# JURY SELECTION AFTER *CORTEZ*


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## I. SCOPE

This paper is intended to be a brief discussion of the Texas Supreme Court's decision in *Cortez v. HCCI-San Antonio, Inc*, 159 S.W.3d 87 (Tex. 2005) and the effect, if any, it will have on jury selection in the future. It will outline the opinion, evaluate the meaning of the court's holding, and suggest techniques practitioners may use to employ or avoid *Cortez* 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* world.

## II. THE 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)

[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.

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 Circuit 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.

## 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. DISCUSSION & PRACTICAL APPLICATION

### A. Trial Court's Discretion

The main principle behind the Court's opinion 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.

Trial court's have always been given broad 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 is 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.[2]

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 effectively rehabilitate the juror. 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.[3]

Counsel should be prepared to rebut the argument that *Cortez* stands for the

[2] 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.).

[3] "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).

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 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 voir dire to encourage the jurors to speak. Once a juror admits to being biased, however, the questioning attorney should 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. Committal Questions

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.

This year, 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 committal 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 committal 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.[4]

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

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 committal 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.

Another way to avoid a committal question problem is to get the juror to explain that they have had these thoughts and feelings long before they ever walked into the courtroom. If a juror will admit that they did not believe in ever awarding noneconomic damages 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 was whether the plaintiff waived her objection to the trial court's denial of the plaintiff's causal challenge. 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.

## IV. APPENDICES

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