No. ____

IN THE

Supreme Court of the United States

LOWNDES COUNTY HEALTH SERVICES, LLC D/B/A HERITAGE HEALTHCARE AT HOLLY HILL,

Petitioner,

v.

GREGORY COPELAND, INDIVIDUALLY AS SON OF BOBBY COPELAND, AND MARIER HOUSE, AS ADMINISTRATOR OF THE ESTATE OF BOBBY COPELAND, DECEASED

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Georgia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Batson v. Kentucky*, 476 U.S. 79 (1986) and its progeny, the Court set a three-part test for ensuring a party does not racially discriminate in exercising peremptory strikes against prospective jurors. Under step two, striking counsel must give a race-neutral explanation for the strike, but the Court has never defined the substantive or procedural requirements for assessing race neutrality. Also, the Court has suggested, but not ruled, that the U.S. Constitution bars any discrimination "on the basis of race," irrespective of the race of the parties and jurors. *Flowers v. Mississippi*, 139 S. Ct. 2228, 2234 (2019).

Respondents provided a *facially race-based* explanation for striking a prospective juror. This civil case involves African-American plaintiffs whose counsel used all six peremptory strikes to remove Caucasian jurors. For one juror, Respondents' counsel acknowledged the strike was based on race: demographic research on the juror's place of residence suggested "that may not be an area that is friendly to African Americans, which [plaintiff] is." Counsel also asserted the juror's "blue collar employment" suggested the juror "may have some innate prejudice" toward Respondents. Here, Georgia courts allowed the strike to stand, conflating race neutrality with pretext and stating counsel mentioned only the race of their client, not the juror's race; the suggestion being that *Batson* applies only to discrimination based on the prospective juror's race.

The questions presented are:

1. Whether striking a juror based on allegations of racial prejudice, when unsubstantiated, is

not a facially race neutral explanation under step two of *Batson*'s three-part test, regardless of whether the juror's race is explicitly stated.

2. Whether compliance with step two of *Batson*'s three-part test requires a distinct inquiry into the facial race neutrality of the explanation, is a prerequisite for advancing to step three, and is subject to a *de novo* standard of review.

PARTIES TO THE PROCEEDING

The parties to the proceeding below are listed on the caption.

RULE 29.6 STATEMENT

Lowndes County Health Services, LLC d/b/a Heritage Healthcare at Holly Hill is owned 99% by United Health Services of Georgia, Inc. and 1% by Neil L. Pruitt, Jr. No publicly traded company owns 10% or more of the stock of Lowndes County Health Services, LLC.

RELATED PROCEEDINGS

- *Lowndes County Health Services, LLC v. Gregory Copeland et al.*, No. S20C0425, Supreme Court of Georgia, grant of the writ of certiorari withdrawn as improvidently granted, entered December 7, 2020.
- *Lowndes County Health Services, LLC v. Gregory Copeland et al.*, No. S20C0425, Supreme Court of Georgia, grant of the writ of certiorari, entered June 1, 2020.
- *Lowndes County Health Services, LLC v. Gregory Copeland et al.*, No. A19A1552, A19A1553, Court of Appeals of Georgia Fifth Division, order entered October 10, 2019.
- *Gregory Copeland, et al. v. Lowndes County Health Services, LLC d/b/a Heritage Healthcare at Holly Hill*, No. 2014SCV287, State Court of Lowndes County, State of Georgia, Order on Defendant's Motion for New Trial entered October 25, 2018.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Lowndes County Health Services, LLC d/b/a Heritage Healthcare at Holly Hill ("Holly Hill") respectfully petitions for a writ of certiorari to review the judgments of the Supreme Court of Georgia and Court of Appeals of Georgia in this case.

OPINIONS BELOW

The orders of the Supreme Court of Georgia to grant a writ of certiorari in this case and then withdraw that grant as improvidently granted are unreported and attached as Appendices A (1a-2a) and B (3a-4a).

The opinion of the Court of Appeals of Georgia, Fifth Division upholding the trial judge's denial of the *Batson* challenge is reported at 352 Ga. App. 233, 834 S.E.2d 322 and attached as Appendix C (5a-22a).

The October 26, 2018 order of the State Court of Lowndes County, State of Georgia denying Defendant's Motion for New Trial is unreported and attached as Appendix D (23a-29a).

The transcript section in which the State Court of Lowndes County, State of Georgia denied Petitioner's objection under *Batson v. Kentucky*, 476 U.S. 79 (1986) is attached as Appendix E (30a-51a).

JURISDICTION

The Georgia Court of Appeals entered judgment on October 10, 2019. App. C. The Supreme Court of Georgia granted a writ of certiorari on June 1, 2020 and withdrew that grant as improvidently granted

on December 7, 2020. App. A, B. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

Pursuant to this Court's order of March 19, 2020, regarding filing deadlines during the COVID-19 pandemic, this petition is due 150 days after the date of the denial of Petitioner's petition for writ of certiorari in the Georgia Supreme Court.

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. amend. XIV provides in relevant part:

"No State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The petition presents recurring and indisputably important questions involving step two of a *Batson* challenge, for which there is little jurisprudence from the Court. In *Batson v. Kentucky*, 476 U.S. 79 (1986) and its progeny, the Court has set forth a three-part test for ensuring a party does not discriminate on the basis of race when exercising peremptory strikes against prospective jurors. Step one, a party makes a *prima facie* case of racial discrimination. *See Flowers v. Mississippi*, 139 S.Ct. 2228, 2243–44 (2019). Step two, the burden shifts to the counsel issuing the strikes to provide a race-neutral explanation for each strike. *See id.* Step three, the judge assesses the facts and determines whether the striking counsel was motivated in substantial part by discriminatory intent for any strike. *See id.* Much of the Court's case law has focused on step three, providing little guidance for lower courts on how to properly assess a step two explanation for facial race neutrality.

Specifically, the Court has not fully defined facially race neutral or provided a clear process or standards of review for step two determinations. Because of these gaps, the Georgia courts here found Respondents' explanation accusing a prospective juror of innate racism against African-Americans without substantiation to be race neutral. The trial court merged its step two analysis on facial race neutrality with a step three analysis on context, motive and pretext, rather than issue a separate step two determination. Also, on review, the appellate

court invoked only the great deference standard of review, which is the standard for a step three finding, rather than articulate a separate *de novo* standard for the purely legal question of whether the step two explanation was facially race neutral. It then excused the peremptory strike, stating it was based on the Respondents'—not juror's—race.

The substantive and procedural gaps these rulings exposed in the Court's jurisprudence on peremptory strikes have been identified in the past by Justices. *See Wilkerson v. Texas*, 493 U.S. 924, 925, 928 (1989) (Marshall, J. dissenting) (urging the Court to define race neutral as "based wholly on nonracial criteria. . . . If such 'smoking guns' are ignored, we have little hope of combating the more subtle forms of racial discrimination."); *Purkett v. Elem*, 514 U.S. 765, 776 (1995) (Stevens, J. dissenting) (suggesting the *de novo* review for step two is "the correct resolution of this procedural question, but it deserves more consideration than the Court has provided").

Further, enforcing Respondents' burden to give a facially race neutral explanation here will also provide the Court with an important opportunity to clarify the core protections of *Batson* and its progeny. Specifically, the Court should clarify, as suggested in *Flowers*, 139 S. Ct. at 2234, that any unfounded peremptory strike "on the basis of race" is disallowed under the Fourteenth Amendment to the U.S. Constitution. There are no "magic words" invoking the juror's race required to trigger this constitutional right, which protects jurors, parties, *and* the courts from the stain of racial discrimination. Otherwise, the lower courts' rulings here would vitiate these

constitutional protections by creating a roadmap for circumventing the Court's jurisprudence. This case is an ideal vehicle for resolving these issues.

A. Factual Background

1. Mr. Copeland was admitted to Lowndes County Health Services, LLC d/b/a Heritage Healthcare at Holly Hill, a skilled nursing facility, in 2001. App. 6a. During the evening on October 25, 2012, he was found to have abdominal distention and a brownish-colored stain on his gown. *See id.* The nursing staff contacted the on-call physician's assistant who decided not to transfer Mr. Copeland to the emergency room that night. *See id.* Mr. Copeland was monitored during the night. *See id.*

The next morning, Mr. Copeland's blood was tested, which revealed several abnormalities. App. 7a. Mr. Copeland was transported to South Georgia Medical Center, where he was treated. *See id.* He ultimately died from Acute Respiratory Distress Syndrome. *See id.* In this lawsuit, Respondents allege Mr. Copeland died due to substandard care provided by Petitioner's staff, alleging they failed to timely monitor, assess, report and respond to Mr. Copeland's changing condition and failed to adequately staff its nursing facility with RNs rather than CNAs during the night shift. *See id.* The case proceeded to trial in the State Court of Lowndes County, Georgia on January 16, 2018.

2. During jury selection, counsel for Respondents, who are African-American, used all six peremptory strikes to remove Caucasian prospective jurors. App. 9a. Petitioner's counsel timely objected to the strikes on *Batson* grounds. App. 32a.

Respondents' counsel provided race-neutral explanations for five of the six stricken jurors. App. 32a-44a. When explaining why they struck Juror No. 11, a man named Britt Voigt, Respondents' counsel admitted to striking him for a racially discriminatory reason: Mr. Voigt "may have some innate prejudice toward our client" because the client is African-American. App. 38a.

The rationale for this reason was based solely on demographics, place of residence and employment:

> Mr. Voigt works in a sheet metal factory. He works in south Lowndes County which based off of our demographic research of this group and with our discussion with other counsel who are – work in this area suggested that that may not be an area that is friendly to African Americans, which our client is; so we have concerns based off his blue collar employment, as well as his living demographic–the demographics of where he resides. He may have some innate prejudice toward our client. App. 38a.

Counsel confirmed there was no reason for striking Mr. Voigt other than their bare accusations of innate racism. App. 39a. Mr. Voigt did not say or do anything that indicated any actual bias or racism, and counsel did not ask Mr. Voigt about any suspected innate racism during *voir dire*:

> In addition . . . this is one of the jurors about whom we have the least information. We know that he's married and is a sheet metal worker and works cranes and lives in . . . south Lowndes, . . . and beyond that, we don't really

> have much information. He was a big question mark in our minds because nobody really developed his testimony much. App. 38a-39a.

Finally, Respondents' counsel stated their mistaken belief that they were allowed to strike Mr. Voigt on the basis of race because Mr. Voigt is Caucasian: "you can't have a *Batson* challenge" when the stricken juror is not part of a "racially distinct minority." App. 32a.

3. On January 25, 2018, the jury found in favor of Respondents in the amount of $7,671,200 and apportioned 20 percent of the verdict to Petitioner. App. 8a. The remaining 80 percent of the verdict was apportioned to non-parties. *See id.*

B. Procedural History

1. The trial court denied the *Batson* challenge regarding Mr. Voigt, stating "as I understand a *Batson* Challenge, that once they put forth *an explanation*, the burden then shifts to you, [defense counsel], to prove that it was some type of purposeful discrimination." App. 39a (emphasis added). Thus, the trial court neither required a *facially race neutral* explanation, nor concluded Respondents' counsel met its step two burden before moving on to step three. The trial court then rejected the *Batson* challenge, dismissed Mr. Voigt from jury service, and held the trial.

Petitioner moved for a new trial on several grounds, including the trial court's error in not finding Respondents' explanation to be race based and not properly making a separate step two determination before engaging in its step three

analysis. App. 23a-29a. On October 26, 2018, the trial court denied Petitioner's motion for a new trial. *See id*. Again, the trial court failed to isolate the burden on the striking counsel to provide a *facially race neutral* explanation. It failed to recognize that the allegation of racism, alone, was not race neutral.

Rather, the court continued to merge step two facial race neutrality with step three concepts of pretext, context and motive. First, it looked at the building blocks that led to the accusations of innate racism—place of residence and employment—finding on their own, they are race neutral. App. 26a-27a. The Court also noted, on its own, the prospective juror's "lack of responsiveness is a sufficient race-neutral basis for a peremptory strike." App. 26a.

Second, it said it was "not convinced" the "passing reference to 'demographics' and the possibility of individuals from the area where Mr. Voigt resided might be prejudiced against African-Americans is facially discriminatory." App. 27a. It then concluded, "in the context of this case, based upon the discussion with the Court when the issue was raised at trial, the actual basis of the strike of Mr. Voigt was not facially racially based." App. 28a. Thus, the court conflated "facially racially based," which is limited to assessing the words in the explanation, with context and discussions with counsel, which is solely relevant to a step three analysis on motive.[1]

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[1] The trial court also suggested the wrong standard for a step three analysis, indicating the strike must be "for no reason other" than race rather than being motivated in substantial part on race. App. 27a.

2. Petitioner appealed, and the Court of Appeals affirmed the trial court's decision. App. 5a-22a. As with the trial court, the Court of Appeals focused on pretext, holding Mr. Voigt's employment, area of residence and lack of other information about him "are facially race neutral." App. 11a. The Court of Appeals also based its conclusion on the incorrect assertion that even if allegations of innate racism are race-based, here they are excused because they were based on the Respondents'—not juror's—race:

> The plaintiffs' explanation for the strike referenced Juror No. 11's employment, his area of residence, and the lack of other information about him. . . . We recognize that plaintiffs' counsel expressed a belief that individuals from south Lowndes County might not be "friendly towards" an African-American claimant. But the explanation for the strike did not reference the race of south Lowndes County residents or Juror No. 11. It was race-neutral as to them. . . . [S]heet metal workers living in south Lowndes County can presumably be of any race. App. 11a-12a.

Finally, the Court of Appeals never articulated a separate, *de novo*, standard of review for the step two requirement that the striking counsel provide a facially race neutral explanation *before* the trial court engages in a step three motive analysis. Rather, it referenced only the "great deference" standard of review for the trial court's ultimate decision on motive: "although the trial court could have determined in addressing the third *Batson* prong that counsel's explanation was pretextual, the trial court's decision on the ultimate question of

discriminatory intent represents a finding of fact of the sort accorded great deference." App. 12a.

3. On June 1, 2020, the Supreme Court of Georgia granted Petitioner's writ of *certiorari*. App. 3a-4a. The court stated it was concerned with the following issues for ensuring courts provide a separate assessment of step two race neutrality:

1) Did the Court of Appeals err in determining that Respondents' proffered explanation for the exercise of their peremptory strike against Juror No. 11 was race neutral?

2) If so, was it proper for the trial court nevertheless to conduct the third step of the *Batson* analysis to determine discriminatory intent?

On December 7, 2020, the Supreme Court of Georgia determined the writ of *certiorari* was "improvidently granted" and vacated the writ. App. 1a.

REASONS FOR GRANTING THE PETITION

This petition raises critical gaps in the Court's thirty-five year jurisprudence regarding *Batson* challenges. Despite the Court's many decisions, concurrences, and dissents in *Batson* cases, the Court has not provided clear guidance on the step two burden on counsel issuing the peremptory strike to provide a "facially race neutral" explanation for that strike. The Court has not fully defined facially race neutral, the process for determining whether counsel has met this burden, or the consequences for failing to do so. The Court also has not specified a standard of review of a trial court's determination of whether an explanation is facially race neutral.

Further, it has suggested but not held that the Fourteenth Amendment bars racism of any kind—not only discrimination against a juror because of his or her race—from entering the jury selection process.

Here, counsel for African-American plaintiffs used all six peremptory strikes on Caucasian prospective jurors. Counsel for Petitioner properly raised *Batson* challenges with respect to all six peremptory strikes. App. 9a. Respondents' counsel provided facially race neutral explanations for all but one of the jurors—Juror No. 11, Mr. Voigt. App. 32a-44a. Respondents' counsel overtly acknowledged that race played a substantial part in striking Mr. Voigt. Their step two explanation was that Mr. Voigt lives in an area "that may not be an area that is friendly to African Americans, which our client is; so we have concerns based off his blue collar employment, as well as his living demographic – the demographics of where he resides. He may have some innate prejudice toward our client." App. 38a.

Despite these clear, repeated references to race, Georgia courts denied the *Batson* challenge, failing to enforce Respondents' burden to provide a facially race neutral explanation for the strike. In fact, the trial court did not address the facial accusations of racism at all, which is the sole province of step two of the *Batson* test. Instead, it engaged only in a step three analysis, assessing context, motive, and pretextual nature of factors counsel said led them to their race-based accusations. The court concluded these factors—residence, employment and lack of information about Mr. Voigt—are race neutral. App. 26a-27a. In some instances, these factors may be race neutral on their own, but once Respondents' counsel

asserted the race-based accusation that Mr. Voigt harbored "innate prejudice," even if based on these potentially race neutral factors, the explanation itself is not and cannot be deemed facially race neutral.

This conclusion should have been apparent to the trial court, but it did not engage in a separate step two analysis. The Court of Appeals compounded this error, stating the strike was also race neutral for Mr. Voigt because Respondents' counsel invoked only their client's race, and not Mr. Voigt's race: "the explanation for the strike did not reference the race of south Lowndes County residents or Juror No. 11. It was race neutral as to them." App 12.

First, the Court should grant this petition to clarify that an allegation of racial prejudice, without substantiation, is not a race-neutral explanation under step two of the *Batson* test. As this Court has held, to be considered racially neutral, race cannot be "inherent in the [counsel's] explanation." *Purkett v. Elem*, 514 U.S. at 768 (internal citation omitted). Put simply, race must be considered "inherent" to an accusation of racism. As Justice Marshall explained in encouraging the Court to define facially race neutral in *Wilkerson v. Texas*, 493 U.S. 924, 925, 928 (1989) (Marshall, J. dissenting), "To be 'neutral,' the explanation must be based wholly on nonracial criteria. . . . If such 'smoking guns' are ignored, we have little hope of combating the more subtle forms of racial discrimination."

Second, the Court should grant the petition to define the process courts should use when determining whether the step two explanation for striking a juror is facially race neutral, including

that the standard of review for a step two determination is *de novo*. As Justice Stevens (joined by Justice Breyer) pointed out in the *Purkett* dissent, *Purkett* only "implicitly ratifies" the *de novo* standard for whether the step two explanation is race neutral by applying the "great deference" standard only to the step three finding on motive. 514 U.S. at 776. Justice Stevens suggested *de novo* is "the correct resolution of this procedural question, but it deserves more consideration than the Court has provided." *Id*. The Court should provide that attention here.

Finally, the Court should use this case to clarify that race cannot infect the jury selection process under the U.S. Constitution, regardless upon whose race the peremptory strike is based. As the Court explained in *Flowers v. Mississippi*, 139 S. Ct. 2234 (2019), the Court's jurisprudence has evolved since *Batson* characterized its ruling as protecting the rights of racially distinct minorities to serve on a jury. It should now be understood the Fourteenth Amendment protects jurors, parties and courts from race being a substantial factor in the jury selection process in any form. *See id.* at 2242. The Court should ensure this constitutional protection does not hinge on whether counsel striking the prospective juror artfully avoids certain "magic words," here by not expressly stating the prospective juror's race.

These gaps in the Court's jurisprudence, as well as confusion among the lower courts, as shown here, warrant the Court's review. The questions presented are of substantial legal and practical importance, and this case is an optimal vehicle for considering them. Because this case satisfies the criteria for *certiorari*, the petition should be granted.

A. The Decision Below that Accusations of Innate Racism Can Qualify as a Race-Neutral Explanation Under Step Two of a *Batson* Challenge Exploits Known Gaps in the Court's Jurisprudence.

The Court should grant the petition to ensure that any invocation of race in a step two explanation of a *Batson* challenge makes the explanation not facially race neutral. Here, Petitioner raised *Batson* challenges because Respondents used all of their peremptory strikes on Caucasian prospective jurors. At that point, Respondents were required "to come forward with a neutral explanation" for the strikes. *Batson*, 476 U.S. at 97. However, for Juror No. 11, Mr. Voigt, Respondents acknowledged striking him on the basis of race. They said Mr. Voigt lives in an area "that may not be an area that is friendly to African Americans," and, given "his blue collar employment," he may "have some innate prejudice toward our client." App. 38a. This explanation is not facially race neutral, and the trial court should have granted the *Batson* challenge regarding Mr. Voigt.

1. The trial court allowed the explanation despite the fact that it was facially made on the basis of race. App. 39a. The trial court did not separately assess the words in the explanation, *i.e.*, whether accusing a prospective juror of harboring innate racism against African-Americans was facially race neutral in and of itself. Rather, it looked at other factors, including context and the rationale counsel said led them to make this accusation, namely place of residence, employment and lack of information about Mr. Voigt. The trial court stated these factors, on their own, are race-neutral. App. 26a-27a. It then concluded, "in the

context of this case . . . the strike of Mr. Voigt was not facially racially based." App. 28a.

The Georgia Court of Appeals repeated this error of conflating facial race neutrality with pretext, stating that Mr. Voigt's "employment, his area of residence, and the lack of other information about him . . . are facially race neutral." App. 11a. It further held that accusing Mr. Voigt of innate racism toward Respondents was race neutral because counsel referred only to the race of their clients, not that of Mr. Voigt: "We recognize that plaintiffs' counsel expressed a belief that individuals from south Lowndes County might not be 'friendly towards' an African-American claimant. But the explanation for the strike did not reference the race of south Lowndes County residents or [Mr. Voigt]. It was race neutral as to them." App. 12a.

Thus, the Georgia courts allowed race to be a substantial factor in the peremptory strike so long as the explanation was based on potentially race neutral factors and did not specify the race of the juror. Neither justification is allowable under the Fourteenth Amendment.

2. To be clear, Petitioner did not assert and is not asserting that residence, employment, demographics, responsiveness, or any other factor was used as a *pretext* for race.[2] Whether those factors are used as a

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[2] Compounding this error, the trial court misapplied the standard for a step three analysis, stating the strike must be "for no reason other" than race. *But see Foster v. Chatman*, 136 S. Ct. 1737 (2016) (stating any peremptory strike "motivated in substantial part by race" is unconstitutional).

pretext for race are considered only under step three of the *Batson* test. Here, counsel *directly tied* these factors to accusations of racism, and accusing a prospective juror of innate racism is not facially race-neutral under step two of a *Batson* challenge.

Further, it is undisputed that Mr. Voigt did not say or do anything during *voir dire* that could have indicated he actually had a bias against Respondents or African Americans generally. Counsel described Mr. Voigt as a "big question mark in our minds because no one really developed his testimony much." App. 39a. Their allegations of innate racism were completely unsubstantiated. They were clear demonstrations of *Respondents'* racial prejudice against Mr. Voigt based on his demographics.

In a telling moment, Respondents' counsel suggested Petitioner could not assert a *Batson* challenge because Mr. Voigt is Caucasian and not part of a "racially distinct minority." App. 32a. The trial court did not accept this argument, but the comment provides valuable insight into why Respondents' counsel in their step two explanation did not seek to even hide the race-based reasons for this peremptory strike: they thought they were *allowed* to discriminate against Caucasian prospective jurors based on their race.

3. Contrary to the Georgia court rulings, Respondents' step two explanation here does not clear even the low bar this Court has set for the requirement that the striking counsel's explanation be race neutral. *See Purkett v. Elem*, 514 U.S. at 767-68 ("The second step of this process does not demand an explanation that is persuasive, or even

plausible."). The issue for step two is solely "facial validity." *Id.* at 768. "Unless a discriminatory intent is *inherent* in the prosecutor's explanation, the reason offered will be deemed race neutral." *Id*. at 768 (internal citation omitted) (emphasis added). "[S]o long as the reason is not *inherently discriminatory*, it suffices." *Rice v. Collins*, 546 U.S. 333, 338 (2006) (emphasis added). Some have called on the Court to make step two a more substantive standard, but if courts do not at least impose the *inherently discriminatory* language, then the second step of the *Batson* test will be completely illusory.

Here, racial discrimination must be determined to be inherent to an accusation of racism if the burden on striking counsel to provide a facially race neutral explanation for a peremptory strike is going to have any meaning. As this Court has explained, accusing a juror of harboring "racial animus" against a party is wholly inconsistent with this Court's jurisprudence for a race-neutral explanation. *See Georgia v. McCollum*, 505 U.S. 42, 58 (1992). Indeed, the Court has "rejected the view that assumptions of partiality based on race provide a legitimate basis for disqualifying a person as an impartial juror." *Id.* The Court should reaffirm that there can be no legal distinction "between exercising a peremptory challenge to discriminate invidiously against jurors on account of race and exercising a peremptory challenge to remove an individual juror who harbors racial prejudice." *Id*. at 59.

The Court should grant the petition to provide clear guidance that accusing a juror of racism, regardless of his or her race, is facially

discriminatory and fails to satisfy the step two *Batson* requirement of race neutrality.

5. Such a ruling is needed. In 1989, Justice Marshall encouraged the Court in two cases—*Wilkerson v. Texas*, 493 U.S. 924 (1989) (Marshall, J. dissenting) and *Lynn v. Alabama*, 493 U.S. 945 (1989) (Marshall, J., dissenting)—to provide needed guidance for the step two requirement of facial race neutrality. In *Wilkerson*, he explained that allegations a juror would be partial for or against any party because of race "cannot be squared with *Batson*'s unqualified requirement that [counsel] offer 'a neutral explanation' for its peremptory challenge." *Wilkerson*, 493 U.S. at 926 (Marshall, J. dissenting) (citing *Batson*, 476 U.S. at 98). "To be 'neutral,' the explanation must be based wholly on nonracial criteria." *Id.* at 926. It "must not be tainted by *any* impermissible factors." *Id.* at 928. He expressed his concern that if "such 'smoking guns' are ignored" in cases where race-conscious factors are overtly stated, "we have little hope of combating the more subtle forms of racial discrimination." *Id.* When place of residence or other factors are openly tied to race, as here, a trial court must conclude the explanation does not satisfy step two of the *Batson* challenge.

In issuing such a ruling, the Court may also find it useful to provide additional guidance for when place of residence or other factors are so inherently tied to race that they are not facially race neutral under step two of the *Batson* test versus when they present a question of pretext requiring a step three analysis for motive. In *Lynn*, the accusation of racism was only slightly more subtle than here; counsel struck a juror based on the fact that she lived near a

party and "the *possibility* of knowing these people might affect her fairness." 493 U.S. at 947 (Marshall, J., dissenting). Justice Marshall wrote that "the proxy for bias on which he actually relied was not place of residence but race." *Id.* The boundaries of step two facial race neutrality could use more definition for such close situations, though the case at bar presents a clear invocation of race.

6. Given the lack of jurisprudence with regard to step two's facial race neutrality requirement, it is not surprising that courts, jurists and scholars have long expressed "serious concerns" that the lack of clear standards for the step two requirement that the explanation be race neutral would allow "cloaking discriminatory motives in only marginally neutral justifications." *U.S. v. Williams*, 936 F.2d 1243, 1247 (11th Cir. 1991); *see also Miller-El v. Dretke*, 545 U.S. 231, 272 (2005) (Breyer, J. concurring) (expressing concern that demographics could be used "to express stereotypical judgments about race"); Jeffrey Bellind & Junichi P. Semitsu, *Widening Batson's Net to Ensnare More Than the Unapologetically Bigoted Or Painfully Unimaginative Attorney*, 96 Cornell L. Rev. 1075, 1093 (2011) (observing the lack of clear standards for race neutrality has led to "purportedly 'race-neutral' reasons that strongly correlate with race"); Justice Hugh Maddox, *Batson: From an Appellate Judge's Viewpoint*, 54 Ala. Law. 316, 317-18 (1993) (finding courts often cannot distinguish "valid race-neutral reasons [from] what are not").

7. Justice Marshall suggested a solution in *Lynn* that would be appropriate here as well: in the step two explanation, if counsel is going to invoke race overtly as here, or assert factors as a "proxy" for race

as in *Lynn*, they should have to seek "corroboration on *voir dire*" as to whether the jurors "actually entertain the bias." 493 U.S. at 947. Bald accusations of racism should not be allowed.

By granting this petition, the Court can make clear that striking a juror based on a belief that he or she would be swayed in favor of or against a party because of race is not race neutral, but inherently tied to racial discrimination. Further, if any accusation of racism is going to be made, counsel must develop the assertion through the juror's testimony in *voir dire*. Unsubstantiated allegations of racism, though, are not race neutral on their face and fail the second step of the *Batson* test.

Here, Respondents' counsel's explanation was facially discriminatory and violated Mr. Voigt's right to be able to serve on the jury free from racial considerations. Also, counsel admitted to not asking any questions of Mr. Voigt about race even though they accused him of racism. As the Court explained in *Batson*, a peremptory strike cannot be based on an "assumption" the juror "would be impartial" because of race. 476 U.S. at 97. Otherwise, "it may be impossible for trial courts to discern if a 'seat-of-the-pants' peremptory challenge reflects a 'seat-of-the-pants' racial stereotype." *Miller-El*, 545 U.S. at 268.

B. The Decision Below Exposes the Lack of a Clear Process for Assessing Step Two of a *Batson* Challenge, Both in the Trial Courts and on Appellate Review.

The Court should also grant the petition to clarify the process and standard of review for when the striking party fails to provide a race-neutral

explanation for its peremptory strike during step two of the *Batson* process. The Court has never explicitly provided this guidance. As a result, courts have given short shrift to step two, either moving on to step three regardless of whether the explanation was truly race neutral or merging steps two and three analyses together. As the Court explained in *Batson*, requiring counsel to "articulate a neutral explanation related to the particular case to be tried" is essential for ensuring the Equal Protection Clause is not a "vain and illusory requirement." 476 U.S. at 98 (citing *Norris v. Alabama*, 294 U.S. 587, 598 (1935)). This case provides the Court with an ideal vehicle for ensuring race neutrality under *Batson*'s step two is given full effect by lower courts.

1. Here, the trial court never engaged in a separate assessment of whether the explanation provided by Respondents' counsel for the peremptory strike of Mr. Voigt was facially race neutral. Rather, once Respondents' counsel put forth any explanation, the trial court shifted the burden to defense counsel "to prove that it was some type of purposeful discrimination." App. 39a. The court never required the explanation to be race neutral on its own.

Next, in response to a motion for a new trial, the trial court conflated the step two requirement for a non-facially discriminatory explanation with a step three context, pretext, and motive analysis. It concluded that "in the context of this case, based upon the discussion with the Court when the issue was raised at trial, the actual basis of a strike of Mr. Voigt was not facially racially based." App. 28a. Context, motive and pretext are step three concerns;

step two is limited to whether the explanation is "facially racially based."

The Georgia Court of Appeals further erred by not stating that a step two explanation is subject to a *de novo* standard of review. The court merely referred to the step three standard of review that the trial court's determination on discriminatory motive was due "great deference and will be affirmed unless clearly erroneous." App. 9a.

2. These errors point to gaps in the Court's jurisprudence with respect to step two of a *Batson* challenge. In *Purkett*, the Court intimated the elements of a proper step two determination but did not state them explicitly. It held only that it was improper for courts to "combin[e] *Batson*'s second and third steps into one." *Purkett*, 514 U.S. at 768. It also stated that a trial court's determination under step three is given "great deference" because "[i]t is not until the *third* step that the persuasiveness of the justification become relevant—the step in which the trial court determines whether the opponent of the strike has carried his burden of proving purposeful discrimination." *Id.* But the Court never set forth the parameters of a step two determination, what happens if the striking party fails to meet its burden of providing a race neutral explanation, and what the standard of review of step two is on appeal.

Justice Stevens, joined by Justice Breyer, pointed out these omissions when dissenting in *Purkett*. Specifically, on the issue of appellate review, they stated the majority opinion only "implicitly ratifies the Court of Appeals' decision to evaluate on its own whether the prosecutor had satisfied step two." *Id.* at

776. They stated their belief that this "is the correct resolution of this procedural question, but it *deserves more consideration than the Court has provided*." *Id.* (emphasis added). The Court can provide that attention here, but it should do more.

3. First, the Court should use this case to clarify that trial courts must assess whether the step two explanation is facially race neutral as a separate inquiry, which can be based solely on the words in the explanation. The Court should also make clear that moving onto step three is dependent on a valid step two explanation. If the trial court determines the step two explanation is not facially race neutral, the responding counsel has not met its step two burden. The trial court must end the inquiry, grant the *Batson* challenge and vacate the strike. There is no basis for engaging in a step three analysis on motive without a facially race neutral explanation.

Second, as suggested in the *Purkett* dissent, the Court should clarify that determining whether a step two explanation is facially race neutral "presents a pure legal question" for the appellate courts to review under a *de novo* standard. *Id.* Several state courts have reached this conclusion, but the Court should ensure consistency across the country. *See*, *e.g.*, *Barrow v. State*, 749 A.2d 1230, 1238 (Del. 2000) ("In a *Batson* claim, the issue of whether the prosecutor offered a race-neutral explanation for the use of peremptory challenges is reviewed *de novo*.") (internal quotations omitted); *State v. Thorpe*, 783 N.W.2d 749, 757 (Neb. 2010) ("For *Batson* challenges, we will review *de novo* the facial validity of an attorney's race-neutral explanation for using a peremptory challenge as a question of law.").

Here, the Court should clarify that the trial court is given deference only for a step three determination as to whether the counsel struck a juror based on discriminatory intent. *See Snyder v. Louisiana*, 552 U.S. 472, 477 (2008) (applying a "clearly erroneous" standard for appellate review of step three determinations). It is not until step three that the judge engages in fact-finding and provides a judgment as to whether the race-neutral explanation is persuasive. *See Thorpe*, 783 N.W.2d at 757. Step two requires no such fact-finding, which is why courts have held that it presents a purely legal question for which *de novo* review is appropriate.

C. The Decision Below to Allow a Race-Based Peremptory Strike Because Counsel Did Not Explicitly Invoke the Race of the Juror Would Eviscerate *Batson*'s Protections.

The importance of this petition extends beyond the parameters for assessing a step two explanation to the core protections *Batson* and its progeny provide against racial discrimination in jury selection: can counsel get away with exercising peremptory strikes based on race merely by avoiding certain "magic words" in the explanation?

As discussed above, the Court of Appeals held a party may strike a juror on the basis of race so long as it is the party's race, and not the juror's race, that is invoked. "We recognize that plaintiffs' counsel expressed a belief that individuals from south Lowndes County might not be 'friendly towards' an African-American claimant. But [they] did not reference the race of south Lowndes County

residents or Juror No. 11." App. 12a. There is no denying that "emphasis on race was on their minds" in striking Mr. Voigt. *Miller-El*, 545 U.S. at 266.

Therefore, in determining the step two issues presented in this petition, the Court can firmly establish that any peremptory strike "motivated in substantial part by discriminatory intent" violates the Fourteenth Amendment to the Constitution regardless of whose race is at issue or whether certain magic words are spoken. *Foster v. Chatman*, 136 S. Ct. 1737, 1742 (2016) (citing *Snyder*, 552 U.S. at 485). As this Court has explained, "[t]he constitutional interests *Batson* sought to vindicate are not limited to the rights possessed by the defendant on trial, nor to those citizens who desire to participate in the administration of the law, as jurors." *Johnson v. California*, 545 U.S. 162, 171-72 (2005). "[T]he overriding interest [is] eradicating discrimination from our civic institutions." *Id.* Race—including unfounded allegations that a juror harbors innate prejudice against African-Americans—must not taint the jury selection process in any form.

1. Such a ruling is a natural next step in the Court's jurisprudence. Initially, *Batson* was understood as protecting the rights of a "cognizable racial group," for both criminal defendants in obtaining a fair trial and prospective jurors in serving on a jury. *See Lynn*, 493 U.S. at 946 (Marshall, J. dissenting). The Court stated "[t]he defendant initially must show that he is a member of a racial group capable of being singled out for differential treatment." *Batson*, 476 U.S. at 94. Also, "no citizen [can be] disqualified from jury service because of *his* race." *Id.* at 99 (emphasis added). "The

core guarantee of equal protection, ensuring citizens that their State will not discriminate on account of race, would be meaningless were we to approve the exclusion of jurors on the basis of such assumptions, which arise solely from the jurors' race." *Id.* at 97-98.

2. Since *Batson*, as well-documented by the Court in *Flowers*, these protections have been extended beyond the rights of African-American criminal defendants and jurors. For example, the Court held any defendant, regardless of race, may object to a race-based exclusion of persons from the jury. *See Powers v. Ohio*, 499 U.S. 400 (1991). *Batson* applies to civil litigation, not just criminal defendants. *See Edmonson v. Leesville Concrete Co, Inc.*, 500 U.S. 614 (1991). And, there is no longer a need to show the juror was within an "arguably targeted class." *Miller-El*, 545 U.S. at 239.

The language the Court has used to describe *Batson* protections also has become much broader, implying its protections apply to any racial discrimination—not just discrimination regarding the juror's race. *Compare*, *e.g.*, *Batson*, 476 U.S. at 87 (juror has a right not to be excluded "on account of *his* race") (emphasis added) *with Powers*, 499 U.S. at 409 (juror has a right not to be excluded "on account of race"). In *Davis v. Ayala*, Justice Sotomayor defined *Batson* as barring any "*racial considerations* to drive the use of peremptory challenges against jurors." 576 U.S. 257, 303-304 (2015) (emphasis added). And, in *Flowers*, the Court stated no party may "discriminate *on the basis of race* when exercising peremptory challenges against prospective jurors." 139 S. Ct. at 2234 (emphasis added). The Court further asserted the goal of "prevent[ing]

racial discrimination from seeping into the jury selection process." *Id.* at 2243-44. The petition presents the perfect opportunity for the Court to hold that the constitutional inquiry in *Batson* and its progeny is not limited to the *juror's* race, but race in any form infecting jury selection.

3. Here, Mr. Voigt had a constitutional right not to be excluded from jury service based on a groundless accusation that he harbored some "innate prejudice" against African-Americans generally and, therefore, might racially discriminate against the Respondents. As this Court has explained, "[a] venireperson excluded from jury service because of race suffers a profound personal humiliation heightened by its public character." *Powers*, 499 U.S. at 414; *accord McCollum*, 505 U.S. at 49 (expressing concern over the "open and public" nature when prospective jurors are racially discriminated). "Both the excluded juror and the [opposing party] have a common interest in eliminating racial discrimination from the courtroom." *Id.* at 413.

4. The Court has also repeatedly underscored the importance of *Batson* for protecting the integrity of the judicial system. *See Edmonson*, 500 U.S. at 628 ("Racial bias mars the integrity of the judicial system and prevents the idea of democratic government from becoming a reality."); *Campbell v. Louisiana*, 523 U.S. 392, 399 (1998) ("If that process is infected with racial discrimination, doubt is cast over the fairness of all subsequent decisions."); *Powers*, 499 U.S. at 411 (stating any discrimination on the basis of race "casts doubt on the integrity of the judicial process"). Indeed, "the overriding interest in eradicating discrimination from our civic institutions suffers"

when a person is struck on account of race. *Johnson*, 545 U.S. at 171-72.

The rights of the parties and jurors, as well as the integrity of the judicial system, cannot hinge on the technicalities the Georgia courts assert here. There is no legal distinction between striking a juror because the juror may favor a party due to race, as in *Batson*, and striking a juror because of fear the juror would disfavor a party due to race, as here. It also should not matter if the parties and jurors are of the same or different race, which party or juror is of which race, or if the counsel states the race of the party or juror. Lower courts are confused on these points. *Compare U.S. v. Thompson*, 528 F.3d 110, 118 (2d Cir. 2008) (stating the "argument that *Batson* does not apply where an African American defendant seeks to eliminate white jurors is entirely without merit") *with U.S. v. Bennett*, 664 F.3d 997, 1009 (5th Cir. 2011) (stating Supreme Court has not "squarely held" that *Batson* prohibits a black party from striking a white juror on the basis of race).

The Court should grant the petition to affirm the Fourteenth Amendment prohibits any peremptory strike on the basis of race. Otherwise, this case will lead to the "backsliding" the Court cautioned against in *Flowers* by providing a roadmap for circumventing the Court's jurisprudence. 139 S. Ct. at 2243.

* * *

This petition provides the Court with an ideal opportunity to consider and resolve the questions presented. These questions are undeniably important and expose omissions in the Court's jurisprudence. Failure to grant the petition would significantly

undermine the protections the Court has assiduously developed over the past thirty-five years against exercising peremptory strikes on the basis of race. Further, the rulings below that unsubstantiated accusations of innate racism against African-Americans are somehow race neutral cannot be defended. The Court should grant *certiorari* in this case and reverse or vacate the judgment below.

CONCLUSION

The petition for a writ of *certiorari* should be granted. In the alternative, the Court may consider granting, vacating and remanding this case in light of *Flowers*, which was decided shortly before the Georgia Court of Appeals issued its ruling.

Respectfully submitted,

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May 6, 2021

APPENDIX

APPENDIX A — ORDER OF THE SUPREME COURT OF GEORGIA, DATED DECEMBER 7, 2020

SUPREME COURT OF GEORGIA

Case No. S20C0425 & S20G0425

December 7, 2020

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

LOWNDES COUNTY HEALTH SERVICES, LLC

v.

GREGORY COPELAND *et al.*

After considering this matter further, the Court has determined that the writ of certiorari issued in Case No. S20G0425 was improvidently granted. Accordingly, the writ is vacated and the petition for certiorari in Case No. S20C0425 is denied.

Melton, C.J., Nahmias, P.J., and, Peterson, Bethel, and Ellington, JJ., concur. Boggs, J., dissents. Warren, J., not participating. McMillian, J., disqualified.

Court of Appeals No. A19A1552

Appendix A

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/
clerk

APPENDIX B — ORDER OF THE SUPREME COURT OF GEORGIA, DATED JUNE 01, 2020

SUPREME COURT OF GEORGIA

Case No. S20C0425

June 01, 2020

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

LOWNDES COUNTY HEALTH SERVICES, LLC

v.

GREGORY COPELAND *et al.*

Court of Appeals Case No. A19A1552

The Supreme Court today granted the writ of certiorari in this case.

All the Justices concur, except McMillian, J., disqualified.

This case will be assigned to the September 2020 oral argument calendar automatically under Supreme Court Rule 50 (2), as amended September 13, 1996. Oral argument is mandatory in granted certiorari cases.

Appendix B

This Court is particularly concerned with the following issue or issues:

1. Did the Court of Appeals err in determining that Respondents' proffered explanation for the exercise of their peremptory strike against Juror No. 11 was race-neutral?

2. If so, was it proper for the trial court nevertheless to conduct the third step of the Batson analysis to determine discriminatory intent?

Briefs should be submitted only on these points. See Supreme Court Rule 45.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

/s/
Clerk

APPENDIX C — OPINION OF THE COURT OF APPEALS OF GEORGIA, DATED OCTOBER 10, 2019

IN THE COURT OF APPEALS OF GEORGIA

A19A1552, A19A1553.

LOWNDES COUNTY HEALTH SERVICES, LLC

v.

COPELAND *et al.*; and vice versa.

October 10, 2019, Decided

MERCIER, Judge.

Following the death of Bobby Copeland ("Bobby"), Gregory Copeland, individually and as Bobby's son, and Marier House, as the administrator of Bobby's estate (collectively, "the plaintiffs") sued Lowndes County Health Services, LLC d/b/a Heritage Healthcare at Holly Hill ("Holly Hill") for wrongful death and other damages. A jury found Holly Hill liable for both professional and ordinary negligence. It awarded the plaintiffs over $7.5 million in damages, but allocated fault between Holly Hill and four nonparties to the trial. Based on the jury's allocation of fault, the trial court entered final judgment for the plaintiffs against Holly Hill for $1,524,240.

In Case No. A19A1552, Holly Hill appeals the final judgment entered on the jury's verdict and the denial

of its motion for new trial, arguing that the trial court erred in (1) rejecting its challenge to the plaintiffs' use of a peremptory jury strike, and (2) denying its motion for directed verdict on plaintiffs' negligent staffing claim. In their cross-appeal in Case No. A19A1553, the plaintiffs assert that the trial court erred in (1) denying their motion for directed verdict as to apportionment, and (2) using a misleading and confusing special verdict form. For reasons that follow, we affirm.

Viewed in the light most favorable to the jury's verdict, see *Ford Motor Co. v. Gibson*, 283 Ga. 398, 399 (659 SE2d 346) (2008), the evidence showed that Bobby lived at Holly Hill, a skilled nursing facility in Valdosta, from 2001 until his death in 2012 at the age of 71. Around 10:45 p.m. on October 25, 2012, Faye Jenkins, a licensed practical nurse ("LPN") employed by Holly Hill and assigned to the 11:00 p.m. to 7:00 a.m. "night shift," entered Bobby's room and saw brown vomit on his clothing. Noting that Bobby's stomach was "slightly distended," Jenkins listened to his abdomen with her stethoscope and detected "a lack of bowel sounds in three of four quadrants[.]" She then called Shawn Tywon, physician's assistant to Dr. Douglas Moss, Holly Hill's medical director.[1] Jenkins related her observations and asked whether Bobby should go to the hospital for evaluation. Tywon told her not to send Bobby to the hospital, but he ordered a blood test, an abdominal x-ray, and nausea medication for Bobby. Jenkins checked

1. The plaintiffs originally named Moss and Tywon as defendants in this action, but they settled with the plaintiffs prior to trial. Although Moss and Tywon provided care for Holly Hill residents, it appears that they were not employed by Holly Hill.

on Bobby throughout her shift. She heard him moan at one point during the night and noticed no change in his bowel sounds.

As the end of her shift approached on October 26, 2012, Jenkins reported Bobby's condition to the nurse coming on duty at 7:00 a.m., as well as to Registered Nurse ("RN") Lisa Sirmans, Holly Hill's assistant director of nursing, who arrived at the facility around 6:30 a.m. Concerned about Bobby, Jenkins asked Sirmans "to please get something done about this resident," and Sirmans responded that "she would." According to Bobby's medical chart, however, he was not actually assessed until 9:15 a.m., when Kaye Frazier, an RN who served as Holly Hill's director of nursing, examined him. Frazier noted that Bobby's abdomen was distended and that he was complaining of abdominal pain.

The x-ray ordered the night before by Tywon was completed at Holly Hill just before 10:00 a.m. Tywon examined Bobby at 10:15 a.m., and approximately 45 minutes later, an ambulance transported Bobby to South Georgia Medical Center ("SGMC"), where he was treated in the emergency room by a team that included Dr. Matthew Shannon, Moss, and Tywon. Bobby was transferred to the hospital's intensive care unit around 5:30 p.m. He died later that night from complications related to aspirating fecal material, a risk associated with bowel obstructions.

The jury found Holly Hill liable to the plaintiffs in both professional and ordinary negligence, and it awarded

the plaintiffs over $7.5 million in compensatory damages. Jurors, however, allocated only 20 percent of the fault to Holly Hill. They apportioned the remainder of the fault to nonparties Tywon (35 percent), Moss (35 percent), SGMC (5 percent), and Shannon (5 percent). The trial court entered judgment against Holly Hill for 20 percent of the damages awarded, and these appeals followed.

Case No. A19A1552

1. Holly Hill argues that the trial court erred in denying its motion, brought pursuant to *Batson v. Kentucky*, 476 U. S. 79 (106 SCt 1712, 90 LE2d 69) (1986), challenging the plaintiffs' decision to strike Juror No. 11 from the jury pool. In *Batson*, the United States Supreme Court barred the government from striking prospective jurors from a jury panel based upon race. See id. at 84-89 (II) (A), (B); *AIKG, LLC v. Marshall*, 350 Ga. App. 413, 418 (829 SE2d 608) (2019). The Supreme Court later extended this holding to civil litigants, prohibiting race-based peremptory strikes in civil trials. See *Edmonson v. Leesville Concrete Co.*, 500 U. S. 614, 630 (II) (B) (111 SCt 2077, 114 LE2d 660) (1991); *AIKG, LLC*, supra.

In both criminal and civil proceedings, a *Batson* challenge is analyzed using a three-pronged test:

> (1) the opponent of a peremptory challenge must make a prima facie showing of racial discrimination; (2) the proponent of the strike must then provide a race-neutral explanation for the strike; and (3) the court must decide

> whether the opponent of the strike has proven discriminatory intent.

AIKG, LLC, supra (citation and punctuation omitted). On appeal, we are mindful that the trial court's resolution of a *Batson* motion "rests largely upon assessment of the proponent's state of mind and credibility; it therefore lies peculiarly within a trial judge's province." Id. (citation and punctuation omitted). A trial court's determination as to whether the opponent of a jury strike proved discriminatory intent is "entitled to great deference and will be affirmed unless clearly erroneous." Id. (citation and punctuation omitted).

Noting that all six of the individuals stricken by plaintiffs' counsel were white, Holly Hill argued at trial that the strikes "ha[d] to do with race." In response, plaintiffs' counsel provided the reasoning behind the strikes. As to Juror No. 11, counsel stated:

> [Juror No. 11] works in a sheet metal factory. He works in South Lowndes County which based off our demographic research of this group and with our discussion with other counsel who are right in this area, suggested that they may not be [an] area that is friendly towards African Americans which our client is. So, we have concerns based off his blue-collar employment, as well as … the demographics of where he resides that he may have some innate prejudice toward our client.

Appendix C

...

> In addition, … this is one of the jurors about whom we have the least information. We know that he's married and is a sheet metal worker and works cranes and lives in … South Lowndes, … and beyond that, we don›t really have much information. He was a big question mark in our minds because nobody really developed his testimony much.

After the plaintiffs' explanation, counsel for Holly Hill asserted:

> [T]hat was the basis of my [*Batson*] objection as we did not have much information on him, so the fact that we didn't have any information on him and he was one of their strikes, was a cause of concern for us.

The trial court rejected the *Batson* challenge following counsels' exchange, stating:

> Okay, well, as I understand a Batson Challenge, … once they put forth an explanation, the burden then shifts to you, [Holly Hill], to prove that it was some type of purposeful discrimination. I don't hear that coming forward, so, for that reason the Court's going to deny your Batson Challenge as to Juror Number [11].

The trial court clarified this ruling in its order denying Holly Hill's motion for new trial, concluding that the plaintiffs had offered race-neutral reasons for striking Juror No. 11 and that the strike "was not racially based."

On appeal, Holly Hill argues that the plaintiffs' explanation for striking Juror No. 11 was facially discriminatory, which required the trial court to uphold its *Batson* challenge and disallow the strike. We disagree. "To qualify as race-neutral, an explanation need not be persuasive, plausible or even make sense. It must simply be based on something other than the race of the juror." *O'Hannon v. State*, 240 Ga. App. 706, 707 (1) (524 SE2d 759) (1999) (citation and punctuation omitted). Absent discriminatory intent inherent in the proponent's explanation, "the reason offered will be deemed race neutral." Id. (citation and punctuation omitted). See also *Toomer v. State*, 292 Ga. 49, 54 (2) (b) (734 SE2d 333) (2012) ("[T]o carry the burden of production at step two, the proponent of the strike need not offer an explanation that is concrete, tangible, or specific. The explanation need not even be case-related. The explanation for the strike only needs to be facially race-neutral.") (citation and punctuation omitted).

The (1) plaintiffs' explanation for the strike referenced Juror No. 11's employment, his area of residence, and the lack of other information about him. These characteristics are facially race-neutral. See *Trice v. State*, 266 Ga. 102, 103 (2) (464 SE2d 205) (1995) ("The nature of a prospective juror's employment is not a characteristic that is peculiar to any race.") (citations and punctuation

omitted); *Smith v. State*, 264 Ga. 449, 450 (1) (448 SE2d 179) (1994) (prosecutor's belief that "all residents, black or white, of a particular neighborhood might be biased against the State's witnesses" was racially neutral). Nothing in the plaintiffs' explanation or the record associates these characteristics with race; sheet metal workers living in south Lowndes County can presumably be of any race. See *Jones v. State*, 240 Ga. App. 339, 341 (1) (523 SE2d 402) (1999) (prosecutor's fear that prospective juror might be "overly sympathetic" to the defendant was facially race-neutral because "people of any race can experience hardships in life"). Compare *Congdon v. State*, 262 Ga. 683, 684-685 (424 SE2d 630) (1993) (decision to peremptorily strike jurors "because they were black residents of Ringgold" was not race-neutral).

We recognize that plaintiffs' counsel expressed a belief that individuals from south Lowndes County might not be "friendly towards" an African-American claimant. But the explanation for the strike did not reference the race of south Lowndes County residents or Juror No. 11. It was race-neutral as to them. And although the trial court *could* have determined in addressing the third *Batson* prong that counsel's explanation was pretextual, "the trial court's decision on the ultimate question of discriminatory intent represents a finding of fact of the sort accorded great deference on appeal." *Smith*, supra at 451 (1) (citation omitted). We discern no clear error in the trial court's conclusion, based on the totality of the circumstances, that Holly Hill failed to prove racially discriminatory intent with respect to the strike of Juror No. 11. See id. at 450-451 (1) (noting that a peremptory

strike based upon where a prospective juror resides raises "concerns about the potential for cloaking discriminatory motives in only marginally neutral justifications," but finding that the trial court did not clearly err in deeming the strike race-neutral) (citation and punctuation omitted). This claim of error, therefore, does not require reversal.

2. Holly Hill further argues that the trial court erred in denying its motion for directed verdict on plaintiffs' negligent staffing claim. A trial court may direct a verdict only "[i]f there is no conflict in the evidence as to any material issue and the evidence introduced, with all reasonable deductions therefrom, [demands] a particular verdict[.]" OCGA § 9-11-50 (a). In reviewing the trial court's ruling on a motion for directed verdict, we construe "the evidence and any doubts or ambiguities in favor of the party opposing the motion[.]" *Strickland v. Hosp. Auth. of Albany/Dougherty County*, 241 Ga. App. 1, 3 (1) (b) (525 SE2d 724) (1999) (citation and punctuation omitted).

With respect to staffing, the plaintiffs alleged at trial that Holly Hill negligently failed to staff the October 25, 2012 night shift with someone who could have properly assessed Bobby's condition. Though the plaintiffs couched this claim in terms of ordinary negligence, Holly Hill countered that the staffing decision required professional nursing judgment, bringing the claim within the realm of professional negligence that had to be — but was not — supported by expert testimony. The trial court rejected Holly Hill's argument and denied its motion for directed verdict. See *Dent v. Mem. Hosp. of Adel*, 270 Ga. 316, 318 (509 SE2d 908) (1998) (whether negligence alleged by

plaintiffs constituted ordinary negligence or professional malpractice is a question of law for the trial court). We find no error.

Kaye Frazier testified that she was responsible for scheduling Holly Hill's staff, which included Certified Nursing Aides ("CNAs"), LPNs, and RNs. CNAs are staff members who assist residents with daily living tasks, such as bathing and eating. CNAs report to LPNs, who, in turn, report to RNs. Although LPNs are licensed nurses, they are not qualified to perform certain functions that RNs are trained to perform, such as assessing a patient's condition and arriving at a nursing diagnosis that "identifies the nature of the problem from a nursing standpoint and the suspected causes."

For the night shift beginning on October 25, 2012, Frazier assigned three LPNs to work at the facility. As was routine at the time, RNs were not scheduled to work the night shift, and no nurse on duty was qualified to perform an independent nursing assessment of a resident's medical condition. Frazier explained that governmental regulations only required Holly Hill to have an RN in the facility eight consecutive hours per day. She chose to staff the facility with an RN during the day shift, rather than the night shift, "because at night most of the residents are asleep." She also admitted, however, that Holly Hill was required to staff above the governmental minimum requirements if necessary to meet patient needs.

Holly Hill's corporate representative testified that staffing decisions were made "based on historically

what has been done and then based on the judgment of the nurses who are at the facility and particularly Ms. Frazier, as to what staff members they need and where." According to the representative, Frazier determined the numbers and types of staff to place on each Holly Hill unit based on her knowledge and nursing judgment. But the representative conceded that these decisions were made in collaboration with the facility administrator, who "is responsible overall for the operation of the facility." The evidence further showed that "RNs cost the facility more than LPNs" because the hourly rate for an RN is greater than that for an LPN.

"Claims of allegedly negligent administrative acts which do not require professional knowledge or skill assert ordinary negligence." *Peterson v. Columbus Med. Center Foundation*, 243 Ga. App. 749, 754 (2) (533 SE2d 749) (2000) (citation omitted). Holly Hill offered evidence that Frazier exercised her professional judgment when making staff shift assignments. The facility administrator, however, also participated in staffing decisions. And Holly Hill has cited no evidence that the overall determination regarding how many RNs were available for Frazier to schedule was made by a medical professional or constituted a medical decision, rather than a business decision based on the higher cost of paying RNs.

The evidence demonstrated that LPNs were not trained to assess the condition of residents such as Bobby, that Holly Hill routinely elected not to employ an RN on the night shift, and that nursing home residents "can get sick any time of the day or night." Plaintiffs

also offered expert testimony that the delay in assessing Bobby caused his condition to progressively worsen, contributing to his suffering and the "downward quick spiral that … ultimately [led] to his death." Given these circumstances, the (2) evidence supported the conclusion that Holly Hill engaged in business-related *ordinary* negligence by forcing Frazier to choose only one shift in which to schedule an RN, leaving the night shift staff without anyone trained to adequately evaluate residents. Because this staffing claim did not sound in professional negligence, the trial court properly denied Holly Hill's motion for directed verdict. See *Upson County Hosp. v. Head*, 246 Ga. App. 386, 391 (1) (540 SE2d 626) (2000) (claims sound in ordinary negligence when stated against hospital based on the acts or omissions of (1) employees who were not medical professionals and (2) medical professionals who were not exercising medical judgment); see also *Lamb v. Candler Gen. Hosp.*, 262 Ga. 70, 71 (1) (413 SE2d 720) (1992) ("A hospital owes to its patients only the duty of exercising ordinary care to furnish equipment and facilities reasonably suited to the uses intended and such as are in general use under the same, or similar, circumstances.") (citations, punctuation and emphasis omitted). Compare *St. Mary's Health Care System v. Roach*, 345 Ga. App. 274, 278 (1) (811 SE2d 93) (2018) (execution of hospital policy regarding availability of radiologists on night shift involved exercise of professional judgment because policy explicitly allowed immediate consult with on-call radiologist, and emergency room physician elected not to consult with radiologist after reviewing x-ray herself).

3. In their cross-appeal, the plaintiffs argue that the trial court erred in allowing the jury to consider whether to apportion fault to nonparties at the trial. Pursuant to OCGA § 51-12-33 (c), "the trier of fact shall consider the fault of all persons or entities who contributed to the alleged injury or damages, regardless of whether the person or entity was, or could have been, named as a party to the suit." According to the plaintiffs, the trial court should have granted their motion for directed verdict on apportionment as to Moss, Shannon, and SGMC because no competent evidence supported a finding that these nonparties contributed to the plaintiffs' damages.[2] See *Southwestern Emergency Physicians v. Quinney*, 347 Ga. App. 410, 427 (4) (819 SE2d 696) (2018) ("[T]he fault of a nonparty cannot be considered for the purposes of apportioning damages without some competent evidence that the nonparty in fact contributed to the alleged injury or damages.") (citation and punctuation omitted). We disagree.

Viewed favorably to Holly Hill, the party opposing the motion for directed verdict, see *Strickland*, supra, the (3) evidence showed that Moss, Shannon, and a team of providers treated Bobby after he arrived at SGMC. Holly Hill's expert testified that Moss, Shannon, and the SGMC team breached the standard of care by failing to timely order necessary CT scans of Bobby's abdomen and, once

2. The plaintiffs do not challenge the jury's decision to apportion fault to Tywon.

the scans were finally ordered, cancelling those scans, leaving Bobby to languish in the emergency room for hours without proper assessment of his condition. According to Holly Hill's expert, Shannon and SGMC also breached the standard of care by not immediately treating Bobby with antibiotics. Holly Hill's expert asserted that each breach was egregious and individually caused Bobby's death, which resulted from the "negligent care that he received at [SGMC]." Such testimony provided some evidence that Moss, Shannon, and the SGMC providers breached the standard of care when treating Bobby, contributing to his injuries and, ultimately, his death.

On appeal, the plaintiffs argue that Holly Hill's evidence failed to meet the heightened negligence standard applicable to emergency room situations. We recognize that in medical malpractice actions "arising out of the provision of emergency medical care in a hospital emergency department," physicians and health care providers cannot be held liable "unless it is proven by clear and convincing evidence that the physician or health care provider's actions showed gross negligence." OCGA § 51-1-29.5 (c). But the term "emergency medical care" does not include "medical care or treatment that occurs after the patient is stabilized and is capable of receiving medical treatment as a nonemergency patient[.]" OCGA § 51-1-29.5 (a) (5). And Holly Hill's expert testified that Bobby's condition stabilized in the emergency room, at which point a CT scan should have been conducted. Shannon (the emergency room physician) further indicated that Bobby was retained in the emergency department for a period simply because a bed was not available in the hospital's

intensive care unit. Such testimony raised a question of fact as to the applicability of OCGA § 51-1-29.5 (c). The trial court, therefore, properly submitted the issue to the jury. See *Bonds v. Nesbitt*, 322 Ga. App. 852, 855-856 (1) (747 SE2d 40) (2013) (doctor's determination that patient was stable raised a jury question as to whether the patient "at some point had stabilized and was capable of receiving medical treatment as a nonemergency patient within the meaning of OCGA § 51-1-29.5 (a) (5)") (punctuation omitted).

Moreover, assuming OCGA § 51-1-29.5 (c) applied, "liability [is] authorized where the evidence, including admissible expert testimony, would permit a jury to find by clear and convincing evidence that the [medical providers] caused harm by grossly deviating from the applicable medical standard of care." *Abdel-Samed v. Dailey*, 294 Ga. 758, 765 (3) (755 SE2d 805) (2014). Holly Hill's expert asserted that the breaches of care committed by Moss, Shannon, and SGMC were egregious, resulting in the provision of "astonishingly poor care" to Bobby in the SGMC emergency room. Given this testimony, as well as evidence regarding delays in treatment, the jury would have been authorized to find by clear and convincing evidence that these nonparty medical providers acted with gross negligence. See id. at 765-767 (3) (evidence that emergency room physician waited hours to contact and transfer patient to surgeon for emergency hand surgery raised jury question as to whether physician acted with gross negligence under OCGA § 51-1-29.5).

Appendix C

The record evidence raised jury questions as to whether the independent actions of Moss, Shannon, and SGMC contributed to the damages suffered by the plaintiffs. Under these circumstances, the plaintiffs were not entitled to a directed verdict on the fault allocation issue, and the trial court properly asked jurors to assess the individual fault of these nonparties under OCGA § 51-12-33.[3]

4. Alternatively, the plaintiffs argue that even if the trial court properly submitted the apportionment issue to the jury, the (4) special verdict form was confusing because it listed the four nonparties (Moss, Shannon, SGMC, and Tywon) on separate lines, allowing an individual assignment of fault as to each. In the plaintiffs' view, Moss and SGMC were — at most — *vicariously* liable for the actions of Tywon and Shannon. "[G]enerally, where a party's liability is solely vicarious, that party and the actively-negligent tortfeasor are regarded as a single tortfeasor." *Trabue v. Atlanta Women's Specialists*, 349 Ga. App. 223, 231 (2) (825 SE2d 586) (2019) (citation and punctuation omitted). Citing this principle, the plaintiffs claim that Moss and SGMC should not have been listed separately on the verdict form. As found in Division 3, however, Holly Hill offered evidence that these nonparties

3. Citing *Amu v. Barnes*, 286 Ga. App. 725 (650 SE2d 288) (2007), aff'd, 283 Ga. 549 (662 SE2d 113) (2008), the plaintiffs argue that apportionment is inappropriate because "Holly Hill remain[s] accountable for [any] subsequent malpractice" that occurred at SGMC. The *Amu* decision, however, involved intervening negligent actors, not apportionment under OCGA § 51-12-33. See *Amu*, supra at 731-735 (2). It has no application here.

independently breached the standard of care owed to Bobby and proximately caused damage to the plaintiffs. This argument, therefore, lacks merit.

The plaintiffs further note that the jury apportioned the same amount of fault to Moss and Tywon (35 percent) and the same amount to SGMC and Shannon (5 percent). They claim that the jury necessarily found Moss and SGMC only vicariously liable, but that the structure of the verdict form confused jurors, causing them to improperly apportion independent fault to them. Again, however, jurors were authorized to find these nonparties independently at fault, and "we cannot go behind the jury's verdict to determine how the damages were apportioned." *City of Gainesville v. Waters*, 258 Ga. App. 555, 558 (2) (574 SE2d 638) (2002).

Moreover, the (5) plaintiffs' objection to the verdict form at trial focused on their claim that, as a matter of law, Moss, Shannon, and SGMC were not independently at fault and thus should not have been listed separately as nonparties subject to apportionment. The plaintiffs have not cited — and we have not located — any evidence that they requested that the verdict form delineate whether jurors found the nonparties at fault based on direct versus vicarious liability. Although plaintiffs' counsel reacted at trial to the jury's verdict by "wonder[ing]" whether the fault assigned to Moss was derivative of Tywon's actions, he did not object or request any action by the trial court to clarify the jury's verdict. To the extent the plaintiffs now argue that the verdict form was confusing and/or misleading because it failed to properly distinguish the

basis for the jury's apportionment determination, that claim has been waived. See *Auto-Owners Ins. Co. v. Dolan*, 342 Ga. App. 179, 182 (2) (803 SE2d 104) (2017) ("In the absence of … specific and timely objections, a party waives error relating to the manner in which questions on a special verdict form are submitted to the jury.") (citation and punctuation omitted).

Judgments affirmed. McFadden, C. J., and McMillian, P. J., concur.

APPENDIX D — ORDER OF THE STATE COURT OF LOWNDES COUNTY, STATE OF GEORGIA, DATED OCTOBER 26, 2018

IN THE STATE COURT OF LOWNDES COUNTY
STATE OF GEORGIA

Civil Action File No. 2014SCV287

GREGORY COPELAND *et al.*,

Plaintiffs,

v.

LOWNDES COUNTY HEALTH SERVICES, LLC
D/B/A HERITAGE HEALTHCARE
AT HOLLY HILL,

Defendant.

ORDER ON DEFENDANT'S MOTION FOR NEW TRIAL

Before the Court is defendant Lowndes County Health Services, LLC's motion for new trial. The motion seeks a new trial on multiple grounds following the entry of judgment on the jury's verdict in favor of Plaintiffs. Based on the Court's review of the record, the trial transcripts, and the briefing and argument of counsel in connection with the motion, the Court finds as follows:

Appendix D

Batson **Challenge Issue**

Defendant moves for a new trial based on an alleged improper peremptory challenge to a juror in violation of *Batson v. Kentucky,* 476 U.S. 79 (1986). *See also Edmonson v. Leesville Concrete Co.,* 500 U.S. 614 (1991); *Fludd v. Dykes,* 863 F.2d 822 (11th Cir. 1989) (applying *Batson* to civil trials). Specifically, for purposes of the pending motion, Defendant claims that the Plaintiffs' challenge to juror 11, Mr. Voigt, violated *Batson.*

Mr. Voigt was unresponsive to any questioning in voir dire except during the Court's own questioning, when he stated his name, his place of employment, his wife's name and occupation, and his place of residence. Transcript v. 1, p. 38. Otherwise, he did not provide any further information when the panel was questioned by counsel for either party. Defendant focuses on a reference that Plaintiffs' counsel made to the location where Mr. Voigt lived, stating that the area "may not be a area that is friendly towards African Americans which out client is." Defendant thus contends that the peremptory strike of Mr. Voigt was impermissibly race-based. The Georgia Court of Appeals has explained that

> *Batson* challenges are analyzed by a three-prong test: (1) the opponent to the peremptory challenge must establish a prima facie case of purposeful discrimination by demonstrating that the totality of the relevant facts gives rise to an inference of discriminatory purpose; (2) the proponent of the challenge is then required

> to articulate a concrete, tangible, race-neutral rationale for the strike; and (3) the opponent must carry the burden of showing that the rationale is merely a coverup to purposeful racial discrimination.

Brown v. Egleston Children's Hosp., 255 Ga. App. 197, 198 (2002) (internal quotations and formatting omitted), citing *Holt v. Scott,* 226 Ga. App. 812, 816 (1997), *Purkett v. Elem,* 514 U.S. 765, 767 (1995), and *McKenzie v. State,* 227 Ga. App. 778 (1997).

The Court notes that during the discussion of Mr. Voigt, Plaintiff's counsel expressed concern about his type of employment and, in particular, the fact that he was non-responsive in voir dire. Indeed, the lack of information regarding Mr. Voigt, by both parties, was apparently the primary concern. To properly frame the discussion and the actual objection by defense counsel, the Court quotes the following dialogue from the discussion regarding the *Batson* challenge, which followed the statement of Plaintiff's counsel quoted above:

> **MR. KEN CONNOR (Plaintiffs' Counsel):**
>
> In addition, Judge, this is one of the jurors about whom we have the least information. We know that he's married and is a sheet metal worker and works cranes and lives in South Lowden· South Lowndes, I'm sorry, and beyond that, **we don't really have much information. He was a big question mark in our minds** because nobody really developed his testimony much.

Appendix D

MR. MATHIS (Defendant's Counsel):

> And Your Honor, **that was the basis of my objection** as we did not have much information on him, so the fact that we didn't have any information on him and he was one of their strikes, was a cause of concern for us.

Transcript v. 2, p. 88 (emphasis added). Significantly, defense counsel's statement that "that was the basis of my objection as we did not have much information on him, so the fact that we didn't have any information on him and he was one of their strikes, was a cause of concern for us" defines the scope of the objection to the propriety of exercising a peremptory strike based on non-responsiveness. In this regard, both the Georgia Supreme Court and Court of Appeals have held that a lack of responsiveness is a sufficient race-neutral basis for a peremptory strike. *Trice v. State,* 266 Ga. 102, 103 (1995); *Norfolk S. Ry. Co. v. Perkins,* 224 Ga. App. 552, 554 (1997); *Thompson v. State,* 194 Ga. App. 163 (1990); *Evans v. State,* 183 Ga. App. 436, 439 (1987). Moreover, with respect to Plaintiff's counsel's reference to Mr. Voigt's employment, the Georgia Supreme Court, citing the United States Supreme Court, has held that "[t]he nature of a prospective juror's employment 'is not a characteristic that is peculiar to any race.'" *Trice v. State,* 266 Ga. 102, 103 (1995), citing *Purkett v. Elem,* 514 U.S. 765 (1995). Therefore, any reference to employment does not constitute a valid basis for a *Batson* challenge, and, indeed, that employment may serve as a race-neutral basis for a peremptory strike.

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Although the Defendant now argues that Plaintiff's counsel's passing reference to "demographics" and the possibility of individuals from the area where Mr. Voigt resided might be prejudiced against African Americans is facially discriminatory, the Court is not convinced. First, it is not at all clear that a reference to "demographics" is, by itself, per se discriminatory in this context. In *Congdon v. State,* 262 Ga. 683 (1993), the Georgia Supreme Court disapproved of the striking African American jurors who were from a particular geographic area (Ringgold), where the strikes were **"for no reason other** than that they were black citizens of Ringgold."[1] (emphasis added). The Supreme Court noted that the concerns were largely based on significant underlying societal issues, including, particularly, the fact that some within the Ringgold African American community had harshly criticized the sheriff, and that using the demographics (or geography) as a proxy to exclude African Americans generally was not permitted under *Batson.* This scenario is distinguishable from the circumstances here, where neither party had information about Mr. Voigt other than the bare personal information he shared at the beginning of voir dire. As noted above, both the lack of information about Mr. Voigt and his occupation are legitimate bases for exercising a peremptory strike. Defendant also cites *Clayton v. State,* 341 Ga. App. 193 (2017) (physical precedent only), but *Clayton* is of only limited persuasive authority as it is non-binding precedent because a majority of the court did not

1. In reaching this result, the Supreme Court cited a dissent from a denial of certiorari at the United States Supreme Court. *Lynn v. Alabama,* 493 U.S. 945 (1989) (Marshall, J, dissenting).

concur fully in the decision.[2] Therefore, the Court finds that, in the context of this case, based upon the discussion with the Court when the issue was raised at trial, the actual basis of the strike of Mr. Voigt was not facially racially based. Therefore under a proper *Batson* analysis and a consideration of the totality of the circumstances, *see Coleman v. State,* 301 Ga. 720, 724 (2017), Plaintiffs have carried their burden of showing a non-discriminatory basis for the strike, particularly given the objection that was actually asserted by defense counsel, and the Court properly rejected the challenge during trial.

Based on the proffered objection to Mr. Voigt's strike, and the Court's determination, as a factual matter, that any comments about potential demographics of Mr. Voigt were not facially racially discriminatory, the Court finds that the Plaintiffs' peremptory strike was not racially-based and therefore the motion for new trial on this ground is DENIED.

Other grounds for new trial

In addition to the *Batson* issue, Defendant also claims that a new trial is required because of an allegedly prejudicial issue concerning a shadow jury employed by Defendant, an improper determination by the jury of ordinary negligence, and finally under the general grounds as provided by O.C.G.A. §§ 5-5-20 ("Verdict contrary to

2. See Ct. App. R. 33.2. The basis of the Court of Appeals' finding of a racially based motive in *Clayton* involved a juror's having gold teeth, facts that are not relevant here.

evidence and principles of justice and equity") and 5-5-21 ("Verdict against weight of evidence"). Upon review of the record of the trial, and having been present during the presentation of evidence at trial, the Court hereby DENIES the motion for new trial on these grounds.

SO ORDERED this 26 day of October, 2018.

/s/_____
Judge Ellen S. Golden
State Court of Lowndes County

APPENDIX E — EXCERPT OF JURY TRIAL TRANSCRIPT OF THE STATE COURT OF LOWNDES COUNTY, STATE OF GEORGIA

IN THE STATE COURT OF LOWNDES COUNTY
STAE OF GEORGIA

CIVIL ACTION

FILE NO: 2014-SCV-0287

GREGORY COPELAND, INDIVIDUALLY AND AS SON OF BOBBY COPELAND AND MARIER HOUSE, AS ADMINISTRATOR OF THE ESTATE OF BOBBY COPELAND, DECEASED,

Plaintiffs,

vs.

LOWNDES COUNTY HEALTH SERVICE, LLC, D/B/A HERITAGE HEALTHCARE AT HOLLY HILL,

Defendant.

Lowndes County Judicial Complex,
Courtroom 4B & 4C 01-17-2018

JURY TRIAL TRANSCRIPT OF CASE - VOLUME II OF X

THE HONORABLE ELLEN S. GOLDEN, Presiding

Appendix E

[TABLES INTENTIONALLY OMITTED]

***

[82]MR. CALEB CONNOR: Okay, all right, so...

MR. KEN CONNOR: So, struck 10?

MR. CALEB CONNOR: No, but he's - no, that's Juror Number 10. She's Juror Number 10

MR. KEN CONNOR: Oh, okay. She's on there, yeah.

JUDGE: Okay, so are we clear on who the juror are?

MR. ANSPACH: Yes.

MR. CALEB CONNOR: Yes, ma'am.

JUDGE: All right, so, my question to Plaintiffs' counsel, is there any objection to the jury selection process?

MR. KEN CONNOR: No, Your Honor.

JUDGE: All right so, we're ready to proceed?

MR. KEN CONNOR: Yes, Your Honor.

Appendix E

BATSON CHALLENGE AND DISCUSSIONS THEREON

MR. MATHIS: Your Honor, we do have a - I mean, a Batson Challenge of the people who were struck on their side.

MR. KEN CONNOR: You have what?

MR. MATHIS: A Batson Challenge.

JUDGE: Okay, on who?

MR. MATHIS: Your Honor, the fact that out of the 6 people that they struck were all White, all 10- 1, 2, 3, 4 - four White males and two White females. 22

MR. CALEB CONNOR: I may have a Batson Challenge on...

MR. KEN CONNOR: ...on they're

[83]MR. KEN CONNOR: ...on they're not especially stationed on our end.

MR. CALEB CONNOR: Right. You can't have a Batson Challenge on it.

MR. KEN CONNOR: When they're not a racially distinct minority.

MR. CALEB CONNOR: They make it the majority...

JUDGE: I don't know - I don't know about that. I think you can. Do you want to go look that up?

MR. CALEB CONNOR: Yeah.

JUDGE: Well, I have to look it up. All right. Okay. I'll go look it up.

MR. KEN CONNOR: What's the nature of the challenge?

JUDGE: Okay, I'm looking this up real quick. The way I understand it, they can't use a - you can't use a preemptory challenge, um, neither party, to exclude potential jurors based on race, gender, and probably ethnicity, so, I can continue to research it; but what's the basis of your challenge?

MR. MATHIS: The basis of the challenge is that all of the individuals in which they removed from the Jury, they're either a White male or White female and they have not out of the group of people, which clearly is a mixed group of jury pool members, that there's absolutely no African American or other races that were excluded.

[84]JUDGE: From - by Plaintiffs' counsel?

MR. MATHIS: Correct.

JUDGE: Okay. Do you - you have the burden of proving it - showing that, so do have an explanation for...

MR. CALEB CONNOR: Which juror?

MR. KEN CONNOR: Yes, Your Honor.

JUDGE: Which juror are we talking about?

MR. KEN CONNOR: Do we want do this in - do we want to do this while the Jury is still in the room?

JUDGE: I can send them out.

MR. CALEB CONNOR: I wish you would, yeah.

MR. KEN CONNOR: I think you should.

JUDGE: Okay.

MR. KEN CONNOR: Preferably.

MR. CALEB CONNOR: I won't tell them why, will you?

MR. KEN CONNOR: Yeah, exactly.

JUDGE: Okay. All right, ladies and gentlemen of the Jury, I'm going to ask that you follow the Bailiff back into Courtroom 4D and I've got to hear a matter and then I'll be calling back for you, okay? Thank you.

(Jury Panel exits Courtroom.)

JUDGE: All right, I'll hear from Defense.

MR. MATHIS: Your Honor, we would just like to renew our Batson Challenge with regards to the members that were struck by the Plaintiff. Out of the mixed pool of jurors in [85]which was comprised of both African American and of Causation jury pool members, the individuals in which Plaintiffs counsel struck were four White males and two White females and the cause we believe has to do with race versus any other reason.

JUDGE: Okay.

MR. KEN CONNOR: At the bench, Judge, as I understood it, counsel had invoked gender as well, and I understand that's not a basis for the Challenge.

MR. MATHIS: No. If I said gender, I didn't mean- I meant race.

JUDGE: Okay, so, I'll hear from Plaintiffs' counsel. Um, first of all, I think, um, the burden does lie with you, um, Defense counsel on - on asserting these Batson Challenges. Do you have the names of each of the Plaintiffs'...

MR. MATHIS: I do, Your Honor.

JUDGE: Okay.

MR. CALEB CONNOR: Is there a particular ch-juror that they're challenging.

JUDGE: All of them. It sounds like.

MR. MATHIS: Yes.

JUDGE: Okay, all right, so, do you want to start with, um, what are they? What are the names?

MR. MATHIS: Ah, Number 11, Britt Voight.

MR. CALEB CONNOR: Your Honor, we can just go down the list as we struck them.

[86]MR. KEN CONNOR: Can we just...

MR. MATHIS: Oh, sure, we can go through them.

JUDGE: We can do that.

MR. MATHIS: Or we can just go in order, Your Honor, if that's easier?

JUDGE: Okay.

MR. MATHIS: They're strikes Number 4 was number 1.

JUDGE: And that was, ah...

MR. MATHIS: And her name is Margaret Chatelain.

JUDGE: Okay, I'll hear from Plaintiffs' counsel on that.

MR. CALEB CONNOR: Ms. Chatelain obviously had a lot to say during voir dire, which has us concern about her influencing the jury pool. She stated that she would judge a family for putting, ah, their loved-ones in a nursing home.

JUDGE: I do remember hearing that.

MR. CALEB CONNOR: That's blatantly, I mean - against our interest.

JUDGE: Okay, so I'll hear from Defense counsel on that issue, on, um, the Challenge concerning Margaret Chatelain? Chatelain?

MR. KEN CONNOR: Chatelain.

JUDGE: Okay.

MR. KEN CONNOR: And she also indicated, Your Honor, that she had been asked to perform work that she was not [87]qualified to do and that's precisely one of the issues in this case. We maintain that Ms. Jenkins was called upon to perform work that she's not licensed for and is not within the scope of her practice.

JUDGE: Okay. I believe once they state a race-neutral reason for their strike, the burden shifts back to you now, Mr. Mathis.

MR. MATHIS: Okay, um, I'm looking for my notes. I don't have any notes on that one, Your Honor, so we will withdraw number 1.

JUDGE: All right, it's - all right, so you don't want me to rule on - you're withdrawing that one. Okay, withdrawing Batson Motio- um, Challenge on - in regard to juror number 1. Okay.

MR. MATHIS: Correct, Your Honor.

JUDGE: All right, so the next one is?

MR. MATHIS: 11.

JUDGE: That would be Britt Green Voigt, is that right?

MR. CALEB CONNOR: Yes, ma'am.

JUDGE: Okay.

MR. CALEB CONNOR: So, Mr. Voigt, works in a sheet metal factory. He works in South Lowndes County which based off our demographic research of this group and with our discussion with other counsel who are right in this area, [88]suggested that they may not be a area that is friendly towards African Americans which our client is. So, we have concerns based off his blue-collar employment, as well as his living demograph- the demographics of where he resides that he may have some innate prejudice toward our client.

MR. KEN CONNOR: In addition, Judge, this is one of the jurors about whom we have the least information. We know that he's married and is a sheet metal worker and

works cranes and lives in South Lowden- South Lowndes, I'm sorry, and beyond that, we don't really have much information. He was a big question mark in our minds because nobody really developed his testimony much.

MR. MATHIS: And Your Honor, that was the basis of my objection as we did not have much information on him, so the fact that we didn't have any information on him and he was one of their strikes, was a cause of concern for us.

JUDGE: Okay, well, as I understand a Batson Challenge, that once they put forth an explanation, the burden then shifts to you, Mr. Mathis, to prove that it was some type of purposeful discrimination. I don't hear that coming forward, so, for that reason the Court's going to deny your Batson Challenge as to Juror Number - what was his number?

MR. MATHIS: 11.

JUDGE: 11, which was Plaintiffs' I think first...

MR. MATHIS: Number 1 strike. Yes, Your Honor.

[89]JUDGE: Yeah, the first strike. Okay, overruled that one. What's the next one? Mr. Mortonson?

MR. MATHIS: No, 14.

MR. CALEB CONNOR: Well, he's just going down the list.

JUDGE: Oh, okay, okay. So, that would be Granger Ratliff? Is that his...

MR. CALEB CONNOR: Yes. Yes, ma'am. Mr. Ratliff also comes from a blue-collar background. He testified that he works in a paper mill and his wife is a small business owner. That's really the thing that got us. You know, business owners fear litigation and lawsuits and typically are more conservatives.

JUDGE: Okay, I'll hear from you, Mr. Mathis as to the Defense, since you have the burden.

MR. MATHIS: Your Honor, we would just renew our same motion as to the last one, as we just didn't believe there was enough information out - with regards to the information that was rendered during the course of the voir dire.

MR. KEN CONNOR: And we agree that the information is scant beyond what we've related, that little bit that we had, ah, but, so, he's a big question mark. And it's difficult with 36 jurors, we acknowledge that, too, without going even- taking even more time to develop all that information fully, but on the basis of the limited information we had we - and Mr. [90]Connor- Mr. Caleb Connor's articulated that was the basis for our strike.

JUDGE: Okay, well, under those circumstances, the court is going to deny defense counsel's Batson Challenge, um, so, as to Juror Number 14, which was Plaintiffs' preemptory challenge number 6, as I understand.

MR. KEN CONNOR: Thank you, Your Honor.

JUDGE: All right next?

MR. MATHIS: 15.

MR. KEN CONNOR: 15.

MR. CALEB CONNOR: Your Honor, Ms. Wisenbaker testified that she is a dental hygienist - or not testified, but articulated that she was a dental hygienist. Typically, ah, in medical malpractice cases, we do try to shy away from folks with, ah, that work in the medical field or healthcare field. She also said her husband owns a small business, which for the same reasons previously discussed about number 14, we have some concerns about that; and lastly, she said she had family members at Pruitt Crestwood, one of the Defendant's sister facilities, so.

JUDGE: Okay, so I'll from Defense counsel.

MR. MATHIS: Ah, regardless of the things that she said, I don't think there was, on behalf of the Defendant, um, there wasn't sufficient information to be able to establish that she should be struck by - on behalf of the Plaintiff.

[91]JUDGE: Well, hearing what I heard from Plaintiffs' counsel as to the reasons they exercised their preemptory strike, I - the Court finds it race-neutral and the Court is going to overturn the Defense Counsels' Batson Challenge as to Plaintiffs' preemptory strike, number 5, regarding Juror Number 15, Trista Wisenbaker. Next.

MR. MATHIS: Number 20.

MR. CALEB CONNOR: Mr. Mortonson is the next one.

JUDGE: Okay.

MR. CALEB CONNOR: Um, he- Mr. Mortonson testified that he ran programs for emotionally and mentally disturbed kids. He also testified about his potential health conflict that may create some problems. Both of those issues, we felt were enough to let him go.

MR. KEN CONNOR: Well, in addition, Your Honor, he indicated he had expensiv- extensive experience in dealing with people with mental disabilities, including paranoia and we're concerned that he might import those experiences and sort of become the resident expert on mental disabilities which our decedent had several diagnosis in that regard.

JUDGE: All right, so I'll hear from Defense counsel, Mr. Mathis?

MR. MATHIS: Your Honor, same objection as the other one is we didn't believe there was sufficient information to establish a suitable reason to dismiss him from this jury.

[92]JUDGE: Okay, well, having considered Plaintiffs counsels' representation to the Court as to why Juror Number 20, Mr. Mortonson was - why they used their

preemptory challenge to excuse him, the Court finds that it was race-neutral and, therefore, the Court is going to deny the Batson Challenge as to Juror Number 20, Billy Mortonson, Jr. Okay. next.

MR. MATHIS: 27.

MR. KEN CONNOR: 27. Pieplow.

JUDGE: All right, is this the last one?

MR. CALEB CONNOR: YES, Ma'am. Mr. Pieplow is a certified athletic trainer with medical training. His wife is a PA. Those again for the reasons we described, the experience in the healthcare field, we felt he was not appropriate to serve on this jury.

MR. KEN CONNOR: One of the non-parties to whom Defendant to seeks to assign fault, is a physician's assistant and also, you'll recall that Mr. Pieplow indicated that he took his cues from the doctors in terms of the chain of command and there are all kind of issues about the appropriateness of the chain of command and one of the central witnesses and the non-parties to whom fault was going to be asked to be allocated is in the same occupation as his wife.

JUDGE: Okay, I'll hear from Defense counsel.

MR. MATHIS: Same objection, Your Honor, is we did [93]not believe there was sufficient information gathered throughout the course of voir dire to establish a basis for excluding this witness.

Appendix E

JUDGE: Okay, well hearing Plaintiffs counsels' explanation as to why Juror Number 27, Philip Pieplow was excused or why they exercised their preemptory challenge, the Court finds that it was race-neutral and therefore, the Court is going to overturn- or deny your Batson Challenge as to that juror. So, is that all of them, gentlemen?

MR. KEN CONNOR: Yes, Your Honor.

MR. MATHIS: Yes, Your Honor.

JUDGE: Okay, so, before I call the Jury in, um, so now do - we now have an agreement as to the jurors?

MR. CALEB CONNOR: Yes, Your Honor.

MR. KEN CONNONR: Right.

MR. MATHIS: And now we just need to do alternates.

JUDGE: Right. So, we need - and usually what I do instead of having the Clerk call four of the jury, is that we go ahead and pick the four alternates.

MR. MATHIS: Sure.

JUDGE: So, do you need the jurors brought back in for that right now or do we want to go ahead and do we want to go ahead and do that?

MR. KEN CONNOR: I think our Court Reporter has a concern.

Appendix E

[94]COURT REPORTER: Your Honor, as to Juror Number 15, I have down you overturned the Batson Challenge, I'd just like to clarify that.

JUDGE: Oh, I denied the...

MR. CALEB CONNOR: She denied.

JUDGE: ...Batson Challenge. I'm sorry if I didn't articulate that way.

COURT REPORTER: I just wanted to make sure.

JUDGE: Okay, yeah. I denied Defense counsel's Batson Challenge as to Juror Number 15.

COURT REPORTER: Thank you, Judge.

JUDGE: Okay. So, I can bring the jurors back in and we can do the alternates or do you want to - are y'all comfortable enough to...

MR. KEN CONNOR: May we...

MR. CALEB CONNOR: Let's see if we can take a second.

MR. KEN CONNOR: ...take a look at our charts first and may, ah...

JUDGE: So, you'd be picking from, if I'm - you'd be picking from 30...

MR. MATHIS: 30...

JUDGE: ...31...

MR. MATHIS: ...through 34.

JUDGE: ...33 - wait - I'm I doing that right.

MR. CALEB CONNOR: No, we have 30, 31...

[95]MR. MATHIS: 30, 31, 33 and 34.

JUDGE: Yes.

MR. CALEB CONNOR: So, we ignore Ms. Brooks, correct?

JUDGE: Yes, because she's in the next four. I mean, I can bring them back in.

MR. KEN CONNOR: No, we're fine.

MR. MATHIS: I think we can do this now.

MR. KEN CONNOR: So, we struck - do we just strike one or two.

MR. MATHIS: Just one - one each.

JUDGE: Just one and it's a piece.

MR. CALEB CONNOR: Who's first? Do they go first?

MR. MATHIS: Do we have the sheet?

JUDGE: She's going to hand it between you. So, Madame Clerk, you understand they're picking the alternates between juror number 30, 31, 33 and 34?

DEP. CLERK: Yes, ma'am.

JUDGE: Okay, she'll hand it between you if y'all are ready to do that.

MR. KEN CONNOR: And what do we put down as our number on this list?

JUDGE: I would say alternate P1 or alternate P, because you only get one.

MR. MATHIS: A-P.

(Alternate jurors struck by counsel.)

[96]DEP. CLERK: That's good. That'll be fine. Um, Defendant chose 30. Plaintiff chose 31.

JUDGE: So, Defendant struck 30?

DEP. CLERK: Yes, ma'am.

JUDGE: 31.

DEP. CLERK: And Plaintiff struck 31.

JUDGE: So, our two are two alternates then are Erika Downing and Sheri Gordon, is that right?

DEP. CLERK: Yes, ma'am.

JUDGE: So, are you - are you comfortable once-because what I'll do is I'll call them in and then I'm going to have you call. I'll say, 'Madame Clerk, will you call the names of the jurors.' I'm going to have you say them.

DEP. CLERK: And whenever I do that, do I call them alternates or I just call their names?

JUDGE: Yeah - I'm, in fact, I'm going to address that with them. No, you treat them like everybody else.

DEP. CLERK: Okay.

JUDGE: Just call out their names.

DEP. CLERK: Yes, ma'am.

JUDGE: All right, there's another thing I want to take up with you, um, gentlemen. I know some judges tell jurors when their selected, they're alternates. I don't.

MR. KEN CONNOR: We agree.

JUDGE: I don't tell them until they go - until the [97] Jury is sent out to deliberate and then I'm, like, by the way, Mr. So-and-So and Mrs. So-and-So, you're an alternate and then I keep them separate.

MR. MATHIS: We agree, Your Honor.

MR. CALEB CONNOR: Yes, Your Honor.

JUDGE: But I do see where some judges tell them ahead of time and I - no.

MR. KEN CONNOR: And then they switch off.

MR. CALEB CONNOR: Right.

JUDGE: Yes. So, I'm not doing that.

MR. CALEB CONNOR: We agree.

Judge: I just wanted to make sure you know that and y'all are in agree with that.

MR. MATHIS: Yes. We have - we prefer that.

JUDGE: Now, I need to ask you, is there any objection to the jury selection process?

MR. KEN CONNOR: No, Your Honor, on - by the Plaintiff.

MR. MATHIS: No, Your Honor, on behalf of the Defendants.

JUDGE: Okay, what about the jury selection process - any objections to the alternates that have been selected from the par-

MR. KEN CONNOR: No, Your Honor.

JUDGE: Okay, none from the Plaintiff.

[98]MR. MATHIS: No, Your Honor.

JUDGE: Okay, so are we ready for the jurors to be brought in and the Clerk to call the names of the jurors?

FURTHER SHADOW JUROR DISCUSSIONS

MR. KEN CONNOR: We - we are. I don't know if you want - when you want to give your instructions to the shadow jurors.

JUDGE: Well, are they in here?

MR. ANSPACH: No - no.

JUDGE: Okay, all right, why don't you do this for me, um, can you - would you mind writing out a draft of what I...

MR. ANSPACH: I would be happy to.

JUDGE: And then I'll let them look at it to make sure it covers everything and then what I would like to do is seat the jurors, because once they're announced and put in the jury box, they'll then be moved when they leave, out through here and go to the jury room and then at that time, I'd like to address it with the shadow jurors.

MR. KEN CONNOR: That would be fine.

JUDGE: Okay?

MR. KEN CONNOR: Yes.

JUDGE: And that - whoever would need to make sure they're available. I don't know who that person is because this is all...