

I. DEFENDANTS SHOULD BE PRECLUDED FROM MAKING ANY REFERENCE TO PLAINTIFF AS “AN ILLEGAL ALIEN,” “ILLEGAL IMMIGRANT” OR OTHERWISE MAKING ANY STATED OR IMPLIED REFERENCES TO HIS NATIONAL ORIGIN OR IMMIGRATION STATUS

Any reference to the immigration status or nation of origin of plaintiff Rolando Fernandes, whether stated or implied, should be barred, as it is not relevant to the matter before the court, and its probative value would otherwise be outweighed by the prejudice that would face the plaintiff if the jury were to hear same. Undocumented workers have the same constitutional right of access to our courts to bring a tort injury claim and receive a fair trial as anyone else, and that right should not be diminished by poisoning a jury with “illegal alien” evidence meant to inflame xenophobic passions. *Plyler v. Doe*, 457 U.S. 202, 211 (1982); *Montoya v. Gateway Ins. Co.*, 168 N.J. Super. 100, 103–04 (App. Div.1979) (“[I]llegal aliens have rights of access to the courts and are eligible to sue therein to enforce contracts and redress civil wrongs such as negligently inflicted personal injuries.”).

A decision that the New Jersey Appellate Division handed down in May 2009, *Serrano v. Underground Utilities Corp.*, 407 N.J. Super. 253 (App. Div. 2009), discussed and underscored the problems of a defendant delving into a plaintiff’s immigration status and nation of origin solely to explore issues of the plaintiff’s credibility. *Serrano*, which pertained to immigration status inquiries in discovery, was a case of first impression in New Jersey. The Court warned that such probing “of litigants who happen to be immigrants” could cause a “chilling effect” on people “attempt[ing] to vindicate their legal interests in the courts of our nation.” *Serrano*, 407 N.J. Super. at 272. Furthermore, the Court cautioned against unearthing a plaintiff’s immigration status because it would likely prejudice jurors:

Apart from these widely recognized concerns about the potential intimidation of

litigants who may be undocumented workers, we also must be cognizant of the risks of undue prejudice if their illegal immigration status is disclosed to a jury at the time of trial. . . . Their illegal status in this country is very likely to trigger negative sentiments in the minds of some jurors.

Id. at 274. *Serrano* considered these factors and dispelled the argument that defendants have carte blanche to explore and exploit a plaintiff's immigration status, even at the discovery stage:

[W]e categorically reject defendants' position that the discovery of any immigration-related information that bears upon plaintiffs' credibility is, as a per se matter, fair game. Such an unlimited approach deficiently ignores the adverse potential chilling effect upon immigrant workers that we have already described, and the potential for inflammatory prejudice at the time of trial.

Serrano, 407 N.J. Super. at 280.

Serrano held that defendants could not ask about a plaintiff's legal status as a United States citizen, resident, or occupant. *Id.* at 283. The Court condemned defendants' questioning of whether plaintiffs were legal residents or citizens of the United States and whether plaintiffs were present in the United States lawfully:

[W]e are convinced that [those questions] are patently too far afield and too prone to cause intimidation to warrant exploration by defense counsel.

Id. There can be no doubt that *Serrano* prohibited the discovery of information related to a plaintiff's immigration status. Accordingly, admitting same at trial through references and remarks is not even a close question since allowing jurors to hear immigration status information would have a greater chilling effect on a people's ability to access our courts and vindicate their legal rights. *Serrano* effectively extinguishes the type of intimidating and divisive tactics that the defendants are using to bias the jury in this case.

New Jersey Rule of Evidence 402 provides "all relevant evidence is admissible." However, issues of national origin and/or immigration status are irrelevant to the issues of liability and

damages that will be addressed in this construction site OSHA safety violation case. The Rules define “relevance” as “a tendency in reason to prove or disprove any fact of consequence to the determination of the action.” *N.J.R.E.* 401. Where one was born or whether one is a United States citizen has nothing to do with determining who was liable for causing this construction accident. Nor is national origin or immigration status relevant to demonstrate that plaintiff sustained injuries in this accident; plaintiff’s need for medical treatment and his right thereto do not derive from or depend upon his national origin and/or immigration status. *See Mendoza v. Monmouth Recycling Corp.*, 288 N.J. Super. 240, 247 (1996). As such, any evidence concerning plaintiff’s national origin and/or immigration status is irrelevant and should not be permitted under *N.J.R.E.* 402.

The *Serrano* Court noted that relevancy in the discovery and admissibility contexts are congruent. *Serrano*, 407 N.J. Super. at 268. The Court barred as irrelevant or unduly prejudicial questions about plaintiffs’ immigration status. *Id.* at 283. The Court also barred inquiries related to certain immigration documents including a green card, social security card, W-4 Form, and an I-9 Form. *Id.* at 283. *Serrano* noted that other jurisdictions have found “immigration-related discovery requests in civil litigation to be irrelevant and unduly prejudicial.” *Serrano*, 407 N.J. Super. at 272. In doing so, *Serrano* cited with approval several cases in which courts in other jurisdictions found analogous discovery requests irrelevant. *Id.* at 273. The Court cited to no case in which a court found such a request relevant. *See id.* *Serrano* specifically stated that any inquiry into a plaintiff’s residence after litigation has begun was irrelevant. *Id.* at 284.

Nevertheless, even if the Court were to find such evidence relevant, it should be barred under *N.J.R.E.* 403. New Jersey Rule of Evidence 403 provides in pertinent part that “relevant evidence may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice,

confusion of issues, or misleading the jury[.]” A “trial court is granted broad discretion in determining both the relevance of the evidence to be presented and whether its probative value is substantially outweighed by its prejudicial nature.” *Green v. New Jersey Mfrs. Ins. Co.*, 160 N.J. Super. 480, 492 (1999). *Serrano* cited *Green* as an example of undue prejudice substantially outweighing probative value; in *Green*, while proof that the plaintiff was racist was relevant, it would have “unduly antagonize[d] jurors.” *Serrano*, 407 N.J. Super. at 275 (quoting *Green*, 160 N.J. Super. at 501). As observed by the Appellate Division in *State v. Medina*, 201 N.J. Super. 565 (App. Div. 1985), “the more attenuated and the less probative the evidence, the more appropriate it is for a judge to exclude it. . . .” *Id.* at 580. Thus, even if the Plaintiff’s immigration status is relevant, it is attenuated and almost certain to bias jurors.

Serrano looked beyond discovery inquiries of plaintiffs’ immigration status and worried about misleading the jury at trial; the Court also took into account a Rule 403 objection if such information were deemed relevant:

[W]e also must be cognizant of the risks of undue prejudice if [plaintiffs’] illegal immigration status is disclosed to a jury at the time of trial. . . . We anticipate that plaintiffs’ counsel at trial would argue that such undue prejudice would be unavoidable if the jurors learned that any of the plaintiffs were illegal immigrant workers. Their illegal status in this country is very likely to trigger negative sentiments in the minds of some jurors.

Serrano, 407 N.J. Super. at 274. The prejudicial nature of testimony regarding a party’s immigration status or nation of origin clearly outweighs its probative value. *See, e.g., State v. Anderson*, 2006 WL 1911586, at *2 (N.J. Super A.D. 2006). In *Serrano*, the Court barred as either irrelevant or unduly prejudicial requests relating to the plaintiffs’ legal status in the country.¹ *Serrano*, 407 N.J.

¹ The Court also found either irrelevant or unduly prejudicial inquiries related to the plaintiffs’ residence beyond what the plaintiffs provided in the initial pleading; to the residences and places of employment of the

Super. at 283.

Given that *Serrano* denied inquiries into such matters during discovery, and based on the court's contemplation of prejudice under Rule 403, this Court should similarly preclude defense counsel from referring to Plaintiff's immigration status at trial. In the present matter, plaintiff was born in Portugal. Plaintiff is not a citizen of the United States of America. These matters are wholly unrelated to the issues of liability and damages that will be presented to the jury and the court. As such, any reference to plaintiff's immigration status or nation of origin should not be presented to the jury and court since its probative value is substantially outweighed by the risk of undue prejudice, confusion of issues, or misleading the jury.

There is no dispute that immigration issues are at the forefront of the political spectrum in the United States and New Jersey. As noted in *Serrano*, one study showed that New Jersey is home to approximately 550,000 undocumented immigrants. *Serrano*, 407 N.J. Super. at 269 n.5. More and more New Jersey municipalities have passed or are attempting to pass ordinances aimed at preventing immigrant workers from residing or working in their towns. In particular, these immigration issues are of specific concern in our political climate and daily debate. Of note, there is daily, if not constant, reporting on foreign nationals immigrating to the United States, with stories pro and con of this reality. There are daily stories about organizations like the Minutemen militia attempting to prevent border crossings of foreign nationals from Mexico into the United States with the use of firearms and the like. Without question, the renewed campaign against immigration into the United States has been strongly influenced by concerns over national security secondary to the

plaintiffs' family members; and to the green card, social security card, W-4 Form, and I-9 Form of plaintiffs who had not already provided their employer with same. *Serrano*, 407 N.J. at 283.

attacks of September 11, 2001.

Serrano touched on these kinds of public policy considerations. Particularly, the Court agreed with the United States District Court for the Eastern District of New York that including undocumented immigrants among the workers covered by the Fair Labor Standards Act likely furthers federal initiatives, like the Immigration Reform and Control Act of 1986 (“IRCA”), to curb the proliferation of undocumented immigrants.² *Serrano*, 407 N.J. Super. at 271–72 (citing *Flores v. Amigon*, 233 F.Supp. 2d 462, 464 (E.D.N.Y. 2002)). *Serrano* explained that it was similarly arguable that including undocumented workers among those covered by New Jersey’s Prevailing Wage Act furthers the goals of the IRCA. Thus, not only do such policy concerns miss the mark, *Serrano* exposes that these arguments are vulnerable on their merits; they should in no way be used to circumvent the law that protects the rights of all people, even immigrants, to redress their employment-related grievances in our courts of law.

As such, any reference to plaintiff’s Portuguese heritage or present immigration status has the likelihood of distracting the jury from the very clear issues of liability and damages in this construction accident OSHA safety violation case. National origin and/or immigration status is irrelevant to the present dispute and would not assist the jury in evaluating liability and damages in

² The IRCA specifically focuses on employers and employer conduct as the means to control immigration; it does not target immigrant-employees. When New Jersey courts have discussed the IRCA they have found that allowing employers to escape liability from workplace litigation based on an employee’s immigration status creates the perverse incentive for employers to continue to hire undocumented workers. *See, e.g., Mendoza v. Monmouth Recycling Corp.*, 288 N.J. Super. 240, 247 (1996):

We also regard the desideratum of workplace safety enhanced by according workers’ compensation benefits to an illegal alien since an employer’s immunity from payment of compensation to that class of employees might well provide a disincentive to assuring workplace safety. Moreover, such an immunity from accountability might well have the further undesirable effect of encouraging employers to hire illegal aliens in contravention of the provisions and policies of the Immigration Reform and Control Act.

this case.

For the foregoing reasons, defendants should not be permitted to attempt to inflame and sour the jury with irrelevant and prejudicial information regarding Mr. Fernandes' immigration status.

Keefe Bartels Clark
Attorneys for Plaintiff Rolando Fernandes

By: _____
GERALD H. CLARK

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