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NO. 81590-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ALEX SALAS

Petitioner,

v.

HI-TECH ERECTORS, a Washington Corporation

Respondent.

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SUPPLEMENTAL BRIEF OF PETITIONER

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INTRODUCTION

Petitioner Alex Salas files this Supplemental Brief in support of his Petition for Review of the decision of the Court of Appeals, ***Salas v. Hi-Tech Erectors***, 143 Wn. App. 373, 177 P.3d 769, *rev. granted* ___ Wn.2d ___ (2008) (hereafter "COA").

The trial court erred in ruling that Salas's status as an undocumented worker would come into evidence because Salas was claiming future lost earnings. There is not the slightest bit of evidence that Salas will ever return to Mexico and any surmise about a return is pure speculation.

This trial took place during intense media attention on illegal immigration relating to the immigration bill under consideration in the Senate. Evidence of Salas's immigration status ignited a fire storm of prejudice against Alex Salas as a symbol of millions of illegal immigrants in this country, allegedly taking jobs from American workers and draining the resources of the state.

The Court of Appeals got the rule right but the remedy wrong when it refused to reverse and remand for a new trial. This Court should reverse and remand for a new trial free of evidence of Salas's immigration status and the prejudicial taint of discrimination.

SUPPLEMENTAL STATEMENT OF FACTS

Alex Salas's case was tried during a time of heightened public awareness and controversy over immigration issues. CP 696. President Bush was supporting a controversial bill on immigration, which was pending in the U.S. Senate. *Id.*; *Senate immigration bill would offer chance at citizenship, build 370-mile border fence*, ***Seattle Times*** (5/17/06). On May Day, only two weeks before Salas's trial began, an estimated 65,000 people marched through the streets of Seattle in support of immigrant rights. *Huge turnout for rally in Seattle*, ***Seattle Times*** (5/2/06). On May 15, the day trial began, President Bush addressed the nation on the topic of immigration. Editorial, *Good speech, one bad idea*, ***Seattle Times*** (5/15/06). During the trial, the Seattle Times reported on the lack of enforcement of security along the Mexico-U.S. border. *Border Patrol demoralized by lack of prosecutions*, ***Seattle Times*** (5/19/06). Daily during the trial, news articles, columnists and letters to the editor discussed immigration and protested the presence of undocumented immigrants in this country. *E.g.*, *Will public back Bush on this emotional issue?*, ***Seattle Times*** (5/16/06); Letters *to the Editor*, *id.* (5/17/06); *The frontline isn't the border*, *id.* (5/18/06); *Immigration, in shades of*

gray, *id.* (5/19/06); *Language on language: Bush backs 2 versions*, *id.* (5/20/06); *Coming to America*, *id.* (5/21/06); *Fraudulent border enforcement, id.* (5/22/06); *Senate rejects letting all illegal immigrants stay, id.* (5/23/06); *Under the noses of out-of-work Americans, id.* (5/24/06). Similar stories were carried in other newspapers and on local television stations. CP 696, 764.

Against this background of controversy, Salas moved in limine to preclude any evidence of his status as an undocumented immigrant. CP 216. He argued in a memo filed in support of the motion that there was not the slightest evidence that he might leave the U.S. (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.

Defendant Hi-Tech Erectors never presented any evidence that Salas might leave the U.S. and return to Mexico.

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). Despite this concern, the trial court ruled that evidence of Salas's immigration status would be admissible if Salas sought to recover future wage loss. RP 26-27 (5/15/06).

Unfortunately, as the trial court anticipated, there were jurors who were "hung up" on the immigration issue. During voir dire, Salas's attorney asked about juror attitudes towards undocumented immigrants and explained in his declaration in support of Salas's new trial motion[1]:

> 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. . . . The general consensus was that no one felt an undocumented worker was entitled to anything.

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[1] Voir dire was made part of the record only through counsel's declaration.

CP 696. Although Salas exercised all three peremptory challenges, *Id.*, half of the jurors seated on the jury stated their strong opposition to allowing illegal aliens to remain in this country and work. CP 728. There were no Hispanic jurors, African-American jurors, or any jurors of color. CP 764.

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 Sates. *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.

Despite the complete lack of any evidence that Salas would ever leave the United States, defense counsel began his cross-examination of Salas by highlighting the fact that Salas was an undocumented immigrant, RP 63 (5/22/06):

CROSS-EXAMINATION

BY MR. BOYLE:

Q. Good afternoon, Mr. Salas. Mr. Salas, you came here to the United States in 1989 with a passport and a visa; correct?

A. That's correct.

Q. And those, the passport, Mexican passport, and the visa are no longer valid?

A. That is correct.

Q. And you are not yet a citizen of the U.S.?

A. Correct.

Q. And you have a permanent residence card?

A. That's correct.

Q. Mr. Salas, so currently you are in the United States illegally; isn't that correct?

A. As I understand, correct.

Defense counsel argued in closing that there was no reason to believe that Salas, as an illegal alien, would remain in this country long enough to earn future wages or complete medical treatment. CP 728, 730-31.

SUPPLEMENTAL ARGUMENT

A. Evidence of immigration status is irrelevant unless 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.

The Court of Appeals correctly held:

> 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.

COA ¶ 31, 143 Wn. App. at 383. This follows almost inescapably from ER 401:

> "Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

The trial court abused its discretion in rejecting Salas's motion in limine that his immigration status was irrelevant, CP 216, and the Court of Appeals erred in refusing to apply this fundamental principle to this appeal.

For immigration status to become relevant, one would have to show that it is more probable than not that an undocumented immigrant will be deported. There is no such evidence for most undocumented workers. The Department of Homeland Security estimates that there were 11.8 million unauthorized immigrants

living in the United States as of January 2007.[2] During 2007, the Department apprehended 960,756 foreign nationals in the United States.[3] Of these apprehensions, 876,787, or 91%, were made by the Border Patrol.[4] The balance of 84,000 apprehensions were made elsewhere. Thus, other than border apprehensions, less than 1% of all illegal immigrants in the U.S. were apprehended. It would be impossible to say that it is "likely" that Salas or any other long-time resident immigrant would be apprehended and deported.

This Court should make clear that there very few cases in which the defendant can successfully argue that an undocumented plaintiff is unlikely to remain in this country during the period of claimed lost income. Indeed, the universe of such cases is limited to those in which the undocumented worker testifies to an intent to return to another country or in which the worker is already in detention or under investigation. *E.g.*, ***James v. Tilghman***, 194 F.R.D. 408, 420 (D. Conn. 1999) ("[P]laintiff testified . . . that a

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[2] Estimate re: unauthorized immigrant population residing in the United States: January 2007: http://www.dhs.gov/xlibrary/assets/statistics/publications/ ois_ill_pe_2007.pdf (Accessed 12/12/08).

[3] Immigration Enforcement Actions: 2007: http://www.dhs.gov/ xlibrary/assets/statistics/publications/enforcement_ar_07.pdf (Accessed 12/12/08).

[4] *Id.*

deportation hearing had already been held and that he is scheduled to be deported . . . .").

Admitting evidence of Salas's immigration status simply called for speculation that Salas might be apprehended or might voluntarily decide to return to Mexico. Many things "might" happen to a plaintiff who claims future wage loss—he "might" be struck by lightening, he "might" die before his expected retirement date, he "might" become addicted to substance abuse and lose any hope of gainful employment, or he "might" win the lottery and quit his job. But none of these scenarios is admissible because they are entirely speculative. The same is true of Salas's immigration status.

Speculating about the possibility of deportation turns the law of damages upside down: "the doctrine respecting the matter of certainty, properly applied, is concerned more with the *fact of damage than with the extent or amount of damage*." ***Lewis River Golf, Inc. v. O.M. Scott & Sons***, 120 Wn.2d 712, 717, 845 P.2d 987 (1993) (emphasis in original) (quoting ***Gaasland Co. v. Hyak Lumber & Millwork, Inc.***, 42 Wn.2d 705, 712-13, 257 P.2d 784 (1953)). "[W]here the fact of damage is firmly established, the wrongdoer is not free of liability because of difficulty in establishing the dollar amount of damages." ***Alpine Indus., Inc. v. Gohl***, 30

Wn. App. 750, 756, 637 P.2d 998 (1981), *rev. denied*, 97 Wn.2d 1013 (1982) (quoting ***Reefer Queen Co. v. Marine Constr. & Design Co.***, 73 Wn.2d 774, 781, 440 P.2d 448 (1968)).

Applying these basic principles to this case, the fact of Salas's damages is well-established—he fell from a defective scaffold ladder and continues to suffer pain and disability. There is no requirement that Salas prove with certainty the amount of his future lost earnings. A jury cannot be permitted to speculate about the improbability of deportation.

Worse yet, introducing this evidence severely prejudiced Salas. Washington's Law Against Discrimination embodies a strong and vibrant public policy that the people of this state will not tolerate discriminatory conduct. RPC 8.4(g) and (h) further this policy by prohibiting discriminatory conduct in the practice of law and in court proceedings. Defendant Hi-Tech struck a burning match of prejudice in an incendiary atmosphere charged with tension about the ongoing immigration debate. That spark ignited the prejudices of the jury and destroyed Salas's case.

B. The better-reasoned cases from other jurisdictions reject the admissibility of immigration status.

Courts in other states have addressed the admissibility of immigration status and the better reasoned decisions have concluded that absent evidence of pending deportation, the immigration status of a stable undocumented worker was outweighed by the potential prejudice. The Fifth Circuit held:

> Once Hernandez (claimant) proved his prior wages in the United States, the burden shifted to Dianella to establish that the use of past wages to calculate future damages was factually improper and, if so, what a proper measure of damages should be. Because Dianella presented no proof that Hernandez was about to be deported or would surely be deported, the court did not err in basing its award on Hernandez's past earnings stream. . . . .

Hernandez v. M/V Rajaan, 848 F.2d 498, 500 (5th Cir.), *cert. denied* 488 U.S. 981 (1988).

The Supreme Court of New York for New York County summarized the cases holding that the relevance of a claimant's status as an illegal alien is outweighed by the prejudicial effect of the evidence absent proof of likely deportation:

> In reviewing these cases, it becomes apparent that a plaintiff's status as an illegal alien, in and of itself, cannot be used to rebut a claim for future lost earnings. (*See*, ***Clemente v. State***, [40 Cal. 3d 202, 221, 219 Cal. Rptr. 445, 707 P.2d 818 (Sup. Ct 1985)]; ***Gonzalez v. City of Franklin***, [137 Wis. 2d 109, 139–140, 403 N.W.2d 747, 759 (1987)]; ***Hagl v. Stern & Sons***, [396 F. Supp. 779, 785 (D.C. Pa. 1975)]; ***Peterson v. Neme***, [222 Va. 477, 483, 281 S.E. 2d

> 689 (1981)].) The fact that a plaintiff is deportable does not mean that deportation will actually occur. Further, whatever probative value illegal alien status may have is far outweighed by its prejudicial impact. (*See*, ***Gonzalez v. City of Franklin***, *supra*; ***Hagl v Stern & Sons***, *supra*; ***Peterson v Neme***, *supra*.) Therefore, in order to rebut such a claim defendants must be prepared to demonstrate something more than just the mere fact that the plaintiff resides in the United States illegally. Absent such a showing, a defendant will be precluded from presenting to the jury evidence which would indicate a plaintiff's immigration status.

Klapa v. O&Y Liberty Plaza Co., 168 Misc. 2d 911, 913, 645 N.Y.S.2d 281 (1996),

In ***Clemente***, *supra*, the California Supreme Court upheld a trial court's refusal to allow evidence that the injured plaintiff was illegal (40 Cal.3d at 221):

> Plaintiff had been gainfully employed in this country prior to his two accidents, there was no evidence that he had any intention of leaving this country and the speculation that he might at some point be deported was so remote as to make the issue of citizenship irrelevant to the damages question. The trial court properly concluded that . . . such testimony, even if marginally relevant, was highly prejudicial.

The Virginia Supreme Court reached the same result in ***Peterson,*** 222 Va. at 482-83:

> The trial judge ruled, and we support his decision, that the evidence was inadmissible because it was irrelevant and immaterial to Neme's right to recover damages for lost wages. Even if the excluded evidence was competent for the purpose Peterson suggests, we question its rebuttal value; if Neme's status did not deter her from working before she was injured, it is improbable it did so later.

> Obviously, the proffered evidence was also uniquely prejudicial. We believe the trial judge properly could conclude that the prejudicial impact of the proffered evidence outweighed its probative value, and we sustain his rulings.

In ***Hagl***, the federal District Court also rejected evidence of immigration status (396 F.Supp. at 784-85):

> It follows that insofar as liability was concerned, Hagl's status as an alien was irrelevant. Whether he will be deported, leave of his own accord, or obtain United States citizenship might have been relevant in the damages portion of the trial. However, there was no evidence on this point. There was testimony to show he had come to this country in 1967. At side bar it was explained he had hired an attorney to help in achieving permanent residency status but nothing further had occurred in this regard. No proceedings to deport Hagl had been started as of the time of trial, nor, was there any indication that such proceedings were contemplated. In short, there was nothing which would have justified the jury's reducing damages because plaintiff is an alien who might conceivably face some unspecified immigration action at an unknown time.

The Wisconsin Supreme Court reached the same result in ***Gonzalez,*** 137 Wis. 2d at 140:

> [The appeals court] . . . correctly stated that no offer of proof was made "by any defendant that deportation was anything other than a speculative or conjectural possibility." [citation omitted]. Based upon these factors, and given the obvious prejudicial effect of the admission of such evidence, we do not believe that the appeals court erred in affirming the trial court's exercise of discretion.

A few courts have found immigration status relevant to lost earning capacity, but these courts have not sufficiently considered

the improbability of deportation or the prejudicial effect of the evidence. The Michigan Court of Appeals simply asserted without considering the improbability of the proposition, "due to plaintiff's status as an illegal alien he was subject to deportation to Mexico at any time." ***Melendres v. Soales***, 105 Mich. App. 73, 78, 306 N.W.2d 399 (1981). But the court did consider the evidence sufficiently prejudicial that it remanded for a bifurcated re-trial in which immigration status would only be admitted during a damages phase, not during an initial liability phase. *Id.* at 78-79.

The highest courts of New York and New Hampshire have grappled with the proper interpretation of an earlier U.S. Supreme Court case that held that the National Labor Relations board could not award back pay to an undocumented immigrant caused by an unfair labor practice. ***Balbuena v. IDR Realty LLC***, 6 N.Y.3d 338, 845 N.E.2d 1246, 812 N.Y.S.2d 416 (2006) and ***Rosa v. Partners in Progress, Inc.***, 152 N.H. 6, 868 A.2d 994, 1002 (2005), (discussing ***Hoffman Plastic Compounds, Inc. v. National Labor Relations Board***, 535 U.S. 137, 122 S. Ct. 1275, 152 L. Ed. 2d

271 (2002)).[5] In ***Hoffman***, the U.S. Supreme Court held that an award of backpay by the NLRB would be contrary to federal immigration policy, as expressed by Congress in the Immigration Reform and Control Act of 1986 (IRCA). The Supreme Court relied on the fact that the undocumented worker had obtained his position by presenting fraudulent papers to the employer as proof of citizenship. 535 U.S. at 141.

In ***Balbuena***, New York's Court of Appeals declined to apply ***Hoffman*** to a jobsite injury, reasoning that the policy of New York's Labor Law was to protect workers, including those not legally employed, and that refusing to allow undocumented workers to recover for their injuries would actually encourage employers to hire undocumented workers, exactly the opposite effect intended by state and federal law (6 N.Y. 3d at 359-60):

> [A] different conclusion would not only diminish the protections afforded by the Labor Law, it would also improvidently reward employers who knowingly disregard the employment verification system in defiance of the primary purposes of federal immigration laws. An absolute bar to recovery of lost wages by an undocumented worker would lessen the unscrupulous employer's potential liability to its alien workers and make it more financially attractive to

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[5] Defendant Hi-Tech relied on ***Hoffman*** in the trial court in this case, CP 477-78, but the trial court rejected the argument. Defendant did not pursue the issue in the Court of Appeals.

> hire undocumented aliens [citations omitted]. This, coupled with the fact that illegal aliens are willing to work in jobs that are more dangerous and undesirable--and for less money--than their legal immigrant and citizen counterparts, would actually increase employment levels of undocumented aliens, not decrease it as Congress sought by its passage of IRCA.

Having reached this conclusion, the ***Balbuena*** court observed, almost casually, "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 the damages, if any, warranted under the Labor Law." *Id.* at 362. This casual reference fails to cite any authority for this conclusory statement, and it is unclear from the opinion whether this issue was ever actually briefed by the parties.

In much the same way, the New Hampshire Supreme Court carefully analyzed the ***Hoffman*** issue, holding that an undocumented worker may still recover lost wages for an injury, but casually added that evidence of immigration status is admissible without providing any reasoning: "Though evidence of his status may well be prejudicial, such evidence, as described above, is essential should an illegal alien wish to pursue a claim for lost

earning capacity measured at United States wage levels." ***Rosa***, 152 N.H. at 15.

The cases rejecting evidence of immigration status are better reasoned, consistent with sound principles of relevance and damages, and should be followed by this Court for all the reasons discussed above.

C. The appellate court erred in holding that Salas was not entitled to relief because "relevant authority was not provided to the court."

There is no requirement that a party cite case law in a motion in limine, as pointed out in the Petition for Review pages 13-15. In any event, as the Court of Appeals noted, 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 ¶¶ 15-17, 143 Wn. App. at 378-79 (discussing ***State v. Avendano-Lopez***, 79 Wn. App. 706, 904 P.2d 324 (1995), *rev. denied*, 129 Wn.2d 1007 (1996)). A party is not required to scour national law to find a case from another state in order to preserve an evidentiary objection.

D. A change in the law applies to benefit the party who advocated for the change.

The appellate court also erred by announcing a new evidentiary principle and then refusing to apply it to Salas, who brought the case to the court and advocated for the rule. In addition to the authorities cited in the Petition for Review pages 16-18, the principle that a new rule applies to the case in which the court adopts the rule is supported by considerable Washington authority:

> Generally, a party should be entitled to the fruits of his own lawsuit.
>
> In this limited sense it is well settled in Washington that unless the decision changing an existing rule holds otherwise, the change made in the opinion is retroactively applied to the case in which the change is adopted. This view is illustrated by the following cases overruling prior decisional rules of law. ***Memel v. Reimer***, 85 Wn.2d 685, 538 P.2d 517 (1975); ***Blaak v. Davidson***, 84 Wn.2d 882, 529 P.2d 1048 (1975); ***Lyons v. Redding Constr. Co.***, 83 Wn.2d 86, 515 P.2d 821 (1973); ***Freehe v. Freehe***, 81 Wn.2d 183, 500 P.2d 771 (1972); ***Friend v. Cove Methodist Church, Inc.***, 65 Wn.2d 174, 396 P.2d 546 (1964); ***Potts v. Amis***, 62 Wn.2d 777, 384 P.2d 825 (1963); ***Siragusa v. Swedish Hosp.***, 60 Wn.2d 310, 373 P.2d 767 (1962); ***State ex rel. Chelan Elec. Co. v. Superior Court***, 142 Wash. 270, 253 P. 115, 58 A.L.R. 779 (1927); ***Christianson v. Fayette R. Plumb, Inc.***, 7 Wn. App. 309, 499 P.2d 72 (1972).

Taskett v. KING Broadcasting Co., 86 Wn.2d 439, 452-53, 546 P. 2d 81 (1976) (Stafford, J., concurring).

CONCLUSION

As the ***Avendano-Lopez*** court warned, in Salas's case "[t]he dark shadow of arrogant chauvinism . . . . eclipse[d] our ideal of justice for all . . . ." 79 Wn. App. at 723. Alex Salas is entitled to a trial free of prejudice and discrimination. Salas asks the Court to reverse and remand for that untainted trial.

RESPECTFULLY SUBMITTED this 19th day of December 2008.

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CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing **SUPPLEMENTAL BRIEF OF PETITIONER** postage prepaid, via U.S. mail on the 19 day of December 2008, to the following counsel of record at the following addresses:

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