

Trial Law TIPS

Roy D. Wasson's
TIP #51

ROY D. WASSON is board certified in Appellate Practice with extensive courtroom experience in more than 750 appeals and thousands of trial court cases, civil, criminal, family and commercial. AV-rated.

Recovering Loss of Earnings Capacity in U.S. Dollars for Plaintiff Who Is An Illegal Alien

Introduction

How can you recover damages for loss of earnings capacity when your client was working illegally in the United States? Shouldn't the jury get to hear about the Plaintiff's immigration status so it can decide that his or her maximum earnings capacity should be limited to the amount which could be earned in pesos back home? How do you deal with a discovery request which asks you to file materials which conceivably could get your client deported?

The smart judges of this state and the nation have held that a plaintiff who is an illegal alien is entitled to recover the *same damages* as a U.S. citizen. Usually, unless deportation proceedings already have commenced, your client should be able to seek loss of

future earnings capacity using the amount that a citizen similarly situated would have been capable of earning. The courts acknowledge that the jury might be confused by hearing argument or evidence about your client's immigration status, and mistakenly award less than the full measure of economic damages. Therefore such matters should be excluded by way of a motion in limine.

Illegal Aliens Can Recover the Same Damages as Citizens

An illegal alien has the same rights as a citizen to recover damages, including damages for lost future earnings capacity. "An illegal alien in the United States is entitled to the same rights to damages that a citizen has under the tort laws of the state and federal government." *Torres v. Sierra*, 553 P. 2d, 721, 725 (N.M. App. 1976). Cases from other states and federal courts which recognize the right of illegal aliens to recover damages for future income losses and which recognize the necessity of excluding evidence of the plaintiff's immigration status include the following:

The California Supreme Court in *Clemente v. State of California*, 707 P.2d 818 (Cal. 1985) approved the trial court's grant of plaintiff's motion in limine to exclude evidence that he was an illegal alien, holding that such evidence was not relevant to his loss of future earnings claim:

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

Id. at 829.

Other courts follow the same rule of law. "In New York, an illegal alien may sue to recover damages for future lost earnings resulting from tortious injury." *Klapa v. O&Y Liberty Plaza Co.*,

645 N.Y.S.2d 28, 282 (Sup. Ct. 1996). Further, the mere fact that the plaintiff is an illegal alien may not be introduced in evidence in an attempt to reduce those damages; a defendant seeking to introduce such evidence must make a showing of imminent deportation or other case-specific facts to reduce the amount of lost earnings awarded to illegal aliens:

[A] plaintiff's status as an illegal alien, in and of itself, cannot be used to rebut a claim for future lost earnings. . . . The fact that a plaintiff is deportable does not mean that deportation will actually occur. Further, whatever probative value illegal alien status may have is far outweighed by its prejudicial impact. . . . Therefore, in order to rebut such a claim defendants must be prepared to demonstrate something more than just the mere fact that the plaintiff resides in the United States illegally. Absent such a showing, a defendant will be precluded from presenting to the jury evidence which would indicate a plaintiff's immigration status.

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.

Id. (Emphasis added).

In *Hagl v. Jacob Stern & Sons, Inc.*, 396 F. Supp. 779 (E.D. Pa. 1975) the court held:

Stern also claims that I erred in refusing to allow it the opportunity to show plaintiff's standing to sue was clouded because he was in the United States illegally and thus subject to deportation. ***Stern also contends it should have been allowed to argue to the jury that since Hagl's continuing presence in this country is not assured, recovery for future earnings loss should be reduced.***

Contrary to defendant’s insinuation, every alien, whether in this country legally or not, has a right to sue those who physically injure him. Each person is entitled to the equal protection of the law. . . . The Fifth and Fourteenth Amendments use the word person not citizen in this context. . . .

It follows that insofar as liability was concerned, Hagl’s status as an alien was irrelevant. Whether he will be deported, leave of his own accord, or obtain United States citizenship might have been relevant in the damages portion of the trial. However, there was no evidence on this point. There was testimony to show he had come to this country in 1967. At side bar it was explained he had hired an attorney to help in achieving permanent residency status but nothing further had occurred in this regard. n6 No proceedings to deport Hagl had been started as of the time of trial, nor, was there any indication that such proceedings were contemplated. In short, ***there was nothing which would have justified the jury’s reducing damages because plaintiff is an alien who might conceivably face some unspecified immigration action at an unknown time.***

Id. at 784 (emphasis added). See also, e.g., *Peterson v. Neme*, 281 S.E.2d 869 (Va. 1981); *Gonzalez v. City of Franklin*, 403 N.W.2d 747 (Wis. 1987); *Arteaga v. Literski*, 265 N.W.2d 148, 150 (Wis. 1978); *Hernandez v. M/V Rajaan*, 841 F.2d 582 (11th Cir.), modified on rehearing, 848 F.2d 498, 499 (5th Cir. 1989)(affirming award of future earnings capacity at U.S. levels and holding that the defendant “ cannot defeat his right to recover by asserting that his award for future lost wages should be based upon speculation regarding what he might be earning were he in Mexico.”

It’s reassuring that courts from coast to coast agree: tortfeasors don’t get a “free pass” when the victim of their negligence is not a citizen. The cost of causing injuries and damages does not go down based on the fortuities of the plaintiff’s place of birth.

File a Motion in Limine to Exclude Immigration Status

Once you have assisted the judge in understanding the foregoing area of the law of damages, you should strongly consider filing a Motion in Limine in which you ask the court to instruct the Defendant and its attorneys, representatives, and witnesses, that they should make no reference to the immigration status of the Plaintiff as an alleged illegal alien. While defendants in civil litigation frequently attempt to place such evidence before juries—asserting the relevance of immigration status on the measure of the Plaintiff’s damages for loss of future earning capacity, impeachment, and other grounds—the Florida and majority rule is that the prejudicial effect of such evidence so far outweighs its relevance as to require exclusion.

In *Maldonado v. Allstate Ins. Co.*, 789 So. 2d 464 (Fla. 2d DCA 2001), the plaintiff appealed a judgment in favor of the defendant following a trial at which his immigration status as an illegal alien was introduced in evidence over the plaintiff’s objection. On appeal, the Second District rejected the defendant’s argument that Mr. Maldonado’s immigration status was relevant, and reversed the judgment on the ground that “the evidence that Mr. Maldonado was an illegal alien was improperly admitted under section 90.403, Florida Statutes.”

In *O’Neil v. Gilbert*, 625 So. 2d 982 (Fla. 3d DCA 1993), the court reversed based upon the erroneous allowance of impeachment evidence concerning the immigration status of a witness, holding that such evidence “served only the plainly prejudicial purpose . . . of disparaging the witness’ character and thus, the acceptability of her testimony.” *Id.* at 983. There is no valid purpose for the defense to place before the jury the issue of your client’s immigration status. Such evidence should be excluded and discovery on the subject should be denied.

Conclusion

Your foreign-born client already has overcome the odds to arrive on our shores in search for fairness and opportunity. Don’t let ignorance and prejudice stand in the way of achieving the same recovery in this client’s case that you would in representing an American citizen. Educate the judge that the rights of aliens are

equal to the rights of citizens in this area of the law. Move in limine to exclude evidence of immigration status so the jury is not confused and misled about the relevance of such matters. Then you, the Trial Lawyer, will have leveled the playing field, and been an instrument of enforcement of basic constitutional rights.

And above all, remember to:

Keep Tryin!

Roy