IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

PAUL WARREN BUCK, II,)
)
Plaintiff,)
)
v.) Case No.: CL25000841-00
)
CITY OF RICHMOND,)
)
Defendant.)

PLAINTIFF'S MOTION REQUESTING MEANINGFUL VOIR DIRE

The question at jury selection is not whether the jurors believe themselves to be fair—it is whether they are. Bias rarely announces itself. It is uncovered through comprehensive and case-specific questioning by counsel. Although extensive voir dire takes time, it is critical because it is the only mechanism for determining whether a juror can truly "stand indifferent in the cause."

Plaintiff, by counsel, respectfully submits the following brief to the Court regarding the voir dire examination of prospective jurors. This brief provides authorities which establish:

1. The parties have the right to trial by an impartial jury.
2. Each counsel has the right to conduct voir dire questioning of the jurors.
3. Virginia law guarantees counsel's right to ask "any relevant question."
4. The trial court must not rehabilitate jurors.
5. Any reasonable doubt must be resolved in favor of striking the juror.
6. Social science research confirms that minimal voir dire and judicial rehabilitation are ineffective. Salerno et al., *The Impact of Minimal Versus Extended Voir Dire and Judicial Rehabilitation on Mock Jurors' Decisions in Civil Cases,* 45 Law & Hum. Behav. 336 (2021).

Points and Authorities

1. The parties have the right to trial by an impartial jury.

Under Virginia law, the right to a trial by jury is enshrined in the Constitution. *See* Va. Const., Art. I, § 11 ("That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred."). So important is this right that it is repeated by statute: "The right of trial by jury as declared in Article I, Section 11 of the Constitution of Virginia and by statutes thereof shall be preserved inviolate to the parties." Va. Code § 8.01-336(A).

"The constitutional and statutory guarantee of an impartial jury is no mere 'legal technicality,' but a substantive right scrupulously to be observed in the day-to-day administration of justice." *Martin v. Commonwealth*, 221 Va. 436, 445 (1980).[1] "That voir dire 'plays a critical function' in ensuring juror impartiality has long been recognized under Virginia law." *Skipper v. Commonwealth*, 23 Va. App. 420, 426-27 (1996) (citing *Reynolds v. Commonwealth*, 6 Va. App. 157, 164 (1988) (quoting *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981))).

Trial courts have the duty to protect and vindicate the right to trial by an impartial jury. *See Salina v. Commonwealth*, 217 Va. 92, 93 (1976) ("It is the duty of the trial court, through the legal machinery provided for that purpose, to procure an impartial jury to try every case.").

2. Each counsel has the right to conduct voir dire questioning of the jurors.

The relevant statute provides that:

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[1] The fact that many of the cases cited in this bench brief are criminal rather than civil cases is a distinction without a difference as the right to a fair and impartial jury applies equally to both. *See Cantrell v. Crews*, 259 Va. 47, 50 (2000) ("[T]he right to a fair and impartial trial in a civil case is as fundamental as it is in a criminal case. The civil courts constantly strive to protect this right. It lies at the very basis of organized society and confidence in our judicial system.") (quoting *Temple v. Moses*, 175 Va. 320, 336 (1940)).

> The court and counsel for either party shall have the right to examine under oath any person who is called as a juror therein and shall have the right to ask such person or juror directly any relevant question to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein; . . . and if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that case.

Va. Code § 8.01-358 (emphasis added).

The trial court cannot allow the quest for expediency to trump counsel's ability to exercise their right and obligation to their client to engage in sufficiently meaningful voir dire. *See Griffin v. Commonwealth*, 19 Va. App. 619, 621 (1995) ("Trial courts primarily determine whether a venireperson is free from partiality and prejudice through meaningful voir dire."); *Mu'Min v. Commonwealth*, 239 Va. 433, 455 (1990) (Whiting, J., dissenting) ("In enacting Code § 8.01-358, the General Assembly intended to provide counsel a meaningful voir dire examination.").[2]

3. Virginia law guarantees counsel's right to ask "any relevant question."

The desire of the trial court or one of the parties to limit the amount of time spent on voir dire must not be allowed to override the constitutional right to trial by an impartial jury and the fundamental right to conduct sufficient voir dire. As the statute above makes clear, voir dire is not limited to questioning by the court. To the contrary, the statute mandates that "the court and counsel for either party shall have the right to examine" the jurors. *Id.* Furthermore, the right to conduct voir dire questioning is a broad right. Each counsel has the right to "directly" ask each prospective juror ("such person or juror") "any relevant question to ascertain whether" the juror:

- is related to a party,

[2] *See also Babcock v. Northwest Mem'l Hosp.*, 767 S.W.2d 705, 709 (Tex. 1989) ("Although we recognize that voir dire examination is largely within the sound discretion of the trial judge, . . . a court abuses its discretion when its denial of the right to ask a proper question prevents determination of whether grounds exist to challenge for cause or denies intelligent use of peremptory challenges.").

- has any interest in the case,
- has expressed or formed any opinion of the case, or
- has any bias or prejudice about the case.

Case law confirms that each counsel is entitled to question prospective jurors during voir dire. *See Le Vasseur v. Commonwealth*, 225 Va. 564, 580 (1983) ("Code § 8.01-358 . . . makes the direct questioning of prospective jurors by counsel a matter of right")[3]; *id.* at 581 ("The court must afford a party a full and fair opportunity to ascertain whether prospective jurors 'stand indifferent in the cause'") (emphasis added); *accord Thomas v. Commonwealth*, 279 Va. 131, 162-63 (2010) (quoting earlier decision).

This right to question prospective jurors necessarily includes the ability to explore the personal beliefs that shape how jurors view noneconomic harm. Building on this framework, Virginia law recognizes an important distinction between improper argument and proper voir dire. While counsel may not invite jurors to decide the case based on how they personally would wish to be treated, voir dire is not argument and serves a different purpose: to uncover the beliefs, fixed opinions, and values that may prevent a potential juror from standing indifferent in the cause.

The "Golden Rule" prohibits counsel—during closing argument—from urging jurors to decide the case based on how they personally would wish to be treated. *See Seymour v. Richardson*, 194 Va. 709, 715 (1953) (improper where counsel asked jury to "apply the Golden Rule" and decide "as you wish would be done to you"); *Velocity Express Mid-Atlantic, Inc. v. Hugen*, 266 Va. 188, 197–203 (2003) (reversible error where counsel repeatedly requested that jurors put

[3] *Cf. id.* at 581 (prior to the 1981 statutory amendment to Code § 8.01-358, counsel's right to question prospective jurors was discretionary).

themselves in plaintiff's position during argument). These cases make clear that the golden rule doctrine applies to argument, where persuasion—not inquiry—is occurring.

Voir dire, however, serves an entirely different function. Questions during voir dire that probe a juror's views about the value of health, quality of life, and noneconomic harm fall squarely within Va. Code § 8.01-358's statutory right to ask any relevant question because those beliefs directly impact a juror's ability to follow the Court's jury instruction on damages.

Determining whether a juror believes, for example, that noneconomic damages should always be minimal, or that the loss of health has only nominal value, is essential to discovering bias. Asking questions such as: "What is your health worth to you?"; "If your ability to work or live normally were taken from you, what value would you place on that?"; and "What value do you believe your family places on your health?" does not ask jurors to decide the plaintiff's damages. Instead, these questions identify whether a juror has an inflexible philosophy that would prevent them from impartially applying Virginia's law governing damages.

Nothing in *Seymour* or *Hugen* suggests that such voir dire is impermissible. To the contrary, those cases reinforce the underlying principle that jurors must decide according to the evidence—not according to personal preference or self-interest. Voir dire questions aimed at uncovering whether a juror can do that are therefore not only permissible, but indispensable.

The broad right to meaningful voir dire of the prospective jurors also includes the right to ask the jurors whether any of them are employed by an insurance company. *See, e.g., Robbins v. Davalos*, 2001 Va. Cir. LEXIS 367, at *1 (Fairfax County Cir. Ct. July 11, 2001). In *Robbins,* during voir dire the patient's counsel asked the panel if anyone was employed by an insurance company and received no response. The physician's counsel moved for mistrial, which the trial court denied. The trial court offered to give a cautionary instruction, but the physician declined

that offer. The trial court held there was a rational basis for the patient's question, and he was entitled to explore potential reasons for bias on the part of prospective jurors. The court held that the question was proper even though prior to trial all counsel had been furnished a printout which purported to show the employment of each prospective jury. The court observed that information previously supplied to counsel about the prospective jurors' employment was often erroneous.

The Supreme Court of Virginia has held that deliberate attempts by counsel to inform the jurors that the defendant is insured are usually objectionable, but otherwise any prejudice due to other references to insurance can generally be eliminated by a curative instruction. "The casual, unsolicited and irrelevant mention by a witness of the word 'insurance' during the course of his testimony was not error under the circumstances of the case. *Simmons v. Boyd*, 199 Va. 806, 102 S.E.2d 292 (1958). In any event, it was cured by the court instructing the jury to disregard it." *State Farm Mut. Auto. Ins. Co. v. Futrell*, 209 Va. 266, 272 (1968). And the Supreme Court has held that a deliberate reference to the fact that the defendant has liability insurance is proper to show the potential bias of a witness. *Lombard v. Rohrbaugh*, 262 Va. 484 (2001); *Graves v. Shoemaker*, 299 Va. 357 (2020). Any potential prejudice can be addressed by a curative instruction.

Because each counsel must be afforded the opportunity to ask any question which is relevant to a determination of the juror's impartiality, voir dire examination may take a substantial amount of time. Asking various questions to a group of more than one dozen persons necessarily takes some time. And in order to do this in a meaningful way, in order to truly make voir dire effective, it will usually take a matter of hours, not minutes. *See, e.g., Hawthorne v. VanMarter*, 2008 Va. Cir. LEXIS 165, at *6 (Roanoke County Dec. 23, 2008) ("Plaintiffs were given sufficient opportunity to determine whether any prospective juror could not 'stand indifferent in the cause.'

The record reflects that voir dire lasted several hours, with Plaintiffs questioning prospective jurors on numerous issues.") (emphasis added), *aff'd* 279 Va. 566 (2010).

Voir dire is the only opportunity counsel has to probe the venire for potential bias or prejudice. This is often a difficult and subtle task. As such, short-changing counsel's ability to meaningfully engage in voir dire is improper. *See, e.g., Goodloe v. Davis*, 53 Va. Cir. 199, 203 (Rockingham County 2000) ("After Juror Roderick's answer to Plaintiff's question in this case, the Court should have either allowed further questioning of him or struck him for cause; however, this was not done. As a result of the Court's failure to strike Roderick for cause, Plaintiff's case was prejudiced and this Court must set aside the verdict and order a new trial.").

4. The trial court must not rehabilitate jurors.

The Supreme Court has repeatedly held that the court must not attempt to rehabilitate a juror whose responses to other questioning indicate that there is a reasonable doubt about their impartiality. "A trial judge who actively engages in rehabilitating a prospective juror undermines confidence in the voir dire examination to assure the selection of fair and impartial jurors. The proper role for a trial judge is to remain detached from the issue of the juror's impartiality. The trial judge should rule on the propriety of counsel's questions and ask questions or instruct only where necessary to clarify and not for the purposes of rehabilitation." *Breeden*, *supra*; *Bradbury v. Commonwealth*, 40 Va. App. 176 (2003); *Foley v. Commonwealth*, 8 Va. App. 149, *aff'd en banc*, 9 Va. App. 175 (1989).

"A [prospective] juror's subsequent statement that he can give the defendant a fair and impartial trial . . . is not dispositive when preceded by positive, unequivocal testimony of bias." *Gosling v. Commonwealth*, 7 Va. App. 642, 646 (1984). Merely giving "expected answers to leading questions" does not rehabilitate a prospective juror. *Martin v. Commonwealth*, 221 Va.

436, 444 (1980). Proof of a prospective juror's impartiality "should come from him and not be based on his mere assent to persuasive suggestions." *Breeden v. Commonwealth*, 217 Va. at 300 (quoting *Parsons v. Commonwealth*, 138 Va. 764, 773 (1924)).

When asked by the court, a suggestive question produces an even more unreliable response. *See Foley v. Commonwealth*, 8 Va. App. at 160. "A juror's desire to 'say the right thing' or to please the authoritative figure of the judge, if encouraged, creates doubt about the candor of the juror's responses.'" *McGill v. Commonwealth*, 10 Va. App. 237, 242 (1990). A juror's responses to leading questions by the trial court or by counsel for one of the parties are not sufficient to cure a reasonable doubt which has been created by the juror's answers to other questions. *Breeden v. Commonwealth*, 217 Va. at 300 ("The efforts of the Attorney for the Commonwealth and the trial court to rehabilitate Mrs. Plummer do not assuage our concern. In response to two long, complex, leading questions, she merely gave the answers expected.").

5. Any reasonable doubt must be resolved in favor of striking the juror.

It is prejudicial, reversible error for a court to require counsel to use a peremptory challenge to exclude a prospective juror who should have been excluded for cause. *See Scott v. Commonwealth*, 1 Va. App. 447 (1986); *Griffin v. Commonwealth*, 19 Va. App. 619 (1995). So important is the right to an impartial jury that a prospective juror <u>must be struck for cause</u> if there is any "reasonable doubt" about whether a venireman "stand[s] indifferent in the cause[.]" *Bradbury v. Commonwealth*, 40 Va. App. 176, 180 (2003) (quoting earlier opinion and statute); *accord Barker v. Commonwealth*, 230 Va. 370, 374-75 (1985). Any reasonable doubt regarding a potential juror's impartiality must be resolved in favor of dismissing the juror for cause. *See Barker v. Commonwealth*, 230 Va. 370 (1985); *Justus v. Commonwealth*, 220 Va. 971 (1980); *Breeden v. Commonwealth*, *supra*.

6. Social science research confirms that minimal voir dire and judicial rehabilitation are ineffective.

Virginia law requires meaningful voir dire and permits counsel to ask relevant, case-specific questions to determine whether a juror can "stand indifferent in the cause." *See* Va. Code § 8.01-358; *see also* Sections 1–5, supra. Empirical research confirms why that matters.

In a study involving 2,041 mock jurors deciding civil cases, researchers found:

> [G]eneric questions requiring jurors to spontaneously and explicitly acknowledge that they cannot be impartial are unlikely to aid attorneys or presiding judges, in that task. The opportunity to probe mock jurors' attitudes and biases in a more extended voir dire that asked about specific attitudes regarding civil litigation and the parties involved was necessary to accomplish that task in the realm of two medical malpractice cases and a bad faith case. Mock jurors were able and willing to express extreme attitudes—but they had to be asked about them directly.

Salerno et al., *The Impact of Minimal Versus Extended Voir Dire and Judicial Rehabilitation on Mock Jurors' Decisions in Civil Cases,* 45 Law & Hum. Behav. 336 (2021).

The same study found that judicial rehabilitation backfires: "Including judicial rehabilitation did not reduce the biasing impact of mock jurors' preexisting attitudes on their decisions. In fact, judicial rehabilitation had an ironic backfire effect: Despite not actually reducing mock jurors' biases, it did make them think they were less biased." *Id.*

Conclusion

Consistent with the constitutional right to an impartial jury and Va. Code § 8.01-358, Plaintiff respectfully asks the Court to: (1) permit attorney-conducted voir dire; (2) allow counsel to ask any relevant questions directed to impartiality (including attitudes toward noneconomic damages); (3) refrain from judicial rehabilitation where a juror's answers create reasonable doubt as to impartiality; and (4) resolve any reasonable doubt in favor of striking the juror for cause.

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