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Incurable, Reversible Error Occurs Whenever the Jury Feels Animus toward or Solidarity with Witnesses or Litigants because of Ethnicity or Race Due to an Attorney's Suggestions Made during Closing Argument, No Matter How Open or Subtle and with Finesse Those Suggestions May Be.

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CIVIL PROCEDURE - APPEAL AND ERROR - INCURABLE, REVERSIBLE ERROR OCCURS WHENEVER THE JURY FEELS ANIMUS TOWARD OR SOLIDARITY WITH WITNESSES OR LITIGANTS BECAUSE OF ETHNICITY OR RACE DUE TO AN ATTORNEY'S SUGGESTIONS MADE DURING CLOSING ARGUMENT, NO MATTER HOW OPEN OR SUBTLE AND WITH FINESSE THOSE SUGGESTIONS MAY BE. *Texas Employers' Ins. Ass'n v. Guerrero*, 800 S.W.2d 859 (Tex. App. — San Antonio 1990, n.w.h.).

On appeal from an action brought for workman's compensation benefits on behalf of Roman Guerrero ("Guerrero"), the Texas Employer's Insurance Association ("TEIA") complained that Guerrero's attorney made an appeal for ethnic unity during his closing argument. Supporting TEIA's allegations is the fact that eleven of the twelve jurors had Spanish surnames, as did Guerrero, his attorney and his treating physician. The portion of the jury argument which was challenged as being incurable error follows:

> [GUERRERO'S COUNSEL]: I am tickled to death to be here and I will represent him like any man like him in Zavala, Maverick, Dimmit, Cameron, any county in the State of Texas any time.
>
> Octavio Paz, a well-known author said one time, and I will quote him and I already translated it. He said, "Things that unite us far exceed those things that divide us."
>
> You apply that to the evidence. The things, the preponderance of the evidence, that unite in favor of Mr. Guerrero, far exceed those inconsistencies, the legal problems. He is not a perfect man, neither is his medical. But heck, he went back to work after he got cut, things of this nature. The things that unite us, exceed the things that divide us. There is a time to be united. Right now is a time to be united.
>
> An example is politics. We don't have to agree with all the candidates, with the same ones. But golly there comes a time when we have got to stick together as a community. We have got to stick together as a jury of peers of a man to pass judgment and help that person if he is entitled to [sic] under the evidence.
>
> [TEIA'S COUNSEL]: Your Honor, this is getting a little inflammatory in asking the jury to take the position—
>
> [GUERRERO'S COUNSEL]: No, No. I didn't ask them, sir, I said, We. I think that is proper.
>
> THE COURT: Well, you have got two minutes.
>
> [GUERERO'S COUNSEL]: Thank you, your Honor. Because if

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> one is united, one has hope, And with hope, one can live. He still has a lot of years to live. And it is all going to depend on you.

Texas Employer's Ins. Ass'n v. Guerrero, 880 S.W.2d 859, 862 (Tex. App. — San Antonio 1990, n.w.h.)

In Texas, improper jury argument has been the subject of much litigation. There are essentially two types of improper jury argument: "curable" and "incurable". *See, e.g., Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 839 (Tex. 1979); *Otis Elevator Co. v. Wood*, 436 S.W.2d 324, 333 (Tex. 1968); *Wade v. Texas Employers' Ins. Ass'n*, 150 Tex. 557, 563, 244 S.W.2d 197, 200 (1951); *Gannett Outdoor Co. v. Kubeczka*, 710 S.W.2d 79, 86 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.). An improper jury argument is curable when a trial judge gives an instruction to the jury which eliminates the argument's harmful effect. *See, e.g., Otis*, 436 S.W.2d at 333; *Houston Lighting & Power Co. v. Fisher*, 559 S.W.2d 662, 684-85 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.); *Hartford Accident & Indem. Co. v. Thurmond*, 527 S.W.2d 180, 192 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e). Conversely, an incurable argument is one in which its harmfulness can not be removed by an instruction from the court. *See, e.g., Otis*, 436 S.W.2d at 333 (Tex. 1968); *Houston Lighting & Power Co.*, 559 S.W.2d at 685; *Hartford Accident & Indem. Co.*, 527 S.W.2d at 192.

The Texas Supreme Court has stated that an objection to an improper argument is required during trial to preserve error unless the argument is incurable. *Texas Employer's Ins. Ass'n v. Haywood*, 153 Tex. 242, 245, 266 S.W.2d 855, 859 (1954). Texas courts, however, have had difficulty in determining exactly what distinguishes curable and incurable arguments. *See Standard Fire Ins. Co.*, 584 S.W.2d at 839; *Haywood*, 153 Tex. at 245, 266 S.W.2d at 858; *Wade*, 150 Tex. at 563, 244 S.W.2d at 200; *see also, Hartford Accident & Indem. Co.*, 527 S.W.2d at 193. The Texas Supreme Court, in *Texas Employer's Ins. Ass'n v. Haywood*, held that it is not the category or subject matter of the argument that controls, but

> the degree of prejudice flowing 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.

153 Tex. at 245, 266 S.W.2d at 858. Although the court stated that the test did not rest solely on the subject matter, it made clear that neither racial prejudice nor jury arguments which are used as a means of entering new evidence would be tolerated. *Id.*; *see also Wade*, 150 Tex. at 564, 244 S.W.2d at 200.

More recently, the Texas Supreme Court has gone to great length in *Standard Fire Ins. Co. v. Reese* to delineate the elements of improper jury argu-

ments distinguishing between curable and incurable. *See* 584 S.W.2d at 839. The *Reese* court announced a seven step process for determining whether a jury argument is improper. *Id.* Under the test announced by the court,

> [the complainant] has the burden to prove (1) an error (2) that was not 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. . . . 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 . . . . 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.

Id.; *see also, Gannett Outdoor Co.*, 710 S.W.2d at 86; *Houston Lighting & Power Co.*, 559 S.W.2d at 685. Although the court in *Reese* created a seven step analysis to determine improper jury argument and to distinguish between curable and incurable, it is also held that racial prejudice falls into an exceptional category that is incurable notwithstanding any jury instruction. *See Reese*, 841 S.W.2d at 840. *Reese* is only one of many cases in Texas wherein arguments involving racial prejudice are abhorred. *See id.*; *Haywood*, 153 Tex. at 245, 266 S.W.2d at 859 (counsel referral to witnesses as "yellow nigs" was racially prejudicial an incurable by instruction or retraction); *Angelina Casualty Co. v. Ryan*, 282 S.W.2d 310, 312 (Tex. Civ. App.—Galveston 1955, writ ref'd n.r.e.) (appeals to race prohibited); *Basasnez v. Union Bus Lines*, 132 S.W.2d 432, 433 (Tex. Civ. App.—San Antonio 1939, no writ) (new trial granted when counsel argued that plaintiffs were not citizens of the United States); *Panhandle & S.F.Ry. Co. v. Sedberry*, 46 S.W.2d 719, 723 (Tex. Civ. App.—Eastland 1932, no writ) (argument stating that defendant was forced to work with Negroes and Mexicans caused granting of new trial); *see also Dallas Ry. & Terminal Co. v. Garner*, 63 S.W.2d 542, 544 (Tex. Comm'n App. 1933, judgm't adopted) (held improper argument when stated that jury did not know whether deposition witness was Chinaman or Negro); *Moss v. Sanger*, 75 Tex. 321, 12 S.W. 619, 620 (1889) (reversing because argument stated that "the old he-Jew of all, who no doubt planned the whole thing" and "all Jews, or Dutch Jews, and that is worse"); *Texas Employers' Ins. Ass'n v. Jones* 361 S.W.2d 725, 726 (Tex. Civ. App.—Waco 1962, writ ref'd n.r.e.) (reversal required due to statement about wit-

ness as "an old hand at the Job, that Jew is"); *Pennate v. Berry*, 348 S.W.2d 167, 168 (Tex. Civ. App.—El Paso 1961, write ref'd. n.r.e.) (incurable argument when argued that aliens were not entitled to justice in United States); *Motley v. Lawrence*, 283 S.W. 699, 701-702 (Tex. Civ. App.—San Antonio 1926, writ dism'd) (reversal required for argument that Hebrews do not socialize with Gentiles). Not all mention of race, however, constitutes reversible error. For example, the Houston Court of Appeals for the First District in *Dayton Hudson Corp. v. Altus* held that the mention of "two black people" and "God fearing Christian woman" in the jury argument was not reversible error. *See* 715 S.W.2d 670, 676 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

Once a determination is made that an argument is incurable, a new trial or reversal is required. *See, e.g., Reese*, 584 S.W.2d at 839; *Otis*, 436 S.W.2d at 333; *Haywood*, 153 Tex. at 245, 266 S.W.2d at 859. The *Reese* test determines whether harmful incurable error exists, thus mandating reversal of the decision below. *See Reese*, 584 S.W.2d at 839 (incurable error found only when argument by its nature, extent and degree equals reversibly harmful error). In *Haywood*, the Texas Supreme Court stated that objections are required for improper jury argument because the litigants should be prohibited from deliberately waiting for a favorable verdict, and if disappointed, complain for the first time in a motion for new trial. *Haywood*, 266 S.W.2d at 858. However, a court should grant a motion for new trial without objections having been made at trial if the argument is incurable. *Id.* In *Otis*, the Texas Supreme Court held that failure to object to an incurable jury argument does not result in a waiver of the right to complain of the improper argument. *Otis*, 436 S.W.2d at 333. The court reasoned that by making the objection, the unoffending lawyer could possibly prejudice his cause. *Id.* However, in *Ford Motor Co. v. Durrill*, the Corpus Christi Court of Appeals held that once an argument is categorized as incurable, there is an additional burden to prove that such error was harmful. 714 S.W.2d 329, 324 (Tex. App.—Corpus Christi 1986), *judgment vacated by agr.*, 754 S.W.2d 646 (Tex. 1988).

In *Guerrero*, the San Antonio Court of Appeals was faced with determining whether the particular jury argument in issue was curable or incurable. *Texas Employers Ins. Ass'n v. Guerrero*, 800 S.W.2d 859, 863 (Tex. App.—San Antonio 1990, n.w.h.). The court stated that incurable, reversible error occurs whenever the jury feels aminus toward or solidarity with witnesses or litigants because of ethnicity or race due to an attorney's suggestions made during closing argument, no matter how open or subtle and with finesse those suggestions may be. *Id.* at 866. The court further held that once a jury argument is found to be incurable, it is deemed harmful and requires reversal. *Id.* at 864.

In making the determination that the jury argument in *Guerrero* was in-

curable, the court found that the plaintiff's closing argument was an appeal to racial prejudice. *Id.* at 863. The court reasoned that Texas courts have never tolerated appeals to racial or ethnic prejudice in jury arguments, and that the Texas Supreme Court, in *Reese*, held that appeals to racial prejudice are incurable. *Reese*, 584 S.W.2d at 839. However, the *Guerrero* court observed that an incidental mention of race would not constitute an incurable argument regardless of the ethnic composition of the jury. *Guerrero*, 800 S.W.2d at 862. The court distinguished *Dayton Hudson Corp.*, by reasoning that the statements "two black people" and "God fearing Christian woman" were made incidentally without the intent to appeal to prejudice. *Id.* at 863. Thus, the court stated that the wrongfulness of the argument is determined by the intent of the attorney to make a racial or ethnic appeal which could affect the jury and their resulting verdict, as opposed to an unintentional reference to race or ethnicity. *See id.* at 863 n.3.

Although the improper argument in *Guerrero* was subtle, the court stated that it should not be allowed to escape scrutiny and ultimately should be regarded as incurable. *Id.* at 862. The court stated that candid assessment of the jury argument evidenced that it was inescapably an intentional appeal for ethnic unity. *Id.* at 863. To allow a subtle, sophisticated ethnic plea to pass muster, and to reject only those pleas which are blatantly obvious would create an atmosphere wherein crafty and shrewd attorneys could pursue arguments that would pass scrutiny although still be racially prejudicial. *Id.* at 865. Further, the court noted that, unless all subtle appeals to racial prejudice or unity are rejected, such a hypocritical approach would demoralize the law and deepen societal divisions. *Id.*

In making its determination as to the result of an incurable jury argument, the court cited *Reese* and *Otis* to show that the Texas Supreme Court uses "incurable" and "harmful" synonymously. *Guerrero* 800 S.W.2d at 863. The court further stated that the term incurable has been used by the Texas Supreme Court to describe arguments which "may be so inflammatory in nature that its harmfulness could not be eliminated by an instruction to the jury to disregard it." *Id.* Although it is clear that an incurable jury argument does not require objection, the court noted that it would be a contradiction in terms to hold that a jury argument may be incurable and yet harmless. *Id.* The court opined that allowing an approach where incurable arguments were not considered necessarily reversible would put the burden on opposing counsel to object to such improper arguments, thus providing the offending counsel an opportunity to cure. *Id.* at 864. Such an arrangement would leave the opposing counsel with the option to either object subject to cure or waive the error; the offending counsel would have almost nothing to lose. *Id.*

The *Guerrero* court stated that the reasons for applying a strict incurable error approach to racially or ethnically prejudice jury arguments are that an

appeal for racial or ethnic sympathy is an affront to the court and society, and "it makes no difference whether the victimized litigant has shown harm." *Id.* at 865. Furthermore, the court emphasized that an appeal for prejudice or ethnic unity goes beyond the realm of the litigants, attacks the integrity of our society as a whole, and offends the impartiality and equality that Texas courts embrace. *Id.* Based on the foregoing, the court held that incurable does not merely mean that no objection need be made, but that an improper argument's reversible impact, its harmfulness, cannot be corrected or cured by instruction. *Id.* at 864.

Justice Biery dissented, stating that case law does not support the expansion of the rule requiring a finding that all subtle arguments are incurable. *Id.* at 868. Justice Biery found that it would be incorrect to conclude that the argument was an improper plea for ethnic unity because ethnicity was never mentioned and Spanish surnames themselves do not constitute a unity of ethnic purpose. *Id.* at 870-71. The dissent further stated that "incurable" simply means that it need not be objected to at trial to preserve error for appeal, not that the error requires reversal. *See id.* Moreover, the dissent reasoned that when an argument is ambiguous and subject to more than one interpretation, the opposing counsel should object and request an instruction to remove the possibility of any prejudicial effect. *Id.* at 872. Justice Biery further stated that even blatant racial arguments must be objected to in order to preserve error, citing *Dayton Hudson Corp. v. Altus* as authority. *See Guerrero*, 800 S.W.2d at 870.

The determination that an incurable jury argument must be reversed regardless of objection is a harsh remedy. However, once an argument is found to be incurable, it would appear logical to allow for such rigid measures. Thus, the difficulty arises in determining whether the argument falls into the incurable category. The dissent incorrectly reasoned that incurable does not equate with harmfulness and reversibility because its analysis of the seven step process assumes a jury argument may be "incurable" and require a further burden of being reversible and harmful. *See Guerrero*, 800 S.W.2d at 871; *Reese*, 584 S.W.2d at 839. A plain reading of the *Reese* test shows that incurable jury arguments are rare, requiring *inter alia* that the argument constitutes reversible error. Thus, the actual determination that an argument is incurable is premised on the requisite that it is reversible. *See Reese*, 584 S.W.2d at 839.

The majority in *Guerrero* bases its decision upon its determination that the jury argument under review was a plea for ethnic unity and as such incurable and reversable. The court reasoned that the intentions of the attorney were the decisive factors that must be used to determine whether the particular jury argument is one involving appeals to racial or ethnic prejudice. If the determination that a particular jury argument is curable or incurable is based solely upon subject matter, grave injustices would result from lawyers

trying to categorize arguments and forgo the improper jury argument tests in *Reese*, *Otis*, and *Haywood*. The dissent improperly reasoned that ethnicity was never mentioned and that Spanish surnames of the participants did not necessarily mean that they were of the same ethnic background, rendering an appeal for ethnic unity impossible. This analysis is flawed because, as the majority stated, it is the intent of the attorney in making the argument that is improper, and not its actual success or failure to improperly persuade the jury. The difficulty now lies in the task of determining whether an argument is an intentional appeal to race or ethnicity or merely an incidental statement because a precise appellate standard does not yet exist for this purpose. Further, since it is the law in Texas that appeals to ethnic or racial prejudice are prohibited, the questions left for the Texas courts to answer become—What constitutes racial prejudice or pleas for ethnic unity? Which arguments may be placed in the racial or ethnic category and which arguments must be reversed according to the appellate standards in *Reese*, *Otis* and *Haywood*? Is it the mention of the word "united" or the composition of the jury that evidences a plea to prejudice?

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