prior to trial, the Honorable Judge Michael Fox had been assigned to the case. Appellant moved to exclude any defense witnesses because respondent had not served a witness disclosure list. However, as pointed out

in respondent's opposition to that motion, the only witness respondent intended to call was respondent's principal owner, George Canney. Mr. Canney had been disclosed in responses to discovery, his deposition had been taken, and he was identified as a witness in appellant's witness disclosure. CP 41. Judge Fox denied appellant's motion to exclude all defense witnesses, but ruled that Mr. Canney could not give any expert testimony at trial. CP 46.

In that same order, Judge Fox partially granted appellant's motion for summary judgment, ruling as a matter of law that respondent violated WAC 296-155-480. However, as respondent pointed out in opposition to the plaintiff's motion, that regulation is inapplicable. The applicable regulation is WAC 296-155-483. CP 41.

During trial, appellant called Mr. Canney as a witness. During his cross-examination, appellant's counsel asked Mr. Canney if in his opinion a lifeline or fall restraint system had been in place the fall would have been prevented. A concern arose that the question asked for expert testimony. So, Judge Hayden had a meeting with counsel at sidebar. VRP 5/18/06, pp. 158-160. As pointed out in respondent's response to appellant's later motion for a new trial, during that meeting Judge Hayden warned that if appellant's counsel asked that question, he would be "opening the door" for any expert testimony Mr. Canney may have. CP 83. In spite of that admonition, appellant's counsel proceeded to ask that question of Mr. Canney. VRP

5/18/06, pp. 160-161.

Though appellant claims surprise and prejudice, it should be noted that appellant presented expert testimony from safety expert Mark Lawless in his case in chief regarding the applicability of safety regulations and standards in the industry. VRP 5/17/06, pp. 26-124. Following the presentation of respondent's case, appellant was permitted to call another industrial safety expert, Richard Gleason, to rebut the testimony of Mr. Canney. VRP 5/23/06, pp. 24-114.

### C. ARGUMENT

1. The trial court properly allowed evidence of Appellant's immigration status.

A trial court has broad discretion in balancing the probative value of evidence against the potentially harmful consequences that might result from its admission. *Martinez v. Grant County PUD*, 70 Wn. App. 134, 138 (1993).

It is undisputed that the appellant is an illegal alien and was at the time of his accident and at the time of trial. In spite of overwhelming authority to the contrary, he argues that evidence of his status as an undocumented worker should not have been allowed in evidence.

The appellant relies on only one civil case to support his position. In *Balbuena v. IDR Realty*, 6 N.Y.3d 338, 845 N.E.2d 1246 (2006), the Court

of Appeals of New York extensively discussed the conflict between the right of undocumented aliens injured on work sites to sue for wages that would be illegally obtained and an employer's duty to provide a safe place to work. The Court recognized that the Federal Immigration Reform and Control Act of 1986 [IRCA] 8 USC sec. 1324a attempts to remove the incentive for illegal immigration by eliminating job opportunities that draw illegal aliens to the United States by making an employment relationship with an undocumented worker illegal. Thus, any claim by an injured illegal alien for future income loss or loss of earning capacity would be a claim for illegal earnings. On the other hand, the Court also recognized the duty of contractors and sub-contractors to comply with safety regulations and state labor laws. At page 363, the Court in *Balbuena* supported the decision of the trial court in this case, saying:

In any event, any conflict with IRCA's purposes that may arise from permitting an alien's lost wage claim to proceed to trial can be alleviated by permitting a jury to consider immigration status as one factor in its determination of damages, if any, warranted under the Labor Law. (*see e.g. Madeira v. Affordable Hous. Found. Inc.*, 315 F.Supp.2d [504] at 507-508).

Thus, the very case relied on by the appellant dictates a affirmation of the trial court in this case.

The *Balbuena* Court's decision allowing the introduction of an undocumented alien's status in civil cases in which the plaintiff is seeking

future wage loss is consistent with every other court that has ruled on the issue. As stated in *Majlinger v. Cassino Contracting*, 25 A.D. 3d 14, 802 N.Y.S. 2d 56 (2005) at page 30:

[T]he jury may take the plaintiff's status into account, along with the myriad other factors relevant to a calculation of lost earnings, in determining, as a practical matter, whether the plaintiff would have continued working in the United States throughout the relevant period, or whether his or her status would have resulted in, e.g., deportation or voluntary departure from the United States

It should be noted that the *Balbuena* Court affirmed the decision in *Majlinger*. *Balbuena*, at page 363. In *Cano v. Mallory Management, et al*, 195 Misc. 2d 666, 760 N.Y.S. 2d 816 (2003), the Court held that even though the plaintiff was not precluded from bringing a personal injury action because of his status as an illegal alien, his status as an undocumented alien could be presented to the jury on the issue of lost wages. See also *Barahona v. Trustees of Columbia University*, 11 Misc. 3d 1036, 816 N.Y.S. 2d 851 (2006) in which the Court held that “[I]n considering what amount to award a plaintiff for future lost earnings, a jury may ‘consider immigration status as one factor in its determination of the damages, if any, warranted under the Labor Law’ “ [Citations omitted.]. And in *Oro v. 23 East 79<sup>th</sup> St. Corporation*, 10 Misc. 3d 82, 810 N.Y.S. 2d 779 (2005), the Court ruled at page 783, “Therefore, the plaintiff in the present matter may likewise seek to establish his claim for lost earnings at trial, and the evidence of his own

immigration status will be relevant to that inquiry.”

Indeed, at least one court has held that an economic expert’s testimony regarding an undocumented worker’s lost income that does not take into account the plaintiff’s immigration status is speculative and inadmissible. See *Garay v. Missouri Pacific Railroad Company*, 60 F.Supp.2d 1168 (1999). In that case the Court said at page 1173:

The court concludes that the failure of Dr. Baker to take into account the decedent’s illegal status in the United States renders his opinion as to future lost wages wholly unreliable. Clearly, the decedent’s immigration status could have potentially precluded altogether any future employment opportunities in the country (and would have made any such employment unlawful).

The appellant claims that the introduction of evidence regarding his status as an illegal alien was unfairly prejudicial. That argument was rejected by the New Hampshire Supreme Court in *Rosa v. Partners in Progress*, 152 N.H. 6, 868 A.2d 994 (2005), in which the Court said at page 1002:

Thus, an illegal alien’s status, though irrelevant to the issue of liability, [citation omitted] is relevant on the issue of lost earnings. The plaintiff argues that evidence of his illegal alien status is unfairly prejudicial. Though evidence of his status may well be prejudicial, such evidence, as described above, is essential should the illegal alien wish to pursue a claim for lost earning capacity measured at United States wage levels.

The appellant claims that jurors’ prejudice against illegal aliens

somehow resulted in a defense verdict, relying on a declaration by appellant's legal team. CP 695 and 727. It should be noted that in spite of appellant's counsel's apparent concerns about the injection of the issue of appellant's immigration status into the case and the potential prejudices of jurors, he chose not to have voir dire recorded. Regardless, the jurors brought their knowledge and experience to the courtroom, and the situation and controversies regarding illegal aliens was something they may consider in determining the likelihood of future lost wages. It is ironic to compare the appellant's concern over current events and publicity relating to the uncertain status of illegal aliens while at the same time arguing that the appellant's personal status in the United States is secure. Regardless, it is only speculation by the appellant that the juror's bias against illegal aliens resulted in a defense verdict.

As summed up by the Court in *Balbueno, supra*, at page 362:

In other words, a jury's analysis of a future wage claim proffered by and undocumented alien is similar to a claim asserted by any other injured person in that the determination must be based on all of the relevant facts and circumstances presented in the case.

The appellant's reliance on criminal cases such as such as *State v. Avendano-Lopez*, Wash. App. 706, 904 P.2d 324 (1995) is misplaced. In a criminal case, a defendant's immigration status is irrelevant to the issue of

whether a crime was committed. As civil courts have decided, the issue of a plaintiff's status as an illegal alien is very relevant to claims for future wage loss and loss of earning capacity.

Therefore, the trial court properly allowed evidence relating to the appellant's status as an undocumented alien.

2. The trial court properly allowed defense witness George Canney to testify regarding justification and excuse for any alleged code violations, including expert testimony.

As discussed above, appellant's counsel "opened the door" to allow George Canney to testify as an expert by asking for his opinion testimony, in spite of Judge Hayden's admonition. Judge Hayden disagreed with counsel for appellant's characterization of the question as asking for a "lay opinion."

A trial court has broad discretion in ruling on evidentiary matters and will not be overturned absent a manifest abuse of discretion. *Cox v. Spangler*, 141 Wn.2d 431, 439 (2000).

Appellant complains that Mr. Canney gave expert opinions in violation of Judge Fox's order. However, Mr. Canney has considerable experience in the construction industry, and is knowledgeable regarding industry standards and safety regulations. VRP 5/22/06, pp. 87-100. The plaintiff sought to have his company held liable for violations of State and industry standards. Even as a layperson, a party is allowed to provide

justification or excuse to rebut any allegation of such violations. As stated in *Morse v. Antonellis*, 149 Wash.2d 572, 574, 70 P.3d 125 (2003):

In analyzing this reasoning, we start with the proposition that the breach of a statutory duty is no longer considered negligence per se, but may be considered as evidence of negligence.

In *Yurkovich v. Rose*, 68 Wash.App. 643, 847 P.2d 925 (1993) the Court noted at page 653:

The statute eliminates evidence of a violation alone being used to support a finding of negligence per se. It permits a defendant to explain the circumstances and show excuse or justification for the apparent violation. [Emphasis added.]

Respondent's counsel did not ask Mr. Canney questions in terms of having an expert opinion. Instead, Mr. Canney was asked about his experiences in the construction industry and the practical allocation of safety measures among the participants on a job site. VRP 5/22/06, pp. 111-118. As Judge Hayden commented, "Judge Fox was not willing to rule and really modified his ruling to correct any suggestion that [a safety regulation violation] was necessarily a violation by Hi-Tech, and it leaves for discussion based on industry standards and practices and the negotiations between the parties at the time as to how those duties were allocated. I would suggest that it is my understanding that each employer had a, generally has a responsibility for its own employees." VRP 5/17/06, pp. 107-108. It was appellant's counsel that characterized Mr. Canney as an expert witness to the jury. VRP 5/23/06,

pp. 15.

Appellant's own expert Mark Lawless basically agreed with Mr. Canney that Charter Construction has a duty to inspect scaffolding to ensure code compliance. VRP 5/17/06, p. 78. He agreed that Charter had responsibility for the safety of its own employees, as would all the subcontractors on the job. VRP 5/17/06, p. 84-85. Mr. Lawless agreed that Charter should have had a fall protection plan for its own employees. VRP 5/17/06, pp. 121-122. Yet, appellant testified that he was given no fall protection training or equipment by his own employer, Charter Construction. VRP 5/22/06, p. 72-73; pp. 80-81.

Appellant complains that due to the "surprise" of Mr. Canney being allowed to testify as an "expert," he was not prepared to rebut that testimony. Appellant's Brief, pp. 25-28. However, a reading of the trial record cited above shows that the same issues were covered by his expert witness Mark Lawless and again covered by his rebuttal expert witness Richard Gleason. Appellant's counsel was obviously quite prepared for this "surprise." The real issue is that the jury chose to believe Mr. Canney and not appellant's paid experts.

Appellant's argue that justification and excuse must be pled as affirmative defenses or are waived, citing CR 8. There is no such language in CR 8. Regardless, appellant did not argue that to Judge Hayden, so the argument should not be considered on appeal. Furthermore, appellant took

the deposition of Mr. Canney and should have asked about these matters. It should be emphasized that even though Judge Fox ruled as a matter of law that certain safety standards had been violated, he did not rule that respondent was negligent, as Judge Hayden recognized in the above quote.

For the reasons stated above, Judge Hayden properly allowed Mr. Canney to testify regarding his experience in the industry.

3. Appellant's proposed jury instruction regarding non-delegable duty was properly refused.

Appellant's proposed jury instruction was verbose, argumentative, and inaccurate. The cases cited by appellant don't support it. In *Stute v. P.M.B.C.*, 114 Wn.2d 454 (1990), the issue was the responsibility of the general contractor for safety on the job site. As the Court noted in *Stute* at page 462, the general contractor is in the best position to ensure compliance with safety standards. Likewise, *Kalama v. Space Needle Corp.*, 147 Wn.2d 114 (2002) dealt with the responsibility of the owner of a construction project for job site safety, again emphasizing the duty of the general contractor to ensure WISHA compliance and to provide safety equipment to workers. *Weinert v. Bronco National Company*, 58 Wn. App. 692, 697 (1990) also states that the primary duty for job site safety rests with the general contractor.

Therefore, the cases cited by appellant to support the giving of the instruction emphasize the duty of the general contractor and the injured

party's employer for compliance with safety regulations. In this case, Charter was not only the general contractor, but also the appellant's employer. The cases relied upon by the appellant do not create a nondelegable duty of a subcontractor to all employees on a job site.

4. The trial court erred in limiting the testimony of George Canney.

Though Mr. Canney was allowed to testify regarding industry standards and regulation compliance at trial, thanks to appellant's counsel "opening the door," Judge Fox should not have limited his testimony in the first place.

Mr. Canney was disclosed in answers to plaintiff's interrogatories and Mr. Canney was disclosed as a witness by Plaintiff. Mr. Canney's deposition was taken by plaintiff on January 16, 2006.

As stated in *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 498, 933, P.2d 1036 (1997)

when reversing a trial court's order excluding expert witnesses without considering lesser sanctions:

[O]ur overriding responsibility is to interpret the rules in a way that advances the underlying purpose of the rules, which is to reach a just determination in every action.

The Washington Supreme Court in *Burnet* held that the exclusion of witnesses is an abuse of discretion unless the trial court finds that there was a violation of a court order or a wilful non-disclosure and whether a lesser sanction would have sufficed. At pages 495-496, the Court said:

Some of those guiding principles are as follows: the court should impose the least severe sanction that will be adequate to serve the purpose of the particular sanction, but not be so minimal that it undermines the purpose of discovery; the purpose of sanctions generally are to deter, to punish, to compensate, to educate, and to ensure that the wrongdoer does not profit from the wrong.

The Court went on to say at page 197:

In any case, we are satisfied that it was an abuse of discretion for the trial court to impose the severe sanction of limiting discovery and excluding expert witness testimony on the credentialing issue without first having at least considered, on the record, a less severe sanction that could have advanced the purposes of discovery and yet compensated Sacred Heart for the effects of the Burnets' discovery failings. [Emphasis added.]

In this case, there was no willful violation of a court order.

Defendant did not see the need to file a Witness Disclosure which merely reiterated the names of the witnesses appellant had already disclosed. Appellant was well aware that George Canney was an important witness in this case and took his deposition on January 16, 2006. He knew that Mr. Canney was very experienced in his field and have expected that Mr. Canney would testify regarding the standards and regulations in his industry. Therefore, Judge Fox erred when limiting the testimony of George Canney.

5. The lower court incorrectly granted summary judgment in favor of the plaintiff finding as a matter of law that defendant violated WAC 296-155-480.

On May 2, 2006, Judge Fox granted appellant's motion for summary judgment in part, ruling as a matter of law that respondent violated certain provisions of WAC 296-155-480, portions of which are quoted in appellant's brief. However, that regulation does not apply. The code section applicable to the scaffold at issue is WAC 296-155-483. WAC 296-155-483 (5) (b) sets forth the requirements for access ladders on scaffold:

(5) **“Access.”** This paragraph applies to scaffold access for all employees. Access requirements for employees erecting or dismantling supported scaffolds are specifically addressed in (i) of this subsection.

(b) Portable, hook-on, and attachable ladders  
(additional requirements for the proper construction and use of portable ladders are contained in Part J of this chapter—Stairways and ladders:

(i) Portable, hook on, and attachable ladders shall be positioned so as not to tip the scaffold;

- (ii) Hook-on and attachable ladders shall be positioned so that their bottom rung is not more than 24 inches (61 cm) above the scaffold supporting level;
- (iii) When hook-on and attachable ladders are used on a supported scaffold more than 24 feet (7.3 m) high, they shall have rest platforms at 30 foot (6.1 m) maximum vertical intervals except the first platform may be up to 24 feet above the ground;
- (iv) Hook-on and attachable ladders shall be specifically designed for use with the type of scaffold used;
- (v) Hook-on and attachable ladders shall have a minimum rung length of 11 1/2 inches (29 cm); and
- (vi) Hook-on and attachable ladders shall have uniformly spaced rungs with a maximum spacing between rungs of 16 3/4 inches.

WAC 296-155-480, which appellant relied upon in his summary judgment motion, is contained in “Part J” of WAC 296-155. WAC 296-155-483 (5)(b) cross references “Part J” only with regard to **portable** ladders and not with regard to hook-on and attachable ladders. In this case

the ladder from which appellant fell was an attachable ladder. Therefore the requirements of "Part J" and the code sections contained in WAC 296-155-480 relied upon by appellant on summary judgment do not apply as a matter of law.

Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim *expressio unius est exclusio alterius* - - specific inclusions exclude implication. *Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish Co.*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969); *Jacobsen v. Dept. of Labor & Industries*, 127 Wn.App. 384, 392, 110 P.3d 253 (2005); *Starr v. Washington State Dept. of Employment Security*, 130 Wn.App. 541, 549, 123 P.3d 513 (2005).

Therefore, Judge Fox erred when he ruled as a matter of law that respondent violated portions of WAC 296-155-480.

## CONCLUSION

The trial court properly allowed evidence of appellant's status as an illegal alien because the issue was very probative to the issue of the claim for future loss of income. Though the issue is one of first impression in the State

the ladder from which appellant fell was an attachable ladder. Therefore the requirements of "Part J" and the code sections contained in WAC 296-155-480 relied upon by appellant on summary judgment do not apply as a matter of law.

When a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim *expressio unius est exclusio alterius* - - specific inclusions exclude implication. *Wash. Natural Gas Co. v. Pub. Util. Dist. No. 1 of Snohomish Co.*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969); *Jacobsen v. Dept. of Labor & Industries*, 127 Wn.App. 384, 392, 110 P.3d 253 (2005); *Starr v. Washington State Dept. of Employment Security*, 130 Wn.App. 541, 549, 123 P.3d 513 (2005).

Therefore, Judge Fox erred when he ruled as a matter of law that respondent violated portions of WAC 296-155-480.

### CONCLUSION

The trial court properly allowed evidence of appellant's status as an illegal alien because the issue was very probative to the issue of the claim for future loss of income. Though the issue is one of first impression in the State of Washington, authorities from outside the state have overwhelmingly allowed such evidence in civil cases.

The trial court also properly allowed the testimony of George Canney. The trial court has broad discretion in handling evidence at trial, and there was not abuse of discretion. Appellant opened the door, after being admonished buy Judge Hayden of the consequences.

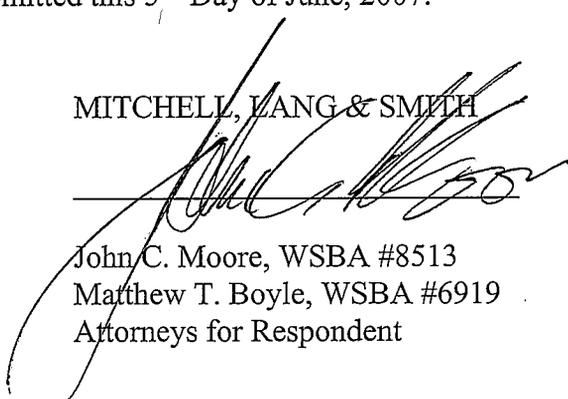
Appellant's propose jury instruction was properly refused as argumentative and an inaccurate statement of the law.

However, Judge Fox improperly limited the testimony of defense witness George Canney. Though Mr. Canney was allowed to testify as to matters that could be considered "expert testimony," should this matter be remanded for a new trial, Judge Fox's order limiting Mr. Canney's testimony should be reversed.

Judge Fox also incorrectly ruled that respondent violated WAC 296-155-480 as a matter of law.

Respectfully submitted this 5<sup>th</sup> Day of June, 2007.

MITCHELL, LANG & SMITH



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COURT OF APPEALS, DIVISION ONE OF THE STATE OF WASHINGTON

ALEX SALAS,

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v.

HI-TECH ERECTORS,

Respondent.

NO. 58511-8-I

CERTIFICATE OF SERVICE

Bonney Ottow certifies and declares under the penalty of perjury of the laws of the State of Washington as follows:

That she is an employee with the law firm of MITCHELL, LANG & SMITH, 1001 Fourth Avenue, Suite 3714, Seattle, WA 98154, that on June 6, 2007, she served true and correct copies of the following documents, on the parties listed below, via method indicated:

The Respondent and Cross Appellant's Brief to the US District Court of Appeals in Seattle via ABC Legal Messenger Service, and to: Brian Boddy, Counsel for the Petitioner via US mail to 3724 Lake Washington Blvd. NE, Kirkland, WA 98033.

MITCHELL, LANG & SMITH



Bonney Ottow  
Legal Assistant