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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]

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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.

"national public policy, as expressed by the United States Congress in enacting immigration reforms, militates against any award of wages as damages to undocumented alien laborers."[95]

The court of appeals disagreed. First, the court reasoned that the *Hoffman* opinion only applies to an undocumented alien worker's remedy for an employer's violation of the NLRA and does not apply to common law personal injury damages.[96] Next, Texas law does not require citizenship or the possession of immigration work authorization permits as a prerequisite to recovering damages for lost earning capacity.[97] Third, Tyson's contention seems to be in the nature of a federal preemption defense, which is an affirmative defense and must be raised in the trial court.[98] The court of appeals found that Dr. Hansen's opinion was not unreliable because plaintiff was entitled to receive compensation for lost earning capacity even though he is not a citizen of the United States.[99]

In *Commercial Standard Fire and Marine Company v. Galindo*, the court considered whether evidence of a person's illegal status would prevent him from being an employee within the meaning of the Workmen's Compensation Act of Texas and from qualifying for benefits thereunder.[100] The court found support for it's conclusion that such evidence could not be used to bar recovery in 42 U.S.C.A. § 1981:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white

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95. *Id.*
96. *Id.* at 244.
97. *Id.*
98. *Tyson Foods, Inc.*, 116 S.W.3d at 244.
99. *Id.*
100. Commercial Standard Fire and Marine Co. v. Galindo, 484 S.W.2d 635, 636 (Tex. Civ. App. — El Paso 1972, writ ref'd n.r.e.). Section 406.092 of the Workmen's Compensation Act of Texas provides as follows:

> (a) A resident or nonresident alien employee or legal beneficiary is entitled to compensation under this subtitle.
> (b) A nonresident alien employee or legal beneficiary, at the election of the employee or legal beneficiary, may be represented officially by a consular officer of the country of which the employee or legal beneficiary is a citizen. That officer may receive benefit payments for distribution to the employee or legal beneficiary. The receipt of the payments constitutes full discharge of the insurance carrier's liability for those payments.

> citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and ex-actions of every kind, and to no other.[101]

After pointing out that an illegal alien is not barred from prosecuting his action for personal injuries, the court concluded that an alien cannot be barred, by reason of his immigrant status alone, from receiving workmen's compensation benefits.[102]

*ii. Decisions in Other States*

The Supreme Court of Virginia was faced with this issue in *Peterson v. Neme*, a case in which the plaintiff remained in the United States after the expiration of her visitor-for-pleasure visa, and was employed as a housekeeper.[103] Plaintiff brought suit against defendant for injuries she suffered after he struck her with his car, and for lost wages.[104] The trial court ruled that evidence of plaintiff's immigration status was irrelevant to her claims for injuries and lost wages, but that such evidence would be admissible if plaintiff elected to claim damages for future wages lost.[105] Although defendant argued on appeal that plaintiff should not be allowed to recover because her employment was in violation of employment laws, the court noted that a plaintiff's claim for wage loss arises in tort law and not in contract law.[106] The trial court judge found, and the supreme court agreed, that the prejudicial impact of the evidence pertaining to plaintiff's immigrant status outweighed it's probative value.[107]

A similar conclusion was reached in *Hagl v. Jacob Stern & Sons, Inc.*, in which Mr. Hagl, an illegal alien, was employed by an independent contractor to do construction work for defendant.[108] Plaintiff Hagl was injured at defendant's plant when he fell into an open pit used to collect waste water, fats, and grease.[109] Plaintiff brought suit, seeking damages for medical expenses, past and future lost wages, and pain and suffering, for all of which he received jury awards.[110] Defendant argued that the trial court erred in

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101. *Galindo*, 484 S.W.2d at 637.
102. *Id.*
103. Peterson v. Neme, 281 S.W.2d 869 (Va. 1981).
104. *Id.* at 870.
105. *Id.*
106. *Id.* at 871–72.
107. *Id.* at 872.
108. Hagl v. Jacob Stern & Sons, Inc., 396 F. Supp. 779 (E.D. Pa. 1975).
109. *Id.* at 781.
110. *Id.* at 782.

refusing to allow it to show that plaintiff was in the United States illegally and thus subject to deportation, and further that because plaintiff's continuing presence in the United States was not assured, recovery for loss of future earnings should be reduced.[111] The court concluded that, contrary to defendant's insinuation, every alien, whether in this country legally or not, has a right to sue those who physically injure him.[112] Insofar as that liability was concerned, plaintiff's status was irrelevant.[113] Because no proceedings to deport plaintiff had begun at the time of trial, nor was there any indication that proceedings were contemplated, there was no evidence that would have reasonably justified reducing the damages awarded by the jury.[114]

The California Supreme Court also emphasized the fact that no deportation proceedings had begun at the time of trial in *Clemente v. State* when analyzing a similar situation.[115] Plaintiff Clemente brought suit after he was struck by a motorcycle, alleging that he was damaged by the officer's negligent investigation which failed to determine the identity of the motorcyclist.[116] In *Clemente*, defendants argued that the trial court improperly excluded testimony from plaintiff's wife regarding his citizenship, evidence they contended was relevant to a determination of plaintiff's claim for future loss of earnings.[117] The supreme court concluded that the trial court did not err in refusing to permit the questioning of plaintiff's wife regarding her husband's citizenship.[118] Plaintiff had been gainfully employed in the United States prior to the accident and there was no evidence that he intended to leave the country.[119] There was no evidence that he was going to be deported. There was merely speculation that plaintiff might be deported, which was so remote as to make the issue of citizenship irrelevant to the damages of question.[120] Thus, the supreme court concluded that the trial court was correct in refusing

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111. *Id.* at 784.
112. *Id.*
113. Hagl v. Jacob Stern & Sons, Inc., 396 F. Supp. at 784.
114. *Id.* at 785.
115. Clemente v. State, 707 P.2d 818 (Cal. 1986).
116. *Id.* at 821.
117. *Id.* at 829.
118. *Id.*
119. *Id.*
120. *Clemente*, 707 P.2d at 829. Following the opinion of the California Supreme Court in *Clemente*, the court of appeals in Rodriguez v. Kline held that in determining the relevance of a plaintiff's alien status the trial court should hear evidence, outside of the presence of the jury as to the plaintiff's alien status, at which, defendant has the burden of establishing that the plaintiff is an alien subject to deportation. Rodriguez v. Kline, 186 Cal. App. 3d 1145, 1148–49 (1986).

to allow the testimony, which even if marginally relevant, would have been highly prejudicial.[121]

Placing importance on the existence, or lack thereof, of deportation proceedings occurs bi-coastally. The Supreme Court of New York County emphasized it in *Klapa v. O & Y Liberty Plaza Company*.[122] In that case, plaintiff Klapa, a Polish national who was living and working illegally in the United States, suffered injuries while removing asbestos at a construction site owned and operated by defendants.[123] He brought suit, and as part of his claim for damages, plaintiff sought recovery for future lost earnings.[124] Liability was determined on a motion for summary judgment, but trial was needed to determine damages.[125] Plaintiff sought to have evidence of his alien status excluded from trial, while defendants argued that it was relevant to his claim for future lost wages.[126] The court stated that in New York, defendant may rebut a claim for future lost wages by presenting evidence that establishes a date of deportation or the inability of plaintiff to obtain future employment in the United States.[127] The court then proceeded to review a battery of cases from other states dealing with the same issue, concluding that plaintiff's alien status, in and of itself, cannot be used to rebut a claim for future lost earnings.[128]

The mere fact that a plaintiff is deportable does not mean that deportation will actually occur; thus, in order to rebut a claim for future lost wages in New York, a defendant must be prepared to demonstrate something more than just the mere fact that a plaintiff resides in the United States illegally. Absent such a showing, a defendant is precluded from presenting evidence to the jury which would indicate a plaintiff's immigration status[129] In *Klapa*, there was no evidence that deportation proceedings had begun or had even been contemplated, thus plaintiff's status as an illegal alien was irrelevant, would have been highly prejudicial and was excluded by the grant of plaintiffs' motion in limine.[130]

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121. *Clemente*, 707 P.2d at 829.
122. Klapa v. O & Y Liberty Plaza Co., 645 N.Y.S.2d 281 (N.Y. Sup. Ct. 1996).
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Klapa*, 645 N.Y.S.2d at 282.
128. *Id.*
129. *Id.*
130. *Id.* at 282–83.

This issue was also raised in *Gonzalez v. City of Franklin*, which was discussed above.[131] In addition to seeking the introduction of evidence pertaining to plaintiff Gonzalez's alien status, defendants sought to introduce the fact that he had not filed any United States tax returns.[132] The trial court excluded both of these pieces of information by granting plaintiff's motion in limine.[133] On appeal, defendants argued that this suppression of evidence inhibited their ability to present evidence relevant to plaintiff's loss of earning capacity.[134] In making this argument, defendants relied on *Melendres v. Soales,*[135] in which the court stated that evidence of a plaintiff's alien status could be admitted when calculating damages in the damage phase, but not the liability phase of a bifurcated trial.[136] The court of appeals held, and the Wisconsin Supreme Court agreed, that because there had been no bifurcation in the *Gonzalez* case, defendants' argument failed.[137] Given the obvious prejudicial effect of the admission of plaintiff's alien status, the trial court did not err in excluding it.[138]

### *C. Evidence of Alien Status as it Pertains to the National Labor Relations Act*

Different in nature and result from the personal injury cases previously discussed, are those cases analyzing the interplay between alien status and the National Labor Relations Act and the Immigration Reform and Control Act of 1986, which makes it unlawful for employers to knowingly hire undocumented workers or for employees to use fraudulent documents to establish employment eligibility.[139] In *Sure-Tan v. National Labor Relations Board*, the Supreme Court held that the National Labor Relations Act applied to all employees, including illegal aliens.[140] The Court did not find any conflict between the National Labor Relations Act and the Immigration and Nationality Act.[141] After making this determination, the Court considered the issue that

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131. *Gonzalez*, 403 N.W.2d at 759.
132. *Id.*
133. *Id.*
134. *Id.*
135. Melendres v. Soales, 306 N.W.2d 399 (Mich. Ct. App. 1981).
136. *Id.*
137. *Id.* at 759 – 60.
138. *Id.* at 760.
139. *See* Hoffman v. Nat'l Labor Relations Bd., 535 U.S. 137 (2002).
140. Sure-Tan v. Nat'l Labor Relations Bd., 467 U.S. 883, 891 (1984).
141. *Id.* at 892.

formed the basis for the case, namely, whether or not Sure-Tan committed an unfair labor practice in reporting their undocumented alien employees to the INS in retaliation for their employees' participation in union activities.[142] Noting that the reporting of illegal activity is generally encouraged, the Court found an exception in cases where the report is motivated by retaliation for engaging in union activities, in which instance Section 8(a)(3) of the National Labor Relations Act is violated.[143] The Court then analyzed the applicability of the traditional remedy of back pay, concluding that in computing back pay, an employee must be deemed unavailable for work (and the accrual of back pay therefore tolled) during any period in which an employee is not lawfully entitled to be present and employed in the United States.[144] The Court set aside an award of back pay and reinstatement to undocumented alien workers who were not authorized to re-enter this country following their voluntary departure.

The Supreme Court relied on the *Sure-Tan* decision when opining on *Hoffman Plastic Compounds v. National Labor Relations Board*, in which Hoffman hired an illegal alien, Castro, after Castro presented Hoffman with documents that appeared to verify his authorization, and laid him off after Castro and others supported a union-organizing campaign at Hoffman's plant.[145] The National Labor Relations Board determined that Hoffman's lay-offs violated the National Labor Relations Act, while an Administrative Law Judge concluded that Castro was barred from receiving back pay after Castro testified that he had been born in Mexico, that he had never been legally admitted to, or authorized to work in the United States, and that he gained employment with Hoffman only after producing a birth certificate belonging to an American-born friend.[146] The National Labor Relations Board reversed the decision with regard to back pay, and an appeal was brought.[147] The Supreme Court reviewed the case, and noted that *Sure-Tan's* express limitation of back pay to undocumented workers forecloses the back pay to Castro, but

142. *Id.* at 894.

143. *Id.* at 895 –96.

144. *Id.* at 903. The Court found that the NLRB's authority to select remedies was limited by federal immigration policy as expressed in the Immigration and Nationality Act (INA), and held that in order to avoid a potential conflict with the INA with respect to back pay, the employees must be deemed "unavailable" for work (and the accrual of back pay therefore tolled) during any period when the employees were not "lawfully entitled to be present and employed in the United States." *Id.*

145. *Hoffman Plastic Compounds*, 535 U.S. at 140.

146. *Id.* at 141.

147. *Id.* at 142.

went on to analyze the effect of the Congressional enactment of the Immigration Reform and Control Act of 1986.[148] Under the Immigration Reform and Control Act, it is impossible for an illegal alien to obtain work in the United States without some party directly contravening explicit congressional policies.[149] Therefore, the Court concluded that allowing back pay to illegal aliens would unduly trench upon explicit statutory prohibitions critical to federal immigration policy.[150]

## IV. PROTECTING AGAINST THE INTRODUCTION AT TRIAL OF AN INJURED WORKER'S ALIEN STATUS

Despite well settled articulated case law, attorneys still attempt to introduce evidence of the illegal alien status of an injured worker. Counsel representing such injured clients must be prepared to timely object, state the specific grounds for the objection, get a ruling, and if necessary, make sure to make a record for appellate purposes. It must be noted that a pre-trial Motion in Limine objection to the introduction of such prejudicial evidence is always recommended. However, keep in mind that a sustained Motion in Limine will not preserve error. So be prepared to always object.

Pursuant to the Texas Rules of Civil Procedure, the following are a number of ways a trial practitioner can identify, flesh out, object to and get a ruling regarding the issue of the potential introduction of the injured worker's alien status at trial.

A. Special Exceptions—Under the Texas liberal pleading rule, parties can plead, whether affirmatively or defensively, in very general terms. It is always suggested that special exceptions be filed. The purpose of special exceptions is to inform the opposing party of defects in its pleadings so the party can cure them, if possible, by amendment.[151]

B. Motion for Summary Judgment—Motion for Summary Judgment can be a useful tool to flesh out opposing parties' intentions when it comes to the introduction of evidence of the illegal alien status of your client. The movant may file a Motion for Summary Judgment that shows the non-movant has no viable defense based on the

148. *Id.* at 146–48.
149. *Id.* at 148.
150. *Hoffman Plastic Compounds*, 535 U.S. at 151.
151. Horizon v. Auld, 34 S.W.3d 887, 897 (Tex. 2000). *See* TEX. R. CIV. P. §§ 90, 91.

non-movant's pleadings.[152] In some cases, when the motion is based on the pleadings, the parties may include summary judgment proof.[153] Keep in mind that when evaluating a Motion for Summary Judgment based on the non-movant's pleadings, the trial court must do the following:

i. Assume all allegations and facts in the non-movant's pleading are true;[154]

ii. Indulge all inferences in the non-movant's pleadings in the light most favorable to the non-movant.[155]

C. Motion in Limine—Remember that a Motion in Limine will not preserve error if no objection is made when the testimony of the injured worker's illegal alien status is raised at trial. It is recommended that a Motion in Limine be filed pre-trial to alert the court of the issue. The more likely result is that the court will sustain the objection and the issue will not come up at trial. In addition, as some courts prefer, the court will instruct the parties to approach the bench before any efforts to introduce evidence of the illegal alien status is attempted.

D. Trial Memorandum or Trial Brief—It is always advisable that a party attempting to keep out evidence of the injured worker's illegal alien status file a Trial Memorandum or Trial Brief informing the court of the specific laws and cases that apply to the specific subject matter.

E. Motion for Mistrial, Motion for New Trial and Appeal—It must be noted that if the evidence of the injured worker's illegal alien status is introduced at trial, the suggested steps to follow are to move for a mistrial, file a Motion for New Trial, and argue for a remand or appeal based on the previously mentioned authority. Remember that running objections are very dangerous and in some cases can lead to waiver. Certainly, do not overlook the lessons learned from the *Rojas v. Richardson* case which guides trial counsel to object at trial to the use of the term "illegal alien," which will in turn preserve error.[156]

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152. Nat'l Union Fire Ins. Co. v. Merchants Fast Motor Lines, 939 S.W.2d 139, 141 (Tex. 1997).

153. St. John v. Pope, 901 S.W.2d 420, 424 (Tex. 1995).

154. Natividad v. Alexsis, Inc., 875 S.W. 2d 695, 699 (Tex. 1994).

155. Medina v. Herrera, 927 S.W. 2d 597, 602 (Tex. 1996).

156. Rojas v. Richardson, 713 F.2d 116, 117–18 (5th Cir. 1983).

## V. KNOWING THE ARGUMENTS IN FAVOR OF THE INTRODUCTION OF AN INJURED WORKER'S ALIEN STATUS

There are two lines of arguments that counsel representing the injured illegal alien plaintiff will need to be aware of: (i) the *Covarrubias* argument, and (ii) the *Sure-Tan / Hoffman* argument.

### *A. The* Covarrubias *Argument*

In 1972, the San Antonio Court of Appeals in *ABC Rendering of San Antonio, Inc. v. Covarrubias*, addressed the propriety of a trial court's exclusion of evidence that plaintiff illegally entered the United States.[157] Plaintiff in *Covarrubias* sought damages for loss of future earning capacity and proved by expert testimony the cash value of this loss of future earnings.[158] The court of appeals reasoned, "[o]bviously, the fact that plaintiff was subject to immediate deportation to a drastically lower standard of earnings would have an effect on his future earning capacity."[159] Accordingly, the court held that if there is evidence at retrial of this case as to the anticipated future earnings of a laborer in the United States, the jury should be permitted to weigh the impact of plaintiff's illegal entry upon these future earnings.[160]

The *Covarrubias* opinion is an anomaly in Texas jurisprudence. In *Commercial Standard Fire & Marine Company v. Galindo*, the El Paso Court of Appeals held that the mere fact that an injured worker is an illegal alien does not bar that worker from receiving workmen's compensation benefits.[161] In *Wal-Mart Stores, Inc. v. Cordova*, the El Paso Court of Appeals held 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.[162] In *Tyson v. Guzman*, the Tyler Court of Appeals held that "Texas law clearly

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157. *See* San Antonio, Inc. v. Covarrubias, 1972 Tex. App. LEXIS 2794, at *1 (Nov. 22, 1972, no writ).

158. *Id.* at *16.

159. *Id.* at *17.

160. *Covarrubias*, 1972 Tex. App. LEXIS 2794, at *1.

161. Commercial Standard Fire & Marine Co. v. Galindo, 484 S.W.2d 635, 636 (Tex. Civ. App. — El Paso 1972, writ ref'd n.r.e.).

162. Wal-Mart Stores, Inc. v. Cordova, 856 S.W.2d 768, 771 (Tex. App. — El Paso 1993, writ denied).

allows for the recovery of damages for lost earning capacity, regardless of the claimant's citizenship or immigration status."[163]

Additionally, no jurisdiction has been so bold as to suggest that an injured worker's alien status should be presented to a jury merely because he is illegally in the United States. The California Supreme Court, in *Clemente v. State,* analyzed whether a plaintiff's illegal alien status should have been presented to the jury, and considered the facts that plaintiff had been gainfully employed in the United States prior to the accident: there was no evidence that he intended to leave the country, and there was no evidence that plaintiff was going to be deported.[164] There was merely speculation that plaintiff might be deported, which was so remote as to make the issue of citizenship irrelevant to the question of damages.[165]

While counsel for defendants will often cite to the *Covarrubias* opinion for the proposition that an injured plaintiff's illegal alien status is relevant for the purposes of calculating damages associated with the loss of future earning capacity, trial courts summarily dismiss this argument.

### *B. The* Sure-Tan / Hoffman *Argument*

The United States Supreme Court cases of *Sure-Tan v. National Labor Relations Board* and *Hoffman Plastic Compounds v. National Labor Relations Board* held that the National Labor Relations Board's award of back pay to illegal aliens, who were improperly terminated from their employment for participating in union activities, was limited by the Immigration and Nationality Act and would unduly trench upon explicit statutory prohibitions critical to federal immigration policy, as expressed in the Immigration Reform and Control Act of 1986.[166] Outside of worker's compensation cases, there are only a handful of opinions that address the impact the *Sure-Tan / Hoffman* analysis has had on personal injury causes of action.

In *Cano v. Malloy*, plaintiff was injured when an electric meter, allegedly owned by Con Edison, exploded causing him third degree burns resulting in injuries which caused him to lose time from work.[167] Plaintiff was not an

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163. Tyson Foods, Inc. v. Guzman, 116 S.W.3d 233, 244 (Tex. App. — Tyler 2003, no writ).

164. Clemente v. State, 707 P.2d 818, 829 (Cal. 1986).

165. *Clemente*, 707 P.2d at 829.

166. Hoffman v. Nat'l Labor Relations Bd., 535 U.S. 137 (2002); Sure-Tan v. Nat'l Labor Relations Bd., 467 U.S. 883, 891 (1984).

167. Cano v. Malloy, 760 N.Y.S.2d 816–17 (2003).

employee of Con Edison.[168] Relying on the *Sure-Tan / Hoffman* analysis, Con Edison sought to dismiss plaintiff's complaint for tortious conduct because he was an "illegal alien."[169] The court held that "[i]t is contrary to the public policy of New York State that a person who claims to be injured as a result of tortious conduct may be barred from pursuing that claim in the courts of this state based upon the resident status of the claimant."[170] According to the court in *Cano*, defendants cannot negligently injure someone who is within this state legally or not, and then not be responsible to that injured person for the injuries sustained.[171]

> It is the province of the New York Legislature to rule on whether a class of people will be barred from the courts of this state. It is not the role of the trial judiciary to bar residents of this state from using the court system absent a statute to the contrary. This court will not bar plaintiff from using the court system simply because he cannot produce a resident alien card or such other documentation to prove that he is a legal resident of this state and country. Absent legislation manifesting the public policy of this state, the trial courts should not compel litigants to prove whether they are citizens of the United States or to produce proof that they are legally within this country before allowing a person to file a lawsuit.[172]

In *Rosa v. Partners in Progress, Inc.*, plaintiff, a Brazilian citizen, was injured while working at a Wal-Mart construction site when an aerial lift, owned and rented by United Rentals, Inc., tipped over and fell on him.[173] Plaintiff brought suit against defendants for damages resulting from his injuries, including a claim for lost earning capacity measured at United States wage levels.[174] Prior to trial, defendants filed motions arguing that plaintiff should be prohibited from making a claim for lost earning capacity, or that the trial court should limit the scope of his claim.[175] Plaintiff, however, argued that evidence concerning his immigration status should be excluded from the trial because it is of limited relevance and unfairly prejudicial.[176] The Superior Court transferred the following questions: (1) "Is the plaintiff permitted to

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168. *Id.*
169. *See Cano*, 760 N.Y.S. at 817.
170. *Id.*
171. *Id.*
172. *Id.* at 817–18.
173. Rosa v. Partners in Progress, Inc., 868 A.2d 994 (N.H. 2005).
174. *Id.*
175. *Id.*
176. *Rosa*, 868 A.2d 994.

introduce evidence and make a claim of lost wage/earning capacity when he is not legally entitled to work in the United States at the time of his accident?"; (2) "If he is entitled to bring a claim for lost wage/earnings, should those be limited to earnings that he could anticipate receiving in his country of full citizenship?"; and (3) "To the extent a lost wage/earning capacity claim is introduced, are the defendants entitled to introduce testimony of the plaintiff's immigration status and the fact that he was not legally entitled to work in this country as evidence to rebut the damage claim?"[177]

Relying on *Hoffman*, defendant argued that allowing illegal aliens to recover lost earnings in the United States would undermine the Immigration Reform and Control Act of 1986 because providing illegal aliens with the potential to recover lost earnings would, in theory, increase the economic incentives that draw illegal aliens to this country.[178] Further, defendant argued that an illegal alien should be barred from claiming lost United States earnings because the "very nature of an undocumented worker's uncertain and unstable status in the United States militates against permitting him to speculate as to wages earned while in this country."[179]

The court held that, as a matter of public policy, a person responsible for an illegal alien's employment, who knew or should have known of that illegal alien's status, may not employ an illegal alien's potential for deportation as a bar to that illegal alien's recovery of lost United States earnings.[180]

> A person responsible for an illegal alien's employment may be held liable for lost United States wages if that illegal alien can show that the person knew or should have known of his status, yet hired or continued to employ him nonetheless. Further, although IRCA penalizes an illegal alien who submits fraudulent documents, such fraud will not bar recovery by an illegal alien unless the person responsible for such employment reasonably relied upon those documents.[181]

Additionally, as previously discussed, the court in *Tyson v. Guzman* held that the *Hoffman* opinion only applies to an undocumented alien worker's remedy for an employer's violation of the National Labor Relations Act and does not apply to common-law personal injury damages.[182]

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177. *Id.*
178. *Id.*
179. *Id.*
180. *Rosa*, 868 A.2d 994.
181. *Id.*
182. Tyson Foods, Inc. v. Guzman, 116 S.W.3d 233, 244 (Tex. App. — Tyler 2003, no writ).

*Cano*, *Rosa*, and *Tyson* are consistent in their holdings that the *Sure-Tan / Hoffman* analysis will not act as a bar to an injured illegal alien's ability to recover lost United States earnings.

## V. CONCLUSION

The term "illegal alien," now more than ever, creates a great deal of fear and distrust in our society. This fear will, undoubtedly, find its way into a courtroom, and prejudice an injured illegal alien's right to a fair trial. As illustrated by this paper, courts throughout this nation recognize the prejudice that is engendered within the term "illegal alien" and have tried to strike a balance between this prejudice and its possible relevance. Texas has made its position clear—any relevance the alien status of an injured plaintiff may have in a particular case is likely outweighed by its prejudicial effect.