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NARROWING THE ABILITY TO STRIKE JURORS: THE TEXAS SUPREME COURT ADDRESSES IMPORTANT VOIR DIRE ISSUES

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*by Craig T. Enoch and David F. Johnson**

I. INTRODUCTION

Texas has undergone many waves of tort reform over the past twenty years.[1] This effort has included a marketing campaign directed to the citizens of Texas to impart a concern about frivolous lawsuits, out of control damages

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1. Michael S. Hull, *House Bill 4 and Proposition 12: An Analysis with Legislative History*, 36 TEX. TECH. L. REV. 1, 3-5 (2005).

awards, and the difficult climate facing various business interests.[2] To a large extent, the marketing campaign has been successful.[3] Thirty years ago, relatively few people had strong feelings about lawsuits or damages.[4] Today, some courts within our state are having difficulty selecting a jury to decide certain cases because of the strong opinions of venire members.[5] Trial courts are striking so many venire members for cause due to their perceived bias or prejudice that often not enough venire members are left to allow attorneys to properly exercise peremptory strikes and select the jury.[6]

Two areas of voir dire are more important and more relevant than ever before.[7] The first is the concept of a member being biased or prejudiced as a matter of law.[8] This is distinguished from a member simply having some bias or prejudice but not enough to require a trial court to excuse the member for cause.[9] The second are "commitment questions" designed to ask the venire members to weigh evidence or to commit to a particular result based on a set of facts.[10] Commitment questions must be distinguished from proper questions that ask in a general fashion about facts to discover a member's external bias and prejudice.[11] The distinction between the two questions may only be a matter of degree.[12]

These two areas are vitally important in the conduct of voir dire because they implicate a party's ability to discover bias and prejudice from venire members and the ability to have members struck for cause when the need arises.[13] The Texas Supreme Court has recently decided several cases that deal with these issues.[14] This Article discusses these important areas of voir dire practice and the next voir dire issue that the court may review.[15]

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2. *See id.* at 37-39.
3. *See id.* at 46.
4. *See* Allessandra Stanley, *The 1992 Campaign: Issues—Tort Reform; Selling Voters on Bush, As Nemesis of Lawyers*, N.Y. TIMES, Aug. 31, 1992, at A1.
5. *See* Andrew Tilghman, *Lawsuit Juries Harder to Find: Many Called for Duty Disqualified for Opposing Punitive Damages*, HOUSTON CHRON., Feb.14, 2004, at A1.
6. *See id.*
7. *See infra* Part III.
8. *See infra* Part III.A.
9. *See infra* Part III.A.
10. *See infra* Part III.B.
11. *See infra* Part III.B.
12. *See infra* Part III.
13. *See infra* Part III.
14. *See infra* Parts IV-V.
15. *See infra* Parts IV-VI.

II. PURPOSE OF VOIR DIRE

The purpose of voir dire is to seat a fair and impartial jury.[16] That, however, is not necessarily the objective of each party in voir dire.[17] Each party attempts to discover which venire members are least inclined to support its position in the case and then to remove those individuals from the jury.[18]

At the outset, a party has no right to have a particular person serve on the jury.[19] A party's right to a trial by jury is established by Article I, Section 15 of the Texas Constitution and the Seventh Amendment of the U.S. Constitution.[20] The right to a jury trial encompasses the right to have the jury selected in substantial compliance with the applicable procedural statutes and rules.[21] Under those statutes and rules, the parties have a role in excluding prospective jurors who are disqualified or unfit for service as jurors by virtue of bias, prejudice, or otherwise.[22] The statutes and rules also allow parties a limited opportunity to strike prospective jurors even when bias or prejudice cannot be shown.[23] They also provide for involvement of the parties in some decisions to excuse prospective jurors.[24]

Texas's constitution, statutes, and rules, however, do not grant litigants the right to "select" jury members.[25] The right to a jury trial is a right to have fact questions resolved by an impartial jury.[26] That right is distinguishable from a right to have particular persons serve on the jury.[27] Therefore, voir dire is the process of deselecting members from the panel in order to create the jury.[28]

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16. *See* Hallett v. Houston Nw. Med. Ctr., 689 S.W.2d 888, 889 (Tex. 1985).

17. *See* Max E. Wildman, *Selecting the Jury—Defense View*, *in* 5 AMERICAN JURISPRUDENCE TRIALS 247, § 19 (Supp. 2006).

18. *See id.*

19. *See id.*

20. U.S. CONST. amend. VII; TEX. CONST. art. I, § 15.

21. *See* Heflin v. Wilson, 297 S.W.2d 864, 866 (Tex. Civ. App.—Beaumont 1956, writ ref'd) (describing how the jury panel was erroneously chosen by jury commission method rather than required jury wheel method).

22. *See* TEX. GOV'T CODE ANN. § 62.105 (Vernon 2005); TEX. R. CIV. P. 229.

23. *See* TEX. R. CIV. P. 232-33.

24. *See* TEX. GOV'T CODE ANN. § 62.110(c) (requiring approval of parties for excuse of prospective juror for economic reasons).

25. *See* Wells v. Barrow, 153 S.W.3d 514, 517 (Tex. App.—Amarillo 2004, no pet.) (citing Babcock v. Nw. Mem'l Hosp., 767 S.W.2d 705, 709 (Tex. 1989)).

26. *See Babcock*, 767 S.W.2d at 709.

27. *Wells*, 153 S.W.3d at 517.

28. *See id.*

III. TYPES OF VOIR DIRE CHALLENGES

A. The For Cause Challenge

A challenge to a particular venire member is done either through a challenge for cause or through a peremptory strike.[29] A challenge for cause is an objection to a panelist alleging some fact that by law disqualifies the person from serving as a juror or renders the person unfit to sit on the jury.[30] Texas Rule of Civil Procedure 228 states:

> A challenge for cause is an objection made to a juror, alleging some fact which by law disqualifies him to serve as a juror in the case or in any case, or which in the opinion of the court, renders him an unfit person to sit on the jury. Upon such challenge the examination is not confined to the answers of the juror, but other evidence may be heard for or against the challenge.[31]

A party can urge a trial court to use an unlimited number of for cause strikes.[32] To avoid being stricken, a juror must meet many qualifications.[33] For example,

> A person is disqualified to serve as a petit juror unless he: (1) is at least 18 years of age; (2) is a citizen of [Texas] and of the county in which he is to serve as a juror; (3) is qualified under the constitution and laws to vote in the county in which he is to serve as a juror; (4) is of sound mind and good moral character; (5) is able to read and write; (6) has not served as a petit juror for six days during the preceding three months in the county court or during the preceding six months in the district court; (7) has not been convicted of a felony; and (8) is not under indictment or other legal accusation of misdemeanor or felony theft or any other felony.[34]

Additionally, a venire member is not qualified if he or she

> (1) is a witness in the case; (2) is interested, directly or indirectly, in the subject matter of the case; (3) is related by consanguinity or affinity within the third degree to a party in the case; (4) has a bias or prejudice in favor of

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29. *See* TEX. R. CIV. P. 227

30. *See id.* 228; Wooten v. S. Pac. Transp. Co., 928 S.W.2d 76, 80 (Tex. App.—Houston [14th Dist.] 1995, no writ).

31. TEX. R. CIV. P. 228.

32. *See id.* 226-229.

33. *See* TEX. GOV'T CODE ANN. § 62.102 (Vernon 1998).

34. *Id.* § 62.102; *see* R.R.E. v. Glenn, 884 S.W.2d 189, 192 (Tex. App.—Fort Worth 1994, writ denied).

> or against a party in the case; or (5) has served as a petit juror in a former trial of the same case or in another case involving the same questions of fact.[35]

If a party determines that a venire member is not qualified as set forth above, the trial court should grant a for cause challenge and remove the member from the venire.[36]

B. The Peremptory Challenge

After the voir dire questioning period and after the for cause strikes are made, each party makes its peremptory challenges.[37] Peremptory strikes are juror challenges that are allocated to each party by which the party can challenge any juror for any nondiscriminatory reason.[38] Texas Rule of Civil Procedure 232 states: "If there remain on such lists not subject to challenge for cause, twenty-four names, if in the district court, or twelve names, if in the county court, the parties shall proceed to make their peremptory challenges. A peremptory challenge is made to a juror without assigning any reason therefor."[39] A party has exercised its peremptory challenges when it delivers its list of peremptory strikes to the court.[40] As with strikes for cause, peremptory challenges are not intended as a means for selecting a jury.[41] Rather, peremptory challenges are intended to permit a party to reject certain members of the venire based upon the subjective perception that those members might be unsympathetic to the party's position.[42]

IV. PROPERLY USING BIAS AND PREJUDICE AS A MATTER OF LAW TO GRANT A FOR CAUSE STRIKE

A. General Basis of Bias and Prejudice to Strike For Cause

The most prevalent and controversial type of for cause challenge is that the venire member is impermissibly biased or prejudiced.[43] Disqualification for bias or prejudice "extends . . . to the subject matter of the litigation" as well as to the litigants personally.[44] Therefore, questions that deal with a venire

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35. *See* TEX. GOV'T CODE ANN. § 62.105.
36. *See* TEX. R. CIV. P. 227-29.
37. *See id.* 232.
38. *See id.*
39. *See id.*
40. Ortiz v. Ford Motor Credit Co., 859 S.W.2d 73, 75 (Tex. App.—Corpus Christi 1993, writ denied); Lopez v. S. Pac. Transp. Co., 847 S.W.2d 330, 333 (Tex. App.—El Paso 1993, no writ); Beavers v. Northop Worldwide Aircraft Serv. Inc., 821 S.W.2d 669, 681 (Tex. App.—Amarillo 1991, writ denied).
41. *See* Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 919 (Tex. 1979).
42. *See id.*
43. *See* TEX. GOV'T CODE ANN. § 62.105 (Vernon 1998).
44. Compton v. Henrie, 364 S.W.2d 179, 182 (Tex. 1963).

member's bias or prejudice concerning the applicable law of the case, attorneys, or other witnesses are proper and permissible.[45]

Some bias does not require removal from the venire—"[t]o a greater or lesser extent, bias and prejudice form a trait common in all men; however, to fall within the disqualifying provision . . . certain degrees thereof must exist."[46] Bias is an inclination in support of one side of an issue over the other leading to the inference that the biased individual will not act with impartiality.[47] Prejudice is defined as a venire member having a prejudgment.[48]

To disqualify potential jurors for bias as a matter of law, the record must conclusively show that their state of mind led to the natural inference that they would not act with impartiality.[49] Merely showing that a venire member has a potential for bias or prejudice is not sufficient; the voir dire examination must reveal that a fixed opinion or bias actually exists.[50] Some courts of appeals and commentators have stated that the key response by a venire member revealing bias and supporting a successful challenge for cause is that the member cannot be fair and impartial because the venire member feels so strong for or against a party or against the subject matter of the litigation that the member's verdict will hinge on those feelings instead of the evidence.[51]

But an expressed bias that is subject to interpretation or communicates uncertainty, referred to as equivocal bias, is not grounds to disqualify as a matter of law.[52] Simply stating that a juror might lean toward one side is not sufficient to prove bias as a matter of law.[53] Bias is not shown by answers to

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45. Swap Shop v. Fortune, 365 S.W.2d 151, 154 (Tex. 1963) (dealing with law); Gum v. Schaefer, 683 S.W.2d 803, 808 (Tex. App.—Corpus Christi 1984, no writ) (dealing with attorneys); Employer's Mut. Liab. Ins. Co. v. Butler, 511 S.W.2d 323, 325 (Tex. Civ. App.—Texarkana 1974, writ ref'd n.r.e.) (dealing with witnesses).

46. *Compton*, 364 S.W.2d at 181-82.

47. *See id.*; State v. Dick, 69 S.W.3d 612, 618 (Tex. App.—Tyler 2001, no pet.); Houghton v. Port Terminal R.R. Ass'n, 999 S.W.2d 39, 46 (Tex. App.—Houston [14th Dist.] 1999, no pet.).

48. *Compton*, 364 S.W.2d at 182.

49. *See Houghton*, 999 S.W.2d at 46; Goode v. Shoukfeh, 943 S.W.2d 441, 453 (Tex. 1997).

50. *See Swap Shop*, 365 S.W.2d at 154; Powers v. Palacios, 794 S.W.2d 493, 496 (Tex. App.—Corpus Christi 1990), *rev'd on other grounds*, 813 S.W.2d 489 (Tex. 1991); Sullemon v. U.S. Fid. & Guar. Co., 734 S.W.2d 10, 15 (Tex. App.—Dallas 1987, no writ); Julie A. Wright, Comment, *Challenges for Cause Due to Bias or Prejudice: The Blind Leading the Blind Down the Road to Disqualification*, 46 BAYLOR L. REV. 825, 836 (1994).

51. *See* Buls v. Fuselier, 55 S.W.3d 204, 210 (Tex. App.—Texarkana 2001, no pet.); Gant v. Dumas Glass & Mirror, Inc., 935 S.W.2d 202, 208 (Tex. App.—Amarillo 1996, no writ); *see also*, Wright, *supra* note 50, at 838; H. L. Godfrey, *Civil Voir Dire in Texas: Winning the Appeal Based on Bias or Prejudice*, 31 S. TEX. L. REV. 409, 427-33 (1990).

52. Silsbee Hosp., Inc. v. George, 163 S.W.3d 284, 294 (Tex. App.—Beaumont 2005, pet. denied).

53. *See* Excel Corp. v. Apodaca, 51 S.W.3d 686, 693 (Tex. App.—Amarillo 2001), *rev'd on other grounds*, 81 S.W.3d 817 (Tex. 2002); *see, e.g.*, *Swan Shop*, 365 S.W.2d at 154 (Tex. 1963) (stating that a member was friend of the defendant's son in law and was concerned that the trial may affect their friendship); Glenn v. Abrams/Williams Bros., 836 S.W.2d 779, 782-83 (Tex. App.—Houston [14th Dist.] 1992, writ denied); Fazzino v. Guido, 836 S.W.2d 271, 276-77 (Tex. App.—Houston [1st Dist.] 1992, writ denied); *Powers*, 794 S.W.2d at 496; *Sullemon*, 734 S.W.2d at 15 (stating that a member expressed doubt at ability to follow the definition of incapacity).

general questions; such responses usually do not satisfy the diligence required for determining the member's mindset and disqualifying for bias.[54] Therefore, attorneys must follow up when members state that they are leaning toward one direction and must show that the members' feelings are so strong that any verdict would be based upon these feelings and not the evidence.[55]

B. Cortez v. HCCI-San Antonio, Inc.

In *Cortez v. HCCI-San Antonio, Inc.*, the plaintiff challenged a venire member who was an insurance claims adjuster in a nursing home personal injury case.[56] The court's account of voir dire was as follows:

> During voir dire, counsel questioned veniremember Snider, who had handled automobile claims as an insurance adjuster. Snider said that his experience might give him "preconceived notions." "I would feel bias," he said, "but I mean, I can't answer anything for certain." When the trial judge asked him to explain his bias, he said that he had seen "lawsuit abuse . . . so many times." He said that "in a way," the defendant was "starting out ahead," and explained:
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> Basically—and I mean nothing against their case, it's just that we see so many of those. It's just like, well, I don't know if it's real or not. And this type [of] case I'm not familiar with whatsoever, so that's not a bias I should have. It's just there.[57]

The venire member went on to state that he was "willing to try" to listen to the case, making his decision based only on the law and evidence.[58] The trial court denied the plaintiff's for cause strike, and the court of appeals affirmed.[59]

The Texas Supreme Court granted the plaintiff's petition for review and affirmed the judgment of the court of appeals.[60] Aside from an interesting preservation of error discussion, the court discussed three main voir dire issues: (1) whether a party can rehabilitate a venire member after an expression of bias, (2) whether certain "magic words" can prove bias as a matter of law, and (3) whether a venire member's response to a party's question about whether one party starts a little ahead of the other after a discussion of the evidence can provide a basis for a for cause strike.[61]

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54. *See Gant*, 935 S.W.2d at 208.
55. *See Buls*, 55 S.W.3d at 210.
56. Cortez v. HCCI-San Antonio, Inc., 159 S.W.3d 87, 89-90 (Tex. 2005).
57. *Id.* at 90.
58. *Id.*
59. *Id.*
60. *Id.* at 89.
61. *Id.* at 91, 93, 94.

1. Rehabilitation Questions are Permitted

Some courts of appeals have held that once a venire member indicates bias as a matter of law, the member cannot be rehabilitated by averring that he or she could decide the case fairly.[62] Those courts held that any declaration that the venire member would be able to set aside the bias and render a verdict based upon the evidence should be disregarded.[63] The Texas Supreme Court reversed this precedent and held that, depending upon the facts of the case, a party can continue to question a venire member even after the member makes an expression of bias:

> We agree 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. But what courts most often mean by "rehabilitation" is further questioning of a veniremember who expressed an apparent bias. And there is no special rule that applies to this type of "rehabilitation" but not to other forms of voir dire examination . . . .
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> . . . [Trial courts] may place reasonable limits on questioning that is duplicative or a waste of time. But whether further questioning would be a waste of time may depend on factors that may not appear in the record, such as a veniremember's tone and demeanor. As in any other part of voir dire, the proper stopping point in efforts to rehabilitate a veniremember must be left to the sound discretion of the trial court.
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> At the same time, trial judges must not be too hasty in cutting off examination that may yet prove fruitful. Statements of partiality may be the result of inappropriate leading questions, confusion, misunderstanding, ignorance of the law, or merely "loose words spoken in warm debate." . . . If a veniremember expresses what appears to be bias, we see no reason to categorically prohibit further questioning that might show just the opposite or at least clarify the statement. . . .
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> In reviewing such decisions, we must consider the entire examination, not just answers that favor one litigant or the other.[64]

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62. *See* Sullemon v. U.S. Fid. & Guar. Co., 734 S.W.2d 10, 14 (Tex. App.—Dallas 1987, no writ); Gum v. Schaefer, 683 S.W.2d 803, 807 (Tex. App.—Corpus Christi 1984, no writ); Carpenter v. Wyatt Constr. Co., 501 S.W.2d 748, 750 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.); Flowers v. Flowers, 397 S.W.2d 121, 123 (Tex. Civ. App.—Amarillo 1965, no writ); Lumberman's Ins. Corp. v. Goodman, 304 S.W.2d 139, 145 (Tex. Civ. App.—Beaumont 1957, writ ref'd n.r.e.).

63. *See* White v. Dennison, 752 S.W.2d 714, 718 (Tex. App.—Dallas 1988, writ denied).

64. *Cortez*, 159 S.W.3d at 92-93.

2. *Magic Words Do Not Prove Bias or Prejudice*

The court also held that there are no magic words for the purposes of striking a venire member for cause.[65] The fact that venire members may state that they are "biased" does not preclude the trial court from reviewing all of their testimony and determining that they were not biased as a matter of law:

> Nor do challenges for cause turn on the use of "magic words." ... [V]eniremembers may be disqualified even if they say they can be "fair and impartial," so long as the rest of the record shows they cannot. By the same token, veniremembers are not necessarily disqualified when they confess "bias," so long as the rest of the record shows that is not the case.
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> Many potential jurors have some sort of life experience that might impact their view of a case; we do not ask them to leave their knowledge and experience behind, but only to approach the evidence with an impartial and open mind. The veniremember here expressed willingness to do that. Any bias he did express was equivocal at most, which is not grounds for disqualification. [He] was therefore not biased as a matter of law, and it was within the trial court's discretion to refuse to strike him.[66]

3. *"Leaning" Questions After Factual Description are Improper*

Finally, the court held that a venire member's statement that "one party starts a little ahead of the other" was not grounds for a for cause strike when the statement followed a description of the evidence.[67] The court explained:

> As we long ago stated, "bias and prejudice form a trait common in all men," but to disqualify a veniremember "certain degrees thereof must exist." "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." Accordingly, 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.
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> . . . .
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> Asking a veniremember which party is starting out "ahead" is often an attempt to elicit a comment on the evidence. Such attempts to preview a veniremember's likely vote are not permitted. 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.

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65. *Id.* at 93.
66. *Id.* at 93-94.
67. *Id.* at 94.

> A statement that one party is ahead cannot disqualify if the veniremember's answer merely indicates an opinion about the evidence. A statement that is more a preview of a veniremember's likely vote than an expression of an actual bias is no basis for disqualification. Litigants have the right to an impartial jury, not a favorable one.[68]

Cortez is important precedent and will impact the way that voir dire and for cause strikes are conducted. A party is no longer constrained to take the initial response of a venire member as irrefutable.[69] Further questioning is allowed, and if the testimony as a whole—not including magic words—indicates that the member's leaning is not to the point of an "unshakeable conviction" in the outcome, then the for cause strike should not be granted.[70] Finally, responses regarding the weight that a venire member may attribute to particular evidence will not be a basis for disqualification.[71]

C. *Post*-Cortez *Precedent*

The Texas Supreme Court most recently addressed bias as a matter of law in *El Hafi v. Baker*, in which the medical malpractice plaintiff attempted to strike a venire member who had worked as a personal injury defense lawyer.[72] The venire member stated that he thought the plaintiff would want to know that he had spent his entire career defending malpractice lawsuits, would relate to the defense attorney in the case, and would tend to look at the case from the defense perspective.[73] The venire member disagreed with the plaintiff's attorney's statement that the plaintiff would start a little behind, and the venire member stated that he would do his best to be objective.[74] The trial court denied the plaintiff's for cause strike.[75] The court of appeals reversed the judgment holding that the venire member was biased as a matter of law and that the trial court should have granted the for cause strike.[76] In a per curiam opinion, the Texas Supreme Court held that the trial court was correct in denying the for cause strike.[77] The court explained:

> A bias is disqualifying if "it [] appear[s] that the state of mind of the juror leads to the natural inference that he will not or did not act with impartiality." "[T]he relevant inquiry is not where jurors *start* but where they are likely to

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68. *Id.* (quoting Compton v. Henrie, 364 S.W.2d 179, 181-82 (Tex. 1963)) (other citations omitted).
69. *See id.*
70. *Id.*
71. *Id.*
72. El Hafi v. Baker, 164 S.W.3d 383, 384 (Tex. 2005).
73. *Id.*
74. *Id.*
75. *Id.* at 385.
76. *Id.*
77. *Id.*

> *end*." We therefore recently held in *Cortez* that a veniremember was not disqualified merely for having a better understanding of the defendant's side, even though he stated that "in a way," the defendant was "starting out ahead."
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> Here, the veniremember protested when counsel suggested that perhaps, in his mind, the plaintiffs were "starting out a little behind." He further explained that he "would do [his] best to be objective." The veniremember's most "biased" statements were his affirmative answers to leading questions suggesting that because of his career as a defense attorney, he could relate to the defendants' attorneys and might see things more from the defendants' perspective. Having a perspective based on "knowledge and experience" does not make a veniremember biased as a matter of law. Taken as a whole, veniremember 25's statements reflect more of an attempt to "speak the truth" so that the examining counsel could intelligently exercise peremptory challenges rather than any genuine bias.[78]

The court reversed the court of appeals's judgment and remanded the case for further consideration of other issues.[79] That opinion reaffirms the court's decision in *Cortez* that in order to be biased as a matter of law, the venire member must state that the outcome is already determined due to the bias—not that one party starts out ahead of the other.[80]

In *Brooks v. Armco, Inc.*, the plaintiff sued the defendant over her husband's death from mesothelioma, allegedly caused by asbestos to which her husband was exposed at work.[81] During the plaintiff's voir dire questioning regarding the burden of proof, three panel members stated that they would use the criminal "beyond a reasonable doubt" standard instead of the appropriate standard for a tort case.[82] The plaintiff moved to strike those members for cause.[83] The trial court instructed the jury on the proper burden of proof, and upon further questioning, all members stated that they could follow the trial court's instructions.[84] The trial court denied the strikes for cause.[85] The court of appeals affirmed this decision stating:

> For a bias to disqualify a juror, it must appear that the state of the mind of the juror leads to the natural inference that he will not or cannot act with impartiality. . . . [W]e find that [the panel members] were not biased as a matter of law, and the trial court did not abuse its discretion in refusing to strike them for cause. A reasonable construction of the record is that the

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78. *Id.*(quoting Compton v. Henrie, 364 S.W.2d 179, 182 (Tex. 1963) and Cortez v. HCCI-San Antonio, Inc., 159 S.W.3d 87, 93 (Tex. 2005)) (other citations omitted).

79. *Id.*

80. *See id.*

81. Brooks v. Armco, Inc. 194 S.W.3d 661, 663 (Tex. App.—Texarkana 2006, no pet. h.).

82. *Id.* at 664.

83. *Id.*

84. *Id.*

85. *Id.*

> prospective jurors in question simply stated what they thought the law ought to be on the burden of proof requirement, but when the trial court explained that it would instruct them as to the burden of proof required in this case, they indicated to counsel for both sides that they had no problem applying the burden of proof the court said they must use and that they would not try to apply any higher burden of proof. None indicated they could not or would not follow the law on the burden of proof as given to them by the trial court.[86]

After resolving two other voir dire issues, the court affirmed the judgment for the defendant.[87]

In *Greer v. Seales*, the plaintiff in a personal injury action appealed the trial court's denial of several strikes for cause.[88] Regarding one question dealing with retaining counsel after an accident, one venire member stated that "'accidents happen.'"[89] Two other venire members stated that they agreed that damages for pain and suffering should be limited.[90] The court of appeals affirmed the trial court's decision to deny the strikes for cause.[91] The court stated:

> The key response that supports a successful challenge for cause is that the veniremember cannot be fair and impartial, because the veniremember's feelings are so strong in favor of or against a party or against the subject matter of the litigation that the veniremember's verdict will be based upon those feelings and not on the evidence.[92]

The court held that the record did not indicate the challenged venire members met this standard and that the trial court acted within its discretion.[93]

In *McMillan v. State Farm Lloyds*, the plaintiffs sued their insurer over a mold claim.[94] The plaintiffs appealed the trial court's denial of multiple for cause strikes.[95] One juror made the following statements: (1) the mold crisis was "'very much overstated;'" (2) she was concerned that her insurance premiums would go up; (3) she may be biased; (4) she would have difficulty awarding the amount that the plaintiffs requested but was willing to listen to the evidence and would award the plaintiffs' requested amount if proved;

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86. *Id.*
87. *Id.* at 667.
88. Greer v. Seales, No. 09-05-001-CV, 2006 Tex. App. LEXIS 1524, at *2 (Tex. App.—Beaumont 2006, no pet. h.).
89. *Id.* at *5.
90. *Id.* at *6.
91. *Id.* at *7.
92. *Id.* at *6-7 (quoting Gant v. Dumas Glass & Mirror, Inc., 935 S.W.2d 202, 208 (Tex. App.—Amarillo 1996, no writ)).
93. *Id.*
94. McMillan v. State Farm Lloyds, 180 S.W.3d 183, 191 (Tex. App.—Austin 2005, no pet.).
95. *Id.*

(5) the plaintiffs were "'starting behind;'" and, (6) she was not the best juror for the case.[96]

The second juror stated the following: (1) she could not under any circumstances award what the plaintiffs were asking; (2) she had a problem awarding mental anguish damages and punitive damages; (3) the plaintiffs would have to present more than 51% of proof to convince her to award mental anguish and proof beyond almost all doubt to award punitive damages; and, (4) she would follow the judge's instructions and would apply the evidentiary standards for proof of mental anguish and punitive damages.[97] The third juror stated that that the plaintiffs' request for damages was "'too much'" but later conceded that he could award damages if proven.[98] The court of appeals affirmed the trial court's denial of the for cause strikes:

> Under the applicable legal standards as clarified by *Cortez*, and giving due deference to the district court's front-line assessment of credibility and demeanor, we find no abuse of discretion in the district court's refusal to strike these jurors for cause. Although some of these jurors said in various ways that the McMillins "started out behind" because of the nature of their claims and the amount they claimed, when questioned further they said that they would listen to the evidence and apply the relevant standards of proof; this is the type of rehabilitation approved by *Cortez*. The jurors' statements that the $5 million demand far exceeded the estimated $500,000 value of the house was a statement of fact, not evidence of bias.[99]

In *Jones v. Lakshmikanth*, the plaintiff sued the defendant for medical malpractice.[100] The plaintiff complained on appeal about the trial court's denial of several for cause strikes.[101] The court of appeals held that the trial court did not err in refusing the strikes.[102] The plaintiff's counsel failed to follow up with venire members' general statements or positions in the health field and never established any actual bias.[103] For example, the following general statements were insufficient to establish bias as a matter of law: (1) the case was not a good one for the member to consider, (2) expressions of sympathy for doctors and nurses, and (3) belief that medical malpractice cases were bad for patient care.[104] Further, bias as a matter of law was not shown

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96. *Id.* at 196.
97. *Id.* at 196-97.
98. *Id.* at 197.
99. *Id.*(citing Cortez v. HCCI-San Antonio, Inc., 159 S.W.3d 87, 93-94 (Tex. 2005)) (other citations omitted).
100. Jones v. Lakshmikanth, No. 13-03-662-CV, 2005 Tex. App. LEXIS 6937, at *1 (Tex. App.—Corpus Christi 2005, no pet.).
101. *Id.*
102. *Id.*, at *7, 9, 10-11, 13.
103. *See id.*, at *6-13.
104. *See id.*, at *6-11.

just because some members worked in the health care field, worked at the defendant's hospital, were former patients of the defendant, or were related to former patients of the defendant.[105]

In *Silsbee Hospital, Inc. v. George*, the court of appeals held that the trial court reversibly erred in denying a defendant's for cause strikes against two venire members who stated that they would award the plaintiff damages even if the plaintiff did not carry his burden of proof.[106] The court held that the venire members' statements were unequivocal and that the record did not indicate that either member would try to follow the instructions of the trial court.[107] The court of appeals did hold, however, that the trial court correctly refused the defendant's for cause strikes against two other venire members: one who acknowledged that he was acquainted with the plaintiff but stated that it would not play a role in his service as a juror, and the other who stated that she would have trouble not awarding the plaintiff damages but also implied that she still had the capacity to follow the trial court's instructions.[108]

In *GMC v. Burry*, the plaintiff sued GM on a products liability claim after the plaintiff was severely injured in an accident.[109] After the jury returned a verdict for the plaintiff, the defendant appealed arguing, among other issues, that the trial court erred in failing to excuse two venire members for cause.[110] The trial court denied a for cause strike to one member who had a brother die in an accident and who subsequently had a "fight" with GM.[111] When asked if he would be against GM, however, the member stated that he had no idea.[112] The court of appeals affirmed the trial court's decision to not strike the member for cause as his statements did not show an unequivocal bias.[113]

Further, the second member had a relative die in a car accident and had sympathy for the plaintiff.[114] When GM asked her whether she could set aside her sympathy, she said, "I don't think I can."[115] The court of appeals held that the member's statement could be interpreted as proof of unequivocal bias, but technically, the statement was equivocal.[116] The court stated that the trial court was in the best position to decide whether the member had unequivocal bias

105. *See id.* at 11-16.
106. Silsbee Hosp., Inc. v. George, 163 S.W.3d 284, 294-96 (Tex. App.—Beaumont 2005, pet. denied).
107. *Id.* at 296.
108. *Id.* at 295-96.
109. Gen. Motors Corp. v. Burry, 203 S.W.3d 514, 514 (Tex. App.—Fort Worth 2006, pet. filed).
110. *See id.* at 546.
111. *Id.*
112. *Id.*
113. *See id.*
114. *Id.*
115. *Id.*
116. *See id.*

because the trial court could review the member's demeanor, expressions, tone, and voice inflection.[117]

The post-*Cortez* precedent shows that courts are reluctant to reverse a trial court's decision on a for cause strike.[118] Unless a statutory disqualification applies, venire members are not biased or prejudiced as a matter of law solely due to their employment or relationship to a party.[119] An attorney must follow up with the venire member and get specific responses.[120] The key response reveals that the venire member cannot be fair and impartial because the venire member's feelings are so strong in favor of or against a party or against the subject matter of the litigation that the venire member's verdict will be based upon those feelings and not on the evidence.[121] Absent such a response, a trial court will likely not err in refusing to strike a venire member for cause.[122]

V. QUESTIONS THAT SEEK VENIRE MEMBERS' OPINIONS REGARDING THE WEIGHT OF EVIDENCE

Attorneys in Texas state courts have traditionally provided the venire panel with a factual description of the case. Thereafter, they may attempt to ask questions dealing with the venire members' opinions about the factual basis of the case in general or about a particular fact. Texas courts have traditionally been lenient in allowing such inquiries.[123] But the Texas Supreme Court has recently affirmed a trial court's ability to limit these types of inquiries.[124]

A. Voir Dire Questioning

Trial courts should permit attorneys wide latitude in conducting voir dire so that a party can "discover any bias or prejudice by the potential jurors so that peremptory challenges may be intelligently exercised."[125] In fact, a trial court's admonitory instructions to the jury panel expressly instruct the jurors that "[t]he parties through their attorneys have the right to direct questions to each of you concerning your qualifications, background, experiences, and

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117. *See id.*

118. *See* Jones v. Lakshmikanth, No. 13-03-662-CV, 2005 Tex. App. LEXIS 6937, at * 1-2 (Tex. App.—Corpus Christi 2005, no pet.); Silsbee Hosp., Inc. v. George, 163 S.W.3d 284, 294-95 (Tex. App.—Beaumont 2005, pet. denied).

119. *See Jones*, 2005 Tex. App. LEXIS 6937, at * 9; *Silsbee*, 163 S.W.3d at 295.

120. *See Jones*, 2005 Tex. App. LEXIS 6937, at * 9-10; *Silsbee*, 163 S.W.3d at 295-96.

121. *See Jones*, 2005 Tex. App. LEXIS 6937, at *10-11; *Silsbee*, 163 S.W.3d at 295-96.

122. *See Jones*, 2005 Tex. App. LEXIS 6937, at *10-11; *Silsbee*, 163 S.W.3d at 296.

123. *See* Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 749-50 (Tex. 2006).

124. *See id.*

125. Babcock v. Nw. Mem'l Hosp., 767 S.W.2d 705, 709 (Tex. 1989); *see* Haryanto v. Saeed, 860 S.W.2d 913, 918 (Tex. App.—Houston [14th Dist.] 1993, writ denied).

attitudes."[126] Additionally, "[t]he scope of voir dire examination is a matter which rests largely in the sound discretion of the trial court."[127] But if a party's voir dire question is aimed at uncovering information to be used for peremptory strikes or challenges for cause, the trial court's discretion is limited by a party's right to a fair trial.[128] Moreover, a trial court abuses its discretion and reversibly errs if it does not allow a line of questioning that inquires into a juror's background, experiences, and attitudes concerning a matter that is reasonably related to the issues presented in the case.[129]

Even if an issue is an appropriate area for voir dire, an attorney may not try to commit a venire member to a particular result based upon certain facts because that constitutes impermissible commitment questioning.[130] The purpose of voir dire, of course, is to ensure a fair and impartial jury; it is not a means to seek an unfair advantage.[131] Therefore, an attempt to commit a potential juror to a particular outcome based on the weight of certain evidence is improper.[132] But determining whether a particular question is designed to properly discover bias and prejudice or is designed to commit a juror to a result can be a difficult task.[133]

The Texas Court of Criminal Appeals addressed the scope of impermissible and permissible commitment questions in *Standefer v. State*.[134] The trial court did not allow the defendant to ask venire members, "Would you presume someone guilty if he or she refused a breath test on their refusal alone?"[135] The court of appeals reversed the trial court, holding that the question was proper.[136] The Texas Court of Criminal Appeals then affirmed the trial court's exclusion of the question.[137] The court held that a question is an improper commitment question if one or more of the possible answers requires the venire member to resolve, or refrain from resolving, an issue in the case on the basis of one or more facts contained in the question:

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126. TEX. R. CIV. P. 226a.

127. McCoy v. Wal-Mart Stores, Inc., 59 S.W.3d 793, 797 (Tex. App.—Texarkana 2001, no pet.) (citing *Babcock*, 767 S.W.2d at 709).

128. TEX. CONST. art. 1, § 15; *Haryanto*, 860 S.W.2d at 918; *Babcock*, 767 S.W.2d at 708-09.

129. *See Babcock*, 767 S.W.2d at 709.

130. *See* Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 753 (Tex. 2006).

131. *See id.* at 749-50.

132. *See* Grey Wolf Drilling Co., L.P. v. Boutte, 154 S.W.3d 725, 746-47 (Tex. App.—Houston [14th Dist.] 2004, judgm't vacated, w.r.m.); Lassiter v. Bouche, 41 S.W.2d 88, 90 (Tex. Civ. App.—Dallas 1931, writ ref'd) ("Counsel should not be permitted, by questions to a prospective juror, to commit such juror, in advance of the evidence, as to the weight he would give any certain evidence.")

133. *See, e.g.*, Standefer v. State, 59 S.W.3d 177, 179 (Tex. Crim. App. 2001) ("[T]he rule is easily stated but has not been so easily applied.").

134. *Id.* at 179-87. The following are other criminal cases dealing with commitment questions: Sells v. State, 121 S.W.3d 748, 756-59 (Tex. Crim. App. 2003); Lydia v. State, 109 S.W.3d 495, 498-99 (Tex. Crim. App. 2003); Barajas v. State, 93 S.W.3d 36, 41 (Tex. Crim. App. 2002).

135. *Standefer*, 59 S.W.3d at 179.

136. *Id.*

137. *Id.* at 183.

> "[A]n attorney cannot attempt to bind or commit a prospective juror to a verdict based on a hypothetical set of facts." The rule is easily stated but has not been so easily applied. Nevertheless, while caselaw has not always been clear and consistent, a few common principles are apparent. Commitment questions are those that commit a prospective juror to resolve, or to refrain from resolving, an issue a certain way after learning a particular fact. Often, such questions ask for a "yes" or "no" answer, in which one or both of the possible answers commits the jury to resolving an issue a certain way. . . .
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> . . . [A]lthough commitment questions are generally phrased to elicit a "yes" or "no" answer, an open-ended question can be a commitment question if the question asks the prospective juror to set the hypothetical parameters for his decision-making.[138]

Importantly, the court noted that not all commitment questions are improper.[139] If the commitment question seeks a response to legal requirements, then it is permissible.[140] If, however, the law does not require the commitment, then the question is improper.[141] For example, a defendant may inquire whether a venire member could follow the law or whether the member would hold a failure to testify against the defendant.[142] The court warned that otherwise proper commitment questions that include extra, unnecessary facts may become improper.[143] A proper commitment question must contain only those facts necessary to test whether the juror is challengeable for cause.[144]

Historically, few opinions discuss commitment questions in the context of civil cases. In the following cases, the courts of appeals determined that the voir dire question was improper.[145] In *Parker v. Schrimsher*, the plaintiff attempted to ask a venire member whether his execution of a deed of trust to a bank would influence him in determining whether the property in question was his homestead at the time he executed the mortgage.[146] The court of appeals affirmed the trial court's exclusion of the question, stating that "the jury should have been free to consider without a previous pledge that they would not 'let the fact that [the plaintiff] executed the mortgage or mortgages to the bank' influence them in determining whether the property was a homestead."[147]

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138. *Id.* at 179-80 (citation omitted).
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 181.
143. *Id.* at 181-82.
144. *Id.* at 182.
145. *See supra* notes 137-42 and accompanying text.
146. Parker v. Schrimsher, 172 S.W. 165, 170 (Tex. Civ. App.—Amarillo 1914, writ ref'd).
147. *Id.*

Similarly, in *Campbell v. Campbell*, the court of appeals affirmed the exclusion of a question inquiring whether the fact that the testator left out one or more members of his family would influence the venire member in finding a verdict.[148] The court of appeals held that to require a venire member "to say that he will or that he will not let a given material fact influence him in reaching a conclusion, if chosen, is simply to commit him to or against that material fact in advance" and "would be improper."[149]

In *Lassiter v. Bouche*, the trial court excluded questions seeking to ascertain whether any venire members had prejudice against the use of an oral agreement to dispute the terms of written documents.[150] The court of appeals affirmed the exclusion, stating that a party "should not be permitted, by questions to a prospective juror, to commit such juror, in advance of the evidence, as to the weight he would give any certain evidence."[151]

Unlike the cases just discussed, the courts of appeals determined that the voir dire questions were proper in the following cases.[152] In *Airline Motor Coaches, Inc. v. Bennett*, the court of appeals affirmed the trial court's decision to allow the question of whether "'the mere presence of a quart of rum and a piece of a bottle of rum or liquor in our car prejudice you at all in this case.'"[153] The court of appeals held that the question "does not require the juror to state what he would do with certain evidence which would be offered in the case nor to state what his verdict thereon would be."[154]

In *Texas General Indemnity Co. v. Manhalter*, the trial court allowed a plaintiff to question the venire members about whether they would be prejudiced if she did not call doctors to give testimony as to the quality of her injury, even if they had examined the plaintiff at her request.[155] The court of appeals found that allowing the question was erroneous because it sought a commitment from the venire against a material fact that the jury could properly consider.[156]

In *City Transportation Co. v. Sisson*, the court of appeals affirmed the trial court's decision to allow a party to ask the venire if any of them would have "any bias or prejudice as to the [plaintiff] if during the trial evidence of her use of narcotics in prior years or of any narcotic convictions in the past

148. Campbell v. Campbell, 215 S.W. 134, 136-37 (Tex. Civ. App.—Dallas 1919, writ ref'd).

149. *Id.* at 137.

150. Lassiter v. Bouche, 41 S.W.2d 88, 89-90 (Tex. Civ. App.—Dallas 1931, writ ref'd).

151. *Id.* at 90.

152. *See supra* text accompanying notes 144-51.

153. Airline Motor Coaches, Inc. v. Bennett, 184 S.W.2d 524, 528 (Tex. Civ. App.—Beaumont 1944), *rev'd on other grounds*, 144 Tex. 36,187 S.W.2d 982 (1945).

154. *Id.*

155. Tex. Gen. Indem. Co. v. Manhalter, 290 S.W.2d 360, 364 (Tex. Civ. App.—Galveston 1956, no writ).

156. *See id.* at 365.

should be introduced."[157] The court of appeals found no error in the question, determining that it properly inquired about bias or prejudice.[158]

Based on the merits of the questions, the only discernable difference in the outcomes of these cases may be the phrasing of the question.[159] As one commentator has stated:

> [T]hese holdings appear to be based on semantical distinctions without practical difference. Jurors are not technically sensitive nor critical of words during voir dire and will likely understand questions as to whether the juror would *consider, be prejudiced by, or be influenced by* certain evidence to mean the same thing.
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> . . . Case law indicates that asking a panelist whether certain evidence at trial will influence the juror would be an impermissible attempt to commit the juror to the weight he would give such evidence at trial. Asking a juror whether certain evidence will influence his determination of the case is not clearly distinguishable from the above-mentioned cases, all holding that to ask a prospective juror whether he would consider or be prejudiced by certain evidence at trial is permissible.[160]

Based upon this precedent and background, the Texas Supreme Court undertook to define an improper commitment question and an improper question seeking the weight that a venire member would place on evidence.

B. Hyundai Motor Co. v. Vasquez

In *Hyundai Motor Co. v. Vasquez*, the plaintiffs sued the manufacturer of an automobile in which their daughter was riding when she was killed by the impact of an air bag following a low-impact collision.[161] The girl was riding in the front seat of the automobile with her aunt driving, and the girl was not buckled into the seat belt.[162] The plaintiffs wanted to ask the venire members whether or not they would be predisposed to an opinion and could not be fair and impartial, regardless of the evidence, that if the girl was not wearing a seat

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157. City Transp. Co. v. Sisson, 365 S.W.2d 216, 219 (Tex. Civ. App.—Dallas 1963, no writ).

158. *Id.*

159. *See supra* text accompanying note 151.

160. John Bibb, *Voir Dire: What Constitutes an Impermissible Attempt to Commit a Prospective Juror to a Particular Result*, 48 BAYLOR L. REV. 857, 874, 876 (1996) (citing Rothermel v. Duncan, 365 S.W.2d 398 (Tex. Civ. App.—Beaumont), *rev'd on other grounds*, 369 S.W.2d 917 (Tex. 1963); City Transp. Co. v. Sisson, 365 S.W.2d 216 (Tex. Civ. App.—Dallas 1963, no writ); Airline Motor Coaches, Inc. v. Bennett, 184 S.W.2d 524, 528 (Tex. Civ. App.—Beaumont 1944), *rev'd on other grounds*, 144 Tex. 36, 187 S.W.2d 982 (1945)).

161. Vasquez v. Hyundai Motor Co., 119 S.W.3d 848, 850 (Tex. App.—San Antonio 2003) (en banc), *rev'd*, Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743 (Tex. 2006).

162. *Hyundai*, 189 S.W.3d at 747.

belt.[163] In the third attempt to seat a jury, the trial court only allowed general seat belt questions.[164] A jury was eventually impaneled, and it rendered a defense verdict.[165] The plaintiffs appealed, and the San Antonio Court of Appeals reversed the trial court's decision, holding that the plaintiffs' original question was a proper question that sought out information regarding the venire members' bias and prejudice.[166] The court of appeals held that a commitment question is improper because it is designed to determine a potential juror's view of certain evidence and does not seek to expose the existence of bias.[167] The court stated: "[A] potential juror's view of the case as influenced by certain evidence does not necessarily mean the juror is biased and cannot be fair. Indeed, every trial lawyer hopes jurors are influenced by the evidence; otherwise, what is the point of a jury trial?"[168]

The court of appeals held that the plaintiffs' question was proper because it focused on the ability of the potential jury to be fair and did not attempt to have it weigh the evidence:

> This question clearly focuses on the ability of the jurors to be fair. . . .
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> The Vasquezes were entitled to determine which of the potential jurors could not be fair to them based solely on the fact that Amber was not wearing a seat belt when she was killed and they were prevented from doing this. The trial court's decision to disallow questions directed at exposing this bias was an abuse of discretion that denied the Vasquezes the right to trial by a fair and impartial jury.[169]

In essence, the court of appeals held that the question was proper because it leaned on the side of exposing bias and prejudice and not committing a venire member to a particular result.[170] The Texas Supreme Court disagreed and reversed the court of appeals.[171]

The Texas Supreme Court started its analysis with a general discussion regarding the purpose of voir dire.[172] "[T]he primary purpose of voir dire is to inquire about specific views that would prevent or substantially impair jurors from performing their duty in accordance with their instructions and

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163. *Id.* at 747-48.
164. *Id.* at 748.
165. *Id.* at 749.
166. *Id.* at 749. The court of appeals panel originally affirmed the trial court's decision but later reversed it on an en banc consideration. *Id.*
167. Vasquez v. Hyundai Motor Co., 119 S.W.3d 848, 855 (Tex. App.—San Antonio 2003) (en banc), *rev'd*, Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743 (Tex. 2006).
168. *Id.*
169. *Id.*
170. *See id.*
171. *Hyundai*, 189 S.W.3d at 747.
172. *Id.* at 749.

oath."[173] As a part of this purpose, a party has a right to question the venire panel in order to discover information to intelligently use peremptory strikes.[174] The court acknowledged the "subjectivity inherent in jury selection voir dire does not lend itself to formulaic management."[175] Even so, "[p]eremptory strikes are not intended . . . to permit a party to 'select' a favorable jury."[176] In fact, because the "objective of jury selection proceedings is to determine representation on a governmental body," an attorney's ability to question is constrained.[177]

The court then addressed voir dire questions that inquired about the facts of the case.[178] It affirmed its prior decision from *Cortez v. HCCI-San Antonio, Inc.*[179] The court held that seeking opinions about the weight venire members will give specific evidence is as equally improper as summarizing the evidence and then asking whether one side was starting out ahead of the other:

> [A]n inquiry about the weight jurors will give relevant evidence should not become a proxy for inquiries into jurors' attitudes, because the former is a determination that falls within their province as jurors. Just as excluding jurors who weigh summarized facts in a particular way infringes upon the right to trial by a fair and impartial jury, so too does excluding jurors who reveal whether they would give specific evidence great or little weight. In both cases, questions that attempt to elicit such information can represent an effort to skew the jury by pre-testing [its] opinions about relevant evidence. And, when all of the parties to the case engage in such questioning, the effort is aimed at guessing the verdict, not at seating a fair jury.[180]

The court also stated that it was simply unfair to allow a venire member's comments about particular evidence to disqualify that member from service because those opinions may change upon hearing all the evidence.[181] The court noted that it desired to be consistent with its sister court—the Texas Court of Criminal Appeals—and cited to *Standefer*.[182] The court concluded:

> Statements during voir dire are not evidence, but given its broad scope in Texas civil cases, it is not unusual for jurors to hear the salient facts of the case during the voir dire. If the voir dire includes a preview of the evidence,

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173. *Id.*
174. *Id.* at 750.
175. *Id.*
176. *Id.*
177. *Id.* (quoting Edmonson v. Leesville Concrete Co., 500 U.S. 614, 626 (1991)).
178. *Id.* at 750-53.
179. *Id.* at 751-60; *see* Cortez v. HCCI-San Antonio, Inc., 159 S.W.3d 87, 94 (Tex. 2005). *See also* discussion *supra* Part IV.B (discussing *Cortez*).
180. *Id.* at 752 (citing City of Keller v. Wilson, 168 S.W.3d 802, 819 (Tex. 2005) and *Cortez*, 159 S.W.3d at 94).
181. *Id.*
182. *Id.* at 752-53 (quoting Standefer v. State, 59 S.W.3d 177 (Tex. Crim. App. 2001)).

> we hold that a trial court does not abuse its discretion in refusing to allow questions that seek to determine the weight to be given (or not to be given) a particular fact or set of relevant facts.[183]

The court then analyzed the proffered question in the case and determined that the trial court did not abuse its broad discretion in refusing to allow the attorney to ask it.[184] The proposed question isolated the fact that the child had not been wearing a seatbelt and sought to identify those jurors who agreed that this one fact overcame all other facts.[185] The court noted that "as reasonable jurors, however, it is within their province to so conclude. The question thus asks the jurors' opinion about the strength of this evidence and does not cull out any external bias or prejudice."[186]

The trial judge is in a better position to judge the proffered question in the context of the courtroom, the phrasing of the question, and the physical appearance of the attorney and venire members.[187] Based on that assumption, the court concluded:

> The substance of a question, not its form, determines whether it probes for prejudices or previews a probable verdict. The trial court in this case reasonably could have concluded that the substance of the proposed question did not present a basis for disqualifying a juror for cause, and instead sought to test the weight jurors would place on the relevant fact that Amber was not wearing a seat belt at the time of the accident. Thus, the trial judge did not abuse her discretion in refusing to allow it.[188]

Rather than its individual holding on the appropriateness of the proffered question, the *Hyundai* case is more important for its broad language that trial courts should not allow voir dire questions that ask a venire member to weigh particular evidence—no matter how the question is phrased: "incorporating phrases associated with an inquiry into whether the jurors hold a preconceived bias does not alter the basic substance of this question."[189] If the question incorporates a relevant fact, venire members' responses to it "encompass more than *pre*dispositions or *pre*conceived notions."[190]

Finally, the court addressed when a commitment question is proper.[191] Similar to the Texas Court of Criminal Appeals in *Standefer*, the Texas Supreme Court held that some commitment questions are permissible when the

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183. *Id.* at 753.
184. *Id.* at 755-60.
185. *Id.* at 747-48.
186. *Id.* at 756.
187. *See id.*
188. *Id.* at 757-58 (citing Cortez v. HCCI-San Antonio, Inc., 159 S.W.3d 87, 93 (Tex. 2005)).
189. *See id.* at 756.
190. *Id.*
191. *See id.* at 756-57.

attorney is attempting to commit the venire member to a legal requirement.[192] For example, when prejudicial evidence cannot be excluded, a party is entitled to question about it and inquire whether a venire member could follow a limiting instruction.[193] Vasquez argued that even if the proffered question was a commitment question, it was proper because it sought to have the members consider all of the evidence as the law requires.[194] The court disagreed, reasoning as follows:

> The phrases "regardless of the evidence" and "no matter what else the evidence is" included in this question...do not transform its substance into a commitment to listen to the evidence, because the question itself isolates one relevant piece and its impact on juror decision-making. Asking whether jurors will ignore all of the relevant facts, or all of the relevant facts *but one* are two very different questions—an affirmative answer to the former reflects bias or prejudice, but an affirmative answer to the latter, without more, reflects that jurors think a presented fact is most important, based upon what they have been told by counsel.[195]

Certainly, *Hyundai* is a significant decision for voir dire practice. The tortured procedural history of this case evidences how close the decision was.[196]

C. *Post*-Hyundai *Precedent*

One court after *Hyundai* discussed voir dire questions that improperly ask the venire to weigh the evidence.[197] In *In re Barbee*, a defendant appealed an order of civil commitment under the Texas Sexually Violent Predator Act.[198] During voir dire, the defendant's attorney attempted to ask certain panel members whether they could be fair and impartial jurors knowing that his client had multiple convictions for sexual offenses against children.[199] For

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192. *See id.* at 756.
193. *See id.*
194. *See id.* at 757.
195. *Id.*
196. *See id.* at 747-79. The trial court excluded the proffered question on the voir dire to the third panel, and the court of appeals panel originally affirmed the trial decision before the en banc court reversed. *Id.* at 748-49. When the case reached the Texas Supreme Court, two justices recused themselves, and the court took the unusual step of requesting a second oral argument due to several new justices sitting on the panel. *Id.* at 747 n.*. The majority opinion was made up of Justices Hecht, O'Neill, Brister, Willet, and two justices assigned from the Courts of Appeals—Bland and Cayce. *Id.* at 746-47. Justices Wainwright, Medina, and Johnson filed multiple dissents because they felt that the trial court had erred in not allowing Vasquez to ask further questions dealing with seatbelts notwithstanding the inappropriateness of the proffered question. *Id.* at 760-69 (Johnson, J., Medina, J., and Wainwright, J., dissenting). The majority found that the issue of additional further questions had not been properly preserved. *See id.* at 759-60.
197. *See In re* Commitment of Barbee, 192 S.W.3d 835, 844 (Tex. App.—Beaumont 2006, no pet.).
198. *Id. See also* TEX. HEALTH & SAFETY CODE ANN. §§ 841.001-.147 (Vernon 2003 & Supp. 2005) (Texas Sexually Violent Predator Act).
199. *Barbee*, 192 S.W.3d at 844.

example, counsel asked, "Who could not be a fair and impartial juror if the evidence showed that the crimes for which Mr. Barbee was convicted involved children of tender age?"[200] The trial court refused to allow this question.[201] Citing *Hyundai*, the court of appeals affirmed the trial court's decision, holding that the questions revealed that Barbee had prior convictions and intended to determine the weight jurors might place on that evidence.[202] In addition, the court held that the trial court did not abuse its discretion in excluding the evidence-weighing questions: "Under these circumstances, the trial court has the discretion to prohibit improper questions although it cannot foreclose all inquiry about a relevant topic."[203]

VI. THE NEXT SUPREME COURT OPINION—IS IT REVERSIBLE ERROR TO STRIKE VENIRE MEMBERS FOR CAUSE DUE TO THEIR ANSWERS TO A QUESTION DEALING WITH THE WEIGHT OF THE EVIDENCE?

In *Hyundai*, the Texas Supreme Court judged whether the trial court erred in excluding a question under an abuse of discretion standard of review.[204] The court's opinion stated that the trial court was in the best position to judge the venire panel and the questions.[205] The court left open the possibility that a trial court could, under its discretion, allow weight of the evidence questions under some circumstances: "[A] trial judge may choose to hear jurors' responses before deciding whether an inquiry pries into potential prejudices or potential verdicts. . . ."[206] The court reasoned:

> Permitting disclosures about the evidence the jury will hear during the case increases the potential for discovering external biases, but inquiries to jurors after doing so should not spill over into attempts to preview the verdict based on the facts as represented to the jurors. Balancing these competing concerns depends on the facts in a case and on the inquiries posited to the jury. The trial judge is in a better position to achieve the proper balance.[207]

Therefore, trial courts in Texas will continue to allow each side to ask questions of the venire panel that seek comments on the weight of the evidence.[208] Further, some trial courts will strike jurors for cause because of their responses.[209] For example, in *Hyundai*, during the first two attempts to

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200. *Id.*
201. *Id.*
202. *See id.* at 846, 848.
203. *Id.*
204. *See* Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 753-54 (Tex. 2006).
205. *See id.* at 753-55.
206. *Id.* at 755.
207. *Id.*
208. *See id.* at 753.
209. *See supra* note 203 and accompanying text.

pick a jury, the trial court struck many venire members for cause because they could not be fair and impartial to the plaintiff after learning that the child was not wearing a seat belt.[210]

Accordingly, the next voir dire issue is whether a trial court reversibly errs in excusing venire members for cause due to their answers to questions that ask them to weigh the evidence.[211] In *Hyundai*, the court repeatedly said that it was erroneous for a trial court to strike venire members due to the weight that they placed on evidence:

> If the trial judge permits questions about the weight jurors would give relevant case facts, then the jurors' responses to such questions are not disqualifying, because while such responses reveal a fact-specific opinion, one cannot conclude they reveal an improper subject-matter bias. . . .
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> . . . .
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> . . . If the trial court allows a question that seeks a juror's view about the weight to give relevant evidence, then the juror's response, without more, is not disqualifying.[212]

Therefore, a trial court clearly errs in striking venire members because of their answers to questions dealing with the weight of the evidence.[213] What is less clear, however, is whether this error constitute grounds for reversal.[214]

The general reversible error rule is found in Texas Rule of Appellate Procedure 44.1:

> No judgment may be reversed on appeal on the ground that the trial court made an error of law unless the court of appeals concludes that the error complained of: (1) probably caused the rendition of an improper judgment; or (2) probably prevented the appellant from properly presenting the case to the court of appeals.[215]

Thus, the appellate court must determine whether it is more likely than not that the trial court's error resulted in an improper judgment.[216]

In the context of removing particular jurors from the panel, determining harm may be a difficult task because dismissed members are presumably replaced by qualified jurors.[217] For example, the United States Supreme Court recognized that an erroneous dismissal of a prospective juror does not

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210. *Hyundai*, 189 S.W.3d at 747-49.
211. *See id.* at 749-51.
212. *Id.* at 753, 755.
213. *See id.* at 755-56.
214. *See id.*
215. TEX. R. APP. P. 44.1.
216. *See* King v. Skelly, 452 S.W.2d 691, 696 (Tex. 1970).
217. *See* N. Pac. R.R. Co. v. Herbert, 116 U.S. 642, 696 (1886).

automatically require reversal if an impartial jury was impaneled.[218] In *Northern Pacific Railroad Co. v. Herbert*, the Supreme Court stated that the trial court erred in allowing the challenge of a prospective juror, despite not showing that he had actual bias.[219] Assuming the challenge was for cause, "its allowance did not prejudice the company."[220] The Court further explained, "[A] competent and unbiased juror was selected and sworn, and the company had, therefore, a trial by an impartial jury, which was all it could demand."[221] Several federal courts and numerous state courts have recognized this principle and applied it in the context of a criminal trial.[222]

Texas is one of the jurisdictions that followed the *Herbert* opinion in the context of criminal proceedings.[223] In *Jones v. State*, the Texas Court of Criminal Appeals held that an error in granting an improper challenge for cause was not of a constitutional dimension and was not reversible error.[224] The court stated that "a defendant has no right that any particular individual serve on the jury. The defendant's only substantial right is that the jurors who do serve be qualified."[225] The court then adopted a new harm standard for when a juror is erroneously excused.[226] If the record shows that the erroneous exclusion deprived the defendant of a legally formed jury, then the exclusion is reversible.[227] Significant in the court's decision was that "no claim [was] made that the jury, as finally constituted, was biased or prejudiced; or that appellant was deprived of a trial by an impartial jury."[228]

In the context of civil cases, Texas courts have held that when a challenge for cause is improperly sustained, a party cannot demonstrate reversible error unless it can show that the court denied the party a trial by a fair and impartial jury.[229] In *Couts v. Neer*, the Texas Supreme Court stated that when a trial

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218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. *See, e.g.*, United States v. Gonzalez-Balderas, 11 F.3d 1218, 1222 (5th Cir. 1994); United States v. Prati, 861 F.2d 82, 87 (5th Cir. 1988); Shettel v. United States, 113 F.2d 34, 36 (D.C. Cir. 1940); State v. Walden, 905 P.2d 974, 988 (Ariz. 1995); People v. Holt, 937 P.2d 213, 236-37 (Cal. 1997); Wheeler v. People, 165 P. 257, 258 (Colo. 1917); Wells v. State, 404 S.E.2d 106, 107 (Ga. 1991); State v. Clark, 278 P. 776, 777-78 (Idaho 1929); State v. Kendall, 203 N.W. 806, 807 (Iowa 1925); Hunt v. State, 583 A.2d 218, 234 (Md. 1990); State v. Hurst, 193 N.W. 680, 682 (Minn. 1922); State v. Hill, 827 S.W.2d 196, 199 (Mo. 1992); State v. Huffman, 296 P. 789, 790 (Mont. 1931); Bufford v. State, 26 N.W.2d 383, 386 (Neb. 1947); State v. Martinez, 278 P. 210, 210-11 (N.M. 1929); State v. Carson, 249 S.E.2d 417, 423 (N.C. 1978); State v. Wells, 103 S.E. 515, 516 (S.C. 1920); State v. Larkin, 228 P. 289, 289 (Wash. 1924); State v. Mendoza, 596 N.W.2d 736, 748-49 (Wis. 1999).
223. Jones v. State, 982 S.W.2d 386, 392 (Tex. Crim. App. 1998) (en banc).
224. *Id.*
225. *Id.* at 393.
226. *Id.* at 394.
227. *Id.*
228. *Id.* at 391.
229. Couts v. Neer, 70 Tex. 468, 473, 9 S.W. 40, 41 (1888); City of Hawkins v. E. B. Germany & Sons, 425 S.W.2d 23, 26 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.).

court exercises a for cause strike, "it ought not to be revised in any case unless it be made clearly to appear that thereby the party complaining has been deprived of a trial by a fair and impartial jury."[230] Courts have also stated that an error in sustaining a challenge for cause is not a ground for reversal unless the appealing party shows prejudice.[231] For example, in *Hawkins v. E. B. Germany & Sons*, the court stated in dicta that even if a trial court erred in excusing venire members for cause, the appealing party must show harm to obtain relief from the court of appeals:

> Appellant does not allege or attempt to demonstrate how any harm resulted by reason of the adverse ruling. It has long been the established rule in this state that even though the challenge for cause was improperly sustained, no reversible error is presented unless appellant can show he was denied a trial by a fair and impartial jury. The record brought forward by appellant fails to show appellant objected to any juror on the panel. Since it was not shown that the city was forced to try the cause before an objectionable juror, it must be presumed that the city was afforded a fair and impartial jury. Consequently, no harm could have resulted to appellant by reason of the action of the court in excusing the two jurors.[232]

In the context of a trial court improperly allowing a commitment question, however, one court has reversed finding harmful error.[233] In *Parker v. Schrimsher*, the trial court allowed plaintiff's counsel to ask and to receive a negative answer to a question about certain evidence.[234] The court of appeals held that the jurors had a right to be influenced by the evidence and that the trial court erred by permitting them to make a pledge that they would not be influenced by it.[235] The court further held that this was a serious error that the court's instructions likely could not cure.[236]

Most recently, in *Hyundai*, the Texas Supreme Court indicated in dicta that striking venire members for cause due to weight that they would place on evidence may infringe upon a party's right to a fair and impartial jury:

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230. *Couts*, 9 S.W. at 40.

231. *See, e.g.*, *City of Hawkins*, 425 S.W.2d at 26 (finding that the appellant failed to demonstrate any harmed caused by dismissal of three jurors for being resident, taxpaying citizens of Hawkins); Woolam v. Cen. Power & Light Co., 211 S.W.2d 792, 793 (Tex Civ. App.—San Antonio 1948, no writ) (finding that the appellant failed to demonstrate harm caused by excusal of juror for giving conflicting answers during voir dire); City of Marshall v. McAllister, 18 Tex. Civ. App. 159, 160, 43 S.W. 1043, 1044 (1898) (finding that the lower court erred in excluding a taxpaying citizen from the jury pool on policy reasons but also stating that normally it would be necessary to determine clear injury from the exclusion).

232. *City of Hawkins*, 425 S.W.2d at 26 (citations omitted).

233. Parker v. Schrimsher, 172 S.W.2d 165, 170-71 (Tex. Civ. App.—Amarillo 1914, writ dism'd).

234. *Id.*

235. *Id.*

236. *Id.*

> Just as excluding jurors who weigh summarized facts in a particular way infringes upon the right to trial by a fair and impartial jury, so too does excluding jurors who reveal whether they would give specific evidence great or little weight. In both cases, questions that attempt to elicit such information can represent an effort to skew the jury by pre-testing their opinions about relevant evidence. And, when all of the parties to the case engage in such questioning, the effort is aimed at guessing the verdict, not at seating a fair jury.[237]

The *Hyundai* opinion suggests that the real effect of improperly striking jurors for cause due to the weight they give particular evidence is that these strikes provide additional opportunities for the party improperly moving to strike for cause to remove unfavorable jurors.[238] For example, imagine a situation in which a party does not like the way that a particular venire member views the evidence and asks the trial court to strike that member for cause.[239] If the trial court does so, the party does not have to use a peremptory strike on that unfavorable juror.[240] Consequently, the party receives more opportunities to strike qualified but unfavorable jurors than its opponent.[241] The resulting panel will be filled with venire members that favor one side's evidence over the other.[242] This result is unfair to the party opposing the for cause strike and, under some circumstances, should amount to reversible error.[243]

For example, in the context of an improper allocation of peremptory challenges, a relaxed harmless error standard applies.[244] In *Patterson Dental Co. v. Dunn*, the Texas Supreme Court recognized that a complaining party who has been wronged by an error in the awarding of peremptory strikes theoretically has an overwhelming burden.[245] Therefore, the court only required the complaining party show that "the trial which resulted against him was [m]aterially unfair" without having to show more.[246] The court must examine the entire record to determine whether an error in awarding strikes caused a materially unfair trial.[247] The court has held that if a trial is hotly

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237. Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 752 (Tex. 2006).
238. *See id.*
239. *Id.* at 750.
240. *Id.*
241. *See id.*
242. *See id.*
243. *Id.* at 768.
244. *See, e.g.*, Lopez v. Foremost Paving, Inc., 709 S.W.2d 643, 645 (Tex. 1986); Garcia v. Cent. Power & Light Co., 704 S.W.2d 734, 737 (Tex. 1986); Lorusso v. Members Mut. Ins. Co., 603 S.W.2d 818, 819-21 (Tex. 1980); Patterson Dental Co. v. Dunn, 592 S.W.2d 914, 921 (Tex. 1979); Tamburello v. Welch, 392 S.W.2d 114, 118 (Tex. 1965); Dunlap v. Excel Corp., 30 S.W.3d 427, 432 (Tex. App.—Amarillo 2000, no pet.).
245. *Patterson Dental Co.*, 592 S.W.2d at 920-21.
246. *Id.* at 921.
247. *Garcia*, 704 S.W.2d at 734.

contested and the evidence is sharply conflicting, the erroneous award of strikes results in a materially unfair trial without showing more.[248]

Moreover, in *Mann v. Ramirez*, the San Antonio Court of Appeals held that appellate courts should review errors occurring in the jury selection process by determining if the trial of the case resulted in a materially unfair trial.[249] The court held that requiring strict compliance with a Rule 44.1 harm analysis would result in the "subtle erosion of the standards of the jury system."[250] Therefore, the court did not require a showing of injury.[251] The court noted that parties have a constitutional right to trial by a jury selected in substantial compliance with the law and that federal and state constitutions guarantee this right.[252] The Fort Worth Court of Appeals applied this relaxed harmless error standard to a trial court's improper grant of a jury shuffle after voir dire had begun, which affected the randomness of the selection.[253] The same relaxed harmless error standard should apply when a trial court improperly excuses a juror due to the weight that the juror places on evidence.

The extent of harm that the replacement juror caused is impossible to show exactly. The effect, though, is that the jury is composed of persons that view the evidence more favorably to one of the parties.[254] This violates the opposing party's right to a fair and impartial trial.[255] Some instances may exist in which harm may not be shown under even the relaxed standard; the case may not be hotly contested with sharply conflicting evidence. Moreover, the weight of the evidence question may only go to a relatively unimportant fact. If members are excused due to the weight they give unimportant facts, a party may not be harmed in having them excused from the panel. Absent these circumstances, under the relaxed standard, an appellate court should reverse the judgment and remand for a new trial so that both parties can have a fair trial before impartial jurors. The Texas Supreme Court has not so held at this time, but a fair reading of the *Hyundai* opinion leads to this conclusion.[256]

VII. CONCLUSION

The purpose of voir dire is to seat a fair and impartial jury.[257] Certainly, issues concerning both weight of the evidence questions and bias as a matter

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248. *Id.* at 734.
249. Mann v. Ramirez, 905 S.W.2d 275, 278-79 (Tex. App.—San Antonio 1995, writ denied).
250. *Id.* at 280 (quoting Mendoza v. Ranger Ins. Co., 753 S.W.2d 779, 781 (Tex. App.—Fort Worth 1988, writ denied)).
251. *Id.*
252. *See id.* at 281 (quoting Tamburello v. Welch, 392 S.W.2d 114, 117 (Tex. 1965)).
253. *See* Carr v. Smith, 22 S.W.3d 128, 135 (Tex. App.—Fort Worth 2000, pet. denied).
254. *See supra* notes 229-31 and accompanying text.
255. *See supra* notes 232-34 and accompanying text.
256. *See* Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743 (Tex. 2006).
257. Hallett v. Houston Nw. Med. Ctr., 689 S.W.2d 888, 889 (Tex. 1985).

of law implicate a party's ability to know venire members' leanings and bias as well as the party's ability to have venire members who are not fair and impartial struck for cause.[258] Because the Texas Supreme Court affirmed *Cortez*, venire members must state that their feelings about an issue are so strong that they will ignore the law or the evidence in the case before they are deemed biased as a matter of law.[259] Now parties will certainly have a more difficult time striking objectionable jurors for cause.[260] Additionally, the use of rehabilitative questions will have more relevance and importance. The court extended its *Cortez* decision in *Hyundai* and held that an attorney may not give a factual description of the case and then ask the venire members if they felt one party was a little ahead of the other.[261] In *Cortez*, the court concluded that the venire members' opinions on the weighing of evidence could not be bias or prejudice as a matter of law.[262]

In *Hyundai*, the court reemphasized *Cortez*: not only does a question concerning the weight of evidence not elicit a for cause strike, but the question itself is improper.[263] If the Texas Supreme Court had affirmed the court of appeals, parties would have been able to ask the venire members how they felt about certain types of evidence in terms of fairness to a party. For example, a party could ask, "Knowing that the defendant rear-ended the plaintiff, could you still be 'fair' to the defendant in assessing liability?" Instead, the court went in the opposite direction.[264]

Moreover, by reversing *Hyundai*, the court broadened the definition of an improper commitment question and held that questions dealing with the weight that venire members give evidence are impermissible.[265] Parties will now have a more difficult time discovering venire members' leanings on certain types of evidence. This will affect the parties' ability to ascertain information from the venire that would assist in exercising both peremptory and for cause challenges. Though improper, information concerning a venire member's view of evidence greatly assists a party in exercising peremptory challenges.

Allowing weight of evidence questions, however, poses a great risk that the information will be abused by parties and trial courts in excusing venire members for cause. At the heart of the issue is a venire member's right to weigh particular evidence and a trial court's duty to strike a venire member for cause due to an indication of how that member would weigh evidence as described by an attorney. In an article written before he joined the Texas

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258. *See* Cortez v. HCCI-San Antonio, Inc., 159 S.W.3d 87, 92 (Tex. 2005).

259. *See id.*

260. *See id.*

261. *Hyundai*, 189 S.W.3d at 747, 751.

262. *Cortez*, 159 S.W.3d at 94-95.

263. *Hyundai*, 189 S.W.3d at 755 ("In *Cortez*, we held improper both (1) a juror's disqualification based on answers that previewed the juror's vote, and (2) the actual questions that sought the same.").

264. *Id.* at 758.

265. *Id.* at 764-66.

Supreme Court, Justice Scott Brister stated the following: "[G]iving varying levels of credence to evidence is not bias, it's why we have jurors in the first place. We invade the unique province of the jury if we disqualify jurors because they may give some evidence little or no weight."[266]

Similarly, because venire members are required to weigh relevant evidence, the court held in *Hyundai* that a trial court cannot strike a venire member for cause due to an answer to a question that requires the weighing of the evidence.[267] "If the trial judge permits questions about the weight jurors would give relevant case facts, then the jurors' responses to such questions are not disqualifying, because while such responses reveal a fact-specific opinion, one cannot conclude that they reveal an improper subject-matter bias."[268] The court reemphasized this rationale by repeating it later in the opinion: "If the trial court allows a question that seeks a juror's view about the weight to give relevant evidence, then the juror's response, without more, is not disqualifying."[269] In no subtle terms, the court directed trial courts that, even though the phrasing of voir dire questions remains largely in the trial courts' discretion, responses to weighing of the evidence questions would not be grounds for a for cause strike.[270]

Arguably, the real error in *Hyundai* was that the trial court struck two entire panels due to the venire members' indications as to how they would weigh the evidence.[271] If the parties could have picked a jury from the first panel, the jury would not have included individuals who would place great weight on the fact that the child's family had not bothered to put a seat belt on her—a permissible fact on which to place weight.[272] That result would have been simply unfair to Hyundai and is not the purpose of voir dire.

When a trial court allows an attorney to ask a broad bias or prejudice question about particular case-specific evidence, the trial court should not strike a venire member for cause due to the weight the member would place on a particular type of evidence. Indeed, the bias and prejudice inquiry for the purposes of for cause strikes ideally relates to broad categories—parties, attorneys, types of suits, and damages. Otherwise, a plaintiff or defendant with a weak case would be able to strike entire panels because the venire members were biased against such things as running red lights.

Finally, if a trial court allows weight of the evidence questions and strikes venire members for their responses thereto, this result may violate the other party's right to a fair and impartial jury. In such a case, a relaxed harm

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266. Scott Brister, *Wanted: Docile, Uninformed Jurors? If We Want to Truly Represent a Jury, There Are Ten Practices We Shouldn't Allow in Voir Dire*, 12 TEX. LAW., No. 44 (Jan. 27, 1997).

267. Hyundai Motor Co. v. Vasquez, 189 S.W.3d 743, 753 (Tex. 2006).

268. *Id.*

269. *Id.* at 755.

270. *Id.*

271. *See id.* at 747-49.

272. *See id.*

standard should apply, so that when a party is denied the right to fair trial because the jury is composed of jurors who prefer the opponent's evidence, the party can obtain a reversal of the judgment and a new trial. The Texas Supreme Court has not had the opportunity to rule on this issue, but a fair reading of the *Hyundai* opinion leads to the conclusion that the court would agree with the inclusion of a relaxed harm standard.