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CAN THE INJURED MIGRANT WORKER'S ALIEN STATUS BE INTRODUCED AT TRIAL?

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I. INTRODUCTION

In 2000, it was estimated that 7 million illegal immigrants were living in the United States.[1] This figure grew by approximately 350,000 persons each year.[2] Presently, the number of illegal immigrants living in the United States is between 9 and 12 million. Illegal immigrants from Mexico account for about 5.3 million of the total illegal immigrants living in the United States[3], with an additional 170,000 legally entering this country each year.[4] These numbers are the spark that has produced a firestorm of controversy.

> We should not be content with laws that punish hardworking people who want only to provide for their families . . . . It is time for an immigration policy that permits temporary guest workers to fill jobs Americans will not take, that rejects amnesty, that tells us who is entering and leaving our country, and that closes the border to drug dealers and terrorists.–President George W. Bush[5]

"The proposal is wrongheaded . . . . It offers amnesty to 12 million to 15 million illegal aliens in our country, about 75 percent of them Mexican. This won't solve our illegal alien crisis . . . . [it] benefits only Mexico, not the United States."–Rep. Tom Tancredo[6]

This paper will first examine the immigration crisis confronting the United States and how Americans' perceptions of what it means to be an illegal immigrant impacts upon American Jurisprudence. The paper will then address what procedural safeguards an attorney representing an injured illegal immigrant needs to employ to ensure that his or her client receives a fair trial, and what arguments can be expected in response.

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1. Estimates of the Unauthorized Immigrant Population Residing in the United States: 1990 to 2000, Office of Policy and Planning U.S. Immigration and Naturalization Service, 1. *See also* Todd Dayton, *The New World, America's Borders in an Age of Terrorism,* http://journalism.berkeley.edu/ngno/reports/newworld/immignumbers.html.

2. *Id.*

3. Jeffrey S. Passel, Randy Capps, & Michael Fix, *Undocumented Immigrants: Facts and Figures* (Jan. 12, 2004).

4. From 1999 to 2003, the U.S. government legally admitted an average of 172,632 immigrants per year. U.S. Citizenship & Immigration Services, http://uscis.gov/graphics/shared/aboutus/statistics/IMM03yrbk/IMMExcel/Table03D.xls.

5. Daniel Borunda, *Immigrant Policy Mentioned: Bush Too Vague Some Say,* EL PASO TIMES, February 3, 2005, at 2A.

6. E. Thomas McClanahan, *Immigrant Plan Helps U.S.*, THE TIME UNION (Albany New York), March 31, 2005, at A10.

II. THE IMMIGRATION CRISIS

President Bush's comments, quoted above, reflect the important role illegal immigrants are currently playing in the United States' economy. The average illegal immigrant family pays more than $4,200 in annual federal taxes[7] while earning less than the average annual salary of $36,700.00.[8] Fifty to eighty-five percent of the country's 1.6 million farm workers are illegal immigrants.[9] Immigrant workers play a critical service in keeping hotels operating affordably by taking jobs American-born workers don't want.[10] Of the 12 million food service workers in the United States, 1.4 million are believed to be immigrants, with 500,000 of them from Mexico.[11] Forty percent of the workers in the New York restaurant industry are undocumented.[12] Illegal immigrants from Mexico tend to be young, predominately male, struggling with the English language and employed in construction, manufacturing and the hospitality industry.[13] The reality of illegal immigrants in America stands in stark contrast to the fears engendered by their presence.

In the debate over national security, there is the association of illegal immigration with the threat of terrorists and weapons of mass destruction entering the United States.[14] Recently, a group called the Minuteman Project was created whereby private citizens patrol sections of the border between the United States and Mexico.[15] The Minuteman Project accuses the federal

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7. Staff Editorial, *Higher Education for All*, CAVALIER DAILY via U-Wire, February 16, 2005.

8. Dave Montgomery, *Mexican Immigrants Open to Guest-Worker Program, Survey Finds*, FORT WORTH STAR–TELEGRAM, March 3, 2005.

9. Sergio Bustos, *Bill Would Give Legal Status to Undocumented Farm Workers*, GANNETT NEWS SERVICE, February 11, 2005.

10. John P. Walsh, *Labor Pains: Immigration Reform Could Ease Employment Strain*, HOTEL & MOTEL MANAGEMENT, February 6, 2004, at No. 3, Vol. 219, pg. 1.

11. Milford Prewitt, *Immigration Reform Push Offers Relief for Job Woes; Legislative Agendas Revived Despite Lingering Terrorism Worry*, NATION'S RESTAURANT NEWS, August 16, 2004, at No. 33, Vol. 38, pg. 1.

12. *Id.*

13. Dave Montgomery, *Mexican Immigrants Open to Guest-Worker Program, Survey Finds*, FORT WORTH STAR–TELEGRAM, March 3, 2005.

14. Lisa Friedman, *License Ban Tacked on Bill*, Inland Valley Daily Bulletin (Ontario, CA), March 19, 2005 ("Advocates of the license ban, sponsored by Rep. James Sensenbrenner, R-Wis., maintain that keeping legal identification documents away from those in the United States illegally is a border-control measure that will thwart terrorists from entering the country."); *See also*, National Journal Croup Inc., *SECURITY: Border-patrol Strategy Encompasses 'Full-Court Press'*, National Journal's Technology Daily, April 6, 2005.

15. David Solana, *American Revelation*, DAILY ILLINI via U-Wire, March 31, 2005; *See also*, Pete Prince, *Bush Gets it Right with Immigration Policy*, UNIVERSITY DAILY KANSAN via

government of sleeping on the job and handing America to the law-breakers.[16] Identifying illegal aliens as law beakers seems to justify, for some, the denial of basic benefits. Currently pending before the Virginia General Assembly are bills that would: (i) deny the children of undocumented immigrants the opportunity to attend state community and four-year colleges; (ii) require citizens and non-citizens to prove that they are lawfully present in the United States before receiving Medicaid or social security benefits; and (iii) deny workers' compensation benefits to anyone who is not in the country legally at the time of the workplace injury or death.[17]

The fear associated with illegal immigrants is not new. Courts throughout this nation have examined, and attempted to insulate against, the prejudices that a plaintiff, who is an injured illegal immigrant, encounters in trying to obtain a fair trial. The debate over illegal immigration, however, is currently at the forefront of policy in the United States, and attorneys who represent injured illegal immigrants must be acutely cognizant of the prejudices that the American people are exposed to during this debate.

III. EVIDENCE OF AN INDIVIDUAL'S ALIEN STATUS IN THE COURTS

In the course of a hotly contested trial, lawyers often "pull off the gloves."[18] Professional and ethical conduct, however, requires that there be limitations on the extent to which counsel may go into prejudicial and inadmissible matters.[19] Rule 403 of the Texas Rules of Civil Evidence requires that the trial court balance the danger of unfair prejudice against the probative value of the evidence seeking to be admitted.[20] In *McLellan v. Benson*, the court determined that "the trial court is to admit relevant evidence unless the probative value of that extraneous evidence is substantially outweighed by the danger of unfair prejudice."[21]

U-Wire, January 24, 2005.

16. *Id.*

17. Editorial, *Poised to Slight Immigrants*, THE WASHINGTON POST, February 16, 2005, at A18.

18. Texas Employers' Ins. Ass'n v. Guerrero, 800 S.W.2d 859, 868 (Tex. App.—San Antonio 1990, writ denied).

19. *Id.*

20. TEX. R. CIV. P. 403 (Vernon 2005); Porter v. Nemir, 900 S.W.2d 376 (Tex. App.—Austin 1995, no writ).

21. McLellan v. Benson, 877 S.W.2d 454, 456 (Tex. App.—Houston [1st Dist.] 1994, no writ).

A. Evidence Used to Inflame the Jury

i. Texas Decisions

"Cases ought to be tried in a court of justice upon the facts provided; and whether a party be a Jew or gentile, white or black, is a matter of indifference."[22] During the last hundred years, the Texas appellate courts have uniformly condemned arguments that invoked prejudice based on race, ethnicity, religion, or national origin.[23] This condemnation extends to arguments that seek to highlight or give weight to a person's alien status.[24] Although the manner in which the prejudicial appeal is presented has varied over the years and from case to case, the response thereto has remained relatively unchanged.

In 1939, defense counsel in *Basanez v. Union Bus Line* brought out plaintiff's alien status in a manner that can hardly be characterized as subtle:

> I don't know about Dr. Basanez; he has been here for eighteen years and has not taken out any of his first papers yet. I don't know who he is, I don't know whether he waded that river or swam. But, I say, Gentlemen of the Jury, when you gentlemen bring in this verdict he will swim that river again, because, I say to you, I think he is all wet in this law suit.[25]

The basis for the suit in which this speech was made was an injury suffered by Dr. Basanez's wife while she was a passenger on a bus operated by an employee of defendant, Union Bus Line.[26] Despite the fact that Dr. Basanez's involvement was only by virtue of his wife's injury and his alien status was seemingly irrelevant, the court disagreed with Dr. and Mrs. Basanez's argument that the alien status reference amounted to misconduct of counsel

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22. Moss v. Sanger, 75 Tex. 321, 12 S.W. 619 (1889). In Moss, an attorney in closing arguments used the following language:

> This entire business is a concocted scheme from beginning to end; a deliberate scheme to swindle and defraud, gotten up by a Jew, a Dutchman, and a lawyer. Who are the parties in interest? A. Moss; his wife, Rose Moss; his mother, Mary Moss; his clerk, D. Golden; and then B. Frieberg, the old he-Jew of all, who no doubt planned the whole thing. All Jews, or Dutch Jews, and that is worse . . . .

Id. at 618.

23. *See* Texas Employers' Ins. Ass'n v. Guerrero, 800 S.W.2d 859 (Tex. App. — San Antonio 1990, writ denied).

24. *See* Hinojosa v. Jones, 154 S.W.2d 275 (Tex. 1941).

25. Basanez v. Union Bus Line, 132 S.W.2d 432 (Tex. Civ. App. — San Antonio 1939, no writ).

26. *Id.*

and that the verdict favorable to defendants was against the overwhelming weight and preponderance of the evidence.[27] The trial court overruled plaintiffs' motion for a new trial, and plaintiffs subsequently appealed.[28] The court of appeals agreed with plaintiffs' contention and characterized defendant's argument as inflammatory and prejudicial, and tending to create a racial prejudice in the minds of the jury as between the alien appellant and the citizen appellee.[29] The court determined the argument of defense counsel sought a verdict upon the premise that appellants were not citizens.[30] The court of appeals concluded that the trial court should have set aside the verdict and granted a new trial, and thus reversed the judgment of the trial court and remanded for a new trial.[31]

Whether the remarks made in *Hinojosa v. Jones* are more subtle than those in *Basanez* is debatable, but subtlety aside, the references to plaintiff's alien status were condemned by the court.[32] Plaintiff, Manuel Garcia Hinojosa, brought suit against defendant, W.W. Jones, for assault and battery after defendant struck plaintiff with a walking cane, spit tobacco juice on him, and verbally abused plaintiff in the presence and hearing of other people.[33] At trial, defense counsel made the following argument to the jury:

> According to Mr. Jones' testimony, he is eighty odd years old, a pioneer of this country, a man that has given his best efforts for the building up of this great Southwest. On the other hand, we have a man that says he has been in this country practically all his life and he has never learned to speak the English language. He has never thought enough of this country to become naturalized.[34]

Despite plaintiff's objection to the prejudicial nature of the remarks, the jury was not instructed to disregard defense counsel's statements.[35] The jury found for defendant on all issues submitted to it, and a take-nothing judgment was rendered against plaintiff.[36] Plaintiff thereafter appealed, contending that the argument constituted a highly inflammatory and prejudicial appeal to the

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27. *Id.*
28. *Id.*
29. *Id.* at 433.
30. *Basanez*, 132 S.W.2d at 433.
31. *Id.*
32. Hinojosa v. Jones, 154 S.W.2d 275 (Tex. Civ. App. — San Antonio 1941, rehearing denied).
33. *Id.*
34. *Id.* at 276.
35. *Id.*
36. *Id.* at 275.

racial prejudice in the jury.[37] The court of appeals sustained this contention based on the improper nature of the argument, and without engaging in any discussion, reversed the judgment and remanded the case.[38]

Twenty years after *Hinojosa* was decided, trial courts were still allowing prejudicial arguments to be made, and courts of appeals were still responding negatively to those arguments. In *Penate v. Berry*, counsel for the defense in a personal injury suit arising from a traffic accident said in his jury argument, "you see, it just so happens that in this country you can't come into court and reach your hands into the pockets of an American citizen and take his property from him—not for an alien they may take away."[39]

The argument was cut short by an objection from plaintiff's counsel; however, the objection was not that the argument was prejudicial, but rather that there was a reference as to who would have to pay for any damages assessed.[40] The case was submitted to the jury on special issues, and a take nothing judgment was returned.[41] Plaintiff appealed and the court analyzed defendant's prejudicial argument and plaintiff's objection thereto, noting that although plaintiff did not object to the prejudice as he should have, if the prejudice resulting from such an argument cannot be cured, a new trial can be given in the absence of a timely objection.[42] Upon appeal, appellant was not required to show that but for the questioned argument, a different judgment would have resulted, but only that it was reasonably calculated to, and probably did cause the rendition of an improper judgment.[43] The court of appeals believed that defendant's argument was highly inflammatory and of such a calculated nature as to create bias and prejudice, resulting in the judgment that it did; the court reversed and remanded the case.[44]

During the same general time frame, the Fifth Circuit Court of Appeals decided *Rojas v. Richardson*, another personal injury case, this involving a ranch-hand who was severely injured when he was thrown from the horse he was riding.[45] In *Rojas*, defense counsel made remarks during his closing argument to plaintiff's status as an illegal alien, alleging that Mr. Rojas shouldn't

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37. *Hinojosa*, 154 S.W.2d at 276.
38. *Id.*
39. Penate v. Berry, 348 S.W.2d 167, 168 (Tex. Civ. App. — El Paso 1961, writ ref'd n.r.e.).
40. *Id.*
41. *Id.* at 167.
42. *Id.* at 168.
43. *Id.* at 169.
44. *Penate*, 348 S.W.2d at 169.
45. Rojas v. Richardson, 713 F.2d 116, 117 (5th Cir. 1983).

be entitled to any extra benefits because he is an illegal alien in this country than would any other citizen of the United States be entitled.[46]

The jury returned a verdict in favor of defendant, denying plaintiff recovery.[47] Plaintiff appealed this verdict on the basis of prejudice, and after reviewing a record that appeared to be devoid of any reference to plaintiff's alien status until defendant's closing, the court concluded that a new trial should be granted on the basis that the closing was highly prejudicial.[48] This determination was made on the basis of "plain error."[49] However, upon rehearing, the court of appeals determined that there was no plain error because plaintiff's counsel not only failed to object when defendant's argument was advanced, but actually referenced the fact that plaintiff was an illegal alien during voir dire after his motion in limine was overruled.[50] Despite characterizing defendant's argument as "highly prejudicial and a blatant appeal to jury bias," the court failed to find the exceptional circumstances necessary to find plain error.[51]

Texas Employers' Insurance Association provides a twist on the typical use of racially biased arguments in that it was the plaintiff, rather than the defendant, who made a closing argument designed to highlight race.[52] While working for defendant, Texas Employer's Insurance Association's client, H.G. Farms, plaintiff Guerrero fell from his tractor and sustained an injury.[53] Plaintiff Guerrero's closing argument to the jury, which was composed of eleven people with Spanish surnames, began with the quote, "Things that unite us far exceed those things that divide us."[54] He applied this theory to both politics and the evidence in the case, imploring the jury, "There is a time to be united. Right now is a time to be united."[55]

After defendant objected on the grounds that the speech was inflammatory, plaintiff's counsel said, "Because if one is united, one has hope. And with hope, one can live. He still has a lot of years to live. And it is all going to depend on you."[56] The case was submitted to the jury who returned a

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46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Rojas*, 713 F.2d at 117.
51. *Id.* at 118.
52. *Guerrero*, 800 S.W.2d at 862.
53. *Id.* at 860.
54. *Id.* at 862.
55. *Id.*
56. *Id.*

verdict awarding plaintiff worker's compensation benefits for total and permanent disability.[57] On appeal, defendant contended that plaintiff's closing argument was a subtle yet real request for the jury to be united, and side with the plaintiff for ethnic reasons; the court of appeals agreed.[58] It failed to find that the request for ethnic solidarity contained in the closing was merely a suggestion that the jury remember the things that "united" plaintiff's case.[59] The fact that plaintiff did not make a blatantly prejudicial remark was of no consequence; a statement may be objectionable regardless of whether it is indirect and implied or direct and express.[60] The court of appeals then expounded on the Texas Supreme Court's view of racial arguments, stating that

> When a racial or ethnic appeal is made, the dispute is no longer confined to the litigants; there has been an attack on the social glue that helps bind society together . . . The offense is against society and it makes no difference whether the victimized-litigant has shown harm. Lawyers have no right to undermine the ethnic harmony of society simply to win a lawsuit.[61]

The court makes it clear that arguments designed to employ racial biases will not be tolerated from either party to a lawsuit.

ii. Decisions in Other States

Courts outside of Texas have rendered opinions espousing the same concerns as Texas courts on the issue of introducing evidence of a person's status as an illegal alien. In *Gonzalez v. City of Franklin*, plaintiff brought suit after he and his son were severely injured by a firecracker that was found by plaintiff's son at city-owned park during his birthday party.[62] A jury determined that the city was one hundred percent negligent and responsible for the plaintiffs' injuries, and a judgment was entered against the City and [its] insurer.[63] Defendants appealed the ruling on several grounds, one of which was the exclusion of evidence pertaining to the fact that plaintiff was a Mexican-born illegal alien.[64] The Wisconsin Supreme Court reviewed the trial court's grant of plaintiffs' motion in limine prohibiting defendants from

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57. *Guerrero*, 800 S.W.2d at 860.
58. *Id.* at 862-63.
59. *Id.* at 862.
60. *Id.* at 864-865.
61. *Id.* at 865.
62. Gonzalez v. City of Franklin, 403 N.W.2d 747, 749–50 (Wis. 1987).
63. *Id.* at 751.
64. *Id.* at 759.

introducing evidence relating to plaintiff's alien status, which was based on the conclusion that the probative value of the evidence did not outweigh its likely prejudicial effect.[65] It concluded, as did the court of appeals, that the trial court did not err in excluding such evidence.

In *Maldonado v. Allstate Insurance Company*, plaintiff, an illegal alien, was seriously injured when he was struck by a vehicle while riding his bicycle.[66] Plaintiff applied for PIP benefits under the Allstate policy covering the car that struck him. Allstate denied coverage on the grounds that plaintiff was not a resident of Florida.[67] After a jury trial on the issue of plaintiff's residency, the trial court entered a judgment declaring that, for purposes of the Florida Motor Vehicle No-Fault Law, plaintiff was not a resident of Florida on August 19, 1993.[68]

The basic facts concerning plaintiff's residency depend to some degree upon his credibility, but do not appear to be in great dispute.[69] Plaintiff lived in Texarkana, Texas for about a year before moving to Manatee County in mid-1993.[70] Plaintiff testified that he came to Florida intending to stay and hoping to find work.[71] The accident occurred a month or two after he came to Florida.[72] There is no evidence in the record that plaintiff had any plans to leave Florida at the time of his accident, or that he had any indicia of residency anywhere other than Florida.[73] At the time of the trial, he had lived continuously in Manatee County for over three years.[74]

The basic facts concerning plaintiff's citizenship are also not in great dispute. Plaintiff was born in Mexico in 1961 and illegally entered the United States.[75] Plaintiff moved to Florida as an illegal alien who spoke little or no English.[76] Accordingly, plaintiff had no valid social security number at the time of the accident, was not eligible for most welfare programs, and generally lived the anonymous lifestyle common to many of the poor, illiterate, illegal aliens who live in this country.[77]

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65. *Id.*
66. Maldonado v. Allstate Ins. Co., 789 So.2d 464, 466 (Fla. Dist Ct. App. 2001).
67. *Id.*
68. *Id.* at 465.
69. *Id.* at 466.
70. *Id.*
71. *Maldonado*, 789 So.2d at 466.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*
76. *Maldonado*, 789 So.2d at 466.
77. *Id.*

At trial, over the objection of plaintiff's counsel, Allstate's counsel made plaintiff's alien status a central feature in the trial. Allstate's counsel established that plaintiff "crossed over the river between Mexico and the United States."[78] Allstate's counsel cross-examined plaintiff extensively on his use of a fake social security number, his intention to work in Florida without appropriate work credentials, and his lack of a voter registration card.[79] During closing argument, Allstate's counsel argued: "Folks, the question is, 'Can a person be subject to deportation and be a resident of the State of Florida? Can a resident be deported?'"[80]

The court of appeals concluded that the residence requirement found in the Florida Motor Vehicle No-Fault Law was intended by the legislature as a pure residence requirement, and not as a requirement for domicile, legal residence, or citizenship.[81] Accordingly, the trial court erred by allowing extensive evidence of plaintiff's status as an illegal alien.[82] The court of appeals reasoned, for purposes of the Florida Motor Vehicle No-Fault Law, plaintiff's status as an illegal alien was of marginal relevance, and, as dramatically demonstrated by the overall tenor of the jury trial, any probative value of this evidence was clearly outweighed by its prejudicial effect.[83]

B. Evidence as it Pertains to Earnings

i. Texas Decisions

In Texas, evidence of a person's alien status is not permissible to bias or inflame a jury, nor is it permissible as a bar to recapturing lost and future earnings. In *Wal-Mart Stores, Inc. v. Cordova*, plaintiff, an illegal alien, brought suit after sustaining injuries while shopping.[84] Plaintiff sought to

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78. *Id.*
79. *Id.*
80. *Id.*
81. *Maldonado*, 789 So.2d at 465–66.
82. *Id.*
83. *Id.* at 470 (The evidence and instruction at trial concerning Mr. Maldonado's illegal alien status was unfairly prejudicial because it made Mr. Maldonado's alien status, rather than his residency, the focus of the jury's attention. His illegal alien status was employed by Allstate to prejudice the jury against him. Consequently, any limited probative value Mr. Maldonado's illegal alien status may have had was thoroughly outweighed by unfair prejudice, confusion of the issues, and misleading of the jury).
84. Wal-Mart Stores, Inc. v. Cordova, 856 S.W.2d 768, 769 (Tex. App. — El Paso 1993, writ denied).

recover for her injuries and her lost earning capacity.[85] Defendant advanced, as a basis for denying loss of earning capacity, the fact that plaintiff was not a citizen of the United States and that there was no evidence that she possessed employment authorization in order to legally work in the United States.[86] The court stated that Texas law does not require citizenship or the possession of immigration work authorization permits as a prerequisite to recovering damages for loss of earning capacity, and that the court would not espouse such a theory.[87] Evidence pertaining to plaintiff's loss of earning capacity was properly before the court and supported the jury's finding.[88]

Approximately ten years later, the court in *Tyson v. Guzman* reaffirmed the *Cordova* decision in holding that "Texas law clearly allows for the recovery of damages for lost earning capacity, regardless of the claimant's citizenship or immigration status."[89] Tyson subcontracted with Jerry Collum ("Collum") to provide labor for catching chickens at various farms for future processing at Tyson's plants. Plaintiff was one of Collum's employees and had been working for him for nine years as a chicken catcher.[90] On July 30, 1998, plaintiff was in the process of rounding up chickens when a Tyson employee ran into plaintiff with a forklift. As a result of the accident, plaintiff suffered spinal and nerve damage and endured a potentially paralyzing surgery to regain some limb movement.[91] Plaintiff sued Tyson, and following a jury trial, the trial court's final judgment awarded plaintiff $745,496.41.[92] On appeal, Tyson argued that the trial court erred when it refused to exclude Dr. Carl Hansen, plaintiff's expert witness on his lost earning capacity, because Dr. Hansen erroneously assumed that plaintiff was legally entitled to work in the United States.[93] Because plaintiff was not a United States citizen and was not otherwise authorized to work in the United States, Tyson concluded that he was not entitled to receive any compensatory award for lost earning capacity.[94] Tyson cites the recent United States Supreme Court case of *Hoffman Plastic Compounds, Inc. v. National Labor Relations Board* for the proposition that

85. *Id.*
86. *Id.* at 770.
87. *Id.* at 771; *see also* Tyson Foods, Inc. v. Guzman, 116 S.W.3d 233, 244 (Tex. App. — Tyler 2003, no writ).
88. *Wal-Mart Stores, Inc.*, 856 S.W.2d at 771.
89. *Tyson Foods, Inc.*, 116 S.W.3d at 244.
90. *Id.* at 236–37.
91. *Id.* at 237.
92. *Id.*
93. *Tyson Foods, Inc.*, 116 S.W.3d at 242.
94. *Id.* at 243.