NO. 81590-9

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ALEX SALAS

Petitioner,

v.

HI-TECH ERECTORS, a Washington Corporation

Respondent.

BRIEF OF *AMICI CURIAE*
AMERICAN CIVIL LIBERTIES UNION OF WASHINGTON AND WASHINGTON EMPLOYMENT LAWYERS ASSOCIATION

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I. INTRODUCTION

The issue before the Court is whether evidence of a plaintiff's immigration status should be admitted in a personal injury suit seeking damages for future wage loss. As the Court of Appeals correctly recognized, "The issue of immigration status is divisive and prejudicial." *Salas v. Hi Tech Erectors*, 143 Wn.App. 373, 383, 177 P.3d 769 (2008), *review granted*, 164 Wn.2d 1030, 197 P.3d 1184 (2008). Accordingly, a trial court must perform an analysis under Evidence Rule 403 before permitting introduction of such evidence.

The Court of Appeals implicitly and correctly recognized that the probative value of undocumented status only outweighs its devastating prejudicial effect if "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." *Id*. The Court of Appeals erred, however, when it found no abuse of discretion in allowing the evidence under ER 403 despite the highly prejudicial nature of the evidence and its low probative value. There was no evidence that Mr. Salas was likely to be deported and no evidence he was likely to depart from the country. Instead, the record shows his longstanding work history and family ties in the United States, giving his immigration status

even less probative value and increasing the risk that the jury would draw improper inferences from his immigration status.

This Court should make clear that undocumented immigration status alone (as in Mr. Salas's case), without more, should be excluded because it is always more prejudicial than probative.[1] Without this clear rule, the courts invite decisions about tort liability to be based on the false and speculative assumption that undocumented status is the same as imminent deportation. If, in contrast, there is evidence that a final deportation order in which all right to judicial review has been exhausted is in place before a party files a lawsuit, it may then be appropriate to permit introduction of immigration status in the context of a future wage loss claim. In the rare case where immigration status evidence survives analysis under ER 403 mechanisms to minimize the prejudicial effect should be used to confine the evidence to the damages issue.

II. IDENTITY AND INTEREST OF *AMICI CURIAE*

The American Civil Liberties Union of Washington ("ACLU") is a statewide, nonpartisan, nonprofit organization with over 20,000 members, dedicated to the preservation of civil liberties and civil rights, including

[1] We agree with other amici that there are many important reasons why immigration status evidence should always be excluded. However, assuming arguendo that the Court may recognize some limited circumstances where the evidence is relevant, this brief focuses on the applicable ER 403 analysis.

the rights of immigrants. It has litigated numerous cases in the state and federal courts involving immigrant rights. *See, e.g.,Rikabi v. Gonzales*, Ninth Circuit Case No. 07-35150 (ACLU amicus brief in case involving delays in naturalization process); *Roshandel v. Chertoff*, C07-1739MJP (W.D. Wash.; ACLU direct representation in case involving naturalization delays).

Washington Employment Lawyers Association (WELA) is a non-profit corporation with approximately 135 members who are admitted to practice law in the State of Washington. WELA is a chapter of the National Employment Lawyers Association. WELA's members primarily represent employees, including employees with foreign sounding names, some of whom are in this country without sufficient documentation. In many of these cases, the employee seeks the recovery of future lost wages. Because the Court's ruling could dramatically affect the willingness of those employees to seek access to courts and their ability to obtain impartial justice, WELA has a strong interest in the outcome of this case.

III. ISSUES PRESENTED FOR REVIEW

1. Whether undocumented immigration status alone, where there is no evidence that deportation is likely to occur, should always be excluded under ER 403 in a personal injury suit with a future wage loss claim?

2. Whether immigration status evidence is admissible in a personal injury suit with a future wage loss claim only when there is a final deportation order for which all right to judicial review has been exhausted and that order is in place prior to the filing of the complaint?
3. Whether mechanisms to confine immigration status evidence to consideration of economic damages - its only relevant purpose - should be used in the rare case where the evidence is admitted?

IV. STATEMENT OF THE CASE

Alex Salas is a long-time resident of Washington who entered the United States legally, with a visa, 20 years ago, on September 20, 1989. 5/22 RP 7. He has Mexican citizenship but has lived, worked and paid taxes in the United States for nearly two decades. Although he entered the United States lawfully with a visa, his visa subsequently expired. Mr. Salas is married and has three children who are United States citizens, the eldest of whom will be 18 years old in September 2009. 5/22 RP 28-33.[2]

Mr. Salas was severely injured in a workplace accident when he fell from scaffolding that was constructed by the respondent, Hi Tech Erectors. *Salas,* 143 Wn.App. at 376. After Mr. Salas filed the present lawsuit, the trial court granted partial summary judgment in his favor,

[2] Mr. Salas testified that his children were born on 11/11/02, 4/16/96 and 9/19/91. 5/22 RP 29.

ruling that Respondent's violation of safety rules and therefore its negligence was established as a matter of law. *Id.*

Mr. Salas moved *in limine* to exclude all references to his immigration status. CP 216; *Salas, supra*, 143 Wn.App. at 376. The trial court denied the motion. CP 307. Although the defense claimed, without any further specificity, that Mr. Salas was an "illegal alien," Mr. Salas thought he had applied for citizenship and was told by federal authorities that his status was "indefinite." 5/15 RP 5, 10-11. He believed he was or would soon be a citizen. 5/15 RP 22-23; RP 30-34. "There was no evidence that Salas was likely to be deported." *Salas*, 143 Wn.App. at 377. The trial court gave Mr. Salas a choice: drop his claim for lost future earnings, or if he pursued that claim, face a trial where the jury would hear about his immigration status at the same time as it was considering liability for his injuries. 5/15 RP 26-28; *Salas, supra*, 143 Wn.App. at 377.

The Plaintiff exercised all three of his peremptory challenges to remove jurors who expressed a bias against undocumented immigrants. CP 696. But the jurors who were impaneled expressed the opinion that it was not "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." CP 696. Mr. Salas did not drop his future wage loss

claim, and his immigration status was an issue at trial. *Salas*, 143 Wn.App. at 377.

Although the trial court had instructed the jury that the defendant's violation of safety regulations was negligence as a matter of law, the jury nevertheless rendered a defense verdict on proximate cause and, as a result, did not reach the issue of damages. *Salas*, 143 Wn.App. at 377. On appeal, Division I of the Court of Appeals affirmed in a published decision. *Salas v. Hi-Tech Erectors*, *supra*. The Court recognized the severe prejudicial effect of immigration status evidence, but concluded that the trial court did not abuse its discretion in admitting the evidence. *Id*. This Court granted review.

V. ARGUMENT

A. Evidence of immigration status, absent any evidence that a party's deportation is imminent, should be excluded under ER 403 because its extremely low probative value is far outweighed by its highly prejudicial nature.

Evidence Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury . . . .

While "even minimally relevant evidence is admissible," (*Kappelman v. Lutz*, ___ Wn.2d ___, ___ P.3d ___, 2009 WL 2960972, *3 (2009)), the Court in *Kappelman* recognized that certain categories of

evidence are categorically more prejudicial than probative unless there is some specific factual connection to the issue on which the evidence is offered. This rule is necessary to provide a fair trial for both parties; in *Kappelman* it was the defendant who sought the categorical exclusion of speculative and unfairly prejudicial evidence, but in Mr. Salas's case it is the plaintiff seeking exclusion of such evidence. Given the lack of evidence here that Mr. Salas was likely to be deported, the required specific factual connection to future wage loss damages was missing and it should have been excluded under ER 403.

Evidence is unfairly prejudicial, and therefore properly excluded, when "it has the capacity to skew the truth-finding process." *Wilson v. Olivetti North America, Inc.*, 85 Wn. App. 804, 814, 934 P.2d 1231 (1997). Washington's rule is identical to the Federal Rule, and the Federal Rules of Evidence Advisory Committee Notes clarify that "unfair prejudice" is "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." FRE Advisory Committee Note, ER 403. This Court has previously noted that "unfair prejudice" may be "caused by evidence of 'scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.'" *Carson v. Fine, M.D.*, 123 Wn.2d 206, 223, 867 P.2d 610 (1994).

This Court recently provided an example of evidence that is categorically more prejudicial than probative, and should be presumptively excluded. In *Kappelman v. Lutz, supra,* the Court ruled that evidence of a motorcycle driver's lack of a motorcycle endorsement and violation of the conditions of his instructional permit was properly excluded under ER 403. The plaintiff passenger was injured in that case when the defendant motorcycle driver hit a deer. The Court explained that the probative value of the evidence was low because there was other evidence relating to the driver's skill and experience operating motorcycles, and the potential of unfair prejudice to the defendant driver's case was very high. *Kappelman, supra*.

Previous cases also have recognized that certain categories of evidence, based on attitudes of the community, are so clearly prejudicial and of tenuous relevance, absent a specific factual link proven by the opposing party, that they should generally be excluded under ER 403. *Kirk v. Washington State University*, 109 Wn.2d 448, 462-63, 746 P.2d 285 (1987) (plaintiff's abortions properly excluded in personal injury case involving claim that injury caused plaintiff's depression when there was no evidence plaintiff had been depressed due to the abortions before the injury).

In the matter at hand, Division I properly concluded that evidence of immigration status should presumptively be excluded unless the defendant can demonstrate that the plaintiff "because of that status, is unlikely to remain in this country throughout the period of claimed lost future income." *Salas*, 143 Wn. App. at 383. Immigration in the United States is an inflammatory issue, and one that appeals to the passions of the jury and tends to distract them from the legally relevant facts of the case. Indeed, the jurors in this case expressed the view that undocumented immigrants should have no right to use courts in the United States. CP 728. The extreme prejudicial effect of this evidence, as was true of the abortion evidence at issue in *Kirk*, compels exclusion under ER 403.

Courts in numerous other jurisdictions agree that evidence of immigration status meets the established test for evidence that should be excluded under ER 403. It invites decisions based on misconceptions about immigration law and has extremely limited probative value. *See, e.g.*, *Hocza v. City of New York*, 2009 WL 124701 at *3 (S.D.N.Y. 2009) (relying on Division I's *Salas* decision to hold that "[a]ny probative value that [Plaintiff's] immigration status might have is outweighed by the

obvious prejudice that would flow from its use to speculate as to [Plaintiff's] removal from the country.") (unpublished)[3].

Mr. Salas's case is a perfect example of the dangers noted in *Hocza*; by letting in the immigration status evidence, both parties, the judge and the jury engaged in speculation about federal immigration law. *See, e.g.,* Supp. Br. of Resp. at 6. No deportation proceedings had ever been brought against Mr. Salas, nor was there any reason to believe they would be. The likelihood of deportation in his case was remote and speculative, at best. Even if he were placed in deportation proceedings, an individual in Mr. Salas' situation would be eligible for numerous forms of relief from deportation.[4] The complex and confusing nature of federal immigration law "makes the possibility of deportation even more

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[3] Citation permitted under GR 14.1 because citation to unpublished decisions is allowed by Second Circuit Rule 32.1.

[4] For example, Mr. Salas has several school-aged U.S. citizen children. If he were ever placed in removal proceedings, Mr. Salas may well be eligible to apply for permanent residence status under 8 U.S.C. §1229b(b)(1) because he has been physically present in the United States for more than 10 years and his deportation would cause hardship to his children, who have never lived in Mexico. Whether any individual immigrant will ultimately be subject to removal from the U.S. can only be determined after a full administrative hearing before an immigration judge with accompanying procedural protections. 8 U.S.C. §1229a. The immigration judge's decision may be appealed to the Board of Immigration Appeals, and the Board's decision may then be reviewed in the Federal Courts of Appeal. 8 U.S.C. §1252(b). Appellate review routinely takes several years. There are also other paths for persons who currently lack status to receive lawful immigration status and remain in the U.S. See, e.g., 8 U.S.C. §1255(i) (allowing certain persons, including persons who entered unlawfully, to adjust status to lawful permanent residence); 8 U.S.C. §1158 (authorizing asylum to refugees fleeing persecution abroad); 8 U.S.C. §101(a)(15)(U) (allowing victims of crimes who cooperate with law enforcement to remain in the United States notwithstanding unlawful status).

speculative than before." *Gonzalez v. City of Franklin*, 137 Wis.2d 109, 140, n.12, 403 N.W.2d 747, 760 (1987).

It wastes judicial resources to inject a mini-trial on immigration law into a personal injury case. The danger of distracting the jury from the legally relevant evidence regarding liability is clear. Given the confusing nature of immigration law, leaving the issue of the likelihood of deportation to be decided by state court judges and juries (as the Court of Appeals did) is an unworkable approach.

The evidence rules are intended to prevent precisely such speculative trials within a trial. Juries in particular are conspicuously unqualified to decide complicated immigration issues addressing the likelihood of deportation. Even with expert testimony, a jury would be left to speculate how a federal immigration judge would ultimately rule on a question of law.

The claim that Mr. Salas's immigration status is relevant to the issue of future wage loss rests on the faulty assumption that he will likely be deported from the United States to Mexico, where he would (presumably) earn less wages. The only evidence in the record to support the inference that Mr. Salas could face deportation is the fact that he is not a United States citizen. As the Court of Appeals recognized, there was no evidence that Mr. Salas was likely to be deported. Contrary to the trial

court's concerns expressed in this case, there was no evidence showing Mr. Salas's ability to work in the future would be impaired by his immigration status, when that status had not prevented him from working for nearly 20 years. Under these circumstances, Mr. Salas's immigration status, standing alone, is too speculative to have sufficient probative value to outweigh the prejudicial effect on the issue of future wage losses.

This reasoning has led several state courts to conclude that evidence of immigration status should always be excluded in state tort cases involving claims for future wage loss. In *Clemente v. State*, 40 Cal.3d 202, 707 P.2d 818 (1986), the plaintiff sued the State of California for negligence in failing to ascertain the identity of a negligent motorist who fled the scene after running into the plaintiff and causing severe injuries. The defendant sought discovery of the plaintiff's immigration status. The trial court excluded testimony of the plaintiff's unlawful status and the Supreme Court affirmed:

> 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.

40 Cal.2d at 221, 707 P.2d at 829.

Other courts have reached the same conclusion. In *Klapa v. O & Y Liberty Plaza Co.*, 168 Misc.2d 911, 645 N.Y.S.2d 281, 282 (1996), the

case relied on by the *Hocza* Court, *supra*, the Court explained that "plaintiff's status as an illegal alien was irrelevant to his claim for future lost wages" where "defendants offered no evidence that deportation proceedings had begun or were contemplated", *cited with approval in Salas*, 143 Wn. App. at 381. The facts of *Klapa* contain some uncanny parallels to *Salas*:

> Plaintiff, Klapa, is a Polish national who came to the U.S. in March, 1991. Since March, 1992, he had been living and working here illegally. On April 13, 1992, plaintiff suffered a fractured nose, wrist and patella when he fell from a scaffold while removing asbestos at a construction site owned and operated by defendants. As part of his claim for damages, plaintiff sought recovery for future lost earnings. …
>
> In this case, defendants offered no evidence that deportation proceedings had begun or were contemplated. Thus, plaintiff's status as an illegal alien was irrelevant to his claim for future lost wages and any mention of it would have been highly prejudicial to his entire claim for damages. This is particularly true considering that plaintiff, in the five years he had been in the U.S., obtained licenses from New York and New Jersey to work as an asbestos handler and had worked steadily until the time of his accident. Since the accident he has continued to find work of a less strenuous nature. … As such, there was no evidence indicating plaintiff would not live and work in the U.S. for the remainder of his life.

Klapa, 168 Misc.2d at 911-12, 913-14.

Despite Klapa's having been in the country a far shorter time than Mr. Salas, the undisputed evidence that he had worked regularly in the United States led the *Klapa* Court to recognize that the prejudicial effect

of the immigration status evidence outweighed its probative effect. This Court should reach the same conclusion.

The Supreme Court of Wisconsin similarly concluded, based on that state's equivalent to ER 403, that immigration status was properly excluded where there was no claim "[']that deportation was anything other than a speculative or conjectural possibility,' … given the obvious prejudicial effect of the admission of such evidence." *Gonzalez v. City of Franklin, supra*, 403 N.W.2d at 760 (citation omitted). *Accord Hernandez v. M/V Rajaan*, 848 F.2d 498, 500 (5th Cir. 1988) (affirming award of future wages "[b]ecause [defendant] presented no proof that [the plaintiff] was about to be deported or would surely be deported"). The state courts in Texas have consistently held that "citizenship or the possession of immigration work authorization permits" are not "a prerequisite to recovering damages for lost earning capacity." *Tyson v. Guzman*, 116 S.W.3d 233, 244 (Tex. App. 2003).

These cases demonstrate the critical error the trial court made in Mr. Salas's case: his unclear immigration status cannot be equated with a likelihood he would not remain in the country. The record in this case shows that once jurors hear about immigration status, they are unlikely to accurately understand the difference between imminent deportation and undocumented status, and the limited relevance of mere undocumented

status to future wage loss. *See Maldonado v. Allstate Ins. Co.*, 789 So.2d 464, 467, 470 (Fla. App. 2001) (insurer sought to deny payment to bicyclist injured by a car because the bicyclist was undocumented; the Court held that admission of immigration status evidence was reversible error because it was of "marginal relevance" and unfairly became "the focus of the jury's attention," despite the limiting instruction that was given). As the *Maldonado* Court recognized, the jury's focus should remain on whether the tortfeasor should be held legally accountable for damages it caused, rather than forcing the court or jury to wade into the morass of immigration law. This Court, supported by the rulings cited above, should hold that in the absence of a final deportation order in which all right to judicial review has been exhausted, immigration status must be excluded from personal injury cases with future wage loss claims.

B. Important policies justify the exclusion of undocumented status alone from discovery in personal injury cases involving future wage loss claims.

Numerous cases recognize the prejudicial effect of immigration status evidence, and the danger that plaintiffs with valid legal claims will be chilled from accessing the courts if speculation about their status is permitted in discovery. For that reason, discovery of such information should rarely if ever be permitted. *See, e.g., Rivera v. NIBCO, Inc*., 364

F.3d 1057, 1064 (9th Cir. 2004) (discovery into immigration status should not be allowed in the early stages of discovery because it chills immigrant-employees' ability to pursue claims against employers for mistreatment); *Nicholas v. Wyndham Inter., Ltd.*, 373 F.3d 537, 543 (4th Cir. 2004) (applying Rule 26 balancing analysis and denying discovery of plaintiffs' immigration status where such requests were at "the outer limits of conceivable relevance."). *See also In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987) (denying discovery of plaintiffs' immigration status in FLSA action and recognizing that disclosure of plaintiffs' immigration status could inhibit them from pursuing their workplace rights "because of possible collateral wholly unrelated consequences, [and] because of embarrassment and inquiry into their private lives.")[5]

In *Sandoval v. Rizutti Farms*, 2009 WL 2058145 (E.D. Wash. 2009) (unpublished)[6], the court granted a protective order regarding immigration status in discovery until the case survived summary judgment to avoid admitting the evidence prematurely. On reconsideration, the court

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[5] Numerous district courts have denied or limited discovery into plaintiffs' immigration status inasmuch as such inquiries could lead to the abandonment of, or otherwise undermine, their claims. *See, e.g.*, *Flores v. Amigon*, 233 F. Supp. 2d 462, 465 n.2 (E.D.N.Y. 2002) ("If forced to disclose their immigration status, most undocumented aliens would withdraw their claims or refrain from bringing an action such as this in the first instance."); *Topo v. Dhir*, 210 F.R.D. 76, 78 (S.D.N.Y. 2002) ("Plaintiff's fears of her immigration status deterring further prosecution of her claims are well-founded.")

[6] Citation permitted per GR 14.1 because citation to unpublished decisions is permitted by the Ninth Circuit. FED. R. APP. PRO. 32.1(a)(i).

ruled that the evidence should be excluded entirely due to its prejudicial effect "in order to prevent manifest injustice ...." The *Sandoval* Court also recognized that the exclusion of immigration status evidence is consistent with Washington state statutes that promote injured persons' right to access the state courts and "[with] Washington's long history of providing comprehensive employment protections irrespective of immigration status." *Id*. at *2.

Without a rule generally barring discovery of immigration status in cases involving workplace conditions, our justice system will be manipulated as a tool for intimidating victims of law violations into remaining silent. Moreover, it creates unacceptable incentives if tortfeasors are allowed to escape damages liability when undocumented persons are injured in the workplace. As the *Rivera* Court recognized, "many employers turn a blind eye to immigration status during the hiring process" to obtain cheap labor, only insisting on the enforcement of immigration laws "when their employees complain." *Rivera*, 364 F.3d at 1072. Similarly, it would create an unacceptable incentive if defendant tortfeasors could gain admission of immigration status evidence by attempting to have deportation proceedings commenced after a plaintiff has filed his complaint. For this reason, the Court should limit discovery to whether there exists a final deportation order with all right of judicial

review exhausted, prior to the filing of the complaint. All other discovery on the issue of immigration status should be precluded.

C. In the rare case where immigration status evidence is admissible at all, trial courts should utilize protective orders in discovery, post-trial remittitur motions for reduction of damages and, as a last resort, bifurcation to confine the evidence to its limited purpose in connection with damages not liability.

As noted above, the test for relevant evidence is minimal and in some circumstances, evidence of immigration status may pass the ER 403 balancing test because imminent deportation has been ordered. Assuming *arguendo* that there is evidence of a final deportation order in which all right to judicial review has been exhausted, in place prior to the filing of the complaint, and a personal injury plaintiff seeks future wage loss damages, the ER 403 test might be satisfied. In that case, trial courts should utilize protective orders and other mechanisms to ensure that juries do not improperly consider the evidence during the liability phase. *See* CR 26(c). Alternatively, the issue can be raised in a post-verdict remittitur motion for reduction in damages. This avoids a premature injection of the issue into the liability determination when it is only relevant, if at all, to economic damages. Finally, as a last resort, bifurcation may be ordered "in furtherance of convenience or to avoid prejudice." CR 42(b). *Myers v. Boeing Co.*, 115 Wn.2d 123, 140, 794 P.2d 1272 (1990); *Brown v.*

General Motors Corp., 67 Wn.2d 278, 407 P.2d 461 (1965) (upholding trial court's discretion to bifurcate liability and damages phase with same jury).

VI. CONCLUSION

For the reasons set forth in this brief, the briefs of plaintiff/petitioner, and other amici supporting plaintiff, this Court should rule that immigration status evidence should generally be excluded.

Respectfully submitted this 16 day of October 2009.

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