

81590-9

**FILED**  
MAY 20 2008  
CLERK OF SUPREME COURT  
STATE OF WASHINGTON  
*[Signature]*

NO. \_\_\_\_\_

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

Court of Appeals No.: 58511-8-1

ALEX SALAS

Petitioner,

v.

HI-TECH ERECTORS, a Washington Corporation

Respondent.

---

**PETITION FOR REVIEW**

---

KORNFELD TRUDELL BOWEN  
& LINGENBRINK PLLC

Robert B. Kornfeld, WSBA 10669  
3724 Lake Washington Blvd NE  
Kirkland, WA 98033-7802  
(425) 893-8989

WIGGINS & MASTERS, P.L.L.C.

Charles K. Wiggins, WSBA 6948  
241 Madison Ave. North  
Bainbridge Island, WA 98110  
(206) 780-5033

FILED  
COURT OF APPEALS DIVISION  
STATE OF WASHINGTON  
2009 APR 28 PM 12:25  
*[Signature]*

Attorneys for Petitioner Salas

## TABLE OF CONTENTS

IDENTITY OF PETITIONER .....	1
COURT OF APPEALS DECISION.....	1
ISSUES PRESENTED FOR REVIEW .....	1
STATEMENT OF THE CASE .....	2
A.    Alex Salas was seriously injured when he fell from the scaffold ladder on a jobsite.....	2
B.    The trial court ruled that evidence of Salas's immigration status would be admitted if he claimed future wage loss, although there was no evidence that Salas was likely to leave the country, and the jury heard testimony about Salas's immigration status. ....	2
C.    The jury found that defendant Hi-Tech was negligent, but that the negligence was not a proximate cause of Salas's injuries. ....	4
D.    The Court of Appeals held that evidence of immigration status is irrelevant unless there is evidence that the plaintiff is unlikely to remain in the country, but refused to apply the rule it announced, declining to find an abuse of discretion in admitting Salas's immigration status. ....	7
WHY THIS COURT SHOULD GRANT REVIEW .....	9
A.    Introduction .....	9
B.    Discrimination based on race or national origin is an issue of substantial public importance.....	10
C.    The appellate court's arbitrary exceptions to review for abuse of discretion are contrary to prior decisions of this Court and the appellate court.....	12
D.    The appellate court's refusal to apply to Salas the rule it announced in this very case is contrary to this Court's prior decisions. ....	16
CONCLUSION.....	19

## TABLE OF AUTHORITIES

### FEDERAL CASES

<i>Kuhn v. Fairmont Coal Co.</i> , 215 U.S. 349, 30 S. Ct. 140, 54 L. Ed. 228 (1910) .....	18
<i>Linkletter v. Walker</i> , 381 U.S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965).....	17

### STATE CASES

<i>Blair v. Washington State University</i> , 108 Wn.2d 558, 740 P.2d 1379 (1987) .....	15
<i>Carrillo v. City of Ocean Shores</i> , 122 Wn. App. 592, 94 P.3d 961 (2004).....	16
<i>Digital Equipment Corp. v. Department of Revenue</i> , 129 Wn.2d 177, 916 P.2d 933 (1996), <i>cert. denied</i> , 520 U.S. 1273, 117 S.Ct. 2452, 138 L.Ed. 2d 210 (1997).....	16
<i>Lockhart v. Besel</i> , 71 Wn.2d 112, 426 P.2d 605 (1967).....	17
<i>Marriage of Littlefield</i> , 133 Wn.2d 39, 940 P.2d 1362 (1997).....	15
<i>Olver v. Fowler</i> , 161 Wn.2d 655, 663, 168 P.3d 348 (2007).....	13
<i>State v. Avendano-Lopez</i> , 79 Wn. App. 706, 904 P.2d 324 (1995), <i>rev. denied</i> , 129 Wn.2d 1007 (1996).....	10, 15, 19
<i>Salas v. Hi-Tech Erectors</i> , 2008 Wn. App. LEXIS 426, 177 P.3d 769 (2008) .....	1, 2
<i>Samuelson v. Freeman</i> , 75 Wn.2d 894, 454 P.2d 406 (1969) .....	17
<i>State v. Evans</i> , 154 Wn.2d 438, 114 P.3d 627 (2005) .....	17
<i>State v. Griggs</i> , 33 Wn. App. 496, 656 P.2d 529 (1982), <i>rev. denied</i> , 99 Wn.2d 1014 (1983).....	14

<i>State v. Koontz</i> , 145 Wn.2d 650, 657-61, 41 P.3d 475 (2002).....	15
<i>Yeats v. Estate of Yeats</i> , 90 Wn.2d 201, 580 P.2d 617 (1978).....	14

**STATE STATUTES**

RCW 49.60.010 .....	11
RCW 49.60.020 .....	11
RCW 49.60.030(1).....	11

**RULES**

CR 59(c) .....	7
ER 103(a)(1).....	14
RAP 9.3 .....	7
RAP 13.4(b) .....	9, 10, 13, 16
RPC 8.4(g).....	11
RPC 8.4(h).....	11

### **IDENTITY OF PETITIONER**

Alex Salas, plaintiff in the trial court and appellant in the Court of Appeals, files this Petition for Review.

### **COURT OF APPEALS DECISION**

The published Court of Appeals decision is *Salas v. Hi-Tech Erectors*, 2008 Wn. App. Lexis 426, 177 P.3d 769 (2008) (copy at Appendix A). Salas's timely motion for reconsideration was denied on March 27 (copy at Appendix B).

### **ISSUES PRESENTED FOR REVIEW**

1. Did the Court of Appeals err in finding no abuse of discretion in admitting of evidence of Salas's immigration status, which the appellate court found to be "divisive and prejudicial" and irrelevant, affirming on the ground that "the issue arose so late in the process and relevant authority was not provided to the court"?
2. Did the Court of Appeals err by addressing the merits of an evidentiary ruling and then declining to apply its analysis to the case?

## STATEMENT OF THE CASE

**A. Alex Salas was seriously injured when he fell from the scaffold ladder on a jobsite.**

Alex Salas was injured while working on a construction site.

***Salas v. Hi-Tech, supra***, at ¶ 1. (“COA Decision”). Salas was employed by the general contractor on the jobsite, and fell 24 feet from a steel scaffold ladder. Br. App. 2. The ladder and scaffolding were supplied and erected by respondent Hi-Tech erectors. Br. App. 3; Br. Resp. 1. Salas brought this action against Hi-Tech, alleging that the company violated the Washington Administrative Code’s safety standards for ladders on construction sites. COA Decision at ¶ 3.

**B. The trial court ruled that evidence of Salas’s immigration status would be admitted if he claimed future wage loss, although there was no evidence that Salas was likely to leave the country, and the jury heard testimony about Salas’s immigration status.**

Salas moved in limine to exclude any evidence that he is not a United States citizen. COA Decision at ¶ 6. Salas argued:

Plaintiff is Mexican and has worked in the USA for numerous years. Plaintiff was married in the USA and has children born in the USA. He has applied for citizenship but has not obtained it yet. This information has no relevancy.

CP 216. Salas filed a memorandum on the same day that the Court heard the motion in limine, reciting the evidence that he is unlikely to leave the country (CP 235-36):

Alex Salas, an undocumented alien from Mexico, has lived in the United States for about 18 years. Alex Salas came to the United States with a visa. It expired. Alex applied for citizenship but after "911" his application has been delayed so long that it was further delayed indefinitely. As a result, Alex is still not a citizen. Alex and his wife have three children born in the United States, all of whom are US citizens.

Alex Salas lives in Everett, Washington. He and his wife purchased a house there. Alex has worked for Charter Construction since 2001 and is still employed at Charter. Alex Salas has paid all federal taxes, FICA and FUDA withholding through his employer Charter Construction. Records of tax returns as [far] back as 1999 have been produced. Each return shows that he paid all taxes and withholdings. Further, Alex filed and was granted full worker's compensation benefits in the state of Washington arising out of this injury of October 2002.

Hi-Tech moved for a continuance on the ground that it had only recently learned Salas's immigration status, claiming that it was misled during Salas's deposition about Salas's status. RP 7-8 (5/15/06). Salas responded that his immigration status was apparent from his psychiatric records, which were made available four to six months before trial. *Id.* at 10. Salas also recounted his 18-year residency in the U.S., his job history, his compliance with

the tax laws, and that his three children were born in the U.S. *Id.* at 10-11.

In response to the trial court's ruling that Salas's immigration status would be admitted if Salas sought loss of future income, Salas's trial counsel made the tactical decision to inform the jury of Salas's immigration status. Salas testified that he came to the US in 1989 and applied for immigration documents. RP 31 (5/22/06). Salas had a valid visa when he came to the United States. *Id.* at 32. Salas would be eligible for citizenship when his son turned 18. *Id.* at 32. His application for proper documentation was delayed by the September 11 attack (*id.* at 33) and in the process of applying for citizenship, his visa and passport expired. Salas intends to remain in the United States where his children were born. *Id.* at 71.

Hi-Tech did not offer any evidence to show even a possibility that Salas would ever leave the US.

**C. The jury found that defendant Hi-Tech was negligent, but that the negligence was not a proximate cause of Salas's injuries.**

There is no dispute that Salas slipped as he was climbing the scaffold ladder and fell three stories to the ground. RP 54, 70-71 (5/22/06); BR 1; COA Decision at ¶¶ 1-2. The ladder rungs did not have a skid-resistant surface (RP 55 (5/22/06)) contrary to the

Washington Industrial Safety and Health Act regulations requiring that ladders have shaped steps and skid-resistant surfaces to reduce the hazard of falling. CP 674-77. Hi-Tech's owner testified that he was unaware of these requirements and that his competitors were also in violation of the WISHA regulations. RP 94-99 (5/22/06). This, of course, is no defense to Hi-Tech's own negligence.

The jury was instructed that Hi-Tech had violated the WISHA regulations as a matter of law (CP 674-77) and found Hi-Tech negligent. But the jury found that Hi-Tech's negligence did not proximately cause Salas's injury. CP 650.

Salas argued in a motion for new trial that admitting his immigration status was prejudicial error. As Salas's counsel noted, this was a time of ongoing political activities about illegal immigration. CP 696. President Bush was proposing a controversial type of amnesty for undocumented workers. CP 696.

The trial court recognized the potentially prejudicial effect of Salas's immigration status:

These are volatile times in terms of immigration, no doubt. .

There might be some jurors who are so hung up on the immigration issue that they would really take it out on him. I can't answer that.

RP 28 (5/15/06). Unfortunately, the trial court's observation was prescient. Counsel explained in his declaration that a majority of the prospective jurors indicated during voir dire that they did not believe that undocumented workers should be permitted to use the court system and remain in the US illegally:

I asked everyone to raise their hand who had an opinion as to what their feelings were about an undocumented worker filing suit to recover personal injury damages in our court system. The overwhelming majority said that they did not think it was right for undocumented workers to work in the USA illegally, take jobs away from Americans, use our court system and to remain here in the USA illegally. Many who remained on the jury, after I exercised all three peremptory challenges, expressed these same feelings and were very strong about their convictions, such as the lady who was juror number 3 or 4. Further juror number 1 was a human resource director at Safeway and he certainly had strong feeling against workers who remained in the USA illegally. The general consensus was that no one felt an undocumented worker was entitled to anything.

CP 695-96. Counsel's paralegal stated in her declaration that 6 of the 12 jurors empanelled in the jury box stated their strong opposition to allowing illegal aliens to remain in this country and work. CP 797-98. Even after Salas's attorney exercised his three

preemptory challenges, a number of these jurors remained in the jury box. CP 696.<sup>1</sup>

The best indication of prejudice is the special verdict form itself, finding Hi-Tech negligent, but finding no proximate cause despite the instruction that the ladder Salas fell from did not comply with WISHA.

**D. The Court of Appeals held that evidence of immigration status is irrelevant unless there is evidence that the plaintiff is unlikely to remain in the country, but refused to apply the rule it announced, declining to find an abuse of discretion in admitting Salas's immigration status.**

The appellate court appropriately began its analysis by stating the standard of review: "Abuse of discretion occurs where the trial court's action is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." COA decision at ¶ 14. The Court reviewed the holdings of New York courts that evidence of immigration status can be admitted where an undocumented worker seeks to recover future lost wages for an

---

<sup>1</sup> The Court of Appeals suggested that, "voir dire was not recorded, leaving no record for this court to review." COA Decision at ¶ 29. The record is counsel's declaration in support of Salas's motion for new trial, which is an entirely appropriate means of placing information before the trial court and this court. CR 59(c). Defense counsel never questioned the accuracy of the declarations, and if they had, either counsel could have prepared a narrative report of proceedings for review and certification (or correction) by the trial court. RAP 9.3.

injury. *Id.* at ¶¶ 18-22. The Court also noted that other decisions have held that evidence of immigration status is prejudicial and should not be admitted unless the defendant presents evidence demonstrating “more than the mere fact that the plaintiff resides in the United States illegally.” *Id.* at ¶¶ 24-27.

Ultimately, the appellate court held that evidence of immigration status should not have been admitted in this case, but that there was no abuse of discretion<sup>2</sup>:

¶31 The issue of immigration status is divisive and prejudicial. We conclude that evidence of a party's illegal immigration status should generally be allowed only when the defendant is prepared to show relevant evidence that the plaintiff, because of that status, is unlikely to remain in this country throughout the period of claimed lost future income. Under the unique facts of this case, however, where the issue arose so late in the process and relevant authority was not provided to the court, we cannot conclude that the trial court abused its discretion in allowing evidence of Salas's immigration status.<sup>31</sup>

---

<sup>31</sup> We note also that the jury never reached the issue of damages.

---

<sup>2</sup> The appellate court also rejected Salas's other arguments on appeal, but Salas does not pursue those issues here.

## **WHY THIS COURT SHOULD GRANT REVIEW**

### **A. Introduction**

The Court of Appeals has announced a fair and balanced rule but has failed to follow its own rule. Three reasons require review.

First, discrimination on the basis of race or national origin is a matter of substantial public interest and review should be granted under RAP 13.4(b)(4). Both the legislature and this Court have adopted a strong policy of eliminating discrimination and prejudice. The reasons offered by the appellate court for refusing to reverse are unsupported by precedent and the court fails to articulate any logical explanation.

Second, the appellate court has engrafted onto abuse of discretion review two arbitrary exceptions inconsistent with prior decisions of this Court: “the issue arose so late” and “relevant authority was not provided.” COA Decision at ¶31. These ad hoc exceptions justify review under RAP 13.4(b)(1).

Third, the appellate court’s refusal to apply to Salas the very rule for which Salas argued at trial and on appeal is contrary to the fundamental principle of appellate jurisprudence that a litigant who advocates successfully for a new rule will benefit from the rule.

This Court has consistently applied new rules to the litigants before the Court and the appellate court decision is contrary to those cases. RAP 13.4(b)(1).

**B. Discrimination based on race or national origin is an issue of substantial public importance.**

The appellate court reached a salutary rule in the abstract, prohibiting of evidence of immigration status absent proof that the plaintiff is unlikely to remain in this country throughout the period of claimed lost income. But the court took away with the right hand what it gave with the left hand, refusing to apply its new ruling to benefit Salas. There is no apparent authority for the two exceptions announced by the appellate court and the appellate court failed to suggest any authority. Moreover, the issue arose in a timely manner in that Salas filed a pre-trial motion in limine and cited such authority as existed in Washington and elsewhere<sup>3</sup> on this issue of “first impression.” COA Decision at ¶ 15.

Washington State has long fought to eradicate discrimination based on race or national origin. The Legislature has unequivocally

---

<sup>3</sup> Salas cited both New York law and a policy statement by Washington’s Human Rights Commission. CP 237, 241-42, 245-46. In the motion for new trial, Salas cited *State v. Avendano-Lopez*, 79 Wn. App. 706, 904 P.2d 324 (1995), *rev. denied*, 129 Wn.2d 1007 (1996). CP 735.

declared in our Law Against Discrimination that discriminatory practices are a matter of state concern, threaten the rights and privileges of our citizens, and menace the institutions and foundation of a free democratic state. RCW 49.60.010. Washington's LAD is liberally construed, RCW 49.60.020, and the right to be free from discrimination "is recognized as and declared to be a civil right." RCW 49.60.030(1).

This Court has joined battle against discrimination, declaring it an act of professional misconduct to discriminate in connection with the lawyer's professional activities. RPC 8.4(g). More specifically, the Court has outlawed discrimination in the courtroom, declaring it to be professional misconduct "in representing a client, [to] engage in conduct that is prejudicial to the administration of justice toward judges, other parties and/or their counsel, witnesses and/or their counsel, jurors, or court personnel or officers, that a reasonable person would interpret as manifesting prejudice or bias on the basis of . . . race, . . . national origin, . . . ." RPC 8.4(h).

This appellate court decision speaks out against discrimination by announcing a salutary rule, then contradicts that rule by refusing to apply it. This opinion is readily subject to

misinterpretation and misuse, signaling that rules announced to protect against discrimination can be flexed or ignored.<sup>4</sup>

This issue is of ever-increasing importance. From 1990 to 2000, the Hispanic population of Washington doubled, increasing from 4.4% to 7.5% of the population, and to 8.4% in 2004. Kirschner and Irion, Growth and Change in Washington State's Hispanic Population (WSU 2006), available at [www.crs.wsu.edu/wacts21/EB2006E-Hispanic.pdf](http://www.crs.wsu.edu/wacts21/EB2006E-Hispanic.pdf).

This Court should grant review and reaffirm the importance of our strong policies against discrimination by approving the holding that immigration status is not admissible unless the plaintiff is unlikely to remain in the U.S., and applying this rule to reverse the judgment against Salas.

**C. The appellate court's arbitrary exceptions to review for abuse of discretion are contrary to prior decisions of this Court and the appellate court.**

The standard by which this Court and the Court of Appeals review evidentiary rulings—abuse of discretion—is well established.

---

<sup>4</sup> Salas is not accusing the appellate court, the trial court or opposing counsel of acting with discriminatory intent. Salas did not make any such argument at trial or in the Court of Appeals and raises the issue solely to show that this case presents an issue of substantial public importance that should be reviewed by this Court.

The appellate court invented two unprecedented and illogical exceptions to the abuse of discretion standard. The Court should review the decision and correct this conflict with prior decisions of this Court and the Court of Appeals. RAP 13.4(b)(1) and (2).

The appellate court initially stated the correct test for abuse of discretion: "Abuse of discretion occurs where the trial court's action is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." COA Decision ¶ 14 (citing ***Oliver v. Fowler***, 161 Wn.2d 655, 663, 168 P.3d 348 (2007)). The trial court clearly ruled on untenable grounds or for untenable reasons by admitting Salas's immigration status without any evidence that Salas was "unlikely to remain in this country throughout the period of claimed lost future income." COA Decision at ¶ 31. Nonetheless, the appellate court found no abuse of discretion: "Under the unique facts of this case, however, where the issue arose so late in the process and relevant authority was not provided to the court, we cannot conclude that the trial court abused its discretion in allowing evidence of Salas's immigration status." *Id.*

These ad hoc exceptions to the test for abuse of discretion are unsupported by reason, logic or precedent. The Court cites no

authority for the proposition that a party objecting to the admission of evidence must cite “relevant authority” in order to preserve the issue for appeal. To the contrary, ER 103(a)(1) provides the test for preserving an evidentiary issue for appeal: a substantial right of the party must be affected; there must be a timely objection; and there must be a specific ground for the objection if the specific ground was not apparent from the context. The Court of Appeals has said in the context of jury instruction issues, “It is of course helpful if the points of law are supported by case or statutory authority but we do not find such citations are essential so long as the points and theories are adequately explained to the trial judge.” ***State v. Griggs***, 33 Wn. App. 496, 500, 656 P.2d 529 (1982), *rev. denied*, 99 Wn.2d 1014 (1983).<sup>5</sup> Salas consistently argued that the evidence of his immigration status was irrelevant because he had lived in the country so long and had such deep roots here. Salas also objected that the evidence would be highly prejudicial. CP 246.

---

<sup>5</sup> A related but distinguishable rule is that an appellate court may refuse to consider an issue unsupported by either authority or argument. ***Yeats v. Estate of Yeats***, 90 Wn.2d 201, 209, 580 P.2d 617 (1978). This rule does not apply to the trial court, and even if it did, as the ***Yeats*** decision indicates, an issue of first impression may be adequately supported by argument and logic, which is the case here.

Even if there were a requirement to cite “relevant authority,” the appellate court held that there is no relevant authority in Washington. The Court rejected Salas’s reliance on **Avendano-Lopez** on the ground that immigration status was completely irrelevant to the material issues of the criminal case. COA Decision at ¶ 17. Moreover, Salas provided the Court with opposite out-of-state authority, and copies of those cases, as discussed above.

The appellate court also states that there was no abuse of discretion because of the “unique fact[]” that “the issue arose so late in the process . . . .” COA Decision at ¶ 31. The significance of this statement is unclear. If the defendant was unprepared for trial, the remedy was a continuance, which the trial court denied. The trial court never blamed Salas or found that he had violated any rule or procedure. There is no justification for affirming an erroneous evidentiary ruling merely because it arose “so late in the process.”

Other decisions by this Court have found an abuse of discretion and reversed when this Court announced a new rule. *E.g.*, **State v. Koontz**, 145 Wn.2d 650, 657-61, 41 P.3d 475 (2002); **Marriage of Littlefield**, 133 Wn.2d 39, 46-47, 50, 54-55, 59, 940 P.2d 1362 (1997); **Blair v. Washington State Univ.**, 108 Wn.2d

558, 570-71, 740 P.2d 1379 (1987). None of these decisions recognized any special exception for issues of first impression, “lateness” of the issue, or allegedly inadequate citation of authority. The Court should accept review, apply the well-established standard for abuse of discretion, and reverse and remand for a new trial free of “divisive and prejudicial” evidence of Salas’s immigration status.

**D. The appellate court’s refusal to apply to Salas the rule it announced in this very case is contrary to this Court’s prior decisions.**

When the Court announces a new rule, it consistently applies the new rule to the litigants before the Court. The appellate court’s refusal to apply the rule it announced to Salas conflicts with this Court’s prior decisions and the Court should grant review under RAP 13.4(b)(1).

An opinion announcing a new rule follows “the normal rule of retroactive application” that the opinion applies retroactively to the litigants then before the Court. *Digital Equip. Corp. v. Department of Revenue*, 129 Wn.2d 177, 187, 916 P.2d 933 (1996), *cert. denied*, 520 U.S. 1273, 117 S.Ct. 2452, 138 L.Ed. 2d 210 (1997). *Accord*, *Carrillo v. City of Ocean Shores*, 122 Wn. App. 592, 602, 613, 94 P.3d 961 (2004) (“In *Digital Equipment*,

the court held that an opinion announcing a new rule follows the normal rule of retroactive application – it applies to the litigants before the court”).

Indeed, when the Court announces a new rule, the rule applies to other cases then pending on appeal, even if those cases had been tried under prior inconsistent law. ***Samuelson v. Freeman***, 75 Wn.2d 894, 900, 454 P.2d 406 (1969). See also ***Lockhart v. Besel***, 71 Wn.2d 112, 118, 426 P.2d 605 (1967) (“The plaintiff, having raised the issue . . . in both the trial court and on this appeal, is entitled to the benefit of the new rule we have announced in this case and should be afforded a new trial”). Since new rules routinely apply to the case before the court and to all other cases currently pending on appeal, the only debate is whether to apply new rules to cases for which an appeal has already been concluded. E.g. ***State v. Evans***, 154 Wn.2d 438, 114 P.3d 627 (2005).

This Court’s application of new rules to the litigant advocating for the new rule is consistent with common law jurisprudence. “At common law there was no authority for the proposition that judicial decisions made law only for the future.” ***Linkletter v. Walker***, 381 U.S. 618, 622, 85 S.Ct. 1731, 14 L.Ed.

2d 601 (1965). This view dates back to the jurisprudence of Blackstone. *Id.* Indeed, Justice Holmes stated, "I know of no authority in this court to say that in general state decisions shall make law only for the future. Judicial decisions have had retrospective operation for near a thousand years." ***Kuhn v. Fairmont Coal Co.***, 215 U.S. 349, 372, 30 S.Ct. 140, 54 L.Ed. 228 (1910) (dissenting opinion of Holmes, J.).

It is absurd to deny application of a new rule to the litigant who advocated for the rule. The only litigants who would appeal such decisions would be those with a stake in future cases, such as governments and corporations. There would be no incentive for a litigant like Alex Salas to appeal an adverse ruling if he could not benefit from the rule. Following such a rule would retard the development of the law and skew the law in favor of institutional litigants with an interest for establishing the law for their future cases. The Court should accept review to correct this anomalous conflict with the prior decisions of this Court and the common law.

## CONCLUSION

The true test of our criminal justice system lies in how we treat the foreigner, the poor, and the disadvantaged, not in how we treat those born in this country, the wealthy or the "respectable" established citizenry. The dark shadow of arrogant chauvinism would eclipse our ideal of justice for all if we allowed juries to infer that immigrants, legal or illegal, were more likely to have committed crimes.

**Avendano-Lopez**, 79 Wn. App. at 722-23. Our civil justice system must meet the same test.

The appellate court articulated a well-reasoned and appropriate rule for limiting the admission of evidence of immigration status. The trial court did not follow the rule announced by the appellate court. Neither logic nor precedent justifies the reasons given by the appellate court for affirming this verdict. Alex Salas did not have a fair trial. This Court should grant review and reverse and remand for a new trial in which the verdict of defendant's negligence is an established finding and the only remaining issues are proximate cause and damages.

RESPECTFULLY SUBMITTED this 25 day of April 2008.

WIGGINS & MASTERS, P.L.L.C.



Charles K. Wiggins, WSBA 6948  
241 Madison Avenue North  
Bainbridge Island, WA 98110  
(206) 780-5033

CERTIFICATE OF SERVICE BY MAIL

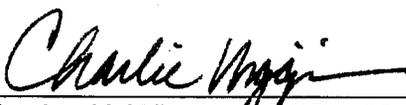
I certify that I mailed, or caused to be mailed, a copy of the foregoing **PETITION FOR REVIEW** postage prepaid, via U.S. mail on the 25 day of April 2008, to the following counsel of record at the following addresses:

Brian K. Boddy  
Attorney at Law  
3724 Lake Washington Blvd NE  
Kirkland, WA 98033-7802

John Clifford Moore  
Attorney at Law  
21201 SE 258<sup>th</sup> St  
Maple Valley, WA 98038-7572

Robert Craig Levin  
MITCHELL LANG & SMITH  
1001 4<sup>th</sup> Ave Ste 3714  
Seattle, WA 98154-1107

FILED  
COURT OF APPEALS  
STATE OF WASHINGTON  
2008 APR 28 PM 12:25

  
\_\_\_\_\_  
Charles K. Wiggins WSBA 6948  
Counsel for Appellant

**IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON**

ALEX SALAS, a single person,	)	
	)	DIVISION ONE
Appellant/Cross-Respondent,	)	
	)	No. 58511-8-I
v.	)	
	)	PUBLISHED OPINION
HI-TECH ERECTORS, a Washington	)	
Corporation,	)	
	)	
Respondent/Cross-Appellant.	)	FILED: February 25, 2008
_____	)	

BAKER, J. — Alex Salas was injured on a construction site. He appeals rulings by the trial judge admitting evidence of his immigration status and expert testimony by Hi-Tech Erector's principal, and the court's denial of a proposed jury instruction. Hi-Tech Erectors cross-appeal a pretrial limitation on its witnesses' testimony, and a grant of partial summary judgment in which the court held as a matter of law that Hi-Tech Erectors violated a Washington Administrative Code provision governing safety standards for ladders. We affirm.

Alex Salas, an undocumented immigrant, was working on a condominium restoration project when he slipped from a scaffold ladder and fell three stories to the ground, suffering serious injuries.

Salas sued Hi-Tech Erectors (Hi-Tech), which supplied the scaffolding at the construction site, asserting that the company violated the Washington Administrative Code's safety standards for ladders on construction sites.

Salas moved for summary judgment. Arguing that Hi-Tech had not disclosed any expert witnesses it might call, he sought to bar Hi-Tech from producing any witnesses, and to exclude the company principal in particular from offering expert opinion testimony.

The court granted Salas partial summary judgment, holding as a matter of law that Hi-Tech had violated former WAC 296-155-480(1) (2007), and denied summary judgment as to liability, proximate cause, and damages. He also ruled that Hi-Tech's principal, George Canney, could be called as a witness at trial, but that he could not testify as an expert or opinion witness.

Salas moved for an order in limine seeking, inter alia, to exclude any evidence that he is not a United States citizen. The court denied the motion.

It is undisputed that Salas was living in this state on an expired visa. However, evidence of his status as an illegal alien came to counsels' attention only shortly before the trial, and counsel had no adequate chance to brief or prepare to address the issue. Hi-Tech unsuccessfully requested a continuance, a request Salas opposed.

Prior to trial, the court discussed the issue of Salas's immigration status with counsel. The court stated that if Salas made a claim for impairment of future income, his status as a non-legal resident would be probative as to the extent of the future impairment. The court ruled that it would leave the decision whether or not to introduce evidence of Salas's immigration status to Salas himself, saying, "you can't have it both

ways. It either stays out and there's no future income claim or it comes in and you may make it." "These are volatile times in terms of immigration, no doubt," the court noted. "It may be a difficult decision for him to decide which way to go."

On the last day of trial, the court again discussed the immigration issue with counsel, noting that it had been provided with a New York case holding that immigration status is a fact issue to be considered by the jury.<sup>1</sup> The court expressed its agreement with that opinion.

Ultimately, in addition to past wage loss, and past and future medical expenses, Salas requested future lost wages, and his immigration status became an issue at trial. Salas testified that he had entered the country on a valid visa, and had applied for citizenship. There was no evidence that Salas was likely to be deported.

At trial, the court ruled that a question posed by Salas opened the door to allow George Canney to give expert and opinion testimony.

The jury found Hi-Tech to be negligent, but that its negligence was not a proximate cause of Salas's injuries.

Salas moved for a new trial, arguing that introducing his immigration status and allowing George Canney to testify had the effect of "unfairly poisoning the jury in favor of" Hi-Tech. His motion was denied. Salas now appeals, and Hi-Tech cross-appeals.

---

<sup>1</sup> The record does not indicate which New York case the court was referring to.

II

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.<sup>2</sup> We review a trial court's decision on the admissibility of evidence, and its rulings on motions in limine for abuse of discretion.<sup>3</sup> Abuse of discretion occurs where the trial court's action is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.<sup>4</sup>

Whether immigration status is properly admissible in a claim for future wage loss appears to be an issue of first impression in Washington. Neither party has provided this court with Washington case law on the matter.

Salas argues that his immigration status was not relevant to any issue in the trial, and its admission was improper and prejudicial. He relies principally on a single criminal case, State v. Avendano-Lopez,<sup>5</sup> to support his contention that any discussion of nationality or immigration status is inherently prejudicial. The Avendano-Lopez court held that questions of nationality and immigration status are irrelevant, appeal to a jury's passions and prejudices, and are generally improper and inadmissible in a court of justice.<sup>6</sup> Courts in other jurisdictions have uniformly condemned questions designed to appeal to national prejudice.<sup>7</sup>

---

<sup>2</sup> Lockwood v. A C & S, Inc., 109 Wn. 2d 235, 256, 744 P.2d 605 (1987).

<sup>3</sup> State v. Finch, 137 Wn.2d 792, 810, 975 P.2d 967 (1999).

<sup>4</sup> Olver v. Fowler, 161 Wn.2d 655, 663, 168 P.3d 348 (2007).

<sup>5</sup> 79 Wn. App. 706, 904 P.2d 324 (1995).

<sup>6</sup> Avendano-Lopez, 79 Wn. App. at 718-19.

<sup>7</sup> Avendano-Lopez, 79 Wn. App. at 719.

Salas's reliance on Avendano-Lopez is misplaced. The court in Avendano-Lopez held that the question of immigration status was improper not only because it appealed to the jury's passions and prejudices, but because it was completely irrelevant to the material issues of the criminal case.<sup>8</sup> In civil cases, as discussed below, several courts have found immigration status to be relevant to a claim for lost future wages.

Salas also cites to Balbuena v. IDR Realty LLC.<sup>9</sup> That civil case, however, supports Hi-Tech's contention that immigration status may properly be placed before the jury. The Balbuena court addressed the question of whether an undocumented alien was precluded from obtaining lost wages because of the Immigration Reform and Control Act (IRCA).<sup>10</sup> The court held that any conflict with IRCA that may arise from allowing 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.<sup>11</sup> A jury's analysis of a future wage claim proffered by an undocumented alien is similar, the court held, 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.<sup>12</sup> The court hypothesized that an undocumented alien plaintiff could introduce proof that he had subsequently received or was in the process of obtaining the necessary documents and, consequently, would likely be authorized to obtain future employment in the United States. Conversely, a defendant could allege that a future wage award is

---

<sup>8</sup> Avendano-Lopez, 79 Wn. App. at 719-20.

<sup>9</sup> 6 N.Y.3d 338 (N.Y. 2006).

<sup>10</sup> Balbuena, 6 N.Y.3d at 353-55.

<sup>11</sup> Balbuena, 6 N.Y.3d at 362.

<sup>12</sup> Balbuena, 6 N.Y.3d at 362.

not appropriate because work authorization has not been sought, or approval was sought but denied.<sup>13</sup>

Hi-Tech points to a number of foreign cases, including Balbuena, where courts have allowed the introduction of evidence that the plaintiff was an undocumented worker.

In Majlinger v. Cassino Contracting Corp.,<sup>14</sup> the court held that a plaintiff's immigration status is relevant to a determination of damages for lost wages, and presents an issue of fact to be resolved by the jury.<sup>15</sup> The court held that a jury may take the plaintiff's status into account, along with the myriad other factors relevant to a calculation of lost earnings, in determining 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 deportation or voluntary departure from the United States.<sup>16</sup>

In Barahona v. Trustees of Columbia University in the City of New York,<sup>17</sup> the court held that the plaintiff put his immigration status at issue when he sought damages for future lost earnings, and that the plaintiff's immigration status was thus a relevant fact for the jury to consider.<sup>18</sup> A jury's analysis of a future wage claim proffered by an undocumented alien, the court held, is similar to a claim asserted by any other injured

---

<sup>13</sup> Balbuena, 6 N.Y.3d at 362.

<sup>14</sup> 802 N.Y.S.2d 56 (N.Y. App. 2005), aff'd by, Balbuena v. IDR Realty LLC, 6 N.Y.3d 338 (N.Y. 2006).

<sup>15</sup> Majlinger, 802 N.Y.S.2d at 68.

<sup>16</sup> Majlinger, 802 N.Y.S.2d at 68-69.

<sup>17</sup> 816 N.Y.S.2d 851 (N.Y. Misc. 2006).

<sup>18</sup> Barahona, 816 N.Y.S.2d at 853.

person in that the determination must be based on all of the relevant facts and circumstances presented in the case.<sup>19</sup>

In another New York case, the court in Cano v. Mallory Management<sup>20</sup> held that the plaintiff's undocumented alien status may be presented to the jury on the issue of lost wages, but not on the issue of pain and suffering.<sup>21</sup>

Similarly, the New Hampshire Supreme Court has held that an illegal alien's status, though irrelevant to the issue of liability, is relevant on the issue of lost earnings.<sup>22</sup> Though evidence of a plaintiff's status may well be prejudicial, such evidence, the court held, is essential should an illegal alien wish to pursue a claim for lost earning capacity.<sup>23</sup>

While Hi-Tech cites numerous cases in which courts allowed evidence of illegal immigrant status, other courts have been more restrictive when allowing such evidence to be presented.

The court in Klapa v. O & Y Liberty Plaza Co.<sup>24</sup> held that whatever probative value illegal alien status may have is far outweighed by its prejudicial impact.<sup>25</sup> The court held that defendants must be prepared to demonstrate something more than the mere fact that the plaintiff resides in the United States illegally.<sup>26</sup>

A Michigan court held that the issue of the plaintiff's illegal alien status, while irrelevant on the question of liability, was material and relevant on the issue of

---

<sup>19</sup> Barahona, 816 N.Y.S.2d at 853 (quoting Balbuena, 6 N.Y.3d at 362).

<sup>20</sup> 760 N.Y.S.2d 816 (N.Y. Sup. 2003).

<sup>21</sup> Cano, 760 N.Y.S.2d at 818.

<sup>22</sup> Rosa v. Partners in Progress, Inc., 868 A.2d 994, 1002 (N.H. 2005).

<sup>23</sup> Rosa, 868 A.2d at 1002.

<sup>24</sup> 645 N.Y.S.2d 281 (N.Y. Sup. 1996).

<sup>25</sup> Klapa, 645 N.Y.S.2d at 282.

<sup>26</sup> Klapa, 645 N.Y.S.2d at 282.

determining the present value of plaintiff's future lost earnings, and remanded for a bifurcated trial to avoid prejudice.<sup>27</sup>

Citing the Michigan case, the Wisconsin Supreme Court affirmed a trial court's decision to exclude evidence of a plaintiff's illegal alien status in determining lost future earning capacity as unduly prejudicial.<sup>28</sup> Noting that no bifurcated trial had been sought, and that no offer of proof had been made by any defendant that deportation was anything other than a speculative or conjectural possibility, the court affirmed the trial court's discretion in not allowing the "obvious prejudicial effect of the admission of such evidence."<sup>29</sup>

In the present case, the court was prepared to exclude all evidence of Salas's illegal alien status, provided he did not seek future lost earnings. Salas ultimately sought future lost wages, but made no attempt to mitigate any potential prejudice caused by evidence of his immigration status. He did not request a bifurcated trial to separate the issue of damages from negligence and liability. He further avers that it would have been pointless to request a curative jury instruction, as the court had already denied his motion in limine. He could have requested an instruction limiting consideration of his immigration status to the issue of future lost wages, but did not do so.

Salas asserts that the jurors were prejudiced against illegal immigrants, and his trial attorney has submitted a declaration to that effect.<sup>30</sup> However, voir dire was not

---

<sup>27</sup> Melendres v. Soales, 306 N.W.2d 399, 402 (Mich. App. 1981).

<sup>28</sup> Gonzalez v. Franklin, 403 N.W.2d 747, 759 (Wis. 1987).

<sup>29</sup> Gonzalez, 403 N.W.2d at 760.

<sup>30</sup> The attorney's paralegal also submitted a declaration alleging prejudice by jurors.

recorded, leaving no record for this court to review. He declares that prejudiced jurors were seated after he used all of his peremptory challenges, but there is no indication that he sought to exclude potentially prejudiced jurors for cause.

Salas states that Hi-Tech's counsel immediately sought to inject the issue into the trial in his opening and on cross-examination. Neither opening nor closing arguments have been provided to this court, but the record shows that Salas's counsel discussed Salas's immigration status at length in his direct examination of Salas's brother and of Salas himself.

The issue of immigration status is divisive and prejudicial. We conclude that evidence of a party's illegal immigration status should generally be allowed only when the defendant is prepared to show relevant evidence that the plaintiff, because of that status, is unlikely to remain in this country throughout the period of claimed lost future income. Under the unique facts of this case, however, where the issue arose so late in the process and relevant authority was not provided to the court, we cannot conclude that the trial court abused its discretion in allowing evidence of Salas's immigration status.<sup>31</sup>

#### Expert Testimony

Salas argues that it was error for the court to allow George Canney to testify beyond the limits imposed on his testimony.

Salas initially sought to bar any witness testimony by Hi-Tech, arguing that such a limitation was justified by Hi-Tech's purported delay in responding to discovery requests.

---

<sup>31</sup> We note also that the jury never reached the issue of damages.

In his motion to exclude all defense witnesses, Salas asserted that Hi-Tech had not disclosed any expert witnesses, nor any witnesses who might “wear two hats.” In one of his interrogatories, Salas asked, “Are there any witnesses who have factual information regarding this case and who are also ‘expert witnesses’?” In its answers to interrogatories, Hi-Tech indicated it had not retained any expert witnesses, but did list George Canney as a witness with factual information as well as “expertise in erection of scaffolds and regulations pertaining thereto.”

In its order granting partial summary judgment to Salas, the court decreed that “defense may only call its principal [George Canney] as a witness at trial, but he shall not be able to testify as an ‘opinion’ or ‘expert’ witness.”

At trial, Salas’s attorney asked Canney whether Salas would have been prevented from hitting the ground if he had been tied off with a safety harness. The court ruled that the question opened the door to allow Canney to offer expert witness and opinion testimony. The court’s discussion with counsel on this matter is not in the record.

In his declaration in support of Salas’s motion for a new trial, Salas’s attorney asserted that after he asked Canney the question, the court asked to speak with both counsel in chambers where it informed Salas’s counsel that he had opened the door to expert testimony.

In its opposition to the motion for a new trial, Hi-Tech disputed that account, stating that Salas’s attorney asked the question after the court held a sidebar conference and warned Salas’s counsel that if he asked that question he would be opening the door.

The record shows that after Salas's attorney asked Canney if Salas would have been prevented from falling if he had been tied off, defense counsel requested a sidebar. After the sidebar, the court asked defense counsel if he wanted to restate his question. Salas's counsel then introduced Canney's deposition, and read the same question aloud from the deposition. After some further questioning, the court again called counsel to a sidebar discussion.

This series of sidebar discussions comports more closely with Hi-Tech's account than it does with Salas's. In its order denying Salas's motion for a new trial, the court reiterated that it had informed counsel outside the presence of the jury that asking for Canney's opinion as to whether any particular safety device would have prevented the accident called for an expert opinion, because Canney was not present at the time of the accident and had no personal knowledge as to how Salas fell from the ladder.

Absent an abuse of discretion, we will not disturb on appeal a trial court's rulings on motions in limine, or the admissibility and scope of expert testimony.<sup>32</sup> The trial court did not abuse its discretion in allowing Canney to testify beyond the initial limitations on his testimony.

#### Jury Instruction

Salas appeals the trial court's decision not to give his proposed jury instruction regarding Hi-Tech's duty to provide a safe workplace. Alleged errors of law pertaining to jury instructions are reviewed de novo.<sup>33</sup>

The instruction Salas proposed reads as follows:

---

<sup>32</sup> See Christensen v. Munsen, 123 Wn.2d 234, 241, 867 P.2d 626 (1994) (admissibility and scope of expert testimony); Gammon, 38 Wn. App. at 286 (motions in limine).

<sup>33</sup> Caldwell v. Dep't of Transp., 123 Wn. App. 693, 696, 96 P.3d 407 (2004).

A subcontractor like defendant Hi-Tech, owes a duty to every employee within the scope of its subcontract to ensure that it complies with all applicable safety regulations. The subcontractor is the party with innate supervisory authority and per se control over the scope of its subcontract, so it bears the primary, non-delegable duty to provide a safe workplace for workers. In Washington, subcontractors have a non-delegable duty to ensure compliance, within the scope of their subcontracts, with all Washington State construction safety regulations. This liability is justified because a subcontractor's supervisory authority is per se control over the workplace within the scope of its subcontract.

Salas cites to three cases to support his instruction. Those cases, however, do not support his assertion that Hi-Tech had a primary, non-delegable duty to provide a safe workplace, and to ensure compliance with all Washington State construction safety regulations.

The court in Stute v. P.B.M.C., Inc.<sup>34</sup> held that the general contractor should bear the primary responsibility for compliance with safety regulations because the general contractor's innate supervisory authority constitutes sufficient control over the workplace.<sup>35</sup>

Similarly, the court in Kamla v. Space Needle Corp.<sup>36</sup> held that "[b]ecause a general contractor is in the best position, financially and structurally, to ensure WISHA compliance or provide safety equipment to workers, we place 'the prime responsibility for safety of all workers . . . on the general contractor.'"<sup>37</sup> This court, in Weinert v. Bronco National Company,<sup>38</sup> stated that, under Stute, a general contractor bears the general duty to enforce safety regulations, and held that a siding subcontractor's duty

---

<sup>34</sup> 114 Wn.2d 454, 788 P.2d 545 (1990).

<sup>35</sup> Stute, 114 Wn.2d at 464.

<sup>36</sup> 147 Wn.2d 114, 52 P.3d 472 (2002).

<sup>37</sup> Kamla, 147 Wn.2d at 124 (quoting Stute, 114 Wn.2d at 463).

<sup>38</sup> 58 Wn. App. 692, 795 P.2d 1167 (1990).

did not extend beyond the scope of its contract with the general contractor, extending only to employees engaged in siding work.<sup>39</sup>

Salas's proposed instruction was not an accurate reflection of the law. A trial court has considerable discretion in determining the number and content of jury instructions.<sup>40</sup> It is under no obligation to give misleading instructions, or instructions which are not supported by authority.<sup>41</sup> We affirm the trial court's decision not to give Salas's proposed jury instruction.

Because we affirm the trial court, we need not address Hi-Tech's cross-appeal.

AFFIRMED.

Baker, J.

WE CONCUR:

Appelwick, C.J.

Becker, J.

---

<sup>39</sup> Weinert, 58 Wn. App. at 697.

<sup>40</sup> Havens v. C&D Plastics, Inc., 124 Wn.2d 158, 165, 876 P.2d 435 (1994).

<sup>41</sup> McCluskey v. Handorff-Sherman, 68 Wn. App. 96, 110, 841 P.2d 1300 (1992), aff'd, 125 Wn.2d 1, 882 P.2d 157 (1994).



4 of 6 DOCUMENTS

*Alex Salas, Appellant, v. Hi-Tech Erectors, Respondent.*

No. 58511-8-I

COURT OF APPEALS OF WASHINGTON, DIVISION ONE

*177 P.3d 769; 2008 Wash. App. LEXIS 426*

February 25, 2008, Filed

**SUBSEQUENT HISTORY:** Reconsideration denied by *Salas v. Hi-Tech Erectors, 2008 Wash. App. LEXIS 730 (Wash. Ct. App., Mar. 27, 2008)*

**PRIOR HISTORY:** [\*1]

Superior Court County: King. Superior Court Cause No: 04-2-36411-6.SEA. Date filed in Superior Court: 6/23/06. Superior Court Judge Signing: Michael Hayden.

**SUMMARY:**

WASHINGTON OFFICIAL REPORTS SUMMARY

**Nature of Action:** A construction worker who was severely injured when he slipped and fell from a scaffold ladder at a construction site sought damages from the scaffolding supplier, asserting that the supplier violated applicable safety regulations for ladders on construction sites.

**Superior Court:** After granting a partial summary judgment in favor of the worker, holding as a matter of law that the supplier violated a state safety regulation, but denying summary judgment as to liability, proximate cause, and damages, the Superior Court for King County, No. 04-2-36411-6, Michael Hayden, J., on June 23, 2006, entered a judgment on a verdict in favor of the defendant. The jury found that the supplier was negligent but that the negligence was not a proximate cause of the worker's injuries.

**Court of Appeals:** Holding that the trial court did not abuse its discretion by admitting evidence of the worker's illegal immigration status as it pertained to his claim for lost future income, that the trial court did not err by allowing the scaffolding supplier's principal to provide expert testimony in violation of an order in limine, and that the trial court did not err by denying the worker's proposed jury instruction stating that the supplier had a duty to provide a safe workplace, the court *affirms* the judgment.

**HEADNOTES**

WASHINGTON OFFICIAL REPORTS HEADNOTES

[1] **Evidence -- Relevance -- Balanced Against Prejudice -- Discretion of Court -- In General.** A trial court has broad discretion in balancing the probative value of evidence against the potentially harmful consequences that might result from its admission.

[2] **Evidence -- Review -- Standard of Review.** A trial court's evidentiary rulings are reviewed for an abuse of discretion.

[3] **Evidence -- Pretrial Order -- Review -- Standard of Review.** A trial court's ruling on a motion in limine is reviewed for an abuse of discretion.

**APPENDIX A**

[4] **Courts -- Judicial Discretion -- Abuse -- What Constitutes -- In General.** A court does not abuse its discretion unless its decision is manifestly unreasonable or it exercises its discretion on untenable grounds or for untenable reasons.

[5] **Damages -- Future Damages -- Earnings -- Factors -- Immigration Status -- Relevance.** In a personal injury action in which the plaintiff claims future wage loss damages, the defendant may generally introduce evidence of the plaintiff's illegal immigration status if the defendant is prepared to show relevant evidence that, because of the plaintiff's illegal immigration status, the plaintiff is unlikely to remain in this country throughout the period of claimed lost future income.

[6] **Evidence -- Review -- Discretion of Court -- Issue of First Impression -- No Authority Cited.** An appellate court may decline to rule that a trial court's decision on an evidentiary issue of first impression constitutes an abuse of discretion if the issue arose late in the proceedings and relevant authority was not provided to the trial court.

[7] **Evidence -- Opinion Evidence -- Expert Testimony -- Violation of Pretrial Order -- Door Opened by Opponent.** A trial court may allow a witness to testify as an expert beyond limitations placed on the witness by an order in limine if opposing counsel opens the door to such testimony by eliciting the witness's opinion on an issue during cross-examination after being warned by the court outside the presence of the jury that asking the witness's opinion on such issue will call for an expert opinion.

[8] **Trial -- Instructions -- Review -- Error of Law -- Standard of Review.** Alleged errors of law in jury instructions are reviewed de novo.

[9] **Trial -- Instructions -- Sufficiency -- Number -- Language.** A trial court has considerable discretion in determining the number and content of jury instructions.

[10] **Trial -- Instructions -- Proposed Instructions -- Misleading Instruction.** A trial court is under no obligation to give a misleading instruction.

[11] **Trial -- Instructions -- Proposed Instructions -- Lack of Authority.** A trial court is under no obligation to give an instruction that is unsupported by authority.

[12] **Employment -- Safe Workplace -- Subcontractor's Duty -- Compliance With Safety Regulations.** A subcontractor does not necessarily have a primary, nondelegable duty to every employee within the scope of the subcontract to provide a safe workplace and to ensure compliance with all applicable safety regulations; rather, the primary responsibility lies with the general contractor.

**COUNSEL:** Brian K. Boddy and Robert B. Kornfeld (of *Kornfeld Trudell Bown & Lingenbrink, PLLC*), for appellant.

John C. Moore, for respondent.

**JUDGES:** Written by: Baker. Concurring by: Appelwick, Becker.

**OPINION BY:** Baker

## OPINION

¶1 Baker, J. -- Alex Salas was injured on a construction site. He appeals rulings by the trial judge admitting evidence of his immigration status and expert testimony by Hi-Tech Erector's principal, and the court's denial of a proposed jury instruction. Hi-Tech Erectors cross-appeal a pretrial limitation on its witnesses' testimony and a grant of partial summary judgment in which the court held as a matter of law that Hi-Tech Erectors violated a Washington Administrative Code provision governing safety standards for ladders. We affirm.

¶2 Alex Salas, an undocumented immigrant, was working on a condominium restoration project when he slipped from a scaffold ladder and fell three stories to the ground, suffering serious injuries.

¶3 Salas sued Hi-Tech Erectors, which supplied the scaffolding at the construction site, asserting that the company [\*2] violated the Washington Administrative Code's safety standards for ladders on construction sites.

¶4 Salas moved for summary judgment. Arguing that Hi-Tech had not disclosed any expert witnesses it might call, he sought to bar Hi-Tech from producing any witnesses and to exclude the company principal in particular from offering expert opinion testimony.

¶5 The court granted Salas partial summary judgment, holding as a matter of law that Hi-Tech had violated former WAC 296-155-480(1) (2007), and denied summary judgment as to liability, proximate cause, and damages. He also ruled that Hi-Tech's principal, George Canney, could be called as a witness at trial, but that he could not testify as an expert or opinion witness.

¶6 Salas moved for an order in limine seeking, inter alia, to exclude any evidence that he is not a United States citizen. The court denied the motion.

¶7 It is undisputed that Salas was living in this state on an expired visa. However, evidence of his status as an illegal alien came to counsels' attention only shortly before the trial, and counsel had no adequate chance to brief or prepare to address the issue. Hi-Tech unsuccessfully requested a continuance, a request Salas opposed.

¶8 Prior [\*3] to trial, the court discussed the issue of Salas's immigration status with counsel. The court stated that if Salas made a claim for impairment of future income, his status as a nonlegal resident would be probative as to the extent of the future impairment. The court ruled that it would leave the decision whether or not to introduce evidence of Salas's immigration status to Salas himself, saying, "you can't have it both ways. It either stays out and there's no future income claim or it comes in and you may make it." "These are volatile times in terms of immigration, no doubt," the court noted. "It may be a difficult decision for him to decide which way to go."

¶9 On the last day of trial, the court again discussed the immigration issue with counsel, noting that it had been provided with a New York case holding that immigration status is a fact issue to be considered by the jury.<sup>1</sup> The court expressed its agreement with that opinion.

1 The record does not indicate which New York case the court was referring to.

¶10 Ultimately, in addition to past wage loss, and past and future medical expenses, Salas requested future lost wages, and his immigration status became an issue at trial. Salas testified [\*4] that he had entered the country on a valid visa and had applied for citizenship. There was no evidence that Salas was likely to be deported.

¶11 At trial, the court ruled that a question posed by Salas opened the door to allow George Canney to give expert and opinion testimony.

¶12 The jury found Hi-Tech to be negligent but that its negligence was not a proximate cause of Salas's injuries.

¶13 Salas moved for a new trial, arguing that introducing his immigration status and allowing George Canney to testify had the effect of "unfairly poisoning the jury in favor of" Hi-Tech. His motion was denied. Salas now appeals, and Hi-Tech cross-appeals.

## II

### *Immigration Status*

[1-4] ¶14 A trial court has broad discretion in balancing the probative value of evidence against the potentially harmful consequences that might result from its admission.<sup>2</sup> We review a trial court's decision on the admissibility of evidence and its rulings on motions in limine for abuse of discretion.<sup>3</sup> Abuse of discretion occurs where the trial court's action is manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.<sup>4</sup>

2 *Lockwood v. AC&S, Inc.*, 109 Wn.2d 235, 256, 744 P.2d 605 (1987).

3 *State v. Finch*, 137 Wn.2d 792, 810, 975 P.2d 967 (1999).

4 *Olver v. Fowler*, 161 Wn.2d 655, 663, 168 P.3d 348 (2007). [\*5]

¶15 Whether immigration status is properly admissible in a claim for future wage loss appears to be an issue of first impression in Washington. Neither party has provided this court with Washington case law on the matter.

¶16 Salas argues that his immigration status was not relevant to any issue in the trial, and its admission was improper and prejudicial. He relies principally on a single criminal case, *State v. Avendano-Lopez*,<sup>5</sup> to support his contention that any discussion of nationality or immigration status is inherently prejudicial. The *Avendano-Lopez* court held that questions of nationality and immigration status are irrelevant, appeal to a jury's passions and prejudices, and are generally improper and inadmissible in a court of justice.<sup>6</sup> Courts in other jurisdictions have uniformly condemned questions designed to appeal to national prejudice.<sup>7</sup>

5 79 Wn. App. 706, 904 P.2d 324 (1995).

6 *Avendano-Lopez*, 79 Wn. App. at 718-19.

7 *Avendano-Lopez*, 79 Wn. App. at 719.

¶17 Salas's reliance on *Avendano-Lopez* is misplaced. The court in *Avendano-Lopez* held that the question of immigration status was improper not only because it appealed to the jury's passions and prejudices, but because it was completely [\*6] irrelevant to the material issues of the criminal case.<sup>8</sup> In civil cases, as discussed below, several courts have found immigration status to be relevant to a claim for lost future wages.

8 *Avendano-Lopez*, 79 Wn. App. at 719-20.

¶18 Salas also cites to *Balbuena v. IDR Realty LLC*.<sup>9</sup> That civil case, however, supports Hi-Tech's contention that immigration status may properly be placed before the jury. The *Balbuena* court addressed the question of whether an undocumented alien was precluded from obtaining lost wages because of the immigration reform and control act (IRCA).<sup>10</sup> The court held that any conflict with IRCA that may arise from allowing 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.<sup>11</sup> A jury's analysis of a future wage claim proffered by an undocumented alien is similar, the court held, 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.<sup>12</sup> The court hypothesized that an undocumented alien plaintiff could introduce proof that he had subsequently received or was in [\*7] the process of obtaining the necessary documents and, consequently, would likely be authorized to obtain future employment in the United States. Conversely, a defendant could allege that a future wage award is not appropriate because work authorization has not been sought or approval was sought but denied.<sup>13</sup>

9 6 N.Y.3d 338, 845 N.E.2d 1246 (2006).

10 *Balbuena*, 6 N.Y.3d at 353-55.

11 *Balbuena*, 6 N.Y.3d at 362.

12 *Balbuena*, 6 N.Y.3d at 362.

13 *Balbuena*, 6 N.Y.3d at 362.

¶19 Hi-Tech points to a number of foreign cases, including *Balbuena*, where courts have allowed the introduction of evidence that the plaintiff was an undocumented worker.

¶20 In *Majlinger v. Cassino Contracting Corp.*,<sup>14</sup> the court held that a plaintiff's immigration status is relevant to a determination of damages for lost wages and presents an issue of fact to be resolved by the jury.<sup>15</sup> The court held that a jury may take the plaintiff's status into account, along with the myriad other factors relevant to a calculation of lost earnings, in determining 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 deportation or voluntary departure from [\*8] the United States.<sup>16</sup>

14 25 A.D.3d 14, 802 N.Y.S.2d 56 (App. 2005), *aff'd sub nom.*, *Balbuena v. IDR Realty LLC*, 6 N.Y.3d 338, 845 N.E.2d 1246 (2006).

15 *Majlinger*, 802 N.Y.S.2d at 68.

16 *Majlinger*, 802 N.Y.S.2d at 68-69.

¶21 In *Barahona v. Trustees of Columbia University in City of New York*,<sup>17</sup> the court held that the plaintiff put his immigration status at issue when he sought damages for future lost earnings, and that the plaintiff's immigration status was thus a relevant fact for the jury to consider.<sup>18</sup> A jury's analysis of a future wage claim proffered by an undocu-

mented alien, the court held, 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.<sup>19</sup>

17 *816 N.Y.S.2d 851 (N.Y. Misc. 2006)*.

18 *Barahona, 816 N.Y.S.2d at 853*.

19 *Barahona, 816 N.Y.S.2d at 853* (quoting *Balbuena, 6 N.Y.3d at 362*).

¶22 In another New York case, the court in *Cano v. Mallory Management*<sup>20</sup> held that the plaintiff's undocumented alien status may be presented to the jury on the issue of lost wages, but not on the issue of pain and suffering.<sup>21</sup>

20 *195 Misc. 2d 666, 760 N.Y.S.2d 816 (2003)*.

21 *Cano, 760 N.Y.S.2d at 818*.

¶23 Similarly, the New Hampshire Supreme [\*9] Court has held that an illegal alien's status, though irrelevant to the issue of liability, is relevant on the issue of lost earnings.<sup>22</sup> Though evidence of a plaintiff's status may well be prejudicial, such evidence, the court held, is essential should an illegal alien wish to pursue a claim for lost earning capacity.<sup>23</sup>

22 *Rosa v. Partners in Progress, Inc., 152 N.H. 6, 868 A.2d 994, 1002 (2005)*.

23 *Rosa, 868 A.2d at 1002*.

¶24 While *Hi-Tech* cites numerous cases in which courts allowed evidence of illegal immigrant status, other courts have been more restrictive when allowing such evidence to be presented.

¶25 The court in *Klapa v. O&Y Liberty Plaza Co.*<sup>24</sup> held that whatever probative value illegal alien status may have is far outweighed by its prejudicial impact.<sup>25</sup> The court held that defendants must be prepared to demonstrate something more than the mere fact that the plaintiff resides in the United States illegally.<sup>26</sup>

24 *168 Misc. 2d 911, 645 N.Y.S.2d 281 (1996)*.

25 *Klapa, 645 N.Y.S.2d at 282*.

26 *Klapa, 645 N.Y.S.2d at 282*.

¶26 A Michigan court held that the issue of the plaintiff's illegal alien status, while irrelevant on the question of liability, was material and relevant on the issue of determining the present [\*10] value of plaintiff's future lost earnings, and remanded for a bifurcated trial to avoid prejudice.<sup>27</sup>

27 *Melendres v. Soales, 105 Mich. App. 73, 306 N.W.2d 399, 402 (1981)*.

¶27 Citing the Michigan case, the Wisconsin Supreme Court affirmed a trial court's decision to exclude evidence of a plaintiff's illegal alien status in determining lost future earning capacity as unduly prejudicial.<sup>28</sup> Noting that no bifurcated trial had been sought, and that no offer of proof had been made by any defendant that deportation was anything other than a speculative or conjectural possibility, the court affirmed the trial court's discretion in not allowing the "obvious prejudicial effect of the admission of such evidence."<sup>29</sup>

28 *Gonzalez v. City of Franklin, 137 Wis. 2d 109, 403 N.W.2d 747, 759 (1987)*.

29 *Gonzalez, 403 N.W.2d at 760*.

¶28 In the present case, the court was prepared to exclude all evidence of Salas's illegal alien status, provided he did not seek future lost earnings. Salas ultimately sought future lost wages but made no attempt to mitigate any potential prejudice caused by evidence of his immigration status. He did not request a bifurcated trial to separate the issue of damages from negligence and liability. He further avers [\*11] that it would have been pointless to request a curative jury instruction, as the court had already denied his motion in limine. He could have requested an instruction limiting consideration of his immigration status to the issue of future lost wages but did not do so.

¶29 Salas asserts that the jurors were prejudiced against illegal immigrants, and his trial attorney has submitted a declaration to that effect.<sup>30</sup> However, voir dire was not recorded, leaving no record for this court to review. He declares that prejudiced jurors were seated after he used all of his peremptory challenges, but there is no indication that he sought to exclude potentially prejudiced jurors for cause.

30 The attorney's paralegal also submitted a declaration alleging prejudice by jurors.

¶30 Salas states that Hi-Tech's counsel immediately sought to inject the issue into the trial in his opening and on cross-examination. Neither opening nor closing arguments have been provided to this court, but the record shows that Salas's counsel discussed Salas's immigration status at length in his direct examination of Salas's brother and of Salas himself.

[5, 6] ¶31 The issue of immigration status is divisive and prejudicial. We conclude that [\*12] evidence of a party's illegal immigration status should generally be allowed only when the defendant is prepared to show relevant evidence that the plaintiff, because of that status, is unlikely to remain in this country throughout the period of claimed lost future income. Under the unique facts of this case, however, where the issue arose so late in the process and relevant authority was not provided to the court, we cannot conclude that the trial court abused its discretion in allowing evidence of Salas's immigration status.<sup>31</sup>

31 We note also that the jury never reached the issue of damages.

#### *Expert Testimony*

[7] ¶32 Salas argues that it was error for the court to allow George Canney to testify beyond the limits imposed on his testimony.

¶33 Salas initially sought to bar any witness testimony by Hi-Tech, arguing that such a limitation was justified by Hi-Tech's purported delay in responding to discovery requests.

¶34 In his motion to exclude all defense witnesses, Salas asserted that Hi-Tech had not disclosed any expert witnesses, nor any witnesses who might "wear two hats." In one of his interrogatories, Salas asked, "Are there any witnesses who have factual information regarding this case and who are [\*13] also 'expert witnesses'?" In its answers to interrogatories, Hi-Tech indicated it had not retained any expert witnesses but did list George Canney as a witness with factual information as well as "expertise in erection of scaffolds and regulations pertaining thereto."

¶35 In its order granting partial summary judgment to Salas, the court decreed that "defense may only call its principal [George Canney] as a witness at trial, but he shall not be able to testify as an 'opinion' or 'expert' witness."

¶36 At trial, Salas's attorney asked Canney whether Salas would have been prevented from hitting the ground if he had been tied off with a safety harness. The court ruled that the question opened the door to allow Canney to offer expert witness and opinion testimony. The court's discussion with counsel on this matter is not in the record.

¶37 In his declaration in support of Salas's motion for a new trial, Salas's attorney asserted that after he asked Canney the question, the court asked to speak with both counsel in chambers, where it informed Salas's counsel that he had opened the door to expert testimony.

¶38 In its opposition to the motion for a new trial, Hi-Tech disputed that account, stating that Salas's [\*14] attorney asked the question after the court held a sidebar conference and warned Salas's counsel that if he asked that question he would be opening the door.

¶39 The record shows that after Salas's attorney asked Canney if Salas would have been prevented from falling if he had been tied off, defense counsel requested a sidebar. After the sidebar, the court asked defense counsel if he wanted to restate his question. Salas's counsel then introduced Canney's deposition and read the same question aloud from the deposition. After some further questioning, the court again called counsel to a sidebar discussion.

¶40 This series of sidebar discussions comports more closely with Hi-Tech's account than it does with Salas's. In its order denying Salas's motion for a new trial, the court reiterated that it had informed counsel outside the presence of the jury that asking for Canney's opinion as to whether any particular safety device would have prevented the accident called for an expert opinion, because Canney was not present at the time of the accident and had no personal knowledge as to how Salas fell from the ladder.

¶41 Absent an abuse of discretion, we will not disturb on appeal a trial court's rulings [\*15] on motions in limine or the admissibility and scope of expert testimony.<sup>32</sup> The trial court did not abuse its discretion in allowing Canney to testify beyond the initial limitations on his testimony.

32 See *Christensen v. Munsen*, 123 Wn.2d 234, 241, 867 P.2d 626 (1994) (admissibility and scope of expert testimony); *Gammon v. Clarke Equip. Co.*, 38 Wn. App. 274, 286, 686 P.2d 1102 (1984) (motions in limine).

#### Jury Instruction

¶42 Salas appeals the trial court's decision not to give his proposed jury instruction regarding Hi-Tech's duty to provide a safe workplace. Alleged errors of law pertaining to jury instructions are reviewed de novo.<sup>33</sup>

33 *Caldwell v. Dep't of Transp.*, 123 Wn. App. 693, 696, 96 P.3d 407 (2004).

[8-12] ¶43 The instruction Salas proposed reads as follows:

A subcontractor like defendant Hi-Tech, owes a duty to every employee within the scope of its subcontract to ensure that it complies with all applicable safety regulations. The subcontractor is the party with innate supervisory authority and per se control over the scope of its subcontract, so it bears the primary, non-delegable duty to provide a safe workplace for workers. In Washington, subcontractors have a non-delegable duty to ensure compliance, within the scope of their subcontracts, [\*16] with all Washington State construction safety regulations. This liability is justified because a subcontractor's supervisory authority is per se control over the workplace within the scope of its subcontract.

¶44 Salas cites to three cases to support his instruction. Those cases, however, do not support his assertion that Hi-Tech had a primary, nondelegable duty to provide a safe workplace and to ensure compliance with all Washington State construction safety regulations.

¶45 The court in *Stute v. P.B.M.C., Inc.*<sup>34</sup> held that the general contractor should bear the primary responsibility for compliance with safety regulations because the general contractor's innate supervisory authority constitutes sufficient control over the workplace.<sup>35</sup>

34 114 Wn.2d 454, 788 P.2d 545 (1990).

35 *Stute*, 114 Wn.2d at 464.

¶46 Similarly, the court in *Kamla v. Space Needle Corp.*<sup>36</sup> held that "[b]ecause a general contractor is in the best position, financially and structurally, to ensure [Washington Industrial Safety and Health Act of 1973, chapter 49.17 RCW,] compliance or provide safety equipment to workers, we place 'the prime responsibility for safety of all workers ... on the general contractor.'" <sup>37</sup> This court, in *Weinert v. Bronco National Company*,<sup>38</sup> stated that, under *Stute*, [\*17] a general contractor bears the general duty to enforce safety regulations and held that a siding subcontractor's duty did not extend beyond the scope of its contract with the general contractor, extending only to employees engaged in siding work.<sup>39</sup>

36 147 Wn.2d 114, 52 P.3d 472 (2002).

37 *Kamla*, 147 Wn.2d at 124 (third alteration in original) (quoting *Stute*, 114 Wn.2d at 463).

38 58 Wn. App. 692, 795 P.2d 1167 (1990).

39 *Weinert*, 58 Wn. App. at 697.

¶47 Salas's proposed instruction was not an accurate reflection of the law. A trial court has considerable discretion in determining the number and content of jury instructions.<sup>40</sup> It is under no obligation to give misleading instructions or instructions which are not supported by authority.<sup>41</sup> We affirm the trial court's decision not to give Salas's proposed jury instruction.

40 *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 165, 876 P.2d 435 (1994).

41 *McCluskey v. Handorff-Sherman*, 68 Wn. App. 96, 110, 841 P.2d 1300 (1992), *aff'd*, 125 Wn.2d 1, 882 P.2d 157 (1994).

¶48 Because we affirm the trial court, we need not address Hi-Tech's cross-appeal.

¶49 Affirmed.

Appelwick, C.J., and Becker, J., concur.

Reconsideration denied March 27, 2008.

Michael J. Killeen, *Employment in Washington: A Guide to Employment Laws, Regulations and Practices* (4th ed.)

Little Mendelson, P.C., *The Washington Employer*, 2007-08 ed.

James F. Nagle et al., *Washington Building Contracts & Construction Law*

*Annotated Revised Code of Washington* by LexisNexis

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

ALEX SALAS, a single person,	)	
	)	DIVISION ONE
Appellant/Cross-Respondent,	)	
	)	No. 58511-8-1
v.	)	
	)	ORDER DENYING MOTION
HI-TECH ERECTORS, a Washington	)	FOR RECONSIDERATION
Corporation,	)	
	)	
Respondent/Cross-Appellant.	)	

---

The appellant, Alex Salas, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 27<sup>th</sup> day of March, 2008.

FOR THE COURT:

Becker, J.  
Judge

FILED  
COURT OF APPEALS DIV #1  
STATE OF WASHINGTON  
2008 MAR 27 AM 11:08