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EVIDENCE OF IMMIGRATION STATUS MAY BE PRECLUDED

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"Evidence of Immigration Status May Be Precluded"

"…[I]t is unfair to prevent a defendant from putting a plaintiff to his proof by precluding the defense from presenting facts material to the accurate assessment of damages."

--Justice Peter Tom, dissent in *Angamarca v. New York City Partnership Housing Development Fund, Inc.. et al.*, 87 A.D.3d 206, 927 N.Y.S.2d 2 (1st Dept. 2011).

With this sharp dissent, Justice Peter Tom of the Appellate Division, First Department took issue with the majority's upholding of the preclusion of evidence of an undocumented alien's plans to return to his country after trial.

Plaintiffs are authorized under CPLR § 4111 to seek an itemized verdict of special damages that may include an award for future medical expenses. But should jurors be permitted to assume that plaintiffs will receive that care in the U.S.? What if they are undocumented immigrants who will likely return to their home nations?

Future medical expenses often represent a significant aspect of the damages award in construction-site accident cases. A plaintiff who can show that he will receive future medical care will often be entitled to a significant recovery, given the high cost of medical care in this country.

The First Department explored the extent to which jurors should know the immigration status of a plaintiff seeking a future medical expense award in *Angamarca.*

In *Angamarca*, plaintiff was an undocumented alien from Ecuador who came to the U.S. in 2001. He was hired as a construction worker in 2002 by Roadrunner Construction Corp., despite its knowledge of his immigration status. Notably, Roadrunner never requested a Social Security number from plaintiff and never withheld any payroll taxes form his wages.

In 2003, plaintiff fell two stories through a hole while working on a roof. He sustained serious injuries, including a traumatic brain injury and multiple vertebral fractures. Plaintiff was granted summary judgment on his Labor Law § 240(1) claim, and the case proceeded to a trial on damages.

The trial court granted the plaintiff's motion *in limine* to preclude any evidence, or cross-examination of the plaintiff and other witnesses, about plaintiff's immigration status and expressed desire to return to Ecuador. The jury found that plaintiff was entitled to $16,721,684.00 for future medical expenses for 40 years. The defendant appealed on the grounds, *inter alia*, that the trial court should have permitted cross-examination of the plaintiff about his immigration status and desire to return to his home nation.

The First Department upheld the preclusion of the evidence on several grounds. The court acknowledged that a worker's immigration status may be a legitimate factor for a jury to consider in deciding whether to issue an award for lost wages, citing *Balbuena v. IDR Realty LLC*, 6 N.Y.3d 338, 362 (2006).[1] Yet, the court stated, the plaintiff's immigration status was irrelevant because he is permanently disabled, and would not be able to mitigate his earnings damages by continuing to work.

The court also found that, despite the plaintiff's deposition testimony, the likelihood that plaintiff might be deported or voluntarily return to Ecuador was "so remote that it rendered the issue of citizenship of scant probative value to the calculation of damages." The majority added that the defendant did not dispute that it was unprepared to present evidence that plaintiff's future medical expenses would have been lower in Ecuador. Indeed, the defendant exchanged a disclosure of an expert prepared to testify about the differences in the medical expenses in the two countries, but the disclosure was not exchanged until the eve of trial. The court concluded, "Thus, under the unique facts of this case, the jury's determination of future medical expenses in Ecuador would have been mere speculation."

[1] In *Balbuena*, the Court of Appeals held that awarding lost earnings to an undocumented alien would not conflict with the purposes and goals of the Immigration Reform and Control Act of 1986.

Justice Peter Tom issued a strong dissent from the majority's holding, and posited that the Court of Appeals decision in *Balbuena* "has no bearing on the issue raised by this appeal." In *Balbuena*, as stated by Justice Tom, the Court of Appeals was presented with the narrow issue of whether an undocumented alien could recover lost wages, not whether he could recover future medical expenses or other types of damages.

In fact, as Justice Tom, argued, the First Department has considered a party's immigration status to be admissible in at least one other situation; when determining one's eligibility for a rent-stabilized apartment. In *Katz v. Park Ave. Corp. v. Jagger*, 46 A.D.3d 186, 843 N.Y.S.2d 329 (1st Dept. 2007), the landlord brought an action against a tenant to eject her from a rent-stabilized apartment. Under New York law, a rent-controlled apartment must be occupied by a tenant as his primary residence. The landlord argued that the tenant, as a holder of a B-2 tourist visa, was required to maintain her principal residence in her home country, not in the U.S. The First Department agreed with the landlord and reversed the lower court's denial of its summary judgment motion. As Justice Tom pointed out in his dissent in *Angamarca*, *Katz* shows that there is no bright line rule that immigration status cannot be considered to resolve disputes.

The *Angarmarca* decision also seems to contradict a key aspect of *Balbuena* that specifically anticipates a situation in which a plaintiff's ability to remain in the U.S. is relevant and admissible. The *Balbuena* Court stated that any possible conflict with federal law regarding illegal immigration would be alleviated by permitting the jury to consider immigration status as, "one factor in its determination of the damages, if any, warranted under the Labor Law (citation omitted")." The court discussed how an undocumented plaintiff could introduce proof that he obtained authorization to work in the U.S. and a defendant could, in response, "allege that a future wage award is not appropriate because work authorization has not been sought or approval was sought but denied."

Thus the Court of Appeals in *Balbuena* seemed to anticipate that where the undocumented alien will live post-trial is an issue that will be contested just like any other disputed matter, with sworn testimony and other evidence.

Justice Tom noted in *Angamarca* that the trial court did not elaborate on the nature of the alleged prejudice to the plaintiff. The trial judge likely (and perhaps not unreasonably) perceived a stigma to the plaintiff's undocumented status, and so ruled that the potential for prejudice to the defendant outweighed any probative value.

However, it is far from clear that New York juries discriminate against undocumented aliens. For example, in *Coque v. Wildflower Estates Developers, Inc.*, 58 A.D.3d, 867 N.Y.S.2d 160 (2d Dept. 2008), the paraplegic plaintiff, who was from Ecuador, admitted at trial that he was undocumented, and that he submitted a false Social Security card when he was hired.

Plaintiff testified that his family in Ecuador would be unable to take care of him. A Queens County jury awarded him, *inter alia*, $863,000.00 for future medical expenses over a period of 22 years. This verdict indicates that juries do not necessarily discriminate against undocumented aliens based upon their immigration status.

In conclusion, practitioners seeking to elicit evidence of a plaintiff's post-litigation plans should be aware that courts may preclude immigration status evidence, notwithstanding precedent that allows for the admission of such evidence. Timely disclosure of experts is also, of course, vital.

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