

FIRST DIVISION  
February 14, 2012

No. 1-10-3475

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

---

IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

---

LAURENSA FLEMING and LORENZO WEAVER,	)	Appeal from the
Special Co-Administrators of the Estate of Lawrence	)	Circuit Court of
Fleming, Jr., Deceased,	)	Cook County.
	)	
Plaintiffs-Appellants,	)	
	)	
v.	)	
	)	
ARTHUR MOSWIN, M.D., HYDE PARK	)	No. 05 L 5802
ASSOCIATES IN MEDICINE, LTD., a Corporation,	)	
and MARK SCHACHT, M.D.	)	
	)	
Defendants-Appellees,	)	
	)	
and	)	
	)	
ROBERTO RAMIREZ, M.D.,	)	Honorable
	)	Edward Washington, II,
Defendant.	)	Judge Presiding.

---

**ORDER**

JUSTICE ROCHFORD delivered the judgment of the court.  
Justice Hall and Justice Karnezis concurred in the judgment.

**Held:** Following a defense verdict in this medical malpractice lawsuit, plaintiffs filed an unsuccessful posttrial motion for a new trial asserting that the trial court improperly: (1) rejected their *Batson* challenge; and (2) allowed defendant doctor to introduce evidence at trial in violation of both the Dead Man's Act and the general rule against

hearsay. Because the trial court's *Batson* analysis was insufficient, we retain jurisdiction and remand for further proceedings on that issue only.

¶ 1 In this medical malpractice action, plaintiffs-appellants, Laurensa Fleming and Lorenzo Weaver, Special Co-Administrators of the Estate of Lawrence Fleming, Jr., Deceased, sought to recover damages following decedent's death of bladder cancer in 2004. Before trial, a directed verdict was entered in favor of defendant Roberto Ramirez, M.D. Following a jury trial, judgment was entered in favor of defendants-appellants, Arthur Moswin, M.D., his employer, Hyde Park Associates in Medicine, Ltd., a corporation (collectively, Dr. Moswin), and Mark Schacht, M.D. On appeal, plaintiffs contend the trial court improperly denied their posttrial motion for a new trial because: (1) Dr. Schacht exercised a peremptory challenge against a prospective juror in violation of the principles espoused in *Batson v. Kentucky*, 476 U.S. 79 (1986); and (2) evidence was admitted at trial in violation of both the Dead Man's Act (735 ILCS 5/8-201 (West 2008)) and the general rule against hearsay. For the following reasons, we remand for further proceedings related to plaintiffs' *Batson* challenge.

¶ 2 I. BACKGROUND

¶ 3 Because we remand for further proceedings on plaintiffs' *Batson* challenge, we recite only those facts necessary for our consideration of that issue.

¶ 4 The original complaint in this matter was filed in May 2005, and a number of subsequent amended complaints were filed over the course of the next four years. In their pleadings, plaintiffs generally alleged that the named defendants were involved in the evaluation and treatment of decedent's complaints of a host of urinary difficulties and related issues throughout 2002 and 2003. Plaintiffs alleged that as a result of various acts of negligence on the part of defendants, the

diagnosis of decedent's bladder tumor was significantly delayed and this delay contributed to decedent's death from metastatic bladder cancer in August of 2004.

¶ 5 The matter proceeded to a jury trial in December of 2009. Prior to trial, the trial court addressed a number of motions *in limine* filed by the parties. These included plaintiffs' motion to bar or limit certain testimony regarding Dr. Schacht's care of the decedent. Specifically, plaintiffs contended Dr. Schacht should not be permitted to testify regarding any conversations he had with decedent because such conversations were inadmissible pursuant to the Dead Man's Act. See 735 ILCS 5/8-201 (West 2008). Plaintiffs' motion was denied.

¶ 6 Jury selection for the trial, thereafter, began with each side being given seven peremptory challenges, with an additional challenge awarded to each side for use in selecting alternate jurors. The defense side split their seven challenges, with four challenges awarded to Dr. Moswin and three challenges awarded to Dr. Schacht. The venire itself originally consisted of 42 people, which was divided in half for purposes of jury selection. Each group of 21 potential jurors was asked a series of group and individual questions, first by the trial court and then by counsel for each party. Group questions were typically answered by a show of hands, with the trial court verbally indicating those nonverbal responses for the record, or recorded as a group "yes" or "no." Nonverbal responses were not otherwise recorded.

¶ 7 The record reflects plaintiffs and decedent are African-American, while defendants are white. The venire included a total of 11 African-Americans.<sup>1</sup> Dr. Moswin exercised three of his

---

<sup>1</sup> There was some debate among the parties below as to whether juror #15, Sherman King, was African-American. The trial court ultimately found that he was, and the parties do not dispute this finding on appeal.

four challenges, with two challenges used to excuse African-American members of the venire. Dr. Schacht used two of his three challenges, and, on both occasions, he excused African-Americans. Specifically, Dr. Schacht excused juror No. 13, Ian Okosi, and juror No. 21, Betty Riley. Following Dr. Schacht's challenge to Ms. Riley, plaintiffs indicated they felt there was a *Batson* issue with respect to his challenges.<sup>2</sup> The trial court then invited plaintiffs to "[p]ut it on the record."

¶ 8 Plaintiffs proceeded to note that both of Dr. Schacht's peremptory challenges were used to exclude African-Americans, and "there's nothing particularly outstanding in something either of them said that made—expressed animus towards doctors or favoritism towards plaintiffs." Plaintiffs asserted that Dr. Schacht was, thus, in the position of having to show that his use of these challenges was a "race neutral decision." Without further prompting from the trial court and without any finding that plaintiff had established a *prima facie* case of discrimination, Dr. Schacht then began offering his reasons for these two challenges. Specifically, Mr. Okosi—ho was 22 years old—was excused because of his youth and inexperience. Counsel for Dr. Schacht further indicated Ms. Riley was excused because "when she was asked about her [health] care that she's received in the past, she said it was all right. The sarcastic way in which she said it bothered me, and that's why I'm getting rid of her."

¶ 9 Plaintiffs challenged Dr. Schacht's expressed reasons, first noting that he had accepted a white juror—Mr. Carchi—who was even younger than Mr. Okosi. Counsel for Dr. Schacht responded: "There's a lot of young people, and we got rid of some of them; but you can't have a jury full of 20-

---

<sup>2</sup> While other *Batson* objections were also raised below, including objections to the peremptory challenges made by Dr. Moswin, plaintiffs have only pursued their objection to the exclusion of Ms. Riley on appeal. We, therefore, similarly limit our discussion to the facts surrounding this objection.

year-olds and 21-year-olds and 22-year-olds." With respect to Ms. Riley, plaintiffs asked counsel for Dr. Schacht to clarify his reasoning, and he reiterated: "It has nothing to do with her age. She had a sarcastic answer to being asked about her medical care and whether she was satisfied with it."

¶ 10 The trial court denied plaintiffs' *Batson* challenge to Dr. Schacht's peremptory challenges at that point, explaining:

"I will note that the – at this point that the reason you gave had nothing to do with [Mr. Okosi's] fairness or his ability to serve in any kind of bias. You just picked out age. I can see with 21 [Ms. Riley] possibly you're saying you believe that for – the comment about her healthcare with doctors shows some kind of bias because you thought it was a sarcastic answer. I will let you go on, but I will note for the record that basically both your challenges have been against African Americans, and one of them has not been for a reason that you believe this person would be unfair or biased. So that's on 13 [Mr. Okosi] because of his age. I'm just noting that. I will not accept – I will not rule that this is a Baxin [*sic*] violation at this point, but I have noted that."

The jury ultimately included three African-American jurors, with an additional two white jurors serving as alternates.

¶ 11 After the jury was selected, the trial court granted a motion for directed verdict in favor of Dr. Ramirez. Additionally, plaintiffs raised the issue of Dr. Schacht's testimony regarding his conversations with decedent for a second time, just before the trial began. The trial court again rejected this argument, and also, subsequently, denied an oral motion to bar any testimony regarding decedent's refusal to consent to a cystoscopy on the grounds that such statements were inadmissible hearsay. At the conclusion of the trial, the jury returned a verdict in favor of defendants.

¶ 12 Following the entry of judgment on the jury's verdict, plaintiffs filed a posttrial motion for a new trial which raised a number of issues. Of particular relevance here, plaintiffs' motion contended the trial court improperly denied: (1) their assertion that Dr. Schacht's peremptory challenges against Mr. Okosi and Ms. Riley violated *Batson*; and (2) their motions to bar or limit Dr. Schacht's testimony. A hearing was held on the motion, including the *Batson* issues, and the trial court ultimately rejected all of the arguments raised by plaintiffs and denied their posttrial motion in a written order. However, the trial court did reevaluate its prior analysis of these two issues in its written order.

¶ 13 With respect to Dr. Schacht's peremptory challenge against Ms. Riley, the trial court reiterated it had previously found Dr. Schacht provided race-neutral reasons for his peremptory challenges and had denied plaintiffs' assertions of a *Batson* violation. However, the trial court did note that – in light of its review of both the parties' written submissions and the transcripts of the juror selection process – it had misunderstood the circumstances surrounding Ms. Riley's response to questioning when it originally found no violation of *Batson*. Specifically, the trial court indicated that at the time of the challenge, it had believed Ms. Riley gave her sarcastic response to a question asked directly by counsel for Dr. Schacht. However, upon review of the record, the trial court noted that Ms. Riley was never asked a direct question about health care by Dr. Schacht's counsel.

¶ 14 In a discussion at the hearing on the posttrial motion, counsel for Dr. Schacht indicated Ms. Riley's response was indeed given to a group question, but it was also sarcastic in *tone*. Dr. Schacht stated that such individual nonverbal responses, were not recorded by the reporter. The trial court responded that Dr. Schacht's counsel did not follow up on this concern with Ms. Riley, and Dr. Schacht's counsel was the only participant in the proceedings to take any particular notice of Ms.

No. 1-10-3475

Riley's response.

¶ 15 The trial court made a number of more specific observations in its written order. It first indicated it was counsel for Dr. Moswin, who asked the following group question: "For those of you who are under the care of a primary care doc, is there anybody here who does not have a good relationship with that doc? Is there anybody here who is not happy with the care that they get from their primary care doctor?" Moreover, while Dr. Schacht's counsel stated he perceived a sarcastic response to this question from Ms. Riley, the trial court noted that the transcript of the jury selection process did not reflect any response from Ms. Riley. Indeed, no group response to this question was recorded in the transcript at all. The only response actually recorded in the transcript was from another prospective juror, after being prompted for a response by counsel for Dr. Moswin. Finally, the trial court noted that Dr. Schacht's counsel did not follow up on any concerns about this perceived response with individual questions directed toward Ms. Riley about that response.

¶ 16 The trial court, therefore, concluded: "[a]fter reflecting on the matter, the Court finds that the Plaintiff made a *prima facie* case under *Batson* with respect to Ms. Riley #21. The defendant failed to provide a race-neutral explanation for excluding Ms. Riley by the manifest weight of the evidence[.]" However, the trial court then went on to further consider whether plaintiffs had met their burden to establish purposeful discrimination. As part of that discussion, the trial court noted: (1) three African-American jurors were ultimately accepted and served on the jury, a proportion similar to the proportion of African-Americans on the overall venire; (2) peremptory challenges to potential African-American jurors were exercised non-consecutively, with African-American jurors accepted on to the jury, both before and after such challenges; and (3) Dr. Schacht had peremptory challenges that were left unused, and were, thus, not used to strike additional African-American

members of the venire.<sup>3</sup> The trial court ultimately found "no purposeful discrimination occurred," explaining:

"Considering the totality of the circumstances, including the racial makeup of the resulting jury, the Court rules that the Plaintiff's [*sic*] received a fair trial, and that no retrial is required under *Batson*. The Plaintiff[s] failed to meet the ultimate burden of establishing a pattern [of] purposeful discrimination. Accordingly, there was no error, and Plaintiffs' motion for a new trial on this should be denied."

¶ 17 With respect to Dr. Schacht's testimony, the trial court again rejected plaintiffs' contentions regarding the Dead Man's Act. Plaintiffs now appeal.

¶ 18 II. ANALYSIS

¶ 19 As noted above, on appeal, plaintiffs challenge the denial of their posttrial motion for a new trial on the grounds that they were denied a fair trial due to the improper exclusion of Ms. Riley as a juror and the introduction of Dr. Schacht's challenged testimony regarding his conversations with the decedent.

¶ 20 A. Standard of Review

¶ 21 In considering whether a motion for a new trial should be granted, the trial court should set aside a jury's verdict only if it was contrary to the manifest weight of the evidence or a party has been denied a fair trial. *Maple v. Gustafson*, 151 Ill. 2d 445, 454 (1992). The trial court is in a superior position to consider errors that occurred, the fairness of the trial to all parties, and whether substantial justice was accomplished. *Smith v. City of Evanston*, 260 Ill. App. 3d 925, 932-33

---

<sup>3</sup> The trial court's analysis included additional comments as well, and those comments will be further discussed below.



(1994). A trial court's ruling on a motion for new trial will not be reversed unless there is an affirmative showing that it clearly abused its discretion. *Gustafson*, 151 Ill. 2d at 455.

¶ 22

B. *Batson* Issues

¶ 23 Because we find that the trial court's analysis of Dr. Schacht's peremptory challenge to Ms. Riley was improper, and we, therefore, remand for further proceedings on that basis, our analysis is limited to a consideration of the *Batson* issues raised on appeal.

¶ 24

1. Legal Framework

¶ 25 "In *Batson*, the United States Supreme Court held that, in a criminal case, the fourteenth amendment's equal protection clause prohibits a prosecutor from using a peremptory challenge to exclude a prospective juror solely on the basis of his or her race." *Mack v. Anderson*, 371 Ill. App. 3d 36, 43 (2006) (citing *Batson*, 476 U.S. at 89). This rule was extended in *Edmonson v. Leesville Concrete Company, Inc.*, 500 U.S. 614 (1991), wherein the court held that "courts must entertain a challenge to a private litigant's racially discriminatory use of peremptory challenges in a civil trial." *Edmonson*, 500 U.S. at 631. The *Batson* decision provides "a three-step process for evaluating claims of discrimination in jury selection." *Mack*, 371 Ill. App. 3d at 44. Specifically, this court has recognized:

"First, the moving party must meet his burden of making a *prima facie* showing that the nonmoving party exercised its peremptory challenge on the basis of race. [Citations.] If a *prima facie* case is made, the process moves to the second step where the burden then shifts to the nonmoving party to articulate a race-neutral explanation for excusing the venireperson. [Citations.] Once the nonmoving party articulates its reasons for excusing the venireperson in question, the process moves to the third step, where the trial court must

determine whether the moving party has carried his burden of establishing purposeful discrimination. [Citations.] At the third step, the trial court evaluates the reasons provided by the nonmoving party as well as claims by the moving party that the proffered reasons are pretextual. [Citations.]" *Id.*

¶ 26 In order to establish a first-step *prima facie* case of purposeful discrimination in the exercise of Dr. Schacht's peremptory challenge to Ms. Riley, plaintiffs were required to present facts and any other relevant circumstances which raised an inference that Dr. Schacht challenged Ms. Riley because she was African-American. *Id.* (citing *Batson*, 476 U.S. at 96). A non-exclusive list of factors relevant to determine whether a *prima facie* case of discrimination against African-American jurors has been established includes: (1) the racial identity between the moving party and the excluded venireperson; (2) a pattern of strikes against African-American venirepersons; (3) a disproportionate use of peremptory challenges against African-American venirepersons; (4) the level of African-American representation in the venire as compared to the jury; (5) the questions and statements during *voir dire* examination and while exercising peremptory challenges; (6) whether the excluded African-American venirepersons were a heterogeneous group sharing race as their only common characteristic; and (7) the race of the various parties and the witnesses. *People v. Allen*, 401 Ill. App. 3d 840, 848 (2010). The trial court may also utilize what is known as a "comparative juror analysis," whereby the striking party's questions to prospective jurors and the jurors' responses are evaluated, to see whether otherwise similar jurors were treated differently because of their membership in a particular race. *People v. Davis*, 231 Ill. 2d 349, 361 (2008).

¶ 27 In sum, the trial court must consider the " 'totality of the relevant facts' " and " 'all relevant circumstances' " surrounding the peremptory strike to see if they give rise to an inference of a

discriminatory purpose. *Id.* at 360. Only if a *prima facie* case of purposeful racial discrimination has been demonstrated does the analysis continue to the next step. *People v. Rivera*, 221 Ill. 2d 481, 501-02 (2006).

¶ 28 At the second step, the burden would then shift to Dr. Schacht to articulate a race-neutral explanation for excusing Ms. Riley. *Mack*, 371 Ill. App. 3d at 44. "The explanation must be clear and reasonably specific, it must contain legitimate reasons for exercising the challenge, and it must be related to the particular case to be tried." *Id.* at 46. Nevertheless, the requirements at step two can only be described as minimal, as a "race-neutral explanation is one based upon *something* other than the race of the venireperson." (Emphasis added.) *People v. Munson*, 206 Ill. 2d 104, 116 (2002). As the United States Supreme Court has held, the "second step of this process does not demand an explanation that is persuasive, or even plausible. 'At this [second] step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is inherent in the prosecutor's explanation, the reason offered will be deemed race neutral.'" *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (quoting *Hernandez v. New York*, 500 U.S. 352, 360 (1991)).

¶ 29 Moreover, our supreme court has noted: "[d]emeanor constitutes a legitimate race-neutral reason for exercising a peremptory challenge." *People v. Easley*, 192 Ill. 2d 307, 327 (2000); *People v. Williams*, 209 Ill. 2d 227, 247 (2004). Furthermore, a potential juror's sarcastic responses during *voir dire* have been recognized as sufficient evidence of demeanor justifying a peremptory challenge. *Jones v. Rockford Memorial Hospital*, 316 Ill. App. 3d 124, 129 (2000).

¶ 30 At this point, "the process moves to the third step, where the trial court must determine whether the moving party has carried his burden of establishing purposeful discrimination." *Mack*, 371 Ill. App. 3d at 44. This court has previously summarized the analytical process at the third

step—in the context of a criminal appeal—stating:

"at the third stage of the *Batson* analysis, the trial court 'weighs the evidence in light of the *prima facie* case, the prosecutor's reasons for challenging the venireperson, and any rebuttal by defense counsel. [Citation.] The court must determine whether the defendant has met his or her burden of proving purposeful discrimination.' [Citation.] It is at this step 'that the persuasiveness of the justification becomes relevant' [citation], and the trial court must assess the genuineness of the State's explanation along with the State's credibility in offering the explanation [citation]. The trial court is free to consider all the circumstances of the trial, evaluate the prosecutor's credibility, and reexamine the explanation offered by the State. [Citation.] 'The trial court must make " 'a sincere and reasoned attempt to evaluate the prosecutor's explanation in light of the circumstances of the case.' " ' [Citations.]" *Martinez*, 335 Ill. App. 3d at 853.

¶ 31 As our supreme court has stated: "a trial court's *third stage* finding on the ultimate issue of discrimination rests largely on credibility determinations." (Emphasis in original.) *Rivera*, 221 Ill. at 502. However, the ultimate credibility of the party exercising a peremptory strike is not the sole consideration at the third step. In *Batson*, the United States Supreme Court "instructed that the procedure to be followed in a hearing on the issue of a prosecutor's discriminatory use of peremptory challenges should be similar to the one utilized in Federal Title VII employment discrimination cases." *People v. Harris*, 129 Ill. 2d 123, 177 (1989) (citing *Batson*, 476 U.S. at 94-98). More recently, the court has cited such an employment discrimination case in the context of its *Batson* analysis for the proposition that the rejection of the proffered nondiscriminatory reason " 'will permit the trier of fact to infer the ultimate fact of intentional discrimination.' " (Emphasis in

original.) *Snyder v. Louisiana*, 552 U.S. 472, 485 (2008) (quoting *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 511 (1993)).

¶ 32 Finally, the "ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike." *Davis*, 231 Ill. 2d at 363. A trial court's ultimate finding, as to whether purposeful discrimination has been proved, is a finding of fact, and that finding will not be overturned unless it is found to be clearly erroneous. *Mack*, 371 Ill. App. 3d at 46.

¶ 33 Thus, in addressing a *Batson* challenge, the trial court must follow a "methodical three-step approach \*\*\*." *People v. Davis*, 233 Ill. 2d 244, 249 (2009). First, the moving party must meet the burden of establishing a *prima facie* showing that a peremptory challenge was made on the basis of race. Only if such a *prima facie* case is made does the process move to the second step, where the burden is shifted to the nonmoving party to provide a facially race-neutral explanation for excusing the venireperson. Finally, only after the nonmoving party states its explanation for excusing the venireperson in question, does the process move to the third step, where the trial court must determine whether the moving party has met the ultimate burden of establishing purposeful discrimination. *Mack*, 371 Ill. App. 3d at 44.

¶ 34 2. Analysis of the Trial Court's Findings

¶ 35 In this case, we perceive a number of ways in which the trial court's consideration of plaintiffs' *Batson* challenge to the exclusion of Ms. Riley from the jury failed to properly follow the specific, three-step analysis outlined above.

¶ 36 We first consider how this issue was initially handled at the time of jury selection. At that time, plaintiffs noted that both of Dr. Schacht's peremptory challenges were used to exclude African-Americans, and "there's nothing particularly outstanding in something either of them said that made

– expressed animus towards doctors or favoritism towards plaintiffs." Plaintiffs maintained Dr. Schacht should, therefore, have to show excluding Ms. Riley was a "race neutral decision." Dr. Schacht then indicated Ms. Riley was excused because "when she was asked about her [health] care that she's received in the past, she said it was all right. The sarcastic way in which she said it bothered me, and that's why I'm getting rid of her." The trial court denied plaintiffs' *Batson* challenge to Dr. Schacht's peremptory challenge to Ms. Riley at that point, explaining: "I can see with 21 [Ms. Riley] possibly you're saying you believe that for – the comment about her healthcare with doctors shows some kind of bias because you thought it was a sarcastic answer."

¶ 37 At no point during this discussion did plaintiffs argue why or how—in light of the factors discussed above—they had met their initial burden to establish a *prima facie* case. Nor did the trial court make any specific findings on that issue. At no point did the trial court call upon Dr. Schacht to fulfill his burden at step two of the analysis to come forward with race-neutral reasons. Instead, the trial court appears to have heard arguments from both parties, and then issued a final decision on the matter. As our supreme court has noted, the trial court should not collapse "what ought to be a methodical *Batson* hearing procedure into an undifferentiated review of [the parties'] contentions." *People v. Garrett*, 139 Ill. 2d 189, 201 (1990).

¶ 38 We have similar concerns with the *Batson* analysis—as to Ms. Riley—contained in the trial court's written order denying plaintiffs' posttrial motion. As noted above, during this analysis, the trial court stated it had previously misunderstood the factual context of Dr. Schacht's challenge. Upon further review, it found the record did not contain support for Dr. Schacht's contention that Ms. Riley made a sarcastic response to the group question posed by counsel for Dr. Moswin. In fact, no verbal response from any of the prospective jurors was recorded. Moreover, the trial court noted

that Dr. Schacht did not follow up on any concerns he might have had by asking additional questions of Ms. Riley before striking her from the jury. After considering these facts, the trial court ultimately found, "[a]fter reflecting on the matter, the Court finds that the Plaintiff[s] made a *prima facie* case under *Batson* with respect to Ms. Riley #21. The defendant failed to provide a race neutral explanation for excluding Ms. Riley by the manifest weight of the evidence[.]"

¶ 39 Again, this analysis does not comport with the *Batson* framework. The trial court found plaintiffs had established a *prima facie* case, but it never provided any analysis on that issue. Moreover, the trial court appears to link his conclusion as to the *prima facie* case with a consideration of Dr. Schacht's reasons for exercising a peremptory challenge to Ms. Riley. Our supreme court "has repeatedly cautioned that the first and second steps in the process 'should not be collapsed into a single, unitary disposition that dilutes the distinctions between a \* \* \* *prima facie* showing of discrimination and the \* \* \* production of neutral explanations for its peremptory challenges.' " *Rivera*, 221 Ill. 2d at 500-01 (quoting *People v. Wiley*, 156 Ill. 2d 464, 475 (1993)). As such, "[t]he party attempting to exercise a peremptory challenge is not required to provide race-neutral reasons for the exercise of its peremptory challenge if a *prima facie* case of purposeful racial discrimination has not been demonstrated." *Id.* at 501-02.

¶ 40 The trial court's order also appears to indicate a finding at stage two, that Dr. Schacht's proffered reason was not supported by "the manifest weight of the evidence," or was not "genuine." The trial court may, therefore, have also collapsed the second and third steps of the *Batson* analysis. As noted above, the second step looks only to the facial validity of the proffered reasons for a peremptory challenge, and "[i]t is not until the third step that the persuasiveness of the justification becomes relevant - the step in which the trial court determines whether the opponent of the strike

[here plaintiffs] has carried his burden of proving purposeful discrimination." *Purkett*, 514 U.S. at 768.

¶ 41 Finally, we turn to the trial court's step-three *Batson* analysis. At this point, the trial court properly indicated it was to consider "the totality of the circumstances." Indeed, at step three, the trial court did consider a number of the *prima facie* factors (*Allen*, 401 Ill. App. 3d at 848) it failed to analyze in making an initial finding at step one, and these factors are also properly considered at step three, along with all the other circumstances of the case. *Martinez*, 335 Ill. App. 3d at 853. The trial court specifically noted, the proportion of African-American jurors was roughly proportional to the proportion of African-Americans on the overall venire, Dr. Schacht's peremptory challenges to potential African-American jurors were exercised non-consecutively, and jury selection ended with Dr. Schacht possessing unused peremptory challenges that he could have used to exclude other potential African-American jurors. Ultimately, the trial court found plaintiffs had failed to meet their burden of establishing that purposeful discrimination had occurred.

¶ 42 However, a number of aspects of the trial court's analysis at step three raise concerns. Indeed, portions of the trial court's step-three analysis seem to indicate: (1) the trial court did not believe that the improper exclusion of a single juror would not require a new trial, so long as other evidence indicated defendant received a fair trial; and (2) plaintiffs had a burden to show a pattern of purposeful discrimination in jury selection at step three.

¶ 43 Specifically, at one point the trial court stated Dr. Schacht's proffered reason for excluding Ms. Riley "does not pass muster." The trial court went on to state, however: "[a]s long as the resulting jury is fair and unbiased, then it is unnecessary to call for a retrial because of a small procedural error during the jury selection process." The trial court further found that the relevant



precedent did not establish "a single excluded juror issue [is] a mandatory violation of *Batson*," and it "may consider whether the jury ultimately seated in a case [is] consistent of a representative number of jurors from the black community." Finally, the trial court found plaintiffs had not met their burden to show a "*pattern* [of] purposeful discrimination." (Emphasis added.) These portions of the trial court's analysis appear to indicate an imprecise understanding of the three-step *Batson* analysis, and run afoul of the well-established proposition "that the exclusion of even just one minority venireperson on account of race is unconstitutional and would require reversal \*\*\*." *Harris*, 129 Ill. 2d at 175.

¶ 44 Indeed, when the trial court's order is read as a whole, it is unclear whether the trial court: (1) may have—as plaintiffs assert—found a discriminatory intent on the part of Dr. Schacht and then excused his improper peremptory challenge in light of other considerations; (2) actually found—only after considering all of the relevant evidence before it and the relevant factors—plaintiffs never met their ultimate burden of persuasion to establish a racial motivation for the exclusion of Ms. Riley from the jury; or (3) found it unnecessary to make an ultimate finding of discrimination as to Ms. Riley because no "pattern" of discrimination had been established. In light of the ambiguities in the trial court's order denying plaintiffs' posttrial motion, and the trial court's failure to rigorously follow the three-step *Batson* analysis, the record is inadequate for this court to review plaintiffs' challenge with respect to Ms. Riley.

¶ 45 Where there has been an apparent failure to conduct the proper *Batson* analysis, we are required to "remand this cause to the trial court for an expedited hearing for the limited purpose of allowing the trial court to conduct the proper *Batson* analysis \*\*\*." *People v. Martinez*, 317 Ill. App. 3d 1040, 1046 (2000). This three-step analysis should be limited solely to a consideration of

the peremptory challenge to Ms. Riley, as this is the only *Batson* challenge plaintiffs have raised on appeal. Moreover, the trial court need not conduct an evidentiary hearing on the matter, but, rather, should make complete findings of fact and conclusions of law—consistent with this order—"on the record as it now exists." *Id.* Because we are remanding for further *Batson* proceedings, " 'the correct procedure' " is for this court to withhold disposition of other unrelated issues, retaining jurisdiction to consider them after the *Batson* proceedings.' " *Id.* (quoting *People v. Ramirez*, 230 Ill. App. 3d 231, 238 (1992)). We, therefore, do not consider the evidentiary challenges plaintiffs have raised on appeal at this time.

¶ 46 The trial court shall file findings of fact and conclusions of law on remand, together with any record of the proceedings, with the clerk of this court within 60 days of the issuance of the mandate in this matter. *Davis*, 231 Ill. 2d at 370. Within 14 days following the filing of these materials with this court, plaintiffs may submit to this court a supplemental brief solely addressing this issue. Defendants shall each have 14 days thereafter to file any response, and no further briefs shall be entertained without further order of this court. This court will thereafter issue a final judgement on all issues pending at that time.

¶ 47

### III. CONCLUSION

¶ 48 For the foregoing reasons, we retain jurisdiction over this matter, but remand this cause to the circuit court of Cook County for proceedings consistent with this order. The mandate shall issue forthwith.

¶ 49 Remanded with directions.

¶ 50 Mandate shall issue forthwith.