



**February 26, 2006**

## **COURT DECLINES TO BAR ILLEGAL ALIENS FROM RECOVERING LOST WAGES**

*(Balbuena v. IDR Realty LLC)*

The New York Court of Appeals (that State's highest court) this week declined to bar illegal aliens who are plaintiffs in personal injury lawsuits from recovering wages lost as a result of their injuries.

The decision was a setback for the Washington Legal Foundation (WLF), which filed a brief filed in the case, *Balbuena v. IDR Realty LLC*, urging that such damages be barred. WLF argued that awarding illegal aliens the wages they would have earned if they had not been injured would be inequitable because it would have been illegal for them to actually earn those wages by taking a job in this country. WLF argued that such awards are preempted by federal law because they undermine federal immigration policy by encouraging more illegal aliens to enter the country.

WLF's brief was drafted with the pro bono assistance of Timothy R. Capowski, Steven J. Ahmuty, and Christopher Simone, lawyers with the firm of Shaub, Ahmuty, Citrin & Spratt, LLP in Lake Success, New York.

This personal injury tort suit was filed by Gorgonio Balbuena, an illegal alien who was severely injured while working for Taman Management Corp. Balbuena alleges that his injuries were caused by Taman's negligence. Because Taman no longer exists, Balbuena filed suit against (among others) IDR Realty LLC, which owns the property where the injury occurred. Balbuena's right to recover for his injuries and medical expenses was not challenged; but Balbuena also claimed that he was entitled to recover the wages he could have earned in this country had he not been injured.

The intermediate appellate court held that Balbuena was not entitled to recover lost wages at the salary he would have earned had he continued to work for Taman. But the court held that he should be able to recover lost wages based on the average wages a similarly skilled worker earns in his native Mexico. Both sides appealed from that decision.

The New York Court of Appeals sided with Balbuena, holding not only that he was entitled to recover lost wages, but that such recovery should be based on prevailing American wage rates. WLF has pledged to support further appeals in the case, should the defendants seek review in the U.S. Supreme Court.

In its brief, WLF argued that federal law prohibits New York from awarding lost-wage damages to illegal aliens. WLF argued that any such award would undermine federal immigration policy by encouraging illegal immigrants to seek employment; WLF noted that the U.S. Supreme Court endorsed that very policy argument in *Hoffman Plastic Compounds, Inc. v. NLRB*. The Court of Appeals rejected that position, contending that it would encourage employers to reap the economic benefits of hiring illegal aliens.

WLF also argued that awarding lost-wage damages would not serve as a deterrent to employers who hire illegal immigrants. WLF stated that when an illegal immigrant is injured while on the job, it is rarely the employer who ends up paying the costs of that injury. Rather, those costs are usually paid by others – such as a property owner, a product manufacturer, or an insurance company – that played no role in the decision to hire the illegal alien. WLF noted that in this case, Balbuena’s employer has long since gone out of business, so none of the defendants had any role in the decision to hire an illegal alien. The Court of Appeals responded that even if defendants are not to blame for the hiring of illegal aliens, New York law nonetheless assigns responsibility to landowners for activities occurring on their property.

WLF’s brief also criticized the lower court’s compromise solution – allow recover of lost wages, but only at Mexico’s lower prevailing wage rates. WLF argued that such a system would be impossible to administer. WLF stated that it would be virtually impossible for American courts to gather competent evidence regarding the types of wages the plaintiff could have expected to earn if he had returned to his home country (rather than remaining in the U.S., as he did despite his status as an illegal alien) and if he had not been injured.

WLF is a public interest law and policy center with supporters in all 50 States, including many in New York. WLF devotes a significant portion of its resources to tort reform efforts and to ensuring the integrity of the American immigration system.

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For further information, contact WLF Chief Counsel Richard Samp, 202-588-0302. A copy of WLF’s brief is posted on its web site, [www.wlf.org](http://www.wlf.org).