

IN THE SUPREME COURT OF MISSOURI

Case No. SC89315

DORIS KESLER-FERGUSON AND BOYD FERGUSON
Plaintiffs/Respondents

Vs.

HY-VEE, INC.,
Defendant/Appellant

SUBSTITUTE BRIEF OF RESPONDENTS
DORIS KESLER-FERGUSON
and
BOYD W. FERGUSON

Appeal from the Circuit Court of Jackson County
The Honorable Marco Roldan
Circuit Court No. 04CV233741

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B. EVEN IF THIS COURT WERE TO ACCEPT HY-VEE'S CLAIM THAT THE TRIAL COURT DID NOT FOLLOW THE CORECT PROCEDURE IN RULING ON THE *BATSON* CHALLENGE AND THAT IT SUFFERED PREJUDICE, THE CORRECT REMEDY WOULD BE A REMAND FOR AN EVIDENTIARTY HEARING BEFORE THE TRIAL COURT, NOT A NEW TRIAL.....46

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JURISDICTIONAL STATEMENT

This appeal involves a premises liability case involving an incident that occurred at Appellant Hy-Vee's store. The issue presented to this court is whether the trial court committed reversible error when it sustained a *Batson* challenge to one of Hy-Vee's peremptory strikes. The Missouri Court of Appeals for the Western District held that the circuit court improperly sustained the *Batson* challenge but held that Hy-Vee did not sustain its burden of demonstrating prejudice and therefore affirmed the circuit court's judgment. After the opinion, this Court granted transfer of the case.

STATEMENT OF FACTS

Appellant used all three of its main peremptory strikes to strike black venire persons and the trial court sustained a *Batson* challenge for only one of those strikes. (Tr. 348:13-14). Appellant will be referred to herein as "Hy-Vee". Respondents Doris Kesler-Ferguson and Boyd W. Ferguson will be referred to herein as "Kesler". References will be made to the appropriate transcript page followed by reference to the lines upon which the facts appear on that page of the transcript.

Thirty seven people sat on the venire panel for this case. (Tr. 22:12-13). After Hy-Vee's attorneys and Kesler's attorneys had both been given an opportunity to question the potential jurors, the court entertained the parties' strikes for cause. (Tr. 329:18-345:23). The Court granted strikes for cause directed at venire persons 1, 4, 5, 7, 11, 12, 13, 17, 19, 20, 23, 27, 30, 32, and 35.

(Tr. 346:6-8). The court then took a recess for approximately thirty minutes to permit the parties to discuss their peremptory strikes. (Tr. 346-347). Following the break, Kesler asserted peremptory strikes for venire persons 2, 15, 29, and 33. (Tr. 348:1-5). Hy-Vee asserted peremptory strikes for venire persons 8, 9, 26 and 37. (Tr. 348: 7-8). Kesler objected to all three of Hy-Vee's peremptory strikes from the main panel (8, 9, and 26) because they were all directed at black individuals. (Tr. 348:13-17). There were no black individuals on the remaining panel for alternates and Hy-Vee's fourth strike (37) was therefore directed to a white individual. (Tr. 349:21-24). The court then looked to Hy-Vee to give a valid race neutral reason for the strikes. (Tr. 348:19 -20). With respect to venire person 26, after a delay, Hy-Vee asserted that venire person 26 had an affiliation with venire person 31. (Tr. 349). The trial court then looked to Kesler's counsel to give an analysis as to why the reasons given were not valid. (Tr. 349). Kesler's counsel gave reasons as to why Hy-Vee's proffered reasons were pretextual. (Tr. 349-350).

With respect to venire person 8, Hy-Vee asserted that the strike was made because the venire person seemed to be falling asleep a little bit and not paying attention. (Tr. 348:25-349:3). With respect to venire person 9, Hy-Vee asserted that he has a work comp claim. (Tr. 349:3-5).

The following statements were made by counsel and the court relating to the strike for venire person 26:

MR. CALLAHAN: No. 26. Oh, yeah, 26 had an affiliation with No. 31. And, frankly, it was just kind of a toss up there. (Tr. 350:6-8).

MR. MCKENZIE: ... Also the record should reflect that out of the alternate panel that we get to select from, all of them were Caucasians or, as we have it in the juror questionnaire, White. (Tr. 349:21-24)

MR. ACCURSO: Mr. Turner also pointed out that he could reach his conclusion independently of any acquaintance or friendship with No. 31, and she said likewise. (Tr. 350:12-15).

THE COURT: What was your basis for No. 26?

MR. CALLAHAN: He's the fellow, Judge, that had a relationship with Juror 31. That made us a little uncomfortable. And other than that, really, we got to a point where we just had a toss up, so. (Tr. 351:7-13).

The court then overruled the *Batson* challenge with respect to venire persons 8 and 9. (Tr. 351:14-352:6). With respect to the venire person 26, the Court granted the *Batson* challenge and the following record was made:

THE COURT: No. 26, though, I see no – No. 26, the basis, Mr. Callahan, that you've given is that they know – or he knows No. 31.

MR. CALLAHAN: He dated her friend, Your Honor. I think that's the same guy.

THE COURT: And to that question, it was only people that responded in the positive to that question that they knew each other. The strike will be denied. There's no other – there's no neutral reason that I can see other than that they know each other. There was nothing negative out of that.

You'll have an opportunity to strike somebody else, Mr. Callahan.

(Tr. 352:7-21).

The only answers given by venire person 26 regarding the association with venire person 31 during voir dire were in response to a question by Kesler's counsel as to whether anybody on the panel knew another member of the panel. (Tr. 205:3-4). Venire person 26 (Mr. Turner) stated that he knew venire person 31 because he (Mr. Turner) used to date a girlfriend of hers. (205:6-22). Kesler's counsel then asked the following question regarding their association:

Mr. McKenzie: All right. Is there anything about that association that would have any effect on your ability to sit as a juror

in this case, quite candidly – I mean, if you were together in the jury box – because he used to date a girlfriend? (Tr. 205:23-206:3).

Both persons answered, “No”. (Tr. 206:4-5). Mr. McKenzie then asked another question to be certain that the association would not pose any problems:

Mr. McKenzie: All right. Here’s my question, though. If you were chosen as jurors in this case and the two of you both were jurors, because of your association and your friendship, would that have any effect on your ability to speak your mind with each other in the room or maybe have a difference of opinion?

Venireperson Yancey-Byrd: Oh, no. We’ve had those before.

Mr. McKenzie: Ms. Yancey-Byrd?

Venireperson Yancey-Byrd: No.

Mr. McKenzie: And, Mr. Turner?

Venireperson Turner: No.

Mr. McKenzie: That would not. All right. Thank you.

(Tr. 206:6-18).

Counsel for Hy-Vee did not ask any questions of either of the two jurors regarding their association with each other during the voir dire process. (Tr. 288-312; 326-328).

POINTS RELIED ON

II. THERE IS NO REASON FOR THIS COURT TO REACH THE QUESTION OF WHETHER THE TRIAL COURT ERRED IN SUSTAINING THE BATSON CHALLENGE OR WHETHER ANY ALLEGED ERROR REQUIRES REVERSAL IN THAT THE TRIAL COURT SUSTAINED THE CHALLENGE BASED ON ITS CONCLUSION THAT THE POPOSED STRIKE OF VENIREPERSON 26 WAS NOT RACE NEUTRAL AND APPELLANT FAILED TO PRESERVE THE ERROR ABOUT WHICH IT NOW COMPLAINS BY FAILING TO REGISTER ANY OBJECTION TO THE TRIAL COURT’S RULING, OR CALL IT TO THE TRIAL COUT’S ATTENTION WHILE THE COURT COULD HAVE CORRECTED THE ALLEGED ERROR.....13

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Pollard v. Whitener, 965 S.W.2d 281 (Mo. App. W.D. 1998).

Rule 84.13(a) V.A.M.R.

III. THE TRIAL COURT DID NOT ERR IN SUSTAINING RESPONDENTS' BATSON CHALLENGE BECAUSE IT APPLIED THE CORRECT STANDARD IN THAT IT REQUIRED APPELLANT TO OFFER AN ACCEPTABLE RACE NEUTRAL EXPLANATION FOR ITS STRIKE, IT THEN LOOKED TO KESLER'S COUNSEL FOR ANALYSIS AND ARGUMENT THAT HY-VEE'S EXPLANATIONS WERE PRETEXTUAL, THEN MADE A DETERMINATION BASED ON THE TOTALITY OF THE CIRCUMSTANCES14

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IV. THE TRIAL COURT DID NOT ERR IN SUSTAINING RESPONDENTS' BATSON CHALLENGE BECAUSE IT CORRECTLY APPLIED THE APPROPRIATE STANDARD IN THAT AFTER HY-VEE GAVE ITS REASONS FOR THE STRIKE AND KESLER'S COUNSEL GAVE ARGUMENT AND ANALYSIS REGARDING PRETEXT, THE TRIAL COURT FOUND THE STRIKE WAS RACIALLY MOTIVATED

Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986)

Ruzicka v. Hart Printing Co., 21 S.W.3d 67, 70 -71 (Mo.App. E.D.2000)

V. THE TRIAL COURT DID NOT ERR IN SUSTAINING RESPONDENTS' *BATSON* CHALLENGE AND IT DID NOT IMPROPERLY PLACE THE BURDEN OF PERSUASION ON THE STRIKING PARTY BECAUSE IT REQUIRED THE STRIKING PARTY TO PROVIDE AN ACCEPTABLE RACE NEUTRAL EXPLANATION FOR ITS STRIKE THEN LOOKED TO KESLER'S COUNSEL TO GIVE ARGUMENT AND ANALYSIS AS TO WHY THE REASON WAS PRETEXTUAL AND MADE ITS DETERMINATION UNDER THE TOTALITY OF THE CIRCUMSTANCES

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Benedict v. Northern Pipeline Const. 44 S.W.3d 410, 420 (Mo.App. W.D.2001)

VI. THE TRIAL COURT DID NOT ERR IN SUSTAINING RESPONDENTS' *BATSON* CHALLENGE BECAUSE IT DID NOT IMPROPERLY RELY SOLELY ON THE JUROR'S ASSURANCES THAT HE COULD BE UNBIASED BUT INSTEAD ASSESSED THE CREDIBILITY OF THE STRIKE BASED ON THE TOTALITY OF THE CIRCUMSTANCES

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State v. Hopkins, 140 S.W.3d 143 (Mo. App. 2004)

State v. McFadden, 191 S.W.3d 648, 654 (Mo. 2006)

VII. EVEN IF THIS COURT WERE TO DETERMINE THAT THE TRIAL COURT ERRED IN SUSTAINING THE *BATSON* CHALLENGE, THE JUDGMENT SHOULD BE AFFIRMED BECAUSE:

A. HY-VEE IS NOT ENTITLED TO A NEW TRIAL UNDER THE MISSOURI STANDARD FOR PEREMPTORY CHALLENGES IN A CIVIL CASE BECAUSE: (1) THE PROPER PROCEDURE WAS FOLLOWED; AND (2) HY-VEE HAS NOT SHOWN THAT IT WAS PREJUDICED BY THE TRIAL COURT'S DENIAL OF THE REQUESTED PEREMPTORY STRIKE; AND

B. EVEN IF THIS COURT WERE TO ACCEPT HY-VEE'S CLAIM THAT THE TRIAL COURT DID NOT FOLLOW THE CORRECT PROCEDURE IN RULING ON THE *BATSON* CHALLENGE AND THAT IT SUFFERED PREJUDICE, THE CORRECT REMEDY WOULD BE A

**REMAND FOR AN EVIDENTIARY HEARING BEFORE THE TRIAL
COURT, NOT A NEW TRIAL**

Anderson v. State, 196 S.W.3d 28 (Mo. banc 2006)

Arizona v. Fulminante, 499 U.S. 279 (1991)

Brines v. Cibis, 882 S.W.2d 138 (Mo. Banc 1994)

ARGUMENT

I. STANDARD OF REVIEW

When reviewing the trial court's decision regarding a *Batson* challenge, because of the extensive role of the trial court and because the findings of fact turn largely on an evaluation of credibility and demeanor, a reviewing court must give great deference to those findings. *Benedict v. Northern Pipeline Const.*, 44 S.W.3d 410, 420 (Mo. App. W.D.2001). The trial court's determination of the propriety of the strike will not be reversed unless it was clearly erroneous, that is, the court must be left with a firm conviction that a mistake was made. *Id.* This standard of review applies to each of the points relied on discussed herein.

II. THERE IS NO REASON FOR THIS COURT TO REACH THE QUESTION OF WHETHER THE TRIAL COURT ERRED IN SUSTAINING THE BATSON CHALLENGE OR WHETHER ANY ALLEGED ERROR REQUIRES REVERSAL IN THAT THE TRIAL COURT SUSTAINED THE CHALLENGE BASED ON ITS CONCLUSION THAT THE PROPOSED STRIKE OF VENIREPERSON 26 WAS NOT RACE NEUTRAL AND APPELLANT FAILED TO PRESERVE THE ERROR ABOUT WHICH IT NOW COMPLAINS BY FAILING TO REGISTER ANY OBJECTION TO THE TRIAL COURT'S RULING, OR CALL IT TO THE TRIAL COUT'S ATTENTION WHILE THE COURT COULD HAVE CORRECTED THE ALLEGED ERROR

When a party takes issue with the trial court's rulings during jury selection, a timely and specific objection is necessary at the time of the ruling to alert the trial court to any potential error:

The purpose of an objection is to eliminate error, if possible, by allowing the trial court to rule intelligently. *See Schmitz v. Director of Revenue*, 889 S.W.2d 883, 886 (Mo.App.1994). It is a settled principle of Missouri trial practice that to preserve trial court error it is necessary to give the trial court the first opportunity to correct the error, *State v. Jordan*, 751 S.W.2d 68, 75 (Mo.App.1988), without the delay, expense, and hardship of appeal and retrial. *See Pruitt v. Community Tire Co.*, 678 S.W.2d 424, 429 (Mo.App.1984). The rule “will be strictly enforced to effectuate [its] intended purpose.” *Id.* (citations omitted). Its purpose is the delivery of expeditious, and expectantly, a fair trial. Otherwise, the rule's purpose is defeated if the error receives its first review in the appellate court. The requirement that the trial court be given the first opportunity to correct the error is incorporated into our rules, which state: “allegations of error *not presented to* or expressly decided by the trial court shall not be considered in any civil appeal from a jury tried case.” Rule 84.13(a) V.A.M.R. (emphasis added).

Missouri courts have routinely required that the party aggrieved by a ruling provide more than a barren objection. The trial court must be

informed in what manner its ruling was incorrect. In that respect, since affirmative action was necessary to accomplish anything in this case, it was incumbent upon the plaintiffs to make known what action they desired the court to take, *State v. Brown*, 364 Mo. 759, 267 S.W.2d 682, 690 (1954), and the plaintiffs had the burden of making the basis of the objection reasonably apparent to the trial court. See *Hayes v. Hudson Foods, Inc.*, 818 S.W.2d 296, 300 (Mo.App.1991). A proper objection must call the court's attention to what is lacking. *Pazdernik v. Decker*, 652 S.W.2d 319, 321 (Mo.App.1983).

Pollard v. Whitener, 965 S.W.2d 281, 288-89 (Mo. App. W.D. 1998).

In *Pollard* the plaintiff sought an extension of time for his voir dire beyond the very limited amount given by the trial judge. Although the judge in that case gave counsel a thirty minute warning, the court foreclosed additional voir dire questions. When notified of the thirty minute warning, counsel asked for the opportunity to make a record of the questions he would have asked. The court said he would be allowed to make the record, and when the thirty minutes expired, counsel indicated he was not finished but was concluding because of the time constraint. The judge indicated counsel could provide the court with the list of questions. The Western District, quoting this court's precedent in *State v. Brown*, 364 Mo. 759, 267 S.W.2d 683, 691 (1954) held the general objection made at the conclusion of voir dire insufficient and said:

The Missouri Supreme Court stated that in order to preserve the record “a party, at the time the ruling or order is ... sought, makes known to the court that action which he desires the court to take.” *Id.* 267 S.W.2d at 690. On rehearing, the court held that it would not be in the interest of the administration of justice “to hold that by merely making some statement in the record, without a request for any action by the Court (when affirmative action would be required to accomplish anything), a party can claim the Court erred in failing to take some action which was not requested.” *Id.* at 691.

Pollard, 965 S.W.2d at 289 (footnote omitted).

Here the record is clear that Hy-Vee’s counsel did not feel passionately about striking Venireperson No. 26. When asked what his basis for striking this juror was, he stated:

No. 26. Oh yeah, 26 had an affiliation with No. 31. And, frankly, it was just kind of a toss up there.

(Abbreviated Transcript at 9, Appellant’s Appendix at 5, hereafter A.T. at __; A_)

After articulating this lukewarm and rather vague associational basis for striking No. 26, the Trial Court, as shown below, was not persuaded and sustained Respondent’s *Batson* challenge. Hy-Vee’s lack of passion translated into a lack of objection, which under Missouri law, constitutes a waiver of a subsequent claim of trial court error.

In *Pollard*, counsel made a lengthy, but non-specific objection which the Western District found to have been waiver. Waiver is even clearer here, where at the time of the Court's ruling, counsel did not call attention to the issue in any respect but acquiesced to it:

THE COURT: Okay, let the record Reflect as follows: On No. 8, yesterday, he did doze off a little bit. We did see him and my staff brought it to my attention. And so, I did have that. That strike obviously, will be overruled as to that.

No. 9. No. 9 answered positive in the question that was asked if anybody sued or been sued. The other people that also answered were, according to my notes, as follows. I just had it in my notes here. Here it is. It was asked this morning, anybody have sued or have been sued. The answers – the positive answers to that were No. 9, No. 12 who's already off for other reasons; and No. 20, who was also struck already as a strike for cause. So that leaves No. 9 as the only one that gave a positive answer. That request is overruled.

No. 26 though, I see no – No. 26, the basis, Mr. Callahan, that you've given is that they know – or he knows No. 31.

MR CALLAHAN: He dated her friend, Your Honor. I think that's the same guy.

THE COURT: And to that question, it was only people that responded positive to that question that they knew each other. The

strike will be denied. There's no other – there's no neutral reason that I can see other than that they know each other. There was nothing negative out of that. You'll have an opportunity to strike somebody else, Mr. Callahan.

MR. CALLAHAN: Okay.

(There was a discussion off the record between defense counsel.)

MR. CALLAHAN: Your Honor?

THE COURT: Yes sir.

MR. CALLAHAN: We're ready.

THE COURT: All right, who's your third strike?

MR. CALLAHAN: No. 22, your honor.

(A.T. at 11-13; A5, A6)(emphasis added).

As the record makes clear, Appellant's counsel did not raise any objection at the time of the Court's ruling to call attention to the fact that Venireperson No. 26 should be stricken on the peremptory challenge. He did not attempt to articulate another race-neutral reason. He did not raise the issue raised on appeal – i.e. that the Court should have conducted a separate pretext analysis. While such issues were raised in the motion for new trial, Appellant never asked the trial court for relief from its ruling before it made another strike. Appellant did not even argue with the trial court's conclusion that the supposed race-neutral reason for the challenge was not race neutral. His only response was "okay". (A.T. at 11-13, A5, A6).

The failure to object did not present the claimed error to the trial court for correction at the time of the error. As *Pollard* makes clear, Kesler had a right to rely on counsel's acquiescence to the court's ruling. *Id.* at 290. If Hy-Vee had raised its claim of error to the Trial Court, the Trial Court could have corrected any perceived deficiencies in the procedural process and Kesler could have provided any further argument perceived to be necessary. Instead, Appellant remained silent, choosing instead to acquiesce in the trial court's directive to choose a different juror to strike. Because Appellant did not object to the process applied by the trial court, the trial court had no opportunity to correct any perceived error and the allegations of error have been waived. Having failed to request that the Trial Court take any particular action, the Appellant has failed to preserve its claim of error and the judgment below should be affirmed without further review.

III. THE TRIAL COURT DID NOT ERR IN SUSTAINING RESPONDENTS' *BATSON* CHALLENGE BECAUSE IT APPLIED THE CORRECT STANDARD IN THAT IT REQUIRED APPELLANT TO OFFER AN ACCEPTABLE RACE NEUTRAL EXPLANATION FOR ITS STRIKE, IT THEN LOOKED TO KESLER'S COUNSEL FOR ANALYSIS AND ARGUMENT THAT HY-VEE'S EXPLANATIONS WERE PRETEXTUAL, THEN MADE A DETERMINATION BASED ON THE TOTALITY OF THE CIRCUMSTANCES

Hy-Vee claims that the Court erroneously required it to provide more than a race neutral reason for its peremptory strike, asserting that the trial court incorrectly required it to give a **negative**, race neutral reason –i.e. a reason that would negatively affect the juror’s ability to serve. (Hy-Vee’s brief at p.9). Hy-Vee mischaracterizes the process applied by the Trial Court and the court’s ruling sustaining Kesler’s *Batson* challenge. The trial court did not impose an additional requirement on Hy-Vee. Instead, the trial court, as it is required to do, considered the credibility of the strike under the totality of the circumstances and found that the reasons given were not believable and that the strike was in fact racially motivated. That is exactly the standard and procedure that is correctly applied when a *Batson* challenge is raised in Missouri and no error was committed by the trial court.

Batson challenges turn that which is peremptory into something that is subject to explanation. Prior to *Batson*, a peremptory challenge required no explanation; it was a right exercised without reference to more than a party’s whim, reasoned experience, or unexpressed prejudice. With *Batson*, however, when peremptory challenges are voiced against identifiable racial or gender groups, the challenge is no longer a challenge of right, but a challenge that must be shown to the trial court’s satisfaction to have been the product of other-than-racial-or-gender motivation. In other words, *Batson* and its progeny require a good reason for striking a juror who fits into a racial or gender profile.

Missouri does not follow the procedure suggested in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) when a *Batson* challenge is made. Instead, it follows its own unitary procedure for the vindication of *Batson* claims. *Benedict v. Northern Pipeline Const.* 44 S.W.3d 410, 418 -419 (Mo. App. 2001). Under Missouri's procedure, a party must first raise a *Batson* challenge by identifying each venireperson who was improperly struck and the cognizable protected group to which that individual belongs. *Id.*, citing *State v. Smith*, 5 S.W.3d 595, 597 (Mo. App. 1999). Once that is done, the striking party must provide a race-neutral reason for the strike. *Id.* Assuming the striking party is able to articulate an acceptable explanation for the strike, the party asserting the *Batson* challenge then needs to show that the striking party's proffered reasons for the strikes are pretextual and that the strikes were racially motivated. *Id.* The party asserting the *Batson* challenge may meet its burden through evidence or analysis that shows that the striking party's explanation is pretextual. *Id.*

The trial court must primarily consider the plausibility of the striking party's explanations in light of the totality of the facts and circumstances surrounding the case. *Benedict*, 44 S.W.3d at 420. The trial court's findings are entitled to great deference because its decision depends largely on the evaluation of intangibles such as credibility and demeanor. *Id.* at 420. In assessing the plausibility of the striking party's explanation for the strikes, any facts or circumstances that detract from or lend credence to the striking party's explanation are relevant. *Id.* A number of factors have been set forth in the case law for

determining whether the *Batson* challenge should be sustained, including: (1) the degree of logical relevance between the explanation and the case to be tried in terms of the nature of the case and the types of evidence to be adduced, (2) the striking attorney's demeanor or statements during voir dire, and (3) the court's past experiences with the striking attorney. *Id.* at 420.

The court correctly applied the foregoing analysis in ruling on the *Batson* challenge in this case. In the context of the stages mentioned above, the following scenario occurred below:

Stage 1 Kesler challenged Hy-Vee's strikes because all three people that Hy-Vee sought to strike (Numbers 8, 9 and 26) from the main panel were black.

Stage 2 When the Court asked Hy-Vee's counsel to explain the reasons for its strikes, Hy-Vee offered reasons for the strikes directed at Venirepersons 8 and 9, and 26, stating that number 8 had been falling asleep and number 9 had a workers compensation claim. (Tr. 348:19-349:5). After a delay and a noticeably strained effort, Hy-Vee suggested that Venireperson 26 should be struck because he was acquainted or associated with Venireperson 31, who was also an African American. Hy-Vee's suggestion was, in reality, nothing more than another way of saying that both Venireperson 26 and 31 were black in this context. (Tr. 349:6-8). In reality, the proffered reason given with respect to Venireperson 26 was not race neutral at all.

Stage 3 The trial court looked to plaintiff's counsel for reasons as to why the proffered reasons for the strike were pretextual. (Stage 2). The plaintiffs' counsel

pointed out weaknesses with respect to all three strikes, including the fact that both 26 and 31 said there was nothing about their acquaintance that would affect their ability to serve as jurors. (Tr. 349-351).

The foregoing record shows the correct procedure and standard was followed by the Trial Court. Kesler's assertion that Hy-Vee's strikes were directed at black individuals satisfied the first step of the *Batson* three-part procedure for figuring out whether the strikes were indeed racially motivated and Hy-Vee does not claim otherwise. The second *Batson* step requires the striker to provide a race neutral explanation – that is an explanation that, on its face, is based on a legitimate, non-racial concern. There is where Hy-Vee failed.

The trial court found the reasons for the first two strikes to be acceptable, genuine non-racial reasons and therefore overruled the *Batson* challenge as to those strikes. (351:14-352:6). The court found, however, that it did not believe Hy-Vee with respect to the third strike (Number 26), stating there was nothing negative about 26 knowing 31 and sustained the *Batson* challenge as to that third strike. Hy-Vee argues that the reason it gave for the strike – that juror number 26 knew juror number 31 was a race neutral reason and the Court was, therefore, required to accept that reason as part two of the *Batson* challenge process without any consideration as to the credibility or genuineness of the proffered reason. In reality the reason was not race neutral at all. Hy-Vee's suggestion that Venireperson 26 should be struck because he was a friend or was acquainted or associated with Venireperson 31 was nothing more than another way of suggesting

that both members of the panel were African American in this context. Hy-Vee did not give a race neutral explanation for its strike.

Even if this Court determines that the reason given by Hy-Vee with respect to Venireperson 26 was race neutral on its face, that does not mean, that the trial court is required to accept the reason without proceeding further. Even in the face of a race neutral explanation, the trial court is permitted to assess the credibility of the proffered reason by considering the reasons given in light of the totality of the circumstances. As discussed more fully above, the court is not only permitted to utilize credibility determinations regarding the proffered reason for the strike, it is required to do so. *Benedict*, 44 S.W.3d at 420. In fact, that is the purpose of the third stage of the process. The following factors were before the trial court and compel a finding that the trial court's determination that the reason given by Hy-Vee for its strike was a pretext and the strike was, in reality, racially motivated:

- Hy-Vee says the reason for the strike was because the two potential jurors knew each other, yet both jurors said the acquaintance would not affect them in any way. (Tr. 206:4-5).
- Hy-Vee claims that it was concerned about the acquaintance *yet it asked no questions regarding the acquaintance* during voir dire. The failure to engage in any meaningful *voir dire* examination on a subject a party alleges it is concerned about is evidence suggesting that the explanation for the strike is a sham and a pretext for discrimination. *State v. McFadden*,

191 S.W.3d 648, 654 (Mo. 2006); See also *State v. Hopkins*, 140 S.W.3d 143 (Mo. App. 2004).

- Hy-Vee claims that its strikes were not racially motivated, yet it used all three of its peremptory strikes for the main panel to strike black people. (Tr. 348:13-14).
- Hy-Vee claims that the acquaintance was genuinely the reason for the strike, yet there was a long delay and a pause while Hy-Vee tried to come up with a reason for its strike, and the demeanor and uncertainty in Hy-Vee's counsel's voice said otherwise. (Before giving any reason for the strike, Hy-Vee's counsel paused, delayed and finally said, "No. 26. Oh yeah.....)(Tr. 349:6-9)
- Hy-Vee claims that the acquaintance was genuinely the reason for the strike, yet at one point Hy-Vee's counsel could not even remember if he had the right guy that had responded affirmatively regarding the acquaintance. (Hy-Vee's counsel said, "He dated her friend, Your Honor. I think that's the same guy." Tr. 352:10-11)
- Hy-Vee claims that the three strikes were not racially motivated yet the only strike not directed at a black individual was from a pool left for alternate jurors that had only white people on it. (Tr. 349:221-24).

The foregoing factors establish that there was no logical relevance between the reason given for the strike and the facts of the case and that the trial court believed that the strike was instead racially motivated. The trial court's

determinations are entitled to great deference because of the necessary attention which must be given to credibility and demeanor. *Benedict*, supra, 44 S.W.3d at 420. These factors, discussed above, are more than sufficient to support the court's determination.

Hy-Vee cites *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L. Ed.2d 834 (1995) in support of its argument that once it gave a racially neutral reason for its strike in response to the *Batson* challenge (at stage two of the process), the trial court was required to accept the reason without regard to any credibility determinations. In other words, Hy-Vee argues that any purportedly race neutral reason posited by Hy-Vee must be determined by the court to be acceptable at stage two of the process, the court was not permitted to proceed to stage three of the process, and the failure to accept any reason warrants a new trial. Hy-Vee's argument is illogical and erroneous for several reasons.

First, although Hy-Vee claims that the trial court made its determination that the reason was not acceptable at stage two of the *Batson* process, it has pointed to nothing in the transcript to support that conclusion. There is nothing in the record that suggests that the trial court based its decision solely on the reasons given by Hy-Vee for its strikes. In fact, it is clear that the trial court did not stop at stage 2 since it looked to Kesler's attorney to provide argument as to pretext. As discussed above, there are numerous other factors, including observations by the trial court as to counsel's demeanor, statements made by Kesler's counsel, and a lack of any logical relevance between the reason given and the facts of the case

that support the trial court's ruling and contradict Hy-Vee's claim that the court deviated from the proper procedure. In a proper progression through the stages discussed above, the trial court properly listened to Kesler and again to Hy-Vee in order to make his ruling based on the totality of the circumstances and there is simply no basis for concluding that the trial court ignored those other factors. Hy-Vee has failed to present any evidence from which this court could conclude that the trial court stopped at step two of the analysis and Hy-Vee's argument must therefore fail for that reason alone.

Second, even if the trial court did make the determination at stage two of the process, this Court should hold that it would have been correct in doing so because a ruling otherwise would mean that a trial court would be required to accept *all* proffered reasons, regardless of how ludicrous they may be. For example, if Hy-Vee's interpretation of the law were correct, a trial court would be required to accept the reason given for the strike even if the reason had been that the potential juror should be stricken because the juror had on a green shirt, even if the trial court did not believe that the green shirt had any logical relevance to the case. If Hy-Vee's argument was correct and there were no other factors contributing to a finding of racial motivation, the strike would have to be sustained. The Court is entitled to consider the logical relevance (or lack thereof) and the attorney's demeanor. Even if Kesler's counsel had not provided sufficient evidence of pretext, the court was entitled to disbelieve the genuineness of Hy-Vee's strike based on those factors. Contrary to Hy-Vee's assertion, the reason

given by the striking party must be an acceptable, believable reason. *Benedict v. Northern Pipeline Const.* 44 S.W.3d at 418 -419 (Mo. App. 2001).

Finally, the analysis applied in *Purkett* is different than in the case at bar, because in *Purkett*, the trial court denied the *Batson* challenge, whereas in this case, the trial court granted the *Batson* challenge. Because of that difference in the factual underpinnings of the case, Hy-Vee misconstrues its holding. In *Purkett*, the question presented was whether a court erred in failing to **grant** a *Batson* challenge when, at the second step of the process, a race neutral reason was given by the striking party but it was not plausible. The Supreme Court held that a trial court is not required to do so. The Supreme Court did not, however, hold that a trial court is not permitted to consider the implausibility of the reasons given when making the ultimate determination as to whether the strike will be permitted. To the contrary, the Supreme Court stated: “But to say that a trial judge may choose to disbelieve a silly or superstitious reason at step three is quite different from saying that a trial judge must terminate the inquiry at step two when the race-neutral reason is silly or superstitious.” *Id.* at 1771. In other words, the trial court is not required to stop at stage two of the analysis, nor is the trial court prohibited from moving to stage three to make its credibility determination. To the contrary, consistent with Missouri law, the *Purkett* Court held that if an acceptable reason is given, the trial court must then make a credibility determination as to whether the proffered reason was valid or was a mere pretext for discrimination. That is

exactly what the trial court did. There was no mistake made in this case and the ruling should be upheld.

Defendant also relies on *State v. Stanley*, 990 S.W.2d 1 (Mo. App. 1999). This case is different than *Stanley* in at least two major respects. First, in *Stanley*, the striking party offered acceptable race neutral reasons for the strikes that made sense. In *Stanley*, the striking party offered at least two reasons for the strike: (1) the potential juror was not paying attention during voir dire; and (2) the potential juror refused to acknowledge knowing counsel even though counsel did business where the juror worked. Those reasons, similar to the reasons, upon which the trial court denied the *Batson* challenge in the case at bar with respect to another potential juror, were acceptable, believable reasons. In contrast, in the case at bar, although defendant eventually came up with an asserted reason for the strike, it could not initially voice a race neutral reason for the strike. Second, contrary to the situation present in *Stanley*, and contrary to defendant's argument, plaintiffs did not stand silent. Instead, they showed that the proffered reason for the strike was pretextual and that the strike was racially motivated. As discussed more fully above, there were a number of other factors that supported the trial court's findings of discrimination. Those factors dispel any notion that the trial court imposed an impermissible burden on Hy-Vee or that it applied an incorrect standard. Even if Kesler had stood silent, however, the trial court would be entitled to make a credibility determination based on all of the factors before him.

If that were not the case, the judge's observations regarding counsel's demeanor, etc. would be meaningless.

Hy-Vee's argument assumes that each step of the *Batson* challenge analysis can and should be analyzed in a vacuum without any consideration as to the other steps involved. That is not the state of the law in Missouri. In Missouri, the challenge is to be looked at under the totality of the circumstances and looking at one step in a vacuum without regard to the other information is not the proper approach because the trial court is not required to make a determination at each stage of the process. Instead, the trial court makes a finding at the conclusion of the process. Finally, in order for Hy-Vee to be entitled to a new trial based upon its argument that the Court stopped at stage two of the analysis, in accordance with the dictates of *Purkett v. Elem.*, supra., 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834, this Court would not only have to conclude that the trial court did, indeed stop at stage two of the process, it would also have to determine that if the Court had proceeded to step three, the result would have been different. The result would not have been different. The trial court clearly did not believe Hy-Vee's reasons for striking venire person 26. If it had, it would have denied the *Batson* challenge at any stage, just as it did with respect to the other two venire persons who were also subject to a *Batson* challenge.

Hy-Vee's argument hinges upon the trial court's statement that there was nothing negative about the two jurors knowing each other. The trial court did not make the comment because he was requiring Hy-Vee to provide more than a race

neutral explanation at stage two of the process. Instead, the trial court was making an assessment, at stage three of the process that he did not believe the explanation given – i.e. there was nothing negative about the acquaintance and it simply wasn't believable that the acquaintance was the true reason for the strike. Because of the extensive role of the trial court in the voir dire process and because the findings of fact by the Court with respect to that process turn largely on an evaluation of credibility, a reviewing court must give great deference to the trial court's findings regarding juror strikes. *Bowls v. Scarborough*, supra, 950 S.W.2d at 700. The trial court's determination of the propriety of the strike will not be reversed unless it was clearly erroneous, meaning that the reviewing court must be left with a firm conviction that a mistake was made.

In its Reply brief, Hy-Vee, citing *State v. Moore*, 88 S.W.3d 31, 34-35 (Mo App. 2002) argues that this Court cannot consider anything other than the fact that the jurors said the acquaintance would not affect them because Kesler did not raise any of the other factors to the trial court at Step 3. That is not true. *Moore* is inapposite. In *Moore*, the trial court **overruled** the Batson challenge and the Court held that the appellant could not assert additional reasons for pretext that had not been presented to the trial court. That is true because a trial court cannot be convicted of error on a basis that it was never given the opportunity to consider. See e.g. *State v. Lewis* 243 S.W.3d 523, 525 (Mo.App. W.D. 2008) and *Pollard*, supra, 965 S.W.2d 281. In the case at bar, however, Kesler is not trying to convict the trial court of error. Instead, Kesler is presenting facts to this Court that were

present before the trial court and that are consistent with the trial court's ruling, for the purpose of this Court affirming the trial Court's ruling. The difference is monumental because, when a ruling involving credibility is at issue, great deference is to be given to the ruling, and the trial court is entitled to consider any facts and circumstances before him, including observations or information available to him outside of the current trial such as prior experience with the trial attorneys when determining whether he believes that the strike was pretextual or not, regardless of whether they were raised by Kesler. *Benedict v. Northern Pipeline Const.*, 44 S.W.3d 410, 420-421 (Mo. App. 2001). The fact that two out of three of the defendant's strikes were upheld establishes that the Court carefully considered the challenges and applied the correct burden of proof in the face of a *Batson* challenge. The Court, after asking Hy-Vee's counsel for the reasons for the strikes, and after listening to the comments, analysis and argument by Kesler's counsel, considered the totality of the circumstances, including its own observations regarding the behavior and demeanor of counsel, the reasons asserted for the strikes, the failure of Hy-Vee to ask any questions regarding the acquaintance between the potential jurors, and the argument presented by plaintiffs as to why the strike was pretextual and properly denied the strike. *Benedict v. Northern Pipeline Const.*, 44 S.W.3d 410, 420 -421 (Mo. App. 2001).

But even if this Court disagrees with that argument, the question remains whether any alleged error by the trial court in failing to follow *Batson's* procedure, the third step of which is reached only if the striker's explanation is race neutral,

was reversible error. The 8th Circuit has recently held that a trial court's decision to make a determination of racial motivation following a race-neutral explanation without argument from the opposing party that the race-neutral explanation is mere pretext for a race-motivated challenge. *Moran v. Clarke*, 443 F.3d 646 (8th Cir. 2006) held that in the conflict between strict application of the third prong of the Batson procedure and "a more fundamental judicial principle: determinations of credibility, including those surrounding voir dire, are peculiarly within the province of the district court" *Id.* at 652 ought to be resolved in favor of the latter. Admittedly, *Moran* was a case that was centered on issues of race; nevertheless, the teaching of the law cannot depend on the kind of case that is involved. It was the lack of a showing of prejudice that supported the *Moran* holding. "Where the district court decided the Batson query based upon its credibility assessment of the proffered reasons, and, where no argument is made that the subsequent trial lacked fairness because of juror bias" a new trial was not warranted." *Id.* at 653.

What is clear in this case is that had Kesler's counsel suggested that Hy-Vee's "acquaintance" rationale was nothing more than pretext because both Venirepersons 26 and 31 were African American, the trial court would have reached the same conclusion it reached here. Even if this Court determines that the trial court determined that the explanation was pretextual without argument from Kesler's counsel, that would not lessen the trial court's rectitude in concluding that the challenge was racially motivated. Rather, the trial court's assessment of the non-verbal communication that surrounded the explanation,

informed by the trial court's superior ability to assess the entirety of the voir dire and the motivations behind Appellant's challenges, highlights the surety of the trial court's convictions about Appellant's racial motivations. Simply put, the trial court is entitled to make credibility determinations with or without argument from the party opposing the strike.

Finally, citing *American Express Travel Related Services v. Mace*, 26 S.W.3d 613, 615 (Mo. App. 2000), Hy-Vee argues that this court cannot consider the long pause that occurred before it was able to come up with an explanation for its strike because the court is not permitted to rely on matters not reflected in the transcript. It is true that the court may not consider a post trial affidavit of counsel that was not a part of the record below because such an affidavit cannot take the place of a properly prepared transcript of the proceedings (the scenario present in *American Express*). It is not true, however, that the trial court cannot consider matters beyond words on paper that affect the credibility of the witnesses, such as demeanor, etc. In fact, that is the exact reason that deference is given to the trial courts credibility determinations because the trial court is in a better position to evaluate the intangibles such as demeanor, pauses, etc. that are before him that are not necessarily visible in a transcript. Those include the pauses by counsel, which Hy-Vee refers to. It also includes the arduous look that appeared on counsel's face when he was asked to provide an explanation for its strike and the actions that counsel exhibited as he attempted to come up with a credible explanation. Hy-Vee's argument is exactly the type of scenario that compels deference to the trial

court's ruling. Furthermore, the wording of the transcript exhibits the uncertainty in counsel's voice that was abundantly clear to those who were standing in the courtroom. (Before giving any reason for the strike, counsel paused, delayed and finally "No. 26. Oh yeah...." (Tr. p. 349:609) and "I think that's the same guy."(Tr. 352:10-11)). The transcript is consistent with a finding that the trial court relied on credibility determinations to reach his conclusion. If this Court holds that the trial court erred in upholding one out of three *Batson* challenges, after following the correct procedure in doing so, the message to the trial courts will be that they have no ability to use credibility determinations. The result would turn *Batson* challenges into an exercise in futility.

IV. THE TRIAL COURT DID NOT ERR IN SUSTAINING RESPONDENTS' BATSON CHALLENGE BECAUSE IT CORRECTLY APPLIED THE APPROPRIATE STANDARD IN THAT AFTER HY-VEE GAVE ITS REASONS FOR THE STRIKE AND KESLER'S COUNSEL GAVE ARGUMENT AND ANALYSIS REGARDING PRETEXT, THE TRIAL COURT FOUND THE STRIKE WAS RACIALLY MOTIVATED

Hy-Vee next argues that the Court did not find that its strike was racially motivated but rather held that Hy-Vee failed to provide a race neutral reason that negatively affected the juror's ability to serve. The trial court did say that Hy-Vee failed to give a race neutral reason that negatively affected the juror's ability to serve. The trial court's statement, however, was not made for the purpose of imposing a different standard than is applicable when a *Batson* challenge is made.

Instead, the statement was made in the context of explaining why Hy-Vee's proffered reason did not have any logical relevance to the facts of the case and it was therefore not credible and the trial court believed it was, in reality, purposeful discrimination. Hy-Vee argues that the trial court did not consider that the explanation was pretextual but cites nothing in the record to support the conclusion. (Hy-Vee's brief at p. 13). Hy-Vee argues that the court did not consider any of the factors Missouri courts use to determine if the opponent of the strike has proved pretext but cites nothing in the record to support its conclusion. (Hy-Vee's brief at p. 13). Hy-Vee seems to be arguing that the court was required, in the middle of the trial to issue formal Findings of Fact and Conclusions of Law setting forth the credibility determinations made by the trial court. If Hy-Vee wanted Findings of Fact and Conclusions of Law it was required to ask for them. See e.g. Ruzicka v. Hart Printing Co., 21 S.W.3d 67, 70 -71 (Mo.App. E.D. 2000) It did not. When findings of fact were not requested, the Court of Appeals must assume all factual findings were in accordance with the result reached by the trial court. *Id.* It is clear from the record that the trial court's ruling was that the reason given by Hy-Vee for its strike for venire person 26 was not credible and was merely a pretext for racial discrimination and the trial court is not required, during the trial to make findings of fact and conclusions of law regarding each aspect of its ruling when none has been requested. As discussed above under point III, the trial court applied the correct standard, it properly considered the

appropriate factors, a finding of racial discrimination was implicit in the ruling and the ruling granting the *Batson* challenge was correct.

V. THE TRIAL COURT DID NOT ERR IN SUSTAINING RESPONDENTS' BATSON CHALLENGE AND IT DID NOT IMPROPERLY PLACE THE BURDEN OF PERSUASION ON THE STRIKING PARTY BECAUSE IT REQUIRED THE STRIKING PARTY TO PROVIDE AN ACCEPTABLE RACE NEUTRAL EXPLANATION FOR ITS STRIKE THEN LOOKED TO KESLER'S COUNSEL TO GIVE ARGUMENT AND ANALYSIS AS TO WHY THE REASON WAS PRETEXTUAL AND MADE ITS DETERMINATION UNDER THE TOTALITY OF THE CIRCUMSTANCES

Hy-Vee claims that the trial court impermissibly shifted the burden of persuasion to Hy-Vee, because it required Hy-Vee to provide more than a race neutral explanation for the strike. As discussed above, the court did not improperly require Hy-Vee to provide more than a race neutral explanation for its strike. Instead, the court noted that the proffered reason included no negative reason that would affect the juror's ability to serve in the context of determining whether it believed that the strike was not racially motivated after hearing arguments from Kesler's attorney and making appropriate observations throughout the process. Again, the trial court is not required to accept any and all proffered reasons, however, ludicrous they may be. Instead, the trial court is supposed to

consider the credibility and genuineness of the proffered reason in light of the demeanor of Hy-Vee's counsel, the lack of any logical relevance that the reason has to the case and all other factors present under the totality of the circumstances. *Benedict v. Northern Pipeline Const.*, 44 S.W.3d 410, 420 (Mo.App. W.D.2001). That is exactly what the court did.

Hy-Vee argues that the trial court failed to consider Kesler's pretext argument at all but cites no support in the record for its conclusion. (Hy-Vee's brief at p. 14). Hy-Vee argues that the trial court placed the burden of persuasion on Hy-Vee but cites no support in the record for its conclusion. (Hy-Vee's brief at p.14). As discussed above, the court, based on the totality of the circumstances, including the lack of credibility of the proffered reason for the strike, statements and analysis by Kesler's counsel that the remaining jurors from whom alternates could be chosen were all white, the fact that the jurors themselves said the acquaintance was not an issue determined that the proffered reason was not credible. The trial court did not shift the burden of persuasion. The trial court correctly required Kesler to provide reasons as to why the strike was racially motivated, it considered all of the circumstances before it and correctly ruled that Kesler had met its burden of persuasion and the strike could not withstand a *Batson* challenge.

VI. THE TRIAL COURT DID NOT ERR IN SUSTAINING RESPONDENTS' *BATSON* CHALLENGE BECAUSE IT DID NOT IMPROPERLY RELY SOLELY ON THE JUROR'S ASSURANCES THAT HE COULD BE UNBIASED BUT INSTEAD ASSESSED THE CREDIBILITY OF THE STRIKE BASED ON THE TOTALITY OF THE CIRCUMSTANCES

Hy-Vee erroneously argues that the trial court improperly relied solely on the juror's assurances that he could be unbiased. As discussed more fully above, there was a lack of any logical relevance between the proffered explanation for the strike and the facts of the case, the credibility and demeanor of Hy-Vee's counsel did not support the reason for the strike because counsel could not initially come up with a reason for the strike and later could not remember if the reason really applied to this particular juror, all three of Hy-Vee's strikes were for black individuals, the remaining pool for alternates jurors consisted only of white people, and Hy-Vee did not ask any questions of the jurors regarding the acquaintance that was supposedly the reason for the strike and the trial court's ruling was correct. *Benedict v. Northern Pipeline Const.*, 44 S.W.3d 410, 420 (Mo.App. W.D.2001). The juror's statement regarding his ability to serve as a juror was not the only factor present that supports the trial court's correct ruling that Hy-Vee's strike was racially motivated. As discussed above, the following factors were also present for the Court's consideration:

in reality, racially motivated:

- Hy-Vee says the reason for the strike was because the two potential jurors knew each other, yet both jurors said the acquaintance would not affect them in any way. (Tr. 206:4-5).
- Hy-Vee claims that it was concerned about the acquaintance *yet it asked no questions regarding the acquaintance* during voir dire. The failure to engage in any meaningful *voir dire* examination on a subject a party alleges it is concerned about is evidence suggesting that the explanation for the strike is a sham and a pretext for discrimination. *State v. McFadden*, 191 S.W.3d 648, 654 (Mo. 2006); See also *State v. Hopkins*, 140 S.W.3d 143 (Mo. App. 2004).
- Hy-Vee claims that its strikes were not racially motivated, yet it used all three of its peremptory strikes for the main panel to strike black people. (Tr. 348:13-14).
- Hy-Vee claims that the acquaintance was genuinely the reason for the strike, yet there was a long delay and a pause while Hy-Vee tried to come up with a reason for its strike, and the demeanor and uncertainty in Hy-Vee's counsel's voice said otherwise. (Before giving any reason for the strike, Hy-Vee's counsel paused, delayed and finally said, "No. 26. Oh yeah.....)(Tr. 349:6-9)
- Hy-Vee claims that the acquaintance was genuinely the reason for the strike, yet at one point Hy-Vee's counsel could not even remember if he

had the right guy that had responded affirmatively regarding the acquaintance. (Hy-Vee's counsel said, "He dated her friend, Your Honor. I think that's the same guy." Tr. 352:10-11)

- Hy-Vee claims that the three strikes were not racially motivated yet the only strike not directed at a black individual was from a pool left for alternate jurors that had only white people on it. (Tr. 349:221-24).

The trial court's ruling was not based solely on the juror's assessment as to whether they would be appropriate jurors and the judgment should be affirmed.

VII. EVEN IF THIS COURT WERE TO DETERMINE THAT THE TRIAL COURT ERRED IN SUSTAINING THE BATSON CHALLENGE, THE JUDGMENT SHOULD BE AFFIRMED BECAUSE:

A. HY-VEE IS NOT ENTITLED TO A NEW TRIAL UNDER THE MISSOURI STANDARD FOR PEREMPTORY CHALLENGES IN A CIVIL CASE BECAUSE: (1) THE PROPER PROCEDURE WAS FOLLOWED; AND (2) HY-VEE HAS NOT SHOWN THAT IT WAS PREJUDICED BY THE TRIAL COURT'S DENIAL OF THE REQUESTED PEREMPTORY STRIKE; AND

B. EVEN IF THIS COURT WERE TO ACCEPT HY-VEE'S CLAIM THAT THE TRIAL COURT DID NOT FOLLOW THE CORRECT PROCEDURE IN RULING ON THE BATSON CHALLENGE AND THAT IT SUFFERED PREJUDICE, THE CORRECT REMEDY WOULD BE A

REMAND FOR AN EVIDENTIARY HEARING BEFORE THE TRIAL COURT, NOT A NEW TRIAL

As discussed more fully above, the judgment should be affirmed because the trial court followed the correct procedure and great deference should be given to the trial court's credibility determinations. Even if this Court were to determine that the trial court erred, however, the correct remedy would not be a new trial because Hy-Vee has shown no prejudice. Even if it had shown prejudice any remand should be for an evidentiary hearing, not a new trial.

Peremptory challenges help to insure the impartiality of jurors who ultimately sit on a particular case. *Care & Treatment of Wadleigh, v. State of Missouri*, 145 S.W.3d 434 (Mo. App. W.D. 2004). However, the loss of a peremptory strike does not automatically violate the right to an impartial jury because such challenges are not constitutionally required. *Id.* The test under the peremptory challenge statute and the constitution is whether the jury actually seated was impartial. *Id.* When the challenging party makes no claim that the selected jurors were unqualified or that the denial of the peremptory challenge in any way affected the impartiality of his jury, he is not entitled to a new trial. *Id.* With respect to the requested strike that is the subject of this appeal, Hy-Vee asserted that the grounds for the strike were that the juror knew another member of the panel. (Tr. 351:7-13) The record is clear, however, that those two jurors affirmatively and clearly stated that their acquaintance with each other would not affect their ability to be fair and impartial jurors. (Tr. 206:4-18). Hy-Vee has

presented nothing to refute those statements. Instead, Hy-Vee, citing *Carter v. Tom's Truck Repair, Inc.*, 857 S.W.2d 172 (Mo. banc 1993) claims that prejudice is shown by simply establishing that the challenged juror sat on the jury. (Hy-Vee's Supplemental Brief at pp. 3; See also Hy-Vee's argument at p. 5). Hy-Vee quotes the following language from *Carter*.

In order to prove the existence of prejudice, the complaining party must show that it exhausted its peremptory challenges and that a prospective juror, who the challenging party would have otherwise stricken, served on the jury.

Id. at 178; (Hy-Vee's Supplemental Brief at p. 4).

While this court, in *Carter* held that establishing that the challenged juror served on the jury is essential, *Carter* contains no holding that making such a showing is sufficient. In *Carter* this Court refused to reverse the trial court's ruling not only because the challenging party did not disclose which prospective juror it would have struck, but also because there was "no claim or suggestion from the record that any of the jurors selected was prejudiced to the extent that he or she should have been removed for cause." (*Id.* at 178). In *Carter* this court explained, "In sum, absent a clear demonstration of prejudice, the trial court's error in failing to allocate all three defense strikes to Tom's does not justify reversal." *Id.* at 178. This Court (in *Carter*) and the Missouri Court of Appeals (in *Care & Treatment of Wadleigh*) have both clearly held that absent a clear showing of prejudice – i.e. that the failure to permit the peremptory strike resulted in the

jury not being qualified or impartial – the complaining party is not entitled to a new trial. The rule is consistent with standards of review that are applied with respect to other areas of juror selection.

At common law, there is no right of peremptory challenge in civil actions. *Rodgers v. Jackson County Orthopedics, Inc.*, 904 S.W.2d 385 (Mo. App. W.D. 1995); The right to peremptory challenges is purely statutory. *Id.* Violation of the statutory right to a peremptory challenge requires a showing of prejudice. *Id.* In *Rodgers*, because the right was statutory and not constitutional, the Western District held that the trial court’s failure to strike a juror for cause, requiring the plaintiff to exercise a peremptory strike, did not constitute reversible error because the 12 jurors who did sit were all qualified. *Id.*

Under Missouri law, very few trial court errors equate to automatic reversal without a showing a prejudice. *See, e.g., Lay v. P & G Health Care Inc.*, 37 S.W.3d 310 (Mo. App. W.D. 2000)(no automatic reversal for instructional error); *Citizens Bank of Appleton City v. Schapeler*, 869 S.W.2d 120, 128 (Mo.App. W.D.1993)(record must indicate substantial prejudice to a party to obtain reversal for instructional error); *In re C.D.*, 27 S.W.3d 826 (Mo. App. W.D. 2000)(no automatic reversal where guardian ad litem appointed on the day of trial in termination of parental rights case) *Neavill v. Klemp*, 427 S.W.2d 446, 448 [9] (Mo.1968)(“Error without prejudice is no ground for reversal.”); *Gage v. Morse*, 933 S.W.2d 410, 421[13] (Mo.App.1996)(Even where irrelevant evidence is placed before a jury, reversal is not mandated unless the incompetent evidence

prejudices the complaining party or adversely affects the jury in reaching its verdict); *Scott v. Blue Springs Ford*, 215 S.W.3d 145 (Mo. App. W.D. 2006)(error in admission of other similar evidence does not mandate reversal without showing of prejudice); *Williams v. McCoy*, 854 S.W.2d 545 (Mo. App. S.D. 1993)(error in admission of evidence requires showing of prejudice); *Stallings v. Washington University*, 794 S.W.2d 264 (Mo. App. E.D. 1990)(unintentional juror nondisclosure requires showing of prejudice); *Wingate v. Lester E. Cox Med. Ctr.*, 853 S.W.2d 912, 916 (Mo. banc 1993)(when there is no intentional non-disclosure by the juror, complaining party must establish that the juror's presence on the jury influenced the verdict so as to prejudice the party seeking a new trial.) *Brines v. Cibis*, 882 S.W.2d 138 (Mo. Banc 1994)(issues must be material for intentional juror nondisclosure to invoke presumed prejudice).

Courts reserve automatic reversal for a very narrow category of cases that deal with structural errors in the trial. Structural errors are “constitutional deprivations ... affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.” *Strong v. State*, ___ S.W.3d ___, 2008 WL 2929675 (Mo. banc 2008) quoting *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). See, also *Williams By and Through Williams v. Barnes Hosp.*, 736 S.W.2d 33, 37 (Mo. 1987)(fundamental right to a fair trial is impinged when juror intentionally fails to disclose material information and requires reversal). There is no constitutional or structural deprivation in the case at bar and a showing of prejudice is essential.

The constitutional/structural error that attends a denial of an improperly-sustained, racially-based peremptory challenge over a *Batson* challenge results not in the loss of a constitutional right of a party to the litigation, but the deprivation of a constitutional right of the venireperson who is denied a place on the jury for racial reasons in violation of the Fourteenth Amendment. See, e.g., *Knese v. State*, 85 S.W.3d 628 (Mo. banc 2002), and *Anderson v. State*, 196 S.W.3d 28 (Mo. banc 2006). Here, in sharp contrast, where the peremptory challenge is denied and the attacked venireperson is allowed to remain on the jury, there is no constitutional violation. Because an error in applying the *Batson/Edmondson* line of cases in the context of this case violates only a statutory right to a peremptory challenge, and not a constitutional right, the Appellant here must show that he was prejudiced in order to obtain reversal. This is particularly so where no argument is made that the subsequent trial lacked fairness because of juror bias.” *Moran*, 443 F.3d at 653.

This is the understanding announced in *Carter*, supra., 857 S.W.2d 172. The loss or misallocation of a peremptory challenge, standing alone, is not a grounds for an automatic reversal. This is because the loss of a peremptory challenge without a commensurate showing of prejudice does not impact on the fairness of the trial itself.

In addition to being consistent with other standards of review, requiring a showing of prejudice in the context of peremptory challenges makes sense. That is true because the purpose of peremptory challenges which are not constitutionally

required is to help insure the impartiality of jurors who sit on the jury, not to guarantee a party a jury of its choosing. See *Care & Treatment of Wadleigh, v. State of Missouri*, supra. 145 S.W.3d 434. If the Court were to grant a new trial to Hy-Vee in the absence of any showing that the jury was not impartial or that any prejudice was suffered, it would not be serving the purpose of the peremptory challenge statute and it would elevate the statutorily created peremptory challenge to a constitutional right. Such a result would clearly be contrary to Missouri law. Id. The foregoing is especially true, since, as the Court is aware, great deference is to be given to the credibility determinations made by the trial court when ruling on peremptory challenges (and when ruling on juror nondisclosure cases) and the trial court's determination of the propriety of the strike is not to be reversed unless it was clearly erroneous. In other words, the court must be left with a firm conviction that a mistake was made. *Benedict v. Northern Pipeline Const.*, supra., 44 S.W.3d at 420. Absent a showing of prejudice – i.e. a showing that the juror was not qualified or that the jury was not impartial, the defendant's right to a fair trial has not been interfered with and no mistake has been made.

Hy-Vee makes no claim that the juror was not qualified. It makes no claim that the jury was not impartial. Hy-Vee has made no showing of prejudice.

As shown above, the trial court followed the correct procedure in exercising its credibility determinations, and when that is true no error has occurred. See *State v. Miller*, 162 S.W.3d 7, 15-16 (Mo. App. 2005)(no error when, although defendant argued he used a “race neutral hunch” in exercising the strike, the trial

court found the striking party's explanation to be speculative and "by implication was not persuaded by it".) Even if this Court were to determine that the correct procedure was not followed, however, the remedy would not be a new trial because Missouri Courts have held that when the trial court erred in failing to follow the correct procedure specified for a *Batson* challenge, the failure to follow the correct procedure requires a remand for an evidentiary hearing at which the trial court must follow the proper procedure, then certify a record of its proceeding and finding back to the reviewing Court. *State v. Nathan*, 992 S.W.2d 908 (Mo. App. 1999). Therefore, if this Court were to accept Hy-Vee's asserted claim of error, the proper remedy would not be a new trial. It would be a remand for an evidentiary hearing so that the trial court could properly follow the procedure that Hy-Vee claims the Court did not follow.

B. Hy-Vee is not entitled to a new trial under the standard for *Batson* challenge violations in the civil and criminal context.

Hy-Vee argues that it is entitled to a new trial under standards set forth in cases from other jurisdictions and in Missouri in the criminal context, citing *State v. Stanley*, 990 S.W.2d 1,6 (Mo. App. 1999). First, there is no need to look to other jurisdictions because, as discussed above, Missouri has clearly set forth the rule with respect to review of a trial court's denial of a peremptory challenge in civil cases. Second, prejudice was not addressed by the *Stanley* Court and the facts in *Stanley* are substantially different than the facts in this case. In *Stanley*, the court held that the criminal defendant was required to incur an additional

burden because the prosecutor stood silent once race neutral reasons were given for the strikes. In the case at bar, Kesler did not stand silent. Instead, the Court requested that attorneys for the Kesler Plaintiffs respond, they did so, and the Court then made its ruling based upon credibility determinations inherent in the process. Furthermore, the *Stanley* Court apparently believed that it was not required to determine whether any prejudice had occurred as a result of the error and it did not address the prejudice issue. Such a procedure is clearly contrary to the dictates of this Court in *Carter* (discussed above) that the issue of prejudice must be addressed and absent a showing of prejudice, no relief is necessary. Hy-Vee's claim that it need only establish that the challenged juror served on the jury is contrary to Missouri law. Hy-Vee is not entitled to a new trial.

CONCLUSION

Although Hy-Vee has couched its claim of error in four different ways, it really only raises one claim of error in the trial court's actions – i.e. that the trial court did not apply the correct procedure in ruling on Kesler's Batson challenge. Hy-Vee registered no objection to the Trial Court below, and it has failed to preserve any alleged error. Even if an objection had been made, the claim of error must fail. The claim hinges on the trial court's comment that he did not see anything negative about the acquaintance between venire person 26 and number 31. The comment was correct as the jurors themselves said it was true. The comment was proper under the correct standard to be applied in the face of a *Batson* challenge and the factors to be considered in the face of a *Batson* challenge

because the court is required to look at the totality of the circumstances in determining whether the reason asserted by Hy-Vee for its strike is believable. Although Hy-Vee claims that the comment was inappropriately made at step two of the *Batson* challenge process, it has presented nothing in the record that would support that claim. Once the *Batson* challenge was made, the trial court asked Hy-Vee the reasons for its strike, then listened to the comments and analysis set forth by Kesler's counsel as to why the proffered reason was a mere pretext and then made the statement as part of its credibility determination based on the totality of the circumstances. The delay and uncertainty exhibited by Hy-Vee's counsel, the inability of Hy-Vee's counsel to say with certainty that the reason actually applied to the venire person in question, the fact that Hy-Vee used all three of its main peremptory challenges to strike blacks, the fact that the remaining alternate pool was all whites, the fact that the venire persons themselves said it would not affect their ability to serve as jurors, and the fact that Hy-Vee asked no questions of the venire persons regarding the acquaintance all support the trial court's determination that the reason given for the strike was a mere pretext and that the strike was racially motivated in violation of the rules set forth by *Batson*. Even if the court's ruling had come at stage two of the process, it would not affect the validity of the verdict because the reason given was not a race neutral reason. It was instead another way of saying that Venirepersons 26 and 31 were both African American. Furthermore, the Court's ruling was not based solely on Hy-Vee's proffered reason for the strike. The trial court applied the correct standard

(as is evidenced by the challenges he did not sustain), he did not improperly shift the burden of persuasion and, contrary to Hy-Vee's assertion, the trial court did conclude that Hy-Vee's strike was racially motivated. There was no mistake in this case and the judgment should be affirmed.

Even if the trial court had committed an error in following the proper procedure as Hy-Vee claims, Hy-Vee has not alleged or established that it suffered any prejudice as a result Juror Number 26 serving on the jury and any error would not warrant reversal of the judgment rendered against Hy-Vee. Finally, even if this Court were to determine that prejudice exists, the proper remedy would not be to remand the case for a new trial. Instead, because the claimed error is a failure to follow the proper procedure for a *Batson* challenge, a reversal and remand for new trial is not necessary. Instead, the proper remedy would be to remand the case for an evidentiary hearing at which the trial court must follow the proper procedure, then certify a record of its proceeding and finding back to this Court.

In the absence of a timely objection, in the absence of a structural flaw in the trial court's decision, in the absence of a showing of prejudice, there is no basis for reversal and the judgment below should be affirmed.

Respectfully submitted,
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**CERTIFICATE OF SERVICE AND
COMPLIANCE WITH COURT RULES**

I hereby certify that the above brief includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), it complies with the dictates of rule 84.06(b), it was prepared using Microsoft Word, Times New Roman, Font size 13 and it has 13,477 words based on the word count in Microsoft Word. I further certify that the disk filed with the brief has been scanned for viruses and it is virus-free. I further certify that on the 18th day of August, 2008, the original and ten copies of the brief were filed with the Missouri Supreme Court, and two copies of the brief in the form specified by Rule 84.06(a) and one copy of the disk required by rule 84.06(g) were mailed, postage prepaid to Michael E. Callahan, Joshua M Ellwanger, Laura K. Brooks, Blackwell Sanders Peper Martin LLP, 4801 Main Street, Suite 1000, Kansas City, Missouri 64112-6777.

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ATTORNEYS FOR RESPONDENTS

APPENDIX

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**IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT INDEPENDENCE**

DORIS KESLER-FERGUSON, et al]	
]	
Plaintiffs,]	
]	
vs.]	Case No. 0416CV233741
]	
]	Division 16
HY-VEE, INC,]	
]	
Defendant.]	

JUDGMENT

On June 26, 2006 through June 29 of 2006, this matter came to the Court on Plaintiffs Petition for Damages against Defendant. Plaintiffs appeared in person and with attorney Charles McKinzie. Defendant appeared by corporate representative and with attorney Joshua Ellwanger.

The parties selected a jury of twelve persons and two alternates. Plaintiff presented witnesses and other evidence. Defendant presented witnesses and other evidence. Motions for Directed Verdict, at the close of Plaintiff's case and at the close of all evidence, were offered by Defendant and denied by the Court.

On June 29, 2006, after deliberations, the Jury returned a verdict as follows:

We, the undersigned jurors, assess percentages of fault as follows:

Defendant Hy-Vee, Inc.	60%
Plaintiff Doris Kesler Ferguson	40%

On the claim of Plaintiff Doris Kesler-Ferguson for personal injury, we, the undersigned jurors, find the total amount of Plaintiff Doris Kesler-Ferguson damages, disregarding any fault on the part of Plaintiff Doris Kesler Ferguson, to be Three hundred fifty four thousand (\$354,000.00) dollars.

On the claim of Plaintiff Boyd Ferguson for damages due to injury to his wife Doris Kesler-Ferguson, we, the undersigned jurors, find that Plaintiff Boyd Ferguson did not sustain damage as a direct result of injury to his wife, Doris Kesler-Ferguson.

The verdict was signed by ten jurors.

Upon the jury's verdict the Court enters its judgment.

WHEREFORE IT IS ORDERED AND ADJUDGED that Defendant Hy-vee, Inc. shall pay Plaintiff Doris Kesler-Ferguson Two hundred twelve thousand and four hundred dollars (\$ 212,400.00).

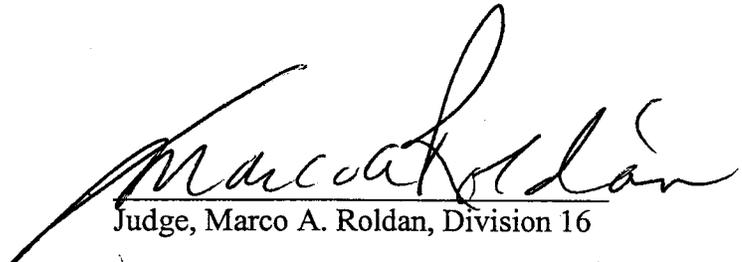
IT IS FURTHERED ORDER AND ADJUDGED judgment is entered in favor of Defendant Hy-Vee, Inc. on the claim of Plaintiff Boyd Ferguson.

IT IS FURTHERED ORDER AND ADJUDGED that costs are assessed against Defendant.

IT IS SO ORDERED.

UPON DEFAULT LET EXECUTION ISSUE.

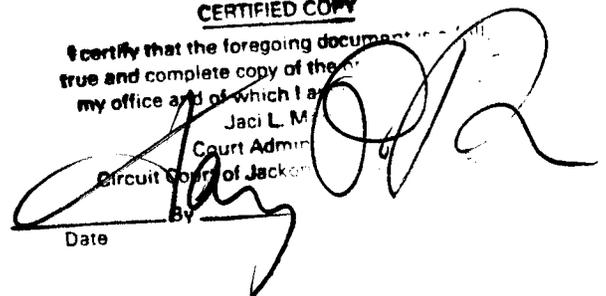
Dated: 07/05/2006


Judge, Marco A. Roldan, Division 16

I hereby certify that a copy of
The foregoing was duly mailed
This day of July, 2006 to:

Charles McKinzie, Attorney for Plaintiff
4646 Roanoke Parkway
Kansas City, Missouri 64112

Joshua Ellwanger, Attorney for Defendant
4801 Main St., Suite 1000
P.O. Box 419777
Kansas City, Missouri 64112-6777

CERTIFIED COPY
I certify that the foregoing document is a true and complete copy of the original in my office and of which I am the Clerk.
Jaci L. M...
Court Admin...
Circuit Court of Jackson
By 
Date

Toiy Phanich, JAA

C

VERNON'S ANNOTATED MISSOURI RULES
SUPREME COURT RULES
RULES OF CIVIL PROCEDURE
PART II. RULES RELATING TO ALL APPELLATE COURTS
→ RULE 84. PROCEDURE IN ALL APPELLATE COURTS

84.13. Allegations of Error Considered--Reversible Error--Review in Cases Tried Without a Jury or With an Advisory Jury

(a) Preservation of Error in Civil Cases. Apart from questions of jurisdiction of the trial court over the subject matter and questions as to the sufficiency of pleadings to state a claim upon which relief can be granted or a legal defense to a claim, allegations of error not briefed or not properly briefed shall not be considered in any civil appeal and allegations of error not presented to or expressly decided by the trial court shall not be considered in any civil appeal from a jury tried case.

(b) Materiality of Error. No appellate court shall reverse any judgment unless it finds that error was committed by the trial court against the appellant materially affecting the merits of the action.

(c) Plain Error may be Considered. Plain errors affecting substantial rights may be considered on appeal, in the discretion of the court, though not raised or preserved, when the court finds that manifest injustice or miscarriage of justice has resulted therefrom.

(d) Appellate review in cases tried without a jury or with an advisory jury.

- (1) The court shall review the case upon both the law and the evidence as in suits of an equitable nature;
- (2) The court shall give due regard to the opportunity of the trial court to have judged the credibility of witnesses;
- (3) The court shall consider admissible evidence that was rejected by the trial court and preserved. The court may order that proffered evidence that was rejected by the trial court and not preserved be taken by the deposition or by reference to a master under Rule 68.03 and returned to the appellate court.

Current with amendments received through 5/15/2008.

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