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Supreme Court of Texas.
Jesus M. CORTEZ on Behalf of the ESTATE OF Carmen PUENTES, Deceased, Petitioner,
v.
HCCI-SAN ANTONIO, INC. d/b/a Alta Vista Nursing Center, Respondent.
No. 04-0181.

December 2, 2004

Appearances:
Thomas S. Hornbuckle, Hornbuckle Firm, Houston, TX for petitioner.
Lori D. Proctor, Proctor & Nagorny, P.C., Houston, TX, for respondent HCCI-San Antonio, Inc.

Before:

Wallace B. Jefferson, Priscilla R. Owen, Harriet O'Neill, David M. Medina, Paul W. Green, Nathan L. Hecht, Dale Wainwright, Scott A. Brister, Justices.

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SPEAKER: All rise.
JUSTICE: Be seated. The Court is ready to hear argument in 04-0181 In re Jesus M. Cortez.
SPEAKER: May it please the Court. [inaudible].

ORAL ARGUMENT OF THOMAS S. HORNBUCKLE ON BEHALF OF THE PETITIONER

MR. HORNBUCKLE: May it please the Court. The jury system does not work if the parties cannot [inaudible] Court. Our --
JUSTICE: Will you help me just [inaudible].
MR. HORNBUCKLE: Sure - sure. Let me get back to that now, this is a nursing home case which was tried to the jury in San Antonio several years ago --
JUSTICE: Counsel, the Court is, I think, well familiar with the case, you know, just, I mean --
JUSTICE: Well, I think you're probably [inaudible] in this type of [inaudible]. I thought you won.
MR. HORNBUCKLE: We won against the settling defendant against the nonsettling defendant HCCI, Inc., we were barely won. We got a judgment of $50, 000 which is, given the facts of the case, [inaudible] is --
JUSTICE: Does it matter if you win or didn't win in this case? Does is matter if you actually won or didn't win in this case --

MR. HORNBUCKLE: In terms --
JUSTICE: -- on this particular issue?
MR. HORNBUCKLE: -- in terms of whether or not there was error in jury selection, I don't think that it matters.
JUSTICE: Oh, no. I didn't mean to imply that it did, I just was confused because I -- that didn't come across to me as -- never mind.
MR. HORNBUCKLE: Okay.
JUSTICE: If we hadn't had this juror number seven on, you had gotten a lot more to your theory.
MR. HORNBUCKLE: I honestly think that we had to see the [inaudible] who was against [inaudible] for an insurance care.
JUSTICE: Explain, by the way, just briefly, why that's a requirement or a law. You just said that you didn't like number seven but didn't have to state any reason, none in the record why you didn't like seven.
MR. HORNBUCKLE: My understanding of, in terms of preserving error, is that what we need to do is, prior to --
JUSTICE: Pick a number that's on the jury and say we would struck him or her --
MR. HORNBUCKLE: That's right.
JUSTICE: -- without saying any reason.
MR. HORNBUCKLE: That's right.
JUSTICE: So frankly, you could pick any number.
MR. HORNBUCKLE: I think you could pick any number. I mean, we've taken --
JUSTICE: But it doesn't have to be -- there doesn't have to be anything in the records suggesting why that person might have been against you.
MR. HORNBUCKLE: My understanding of the case law and --
JUSTICE: I know that's the case law --
MR. HORNBUCKLE: -- that's my understanding.
JUSTICE: -- I just can't figure out why we would ask you to pick a number, now tell us why, just tell us why I would have struck somebody else. Obviously, you wouldn't strike somebody else that's why [inaudible].
MR. HORNBUCKLE: Well, [inaudible] You're correct. It could -- the rule could be different and the parties could be required to state a reason like in -- I mean, if that's a challenge, if the -- if there's a question about why a party is striking the jury. If it's based on race, then [inaudible] --
JUSTICE: Might have to remain a neutral reason --
JUSTICE: Tell me -- tell me, why is it wrong to rehabilitate the juror in the sense of, they say, make it as extreme as you want, I'm gonna vote against the plaintiff. Why is it wrong to ask the next question, "Why". Why should we prohibit a judge or the attorney for either side asking why?
MR. HORNBUCKLE: I guess I can answer that was a rhetorical question. Does anyone here want the juror on their panel who says, "I'm biased and I can be fair."
JUSTICE: What if the jury says because Mr. Fred Hornbuckle's one of their attorneys. And you say, "I'm not Fred Hornbuckle, that's somebody else. I'm Steve Hornbuckle." The jury then says, "Oh, my mistake. Never mind."
MR. HORNBUCKLE: That's unfair hypothetical -- I don't think it fits the facts of this case [inaudible] --
JUSTICE: I know but your position is once they say biased, that's it. The judge must stop. There is no further questioning. Why would we

want to do that, that you're might be mistaken?

MR. HORNBUCKLE: You can imagine the hypothetical where it was an honest mistake, but what you have here and what will happen if you didn't have the rule that prohibited rehabilitation is you give the juror, before getting up in front of the very intimidating Court and be questioned by the Court, a figure of authority in a row, in a very frightening situation for a lay person. They would confess bias, and I think that the initial admission of bias would be the more honest statement. Then without -- if you're allowed to rehabilitate, you would go back and the Court could say or other lawyers and you could bully the juror into saying, "Well, you can be fair, can't you?" And everybody wants to say --

JUSTICE: Why -- why don't we -- so that's arguing we should have a rule against bullying and not rehabilitation.

MR. HORNBUCKLE: It's not necessarily bullying but when the figure of authority, the Court, and that was the case in this instance, asked questions like, "Well, you can listen to the evidence, can't you?" and, "You can be fair," there's a natural inclination to say, "Oh, yes, I can, Judge. Yes, I can."

JUSTICE: Why shouldn't the trial court be given some discretion and latitude in making that determination as to whether jury can -- a juror -- potential juror can render a true and -- true verdict?

MR. HORNBUCKLE: I think that they're in discretion but I think that there is bias as matter of law also. In some cases, not this one, but in some cases, there may be some ambiguity with respect to whether or not there's been a clear expression of bias and that is discretion. But when -- and this is straight out of Shepherd v. Ledford --

JUSTICE: An artful trial lawyer can have any veniremen struck for cause by leading the questions and getting potential juror to ask and answer those questions of bias affirmatively every time.

MR. HORNBUCKLE: [inaudible], your Honor. [inaudible]

JUSTICE: So come back and repeat it. Go ahead.

JUSTICE: Let me ask you, I mean, -- I understand the line of authority to that, you know, once the bias words are there, there can be no rehabilitation. But don't you have to look at the context. I mean, it strikes me what happened here is when you look at everything this juror said, he pretty much said, "I'm an insurance adjuster and I see a lot of frivolous lawsuits in my job. And I'm biased against frivolous lawsuits." Well, I mean, everybody's biased against frivolous lawsuits. He also acknowledged that he sees good clients too. So if you look at it in context, don't you think that the bias he expressed was as to lawsuit abuse?

MR. HORNBUCKLE: I really don't think so. He says that, basically, I mean, it's nothing against their case, but we see so many of those. It's not --

JUSTICE: But many of those --

MR. HORNBUCKLE: -- so many cases --

JUSTICE: -- of those. No, well, though --

MR. HORNBUCKLE: He wasn't [inaudible] use the phrase "frivolous lawsuit".

JUSTICE: He was referring a lawsuit.

MR. HORNBUCKLE: I don't think he ever used the phrase "lawsuit".

JUSTICE: Yes, I will. It's there. I mean, he talks about tort, Warman, and I thought he said lawsuit abuse, if not lawsuit abuse, frivolous lawsuits. And that's what bothered me is we're looking at that one phrase out of context, but he seems to be talking about -- we see a lot of that abuse in the system. So why can't we look at the

context of the statement?

MR. HORNBUCKLE: I think that --

JUSTICE: The witness, I don't really know how to say it and but lawsuit abuse, we see it so many times. And then he goes on to say, "Those cases".

MR. HORNBUCKLE: Well, that's the reason that he's biased. That's the reason that the claimant is --

JUSTICE: But isn't everyone biased against lawsuit abuse? I would ...

MR. HORNBUCKLE: Everyone has an opinion about whether or not there is lawsuit abuse but it doesn't make every juror biased. If the juror says, "Well, I'm concerned about lawsuit abuse," I don't think that disqualifies them. But then if you follow up and ask, "Well, though do your concerns about lawsuit abuse, do they make it such that one party is starting out before another party for [inaudible] about?

JUSTICE: Okay. Then let me ask you about that because when you start out, the plaintiff always starts out behind but has not got the burden of proof. So to say one party -- here's a panel, this is a car wreck case. I'm trying to recover money. Does anybody think that I started out behind? Well, yes, you do because you've got to meet your burden of proof. What's incorrect about -- I mean, to say I'm a little bit behind, ain't that an accurate statement of the law?

MR. HORNBUCKLE: Well, I don't think he says -- he doesn't say how far we are behind. The burden of proof, I think, each side started out evenly and the plaintiff has the burden at tip the scales more than -- to more likely than not --

JUSTICE: Or they lose.

MR. HORNBUCKLE: -- or they lose --

JUSTICE: So they started out behind at [inaudible].

MR. HORNBUCKLE: Well, I think they started out -- I think you can characterize it in such that they started out evenly and the plaintiff has the burden to get a little ahead. I don't think this plaintiff starts out at the end zone and has to run all the way up to the 50-yard line and then crosses. I think they started out even. Scales are justice and the plaintiff has to put the scales [inaudible] in order to meet their burden of proof. So, I don't think that they do started out behind and I've never heard it phrased that way in [inaudible] the burden of proof. In a trial court, it's always been expressed such that the scale of the justice. And you have to tip the scales of justice to your way.

JUSTICE: The other side said you can distinguish our priority of cases. Do you agree with that? You're about to mention Shook and maybe others.

MR. HORNBUCKLE: I really disagree that this case is distinguishable. And I think if you look at the questions that were asked to the juror that was disqualified as a matter of law in Shepherd v. Ledford Case, that juror was asked an almost identical question to one of the questions that [inaudible] juror was asked. The question, this is on Shepherd v. Ledford page 34, the question is, "As a result of that you feel that Mrs. Ledford would be, you would get for her and put her -- sort of put her ahead of [inaudible] in this case." The answer, "I think so. Like I said, my dad was ... after that for long, he was in a coma so I've seen him suffer a lot and I know what it did to me." The -- under that circumstance --

JUSTICE: As a result of what? You started off, as a result of.

MR. HORNBUCKLE: There's a prior question to, "Is there anybody else, aside from who's listening to this..." there was a series of

questions in this case and refers to the questions were whether or not they did objectively [inaudible] the evidence in a neutral way and two jurors said, "I don't think so."

JUSTICE: Okay. Let me put the question in context. Jurors walk in the courtroom, they don't even know if it's a civil or criminal case. You ask them how many of them," you stand up first, "how many of you think I'm starting behind?" Obviously, no one raises their hand. There's no basis to do so --

MR. HORNBUCKLE: Right.

JUSTICE: Now you tell them -- you'd say, "Sued against a nursing home for negligence, anybody think I'm starting about behind or ahead because I'm suing a nursing home." Two people say you're starting out behind and twelve people say you're starting out ahead because everybody hates nursing homes. Can we strike all the people who calls that say they hate nursing homes so therefore, you're starting out a little ahead?

MR. HORNBUCKLE: If you follow up and ask them, "Does your hatred --"

JUSTICE: So the answer is no at that point.

MR. HORNBUCKLE: Someone just says, "I hate nursing homes."

JUSTICE: Say, "I really don't like nursing homes so you're starting out a little ahead, Mr. Hornbuckle."

MR. HORNBUCKLE: I think that would disqualify --

JUSTICE: Disqualify everybody. So we only have a jury made up of people who have no feeling or knowledge of nursing homes. Is that reflective of the community?

MR. HORNBUCKLE: They have knowledge of nursing homes. And I know from experience that you do have a problem with jurors disqualifying themselves because they dislike nursing homes and that comes out in every trial. And it's especially important to the defense to be able to get juror --

JUSTICE: Let's go a -- let's go a step further. You've told the jury as you did in this case. Our case has to do -- our client was blind, left alone in a bathroom, broke her hip, and as a result, later died. How many of you think I'm starting -- how many of you think Mr. Hornbuckle is starting out a little ahead? Now, many people raise their hands. Aren't they doing that because based on the facts you've told them? And aren't we therefore, we disqualify them or striking them for telling us how they think they're gonna vote based on the facts of the case.

MR. HORNBUCKLE: I don't think that it's the way that they're going to vote. It's a question about, given the facts of the case, is one party starting out ahead of another --

JUSTICE: What's the difference in the following two questions: "If you have to vote now, who would you vote for?" and the question, "Am I starting it based on what you've heard, am I staring out a little ahead or behind?" I can't think of any difference in those questions at all, can you? You, obviously, couldn't ask or based on what you've heard so far, are you're gonna vote for me or them. That would be improper.

MR. HORNBUCKLE: I've never heard it asked. I've never heard that question asked --

JUSTICE: Because everybody knows that would be improper. My question is, is there any difference in this question and that one?

MR. HORNBUCKLE: I think with asking them how you're gonna vote, you're asking for a limit --

JUSTICE: When you're asking them in this context, after telling some of the facts, am I starting a little behind or to asking for

commitment as well?

MR. HORNBUCKLE: I don't think so. You're just asking them whether they -- whether or not their prior experiences or what they bring with them into the courtroom causes them to -- causes one party or the other to start out behind. So I think it has to be in the context of prior experiences. Is there something that you brought in to you with this courtroom today that causes one party or the other to start out ahead or behind?

JUSTICE: Thank you, Counsel.

Any further questions?

The Court is ready to hear argument from the respondent.

SPEAKER: May it please the Court. Ms. Lori Proctor will represent argument for the respondent.

ORAL ARGUMENT OF LORI D. PROCTOR ON BEHALF OF THE RESPONDENT

MS. PROCTOR: May it please the Court. Good morning.

I first wanna correct one thing about the factual background that you asked. What actually happened was the judgment -- joined several judgment in favor of the plaintiff was awarded against all three defendants for $1 million in actual compensatory damages. Then the jury went on and awarded punitive damages against the two defendants who are not being appealed here for a total of $8,250,000. So the entire judgment was $9,250, 000 and it is only a $50,000-portion that ended up being the judgment against my client of that --

JUSTICE: So it's your position of if there was error than there was -- it would be harmless error?

MS. PROCTOR: Absolutely. It is my position that it would be harmless error. It's also my position that if we start allowing parties to pick and choose, in this case specifically, they're saying that they were forced to try the case in front of a jury that contained a member that was objectionable to them and should have been stricken or any member should have been stricken so that that juror could also have been stricken. But --

JUSTICE: But once they stated that they have a bias or prejudice against one side or the other, why shouldn't they be struck as a matter of law?

MS. PROCTOR: If, in fact, this juror had or potential juror has said to the judge, "I cannot be fair and partial," as has been stated in the cases where that's been upheld, then I'll agree. But this juror never got to that point. He was consistently equivocal every time a question was asked him. He would say things like, "I can't be sure, I don't know, it might --"

JUSTICE: From reading the record --

MS. PROCTOR: -- put on us [inaudible] it away."

JUSTICE: -- from reading the record, it appears to me that he was evasive. So shouldn't the trial court be given some discretion --

MS. PROCTOR: Absolutely. That's exactly why, and that's one of our primary points on that issue, assuming that the Hallet notice was properly and timely given, which we dispute, then all of the case laws is consistent in saying that the trial court judge has to be given a quad latitude and discretion in determining whether a potential juror person has actually expressed bias or prejudice. You've all seen jurors who stand at the bench asking or answering the questions being posed to

them either by the Court or by the attorneys and they got their head down and their shifting their feet and their nodding their head and their shaking their head -- all of those things were observations that the Court makes and determining at that point --

JUSTICE: But even if it was not there, you can see that on certain records, it would be clear enough a judge was bullying a juror into saying, "Sure, I can put it all aside."

MS. PROCTOR: Absolutely.

JUSTICE: -- that we could say, as a matter of law, they shouldn't have been stricken.

MS. PROCTOR: Absolutely. Not this case but that absolutely has happened and, in fact, in the cases where it was decided in favor of the petitioner that the case should be remanded for trial because the juror has expressed bias. I think it's clear in the Shepherd case when the juror said, "I feel just like the panel member who was stricken for cause. I feel just like that panel member does." I think that's clear. Obviously, if the Court's going to strike two panel members because they have expressed a clear bias and then not strike the third who says he feels the same way, obviously, that's a record that the Court can look at and determine clear bias. This --

JUSTICE: Was there in this case properly preserved?

MS. PROCTOR: No, for a couple of reasons. Number one, all the case laws consistent that the Hallet notice must be give prior to the time that peremptory challenges are exercised. Case law also establishes that peremptory challenges are exercised once the list is delivered to the Court,

JUSTICE: Which normally doesn't appear in our record.

MS. PROCTOR: Correct. Which is why we then have to go the rule that says that the it's the petitioner's burden to prove in the record that they are timely making their Hallet notice --

JUSTICE: Even when the trial judge says that's preserved?

MS. PROCTOR: Even when the trial judge says that's preserved.

JUSTICE: Generally, when the trial judge makes a comment, it's been my experience to litigate, stand down and move on. Do they need to urge the judge to allow them to make a proper record?

MS. PROCTOR: Well, in this case, it would have been impossible because they did not timely make their Hallet notice. If they had set -- it is incumbent upon the litigants to preserve the error. And, in this case, what should have been done is a) prior to making the peremptory challenges and delivering them to the Court, they should have brought to the Court's attention that they were going to have to in the future use a peremptory strike on an objectionable juror that would allow another objectionable juror to remain on the panel.

In this case, it's just like in the directed verdict when the litigant says, "Comes now the defendant, after the close of the plaintiff's case and prior to the commencement of defendant's evidence, we make this corrected verdict motion." In this case, in order to preserve their Hallet notice was timely made, when you are making it, you say, "Comes now the plaintiff" and before exercising his peremptory strikes, advices the Court that he will be forced to strike an objectionable juror that was not properly stricken for cause. And that will cause an objectionable juror to remain on the panel. That was not done in this case. The record has no reflection that the Hallet challenge was timely made. In addition, the record actually implies that the challenge was not made timely because when the attorney does make the objection, he speaks in the past tense of, "I had to exercise a strike on Mr. Snider and so we had to allow juror number seven to

remain on the panel."

What is also interesting and distinguishable in the case is that in the Hallet and the Shehperd cases, the panel ended up with a juror who the Court did not strike after a motion by [inaudible] litigants. In this case, it's different. The juror that they wanted stricken for cause, they used the peremptory challenge on and he did not end up on the jury. I say that because I think it's distinguishable because in those two cases it was obvious that the juror was objectionable because a strike motion had already been made by the party. In this case, it was never in motion to strike juror number seven for cause and therefore, there is no record that that juror was objectionable. The case law states that in order to appropriately preserve your Hallet challenge, you must state a specific juror, which was admittedly done in this case, number seven would remain on the panel or did remain on the panel, in the past tense. But the fact that the juror was objectionable, was never even stated nor was any basis for the objection --

JUSTICE: Which of our cases says you have to give a reason on the jury's objection?

MS. PROCTOR: No prior case does although it is somewhat implied in the Hallet case because the petitioner's argument was, "We don't have to reraise this issue. We already asked that the juror be struck for cause and to reiterate it would be silly. But the Court found, "No, in fact, it's not." In order to avoid just the situation that we're in here, you must give the trial court an opportunity to correct the error. You must tell the trial court, "I've exhausted all my peremptory challenges and this juror remains to us objectionable."

Now, I think that the trial court is aware of the reason for the objection of the juror if a challenge for cause has been made. But if one has not been made, and there is no case law either way on this, then the party should have to go further and explain why that juror is objectionable or otherwise, like you said, Judge Brister, we -- Justice Brister, sorry, we --

JUSTICE: Just [inaudible].

MS. PROCTOR: -- end up having appeals on cases where, you know, how do we know number seven was objectionable. How do we know we're not wasting our time here and haven't been doing that?

JUSTICE: Well, objectionable is not equivalent to being able to strike for cause.

MS. PROCTOR: True.

JUSTICE: Peremptory challenges are not designed for the act. I mean --

MS. PROCTOR: I agree. I agree. But I don't think any case ever gets tried where one party doesn't have somebody, after her exercising peremptory challenges, who they think is objectionable.

JUSTICE: But isn't it true, I mean, just like in that scenario -- area, you'll just get people come out with, you know, shuffling [inaudible] reasons or, you know, really doesn't make this lie or they just present anything to its [inaudible]. I mean, why should we make them state why they're exercising a peremptory strike. It just seems like it gets failed in the government system.

MS. PROCTOR: The reason that one should be required to do that at that level is solely in the Hallet notice situation. So that the use of the Hallet challenge is not abused, there should be some basis and so that harm can be determined --

JUSTICE: Well, in the criminal context, when you say who you're having to take, you're also supposed to ask the judge for an additional

peremptory strike which those --

MS. PROCTOR: Correct.

JUSTICE: -- or initial peremptory or strike for cause, which I suppose the judge could do in a civil case as well. And so it puts the judge on notice of whose bed that that you're taking so the judge can decide was this person also a questionable person or not. Where it was just somebody out of the blue, there's no basis for the trial judge to do that, is there?

MS. PROCTOR: Exactly.

JUSTICE: Get to the question, if you would, the starting ahead or behind, proper question or not?

MS. PROCTOR: You know, and I haven't really considered it although it always pains me when the question is asked because, generally, --

JUSTICE: You all asked the question, too?

MS. PROCTOR: -- We do. We do. And --

JUSTICE: Everybody asked this question.

MS. PROCTOR: You're exactly right.

JUSTICE: Why is it any different from asking everybody how they're gonna vote?

MS. PROCTOR: And it's not. And it's not. And I think you're exactly correct. I think it is an incorrect question and I certainly don't think it's a question that --

JUSTICE: And what are you all gonna say if a question that everybody asks we say, suddenly is improper.

MS. PROCTOR: Ooops. Well, I mean, you've all heard it in the Vordar examinations that that is asked and a lot of times, as I do in mine, if I answer it, then I tell him, "Hey, you know what, you heard any evidence you really can't say. Well, we'll follow it up that way." But have used it more as a guide, not as something that I would use to disqualify a jury. And I disagree with Mr. Hornbuckle that if twelve of the panelists say that they hate nursing homes, I don't think that's enough to get them off. I'm sure like for that to be the case but I don't think that's enough to start --

JUSTICE: If they say that they hate nursing homes, that's not enough to get them off as opposed to, don't like them, they've got a bad reputation --

MS. PROCTOR: I don't think -- without any follow up, I do not think that's enough to strike them for cause.

JUSTICE: So let me distinguish between an attorney asking the question, "How many of you hate nursing homes?" and having someone raised their hand, which I think can qualitatively, depending on the circumstance, be different form a juror just stating voluntarily, "I hate nursing homes."

MS. PROCTOR: Correct.

JUSTICE: If they truly believe that, you think, without more, that's not enough for them to get off the battle?

MS. PROCTOR: If they volunteer that, without being asked by Counsel, then I think that may be on it face [inaudible]. That is a general question to the panel, "How many of you have [inaudible] feelings? How many of you hate nursing homes?" I asked it but I don't get all those people stricken --

JUSTICE: Well, if they say, "We're leaning against nursing homes.", then you said you used that as a signal to delve into a [inaudible] --

MS. PROCTOR: Correct.

JUSTICE: -- and then maybe you may find a bias that is sufficient to strike them for cause --

MS. PROCTOR: That's correct.

JUSTICE: -- but a leaning doesn't get you there.

MS. PROCTOR: I don't think so. It would be like -- in a criminal case, "How many of you hate murderers? Everybody raise your hands." Okay. Well, we can't get a fair jury here because this guy's on trial for murder. You know, there has to be -- and it's the same thing on the other side, "How many do you hate [inaudible]?" How many of you hate frivolous lawsuits?" Look, they're trying a frivolous lawsuit then you [inaudible] I'll be concerned. But if they're not, then the bias against murderers or frivolous lawsuits, it is not what should be considered.

JUSTICE: Some of your questions beg the ultimate question. If you say, "How many hate murderers?" Well, that's what they're there to decide. The question is, "How many hate nursing homes?" That's a fact. That's not subject to proof over evidence at trial.

MS. PROCTOR: Well, I guess it's, on my defensive perspective, it is yet to be proven if we hated nursing homes.

JUSTICE: When does a trial judge's discretion stop when a trial judge is trying on a panel of the jury?

MS. PROCTOR: Well, I think that it stops when the juror absolutely states the magic words which this potential juror never did.

JUSTICE: But an artful attorney on either side can get, it's been my experience, potential juror to say the magic words "by leading him or her down that path to bias or prejudice".

MS. PROCTOR: Then again, and I thought was a little questionable in the Shepherd case. Again, I think if the potential juror says, "This is just not a case I can be fair in. I have opinions about this and I can't be fair and I'll have them do that very adamantly." It's different than a juror saying, "You know, I don't know if this is gonna affect me or not.", and then the attorney saying, "So are you saying that in this case, you cannot be fair and partial and that my client starts behind as we sit here right now?", and the juror saying, "Yeah." Observations that the Court is making at the time --

JUSTICE: Isn't the problem in that and the rehab question, the use of leading questions?

MS. PROCTOR: Yes, absolutely.

JUSTICE: So the problem is we're asking leading questions stuffing in words into their mouths and then they say, "Well, maybe yes or no."

MS. PROCTOR: Exactly. I don't think this juror ever would have said preconceived notions. And what is really important with respect to the Court's discretion is that Judge Littlejohn was asking the questions and she was being very offended, "Tell me why you feel that? I don't really understand what you're saying."

JUSTICE: Normally, we allow leading questions when it's the opposite side but not when it's your own side. Which one are jurors'?

MS. PROCTOR: Neither. Hallet challenge again, I just want to make sure that I'm clear. It is the petitioner's burden to preserve that and to provide you guys with the record that indicates that it was properly and timely preserved, and that was not done here. It would have been very easy to do had, in fact, it been done timely but it was not. I think the record reflects it was not by the Counsel's use of past tense word and by their repetitive with which the jury was then seated immediately after that challenge was made.

JUSTICE: Now, is the jury seated before the objection was made or was the objection made as the lawyer [inaudible].

MS. PROCTOR: The record doesn't reflect it but the peremptory challenges had already been handed over. There's some shuffling in the

courtroom. Then the objection was made, the judge made a statement --

JUSTICE: Why should it matter if the rest of the panel members are still out there and the judge can make a decision to remove one of the jury members and you still have a selection of jurors out there? Why can't they do that?

MS. PROCTOR: Because it's too late for them, because the case law says that [inaudible] have been made once they've been delivered. The Court -- it is now in our Court's hand to strike a jury without returning the peremptory challenge list, giving us more time to go back and make the challenges based on the fact we now know this other juror has been --

JUSTICE: Are we missing items from the record that would answer these questions or --

MS. PROCTOR: No. I think the only way that it could be answered is an affirmative statement by someone on the record without challenge.

JUSTICE: But we know the jury wasn't seated because after the -- Mr. Rove's motion to strike number 15, the Court tells everybody to gather around the back of the courtroom and then called out the names of the twelve jurors. So the twelve jurors have not been placed in a --

MS. PROCTOR: No -- no -- no, that's undisputed. They have not.

JUSTICE: There was still time to substitute somebody --

MS. PROCTOR: Yes.

JUSTICE: -- Of course, you can, under Batson, you can substitute somebody even after they're in the box.

MS. PROCTOR: True. But the case law, with respect to Hallet and with respect to making your peremptory challenges, indicates once they deliberate, they're made. And so --

JUSTICE: But the judge still could -- if the judge was convinced that number seven was bad too. The judge could have struck seven, allow both sides an additional peremptory. We still could have fixed the problem --

MS. PROCTOR: Correct.

Thank you.

JUSTICE: Thank you.

REBUTTAL ARGUMENT OF THOMAS S. HORNBUCKLE ON BEHALF OF THE PETITIONER

MR. HORNBUCKLE: May it please the Court.

There are several things that I'd like to set the record straight on Mr. Tristan. I think Ms. Proctor mentioned that he was not a party of this appeal. I believe that's incorrect. I didn't mean the mistake the -- in answer to your question, Justice O'Neill, that the -- I did not mean the mistake that we didn't get a judgment against Mr. Tristan for punitive damages. We did, 250. I just think that it's uncollectible that's why I didn't include it. I wasn't -- certainly wasn't mean to mislead anybody. It's certainly a judgment proof --

JUSTICE: So if this was back for new trial, you will have collected over $1 million and the settling defendant will no longer be in the courtroom in the trial and go back just as this one.

MR. HORNBUCKLE: As the HCCI and Mr. Tristan, we will [inaudible] 950. 950 was the settlement with the settling firm and [inaudible] nursing aide

JUSTICE: Are there no circumstances in which we would ever look at the verdict in deciding if there is harmful error? Can it challenge for

cause?

MR. HORNBUCKLE: I think that the harm occurred when the improper juror is seated, or an objectionable juror is seated, or the parties have to use a strike on and --

JUSTICE: But we know -- how did jury number seven vote, with everybody else?

MR. HORNBUCKLE: Juror number seven was with the majority.

JUSTICE: So we're not like a criminal court where one person can hang the jury. If one objectionable juror is out against you, as you say they were, then they'll just vote differently from everybody else, won't they?

MR. HORNBUCKLE: Well, they can now. I think with the Newlaunder, punitive damages -- there has been unanimous [inaudible].

JUSTICE: But not as to -- not as everything else.

MR. HORNBUCKLE: Not as everything else. That's true.

JUSTICE: I thought you stated previously that your client was awarded punitive damages.

MR. HORNBUCKLE: As to the settlement, and as to the judgment proof, nurse's aide Jerry Tristan.

JUSTICE: So this juror that you had concerns about or have concerns about was able to find with the other eleven that punitive damages, in fact, it should have been awarded in this case.

MR. HORNBUCKLE: That juror did vote with the majority, the rest of panel. That's true.

JUSTICE: So where's the harm?

MR. HORNBUCKLE: The harm was in the -- in it having to use in one of our strikes on and objection withdrawn. The harm occurred when, and that's under the case law --

JUSTICE: I understand that the case law and I appreciate the concern that each side have a fair trial and a just verdict be rendered. But it seems to me that this defendant had been hit with a greater number, you may not be here. And I'm trying to balance that issue with the concern that I have that perhaps this juror may have been struck or should have been struck along the rules [inaudible] that the trial courts should have discretion in making that determination.

MR. HORNBUCKLE: On this case, the nonsettling defendant wasn't hit with any punitive damages. We did not get a judgment of a significant sum of money against the non-settling defendant. And the punitive damages were against the settling defendant and were not collectable. So, in this case, we really didn't win, not against the nonsettling defendant --

JUSTICE: But the settling defendant participated in the trial.

MR. HORNBUCKLE: They did. We had a high [inaudible].

JUSTICE: Right. That's my question [inaudible]. Are there other circumstances under which we could look at the jury's verdict and look up for harmful errors in these challenge cases, I mean, it seems to me it might have been one thing if this jury said, "Well, you know, they may be liable but absolutely not gonna worth more than $300,000. That will be one thing, perhaps. [inaudible] we looked at what the jury actually did --

MR. HORNBUCKLE: I don't believe so. And I don't believe that it would be a significant problem. You just don't see if somebody wins or, in this case, we got a significant sum of money against the nonsettling defendant, we wouldn't be here either. And there are very few cases, I think. I only know one where the prevailing party has appealed but I'm out of time, your Honor, [inaudible]. There are several things, I guess I could address them in the --

JUSTICE: Post submission if you would like and that concludes this argument and all arguments for today. And the Court will now adjourn the case.

SPEAKER: All rise. Oyez, oyez, oyez. The Honorable Court [inaudible] is now being adjourned.

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