ORAL ARGUMENT — 4/6/99
98-1076
GOLDEN EAGLE ARCHERY V. JACKSON

LAWYER: The primary issue before this court is the constitutionality of Texas Rules of Civil Procedure 327. And rule 327 is a rule of procedure that limits the evidence that can be received from jurors regarding their own verdict.

This case was brought as a product's liability lawsuit in the TC following the trial with which respondent Jackson was awarded monetary damages on his failure to warn claimant. Respondent Jackson thought that he was not awarded enough money in damages, so he filed a motion for a new trial alleging jury misconduct among other issues.

Attached to the motion for new trial were several affidavits from jurors regarding the deliberative process itself and what jurors said to each other. He filed a supplemental motion for a new trial which was untimely addressing the juror disqualification issue.

The TC denied both motions for new trial and respondent Jackson appealed the case to the 9th CA. The 9th CA agreed with the TC's interpretation of rule 327 and Texas Rules of Evidence, then Texas Rule of Civil Evidence 606b and declared all the evidence inadmissible pursuant to those rules, but went on to hold rule 327 unconstitutional. It is from that declaration that we seek relief by our petition for review.

We have several other points that are raised in our brief on the merits, including the limitation of respondent Jackson's constitutional challenge, the fact that he did not challenge Texas Rule of Civ. Evid. 606b, and the fact that challenge to Texas rule of civil procedure 327 was itself limited. Also that there is no evidence of deliberate concealment on the part of juror Barbara Maxwell to questioning during juror selection and, therefore, no evidence of misconduct in that regard. Also we argue that there is no evidence of harm and materiality of the juror misconduct. And finally, that the 9th CA improperly used a de novo standard of review where it should have used an abuse of discretion standard.

On to the constitutional issue. Rule 327 limits the testimony of jurors regarding their own verdict. The only exception is for evidence of an outside influence. That term or phrase has been interpreted by Texas cases to mean evidence or some sort of influence emanating from outside of the jury: conversations; statements between jurors themselves. Actions that occur during the deliberative process are not classified as an outside influence.

PHILLIPS: How about actions by a juror before or apart from deliberations?

LAWYER: Apart from the deliberative process, yes. But where statements or the evidence itself comes from the deliberative process, then that evidence would be excluded even though it related to an action that occurred prior to any sort of deliberative process. For example, during the jury selection.

BAKER: Does this record show that Ms. Maxwell's alleged bias was discussed with another jury member while they were on a break sometime during the course of the trial but before deliberations started?

LAWYER: It was before formal deliberations had started.

BAKER: Are you drawing a distinction between as you just said formal deliberation and whatever other kind there may be, if any?

LAWYER: I'm not drawing a distinction in the sense that I think everything after the jury is seated is part of the deliberative process as that term is used in Rule 327.

PHILLIPS: Are there cases that support that?

LAWYER: There are and they are cited in our brief that anything after the jury is seated and where there are communications between jurors is part of the deliberative process. And the reasoning behind those decisions is sound. If you are going to preclude intrusion into the juror's deliberative process and into conversations between jurors, the line between formal deliberations and before and after the jury is seated is sort of arbitrary. You are either going to preclude inquiry(?) or you are not.

GONZALES: But it is true that we want to promote candid discussion once a jury begins deliberating. We don't want to encourage discussions during recess which may be improper, is that right?

LAWYER: You're not encouraging discussion between recess anymore than you are encouraging jury misconduct by having this rule. If jurors are going to misbehave, they are going to misbehave. What you're encouraging are all the things that I have listed in the brief: candor among jurors; accuracy in the verdict; a willingness to render a verdict, not the result of pressure but as the result of what you want the verdict to be. Finality in verdicts, things like that is what you are encouraging by way of the rule not discussions during recess, although those may be included within the prohibition.

HANKINSON: But the way a trial is conducted, the trial judge specifically instructs the jury not to talk about the case, not to deliberate until after the jury is charged and it's like a starting gun goes off and he or she says, Now you can go to the jury room and now you can deliberate. In fact, the jury is expressly precluded from deliberating or talking about the case until the judge tells them it's time. So what is being protected if all of these things that come before are not supposed to occur under our rules?

LAWYER: Jurors aren't supposed to consider things that are outside the evidence, but if they consider those during "formal deliberations," those conversations are precluded under rule 327. So, my point would be that it's the entire deliberative process that's protected...

HANKINSON: You're asking us to define the deliberative process to begin at the point in time

that the jury is sworn in and actually becomes a jury, as opposed to the point in time when the trial judge says to the jury, Now you may deliberate?

LAWYER: Let me just disagree with you on one point. I'm not asking this court to define anything. I'm not asking this court to interpret anything. The 9th CA held that all of the evidence was inadmissible pursuant to both rule 327 and 606b. Respondent Jackson did not seek any relief from those rulings and the interpretation aspect is not before the court per se. The reason I'm giving the interpretation is to give background.

BAKER: Well what if the CA was wrong when they said that?

LAWYER: But error wasn't preserved for review by this court. Respondent Jackson has a duty to seek review from that erroneous ruling if it's against him. He did not do so. So that is not before this court. But I'll answer your question nonetheless. It's all conversations between jurors. Rule 327 wants to protect the statements between jurors. And I realize that it's before the formal deliberation process and against instructions by the TC. All the same it has to do with the discussion of the case between the jurors. And to say that, Well at 302 before the jury was retired for formal deliberations well that's not protected, but at 330 once they retired to formal deliberations it is protected sort of draws a arbitrary line and doesn't really promote the protections that rule 327 is seeking.

HANKINSON: Why is that so arbitrary if in fact what we're trying to do is protect the jury's deliberative process, the things the jurors say to each other, what they are thinking about, why they did what they did as a result of the verdict that's what we are trying to protect isn't it?

LAWYER: They can say that at anytime.

HANKINSON: But in terms of you drawing the line at an earlier point in time, why do we care about protecting whether or not the jurors say to each other, Why don't we go to the courtroom cafeteria today and have a hamburger?

LAWYER: Well because that doesn't have anything to do with the case.

HANKINSON: But under your decision that's any communication between the jurors and under your rule is part of the deliberative process and they would be protected?

LAWYER: My argument is not moving the line up or anything like that. It's after they become jurors. So it's not a sort of line in the deliberative process. I guess that conversation would be protected in the sense that they would not be allowed to question jurors or that that conversation wouldn't be relevant, they wouldn't ask about that. This particular conversation had to do with the case. It had to do with the jury selection process, what was said during jury selection. So it did in fact have to do with the case. And my argument prohibition to when "formal deliberations" begin even though they are jurors before that time is arbitrary and goes against the protections of rule 327.

HANKINSON: Did the petitioner in this case in the CA claim that the trial judge abused his

discretion when he did not consider the evidence?

LAWYER: I don't think he used those terms.

HANKINSON: Was there any challenge to the TC's ruling that it would not consider the evidence from the juror who had given affidavits and was prepared to testify?

LAWYER: Yes.

ENOCH: What is the nature of the testimony? Is it that it was revealed during deliberations, that the person who heard the information was influenced in the deliberations? How would an attack on a juror's revealing or talking about a case before formal - how would that get revealed in terms of an attack on the jury verdict?

LAWYER: Are you talking about how it was revealed in this case?

ENOCH: Specifically yes. But could it be revealed any other way is the other part of the question?

LAWYER: You mean from a source other than a juror? If the conversation is between two jurors, is that your question?

ENOCH: How was this conversation between the jurors before deliberations began come into evidence? What was the nature of the question?

LAWYER: One of the jurors gave affidavit and live testimony on the motion for a new trial.

ENOCH: Was the point that it influenced their decision or...

LAWYER: There is no evidence that any of the alleged jury misconduct influenced any of the decision. I guess that's the implied point. But there is certainly no evidence to that effect in the record just in the void that there was jury misconduct and, therefore, they are entitled to a new trial, but not connecting it in any way to any sort of influence that that alleged misconduct had upon the verdict, which is one of our points in the brief that there is in fact no evidence of harm as required by rule 327.

ENOCH: But the problem would be if it's conversations between jurors as opposed to an outside influence. To get to that point you invariably have to talk about what influence their decision was the part of the deliberative process. That's ultimately what you would have to ask the jurors about.

LAWYER: Right. But you can't ask the jurors about that because even under the less restrictive federal rule you can't ask jurors what influenced your mental processes? Were you thinking about this at the time? Even though they might be less restrictive in the evidence that can

come in, the federal rule restricts that kind of evidence. So they have no demonstration of harm.

Going back to the various policy support for rule 327 and its limitation on evidence from jurors, there is a need to insulate the deliberative process. As Justice Gonzales mentioned, it fosters candor among jurors. As I pointed out earlier it fosters accurate verdicts, verdicts that are not rendered by pressure, but instead by the willingness to follow the evidence and to rule as the jurors would want to rule. It also insulates jurors from harassment. And I point to this court's recent decision in *Binton*, which itself recognized the need for limitation on post-verdict communications with jurors. Also recognizing the lower CA's ruling in *Soliz* holding rule 327 constitutional. In fact, holding that rule 327 itself protects the right to a fair trial because it maintains the jury's purity and efficiency, which are words that are taken from the constitution itself.

In *Binton* this court also recognized the US SC ruling in *Tanner*, which held federal rule of evidence 606b, which is similar to our own rules, constitutional. Also it precludes rejection of jury service in the future. If jurors know that their private discussions are going to become public and that they themselves are going to be tried following a trial on the merits, they themselves would be less likely to want to serve on a jury. It prevents tampering. If you go after a trial and you're motivated to find jury misconduct so that you can get a new trial, you or your goal may have the effect of swaying a particular juror. Maybe the juror's recollections are not the same as what really happened. It also provides a tool for a dissenting juror to make his one dissenting vote now the vote of the jury. He can testify by an affidavit or live testimony during a motion for a new trial hearing that certain misconduct occurred, and therefore, overturned by his sole dissenting vote of what was the verdict of the jury.

And finally, it supports the goal of finality of verdicts. As this court knows, the motion for new trial regarding jury misconduct are unlimited and I can concede with _____ scenario where opposing counsel will constantly go and question the juries. And in fact under the 9th CA ruling, might even concede that he has an ethical duty now to question all juries following all trials.

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RESPONDENT

LAWYER: Inherent in the constitutional guarantee to a fair and impartial jury trial is the right to be able to prove that the constitutional right has been denied.

PHILLIPS: Do you think the federal rule is unconstitutional also, or does its slightly different language sail?

LAWYER: I think it's different language would save it in this case. However, I think the federal courts address it on a case-by-case basis and also have difficulty with jury misconduct issues, particularly those involving bias even under the federal rule.

PHILLIPS: A lot of those are criminal cases though.

LAWYER: That's correct.

HECHT: Your opponent says that with respect to civil cases as opposed to criminal cases and not involving racial bias, you have not cited a case in support of your position, is that true?

LAWYER: The cases in federal court which dealt with bias generally dealt with racial bias. However, I don't think the nature of the bias of the juror is dispositive in this case.

HECHT: But do you have a case on that? Do you have any case from an American jurisdiction?

LAWYER: One does not come to mind. But the difficulty with the state rule is its inflexibility and the fact that it absolutely seals from scrutiny by the courts jury misconduct. This denies due process rights. It denies essentially a meaningful hearing and a meaningful opportunity to prove the violation.

O'NEILL: Even assuming that we can take into account all the evidence that was submitted by jury misconduct in this case, is there any evidence that it influenced a juror's vote one way or the other, and isn't that required?

LAWYER: There is evidence from the presiding juror that in fact the comments made and the arguments made by the biased juror affected the jury's deliberations to issues No. 4 and 5.

O'NEILL: But I think that the requirement is that you have to show that it affected a specific vote. I know that what you're talking about, the affidavit, but that's just a pretty broad statement to say that affected an answer. Don't you have to show that it caused one juror to vote a different way than they otherwise would have voted, isn't that what the legal requirement is?

LAWYER: Well there are really two issues of jury misconduct here. One is a very essential issue, and that is, a biased juror.

O'NEILL: Even a biased juror though don't you have to have testimony that one of the jurors would have gone a different way but for this juror's expressed bias?

LAWYER: I think in the case of a biased juror what you have proven is that you do not have a competent jury. If you have a biased juror, then under the constitutional guarantee to a fair trial, you do not have 12 competent jurors. So the harm you have proven there is the constitutional violation itself and you're not simply talking about the type of other jury misconduct which occurred in this case which was the biased juror then said, He's been drinking; he's already received money; we don't need to give him anything; we are the one's that end up paying for lawsuits like this.

O'NEILL: You're saying legally disqualified, and I believe your opposing counsel said that you didn't preserve that issue. How do you respond to that?

LAWYER: My response to that is the argument she made to the CA, and that is this: I did

file a supplemental motion citing the government code. But the competency of the juror is addressed in the constitutional challenge that was filed initially. And in fact point No.7, which this court accepted the petition for review on and is the one that the CA considered, the court said this was not a competent juror. And in our brief on page 34 to the CA, she invited that interpretation by saying, This point, referring to my disqualification point under the government code, is simply a restatement of appellant's point of error No. 7. She then goes on to argue waiver in the alternative. But the point is, that not only does the government code require an unbiased juror, the constitution requires an unbiased juror.

HANKINSON: Is it your view that the constitution requires that the jury deliberation process be wide open to public view, that there should be no restriction?

LAWYER: No.

HANKINSON: What would a constitutional rule look like in your view?

LAWYER: What I believe this court should do is adopt the federal rule. Because when this court adopted its rules in 1984, it specifically excluded the language "extraneous, prejudicial information improperly brought to the attention of the jury." That is the federal rule and includes outside influence that the state rule includes. But that restriction extraneous, prejudicial improperly has brought to the jury several limiting factors, which would not expose the jury to wholesale question, but would permit proof of bias.

OWEN: But you would get to depose every juror in every case to see what they talked about or didn't talk about?

LAWYER: First of all, rule 226(a) says that they could anticipate they may be contacted by attorneys after the trial to prove jury misconduct. I mean that's what 226(a) says. So the rule anticipates that jurors will be contacted to prove jury misconduct. Yet, the rule that governs the TC says, No, you can't consider it, you can't offer it. So even if you find it, you can't offer it. If you find bias, you can't prove it.

OWEN: But if the juror chooses not to talk to you and you say you've got a constitutional right to know, why don't you have a constitutional right to depose every juror in every case to find out what they talked about and see if any extraneous or prejudicial matters were discussed when they shouldn't have been?

LAWYER: As a practical matter, it might lead to abuse. As a practical matter under the federal rules, I don't think that has been shown to happen.

OWEN: We are in state court. Here would you have the constitutional right to do that kind of probing?

LAWYER: I think you're entitled to interview the jurors under current rules.

OWEN: But if they don't talk to you, wouldn't you have the right to...

LAWYER: Would you be entitled to subpoenas, is the question? I suppose if that were the alternatively, although I suppose if a juror was not going to talk to you, that may be an indication that you are not going to get favorable testimony. I would think that you would have the right to prove a juror is biased if you had evidence of that. Let's say what you are suggesting to me is that this juror doesn't want to talk to me because he or she is biased and I need to prove that.

OWEN: Let's suppose you don't have any evidence going in but you want to talk to the jurors or depose them to see if you can develop evidence of bias?

LAWYER: I think the TC will have control over wholesale abuse of the post-trial process and I think there are sufficient rules in place to prohibit that type of abuse of jurors.

ENOCH: Another instruction the jury has is to not consider the effect of their answers. And suppose a juror comes to you and says, Well I saw this award down here for attorneys' fees on appeal but we already gave the plaintiff all the damages they wanted and so we didn't want to encourage them to appeal, so we didn't award them any attorney's fees on appeal. Now first of all, the jury misunderstands the instruction. They chose to not award attorney's fees, not because they didn't think they were deserved, but because they didn't want to encourage the wrong party to appeal. They considered the effect of their answers. It seem to me that's prejudicial. It seems to me that's material. It seems to me that meets the definition of what you say is the federal rule and so that amounts to jury misconduct and there's a new trial.

LAWYER: I question whether the federal rule would admit that. The federal rules generally don't get into whether or not they understood the law.

ENOCH: Well this is misconduct. They violated the instructions from the court.

LAWYER: Right. And that gets back to Justice Hankinson's point.

ENOCH: And it's material and it's prejudicial.

LAWYER: It's a difficult rule. It may be this court does not want to adopt that language because of its difficulty in applying it. But some language needs to be in the Texas rule which permits proof of bias, which prevents _____ prejudice. Whether it's racial, gender, or simply like in this case, I'm biased against this lawsuit, or I am biased against this corporation. I mean, a million dollar verdict against a corporation, the corporation ought to be able to come in and say, the juror was biased. Because that's an essential constitutional guarantee.

HANKINSON: In this particular case, it was an 11 to 1 verdict, right?

LAWYER: 10 to 2.

HANKINSON: And the juror who gave the affidavits and testified was one of the two, is that

right?

LAWYER: Juror Fredrick was one of the two that dissented.

HANKINSON: Doesn't this rule then in this circumstance operate to protect the integrity of the process. I'm one of the losing jurors. I don't like this result. My gosh, I'm going to get the other juror, I'm going to get all the other cards out on the table. Isn't this the very kind of thing that there is an interest in protecting the process to keep the jurors from afterwards retrying what ended up happening in the jury room if a juror doesn't like the result?

LAWYER: I will address that in two ways. First, I am not urging wholesale attacks on jury verdicts. There were three affidavits. One was from the presiding juror, who actually agreed with the 10th. You are correct that Fredrick was a dissenting juror and that our challenge was on the insufficiency of the award. I agree that this rule allowing only outside influence and not juror testimony does protect the efficiency of the verdict. Certainly. But it affects the efficiency of a biased verdict. This juror essentially goes in the hallway and says, I was on a prior wrongful death case; we awarded no money because I don't believe in lawsuits like that. She then goes back in to the jury room and says, This is a frivolous lawsuit.

HANKINSON: But why isn't that part of the lawyer's responsibility to be able to ferret this out during voir dire, because what we have here is the circumstance where the trial judge decided that the question that was asked during voir dire was not specific enough? Had you asked the right question, you would have found this out and you could have either challenged her for cause or used one of your _____. Why doesn't that part of the process protect this exact circumstance? There is an opportunity to ferret that out.

LAWYER: I think one of the SC cases that is cited in the briefs talks about the difficulty of proving bias because no one wants to admit bias. In this case though...

HANKINSON: People do doing voir dire admit bias though.

LAWYER: Occasionally. In this case, in fact, one of the jurors did. One of the panel members did. So you are correct. In response to the question of counsel...

HANKINSON: No, it's part of counsel's job during voir dire to be able - and that's why voir dire is part of the process - to give counsel the opportunity to interact with the jurors, to ask questions, to be able to find out which people in fact are qualified under Texas law to serve on a Texas civil jury. And if you don't ask the right question or the voir dire is conducted in a way that does not ferret that out, why should the whole integrity of the whole jury deliberation process suffer as a result of that?

LAWYER: Because if a juror responds to a question as she did in this case, that the wrongful death lawsuit I was on did not reach a verdict, when in fact it had, when she says nothing about that lawsuit will affect my service in this case, which it did - in fact she mentioned the lawsuit in describing her bias against lawsuits, then she has concealed. That was a direct question to her...

HANKINSON: The trial judge didn't agree with that.

LAWYER: The trial judge did not agree, the CA did . The CA said that it was a concealment. But see that's not really sufficient protection.

HANKINSON: But you can prove that up from extraneous evidence. You can go back and find out what jury she served on and prove up that it did in fact reach a verdict?

LAWYER: It's going to be difficult to prove all types of bias or prejudice that expresses itself only in the jury room without testimony from jurors. In fact, I do argue that the Texas rule as interpreted by the lower courts that jury deliberations begin as soon as the jurors are seated, that nothing, this conversation in the hallway, these can be shown, can be proven, then what you're doing is you are saying that if a juror conceals successfully his/her bias - prejudice, and gets on the jury and then manifests itself which is when she wants to do it, that we are going to protect that from the scrutiny of the trial courts because there is no exception under the current Texas rule which would prevent that evidence.

ENOCH: But what's happening with all the other jurors? You've got someone who expresses a bias. And what's happening with the rest of the jurors? Is the point that the bias has so infected the jury that - every juror has a bias. Every juror has a prejudice. You have no idea except in concealment that that may come to the forefront until they are sitting around the table and they are all deliberating, and pretty soon it becomes pretty obvious that the sides have chosen and there is some pretty stiff arguments going on. And pretty soon there's some anger going on. And somebody says, Well you're just bias. You just don't like these kinds of lawsuits. No, I don't like these kinds of lawsuits. And bingo, now you've got misconduct. Concealment had nothing to do with it. Is that the end of the inquiry? Does that become bias and therefore the case is no good. Should a judge just kind of say, By the way before I discharge the jurors, did anybody sense that anybody else was expressing bias in the jury room? Is this what really starts happening?

LAWYER: I think that what I am saying is that these cases are going to have to be approached on a case-by-case basis. And the trial judge is going to have to look at it.

BAKER: What is the solution to say the rule is unconstitutional if you are going to look at each case?

LAWYER: Well it has to be, because under this rule there is no way. There is no case.

BAKER: Is that because the lower courts have interpreted it to mean it starts when the jury is sworn in as the group and it goes all the way till they are discharged?

LAWYER: That was not my case, because my conversation occurred in the hallway. There is additional evidence in this case that the bias and the misconduct occurred in the jury room. So you're going to have a case in which that's where it's manifested, that's the only place it's manifested. You're not going to have a hallway conversation and you have to have some method, some rule, some tool the TC can use to efficiently determine that bias and prejudice. And what I am

suggesting is that the federal court is the only alternative we have currently framed before us, but I don't think it's the only one that _____ the draft. I'm also suggesting that outside influence shields all of this and as a result the rule is unconstitutional.

PHILLIPS: How about the rule of evidence? If it's still there, you're in the same situation, right?

LAWYER: It's the same language, so implicitly an attack on 327b is an attack on 606b.

PHILLIPS: And it's your position that everything you say about 327, you're saying about 606?

LAWYER: The same language. And I think the CA in remanding it essentially held rule 606b unconstitutional implicitly, because it's the same language. You either have outside influence like bribery, but anything inside the jury room or anything inside jury deliberations is protected. So if I say I don't like that person and I encourage some type of bias or prejudice against, that's totally improper, the harmed party can't prove it under the Texas rule; whereas, he could under the federal rules. And that's clear.

The US SC has clearly held that bias or prejudice - bias has been considered by the federal courts.

OWEN: How far do we take bias? What if a juror says, I don't believe that person because he or she is overweight, I just don't trust overweight people. How far do we take this?

LAWYER: Again, my response would be it's going to have to develop on a case-by-case basis. But for the rule to say you can never prove bias is unconstitutional because the constitution has been interpreted under the *Compton v. Henry* case, that says bias includes bias against a type of lawsuit.

OWEN: There are other methods of proving it short of interviewing the jurors isn't there?

LAWYER: Not in this case and not in most cases. Because that's where the evidence is going to be manifested, is in jury deliberations. That's where the only witnesses are going to be jurors. They are going to be people that heard him say something biased or prejudiced. That is the key.

HANKINSON: I can bring my personal biases and prejudices to the jury room and still be a competent juror can't I?

LAWYER: Bias is a broad word.

HANKINSON: For example: During voir dire, I express the opinion in response to a question that I don't like lawsuits. Or in a criminal case, I can't give the kind of sentence that — I don't

believe in that kind of sentence, or whatever. And the follow-up question is always asked, But can you be fair and listen to all the evidence in this case and decide the case based on the evidence? And if I answer the question, yes, am I competent to sit as a juror regardless of the fact that I don't like lawsuits?

LAWYER: No. The way it was expressed here...

HANKINSON: No, I'm not talking about that. But you've taken the position that if someone has a bias or a prejudice, they are not competent to be a juror. And you should be able to expose that. During the jury process, a juror may be able to say, I don't like lawsuits, but I've listened to all the evidence in this case, and here's my decision. Now that person brought their biases in there but it didn't affect the decision. You're not entitled to have a jury room full of people who don't bring their personal experiences and personal viewpoints in are you?

LAWYER: Bias is a degree. And to say, I don't generally like lawsuits is one thing. To say, I don't believe in this type of lawsuit disqualifies you under the *Compton v. Henry* case.

HANKINSON: But if I don't believe in the kind of lawsuit, and I'm rehabilitated that I will sit on a jury and fulfil my obligation and decide the case based on the evidence, I'm a competent juror. We've all taken voir dire where the jury answers - the member of the jury answers a question that you just cringe because you hear them say, I don't like big corporations, or I don't like lawsuits, or I don't like something and you know everybody on the panel heard it and you're dying to get that person off of there. And the next thing you know the trial judge is asking questions: Can you be a fair juror? And the person says, Yes.

LAWYER: I think there is some case law saying you can't rehabilitate them if they've committed themselves. The ultimate question is - in other words, the fact that they then are led to say yes, I don't think successfully rehabilitates them under voir dire laws that currently exist. But the point is, the bias either exists or it doesn't. For her to say, Yeah, I could be fair, but I don't believe in lawsuits, and then to be rehabilitated and say well if you listen to the facts. The underlying bias exists. It existed in this case. She expressed it twice. And the underlying bias exists.

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REBUTTAL

O'NEILL: If you agree that it is a fairly broad rule that requires outside influence what if in another situation where one of the jurors went back in the jury room during deliberations and said, I feel strongly about this case and I will give everybody here $50 if they will vote for liability in this case. Under the rule as it's written, that could never be the cause of a new trial or would never come to light.

LAWYER: That's right. I would agree. Respondent Jackson argues for federal rule of evidence 606b as a constitutional alternative. But there is nothing sacrosanct about federal rule of evidence 606b, and the words that it uses. It's not more constitutional than the Texas rules. It just happens to benefit respondent Jackson in this case. There aren't any US SC cases, no Texas state

cases saying that in order for a rule to be constitutional it has to say exactly what the federal rule does. Respondent Jackson asserts that what we'll need to do is look at this under his proposed federal rule on a case-by-case basis. Well that's exactly the harm that rule 327 is seeking to prohibit. On a case-by-case basis means you question every juror in every case to find bias, to find misconduct, to find whatever it is that you want to find. Respondent Jackson says, Well this is the only place that we can find the evidence. Well I will read you a quote from the US SC decision in *McDonald v. Plaz*(?). " But the argument in favor of receiving such evidence is not only very strong but unanswerable when looked at solely from the standpoint of the private party who has been wronged by such misconduct. The argument, however, has not been sufficiently convincing to induce legislatures generally to repeal or to modify the rule. For while it may often exclude the only possible evidence of misconduct, a change in the rule would open the door to the most ____ acts in tampering with jurors. The practice would be replete with dangerous consequences, and it continues." And I agree.

And all of respondent Jackson's arguments on bias sort of precede from the conclusion that there was bias in this case. But in this court's opinion in *Compton v. Henry*, a juror made statements even more egregious than Ms. Maxwell's statements. Such as, he was prejudiced against suits such as this. He did not believe such suits should be brought. He characterized the litigation as absurd. He related his own experience where he was involved in an accident and he had to make sacrifices and he still didn't bring suit because he didn't believe that people should be bled for money. Those are more egregious statements than anything that Ms. Maxwell made. And the Texas SC found that bias was not established as a matter of law.

I would also like to clarify respondent Jackson's mischaracterization of my statement before the CA. What I said was, not that there was no difference between the 7th and the 8th point of error, one dealing with misconduct and one dealing with disqualification, but that his argument was all tied to the concealment not this bias in the abstract, but it all related to jury misconduct and Ms. Maxwell's concealment of her alleged bias during the jury selection process.

Respondent Jackson has now elevated bias into the focus of his argument and now says that bias in and of itself without being tied I suppose to any sort of concealment during jury selection is reason enough to allow intrusion into the jury deliberations and the juror mental processes and allow rule 327 to be declared unconstitutional.

Regarding Ms. Maxwell's comments that she was on a jury that didn't reach a verdict. I'm not so sure that that's inconsistent with the statement that they awarded zero damages. I mean, she is a lay person. She's not an attorney. She could have in her mind thought that not reaching a verdict was the same as awarding zero dollars in damages. But that's something that respondent Jackson sought not to follow up. So we don't know to this day whether she misunderstood and whether there was any sort of deliberate concealment on her part.

Likewise in her statements that she didn't believe in lawsuits like this, Respondent Jackson said it herself, she later said that the lawsuits were frivolous. Why couldn't she admit that she didn't believe in frivolous lawsuits rather than product's liability lawsuits.