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Supreme Court of Texas.
TESCO AMERICAN, INC. d/b/a Tesco/Williamsen, Petitioner,
v.
STRONG INDUSTRIES, INC. and Brooks Strong, Respondents.
No. 04-0269.

February 17, 2005

Appearances:
Thomas C. Wright, Wright Brown & Close, LLP, Houston, TX, for petitioner.
Robert B. Dubose, Cook & Roach, L.L.P., Houston, TX, for respondents.

Before:

Chief Justice Wallace B. Jefferson, Priscilla R. Owen, Harriet O'Neill, David M. Medina, Paul w. Green, Nathan L. Hecht, Dale Wainwright, Scott A. Brister, Justices.

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SPEAKER: Oyez, oyez, oyez. The Honorable, the Supreme Court of Texas. All persons having business before the Honorable, the Supreme Court of Texas are admonished to draw near and give their attention for the Court is now seated. God save the State of Texas and this Honorable Court.
CHIEF JUSTICE JEFFERSON: Thank you. Please be seated. The Court has just one matter on this oral submission docket. It is 04- 0269 Tesco American, Inc. d/b/a Tesco/Williamsen v. Strong Industries Inc. and Brooks Strong. The Court has allotted 20 minutes per side. These proceedings are being recorded digitally and a link to this argument should be posted on the Court's website by the end of the day. There is currently one vacancy in the Court which we expect will be filled in the near future. The Court is now ready to hear argument in 04- 0269 Tesco American, Inc. v. Strong Industries.
SPEAKER: May it please the Court. Mr. Tom Wright will present argument for the petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF THOMAS C. WRIGHT ON BEHALF OF THE PETITIONER

MR. WRIGHT: May it please the Court. The court of appeals affirmed a fraud in the renditionof judgment on the basis that my client did not

intend to perform a contract when they signed it although they performed it for five years and about $2 million dollars worth of [inaudible] from the other side. The court of appeals also said that when the charge is not defined on major damages, the jury can award whatever the plaintiff has testified to because there's no way to assess the legal and factual sufficiency of the evidence when there's no major damages in the charge.

Well, I wanna start today where I think the Court may be focused and that is on the issue of disqualification. Justice Higley is disqualified under the Constitution. That's the inexorable result of looking at In Re: O'Connor which was decided by this Court a couple of years ago. And the question to be quote really is this. Is rule 18b(1) of the Texas Rules of Civil Procedure intended to be a restatement of the constitutional standard or is it intended as an expansion on the constitutional standard?

We say and In Re: O'Connor supports the reading that rule 18b(1) is the constitutional standard. You can tell that from not only the language of In Re: O'Connor but from the holding of In Re: O'Connor that the judgment signed by a judge even though the issue was not raised till after the rendering of judgment was void and that the point could not be waived. Those are --

JUSTICE: You would agree though, Counsel, wouldn't you, that the language of Section 5, Article -- I'm sorry, Section 11, Article 5 of the Constitution is different from the language of rule 18b(1), isn't it?

MR. WRIGHT: Yes, there are more words in rule 18b than there are in the Constitution on two of the grounds for disqualification. Not only this one but the one about financial [inaudible].

JUSTICE: So although the wording is different you think this standard is the same, that 18b states in the Constitution [inaudible].

MR. WRIGHT: Yes, I do, your Honor. And that is not only my opinion. It was the opinion of this Court's advisory [inaudible]. In the materials we have provided, that exact point was made by [inaudible] and solicited dissent and got known from the committee.

JUSTICE: If 18b expands the standard for disqualification, would it be legitimate and could we expand that standard to our rule or can it only be expanded by the Constitution of that statute?

MR. WRIGHT: Our cases did say that the Constitution is both inclusive and exclusive on the grounds of disqualification. And I think that's why this Court, when it developed the rules in 18b(2) about recusal, made some recusals mandatory rather than calling those disqualification because the Court and the legislature is permitted to expand recusal, even mandatory recusal which might work the same as disqualification. But I believe that the rule would be in question if it had expanded the constitutional standard.

Besides which there would be this practical problems that [inaudible] has talked about in the committee and that is, you would never know whether an order was void or voidable. Just as in this case we have assumed the justice did not work on this case but we had no way of knowing that. And I don't think this Court wants to adapt a procedure where we can take depositions to find that out.

JUSTICE: Did you quarrel with the procedure that the court of appeal's used the idea that -- that I wanted you to --

MR. WRIGHT: Well, disqualification in the first instance is a matter of professional responsibility of the judge in question. So I don't quarrel that they first asked the justice whether she felt herself disqualified. After that, I do believe that Justice Hedges

probably has a better idea. And that is the question ought to be sent to a different court of appeals because people cannot be depended upon to judge their own conduct accurately. And that's in -- many of these cases have discussed this very [inaudible].

JUSTICE: Of course, the U.S. Supreme Court does.

MR. WRIGHT: Well, yes, but there's no place else to go and --

JUSTICE: You know, we sometimes like to think that this Court [inaudible] nowhere else to go as far as state law matters so who are we gonna send it to? Folks across the hall?

MR. WRIGHT: No. I'll give your Honor a very good example. The Arkansas Supreme Court issued an opinion 6-1 and that the authoring judge was found later to be disqualified. The entire Arkansas Supreme Court recused themselves and asked the governor to appoint seven other people. Apparently, having a constitutional provision very similar to what we have. So if there's no place else to go, there is a place to go under our Constitution. The governor can appoint special judges who are not recused or disqualified.

JUSTICE: Of course, if the legislature's in session, they're gonna have to be confirmed?

MR. WRIGHT: I do not know but I do not believe special judges have to be confirmed but your Honor probably knows more about that than I do.

JUSTICE: But your thought is that if one is disqualified, the -- on -- on -- on the court of appeals, the other two would be ?

MR. WRIGHT: No, they're not disqualified.

JUSTICE: They should recuse? And I guess, that would apply -- but you don't think it applies past the panel.

MR. WRIGHT: Well, let me state the goal. The goal is to create a system that will accomplish both the -- the -- not only the appearance but the reality of impartiality and fairness and propriety so that the litigants and the public, in general, will have confidence in the system. Right now, we can draw some legal conclusions from the myriad of Texas cases and constitutional provisions and we can also design a system that's more directly or more fully accomplishes that goal.

I think the best thing to do would be to send the case to another court of appeals. This Court has the --

JUSTICE: Why is the public gonna feel better if the First Courts all recused on this case so we send it upstairs to the Fourteenth Court. I mean, all those people know each other. If the idea is, well, Judge X knows Judge Y then the facts of the matter X and Y know Judge Z upstairs, too.

MR. WRIGHT: Well, that may be a function of having two courts sitting in the same building.

JUSTICE: Well, but I mean, you know, everybody knows -- it's only A, B judges. And most of them do know each other even if they are in God forsaken places like Eastlander wherever that might be. As [inaudible] the matter, they do know each other. So why is that gonna matter?

MR. WRIGHT: Well, what we have here is a scale. Obviously, we can't take every judge in the system out of the case.

JUSTICE: But shouldn't it be a -- more practical [inaudible]. I mean, let's take First and Fourteenth. First Court, every case circulates full court, the Fourth goes out. Fourteenth Court, they don't. So, First Court, the Fourth goes out. Every judge has implicitly approved it but Fourteenth, they have not. So why should you, if one panel has all recused to the Fourteenth Court, why would the rest of the Fourteenth Court who did -- who read this opinion for the first

time that they had issued just like everybody else, why should they be recused?

MR. WRIGHT: Well, I believe this Court wants to establish rules that will apply equally whether or not the Court has decided to have an internal policy about the full review, whether that changes over time, sometimes, that's hard to find out for litigants whether they go through that process or don't. So, I think there needs to be a rule that can apply whether we're talking about a three-judge court or a nine-judge court or whether as your Honor mentioned, a court that goes through this full review process.

JUSTICE: Why should all three be recused if one is -- why, I mean, what's the principle behind it? Is it the appearance or what?

MR. WRIGHT: Well, the principle especially when it's the authoring judge that has been disqualified --

JUSTICE: But each of the other judges are gonna make their independent assessment and let's say that judge steps down then the remaining two, why can't they review that work, accept it or not, and issue an opinion if they themselves were not recused.

MR. WRIGHT: Well, we do not know the extent of which the two other judges on the panel independently reviewed the opinion.

JUSTICE: Well --

MR. WRIGHT: We presume that they do.

JUSTICE: Yes, we can try. I think we can presume that.

MR. WRIGHT: Well, we presume that they do but it is undeniable that the authoring judge has a great deal of influence on what goes into the opinion. Unless the other judges, you know, say something that's blatantly wrong or some flagged results, it is the responsibility of the authoring judge to -- from before the case is submitted in the First Court of Appeals, to take the case through to opinion assuming they stay in the majority.

JUSTICE: If it was an en banc decision and there were dissenting justices, should they recuse, too? Dissenters have a great deal of influence on occasion into what goes into a majority opinion also, if that's your rationale.

MR. WRIGHT: If that's the rationale, then that should be the rule. The plainest rule, as I say, is to assign this to a new court of appeals. That way you avoid all of these little detailed questions, and I'm not criticizing the questions but there are a number of permutations about how this might work out. If you send it to a different court of appeals, then I think that will be perceived as and it will be a clean break.

Send it another court of appeals not to review the opinion to say they agree with it but to resubmit the case, to have a new appeal because if a trial judge were disqualified, we would not be satisfied to send it back and say, "Get another judge and he'll come in and sign the same order."

No. A new trial is ordered when a trial judge is disqualified even if the jury is not disqualified because it has permeated the process.

JUSTICE: Well, you're right, it's a good point. Let's suppose that a judge is disqualified in Harris County, do we disqualify all the district judges in Harris County and submit to Fort Worth?

MR. WRIGHT: No, the district judges in Harris County are single judges of independent courts. Yes, they are --

JUSTICE: They trade benches. They eat lunch together. They -- they're very tight.

MR. WRIGHT: Yes.

JUSTICE: A mass tort sometimes sit informally in groups of three

to make major decisions.

JUSTICE: Or in Baylor County, you might have ten or fifteen judges ruling in the same thing.

MR. WRIGHT: Exactly, but if anyone of them has been disqualified, whatever order that judge has entered are void. But this, you know --

JUSTICE: But do you disqualify everybody else?

MR. WRIGHT: No, because they are not all participating in the decision.

JUSTICE: But in Chief Justice Jefferson's example, [inaudible] there might be 10 judges that sat in the case over time.

MR. WRIGHT: I don't believe they all, your Honor, with respect, participated in the same decision. One's gonna rule on a discovery matter, one's gonna rule on, you know, quashing depositions, another one takes the case --

JUSTICE: But what is it, I guess, at core, what is it you fear? Are you concerned that confidential information was shared with other judges, what is it that requires disqualification of colleagues?

MR. WRIGHT: Well, what ought to cause this Court to maybe not disqualify them but send the case to another court as a remedy is the appearance of fairness in the eyes of the public. This is not a big public case. I see no newspaper article on it but supposed it worked, this could be one of the biggest cases -- this could happen in one of the biggest cases this Court has and the scrutiny that would be applied to it needs to be satisfied. Besides which, this disqualification seems to be somewhat less egregious shall we say, than it could be.

JUSTICE: And let me follow up on that point because really what we're talking about here is whether it's void or voidable. If it's voidable, then it's waivable. And why wouldn't we want to go with nonconstitutional disqualification so that somebody can't lie behind the log, get the opinion of it. If they don't like it, they could come back and claim constitutional disqualification. I mean, it it's a close question. Why don't we, as a policy matter, decide that we'll decide it on an individual basis that someone can waive [inaudible] point out?

MR. WRIGHT: Well, you raised a couple of points on that question. The first, to lay-behind-the-log' idea is equally applicable to both sides and so there is no tactical advantage. I fully expected to win this case. It would not have been to my advantage to lay behind the log if [inaudible] realized this before the opinions which I did not.

But the other point about why not have a rule that goes towards trying to find this as waivable, if going in the wrong direction. All the other courts that have dealt with this have gone in the direction of, "Let's avoid any question. Let's take ourselves out of this. Let's not try to fight to stay on a case where the public or the perception is gonna be --

JUSTICE: But that sort of begs the question in a way because you can still make that determination if we decide that it's not constitutional disqualification. You can still look at the individual case and decide here because of the appearance of what happened here, we're gonna go ahead and disqualify so you still got that same discretion.

MR. WRIGHT: You could. You'll have to overrule In Re: O'Connor if you say that vicarious disqualification is not constitutional or required because there, you held the judges' opinion void and held there was no waiver because the law partner of that judge had worked on the case. There's no issue in that case that the judge himself had been a part of the case. So I think it kind of started the remedy in working backwards may be the wrong approach. I think you needed to look at what

is constitutional disqualification. And as a rule, I clearly think that -- and as this Court did not mean to make a substantive change in 1997 when it amended the rules like I do not believe it did --

JUSTICE: So, your response is to cross that bridge in O'Connor and if we don't think we crossed that bridge then it may be the better course to hold it not constitutional so you consider each one individual.

MR. WRIGHT: Yes, I do and then the question is the remedy.

JUSTICE: Of course, we're gonna hear in a minute that O'Connor only involved trial judge not appellate judge.

MR. WRIGHT: Of course.

JUSTICE: What -- the language of the constitutional provision says no judge shall sit it any case when the judge shall have been counsel in the case. What about that language allows us to do anything about this situation when the judge has not been counsel to the client in the case?

MR. WRIGHT: The language as explained by the rules committee and as explained in the rule itself, takes into account --

JUSTICE: I will specifically just limit my question to the constitutional provision.

MR. WRIGHT: All right. The constitutional provision has to be applied in what this counsel in the case mean. That's why you have to apply the Constitution and interpret it and when you find out that the law partner had worked on the case and under the modern rule that has been developing over the last hundred years, the imputation of knowledge between people and the law firm, that's how you get back to reading the Constitution that way.

JUSTICE: Do I take it then that for your position to hold water, you've got to look at not just the constitutional provision but other things in connection or in conjunction with this constitutional language?

MR. WRIGHT: Well, I think the Court would be interested in looking at the interpretations of that constitution that the Court itself has made in the rules and in its previous decisions.

JUSTICE: And let me just clarify one other point. When you said that better approach is to send the issue -- the case to another court of appeals, it sounded to me like you're saying that's a prudential decision we should make. It's not required under the disqualification rule. It's not required under recusive rules but it's just the better approach in your opinion.

MR. WRIGHT: That is a better approach. The Constitution provides that when any one justice is disqualified, the governor will appoint a replacement. That's in that same section 11: That's certainly another [inaudible]. I see my time is up.

CHIEF JUSTICE JEFFERSON: Are there any further questions? Thank you, Counsel. The Court is ready to hear argument from the respondent.

SPEAKER: May it please the Court. Mr. Robert Dubose will present argument for the respondent.

ORAL ARGUMENT OF ROBERT B. DUBOSE ON BEHALF OF THE RESPONDENT

MR. DUBOSE: May it please the Court. My name is Robert Dubose and I represent Strong Industries and Brooks Strong. It's an interesting picture that we've heard from the petitioner in this case. It's one

that is rooted in the petitioner's view of the policy that this Court should adopt. But I think that policy, some of the ideas that have been suggested such as having another court of appeals decide disqualification is not something that's rooted in our history and it's not something that's rooted in the constitution. The problem with this entire argument is it ignores the constitution and the history of the cases that had interpreted it.

JUSTICE: Well, let me ask you. Did we cross this bridge in O'Connor? I've two questions there. One, the disposition was the order was void which would seem to indicate constitutional disqualification. And two, if that is the case, why should we have a different standard for trial court judges and appellate judges.

MR. DUBOSE: I acknowledge that's what happened in O'Connor. We say it was not an issue in O'Connor that was debated between the parties. That was argued between the parties, whether it was constitutional disqualification or rule-based qualification. We'd encourage the Court to look at that issue with fresh eyes now that that is glaring before the Court in this case.

But that is -- that does seem to be what was going on in O'Connor. O'Connor is -- it does apply only to trial court judges. And in that case, there is the trial court rule that provides for vicarious disqualification so that makes sense. But I don't think the Court carefully considered in O'Connor -- wasn't asked to carefully consider whether there was some distinction there between the rule based disqualification and constitutional disqualification.

JUSTICE: Well, that would -- it leads me to my second point, why should we treat trial court judges differently than appellate court judges on this issue?

MR. DUBOSE: Well, two. One is, there's a rule. There's a rule of procedure that applies to trial court judges that says that they are disqualified in this situation. And there's not that rule, at least, currently, there's not rule for appellate court judges. Is there some policy behind --

JUSTICE: There's not if you win your argument. I mean, the argument is if it is constitutional disqualification, then it's the same. And so why shouldn't we --

MR. DUBOSE: Sure.

JUSTICE: -- make it the same? It would be very easy to say, in O'Connor that the result was a void order, therefore, we've met constitutional disqualification and now trial and appellate judges are all the same. What's wrong with that picture?

MR. DUBOSE: The problem is it goes against the Constitution because the Constitution does not recognize vicarious disqualification and that's the big problem. I mean, there's some other problems but that's the main one. So the constitution does not recognize vicarious disqualification. It says that someone who was counsel in the case is disqualified.

There's a very important case that I haven't cited in the brief. It was issued by this Court shortly after the Constitution was adopted. It's the Taylor v. Williams case from (1863) 26 Texas Reporter 583. In that case, the question was whether a lawyer who was of counsel in the case, whether that should be extended to include a judge who had been a lawyer -- who was of counsel in a number of related cases. And the Court said no. The Court said, "You cannot expand this term beyond what it says in the Constitution." The Court actually used the phrase plain language and said, "We run a lot of risks if we freely interpret the Constitution and go beyond the plain language of the meaning of the

phrase "of counsel."

Now, this is a different case but the Court is being asked to do essentially the same thing. Expand the meaning of "of counsel" to include someone who is not "of counsel" but simply happened to work at the same firm as someone else who was "of counsel." It just doesn't make sense under the Constitution.

JUSTICE: You quarrel with the procedure of the court of appeals used as they did, about whether it should be by mandamus or by discussion among the judges.

MR. DUBOSE: The dissent makes some sense to me and one of the reasons it makes some sense is because particularly after the case has been decided mandamus seems to be, at least the easiest way to resolve the situation, to stop the judges' participation immediately by mandamus rather than challenging the opinion that the Court has decided on the appeal.

The problem, though, with that approach is that it hasn't been the historical approach of the courts of appeals and of this Court. The Sun Oil case in 1972 that this Court presided, it essentially did the same procedure which was when one of the judges was questioned for disqualification, the other judges decided the disqualification issue and that judge sat down. I don't think the majority opinion cited the Sun Oil case. They cited some court of appeals who had done essentially the same thing but there's some, at least, historical practice that supports the procedure that the court of appeals did in that case.

There is a -- I think the plea and in concurrence by Chief Justice Hedges that this Court defined the procedures. I think the procedures exist to some degree and in the history of how it's been treated but it might make sense eventually to write a rule that specifies the procedures for disqualification since they're not specified.

JUSTICE: In this case, there appears to be a good faith disagreement in the court of appeals over what the Constitution provision means and it's not clear that Justice Higley recognized the factual basis in the argument that she is disqualified.

Do you think it would make any difference to the remedy whether everybody's recused or some or none or how to proceed if she is recused -- is disqualified, I'm sorry. Do you think it would make any difference to what else happens, depending on her conduct if she knew she was disqualified but she just refused to do it and the Court had to order her off the case? Would that be a different circumstance with respect to who else was recused on that court than if you had these circumstances where there do seem to be good faith disagreements?

MR. DUBOSE: That's an interesting question. I'm not sure I understand what you mean about the confusion about what the rule from Justice Higley. But -- but --

JUSTICE: Well, they disagreed. They read the Constitution differently. Just as it will turn out a whole lot of people did if rule 18(b) just is congruent with the Constitution.

MR. DUBOSE: I had the sense that the judges of the court of appeals all read the Constitution the same way with the possible exception of one footnote in the dissent that recognized that there was a problem with -- with [inaudible]. But if I understand the question correctly, it's whether or not there's some difference in the remedy depending on whether she had actual knowledge about this case during the course of the proceedings or --

JUSTICE: And hid it.

MR. DUBOSE: And hid it --

JUSTICE: Didn't come forward or something hideous or culpable but

something more that implicated more culpability than appears to be here.

MR. DUBOSE: The parties in this case have all assumed that Justice Higley did not know anything about the case. And in fact, there's a line in the majority's opinion that says that she did not know about the case. We've never had any fact finding to see whether she knew about this case or participated in this case but the assumption by everybody is that when she was at Baker and Botts, she had no knowledge about the case.

But would the rule be different in that circumstance, that's an interesting question. If she had been counsel in the case, then she would be constitutionally disqualified. And even if this case -- even if the disqualification had been raised later, I believe it would be void.

If it's a vicarious -- at least, our position is that if it's a vicarious disqualification that's not constitutional based, that's rule based. And so, that is judged by essentially a reversible error [inaudible] whether or not -- and it's something that can be waived if it's not raised by the time of judgment.

In this case, of course, the petitioner has raised his argument for the first time after the judgment yet all the facts were out there. They knew Justice Higley was the case. They said in their affidavit they had an associate at the firm who knew Justice Higley had been at Baker and Botts. And they just didn't do diligence to put it altogether until a week or two after the opinion came out.

That's a situation where there should be a waiver both for the lack of diligence and because there's an opinion that comes out that has -- that has never been challenged and the difference is there's a constitutional jurisdictional barrier if it's disqualifications based on the Constitution. If it's based on a rule, it doesn't have that same -- it's not void.

JUSTICE: Let's assume, you've -- just for the sake of argument agree that she was disqualified constitutionally and an opinion is written but it's a three-judge panel. What is your view on whether the other two can continue to sit, review the case, issue an opinion very much like the one altered or different? I mean -- is the whole panel disqualified if one member is?

MR. DUBOSE: The only case that I found that's dealt with that issue is a 1926 case of Beaumont. I believe the name of the case was Wheat and Lambert 189 Southwest 749. And in that case, a judge was disqualified after the case was decided. That was an interesting result. There was a two-one split and one of the two justices was disqualified. That left a one-one split on the court. A new judge was appointed and resolved the decision. In fact, they didn't even issue a new opinion. They went with the same opinion that had been written initially. And that should be the result here. If there is a new judge appointed, then there's no reason the other two judges can't serve on the case.

There's one other similar case the Nalle case, N-a-l-l-e, decided by this Court in 1896. In that case, one of the court of appeals' judges was disqualified before the case was decided and then the remaining two judges decided the case. They agreed on the result and this Court held that that was sufficient. It was sufficient to have two judges from the court of appeals decide the case. So, under this Court's precedent in Nalle, the two remaining judges could decide this case even without a third judge being provided.

The Beaumont case only suggest that there is a need to appoint a

third judge if there's a one-one split between the remaining two judges.

JUSTICE: At what point in the proceeding would the disqualification affect the case? Obviously, before the case is submitted, before there's any deliberation on the case, the disqualification becomes apparent, that judge is gone. And the Court treats it by appointing another judge or assigning another judge or something. But at what stage in the proceedings -- would it be the submission date? Would it be when assigned to a panel? When -- when would the -- the disqualification affect the decision?

JUSTICE: There's a body of law under -- if we're talking about nonconstitution disqualification. There's a body of law surrounding [inaudible] that said the party has a duty to bring it out as soon as it learns of the facts that required the recusal. But, at a minimum, it would need to be raised before the case is decided, before the case is --

JUSTICE: [inaudible] constitutional disqualification.

MR. DUBOSE: Constitutional disqualification, in my understanding from the precedent of this Court, is that it can be raised at any time during the proceeding.

JUSTICE: Well, right but what I'm asking is if before the -- if it's assigned to a panel and it's raised at that time but it hasn't been submitted yet, does that taint the entire panel? Or is it after independent issues or --

MR. DUBOSE: Sure, there is absolutely no precedent for recognizing taint as a basis for disqualifying a judge. If you look at all the rules for recusal, for disqualification whether it be in a Constitution or whether it's in the rules of procedure, none of those rules recognize disqualifying or recusing a judge because that judge participated with another judge on a case where that judge was disqualified. It wouldn't make any sense. But historically, the kind of interest that disqualifies a judge is one where the judge has a personal interest in the case, usually financial interest, family interest or actually, active as counsel in the case. Personal knowledge of some facts about the case has never been a ground for disqualifying a judge under the Constitution.

JUSTICE: But the policy is clients will not be as open as we want them to be with their lawyers if we're afraid that one of the people in the firm will get on a court and punish undisclosed conduct that the lawyer happens to know about. So we don't want them -- we won't be able to share everything with our lawyers. So, isn't that the same thing? I mean, won't people be discouraged from sharing everything with their lawyers if afraid one of the lawyers will become a judge and sit on cases about them and use that information in deciding those cases?

MR. DUBOSE: I think that policy -- it's more concerned at the trial court level because trial court judges have more discretion on discovery of factual matters. And appellate judges are --

JUSTICE: I agree there's a difference. We're not supposed to have much discretion. That's supposed to be all down at the trial level. Furthermore, it would -- probably on a panel of three judges, if I happen to know some confidential information about a client, it would probably be a breach for me to share that with the other judges. Would it not?

MR. DUBOSE: I think that's correct. And you have --

JUSTICE: So, there's less reason to think of taint on a panel.

MR. DUBOSE: Certainly at the appellate level.

JUSTICE: Now, the other problem, however, is that recusal is

ordinarily treated as initially a voluntary decision. Always leave it up to the judge to decide in the first instance whether to recuse. If it turns out in this case that Justice Higley was disqualified, should the other two panel members have the opportunity to determine whether they want to recuse themselves now that they know what they didn't think at that time which is that Justice Higley was disqualified. Or should we just say, "Well, we're gonna decide that for them." They might see the issue differently. Now, once they know -- if that's the way the things come out, that Justice Higley was disqualified.

JUSTICE: Part of the question is whether this Court reverses the opinion or not. If the two judges were enough, then there's no reason for it to go back to them --

JUSTICE: But they might have a different view. I mean, we're sitting here arguing about, does it affect the public image? Does it affect the perception of how justice is rendered? But we ordinarily let the judge make that call in the first instance and then the rest of the body makes the decision as well.

MR. DUBOSE: If this Court [inaudible] reverse and send back the case to be decide anew by the court of appeals, I think it would make sense to give them -- that means, certainly, they have the freedom to recuse themselves in that situation.

JUSTICE: During the appeal, part of the appeal, your client was represented by a lawyer who has partnered with the eventual author of the court of appeal's opinion.

MR. DUBOSE: She was [inaudible] partner.

JUSTICE: Pardon me?

MR. DUBOSE: She was not a part.

JUSTICE: She was an attorney of the firm.

MR. DUBOSE: She was an attorney.

JUSTICE: But being there, there's an irrebuttable presumption that she knew all the client confidences and client information, correct?

MR. DUBOSE: Correct.

JUSTICE: Doesn't that presumption, the deeming of having that knowledge continued with her on the bench? We don't assume that that's gone just because she put on a robe, did we? And if that's the case, doesn't that raise some question about whether the -- the requiring this strict adherence to just being [inaudible] in the case as a basis for disqualification, whether that's the appropriate approach or not? Or should we just disregard the fact that the judge is deemed to have all the client confidences and information as the former law firm did?

MR. DUBOSE: That's an important question. The rule about deeming --

JUSTICE: I mean, if we take your approach, we'd be saying -- and I'm not sure how it's gonna come out, where exactly I stand yet. But if we take your approach, we'd be saying that a judge who has client confidences and client information that no one else in the world except the client and the attorney have, can author an opinion in that case without being subject to disqualification, wouldn't it?

MR. DUBOSE: Yes. Client confidences are a concern in conflicts of interests cases where lawyers are disqualified. They have never been a concern in the context of judicial disqualification. Historically, judicial disqualification is not based on knowledge. Historically, it's been based on an interest in the case -- an interest in the case of familial or some money interest or something like that. And that's the difference. That's a policy that might make sense but it's not the historical basis.

JUSTICE: Well, my understanding is you don't disavow that policy.

You don't disavow the presumption that confidences were given while at the firm and that you take those confidences to the bench. I understand your argument today that you just waive that based on the circumstances so you don't necessarily have to disavow that policy to get where you need to go.

MR. DUBOSE: Right.

JUSTICE: Any further questions? Thank you, Counsel.

REBUTTAL ARGUMENT OF THOMAS C. WRIGHT ON BEHALF OF THE PETITIONER

MR. WRIGHT: May it please the Court. I first like to say another sentence or few about the merits of the case because this is a meritorious appeal. And I do not want to support thinking that this disqualification is something other than trying to get the merits of this case ruled on in the proper way. This court of appeals has taken Osterberg and expanded it far beyond what this Court have possibly have anticipated or intended. So that now, if you have a fraud case where fraud is not defined, a truthful statement might support the fraud finding because there's no definition and no way to analyze the evidence.

The evidence has to be analyzed under the law. Osterberg involved a challenge that was directly contradictory to something that was expressly in the charge. Our challenge is that the damages ought to be measured by the law and the charge says nothing different.

The fraud finding, there has to be some way that a party who has performed his contract for five years can avoid a fraud in the inducement charge when he eventually thus do something that could constitute a breach of contract. And those points and the refusal to even review the punitive damage award of a million dollars because the court felt that we had only challenged the award itself and not the amount of the award is a violation of Muriel .

Let me talk a moment now about the remedy that needs to be applied here. My opponent said that client confidences had never been a part of judicial disqualification. Not so. That's exactly the basis for this Court's ruling in In Re: O'Connor because they referred back to National Medical Enterprises v. Godbey in the irrefutable imputation acknowledged from one lawyer to the others in their firm.

And so, what are we going to say then? That Justice Higley would be disqualified to represent my client because she was an affirmed representative of the other side. But she is qualified under the Constitution to render a decision and an impartial argument.

We have assumed as you have heard that she did not work on this case but that's an assumption. I'm provided no way of finding that out and if this Court makes the distinction with appellate judges or trial judges about whether they actually worked on the case, we're gonna have to have a way to find out.

JUSTICE: But under the existing law, it doesn't matter whether she actually knew or not. She's irrebuttably presumed to know.

MR. WRIGHT: Right. But what I'm saying is if you adapt my opponent's argument, that if she didn't actually work on the case, that's not constitutional disqualification and that can be waived and so forth. Then we're gonna have to know whether or not she did in order to know what they ordered

JUSTICE: But if we assumed that she had confidences, we also must

assume she didn't tell anybody else on the Court because that would have been an automatic breach of fiduciary duty, right?

MR. WRIGHT: Well, I think we can make that assumption.

JUSTICE: So, why should we assume the rest of the panel was poisoned?

MR. WRIGHT: It's not an assumption about actual poisoning. It's a remedy to make sure nobody can even question. This is the first time this has happened in Texas, I believe. I am not familiar with the Nomad case but I thought -- well, I have read it and I thought the disqualification came out before the opinion. I thought this was the first case in which the disqualification has come up after the opinion. And that's why the courts of appeals going to such great lengths to try to figure out [inaudible] disqualify. And we've got a system that has worked pretty well. But what I think this Court should do in this case is send it to another court of appeals because as Justice Hecht noted, the other folks down in the first court of appeals have already decided whether to recuse themselves and decided not to, albeit on a false assumption that Justice Higley was not disqualified. But in recusing --

JUSTICE: Because that raises the whole panoply of problems with visiting judges and case transfers as you have somebody who's not elected in one district making the law for another district.

MR. WRIGHT: Well, your Honor, that goes on in dozens and hundreds of cases every year --

JUSTICE: I agree. I agree. That didn't make it right?

MR. WRIGHT: Well, if we're willing to do that just for the convenience of having courts in places that don't have enough business --

JUSTICE: No, I'm just saying should we expand it anymore?

MR. WRIGHT: It's not gonna be expanded very often because once this Court says this same constitutional provision applies in the same the Court of Appeals judges, then they'll know it.

JUSTICE: But why should the public presume -- let's assume, one of the judges took a bribefrom one of the parties, why should the public presume that the other two judges were crooked, too. We don't. Why -- why -- they're wrong about that, aren't they?

MR. WRIGHT: They may be wrong about that but both the Arkansas Court Supreme Court and the United States Supreme Court have talked about how -- when one judge is disqualified in a collegial body, it does affect the public's perception of the whole process. And I would say to your Honor, whatever remedy has to take into account that disqualification could include a fraud case. And so it has to be a remedy that will apply in the worst possible disqualification in an event like that. Thank you.

CHIEF JUSTICE JEFFERSON: Thank you, Counsel. That concludes the argument in the Court. The marshal will now adjourn the Court.

SPEAKER: All rise. Oyez, oyez, oyez. The Honorable Supreme Court of Texas now stand adjourned.