

# Jury Selection

2005

## Alice London

*Watson, Bishop,  
London, Brophy  
Austin, Texas*

## Bruce Oakley

*Pillsbury, Winthrop,  
Shaw, Pittman  
Houston, Texas*

# Three Recent Significant Cases

## **Cortez v. HCCI**

– 48 Tex. Sup. J. 480 (2005)

## **Salah El Hafi v. Baker**

-48 Tex. Sup. J. 648 (May 2005)

## **Hyundai v. Vasquez**

119 S.W.3d 848 (Tex. App- San Antonio 2003)

## **Cortez**

- **Nursing home negligence case**
- **Plaintiff gets a \$9 million verdict.**
- **After settlement credits and high-low agreement: judgment for \$337,867.**
- **Plaintiff appeals.**
- **Texas Supreme Court says case presents two issues.**

# Cortez Issues

**“This case presents two issues: whether the trial court abused its discretion in denying a challenge to an equivocating veniremember for cause, and whether an objection to the denial was timely to preserve error.”**

*48 Tex. Sup. J. 480*

# Equivocating Veniremember

- **Automobile claims insurance adjuster**
- **“Snider said that his experience might give him preconceived notions.”**
- **“I would feel bias 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.**

- **“And this type of case I’m not familiar with whatsoever, so that’s not a bias I should have. It’s just there.”**
- **Upon further questioning, he agreed that at times when he evaluated claims, he found that they had merit, and that he was “willing to try” to listen to the case and decide it on the law and the evidence.**

## Court's Holding

- **“...veniremember Snider was not biased as a matter of law. The trial court therefore did not abuse its discretion in failing to strike Snider for cause.”**

# Cortez Reasoning:

- **Voir dire examination is largely within the sound discretion of the trial judge.**
- **The proper stopping point in efforts to rehabilitate a veniremember must be left to the sound discretion of the trial court.**
- **Challenges for cause do not turn on magic words.**
- **Any bias Snider has was against “lawsuit abuse.”**

- **“Any bias he did express was equivocal at most, which is not grounds for dis-qualification. Snider was therefore not biased as a matter of law, and it was within the trial court’s discretion to refuse to strike him.”**
- **“An initial ‘leaning’ is not disqualifying if it represents skepticism rather than an unshakeable conviction.”**

# Preservation of Error Issue

- **Cortez used his last peremptory challenge to strike Snider, and veniremember 7 was empaneled.**
- **Cortez never challenged veniremember 7 for cause.**
- **Cortez never stated why he found 7 objectionable, but maintains that he would have struck 7 had he been able.**

Court's holding

**“We hold that Cortez  
properly preserved  
error ...”**

# **Requirements to preserve error**

- Party must use a peremptory challenge against the veniremember involved,**
- Exhaust its remaining challenges,**
- Notify the court that a specific objectionable veniremember will remain on the jury list.**

# **Salah El Hafi v. Baker**

- **Medical negligence suit against a cardiologist for death of Jean Baker.**
- **Defense wins take nothing verdict.**
- **Plaintiff appeals on grounds that trial judge denied Bakers challenge for cause against veniremember 25.**

# **Salah El Hafi v. Baker**

- **Court of appeals agreed that venire-member 25 was biased as a matter of law.**
- **Court of Appeals reversed and remanded for new trial.**
- **Texas Supreme Court issued an opinion in May 2005.**

**Q. Is there anybody here that feels that you could not sit on a medical case and make a decision as to whether the doctor acted within or below the standard of care?**

**A. I'm not saying I want to [sic] be impartial. If I were in your shoes, I would want to know that I have spent most of my professional career on the defense side.**

**Q. Are you a lawyer?**

**A. Yes.**

**Q. And you actually defend health care operations?**

**A. Correct.**

**Q. ...in all fairness, do you think that if this were a horse race so to speak, the plaintiff's [sic] are starting a little bit behind in your eyes?**

**A. I'm not saying that—I would do my best to be objective.**

**Q. You feel like you can relate to the defendant's [sic] lawyers in this case?**

**A. That's correct.**

**Q. You feel like you would tend to look at it from their perspective as more of the plaintiff's [sic] perspective?**

**A. I think it would be natural.**

## **Court's reasoning**

- **Citing Cortez, the court said, “a veniremember was not disqualified merely for having a better understanding of the defendant’s side, even though he stated “in a way”, the defendant was “starting out ahead.”**
- **The veniremember explained that he would do his best to be objective.**

## **Court's reasoning:**

- **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.**
- **Taken as a whole, veniremember 25's statements reflect an attempt to "speak the truth so that the examining counsel could intelligently exercise peremptory challenges rather than any genuine bias.**

Key holding:

- **Having a perspective based on “knowledge and experience” does not make a veniremember biased as a matter of law.**

# Practical realities in a post Cortez, Baker world

- **Answers to leading questions may not be enough to establish bias as matter of law.**
- **Proving up an occupation that would tend to indicate bias is not enough.**
- **If a veniremember has one party starting out ahead, that does not establish bias.**
- **If the veniremember promises to be “fair” then that helps.**

# Silsbee Hospital v. George

- **On the job injury case.**
- **Plaintiff, employee, slipped and fell off a ladder and sustained multiple foot fractures.**
- **Jury awarded \$1,000,000.**
- **Defendant appealed.**
- **Beaumont Court of Appeals reversed and remanded.**

Some of the Hospital's  
complaints on Appeal

- **Mr. Stevenson and Ms. Hazelton stated that they would award money even if they couldn't find liability.**
- **Ms. Phillips indicated that she would have trouble not giving him money.**

- **Awarding money w/o liability**  
“~~Hazelton stated in voir dire that she would~~ give Mr. George money even if plaintiff failed to carry his burden of proof. Stevenson acknowledged that if *at the end* the evidence showed no negligence, he would still not be able to award no money.”
- We hold that Hazleton and Stevenson expressed an unequivocal bias in George’s favor because both tacitly indicated that they would disregard instructions by the trial court on the burden of proof and there was no indication that they would try to follow the trial court’s instructions.

## Possibly awarding money w/o liability

- **Ms. Phillips indicated, “I would have trouble not giving him money –something anyway...”**
- **Phillip’s statements about having ‘trouble’ although a close question are not in the same category as the unequivocal statements of Hazleton and Stevenson.**

**“We observe that Phillips’s statements, although subjecting her to the trial court’s discretion to disqualify her for cause, remain susceptible to the interpretation that although she would have trouble reaching a verdict that awarded no money to George, she still had the capacity to follow the instructions and do so if required by the court’s instructions.”**

# Facts of Hyundai Case

- **Product Liability case-defective airbag.**
- **Four year old child died when air bag deployed and snapped her neck.**
- **Child was in the front seat.**
- **Child was not wearing her seat belt.**
- **Low speed collision precipitated the deployment of the air bag.**

## Hyundai v. Vasquez

- ~~Two panels were dismissed~~ before the jury was seated from the third panel.
- The prior two panels were busted because of the numbers of people who said they could not listen to the evidence—once they knew the case involved that a 4 year old who wasn't wearing her seatbelt while in the front seat was killed.

# Question asked of 1<sup>st</sup> panel:

**“...what I am looking for are those among you that will say if she wasn't wearing a seat belt, then I don't care what the scientific evidence is....there's no way Hyundai can be responsible...Is there anyone here that regardless of what the evidence is once you hear she wasn't wearing a seat belt your mind is made up?”**

## Second attempt

- Court brought in 52 panel members.
- Court then instructed the attorneys that she would question the panel about the seat belt issue.

Second Question  
(The Judge's question)

**Is there anyone sitting there among you that believes that one fact alone, that Amber was not wearing her seat belt, that one fact alone would prevent you from following your oath that you would not decide this case on all of the evidence?**

- **19 out of 52 raised their hands indicating that they could not be fair.**
- **The judge once again dismissed the panel.**
- **The Plaintiffs asked the judge to ask the same question to the third panel.**
- **The court declined.**
- **The third panel had 72 panel members.**

# Third Panel

- **How many of you are always buckling up before the car moves?**
- **How many of you buckle that seat belt before the car is out of the garage?**
- **How many of you are completely buckled before you exit the driveway?**
- **How many buckle up before the car leaves the parking spot?**

- **46/72 raised their hands in answer to each of these questions.**
- **Plaintiff asked to individually question the jurors whether “they would be predisposed regardless of the evidence” and whether they could be “fair and impartial.”**
- **Judge refused any individual questions.**

## **Court of Appeals**

- **Affirmed ~~Trial court's~~ judgment.**
- **Plaintiff's questions required a commitment from the jury.**
  - Citing a 1931 case: "to commit such juror in advance of the evidence as to the weight the juror would give any evidence is prohibited".

Justice Paul Green wrote:

**“Any question during voir dire which specifically asked potential jurors their attitudes toward Amber’s failure to wear her seat belt amounted to a ‘pre-testing’ of the panel.”**

The court suggested that the Plaintiffs could have asked other questions to uncover bias.

- **The Plaintiffs filed a motion for reconsideration en banc which was granted.**
- **The en banc decision was unanimous.**
- **The opinion was also written by Justice Green.**

## Court of Appeals (Round two)

- **Acknowledged the abuse of discretion standard.**
- **Focused the issue on “commitment” questions.**
- **Was the Plaintiff trying to pre-test the juror views?**

## 119 s.W.3d 848, 856

“The Vasquezes specifically wanted to ask potential jurors ‘whether or not they would be predisposed regardless of the evidence to –Their preconceived notion is that if there is no seat belt in use, no matter what else the evidence is, that they could not be fair and impartial’ **This question clearly focuses on the ability of the jurors to be fair.**”

## Court of Appeals (Round Two)

“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.”

# **Texas Supreme Court Grants Petition for Review**

- 1. Whether the trial court erred by disallowing voir dire questioning on individual attitudes regarding the failure to use a seat belt.**
- 2. Whether harm could be presumed if the voir dire restriction was error.**

# What is at stake for the litigator:

- **“Can you listen to the evidence” questions—are they prohibited?**
- **Can you have a trial court verdict overturned because of question that was not asked on voir dire?**
- **How do you establish the threshold to strike a juror for cause?**
- **What do you do with your worst facts?**

## Oral Argument: January 6, 2005

- **Justice Green and Justice Jefferson are not sitting in this case.**
- **Six judges were present.**
- **Oral argument posted on the Texas supreme court's website.**

# Do lawyers have the right to pre-test their facts?

- How many facts do you pre-test?
- If you pre-test all your facts, are you in fact facilitating deliberation?
- Federal courts don't let lawyers voir dire—why should state courts?
- If you can't ask the question, how do you establish bias and challenge a juror for cause?

# Contrast Vasquez to Grey Wolf

- Grey Wolf Drilling company v. Boutte, 2004 WL 2851784 (Tex. App. –Houst. [14<sup>th</sup>] 2004).
- **Trial court granted challenges for cause and defendant appeals.**
- **Defense contends the question was an improper commitment question.**
- **Court of appeals affirms trial court and says question is not a commitment question.**

## Grey Wolf Question

**Is there anyone here who given undisputed evidence that Denfer Boutte knew he was working in slippery drilling mud and he continued to try to finish the Halliburton job– Anyone given those undisputed facts could not consider the rest of the evidence that will be presented to you regarding the urgency of the situation he was in?**

**Impartiality is not the  
absence of initial  
impressions but is the  
willingness to keep an  
open mind.**

-Judge Brister