ORAL ARGUMENT – 01/06/05
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HYUNDAI V. VASQUEZ, ET AL.

KELTNER: We have a very serious disagreement in this case. And as you know, it involves voir dire. Both sides think jury selection is incredibly important for the jury process. And also it is important to pick a non-biased and non-prejudiced jury. We differ though tremendously on how to get that done. The plaintiffs believe in this case that they are entitled to preview operative facts before a jury panel, facts that will be introduced into evidence, facts that the jury would have to consider to answer what the court's charge would be. Some of these facts might even be dispositive of at least two of the questions asked the jury: both liability and causation. They believe that they can preview those facts and under the guys of asking about bias...

O'NEILL: You say facts. Isn't the only fact we're dealing with is the non-seatbelt use?

KELTNER: Yes.

O'NEILL: So really it's just the one fact. Looking at the Standaford(?) case, do you think there's any reason for our jurisprudence to be different?

KELTNER: Yes. We do. I think the court has an opportunity here to redefine what a commitment question is. And equally as important to deal with situations in which potential jurors are invited to give their initial reactions to weighing of the evidence prior to the time they are selected as jurors.

O'NEILL: In Standaford(?) they seem to say that it would be okay to say, Are you biased against nuns? Would you say that's proper?

KELTNER: Actually in Barahass(?) the CCA reversed that decision, and that would no longer be an appropriate question according to the CCA.

O'NEILL: I thought that question was appropriate: Are you biased against nuns?

KELTNER: I'm sorry. You are right about that. Are you biased against nuns would be an appropriate question according to the CCA.

O'NEILL: So what if you said, Are you biased against non-seatbelt users? Is that appropriate?

KELTNER: It could very well be, and that could have been a question that could have been asked here.

O'NEILL: And here's the question: would the jurors be predisposed if there is no seatbelt use? How is that different from would you be biased against a non-seatbelt user?

KELTNER: I think the issue always is going to be a difference between operative facts that the jury is going to be called upon to weigh. As the CCA said, both in Barahass(?) and Standaford(?) in reviewing their previous ____ decision, the issue about the victim being a nun was not an operative fact that would drive the court's decision. The fact of whom the victim is is not an element or goes to any element of the case that the jury would have to decide. Seatbelt use is different because it is an operative fact that would drive a defensive theory of the defendants and would drive causation.

O'NEILL: So are you saying then if the victim was a nun, that asking if you're biased against nuns would be improper?

KELTNER: No. What I'm saying is, if you were a nun and the big issue was - and let's say the defendant was a nun or the victim was a nun. I think that would be an appropriate question. Yes.

O'NEILL: An appropriate or inappropriate?

KELTNER: A appropriate question.

O'NEILL: But again I'm not sure I understand the distinction between saying are you biased against non-seatbelt users.

KELTNER: Again, I think that that might very well be an appropriate question. I think it is not appropriate to say what the plaintiffs attempted to do in this case is young Amber was in the front seat, unbuckled. Is that going to be something that will drive your decision.

O'NEILL: That's not the way I read the question that they seem to want to posit. And that was, is there a preconceived notion that if there is no seatbelt use you couldn't be fair?

KELTNER: Well that is the question I think we have a problem with the issue of what question was asked.

O'NEILL: But don't we have to know that before we can answer this?

KELTNER: Yes. To some extent. But I ask this question to you. That was not important to the San Antonio CA. Generally we don't see reversals of TC's rulings on voir dire without knowing the precise question that was going to be asked. And we have that issue here. I don't blame the plaintiffs for this in one respect because of the way it arose. But nonetheless I think that there's no doubt on the initial panel the question was different. The question that was actually asked to the jurors is, Do you have a preconceived notion, and is it something that once you hear that

evidence the whole matter for you is over as the plaintiffs put it? Now if that's the case, what we are asking the jury to do is give an initial opinion on what their view of the evidence is. And then do what the plaintiffs did here: attempt to strike the juror for cause. And that, I think, is in appropriate. Why could you strike a juror for performing the very task the juror is going to be required to do in answering the court's charge.

BRISTER: So it was the defendant's theory of the case at least in part that if a child doesn't wear a seatbelt in the front seat your damages are worse are entirely due to that fact rather than the airbag?

KELTNER: Yes. Let me say that it went to really more questions than that. And the plaintiffs do not disagree with this. It went to 1) the liability question; and 2) it went to the causation question. I think the plaintiffs at least in their briefing tell you that the reason they believe this is okay is the Babcock decision. As the court knows this is a decision that was written in 1989. Interestingly this court has not had an opportunity to look at commitment questions or questions where evidence is invited to be weighed in over 20 years. Ledford was a different kind of case that reached the court back in the late 90's. But the real truth of the matter is, in their reliance on Babcock they read it very broadly. I know the court remembers the facts in Babcock. That was a case tried right around the 1987 legislative session in which tort reform was first brought up. J. Mauzy in his opinion takes judicial notice that there is a controversy in the state that no one could escape lots of ads on airwaves. In fact he points out that one of the jurors had read some of the advertisements or listened to it on TV. And had the fear that if he voted in favor of the plaintiff, that insurance premiums might be increased. And said that exactly.

Now J. Mauzy decided this case under Gov't Code 62.105 provision 2. And he says directly, that this was a question about whether the jurors had an indirect or direct interest in the case. And based on that he said it was error of the TC to refuse to allow further questions of the jury panel on that.

The interesting thing there, I think, is that it dealt with outside societal influences. That case had nothing to do with the operative facts and the juror's reactions to them. And I think those are different things.

BRISTER: Suppose we have a divided society where half of the people think there is way too many lawsuits and verdicts way too big, and the other half think that people are getting killed and they are not getting compensated. And so everybody has a strong feeling. It's all from outside. Is it your theory we can't have a jury in that case at all, or is it your theory that we should only have a jury made up of those handful of people who are so oblivious to current affairs they have no opinion about this?

KELTNER: First, we obviously don't - all people that are going to serve are going to have some vices and prejudices. As this court said in Cotton v. Henry, the issue about whether there is bias is one thing. Whether it is bias that gets rid of someone is something else where you become

impartial, where there's a subjective feeling of impartiality. The theory I think is, you can't have any direct or indirect interest. You can't have a feeling - my mother, God rest her soul, truly believed that people ought never to sue for anything. Mom would not have been a great juror and may not have been an appropriate juror in many of those cases.

It often comes down to a question of degree of how far things will go? The one thing though is, I don't think Babcock answers the questions raised in this case. And I don't because Babcock didn't deal with operative facts. There was no opportunity to find out what the juror was thinking. And then decide what to do based on that.

BRISTER: Our sister court has a disagreement among the judges about whether you just can't ask those questions that seek a commitment, or whether it's okay to ask the question but a judge can't strike them for cause because of their answer. What's your position on that?

KELTNER: I first think that it would be always improper to strike for cause based on a juror's initial evaluation of the evidence. That issue is not truly raised in this case but it is one the court ought to address in that regard. The second things is, I think under some circumstances you ought to be able to ask some type of commitment questions. I think the Standaford(?) line of cases indicates well what you ought to do in that regard. I think the CCA has thought this out fairly well in a commitment question dealing again with the operative facts of the case, and that's what we're dealing with here.

O'NEILL: You're always dealing with operative facts in the case. What you're trying to get out is prejudice that might view those facts based on something other than those facts. So if for example, let's say you had a product liability case, and the driver was alleged to be drunk. But it doesn't matter because the car exploded, because of some fuel line defect. How would you fair it out - prejudice against drunk drivers? You would have to ask, Do you have a prejudice against drunk drivers that would cause you to ignore any other evidence presented in the case?

KELTNER: You raise an interesting point. Here's how I think the court can address that and the guidelines that you could set. I think on one hand it is very appropriate to ask that kind of question. But let's apply it another way and it shows you a different result that I think should be impermissible, and I believe under Texas case law is. And that would be, my client had 10 beers in the hour before the accident. Are you going to hold that against him, or can you listen to all of the evidence?

O'NEILL: You're arguing nuances here, but you preface it with we don't know the question that we're talking about. So I'm struggling with that concept. It sounds to me as though the question they claimed that was presented, you wouldn't have any problem with if in fact that was the question that was presented.

KELTNER: In one respect yes. This is the difficult part of this record. Remember in the 1st CA's opinion, the court said they could have asked the question you posited. The question was,

If you don't buckle seatbelts do you have a bias against people who don't? You know, that's an interesting question. Does bias get it? Is bias and prejudice something a jury understands? Thomas Jefferson is biased in favor of jury trials. Was he prejudiced in favor of jury trials? I think that's an unfair characterization. I think that when we are dealing with jurors and asking them the questions especially since the 2226(a) instructions are not given to the - I mean the ones that are really good about follow my instructions, listen to all the evidence, they are not given before voir dire selection. They are given only after the jury is impaneled. And I think that there can be a huge volume for error here.

Your initial question to me was one I don't think I quite answered. And that is this. Since we don't know precisely what the question is, how can you say there is error? My point. How can the CA reverse the TC's discretion. This judge on the record said, Listen, I think we have a problem here. I think we have a problem because, I think the jury is interpreting this as the weight they should give the evidence. That's what we ought to be given some discretion to. That's where I think we ought to be given the latitude.

WAINWRIGHT: If the plaintiff is addressing the panel during voir dire and says, This is a personal injury case, my client has been injured, they are in the hospital, suffered a lot, no permanent injuries. But is there anybody here who absolutely couldn't award millions of dollars if I prove my case? Do you think that's a proper question?

KELTNER: No.

WAINWRIGHT: What if the plaintiff's counsel asks, Is there anyone here based on those same brief facts who could never consider awarding millions of dollars if I prove my case? Different question or same question? The only difference is award verses consider awarding.

KELTNER: I think it is the same question asked more artfully. Just like the question is that J. Brister has written about: After what you've heard who are you for? Verses the question, Is your mind already made up? They are the same question just a difference in degree. And if we're going to deal with difference of degrees, we have to give the TC broad discretion. The court who is looking at the parties, making a determination of what's happening, seeing the impact of the jury panel, and just like this judge made a decision that she put on the record of what she thought was happening.

WAINWRIGHT: So which of my two questions is improper if either in your opinion?

KELTNER: Depending on the circumstances both.

WAINWRIGHT: Only the circumstances I gave.

KELTNER: I think it is less likely that the second one is improper. And that's a question that has been allowed in past cases. Interestingly, I couldn't find a case that absolutely blesses that

question.

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RESPONDENT

CADDELL: The question that we anticipated would be asked, the question that has been represented to us would be asked was the same question that J. Speedlin asked of the second voir dire panel. The first voir dire panel, Mr. Sedeo asked the question himself. It was rambling. And we disqualified of the panel, there were 48, and 29 out of 48 said, I can't listen to all of the evidence.

BRISTER: I mean the fact is, we want people to be biased against putting their 4-year old children in the front seat with no seatbelt. I mean it's illegal.

CADDELL: And I will get to that because there is no question that that is an important fact. In fact, someone wrote "impartiality is not the absence of initial impressions, but the willingness to keep an open mind." And that was J. Brister in his article on Wanted Uninformed Docile Jurors. So we're not here talking about whether seatbelt use or non-seatbelt use is important. We all concede it's important. We all concede that at the end of the day a juror might very well conclude that that fact was dispositive. What we're here about is, do the parties have the right to ask the jurors, the panel, if they can follow their oath. If they can follow the court's instructions and listen to all of the evidence. And this is the question that we thought would be asked. And this was the question that was asked to the second panel by J. Speedlin. First she had already told them that she would give them instructions and that one of the things they would have to do is they would have to listen to all of the evidence. "Remember, I said, you also had to decide this case based on all of the evidence that you hear in this case, not parts of the evidence or part facts, but every case has certain facts. This case for example, I anticipate that the facts you will hear in this case is that Amber was in that car and she was not wearing a seatbelt. Here's the question I have. Remember, once you are in that jury box you are going to swear to me and you are going to promise to me that you are going to wait to hear all of the evidence that comes in and you are going to follow the law that I give you before you return your verdict. Is there anyone sitting there among you that believes that one fact alone, that Amber was not wearing her seatbelt, that one fact alone would prevent you from following your oath? And that you would not decide this case on all of the evidence. If you believe you could not wait and listen to all of the evidence before you decide this case, please raise your hand based on that one fact alone."

Now that cannot be an improper instruction. Because it does not ask what weight you will give to it. It does not ask the jurors to commit that they will disregard that fact. It does not ask them to commit that they will consider it. It simply says can you follow your oath knowing that fact?

BRISTER: What part of the oath? Will you listen to all of the evidence? Of course under that theory that would mean that any judge that grants a summary judgment is biased. Because you're saying before a trial, before anybody gets on the stand as a matter of law you lose. The judge that grants that is not biased are you just because you don't listen to everything that might happen at a

trial.

CADDELL: I think you have put your finger right on the critical bright line here. If a fact is so dispositive that that fact relieves all of us from the obligation of listening to the rest of the evidence, then that is a summary judgment fact. And that case should never be presented to a jury. But once a case has survived summary judgment or the opportunity for summary judgment and it is presented to the jury, this court's rules of civil procedure 226(a)(2) says, It is your duty to listen to and consider the evidence. And the court has to instruct the jury, You will need to consider all of the evidence.

Now I go back to your article J. Brister where you say impartiality is not the absence of initial impressions, but the willingness to keep an open mind. And if we can't ask jurors in voir dire if they can keep an open mind regardless of one particular fact, then the right to a fair and impartial jury has become meaningless.

O'NEILL: We're trying to draw some lines here and everyone seems to agree that it's a pretty nuance question. What question are you complaining that you were not allowed to ask?

CADDELL: The question that J. Speedlin asked, Can you listen to all of the evidence? Because what happened in this case was, after she asked that question...

O'NEILL: But it's the preface to that that's important. It's not can you listen to all of the evidence. It's if I told you that she was standing up (and I understand that was disputed) would you be prejudiced against her? If I told you that the driver was piddling with the radio would that affect your decision? That's a pretty broad umbrella.

CADDELL: Let me tell the court that I don't like the use of the term prejudice or bias. And I've read the articles - I will note that the CCA in the Standaford decision does use the language fair and impartial. I think if you want a bright line, and it's ironic that we say we want smart jurors and informed jurors. But then to some extent this is a discussion of how ignorant we think jurors really are. Because we say well they don't understand what it means to be fair and impartial. If we condescend to jurors and say they don't understand what it means to be fair and impartial, then the bright line is, you ask them can you listen to all of the evidence before you make your decision?

O'NEILL: What do you preface that with?

CADDELL: I think you preface that with any fact.

O'NEILL: So you can go through your entire case and say if my client is struggling under cross-examination can you promise me you will be fair and impartial? That would be okay?

CADDELL: I think yes. Now I think you can take it to an extreme and taken to an extreme anything becomes ridiculous. At some point you have to cut things off.

O'NEILL: But you think laying out each fact and asking if you can still keep an open mind is appropriate?

CADDELL: I think laying out critical facts - let me give you an example. In this case, Hyundai's counsel at trial asked, You're going to find that the evidence is that an airbag deployed, and it caught a 4-1/2 old girl under her chin and snapped her neck back and killed her. Is there anyone among you who simply hearing that this involves the death of a 4-1/2 child cannot listen to all of the evidence and be fair and impartial? They asked that question. Is that a proper question? I say yes. Because they are entitled to a fair trial.

HECHT: But the reality of the phenomenon is, the more of those questions you ask the more jurors start saying, I'm for this; I'm not for that. And they start doing what they are supposed to do, which is decide the case. They are not going to be able to sit there like a law professor and say, Yes I can be fair. They are going to start emoting toward a decision it seems to me. As you tick though the facts, when both lawyers get to the end the jury is going to be ready to make up their minds at that point. As a technical matter you can. But you've pretty much made up your mind.

CADDELL: I've tried a lot of cases. I think it is a canard that most jurors make up their minds during voir dire. That simply is not true. I think J. Brister is right, that they often have initial impressions or initial reactions. And those may be strong. But I don't think that that means that you should not secure from them a commitment and be able to probe as to the authenticity - the validity of their commitment.

WAINWRIGHT: But the judge tried that. The lawyers tried it, then the judge tried it, and busted both panels. Why can't we let the judge say, In order to get this case tried, and we need to provide the trial judges with more guidance in this area. But trial judges need to have the discretion don't they to say, In order to get this case tried and get a jury that can do the job legally under Texas law, we're going to have to do something different here. I tried what you're suggesting by letting the lawyers try it, and I tried it by myself even explaining that. This is what the J. Speedlin is thinking I know, having set in her shoes many, many times. And then finally she had to do something else to get this case tried. Why not fall back on the judge's reasoned discretion in this case?

CADDELL: Expediency is no substitute for a fair and impartial jury.

WAINWRIGHT: What I'm suggesting is not that you extinguish justice in favor of expediency. It's that you don't ask the same question over and over and bust panel over and over and over and over again. She let you try your question and then she asked your question. And busted both panels.

CADDELL: And what happened was, we would not have busted the third panel. What happened was after the second panel was busted, we pointed out to the court - and I said to the court, Of course these issues are important. All of these issues are important. The question is not whether the prospective juror thinks its important. The question is whether the juror thinks it is so dispositive

that the juror will be unable to consider the rest of the important issues in the case, consider the evidence. So what we did was we said, Judge, if we had - we didn't disqualify everyone. We disqualified about ⅓ to ½ of the first two panels. What does that tell you? You need a bigger panel.

We only needed 26 jurors from which to make our selection. And so what we suggested was, get a bigger panel. And that's what J. Speedlin agreed to do and decided to do.

BRISTER: The more people we disqualify, the less representative the jury is going to be as far as a cross section of the community.

CADDELL: Well when you say that - let's say we're selecting a jury in the 1930's or 1940's in Texas, and the case involves a black man. Now let's say we're picking a jury today and the case involves a black man. Does that mean that if we disqualify half of the jurors because we say, Can you be fair and listen to all of the evidence if you know that the plaintiff or the defendant is black? And people will say no, I can't do that.

HECHT: I don't think we will get much disagreement here that any kind of external bias should be fully inquired about. So if the mere fact, which had nothing to do with the case, that someone is older or younger, or a particular gender or race, or lives in a particular place, has anything to do with the outcome of the case when logically it doesn't. And anybody that thinks that we would like to know about it. That would clearly be a disqualifying kind of thing. But when you get into the facts of the case that's where it gets harder it seems.

CADDELL: With all due respect virtually every fact has the potential to be an operative fact in the case.

OWEN: In federal court, in lots of jurisdictions, the lawyers don't get to ask any questions at all on voir dire. And you're basically asking us to say, if a judge did that in Texas, which they could do if they chose to do it, and you handed them this question and said you've got to ask this question. And if you don't, I'm going to get you reversed on appeal. That's basically what you are asking us to say, that you can dictate to a judge even who is doing the voir dire what questions have to be asked or not.

CADDELL: I'm asking this court to follow the law in Texas. I'm asking this court to apply the law of voir dire that has been the law in Texas for 100 years.

BRISTER: It's not the law in criminal cases. And here's my problem. We are one of two states that has two high courts. We can't tell them what the law of voir dire is. They can't tell us what the law of voir dire is. And I'm having trouble - theirs is clearly more restrictive than our. And I'm having trouble why lawyers should be more restricted when it's only your life and liberty that's at stake. But lawyers should be wide open in voir dire when we're talking about money.

CADDELL: Let's read from the Standaford decision. Of course many questions in voir

dire are not commitment questions, they are not covered by this opinion. For example, the question: If the victim is a nun could the prospective juror be fair and impartial? Does not ask the prospective juror to resolve or refrain from resolving any issue. The juror could be fair.

BRISTER: As Mr. Keltner pointed out, they changed that within 1 year and they said you can't ask whether it would make any difference, you would be unfair if the victim was a child. Because in a criminal case you can give a stiffer punishment if the victim is a child. It's something a reasonable juror can do and if it's a decision reasonable jurors can make on the facts. According to them you can't even ask the question. Where do you stand by the way on the issue of does it make a difference whether you can ask the question but the judge can't strike them for cause, or that you've got to have the right to do both?

CADDELL: First, you have to have the right to ask the question. I think that's fundamental. By the way I disagree with the interpretation of the Brahaus decision. I don't think that it makes that question about whether a nun is the victim: Could you be fair and impartial? I don't think it says that that question is not permissible in the CCA. I think that's a misreading of that opinion. And I actually believe that Mr. Keltner conceded that that is not an improper question even today under the CCA's decisions. The second question though is, I think you have to disqualify a juror who says, I'm not going to listen to all of the evidence.

MEDINA: That's substantially different if a juror makes that response. I think trial judges certainly do have broad discretion. During my time on the bench there was never a panel busted. And I don't know if that was because we had larger panels in cases like yours. Is that the answer to have larger panels and then face the problem that J. Brister stated, or is the answer as J. Owen may have talked about is just to eliminate voir dire and hand that to the judges as they do in the federal court because we give the judges discretion to be the gatekeepers of the evidence, which is as crucial as empaneling juries.

CADDELL: I think first to eliminate voir dire would be an outrageous act by this court.

MEDINA: Why?

CADDELL: I say that recognizing how that might offend some members of the court. But I think that would be such a break. I think voir dire is not only recognized by the courts in this state historically, but also the US SC has an integral part of jury selection. And you have to be able to identify people who say I will not listen to all of the evidence.

MEDINA: Why can't a judge do that?

CADDELL: The court asked the question to the second panel, the question that I have read. That was done without objection. The court does have broad discretion. The court in that instance took over the questioning as to that sensitive question. Asked that question herself without objection from plaintiff's counsel. And she structured it. We may have talked about how it was going to be

asked, but she wrote out the question herself and she asked it. And it was done without objection from plaintiff's counsel. What happened was, we did not have a big enough panel. Now there are some cases that by their very nature - medical malpractice cases are often the case where you will bust a panel, where you will disqualify so many jurors because it's doctors. And we are all familiar with tort reform and we're all familiar with the publicity about medical malpractice insurance and things like that. So in those cases it is customary to have a larger panel. What happened in this case was, we were told on Friday afternoon we could not get a pool, there was no pool on Friday. That we would have a third panel but we would have 72 instead of the 48 in the first panel or the 50 in the second panel. J. Speedlin was concerned about the herd mentality. And I think that is completely within her discretion.

So she said, instead of asking the seatbelt question to the entire panel, we will not ask the seatbelt question during the general questioning. And we will bring the jury in, we will do a general voir dire. I will give a general description of the case and then we will bring them in one at a time and I will ask. And what she said specifically was, I will go through very similar to the spill I went through with our second panel and ask them the sympathy question. The sympathy question was, It's a 4-1/2 year old little girl; can you put aside that sympathy and listen to all of the evidence and be fair and impartial to Hyundai? And then I will ask the seatbelt question and then I will ask the front seat question. And then I'm going to allow each of you to ask additional questions you want of that juror.

Now what happened was. We did the general voir dire. We did not ask the seatbelt question. When we brought the first juror in she changed her mind. And we said at that time, and I told the court. Intentionally or not..and she said, We are not going to go any further into seatbelts. And I told the court then on the record, we would have been ambushed.

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REBUTTAL

WAINWRIGHT: As among the three parties in front of the bar at trial - the plaintiff, defendant, the judge, how many of those three actually want a fair and impartial jury?

KELTNER: One.

WAINWRIGHT: The judge?

KELTNER: Yes. No doubt about that. And that's why Texas cases have traditionally like those of every other state given immense discretion to the trial judge. It is because the judge gets to see what is happening and what the impression on panels are of certain things. And begin to understand how the jury is reacting to a line of questions.

O'NEILL: Can you explain to me the difference between the question that we're talking about here, even though we don't know quite what it is, and the question that Hyundai imposed

during voir dire which was, Here's what happened to the 4 year old girl in this case and can everybody still be fair?

KELTNER: No matter who the victim is, it doesn't make any difference to the operative facts of a case. Just like whether the victim be black or white, an atheist or a Baptist. It makes no difference to how the jury should answer those questions.

BRISTER: Well it shouldn't, but it does.

KELTNER: It can.

BRISTER: That's why you can't remand on damages but not reverse on liability because we all know...

BRISTER: I think that's fair. But I think that's the real reason. The other thing is you need to remember is, when we got to the third panel that question was put off limits for us as well. And the judge was trying - and let me tell you. There were lots of hits on that one too. In the second voir dire there were 10 hits on that one. Three of which were the same jurors said that the seatbelt issue would _____.

BRISTER: So they were bias against both of you?

KELTNER: Yes.

BRISTER: Who were they going to rule for?

KELTNER: Those are always interesting issues. We agree with Mr. Caddell on one issue. Voir dire is important, but should voir dire decide cases? Is it correct to say, Should we glorify the idea that the case is won when picking a jury? The answer to that has got to be no, or justice is merely advocacy and that's all.

OWEN: What's your view of rehabilitation?

KELTNER: That's not an issue in this case. But I believe you ought to be able to follow up with questions even on cause issues. Here's why. The cause issues that are again the government code 65.102 are divided into various things and they deal to the great extent to the instructions the jury is going to get, but only after the jury is sworn in. Section 226(a), the majority of the instructions don't happen to the voir dire panel. They happen to the jury after they are sworn. And the court needs to be able to say, Hey, Look. I'm going to instruct you that you are going to have to listen to all of the evidence. And it's okay to have an initial reaction to certain matters. But I want you just to say that you are going to agree with me you're going to keep your mind open. Those are the kinds of things you ought to do. I think you ought to be able to do that.

The evil here, and it is an evil, is that anytime

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...from a panel because of their reaction to evidence you don't get a fair and impartial jury. You get a jury that tends to look at the case from one side's viewpoint. It isn't any longer a cross section of the community. Mr. Caddell argued to you that it ought to be appropriate to mention a fact and say, Listen with this fact, is it dispositive to you (and he used that term and the term was used at trial as well) or can you keep an open mind? What does that do? It does two things. It's great advocacy by the way. It removes people that don't think it's dispositive or think that the issue may be dispositive and it encourages others to believe that that fact ought not be dispositive. That's not fair.

MEDINA: What are your thoughts about handing that monumental task to the judge as they do in federal courts?

KELTNER: I agree with Mr. Caddell on this one. I don't think the court ought to do that. And in Texas there are two important reasons why not. We still have a judiciary that is hardly underfunded. We have a judiciary in which we have less than 1 cent of every tax dollar going to the third branch of government. Trial judges in Texas don't have the time to learn the issues in the case to be able to do that. Federal courts have a lot more talent and a lot more people doing that.

The other thing is, sometimes in Texas in the past we've gotten the idea that lawyers ought not to be involved in helping get the cases tried. I think that's a mistake. I don't think the judiciary in this state has the resources to be able to do that.