ORAL ARGUMENT – 02/15/06
03-0914
HYUNDAI MOTOR CO V. VASQUEZ

KELTNER: When you look at it, I think this case has boiled down to one simple question and it's this. Whether this court's opinion in Babcock issued in 1989 has any limitations at all on the search for bias or prejudice or whether the court should draw a line and prohibit commitment questions and prohibit questions that pretest the jurors or potential jurors reaction to case specific facts? And this is the perfect case to preview that issue for you and to give the court an opportunity to answer.

And this case as you know was a products liability case in which it was claimed that the Hyundai automobile had an air bag that deployed with too much force and also was misplaced in the automobile. The plaintiffs had a problem though, and that was the minor child who was tragically killed in this case was unbuckled in the front seat. And that was undisputed. The plaintiff with very good advocacy in an issue that could have been argued to the jury but we say could not have been delved in to in detail in voir dire examination sought to pretest the jurors' reaction to that fact that they even admitted to the jury was bad for them. They then say, and they still take the position I might add even in their latest brief filed and also in their _____ reply, that they were entitled to strike for cause any jurors who thought that fact alone was dispositive or was conclusive. And that's what they argued to the TC.

The TC as you know struck two jury panels after allowing questions directly on that. And after striking the two panels, one of which the judge had conducted questioning, she came back and on the record - I think lucky for us it is on the record - she expressed her concern about what she had done and what she had let the parties done. And she said you know the truth of the matter is, the jurors are the sole judge of the weight to give the evidence and I'm afraid that they are interpreting what I'm doing as commenting on that which I don't mean to do. She also said in response to the idea from the plaintiffs that we ought to just get more jurors in here to try this case. If that's the case we have a bigger jury pool, we might be able to do a little bit better job.

JUDGE: What about the TC's ruling that we're not going to go any further into seatbelts. Period.

KELTNER: That's after of course, that is the selection of the third jury panel. What she did, and I think this is important, you can't read that out of context of the entire voir dire. What she also said is look, I am worried. I'm worried that the jury has been taken what I've been saying and what you've been saying is an idea that they are not entitled to give weight to the evidence of non-seat belt use. And she said that would be wrong and that would be prohibited. And she was right. Because under other CA's opinions in other cases - Campbell v. Campbell and Lassiter v. Bouche case, that's exactly what courts have held: You can't pre-test evidence with the jury to get their initial reaction, and then attempt to strike them.

MEDINA: There was an objection made there right?

KELTNER: Yes.

MEDINA: Was that objection sufficient? I take that you take the position that it probably wasn't sufficient.

KELTNER: Good point. The defendant certainly had objected all along to the questioning on seat belt usage when it got to case specific facts. These are facts that went to the element of the cause of action and to the elements of the defense. They weren't about extraneous facts and the like. But in answer to your question, here is what occurred and we have a little bit of a difficult record here. And the reason we do, and I don't fault anybody on the other side for this at all, when we got to the third jury and we had at this point, we had had 140 jurors in the courtroom to that point. What happened was, I think the plaintiffs suspected that they were going to get to ask case specific questions. And there wasn't really a question posited that was objected to. Instead what happened is, they quite appropriately approached the bench and said, Judge, we would like to ask these questions. They made it very case specific. But they didn't say what the questions were. They sort of summarized what they would be. And what it was is, we want to ask if they are pre-disposed against seat belt use that that fact alone would cause them not to listen to the rest of the testimony and mean that they were biased and prejudiced. My question. How could they be biased and prejudiced on that fact? Texas law requires you to wear a seat belt. It is a violation of the law not to. The jury would have been titled to give that conclusive and dispositive effect in the weight they might give the evidence.

JUDGE: There was a similar question asked by the TC to the second panel. No objection was made by the petitioner in that case. What's different about the question when asked by the respondent than the one asked by the TC?

KELTNER: I disagree there was no objection made. The record is not as clear on that as it could be I will admit. Here's what happened. The court discussed before she was asking that question, the one that she was going to ask. We filed a brief objecting to that. And that brief was attached to our brief on the merits. So there was an objection. It was similar, but it was different. It was different in material terms. But the judge even realized after she had asked that question and caused the problem that it was improper herself. And she says at page 107 of vol. VI, and also again in Vol. VII that she really should not have asked it. Her view of what the jurors's reaction was, was such that she believed that it had had the wrong effect on the jury. And that the jury panel was believing that the court was commenting on the weight that they could give the testimony, which would have been devastating and something that a court would never do.

JUDGE: Am I correct. Hyundai's trial counsel also asked a question that focused on this single, operative fact that was very similar to the question that is at issue today. Is that correct?

KELTNER: I don't think so. Not in a case specific way. We did ask questions about

sympathy for a 4-year old and sympathy for a minor in a case like that. That question was asked.

JUDGE: And that was asked in the first panel?

KELTNER: Yes. It was asked of all three panels. But it was done in a way - and again, I point out to you the difference. The seatbelt question went to an operative fact. It went to the jury's weighing of evidence on one of the elements of the plaintiff's causes of action, and one of the theories of defense. The issue about who the plaintiff is, or who a defendant is, whether they be Black, White, Republican, Democrat, Baptist, Atheist should have nothing to do with what the jury's deliberations are, and have always been fair game for voir dire. We think that that is a tremendously different situation. Texas courts have as well. And in fact the CCA as we've pointed out in our briefing has really looked at this issue and made clear that when you get in to fact specific circumstances you run a danger. In Barajas, which is cited in both of our briefs, the CCA says you know the more effective voir dire examination is, especially on the facts, it becomes more specific. And out of necessity the more specific it comes the more you invite the jury to give their initial reaction to the very operative facts upon which they are going to be called to judge the case.

JUDGE: Getting back to Justice Bland's first question about the TC shutting down all questions about seatbelt use. Did the court act within its discretion in doing that, shutting down all questions about seatbelt use?

KELTNER: Yes. Here's why. And I want to caution on two things. First off remember the CA's opinion doesn't just deal with the questions in the third voir dire. It approves the questions asked by the plaintiff in the first voir dire and by the judge in the second voir dire. So when the court is looking at this, you're not just looking at the third question. But, yes, she was within her discretion to do it. Remember here is what had happened...

JUDGE: So if counsel for the Vasquezes had wanted to ask whether any prospective juror had bias against seatbelt users in automobile products liability cases, you're saying that would not be a proper question and the TC would have been correct in foreclosing that type of question?

KELTNER: No. And in fact, that is the type of question that the judge instructed both parties beforehand about the experience and use of seatbelts that could be asked. We believe that a question like that would have been okay. And we would probably not have had an objection because it is not case specific. The CCA again has drawn that distinction just quite recently. And in fact in a new case that neither side has cited to you yet is Sanchez in which exactly that issue came up.

WAINWRIGHT: Would it in your opinion have been appropriate for the trial judge to have precluded the question of how many of you - are there folks here who believe they are biased about minors wearing seatbelts? So the only change to J. Casey's question is I changed it to minors, not just all seatbelt use.

KELTNER: Good question. The question that wasn't asked here.

WAINWRIGHT: Well it was precluded by the number of questions about seatbelts.

KELTNER: Perhaps it was, but it was a more general, not case specific question. And remember what J. Speedlin was always saying was no case specific questions. Why? She had read the cases that prohibit that. But yes, that is very much closer to becoming non-case specific and is I think probably much closer to the line than tying it to Amber and that particular accident, which would have been a different thing.

WAINWRIGHT: And your close to answering my question. The question is, is it proper or not? Not how close to the line is it.

KELTNER: In these issues discretion sometimes has many faces. I would say that I think that it is proper in most instances. But if a judge could draw the conclusion from the reaction to the jury that it would be tending to commit them or getting their initial reaction to the facts of that case, then I think the judge would be within her discretion to of denied the question.

WAINWRIGHT: Under the circumstances of this case, did the judge know in your opinion that that was one of the types of questions that plaintiffs were seeking to ask?

KELTNER: In honesty she had to know. And she had to know because of the questions that had gone on previously. I think the judge was trying to draw a line that prevented case specific questioning and the like. Now, I don't think that the judge - anything the judge did prevented that type of questioning. When the general questioning stopped and the individual questioning started with the jurors, the plaintiff had already had the opportunity to go in to all of those issues, and the plaintiff stopped them from going any further. And the question that Mr. Cedillo asked is in the record. And he was trying to describe what the question was and what he said is he made it case specific to Amber, case specific to riding in the front seat, case specific to her not wearing a seatbelt. And his theory was that that would prove that if you give that dispositive effect (and this in what he says on the record in vol. VII) and this is when the judge said no more. And he said and when they give - I'm asking them if that makes them biased and prejudiced? How can a reaction to an operative fact that is an element of a cause of action cause bias and prejudice? We hope the jurors are going to be biased and prejudiced in answering the court's charge. And I think that's the issue.

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RESPONDENT

CADDELL: There is a lot of confusion in the record. First, it's clear from the CA's opinion and it's clear from the record, we were not permitted to ask questions concerning attitudes towards non-seatbelt users.

BRISTER: What kind of questions did you want to ask?

CADDELL: Well you could ask the same question. And I don't disagree there is a way

to do it without talking about Amber Vasquez. You can talk about how do you feel about people who don't wear their seatbelts? Do you think that they deserve whatever happens to them? Can you be fair to people who don't wear seatbelts? There is a commitment question that we are absolutely entitled to ask. The Standifer(?) decision we talked about that a little bit in our last argument. The Standifer(?) decision says there is certain commitment questions you can ask: Can you follow the law? If the law says this can you do that? will you do that? Similarly in this court's decision, which was issued after our last argument in Cortez, this court said like the _____ member in Goode, Snyder said he was willing to listen to all the evidence and to withhold judgment until the entire case had been presented. He never indicated inability to find for Cortez if Cortez proved his case. More significantly he said he was willing to try to make his decision based on the evidence and the law. That is all we can ask of any juror. I submit that is what we must demand of every juror.

JUDGE: In this case there was in response to the judge's invitation what questions did you want to ask? Mr. Cedillo, I suppose articulated what has been identified as the question at issue in this case. Are there any other questions that you believe that you are entitled to ask but were denied an opportunity to ask as a result of the judge's ruling?

CADDELL: Here's what happened in the sequence of events. It's laid out in our brief. It's at pages 6-8 of our brief. After we lost the first two panels and the court asked the question to the second panel and the court's question, and it's in the CA's opinion, it is a commitment question: are you going to follow my instructions to listen to all the evidence? Mr. Keltner frames the question differently than I would frame it and incorrectly. Of course the jurors could decide that not wearing the seatbelt was dispositive. Of course that's going to prejudice you or be influencing you when making your decision. There's no question about that. That's obvious. I didn't have to ask anybody on the panel that question. The question is, can you follow the court's instructions and listen to all the evidence? Or once you've heard that one fact in voir dire are you done? Have you shut down your mind and you will not listen, you will not consider the evidence?

JUDGE: The question I have is are there any other questions other than the one that the CA's identified, the one that you've identified in your briefs that you wanted to ask but were denied an opportunity to ask as a result of the court's ruling in foreclosing the question that you asked to ask?

CADDELL: Yes. And we did place that on the record.

JUDGE: What were those questions?

CADDELL: The questions were: What are your attitudes towards people who do not wear their seatbelts? The mere fact that you may or may not belt your own seatbelt when you start up your car doesn't tell us necessarily what your attitudes are towards others. You may not wear your seatbelt, and you may feel like anybody who doesn't deserves whatever they get, and that you're not going to listen to any evidence about a bad air bag or a defective...

BRISTER: So you're entitled to a jury made up only of people who think it doesn't matter whether you wear a seatbelt or not? If that was the law why did the legislature require it? They obviously thought people ought to do that.

CADDELL: The Cortez opinion - I know where some of that language came from. It says many potential jurors have some sort of life experience that might impact their view of a case. We do not ask them to leave their knowledge and experience behind, but only to approach the evidence with an impartial and open mind. That's the standard that we ask of a juror. We're not asking the jurors to say you don't have a prejudice, or you don't feel that seatbelts should be worn, and if people don't wear their seatbelts they are not at risk. We're simply saying you have to listen to the evidence in the case and keep a fair and impartial and open mind. Your rules, the TRCP 226(a), you instruct the jurors that they must listen to and consider all the evidence and make their decision based on the evidence and the law.

BRISTER: We don't instruct them they have to listen to. Normally what we mean by that is - suppose the defense lawyer stands up and says Ladies and Gentlemen, my doctor was drunk at the operation and cutoff the wrong leg. Anybody that's not going to listen to the rest of the evidence. Now we're not really asking are you going to put your fingers in your ears? We're asking is that going to be dispositive? Aren't we asking and shouldn't that be dispositive? Do we really want to throw off everybody that thinks it might be okay to cut off the wrong leg when you're drunk as a doctor?

CADDELL: The question is, if the facts as you've laid them out are accurate, then I suspect that's a summary judgment case and we wouldn't be at trial. The point is if it's not summary judgment and you're at trial, and you do instruct - 226 which has been in this court's rules since 1966 and was amended just last year says these are the court's instructions. It is your duty to listen to and consider the evidence. It also says since you will need to consider all of the evidence admitted by me, it is important that you pay close attention to the evidence as it is presented. I submit you can always ask. You must always be able to ask the prospective jurors if you hear one fact are you done? can you listen to the rest of the evidence? can you follow your instructions? And this court said in Cortez that's what we ask of jurors. And in this case we were precluded from asking that question.

WAINWRIGHT: And if they give an answer of yes. If I hear one fact that's going to keep me from really being able to weigh everything else because it was so critical, should that be a basis for a for cause challenge?

CADDELL: Yes.

WAINWRIGHT: What if it's the law that you must wear a seatbelt and a potential juror says well the legislature said that, it's a crime not to, that's going to end my inquiry. So you're saying you're not qualified to be a juror because you are going to follow what the legislature has passed as law in this state?

CADDELL: Yes.

WAINWRIGHT: But you just said the jurors must follow the law.

CADDELL: The law doesn't say that if you don't wear your seatbelt you are going to lose a lawsuit over a defective air bag. That's not what the law says. The law says you must wear a seatbelt. The law also says you can't speed. Obviously in many automotive accidents there is a head-on collision, one party, the party who is killed who stays in his lane is speeding. Does the fact that that person is speeding mean that he doesn't have a claim against the driver of the other vehicle who crossed into his lane and hit him head-on? No. It's not dispositive. It may be an important fact. Had he not been speeding might he have had an opportunity to see the vehicle coming in the other direction and take evasive maneuvers? So it is clearly a critical fact. It's clearly an important fact. But I would not want to have, and I do not think I should be forced to have, a juror who says if you're speeding, then whatever happens to you it's your own fault. And I can't listen to the rest of the evidence. You tell me that this poor person who is dead because a driver crossed into his oncoming lane and hit him head-on, he was going 10 miles over the speed limit, the legislature says you can't speed so he deserves what he got.

WAINWRIGHT: So if you make a for cause challenge to a ____ member who says it's going to be important to me that a crime was committed by this child not wearing a seatbelt, but I'm going to listen to everything else, you should lose that for cause challenge?

CADDELL: Yes.

WAINWRIGHT: Well that's consistent with what you've been saying.

CADDELL: Yes, it is consistent. And I think the Cortez decision - and I would point out for the court, the Cortez decision was an affirmance of the San Antonio CA, a 2 to 1 opinion. This opinion is a 6/0 en banc decision. The law is pretty clear. If the court wishes to change the law in Texas on voir dire it should appoint a commission as it has its rulemaking authority to do so.

BRISTER: Was there any other questions you wanted to ask the jury, whether they could listen to the evidence?

CADDELL: When they listen to the evidence. But we would have asked and what we said at the end of the transcript we were precluded, the judge said go forward. I would point out again...

MEDINA: That was after your objection was made correct?

CADDELL: It was after the objection was made. The circumstances that were created, at pages 6-8 of our brief, the court specifically represented to us that she was going to ask the three areas that we have identified. She said, I will bring in the jurors one at a time. I don't want to have a herd mentality. We did not object to that. There were questions at our last argument about the

issue of whether judges can take over voir dire. We did not have an objection. We did not lodge an objection to the court asking the question. So that there could be no issue of any inflection or the way we presented it, or anything like that. We didn't object. We resisted it initially but we ultimately did not object to the court questioning jurors individually.

BRISTER: So the additional question, it was the one that Mr. Cedillo mentioned about if you hear that fact you don't want to hear anything else. What other questions did you want asked to the jury?

CADDELL: The question we expected to be asked was the question the judged asked to the second panel. And what she represented to us is, I will go through similar to the _____, I will bring them back one by one and I will ask them the sympathy question, the seatbelt question and the front seat question. If I feel like it, I'm going to followup on that and then I'm going to allow each of you to ask any additional questions.

BRISTER: So you don't care about the sympathy question. And was the seatbelt question other than what Mr. Cedillo stated?

CADDELL: The seatbelt question was what the judge read . The judge wrote out the question and what she read to the second panel was what we expected and what was represented to us would be asked of the third panel.

BRISTER: Remind me what that was.

CADDELL: 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 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.

BRISTER: Well that's identical to the one that Mr. Cedillo stated here in the third voir dire.

CADDELL: It's effectively the same one. And then at the end of the voir dire the court did allow us to place on the record that we felt we had been ambushed and that we would have asked if she had alerted us that we were not going to be allowed to ask other questions, we would have asked other questions to illicit attitudes towards people who don't wear their seatbelts.

JUDGE: But you didn't identify any specific questions related to attitudes.

CADDELL: I believe I did say we would have asked people about their attitudes towards rule-breakers, people who don't follow the law, people who don't wear their seatbelts...

JUDGE: But attitudes was the whole object of what you're saying that you would hope to have asked had the judge not shut you down. You didn't ask the court if you could ask questions about whether the prospective jurors had a bias against product liability claims correct?

CADDELL: Correct.

JUDGE: You didn't ask whether product liability claims whether they had any bias or prejudice against persons who were unbelted bringing products liability claims. Correct?

CADDELL: Actually we were precluded - the record is very clear. After she brought in the first juror to be questioned on an individual basis and we were precluded from going in - she decided in the middle of that process. We had already gone through the general questioning and she had limited us (it's very clear in the record) to asking only do you buckle your seatbelt before you leave your driveway? That's all we could ask. We couldn't ask how - what are your attitudes towards other people? She brought in the first juror, she then decided not to ask the seatbelt question. Mr. Cedillo stated his objection on the record and she said that's it, we are not going to have any more seatbelt questions period. So we could not ask about attitudes towards people who don't wear their seatbelts. We couldn't ask a non-case specific question.

MEDINA: When the judge made that decision, and we're up here trying to review this court record do we review that under abuse of discretion standard or harm analysis?

CADDELL: I think this court's holdings in Babcock and elsewhere, the court is clearly given broad discretion in handling voir dire. So I think it is an abuse of discretion standard. The question is not would you have asked or allowed a different question or the same question? The question is was this a question that under the law we were entitled to ask? And the court refused to - it was an abuse of discretion.

JUDGE: Which question are you talking about that you are entitled to ask? The question that has been argued and discussed in the briefs and was the focus of the first argument in this case or some other questions that aren't clearly identified in the record?

CADDELL: I think for me the simple question, the bright line question is, and it's a commitment question. You ask people can you follow your oath? Can you follow the court's instructions to listen to the evidence? I think that's a commitment you're entitled, and this court said in Cortez that that's all we can ask of a juror. Well we didn't get to ask that of the jurors in this case. We did not get to ask the jurors in this case can they be impartial? can they listen to all the evidence before they make up their mind? will this one fact preclude them from following their oath? That to me is the bright line question. You don't even have to use the terms bias and prejudice. I'm not sure sometimes that jurors really know what those mean. And I'm biased against people who don't wear their seatbelts. I have small children. When I see somebody with their child in the front seat - I saw a photograph of Brittany Spears with her child in the front seat, in her lap. If something happens to that child, I'm biased. I am prejudiced.

BRISTER: So you can't sit on Brittany Spears jury. So we are going to have only people who think that's okay sitting on Brittany Spears jury?

CADDELL: No. We are going to have people who say I don't like that. I think that's a problem. I'm very unhappy about that, but I can follow my oath and listen to all the evidence in the case...

BRISTER: Well what does that mean? We've got a press photo of her with the child sitting in her lap. What other evidence is it you would listen to?

CADDELL: It depends on what happened.

MEDINA: Well that would be like someone getting on a panel for some reason who may be against the death penalty but telling the judge and all parties that irrespective of my feelings, I can still follow the instructions of the court, and if the evidence supports it vote for the death penalty.

CADDELL: That's right. And that's what Mr. Schneider said in Cortez. Mr. Snyder said I see a lot of cases. I'm an insurance adjuster. Sometimes I don't like - I think I see a lot of cases or claims that are not legitimate. I think the defendant starts out ahead. That's what he said. And this court found that that was okay because he said he was willing to try and he would follow his oath to listen to all of the evidence. That's all I'm saying. I'm not saying we didn't start out behind.

BRISTER: The cases in the middle that are close, you can tell the jurors all the facts and they are not going to have a strong feeling. But I'm concerned about the rule, what do we do on the cases that are just outrageous one way or the other where as soon as we tell the jurors the doctor was drunk or the plaintiff was drunk, whatever, they are going to have a visceral reaction: this person should lose. And do we have to have a special rule for those cases or is it exactly the same as in close cases where we know the jurors are not going to have strong feelings one way or the other?

CADDELL: I think that justice is often inconvenient. And when you have a difficult case, it may mean that you have to have a bigger panel. And it may mean that the court ask the question, and it may mean that you bring them in individually and do it one at a time to avoid a herd mentality. But it is important that the same policy...

BRISTER: The bigger panel you get - I mean if you've got a videotape of Rodney King getting beat up by the police, and we get a huge panel so we get rid of everybody except people who think that might have been a good thing to do. Then there are other problems that we have with the system which is people don't feel that the verdict exactly is representative. Don't we - the bigger the panel gets the less representative panel we're going to have from the community right?

CADDELL: I just disagree with that. I don't think that's an accurate statement. I think the panel is reflective of the community in the sense that it is drawn from the community.

O'NEILL: It strikes me that one of the problems here is jurors are clearly confused. If you've got a bad fact and you say here's a bad fact, can you still be fair? It sounds as though you are asking them to disregard that fact. It strikes me that if you had a more complete question that was something like if non-seatbelt use did not cause the injury here, would you hold non-seatbelt use against my client anyway? Then they understand it better. But to sort of say here's a bad fact. Can you follow instructions? Jurors reactions are are you asking me not to pay any attention to that? It strikes me it could be asked in a way that would be more explanatory that would be okay. But if it's asked in a way that's confusing, the court can't really abuse its discretion by not allowing it.

CADDELL: And that's why I say I'm not comfortable with the use of the terms fair, bias, prejudice because I don't know that - sometimes I don't know what that means. And I certainly think that jurors sometimes don't know what that means. That's why to me the bright line test is, can you honor your commitment to listen to the evidence? If you're telling me right now you've heard one fact...

O'NEILL: The question is the same. If you say a drunk doctor can you still honor the evidence. As a potential juror I'm thinking what you're asking me is not to pay attention to that.

CADDELL: And I think the way to cure that is with this court's opinion in Cortez. If you think - and let me say with respect to Cortez I've never tried a case where the judge and opposing counsel didn't try to rehabilitate potential jurors who expressed an inability to be fair and impartial. That's just the way trials work. They are sometimes messy. And there is some give and take. And it's a good process. And the point that you make I think is exactly addressed by Cortez.

WAINWRIGHT: In _____ v. Baker, after Cortez, we issued a per curiam that distinguishes bias from legally disqualifying bias. And that's the distinction I think you're trying to draw. And you believe that commitment questions should be used in order to determine if there is legally disqualifying bias. At some point, surely even you agree that you go too far down the commitment road?

CADDELL: Yes. And I think that the - actually I think the CA in Standifer probably had a pretty good bright line there if there's a commitment that someone has to make. If your rules are going to have the court instruct jurors that you have to listen, it is your duty to listen to and consider the evidence, and since you will need to consider all of the evidence admitted by me, it is important that you play close attention to that evidence. If we can't ask people if they can do that, you need to get rid of your rule.

WAINWRIGHT: Would you agree that if you had stood up and asked the third panel: if Amber wasn't wearing a seatbelt how many of you would vote that I would lose? That's improper.

CADDELL: That is absolutely improper.

WAINWRIGHT: What if you said if Amber were not wearing a seatbelt how many of the

members of the panel would not be able to consider all the other facts and the judge's instructions and still reach a fair and impartial verdict? Do you think that's a proper question?

CADDELL: I think that's a difficult question. Because at that point, I think jurors are clearly after they listen to all the evidence, they make a decision as to which parts of the evidence they accept and which they reject. Once you get to the end of the trial, they don't have to consider or accept all the evidence. They can clearly reject it. I think their duty is to listen.

WAINWRIGHT: How is that different from just a preview of the jury's vote?

CADDELL: Well it's not asking them to vote. There is no vote there. You're simply saying can you listen to the evidence. You either can or you can't. I think again any juror - if a juror just answers the question: I'm sorry Judge, I'm not going to listen to the evidence. We don't let that person serve on the jury.

WAINWRIGHT: So the critical distinction in the questions is, did you ask how many of you would vote with me verses how many of you would consider everything else. Is the critical distinction using the word consider or listen verses vote?

CADDELL: I don't find consider - I don't think there is any magic word. I think following your commitment to listen to all of the evidence, and there is the instruction since you will need to consider all of the evidence. I think as long as you frame it in conformity with this court's rules as to what the duties of the jurors are, then I think you should be permitted to ask those questions. You must be permitted to ask those questions.

WAINWRIGHT: So it's going to differ depending on the facts and it's a judgment call?

CADDELL: Yes.

JUDGE: If the trial judge has the discretion to gage the response of the juror to be disqualifying or not disqualifying, does the trial judge have the discretion to take a look at a question, because these are really close cases, and the questions are always closed, and make a call about whether the question seeks the view of the evidence in terms of how they would vote, or seek some bias or prejudice that the juror brings in that's unfair?

CADDELL: Well I think the answer is yes. But there clearly are limits to the TC's discretion. And if the TC precludes the lawyers from asking if jurors can discharge their responsibilities as set forth by this court in rule 226(a), then the court has abused its discretion. Again, we didn't have an objection to J. Speedlin taking the question. The question that we asked the first panel, that Mr. Cedillo asked the first panel was not - we can talk about it in different ways, but it was not as clear as the question that J. Speedlin asked the second panel. And she wrote it out and she showed it to us ahead of time, and we looked at it and it conformed to basically the instructions that she knew she was going to give. And it was delivered from the judge. There was

nothing objectionable about that question. And that's - so she had all of that discretion. But then when she refused to ask the question that she herself had drafted and she delivered, I think she...

JUDGE: But you didn't ask her to ask the question that she had asked the second panel. You didn't ask that. Perhaps that's what you intended, but that's not clear from the record that that's what you wanted her to do.

CADDELL: Actually she told us that's what she was going to do. We didn't have any objection.

JUDGE: But at the time that she asked what questions do you want to ask other than what's already been asked, there was no point made at that point in time in the record or thereafter the respondent wanted her to ask the question that she had asked of the second panel?

CADDELL: Actually that's not true.

JUDGE: Well that's what the record reflects.

CADDELL: Actually the record does not reflect that. There are two things you're looking at. One is the immediate reaction - and frankly we were ambushed. There is no other go word for it. The court represented to us on the record this is what was going to happen. You have to remember this came in the context of this is what happened with the second panel. And the court gave that instruction, gave that question to the second panel and then represented to us with the third panel we're going to bring in a bigger panel, we're going to bring them in one at a time (that's in our brief pages 6-8). And she said I will ask the seatbelt question just like I did with the second panel. When she suddenly changed course in midstream we were already past the general voir dire. We were then in to questioning individual jurors. And at that point, she not only said I'm not going to ask the question. She said I'm not going to let you ask any questions about seatbelts. At that point there was not - you know our saying the question, the prohibition was very clear.

JUDGE: You don't think the trial judge was entitled to know that you wanted her to ask the specific question that she had asked of the second panel?

CADDELL: I guess. I don't know how we could have let her know that anymore than the fact that she had represented to us that that's what she was going to do. And had instructed us that that's how she was going to proceed. Then at the end, on the record, at the very end, I put on the record that we were ambushed, that this was not what we had expected, that it had been represented to us that she would ask the seatbelt question, and that when she failed to do so and then instructed us not to ask any seatbelt questions that that effectively precluded us from trying to get at these attitudes through other questions. So it is on the record. It's at the very end however. It's at the very end of voir dire. And she allowed me to make appeal on that basis.

O'NEILL: Trial judges are very different. Some are more involved in voir dire. Some

are less involved in voir dire. It's clear that often these questions are confusing when you look at the panel. Although on paper it may look fine to us as lawyers. When they are asked the question, The doctor was drunk. Can everybody still look at the evidence? You can look out there and see they are confused. At what point does the judge - the judge can sit back and kind of make that determination they are confused, you are going to have to approach this another way. You ask it five different times and each time is a problem. How far does the court have to go to allow a question to be rephrased until it's such - I mean I can picture this question being phrased in a way that would not be confusing. But if every question that's put up is generating confusion and no question is proffered, it would be clear. When does the court have to stop? When can the court stop and say the same questions are causing the same confusion. The questions aren't being changed to eliminate the confusion. We're not doing it anymore.

CADDELL: I may have been fortunate in that I've been working with good judges. But I've just not had that experience. The reality is that when a judge works with the lawyers on voir dire and it very clearly identifies jurors who are confused, they bring them up one at a time to the bench or they bring them in one at a time outside the hearing of the rest of the jury, and they go through: what's your confusion? you understand this? you understand we're not asking you that this is not important? we're asking you can you recognize it even if you believe this is important? even if you think the defendant starts ahead can you listen to all of the evidence? I've never seen a juror who didn't at some point understand and appreciate the distinction.

O'NEILL: So you would say then the court abuses its discretion if it doesn't continue and become pro-active in getting to that point? The court just can't sit back and say you can't ask that question, that question is confusing too, that one is too, you are continuing to ask the same questions. No more.

CADDELL: Surely there is a point at which the court does not abuse its discretion in cutting off voir dire. I think the real question in this case - I think it's important again if the court wants to rewrite the rules on voir dire, there is a rule making authority in which it can do so. I think for this case however, there was a question. We knew what the question was. The court knew what the question was. And the question was never asked. So we never got to. And so we had two panels where we had a ⅓ to ½ of them disqualified on various issues. And then in the third panel when we brought in 72 people and we were going to question them on an individual basis, we seated the panel on the first 29.

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REBUTTAL

KELTNER: I'm not going to be the lawyer that's saying that voir dire is not important because it is. And picking a fair and impartial jury is very important. The problem with commitment questions, and questions that pretest the juror's reaction to that don't create a fair and impartial jury. What they create is a jury that is likely to see the case from one side's perspective and not the other. If they make a commitment they feel honored to stand by it. If they tell their initial reaction to the

evidence they have to think about it again when they are looking at the evidence after it has come in and that's not the fair and impartial view we want people to have. We have a fundamental _____ thought. It's a very clever thing to say can you listen to all of the evidence? It is consistent with Cortez as J. Wainwright pointed out. And that's important. But you've already seen in other cases that had come before you the danger. In Wolfe Drilling in which this court granted petition and subsequently the parties settled this same issue came up. The question was, the mud is slippery on the drilling platform floor. The plaintiff knew that. That's undisputed. Is that fact alone going to help make your decision? Will you pay attention to it? Or are you going to be unfair, and are you going to be biased and prejudiced? Objection. Same objection we make.

They go back. They read Vasquez. And what they tell the court is, let's reask the question and ask them whether they can listen to all of the evidence after hearing that piece of evidence as well.

JUDGE: Even if the question would not be disqualifying, is counsel entitled to ask the question so that they can intelligently exercise the preemptory strikes, and if not, why not?

KELTNER: Two reasons. First off, the idea of time, the limits of voir dire to preemptory strikes has a problem. And here's what the problem is. Preemptory strikes can be exercised for any reason whatsoever. So as a result voir dire would be endless. The CCA in Barajas has joined the majority of jurisdictions in the US saying that's not an appropriate limit on voir dire. It doesn't mean you can't argue your case that way. It doesn't mean that you couldn't talk to the jurors in opening statement and closing argument about it.

What you ask when you ask whether you can listen to all the rest of the evidence is, especially if the judge does it - and let me tell you. That's what now Justice Speedlin then Judge Speedlin did in this case. When she asked the question about can you listen to all the evidence, she immediately came back after seeing - I mean minutes after seeing the juror's reaction to that, she comes back and says oh my goodness, they are getting the idea that I'm telling them they can't put weight on this particular evidence. That's not what I intended. The judge there on the scene watching the jurors had that reaction. Now the question is how far do we have judges go in all of this? And I think that that is a troublesome - always has been a troublesome issue. Mr. Caddell says well don't change this case. Change the rules. There aren't any rules. There are no rules on this. Perhaps there should be some.

MEDINA: Can you think of a bright line test the court can give to help members of the bar and the trial judges?

KELTNER: Yes. I would look at the Sanchez opinion from June 2005, from your sister court, the CCA. And what they say is this. We don't let fact specific questions be asked. We don't do it because it tends to pretest the juror's reaction to those things. You can ask things generically if you will. J. Bland had that issue in the McDonald case that was decided in Nov. 2005. The same issue regarding a child who had been sexually molested. And the issue was in that case, it wasn't

asked in a case specific way. It was asked in a general way of what the jury's reaction would be to a child who made that kind of allegation. Again, not case specific. And that's a good rule.

MEDINA: How do you get there if a judge says we're cutting all questioning off in that general topic, whatever that topic is?

KELTNER: I don't think you cut it off completely. There has always been things...

MEDINA: But that's what happened here as I understand it. We're not talking about seatbelts anymore.

KELTNER: No. I don't believe that's what happened. I think a fair review of the record will show this. The court went through three questions. And I know one of the fellow justices on the court wrote this opinion. And no one has more respect for J. Green than I. But I think this one got by him. And I think it did because he approves everyone of these questions in all the three voir dires, including the first one which doesn't consider all of the rest of the evidence. It's asked, if you listen to it and will you give it dispositive effect? And pretty much says that means you're not fair and impartial. It also means in the way it was asked that you are biased and prejudiced. But here's what really happened in this case. What the judge did, and there wasn't any hiding of this at all. The judge goes through two panels. She realizes what the problem is. She talks about the problems her question that he now says he would have her ask, talked about the problems that created with the specific jury panel on that case. And said oh my goodness, they are misunderstanding the question. They are not understanding what I'm asking, and I'm commenting on the weight which I don't intend to do. Then she said here's what we will do. And there was a whole discussion and she gave the parties some options. Plaintiffs rejected both of them. Defendants took one. But when they came back she changed the whole landscape. And what she said is, you're going to ask general questions about seatbelt use. Then we are going to go specifically and we will see what needs to be done. When they get to specific questions, Mr. Cedillo very appropriately approaches the bench and there is a discussion about what's going to be asked. And after explaining it and making it case specific here's what he says: the eventual question is whether or not they would be predisposed regardless of the evidence. Their preconceived notion is that if there was no seatbelt in use, no matter what else the evidence is, that they cannot be fair and impartial. That is in response to the judge's question about what do you want to ask?

WAINWRIGHT: Well she asked what is the type of question you need to ask?

KELTNER: Yes. That's exactly right. There is no doubt about that.

WAINWRIGHT: And then the answer you just read is the answer that was given.

KELTNER: The problem that I think that I've got there is 1) we don't have a proposed question, which generally we would require in this issue to get a reversal. But the San Antonio court didn't deal with that issue.

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