

CHAPTER 13. THE JURY

A. Assembling a Jury Panel

Read Rule 221-226a, Gov't Code Chapter 62.

In *Taylor v. Louisiana*, 419 U.S. 522, 528-30, 95 S.Ct. 692 (1975), the United State Supreme Court summarized the requirement that juries be summoned from a fair cross section of the community:

The unmistakable import of this Court's opinions, at least since 1940 . . . is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial. Recent legislation within the federal court system [the Federal Jury Selection and Service Act of 1968, 28 U.S.C. §§ 1861-1878] has a similar thrust. . . . In passing this legislation, the Committee Reports of both the House and the Senate recognized that the jury plays a political function in the administration of the law and that the requirement of a jury's being chosen from a fair cross section of the community is fundamental to the American system of justice.

The following case applies these principles.

MENDOZA
v.
RANGER INSURANCE COMPANY
753 S.W.2d 779
(Tex. Civ. App.—Ft. Worth 1988, writ denied)

FENDER, CHIEF JUSTICE.

This is an appeal from a workers' compensation case tried before a jury primarily on the issue of the extent and duration of an injury. The trial court, based on the jury's answers to special issues, held appellant, Mary Mendoza, incurred total incapacity for a duration of four weeks. Appellant appeals from this adverse jury verdict.

We reverse and remand.

At the conclusion of the initial voir dire by the court and prior to impaneling of the jury, appellant's counsel moved for a mistrial and requested that a new panel of prospective jurors be drawn because a disproportionate number of jurors were from a single occupation. After six jurors were excused for cause and one for personal emergency, ten of the remaining twenty-one jurors identified teaching as their occupation. Appellant's motion was overruled.

In support of plaintiff's first amended motion for new trial, appellant took the sworn testimony of Thomas P. Hughes, District Clerk, and Ouida Stevens, Deputy District Clerk and Administrative Assistant to the Administrative Judge for Tarrant County. Several key facts were brought forth by the testimony. The morning the trial started, June 8, 1987, 550 jurors were called by the Administrative Judge of Tarrant County from a random list generated by data processing. Generally, those persons who postpone their jury service are placed on a transfer list, and teachers are often granted

transfers in the months of March, April, and May. A transfer list was used on June 8, 1987. The computer list of 550 people and the transfer list were not mixed or shuffled prior to the first assignment to a court. The usual procedure is that the first round of jurors is drawn from the transfer list; those jurors returning to the Central Jury Room who were not selected as jurors on the first round are then randomly mixed before being sent out again to another court. Jurors are assigned to courts from the Central Jury Room in numerical order; thus, the 67th District Court on June 8, 1987, received a panel of prospective jurors composed entirely of persons on the transfer list.

Appellant's first point of error contends that she was denied her constitutional right to a fair and impartial jury by the lack of randomness in the impaneling process, and that appellant's counsel properly preserved error of the purported improper impaneling of jurors.

TEX. GOV'T CODE ANN. sec. 62.011 (Vernon 1988) provides for interchangeable juries in counties with at least three district or criminal district courts, as in Tarrant County. The Texas Supreme Court has ruled that in counties governed by the interchangeable jury statute "[o]bjection to the jury panel therefore must be presented to the judge charged with organizing and impaneling the jurors for the week."

It is the practice of the judge of the 67th District Court to conduct a preliminary voir dire at which time the court asks the occupations of the panel members. Tarrant County does not provide juror cards, nor is there any preliminary indication of whether jurors are serving pursuant to a postponement. In the instant case, the panel members' answers revealed that a substantial number of panelists were teachers. Immediately thereafter, appellant's counsel objected to the panel and moved for a mistrial on the basis that ten members of the original panel of twenty-seven were teachers. He additionally pointed out to the court that six panelists were struck for cause leaving only twenty prospective jurors. Out of this number, ten were teachers.

While there is authority holding that a party seeking to object to the randomness of a jury panel must present the objection to the judge charged with organizing and impaneling the jurors for the week, the application of this rule to the facts of the instant case results in a denial of the right to a trial before a jury that represents a cross section of the community. The rule puts an unreasonable and impractical burden on a party who is faced with a jury panel which is impermissibly selected. The first time appellant knew the basis for and had an opportunity to object to the randomness of the jury panel was during the voir dire examination in the courtroom. At this point, the time to make objections to the impaneling judge was long past; thus, appellant was denied the opportunity to preserve error in objecting to the manner in which the jury panel was assembled.

Moreover, those cases cited in support of the rule requiring that objections to the jury panel be presented to the judge charged with impaneling the jurors for the week are distinguishable from the instant case. Each of these cases contained an alleged error in the procedure of impaneling jurors which could have been detected during the initial organizing and impaneling process, but none of the cases cited dealt specifically with the lack of randomness of juror placement. *See State ex rel. Hightower*, 677 S.W.2d at 36 (the jury was not selected in compliance with the jury wheel statute); *Texas Emp. Ins. Ass'n*, 610 S.W.2d at 525 (juror excused for unauthorized and illegal reasons); *Texas & New Orleans Railroad Co.*, 306 S.W.2d at 794 (improper excuses granted for prospective jurors).

Every citizen is entitled to a fair and impartial trial before an impartial jury, fairly representative of the community. Appellant was denied this right because the panel from which she was forced to choose her jury was impermissibly assembled. The jury was not a randomly selected cross section

of the community. The necessity to prevent the subtle erosion of the standards of the jury system does not require a showing by appellant of injury.

Appellant actively asserted her rights and moved for a mistrial on the proper grounds. The motion in the record is detailed and complete. We hold that the trial court abused its discretion in failing to grant the motion for mistrial. Appellant's point of error one is sustained.

In view of our holding in point of error one, it is unnecessary to address appellant's remaining points of error.

The trial court's judgment is reversed and the cause is remanded for a new trial.

Notes & Questions

1. *Harm.* How could the appellant discharge its burden of showing harm for an error in assembling the panel? How could she show that having an excess number of teachers on the panel probably changed the case outcome as required by the harmless error rule?

2. *How jurors reach the courtroom.* Government Code §§ 62.001 through 62.016 govern the selection of jury panelists. Each county is required to use a random method for selecting jurors for a panel for the week. Unless the county has elected to use a mechanical or electronic means for random selection, it is required to use a jury wheel (more like a barrel in which cards, each containing the name of a potential juror, are placed and rearranged by revolving the barrel). Names on the cards are taken from the county's voter registration list and those persons with driver's licenses or personal identification cards issued in lieu of licenses. The sheriff and the district clerk each have a key to the wheel, and both keys are required to open it. Ten days before the first day of each term, the district clerk and the sheriff (or their deputies) draw jurors' names in the presence of a district judge for district court jurors (or the county judge for county court jurors). Parties to suits affected by the drawing may observe it. Jurors whose names are drawn are listed, and summoned for duty for a given week during the term. Jurors report to the judge (or in urban areas, the judge with responsibility for jurors) and present their excuses.¹ In counties which maintain three or more district courts, the jury wheel is used to supply interchangeable panels. Jurors summoned usually report to a central jury room and lists of jurors making up the *panel for the case* are made up from the panel for the week. The panel for the case is then ordered to report to a specific courtroom where the jury panelists are seated in the order listed.²

3. *Challenge to the array.* Note that irregularities in making up jury lists may be attacked by a "challenge to the array" under Rule 221. However, if the jurors have been selected by jury commissioners or by drawing the names from a jury wheel, the latter being an almost universal practice, a Rule 221 challenge is inappropriate.

4. *Jury shuffle and harmless error.* Rule 223³ prescribes the procedure for the original listing of jurors and for a "shuffle" of jurors appearing on a given jury panel. In *Rivas v. Liberty Mutual Ins.*

¹ Note that GOV'T CODE § 62.110 provides that the court may not excuse any juror for economic reasons, unless all parties of record are present and approve.

² For a more detailed discussion of the way jury panels are selected, see 4 MCDONALD & CARLSON, TEXAS CIVIL PRACTICE, §§ 21:12 through 21:14.

³ The rule is somewhat misleadingly captioned "Jury List in Certain Counties" and is commonly referred to as the "jury shuffle" rule.

Co.,⁴ the panel for the case was apparently listed in the order in which jurors showed up in the jury room and not in the random order required by Rule 223. Furthermore, the trial judge refused counsel's request that the judge make a "drawing of the jurors' names to make up the panel for this case." The Supreme Court held that adequate randomness resulted from the procedure used to list the jurors and that the trial court's refusal was harmless error, noting that the respondent made "no attempt to show that it was required to accept a juror which it otherwise would have stricken had it not been for the trial court's ruling." The court distinguished *Heflin v. Wilson*,⁵ which held that a showing that selection of potential jurors by jury commissioners instead of the mandated jury wheel was sufficient without more, to establish harm. However, the Fort Worth Court of Appeals has held that the complaining party is not required to show specific harm, but is entitled to reversal if it can show that the trial was "materially unfair" (the relaxed showing of harm that we will discuss in the context of peremptory challenges).⁶ The Eastland Court of Appeals disagrees, applying the traditional harmless error analysis.⁷

5. *Juror questionnaires.* The *Mendoza* court notes that, at the time of the opinion, Tarrant County did not provide "juror cards." As of January 1, 2001, all written summonses must include a juror questionnaire developed by the Office of Court Administration of the Texas Judicial System.⁸

6. *Jury panelists instructions.* Note the juror's code of conduct in Rule 226a prescribes the conduct of attorneys and parties as well. Would the provisions of Rule 226a have any part in your pretrial instructions to your client? What if your client takes to chatting with the jurors in the hallway?

⁴ 480 S.W.2d 610 (Tex. 1972).

⁵ 297 S.W.2d 864 (Tex. Civ. App.—Beaumont 1956, writ ref'd).

⁶ Carr v. Smith, 22 S.W.3d 128 (Tex. App.—Fort Worth 2000, pet. denied).

⁷ Whiteside v. Watson, 12 S.W.3d 614 (Tex. App.—Eastland 2000, pet. dismiss'd by agr.).

⁸ TEX. GOV'T CODE Ann. § 62.0132 (West Supp. 2001); Act of May 27, 1999, 76th Leg., R.S., ch. 539, § 2(c), 1999 Tex. Gen. Laws 3035, 3036.

B. Voir Dire Examination: Scope and Procedure**BABCOCK**

v.

NORTHWEST MEMORIAL HOSPITAL

767 S.W.2d 705

(Tex. 1989)

MAUZY, JUSTICE.

This cause concerns the propriety of a trial court's refusal to allow attorneys to question the venire panel about the alleged "lawsuit crisis." Artaruth Babcock and husband, Gifford Babcock, sued respondents, Northwest Memorial Hospital, Dr. E. E. Kearns and Dr. Fred DeFrancesco for damages arising out of alleged medical malpractice. During voir dire, the trial judge refused to allow the Babcocks to question the jury panel about the alleged "lawsuit crisis." The trial court rendered judgment in favor of the defendants in accordance with the jury's verdict. The court of appeals affirmed the judgment of the trial court. We reverse the judgment of the court of appeals and remand the cause to the trial court.

Artaruth Babcock broke her pelvis and was hospitalized. During her hospitalization, Mrs. Babcock developed blisters on her heels which allegedly ultimately resulted in the amputation of both her legs. Mrs. Babcock and her husband sued the hospital and her doctors alleging negligence in their care of Mrs. Babcock.

* * *

We now reach the Babcocks' contention that the trial court abused its discretion by refusing to allow them to question the jurors about the alleged "lawsuit crisis." In Texas, the right to a fair and impartial trial is guaranteed by the Constitution and by statute. *See* TEX. CONST. art. I, § 15; TEX. GOV'T CODE ANN. § 62.105 (Vernon 1987). It is widely recognized that Texas courts permit a broad range of inquiries on voir dire. * * * At the time of trial, tort reform and the debate concerning the alleged "liability insurance crisis" and "lawsuit crisis" were the subject of much media attention. No one can deny the media blitz spurred by the controversy over tort reform during the 1987 legislative session. Advertisements proclaiming a "lawsuit crisis" asserted that personal injury lawsuits had created an economic crisis and that excessive jury awards resulted in higher premiums.

Media coverage of the alleged "lawsuit crisis" has unquestionably created the potential for bias and prejudice on both sides of the personal injury docket. As stated in *Green [v. Ligon]*, 190 S.W.2d 742 (Tex. Civ. App.—Ft. Worth 1945, writ ref'd n.r.e.), "[i]f counsel has reason to believe that a juror is directly or indirectly interested in the result of the trial to be had, he has a right to question the juror touching that interest."

* * *

[T]he respondents in this case contend that allowing such questions would interject insurance into the case. We are unpersuaded by this argument. The mere mention of insurance is not necessarily grounds for reversal. When the Babcocks requested to ask the prospective jurors questions about the "liability crisis" and the "lawsuit crisis," they specifically stated they did not want to question the jury about insurance. The proposed voir dire questions that were subsequently filed with the trial court avoid any mention of insurance.

The test for abuse of discretion is whether the trial court acted without reference to any guiding rules and principles or whether the act was arbitrary and unreasonable. Both the Fourteenth Court of Appeals and the Second Court of Appeals have concluded that litigants have a right to question prospective jurors about their exposure to media coverage of the “lawsuit crisis.” This right is based on the fundamental right to trial by a fair and impartial jury. We hold that the trial court abused its discretion by refusing to allow the Babcocks to question the jurors about the alleged “lawsuit crisis.”

A broad latitude should be allowed to a litigant during voir dire examination. This will enable the litigant to discover any bias or prejudice by the potential jurors so that peremptory challenges may be intelligently exercised. Although we recognize that voir dire examination is largely within the sound discretion of the trial judge, a court abuses its discretion when its denial of the right to ask a proper question prevents determination of whether grounds exist to challenge for cause or denies intelligent use of peremptory challenges.

In the instant case, the Babcocks were denied the opportunity to intelligently exercise challenges. The trial court’s refusal to allow questions directed at exposing bias or prejudice resulting from the controversy over tort reform denied the Babcocks the right to trial by a fair and impartial jury.

Respondents contend that the trial court’s refusal to allow the questions was harmless error. We disagree. The trial court’s actions, which resulted in the denial of the Babcocks’ constitutional right to trial by a fair and impartial jury, was harmful. Therefore, we hold that the trial court’s refusal to allow questions during voir dire addressing the alleged “liability insurance crisis” and “lawsuit crisis” was an abuse of discretion and was reasonably calculated to cause and probably did cause the rendition of an improper judgment.

The judgment of the court of appeals is reversed and the cause is remanded to the trial court.

HYUNDAI MOTOR CO.

v.

VASQUEZ

189 S.W.3d 743

(Tex. 2006)

BLAND, JUSTICE*

In this case, we decide whether a trial court abuses its discretion in refusing to allow a voir dire question from counsel that previews relevant evidence and inquires of prospective jurors whether such evidence is outcome determinative. We hold that it does not. . . .

I. Background

Four-year-old Amber Vasquez died in a low-speed neighborhood traffic collision, after the passenger-side airbag in her aunt’s Hyundai Accent deployed with enough force to catch Amber’s chin and break her neck. The driver of the other car had turned unexpectedly in front of the

* The Honorable John Cayce, Chief Justice, Second District Court of Appeals, and the Honorable Jane Bland, Justice, First District Court of Appeals, sitting by commission of the Honorable Rick Perry, Governor of Texas, pursuant to the Tex. Gov’t Code § 22.005. CHIEF JUSTICE JEFFERSON and JUSTICE GREEN are recused.

Hyundai, and the force of the collision threw Amber forward in her seat. It is undisputed that Amber was not buckled into her front-seat seat belt at the time of the accident.

Amber's parents, Victor and Brenda Vasquez, sued Hyundai Motor Company and Hyundai Motor America, Inc. (together "Hyundai"), contending that Hyundai had placed the airbag incorrectly, and that the airbag had deployed with too much force in this low-impact accident. Hyundai responded that the airbag that killed Amber was not defective because a child wearing a seat belt—as state law requires—or sitting in the back seat—as the car's warnings cautioned—would not have been injured by its deployment.

In placing Amber unbuckled in the front seat, Amber's aunt, Valerie Suarez, disregarded airbag warnings on both sunvisors, a hangtag from the rearview mirror, a decal on the dashboard, and a notification in the owner's manual. Suarez ignored the warnings because she planned a short neighborhood trip and believed that the airbags would deploy only at higher speeds. Hyundai conceded that it knew some occupants would ignore the airbag warnings about placing children unbuckled in the front seat, but maintained the risk was outweighed by the benefits of the airbag to all others. Hyundai named Suarez and the driver of the other car as responsible third parties.

The trial judge dismissed two jury panels before seating the jury in the case from a third. During the first voir dire, Amber's counsel asked jurors whether the fact that Amber was not wearing her seat belt would determine their verdict.⁷ After numerous jurors indicated that the lack of a seat belt would determine their verdict, the trial court dismissed the jury panel. During the second voir dire, the trial judge questioned the jurors along similar lines, with slightly fewer, but nonetheless significant, affirmative responses.⁹ The court again dismissed the panel.

Before the third voir dire, the trial judge discussed with counsel her concern that the previous jury panels had misunderstood the inquiry about placing a child in the front seat without a buckled seat belt to be one about the weight they could give to particular evidence in the case rather than whether they could fairly consider all of the evidence presented. . . . Thereafter, the trial court allowed counsel to ask "general questions about belting" and to inquire about jurors' personal seat belt habits, but she did not allow disclosure that Amber was not wearing one at the time of the accident. Counsel asked questions about whether the jurors buckled their seat belts on short trips, before leaving the garage, before exiting a driveway, and before leaving a parking spot. At the conclusion of the third voir dire, the trial court excused 3 of the first 28 jurors for cause and seated a 12 member jury and one alternate.

⁷ Plaintiffs' counsel asked:

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

⁹ During the first voir dire, 29 out of 48 jurors indicated that the fact that Amber was not wearing a seat belt would preclude them from considering any other evidence presented. During the second panel, 18 of the 52 jurors responded affirmatively to the trial court's inquiry.

The jury heard evidence for three weeks and returned a verdict in favor of Hyundai. It found no design defect and assessed liability for Amber's death to the two drivers (75 percent to Suarez, and 25 percent to the other driver). The trial court rendered a take-nothing judgment.

The Vasquezes appealed, contending the trial court erred in disallowing voir dire inquiry into whether the jurors would be "predisposed, regardless of the evidence," against the Vasquezes because "there is no seat belt in use," to a point that "[the jurors] could not be fair and impartial." Hyundai responded that the proposed voir dire inquiry is improper in that it asks jurors about the weight they would place on a particular piece of relevant evidence, and thus the trial court properly refused to allow it. . . . [T]he court of appeals reversed, holding that the trial court had abused its discretion in disallowing the inquiry because the proposed question focuses "on the ability of the jurors to be fair." . . .

II. The Purpose of Voir Dire

. . . [T]he Legislature has established general juror qualifications relating to age, citizenship, literacy, sanity, and moral character. The Legislature also has established bases for juror disqualification, including . . . anyone who "has a bias or prejudice in favor of or against a party in the case."

Voir dire examination protects the right to an impartial jury by exposing possible improper juror biases that form the basis for statutory disqualification. Thus, the 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 oath.

In addition, this Court recognizes that trial courts should allow "broad latitude" to counsel "to discover any bias or prejudice by the potential jurors so that peremptory challenges may be intelligently exercised." *Babcock v. Nw. Mem'l Hosp.*, 767 S.W.2d 705, 709 (Tex. 1989). "A peremptory challenge, commonly referred to as a 'strike,' is defined by rule 232 as one 'made to a juror without assigning any reason therefor.'" Peremptory challenges allow parties to reject jurors they perceive to be unsympathetic to their position. . . .

. . . Counsel's latitude in voir dire, while broad, is constrained by reasonable trial court control. Such control is necessary because, "[t]hrough the motive of a peremptory challenge may be to protect a private interest, the objective of jury selection proceedings is to determine representation on a governmental body." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 626 (1991) (holding that, in civil cases, private parties may not base their peremptory challenges on a juror's race). Thus, the exercise of jury strikes is not solely a private endeavor: "[W]hen private litigants participate in the selection of jurors, they serve an important function within the government and act with its substantial assistance."

III. Voir Dire Inquiry Regarding Facts in a Case

Voir dire inquiry into potential juror bias and prejudice thus is proper to determine whether jurors are disqualified by statute and to seek information that allows counsel to intelligently exercise their peremptory strikes. Because the statute does not define "bias" or "prejudice," we defined them in *Compton v. Henrie*, 364 S.W.2d 179, 182 (Tex. 1963), using their ordinary meanings:

Bias, in its usual meaning, is an inclination toward one side of an issue rather than to the other, 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. Prejudice is more easily defined, for it means prejudgment, and consequently embraces bias; the converse is not true.

Other sources confirm that “bias” generally relates to inclinations, while “prejudice” is associated with prejudgment. Although it expressly prohibits only bias or prejudice concerning parties, we recognized in *Compton* that the statute extends to bias or prejudice concerning types of cases. A juror who is prejudiced against all medical malpractice claims, for example, is necessarily prejudiced “against a party in the case,” even if they have never met.

Although a juror may be statutorily disqualified because of a bias or prejudice against a type of claim or a general inability to follow the court’s instructions regarding the law, this Court has refused to hold that statements that reflect a juror’s judgment about the facts of a case as presented, rather than an external unfair bias or prejudice, amount to a disqualifying bias. In *Cortez v. HCCI-San Antonio, Inc.*, 159 S.W.3d 87, 94 (Tex. 2005), an attorney summarized the evidence during voir dire, and then inquired of the jurors whether either party was “starting out ahead.” The Court held that such inquiries are improper, and that a trial court should not disqualify a juror based on an answer to an inquiry that seeks “an opinion about the evidence.”

Cortez thus adopted the general rule that it is improper to ask prospective jurors what their verdict would be if certain facts were proved. Fair and impartial jurors reach a verdict based on the evidence, and not on bias or prejudice. Voir dire inquiries to jurors should address the latter, not their opinions about the former. *Cortez* involved a general summary of all the evidence, and thus we did not review whether a voir dire question addressed to the weight a juror would give a relevant piece of the evidence could be objectionable. Such an inquiry, however, raises similar concerns.

First, an 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. See *Cortez*, 159 S.W.3d at 94. 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.

Second, inquiring whether jurors can be fair after isolating a relevant fact confuses jurors as much as an inquiry that previews all the facts. Lawyers properly instruct jurors that voir dire is *not* evidence, yet jurors must answer whether they can fairly listen to all of the evidence based only upon the facts that counsel have revealed. In responding, jurors are unable to consider other relevant facts that might alter their responses, rendering their responses unreliable. This confusion may explain in part why jurors’ voir dire reactions to the evidence have not been proven to be predictors of jury verdicts: experience tells that, whatever jurors’ stated opinions about particular evidence may be at the outset, they can shift upon hearing other evidence.

Third, previewing jurors’ votes piecemeal is not consistent with the jurisprudence of our sister court. In *Standefer v. State*, 59 S.W.3d 177, 183 (Tex. Crim. App. 2001), the Court of Criminal Appeals held it improper to ask jurors whether they would presume guilt if one fact [defendant refused a breath test] was proved and no others. Our sister court consistently has observed that

[Q]uestions that are not intended to discover bias against the law or prejudice for or against the defendant, but rather seek only to determine how jurors would respond to the anticipated evidence and commit them to a specific verdict based on that evidence are not proper.

As the statutory standards for bias or prejudice in civil and criminal cases are the same, voir dire standards should remain consistent.

Finally, the Court's decision in *Babcock v. Northwest Memorial Hospital* does not dictate that a trial judge must accept questions that seek to assess jurors' opinions about the weight they will place on particular evidence. In that case, we held that counsel could question jurors about bias or prejudice resulting from a societal influence outside the case—namely, tort reform. In contrast, a question that asks jurors to judge the weight to be given an operative fact will not reveal whether jurors have potential external biases or prejudices that improperly skew their view of case facts.

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, 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. 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.

IV. Trial Court Discretion

One of the primary rules of voir dire in Texas civil cases has long been that trial courts have broad discretion in conducting it. . . . For good reason: an attorney's question is easier to parse in the courtroom than it is in an appellate record. In this case, for example, when a juror specifically asked whether questions about prejudice should take into account evidence already disclosed by counsel, the response was ambiguous:

PROSPECTIVE JUROR NO. 7: I don't understand that question. Does that mean like that by what we have heard so far we haven't made a judgment?

[PLAINTIFFS' COUNSEL]: Yeah. I don't want—Is there anyone here who has already made up their mind? Let me ask that question real, real loud again. Is there anybody here that thinks that they have already made up their mind on this case right now before you have heard any evidence whatsoever?

Without being present in the courtroom, one cannot tell whether jurors might have understood this response to be "Yes" or "No."

It can be a close question whether a juror's response indicates a prejudice due to personal animus or bias, rather than a fair judgment of the previewed evidence. Similarly, it can be a close question whether a voir dire inquiry focuses on the former or the latter, as the question presented for a ruling in this case reflects. Determining whether jurors' answers assume or ignore the evidence disclosed to them turns on the courtroom context, and perhaps the looks on their faces. So, too, does the import of counsel's questions, and whether as phrased they seek external information or a preview of a potential verdict. The trial judge is in a better position to evaluate the reasonableness of both aspects—the question and the answer.

We observed in *Cortez* that trial judges have discretion to clarify whether a juror's response is the result of confusion, misunderstanding, or mistake. Similarly, the trial judge must have discretion to exclude questions that seek to gauge the weight a juror will place on specific evidence. 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.⁵⁵ Depending on the circumstances, a trial judge may choose to hear jurors' responses before deciding whether an inquiry pries into potential prejudices or potential verdicts, but if the question reaches for the latter, a trial court does not abuse its discretion in refusing to allow it. 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.

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.

V. The Question

[Counsel for the Vasquezes sought permission to ask the jurors whether any of them had a "preconceived notion . . . that if there is no seat belt in use, no matter what else the evidence is, that they could not be fair and impartial." After a brief discussion, the court responded: "I'm going to sustain the objection. We are not going to go any further into seat belts. . . ."]

* * *

The court of appeals held that the trial court abused its discretion in excluding the inquiry, agreeing with the Vasquezes that the proposed question "clearly focuses on the ability of the jurors to be fair," because, upon learning that Amber was not wearing a seat belt, jurors should not be so biased that they could not consider the remaining evidence in the case. Here, however, the trial court reasonably could have determined that the question seeks to gauge the jurors' verdicts and therefore we disagree with the court of appeals.

First, the question isolates a single fact material to the case: that Amber did not wear a seat belt. Hyundai's defense at trial rested in part on a theory that its airbags would not have harmed a child wearing a seat belt, as required by law, or sitting in the back seat. Assuming that placing an unbelted child in the front seat is relevant, admissible evidence, reasonable jurors could base their verdict on that fact alone. By isolating this fact, the question seeks to identify those jurors who agree that the one fact overcomes all others. 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.

Jurors should not base their verdicts on matters that are irrelevant, inadmissible, or unfairly prejudicial, and counsel is entitled to frame voir dire inquiries that ensure that the seated jury will not do so. In those cases in which prejudicial evidence cannot be excluded, a party is entitled to a limiting instruction, *see* TEX. R. EVID. 105(a), and to inquire whether jurors can follow it. Here, however, both the trial court and the court of appeals concluded that evidence of the lack of a buckled seat belt was relevant and admissible; thus, the trial court could have determined that the inquiry focused upon the weight jurors would give specific evidence.

Second, incorporating phrases associated with an inquiry into whether the jurors hold a preconceived bias does not alter the basic substance of this question. Although the proposed question refers to predispositions and preconceived notions, both concepts properly relate to opinions

⁵⁵ *Id.* at 94 (stating that "attempts to preview a veniremember's likely vote are not permitted," and that "[a] statement that one party is ahead cannot disqualify if the veniremember's answer merely indicates an opinion about the evidence").

jurors hold *before* entering the courtroom and hearing the relevant facts. Here, the question includes a relevant fact; thus, responses to it encompass more than *predispositions* or *preconceived* notions. In this case, the jurors' judgments about the fact that Amber did not wear a seat belt at the time of this accident are not separable from their potential verdict. The proposed inquiry asks about these judgments, not about any separate unfair prejudice against a party or a claim jurors may have held before hearing the facts of the case.

The Vasquezes maintain that, even if the proposed question is a commitment question, it nonetheless is proper because the only commitment the question seeks is to have jurors consider all of the evidence, as the law requires. The phrases "regardless of the evidence" and "no matter what else the evidence is" included in this question, however, 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.

The emphasis of the question is not ameliorated by asking in it whether jurors could be fair and impartial. "Called as they are from all walks of life, many [jurors] may be uncertain as to the meaning of terms which are relatively easily understood by lawyers and judges." *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 555 (1984). In *Cortez*, we held that fair jurors do not leave their knowledge and experience behind, but nonetheless must approach the evidence with an open mind. However, if an inquiry suggests that, to be "fair," jurors must not decide the case based on a relevant fact, then a trial court reasonably could conclude that the question seeks a response that reveals nothing about a juror's potential fairness, but instead attempts to guess about his potential verdict.

* * *

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.

VI. Further Questions

At the conclusion of the general questioning of the panel, the trial judge asked counsel to state the additional questions he sought to ask the jurors about seat belts. The Vasquezes proffered the above question. In sustaining Hyundai's objection, however, the trial judge also ruled: "We are not going to go any further into seat belts." . . . In sustaining an objection to an improper voir dire question, a trial court should not foreclose *all* inquiry about a relevant topic. The Vasquezes' complaint as to this part of the trial court's ruling, however, is not preserved.

A trial court may not foreclose a proper line of questioning, presuming that the actual questions posed are proper. In some instances, an area of inquiry may be proper, but not the particular question asked. In such circumstances, a trial court may exercise its discretion to reject the form of the question. If it is necessary to discuss the facts in the case to probe for potential biases, counsel must frame corresponding inquiries to avoid jury confusion and ensure that the question does not seek to preview the verdict. When the trial court determines that a proffered question's substance is confusing or seeks to elicit a pre-commitment from the jury, counsel should propose

a different question or specific area of inquiry to preserve error on the desired line of inquiry; absent such an effort, the trial court is not required to formulate the question.

Thus, to preserve a complaint that a trial court improperly restricted voir dire, a party must timely alert the trial court as to the specific manner in which it intends to pursue the inquiry. Such a requirement provides the trial court with an opportunity to cure any error, obviating the need for later appellate review, and further allows an appellate court to examine the trial court's decision in context to determine whether error exists, and if so, whether harm resulted. In *Babcock*, we held that litigants need not present a list of each intended voir dire question, but parties must nonetheless "adequately apprise[] the trial court of the nature of their inquiry." A timely, specific presentation to the trial court of the manner of an inquiry is important because it is difficult to evaluate after a trial whether the trial court's denial of an inquiry caused a biased juror to be seated on the jury or to evaluate what additional information a party could have adduced for the exercise of peremptory strikes. Thus, the Court traditionally has adhered strictly to the principle that voir dire objections must be timely and plainly presented.

Here, in response to the trial judge's request that counsel specify the type of additional inquiry he would ask, counsel framed one inquiry. The proposed question is virtually the same inquiry that the trial court perceived had caused confusion during the second voir dire. That the trial court did not allow a similarly confusing question does not mean, though, that the trial court would have rejected a different approach had counsel proposed it. . . . Counsel does not have to present a list of questions to preserve error, but after the trial court's ruling sustaining Hyundai's objection to the one presented, it was incumbent on the Vasquezes to request alternative approaches to avoid the problems the trial court was addressing by its ruling. . . .

The Vasquezes . . . did not frame additional inquiries or convey to the trial court that the thrust of any remaining questions would be different from the single one presented for a ruling.⁷⁶ We do not know whether the trial court would have allowed other sorts of inquiries had counsel presented their substance. We therefore hold that the record does not present a sufficient basis for review of the trial court's ruling foreclosing further inquiry into seat belts.

* * *

The Texas Constitution guarantees a trial by a fair and impartial jury, and our courts use voir dire to achieve that goal. Voir dire inquiries that explore external biases and unfair prejudices further the effort, but those that test jurors' possible verdicts based on case-specific relevant evidence detract from it. The distinction between the two in some cases is a fine one. Thus, we vest trial judges with the discretion to decide whether an inquiry constitutes the former or the latter; as appellate courts, we should defer to their judgment. We hold that the trial court did not abuse its discretion. We therefore reverse the judgment of the court of appeals and remand the case to that court to consider the Vasquezes' remaining issues on appeal.

JUSTICE MEDINA, joined by JUSTICE WAINWRIGHT and JUSTICE JOHNSON, dissenting.

We can all agree that (1) litigants are entitled to fair and impartial jurors, (2) voir dire should not be used as an exercise to preview the verdict, and (3) trial courts must necessarily have broad

⁷⁶ After the trial court had ruled on the parties' challenges for cause, the Vasquezes renewed their objection that the court improperly had restricted the voir dire, but did not frame further seat belt inquiries for a ruling. If the complaint on appeal is that a trial judge has not allowed sufficient questions about a particular subject matter, then a party should detail its areas of inquiry before challenging the juror for cause, allowing the trial judge an opportunity to cure the problem. . . .

discretion when conducting voir dire. That said, I do not agree that a trial court can totally divorce the legitimate search for bias and prejudice during voir dire from all material facts in the case. I also disagree with the Court's statement of the issue in this case because this case is not simply about the weight prospective jurors may attach to certain evidence but whether such jurors can follow their oath and the court's instructions. I believe that the issue is whether the trial court abused its discretion when it cut off questioning about seat belts; specifically questions about whether members of the venire would fairly consider all the evidence in the product liability and wrongful death suit, knowing that the decedent was not wearing her seat belt at the time of the accident.

The trial court here summarily dismissed two jury panels after approximately 60% of the first panel, and 35% of the second, initially indicated that they would not listen to any other evidence in the case upon learning that Amber was not wearing a seat belt at the time of the accident. Before beginning a third voir dire, the trial court devised a new format for questioning the panel, requiring that specific questions about seat belt attitudes be asked only during individual questioning of prospective jurors, and not to the panel as a whole, as had been done previously. When the time came to ask these questions individually, however, the trial court abandoned its plan, forbidding any further questions about seat belts. The Court agrees that this was error, but concludes that the error was not appropriately preserved for our review. I disagree and therefore respectfully dissent.

I

* * *

I do not disagree that the question rejected by the trial court, as it was phrased, was an impermissible attempt to pre-test the weight jurors would attach to Amber not being belted. However, this improper question did not authorize the trial court to foreclose the entire area of properly-phrased seat belt usage questions. As the record reflects, there were (and are) a number of ways to pose the subject to the jury. Not all of them are improper commitment or pre-testing questions. But, when a trial court tells a party's attorney that there will be no further inquiry into a particular subject matter, as was done in this case, that party should not be prejudiced by taking the court's ruling at face value.

Notes & Questions

Scope of questioning. As a general rule, counsel may inquire about anything relevant to the issues to be tried, the facts to be presented, or the parties themselves.¹ It is clear that voir dire questioning is not limited to information supporting challenges for cause, but extends to information relevant to the exercise of peremptory challenges.² Obviously, no questions may be asked which would introduce matters not admissible during the trial.³ The mention of insurance, for example, is

¹ Green v. Ligon, 190 S.W.2d 742, 747 (Tex. Civ. App.—Ft. Worth 1945, writ ref'd n.r.e.).

² Lubbock Bus Co. v. Pearson, 277 S.W.2d 186 (Tex. Civ. App.—Amarillo 1955, writ ref'd n.r.e.) and Greenman v. Ft. Worth, 308 S.W.2d 553 (Tex. Civ. App.—Ft. Worth 1957, writ ref'd n.r.e.).

³ Christie v. Brewer, 374 S.W.2d 908 (Tex. Civ. App.—Austin 1964, writ ref'd n.r.e.).

usually forbidden.⁴ However, since a juror's employment by a liability insurance company would be highly relevant concerning bias about claims generally, questions eliciting that information have been allowed.⁵

Rules governing argument also apply to voir dire. Thus, counsel may not contrast the financial positions of the parties.⁶ And counsel may not tell the panelists the effect of certain jury answers; that is, cannot say who will win or lose or what judgment will result from certain answers to the jury questions.⁷ Another rule governing argument generally is that counsel may not attempt to foster sympathy for or prejudice against a particular party, a rule equally applicable in voir dire examination.⁸

C. Statutory Disqualifications and Challenges for Cause

Read Rules 227-231 and 292, Gov't Code, Chapter 62.

CORTEZ
v.
HCCI-SAN ANTONIO, INC.
159 S.W.3d 87
(Tex. 2005)

MEDINA, Justice.

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. The court of appeals held that error was preserved and that the trial court did not abuse its discretion. We affirm the judgment of the court of appeals.

I

Carmen Puentes, a nursing home resident, sued HCCI-San Antonio ("HCCI"), Altman Nursing, and Jerry Tristan for negligence, gross negligence, assault, penal code violations, and intentional infliction of emotional distress related to a fall and allegations of mistreatment at the Alta Vista Nursing Center, a nursing home HCCI had purchased from Altman four months earlier. Puentes died while the suit was pending, and her heir Jesus Cortez pursued the claim.

⁴ South Austin Drive-In Theater v. Thomison, 421 S.W.2d 933 (Tex. Civ. App.—Austin 1967, writ ref'd n.r.e.).

⁵ A.J. Miller Trucking Co. v. Wood, 474 S.W.2d 763 (Tex. Civ. App.—Tyler 1971, writ ref'd n.r.e.).

⁶ Texas and N.O.R. Co. v. Lide, 117 S.W.2d 479 (Tex. Civ. App.—Waco 1938, no writ).

⁷ T.E.I.A. v. Loesch, 538 S.W.2d 435 (Tex. Civ. App.—Waco 1976, writ ref'd n.r.e.) (advising jurors as to the amount of recovery based on given findings in workers compensation case).

⁸ Texas and N.O.R. Co. v. Lide, 117 S.W.2d 479 (Tex. Civ. App.—Waco 1938, no writ) (classifying as highly improper attorney directing jury's attention to railroad owner's profits).

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:

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.

Upon further questioning, he agreed that at times when he evaluated automobile 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. Cortez challenged Snider, arguing that he had demonstrated bias, but the trial court denied the challenge. Cortez therefore had to use his last peremptory challenge to strike Snider, and veniremember 7 was empaneled. Cortez never challenged veniremember 7 for cause, and never stated why he found 7 objectionable, but maintains that he would have struck 7 had he been able.

The jury returned a \$9 million verdict against the defendants, but after reduction for settlement credits and the jury’s apportionment of fault, the trial court rendered judgment against HCCI and Tristan for \$87,869.36 in actual damages, and against Tristan for \$250,000 in exemplary damages. Cortez, unsatisfied with the judgment, refused tender from HCCI and filed a motion for a new trial, which was denied.

Cortez appealed the judgments against HCCI and Tristan, on the ground that veniremember Snider should have been dismissed for cause. The court of appeals affirmed. We granted Cortez’s petition for review, and we affirm the judgment of the court of appeals.

II

HCCI and Tristan claim that Cortez failed to preserve error by timely notifying the trial court that he would be harmed by having to use his last peremptory strike on Snider. In civil suits in Texas district courts, each side has six peremptory challenges—more than litigants in most other states.¹ TEX. R. CIV. P. 233. When a challenge for cause is denied, that error can be corrected by striking the veniremember peremptorily. Thus, the error is only harmful if this peremptory challenge would have been used on another objectionable veniremember.

Accordingly, in *Hallett v. Houston Northwest Medical Center*, we held that to preserve error when a challenge for cause is denied, a party 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. 689 S.W.2d 888, 890 (Tex. 1985). This ensures that “the court is made aware that objectionable jurors will be chosen” while there is still time “to determine if the party was in fact forced to take objectionable jurors.” Our sister court applies the same test, adding that a trial court may cure the objection by granting an extra peremptory challenge. *Escamilla v. State*, 143 S.W.3d 814, 821 (Tex. Crim. App. 2004) (holding error in

¹ Of the 34 states utilizing twelve jurors on civil cases, 24 allow 4 strikes per side or fewer, 7 (including Texas) allow 6 strikes per side (Alabama, California, Georgia, Louisiana, New Jersey, Texas, and Vermont), 2 allow 5 strikes per side (New York and New Mexico), and 1 (North Carolina) allows 8 strikes per side. See U.S. DEPARTMENT OF JUSTICE: BUREAU OF JUSTICE STATISTICS, STATE COURT ORGANIZATION 1998 at 273 (1998); see also ABA STANDARDS RELATING TO JUROR USE AND MANAGEMENT, Standard 9 (recommending three strikes per side in civil cases tried to twelve-member juries).

denying challenge for cause is harmful only if party (1) strikes that veniremember peremptorily, (2) exhausts peremptory strikes, (3) requests additional strikes, and if refused (4) identifies objectionable juror remaining on venire).

Cortez's notice served this purpose, if barely. While it is unclear whether Cortez gave his notice to the trial court before or after he delivered his strike list, it does appear that the two events were roughly contemporaneous. More importantly, notice was given before the jury was seated, and the trial court stated on the record "it's preserved." We therefore hold that error was preserved.

Nor do we find Cortez waived error by failing to state why veniremember 7 was objectionable. Peremptory challenges normally require no reason. TEX. R. CIV. P. 232. While an "objectionable" veniremember could be picked at random, the objecting party must do so before knowing who the opposing party will strike or who the actual jurors will be. If it "guesses" wrong, any error is harmless; as our sister court recently noted, if the opposing party or the court agree to remove this veniremember, the objecting party does not get to object again to the veniremember who will be seated instead.

HCCI and Tristan also contend that any error was harmless. We disagree. The fact the Cortez prevailed at trial is not relevant, because we held in *Hallett* that "harm occurs" when "the party uses all of his peremptory challenges and is thus prevented from striking other objectionable jurors from the list because he has no additional peremptory challenges." No one except the jurors themselves knows exactly what transpires in the jury room; we know only the verdict. * * * Here, we do not know why veniremember 7 was objectionable. * * * [W]e cannot know for certain that his inclusion did not affect the verdict, so we presume harm. * * *

III

Cortez next argues, citing several court of appeals opinions, that veniremembers cannot be "rehabilitated"—that once a veniremember has expressed "bias," further questioning is not permitted and the veniremember must be excused. We disagree that there is such a rule, and to the extent these decisions conflict with our opinion here, we disapprove those cases.

As a preliminary matter, we must define what we mean by "rehabilitation." 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. This Court has used the term only once in connection with voir dire and then with apparent approval. Similarly, our sister court has shown no special disapproval of rehabilitated veniremembers. Thus, the length and effect of efforts to rehabilitate veniremembers are governed by the same rules that apply to all of voir dire.

Of course, the rules of civil procedure contain no rule on voir dire, but a few can be gathered from case law. Among these are that voir dire examination is largely within the sound discretion of the trial judge and that broad latitude is allowed for examination. Both of these principles are completely inconsistent with the assertion that voir dire must stop at the moment a veniremember gives any answer that might be disqualifying. Certainly, just as trial judges may exclude "needless presentation of cumulative evidence," TEX. R. EVID. 403, they 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.

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. If the initial apparent bias is genuine, further questioning should only reinforce that perception; if it is not, further questioning may prevent an impartial veniremember from being disqualified by mistake. Similarly, we do not believe the discretion accorded trial judges in ruling on challenges for cause is arbitrarily limited in cases involving rehabilitation. Because trial judges are actually present during voir dire, they are “in a better position . . . to evaluate the juror’s sincerity and his capacity for fairness and impartiality.” 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.

In reviewing such decisions, we must consider the entire examination, not just answers that favor one litigant or the other. For example, in *Goode v. Shoukfeh*, a veniremember admitted he had “a slight bias,” was “leaning a little” toward the defendant, and the plaintiff was “starting off a little bit behind.” Nevertheless, we affirmed the trial court’s refusal to strike the veniremember for cause based on the veniremember’s explanation that “both sides . . . are pretty even,” that his “bias” was only because the defendant’s explanation of the evidence “was just a little more clear in [his] mind[.]” The veniremember explained, “I can make my decision on the evidence that comes from the witness stand . . . I have not made a decision just from what you two have said.” Clearly, neither trial nor appellate courts are required to consider challenges for cause based on only one part of a veniremember’s responses.

Nor do challenges for cause turn on the use of “magic words.” Cortez argues, and we do not disagree, that veniremembers 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.

Here, the challenged veniremember admitted having a better understanding of the defendant’s side, having worked as an insurance adjuster. Nevertheless, his answers to the trial judge’s questions revealed that any initial apparent bias he expressed was actually against lawsuit abuse. Like the veniremember in *Goode*, Snider said he was willing to listen to all the evidence and to withhold judgment until the entire case had been presented. He never indicated any inability to find for Cortez, if Cortez proved his case. More significantly, he said he was “willing to try” to make his decision based on the evidence and the law. That is all we can ask of any juror.

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. Snider was therefore not biased as a matter of law, and it was within the trial court’s discretion to refuse to strike him.

IV

Finally, we address the veniremember's affirmative response to a question by Cortez's counsel that the defendants "would be starting out ahead" of the other party before he even got into the jury box. This cannot be grounds for disqualification. 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." *Id.* at 182 (emphasis added). 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.

Cortez claims his case is analogous to *Shepherd v. Ledford*, 962 S.W.2d 28 (Tex. 1998). In *Shepherd*, a veniremember agreed that "based upon [his] past experience, [he] could not be fair and objective in looking at the medical facts as they have been testified to so that both sides start out evenly[.]" and that the plaintiff was starting out "ahead." We held that the veniremember was biased as a matter of law, and that the trial court abused its discretion in failing to strike him for cause. That veniremember, unlike Snider, agreed that he "could not be fair and objective" in looking at the facts, and that is what disqualified him. Snider said he was "willing to try" to decide the case on the facts and the law.

Asking a veniremember which party is starting out "ahead" is often an attempt to elicit a comment on the evidence. See Scott A. Brister, *Lonesome Docket: Using the Texas Rules to Shorten Trials and Delay*, 46 BAYLOR L. REV. 525, 538 (1994). 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. A statement that one party is ahead cannot disqualify if the veniremember's answer merely indicates an opinion about the evidence. See Jim M. Perdue, *A Practical Approach to Jury Bias*, 54 TEX. B.J. 936, 940 (1991) (recommending that disqualification turns on follow-up question "Had you formed this opinion before you entered this courtroom?"). 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.

* * *

We hold that Cortez properly preserved error and that 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. We affirm the judgment of the court of appeals.

Notes & Questions

1. *Defense lawyer juror.* Soon after *Cortez* was decided, the Supreme Court addressed another challenge for cause in *El Hafi v. Baker*.¹ In a medical malpractice case, the following exchange occurred during voir dire:

¹ 164 S.W.3d 383 (Tex. 2005).

Counsel [for plaintiffs]: Okay. 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? . . . How about on the third row? . . . No. 25 [hand raised] . . .

Juror 25: 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.

Counsel: Are you a lawyer?

Juror 25: Yes.

Counsel: Who are you with?

Juror 25: Preston and Calvert.

Counsel: Okay. And you actually defend health care operations?

Juror 25: Correct.

Counsel: Let me ask you: 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?

Juror 25: I mean—I'm not saying that—I would do my best to be objective. I'm just saying that if I were in your shoes I might consider you towards as the attorney who spend [sic] most of his career defending malpractice lawsuits.

Counsel: You feel like you can relate very much to the defendant's [sic] lawyers in this case? Is that fair?

Juror 25: That's correct.

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

Juror 25: I think it would be natural.

The trial court denied the Bakers' challenge for cause to Juror 25, and the Supreme Court held that the trial court did not abuse its discretion in doing so. The Court emphasized the juror's disagreement with every suggestion that he could not be fair and objective, and characterized the testimony as "an attempt to 'speak the truth' so that the examining counsel could intelligently exercise peremptory challenges" rather than a reflection of bias.

2. *Statutory qualifications.* Questions to members of the panel in the case will deal with the disqualification for service on that particular jury under § 62.105 of the Government Code. One is disqualified if he or she 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;⁴ has a bias or prejudice in favor of or against a party in the case; or has served as a juror in an earlier trial of the case, or

² T.R.C.E. 606 prohibits a member of the jury from testifying as a witness.

³ This usually refers to a financial or pecuniary interest. A shareholder of a party corporation is disqualified (*see Texas Power and Light Co. v. Adams*, 404 S.W.2d 930, 943 (Tex. Civ. App.—Tyler 1966, no writ), whereas a taxpayer of a governmental entity ordinarily is not (*see City of Hawkins v. E. B. Germany and Sons*, 425 S.W.2d 23, 26 (Tex. Civ. App.—Tyler 1968, writ ref'd n.r.e.)). The employee of a party is also disqualified. *See Stephens v. Smith*, 208 S.W.2d 689, 691 (Tex. Civ. App.—Waco 1948, writ ref'd n.r.e.). The resident of a county is not disqualified as a juror in a case where that county is a party. *See Local Government Code* § 81.042.

⁴ *See* discussion of degrees of relationship in connection with recusals in Chapter 3, and *see GOV'T CODE* §§ 573.021-.025, for definitions of degrees of relationship.

another case involving the same fact questions. “Bias or prejudice” is by far the most important basis for disqualification of jurors, accounting for perhaps 90% or more of successful challenges for cause. By the time an attorney confronts a jury panel, it will ordinarily have been screened for the general qualifications required of jurors under § 62.102 of the Government Code. They are that the juror be at least 18 years old, a citizen of the state and county, qualified to vote in the county, of sound mind and good moral character, able to read and write, not having had specifically defined prior jury service within the preceding six months, not a convicted felon, nor under indictment for theft or a felony.⁵ Those who are legally blind and those who are deaf are not automatically disqualified, but may be disqualified in a particular case, if, in the court’s opinion, the impairment renders the person unfit to serve.⁶

3. *Wording of voir dire questions.* General or vague questions during voir dire are not helpful in uncovering bias or preserving error. In *Soliz v. Saenz*, 779 S.W.2d 929 (Tex. App.—Corpus Christi 1989, writ denied), plaintiffs sued a drunk driver and the business that served him liquor (Waterstreet). The jury found the driver liable but exonerated Waterstreet. One argument on appeal was that two jurors had not been truthful about their leanings and experiences. The court of appeals rejected this argument (at 933):

During voir dire, the trial judge asked prospective jurors if they could listen to the evidence and apply the law to the facts. The prospective jurors did not respond [i.e. no juror raised a hand]. Appellants’ counsel asked them if having eaten at the Waterstreet would affect their ability to sit in judgment and consider the facts and the evidence. In response, the prospective jurors shook their heads. Appellants contend that because [jurors] Adkins and Hefte did not follow the law, their answers to these voir dire questions were not truthful. Appellants also state that Adkins and Hefte failed to disclose their biases and prejudices.

In certain circumstances, failure to disclose biases and prejudices during voir dire examination can amount to jury misconduct not affected by Rules 327(b) and 606(b). For instance, when a party discovers that a juror lied about a matter which reveals that the juror was clearly biased or prejudiced, this could amount to jury misconduct. * * * In order for false answers given during voir dire examination to entitle a party to a new trial, there must be a concealment by a juror in response to a specific and direct question calling for disclosure. Catch-all questions do not meet the requirement of specificity.

4. *Exemptions and excuses.* Exemptions and excuses do not disqualify the juror but provide an escape from jury duty should the holder so elect. The person may be exempted from jury services if he or she is over 70 years old; is the caretaker with legal custody of a child under ten; is a high school or college student; is an officer or employee in the legislative branch of state government; has had jury duty in the past two years (applicable to urban counties, certain restrictions apply);⁷ or is the primary caretaker of an invalid.⁸ Persons over 70, those with physical or mental incapacities, and

⁵ Under § 62.103 of the Government Code, the requirement that a juror be able to read and write and the disqualification based on prior jury service may be waived in sparsely populated counties. Also, the voting requirement is based on eligibility, and the failure to register to vote does not disqualify a juror. § 62.1031, Government Code.

⁶ See § 62.104 and § 62.1041, Government Code.

⁷ See § 62.106(6) and (8).

⁸ § 62.106, Government Code, establishes procedures for claiming exemptions.

those who cannot speak English may obtain permanent exemptions.⁹ Jurors may also be excused if their service conflicts with a “religious holy day” as defined in § 62.112 of the Government Code. Furthermore, a court or its designated agent may excuse a juror based on “any reasonable sworn excuse,” except that a juror may not be excused for “an economic reason,” unless each party of record is present and approves.¹⁰

5. *Statutory and discretionary challenges for cause.* Once a statutory disqualification is established, the court must excuse the juror. The error is one of law and the trial court has no discretion. However, challenges for cause may prompt the trial court to excuse a juror who, though not disqualified by statute, is nevertheless (in the court’s opinion) unfit to serve on the jury for that case.¹¹ The court’s decision on the second type of challenge for cause is reviewable for abuse of discretion.¹²

6. *Showing harm.* Note that *Cortez* involved the trial court’s error of failing to excuse a disqualified juror after the disqualification was revealed during voir dire. It is reversible error to *refuse* to dismiss a disqualified juror if a good challenge for cause is made and if the *Hallett* steps are followed to preserve error. Be sure that you understand the *Hallett* steps described in *Cortez*. No other showing of harm is required. But erroneous *dismissal* of a qualified juror for cause is seldom reversible. Complainant must show harm, and the case law interprets that to mean that the complainant must show that he or she was denied a trial “by a fair and impartial jury,” a virtually impossible burden in this circumstance.¹³

7. *The need for a record.* Following the *Hallett* steps will be futile unless they are preserved in the record for appeal. The court’s action in seating a juror following a challenge results in an implied fact-finding that the juror was qualified and such a finding will not be disturbed on appeal absent a statement of facts or a formal bill of exceptions showing the challenge, the court’s action and the *Hallett* steps taken to preserve error.¹⁴

8. *Typical sequence.* As attorneys are interrogating jurors, they may make challenges for cause, based on particular jurors’ answers. Good advocacy requires that this be done outside the presence of the rest of the panel, usually at the bench, where the attorneys, the juror being questioned, and the court reporter will gather to conduct a *sotto voce* conference. Although there is a court reporter present in the courtroom, counsel sometimes overlooks the necessity for having the court reporter close enough to record the proceedings at the bench. Sometimes, to avoid keeping the rest of the panel waiting and because of the clumsiness involved in the bench proceedings, the judge will defer the questioning of suspect jurors until the end of the questions to the panel and will then declare a recess for the majority of the panelists, who are excused from the courtroom. Thereafter, individual jurors are brought up to the bench where the questioning—still *sotto voce*—proceeds, the challenges are renewed and the court rules on them. In the course of the voir dire examination, a juror will some-

⁹ § 62.108 and § 62.109, Government Code.

¹⁰ § 62.110, Government Code.

¹¹ Rule 228.

¹² *Moss v. Fidelity and Casualty Co.*, 439 S.W.2d 734 (Tex. Civ. App.—Ft. Worth 1969, no writ); *Texas Power and Light Co. v. Adams*, 404 S.W.2d 930 (Tex. Civ. App.—Tyler 1966, no writ); *Texas Elec. Service Co. v. Yater*, 494 S.W.2d 271 (Tex. Civ. App.—El Paso 1973, writ ref’d n.r.e.).

¹³ *City of Hawkins v. Germany and Sons*, 425 S.W.2d 23 (Tex. Civ. App.—Tyler 1968, writ ref’d n.r.e.).

¹⁴ *Southwestern Bell Telephone Co. v. Sims*, 615 S.W.2d 858 (Tex. Civ. App.—Houston [1st Dist] 1981, no writ); *Lauderdale v. Insurance Co. of North America*, 527 S.W.2d 841 (Tex. Civ. App.—Ft. Worth 1975, writ ref’d n.r.e.); *City of Hawkins v. Germany and Sons*, 425 S.W.2d 23 (Tex. Civ. App.—Tyler 1968, writ ref’d n.r.e.).

times present an excuse not available earlier, and the judge will excuse the juror. It is important for counsel to keep the jury list up to date, showing the removal of jurors who have been excused, so that no peremptory challenge or “strike” will be wasted on such a juror. After all challenges for cause are disposed of, the court will allow attorneys to retire to separate locations where they can strike their lists in conference with their clients (and sometimes with counsel for other parties). Before the list is handed over to the clerk, *Hallett* requires that the aggrieved attorney make the prescribed record. The attorneys typically strike through the names of jurors on whom peremptory challenges are exercised and number those “strikes” one through six. The attorneys return their lists to the clerk, who then posts the peremptory challenges to the master list. (As we will see later, these strikes may be challenged on the basis of racial, ethnic or gender bias, requiring a hearing at this point.) The clerk then reads the first 12 names which remain on the list, passing over the names of jurors who have been excused or struck. At the time the list of 12 jurors chosen for service is read, attorneys may raise a *Batson* challenge, suggesting that the strikes were based on race or gender.¹⁵ A very cautious attorney might well repeat the *Hallett* step of identifying an unacceptable juror who will be serving because a valid challenge for cause was overruled. This step will, of course, be taken outside the hearing of jurors. After the jurors are seated, the court will give the additional instructions prescribed by Rule 226(a)II.

D. Peremptory Challenges

Read Rules 232-235.

Peremptory challenges allow parties to strike jurors for no cause, any cause, or “just because.” They do not have to identify why they strike a juror, and do so for any number of reasons. They originated in the English common law as an “unfettered right” to strike potential jurors.¹ Peremptory challenges are limited only by the number allocated to each party, and by the Equal Protection Clause of the United States Constitution (as we will discuss later).

Exercise of peremptory challenges is often seen as a trial lawyer’s art, and more recently, as a science. In big cases, parties often hire expensive experts to assist in identifying characteristics of the “perfect juror” that are considered in putting together the voir dire examination and exercising peremptory challenges.

¹⁵ *Batson* challenges are discussed later in this chapter.

¹ See *Creed v. Fisher*, 9 Exch. 472 (1854).

1. Reapportioning Peremptory Challenges

PATTERSON DENTAL COMPANY

v.
DUNN
592 S.W.2d 914
(Tex. 1979)

SPEARS, JUSTICE.

This case involves the “equalizing” by the trial court of peremptory challenges between multiple parties in a civil suit as required by TEX. REV. CIV. STAT. ANN. art. 2151a (Vernon Supp. 1978-79). Plaintiff-respondent Dunn, a dentist, sued four defendants on negligence and products liability theories for personal injuries received when a piece of equipment he was operating in his dental office exploded. The fire and explosion resulted when Dunn opened the valve of an oxygen cylinder which was connected to a two-cylinder manifold system. After trial to a jury, a take-nothing judgment was rendered against Dunn. The court of civil appeals reversed and remanded the cause for a new trial. We affirm the judgment of the court of civil appeals but on different grounds.

Respondent Dunn sued Patterson Dental Company, the retail vendor of the manifold system; Fraser-Sweatman, Inc., the designer and manufacturer of the system; Western Enterprises, Inc., the manufacturer of certain component parts of the system; and Puritan-Bennett Corp. (Medicall, Inc.), the company that serviced the system. All four defendants were united in denying that there was any defective product or negligence causing the incident and in contending that the plaintiff was guilty of “misuse,” but each sought indemnity and/or contribution from other defendants if there were blame placed on that defendant for the explosion. Each also alleged that another defendant’s actions were the sole cause of the accident.

The trial court called a panel of forty-six jurors. The court allowed each of the defendants six peremptory challenges, a total of twenty-four, but allowed plaintiff Dunn only six. Dunn objected and moved that all defendants collectively receive only six, the same number he was allowed. The trial court denied this motion. After the evidence was presented, forty-four special issues were submitted to the jury. By a ten to two verdict, the issues were answered against plaintiff Dunn and for exoneration of the four defendants. The court of civil appeals held that under article 2151a which requires equalizing the peremptory challenges plaintiff Dunn should receive twenty-four peremptory challenges. We believe the court of civil appeals has misinterpreted the statute.

The practice of allowing peremptory challenges by parties to a civil suit was unknown to the common law. The practice in Texas began as a creature of statute and is now permitted by the Texas Rules of Civil Procedure. Rule 233 provides: “Each party to a civil suit shall be entitled to six peremptory challenges in a case tried in the district court, and to three in the county court.” A peremptory challenge, commonly referred to as a “strike,” is defined by rule 232 as one “made to a juror without assigning any reason therefor.” These rules are derived without change from their predecessor statutes, articles 2147 and 2148, and have controlled civil trials for more than one hundred years.

The term “party” in rule 233 is not synonymous with “litigant” or “person.” Rather, “party” refers to a litigant or a group of litigants having essentially common interests. Though their interests need not be completely identical, litigants on the same side of the docket are deemed to be a “party”

under the rule when their interests are not antagonistic in a matter in which the jury is to be concerned.

Until article 2151a was enacted in 1971, Texas courts had engrafted into rule 233 the “single issue” test for determining the number of strikes to be allowed multiple parties aligned on the same side of a lawsuit. Under that test the presence of a solitary issue which was not common to all parties on the same side entitled each party on that side to a full set of six strikes. In other words, the community of interest of the parties on the same side must be complete before separate sets of strikes would be disallowed. Once antagonism on a single issue was found, each party received a full complement of six strikes. Application of the rule resulted in justifiable criticism of unfair results when multiple parties, each with a full set of strikes, collaborated in exercising those strikes in aid of their primary, common interest of defeating a common opponent on the other side.

The unfairness created by the single-issue rule was undoubtedly the reason article 2151a was enacted by the legislature in 1971. Intended to relax the rigidity engrafted into rule 233, the statute provides:

After proper alignment of parties, it shall be the duty of the court to equalize the number of peremptory challenges provided under Rule 233, Texas Rules of Civil Procedure, Annotated, in accordance with the ends of justice so that no party is given an unequal advantage because of the number of peremptory challenges allowed that party.

The court of civil appeals here has interpreted the statute as requiring numerical equality of the number of strikes allowed each side. Petitioners argue that the holding conflicts with prior decisions of other courts of civil appeals. In those cases, an adjusting or proportionalizing of the strikes given to antagonistic parties on the same side was allowed by the trial court and upheld on appeal. We must determine what effect article 2151a has on the provisions of Rule 233.

The threshold question to be answered in allocating strikes when multiple litigants are involved on one side of a lawsuit is whether any of those litigants on the same side are antagonistic with respect to a question that the jury will decide. Where no antagonism exists, each side must receive the same number of strikes. * * * When antagonistic parties on the same side are required to share six strikes, it is error amounting to a violation of the basic right to trial by jury. The antagonism must exist on an issue of fact that will be submitted to the jury, not on a matter that constitutes a pure question of law. Further, the antagonism must exist between litigants on the same side, vis-à-vis each other. Antagonism does not exist because of differing conflicts with the other side; e.g., when a plaintiff sues several defendants alleging different acts or omissions against each defendant. Antagonism would exist, however, if each of the defendants alleged that the fault of another defendant was the sole cause of plaintiff’s damage. . . . The existence or non-existence of cross-actions or third-party actions is not determinative. . . .

The existence of antagonism must be determined prior to the exercise of the strikes by the parties. The trial court must consider the pleadings, information disclosed by pretrial discovery, and other information brought to the attention of the trial court. * * * Information and representations made during voir dire of the jury panel also may be considered. Each case should be considered under the relevant circumstances. The existence of antagonism is not a matter within the trial court’s discretion; it is a question of law whether any of the litigants aligned on the same side of the docket are antagonistic with respect to any issue to be submitted to the jury.

Here, Dunn seeks to uphold the result of the court of civil appeals’ holding by arguing that no antagonism existed between the four defendants. The pleadings, however, clearly reflect that the defendants each blamed the others for the explosion of the equipment and pleaded that specific acts

and omissions of others were the sole cause of plaintiff's injuries. Moreover, special issues were submitted to the jury on which defendants took opposite positions. Therefore, both the trial court and the court of civil appeals correctly concluded that there was antagonism between the defendants that entitled them to additional strikes.

Once the parties have been aligned on "sides," and it is determined that antagonism exists between parties on the same side, the provisions of article 2151a require the trial court to "equalize the number of peremptory challenges provided under Rule 233 . . ." This task is to be done "in accordance with the ends of justice so that no party is given an unequal advantage because of the number of peremptory challenges allowed that party." Thus, article 2151a, while not involving the trial court's discretion in the determination of antagonism, does grant discretionary power to the trial court in allocating strikes.

In ascertaining whether the legislature intended that each side in a suit have an equal number of strikes after alignment, we consider the old law, the evil, and the remedy. TEX. REV. CIV. STAT. ANN. art. 10, § 6 (Vernon 1969). The application of the "single issue" rule made it possible for one side in a lawsuit, consisting of several parties each with six strikes, in effect to dictate who was on the jury. Presumably, this unfairness was the evil the legislature addressed when it enacted article 2151a in 1971.

The purpose of allowing strikes is not to allow a party to *select* a jury; instead, strikes are intended to permit a party to reject certain jurors based upon a subjective perception that those particular jurors might be unsympathetic to his position. When the number of strikes allowed to one side of the suit is grossly disproportionate to the number allowed the other side, it permits the side with the greater number to actually construct the jury. On the other hand, if the remedy provided in article 2151a was to grant each side an exactly equal number of strikes, a different evil would be substituted: the number of strikes would be unbalanced in favor of the side with a single litigant, for the antagonistic parties on the other side would have received no strikes to compensate for their antagonism between each other. The statute requires that the court equalize strikes between the parties, not the sides, of the suit. It provides that "[a]fter proper alignment of *parties* [strikes will be equalized] in accordance with the ends of justice so that no *party* is given an unequal advantage because of the number of peremptory challenges allowed that *party*." (emphasis added) The court of civil appeals incorrectly interpreted the word "party" as synonymous with "side." Moreover, had the legislature intended that each side receive the same number of strikes, it could easily have said so. Additionally, under such a construction, the last half of the statute, which speaks of the "ends of justice" and "unequal advantage," would have been superfluous. We presume the language was placed in the statute for a purpose.

We conclude that exact numerical equality between sides was not the purpose of article 2151a. Rather, the intention of the legislature was to place a duty on the trial court to equalize the positions of the parties to prevent one side, antagonistic among the parties on certain matters of fact with which the jury would be concerned but primarily united in their opposition to the other side, from selecting the jury.

Proportionalizing the strikes may be accomplished by increasing the number allotted a sole party on one side, by decreasing the number allotted the multiple parties on the other side, or by both. *King v. Maldonado, supra* (plaintiff allowed six; two groups of defendants allowed four each and allowed to collaborate); *Dean v. Texas Bitulithic Co., supra* (plaintiff allowed six; two defendants allowed nine); *Austin Road Co. v. Evans, supra* (three plaintiffs allowed six each; principal defendant allowed nine). The extent to which equalizing is allowed depends upon the circumstances of the particular case, the information available to the trial court, the extent and degree of the antago-

nism, whether the parties collaborate in selecting jurors to be struck, the number of jurors available on the panel, and such other considerations as meet the statutory criteria of promoting the “ends of justice” and preventing “unequal advantage.” The process of equalizing the strikes is not without limits, however, and is not subject to the unlimited discretion of the trial judge. Although article 2151a was intended to add an element of flexibility in awarding strikes among multiple parties and the trial court has discretionary power in determining the number of strikes awarded, in most cases a two-to-one ratio between sides would approach the maximum disparity allowable. In cases in which the disparity between strikes allowed the two sides did not exceed a two-to-one ratio, courts have held that there was no abuse of discretion. On the other hand, a disparity of four-to-one between sides as been held erroneous

In the case before us, we hold that the four-to-one disparity of strikes allowed was erroneous. Forty-six jurors were called, three of whom were excused for cause, leaving forty-three on the panel. The jury was selected from the first thirty-three jurors; that is, the twelfth juror selected was No. 33 on the panel. Plaintiff Dunn struck six of the thirty-three jurors while the four defendants struck at least fifteen, none of which had been struck by Dunn. Thus, the defendants, with twenty-four strikes, were able to exercise fifteen of them on the thirty-three member panel from which the jury was selected, effectively allowing the defendants to select the jury which would try their case. Irrespective of how they were exercised by the four defendants, the disparity of a four-to-one ratio of strikes between the two sides to the lawsuit was erroneous. The trial court had a duty to equalize the strikes in accordance with the language of article 2151a so that no party retained an unequal advantage, or, as in this case, an unequal disadvantage to Dunn.

Having determined that the trial court committed error in allocating the strikes, we must determine if the error resulted in a trial that was materially unfair, thus requiring reversal. In *Tamburello*, we held that the trial court committed reversible error in requiring two antagonistic defendants to share six strikes as against plaintiff’s six strikes. After stating that the harmless error rule was applicable, we pointed out the difficulty of showing that an improper judgment probably resulted from an error of this nature. Peremptory challenges are subjective in application, are prompted by intuition, and are in spontaneous reaction to a juror’s background, appearance, personality, prior contacts, and perceived attitude. We wrote in *Tamburello*, “The decision to strike is, in the last analysis, a matter of personal judgment usually based in large measure upon intangibles not susceptible of precise description and which cannot be fairly appraised by a trial or appellate court.” We relaxed the requirement of the traditional “harmless error” rule by establishing the burden on the complaining party to show that “the trial which resulted against him was materially unfair” and held that the denial of strikes to each defendant, without any further showing, resulted in a trial that was so materially unfair that the judgment must be reversed.

In *Perkins v. Freeman, supra*, a child custody case, the plaintiff-mother was given six strikes, the defendant-father was given six, and the intervenors, paternal grandparents, were given six. Because the pleadings demonstrated that no antagonism existed between the father and his parents, we reversed and remanded, holding that their twelve strikes gave them “an unequal advantage, [that] was so materially unfair that the judgment cannot be upheld.” No further showing of harm was made or discussed.

Normally, the question whether the trial was materially unfair in either the determination of antagonism or the equalizing of strikes requires that the entire record, including the statement of facts, be examined by the appellate court. The presence of error in either instance is to be viewed from the perspective of the trial judge as of the time he makes his determination. Whether any such error resulted in a materially unfair trial, however, must be decided from an examination of the entire trial

record. For example, in a case in which the complaining party failed to prove his cause of action or defense, an error in allocating or equalizing strikes could not be said to have resulted in a materially unfair trial. On the other hand, when the trial is contested and the evidence is sharply conflicting, the error results in a materially unfair trial without showing more.

Here, we have no statement of facts of the testimony at the trial or of the *voir dire* examination of the jury panel. It is abundantly clear, however, from the number of special issues submitted, the ten-to-two verdict, and the absence of any motion for summary judgment or motion for instructed verdict in the record before us, that the trial was hotly contested. In these circumstances we hold that in the absence of a statement of facts that demonstrates that the non-complaining party would otherwise have been entitled to a judgment or that the case was not seriously disputed on its facts, a disparity of strikes between sides of as much as four-to-one results in a materially unfair trial as a matter of law.

The petitioners contend that Dunn did not properly preserve any error because he only objected to the trial court's action in refusing to limit the defendants collectively to six strikes, the number Dunn was allowed. We disagree. Rule 373 requires that a complaining party, "at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of court and his grounds therefor;" Dunn's timely objection was essentially that the defendants received more strikes than he did, and he repeated his complaint in his motion for new trial and his amended motion for new trial, citing the specific provisions of art. 2151a. We hold that his objection was sufficient to direct the court's attention to the unequal distribution of the peremptory challenges allowed the sides and the statutory duty to equalize.

The judgment of the court of civil appeals is affirmed.

Notes & Questions

1. *Antagonism and allocation.* The existence of antagonism is a question of law. There is a right answer, and, if the trial court gets it wrong, it is error. However, once antagonism is correctly identified, then the way the trial court goes about apportioning the strikes is a matter within the court's discretion. Thus, the complaint may be that the trial court erred in determining antagonism, in which case *any* reallocation of strikes is error; or it may be that, though antagonism was correctly found, the way the strikes were allocated was unfair. In either case, however—error of law on antagonism or abuse of discretion in allocating strikes (assuming that antagonism exists)—the complainant must show harm. How does he do it?¹

2. *The hot contest.* What about the *Patterson* "hot contest" criterion as a substitute for the record of sharply conflicting evidence required by *Tamburello*? It makes no sense. Except for a split verdict, the hot contest criterion does not identify a close case. Motions for summary judgment are routinely filed in cases presenting threshold legal questions, such as limitations, the scope of a duty, and trial court jurisdiction. These motions say nothing about the intensity of the dispute or how close the calls will be on the evidence. While motions for summary judgment resolve legal issues which may define and limit the contest, no one would suggest that the mere *filing* of such a motion means that the contest is one-sided. The same is true of motions for directed verdict, which provide even less

¹ For a look at various ratios which have been held acceptable and unacceptable, see *Patterson*, *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1 (Tex. 1986); *Lopez v. Foremost Paving, Inc.*, 709 S.W.2d 643 (Tex. 1986); and numerous cases collected at 4 MCDONALD, TEXAS CIVIL PRACTICE § 21:24 at footnote 203.

information about the intensity of the contest or the state of the evidence. Many defense counsel make such motions as a matter of course at the close of plaintiff's evidence. The number of special issues (now jury questions) is equally uninformative. Perhaps the best refutation of the hot contest fiction is *Texaco, Inc. v. Pennzoil Co.*,² which is surely one of the hottest contests in the history of litigation. Because the case involved motions for summary judgment and for directed verdict, only eight jury questions, and a unanimous verdict, it would not qualify as a "hotly contested trial," even though the trial lasted several months and the verdict was for \$11 billion.

3. *Antagonists confer*. Some antagonists, having been granted separate strikes, routinely confer in exercising their separate strikes and are permitted to do so.³ Why would antagonists (usually co-defendants) combine forces in order to strike the jury? Counsel for D1 would seldom acknowledge his need for the expertise of counsel for D2 in deciding whom he should remove from the jury list. Since defendants are likely to strike the same kind of jurors, the collaboration is aimed at avoiding double strikes of the same juror. Collaboration between antagonists on strikes may be hazardous, however, if a serious question is to be raised about the existence of antagonism. In *Lopez v. Foremost Paving, Inc.*,⁴ the Supreme Court found that there was not true antagonism between the defendants and reversed the case, relying in part on the fact that the "antagonistic" defendants "collaborated on the exercise of their strikes and did not have any double strikes."

4. *Antagonistic pleadings not decisive*. The Supreme Court has made clear that the trial court must look at more than just the pleadings to determine antagonism. In *Garcia v. Central Power & Light Co.*,⁵ the Court struck down a 10-6 strike allocation because during the voir dire examination the defendants "asserted Garcia's contributory negligence as the sole cause of his death, and also made affirmative exculpatory representations about their co-defendants." Therefore, the Court found no antagonism between the defendants. Shortly following the *Garcia* decision, the Texas Supreme Court also found no antagonism in *Lopez v. Foremost Paving, Inc.*,⁶ where the Court noted that the "antagonistic" defendants called witnesses who were asked perfunctory questions and then turned over to a co-defendant's counsel for "cross-examination" by leading questions. The Court further noted that defendants collaborated on the exercise of their strikes, had no double strikes, and neither presented motions for summary judgment nor for instructed verdict. In both *Garcia* and *Lopez*, the Court found that the trial was hotly contested *and* the evidence sharply conflicting, and reversed because of the trial court's error in awarding defendants twice the number of strikes it awarded to plaintiffs.

5. *Reviewing the entire record*. It is significant that *Lopez* held for the first time that the appellate court will look at the entire trial record (including events occurring after the judge's ruling allocating peremptory challenges) to determine antagonism. (It had previously done so to see whether the evidence was "sharply conflicting.") The trial court must determine antagonism early in the trial. Under *Lopez*, the correctness of that determination will be reviewed by taking into account events subsequent to the court's ruling—i.e., information not available to the court when the ruling was made.

² 729 S.W.2d 768 (Tex. App.—Houston [1st Dist] 1987, writ ref'd n.r.e.).

³ See *King v. Maldonado*, 552 S.W.2d 940 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.). Note, however, that an unqualified agreement, such as one to dismiss a party in exchange for strikes, constitutes reversible error. See *General Motors Corp. v. Herbert*, 501 S.W.2d 950 (Tex. Civ. App.—Houston [1st Dist] 1973, writ ref'd n.r.e.).

⁴ 709 S.W.2d 643 (Tex. 1986).

⁵ 704 S.W.2d 734 (Tex. 1986).

⁶ 709 S.W.2d 643 (Tex. 1986).

Is this “fair” to the judge? Perhaps not. The idea seems to be that it *is* fair to penalize the parties who have claimed to be antagonists and subsequently behaved as allies by remanding for a new trial.

6. *Waiver*. Any complaint concerning unfair allocation of strikes is waived if not timely made (ideally at the time the court reapportions strikes or refuses to do so). The point cannot ordinarily be raised for the first time on motion for new trial.⁷ If, however, the complaint is based upon in-trial cooperation between “antagonists”—as in *Lopez*—either a motion for new trial or perhaps a motion for mistrial might be the first opportunity to complain and should preserve the error.

E. Jury Misconduct

Read Rules 292, 327.

Previous sections discussed error resulting from the trial judge refusing to exercise a juror for cause when the voir dire revealed the error, and when the trial judge fails to properly allocate the number of peremptory strikes. In each of these situations, the error is apparent when it occurs and the opinions specify what lawyers must do to preserve error and show harm. But there are situations where the lawyers or the judge do not discover that an unqualified juror is on the panel until after the trial has begun, or even after it is completed. The verdict-loser will want to complain that the verdict is invalid because of the presence of an unqualified juror. How does this work?

PALMER WELL SERVICES, INC.

v.

MACK TRUCKS, INC.

776 S.W.2d 575

(Tex. 1989)

PER CURIAM.

Conflict with Rule 292 of the Rules of Civil Procedure and Section 62.102 of the Government Code, regarding the qualifications of jurors and the requisites of verdicts, prompts this court’s examination of this case.

Suit was filed to recover for personal injuries suffered by petitioner, Paul Quinonez, as a result of an explosion and fire of a hot oil treatment unit and truck. Quinonez was employed by petitioner Palmer Well Services, Inc. (Petitioners will be referred to collectively as “Palmer”). The trial was to jury which rendered a 10-2, take-nothing verdict against the plaintiffs. Palmer filed a motion for new trial alleging the discovery, after the verdict, of a felony indictment pending against one juror. The trial court overruled the motion for new trial.

⁷ Pouncy v. Garner, 626 S.W.2d 337 (Tex. App.—Tyler 1981, writ ref’d n.r.e.).

The court of appeals held that the juror should have been excluded from the panel because of the pending felony indictment and that due diligence was not lacking in failing to discover that fact earlier. However, the court of appeals held that Palmer was required to demonstrate that the unqualified juror's presence on the jury was a material factor which was reasonably calculated to, and probably did, cause the rendition of an improper judgment. The court of appeals held that Palmer failed to establish the requisite material injury¹ needed to sustain this burden and affirmed the trial court. For the reasons expressed, the court of appeals' judgment is reversed and this cause is remanded for new trial.

The only facts pertinent to this appeal regard one of the jurors, Mr. Ira Anderson. Anderson was one of the majority of 10 jurors that rendered the take-nothing verdict. During voir dire, the trial judge queried the panel as to their qualifications to serve. Conflicting evidence exists regarding whether Anderson had gone to the restroom, or remained silent when the panel was asked about pending indictments or legal accusations for a misdemeanor or felony.

Palmer contends that the verdict was not rendered by the requisite number of qualified jurors. In all but one instance,² where the jury is originally composed of twelve jurors, a minimum of ten members of the original jury must concur in the verdict. TEX. R. CIV. P. 292. All individuals are competent to serve as petit jurors unless disqualified by statute. TEX. GOV'T CODE Ann. § 62.101 (Vernon 1988). The general qualifications permitting jury service are set forth by statute in Texas Government Code § 62.102. That statute disqualifies a person to serve as a petit juror if he is "under indictment or other legal accusation of misdemeanor or felony theft, or any other felony." *Id.* § 62.102(8).

Respondent, Mack Trucks Inc. (Mack Trucks) concedes that Anderson was under indictment for a felony and does not argue that Palmer lacked due diligence in failing to discover that fact. Mack Trucks argues, however, that Palmer was in no way prejudiced or injured by the inclusion of Anderson on the jury. Relying on *De Leon v. Longoria*, 4 S.W.2d 222 (Tex. Civ. App.—San Antonio 1928, writ dismissed), and *Mendoza v. Varon*, 563 S.W.2d 646, 648 (Tex. Civ. App.—Dallas 1978, writ refused n.r.e.), Mack Trucks asserts that showing the absence of a qualification or

¹ TEX. R. CIV. P. 327(a) provides that when a motion for new trial is sought on the ground that a juror gave an erroneous or incorrect answer on voir dire examination, the court may grant a new trial if such erroneous or incorrect answer "be material, and if it reasonably appears from the evidence both on the hearing of the motion and the trial of the case and from the record as a whole that injury probably resulted to the complaining party." TEX. R. CIV. P. 327(a). Also pertinent is TEX. R. APP. P. 81(b)(1) which provides in part:

No judgment shall be reversed on appeal and a new trial ordered in any cause on the ground that the trial court has committed an error of law in the course of the trial, unless the appellate court shall be of the opinion that error complained of amounted to such a denial of the rights of the appellant as was reasonably calculated to cause, and probably did cause, rendition of an improper judgment in the case

² TEX. R. CIV. P. 292 provides:

A verdict may be rendered in any cause by the concurrence, as to each and all answers made, of the same ten members of an original jury of twelve, or of the same five members of an original of six. However, where as many as three jurors die or be disabled from sitting and there are only nine of the jurors remaining of an original jury of twelve, those remaining may render and return a verdict. If less than the original twelve or six jurors render a verdict, the verdict must be signed by each juror concurring therein.

Thus, only in the event that *three* jurors die or become disqualified to hear a case may nine jurors render a verdict.

establishing a ground for disqualification of a juror does not render a jury verdict invalid nor require the jury verdict to be set aside. The cases of *De Leon* and *Mendoza*, however, are factually distinguishable from the instant case. In *De Leon*, although the pending felony indictment and due diligence were stipulated by the parties, a sufficient number of jurors remained that could have rendered a binding verdict. In *Mendoza*, the parties discovered the pending felony indictment during the course of the trial and agreed to allow that juror to remain empanelled and participate in the verdict. Because of the agreement to continue, the parties waived their right to complain of the disqualification of the juror.

Palmer's plight with regard to the claim that Anderson was disqualified as a juror is distinct from either *De Leon* or *Mendoza*. First, the discovery of the pending felony indictment was not made until after the verdict was rendered. Second, the failure to discover the pending felony indictment was not due to Palmer's lack of diligence. Finally, if the rules and statutes governing the qualifications of jurors and the requisites of verdicts are to have any effect, litigants similarly situated to Palmer must be held to have suffered material injury as a matter of law. Therefore, because this is not an instance in which a verdict could have been rendered by less than ten jurors, as a matter of law Palmer was materially injured by the rendition of an unfavorable verdict by less than the requisite number of qualified jurors.

For the foregoing reasons, a majority of this court grants the application for writ of error, and without hearing oral argument, reverses the judgment of the court of appeals and remands this case to the trial court for new trial.

Notes & Questions

1. *Due diligence.* In *Palmer Well Services*, the juror's disqualification was not revealed until after trial—there was no strike for cause. The opinion requires the complaining party to be diligent in using voir dire to find disqualifications—there is no reversal without due diligence. What does due diligence require? The Austin Court of Appeals considered whether due diligence required following up with individual jurors on answers to written juror questionnaires. There the juror had answered “no” to a question about prior criminal accusations. The juror had been accused of writing bad checks, but she thought her answer was truthful because she thought no charges had been filed. The court concluded:¹

The justice system's use of devices to expedite the trial of cases should not become a snare for the advocates who practice within that system. We recognize that a tension exists between the justice system's desire to advance cases with dispatch and the obligation of counsel to use diligence to uncover facts that could lead to a potential juror's disqualification.

We believe that these competing interests may be balanced on a case-by-case basis. The legislature has established certain minimum qualifications for jurors. See TEX. GOV'T CODE Ann. § 62.102 (West 1998). The supreme court has held that “the rules and statutes governing the qualifications of jurors and the requisites of [jury] verdicts” are to be given effect and that a party who suffers an adverse 10-2 verdict returned by fewer than 10 qualified jurors has suffered material injury as a matter of law.

¹ *Priess v. Moritz*, 60 S.W.3d 285 (Tex. App.—Austin 2001), *rev'd on other grounds*, 121 S.W.3d 715 (Tex. 2003).

In the case before us, the question posed was unambiguous, understood by Garcia, and capable of being answered “yes” or “no.” The question did not inquire into the subjective state of mind of the potential jurors or address whether they could be fair and impartial, thus perhaps requiring follow-up questions. There is no reason to believe that had additional questions been asked, Garcia would have responded differently. As was within her discretion, the district court had restricted the time available to the parties for *voir dire*. Under these particular facts, we tip the balance in favor of Preiss and hold that because he was justified in relying on Garcia’s juror-questionnaire response and thus satisfied his duty of diligence, the district court abused her discretion in overruling his motion for new trial. To hold otherwise would undermine the utility of juror questionnaires and unduly extend trials by requiring counsel to unnecessarily inquire into the same information that had already been disclosed. We sustain Preiss’s first issue.

Because we have held that a juror who participated in the district-court verdict was not qualified to serve on the jury (a fact that was not discovered until after the verdict), that Preiss was diligent in discovering the facts forming the basis of the disqualification, and that Preiss was harmed as a matter of law when fewer than ten qualified jurors returned the verdict, we reverse the district-court judgment and remand this cause to that court for a new trial.

2. *Diligence required for peremptories.* Often lawyers will complain they were unable to properly exercise their peremptory strikes because the juror’s answers during *voir dire* were inaccurate, misleading, or simply failed to disclose information that would be important to the lawyer in deciding how to exercise the strikes. It is extremely difficult to get reversal of a judgment and a new trial based on a juror’s failure to disclose information. As one court of appeals said in refusing to reverse a judgment on these grounds:²

It is counsel’s responsibility to make sure that all members of the jury panel hear and understand the question asked. Baker offered no evidence to refute Mrs. Odom’s assertions that she misunderstood the question and that she was unaware of her husband’s claim for unemployment benefits. As the trier of fact, the trial court was entitled to believe her testimony. The trial court did not abuse its discretion by finding that no jury misconduct occurred. Even if Mrs. Odom’s failure to answer the question was misconduct, Baker has not shown that such misconduct was material or that it resulted in probable harm. “To show probable harm, there must be some indication in the record that the alleged misconduct most likely caused a juror to vote differently than he ‘would otherwise have done on one or more issues vital to the judgment.’” There is nothing in the record to indicate that Baker struck any of the jurors from the jury panel who responded to the question, or that it would have struck Mrs. Odom had she responded.

Voir dire questions addressed to the entire panel are particularly infirm as the basis for a reversal. Courts are prone to accept jurors’ excuses for not responding because, for example, they did not hear or understand the question.³ The case law requires that counsel ask direct questions, see that each juror hears and understands them,⁴ identify for the record jurors who indicate a need to respond (by

² Baker Marine Corp. v. Weatherby Engineering Co., 710 S.W.2d 690 (Tex. App.—Corpus Christi 1986, no writ).

³ See McCarthy Oil v. Cunningham, 255 S.W.2d 368, 372 (Tex. 1953).

⁴ O’Day v. Sakowitz Bros., 462 S.W.2d 119 (Tex. Civ. App.—Houston [1st Dist] 1971, writ ref’d n.r.e.); Missouri-Pacific Railroad Co. v. Cunningham, 515 S.W.2d 678 (Tex. Civ. App.—San Antonio 1974, no writ).

raising their hands), and follow up with specific questions.⁵ The upshot is that reversal based on questions addressed to the entire panel will be extremely rare.⁶

3. *Reaching a verdict.* In order to determine materiality or harm from the presence of a disqualified juror, the court must look at the verdict. Rule 292 allows non-unanimous verdicts in civil cases, with the same ten of twelve jurors concurring with each answer in the charge. Therefore, if the disqualified juror is one of 10 concurring in the verdict, the juror's presence is harmful. If the juror is one of 11 or 12 concurring in the verdict, there is no harm. Rule 292 also allows a unanimous verdict when any jurors have been discharged during the trial, but at least nine jurors remain. In such a case, the presence of disqualified juror would be harmful.

MERCK

v.

GARZA

277 S.W.3d 430

(Tex. App.—San Antonio 2008, pet. filed)

[Leonel Garza was 71 years old, with a history of heart problems. His physician prescribed Vioxx for pain and within a few weeks, Garza died from a heart attack. His family sued Merck, the manufacturer of Vioxx, and the jury returned a 10-2 verdict in the plaintiffs' favor. Merck appealed on numerous grounds, including juror misconduct.]

Opinion by SANDEE BRYAN MARION, JUSTICE.

* * *

Following the jury's verdict, Merck discovered that one of the jurors, Jose Manuel Rios, had received loans of money from Mrs. Garza. Mrs. Garza made seven interest-free loans to Rios, totaling \$12,700, over a six-year period beginning in July 2000. Voir dire in the underlying lawsuit commenced on January 24, 2006. The last loan, for \$2,500, was made in July 2005, just six months before trial. Also, following the verdict, Merck discovered several calls from Rios's cell phone to Mrs. Garza's telephone: one within days of Rios's receipt of the jury summons; another the night before jury selection; and four calls on the day after Merck filed a post-trial motion to take Rios's deposition. Rios voted with the 10-2 majority in rendering a verdict against Merck. On appeal, Merck complains the trial court erred in denying its motion for new trial based upon juror misconduct.

We review a trial court's ruling on a motion for new trial for an abuse of discretion. A new trial for jury misconduct is warranted if (1) the misconduct occurred, (2) it was material, and (3) probably caused injury. TEX.R. CIV. P. 327(a); *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 372 (Tex. 2000).

⁵ See, e.g., *Southern Truck Leasing Co. v. Manieri*, 325 S.W.2d 912 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.); *Ramirez v. Wood*, 577 S.W.2d 278 (Tex. Civ. App.—Corpus Christi 1978, no writ).

⁶ See, e.g., *Texaco, Inc. v. Haley*, 610 S.W.2d 224 (Tex. Civ. App.—Houston [14th Dist] 1980, no writ); *Liberty Cab Co. v. Green*, 262 S.W.2d 522 (Tex. Civ. App.—Beaumont 1953, writ ref'd n.r.e.). See, generally, MCDONALD, TEXAS CIVIL PRACTICE, §§ 21:15-21:19.

Here, Rios did not reveal his financial relationship with Mrs. Garza during voir dire. When asked on voir dire how he knew Mrs. Garza, he replied: “from school.”⁴ When asked if his knowing her would affect his ability to be fair and impartial, Rios responded in the negative. When asked if he would be uncomfortable seeing Mrs. Garza in the future if he decided Merck was not liable, Rios again responded in the negative. However, in his post-trial deposition, a copy of which was attached to Merck’s motion for new trial, Rios admitted he obtained interest-free loans from Mrs. Garza and he performed no services in exchange for the loans. The loans were always in the amount he requested. Rios’s bank statements obtained during post-trial discovery reveal he was in financial distress from December 21, 2005 to February 16, 2006, the time period during which he would have received his jury summons and participated in voir dire. On November 23, 2005, the Rioses received notice to vacate their house because they had not been able to secure financing to pay off the amount owed on the house. Rios admitted in his deposition that he often needed the loans to pay his bills. Rios explained that most of the telephone calls from his cell phone to Mrs. Garza were made by his wife.

Rios had a personal financial relationship with Mrs. Garza, but when asked in voir dire how he knew her, Rios merely replied “from school.” Also, Mrs. Garza’s eve of trial communications with either Rios or his wife were not revealed to Merck. This is clearly a relationship that was more than simply “from school.” Litigants are entitled to an unbiased jury. Rios’s less than forthright answer left a false impression about how he knew Mrs. Garza and the extent of their relationship. We conclude Rios’s failure to disclose his financial relationship with Mrs. Garza amounted to misconduct. Even assuming Rios’s silence regarding his financial relationship with Mrs. Garza was innocent, “it is impossible to say that injury to the defendant did not result from it.” Because Rios voted with the majority on the 10-2 verdict, Merck was harmed by this conduct. *See Tex. Milk Prod. Co. v. Birtcher*, 138 Tex. 178, 157 S.W.2d 633, 635 (1941) (“[T]he mind of the juror, without intending any harm, might well have been unconsciously turned in the direction of those who had thus consistently favored him upon the three occasions in question.”). Therefore, on this record, we must conclude the trial court erred in denying Merck’s motion for new trial.

Notes & Questions

Garza Backstory. In this case, the record revealed that Juror Rios also knew Merck’s local counsel’s wife “through school.” Moreover, Merck’s questioning of Juror Rios was quite limited, with no follow-up on the extent of his friendship with Mrs. Garza other than he knew her “from school.” Finally, Juror Rios affirmatively answered Merck’s leading questions indicating that he could be fair in the case despite his friendship with Mrs. Garza. Should this matter in the court’s analysis of possible juror misconduct? What is the basis for the court’s ruling? Did Juror Rios lie in voir dire? Or was he disqualified as a matter of law because of bias or prejudice due to his prior financial relationship with Mrs. Garza? Does it matter?

⁴ Both Rios and Mrs. Garza work for the Rio Grande City public schools.

GOLDEN EAGLE ARCHERY, INC.

v.

JACKSON

24 S.W.3d 362

(Tex. 2000)

JUSTICE GONZALES delivered the opinion of the Court, in which CHIEF JUSTICE PHILLIPS, JUSTICE HECHT, JUSTICE ENOCH, JUSTICE OWEN, JUSTICE BAKER, JUSTICE HANKINSON and JUSTICE O'NEILL joined.

The main issue in this case is whether procedural and evidentiary rules may constitutionally prohibit jurors from testifying post-verdict about statements made during deliberations, unless such statements concern outside influences. *See* TEX.R. CIV. P. 327(b); TEX.R. CIV. EVID. 606(b). Ronald Jackson obtained a verdict in a products liability case, but moved for a new trial on several grounds, including juror misconduct, juror bias, and the adequacy of the verdict. After a hearing, the trial court denied the motion. The court of appeals reversed and remanded for a new trial, holding that Texas Rule of Civil Procedure 327(b) denied Jackson his constitutional right to a fair and impartial jury trial because it prohibited him from proving jury misconduct during deliberations. Because we conclude that the rule is constitutional, we reverse the court of appeal's judgment and remand to that court to consider Jackson's other points of error that the court of appeals did not reach.

I

Jackson's wife bought him a Golden Eagle compound bow from a Wal-Mart store. When Jackson drew back the string the bow slipped out of his hand and a cable guard struck his eye, causing severe injuries. He sued Golden Eagle Archery, Inc., Coleman Company, Inc., and Wal-Mart, Inc. for negligence and products liability. The trial court dismissed the claims against Coleman and Wal-Mart, leaving Golden Eagle as the sole defendant. The jury found that Golden Eagle defectively marketed the bow but failed to find that the bow was defectively designed. The jury also found that Jackson was negligent, and attributed to him 45% of the responsibility for his injury. The jury found Jackson's damages to be approximately \$25,000 for medical care, \$2,500 for physical pain and mental anguish, \$2,500 for vision loss, \$0 for physical impairment other than vision loss, \$1,500 for disfigurement, and \$4,600 for past lost earnings. Ten of the twelve jurors signed the verdict. The trial court asked the ten if they agreed to the entire verdict, but neither party asked to poll the individual jurors. The trial court then rendered a judgment for approximately \$20,000 damages and \$6,700 prejudgment interest.

Jackson moved for a new trial. He challenged the legal and factual sufficiency of the evidence to support several of the jury's answers, contested the trial court's exclusion of certain evidence, and alleged that juror Barbara Maxwell concealed a bias during voir dire and that she and other jurors committed misconduct before and during formal deliberations. The motion attached affidavits from one of Jackson's attorneys and three jurors. Two of the affidavits were from the jurors who did not vote for the verdict, Donald Frederick and Janet Cline. A third was from the presiding juror, Shawn Lynch. The motion asserted that even though Texas Rule of Civil Procedure 327(b) prohibits consideration of juror affidavits to impeach the verdict, to ignore the evidence of misconduct during deliberations would unconstitutionally deny Jackson his right to a fair trial. Golden Eagle responded that both Rule 327(b) and Texas Rule of Civil Evidence 606(b) prohibit the court from considering the juror's affidavits, that Jackson's attorney's affidavit pri-

marily recounted hearsay statements about what some jurors told him, and that Jackson waived any juror-bias complaint because he did not conduct a sufficient voir dire.

At the hearing on his motion for new trial, Jackson offered the four affidavits as well as juror Frederick's testimony. The trial court admitted the testimony and affidavits without limitation "to the extent they contain appropriate evidentiary matters for consideration under Rule 327," and otherwise for the purposes of Jackson's bill of exceptions. At the hearing, Jackson's attorney read passages from the voir dire questioning of the jurors to demonstrate that Maxwell had hidden her bias against lawsuits of this kind. Jackson's attorney began voir dire with a lengthy question about whether any jurors were opposed to lawsuits, or could not be fair, or simply did not want to be on a jury.¹ A panel member raised his hand. Jackson's attorney told the juror he would ask him more questions later, then asked the panel, "Anyone else?" No one responded. Jackson's attorney continued:

Is there anybody here, by the same token, who would just say, "Look, I just can't do that. I can't—I don't believe in it. I just can't give a verdict that means that somebody is going to have to pay a lot of money"? Anybody here that—again, if you do, now is the time. You owe it to yourself and you owe it to these people and to the Court to be honest about it because we—all we can do is ask you about it, but you have to tell us. Anybody here that could not do that?

Again, no one responded. Finally, Jackson's attorney asked the panel if any of them had served on a jury. Maxwell answered that she had served on both a civil and a criminal case. She said the civil case involved a man's death in an accident. Jackson's attorney asked:

Q Did you—did you reach a verdict in that case?

A No.

Q Anything about that case that would keep you from being fair here?

A No, sir.

Frederick testified in his affidavit and at the hearing about a conversation he had with Maxwell during a trial recess. According to Frederick, Maxwell told him that previously she had served on a jury that awarded nothing for a wrongful death claim, which Frederick thought contradicted her voir dire statements, and further told him she did not believe in "awarding money in stuff like that," and that "we are the ones who end up paying for it."

¹ [W]e're in this lawsuit concerning what we contend to be an unreasonably dangerous product that injured an unknowing consumer. And Mr. Jackson has a right to be here. He has a right to ask a Court in this county to render him a fair verdict; but there are people that, for many reasons, of their own, again, are opposed to this type of lawsuit. They just don't think that this ought to be done, that they're opposed to lawsuits. They don't think they ought to happen, that they can't render verdicts in this case, these types of cases, et cetera. If that is the case—of course, you're entitled to your opinions; and I would fight anybody for you to have that opinion. But if that's the case, you should not be on this jury because we are operating within the—within the parameters of the law; and we are doing something that Mr. Jackson has every right to do and every right to request of a Jefferson County jury.

Is there anyone on this panel that right now would say, "Look, I just don't want to sit on this kind of jury. I need out of here. I don't want to be here. I can't be fair. These type of things bother me. I don't agree with the system, too much stress," whatever; that you want to tell the Judge, tell Judge Sheffield or me and [defense counsel] right now, "I don't want to be here"? If you do, I would ask you please to be honest and do that right now because our system depends on the integrity of our jury system and the integrity of jurors. Is there anyone here that says, "I can't do this"? Anyone?

The remaining juror testimony concerned events occurring after the jury retired to begin deliberating the evidence. Frederick, Cline, and Lynch all recalled that the jury bartered on the amounts to award for disfigurement and loss of vision, although their accounts contradict each other in the specifics. Frederick said that initially ten jurors had agreed to award \$2,500 for disfigurement and nine had agreed to award \$2,500 for loss of vision, but traded votes to award \$1,500 for disfigurement and \$2,500 for loss of vision. Lynch, however, claimed that initially ten jurors had agreed on \$1,500 for loss of vision, and eight agreed on \$2,500 for disfigurement, but ultimately decided to switch these amounts. Cline merely remembered that the jurors “traded off” on these answers.

Frederick also stated that during the jury’s discussion of damages, Maxwell told other jurors that “there is too much of this going on,” which he took to mean the filing of lawsuits. He said that she “held up a document which showed the name of Wal-Mart and said something to the effect that the plaintiff had probably already gotten a big settlement from Wal-Mart and did not need any more money out of this case.”

Frederick and Lynch additionally testified that during jury room deliberations Maxwell speculated whether Jackson had been drinking alcoholic beverages when the accident occurred. Finally, all three juror affidavits claim that Maxwell strongly argued against Jackson’s position throughout the jury room deliberations.

The trial court overruled Jackson’s motion for a new trial explaining its ruling in a letter to the parties. The court advised it would not sustain Jackson’s jury misconduct arguments because the jurors’ affidavits and testimony all pertained to jury deliberations and were therefore incompetent. The court also rejected Jackson’s complaints about undisclosed juror bias. Acknowledging that the same evidence offered to show jury misconduct “would certainly support a conclusion that the juror in question was biased against product liability suits” the court did not resolve whether Maxwell was in fact biased. Instead, the court concluded that Jackson’s attorney’s voir dire questioning of Maxwell was not specific enough to show she purposefully concealed any bias. Jackson did not request the trial court to make any fact findings about any of these issues.

On appeal, Jackson asserted eight points of error, any one of which, if sustained, would result in a new trial. His first six points challenged the sufficiency of the amount of the damages awarded, the weight of the evidence supporting the jury’s verdict, and the exclusion of certain evidence. The court of appeals addressed only Jackson’s last two points about jury misconduct and juror bias. A divided court of appeals reversed the trial court’s judgment and remanded the case for a new trial. The court expressed its concern about “the ever increasing lack of veracity of jurors on voir dire” The court held that because Rule 327(b) denied Jackson the only evidence available to prove misconduct, it denied him his right to a fair and impartial trial. It concluded that the evidence established Maxwell’s misconduct, and that the misconduct was material and caused harm. Golden Eagle petitioned this Court for review, and we granted the petition.

II

This case turns on whether, and to what extent, the jurors’ affidavits and testimony are admissible to show juror misconduct such as undisclosed bias. The problem of jury misconduct or bias presents difficult choices about how best to promote the jury system’s “purity and efficiency” under Article I, Section 15 of the Texas Constitution. On the one hand, it may be desirable in a particular case to rectify a verdict improperly decided because of juror bias or misconduct. A fair trial before an impartial tribunal is a basic requirement of due process. However, the goal of a trial by a jury free from bias or misconduct must be balanced against other legitimate interests.

Courts and commentators have noted several policy reasons why losing parties should not be allowed to conduct unfettered investigations into the jury's deliberations to try to prove such allegations, in essence putting the jury on trial.

First, jury deliberations must be kept private to encourage jurors to candidly discuss the case. A verdict is a collaborative effort requiring individuals from different backgrounds to reach a consensus. A juror should feel free to raise and consider an unpopular viewpoint. To discharge their duties effectively, jurors must be able to discuss the evidence and issues without fear that their deliberations will later be held up to public scrutiny. Second, there is a recognized need to protect jurors from post-trial harassment or tampering. The losing party has every incentive to try to get jurors to testify to defects in their deliberations. The winning party would likewise want to investigate in order to protect the judgment. Jury service will be less attractive if the litigants can harass a juror after trial, call a juror to testify about jury deliberations, and make juror deliberations public. Third, a disgruntled juror whose view did not prevail in the jury room would have an avenue for vindication by overturning the verdict. This is a significant concern in Texas civil trials, in which the verdict may be less than unanimous. Fourth is the need for finality. Litigation must end at some point if the public is to have any confidence in judgments.

* * *

III

Before we consider the constitutional questions, we first determine if, and to what extent, the rules bar the evidence Jackson offered in this case. Golden Eagle argues that Rule 327(b) precludes proof of all jury misconduct except misconduct resulting from outside influences. Both Rule 327(b) and Rule 606(b) state that jurors may not testify about statements or matters occurring during deliberations, but they may testify about outside influences. A number of cases and commentators have concluded that the Texas rules forbid all proof of jury misconduct unless it involves outside influences. Many of these cases rely on a statement in *Weaver v. Westchester Fire Insurance Company*:

[A] motion for new trial based on jury misconduct must be supported by a juror's affidavit alleging "outside influences" were brought to bear upon the jury.

739 S.W.2d 23, 24 (Tex.1987). However, our statement in *Weaver* was overly broad, because the rules' limitations on affidavits and testimony as grounds for a new trial expressly do not apply to non-jurors. A court may, of course, admit competent evidence of juror misconduct from any other source. See, e.g., *Mayo v. State*, 708 S.W.2d 854, 856 (Tex. Crim. App. 1986) (considering testimony of witness contacted by juror); *Fillinger v. Fuller*, 746 S.W.2d 506, 508 (Tex. App.—Texarkana 1988, no writ) (holding that rules do not require that affidavits be from jurors only); *Goode, supra*, § 606.2 & n. 42. There is no competent non-juror evidence of misconduct here, however. Jackson's attorney's affidavit relates in part to statements made in open court during voir dire; the remainder of the attorney's testimony is objected-to hearsay concerning what the jurors told him another juror said. See *Mitchell v. Southern Pac. Trans. Co.*, 955 S.W.2d 300, 322 (Tex. App.—San Antonio 1997, no writ) (holding non-juror's affidavit about what occurred in jury deliberations was hearsay). While we may consider the record of the voir dire, it alone contains no suggestion of jury misconduct.

We now turn to the juror testimony. Here three jurors testified as to (1) matters alleged to have occurred after the jury retired to begin deliberating the evidence and (2) a conversation alleged to have occurred during a trial break. We consider first the jurors' testimony about events occurring after retiring to begin deliberations.

* * *

Rule 327(b) operates to prohibit jurors from testifying about matters and statements occurring during deliberations. Harmonizing both sections, subsection (b) applies regardless of the grounds alleged for a new trial. Jackson suggests that Rule 327(a)'s provision for juror testimony would be meaningless if Rule 327(b) precludes a juror from testifying about statements made during deliberations. We disagree. Rule 327(b) does not preclude juror testimony about improper contacts with individuals outside the jury, nor juror testimony about matters or statements not "occurring during the course of the jury's deliberations." A juror may testify about jury misconduct provided it does not require delving into deliberations. For example, a juror could testify that another juror improperly viewed the scene of the events giving rise to the litigation. Likewise, a juror could testify about reasons for disqualifying another juror provided the testifying juror's knowledge was gained independent of deliberations. Juror Maxwell, had she been called to testify, could have been questioned about the facts of her prior jury service without violating Rule 327(b).

Despite the rules' prohibition against juror testimony about deliberations, both Rule 327(b) and Rule 606(b) allow jurors to testify about outside influences. Jackson argues that we should broadly interpret the exception for outside influences and consider the jurors' testimony because it falls within the exception in the rules for "outside influences." We have not defined what kind of "outside influence" a juror may testify about. . . .

Most Texas courts considering the question have held that the rules prevent a juror from testifying that the jury discussed improper matters during deliberation. We agree. The rules contemplate that an "outside influence" originates from sources other than the jurors themselves. Accordingly, here the accounts that some jurors speculated whether alcohol was involved in the accident and that Jackson may have received a settlement, or that the jurors traded answers on two issues, are all juror statements about matters occurring during their deliberations. They are not evidence of outside influences.

Jackson also argues that we should consider Maxwell herself an "outside influence" because she brought prejudices into the jury room. A number of cases have also rejected this argument, holding that the rules preclude evidence from a juror that another juror exhibited bias during jury deliberations. *See, e.g., United States v. Duzac*, 622 F.2d 911, 913 (5th Cir. 1980) (holding that the "proper time to discover such prejudices is when the jury is being selected and peremptory challenges are available to the attorneys"); *Soliz*, 779 S.W.2d at 933 (holding that evidence emanating from inside jury deliberations not admissible to show bias); *Baker Marine Corp. v. Weatherby Eng'g Co.*, 710 S.W.2d 690, 692-93 (Tex. App.—Corpus Christi 1986, no writ) (holding that juror testimony that fellow juror seemed biased during deliberation was inadmissible). Moreover, while failure to disclose bias is a form of juror misconduct that justifies a new trial under the appropriate circumstances, proof of a juror's failure to disclose bias must come from some source other than a fellow juror's testimony about deliberations.

In the same vein, Jackson contends that Maxwell was an outside influence because her bias statutorily disqualified her from serving on the jury. *See* TEX. GOV'T CODE § 62.105(4). However, Jackson did not timely raise statutory disqualification as a basis for new trial. *See* TEX. R. CIV. P. 329(b). But even if Jackson had timely raised it, Jackson must depend on proof other than matters prohibited by Rule 327(b) to establish statutory disqualification.

Finally, we consider the alleged conversation between Frederick and Maxwell during a trial break. Jackson argues that the conversation should not be considered "deliberations" and therefore barred by Rule 606(b) and Rule 327(b). We agree. The Texas Rules of Civil Procedure use

the term “deliberations” as meaning formal jury deliberations—when the jury weighs the evidence to arrive at a verdict.

* * *

Juror testimony is still permitted on the issues of juror misconduct, communications to the jury, and erroneous answers on voir dire, provided such testimony does not require delving into deliberations. TEX.R. CIV. P. 327(a), (b).

Consequently, we conclude that Rules 327(b) and 606(b) do not bar Frederick’s testimony about his conversation with Maxwell during a trial break. However, because this evidence does not conclusively establish that Maxwell prevaricated or concealed bias during voir dire, we do not agree that the trial court abused its discretion in failing to grant a new trial.

To warrant a new trial for jury misconduct, the movant must establish (1) that the misconduct occurred, (2) it was material, and (3) probably caused injury. Rule 327 provides that a trial court:

may grant a new trial if . . . the erroneous or incorrect answer on voir dire examination, be material, and if it reasonably appears from the evidence both on the hearing of the motion and the trial of the case and from the record as a whole that injury probably resulted to the complaining party.

TEX.R. CIV. P. 327(a). Whether misconduct occurred and caused injury is a question of fact for the trial court. Absent findings to the contrary, we must assume that the trial court made all findings in support of its decision to deny the motion for new trial. *See id.* Consequently, Jackson had the burden to conclusively establish that Maxwell committed jury misconduct, a burden he did not discharge.

Jackson contends that juror Frederick’s accounts of a casual conversation with Maxwell established that she prevaricated on voir dire and concealed her bias. Frederick’s affidavit in support of Jackson’s motion stated in part:

At a recess during the trial after the testimony of the witness Mulaney, the juror Barbara Maxwell told me that she had been on a previous jury in which a family was suing for the death of another family member. Her comment was that the jury she was on awarded nothing, and that she did not believe in “awarding money in stuff like that”. She also said, “We are the ones that end up paying for it.” I reminded her that she had been asked about that by [Jackson’s attorney] and she gave no answer.

Frederick elaborated on this incident as a witness called by Jackson at the hearing on the motion:

Q I believe [your affidavit refers] to something that took place while the case was still being tried; is that correct?

A Yes, sir, it is.

Q Did that take place on a break of the jury?

A Yes, sir, right outside the courtroom.

Q Now, this this—I believe that you told me that you and a female juror both like to drink coffee and you-all were the only coffee drinkers?

A Yes, sir.

Q Is that right?

A That's correct.

Q And during this break this female juror made some comments; is that right?

A That's correct, yes.

Q And what was it she said?

A It was during or right after the witness Mulaney, right after his testimony. She made the comment about it being boring. She said, "Of course, the whole thing is boring." And she said, "I don't believe in lawsuits like this." And I said, "Well," I said, "I think you was asked that during voir dire." And she didn't make any comment after that. She didn't answer me one way or the other.

Q Did she in the same conversation mention to you that she had served on a wrongful death jury?

A Yes, she did. She said she had—that someone was killed in an auto accident and the family had sued and she was on the jury and she said, "We didn't award them anything because I don't believe in things like that. I don't believe in lawsuits like that."

Q And you reminded her that she'd been asked that on voir dire?

A Right, right, I reminded her. I said—I think Mr. Smith had asked that very question on voir dire, if anybody did not believe in it to say so; and she made no comment about that.

Q Now, there was one other statement in this affidavit attributed to this juror and that is, "We are the ones that end up paying for it"?

A Yes, sir, she said that.

Q She made that comment at the same time?

A Right.

Jackson contends that Frederick's testimony established that Maxwell prevaricated on voir dire. When Jackson's attorney asked the panel about prior jury service, Maxwell volunteered she had served on juries in a criminal matter and a civil matter involving a death. The attorney asked if the jury had reached a verdict in the civil case, and Maxwell answered "no". The attorney did not ask Maxwell any further questions.

We conclude that Frederick's affidavit and testimony do not conclusively establish that Maxwell failed to answer Jackson's voir dire questions truthfully. The other party to the conversation, Maxwell, did not testify at the new trial hearing nor does the record indicate that anyone called her to testify. It is at least possible that Maxwell misunderstood the voir dire question about whether the jury had reached a verdict in the wrongful death case and thought it meant whether the jury had awarded any damages in the case. There is no other evidence in the record about this conversation or the facts of Maxwell's prior jury service. This evidence does not conclusively establish that Maxwell intentionally answered incorrectly.

Jackson also contends that Frederick's testimony demonstrates that Maxwell concealed bias during voir dire. If, as Frederick testified, Maxwell said that she did not believe in "things like that" or "lawsuits like that" or in awarding money in "stuff like that" or "things like that", all referring to the wrongful death action, or that she did not believe in "lawsuits like this", referring to the present case, did she mean lawsuits that she considered to be lacking in merit or all personal injury actions? The latter is a reasonable inference, but so is the former. Frederick's testimony, if credible, was inconclusive.

But the trial court may not have considered Frederick's testimony to have been credible. It was certainly hearsay, and while no objection was made to its admission to preclude the trial court from considering it, the trial court was nevertheless free on its own to disregard the testimony.

We conclude that the evidence about discussions prior to formal deliberations does not establish jury misconduct here, and Rules 606(b) and 327(b) prohibit considering the testimony about matters and statements occurring in the course of the jury's formal deliberations. We turn now to Jackson's constitutional arguments.

IV

* * *

We conclude that Rules 327(b) and 606(b) do not deprive the litigants of a fair trial under the Texas Constitution, nor do they fail to afford litigants due process. The rules are designed to balance concerns about the threat of jury misconduct with the threat from post-verdict juror investigation and impeachment of verdicts.

V

The trial court did not abuse its discretion by denying a new trial on grounds of jury misconduct because Jackson did not present competent evidence. Accordingly, we reverse the judgment of the court of appeals and remand the case to that court to consider Jackson's other issues that it did not reach.

JUSTICE HECHT filed a concurring opinion, in which JUSTICE OWEN joined, omitted.

Notes & Questions

Juror testimony in other contexts. Rules 327(b) and 606 specifically refer to juror testimony in a motion for new trial hearing that seeks to invalidate a jury verdict. But the Supreme Court applied the rules in another context—an action seeking to invalidate a settlement agreement. In *Ford v. Castillo*,¹ Ford settled a products liability case after the jury asked a question about the maximum amount that could be awarded. After the jury was discharged, jurors told Ford that the deliberations favored Ford, and that the presiding juror sent the question to the judge over the protest of other jurors. Ford sought to invalidate the settlement agreement for mutual mistake, and asked for discovery from the presiding juror to see if she had been subjected to outside influences. The Court held that juror testimony was discoverable, and said:

Once the trial court discharges them, jurors are not prohibited from discussing what took place during deliberations. But there is a difference between jurors choosing to talk about their service and their being compelled to do so in discovery depositions and court hearings. We believe the better policy, in general, is to conform discovery involving jurors to those matters permitted by Rule of Civil Procedure 327 and Rule of Evidence 606. That is, discovery involving jurors should ordinarily be limited to facts and evidence relevant to (1) whether any outside influence was improperly brought to bear upon any juror, and (2) rebuttal of a claim that a juror was not qualified to serve. And although we have determined that the trial court abused its discretion by entirely depriving Ford of discovery

¹ 279 S.W.3d 656 (Tex. 2009).

on the breach of contract claim, it remains within the trial court's discretion to reasonably control the limits of discovery and the manner in which the discovery may be obtained.

F. Constitutional Limits on the Exercise of Peremptory Challenges

GOODE
v.
SHOUKFEH
943 S.W.2d 441
(Tex. 1997)

OWEN, JUSTICE

In this case we review a determination that peremptory challenges were not based on race and consider whether two members of the venire should have been excused for cause. The trial court overruled Petitioner's objections to Respondent's peremptory challenges and also refused to excuse two veniremembers for cause. The court of appeals affirmed the trial court's take-nothing judgment. We affirm the judgment of the court of appeals.

I

James Emerson Goode died from complications following knee-replacement surgery performed at Methodist Hospital of Lubbock. Orlin Goode, as independent executor of the estate of James Goode, brought a medical malpractice suit against Mohammad F. Shoukfeh, a cardiologist who treated James Goode for a pulmonary embolism several days after his surgery. The case was tried to a jury, who failed to find Shoukfeh negligent. The trial court rendered judgment on the verdict, and Goode appealed. The court of appeals affirmed.

Goode's complaints on appeal focus on the selection of the jury. Following voir dire of the prospective jury panel, Shoukfeh peremptorily challenged six veniremembers. Goode, an African-American, objected to four of these challenges as impermissibly motivated by race under *Edmonson v. Leesville Concrete Co.* The challenged jurors included three African-Americans (jurors 7, 26, and 28) and one Hispanic (juror 9). During voir dire, Goode also alleged that Shoukfeh struck juror 9, a woman, for "gender based reasons." However, Goode has not asserted a claim of gender discrimination in this Court.

The trial court conducted a hearing on Goode's *Edmonson* challenge, which Goode's counsel began by stating that: (1) the four challenged jurors were members of a racial minority; (2) no sufficient, racially neutral reason justified these challenges; and (3) Goode would put forth evidence of his claims if the court so desired. The court declined this offer of evidence and instead called upon Shoukfeh's counsel to reply.

Responding to the court's request, Shoukfeh's counsel offered explanations for striking the four jurors in question. Juror 7 knew and had worked with either James Goode's widow or one of his children. Juror 26 was once a nurse at Methodist Hospital, and Shoukfeh's counsel expressed concern with "the reasons that she left employ there." The objection to juror 28 was that she made an "unequivocal statement . . . that she had a problem sitting in judgment" and also that she failed to disclose her prior jury service on her juror information card. Finally, juror 9 was a single mother of

four who listed her occupation as “house mother,” which counsel for Shoukfeh took to mean unemployed, and Shoukfeh’s counsel stated that he was concerned that her service on the jury “would affect her ability to take care of four children.” Shoukfeh’s counsel also claimed that juror 9 would be “more of a plaintiff’s juror” because she appeared to be a welfare recipient.

Following these explanations, Goode requested the opportunity to examine the voir dire notes of opposing counsel and argued that these notes should be admitted into evidence. Goode then requested the opportunity to call witnesses and eventually did call Jim Hund and Bill Moss, Shoukfeh’s attorneys. The questioning of Hund and Moss focused on their respective voir dire notes. When asked whether these notes reflected any reliance on race in striking the four jurors in question, Hund invoked the work-product privilege. Moss answered “no” in response to the same question. However, both Hund and Moss asserted the work-product privilege in refusing to disclose their notes to Goode. The trial court sustained the privilege claims and refused to conduct an in camera inspection of the notes. The court then overruled Goode’s Edmonson objections. Goode contends that following Shoukfeh’s peremptory challenges, no African-Americans or Hispanics were left on the panel, although the record indicates that two individuals with names of Hispanic origin remained.

Goode contends that Shoukfeh failed to offer race-neutral explanations for his peremptory challenges and that the trial court erred in denying access to counsel’s notes, which may have provided concrete evidence that the peremptory challenges were made with racially discriminatory intent.

II

A

Goode’s challenges to the strikes exercised by Shoukfeh arise under the United States Constitution, as interpreted in decisions of both the United States Supreme Court and this Court. In *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the Supreme Court held that a criminal defendant is denied equal protection under the United States Constitution if a prosecutor uses peremptory challenges to exclude members of the jury panel solely on the basis that their race is the same as the defendant’s.

The United States Supreme Court has extended the reach of *Batson* to other situations, most notably civil trials. See *Edmonson v. Leesville Concrete Co.* The Court held in *Edmonson* that race-based exclusion of civil jurors violates the equal protection rights of the excluded juror. . Other extensions of *Batson* include *J.E.B. v. Alabama* (prohibiting peremptory challenges based on sex); *Georgia v. McCollum* (prohibiting criminal defendant’s exercise of peremptory challenges in a racially discriminatory manner); *Powers v. Ohio* (prohibiting racially motivated peremptory challenges even when excluded jurors are of a different race than the defendant). As in *Edmonson*, these decisions reflect the Supreme Court’s recognition of the equal protection rights of both the excluded jurors and the litigants.

In the wake of *Edmonson*, this Court confirmed in *Powers v. Palacios*, 813 S.W.2d 489, 490-91 (Tex. 1991), that the use of a peremptory challenge to exclude a juror on the basis of race violates the equal protection rights of the excluded juror.

Decisions of the United States Supreme Court have delineated the substantive parameters that govern a *Batson/Edmonson* objection. In two criminal cases, *Hernandez v. New York*, and *Purkett v. Elem*, the Supreme Court explained the three-step process utilized in resolving a *Batson* objection to a peremptory challenge. At the first step of the process, the opponent of the peremptory challenge must establish a prima facie case of racial discrimination. There is no contention in this

case that Goode failed to make out a prima facie case, and accordingly, we need not consider that question. In any event, once a party offers a race-neutral explanation for the peremptory challenge and the trial court has ruled on the ultimate question of intentional discrimination, the preliminary issue of a prima facie case is moot.

During the second step of the process, the burden shifts to the party who has exercised the strike to come forward with a race-neutral explanation. *Purkett; Hernandez*. The United States Supreme Court clarified in *Purkett* the role of an appellate court at this stage of the inquiry. The appellate court does not consider at the second step whether the explanation is persuasive or even plausible. The issue for the trial court and the appellate court at this juncture is the facial validity of the explanation. *Purkett*. In evaluating whether the explanation offered is race-neutral, a court must determine whether the peremptory challenge violates the Equal Protection Clause as a matter of law, assuming the reasons for the peremptory challenge are true. *Hernandez*. A neutral explanation means that the challenge was based on something other than the juror's race. Unless a discriminatory intent is inherent in the explanation, the reason offered will be deemed race-neutral for purposes of the analysis at step two. Thus the inquiry does not terminate at step two even if the party opposing the peremptory challenge offers a "silly or superstitious" explanation, so long as that explanation is race-neutral. *Purkett*. It is not until the third step that the persuasiveness of the justification for the challenge becomes relevant. At the third step of the process, the trial court must determine if the party challenging the strike has proven purposeful racial discrimination, and the trial court may believe or not believe the explanation offered by the party who exercised the peremptory challenge. It is at this stage that implausible justifications for striking potential jurors "may (and probably will) be found [by the trial court] to be pretexts for purposeful discrimination." Nevertheless, the Supreme Court has emphasized that "the ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the [peremptory] strike."

The decisions of the United States Supreme Court also make clear that at the third step in the process, the issue of whether the race-neutral explanation should be believed is purely a question of fact for the trial court. In the federal system, the standard of review on appeal of a *Batson/Edmonson* challenge is whether the ruling was "clearly erroneous." Under that standard, a trial court's finding will not be disturbed unless the appellate court is "left with a definite and firm conviction that a mistake has been committed." The Texas Court of Criminal Appeals has also adopted the clearly erroneous standard of review for *Batson* issues.

Our civil jurisprudence in Texas has employed a deferential, but more familiar, "abuse of discretion" standard in reviewing many of the decisions made by a trial court. A trial court abuses its discretion if its decision "is arbitrary, unreasonable, and without reference to guiding principles." With regard to questions of fact, our abuse of discretion standard is similar, although not identical, to the federal standard of "clearly erroneous." "Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." In reviewing an *Edmonson* challenge, we will adhere to the abuse of discretion standard of review by which trial court rulings of this nature historically have been judged in civil cases in Texas.

However, a reviewing court will not be bound by a finding of no discrimination under either our abuse of discretion standard or the clearly erroneous standard if the justification offered for striking a potential juror is "simply too incredible to be accepted." *Hernandez*. For example, in the case of *Norris v. Alabama*, it was undisputed that no African-American had served on a grand or petit jury in the area "within the memory of witnesses who had lived there all their lives," *Hernandez*. Accordingly, the Supreme Court reversed the lower court's finding of no discrimination.

These are the parameters within which we analyze Goode's contentions that Shoukfeh gave no race-neutral explanation for his peremptory challenges and that the court of appeals applied the wrong standard in reviewing the trial court's ruling.

B

The issue of whether Goode established a prima facie case of racial discrimination is unchallenged. Accordingly, our review begins at the second step of the *Batson/Edmonson* analysis. We must determine whether, assuming the reasons Shoukfeh offered for striking the jurors at issue were true, the peremptory challenges violate the Equal Protection Clause as a matter of law. *Hernandez*. We conclude they do not. Shoukfeh's explanations were race-neutral.

Shoukfeh's counsel stated that he struck juror 7 because she knew a member of the Goode family and that he struck juror 26 because she was a former employee of Methodist Hospital. Counsel asserted that he struck juror 28 because she said she could not sit in judgment and because she made misstatements on her juror information card. Finally, Shoukfeh's counsel claimed that he struck juror 9 because she was an unmarried, unemployed, mother of four, apparently on welfare, whom he believed would be a "bad defense juror." Each of these reasons is facially race-neutral, and it cannot be said as a matter of law that there has been a violation of the Equal Protection Clause.

C

In proceeding to the third step of the *Edmonson* analysis, we address Goode's contention that the court of appeals failed to follow the *Batson/Edmonson* analytical framework. Goode argues that the court of appeals moved beyond the first step in the procedure only to improperly combine the second and third steps and summarily conclude that Shoukfeh's peremptory challenges were proper because the explanations offered by Shoukfeh's counsel were facially race-neutral. Goode contends that the court of appeals failed to determine whether the explanations were credible or were a mere pretext.

The United States Supreme Court has made it clear that whether the explanations offered for exercising peremptory challenges are credible is a fact question to be resolved by the trial court. That factual determination will be disturbed by this Court only upon a finding that the trial court abused its discretion.

Goode catalogues the factors upon which he relies to demonstrate that Shoukfeh's proffered reasons were pretextual. First, Goode contends that the pattern of Shoukfeh's peremptory strikes establishes an intent to purge the panel of racial minorities. Shoukfeh used six peremptory strikes. Three of these were used to remove African-Americans (jurors 7, 26, and 28), two were used to remove Anglos (jurors 13 and 22), and one to remove an Hispanic (juror 9). The remaining panel had no African-Americans.

Next, Goode argues that racial discrimination is established because Shoukfeh did not strike Anglo jurors who possessed characteristics similar to those of minority jurors whom he did strike. Shoukfeh struck juror 26, an African-American, allegedly because she was a former Methodist Hospital nurse, but he did not strike jurors 4 and 11, Anglos who were acquainted with one of Shoukfeh's partners, or juror 18, an Anglo who, like juror 26, was a former nurse at Methodist Hospital. Shoukfeh counters that this is irrelevant for two reasons. First, he did strike juror 13, an Anglo medical professor. Second, Shoukfeh's counsel contends that unlike juror 18, juror 26's relationship with Methodist Hospital was problematic because the reasons her employment ended concerned him.

Similarly, Goode asserts that Shoukfeh struck juror 7, an African-American, because juror 7 knew a member of the Goode family, but he did not strike juror 12, an Anglo who went to school with one of James Goode's children. Shoukfeh responds that this discrepancy is meaningless because he did strike juror 22, an Anglo who went to school with Orlin Goode.

Finally, Goode contends that Shoukfeh's failure to question three members of racial minorities before striking them (jurors 9, 26, and 28) indicates that Shoukfeh's proffered reasons for exercising these peremptory challenges were pretextual. Goode argues that the lack of questioning is particularly troubling with respect to juror 9, because the record indicates that the factors Shoukfeh identified for challenging her are ambiguous or inaccurate. Shoukfeh's stated reasons for striking juror 9 were that she was an unmarried, unemployed, mother of four, apparently on welfare, who was unlikely to be a good defense juror. Shoukfeh downplays the significance of his failure to question these minority jurors because he also did not question juror 13, one of the Anglos he peremptorily challenged.

The trial court resolved these factual disputes and chose to believe that Shoukfeh's counsel exercised the peremptory challenges for the reasons stated. The record before us does not indicate that the trial court's ruling was an abuse of its discretion. Neither this Court nor the court of appeals can second guess that decision. When, as in this case, a party offers a facially race-neutral explanation, a reviewing court cannot reweigh the evidence and reach a conclusion different from that of the trial court unless, as in *Norris*, the explanation offered is too incredible to be believed.

D

* * *

III

The court of appeals expressed some consternation that neither this Court nor the United States Supreme Court has offered guidance for the procedures to be followed in resolving *Edmonson* challenges to peremptory strikes.

Though the topic has long been the subject of judicial discourse in the criminal realm, neither of the aforementioned supreme courts expounded upon the procedures utilized in a civil proceeding. Indeed, this dearth of guidance spawned at least one jurist to wish that "some of these appellate . . . judges that turn in all this [stuff], would have to come down here and put up with it." We are generally reluctant to address issues that are not squarely before us. In this instance, however, we are persuaded that some guidance for future cases is appropriate.

Procedures for resolution of *Edmonson* challenges must adequately safeguard the constitutional rights arising under the Equal Protection Clause. However, those procedures should disrupt the trial of the case as little as reasonably possible. We are sensitive to concerns that *Edmonson* hearings will become "yet another complexity . . . to an increasingly Byzantine system of justice that devotes more and more of its energy to sideshows and less and less to the merits of the case." *Edmonson* (SCALIA, J., dissenting).

The United States Supreme Court has declined "to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges." *Batson*; see also *Powers v. Ohio* ("It remains for the trial courts to develop rules, without unnecessary disruption of the jury selection process, to permit legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice."). Instead, the Supreme Court has continued to allow lower courts to wrestle with *Batson/Edmonson* procedures.

The state and federal courts left with the responsibility of formulating *Batson/Edmonson* procedures have produced a fairly uneven set of procedures across the country. As the court of appeals noted below, the resulting “dearth” of consistent procedural guidance is the “predicament” of the *Edmonson* rule.

The Texas criminal jurisprudence on *Batson* procedures is much more developed than civil jurisprudence. In 1987, the Legislature included a provision in the Texas Code of Criminal Procedure incorporating *Batson*.³ Because no similar change was made to the Texas Rules of Civil Procedure, the courts of appeals have often looked to the state’s criminal jurisprudence for guidance in applying *Batson* and its progeny to civil matters.

The most general procedural issue concerns the overall nature and tenor of a *Batson/Edmonson* hearing. The court of appeals in this case concluded that such a hearing is an “adversarial, evidentiary hearing” in which “the procedural and evidentiary rules normally applicable to general civil matters apply with equal force.” Likewise, other Texas courts of appeals have repeatedly held that a *Batson/Edmonson* hearing should be adversarial. Other jurisdictions also require a full adversarial hearing. . . .

In contrast, courts in other jurisdictions have held that a full-blown, adversarial hearing is not required

Still other jurisdictions have specifically approved the use of *ex parte*, *in camera* proceedings in lieu of an adversarial hearing

Finally, many jurisdictions simply leave it to the trial courts to determine appropriate procedures for a given set of circumstances The trial court’s choice of procedure can then be reviewed for an abuse of discretion

Consideration of an *Edmonson* challenge is by its very nature adversarial. Further, this Court has often held that *ex parte*, *in camera* procedures are disfavored. Accordingly, at a minimum, the proceedings should be held in open court. Unsworn statements of counsel may be offered to explain why the peremptory challenges were exercised. The juror information cards may be made a part of the record by inclusion in the transcript or by a formal tender into evidence. To the extent that any party wishes to include other information or matters in the record, the rules of evidence and procedure apply.

The more difficult questions are the extent to which the party making the *Edmonson* challenge may rebut the explanations offered and whether there is a right of cross-examination. Some juris-

³ The statute provides:

Art. 35.261. Peremptory challenges based on race prohibited

(a) After the parties have delivered their lists to the clerk under Article 35.26 of this code and before the court has impanelled [sic] the jury, the defendant may request the court to dismiss the array and call a new array in the case. The Court shall grant the motion of a defendant for dismissal of the array if the court determines that the defendant is a member of an identifiable racial group, that the attorney representing the state exercised peremptory challenges for the purpose of excluding persons from the jury on the basis of their race, and that the defendant has offered evidence of relevant facts that tend to show that challenges made by the attorney representing the state were made for reasons based on race. If the defendant establishes a *prima facie* case, the burden then shifts to the attorney representing the state to give a racially neutral explanation for the challenges. The burden of persuasion remains with the defendant to establish purposeful discrimination.

(b) If the court determines that the attorney representing the state challenged prospective jurors on the basis of race, the court shall call a new array in the case. TEX. CODE CRIM. P. art. 35.261.

dictions have held that the movant does have the right to rebut the opponent's stated reason or otherwise prove that these reasons are a sham or a pretext Frequently, these jurisdictions note that the assignment to the movant of the ultimate burden of persuasion in a *Batson/Edmonson* hearing dictates that the movant have the last word However, other jurisdictions, recognizing that *Batson* itself does not mention this right, have refused to recognize it

Because the party challenging the peremptory strikes has the ultimate burden of persuasion, we conclude that the trial court should provide the party challenging the strikes under *Edmonson* a reasonable opportunity to rebut the race-neutral explanations.

Whether the movant should have the right to cross-examine the opponent's attorney in order to establish that the attorney's stated race-neutral explanations are pretextual is another much-debated issue. Some jurisdictions place the determination of the right to cross-examine within the discretion of the trial court Others deny the right on the grounds that "the disruption to a trial which could occur if an attorney in a case were called as a witness overbears any good which could be obtained by his testimony." * * * However, in *Salazar v. State*, the Texas Court of Criminal Appeals held that "[c]ross-examination [of the prosecutor] is necessary in a *Batson* hearing because once the State has met its burden of coming forward with neutral explanations for its peremptory strikes, the burden to show purposeful discrimination shifts back to the defendant to impeach or refute the neutral explanation or show that it is merely a pretext."

As with the opportunity to rebut, we conclude that the trial court should provide the party asserting objections under *Edmonson* with a reasonable opportunity to conduct cross-examination.

In sum, we acknowledge the importance of protecting equal protection rights, but also adhere to the Supreme Court's observations in *Batson* and its progeny that procedures for *Edmonson* hearings should prevent "unnecessary disruption" in the trial courts.

* * *

We affirm the judgment of the court of appeals.

DAVIS
v.
FISK ELECTRIC CO.
268 S.W.3d 508
(Tex. 2008)

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court, joined by JUSTICE HECHT, JUSTICE O'NEILL, JUSTICE WAINWRIGHT, JUSTICE MEDINA, JUSTICE GREEN, JUSTICE JOHNSON, and JUSTICE WILLETT.

Our rules generally permit each party in a civil action to exercise six peremptory strikes, which are challenges "made to a juror without assigning any reason therefor." TEX.R. CIV. P. 232, 233. But peremptories exercised for an improper reason, like race or gender, are unconstitutional. In this case, the African American petitioner asserted that he was terminated based on his race. The respondents used peremptory challenges at trial to exclude five of six African Americans from the venire but contend that their reasons for doing so had nothing to do with the potential jurors' race. The stated reasons, however, when viewed in conjunction with the 83% removal

rate and a comparative juror analysis, defy neutral explanation. Because we conclude that at least two of the strikes were based on race, we reverse in part the court of appeals' judgment and remand the case for a new trial.

I

Factual Background

Donald Davis, an African American, worked for Fisk Electric Company as an assistant project manager. In February 2001, Fisk was awarded the contract to install cables at Goodson Middle School, in the Cypress Fairbanks School District. After problems arose on the Goodson project, Fisk terminated Davis. Davis asserts that his termination was based on his race, as evidenced in part by his supervisor's alleged use of the "n-word" when planning Davis's termination.

Davis sued Fisk, claiming violations of 42 U.S.C. § 1981 and the Texas Labor Code. Fisk denied liability. The case was called for trial, and at the conclusion of voir dire, Fisk peremptorily struck six venire members, five of whom were African American and all of whom were minorities. Davis objected, citing *Batson v. Kentucky*, and the trial court, after a hearing, overruled the objection. The jury returned a defense verdict, the trial court signed a take-nothing judgment, and the court of appeals affirmed. We granted Davis's petition for review to apply the United States Supreme Court's most recent guidance on peremptory challenges that are allegedly race-based.

II

Batson Challenge

Davis raises a single complaint: that Fisk struck prospective jurors based on race, in violation of *Batson*. We last wrote on *Batson* challenges in *Goode v. Shoukfeh*, and in the intervening years, the landscape has evolved. Significantly, after the trial in this case, the Supreme Court decided *Miller-El v. Dretke*, 545 U.S. 231 (2005) ("*Miller-El II*"), a case in which the Court concluded that a habeas petitioner was entitled to relief because prosecutors in his criminal trial peremptorily struck potential jurors based on race. Although *Miller-El II* is a criminal case, it involves many of the same factors at issue here, and we examine it in some detail.

The case began with Miller-El's 1986 capital murder trial in a Texas trial court. During jury selection, prosecutors used peremptory strikes to remove ten African Americans from the venire. Miller-El objected that the strikes were improperly based on race, given the Dallas County District Attorney's Office's historic practice of excluding blacks from criminal juries. . . .

The trial court reviewed the voir dire record, and one of the prosecutors provided his rationale for previously unexplained strikes. The trial court deemed the explanations "completely credible [and] sufficient" and found there was "no purposeful discrimination." The Court of Criminal Appeals affirmed, stating that the voir dire record provided "ample support" for the prosecutor's race-neutral explanations.

Miller-El then sought habeas relief under 28 U.S.C. § 2254, again raising his *Batson* claim. . . . The Supreme Court again granted certiorari, and again reversed, this time on the merits of Miller-El's *Batson* challenge.

Noting that a *Batson* challenge requires an examination of " 'all relevant circumstances,' " the Court examined five factors in determining that jury selection in Miller-El's criminal trial violated the Equal Protection Clause. The first involved an analysis of the statistical data pertaining to the prosecution's peremptory strikes. The Court noted that prosecutors used peremptory strikes to

exclude 91% of the eligible African-American venire members—a percentage too great to attribute merely to “[h]appenstance.”

The Court then conducted a comparative juror analysis, noting that “[m]ore powerful than these bare statistics, however, are side-by-side comparisons of some black venire panelists who were struck and white panelists who were allowed to serve.” The Court explained that “[i]f a prosecutor’s proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson*’s third step.” In conducting this analysis, the Court rejected the notion that struck venire members must be compared only to jurors who are identical in all respects (save race): “A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not products of a set of cookie cutters.” The Court focused on the prosecution’s questioning of two black venire members—Billy Jean Fields and Joe Warren—and compared their answers to those given by whites. With regard to Fields, the Court determined that:

nonblack jurors whose remarks on rehabilitation could well have signaled a limit on their willingness to impose a death sentence were not questioned further and drew no objection, but the prosecution expressed apprehension about a black juror’s belief in the possibility of reformation even though he repeatedly stated his approval of the death penalty and testified that he could impose it according to state legal standards even when the alternative sentence of life imprisonment would give a defendant (like everyone else in the world) the opportunity to reform.

As for Warren, the Court noted that the State’s proffered reason—that Warren’s voir dire answers were inconsistent—seemed plausible, but “its plausibility [was] severely undercut by the prosecution’s failure to object to other panel members who expressed views much like Warren’s.” After comparing his answers to panel members who expressed similar conclusions, the Court decided that race was significant in determining who was challenged and who was not. The Court also rejected the court of appeals’ independent conclusion that Warren expressed general ambivalence about the death penalty, because the prosecutor’s stated reasons for striking Warren did not allude to any such ambivalence. The Court then noted:

[T]he rule in *Batson* provides an opportunity to the prosecutor to give the reason for striking the juror, and it requires the judge to assess the plausibility of that reason in light of all evidence with a bearing on it. It is true that peremptories are often the subjects of instinct, and it can sometimes be hard to say what the reason is. But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. ***A Batson challenge does not call for a mere exercise in thinking up any rational basis.*** If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false. The Court of Appeals’s and the dissent’s substitution of a reason for eliminating Warren does nothing to satisfy the prosecutors’ burden of stating a racially neutral explanation for their own actions.

A third factor the Court considered was the prosecution’s use of the jury shuffle, a practice unique to Texas, and one that the Court held could “indicate decisions probably based on race.” The *Milner-El* jury was shuffled some eight times, at the request of both the prosecution (three times) and the defense (five times). The Court noted that “ ‘the prosecution’s decision to seek a jury shuffle when a predominant number of African-Americans were seated in the front of the panel, along

along with its decision to delay a formal objection to the defense's shuffle until after the racial composition was revealed, raise a suspicion that the State sought to exclude African-Americans from the jury.' ” This was amplified by testimony that the Dallas County District Attorney's Office had previously admitted to using the shuffle to manipulate the racial makeup of juries. The Court concluded:

The State notes in its brief that there might be racially neutral reasons for shuffling the jury, and we suppose there might be. But no racially neutral reason has ever been offered in this case, and nothing stops the suspicion of discriminatory intent from rising to an inference.

A fourth factor the Court relied on was the “contrasting voir dire questions posed respectively to black and nonblack panel members.” Prosecutors gave black panel members a vivid, graphic account of the death penalty before asking about the member's feelings on the subject, while it gave nonblacks a “bland description.” While the State conceded that disparate questioning occurred, it asserted that the disparity was based on panel members' differing views of the death penalty—those who expressed ambivalence received the “graphic script,” while those who did not received the watered-down version. Based on the record, however, the Court concluded that black venire members were more likely to receive the graphic script regardless of their expressions of ambivalence, and the State's explanation failed for four of the eight black panel members who received that script. Additionally, four out of five nonblacks who were given the graphic script were not those who had expressed ambivalence but were instead unambiguously in favor of, or vehemently opposed to, the death penalty. The Court also noted that the State disparately used manipulative questioning regarding minimum punishments. The State conceded that practice but argued that it was premised on opposition to or ambivalence regarding the death penalty, rather than race. The Court disagreed, noting that “only 27% of nonblacks questioned on the subject who expressed these views were subjected to the trick question, as against 100% of black members. Once again, the implication of race in the prosecutors' choice of questioning cannot be explained away.”

Finally, the Court considered the Dallas County District Attorney's Office's history of “systematically excluding blacks from juries.” Specifically, the defense presented evidence that the DA's office had adopted a formal policy to exclude minorities from jury service, and that policy was summarized in a “manual entitled ‘Jury Selection in a Criminal Case’ [sometimes known as the Sparling Manual]” that was distributed to prosecutors. Although the manual was written in 1968, the evidence showed it was available to at least one of Miller-El's prosecutors. The Court also observed that prosecutors had noted the race of each prospective juror on their juror cards.

Considering the totality of the circumstances, the Court held:

It blinks reality to deny that the State struck Fields and Warren, included in [the] 91% [of black venire members who were struck], because they were black. The strikes correlate with no fact as well as they correlate with race, and they occurred during a selection infected by shuffling and disparate questioning that race explains better than any race-neutral reason advanced by the State. The State's pretextual positions confirm Miller-El's claim, and the prosecutors' own notes proclaim that the Sparling Manual's emphasis on race was on their minds when they considered every potential juror.

Holding that the state court's conclusion about the prosecutors' strikes of those two jurors was wrong “to a clear and convincing degree,” the Court reversed the court of appeals' judgment and

remanded the case for entry of judgment for Miller-El, “together with orders of appropriate relief.”

* * *

V

Analysis

A

Statistical Disparity

Here, as in *Miller-El*, the statistics are “remarkable.” *Miller-El II*, (noting that prosecutors used peremptory strikes to exclude 91% of eligible black venire members). Jurors were chosen from the first twenty-eight members of the venire. At the conclusion of the parties’ questioning, four panelists were struck for cause or by agreement, and the parties then submitted their peremptory challenges. Fisk struck five of the six African Americans (83%) but only one (5.5%) of the eligible nonblack prospective jurors, and “[h]appenstance is unlikely to produce this disparity.”

B

Comparative Juror Analysis

Beyond the raw statistics, a comparative juror analysis is similarly troubling. Fisk struck Juror No. 12, Patrick Daigle, and provided the following explanation:

Of all the jurors, juror No. 12, who initially I thought would be good a good [sic] juror for us, reacted that corporations should be punished with the use of punitive damages. He was the most clear on that subject. In addition, I attempted to draw out of him a discussion from him about his involvement in this management-employee committee thing at Continental, something that would make me think he recognized that many of the discrimination claims that they deal with—I know he said he didn’t have any personal involvement with race discrimination cases; but he seemed to be too ready to believe that Continental has discriminatory employment practices; which, you know, I could be totally wrong about this, Your Honor; but my belief is that I tend to have a high degree of skepticism about that, about Continental and the fact that he didn’t have that same skepticism caused me to believe they we should exercise a challenge on him.

The trial court then immediately overruled Davis’s *Batson* objection to the strike.

Davis’s counsel conducted the only questioning on punitive damages, and, as is evident from the colloquy, Daigle never verbally responded to the questions about punitive damages. Fisk nonetheless asserted in the trial court that Daigle nonverbally “reacted that corporations should be punished with the use of punitive damages.” Fisk did not elaborate on the type of nonverbal conduct that Daigle manifested, other than to say Daigle was “most clear” on the subject. Davis’s counsel objected that “the nonverbal cues that Defense Counsel has cited throughout are not supported by the record” and also noted that Fisk never attempted to question Daigle about any alleged “nonverbal cues.”

Last term, the Supreme Court decided a *Batson* case involving nonverbal conduct. In *Snyder v. Louisiana*, the Court held that the prosecution improperly struck a potential juror. The prosecution gave two reasons for its strike, one of which was that Brooks, the potential juror, looked “very nervous” throughout the questioning. The Court noted that the “record [did] not show that the trial judge actually made a determination concerning Mr. Brooks’ demeanor.” Absent such a finding, the Court concluded that it could not “presume that the trial judge credited the prosecu-

tor's assertion that Mr. Brooks was nervous." Thus, while "deference [to the trial court] is especially appropriate where a trial judge has made a finding that an attorney credibly relied on demeanor in exercising a strike," here there was no such finding, and we cannot presume the trial court credited Fisk's explanation.

Additionally, the lack of further detail about Daigle's purported reaction, Fisk's failure to question Daigle about it, and the failure to strike a white juror who expressed verbally what Daigle purportedly did nonverbally, give us pause. Peremptory strikes may legitimately be based on nonverbal conduct, but permitting strikes based on an assertion that nefarious conduct "happened," without identifying its nature and without any additional record support, would strip *Batson* of meaning. Opposing counsel must have an opportunity to rebut the accusation, the trial court must be enabled to decide whether the charge accurately describes what happened during voir dire, and the appellate court must have a record on which to base its analysis. Verification of the occurrence may come from the bench if the court observed it; it may be proved by the juror's acknowledgement; or, it may be otherwise borne out by the record as, for example, by the detailed explanations of counsel. We do not think *Snyder* excludes sources of verification other than an explicit trial court finding. The point, instead, is that the communication be proved and reflected in an appellate record, and counsel must, therefore, identify that conduct with some specificity.

Nonverbal conduct or demeanor, often elusive and always subject to interpretation, may well mask a race-based strike. For that reason, trial courts must carefully examine such rationales. Our sister court which, as we have noted, has a much more developed *Batson* jurisprudence than we do, *see Goode*, 943 S.W.2d at 450,⁹ has held that a prosecutor's statements that he didn't like a venireman's "attitude, his demeanor" were pretextual when his verbal answers failed to show hostility, and the prosecutor "never mentioned any specific body language, or any other non-verbal actions which led him to believe the venireman was biased against his case." *Batson* requires a "clear and reasonably specific explanation" of the legitimate reasons for a strike, and merely stating that a juror nonverbally "reacted" is insufficient.

Fisk's failure to question Daigle about his purported reaction also suggests that Daigle's reaction had little to do with Fisk's strike. Moreover, Fisk did not strike Vinzant, a white juror who stated that he would not have a problem awarding punitive damages. These factors suggest that the stated reason-Daigle's "reaction" to punitive damages—was pretextual.

Thus, we turn to the remaining reason offered for striking Daigle: that he seemed too eager to believe that his employer, Continental Airlines, discriminated against employees and that he did not express sufficient skepticism about discrimination claims. Daigle, a seventeen-year employee of Continental, listed his occupation as "customer service manager"

The court of appeals held that Fisk's explanation for striking Daigle sufficed, because even though Daigle stated he could be fair, "counsel is not required to take all voir dire answers at face value." While that is true, there is nothing in the voir dire record to support counsel's explanation that Daigle believed Continental discriminated against employees—indeed, Daigle, a longtime employee, stated that leaving his old job for Continental was "a better move for [him]," and the only thing he said about race discrimination cases was that he had never been involved with one. At best, the record shows that Daigle was neutral about employment discrimination issues, providing no support for Fisk's asserted reason for striking him. Even if Fisk were concerned about Daigle's description of his aide-of-counsel position as "like having a union without the union" (a

⁹ [footnote omitted]

concern that was never expressed at trial), it does not explain why Fisk failed to strike (or even question) juror 27, a white woman, about her membership in a union.

* * *

VI

Conclusion

Despite its laudable goal, *Batson* has been difficult to enforce. In *Miller-El II*, decided a year after this case was tried, the Supreme Court noted that *Batson*'s "individualized focus came with a weakness of its own owing to its very emphasis on the particular reasons a prosecutor might give."

If any facially neutral reason sufficed to answer a *Batson* challenge, then *Batson* would not amount to much more than *Swain*. Some stated reasons are false, and although some false reasons are shown up within the four corners of a given case, sometimes a court may not be sure unless it looks beyond the case at hand. Hence, *Batson*'s explanation that a defendant may rely on 'all relevant circumstances' to raise an inference of purposeful discrimination.

Miller-El I's "totality of the circumstances" analysis places a heavy burden on trial courts, and we acknowledge that some of the factors that Court examined—most especially the comparative juror analysis—are perhaps more easily reviewed on appeal, with the benefit of a transcript from which such comparisons may most accurately be drawn. But without *Miller-El II*'s searching inquiry into the basis of the challenged strikes, *Batson* would become a "mere exercise in thinking up any rational basis."

Unlike *Miller-El II*, there is no evidence here of a historical pattern of excluding blacks from juries. But *Miller-El II* made it clear that the five factors it considered were neither exhaustive nor mandatory; courts must consider "all relevant circumstances" when reviewing *Batson* challenges. And here, the relevant circumstances include many of those pertinent in *Miller-El II*, including a statistical disparity and unequal treatment of comparable jurors.

We acknowledge that peremptory strikes, often based on instinct rather than reason, can be difficult to justify. The trial lawyer's failure to do so here does not suggest personal racial animosity on his part. A zealous advocate will seek jurors favorably inclined to his client's position, and race may even serve as a rough proxy for partiality. But whatever the strategic advantages of that practice, the Constitution forbids it.

The concurrence suggests that we ascribe sinister motives to Fisk's counsel. The question presented, however, is not whether this particular advocate harbors ill will, but whether the record explains, on neutral grounds, a statistically significant exclusion of black jurors. It is not enough, under the Supreme Court precedent we examine here, that the lawyer be pure of heart. We assume that he is. Our holding depends not on the personal sentiments of the advocate but on the state of the record. *Miller-El II* and *Snyder* emphasize that *Batson*'s promise cannot be fulfilled if its requirements may be satisfied merely by ticking off a race-neutral explanation from a checklist.

After examining the totality of the circumstances, we conclude that race explains Fisk's strikes of Daigle and Pickett better than any other reason, and the trial court abused its discretion

in failing to sustain Davis's *Batson* challenge. We reverse in part¹⁵ the court of appeals' judgment and remand the case to the trial court for a new trial. TEX.R.APP. P. 60.2(d).

JUSTICE BRISTER, joined by JUSTICE MEDINA as to Part III, concurring.

I disagree with the Court's conclusion that defense counsel's peremptory strikes were racially motivated. Neutral reasons were given for them but were not properly preserved, in part because the rules changed during this appeal. The difference between not having neutral reasons and merely not preserving them is no technicality; charges of discrimination (like discrimination itself) can have far-reaching effects, including use in future trials.

* * *

I agree that peremptory strikes provide an opportunity for discrimination. But they also provide an opportunity to accuse an opponent of discrimination and get a new trial if the first one turns out badly. As these strikes have outlived their original purpose, it is time we did something about them. Rather than using this case as an opportunity to disparage one attorney, I would use it as an opportunity to discontinue a practice inherently based on stereotypes. As the Court misses that opportunity, I concur only in the judgment.

* * *

II. Scrutinizing Jurors' Shrugs

The Court also goes overboard by prohibiting peremptory strikes based on a juror's nonverbal conduct unless (1) the conduct is identified on the record "with some specificity," and (2) the juror is questioned about it. Neither has ever been required by any constitutional or procedural rule, and both exalt appellate-level clarity over trial-level reality.

* * *

The Court's new requirements are completely impractical. Most of us recognize surprise, disgust, or eagerness when we see it, but giving a "clear and reasonably specific" explanation of which muscles twitched is another matter. Yet the Court says attorneys must publicly announce any reaction they saw on the record, question the juror about it, allow opposing counsel to rebut, and obtain a ruling that the conduct occurred. This sounds like a good way to antagonize jurors; any attorney who complies can expect exchanges like the following:

Counsel: Juror No. 7, I notice that you are yawning. Why is that?

Juror No. 7: I wasn't yawning.

Counsel: Judge, I want the record to reflect that Juror No. 7 was yawning, even though he denies it.

Opposing Counsel: No he was not.

Counsel: Yes he was. Judge, may I have a ruling?

Court: I wasn't watching him, so your request is denied. And now you can't strike Juror No. 7, even though you have thoroughly embarrassed him.

This will never work. If the Court wants to prohibit peremptory strikes based on nonverbal conduct, it should say so directly rather than imposing an impractical test that does so indirectly.

¹⁵ In the trial court, Davis unsuccessfully moved for sanctions against Fisk, and the court of appeals affirmed the trial court's order. Davis does not challenge that portion of the court of appeals' judgment.

III. Ending Peremptory Strikes

Yet the Court's opinion does not go far enough to ensure every American citizen the opportunity to sit on a jury.

If the composition of a jury is a matter of pure chance, neither litigants nor jurors can complain that the system has treated them unfairly. But peremptory strikes allow litigants to change the complexion of a jury, which is why they provoke charges and suspicions of discrimination. The only way to reduce or eliminate discrimination and suspicion is to reduce or eliminate these strikes.

Texas allows more peremptory strikes than most of our sister states. Twenty years after *Batson*, it is now clear we cannot always detect how many of those strikes are racially motivated, no matter how hard we try. Nor can we guarantee equal protection if we focus only on cases like this one where “too many” minority jurors were struck. In the meantime, we are doing neither the jury system nor racial harmony any favors by encouraging lawyers to accuse each other of racial motives so they can get a second trial if they lose the first one.

Haphazard success in removing race from jury selection might be the best we could expect if peremptory strikes were absolutely necessary for a fair and impartial jury. But they are not. Peremptory strikes were an important part of older jury systems in which panels were not randomly selected. Each side in ancient Rome could strike 50 jurors because each side got to propose 100 jurors for the panel. Parties needed peremptory strikes in early Texas because potential jurors were hand-picked by the local sheriff, and later by jury commissioners, and tended to reflect a limited part of the community.

But today jury venires are randomly selected, and anyone who is related to, interested in, or biased against a party or case is disqualified. It is hard to see why litigants need to remove *half* of the *unbiased* jurors to get an impartial jury—especially when peremptories are based mostly on instinct, intuition, and inference. This is especially true in civil cases, as a fractious juror or two cannot keep the rest from rendering a verdict.

There is no constitutional right to peremptory strikes. Indeed, recent cases suggest the opposite may be true, as several justices have already concluded. . . .

A majority of this Court could curb peremptory strikes today, as they stem entirely from our Rules of Civil Procedure.³³ The reason we hesitate to do so is that lawyers are tenaciously protective of them, believing they can use these strikes to mold a favorable jury. Study after study has shown this belief to be unfounded. But even if it were true, that reason is not enough: “Peremptory strikes are not intended . . . to permit a party to ‘select’ a favorable jury.”

All these problems—discriminating against minorities, disrupting trial, and discarding perfectly good jurors—are particularly acute in Texas. Whether because of the state's diversity, the generous allowance of peremptory strikes, or something else, *Batson* challenges are far more frequent here than anywhere else. A recent Westlaw search for state court cases citing to *Batson* yields:

- 4 cases from Idaho,
- 17 from Alaska,
- 43 from Colorado,
- 58 from Oklahoma.

- 74 from Minnesota,
- 90 from Florida,
- 181 from Pennsylvania,
- 342 from Illinois,
- 676 from California, and
- 1,364 cases from Texas.

More than any other state, we in Texas must consider whether peremptory strikes are worth the price they impose.

G. Jury Argument

Read Rules 266, 269.

LIVING CENTERS OF TEXAS, INC.

v.

PEÑALVER

2008 WL 204502

(Tex. 2008)

PER CURIAM.

Living Centers of Texas, Inc., defendant in a wrongful death suit, stipulated liability. During final argument of the trial on damages, plaintiff's counsel compared Living Centers' lawyer's attempts to minimize damages to a World War II German program in which elderly and infirm persons were used for medical experimentation and killed. Concluding that the jury argument was improper and incurable, we reverse and remand for a new trial.

Belia Peñalver moved into a nursing home in 1997. In September 2000, a nursing home employee dropped Belia, who was then 90 years old, while transferring her from a wheelchair to a bed. She died the next day from injuries suffered in the incident. Belia's sons sued Living Centers of Texas, Inc., its administrator, and its director of nursing (collectively, "Living Centers") seeking wrongful death and survivor damages.

A first jury trial resulted in judgment in favor of the Peñalvers for \$356,000 actual and \$362,000 punitive damages, reduced from \$500,000 when the trial court applied the statutory cap on punitive damages. The court of appeals reversed and remanded for a new trial because of improperly admitted evidence of previous falls at the nursing home. Before the second trial, Living Centers stipulated that its negligence proximately caused Belia's injuries and death, so the only issue at trial was the amount of damages.

During closing argument at the second trial, the Peñalvers' counsel referred to Germany's World War II T-4 Project and defense counsel's trial conduct:

In World War II the Germans had a project called T-Four. You probably read about it in history books.

But what they did is they took all the people who they thought were inferior in society, primarily older people, impaired people, and they used them for experiments. They killed them. Over 400,000. That culture 60 years ago didn't consider the impaired and elderly valuable.

Our culture has never looked at that. We went to war to stop that, the biggest war in the history of the world to stop those atrocities that were going on. And we're not at the point where we're tolerant today, as the defense would like you to be, of this wrongful death.

* * *

But [the defense lawyers'] job here is to convince you that the damages are insignificant to minimize the damages. How have they done that? At the very beginning in opening statement [they] said they only have two defenses, if you want to call it defense. She is old and she is impaired.

* * *

So it really goes back to that, the initial issue, where are we as a society? Have we regressed to 1944, 1945 Germany? Have we regressed or gone ahead so far now, 60 years later now, we have a different attitude, that a wrongful death of an elderly or impaired person is not every bit as significant and has every bit as significant damages as the wrongful death of anyone else?

Living Center's counsel did not object to the argument, but attempted to counter it by arguing that "there are no Nazis in this courtroom" and "I've never been accused of being a Nazi before."

The jury awarded almost three times the actual damages awarded in the first trial. The second jury awarded actual damages of \$510,000 to Belia's estate and \$300,000 to each of her two sons—a total of \$1,110,000. Living Centers filed a motion for new trial based, in part, on allegations that the Peñalvers' jury argument as to the T-4 Project was improper, incurable, and harmful. The trial court denied the motion for new trial.

Living Centers appealed. The court of appeals affirmed, with one justice dissenting. 217 S.W.3d 44. In its petition for review, Living Centers continues to complain of the final jury argument which criticized Living Centers' counsel and referenced Germany's World War II T-4 Project.

Error as to improper jury argument must ordinarily be preserved by a timely objection which is overruled. The complaining party must not have invited or provoked the improper argument. *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 839 (1979). Typically, retraction of the argument or instruction from the court can cure any probable harm, but in rare instances the probable harm or prejudice cannot be cured. In such instances the argument is incurable and complaint about the argument may be made even though objection was not timely made. *See* TEX. R. CIV. P. 324(b)(5);. To prevail on a claim that improper argument was incurable, the complaining party generally must show that the argument by its nature, degree, and extent constituted such error that an instruction from the court or retraction of the argument could not remove its effects. The test is the amount of harm from the argument:

whether the argument, considered in its proper setting, was reasonably calculated to cause such prejudice to the opposing litigant that a withdrawal by counsel or an instruction by the court, or both, could not eliminate the probability that it resulted in an improper verdict.

But jury argument that strikes at the appearance of and the actual impartiality, equality, and fairness of justice rendered by courts is incurably harmful not only because of its harm to the litigants involved, but also because of its capacity to damage the judicial system. Such argument is not subject to the general harmless error analysis.

In *Reese*, this Court discussed different types of jury argument that constitute incurable error. For example, appeals to racial prejudice adversely affect the fairness and equality of justice rendered by courts because they improperly induce consideration of a party's race to be used as a factor in the jury's decision. Unsupported, extreme, and personal attacks on opposing parties and witnesses can similarly compromise the basic premise that a trial provides impartial, equal justice. Further, accusing the opposing party of manipulating a witness, without evidence of witness tampering, can be incurable, harmful argument.

The serious effects of arguments not based on evidence or invited by opposing counsel, such as the one under consideration here, are recognized in our Rules of Civil Procedure. Rule 269 provides that during final arguments, "[m]ere personal criticism by counsel upon each other shall be avoided, and when indulged in shall be promptly corrected as a contempt of court." TEX. R. CIV. P. 269(e). Trial courts are not required to wait for objections before correcting improper argument, but should guard against such conduct and correct it *sua sponte*. TEX. R. CIV. P. 269(g).

Incurable argument is, however, rare. Not all personally critical comments concerning opposing counsel are incurable. But arguments that strike at the courts' impartiality, equality, and fairness inflict damage beyond the parties and the individual case under consideration if not corrected. Such arguments damage the judicial system itself by impairing the confidence which our citizens have in the system, and courts countenance very little tolerance of such arguments. See *Reese*, 584 S.W.2d at 840 ("The injection of new and inflammatory matters into the case through argument has in exceptional instances been regarded as incurable by an instruction . . . [A]n affront to the court and the equality which it must portray will be dealt with harshly.").

The argument which Living Centers complains of struck at Living Centers and its trial counsel by comparing trial counsel to perpetrators of the T-4 Project atrocities. The T-4 Project was brought up only once during trial when, upon inquiry by the Peñalvers' counsel, a witness testified that he was not familiar with the program. There was no evidence that Living Centers either intended to injure or kill Belia or that Living Centers performed medical experiments on her. The extreme final argument cannot be said to have been invited by the actions of Living Centers' counsel in pointing out what the evidence clearly showed: Belia was elderly and had certain impairments that accompanied the aging process. The Peñalvers' improper comments were not inadvertent, and the jury argument was designed to incite passions of the jury and turn the jurors against defense counsel for doing what lawyers are ethically bound to do: advocate clients' interests within the bounds of law. Counsel for Living Centers was entitled to urge a smaller damages amount than the plaintiffs sought without being painted as modern-day equivalents of T-4 Project operators who experimented on and purposefully killed humans.

The argument struck at the integrity of the courts by utilizing an argument that was improper, unsupported, and uninvited. Failure to deal harshly with this type of argument can only lead to its emulation and the entire judicial system will suffer as a result.

Our analysis and conclusion is not altered because it was Living Centers' counsel who first used the term "Nazi." The right to complain of improper, incurable jury argument is not lost by counsel's attempting to respond to and reduce the effect of such argument. *See* TEX. R. CIV. P. 269(e). We agree with the dissenting justice in the court of appeals: the argument complained of struck at the heart of the jury trial system, was designed to turn the jury against opposing counsel and his clients, and was incurable. The judgment of the court of appeals is reversed, and the case is remanded for a new trial.

In *General Motors Corporation v. Iracheta*, 161 S.W.3d 462 (Tex. 2005), the supreme court sustained General Motors' contention that there was no evidence of defect. The court reversed and rendered judgment that the plaintiff take nothing. The court then issued the following condemnation of the plaintiff's spontaneous address to the jury and held that a prompt and timely objection was not necessary:

We are obliged by one highly unusual occurrence during summation to add this additional note. Rising to begin his argument to the jury, Iracheta's counsel stated: "Mrs. Iracheta has asked for the opportunity simply to stand and thank you for your time as well." Immediately, without leave of court or notice to opposing counsel, Mrs. Iracheta stood and said to an all-Hispanic jury: "*Muchas gracias les doy de parte de mis nietos y mi hija y de parte mia la jurado.*" ("Thank you very much to the jury on the part of my grandchildren and my daughter and on my part.") General Motors understandably did not interpose an objection at once but waited until after Iracheta's counsel had finished his argument, and then moved for a mistrial at the bench. The court denied the motion.

The court of appeals concluded that General Motors' objection was untimely. We disagree. In these most unusual circumstances, General Motors' counsel was not required to object to a grandmother's expression of appreciation on behalf of her deceased daughter and deceased grandchildren, thereby risking the jury's ire, and it is entirely impractical to think otherwise. At oral argument in this Court, Iracheta's counsel concedes that it was improper for Mrs. Iracheta to address the jury but argues that the error was harmless. We think the harm is manifest to any experienced trial lawyer. A party's personal expression of gratitude to the jury at the close of a case is error that cannot be repaired and therefore need not be objected to. *Cf. Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 241 (Tex. 2001) ("[O]bjection to a trial court's alleged improper conduct or comment must be made when it occurs if a party is to preserve error for appellate review, *unless the conduct or comment cannot be rendered harmless by proper instruction.*") (emphasis added).

Notes & Questions

1. *TRCP 266 & 269*. Closing argument is given after the charge is read to the jury. The party with the burden of proof on the whole case at the time of argument is entitled to open and close. This is usually the plaintiff. Rebuttal argument is limited to replying to the counsel on the other side. When there are multiple parties and multiple claims, the court has wide discretion in determining the order of argument.

2. *Limits on argument.* What is prohibited? Generally, it can be lumped into three groups: (1) don't go outside the record or law; (2) don't appeal to passion or prejudice; (3) don't insult witnesses, lawyers or litigants.

3. *Incurable error.* Most erroneous arguments either are not harmful because they don't amount to much, or they can be cured by an instruction to the jury to disregard. As you have seen in the previous opinions, however, sometimes a court finds that improper argument is so bad that it cannot be cured by an instruction. This type of error is called "incurable." As the Supreme Court said in *Standard Fire Insurance v. Reese*:¹

Harmless error creeps back into the practice when subjective evaluations replace a more objective and structured testing of error. For that reason, decisions since 1941 have resisted the tide of presumed harm by surrounding the decision about reversibility with several tests. In the case of improper jury argument, the complainant must prove a number of things. He has the burden to prove (1) an error (2) that was not invited or provoked, (3) that was preserved by the proper trial predicate, such as an objection, a motion to instruct, or a motion for mistrial, and (4) was not curable by an instruction, a prompt withdrawal of the statement, or a reprimand by the judge. There are only rare instances of incurable harm from improper argument. The complainant has the further burden to prove (5) that the argument by its nature, degree and extent constituted reversibly harmful error. How long the argument continued, whether it was repeated or abandoned and whether there was cumulative error are proper inquiries. All of the evidence must be closely examined to determine (6) the argument's probable effect on a material finding. (7) Importantly, a reversal must come from an evaluation of the whole case, which begins with the voir dire and ends with the closing argument. The record may show that the cause is weak, strong, or very close. From all of these factors, the complainant must show that the probability that the improper argument caused harm is greater than the probability that the verdict was grounded on the proper proceedings and evidence.

Incurable argument appeared to be limited to argument that appeals to racial or religious prejudice, but the Supreme Court appears to have expanded it recently. In a specific case an appellate court could find that just about anything was so bad that it was "incurable." (Bringing up insurance in argument used to be incurable, but now is generally treated as curable.)

4. *Incurable argument and strategic silence.* Why did counsel give up on the objections? Was he satisfied that the argument had become so egregious that it would be held incurable on appeal? If so, this is a risky course. What will be held incurable on appeal is very hard to predict during the trial. And, these days, most improper argument is considered curable by instruction.² The best course is to preserve error by an objection *and* a request that the jury be instructed to disregard the improper comments. The court may, in fact, sustain such objection and request, and truly limit the harm in the argument because of the jury's perception that errant counsel has acted unfairly. What is the best appellate posture for the trial court loser with respect to objections and actions by the judge? The best chance on appeal is provided when counsel objects to each improper argument and requests a curative instruction to the jury to disregard, and is overruled each time.³ Note that a complaint of incurable argument not objected to earlier must, at the latest, be included in a motion for new trial. Rule 324(b)(5).

¹ 584 S.W.2d 835 (Tex. 1979).

² See MCDONALD & CARLSON, TEXAS CIVIL PRACTICE § 23:20 at fn. 178 and 23:24 at fn. 229. See also *Alpine Tel. Corp. v. McCall*, 195 S.W.2d 585, 592 (Tex. Civ. App.—El Paso 1946, writ ref'd n.r.e.).

³ See MCDONALD & CARLSON, TEXAS CIVIL PRACTICE § 23.24 at fn. 240.

5. *Rule 269(g)*. Note that the court may intervene to correct improper argument without waiting for an objection. Note also the somewhat courtly procedure required (but, unfortunately, often ignored) respecting the making of objections.

6. *Hyperbole*. In *Standard Fire Insurance v. Reese*,⁴ the Supreme Court distinguished improper argument, which had no support in the evidence, from hyperbole.

Standard's argument that Reese "drove by a thousand doctors between the Astrodome and Spring Branch" to see Dr. Buning was not improper. Hyperbole has long been one of the figurative techniques of oral advocacy. Such arguments are a part of our legal heritage and language. Shakespeare wrote about "a thousand blushing apparitions" and "a thousand innocent shames," in *Much Ado About Nothing*. In *The Tempest* he wrote, "Now would I give a thousand furlongs of sea for an acre of barren ground;" in *King Richard III*, "My conscience hath a thousand several tongues, and every tongue brings in a several tale . . . ;" in *Hamlet*, "And by a sleep to say we end the heartache and the thousand natural shocks that flesh is heir to;" in *Hamlet* again, "To be honest, as this world goes, is to be one man picked out of ten thousand," and in *Romeo and Juliet*, he has Juliet saying, "A thousand times good-night!" The method has often been employed to make a point.

7. *Harmful error review*. Harmful error can occur in two situations:

A. The trial judge overruled a proper objection to an improper argument. Thus, there was no attempt to cure by instruction to the jury, and even a curable error could be harmful because there was no attempt to cure it.

B. The trial judge sustained the objection, and may have even given an instruction to disregard, but failed to grant a new trial. An incurable error would be harmful in this situation. Since they cannot be cured, the only relief available is a new trial. The new trial is sought either by a motion for mistrial when the argument was made or a motion for new trial after the judgment was signed. For incurable error, a motion for new trial after judgment alone is sufficient to preserve error. This is one of the few times that error can be preserved without making an objection at the time the error occurred. The rationale is that an objection would make no difference because the error was incurable.

8. *Preserving error for appeal review*:

A. There was error.

1) Argument was improper, and
2) Was not invited or provoked (it is not improper to respond to another's improper argument).

B. The error is properly preserved by proper trial objection.

1) For most errors, an objection to the argument at the time improper argument is made is required, and if granted then make motion for instruction to disregard.

2) For incurable error, either

a. an objection and motion for mistrial at time improper argument is made, or
b. a motion for new trial after judgment.

C. There must be harm.

1) Look at the whole record.

⁴ 584 S.W.2d 835 (Tex. 1979).

2) Did the improper argument affect a material jury finding? Was this a “closely contested” case or did the evidence clearly favor the appealing party? If so, the argument probably caused an improper wrong verdict.

3) Sometimes improper argument can be the straw that breaks the camel’s back. Viewed in isolation, the argument might not seem harmful, but considered along with other errors it could tip the balance toward a finding of harmful error.
