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SUPREME COURT
STATE OF WASHINGTON

ALEX SALAS,
Petitioner

v.

HI-TECH ERECTORS,
Respondent

SUPPLEMENTAL BRIEF
OF
RESPONDENT
HI-TECH ERECTORS

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Statement of the Issues

1. Did the Court of Appeals correctly determine that the trial court did not abuse its discretion in ruling that plaintiff's status as an undocumented worker would be admissible if plaintiff chose to pursue damages for lost future earnings?

2. If the evidentiary ruling was error, was it harmless, where the jury never reached the issue of damages, where the record does not support plaintiff's claim of juror bias, and where plaintiff took no steps to ameliorate any prejudicial effect the information may have had?

Statement of the Case

Respondent Hi-Tech Erectors (hereinafter "Hi-Tech") was a subcontractor to Charter Construction Co. (hereinafter "Charter") on a construction project in Seattle. Hi-Tech's role was to install scaffolding at the project. CP 4. After erecting the scaffolding in early June of 2002, Hi-Tech left the site. At that time Hi-Tech knew generally that the scaffolding would be used by Charter and its subcontractors, but did not know who the subcontractors were. After Hi-Tech completed the erection it did not return to the job site until it was time to disassemble the scaffolding. RP 5/23/06 at 86. Some four months after the scaffolding was erected, Appellant Alex Salas (hereinafter "Salas" or "plaintiff"), an employee of

Charter, was injured when he fell from a scaffold ladder on the job site.

CP 4. At the time of his injury Salas was not wearing, nor had his employer equipped him with a fall-protection harness. RP 5/22/06 at 49. Salas sued Hi-Tech for damages as a result of his fall.

During his deposition taken on February 16, 2006, Salas testified that he was a citizen of the United States and working in the country legally. RP 5/15/06 at 22-23. Approximately one week before trial began, and after the perpetuation deposition of Salas' expert economist had been taken, counsel for Hi-Tech learned for the first time that Salas was living and working in the country illegally. RP 5/15/06 at 5-8. Hi-Tech filed a motion for a continuance of the trial date, based in part on this newly discovered evidence. Salas opposed the motion which the trial court denied. RP 5/15/06 at 24.

Salas' motions in limine included a motion seeking to exclude from evidence the fact that he was not a U.S. citizen. The basis for the motion was that the information was not relevant. No case citations were provided for this particular motion in limine, nor was it based on ER 403. CP 216. Counsel for Salas had filed a separate Memorandum of Authorities as to whether the plaintiff had an actionable claim for lost earning capacity. (CP 235-305). During argument for both the Motion for Continuance and the Motions in Limine, trial judge Michael Hayden

issued a preliminary ruling that plaintiff could proceed with a claim for lost future earnings. RP 5/15/06 at 26. The proviso with this ruling was that if Salas sought to make such a claim, then his immigration status would be probative as to the extent of the future impairment. *Id.* at 26-27. Judge Hayden made clear that this was a preliminary ruling. The following colloquy took place.

THE COURT: . . . I said, that's my preliminary decision. In order to make a different decision, I would really need a case that says the immigration status stays out and he is still allowed to make a future wage loss claim. And you haven't presented me that case.

MR. KORNFELD (counsel for plaintiff): Correct.

RP 5/15/06 at 28.

Judge Hayden invited counsel to submit additional briefing on the issue, making clear he could be persuaded either way by additional briefing. RP 5/15/06 at 34-35. Counsel for Salas submitted no further authority on this issue. Counsel for Hi-Tech submitted a Memorandum of Authorities Re Plaintiff's Claim of Loss of Earning Capacity. CP 447-539.

Salas ultimately elected to proceed with his claim for lost earning capacity thereby permitting discussion of his immigration status. That issue was first raised with the jury by plaintiff's counsel in *voir dire*, as

well as during plaintiff's opening statement (CP 733) and during the direct examinations of both plaintiff and his brother. RP 5/22/06 at 33 and 7. At the conclusion of trial the jury rendered its verdict concluding that the negligence of Hi-Tech was not a proximate cause of plaintiff's injuries, and thus they never reached the question of damages, including lost earning capacity. CP 650-52.

Argument

The sole question for this court to address is whether the appellate court properly concluded that the trial court did not abuse its discretion when it ruled that, if plaintiff wished to pursue a claim for loss of earning capacity, his immigration status as an undocumented worker would be admissible. The parties agree that the appropriate standard for review on evidentiary rulings such as this is abuse of discretion. *Proctor v. Huntington*, 146 Wn.2d 836, 852, 192 P.3d 958 (2008).

A. The trial court did not abuse its discretion.

A trial court abuses its discretion when its decision is manifestly unreasonable or exercised on untenable grounds or for untenable reasons, i.e., if the court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law. *Id.*

1. The trial court should be given deference in making evidentiary rulings.

The intent of the abuse of discretion standard is to give great deference to the sound judgment of the trial judge who is better positioned than an appellate court to decide a particular issue. *Eugster v. City of Spokane*, 110 Wn.App. 212, 231, 39 P.3d 380 (2002); *see also, Wash. State Physicians Ins. Exch. & Ass'n. v. Fisons Corp.*, 122 Wn.2d 299, 339, 858 P.2d 1054 (1993). “A trial court abuses its discretion only when it takes a view that no reasonable person would take.” *Brundridge v. Fluor Federal Services, Inc.*, 164 Wn.2d 432, 450, 191 P.3d 879 (2008). *See also, State v. Castellanos*, 132 Wn.2d 94, 97, 935 P.2d 1353 (1997), *Housel v. James*, 141 Wn.App. 748, 755, 172 P.3d 712 (2007).

2. The trial court’s ruling was reasonable and consistent with the authority cited by both parties.

In this case, the trial judge made the only ruling he could, based on the case law brought to his attention *by both parties*. He was first asked to address the question of whether, in light of plaintiff’s status as an undocumented worker, Salas could make a claim for lost future earnings. Washington case law is silent on this issue. Cases from other jurisdictions have split on this question. *See, e.g., Veliz v. Rental Service Corp.*, 313 F.Supp.2d 1317, 1337 (M.D. Fla. 2003); *Sanango v. 200 East 16th Street Housing Corp.*, 778 N.Y.S.2d 314, 321, 15 A.D.3d 36 (2004); *Rodriguez*

v. Kline, 186 Cal. App.3d 1145, 1150 (1986); (Generally holding that an illegal immigrant may not recover future earnings based on United States wages). *But see also, Cano v. Mallory Management*, 760 N.Y.S.2d 816, 818 (2003); *Majlinger v. Cassino Contracting*, 802 N.Y.S.2d 56, 66 (2005); *Balbuena v. IDR Realty, LLC*, 812 N.Y.S.2d 416, 429 (2006); (Generally holding that illegal immigrants may recover such damages). As to this question, Judge Hayden concluded that Salas could pursue a claim for loss of earning capacity if he chose.

Next was the question of whether his immigration status was admissible. Once again Washington law was silent on this issue. Every civil case from outside the jurisdiction, brought to the attention of the trial court, by both parties, held that where a plaintiff who was illegally in the country was permitted to pursue a claim for lost wages and loss of earning capacity, his or her status as an undocumented worker was admissible. *See, e.g., Cano*, *supra*, at 818. (“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.”); *Majlinger, supra*, at 68-69. (“[T]he jury may take the plaintiff’s status into account, along with the myriad other factors relevant to a calculation of lost earnings...”); *Balbuena, supra*, at 429. ([A]ny 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...”); *Barahona v. Trustees of Columbia Univ.*, 816 N.Y.S.2d 851, 853 (2006). (Plaintiff put his immigration status at issue when he sought damages for future lost earnings.”); *Oro v. 23 East 79th Street Corp.*, 810 N.Y.S.2d 779,783 (2005) (“Therefore, plaintiff in the present matter may likewise seek to establish his claim for lost earnings at trial, and evidence of his own immigration status will be relevant to that inquiry.”).

3. Salas’ counsel acknowledged that the law supported admission of immigration status.

During oral argument on the motion for continuance and the motions in limine, trial counsel for plaintiff commendably noted to the court that the state of the law from other jurisdictions supported the admissibility of a plaintiff’s immigration status.

MR. KORNFELD: I’m in a tough situation, your Honor, because I’m supposed to be a plaintiff’s advocate; so, naturally, I want a motion in limine keeping that [plaintiff’s immigration status] from the jury.

THE COURT: You’ve already made that motion in limine.

MR. KORNFELD: I know, but candidly speaking, given what I’ve read in those New York cases the judges there say that the loss of earning capacity is recoverable, recoverable damages, but it cites another case that says, but, perhaps, the jury should hear that he’s here

illegally and now the fact that he's working illegally will go to the weight of the evidence for them to make the ruling.

THE COURT: For them to make the ruling?

MR. KORNFELD: I mean, it's an issue of fact for the jury to consider, for them to weigh, and, naturally, you won't hear me support that. I'm just telling you what the case says.

RP 5/15/06 at 14. Later, during the same argument, but prior to any preliminary ruling from the court, when the issue arose about Salas' inconsistent deposition testimony concerning his immigration status, trial counsel for plaintiff took the following position:

MR. KORNFELD: But I think it's an issue of, a question of impeachment. He has the right to impeach my client on the stand and insinuate he was lying, and he was trying to hide from it, and let the jury decide whether that's any big deal or not. That's how I think it should go.

RP 5/15/06 at 18-19. Obviously, any impeachment on the issue of immigration status presupposes the admissibility of that status. What the record makes clear is that during argument on the pre-trial motions, counsel for plaintiff had all but conceded that Salas' status as an undocumented worker would be an issue the jury could consider. As noted above, the court requested that Salas' counsel produce a case standing for the proposition that his client could both seek a claim for lost earning

capacity and simultaneously keep his immigration status from the jury. RP 5/15/06 at 28, 34. Plaintiff's counsel presented no such authority. Given the overwhelming number of cases holding to the contrary, Judge Hayden correctly admitted evidence of plaintiff's undocumented status, providing he was seeking recovery of future wages.

4. Salas made no effort to ameliorate any possible prejudicial effect.

As the appellate court noted, even after the court made its ruling, Salas never sought to bifurcate the trial on the damages issue, nor did he seek a limiting instruction. COA Decision at ¶ 28. While Salas now argues that admission of his immigration status was unduly prejudicial, it is interesting to note that, during the pre-trial motions, Salas never raised or cited to ER 403. His motion in limine was based purely on relevance grounds under ER 402. CP 216.

5. By following cited authority the trial court acted reasonably.

In order to prevail on this appeal Salas must convince this court that Judge Hayden's ruling to admit plaintiff's immigration status in light of his claim for lost earning capacity, was one which no reasonable person would make. Such a finding would require a determination that, not only was every trial court judge in the cases cited at pages 6-7 of this brief, unreasonable, but that each panel of appellate judges who upheld those

rulings, likewise had taken leave of their senses. The simple truth is that Judge Hayden had no authority from the state of Washington to follow on this issue. His ruling was consistent with the law of every out-of-state jurisdiction which was cited to him by both parties. It can not plausibly be claimed, that in doing so, he acted unreasonably, or abused his discretion.

6. Additional case law cited by the Court of Appeals does not support a finding of abuse of discretion.

The Court of Appeals decision in this case did cite two older cases in which a plaintiff's immigration status was not permitted to go to the jury. *Klapa v. O&Y Liberty Plaza Co.*, 645 N.Y.S.2d 281 (1996); *Gonzalez v. City of Franklin*, 403 N.W.2d 747 (Wis. 1987). COA Decision at ¶ 25 and 27. Neither of these decisions was cited to Judge Hayden at the time he made his ruling. Importantly, in both cases the appellate courts affirmed the discretion of the trial courts in balancing the probative nature of the evidence with its possible prejudicial effect under each state's equivalent of ER 403. *Klapa*, supra at 283; *Gonzalez*, supra, at 760. As is clear from the cases cited at pages 6-7 of this brief, as well as other, more recent decisions, appellate courts around the country have affirmed trial courts' admission of immigration status where lost wages and future earnings are at issue despite the possible prejudicial effect of such evidence. *Villasenor v. Martinez*, 991 So.2d 433, 436-37 (Fla. App. 2008)

(“We find no error in the trial court’s ruling allowing evidence of Villasenor’s illegal immigrant status on the limited issue of her claim for lost future earnings.”); *Rosa v. Partners in Progress, Inc.*, 868 A.2d 994, 1002 (N.H. 2005) (“Though evidence of his status may 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.”).

There is not a single case or cited authority anywhere in the country, where an appellate court has done what Salas is seeking here, namely a determination that the admission of a plaintiff’s immigration status where that plaintiff is making a claim for lost wages and loss of earning capacity, constitutes an abuse of judicial discretion.

B. The rule identified by the Court of Appeals is not material to the Court’s holding and is therefore dicta.

Salas further argues that the Court of Appeals erred by announcing a new rule to govern admissibility of immigration status, but failing to apply that rule to him. His argument in this regard is misplaced. What Salas views as a new rule is nothing more than dicta. The only question (subject to this Court’s review) in that appeal was whether the trial court abused its discretion in admitting evidence of plaintiff’s status as an undocumented worker. The appellate court

correctly answered that question in the negative. Its subsequent statement that “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.” (Emphasis added.) is not material to the holding as to whether there had been an abuse of discretion. Where language such as this is used in an opinion which has no bearing on the outcome and is unnecessary to decide the case, it is considered *obiter dictum* and need not be followed.¹ *In Re Marriage of Rideout*, 150 Wn.2d 337, 354, 77 P.3d 1174 (2003); *State v. Potter*, 68 Wn.App. 134, 150, n.7, 842 P.2d 481 (1992); *State ex. rel. Evergreen Freedom Foundation v. National Educ. Ass’n.*, 119 Wn.App. 445, 452, 81 P.3d 911 (2003).

¹ While not material to the question of whether the trial court abused its discretion in this case, the general rule identified by the appellate court is unduly narrow as it fails to take in to account other relevant factors surrounding an illegal immigrant’s potential future earnings, including, whether the plaintiff committed a fraudulent act in obtaining employment, the likelihood of the plaintiff voluntarily returning to his native country, the plaintiff’s pattern of migration between the two countries, as well as the likelihood of obtaining future employment in the United States absent proper documentation. See, e.g., Hugh Alexander Fuller, Note, *Immigration, Compensation and Preemption: The Proper Measure of Lost Future Earning Capacity Damages After Hoffman Plastic Compounds, Inc. v. NLRB*, 58 Baylor L. Rev. 985,1006-08 (2006)

C. Any possible error was harmless.

Even if this court were to determine that the admission of Salas' immigration status was an abuse of the trial court's discretion, any error in this regard was harmless.

1. The jury verdict was consistent with defendant's theory of the case.

Salas asserts that the very fact the jury concluded that the defendant's negligence was not a proximate cause of his injuries is proof that the jury must have been prejudiced by his immigration status. Pet. For Review at 7. More likely the jury's verdict was the result of its agreement with the defendant's theory of the case, that the accident was solely the result of Charter's negligence in failing to supply its employees with appropriate fall protection devices. The plaintiff's own expert, Richard Gleason, testified that 90 percent of scaffolds in use on projects of this type were consistent with the one erected by Hi-Tech. RP 5/23/06 at 110. He also acknowledged that Charter, as the general contractor on the project, would be in the best position to provide the necessary fall protection devices and train its employees on use of those devices. RP 5/23/06 at 74-76; and that it was the general contractor's obligation to inspect the scaffolding prior to its use. RP 5/23/06 at 108. The trial transcript reveals that this particular jury was very active and

inquisitive and was tuned in to the issues regarding the respective responsibilities of the general contractor and scaffolding subcontractor. The questions posed by the jury to Mr. Gleason, for example take up 15 pages of the trial transcript, including much of the testimony identified above. RP 5/23/06 at 97-111. There is every indication this jury would have arrived at the same verdict had plaintiff been a caucasian citizen of this country. It is not appropriate to simply assume the jury's verdict must have been the result of prejudice absent any proof.

2. The record does not support plaintiff's claim of jury bias.

Plaintiff here has presented no actual proof of prejudice. While claiming many jurors revealed prejudice against illegal immigrants during voir dire, he did not request that voir dire be recorded, and there is no evidence showing that he sought and was denied any challenges for cause.

Finally, it is important to note that the only issue to which plaintiff's immigration status was deemed relevant, his claim for future income loss, was not even addressed by the jury, as it never reached the issue of damages. Salas chose not to seek a bifurcation of the trial on liability and damages, which would have ameliorated the problem he now raises. Likewise, he could have sought a limiting instruction with regard to the admissibility of this information, but failed to do so. He should not be

heard now to complain about the possibility of prejudicial information affecting the jury's deliberations where he made little to no effort to limit the effect of that information.

Conclusion

The trial court did not abuse its discretion when it provided plaintiff with the choice of whether he wanted to seek recovery of lost future earnings, thereby making his status as an undocumented worker admissible. That ruling was consistent with every civil case cited to the trial court by both parties. The ruling was both reasonable in light of the circumstances, and based on tenable grounds, as plaintiff's counsel acknowledged that the ruling was consistent with out-of-state authority. Salas also declined the court's invitation to submit any authority to the contrary.

Even if such a ruling did constitute error, it was harmless as the jury did not reach the issue of damages and there is no proof that the verdict was the result of bias or prejudice due to plaintiff's immigration status. While Salas claims some of the jurors expressed bias during voir dire, there is no record to support this claim, nor any record that he sought any challenges for cause. He did not seek to bifurcate the trial or even request a limiting instruction to ameliorate any potential prejudice.

The trial judge, exercising his sound discretion, made both a reasonable and correct ruling in permitting evidence of plaintiff's immigration status to be heard by the jury, in light of his claim for future income loss. It is respectfully requested that this Court affirm the Court of Appeals finding that no abuse of discretion occurred.

RESPECTFULLY SUBMITTED this 19th day of December, 2008.

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CERTIFICATE OF SERVICE

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The undersigned declares under penalty of perjury under the laws of the State of Washington that on December 19, 2008, the original of the Supplemental Brief of Respondent Hi-Tech Erectors was sent for filing with The Supreme Court of the State of Washington, and copies of the same were sent out for service via US Mail on December 19, 2008, to Appellant's counsel at the following addresses:

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Dated and signed this 19th day of December, 2008, at Seattle, Washington.

[Signature]
Soledad Saldana