Undocumented Workers' Ability to Claim Lost Earnings In Pennsylvania Personal Injury Cases

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In a personal injury action, a plaintiff is ordinarily entitled to recover lost wages, past and future. But complications may arise when the plaintiff is an undocumented worker. In such a situation, defense counsel typically seeks to introduce the worker's immigration status, ostensibly to mitigate damages for lost earnings.

The argument for admitting such evidence is that a worker's undocumented status is relevant to the question of whether their earning capacity should be measured at United States wage levels as opposed to the wage levels of their country of origin. Given this risk of admissibility, and the prejudicial impact that undocumented status may have on the jury (and the plaintiff's ability to remain in the U.S.), plaintiffs' attorneys may forego raising claims of earnings loss when their client is an undocumented worker.

Perhaps due in part to the reluctance of plaintiffs' attorneys to raise such claims and put their undocumented clients at risk, Pennsylvania appellate courts have never squarely addressed questions involving an undocumented worker's ability to recover wage loss in a civil tort action and the admissibility of the plaintiff's immigration status. However, case law from other jurisdictions and a recent addition to the Pennsylvania Rules of Evidence provide guidance to how Pennsylvania litigators should approach this issue.

Federal Immigration Law Preemption

First, it must be noted that undocumented workers have a right to bring a claim for economic damages. *See, e.g.*, *Hagl v. Jacob Stern & Sons, Inc.*, 396 F. Supp. 779, 784 (E.D. Pa. 1975) ("[E]very 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."). In other states, defendants have argued the Immigration Reform and Control Act of 1986, or IRCA (making it unlawful for employers to knowing hire undocumented workers and for undocumented workers to submit fraudulent documents to secure employment) and the U.S. Supreme Court's decision in *Hoffman Plastic Compounds, Inc. v. N.L.R.B.*, 535 U.S. 137 (2002) (holding that the IRCA prohibits the NLRB from awarding backpay to undocumented workers not legally authorized to work in the U.S.) prohibit undocumented workers from recovering wage loss in state tort actions based on their immigration status. Courts have overwhelmingly rejected this argument. *See, e.g.*, *Escamilla v. Shiel Sexton Co.*, 73 N.E.3d 663, 667-68 (Ind. 2017); *Ayala v. Lee*, 81 A.3d 584, 595-56 (Md. App. 2013) (collecting cases); *Grocers Supply, Inc. v. Cabello*, 390 S.W.3d 707, 723-24 (Tex. App. 2012). As the Indiana Supreme Court has noted, *Hoffman* "is a narrow decision that does not touch on state common law." *Escamilla*, 73 N.E.3d at 668 (citation omitted).

New York's high court has opined that prohibiting undocumented workers from raising such claims would *frustrate* the aims of federal immigration law: "An absolute bar to recovery of lost wages by an undocumented worker would lessen the unscrupulous employer's potential liability to its alien workers and make it more financially attractive to hire undocumented aliens." *Balbuena v. IDR Realty LLC*, 845 N.E.2d 1246, 1257 (N.Y. 2006). In a similar vein, the Virginia Supreme Court has noted, in rejecting the argument that permitting recovery for wage loss would further incentivize undocumented workers to seek unlawful employment, that "[o]rdinarily, a person seeks a job because he needs to earn a living, not because he wants to become legally eligible to recover wage losses occasioned by tortious injury." *Peterson v. Neme*, 281 S.E.2d 869, 872 (Va. 1981).

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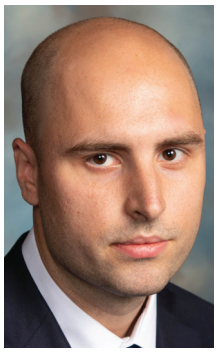

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A minority of courts have held that an undocumented worker is generally excluded *per se* from recovering damages based on loss of future United States earnings. *See Hernandez-Cortez v. Hernandez*, No. 01-1241, 2003 WL 22519678, at *7 (D. Kan. Nov. 4, 2003); *Wielgus v. Ryobi Techs., Inc.*, 875 F. Supp. 2d 854, 862 (N.D. Ill. 2012) (predicting Illinois law); *see also Rosa Partners in Progress, Inc.*, 868 A.2d 994, 1002 (N.H. 2005) (adopting a qualified bar on recovery of United States wages with an exception where a defendant hired an undocumented plaintiff and knew or should have known of the plaintiff's undocumented status). By contrast, in *Ayala*, the Maryland Court of Appeals rejected any *per se* rule, explaining that "a blanket rule prohibiting United States earnings improperly ignores the reality of a plaintiff's living situation, regardless of his or her legal status." 81 A.3d at 598 n.19.

While Pennsylvania appellate courts have not yet faced this question of federal immigration law preemption

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with respect to a civil tort action for earnings loss, the U.S. District Court for the Middle District of Pennsylvania predicted in *Berdejo v. Exclusive Builders, Inc.*, "that the Pennsylvania Supreme Court would not preclude [the undocumented plaintiff's] claims for lost earnings as a matter of law." 865 F. Supp. 2d 617, 625 (M.D. Pa. 2011). In reaching this proposition, the Court relied upon *Reinforced Earth Co. v. W.C.A.B. (Astudillo)*, 810 A.2d 99 (Pa. 2002), in which the Pennsylvania Supreme Court upheld an award of workers' compensation benefits to an undocumented worker.

Admissibility

The next issue is whether an undocumented worker's immigration status is admissible evidence in cases where future earnings loss is claimed. Courts have long recognized that immigration status is irrelevant to liability. *See Hagl*, 396 F. Supp. at 784; *Melendres v. Soles*, 306 N.W.2d 399, 402 (Mich. App. 1981); *Escamilla*, 73 N.E.3d at 669.

While some courts have found that a plaintiff's unauthorized immigration status is entirely irrelevant to their decreased earning capacity, most have found it relevant, but that does not mean admissible. *Escamilla*, 73 N.E.3d at 669 (collecting cases). As the *Ayala* Court explained, "[i]mmigration status is relevant to a claim for lost wages for the simple reason that the legal ability to work affects the likelihood of future earnings in the United States." 81 A.3d at 597 (collecting cases). With respect to the introduction of immigration status for the purpose of mitigating damages, courts generally employ a Rule 403 balancing test to determine admissibility—weighing the probative value against, amongst other considerations, the risk of unfair prejudice. *See Escamilla*, 73 N.E.3d at 669.

The only court to hold that a plaintiff's undocumented status was admissible after undertaking a Rule 403 balancing test was the New Hampshire Supreme Court in *Rosa*, 868 A.2d at 1002. However, the *Rosa* Court's holding was predicated on its acceptance of a qualified *per se* rule prohibiting recovery at U.S. wage levels unless the defendant employed the worker and knew or should have known about their undocumented status. *Id.* Accordingly, the Court concluded that evidence of immigration status "is essential should an illegal alien wish to pursue a claim for lost earning capacity measured at United States wage levels." *Id.*

In jurisdictions that have not adopted a *per se* rule, courts have concluded that a plaintiff's unlawful immigration status, standing alone, has low probative value. Courts have reached this conclusion by reasoning that, although immigration status may have bearing on the calculation of future earnings should the plaintiff be subject to deportation, "[t]he fact that a plaintiff is deportable does not mean that deportation will actually occur." *Klapa v. O & Y Liberty Plaza Co.*, 645 N.Y.S.2d 281, 282 (Sup. Ct. 1996); *Ayala*, 81 A.3d at 597 ("[T]he majority of courts that have considered the issue have held that the mere chance of deportation is not a sufficient basis for the introduction of immigration-related evidence."). As the Texas Court of Appeals explained, "Without a showing that a plaintiff will likely be deported in his working lifetime, the jury is invited to engage in conjecture and speculation regarding whether he will be deported, when he will be deported, and, if deported, whether he will return to the United States to work." *Republic Waste Servs., Ltd. v. Martinez*, 335 S.W.3d 401, 409 (Tex. App. 2011) (internal citation omitted).

In *Salas v. Hi-Tech Erectors*, the Washington Supreme Court held that the trial court abused its discretion by admitting evidence of the undocumented plaintiff's immigration status where the plaintiff sought damages for future lost income. 230 P.3d 583, 587 (Wash. 2010) (en banc). The Court first held that the plaintiff's immigration status was "relevant to the issue of lost future earnings." *Id.* at 586. The Court explained that whether the plaintiff will sell his labor in the U.S. labor market is a "consequential fact" with respect to future earning power, and the fact that the plaintiff did not legally reside in the U.S. increased the risk by "a minimal amount" that he would not sell his labor in the U.S. *Id.* Recognizing that "[t]he relevance requirement is not a high hurdle," the Court noted that "minimal relevance" was sufficient to meet the relevance standard. *Id.* at 585–86.

However, the Washington Supreme Court next held that "with regard to lost future earnings, the probative value of a plaintiff's undocumented status, by itself, is substantially outweighed by the danger of unfair prejudice." *Id.* at 587. The Court explained that "immigration is a politically sensitive issue" which "can inspire passionate responses that carry a significant danger of interfering with the fact finder's duty to engage in reasoned deliberation." *Id.* at 586. Accordingly, the Court concluded that "[i]n light of the low probative value of immigration status with regard to lost future earnings, the risk of unfair prejudice brought about by the admission of a plaintiff's immigration status is too great." *Id.* at 586–87; *see also Escamilla*, 73 N.E.3d at 670 (noting that allowing evidence of the plaintiff's immigration status has "some risk of unfair prejudice" and "a high risk of confusing the issues"). The Washington decision is particularly noteworthy for Pennsylvania practitioners because Pennsylvania's Rule of Evidence 413, discussed below, is based on Washington's.

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Rule 413

In 2018, Washington adopted a new rule of evidence, providing, in relevant part, that in a civil case, "evidence of a party's or a witness's immigration status shall not be admissible unless immigration status is an essential fact to prove an element of a party's cause of action." Wash. R. Evid. 413(b). The rule provided exceptions, permitting the introduction of such evidence through a posttrial motion in circumstances "[w]here a party who is subject to a final order of removal in immigration proceedings was awarded damages for future lost earnings," or "[w]here a party was awarded reinstatement to employment." *Id.* 413(b)(1)(A)-(B). The rule specified, "Whenever a party seeks to use or introduce immigration status evidence, the court shall conduct an in camera review of such evidence." *Id.* 413(b)(2).

In 2021, Pennsylvania adopted a substantially similar rule based off Washington's. Under Pa. R. Evid. 413, "In any civil matter, evidence of a party's or a witness's immigration status shall not be admissible unless immigration status is an essential fact to prove an element of, or a defense to, the action, or to show bias or prejudice of a witness pursuant to Rule 607." Pa. R. Evid. 413(b). For evidence falling within these categories, the proponent must "file under seal and serve a written pretrial motion containing an offer of proof of the relevancy of the proposed evidence supported by an affidavit." *Id.* 413(c)(1). After this, the court must hold an in camera hearing if it finds that the offer of proof is sufficient, wherein the court may admit the evidence "if it finds the evidence is reliable and relevant, and that its probative value outweighs the prejudicial nature of evidence of immigration status." *Id.* 413(c)(2)-(3).

The comment to Pennsylvania's Rule 413 notes, "The rule is modeled, in part, after Washington Rule of Evidence 413." Pa. R. Evid. 413, cmt. The comment further explains that "the introduction of immigration status has received heighted consideration in terms of relevancy and prejudice," and that "[t]his rule is intended to limit the admissibility of evidence of immigration status for purposes other than those stated in the rule." *Id.* Further, litigants may invoke Rule 413(b) as a basis for limiting discovery about immigration status via a protective order. *See id.*; *In re Order Approving The Adoption of Pa. Rule of Evidence 413*, No. 878 (Pa. Aug. 11, 2021).

Thus far, there are no reported decisions in Pennsylvania concerning Rule 413. However, one can reasonably anticipate the arguments that will be raised by plaintiff and defense lawyers with respect to the rule's application to claims for future lost earnings. Plaintiff's counsel will argue that, under the plain text of the rule, a plaintiff's immigration status is categorically prohibited from being admitted.

The argument here is that, in the typical personal injury case, an undocumented worker's immigration status is not an essential fact to prove an element of or a defense to the action. Rather, the plaintiff's status is only a potentially relevant factor in one element of damages. Plaintiff's counsel will further note that Washington's Rule 413, in providing for a distinct posttrial procedure for the introduction of evidence of a pending deportation order after the award of future lost earnings, clearly considers evidence related to the determination of damages as falling outside "an essential fact to prove an element of a party's cause of action."

Conversely, defense counsel will argue for a broader reading of the rule that would include evidence relevant to the determination of damages within the meaning of "an essential fact to prove . . . a defense to[] the action." However, even if courts were to accept defense counsel's position, counsel must still seek pretrial approval — and the evidence would still be subject to the court's determination of whether the evidence is reliable, relevant, and its probative value outweighs its prejudicial nature. As shown above, when such an analysis has been undertaken in other states, the prejudicial value is seen as high, and the probative value is diminished by the speculative nature of a future deportation. The plaintiff's counsel will argue, with strong support from other jurisdictions, that such evidence cannot be admissible absent evidence of the initiation of a deportation proceeding.

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