VOIR DIRE: STRATEGIES AFTER *CORTEZ* AND *HYUNDAI*

DAN CHRISTENSEN
Carlson Law Firm, P.C.
3410 Far West Blvd., Ste. 235
Austin, Texas 78731
(512) 346-5688

State Bar of Texas
23RD ANNUAL ADVANCED
PERSONAL INJURY LAW COURSE
July 18 - 20, 2007 — *Dallas*
August 1 - 3, 2007 — *San Antonio*
August 22 - 24, 2007 — *Houston*

CHAPTER 19.1

Dan Christensen

Dan Christensen has a personal injury practice in Austin, Texas. Mr. Christensen works with The Carlson Law Firm doing the firm's litigation and trial work. Mr. Christensen is Board Certified in Personal Injury Trial Law by the Texas Board of Legal Specialization. He is "AV" rated and was recognized in 2004 by *Texas Monthly* as one of Texas' "Rising Stars." He is licensed to practice law in federal and state courts in both Texas and California.

Before beginning the practice of law, Dan graduated from the University of Iowa earning his B.B.A. with distinction and honors in Finance. He then acquired his J.D., with distinction, also from the University of Iowa. During his final year, Dan was Editor-in-Chief of the JOURNAL OF CORPORATION LAW.

Upon graduation, Dan served as a prosecutor and defense counsel in the U.S. Army Judge Advocate General's Corps (JAG). He then joined The Carlson Law Firm, P.C., and has tried cases involving negligent security, commercial trucking collisions, product defects, highway design, medical malpractice, FTCA, premises liability, and car wrecks. Dan also contributes substantial time to writing articles for local and national publications and organizations, as well as speaking to groups on various legal topics.

TABLE OF CONTENTS

VOIR DIRE: STRATEGIES AFTER *CORTEZ* AND *HYUNDAI*

I. SCOPE

This paper is intended to be a brief discussion of the effect, if any, on the performance of voir dire after the Texas Supreme Court's decisions in *Cortez v. HCCI-San Antonio, Inc,* 159 S.W.3d 87 (Tex. 2005) and *Hyundai Motor Co. v. Vasquez,* 189 S.W.3d 743 (Tex. 2006). It will evaluate the meaning of the court's holdings, and suggest techniques practitioners may use to employ or avoid *Cortez* and *Hyundai* while selecting juries. This article is not meant to be a comprehensive study of Texas or Federal law regarding jury selection, nor an exhaustive treatment of the specific issues covered. The paper is offered as a practical tool for the busy attorney who is looking for a quick and useful resource on jury selection in the post-*Cortez*, post-*Hyundai* world.

II. THE *CORTEZ* CASE

A. Facts

On May 5, 1995, Carmen Puentes, a resident of Alta Vista Nursing Center, fell in her bathroom and broke her hip. Ms. Puentes had been a resident for approximately three years before her fall during which she allegedly received substandard and abusive care from the nurses and employees at Alta Vista Nursing Center. Alta Vista Nursing Center was owned by Altman Nursing and then sold to HCCI-San Antonio shortly before Ms. Puentes' fall. Ms. Puentes passed away while the case was pending, so her heir, Jesus Cortez, pursued the claim for her estate.

During jury selection, Plaintiff's[1] counsel questioned a veniremember, Mr. Snider, who had worked as an insurance claims adjuster. During the questioning, the following exchanges took place:

(Questioning by the plaintiff's counsel)

Q: You have expressed the fact that you would have difficulty sitting on a case of this nature; is that correct?

A: I think, if any, it would be preconceived notions. I don't know how to really define it, but that would be it.

Q: Sure. You would have basically a prejudgment in the case or a bias in this case?

A: Yes. I feel it could almost go either way.

Q: Well, you definitely have preconceived notions that you have just told the judge about?

A: Sure.

(Questioning by the court)

Q: Is there one party that's starting out ahead of the other party before you even get into the jury box?

A: In a way, yes.

Q: Tell me what you mean.

A: Basically – and I mean nothing against their case, it's just that we see so many of those…And this type [of] case I'm not familiar with whatsoever, so that's not a bias I should have. It's just there.

* * *

(Questioning by the court)

Q: Let me ask you this. Just because – you know, we all walk into the courtroom with our own life experiences. I'm not asking you to set [them] aside. What I am asking you, though is whether or not the training and the expertise or the work that you do, is it going to affect you in listening to the evidence from both sides of this case and making a decision at the end of all the evidence?

A: You know, I honestly don't know.

Plaintiff's counsel challenged Mr. Snider for cause and the court denied the challenge. The plaintiff's counsel objected and informed the court that, because of the court's denial of the plaintiff's causal challenge of Mr. Snider, the plaintiff was going to exhaust her peremptory strikes on Mr. Snider, thereby allowing an objectionable juror, Juror Number 7, to remain on the jury. The record is not clear whether the plaintiff's counsel informed the court of this before or after he exercised the plaintiff's peremptory challenges. In any event, at some point, the plaintiff's counsel did exhaust his peremptory strikes, using one of them on Mr. Snider.

The case was tried before Judge Janet Littlejohn, 285th District Court, Bexar County, Texas. The jury returned a verdict for the plaintiff, finding both negligence and gross negligence, and awarded approximately $9 million. After offsets and reductions for comparative negligence, judgment was entered for just under $350,000. Plaintiff refused tender from HCCI and filed a motion for new trial, which was denied.

The plaintiff then appealed to the 4th Court of Appeals which affirmed the trial court's judgment. The Supreme Court granted the plaintiff's petition for review and affirmed the Court of Appeals.

[1] For purposes of this paper, Plaintiff will refer collectively to Appellant, Mr. Cortez acting on behalf of Ms. Puentes' estate. Defendant will refer collectively to Respondent, HCCI-San Antonio, Inc. d/b/a Alta Vista Nursing Center.

B. Issues

1. Was Mr. Snider biased?

The plaintiff argued that Mr. Snider expressed a bias and, therefore, could not be rehabilitated. The plaintiff argued that Mr. Snider himself used the language "preconceived notions" and in response to the judge's questions, admitted that one party was starting out ahead. Plaintiff also asserted that once Mr. Snider expressed this bias, the trial court lost its discretion and was obligated to grant the causal challenge.

The defendant, on the other hand, argued that Mr. Snider consistently gave equivocal responses that were confusing and even prompted clarifying questions from the court. The defendant pointed out that Mr. Snider repeatedly said that he would try to be fair and that his "bias" could "go either way." Because the plaintiff did not conclusively establish that Mr. Snider was biased, the court maintained its discretion to make the factual determination as to whether Mr. Snider was disqualified.

2. Did the plaintiff preserve error?

This issue boiled down to whether the plaintiff's counsel informed the court that he was forced to accept an objectionable juror before or after counsel exercised his peremptory challenges. There is no question that the plaintiff's counsel did properly object and inform the court before the jury was seated and that the court replied that the plaintiff's objection was preserved.

The plaintiff argued that her counsel informed the court before peremptory strikes were exercised, although the record may not clearly reflect that. The defendant argued that the plaintiff's counsel did not properly object until just seconds before the jury was escorted in and seated.

3. Was any error harmless?

The defendant argued that even if the trial court's ruling was erroneous, it was harmless because the plaintiff actually was victorious at trial. The plaintiff replied that an appellate court's review of a trial court's ruling is done without regard to the outcome of the case.

C. Holding

1. Was Mr. Snider biased?

The Court found that the trial court did not abuse its discretion when it denied the plaintiff's causal challenge to Mr. Snider. "Bias, in its usual meaning, is an inclination toward one side of an issue…but to disqualify, it must appear that the state of mind of the juror leads to the natural inference that he will not or did not act with impartiality." *Cortez, supra* at 94, *citing Compton v. Henrie*, 364 S.W.2d 179 (Tex. 1963). The Court noted that most people are biased, but it is only an issue for jury selection when that bias makes a juror unable to *act* impartially.

In order to determine whether a juror's bias is merely "skepticism" as opposed to an "unshakable conviction," courts should examine the record as a whole. *Cortez, supra* at 94. In support of its holding, however, the Court latched on to a couple of Mr. Snider's pledges to "try" to be impartial when deciding the case.

Under *Cortez*, it appears that if a juror's responses are slightly equivocal, the juror will not be disqualified as a matter of law and the court will retain the discretion to rely on the juror's assurances that, while they may be biased, they will try to set that aside and decide the case based on the facts and the law.

The Court found that Mr. Snider's responses, when looked at in their entirety, did not indicate a disqualifying bias, but rather, were equivocating and "revealed that any initial apparent bias he expressed was actually against lawsuit abuse."

The plaintiff argued that because Mr. Snider confessed that the defendants "would be starting out ahead" that, under *Shepherd v. Ledford*, he should have been disqualified. The Court disagreed and stated that "the relevant inquiry is not where jurors *start* but where they are likely to *end*. An initial leaning is not disqualifying if it represents skepticism rather than an unshakeable conviction." *Cortez, supra* at 94.

The Court distinguished *Shepherd v. Ledford*, 962 S.W.2d 28 (Tex. 1998) by noting that the juror in that case admitted he could not be fair and objective, whereas Mr. Snider repeatedly insisted he was "willing to try" to decide the case based on the facts and the law.

The Court affirmed the long-standing rule that "voir dire examination is largely within the sound discretion of the trial judge and that broad latitude is allowed for examination." *Cortez, supra* at 92. This discretion includes the discretion to allow "rehabilitation" questions of a juror who has expressed bias. The Court refuted the notion that there was ever a rule prohibiting rehabilitation of a juror who had admitted bias.

2. Did the plaintiff preserve error?

The Court found that the plaintiff properly preserved error. This was in spite of the fact that the record was not clear as to when the plaintiff's counsel objected to the court's ruling and informed the court that an objectionable juror, Juror Number 7, was going to remain on the jury because the plaintiff was going to have to exhaust her peremptory strikes on Mr. Snider. The Court seemed to find it important that the trial court stated on the record that that the plaintiff's objection had been preserved.

The Court also found that the plaintiff's counsel was not required to provide a reason why Juror Number 7 was objectionable. While the party must identify the specific objectionable juror who is remaining on the jury, they do not have to explain why they would have challenged or struck that juror.

3. Was any error harmless?

While the Court did not find any error, it did state that the fact that the plaintiff prevailed at trial was not relevant to whether any error was harmful. Significantly, the court held that because the Court cannot know whether or how an objectionable juror affected deliberations, if a party properly preserves their objection, the Court presumes harm.

III. THE *HYUNDAI* CASE

A. Facts

Victor and Brenda Vasquez brought suit against Hyundai Motor Company for the death of their four-year-old daughter, Amber. Amber was riding as a front-seat passenger in her aunt's vehicle when another vehicle suddenly turned in front of them resulting in a collision. Amber was not seat-belted at the time. The front, passenger-side airbag in the Hyundai Accent in which Amber was riding deployed with such force that it broke Amber's neck and killed her.

Picking a jury proved to be a difficult task, requiring three different jury panels. During the first voir dire, Plaintiffs' counsel inquired of the panel whether the fact that Amber was not wearing her seat belt would determine their verdict.[2] Twenty-nine out of 48 jurors responded that such evidence would preclude them from considering any other evidence. The trial court dismissed the panel.

During the second voir dire, the trial court took over the questioning about seat belt use.[3] This time, 18 out of 52 panelists responded that the fact that Amber was not wearing her seatbelt would solely determine their verdict. Again, the trial court dismissed the panel.

Having lost two panels, the trial court refused to allow counsel to inform the third panel that Amber was not wearing her seat belt at the time of the collision. Initially, the trial court also stated that it would allow questioning of the entire venire about seat belt usage in general,[4] leaving more specific questioning on seat belt usage with children or others for individual voir dire at the bench.

In accordance with the protocol set out by the trial court, after general voir dire to the venire, Plaintiffs' counsel requested to pursue more specific questions during individual voir dire. Counsel stated:

> Your Honor, I need to know whether or not they would be predisposed regardless of the evidence to – Their preconceived notion is that if there is no seat belt in use, no matter what else the evidence is, that they could not be fair and impartial.

The trial court denied counsel's request, stating, "we are not going any further into seat belts." After this voir dire examination, there were only three causal challenges which enabled the court to seat a jury.

The jury found against Plaintiffs and the court entered a take nothing judgment. Plaintiffs appealed claiming the trial court abused its discretion in limiting their voir dire inquiry about juror attitudes regarding the fact that Amber was not wearing a seat belt. The Fourth Court of Appeals affirmed initially, but then reversed after an *en banc* rehearing. The *en banc* panel held that because Plaintiffs' questions focused on the juror's ability to be fair and impartial, that such questions were proper and should have been allowed.

The Supreme Court granted Hyundai's petition for review, reversed the Court of Appeals and remanded.

---

[2] The question specifically was, "Now, what I specifically am looking for are those among you right now that will say, if [Amber] wasn't wearing a seat belt, then I don't care what the scientific evidence is. I don't care about the characteristics of this particular airbag and how it operated in this particular accident at this particular speed. As long as I know she wasn't wearing an airbag – I mean a seat belt, that means that, you know, there's no way Hyundai can be responsible. If that is an attitude that you have about seat belts and about airbags, if that is an attitude that you have about accidents of this kind and the tragic results that flow from them, that's what I'm asking you about. Is there anyone here that regardless of what the evidence is, once you hear [Amber] wasn't wearing a seat belt your mind is made up?"

[3] The court informed the panel that Amber was not wearing her seat belt at the time of the collision and asked whether the panelists would "decide this case…based on that one fact alone."

[4] Some of the questions that Plaintiffs' counsel asked were, "[H]ow many of you are always buckling up before the car moves when you are coming in and out of that automobile…even though you are going to go…to the next mailbox?" "Those of you that have your car actually garaged, …how many of you buckle that seat belt before the car is out of the garage?" "How many of you are completely buckled before you exit the driveway?" "[H]ow many of you are already buckled in before the car leaves the parking spot where you had it in front of the house?"

B. Issues

1. Was this an improper commitment question?

Plaintiffs argued that they should be entitled to inquire about whether jurors can fairly and objectively evaluate the evidence in a case where the injured or killed party was not wearing their seat belt. If one fact causes a particular juror to become so prejudiced for, or against, one side of the case, or so inflamed that they cannot, or will not, consider any other facts or evidence, such juror should be subject to causal challenge.

Plaintiffs also argued that, even if the question is a commitment question, it is a permissible commitment question because the only commitment the question demands from the juror is that they consider all of the evidence before making a decision, as the law requires.

Defendant argued that allowing Plaintiffs to isolate one fact and then question jurors about their reaction to that fact is nothing more than pre-testing the juror's verdict and should not be allowed. Regardless of whether the question is couched in terms of fairness or impartiality, if it seeks juror opinions about a specific fact of the case, it is improperly seeking a commitment from the juror.

2. Did the trial court improperly restrict voir dire?

Plaintiffs argued that the court improperly restricted their inquiry about seat belt usage during individual voir dire. The court had set forth a protocol for addressing the issue of seat belt use and then, after general questioning to the venire, abandoned that protocol and refused additional, more specific, questioning during individual voir dire.

Defendant, naturally, argued that because the questions were impermissible commitment questions to begin with, the court did not improperly restrict Plaintiffs' voir dire inquiry into the issue of seat belt usage.

C. Holding

1. Was this an improper commitment question?

The Court held that the question proposed by Plaintiffs' counsel was an improper commitment question. Regardless of the question's use of the terms "fair and impartial," the design of the question was simply to pretest the jurors' verdict. The court found that questions that simply ask a juror how significant they find an admissible fact do not expose any disqualifying bias or prejudice.

2. Did the trial court improperly restrict voir dire?

Regarding the trial court's refusal to allow any further questioning on the subject of seat belts at all, the Court found that Plaintiffs' counsel did not properly preserve error. The Court recognized that "a trial court should not foreclose *all* inquiry about a relevant topic." The Court stated, however, that, to properly preserve error, a party must "timely alert the court as to the specific manner in which it intends to pursue the inquiry." Counsel is not required to submit a list of proffered questions, but they "should propose a different question or specific area of inquiry to preserve error on the desired line of inquiry." In the Court's view, that was not done in this case.

IV. DISCUSSION & PRACTICAL APPLICATION

A. Trial Court's Discretion

The main principle behind the Court's opinions is that trial judges will be given almost unbridled discretion as to how to conduct jury selection in their court. Two months after delivering *Cortez*, the Court reinforced this message in *El Hafi v. Baker*, 164 S.W.3d 383 (Tex. 2005).

In *El Hafi*, the plaintiff was suing a doctor and facility for alleged medical negligence. The plaintiff's counsel challenged a juror who was an attorney who primarily defended doctors and health care providers in medical malpractice cases. The juror admitted that "it would be natural" for him to look at the case from the defense perspective, rather than the plaintiff's. He also agreed that he could relate very much to the lawyers on the defense side of the case. As in *Cortez*, the Court again affirmed the trial court's decision not to grant the plaintiff's causal challenge.

The *Hyundai* opinion continued to strengthen the signal being sent by the Supreme Court that it will give extreme deference to a trial court's ruling during voir dire in virtually every instance. The Court acknowledged that determining whether a voir dire inquiry is aimed at exposing bias or previewing a potential verdict is a difficult question that can turn on various dynamics existing within the courtroom. Therefore, the trial court is in a better position to evaluate the questions posed, as well as the responses given.

Trial courts have always been given wide latitude with regard to issues involving jury selection. It's arguable, however, that the Supreme Court's recent rulings have, at the very least, encouraged a more strict application of the abuse of discretion standard.

The effect of this trend will be to force attorneys to establish more solid bases for their causal challenges. Attorneys seeking to challenge a juror need to make sure they are locking the target jurors down and creating a clear record of bias before making their challenge or turning the juror over to opposing counsel. Obviously, to do this, attorneys need to spend time with the juror to flush out the juror's bias and firmly tie them to it. A brief admission or two of potential bias will likely not result

in a record that "clearly shows" the juror is "materially biased". *Cortez, supra* at 94. This will be an increasingly difficult task as courts continue to shrink the time allowed for jury selection.

B. Rehabilitation

One of the more notable parts of the *Cortez* opinion is where the Court states that there is no rule prohibiting a juror from being "rehabilitated" after confessing bias. *Cortez, supra* at 92. The Court writes as if there has never been such a rule but then, curiously, takes the time to expressly disapprove numerous court of appeals decisions stating that there was such a rule. It is also interesting to note that the Court had previously reviewed many of these decisions which established a rule prohibiting juror rehabilitation and declined to disturb those rulings.[5]

The Court does, however, acknowledge that if "the record, taken as a whole, ***clearly shows*** that a veniremember was ***materially biased***, his or her ultimate recantation of that bias at the prodding of counsel will ***normally*** be insufficient to prevent the veniremember's disqualification." *Cortez, supra* at 92 (emphasis provided). Therefore, it seems that, while a court may permit attempts to rehabilitate, the success of such efforts will ultimately depend on whether the juror has expressed an "apparent bias" or has proven to be "materially biased." In other words, the more biased a juror admits to being, the less likely he can be rehabilitated.

In practice, the Court's ruling may not have as revolutionary effect as some fear. Before *Cortez*, if a juror admitted to having some bias, but equivocated or begrudgingly pledged to follow the law, many times trial courts would allow "clarifying questions" from counsel to flush out this "apparent bias." Sometimes, these clarifying questions would result in the juror rehabilitating themselves. If, however, a juror firmly committed to being biased and admitted their bias would affect their actions as a juror in the case, they were disqualified as a matter of law and the trial court was obligated to excuse them.

Under *Cortez*, the two scenarios described above would be treated very similarly to before the Court's opinion. For example, while trial courts now may be more likely to permit counsel to try to rehabilitate the juror who has an apparent bias, such efforts to rehabilitate may or may not be successful depending on if the juror equivocates. If, however, a juror is "materially biased," counsel's attempts to rehabilitate will likely still be unsuccessful under *Cortez*. So, even though a trial court may be more likely to grant counsel latitude to try to rehabilitate a juror, the end result will likely be the same. In other words, assuming counsel has done a good job of firmly committing the juror a disqualifying bias, the fact that opposing counsel now can attempt to rehabilitate the juror, will not change the end result being that the juror will likely be excused.[6]

Counsel should be prepared to rebut the argument that *Cortez* stands for the proposition that it is now easier to rehabilitate jurors who have confessed to some bias. The Court made no such finding. The Court simply rejected the notion that "voir dire must stop at the moment a veniremember gives any answer that might be disqualifying." *Cortez, supra* at 92. From this author's experience, most courts did not subscribe to such a notion anyway. Therefore, the criteria to determine whether someone should be disqualified for being biased has not changed under *Cortez*.

Recognizing that *Cortez* may cause some trial courts to be more liberal in the way they treat efforts to rehabilitate jurors, counsel should take extra care to tie the target jurors down after they admit to bias. For example, counsel may want to consider asking questions similar to the following:

> Example 1: Tying down and protecting against rehabilitation.
> *(asked to a juror who has already admitted to being biased against awarding noneconomic damages)*
> Q: And so, earlier you told us that regardless of the facts, law or the instructions, while you could consider reimbursing someone for things like lost wages or medical expenses, you just could not consider giving money to someone for something intangible like mental anguish or emotional distress. Do you recall that?
> Q: And when you told us that, obviously, you were telling us the truth.
> Q: In other words, you didn't say that just because you felt intimidated by me or

[5] Of the court of appeals decisions that the Court disapproved in *Cortez*, the following decisions resulted in either the petition being denied or refused due to no reversible error: *White v. Dennison*, 752 S.W.2d 714 (Tex. App. – Dallas 1988, writ denied); *Carpenter v. Wyatt Cosntr. Co.*, 501 S.W.2d 748 (Tex. Civ. App. – Houston [14th Dist.] 1973, writ ref'd n.r.e.); and *Lumbermen's Ins. Corp. v. Goodman*, 304 S.W.2d 139 (Tex. Civ. App. – Beaumont 1957, writ ref'd n.r.e.).

[6] "Therefore, trial courts exercise discretion in deciding whether to strike veniremembers for cause ***when bias or prejudice is not established as a matter of law***, and there is error only if that discretion is abused." *Cortez, supra* at 93 (emphasis provided).

because of the way I asked the question.

Q: You told us that because that is they way you feel on this issue, correct?

Q: So, if anyone else, whether it be the judge or Mr. Defense Counsel, were to ask you the same type of question, obviously, you would tell them the same thing.

Example 2: Tying down and reinforcing the juror's commitment.

(asked to a juror who has already admitted to being biased against awarding noneconomic damages)

Q: You mentioned earlier that you do not believe in intangible damages. Do you remember that?

Q: My notes say that you believe that, regardless of the facts, law or instructions, juries should not be giving people money for intangible things like emotional distress or mental anxiety, correct?

Q: And, it seems these feelings stem from your experience as a defendant in a lawsuit.

Q: That was a very unpleasant experience for you, is that fair?

Q: Something you won't forget anytime soon.

Q: So, is it fair to say that because of some of the experiences you have had in your life, your feelings about these intangible damages are pretty strong.

Q: And apparently these are beliefs that you have held for years, since back when you were a defendant in a lawsuit.

Q: Now, Ma'am, there are cases being tried this week all over town, in this courthouse and others. Some of them are civil trials like this one and the one you were involved in as a defendant. But, many of them are criminal trials or divorces, things like that – cases that don't involve awarding intangible damages at all. Because of your strong feelings about intangible damages, I imagine you would agree that you would probably be better suited to sit on a jury in a different type of case – one that doesn't involve awarding intangible damages, is that fair?

OR

Q: Now, most of us have heard about our civic duty to serve on a jury. But, there is another duty that is not talked about as often, even though it is just as important, and that is our duty *not* to serve on a jury if we think there may be something in our past that might affect our ability to serve. We all have a duty to the parties in the case to not serve if we think, because of an experience we had, that we might not be the best juror for that case. Ma'am, you would agree that because of your strong feelings about intangible damages, that you might not be the best juror for this particular case; that in this case, you might have the duty *not* to serve.

Note that almost all of the questions used while tying the juror down are leading questions. Typically, counsel should use open-ended questions during general voir dire to encourage the jurors to speak. Once a juror admits to being biased, however, the questioning attorney should typically shift to using leading questions to tie the juror down and try to disqualify them.

Depending on the juror's responses and admitted bias, there are an infinite number of ways to firmly tie a juror to their bias and reinforce them before turning them over to the court or opposing counsel to try to rehabilitate. These are just a couple of examples. Counsel should adopt their own series of questions that fit their style and delivery. Getting a juror to fully commit to being "materially biased" is as much in the delivery as in the language used.

C. Commitment Questions

1. Questions about a juror's initial leaning.

While the Court in *Cortez* did not change the definition of bias, it did clarify what was *not* a disqualifying bias. Specifically, the Court stated that a juror who admits one party is "starting out ahead" of the other is *not* disqualified when their "leaning" is merely "skepticism rather than an unshakeable conviction." *Cortez, supra* at 94.

In *Shepherd v. Ledford*, 962 S.W.2d 28 (Tex. 1998), the Court found a juror who stated that the plaintiff was starting out ahead was disqualified as a matter of law. Interestingly, the Court in *Shepherd* never mentioned that asking a juror whether a party is starting out ahead was improper. Instead, the Court used the fact that the juror admitted he would put the plaintiff ahead of the defense to support its holding that the juror was disqualified as a matter of law and should have been excused. *Id.* at 34.

The Court in *Cortez* stated that the *real* reason the juror in *Shepherd* was disqualified was because he admitted he could not be fair and objective, not because he confessed that one party was starting out ahead. *Cortez, supra* at 94.

The Court went on to state that questions asking a juror which party is starting out ahead are often improper commitment questions. In other words, the Court found that such questions were sometimes an attempt to preview a juror's likely vote and should not be allowed. This conclusion, however, was limited to those circumstances where information about the case had already been disclosed. The court stated:

> Asking which party is "ahead" may be appropriate before any evidence or information about the case has been disclosed, but here, the plaintiff's attorney gave an extended and emotional opening statement summarizing the facts of the case to the venire.

Cortez, supra at 94.

Counsel should be prepared to face an objection if they ask a juror whether their feelings on an issue causes them to put one party ahead of the other. The objecting attorney may assert that *Cortez* has prohibited such questions. Such an argument would be false, as the court specifically stated that there are instances when such questions may be appropriate. *Cortez, supra* at 94.

The best way to avoid a problem with these types of questions is to avoid giving a factually detailed description of the case at the beginning of your voir dire examination. Many practitioners and commentators believe that such lengthy and involved opening comments at the beginning of voir dire are counter-productive anyway. If the jury simply knows your case is about a car wreck and nothing more, their tendency to put one party ahead of the other necessarily must be based on their biases, as opposed to an opinion about the evidence. In other words, counsel cannot be accused of asking an improper commitment question or pre-testing a juror's opinion about certain evidence if the juror does not know about any evidence.

Some counsel give detailed opening comments at the beginning of their voir dire examination because they fear that if they don't, opposing counsel will do it and begin to persuade the jury. First of all, such fear is probably misplaced. Most experienced trial lawyers agree that voir dire is best used as a time to elicit bias and not to attempt to persuade jurors to abandon their firmly-held convictions or change their belief structure, which is not likely to occur anyway.

One way, however, to reduce any risk that opposing counsel will launch into a detailed rendition of his case at the beginning of his voir dire examination is to explain to the venire that it is inappropriate for a lawyer to try to sell his case before the jury is picked. For example:

> I wish I could tell you more about the facts of this case, but the rules don't permit me to do that. It's kind of like a race: you can't have a false start where one lawyer starts selling his case before the gun goes off. I'm not going to do that. You can always tell when a lawyer tries that, however, because he does all the talking and the jurors just sit there and listen.[7]

A more reactive approach to preventing opposing counsel from trying to expose the jury to his view of the facts is to object and use *Cortez's* language discouraging commitment questions. *Cortez* stands for the proposition that it is improper for counsel to give a detailed summary of the facts of the case to the venire and then pre-test their opinions about those facts. Once counsel exposes the venire to the facts, it can be argued that all of the veniremembers' responses regarding biases will necessarily be given in the context of the case, as opposed to simply their belief structure.

2. Questions about the effect of certain evidence.

The Court in *Hyundai* addressed a related, but different type of commitment question. In *Cortez,* counsel essentially gave a summary of Plaintiff's case and then asked if anyone was leaning for or against his client. In *Hyundai,* counsel essentially gave a summary of Plaintiffs' case, isolated one of the operative facts, and then wanted to ask if jurors, knowing that fact, could still be fair and impartial. The Court found that, in either instance, that is improperly seeking a commitment from the juror.

Even prior to *Hyundai*, counsel generally were prohibited from inquiring whether certain evidence would ***influence*** a juror. *Tex. Gen. Indemn. Co. v. Mannhalter,* 290 S.W.2d 360 (Tex. Civ. App. – Galveston 1956, no writ); *Metropolitan Cas. Co. v. Medina Rural High School Dist.*, 53 S.W.2d 1026 (Tex. Civ. App. – San Antonio 1932, writ dism'd w.o.j.); *Campbell v. Campbell*, 215 S.W. 134 (Tex. Civ. App. – Dallas 1919, writ ref'd); *Parker v. Schrimsher*, 172 S.W. 165 (Tex. Civ. App. – Amarillo 1914, writ ref'd).

[7] This example came from attorney and jury consultant Robert Swafford who practices in Austin, Texas.

Prior to *Hyundai*, however, some courts, allowed counsel to inquire whether certain evidence would ***prejudice*** a juror to the extent that they could not consider other evidence. *Grey Wolf Drilling Co. v. Boutte*, 2004 WL 1784 (Tex. App. – Houston [14th Dist.] Dec. 14, 2004); *City Transp. Co. v. Sisson*, 365 S.W.2d 216 (Tex. Civ. App. – Dallas 1963, no writ); *Rothermel v. Duncan*, 365 S.W.2d 398 (Tex. Civ. App. – Beaumont), rev'd on other grounds, 369 S.W.2d 917 (Tex. 1963); *Airline Motor Coaches, Inc. v. Bennett*, 184 S.W.2d 524 (Tex. Civ. App. – Beaumont 1944), rev'd on other grounds, 187 S.W.2d 982 (Tex. 1945). These persuasiveness of these opinions is arguably in question now in light of *Hyundai.*

The *Hyundai* case appears to advocate a substance over form analysis in determining whether a question is aimed at exposing bias or seeking a preview of the juror's potential verdict. Regardless of whether the question uses terms such as "bias," "prejudice," or "impartial," the court will look to the substance of the question and the context in which it is delivered to determine whether it is an improper commitment question.

As discussed above, one way to avoid the problem of commitment questions is to resist giving a lengthy, detailed summary of the facts during your opening remarks during voir dire. Additionally, avoid selecting specific facts and inquiring of the panel how they feel about such facts, whether they would be influenced by them, or whether such facts would cause them to be prejudiced or bias for or against one side of the case. Such efforts will not likely be viewed favorably under the Court's guidance given in *Hyundai.*

There are plenty of other, arguably more effective, ways to elicit the same information from potential jurors than by using commitment questions. It normally is not very helpful, nor does it provide much insight, for counsel to set forth a limit set of facts and then ask jurors to commit to a verdict based on those facts. In this author's opinion, such a method does not produce useful data to predict a juror's future verdict.

A better approach, and one that will not run afoul of the Supreme Court's recent cases, is to focus your questions less on the facts and more on juror attitudes and experiences. In virtually every instance, a fact is especially helpful or harmful because it is tied to jurors' attitudes or previous experiences. For example, assume the plaintiff may have been drinking when she was involved in the collision. Whether, and to what degree, that fact is harmful to the plaintiff's case depends on the potential jurors' attitudes about issues such as drinking in general, drinking and driving, and lawabidingness. It also depends on the potential jurors' experiences with things like drinking, substance abuse, criminal justice system, and friends or relatives who have been hurt by drunk drivers.

3. Questions about juror attitudes regarding damages.

Another type of question that can result in an improper commitment question is when counsel inquires into whether a juror can award a certain amount of damages. The courts have allowed these questions in some instances and have prohibited them in others.[8] The only real clear message from the cases is that, in most every instance, the trial court's ruling will be upheld.

Considering the Supreme Court's recent decisions, however, counsel would be well-advised to avoid asking potential jurors whether they could give a specific dollar amount based on a designated set of facts. As discussed above, such an inquiry may not provide a tremendous amount of insight anyway. A potentially better approach may be to address jurors' attitudes about issues such as noneconomic damages, "frivolous lawsuits" or damage caps. Additionally, counsel may find it useful to explore jurors' experiences with things like insurance claims, similar injuries, or the civil justice system. Jurors' responses to these inquires are likely to offer counsel more insight as to jurors' value beliefs, and hence their

[8] *Brown v. Poff*, 387 S.W.2d 101 (Tex. Civ. App. – El Paso 1965) (trial court properly allowed following question, "If under all the evidence when it is in, the greater weight and greater degree of believable evidence shows [plaintiff] is entitled to the $115,000.00," (for which amount suit was brought) "is there any reason why anyone of you could not and would not be able to write such a verdict?"; *Dodd v. Burkett*, 160 S.W.2d 1016 (Tex. Civ. App. – Beaumont 1942) (Counsel allowed to ask jurors if they were convinced plaintiff was injured through the negligence of defendant and they thought plaintiff was entitled to $20,000, would they put in that amount just as quick as they would $.25. Court stated, however, the question was allowed only because counsel followed it up by asking whether jurors would put in an amount that was fair and supported by the law and evidence at trial); *Rice v. Ragan*, 129 S.W. 1148 (Tex. Civ. App. 1910, writ ref'd) (Counsel allowed to ask "if for any reason they would be unwilling to render a verdict for full and fair compensation if they found for [the plaintiff], and, …would there be any disposition to give him less than full compensation, under the evidence." But, see *Greenman v. City of Fort Worth*, 308 S.W.2d 553 (Tex. Civ. App. – Fort Worth 1957, writ ref'd n.r.e.) (court affirmed trial court's ruling preventing the question, "If the evidence is that the land taken has a fair market value of approximately $87,000, and that the damage to the property not taken is $230,000, will you have any objection to render a verdict for those amounts merely because of the large amounts of money involved?").

potential future verdict, than forcing jurors to commit to a verdict knowing only a certain fact or set of facts.

4. Permissible commitment questions.

Often, even when asking about juror attitudes or experiences, it will become necessary to share certain facts of the case with the potential jurors. This does not mean that the questions that follow are necessarily commitment questions or that, if commitment questions, they are improper. Not all commitment questions are improper. The test set forth by the Court of Criminal Appeals in *Standefer v. State*[9], and endorsed by the Supreme Court in *Hyundai,* states that a commitment question is ***not*** improper if:

1. one or more of the possible answers does not require the prospective juror to resolve or refrain from resolving an issue in the case on the basis of one or more facts contained in the question;
2. an answer to the question would possibly lead to a challenge for cause, and
3. the question contains only those facts necessary to test whether the prospective juror is challengeable for cause.

Therefore, even under the recent Supreme Court decisions, counsel is still free to share some facts of the case with the jurors and illicit their views. For example, counsel could tell the jury that the case is a medical negligence case against a local surgeon and inquire whether they thought that fact alone would prevent them from being impartial. If a juror did not believe in medical negligence cases, did not believe doctors could ever be negligent, or had a pre-formed opinion of the doctor from previous dealings, they would be subject to a causal challenge. Generally speaking, as long as there is a potential response to the question that could serve as the basis of a causal challenge, the question is likely permissible.

Another way to avoid a commitment question problem is to ensure that the juror's response is based on attitudes formed before they got to the courtroom. If, in the above example, a juror stated that they did not believe in cases brought against doctors, counsel would want to have the juror explain that they have had these thoughts and feelings long before they ever walked into the courtroom. Once a juror admits that they formed their belief before they came to court that morning, then they, obviously, cannot be expressing an opinion about the evidence in the case at hand.

D. Error Preservation

The final primary issue that the Court focused on in its recent opinions was error preservation. In *Cortez,* the issue was whether the plaintiff waived her objection to the trial court's denial of the plaintiff's causal challenge. While the Court did not find any error, the Court stated that counsel properly preserved his objection.

The Court reiterated the long-standing rule that to properly preserve error when a causal challenge has been denied, counsel "must use a peremptory challenge against the veniremember involved, exhaust its remaining challenges, and notify the trial court that a specific objectionable veniremember will remain on the jury list." *Cortez, supra* at 90-91, *citing Hallett v. Houston Northwest Medical Center,* 689 S.W.2d 888 (Tex. 1985). While the record was not clear, the Court found that the plaintiff's counsel objected and gave the trial court notice, if not before he exercised his peremptory strikes, at least contemporaneously with submitting his strikes. This was sufficient to preserve error.

This is important, in part, because the Court did not require plaintiff's counsel to request an additional peremptory strike or provide a reason why the specific objectionable juror (Juror Number 7) was objectionable. The Court seemed to employ a substance over form analysis and rely on the fact that the trial court was informed of the issue before the jury was seated and actually stated on the record that the plaintiff's counsel's objection was preserved.

In *Hyundai*, however, the Court held that Plaintiff's counsel did not preserve any potential error when the trial court terminated counsel's line of questioning regarding seat belt usage. According to the Court, after being stopped by the trial court, counsel was obligated to propose "a different method of inquiry that would avoid continued confusion or pre-commitment…." It is not enough that the trial court is aware of the area of inquiry that counsel wants to pursue. To preserve error, counsel must also ensure the trial court is aware of, and rules on, the actual method of such inquiry. The Court stated, "Counsel's continued pursuit of the same inquiry did not preserve error on other inquiries that might have been proper had counsel posed them."

On one hand, the Court acknowledges that counsel is not required to submit an exhaustive list of proposed questions in order to preserve error.[10] On

[9] *Standefer v. State*, 59 S.W.3d 177 (Tex. Crim App. 2001) (holding that the question, "If someone refused to take a breath test, would you presume such a person in your mind to be intoxicated by virtue of refusing a breath test alone?" was an improper commitment question).

[10] The Court stated, "In *Babcock*, we held that litigants need not present a list of each intended voir dire question, but

the other hand, however, the Court requires counsel to inform the trial court of, not only the area of inquiry, but also the actual questions that he proposes to ask regarding that subject.

This guidance seems to this author to require slightly more of counsel than was previously expected under *Babcock.* Regardless, however, the Court's suggestion that counsel be specific as to how they intend to question on a particular issue is well-taken.

If a trial court shuts down a line of questioning, counsel should not only submit its original inquiry for ruling, but then also any other proposed inquiries on the subject. If possible, the additional proposed questions should be structured in a way to avoid the trial court's concern with the original inquiry.

V. CONCLUSION

The clearest of all signals sent by the Supreme Court through its recent decisions is that the trial court's judgment will be given extreme deference. Regardless of whether the questions are attempting to establish bias, or to rehabilitate a juror who has demonstrated apparent bias, the trial court will retain the discretion to permit or refuse questioning as it deems appropriate.

A trial court's determination regarding whether a question is an improper commitment question will also likely be upheld. Acknowledging the difficulty in distinguishing a proper commitment question from an improper one, the Supreme Court has repeatedly stated that the trial court is in the best position to ascertain question's true purpose or response's full meaning.

Finally, with regard to error preservation, the Court in *Cortez* seemed to apply a substance over form analysis in evaluating error preservation. It is probably too early to tell, however, whether this means the Court will adopt a more relaxed application of the very technical rules regarding error preservation for the denial of a causal challenge.[11]

The Court does not, however, seem anxious to relax the standards for preserving error when the claim is that a trial court improperly limited the scope of questioning. While acknowledging that counsel is not required to submit a list of proposed questions, the *Hyundai* requires counsel to "timely alert the trial court as to the specific manner in which it intends to pursue the inquiry." This is arguably more onerous than the previous guidance delivered in *Babcock* requiring counsel to simply appraise the trial court of the "nature of the inquiry."

Overall, the Court's recent decisions encourage practitioners to follow a few general guidelines:

1. Do not give an extensive summary of the facts of the case during your opening remarks.
2. Make sure at least one potential response to each question asked could serve as the basis for a causal challenge.
3. Focus on juror attitudes and experiences in questioning as opposed to the facts of your case.
4. If the court restricts your inquiry on a particular subject, offer the court alternate inquiries to obtain the information.
5. If a juror expresses bias, firmly tie them to their response before allowing opposing counsel an opportunity to rehabilitate.
6. If a juror expresses bias, establish that such bias existed before they came to court and were exposed to any facts from the case.

---

parties must nonetheless 'adequately apprise[] the trial court of the nature of their inquiry.'" *Hyundai*, *supra* at 758.

[11] To preserve error after being denied a causal challenge, counsel must:

(1) Object immediately upon denial;

(2) Advise court, before exercising peremptory challenges, that you will exhaust peremptory challenges and that after exhausting such challenges, a specific objectionable juror will remain on the jury. *Hallett v. Houston Northwest Med. Ctr.*, 689 S.W.2d 888 (Tex. 1985);

(3) Request that the court reconsider its ruling on your previous challenge for cause;

(4) Request the court grant you an additional peremptory strike. Whether this last step is required or not is not clear, but counsel are well-advised to do it anyway out of an abundance of caution. *See*, *Cortez v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87 (Tex. 2005) (no indication that counsel did it, but court found no waiver); *Burton v. R.E. Hable Co.*, 852 S.W.2d 745 (Tex. App. – Tyler 1993, no writ) (requiring litigant to request additional strikes before giving peremptory challenges to court); *Sullemon v. United States Fidelity & Guar. Co.*, 734 S.W.2d 10 (Tex. App. – Dallas 1987, no writ) (finding that *Hallet* does not require litigant to request additional peremptory strikes); and

(5) Then, and only then, hand your peremptory strikes to the court or clerk. "While an 'objectionable' veniremember could be picked at random, the objecting party must do so before knowing who the opposing party will strike or who the actual jurors will be. If it 'guesses' wrong, any error is harmless…." *Cortez*, *supra* at 91. There is no requirement that counsel state the reason why the objectionable juror remaining on the panel is objectionable. *Id. citing Wolfe v. State*, 178 S.W.2d 274 (Tex. Crim App. 1944).